Citation: R v SS, 2025 MBCA 70
Date: 20250814
Docket: AR23-30-09989

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Diana M. Cameron
Mr. Justice David J. Kroft

B E T W E E N:

	)	***K. E. Smith***
HIS MAJESTY THE KING	)	*(via video conference) and*
	)	***A. S. Pinx***
Respondent	)	*for the Appellant*
	)	
- and -	)	***M. E. Carlson***
	)	*for the Respondent*
S. S.	)	
	)	***D. V. Gunn*** *and*
(Accused) Appellant	)	***M. A. Zurbuchen***
	)	*for the Intervener*
- and -	)	
	)	*Appeal heard:*
TRIAL COUNSEL FOR THE APPELLANT	)	***April 1, 2025***
	)	
Intervener	)	*Judgment delivered:*
	)	***August 14, 2025***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

CAMERON JA

[1] The accused appeals her conviction after a trial in the Provincial Court of one count of sexual interference. Her sole ground of appeal is that she received ineffective assistance of counsel. In support of her appeal, she moves for the admission of further evidence.

[2] The further evidence includes an affidavit sworn by the accused, copies of Facebook communications that she had with counsel, police statements taken from the victim and witnesses, the pre-sentence report (PSR) and a sentencing transcript of one of the witnesses regarding an offence that occurred after the allegations against the accused were reported to the police.

[3] For the reasons that follow, I would dismiss the motion for further evidence. Given that the ground of ineffective assistance is dependent on the admission of the further evidence, the appeal must also be dismissed.

Background

History of the Proceedings

[4] The charge of sexual interference is based on one incident where the accused is alleged to have fellated and have had vaginal sexual intercourse with the then thirteen-year-old victim (the incident). The information charged that the incident occurred between August 1 and August 31, 2019. The incident was alleged to have occurred at a residence on a First Nation reserve in Manitoba (the residence) where the accused was staying with her mother, her mother's boyfriend and his children.

[5] The incident came to the attention of the authorities in September 2019 after the victim's grandmother (the grandmother), with whom he had been living, was told by the victim's cousin (the cousin) that the accused and the victim had sexual intercourse. On September 11, 2019, the grandmother and the cousin provided statements to the RCMP indicating how and when they became aware of the incident. The victim was not interviewed at that time.

[6] On September 17, 2019, the accused's mother reported to the RCMP that the cousin, the victim and two other males had been to the residence the night prior. She said that they used a hatchet that had been located on the property to smash the windows of a vehicle on the property. As well, she alleged that they smashed windows of the residence in an alleged attempt to enter it (the events of September 16).

[7] Both the victim and the cousin were arrested on September 17, 2019. The cousin was charged with several offences relating to the events of September 16. The victim was not charged.

[8] For reasons unknown, the RCMP did not interview the victim regarding the sexual allegations against the accused until October 17, 2019. While the grandmother was present for a portion of the victim's police statement, she left the room upon his request, as he did not want to discuss the sexual nature of what had occurred between him and the accused in her presence.

[9] The accused was charged in January 2020 and a warrant for her arrest was issued. She was arrested by members of the Winnipeg Police Service in January 2021. The record indicates that on August 18, 2021, the Crown elected to proceed by way of indictment and the accused elected to have a trial in the Provincial Court. Two trial dates of March 3, 2022 and June 22, 2022 were subsequently adjourned at the request of trial counsel. The accused's trial proceeded on October 6, 2022.

[10] In the interim, on December 11, 2019, the cousin pleaded guilty to mischief under $5,000 and possession of weapon for dangerous purpose in

relation to the events of September 16. A PSR was prepared (the cousin's PSR) and she was sentenced for those offences on November 4, 2021.

The Trial

[11] Prior to commencing the trial, the trial judge asked whether an order excluding witnesses was required. Trial counsel confirmed that the accused's mother was in the courtroom but stated that she was not one hundred per cent certain whether she would testify, although it was not "anticipated or planned". In the end, the accused's mother left the courtroom in response to the trial judge ordering an exclusion of witnesses.

[12] The Crown called two witnesses. First was the grandmother. She said she knew the accused, having first met her when she gave the accused and her boyfriend a ride to a dock to catch a boat to take them to an annual summertime community event (which, according to the grandmother's statement, occurred around July 30 to August 5, 2019). She testified that the victim had been acting up that summer, breaking curfew, leaving the house at night and coming home high. The grandmother said that she went to the residence and spoke to the accused on one occasion when looking for the victim. While the victim was not there on that day, the grandmother told the accused that the victim was too young to hang out at the residence, in response to which the accused just rolled her eyes. The grandmother agreed that she contacted the RCMP in September 2019 regarding the allegations.

[13] The Crown's second witness, the victim, testified that he met the accused at the community event. He said that during the summer, he would regularly "hang out" on the front porch of the residence listening to music and smoking weed with the accused and others. In addition, he testified that, on

about three occasions, the accused had given him a drug he described as Molly or MDMA.

[14] The victim testified that on the day of the incident, he went to the residence while he was high. He and the accused were alone smoking weed and listening to music. He testified that she suggested they go to her mother's bedroom and, while there, the accused fellated him at his suggestion and they had vaginal sexual intercourse at her suggestion.

[15] The victim testified that he told his friends about the incident. He stated that he did not speak to or see the accused again and that he did not go back to the residence after the incident.

[16] The accused testified in her defence. She agreed that the victim and others would hang out on the front porch of the residence. She described him as a follower. She denied that she had any sexual interaction with him. As well, she denied that she had ever been alone with the victim or that he had ever been inside the residence. She said that she left the reserve when she heard about the allegations against her.

[17] Two other "potential" witnesses did not testify in the trial. First, although the cousin had been subpoenaed by the Crown, she was unable to attend on the day of the trial due to illness. The Crown decided to proceed without her and trial counsel did not object. Second, the accused's mother did not testify.

The Decision of the Trial Judge

[18] In convicting the accused, the trial judge stated that she did not believe the accused, nor did her evidence raise a reasonable doubt. The trial judge said that her reasons for not believing the accused included that the accused minimized her interactions with the victim, denied ever sharing any marihuana with him despite agreeing that they would all hang out together and smoke weed, and denied that she was ever alone at the residence or alone with the victim. It was the absolute nature of the denials that led the trial judge to disbelieve the accused's testimony.

[19] In considering the evidence of the victim, the trial judge noted the manner in which courts should approach children's evidence as set out in *R v W(R)*, [1992] 2 SCR 122, 1992 CanLII 56 (SCC) [*W(R)*] and *R v B(G)*, [1990] 2 SCR 30, 1990 CanLII 7308 (SCC), including that a child's evidence need not be corroborated, that it may be wrong to apply adult tests for credibility to such evidence, details such as time and place may be missing from a child's recollection and that a flaw such as a contradiction in a child's evidence need not be given the same effect as a similar flaw made by an adult (see *W(R)* at 132-33). Nonetheless, she recognized that the offences still required proof beyond a reasonable doubt (see *ibid* at 134).

[20] In concluding that the victim's evidence persuaded her beyond a reasonable doubt that the incident occurred, the trial judge noted that the victim did not appear to have any romantic interest in the accused, that he did not want his family to find out what had occurred and that he did not really want to tell the police what had happened. She noted that, while he initially thought what had happened was cool, he only later realized that it was wrong.

She acknowledged that there were issues with his testimony, including the possibility that he lied to appear cool to his friends. Importantly, she acknowledged that during cross-examination, he wavered between claiming whether he had told the police the full truth about what happened between him and the accused and admitting that he did not tell the police everything.

[21] Despite the above, the trial judge gave detailed reasons for believing the victim, including his description of the incident and where it occurred, his explanation for not telling the police all the details about the sexual acts that occurred and that he was uncomfortable speaking to the police about what had happened. She also considered and rejected that he had made up the incident solely to sound cool to his friends. She said that, despite a "robust cross-examination," his testimony regarding the sexual encounter was not contradicted.

The Motion for Further Evidence

[22] The accused's assertion of ineffective assistance is grounded in five allegations regarding trial counsel's representation of her. I have reordered and summarized these allegations as trial counsel:

1) failed to explain to the accused or obtain her instructions regarding her election of mode of trial;

2) failed to prepare the accused for direct and cross-examination;

3) failed to consult the accused or ask for an adjournment when the cousin was unavailable to testify or otherwise ensure that the cousin was examined at trial;

4) failed to call the accused's mother as a witness; and

5) failed to adequately prepare, investigate and put all theories forward in the case, including failing to cross-examine the victim and the grandmother regarding information in their police statements concerning the timeline of the events and the accused's conspiracy theories.

[23] The further evidence that the accused asks to be admitted includes her affidavit, setting out details of her interactions (or lack thereof) with trial counsel. Attached as exhibits to the accused's affidavit are (a) copies of Facebook Messenger messages between her and trial counsel that occurred after she was convicted, (b) the victim's police statement, (c) the cousin's police statement, (d) the grandmother's police statement, (e) the cousin's PSR, and (f) the transcript of the cousin's sentencing hearing.

[24] Trial counsel filed an affidavit disputing many of the statements made by the accused, as well as the accused's allegations of ineffective assistance. Attached as exhibits to trial counsel's affidavit are (a) handwritten notes regarding the accused's election for mode of trial; (b) copies of Facebook Messenger messages between the accused and trial counsel that were not included in the accused's Exhibit A; (c) text messages sent to various phone numbers that had been provided to trial counsel to contact the accused; (d) trial counsel's handwritten notes regarding a phone conversation she had with the accused on February 25, 2022, during which trial counsel stated that she read all of the witness statements to the accused; (e) trial counsel's handwritten notes of a phone conversation she swore she had with the accused on March 3, 2022, wherein she discussed the cousin's PSR regarding the

events of September 16; (f) copies of messages that trial counsel exchanged with the accused's mother; (g) handwritten notes that trial counsel made on the day of the trial and on the day that the accused was convicted, including her conversation with the accused and the accused's mother wherein the accused told her mother to "mind [her] own business" and that the accused blamed the fact that she had been convicted on her mother; and (h) the accused's PSR, which trial counsel says demonstrates the strained relationship between the accused and her mother.

[25] Trial counsel filed a supplemental affidavit attaching a complete list of messages exchanged between her and the accused's mother, as they inadvertently were not attached to the information she had earlier provided.

Ineffective Assistance of Counsel

[26] I start by emphasizing the importance of effective defence counsel. Effective representation necessarily ensures the reliability of the adversarial process of our justice system and "enhances the adjudicative fairness of the process" (*R v Joanisse*, 1995 CanLII 3507 at 34 (ONCA)).

[27] In *R v GDB*, 2000 SCC 22 [*GDB*], the Supreme Court of Canada explained that incompetence is determined based on the reasonableness standard. There is a strong presumption favouring the competence of counsel and that their conduct "fell within the wide range of reasonable professional assistance" (*ibid* at para 27). The onus is on the party alleging incompetence "to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment" (*ibid*). Such an assessment cannot be based on hindsight (see *ibid*). Also see *R v Rhodes* (*KHC*), 2015 MBCA 100 at para 18).

[28] In demonstrating ineffective assistance, the accused must first establish the facts grounding the claim on a balance of probabilities (the factual component). Where a factual foundation is made out, the accused must show that the presumed incompetence resulted in a miscarriage of justice (the prejudice component). If this is made out, the accused must demonstrate that the actions of counsel were incompetent (the performance component). At this final stage, the presumption that the conduct of counsel fell within the wide range of reasonable professional assistance is of particular import (see *R v Le (TD)*, 2011 MBCA 83 at para 189 [*Le*]). Also see *GDB* at para 27.

[29] If the accused is unable to satisfy any stage of the analysis, it is undesirable for the courts to consider the performance component (see *Le* at para 189; *GDB* at para 29).

[30] The three routes to a miscarriage of justice are summarized in *R v Mazhari-Ravesh*, 2022 MBCA 63 at para 21 [*Mazhari-Ravesh*]:

> There are three routes to a miscarriage of justice due to ineffective representation by a trial lawyer (although there may be some overlap), being ineffective representation that affected the reliability of the verdict, or that affected the fairness of the trial process (see *Joanisse* pp 55-64), or that undermined the fairness of the trial or the appearance of trial fairness (see *R v Mehl*, 2021 BCCA 264 at paras 140-44.) The remedy for a miscarriage of justice is at least a new trial (see *Joanisse* at p 57; and *DGM* at para 4).

[31] In *R v White*, 2022 SCC 7 [*White*], the Supreme Court explained that where ineffective assistance is alleged to have occurred on grounds concerning procedural fairness, the accused must also demonstrate subjective prejudice such that there was a reasonable possibility that they would have

acted differently (see para 6). Further, it affirmed the high standard required to establish a miscarriage of justice on the basis of an appearance of unfairness, stating that "the defect must be 'so serious that it shakes public confidence in the administration of justice'" (*ibid* at para 9).

Admissibility of Further Evidence

[32] Occasionally, a claim of ineffective assistance can be established by filing the entirety of the record, including the transcripts of court proceedings. Unless the record is sufficient to satisfy the court of the factual foundation for the claim, the accused must provide further evidence to establish it. Usually, an accused will file an affidavit attaching materials alleged to be relevant, as well as affidavits from others whose evidence is relevant to the proceeding. (See e.g. *R v Clarke*, 2024 ABCA 346 at para 23, where the accused filed an affidavit from his girlfriend regarding her interactions with the accused's former lawyer.)

[33] In *R v Zamrykut*, 2017 MBCA 24, this Court set out the test for the admission of further evidence where ineffective assistance of counsel is alleged. That case cited with approval and adopted the British Columbia Court of Appeal's test from *R v Aulakh*, 2012 BCCA 340 [*Aulakh*]. The *Aulakh* test is as follows (at para 68):

> 1. Determine if the fresh evidence is admissible under the rules of evidence (e.g., no hearsay, speculation, opinion or mere argument).
>
> 2. If the fresh evidence complies with the rules of evidence and if it is apparent from the trial record that the fresh evidence could not reasonably have affected the result (assuming the allegations of ineffective representation could be established)

there is no miscarriage of justice and the application to adduce fresh evidence and the appeal should be dismissed.

3. If that determination is not apparent and the fresh evidence in support of the allegation of ineffective representation is relevant to that issue and credible, admit the fresh evidence for the limited purpose of determining the allegation of ineffective representation, an issue that was not adjudicated at trial. At this stage the fresh evidence will not be admissible to determine the substantive issue of whether a miscarriage of justice has occurred.

4. In considering whether the performance component of the test for ineffective representation has been established, apply the standard of "reasonable professional judgment", remembering that the appellant must establish the facts underlying the claim of ineffective assistance on a balance of probabilities.

5. If the performance component of the ineffective assistance of counsel claim is established, consider whether the appellant has established the prejudice component of the test, namely a "reasonable probability" that the outcome of the trial would have been different if the appellant had received the effective assistance of counsel (i.e., if there had been a miscarriage of justice). If the answer is yes, the fresh evidence application should be granted, the appeal allowed, and a new trial ordered. If the answer is no, the fresh evidence and the appeal should both be dismissed.

[34] This Court has applied the *Aulakh* test in the determination of the admission of further evidence in consideration of ineffective assistance of counsel (see e.g. *R v Soroush*, 2022 MBCA 84 at para 78; *Mazhari-Ravesh* at para 28; *R v Dyck*, 2019 MBCA 81 at para 54; *R v Owens*, 2018 MBCA 94 at para 53).

[35] In this case, the accused makes several allegations of ineffective assistance. The further evidence offered supporting the allegations varies with

the nature of the allegation. Thus, I will examine the admissibility of the further evidence as it relates to the specific allegations.

Allegations 1 and 2—Trial Counsel Failed to Explain to the Accused or Obtain Her Instructions Regarding Her Election of Mode of Trial (Allegation 1) and Failed to Prepare the Accused for Direct and Cross-Examination (Allegation 2)

[36] In *Mazhari-Ravesh*, Beard JA underscored the caution with which the court must approach an accused's claims of ineffective assistance. She said (*ibid* at para 62):

> The courts have recognized that an accused's complaints of ineffective representation, particularly regarding discussions with defence counsel and advice given by defence counsel, should "not [be] blindly accept[ed]" (*Le*, at para 177). As was stated in *R v Archer* (2005), 202 CCC (3d) 60 (Ont CA), "Common sense dictates a cautious approach to allegations against trial lawyers made by convicted persons who are seeking to avoid lengthy jail terms" (at para 141).

[37] The first two allegations of ineffective assistance are founded solely on the credibility of the assertions contained in the affidavit and cross-examination of the accused. Thus, the issue is whether the accused has established that her affidavit is sufficiently credible to be admitted regarding these two allegations (see *Mazhari-Ravesh* at para 64). In my view, it is not.

[38] Regarding the first claim, the accused asserts that trial counsel did not discuss her election to be tried in the Provincial Court. She maintains that, had the matter been discussed with her, she would have elected to have a preliminary inquiry and a trial before a judge of the Court of King's Bench, thereby invoking the third route to a miscarriage of justice to the extent that

trial fairness or the appearance of it was undermined (see *ibid* at para 24; *White* at paras 4, 9).

[39] In response, trial counsel provided affidavit evidence refuting the accused's claim. Attached to trial counsel's affidavit is a handwritten note made by her indicating that the election of mode of trial was discussed with the accused and that her election was to have her trial in the Provincial Court.

[40] Although the note is dated May 2019, trial counsel swore that it was incorrectly dated and that it should have been dated May 2021. I note that the record indicates that the accused had a court appearance scheduled for May 5, 2021 and the election was entered on August 18, 2021. Given the above and that the accused only made her first post-arrest court appearance on April 7, 2021, I accept that the indication on the note that it was created in 2019 was a simple error and that it was created in 2021.

[41] Furthermore, in her affidavit and cross-examination, trial counsel indicated that because of COVID-19, "preliminary hearings were not being given out liberally at [that] time [because they] were in the middle of the pandemic lockdowns". She said that as a result of her discussions with the Crown, she advised the accused that the Crown may proceed by direct indictment, thereby precluding the accused from having a preliminary inquiry.

[42] The materials filed by the Crown included Notices to the Profession from all levels of Manitoba Courts responding to Public Health Order restrictions and describing safety responses (including court cancellations) between March 2021 and May 2022.

[43] Despite the accused's suggestion that trial counsel's note regarding her entire conversation with the accused about her election of mode of trial constituted an "oddly dated hand-written note that purported to record [the] election", trial counsel was not cross-examined about any alleged fabrication in her notes. Trial counsel was unshaken in her position that she discussed the issue of mode of trial with the accused and that the accused made the decision. She also testified that considerations other than the issue of direct indictment were reviewed with the accused when discussing the decision to elect to be tried in the Provincial Court.

[44] In my view, the accused's assertion that trial counsel did not discuss the accused's election for mode of trial with her is not credible.

[45] Next, the accused maintains that trial counsel did not properly prepare her to testify. In her view, this directly contributed to the trial judge's finding that she lacked credibility.

[46] Trial counsel indicated that, despite having difficulty contacting the accused, she was able to review the disclosure provided by the Crown, including all witness statements and the cousin's PSR, with the accused. She further indicated that she conducted a mock cross-examination with the accused over the phone.

[47] The text and Facebook messages filed by trial counsel demonstrate numerous unsuccessful attempts to contact the accused for the purpose of preparing for the trial. In addition, trial counsel's handwritten notes confirmed her discussions with the accused in preparation for the trial. This included trial counsel cautioning the accused about her attitude when

testifying based on trial counsel's perception that the accused did not appear to take the charges seriously.

[48] In her cross-examination, the accused admitted that she was difficult to reach, that she "kind of avoided" her charges and that she did not reach out to counsel to inquire about her case. Nonetheless, she maintained that the notes provided by trial counsel and trial counsel's description of meetings and conversations she had with the accused were fabricated.

[49] I do not find the accused's evidence to be credible regarding trial counsel's efforts to prepare her to testify. A common thread in the accused's evidence is that she denies the possibility of any matter that she perceives to be not favourable to her, regardless of how mundane. Among other things, she denied (a) the interaction pursuant to which trial counsel came to represent her; (b) trial counsel had provided her with her business card; and (c) trial counsel discussed the disclosure with her, including the statements given by the victim, the grandmother and the cousin, as well as the cousin's PSR. As I said, she also denied having had the several conversations with trial counsel that trial counsel had documented.

[50] The nature of the accused's affidavit evidence and subsequent cross-examination is consistent with the trial judge's finding that the accused minimized her actions and denied in absolute terms that she had ever been alone with the victim, that she had ever shared her marihuana with the victim or that she had ever been alone in the house in which she lived.

[51] Based on the above, I am of the view that the evidence the accused proffers in support of her allegations that she was not advised of her ability to elect the mode of trial and would have elected differently had she been

informed and that trial counsel did not prepare her to testify is not credible and therefore not admissible for the determination of the issue of ineffective assistance. The accused has not established on a balance of probabilities a factual foundation for her claims that she was not consulted regarding her election of mode of trial or that trial counsel did not prepare her to testify.

Allegations 3 to 5—Trial Counsel Failed to Consult the Accused or Ask for an Adjournment When the Cousin Was Unavailable to Testify or Otherwise Ensure That the Cousin Was Examined at Trial (Allegation 3), Failed to Call the Accused's Mother as a Witness (Allegation 4) and Failed to Adequately Prepare, Investigate and Put All Theories Forward in the Case, Including Failing to Cross-Examine the Victim and His Grandmother Regarding Information in Their Police Statements Concerning the Timeline of the Events and the Accused's Conspiracy Theories (Allegation 5)

[52] The remaining allegations of ineffective assistance raised by the accused involve her allegation that trial counsel failed to pursue two theories that I would describe as the timeline theory and the conspiracy theory.

The Timeline Theory

[53] The timeline theory is that the evidence as to the date when the incident was alleged to have occurred was inconsistent as between when the cousin said she learned of it, when the cousin told the grandmother about it and when the victim said it occurred.

[54] In the cousin's police statement given on September 11, 2019, she stated that she first heard rumours about the incident around August 1, 2019 or during the week before August 16 of that year. The cousin said that she

questioned the victim about the rumours on August 16, 2019 and that he confirmed that he had sex with the accused.

[55] In the grandmother's police statement given on September 11, 2019, she said that the cousin told her about the incident on August 22 of that year.

[56] In the victim's police statement given on October 17, 2019, he said that the incident occurred during August 2019 and he thought that it was the day before school started. He said that he had not seen the accused since the incident.

[57] In direct examination, the victim testified that the incident occurred before school had started that year. In cross-examination, the following exchange occurred between the trial counsel and the victim.

> [Trial Counsel]: Now, the only thing you did say, at page 16 out of 21 [of the victim's police statement], you said -- they said, What made you scared about it? And you said, that, Maybe, I don't know -- and the police officer said, Okay. Maybe she could be sick or something. *Did you go to the police or to -- did you go to the police immediately after the alleged incident?*
>
> [Victim]: (INDISCERNIBLE).
>
> [Trial Counsel]: *Meaning that day, or the next day or two.*
>
> [Victim]: *Probably, like, the next day or two*, *because eventually my grandma found out and my auntie.*
>
> [Trial Counsel]: Okay, you went --
>
> [Victim]: And then --
>
> [Trial Counsel]: -- to the police because grandma heard something.
>
> [Victim]: M-hm.

> [Trial Counsel]: Okay. But did you go to any medical clinic to be examined after --
>
> [Victim]: After the --
>
> [Trial Counsel]: -- this allegation?
>
> [Victim]: Yes.
>
> [Trial Counsel]: *Immediately after?*
>
> [Victim]: *Yes.*
>
> [Trial Counsel]: *Which date was that?*
>
> [Victim]: *I don't know. I couldn't really -- probably, like, October.*
>
> [Trial Counsel]: *Oh, two months later?*
>
> [Victim]: *Yeah*.
>
> [emphasis added]

[58] The accused argues that cross-examination of the victim, the grandmother and the cousin regarding the timeline was essential to the determination of the victim's credibility and that trial counsel's failure to do so undermined the reliability of the verdict.

[59] Furthermore, the accused submits that "[o]nce the timeline is unraveled, there becomes no doubt that the Crown's witnesses and proposed witness[es] were engaged in deliberate deception."

The Conspiracy Theory

[60] The conspiracy theory is that the victim was influenced to make a false complaint. In her affidavit, the accused states that she and her mother

instructed trial counsel to defend the matter on the basis that the grandmother and the cousin told the victim to make a false allegation against her for the purpose of having her and her mother removed from the community.

[61] Furthermore, the accused submits that the false complaint was made to try to cover up an alleged attempted break and enter—separate from the events of September 16—committed at the residence before the grandmother contacted the police regarding this incident.

[62] In addition to alleging ineffective assistance by failing to cross-examine the victim and the grandmother, the accused also submits that trial counsel failed to ask for an adjournment of the trial to provide her with an opportunity to examine the cousin or have the court call the cousin as a witness and that she failed to call the accused's mother as a witness.

Response of Trial Counsel

[63] Regarding cross-examination on the timeline theory, trial counsel stated that she did confront the victim with the fact that he had provided a statement to the police nearly two months after the allegations. However, she stated that she did not see the significance of his testimony that he reported the incident to police within days of the event given that his disclosure led to Child and Family Services contacting police on September 6, 2019.

[64] In addition, trial counsel says she addressed the issues raised regarding the cousin. Despite the accused's denial, trial counsel's evidence was that she discussed the cousin's PSR with the accused prior to the trial and again on the day of her trial. However, trial counsel was of the view that the cousin's evidence was not beneficial to the defence and indicated that the

accused took no issue with the decision to proceed despite the cousin's absence.

[65] Regarding the conspiracy theory, trial counsel was of the view that there was no evidence that the community was racist against the accused and her mother. Trial counsel was not made aware of any allegation that the victim or his family had attempted to commit a break and enter at the residence prior to the allegations having been made. That evidence did not come up until it was mentioned in texts between the accused and trial counsel after the trial wherein the accused was expressing her dissatisfaction with the guilty verdict.

[66] Trial counsel stated that, in her view, the accused's theory that the complaints were fabricated in retaliation for the offences committed by the cousin on September 16, 2019, did not make sense given that the allegations against the accused were made before that date.

[67] Regarding the failure to call the mother as a witness, trial counsel maintained that she consulted with the accused regarding her mother's potential testimony. She also explained that she observed that the accused and her mother had a volatile relationship. Trial counsel said that, during a break in the trial, the accused told her mother to "mind her own business". In addition, trial counsel affirmed that the accused's mother unexpectedly left the courthouse around the conclusion of the Crown's evidence on the day of the trial and did not return for the remainder of the day (which the accused denied in cross-examination on her affidavit). Finally, trial counsel said that on the day the trial judge delivered the guilty verdict, the accused told her mother that it was her mother's fault.

Discussion—Allegations 3 and 4

[68] For the reasons that I earlier explained, I do not accept the accused's evidence regarding her interactions with trial counsel or the instructions the accused said she provided to trial counsel.

[69] Regarding the allegation concerning the failure to call the cousin, trial counsel directly rebutted the accused's statement that she did not discuss proceeding with the trial in the absence of the cousin. As stated by trial counsel, given the cousin's statement, there was a very real possibility that her testimony would have been more damaging than helpful to the accused's case. The allegation as it relates to this aspect of ineffective assistance is not credible and therefore it fails the third prong of the *Aulakh* criteria.

[70] Regarding trial counsel's failure to call the accused's mother as a witness, the mother did not file an affidavit in support of the further evidence motion. The accused's affidavit simply states that she and her mother provided trial counsel with information that was not used. There is no evidence regarding generalized racism against the accused and her mother. When cross-examined regarding her affidavit, the accused stated that she was not "even totally sure" about any retaliatory motive at the time of her trial. To summarize, there is no admissible evidence regarding what the mother was aware of, what she would have testified to or why she left the trial. All of the evidence in support of this allegation is based on hearsay and fails on the first prong of the *Aulakh* criteria.

[71] The accused has not established on a balance of probabilities the factual foundation to support allegations 3 and 4.

[72] However, other evidence can be considered regarding the timeline and conspiracy defence theories. This evidence mainly applies to the fifth allegation.

Discussion—Allegation 5

[73] This allegation invokes the assertion that trial counsel failed to properly prepare the case, which resulted in her not cross-examining the witnesses regarding the timeline and conspiracy theories the accused now advances.

[74] The Crown agrees that the statements of the victim, the grandmother, and the cousin, and the cousin's PSR are admissible for the purpose of deciding the admissibility of the further evidence. To this, I would add that the transcript of the cousin's sentencing for the offences that she committed related to the events of September 16 is also admissible.

[75] In addition, the trial transcript supports that trial counsel did not cross-examine the victim or the grandmother regarding the issues now raised, nor did she ask for an adjournment or otherwise attempt to have the cousin or the accused's mother testify.

[76] The only argument that the accused raises regarding an alleged contradiction regarding the timeline theory relates to the credibility of the victim. Establishing any alleged contradiction in the timeline would have required evidence from the cousin or for the victim to have confirmed the cousin's statement about when he told her about the incident. Even if an inconsistency could have been demonstrated, the difference alluded to is not significant. This is especially so considering the age of the victim at the time

of the incident and when he testified, and the fact that the incident is alleged to have occurred during the school summer break.

[77] In assessing the victim's credibility, the trial judge was cognizant of the Supreme Court's direction that a child's evidence should be treated differently than an adult's, given that they may not remember details like time or place (see *W(R)* at 132-33). She was already aware of other inconsistencies in the victim's testimony versus his police statement regarding issues more significant than this. Notwithstanding the inconsistencies, she found his testimony credible and reliable.

[78] Furthermore, the cross-examination of the victim that I earlier quoted clearly demonstrates his lack of understanding of the significance of questions related to date and time. Thus, I am of the view that cross-examining the victim on the inconsistency of the timeline would not have affected the result and, therefore, does not pass the second prong of the *Aulakh* test.

[79] While not strictly within the timeline theory, the accused's assertion of ineffective assistance is also grounded in trial counsel's failure to cross-examine the victim regarding whether he had returned to the residence after the incident occurred. Again, this evidence was only relevant to possibly diminish the victim's credibility. Given what I have stated above, such evidence could not have reasonably affected the result at trial.

[80] Regarding the conspiracy theory, almost all the evidence alleged to support it is grounded in the accused's assertion of what her mother could have said, as well as the police summary of the offences committed by the cousin on September 16, 2019.

[81] In addition, the accused now alleges that persons connected to the victim's family attempted to break and enter the residence sometime prior to when the grandmother gave her police statement regarding the allegations against the accused. The materials filed by the accused indicate that this new information was only disclosed to defence counsel after the accused had been convicted. I accept trial counsel's assertion that she was unaware of any offence being directed at the residence or its occupants other than what occurred on September 16, 2019. The accused confirmed in cross-examination that she does not have *personal* knowledge about such an incident. Thus, there is no evidence to support the theory that there was an attempted break and enter prior to the incident being reported to the RCMP.

[82] Regarding the theory of collusion based on racism, the only evidence that the accused can point to is the police summary regarding the charges brought against the cousin regarding the events of September 16. That document is attached to the cousin's PSR. It indicates that the accused's mother told the police that during the events of September 16, the cousin called her a "white bitch" and said that she did not belong on the reserve. Aside from this hearsay, there was no evidence of racism. I agree with the Crown that "trial counsel did not have sufficient, reliable or credible information to pursue questioning with regards to any racist motivations or collusion amongst the Crown's witnesses." No admissible evidence has been provided to support this theory. Even accepting that it could have been established that the cousin had referred to the accused's mother in such a derogatory manner, absent any other evidence, it would not have affected the outcome.

[83] Similarly, the theory that there was collusion whereby the victim was influenced to make the allegation against the accused to "cover up" the events of September 16 does not coincide with the timeline of the victim's disclosure of the offences to the cousin and the initial reporting by the grandmother, each of which occurred before September 16. While the events of September 16 may have constituted evidence of ongoing animosity between the parties, cross-examination on this point would not have affected the result.

[84] One final argument made by the accused regarding the cousin's PSR and sentencing hearing can be dismissed summarily. In the cousin's PSR, it states that it was the accused's mother who had allegedly provided alcohol and drugs to the cousin's thirteen-year-old cousin (the victim) and had sexual relations with him. Similarly, in the cousin's sentencing submissions, defence counsel said that the accused's mother had given the victim drugs and had sexually assaulted him. He added that the accused's mother was facing trial for those charges.

[85] The accused argues that the above is evidence of fabrication in support of the conspiracy theory. I disagree. In my view, the record demonstrates a clear misunderstanding. There has never been any allegation against the accused's mother. The references to the accused's mother as being the perpetrator of the sexual assault against the victim were inaccurate and were more properly directed to the accused and not her mother.

[86] In all, the accused has not established on a balance of probabilities the factual foundation to support her claim of ineffective assistance for allegation 5.

Decision

[87] Application of the considerations enunciated in *Aulakh* leads to the conclusion that the further evidence that the accused seeks to adduce is not admissible. The factual foundation supporting the claim of ineffective assistance has not been established. Therefore, I need not consider whether the representation provided by trial counsel was incompetent or whether any incompetent representation resulted in a miscarriage of justice.

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

Cameron JA

I agree: Rivoalen CJM

I agree: Kroft JA