R. v. Daou: Implications for police opinion and jury instructions on evidence

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In *R. v. Daou*,[1] the Ontario Court of Appeal overturned a first-degree murder conviction because the trial judge failed to instruct the jury to disregard a police officer's opinion that the accused's confession was true. The case raises important issues in three areas: lay opinion evidence from police, jury instructions on evidentiary matters generally, and jury instructions on confession evidence in particular.

Lay opinion evidence from police officers

Daou is the latest in a series of cases in which the Ontario Court of Appeal has grappled with the admissibility of lay opinion from police officers.[2] Opinion evidence from non-expert police witnesses is subject to the general rule prohibiting lay opinion evidence. Such evidence also raises unique dangers, as acknowledged by the Supreme Court of Canada in the leading case of *R. v. Graat*,[3] and as emphasized by Trotter J.A. in *Daou*. The concern is that because of the air of authority around them, police witnesses' opinions might be viewed as inherently more valuable than the evidence of other witnesses, when in fact lay opinion evidence from police officers should be given "no special regard".[4] Where that air of authority is cultivated by extensive questioning and testimony about the police witness's experience and accomplishments – as in *Daou* – one might question whether a jury could reasonably be expected to understand that the witness is not, in fact, testifying as an expert. In the context of expert evidence, Canadian courts have warned of the danger of overreliance on opinion evidence "cloaked under the mystique of science".[5] One can appreciate how an equivalent mystique could surround opinion evidence from a police detective at the pinnacle of a long and distinguished career.

In *Daou*, the Crown's case depended almost entirely on the accused's video-recorded police station confession. As Trotter J.A. observed, the police witness's opinion that that confession was truthful "amounted to an opinion that the appellant was guilty".[6] Even for witnesses who are qualified as experts, direct commentary on the "ultimate issue" to be decided by the jury is often disapproved.[7]. For the Crown to elicit such testimony from a lay witness in *Daou* was a serious overreach. In the words of Trotter J.A., the evidence was "dangerous",[8] "highly prejudicial",[9] and "inadmissible – full stop".[10]

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1 Reported above.
2 See *R. v. Borel*, 2021 ONCA 16; *R. v. Short*, 2018 ONCA 1; *R. v. H.B.*, 2016 ONCA 953.
3 [1982] 2 S.C.R. 819.
4 *Graat*, *ibid*., at p. 840.
5 *R. v. Beland*, [1987] 2 S.C.R. 398, at p. 434, quoted in *R. v. Mohan*, [1994] 2 S.C.R. 9, at para. 19, and *R. v. J.-L.J.*, 2000 SCC 51, at para. 26.
6 *Doau*, *supra* note Error: Reference source not found, at para. 5.
7 See *Mohan*, *supra* note Error: Reference source not found at paras. 25 and 28.
8 *Daou*, supra note Error: Reference source not found, at para. 5.
9 *Ibid*., at para. 91.
10 *Ibid*., at para. 89.

Given that the opinion evidence in *Daou* was not admissible for any purpose, it seems somewhat odd that the Court of Appeal focussed much of its discussion on the trial judge's instructions about the evidence. Where evidence is entirely inadmissible, surely the appropriate course is to ensure that it does not go to the jury, rather than to put it before the jury with instructions. The focus on jury instructions in *Daou* probably reflects the way the evidentiary issue came before the courts: at trial, the evidence was led without objection from the defence, and the parties' arguments on appeal likely focused on how the trial judge was required to instruct the jury once the evidence was admitted. Still, it seems important to acknowledge that this evidence should never have been put before the jury at all. This was not scrap of inadmissible evidence that slipped out during a witness's testimony. Rather, the Crown led extensive evidence in direct examination and re-examination about the police officer's opinion and the basis for it. Even in the absence of a defence objection, it seems clear that the trial judge should have intervened to prevent the jury from being exposed to this prejudicial and inadmissible body of evidence.

Jury instructions on evidentiary matters

The Court of Appeal's focus on jury instructions provides a welcome opportunity to reflect on judicial instructions on evidentiary issues. Justice Trotter concluded that the trial judge in *Daou* was required to instruct the jury that the police officer's opinion evidence should be "completely disregarded".[11] He referred to this instruction in a variety of ways, including as a "caution"[12] and as a "limiting instruction".[13] With respect, these two labels do not appear to be interchangeable, and, arguably, neither seems apt when applied to an instruction to disregard inadmissible evidence entirely.

The variable language used in *Daou* reflects real uncertainty in the case law and the secondary literature about the terminology to describe jury instructions about evidence.[14] In *R. v. White*,[15] Rothstein J. commented on this terminology:

> The terms "limiting instruction" and "caution" (or "warning") are not narrowly defined terms of art which courts have consistently treated as distinct. Nevertheless, there is a distinction between the following two types of jury instruction: one that tells the jury they must not consider the evidence for one or several purposes, and the other that leaves evidence for the jury to consider, but warns them to be careful with it. For ease of reference, I will refer to the first type of instruction as a limiting instruction and to the second type as a warning or caution.[16]

Justice Rothstein's guidance on terminology clarifies an important distinction and merits broader acceptance. And while Rothstein J. elsewhere defined limiting instructions broadly enough to include instructions to disregard evidence entirely,[17] it might be clearer to confine the label

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11 *Ibid*., at para. 91.
12 *Ibid*., at paras. 5 and 107.
13 *Ibid*., at paras. 7, 84, 91 and 107.
14 See Lisa Dufraimont, "Limited Admissibility and Its Limitations" (2013) 46:2 U.B.C. L. Rev. 241, at p. 253.
15 2011 SCC 13.
16 *Ibid*., at para. 34.
17 See *White*, *ibid.*, at para. 28.

"limiting instructions" to those instructions that permit evidence to be used for certain purposes while precluding its use for some other purpose or purposes – a situation known as "limited admissibility".[18] Instructions to disregard evidence entirely appear different in their nature and purpose, and might usefully be labelled "disregard instructions", as they are often called in the social science literature.[19]

Jury instructions on false confessions

Finally, while this issue does not appear to have been raised on appeal, it is worth noting that the facts of *Daou* arguably made it an appropriate case for another kind of jury instruction: a caution about the phenomenon of false confessions. The accused's confession was the heart of the Crown's case and the circumstances gave rise to realistic concerns about its reliability. Justice Trotter summarized these circumstances as follows:

> When the appellant made his confession, he was exhibiting the symptoms of schizophrenia. His motivation for confessing appeared to be a practical one – when he first called for the police, the appellant was desperate to be removed from custodial segregation. His stated motivation for killing Ms. Stewart was less clear, if not bizarre – he said that he wanted to be a "billionaire rap superstar"…. The challenge of determining whether the confession was authentic was compounded by the appellant's attempt to confess to killing another woman, which was almost immediately dismissed as demonstrably false…. For the jury, determining the reliability of the confession would have been no easy task.[20]

One recognized danger in cases where juries are called upon to assess the reliability of confessions is that they may rely on the popular misconception that people do not confess to crimes they did not commit.[21]

Increasingly, Canadian judges are instructing juries to avoid this myth. For example, in *R. v. Ordonio*,[22] Baltman J. cautioned the jury as follows:

> [I]t is known that people sometimes falsely confess. That does happen, for a number of reasons, including fear, hope, promise or favour. Therefore you should not start with the premise that people only confess to crimes they have actually committed.[23]

The leading case on point is *R. v. Pearce*,[24] in which Mainella J.A., writing for the Court, held:

> Properly done, a jury caution on the phenomenon of false confessions will dispel the assumption…that nobody would confess to something that they did not do. This is in keeping with the recognition in *Oickle* that the phenomenon of false confessions is real,

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18 See *e.g. R. v M.T.*, 2012 ONCA 511, at para. 82.
19 Dufraimont, *supra* note Error: Reference source not found, at p. 253.
20 *Daou*, *supra* note Error: Reference source not found, at paras. 98-99.
21 See *e.g. R. v. Oickle*, 2000 SCC 38, at paras. 34-35; Gary T. Trotter, "False Confessions and Wrongful Convictions" (2003) 35:2 Ottawa L. Rev. 179, at p. 183; Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?" (2008) 33:2 Queen's L.J. 261, at pp. 270-271.
22 2019 ONSC 3017.
23 *Ibid*., at para. 15.
24 2014 MBCA 70.

occurs for a variety of reasons, and is counterintuitive to juries.[25]

Justice Mainella went on state that such a caution could "assist the jury in evaluating the reliability of the confession"[26] by identifying some of the factors – including vulnerabilities of the suspect and coercive or oppressive police tactics – that are known to raise the risk of a false confessions.

In *Pearce*, the Manitoba Court of Appeal determined that a caution on the phenomenon of false confessions was required in the circumstances, which included the unusual feature that the accused "pursued the police"[27] in his attempts to incriminate himself. The confession in *Daou* also emerged in circumstances that were unusual and included the accused seeking out the opportunity to confess to police. This shared feature of the *Daou* and *Pearce* cases was also, notably, present in the well-known case of *R. v. Phillion*,[28] in which the accused was wrongly convicted and served decades in prison after volunteering a spontaneous and false confession to the murder of a firefighter, Leopold Roy.[29] In *Pearce*, Mainella J.A. concluded that, given the unusual features of that case, "it would be difficult for a jury to fairly adjudicate on the appellant's claim of false confession unless they were informed about the phenomenon of false confessions".[30] Arguably, the jury in *Daou* should have been similarly informed.

25 *Ibid*., at para. 134.
26 *Ibid*., at para. 135.
27 *Ibid*., at para 140.
28 2009 ONCA 202.
29 *Ibid*. at para. 16.
30 *Pearce*, *supra* note Error: Reference source not found, at para. 141.