R. v. B.B.

Collection: Decisions of the Court of Appeal
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Docket numbers: C70978
Judges: Pepall, Sarah E.; Thorburn, Julie; George, Jonathon C.
Subject: Criminal

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4 or 486.6 of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

486.6 (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any

way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. B.B., 2024 ONCA 766
DATE: 20241021
DOCKET: C70978

Pepall, Thorburn and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

B.B.

Appellant

B.B., acting in person

Dan Stein, appearing as duty counsel

Erica Whitford, for the respondent

Heard: May 8, 2024

On appeal from the conviction entered by Justice David Salmers of the Superior Court of Justice, sitting with a jury, on October 31, 2019.

George J.A.

[1] The appellant was charged with seven counts of assault, one count of assault with a weapon, and two counts of sexual assault with a weapon. He pleaded guilty to three of the assault charges, and was convicted by a jury on all the remaining counts. The offences occurred between October 20 and November 7, 2017.

[2] The complainant's testimony at trial introduced evidence of other reprehensible conduct for which the appellant had not been charged. This evidence included allegations that the appellant was domineering and abusive toward the complainant by, among other things, controlling her phone, preventing her from going to therapy, and encouraging her to commit suicide as a way to prove her loyalty and affection.

[3] The appellant, with the assistance of duty counsel, argued that an instruction against propensity reasoning should have been given. More specifically, duty counsel submitted that the jury should have been cautioned 1) against reasoning that evidence of the appellant's uncharged but objectionable behaviour meant that he was more likely to have committed the charged offences, and 2) against reasoning that evidence of the appellant's conduct subject to one count meant that he was more likely to be guilty of the other counts.

FACTS

Background and Bad Character Evidence

[4] In the early summer of 2017, the appellant and complainant were friends. The appellant was in and out of custody, and for a short time the complainant served as his surety. Between July 29 and October 20, the appellant was incarcerated. The two communicated through phone calls and letters, and their relationship progressed. The complainant testified that she did not want to be the appellant's girlfriend, but he "would not accept no as an answer" and threatened to commit suicide if she would not agree. He threatened to kill both himself and her if she would not agree to marry him, and uttered similar threats with respect to cheating on him. According to the complainant, she felt "trapped" by these threats and continued the relationship out of fear that the appellant would follow through with them.

[5] The appellant was released from custody on October 20, 2017, though he was required to return to jail on weekends to serve an intermittent sentence. During the week, the appellant lived with the complainant at her apartment.

[6] The complainant testified about her lack of privacy during this time. The appellant would comb through her social media accounts to ensure she was not in touch with other men, and he took control of her phone so that she could not communicate with others without his approval. He removed the door to the bathroom so he could physically monitor her in the apartment, arranged for the complainant to stay with his friend on the weekend when he was in custody, and prevented the complainant from going to therapy because it would involve an evening apart.

[7] The complainant also testified that the appellant was verbally and physically abusive. He called her degrading names and made negative comments about her appearance; for example, he told her that she needed to wear a bra because her breasts were beginning to sag. In addition, the complainant spoke about uncharged physical assaults, such as an instance when the appellant became agitated and "basically smashed [the complainant's] head into the wall", giving her a "goose egg". Most of these confrontations occurred after the appellant accused the complainant of cheating on him.

Charged Offences

[8] The appellant accepted on cross-examination that he had used suicide threats as a way of controlling the complainant, including to prevent her from going to the police. He also pleaded guilty to three assault charges. However, the appellant denied committing the seven other counts for which the jury eventually convicted him.

[9] The complainant testified that on October 24, 2017, the appellant used a steak knife to force her to climb a staircase to the edge of a Home Hardware rooftop, where he demanded that she commit suicide by jumping. The point was to force the complainant to "prove [her] love to [the appellant] by [being] willing to die".

[10] The next evening, on October 25, the appellant sexually assaulted the complainant at knife point. According to the complainant, the appellant became upset with her for refusing to have sex, and held a knife to her throat while forcing her to perform oral sex. He then cut her

throat and demanded to have vaginal sex. She testified that she was crying throughout, "which he did not find very attractive", and so he cut her stomach.

[11] A few days later, the appellant accused the complainant of having sex with the friend with whom she had been staying on the weekend while he served his intermittent sentence. The complainant testified that as they drove home from the friend's house, they stopped in a Tim Hortons parking lot where the appellant slapped her, pulled her hair, and threw her possessions onto the lawn. He then "pulled" the complainant to the side of the Tim Hortons and "direct[ed her] to pull [her] pants down" so he could "smell [her] crotch to make sure it [didn't] … smell like [his friend]".

[12] The appellant later intercepted a "Happy Birthday" message from another man while in possession of the complainant's phone. The complainant testified that he ordered her to strip naked and sit in the bathtub, where he sexually assaulted her with an aerosol spray can, and then dumped items from the fridge on her, such as milk and mayonnaise. He attempted to urinate on her and ordered her to cut her wrists with a box cutter, to "prove how sorry" she was for cheating.

[13] Shortly thereafter, the appellant again used a steak knife to demand oral sex from the complainant. She testified that he then inserted the blade into her vagina and twisted it inside of her. When he took the blade out, the complainant became hysterical and started crying.

Submissions at Trial and Jury Instructions

[14] The trial judge gave two limiting instructions to the jury. First, he warned against reasoning that the appellant was a "bad person" who was likely to have committed the charged offences because of his prior convictions or because he had spent time in custody and was serving an intermittent sentence at the time the alleged offences occurred. Second, he explained that they must make their decision on each charge only on the basis of evidence relating to that charge. He repeatedly cautioned the jury that they "must not use evidence that relates only to one allegation or incident when you are making your decision on any other allegation or incident". For instance, at p. 32 of his charge, the trial judge instructed the jury:

"Remember my earlier instruction that you must make a separate decision for each charge. Each charge must be decided only on the evidence that relates to that charge. [The appellant] is not guilty of any charge unless based on the evidence that relates to that charge, the Crown has proven each essential element of [that] charge."

[15] The trial judge did not provide a general propensity instruction that directed the jury not to infer, either from the uncharged conduct that came up in the complainant's testimony or from the conduct relating to each individual charge, that the appellant was a bad person more likely to have committed the offences. On appeal, the appellant and duty counsel argue that the trial judge erred by failing to provide that instruction. I note here that, while this is not determinative, defence counsel did not object to this missing instruction or raise the issue in either the pre-charge conference or after the jury instructions were delivered.

[16] Defence counsel did, however, rely on the bad character evidence to argue that the complainant had a motive to fabricate her allegations. More specifically, defence counsel pointed to the appellant's "jealousy and threats" to suggest that the complainant had both the motive to self-harm and the motive to "punish" the appellant by making up allegations against him. Consider defence counsel's closing argument before the jury:

> When [the complainant] first testified about the Home Hardware incident, the rape at knifepoint, the knife in the vagina, it sounded far-fetched. It sounded more like a plot from a TV show than a real event. It didn't happen. The defence position is that the complainant entered into a relationship with [the appellant] willingly. The two spoke of love and marriage. On his release [the appellant's] jealousy and threats to leave caused [the complainant] to cut herself. He gave her a black eye, he skipped out on his jail sentence, he was consuming Valium and alcohol, he began to fear that the complainant would tell police about what happened …
>
> The relationship turned into something that she didn't expect. He betrayed her. She decided to punish him. She fabricated the allegations, fabricated the picture of her in the bathtub in the apartment to attempt to support her allegations because that's what a liar does, a good liar, a good actor. Trying to tell a story, trying to make sure that they are believed, going the extra mile. Ladies and gentlemen I urge you to find [the appellant] not guilty. [Emphasis added.]

[17] The trial judge repeated many of the defence allegations in this respect in his final charge. For example, he highlighted the defence position that the appellant's "jealousy showed itself multiple times" and that the complainant "needed to get away", and he reiterated the defence submission that the complainant "fabricated the allegations, and fabricated a picture of herself in the bathtub in her apartment to attempt to support her allegations".

[18] The Crown did not attempt to rely on the bad character evidence to support a finding of guilt.

POSITIONS OF THE PARTIES

[19] Duty counsel argued that the evidence triggered a need for a propensity instruction. He submitted that the appellant's "morally outrageous behaviour made the need for a caution about [propensity] reasoning loud and clear" given the risk that the jury would draw impermissible inferences. After duty counsel made his submissions, the appellant, on his own behalf, argued further that there were inconsistencies in the complainant's statements which should have been considered.

[20] The Crown argued that the trial judge's instructions equipped the jury to engage properly with the evidence. The Crown further asserted that, on the particular facts of this case, there was no significant risk that the jury would engage in moral and reasoning prejudice.

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

ANALYSIS

Introduction

[22] While I accept duty counsel's argument that the jury here heard about the kind of morally outrageous behaviour that would typically require a propensity instruction, in the unique circumstances of this case, and in light of the use defence counsel made of that very behaviour, the failure to provide the instruction was not fatal. In fact, had the trial judge provided such an instruction it would have risked further prejudice to the appellant by needlessly placing a spotlight on his possessive and threatening behaviour.

[23] A jury charge need not be perfect. In *R. v. Goforth*, 2022 SCC 25, 470 D.L.R. (4th) 617, at para. 21, the Supreme Court held that appellate courts must take a "functional approach" when reviewing jury instructions "by examining the alleged errors in the context of the evidence, the entire charge, and the trial as a whole".

[24] While the trial judge directed the jury not to engage in cross-count reasoning, he did not provide a limiting instruction against propensity reasoning with respect to the other charges and the uncharged behaviour recounted in the complainant's testimony. This instruction should be given when circumstances warrant it; as Doherty J.A. explained in *R. v. Chamot*, 2012 ONCA 903, 296 C.C.C. (3d) 91, at para. 62, "when there is a real risk that evidence properly admitted for one purpose could be used by the jury for an improper purpose, the trial judge must caution against that misuse of the evidence".

[25] However, as this court recently noted in *R. v. Amin*, 2024 ONCA 237, 435 C.C.C. (3d) 528, at para. 66, this general rule "is subject to a narrow exception: A warning is not required if the facts of the case negate any realistic possibility that the trier of fact will use bad act evidence improperly". In addition, in *R. v. M.R.S.*, 2020 ONCA 667, 396 C.C.C. (3d) 172, at para. 101, Paciocco J.A. observed that: "Occasionally, courts have rejected appeals based on the failure of a trial judge to give a propensity direction where such failure did not prejudice the accused, but, instead, spared the accused from the reciprocal need for the judge to recite the damaging permissible uses of the similar fact evidence".

[26] As I will explain, the facts of this case negate the likelihood that the jury would have used the bad character evidence improperly. The absence of a propensity instruction therefore did not prejudice the appellant.

There was little risk that the jury would misuse the evidence and engage in propensity reasoning

[27] The circumstances of this case are distinguishable from those in cases such as *Amin* and *M.R.S.*, where a more robust limiting instruction was necessary. In *M.R.S.*, for example, the risk of propensity reasoning was high. The case involved multiple complainants. The

character evidence showed the appellant “to be a wealthy drug dealer and pimp” who not only brutally abused the complainant but left her alone for years with their children, before moving in and “repeatedly beating and traumatizing [the children] while holding [the complainant] captive”: at para. 95. This evidence was highly prejudicial. In the present appeal, the bad character evidence was considerably less serious than the evidence in respect of the charges that were laid. Moreover, unlike in *M.R.S.*, there was only one complainant, and the relevant time period was weeks, not years. The evidence in this case could plausibly – and permissibly – have shown a relationship that had badly soured and provided a motive for the complainant to exaggerate or lie.

[28] Furthermore, neither the Crown nor the defence invited the jury to use the evidence for an improper purpose. Had the trial judge presented a limiting instruction he would have risked confusing the jury, introducing them to impermissible reasoning that they might not have considered without that instruction: *R. v. Beausoleil*, 2011 ONCA, 471, 283 O.A.C. 44, at para. 20. Faced with a similar situation in *R. v. Fast*, 2022 ABCA 33, the Alberta Court of Appeal noted, at para. 47, that “a discussion of permissible uses of the evidence … could have made the jury aware of a form of impermissible reasoning that might not have occurred to them otherwise. In other words, the jury might be told about such impermissible reasoning and then told to avoid it”. This, the court held, would not benefit the defence.

[29] Likewise, in *R. v. A.G.* (2004), 190 C.C.C. (3d) 508 (Ont. C.A.), the defence used bad character evidence to tarnish the complainant’s credibility, and this court held, at para. 8, that “[a]ny direction by the trial judge that explained both the proper and improper uses of the propensity reasoning would have operated against the appellant’s interests. There was, therefore, no error and no prejudice to the appellant”.

[30] It is important that much of the bad character evidence admitted in this case arose from the same time period and context as the offences charged. As this court explained in *R. v. Joles*, 2022 ONCA 681, at para. 10, “the risk of general bad character inferences is apt to be far greater where the Crown leads evidence of the accused’s behaviour on other occasions

than it is where such evidence unfolds as part of the story itself … [J]urors are more likely to struggle to understand why extrinsic misconduct evidence is being presented and to thereby engage in prohibited lines of reasoning" where the link between the evidence and the charged conduct is less clear. Here, the charged offences, and the majority of the behaviour comprising the bad character evidence, occurred during the period between October 20 and November 7, 2017. And much of the impugned bad character conduct occurred immediately before an assault, in the hours between the assaults, or as a trigger to an assault.

[31] In my view, there was minimal risk that the jury would engage in impermissible reasoning, particularly given that neither party asked them to do so. On the contrary, there was here, as in *A.G.*, a substantial risk that a limiting instruction would have prejudiced the appellant's position at trial: see also *R. v. Batte* (2000), 49 O.R. (3d) 321, at paras. 113-14; *R. v. C.B.*, 2008 ONCA 486, 237 O.A.C. 387, at para. 35; and *R. v. N.T.*, 2011 ONCA 411, at para. 22.

A limiting instruction could have hindered defence counsel's ability to rely on the evidence for a proper purpose

[32] As mentioned, in his closing address, defence counsel pointed to the bad character evidence in support of his position that the complainant had fabricated her allegations. In so doing, he invited the jury to use the evidence for a proper purpose: to undermine the complainant's credibility.

[33] There were other permissible inferences available from the appellant's discreditable conduct. For instance, this evidence went some distance in revealing the nature of the relationship between the complainant and the appellant: *R. v. R.O.*, 2015 ONCA 814, 333 C.C.C. (3d) 367, at para. 16; *R. v. K.K.*, 2007 ONCA 203, 222 O.A.C. 99, at para. 8. It was also capable of providing context for the evidence that was directly relevant to the charges: *R. v. M.P.*, 2018 ONCA 608, 373 C.C.C. (3d) 61, at para. 99.

[34] I also note that the jury did receive limiting instructions for other "purely extraneous evidence" (*i.e.*, the appellant's criminal record and the time he had spent incarcerated). And,

unlike this “purely extraneous evidence”, the impugned bad character evidence underlined the appellant’s controlling and abusive behaviour and was relevant to the narrative, the credibility of both the complainant and the appellant, and, as mentioned, the dynamic of the relationship. While ably and forcefully arguing that a limiting instruction was required, even duty counsel acknowledged that “we’re talking about evidence that was part of the narrative that had to go in to describe the environment”.

The bad character evidence was relatively mild compared to the offences charged

[35] The severity of the charges and their underlying allegations, as compared to the appellant’s discreditable conduct, weighs against the need for a limiting instruction: *M.P.*, at para. 100; *Joles*, at para. 8. In other words, while the uncharged conduct is serious, it is not nearly as serious as the allegations underlying the charged offences. For example, some of the uncharged bad conduct involves the appellant monitoring the complainant’s social media accounts and removing the bathroom door. This is undoubtedly serious and extremely controlling behaviour, but it would not engender the same level of moral outrage as the subject matter of the charges, such as the insertion of an aerosol can or a steak knife into the complainant’s vagina, or the incident on the rooftop of Home Hardware.

[36] This court engaged in similar analysis in *Beausoleil*, finding that the trial judge had not erred by failing to provide a limiting instruction. In *Beausoleil*, the bad conduct evidence at issue – welfare fraud, curfew breaches, alcohol prohibition breaches, and kicking a police officer while intoxicated – “was essentially trivial by comparison to the offence” charged: *Beausoleil*, at para. 24. Here, as in *Beausoleil*, the mild nature of the impugned conduct relative to the allegations underlying the offences charged significantly diminished any risk that the jury would rely on propensity reasoning to convict.

Defence counsel did not object at trial

[37] Trial counsel did not object to the failure to provide a limiting instruction, either during the pre-charge conference or after the final charge was delivered. While this is not determinative, it is a factor that can be considered when determining whether an error was

committed: *M.P.*, at para. 108; *R. v. Smith*, 2021 ONCA 310, at paras. 13, 18; *R. v. Cook*, 2013 ONCA 467, at para 26. It offers a strong indication that defence counsel did not view the lack of a propensity instruction as something that compromised the fairness of their client's trial.

[38] Put another way, the defence decision not to a seek a limiting instruction may be taken as an indication that defence counsel felt that such a caution would not have been in his client's interests: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 38. As the Alberta Court of Appeal explained in *Fast*, at para. 26:

> Failure to object or seek limiting instructions or warning may also be considered in the broader context of an overall defence strategy which might be injured by the trial judge intruding with an unrequested limiting instruction or warning, especially if such limiting instruction or warning could include complex balancing guidance as to how such evidence might be permissibly used as well as how it might be impermissibly used.

[39] This is an apt description of the dynamic at play here, and ties nicely into my earlier discussion about defence counsel's reliance on the impugned evidence. In the circumstances of this case, and given the nature of the defence, the fact that counsel did not expressly seek a limiting instruction against propensity reasoning might well have been tactical. This will not always be the case, but where the defence refers to, and in some way relies on, bad character evidence, it would be dangerous for a trial judge to provide an unsolicited instruction about the uses that could be made of that evidence.

CONCLUSION

[40] The failure to provide a limiting instruction, and my decision not to interfere with the outcome in light of that failure, fits comfortably with the guidance provided in both *M.R.S.* and *Beausoleil*, and is not a reversible error.

[41] For these reasons, I would dismiss the appeal.

Released: October 21, 2024 "S.E.P."

"J. George J.A."
"I agree. S.E. Pepall J.A."
"I agree. Thorburn J.A."