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Criminal

Ontario Court of Appeal rules trial judge erred with after-the-fact conduct evidence

By **Jeff Buckstein**

(September 26, 2023, 12:54 PM EDT) -- Ruling that the "trial judge erred by failing to provide a proper instruction concerning the use of after-the-fact conduct evidence," the Court of Appeal of Ontario overturned the second-degree murder conviction of a man who stabbed his roommate to death at a party in 2016, and it ordered a new trial.

In *R. v. Ethier*, 2023 ONCA 600, released on Sept. 15, appellant Brandon Ethier had been sentenced to life in prison with no possibility of parole for 11 years, in a jury trial in Ontario's Superior Court of Justice in 2018. During his trial, the appellant unsuccessfully undertook the position that the victim's death constituted manslaughter, as he did not have the requisite *mens rea* to commit murder.

On appeal, Ethier argued that the trial judge committed four legal errors in his instructions to the jury, claiming: the rolled-up instruction to the jury failed to adequately explain all the relevant factors for assessing whether he had the state of mind to commit murder; the trial judge's treatment of the appellant's evidence rendered the charge imbalanced; the charge would have confused jury members by suggesting the appellant relied on a defence that the incident was an "accident"; and that the charge failed to properly instruct the jury on the use it could make of the evidence regarding the appellant's after-the-fact conduct.

Ethier also argued that the trial judge erred in principle by imposing a parole ineligibility period that exceeded the statutory minimum of 10 years, but that argument was not addressed because the fourth ground of appeal, that the trial judge erred instructing the jury about the use of after-the-fact conduct evidence, was successful.

The Court of Appeal noted that Ethier had been drinking, using cocaine and consuming cannabis before the fatal stabbing. Ethier testified at trial that during a physical altercation with the victim, he had grabbed the knife to protect himself, and that while he intended to cut the victim, he did not mean to kill him.

In the hours following the fatal stabbing, Ethier was seen on surveillance footage at a convenience store a few kilometres from his apartment, and then entering the apartment building of a friend, who subsequently called 911 to report that Ethier had overdosed. Ethier testified that he fled the scene through a path and discarded the knife over a fence, and that after going to his friend's apartment he attempted suicide by overdosing on fentanyl.

The Court of Appeal rejected the appellant's argument that the trial judge's rolled-up instruction "unduly focused on the appellant's anger, appears to instruct the jury that evidence of intoxication ceased to be relevant if on its own it did not negate the *mens rea* for murder, and insufficiently conveyed the other factors that were relevant to assessing the appellant's state of mind."

The court disagreed that the trial judge invited the jury not to consider the evidence of intoxication if they did not find that factor, standing on its own, was sufficient to deprive Ethier of the necessary mens rea.

The court also rejected the appellant's argument that the jury charge was not balanced, with the trial judge having pointed out instances where the appellant's evidence was contradicted, but not that of other witnesses.

It ruled the trial judge had generally told the jury that members needed to find the facts and base their decision on their own memory of the evidence, without having to accept any comments or opinions he expressed.

The court also rejected the "accident" ground of appeal. It noted that while the appellant used the term "accident" during cross-examination, and defence counsel had objected to the trial judge including such a reference — with the appellant arguing that had the potential to confuse the jury by attributing to him a position he was not taking, "the trial judge effectively met his task of focusing the jury on the significance of the appellant's evidence that what occurred was an accident — that it went to the category of negation of *mens rea*, rather than voluntariness," in that regard.

The successful appeal hinged exclusively on the Court of Appeal's ruling regarding the after-the-fact conduct evidence.

"In my view, the trial judge erred in law by inviting the jury to consider, without limitation or caution, the after-the-fact evidence and by reiterating, without limitation or caution, the Crown's overly-broad position on the use of the after-the-fact conduct evidence," wrote Justice Benjamin Zarnett.

"The effect of the charge was to tell the jury that they could use all the after-the-fact conduct evidence to distinguish between the offences of murder and manslaughter, not just to assess the effects of intoxication," said the unanimous decision agreed to by Justices David Doherty and Eileen Gillese.

Zarnett wrote that there was a real risk that the jury would impermissibly use the after-the-fact conduct evidence to conclude that the appellant was guilty, because he acted as though he was "guilty of *something*."

But, he added, the jury was given no cautionary instructions to counteract the risk of jumping too quickly from the evidence of after-the-fact conduct to an inference of guilt without considering alternative explanations. They were also given no instructions on the limited permissible use of the evidence.

Because "the jury was not accurately and sufficiently instructed on the use of after-the-fact conduct evidence," the Court of Appeal concluded that the trial judge's verdict could not stand.

"We are very pleased that the Court of Appeal ordered a new trial," said Richard Litkowski, a principal with Smith Litkowski in Toronto and counsel for the appellant.

"Mr. Ethier acknowledged responsibility for causing the victim's death at trial through his attempt at the outset to plead guilty to manslaughter, and expressed what the trial judge acknowledged was genuine remorse at the sentencing stage," he elaborated. "The real issue at the trial was whether Mr. Ethier had the necessary intent for murder, and the ground of appeal we succeeded on, namely the legal instruction on the use of after-the-fact conduct, was directly relevant to the murder conviction."

Jordan Watt, McCullough Watt Sutton Lynskey & Hodson

Jordan Watt, a partner with McCullough Watt Sutton Lynskey & Hodson in Victoria, B.C., said he agreed with this decision, including the ordering of a new trial.

"Any time that you're dealing with after-the-fact conduct, it's imperative that, as the Court of Appeal said, the trial court instruct juries with respect to this evidence, just because there's such a risk of the jury falling into impermissible reasoning. Ultimately in this case, due to limited instruction or no explanation given with respect to that evidence, the Court of Appeal couldn't have been sure that it didn't impact the overall jury's reasoning," he explained.

"This is a thorough, and well-reasoned decision dealing with an important issue. In my opinion, the Court of Appeal got it right," said Brandon Crawford, a partner with Edelson Foord Law in Ottawa. "The Court of Appeal properly found that the potential for a miscarriage of justice in this case was significant enough that the trial decision had to be set aside."

The major issue, which ultimately determined the outcome of this case, was the Court of Appeal's assessment of the trial judge's instructions on the proper use of the appellant's alleged conduct after the offence, said Crawford.

Brandon Crawford, Edelson Foord Law

"Because of the inherent unique reasoning risks, the potential for a miscarriage of justice in these circumstances was a significant one. The Court of Appeal made the proper determination in deciding to set aside the conviction and to allow the appeal on this ground," he added.

Watt also viewed the trial court's handling of after-the-fact conduct as the major issue in this case, as reflected in the Court of Appeal's decision. The trial court "didn't provide a caution. They didn't provide a limiting instruction; they didn't provide an explanation as to the use that the jury could make of that evidence. And ultimately because nothing happened, the Court of Appeal found that was an error and ordered a new trial," he said.

Litkowski said this decisionis instructive because it "reasserts the importance of a careful and nuanced approach to after-the-fact conduct evidence. Our courts have noted that the inherent frailties of after-the-fact conduct requires the exercise of significant caution," he added.

This decision provided an important illustration of well-established principles regarding how, in order for an accused person to have a fair trial before a jury, members need to be properly instructed on the law, said Crawford.

He added that it also provided some guidance regarding language that could be used to avoid having a verdict overturned. This includes, for example, instructing that the after-the-fact conduct evidence "has only an indirect bearing on the issue of guilt"; that the jury should be "careful" about using such evidence to infer guilt as there "might be other explanations for that conduct"; that the jury should "consider alternative explanations for the conduct before drawing an inference of guilt"; and that the jury "could use the evidence to support an inference only if they rejected any other explanation for the conduct," said Crawford.

Watt believes this case is instructive to both prosecutors and defence counsel, who need to ensure that improper reasoning doesn't occur, and to raise such issues with the judge to ensure the jury can be instructed properly.

It is instructive to the courts in terms of illustrating the problems that can occur when that doesn't happen. The courts need to ensure the jury is either given a caution, limiting instruction, or explanation as to how they can use that type of evidence in order to reduce the risk the jury can use that evidence for an improper purpose, he added.

"We all need to be aware," stressed Watt. "Because … it can lead to a wrongful conviction."

Counsel for the Crown was contacted by Law360 Canada, but declined to comment.
