CITATION: R. v. Mitchell, 2024 ONSC 1740
COURT FILE NO.: CR-22-101495-AP
DATE: 2024/03/25

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
HIS MAJESTY THE KING	Respondent	Jonathan Janke, Counsel for the Respondent
– and –		
JEFFREY MITCHELL	Appellant	Devin Bains and Sean Biesbroek, Counsel for the Appellant
		HEARD: July 7, 2023

THE HONOURABLE JUSTICE I.R. SMITH

REASONS FOR JUDGMENT

Introduction

[1] The appellant was convicted of two counts of threatening death following a trial before Justice A.T. McKay of the Ontario Court of Justice. He was sentenced to a 90-day conditional sentence and probation for two years. He appeals both conviction and sentence.

[2] For the reasons that follow, the appeals are dismissed.

Background

The appellant's relationship with the complainants

[3] The appellant was charged with three counts of threatening, two of which alleged threats against his former wife, Theresa Mitchell, and one of which alleged a threat against her new partner, Richard Hoffarth.

[4] The appellant and Ms. Mitchell were married in 2003, had three children together, and separated in 2017. They divorced in 2019, although issues related to decision-making and parenting time with the children lingered after that date, and were the subject of contentious family court litigation. In the period following the separation of the parties the police and the Children's Aid Society (CAS) were frequently called upon to intervene in the affairs of this family.

[5] The first such occasion was on the day the separation began, September 4, 2017. On that day, Ms. Mitchell told the appellant that she wanted their marriage to come to an end. An argument ensued, the appellant was said to have become violent and was charged with several criminal offences as a result. Ultimately, he pleaded guilty to a single count of mischief, received an absolute discharge, and entered into a peace bond for a period of one year commencing February 1, 2018.

[6] Thereafter, the relationship of the appellant and Ms. Mitchell has remained fractious. She testified that the appellant is aggressive and threatening and that she is afraid of him. He testified that Ms. Mitchell has made repeated false reports to the police and the CAS about his behaviour, all of which has been innocent.

December 4, 2019: "I am going to run you over"

[7] The first of the alleged threats was sent by text message on December 4, 2019. On that day, the appellant asked Ms. Mitchell to call him as both of them were to be meeting with their family lawyers later that morning. The exchange of texts quickly became heated, and the appellant said that their issues would be settled at a trial. Ms. Mitchell invited the appellant to call her if he

was able to speak to her "politely", but said she would hang up if he was "going to call with threats." The appellant said that Ms. Mitchell should be concerned that she was "not driving the bus" (by which he meant that she was not in control of the situation, or the litigation process), and she responded by agreeing and adding that "You are driving the bus as usual." Eventually the appellant asked Ms. Mitchell to call him the following day. She said that she could not, and then made reference to some scheduling issues respecting their children. The text exchange continued as follows (errors in the original, emphasis added):

Appellant:	You are fucked goodbye if you don't want to talk to me and realistic <u>I am going to run you over</u>.
	I dare you to keep up.
	Don't fuck with me you will lose.
Ms. Mitchell:	There is nothing to keep up
Appellant:	I bet you don't keep up the game.
	You are going to lose……
Ms. Mitchell:	Fuck off idiot I don't want to talk to you anymore end of story keep your threats to yourself
Appellant:	Now we get to have fun game on

[8] Ms. Mitchell closed the conversation by telling the appellant that if he continued to threaten her their communications respecting scheduling for the children would have to be done through the CAS as they had in the past.

[9] When asked in cross-examination to agree that the appellant was simply indicating in his text message that he was going to win at trial, in other words, that he was going to "run you over during the trial," Ms. Mitchell answered "During the trial or in the parking lot at the lawyer's office, I don't know."

[10] The appellant testified that he was intending to convey to Ms. Mitchell the idea that he was going to run Ms. Mitchell over in court: "Basically in court, lawyers, exactly where we are today."

May 22, 2020: "Don't be scared I will kill you you fucking cocksucker"

[11] On May 22, 2020, the appellant and Ms Mitchell were engaged in another unpleasant text exchange respecting their family law issues. The appellant said that he was looking forward to the trial at which, so he predicted, he would win: "I don't lose I don't know how". When Ms. Mitchell said that no-one wanted the appellant to feel that he was losing, he responded as follows (errors in the original, emphasis added):

> I am sorry but I will not quit you will lose in the story There is no end show my commitment. I am not sure if you understand but this will not end
>
> We are going to raise these kids together with a 5050 or I am taking you to trial
>
> That is the end of the story good night
>
> And I can't fucking wait for frail. Bring it on
>
> If the midget you about Mary wants to meet you in back Road let's do it
>
> What road I'll be there
>
> Don't be scared I will kill you you fucking cocksucker let's do this
>
> I'll see you soon
>
> Really you'll see

[12] The appellant testified that he sent this message (as he did with all his text messages) having dictated it to the Siri voice to text application on his phone. The word "frail" was intended to be "trial." The reference to "the midget" was a reference to Mr. Hoffarth. The phrase "you about Mary" should have been "you are about to marry." In that same sentence, the second use of the word "you" should have been "me."

[13] Ms. Mitchell responded the following day saying "Your Threatening messages to me or Rich will not be tolerated. If this behaviour continues I will be notifying the police."

[14] Ms. Mitchell testified at trial that she understood the appellant to be saying that he wanted a fight with either Mr. Hoffarth or her. Ms. Mitchell testified that Mr. Hoffarth was sitting beside her when the appellant's text was received. She said that it was a Friday evening and, after thinking about it for the weekend (throughout which she was afraid that the appellant was going to "come up the driveway to get me, to get Rich") she called the police on the Monday. In cross-examination, she agreed that the appellant was proposing a fight to "have it out."

[15] The appellant testified that he was angry when he sent this text because he understood Mr. Hoffarth to have said unpleasant things about him behind his back. He said that he was effectively telling Mr Hoffarth "if you want to have a big mouth and get this off your chest, just – let's just meet on the back road face to face." There they would "chat or fight." He said that he would not have killed Mr. Hoffarth. In cross-examination he explained that he did not mean to say that he would kill Mr. Hoffarth: "It doesn't mean kill you in the literal sense dead, morgue, no."

[16] The appellant was arrested on May 25, 2020, charged in connection with this incident and the incident occurring December 4, 2019, and released on bail.

<u>June 11, 2021: Stick family</u>

[17] In June of 2021, the appellant, who runs a landscaping business, had some work done on one of his trucks. According to the appellant, while that work was done his "graphic designer" affixed to the rear window of the vehicle a decal with stick figures representing the members of a family. The scene includes three smiling children and a dog standing near a campfire with a father wearing a cowboy hat and holding a pistol in the air. Beside the father stick figure is a mother stick figure, toppled over with a large X over her body. The mother stick figure has no eyes (unlike the five other figures) and has a downturned mouth.

[18] The appellant said that when he went to pick up his truck from the shop on June 11, 2021, he thought the decal was funny. Others who saw it also thought it was funny and sent him text messages saying as much. He testified that in order to protect himself, he sent a photograph of the stick family (along with the message "hahaha") to the CAS worker assigned to his and Ms. Mitchell's file. That CAS worker, Jana Tatton, did not share the opinion that the decal was funny. She told Mr. Mitchell to remove it, forwarded the photograph of the decal to Ms. Mitchell, and – after consulting her supervisor – reported the matter to the police.

[19] After some initial resistance, the appellant complied with Ms. Tatton's direction by removing the figure of the toppled-over woman and the pistol, so that only the father figure, the dog, the campfire and the three children remained. He sent Ms. Tatton a photograph of the amended stick family.

[20] Ms. Tatton said that after she received the appellant's initial text she spoke to the appellant by phone. He told her that the stick woman with an X through her represented Ms. Mitchell. She testified as follows:

> But then even given the context of – of the conflict that exists between Mister and Mrs. Mitchell that he was up on criminal charges; that he had a past history of violence towards her; that it was in my opinion very offensive and threatening and problematic that that would be on his vehicle.

[21] Ms. Mitchell testified that to her the stick family scene showed "Jeff and the kids and he's shot mom off to the side. […] this is what Jeff has in store for me. That's what I think. I think at the end, I think that he is eventually going to kill me."

[22] The appellant testified that when he picked up the truck he thought the decal was "inappropriate, but funny." He said that he was protecting himself by sending the photo of the stick family to Ms. Tatton and that he did not think that she would send it on to Ms. Mitchell.

The reasons for conviction

[23] Justice McKay delivered oral reasons for judgment that cover roughly 15 and a half pages of transcript. In those reason, after laying out the evidence and the elements of the offence of threatening death, McKay J. turned to his analysis of the case. He referred to the contentious relationship between the appellant and Ms. Mitchell and the appellant's evidence that he tried to avoid communicating with Ms. Mitchell so that she would not have reasons to contact the police with fabricated allegation. He then continued as follows (emphasis added):

> That evidence is to be contrasted with what the court knows to be true, that he sent the text messages involved in the three incidents which led to these charges. The idea that he would send those messages despite knowing that Ms. Mitchell was attempting to set him up to involve the police is not believable.
>
> In general, his evidence is illogical and not credible. There is no dispute that Mr. Mitchell sent the messages which led to the charges. From the evidence in this case, there is no doubt that at least with respect to Ms. Mitchell he is a bully who is used to getting his way. His behaviour towards her for example, the stick person decal, is juvenile. However, the issue for the court to decide is whether the crown has proven the elements of each criminal charge beyond a reasonable doubt.

[24] The trial judge then turned to the first of the three allegations made against the appellant, the December 4, 2019, text asserting that he would run Ms. Mitchell over. On this count, McKay J. found the appellant not guilty, reasoning as follows:

> I cannot say that I am satisfied beyond a reasonable doubt that the crown has proven that Mr. Mitchell was making a threat to kill or cause bodily harm as opposed to using the court process to bully her. For that reason, there will be a finding of not guilty of that count.

[25] With respect to the May 22, 2020 text message challenging Mr. Hoffarth to a fight, the trial judge rejected the defence argument that the Crown had not proved that a threat was made to Mr. Hoffarth given that the text in question was sent to Ms. Mitchell's phone, and the argument that the text was nothing more than an invitation to a consensual fight. Justice McKay found that there

was no need for the Crown to prove that the target of the threat became aware of the threat and cited high authority for that proposition. He summarized his conclusions on this point as follows (emphasis added):

> Given the context of the relationship and the conflict within it between the three parties, and the words used, I find that at reasonable person, fully informed of the circumstances, would consider the words […] a threat to cause death to Mr. Hoffarth.
>
> […]
>
> In this case Mr. Mitchell testified that his comments were directed at Mr. Hoffarth. Essentially they were a challenge for him to meet and potentially fight. The language that he used "I will kill you, you fucking cocksucker", suggests that he at the very least intended that Ms. Mitchell convey the threat to Mr. Hoffarth.
>
> I find that Mr. Mitchell made the threat to intimidate Mr. Hoffarth and therefore made the threat knowingly. Therefore I find that the crown has proven that charge beyond a reasonable doubt.

[26] Turning last to the June 11, 2021 text attaching a photograph of the stick family, the appellant was found guilty for the following reasons (emphasis added):

> Finally with respect to the December 4, 2019, threat made by text message to cause death to Theresa Mitchell, specifically the decal incident, I make the following findings. Again, the context is a contentious marital breakup in which Mr. Mitchell has been charged with criminal offences involving Ms. Mitchell, placed on a peace bond and had his communications with her restricted. In that context, he sent a photo of the decal to the Child and Family Services worker who had been involved in the family for approximately four years because of protection issues and the need to manage family conflict.
>
> Mr. Mitchell minimizes his behaviour by testifying that he thought it was funny and that he thought that the CFS worker would give him credit for sharing the photo with her. He also testified that he did not believe that the CFS worker would forward the message onto Ms. Mitchell. I simply, do not believe that. I find that a reasonable person, knowing all of the circumstances, would perceive the decal as a threat to cause death of Ms. Mitchell.

> I find this is an example of Mr. Mitchell simply trying to be clever and do indirectly what he has also done directly. I find that the threat was made to intimidate Ms. Mitchell. I find that the crown has proven that charge beyond a reasonable doubt and there will also be a conviction on that charge.

[27] After concluding his reasons for judgment, the trial judge and counsel engaged in a discussion about scheduling sentencing proceedings. Justice McKay observed that the Crown would need time to get a victim impact statement from Ms. Mitchell and then said that he would also like to have an electronic monitoring report respecting the appellant. He said as follows (emphasis added):

> I am also concerned about a pattern of behaviour here which it seems difficult to deter, so I am over the view that I need to consider a full range of options in terms of sentence. I am going to order the preparation of an electronic monitoring report.

The grounds of appeal

[28] The appellant advances several overlapping grounds of appeal against conviction. I would paraphrase and re-organize them as follows:

1. The learned trial judge erred by improperly relying on propensity evidence and that, when such evidence is excluded from consideration, the trial judge's two guilty verdicts are unreasonable;

2. The trial judge failed to apply the analysis required by *Regina v. W.(D.)*, [1991] 1 S.C.R. 742, and his reasons are therefore insufficient;

3. The trial judge misapprehended the evidence respecting both the May 22, 2020 threat to Mr. Hoffarth, and the June 11, 2021 stick family threat;

4. The trial judge applied uneven scrutiny to the evidence of the complainant and the appellant.

5. The appellant also applies to lead fresh evidence in the form of a psychologist's report offering the opinion that the appellant's dyslexia has caused him to be effectively illiterate and unable to proofread his dictated text messages before they are sent.

Discussion

Propensity evidence

[29] The appellant argues that the trial judge erred by relying on propensity evidence in the absence of an application by the Crown to adduce evidence of prior discreditable conduct, or an application to adduce count-to-count similar fact evidence. He notes that Ms. Mitchell testified at some length about the toxic relationship between the parties, including prior assaultive conduct of the appellant, the fact that the complainant called the police 13 or 14 times to complain about the appellant, her belief that he was following her, and that he had been the subject of a peace bond. It is submitted in the appellant's factum that the trial judge's reasons for conviction are driven "almost entirely [by] prohibited reasoning."

[30] It is also submitted that in the absence of a proper Crown application the appellant had no "opportunity to make submissions on the use of this evidence prior to His Honour's judgment." It is argued that the Crown was permitted to lead evidence of the appellant's discreditable conduct without interference, but that the trial judge expressed impatience when the appellant's counsel cross-examined on prior complaints made by Ms. Mitchell.

[31] For three reasons, I cannot give effect to this ground of appeal.

[32] First, while it is true that evidence of the appellant's prior discreditable conduct was led by the Crown at trial, and that no application was made to the trial judge to admit that evidence, it is completely clear that the appellant was content to have that evidence provided to the Court. The appellant's counsel, about whom no allegation of ineffectiveness has been made, did not once object to this body of evidence. Indeed, it was the trial judge who intervened when the Crown was questioning the complainant about her reports to the police about the appellant.

> THE COURT: I'm not sure where you're going with this, Ms. Nevin [Crown counsel] and relevance, but Mr. Brock [appellant's counsel at trial] I guess will object if he thinks it gets to a point where it's strange.
>
> MR. BROCK: Well, I have a number of examples, sir, and I'll be putting them to this witness.
>
> THE COURT: Okay. Okay, thank you.
>
> MS. NEVIN: And I'm not going to go too far, Your Honour, but I think my friend knows where I'm going and I'm anticipating where he's going.

[33] Counsel did not suggest that he did not know where Crown counsel was "going," nor did he make any objection. Indeed, he then indicated that he had no objection to the Crown leading evidence of the peace bond to which the appellant had been subject. When the Crown sought to use a letter which dealt with Ms. Mitchell's various complaints to the police, the appellant's only objection was that the author of the letter should be called, not that the fact of the complaints was irrelevant or inadmissible. Crown counsel said that the letter was relevant to a line of cross-examination she was anticipating from the appellant's counsel. She agreed with the trial judge's suggestion that the letter could wait until re-examination.

[34] As Crown counsel predicted, counsel for the appellant did rely on the evidence led by the Crown for the purposes of mounting the appellant's defence, that is, as stated at the outset of these reasons, that Ms. Mitchell has made repeated false reports to the police and the CAS about the appellant's behaviour. While the trial judge did once ask the appellant's counsel about the relevance of some of this evidence, he made no ruling and did not in any way impede cross-examination. In any case, not only did counsel cross-examine Ms. Mitchell about these issues, he examined the appellant in-chief about the complainant's repeated allegations against him.

[35] In his closing submissions to the trial judge, counsel for the appellant at trial emphasized at both the opening and the conclusion of his remarks that the context in which the impugned texts were sent was important to determine whether the words and the image sent could constitute threats. He emphasized the ongoing family litigation.

[36] Crown counsel opened her submissions by agreeing that the context was important, which she then reviewed with the court. She argued that the law respecting the offence of uttering threats requires a consideration of the surrounding circumstances and that the relevant surrounding circumstance in this case were that the parties had a toxic relationship, the CAS had intervened when their communications by phone had become vitriolic, that Mr. Hoffarth did not want to meet the appellant, that it was clear that the appellant disliked Mr. Hoffarth, and that the appellant had previously been the subject of charges, complaints to the police, bail conditions and a peace bond all in relation to Ms. Mitchell, who had asked the appellant no later than December, 4, 2019, not to threaten her. She argued that in these circumstances, the appellant could not possiby have believed that his texts to Ms. Mitchell and to Ms. Tatton would not be received as threatening.

[37] In his reply submissions, counsel for the appellant took no issue with the Crown's proposed chain of reasoning.

[38] Contrary to the submission of the appellant, he had every opportunity to object to the admissibility of this evidence, and to make submissions about its limited use. The fact of the matter is that the appellant was content to have the court receive this body of evidence.

[39] Second, in my view the evidence led was admissible. In this respect it bears emphasis that the law respecting threats requires the court to take into account all the surrounding circumstances when deciding whether the offence has been made out beyond a reasonable doubt (see *Regina v. McRae*, 2013 SCC 68, at paras. 10 – 16). Such circumstances can include evidence of the accused's prior interactions with the complainant (see *Regina v. Felteau*, 2010 ONCA 821, at paras. 8 – 9; *Regina v. Lowry*, [2002] O.J. No. 3954 (C.A.), at para. 3). In addition, in cases where threats or violence are alleged in the context of a domestic relationship, the courts routinely admit evidence of prior discreditable conduct. It is relevant to issues including but not limited to animus or motive, the nature of the parties' relationship, and the timing of reports to the police (see *Regina v. M.R.S.*, 2020 ONCA 667, at para. 81; *Regina v. A.L.*, 2020 BCCA 18, at paras. 139 – 140).

[40] In my view, the evidence was admissible in this case to provide evidence of the nature of the parties' relationship and respecting the appellant's motive, in addition to explaining the context in which the threats were made so that their threatening nature could be properly understood. Almost certainly, appellant's counsel at trial understood that the evidence was admissible for these reasons and that is why he did not object when the Crown tendered it. Moreover, and as I have said, it is plain that the appellant intended to rely on the evidence of context as part of his defence.

[41] Third, it is clear that the evidence was not misused by the trial judge. It is significant that this was a judge-alone trial conducted by an experienced trial judge presumed to know the law. More importantly, his reasons show that he did not reason from a finding that the appellant had a propensity for abusing to a conclusion that he had committed the offences alleged. To be sure, the trial judge found that the evidence established that the appellant was a "bully used to getting his way," but immediately after making that finding he added the following: "However, the issue for the court to decide is whether the Crown has proven the elements of each criminal charge beyond a reasonable doubt." In other words, despite the fact that the appellant is a bully, the elements of the offence must still be established.

[42] And in that respect, the Crown failed to establish that the text sent on December 4, 2019 amounted to a threat because Justice McKay found that he had a doubt about whether the words used constituted a threat of violence, on the one hand, or a prediction about the court process, on the other.

[43] Then, turning to the second count, Justice McKay found the appellant guilty largely because the appellant had acknowledged in his own evidence that his May 22, 2020 text – where he used the language "I will kill you you fucking cocksucker" – was directed at Mr. Hoffarth. The threat was obvious on the plain language of the text. The trial judge's reference to the context evidence in connection with this count was completely proper. He referred to it when applying the test he was required to apply: whether a reasonable person, fully informed of the circumstances, would consider the words used to be a threat (*Regina v. McRae, supra*, at para. 13). Those circumstances properly included the relationships between the appellant, Ms. Mitchell and Mr. Hoffarth. This is not an example of reasoning from propensity.

[44] With respect to the allegation relating to the stick family photograph, Justice McKay did refer to the context which preceded the sending of the text to Ms. Tatton, but the references in the reasons to that context do not betray any propensity reasoning. On the contrary, the context evidence was used for the entirely proper purpose of deciding whether the appellant's evidence – that the stick family decal was just a joke that he did not believe would not be forwarded to the complainant – was credible. That trial judge found that it was not. I do not read the trial judge's comment that the appellant was doing indirectly what he had also done directly to be an example of the use of count-to-count similar fact evidence, and none of the reasoning preceding that comment suggests that it was. On the contrary, the trial judge has done no more than find that the appellant used Ms. Tatton to make a threat to Ms. Mitchell indirectly. This was a conclusion open to him on the evidence.

[45] Similarly, the trial judge's comment that he was concerned about a pattern of conduct does not establish either that he had found a pattern of conduct or that such a finding played any role whatsoever in the reasoning leading to his findings of guilt. At that point, the trial judge had turned his mind to the question of sentencing, expressly said that he wanted to consider a full range of sentencing options, and was obviously concerned about which sentencing option would best address the issue of specific deterrence. These were appropriate comments for the trial judge to make at this stage of the proceedings.

[46] It follows from all of the foregoing that I do not agree with the appellant that either of the two convictions was unreasonable. On the contrary, the findings of guilt were amply supported on the evidence before Justice McKay.

Regina v. W.(D.) and the sufficiency of the reasons for conviction

[47] The appellant argues that the trial judge failed to apply the well-known principles set out in *Regina v. W.(D.), supra*. He acknowledges that the reasons do not need to make express reference to those principles, or to apply them in a particular order, but correctly submits that the reasons should show that they have been adhered to, and that the trial judge has not simply chosen

the more believable of two stories (see *Regina v. C.L.Y.*, 2008 SCC 2, at para. 8). In this case, he submits, Justice McKay failed to do so.

[48] Instead, so it is argued, the trial judge found the appellant to be an unbelievable witness but did not consider either whether the evidence of the appellant raised a doubt, irrespective of whether the appellant was believed, and did not consider whether the whole of the evidence established the appellant's guilt beyond a reasonable doubt. He further failed to make any meaningful assessment of the evidence of the other witnesses at trial.

[49] There is no merit to this submission.

[50] The reasons reveal that the trial judge concluded that the appellant was not credible in the face of uncontroverted – indeed admitted – evidence that the appellant had sent the three text messages in question. He then proceeded to consider whether the charges had been proven beyond a reasonable doubt. This is precisely what *W.(D.)* requires and the reasoning in this case was more than sufficient given the general lack of controversy on the basic facts of the case.

[51] It bears repeating that the trial judge acquitted the appellant on the first count precisely because the appellant's evidence, and the evidence as a whole, left him in a state of doubt about whether the words used constituted a threat. Justice McKay found that it was possible – despite the fact that he had found the appellant to be an incredible witness – that what the appellant had said was true. In other words, it was possible that the words used referred to the litigation process, not a threat to cause death or bodily harm. This was a clear and appropriate application of the principles of *W.(D.)*.

[52] In connection with the remaining counts, the reasons show that the trial judge did not just choose the better of two competing versions of events. Instead, he considered the arguments made in favour of the appellant and whether they raised a doubt. In largest measure Justice McKay relied on the appellant's own testimony, and the various admissions he made in the stand, to find that the charges had been made out beyond a reasonable doubt in the context of all the evidence

he had heard. He committed no error in doing so. The reasons more than adequately show that the trial judge was alive to, and properly applied, the principles in *W.(D.)*.

Did the trial judge misapprehend the evidence?

[53] The appellant's argument that the trial judge misapprehended the evidence rests on two main submissions. First, it is submitted that the trial judge did not deal with the fact that the appellant testified that he dictated his text messages using a voice-to-text application and that he did not read those texts before sending them. It was therefore incorrect to conclude, as the trial judge did, that the threat to Mr. Hoffarth was sent knowingly. This is especially so given that the lack of punctuation in the critical portions of that text message leaves it open to varying interpretations, some of which are innocent and should have led the trial judge to find a reasonable doubt.

[54] This argument cannot be sustained. While it is true that the appellant testified that he dictates his texts and sends them without proofreading them first, the appellant did not once take the position during his testimony that he did not intend to send the texts or that the critical portions of those texts did not represent the wording he chose. In examination in-chief and in cross-examination, the words of the texts were put to the appellant and he explained what they meant. Except to the limited extent described at paragraph 12 above, he did not once say that the words of the texts were not his words. When asked directly by his own counsel about the line "Don't be scared I will kill you you fucking cocksucker," the appellant did not distance himself from the language, or suggest that Siri had misunderstood him, or explain that he meant that Mr. Hoffarth should not worry because he was not going to kill him. Instead, the appellant gave the following explanation:

> I was upset, mad. This followed a Zoom meeting. Behind these scenes, there was – there was text messages to me; voice calls. Particularly upsetting me, they were coming to Sandy Holheiser, her mother, which was with me. And I'm basically defending her and what this is is basically saying, "I'm not afraid of you. While calling you a cocksucker is just an insult to you," but you know, it's about the biggest insult you can say. At the time I'm upset obviously, and, "Let's do this," means I'm ready.

[55] While the appellant did testify that he would not have killed Mr. Hoffarth, and that he did not know that Mr. Hoffarth was with Ms. Mitchell when he sent this text, he did not once say that he did not intend to send the words found to have constituted a threat, or that they did not refer to Mr. Hoffarth. In his closing submissions, the appellant's counsel did not argue that this text was not sent intentionally, and he did not argue that proper punctuation might have cured the text of criminality.

[56] The trial judge did not misapprehend the appellant's evidence, he relied on it.

[57] The second alleged misapprehension relates to the appellant's evidence that he did not ask his graphic designer to create and apply the stick family decal to his truck and that he reported it immediately to the CAS. By failing to refer to this evidence in his reasons, it is argued, the trial judge misapprehended the evidence leading to his conclusion that the decal constituted a threat.

[58] I do not accept this argument. The key act was not the creation of the decal, or the application of it to the appellant's truck, it was the act of sending the photograph of the decal to Ms. Tatton. The trial judge did not misapprehend this evidence. His reasons (as quoted above at paragraph 26) show that he understood it accurately.

Uneven scrutiny

[59] The appellant alleges that the trial judge held the appellant's credibility to a higher level of scrutiny than the level of scrutiny applied to the credibility of the evidence called for the Crown. This ground of appeal, "notoriously difficult" to establish (see *Regina v. G.F.*, 2021 SCC 20, at para. 99), is not established here.

[60] Although Justice McKay's reasons focus on the credibility of the appellant's evidence, this by itself is not an error (*Regina v. Keresztes*, 2014 ABCA 281, at para. 4), and in the context of this case that focus made perfect sense. That is so because there was very little dispute on the facts. There was no doubt that the parties had had a difficult relationship and there was no doubt that the texts had been sent and that the appellant had sent them. The critical issue was whether

the appellant's explanations left a reasonable doubt in the mind of the trier of fact. In one instance they did, in two, for reasons more than adequately explained, they did not.

[61] This is not an example of uneven scrutiny, it is an example of reasons for judgment tailored for the unique circumstances of this case. This ground of appeal fails.

The proposed fresh evidence

[62] The appellant proposes to introduce the expert report of a psychologist, Dr. Sandor Wiseman, which explains that the appellant suffers from dyslexia, is effectively illiterate, has adopted strategies to conceal his illiteracy, and has become dependent on the Siri application on his cell phone to send texts which he does not, because he cannot, proofread. In the result, according to Dr. Wiseman, the appellant's texts are "prone to any number of different kinds of errors or ambiguity" and to "misinterpretation."

[63] The test for the admission of fresh evidence on appeal is well-known and was summarized by Justice Watt in *Regina v. T.S.*, 2012 ONCA 289, as follows (at para. 115, citations omitted):

> The exercise of our statutory discretion to receive further evidence on appeal requires an answer to three questions:
>
> > i. Is the proffered evidence admissible under the rules of evidence applicable to criminal trials? [the admissibility requirement]
> >
> > ii. Is the evidence sufficiently cogent that it could reasonably be expected to have affected the verdict? [the cogency requirement]
> >
> > iii. What is the explanation offered for the failure to produce the evidence at trial and how should that explanation affect its admissibility on appeal? [the due diligence inquiry]

[64] I focus my analysis on the second and third of these three questions.

[65] First, in my view, the proposed evidence is not sufficiently cogent that it could have affected the verdict. The fact of the appellant's dyslexia was in evidence at trial. The fact that he used the Siri application to send texts was also in evidence. As the appellant testified when asked if Siri had helped him with the grammar of the text sent on May 22, 2020, "Every message I ever have sent in my life she has." He explained to Justice McKay that "basically my fingers aren't typing. […] And if they were, it would be really messed up."

[66] Later he testified that "when I'm texting in confidence with somebody that I know, I don't check anything. I just hit send, send, send. If it's really important or to somebody that really matters, I check it."

[67] In other words, the appellant testified that he relies on Siri to assist him in his text communications and that he is not always careful respecting the precise content of the texts before sending them. Moreover, the evidence made clear that the appellant ran a successful business and relied on texting to communicate. The text messages in evidence in this case show that his communications were responsive to the texts he was receiving from Ms. Mitchell. In other words, he was engaging in meaningful communications with Ms. Mitchell and his side of those communications made sense in the context of the text conversations they were having. Most important, as I have outlined above, the appellant did not once testify that the text messages he sent in this case did not reflect his intended message.

[68] In all these circumstances, I fail to see how the evidence of Dr. Wiseman could have affected the verdict reached by Justice McKay. While it may be that the appellant's texts are from time to time open to misinterpretation, here the appellant effectively testified that he meant what Siri had written for him. In short, the proposed fresh evidence does not meet the cogency requirement.[1]

[1] I come to this conclusion without considering the Crown's argument – well-supported on the record – that the appellant repeatedly testified that he could read. I do so because, if Dr. Wiseman's report is correct, this might have been part of the appellant's attempts to mask his illiteracy. My conclusion assumes the correctness of Dr. Wiseman's finding that the appellant is illiterate and rests instead on the evidence that the texts Siri created in this case accurately reflected the appellant's intentions, as he testified.

[69] Second, the failure to lead this evidence at trial is largely unexplained. While it is clear on the record that the appellant's counsel had just become aware of his client's dyslexia, there is no affidavit from counsel, or from the appellant, or from anyone else, about how the issue came to light, and what was done about it. No adjournment was sought on this basis and I note that nearly five months passed between conviction and the date set for sentencing submissions – during which time Justice McKay's jurisdiction was not *functus*.

[70] While I accept a failure of due diligence should not stand in the way of correcting a miscarriage of justice in appropriate cases, here the absence of a full explanation coupled with the fact that the evidence of Dr. Wiseman could not reasonably have affected the verdict, leads me to the conclusion that the application to adduce fresh evidence should be dismissed.

[71] The conviction appeal is therefore dismissed.

The sentence appeal

[72] The appellant was sentenced to a conditional sentence of 90 days and to probation for two years. He had argued for a conditional discharge, and submits again to this court that a discharge should be imposed.

[73] The sentence appeal was pressed only lightly in argument, and appropriately so. The sentence imposed was completely reasonable in all the circumstances and is obviously not manifestly unfit.

[74] Further, the alleged error in principle in the reasons for sentence – that Justice McKay relied on the "propensity evidence" which should not have been tendered at trial – was no error at all. As I have already found, that evidence was properly led at trial without objection, and it would have been a mistake for McKay J. to fail to advert to it on sentencing. As he found, these offences occurred in a context of family conflict including domestic violence. The sentence imposed had to reflect that fact, which made registering a conviction and imposing a conditional sentence appropriate.

[75] The sentence appeal is dismissed.

Conclusion

[76] Accordingly, the appeals are dismissed.

[77] The appellant's sentence was stayed pending appeal by order of Justice Gordon, dated April 8, 2022. I now make the following order:

1. The appellant will report to his conditional sentence supervisor within 2 business days of the release of these reasons, at which time the order of The Honourable Justice Gordon, dated April 8, 2022, staying the conditional sentence and probation order imposed by The Honourable Justice McKay of the Ontario Court of Justice, will be spent, and the appellant will complete the remainder of the conditional sentence and probation imposed by Justice McKay.

I.R. Smith J.

Released: March 25, 2024

CITATION: R. v. Mitchell, 2024 ONSC 1740
COURT FILE NO.: CR-22-101495-AP
DATE: 2024/03/25

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HIS MAJESTY THE KING

Respondent

– and –

JEFFREY MITCHELL

Appellant

REASONS FOR JUDGMENT

I.R.Smith J.

Released: March 25, 2024