Citation: R v Park, 2024 MBCA 93
Date: 20241121
Docket: AR22-30-09850

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

***B E T W E E N:***

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| | ) | ***C. A. D. Olson*** |
| ***HIS MAJESTY THE KING*** | ) | *for the Appellant* |
| | ) | |
| *Respondent* | ) | ***A. Y. Kotler*** |
| | ) | *for the Respondent* |
| *- and -* | ) | |
| | ) | *Appeal heard:* |
| ***TANNIS LYN PARK*** | ) | ***May 27, 2024*** |
| | ) | |
| *(Accused) Appellant* | ) | *Judgment delivered:* |
| | ) | ***November 21, 2024*** |

## CAMERON JA

### Introduction and Issues

[1] The accused appeals her convictions of two counts of assault with a weapon, namely, an American bulldog (the dog). She raises two grounds of appeal. First, that the verdict was unreasonable and based on a misapprehension of the evidence. Second, that the trial judge erred in finding that the doctrine of transferred intent applied to her conviction on the second count.

[2] For the reasons that follow, I would dismiss the appeal.

Background and Findings of the Trial Judge

[3] At the time of the incident, the accused and the dog had been temporarily living with the first victim, Mr. Watt. She paid him monthly rent and had a room in his house.

[4] The second victim, Ms. Neufeld, was a friend of Mr. Watt. All three parties had known each other for many years. The accused had owned and trained the dog for six years and the dog was familiar with Mr. Watt and Ms. Neufeld.

[5] There is no question that, as a result of a confrontation with the accused, the dog bit both Mr. Watt and Ms. Neufeld. The issue at the trial was exactly how that came about and whether the accused caused the dog to attack Mr. Watt and Ms. Neufeld. Unfortunately, at the time of the trial, Mr. Watt had passed away. Thus, the only direct evidence about how the dog came to bite the victims came from Ms. Neufeld and the accused. Their versions of the event were quite different.

[6] The trial judge found that the parties had been consuming cocaine and/or alcohol on the date of the incident. More specifically, the evidence demonstrated that the accused and Ms. Neufeld had been smoking crack cocaine and drinking and that Mr. Watt had been drinking. The trial judge found that at the time of the first dog attack, Mr. Watt was outside the accused's bedroom door demanding money and an argument ensued. Other issues causing problems between the accused and Mr. Watt near the time of the incident were that the accused refused to turn down her music when Mr. Watt asked her to do so and that he did not like her using crack cocaine in his home—especially with Ms. Neufeld.

[7] Mr. Watt could not speak due to throat cancer. The trial judge accepted that he was gesturing and clapping with his hands and banged his hand on the kitchen table during the confrontation.

[8] Ms. Neufeld testified that during this confrontation, the accused ordered the dog to attack Mr. Watt by telling it to "sic em". The accused denied she did that in her testimony. The trial judge rejected the accused's evidence in this regard. Given that the accused had been living with Mr. Watt for approximately six months, the trial judge found that the dog would have been accustomed to Mr. Watt gesturing with his hands and that this would not have been sufficient to cause the dog to attack Mr. Watt based on his assessment of the dog's temperament.

[9] The trial judge found that the dog responded to the command by biting Mr. Watt while the accused was lying on Mr. Watt's chest, holding him down. As a result, Mr. Watt suffered two puncture marks from separate bites to his right forearm and four puncture wounds to his left ankle.

[10] The trial judge also rejected the accused's evidence that Ms. Neufeld attacked her on two separate occasions after Mr. Watt had been injured. The accused maintained that these attacks caused the dog to attack Ms. Neufeld. Rather, the trial judge accepted Ms. Neufeld's evidence that when she called 911 in response to the assault on Mr. Watt, the accused turned her attention away from him and approached Ms. Neufeld, pinning her first to the door and then to the ground. During this time, the accused yelled out the wrong address to the 911 operator for the purpose of preventing Ms. Neufeld from calling the police. Ms. Neufeld said that the dog followed suit, mauling her while she was pinned both to the door and to the ground. The injuries to Ms. Neufeld

were significant. They included parts of her lip being torn off as well as numerous puncture marks, cuts and bruising to her shoulder, chest and arm. She also required surgery to her right foot due to two open fractures.

[11] The trial judge found that the dog also mistakenly bit the accused. He held that by this time, the dog "was in attack mode and was not relenting because his master was in a physical conflict and was threatened." He also accepted that the accused called out the name of the dog in an attempt to gain control of it during the attack, but she was only able to do so after grabbing it by the testicles.

[12] The trial judge had no hesitation in convicting the accused of assault with a weapon regarding Mr. Watt given his finding that she commanded her dog to "sic em".

[13] Unlike the case with Mr. Watt, there was no evidence that the accused commanded the dog to attack Ms. Neufeld. The trial judge characterized the Crown's argument for conviction on the basis that the accused was not a responsible dog owner as one based in negligence, where a modified objective test applies. In his rejection of the Crown's submission, the trial judge concluded that assault is not a negligence-based offence. Rather, the Crown must prove intent.

[14] The trial judge then considered the doctrine of transferred intent. Referring to *R v Deakin*, 1974 CarswellMan 36, 1974 CanLII 1464 (MBCA) [*Deakin*], he described it as, "[i]n law, if a person attempts to use force against one person, but in doing so commits the act of assault against a second person, the accused can be guilty of assaulting the second person."

[15] While recognizing that the concept of "transferred intent is somewhat controversial in its application", the trial judge found that the concerns raised in *R v Whittaker*, 2007 ONCJ 14 at paras 51-58 [*Whittaker*], that this doctrine diminishes the necessary intent required to be criminally liable and that an accident could result in criminal liability, did not apply in this case. Describing the accused's choice of weapon as imprecise and unpredictable, the trial judge applied *Deakin* and found this to be a case of transferred intent. That is, the initial intent to use the dog as a weapon in the assault on Mr. Watt was transferred to support a conviction regarding the assault committed on Ms. Neufeld.

Issue 1: Reasonableness of the Verdict and Misapprehension of Evidence

[16] In my view, the accused's argument that the verdict is unreasonable on the basis that the reasons were "illogical . . . or contrary to the evidence" (*R v Beaudry*, 2007 SCC 5 at para 97) does not apply to her assertion that the trial judge misapprehended the evidence in this case. Rather, as in *R v Sinclair*, 2011 SCC 40 at paras 3, 45, 68, this argument is properly dealt with pursuant to the principles guiding errors regarding the misapprehension of evidence as set out in *R v Lohrer*, 2004 SCC 80 [*Lohrer*].

[17] The standard of review set out in *Lohrer* at para 2 is that the misapprehension must a) go to the substance rather than detail, b) be material to the reasoning of the trial judge, and c) play an essential role in the reasoning process that resulted in a conviction.

[18] In *R v Whiteway (BDT)*, 2015 MBCA 24 at para 32, Mainella JA explained:

> A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence (*R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161 at para. 83; and *R. v. Sinclair*, 2011 SCC 40 at para. 13, [2011] 3 S.C.R. 3). A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge (*R. v. Lee*, 2010 SCC 52 at para. 4, [2010] 3 S.C.R. 99). It is insufficient that the judge may have misapprehended the evidence; the error must be readily obvious (*Sinclair* at para. 53).

[19] The accused argues that the trial judge erred when he concluded that she commanded the dog to attack Mr. Watt based on his inference that "while this was a dog that would protect his owner, he was not necessarily easily set off or inclined to protect [the accused] without some prompting in highly stressful situation[s]".

[20] She claims that the inference was made solely based on the police officers' observations of the dog when they arrived at the scene. In this regard, the trial judge considered that, at the time of police arrival, the accused was yelling and in an agitated state, yet was still able to control the dog (who was collarless) by holding it by the scruff of the neck. During this time, the police had their guns drawn and there was yelling and tension. Furthermore, the trial judge noted that the accused had enough control over the dog to put it in her bedroom and that the dog did not try to force its way out to protect its still agitated owner even though there was an opportunity to do so "in the moment" when the accused moved away from the door and police moved in to shut it.

[21] The accused states that this brief interaction was insufficient to determine the dog's temperament and that there was simply no evidence to

support the trial judge's conclusion. She argues this constituted a misapprehension of evidence, which led to a miscarriage of justice.

[22] In reaching his conclusion, the trial judge was entitled to rely on all of the evidence, including the evidence of the behaviour of the dog while police were on the premises. He described the atmosphere at that time as "chaotic". However, that was not the only evidence relied on by the trial judge.

[23] Rather, in reaching his conclusion, the trial judge also relied on evidence about the dog's demeanour as described by the accused, including that the dog had never attacked anyone except one time prior when she was physically attacked on the street. He relied on the fact that the accused had lived with Mr. Watt for several months prior to the incident and the dog would have been familiar with the fact that Mr. Watt gestured with his hands given that he could not speak.

[24] Based on all the evidence, the trial judge drew an inference that the dog was not easily set off without prompting in highly stressful situations. He found that the context of the confrontation between the accused and Mr. Watt would not be sufficient for the dog to attack on its own volition. He used this conclusion to support his finding that Ms. Neufeld's evidence that the accused ordered the dog to attack was both credible and reliable in convicting the accused. In my view, the accused has not demonstrated a misapprehension of the evidence.

Issue 2: Alleged Error of Application of the Doctrine of Transferred Intent

*Positions of the Parties*

[25] The accused conceded at the appeal and at trial that courts have found the use of a dog to constitute a weapon as defined in section 267(a) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*] (see *R v B(T)*, 2003 CarswellOnt 8736, 2006 ONCJ 391 (ONCJ) [*B(T)*]). The accused states that the issue is whether she *intended* to use the dog as a weapon in the assault against Ms. Neufeld.

[26] She submits that even if she commanded the dog to attack Mr. Watt, this intent should not be transferred to Ms. Neufeld. She underscores that there was no evidence that she commanded the dog to attack Ms. Neufeld. She submits that the dog is animate rather than an inanimate object and that it was able to make decisions beyond her control. She maintains that the dog was out of her control when it attacked Ms. Neufeld. She argues that the trial judge accepted that she was yelling the dog's name in an attempt to gain control over it and that he found that at the time it bit the accused, the dog was out of control. She submits that these findings were inconsistent with transferred intent.

[27] Next, the accused argues that the incident with Mr. Watt was over. She submits that it was separate and apart from the act involving Ms. Neufeld. That is, these were two different acts and not the same act to which the doctrine of transferred intent could apply.

[28] The Crown argues that *Deakin* continues to be good law that applies or should be expanded to apply to the intent of the accused in assaulting Ms. Neufeld.

[29] Regarding the animate nature of the dog, the Crown submits that the trial judge's decision was not inconsistent with his finding that once the accused caused the dog to be in attack mode, in the circumstances of this case, her initial intent was sufficient to support both convictions. Furthermore, it submits that given that a dog can be a weapon for the purpose of the charge of assault with a weapon, the animate nature of it is irrelevant. That is, if the accused had commanded the dog to attack Mr. Watt, but it instead attacked Ms. Neufeld, the doctrine of transferred intent would apply.

[30] The Crown concedes that this is not the typical situation as described above. However, the Crown submits that the attacks on Mr. Watt and Ms. Neufeld were not separate events. It argues that the two attacks were a single transaction. In addition, it submits that the doctrine of transferred intent has been applied in cases where additional victims are injured along with the intended target (see *R v LP*, 2022 CanLII 97955 at paras 46-50 (NLPC) [*LP*]).

[31] In any event, the Crown argues that it is not necessary to resolve the issue as the appeal can be disposed of without reference to transferred intent because the accused had contemporaneous intent to commit the offence. It relies on *R v Buzzanga and Durocher*, 1979 CarswellOnt 1502, 1979 CanLII 1927 (ONCA) [*Buzzanga*], as authority for the proposition that knowledge can be an adequate substitute for intent. That is, "a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence" (*ibid*

at para 45). The Crown submits that, given the accused's knowledge of the dog and the circumstances of the situation, the accused was "certain or substantially certain" the dog would follow her lead in attacking Ms. Neufeld.

[32] In support of its argument, the Crown emphasizes that the trial judge found that the accused pinned down Ms. Neufeld while she was trying to call 911 and not because she was trying to stop the dog from attacking. The trial judge accepted that the accused called out a different address while Ms. Neufeld was trying to give information to the 911 operator. He also found that when the accused intentionally assaulted Ms. Neufeld, the dog "followed her lead".

*Recklessness Issue Raised by this Court*

[33] During the appeal hearing, this Court raised the issue of whether recklessness could ground a finding of intent in this case. That is, the accused unleashed an imprecise weapon in a confined space and was reckless as to the collateral damage. Counsel for each of the parties addressed the issue in oral argument. The Crown agreed that recklessness could apply. The accused argued that it would be unfair to consider recklessness given that the accused did not have control over the dog at the time it was biting Ms. Neufeld. She relied on *B(T)* in asserting that for a dog to be considered a weapon, the person using it as such must have some control over it.

The Law—Intent, Recklessness and Transferred Intent

*Intent*

[34] An assault is committed when someone intentionally applies force to another person absent of their consent (see the *Code*, s 265(1)(a)).

[35] An assault with a weapon is defined in section 267(a) of the *Code*. It states:

> **Assault with a weapon or causing bodily harm**
> **267** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,
>
> **(a)** carries, uses or threatens to use a weapon or an imitation thereof,
>
> **Agression armée ou infliction de lésions corporelles**
> **267** Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans ou d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, en se livrant à des voies de fait, selon le cas:
>
> **a)** porte, utilise ou menace d'utiliser une arme ou une imitation d'arme;

[36] Assault is a subjective *mens rea* or intent offence as opposed to a negligence-based offence. This is evidenced by the use of the word "intentionally" in the definition of offence (*ibid*, s 265(1)(a)). It is a general, as opposed to specific, intent offence. In *R v George*, 1960 CanLII 45 at 890 (SCC) [*George*], Ritchie J provided the following guidance on the mental element of assault and the difference between general and specific intent crimes:

> *In considering the question of mens rea, a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end* on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand. *Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake*, but acts of the latter kind are the product of preconception and are deliberate steps taken towards an illegal goal. *The former acts may be the purely physical products of momentary passion*, whereas the latter involve the mental process of formulating a specific intent. A man, far advanced in drink, may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense. The offence of robbery, as defined by the *Criminal Code*, requires the presence of the kind of intent and purpose specified in ss. 269 and 288, but the use of the word "intentionally" in defining "common assault" in s. 230(a) [now s 265(1)] of the *Criminal Code* is *exclusively referable to the physical act of applying force to the person of another.*
>
> [emphasis added]

[37] In *R v Hominuk*, 2019 MBCA 64 [*Hominuk*], this Court relied on *George* (among other authorities) in stating that a "finding that the accused was 'hysterical' or 'out of control' does not necessarily lead to the conclusion that she was unable to form the minimal intent required for assault" (*Hominuk* at para 7). Rather, "such acts 'may be the purely physical products of momentary passion"' (*ibid*).

[38] As argued by the Crown, *Buzzanga* stands for the proposition that certainty or substantial certainty of the consequences of one's actions may constitute intent. This statement has been endorsed by courts throughout the country.

[39] For example, in *R v Chartrand*, 1994 CarswellOnt 1161, 1994 CanLII 53 (SCC) [*Chartrand*], the trial judge allowed a motion for non-suit where the accused was charged with abducting a person under fourteen years of age, contrary to section 281 of the *Code*, which states:

> **Abduction of person under age of 14**
> **281** Every person who, not being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession that person is guilty of
>
> **(a)** an indictable offence and liable to imprisonment for a term of not more than 10 years; or
>
> **(b)** an offence punishable on summary conviction.
>
> **Enlèvement d'une personne âgée de moins de 14 ans**
> **281** Quiconque, n'étant pas le père, la mère, le tuteur ou une personne ayant la garde ou la charge légale d'une personne âgée de moins de quatorze ans, enlève, entraîne, retient, reçoit, cache ou héberge cette personne avec l'intention de priver de la possession de celle-ci le père, la mère, le tuteur ou une autre personne ayant la garde ou la charge légale de cette personne est coupable:
>
> **a)** soit d'un acte criminel passible d'un emprisonnement maximal de dix ans;
>
> **b)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

[40] The accused had met an eight-year-old boy in a park, convinced him to come in his car, and driven him to various locations to take pictures of him. They were intercepted by a police officer and the boy's father. The accused said he was taking photos of the boy as a surprise for his parents. The trial judge concluded that the offence required an unlawful taking of the child from his parents, which he interpreted to mean an intentional deprivation. The

Ontario Court of Appeal agreed that a properly instructed jury could not find intent to deprive the parents of possession of their child.

[41] The Supreme Court disagreed, allowed the appeal, and ordered a new trial. Justice L'Heureux-Dubé, writing for the Court, examined the *mens rea* required by section 281 of the *Code*. In *Chartrand* at para 54, she wrote:

> General principles of mens rea apply to the words "with intent to", and, accordingly, in order to conclude that the mens rea of the offence under s. 281 has been made out, it is sufficient that the taker knows or foresees that his or her actions would be certain or substantially certain to result in the parents (guardians, etc.) being deprived of the ability to exercise control over the child.

[42] In support of her conclusion, she cited *Buzzanga* with approval, remarking that the Court had earlier endorsed it in *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC) (see *Chartrand* at para 55). She added that in *R v Olan*, 1978 CanLII 9 (SCC), the Court noted that intent under section 380 of the *Code* (fraud) "may encompass a contemplated outcome distinct from the purpose of the conduct" (*Chartrand* at para 55). Further, in *R v Meddoui*, 1990 ABCA 168, aff'd 1991 CanLII 42 (SCC), the Court concluded that it was open to the trial judge to infer the necessary intention from the facts; it was irrelevant whether the accused had an innocent motive (see *Chartrand* at para 56).

[43] *Chartrand* therefore also stands for the principle that motive and purpose are distinct from intent. Justice L'Heureux-Dubé concluded (*ibid* at para 61):

> [T]he main body of jurisprudence and the academic commentaries support the view that the mens rea in offences such as s. 281 of the

> Code can also be proven by the mere fact of the deprivation of possession of the child from the child's parents (guardians, etc.) through a taking, as long as the trier of fact draws an inference that the consequences of that taking are foreseen by the accused as a certain or substantially certain result of the taking, independently of the purpose or motive for which such taking occurred.

[44] In *R v Boone*, 2019 ONCA 652 [*Boone*], Doherty JA described the meaning of intent as stated in *Buzzanga* as a "mental state predicated on a belief that a result is a virtually certain consequence of one's action" (*Boone* at para 57), adding that "'virtual certainty' . . . connotes the very high degree of certainty required" (*ibid* at para 56; see also *R v Barton*, 2024 ABCA 34 at para 150; *R v Ellis*, 2023 NSCA 63 at para 47; *R v Alsager*, 2016 SKCA 91 at para 52).

*Recklessness*

[45] Courts have affirmed that the intent for assault also includes recklessness. In the leading case of *Sansregret v R*, 1985 CanLII 79 at para 16 (SCC) [*Sansregret*], McIntyre J, writing for the Court, described recklessness, distinguishing it from negligence:

> The concept of recklessness as a basis for criminal liability has been the subject of much discussion. Negligence, the failure to take reasonable care, is a creature of the civil law and is not generally a concept having a place in determining criminal liability. Nevertheless, it is frequently confused with recklessness in the criminal sense and care should be taken to separate the two concepts. Negligence is tested by the objective standard of the reasonable man. A departure from his accustomed sober behaviour by an act or omission which reveals less than reasonable care will involve liability at civil law but forms no basis for the imposition of criminal penalties. *In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of*

> *the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance*. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.
>
> [emphasis added]

[46] The Supreme Court continues to rely on *Sansregret* as an authoritative statement on the meaning of recklessness. In *R v Morrison*, 2019 SCC 15 [*Morrison*], Moldaver J, for the majority, explained: "Recklessness refers to the state of mind of a person who, 'aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk'" (at para 100, citing *Sansregret* at para 16; see also *R v Hills*, 2023 SCC 2 at paras 160, 193; *R v Zora*, 2020 SCC 14 at paras 117, 119).

[47] This Court has applied the definition of recklessness in *Sansregret* in the cases of *R v Barca*, 2022 MBCA 80 at paras 78, 122 and *R v Noble (PDJ)*, 2010 MBCA 60 at para 11.

[48] In *Nagle v R*, 2023 NBCA 35 at para 21, the Court described recklessness as it applies to the offence of assault as follows:

> An assault, as defined in the *Code*, can occur only where, *inter alia*, the accused person intentionally applies force to another person, without that person's consent (s. 265(1)). In the same context, the word "intentionally" has been interpreted to include recklessness (see *R. v. D.J.W.*, 2011 BCCA 522, [2011] B.C.J. No. 2463 (QL), at para. 70, aff'd on appeal to the Supreme Court of Canada at 2012 SCC 63, [2012] 3 S.C.R. 396, at para. 1). Consequently, an assault may occur where a person recklessly applies force to another person, without that person's consent. A

> person engages in recklessness where they are subjectively aware of the risk associated with their actions and act in disregard of that risk (see *Watts v. R.*, 2022 NBCA 34, [2022] N.B.J. No. 160 (QL), at para. 28).

[49] Courts have applied the definition of recklessness in *Sansregret* to the offence of assault with a weapon. In *R v Wesaquate*, 2022 SKCA 101, the accused was convicted at trial of assault causing bodily harm, under section 267(b), and acquitted of several other charges, including assault with a weapon. The Saskatchewan Court of Appeal concluded that the trial judge erroneously failed to consider the three levels of *mens rea*, which Kalmakoff JA described as "knowledge, wilful blindness, and recklessness" (*ibid* at para 36). At para 38, he cited Moldaver J's description of recklessness found in *Morrison* at paras 98-101 (see also *SH c R*, 1987 CanLII 407 at paras 9, 22 (QCCA)).

[50] Other cases have relied on proof of recklessness to satisfy the intent requirement for assault with a weapon without referring to *Sansregret*. For example, in *R v Dawydiuk*, 2010 BCCA 162 [*Dawydiuk*], the accused drove his vehicle onto a crowded sidewalk, striking an innocent bystander. He argued that he was in fear of being attacked and was trying to leave the scene but was boxed in by a taxi. He said he made reasonable efforts to avoid hitting pedestrians. Relying on *George*, the Court described the intent of assault with a weapon to mean "not done by accident or through honest mistake" (*Dawydiuk* at para 29). This would encompass the conduct of someone who sees the risk and takes the chance (see also *R v Zaworski*, 2022 BCCA 144 at paras 41-46; *R v DJW*, 2011 BCCA 522 at para 70, aff'd 2012 SCC 63).

*Transferred Intent*

[51] In finding that the intent of the accused to assault Mr. Watt with the dog transferred to the offence committed on Ms. Neufeld, the trial judge stated:

> [The accused] set out to attack Mr. Watt with [the dog]. [The accused's] weapon was imprecise and unpredictable. But [the accused] intended to use it. [The accused] then intended to continue with an assault upon Ms. Neufeld. Her weapon was then unleashed upon Ms. Neufeld when the focus of the assault turned away from Mr. Watt. On the facts of this case, the concerns addressed as to the applicability of transferred intent are not at play. I'm satisfied beyond a reasonable doubt that [the accused] intended on having [the dog] assault Mr. Watt and that [the dog] followed her lead to assault Ms. Neufeld. On the basis of these facts, [the accused] is guilty of count two.

[52] As explained by Glanville Williams, *Criminal Law: The General Part*, 2nd ed (London, UK: Stevens & Sons, 1961) at 126:

> [W]hen an injury intended for one falls on another by accident. In other words, if the defendant intends a particular consequence, he is guilty of a crime of intention even though his act takes effect upon an object (whether person or property) that was not intended. His "malice" (*i.e.,* his intention) is by a legal fiction transferred from the one object to the other. *The defendant is then treated for legal purposes as though he had intended to hit the object that he did hit, though in fact he did not have the intent, nor even was reckless as to it*.
>
> [emphasis added; footnote omitted]

See also JC Smith & Brian Hogan, *Criminal Law*, 7th ed (London, UK: Butterworths, 1992) at 74-76; Don Stuart, *Canadian Criminal Law: A*

*Treatise*, 8th ed (Toronto: Thomson Reuters, 2020) at 287-88, for helpful descriptions of the doctrine.

[53] In *Droste v R*, 1984 CanLII 68 (SCC) [*Droste*], Dickson J further explained that there are two situations in which a wrong victim is harmed by the actions of the accused. The first involves the mistaken identity of the victim. For example, where a perpetrator shoots at X, but in fact he is Y. The second has been referred to as a "mistake of the bullet" (*ibid* at 216). In this scenario, "the perpetrator aims at X but by chance or lack of skill hits Y" (*ibid*). In this case, the trial judge found the latter scenario applied to the accused.

[54] In *Droste*, the accused planned to kill his wife, but in carrying out his plan, killed his two young children instead. While Dickson J condoned the common law doctrine of transferred intent, he found that he did not need to rely on it, applying sections 212(b) and 214(2) of the *Code* (now sections 229(b) and 231(2)), which provide a statutory basis for the application of transferred intent. There is no such provision for the offences of assault or assault with a weapon.

[55] In *Deakin*, this Court applied the doctrine in a situation where an accused swung at his intended victim, Mr. Pelletier, but instead hit a glass ornament atop a television. The glass shattered and struck Mrs. Pelletier, injuring her. The trial judge found that the assault charge did not apply to a third party injured accidentally and acquitted the accused. In overturning the acquittal and entering a conviction, Matas JA explained that, through the accused's unlawful act of striking at Mr. Pelletier, he injured Mrs. Pelletier. Therefore, "[the] accused's intention to strike Mr. Pelletier is deemed to have

been directed (transferred) to the assault on Mrs. Pelletier" (*ibid* at para 37). Further, he noted that "[l]ack of hostility toward Mrs. Pelletier, and lack of a specific intent to harm *her*, are irrelevant. Nor is it of any significance that Deakin struck an object which injured Mrs. Pelletier" (*ibid*) [emphasis in original].

[56] In *Hominuk*, this Court referred to *Deakin* in upholding the conviction of an accused who, while being placed in a restraining chair, deliberately spit in the air at the officers, hitting one of them.

[57] In *LP*, the accused was convicted of two counts of assault with a weapon. The accused purposefully discharged a can of bear spray into the face of one person, CC, and the spray spread to a second person, BB, standing nearby (see *ibid* at para 1). The trial judge concluded that the accused had intentionally sprayed CC and BB, the latter through the doctrine of transferred intent (see *ibid* at para 9).

[58] However, the doctrine of transferred intent has been subject to scrutiny and criticism as articulated by Stuart at 290:

> The doctrine of transferred malice should be rejected in Canada. The two statutory instances [murder and the former aggravated assault provision] should be repealed and the common law doctrine not followed. The doctrine is an historical aberration from the fundamental principle that *mens rea* be in respect of the prohibited consequence and/or circumstances. The danger is that we might end up punishing a mere accident in circumstances far more sympathetic than those in *Deakin* and *Droste*. There is simply no need for an automatic, harsh and arbitrary rule that withdraws this issue from the trier of fact. In the area of murder, for example, where a bullet aimed at someone penetrates a partition wall and kills another innocently seated on the other side, where a suicide attempt involves the accused in a head-on collision

> in which he kills another motorist, or where poison deliberately left for the occupier of an apartment is swallowed by a burglar who dies, there may be proof beyond a reasonable doubt of a sufficient *mens rea.* But this is a matter for the jury. In such cases, even if acquitted of murder, the accused may be guilty of the serious offence of attempted murder of the intended victim or of manslaughter. Deakin was clearly guilty of attempted assault of [Mr.] Pelletier. The only basis on which he should have been convicted of assaulting Mrs. Pelletier, as he did not intend to harm her, was if he was subjectively reckless toward her.
>
> [footnotes omitted]

[59] Canadian courts have refused to expand the application of the doctrine to certain specific intent offences. For example, in *Whittaker*, Nakatsuru J rejected the notion that the doctrine should be applied to the specific intent offence of attempted murder where the accused fired shots into a bar, hitting unintended victims. He distinguished *Deakin* on the basis that assault is a general intent offence. In reaching his conclusion, he referred to Stuart's criticism of the doctrine (see also *R v Santhankumar*, 1992 CarswellOnt 3722, [1992] OJ No 818 at paras 50-52 (ONCJ (PC))).

[60] As well, this Court has refused to apply the provision in circumstances where the original intent was not to commit the resultant criminal act. In *R v Fontaine*, 2002 MBCA 107 [*Fontaine*], the accused, intending to kill himself during a high-speed chase, deliberately drove his car into a parked semi-trailer. While the accused survived, his passenger was killed. Justice Steel, writing for the Court, held that the trial judge erred in charging the jury on the doctrine as set out in section 229(b) of the *Code* in a murder trial. She explained (*Fontaine* at paras 14-15):

> In both the cases of *R. v. Deakin* (1974), 16 C.C.C. (2d) 1 (Man. C.A.), and *Droste v. The Queen*, [1984] 1 S.C.R. 208, the courts refer to legal texts with approval on the issue that transferred intent only applies within the same crime. That is, it only applies where the harm that follows is of the same legal kind as that intended.
>
> In order to determine whether an intent to commit suicide is properly transferred pursuant to s. 229(b) of the *Criminal Code*, it will be necessary to examine the nature of suicide and how it differs, conceptually, from murder.
>
> [emphasis in original]

[61] Justice Steel concluded that the doctrine should not apply as suicide is legal. Conversely, murder is "the most serious crime in our *Criminal Code*" (*Fontaine* at para 85).

[62] Similarly, courts have avoided the application of the doctrine to general intent offences when guilt can be determined on the issue of actual intent. In *R v Irwin*, 1998 CarswellOnt 716, 1998 CanLII 2957 (ONCA) [*Irwin*], the accused and Graham got into an altercation on a crowded patio. As they grappled, they knocked Behling to the floor and he was seriously injured. Behling was an innocent bystander and the accused did not mean to apply force to him. The trial judge convicted the accused of assault causing bodily harm by applying the doctrine of transferred intent.

[63] On appeal, Doherty JA, stated that, Stuart "persuasively marshalled" the arguments against the application of the doctrine of transferred intent (see *Irwin* at para 6, n 1). Citing Stuart, Doherty JA commented that "[t]he application of the common law doctrine of transferred intent to the charge of assault causing bodily harm and to these facts raises difficult problems" (*ibid* at para 6). Rather than uphold the conviction on the basis of transferred intent,

he found that the Court of Appeal had the authority to amend the indictment to charge the accused with unlawfully causing bodily harm to Behling, pursuant to section 269 of the *Code*. In doing so, he upheld the conviction while avoiding the application of the doctrine.

[64] Finally, in *R v Delaney*, 1989 CarswellYukon 10, [1989] YJ No 182 at para 19 (TK Terr Ct) [*Delaney*], Lilles TCJ refused to apply the doctrine of transferred intent to the charge of assault with a weapon. In that case, the accused stabbed Mr. Titus and in the course of doing so, accidentally cut Mr. Marada (see *ibid* at paras 2, 11). Citing *Deakin*, the Crown relied on transferred intent in arguing for a conviction of assault with a weapon against the complainant, Mr. Marada (see *Delaney* at para 15).

[65] Citing Stuart, Lilles TCJ concluded that *Deakin* was incorrectly decided and should not be followed. He found that the doctrine of transferred intent should not apply to the charge of assault. Despite Stuart's suggestion above—that assault could be grounded on recklessness—he also concluded that recklessness should not ground a conviction for assault. The accused was therefore found not guilty of assault with a weapon against Mr. Marada.

[66] *Deakin* remains good law in Manitoba. Nonetheless, the doctrine of transferred intent has a checkered history in Canada and continues to be debated by judges, lawyers and academics. Courts have limited its application and have sought to avoid reliance on it where possible. As I will explain, the doctrine does not apply in this case.

Analysis and Conclusion

[67] The doctrine of transferred intent is a legal fiction. As stated earlier, it has been applied in cases where an accused intends to commit a crime against X but instead, by chance or accident, commits a crime against Y.

[68] The facts in this case are not quite as simple as the above scenario. Here, two distinct crimes were committed.

[69] While the transaction may have been brief, I am of the view that the trial judge erred in law by applying the doctrine of transferred intent in these circumstances. It is clear from the facts that the accused was assaulting each of these victims for different reasons and that she formed an intent to assault each of them separately. First, is the intentional assault with a weapon against Mr. Watt in response to him confronting her. Second, is the assault which the accused intended to commit against Ms. Neufeld to stop her from calling 911. The assaults constituted two distinct acts, each of which required a separate analysis of the intent of the accused. The trial judge applied the doctrine as if they were one act. Given the contentious nature of the doctrine, I am reluctant to expand its application in the circumstances of this case.

[70] However, this does not end the matter. What are the consequences of the trial judge's error? It does not appear to have been argued before him, nor did the trial judge consider whether the accused had knowledge or was substantially certain of the likely consequence that the dog would follow her lead and attack Ms. Neufeld as contemplated in *Buzzanga*. Additionally, he did not consider whether the accused was reckless as to the consequence.

[71] In support of its argument that the accused's knowledge was sufficient to ground a finding of contemporaneous intent, the Crown pointed to the following:

- The context that the accused had just ordered the dog to attack Mr. Watt and participated in that attack by pinning him to the floor while the dog bit him;
- The accused then immediately engaged in the *exact same behaviour*, pinning Ms. Neufeld to the floor in close proximity to Mr. Watt;
- The accused was aware that the dog would bite when she was physically threatened, as it had happened in an unrelated incident; and
- The trial judge found that the accused was "in a physical conflict and was threatened" during the "melee" with Ms. Neufeld—even though the accused initiated the struggle.

[72] Given that the accused had owned the dog for six years and had trained it, the above argument is persuasive—the accused was certain, or substantially certain that the dog would attack Ms. Neufeld in these circumstances. Recall, the accused need not intend to cause the event. Rather, they must foresee the resultant consequence of their intended act as certain or substantially certain in order for knowledge to ground a finding of intent.

[73] However, if I am wrong in this regard, it is clear that the accused was reckless as to whether the dog would attack Ms. Neufeld. That is, if the

accused did not have sufficient knowledge of the result, she was certainly aware of the significant risk that the dog would attack Ms. Neufeld but nevertheless proceeded to assault Ms. Neufeld.

Curative Proviso

[74] While I have found that the trial judge erred in law by applying the doctrine of transferred intent, based on my view that the accused had the sufficient intent to commit assault with a weapon, I now turn to consideration of the curative proviso found in section 686(1)(b)(iii) of the *Code*. It states:

| | |
|---|---|
| **Powers**<br>**686(1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal | **Pouvoir**<br>**686(1)** Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel: |
| **(b)** may dismiss the appeal where | **b)** peut rejeter l'appel, dans l'un ou l'autre des cas suivants: |
| **(iii)** notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred. | **(iii)** bien qu'elle estime que, pour un motif mentionné au sous-alinéa a)(ii), l'appel pourrait être décidé en faveur de l'appelant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit, |

[75] In *R v Sekhon*, 2014 SCC 15 at para 53, Moldaver J explained:

> As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been made" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff'd in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1)(*b*)(iii) is appropriate: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[76] In my view, this case falls within the latter category. The findings of the trial judge are clear and he rejected the Crown's invitation to convict based merely on negligence. The evidence that he accepted overwhelmingly supports the conclusion that the accused either knew or was substantially certain that the dog would attack Ms. Neufeld. Alternatively, she exhibited a high degree of recklessness. Either way, a conviction for assault with a weapon would be inevitable. Whether intent is attributed by knowledge or recklessness, it is my view that, on these facts, any difference in moral culpability would be negligible.

[77] Furthermore, it is not in the public interest to order a new trial in these circumstances (see *R v Sarrazin*, 2011 SCC 54 at para 24).

[78] In the result, I would dismiss the appeal.

Cameron JA

I agree: Mainella JA

I agree: Pfuetzner JA