

Case Name:
R. v. Stubbs

Between
**Her Majesty the Queen, Respondent, and
Sheldon Stubbs, Appellant**

[2013] O.J. No. 3657

2013 ONCA 514

309 O.A.C. 114

300 C.C.C. (3d) 181

109 W.C.B. (2d) 50

2013 CarswellOnt 11070

Docket: C51351

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, E.E. Gillese and D. Watt JJ.A.

Heard: April 11, 2013.
Judgment: August 12, 2013.

(151 paras.)

Criminal law -- Procedure -- Trial judge's duties -- Charge or directions -- Onus and burden of proof -- Appeal by Stubbs from convictions for numerous offences, including attempted murder, arising from incident wherein appellant broke into ex-girlfriend's apartment and shot her in head dismissed -- While trial judge's answer to jury's question on standard of proof was problematic in that trial judge provided examples using evidence from trial itself and implied he had nothing more to say on the issue even if jury required further clarification, there was no substantial wrong or miscarriage of justice in light of overwhelming evidence against appellant -- Instructions to jury as a whole were not unfair or unbalanced as appellant alleged.

Criminal law -- Evidence -- Admissibility -- Prejudicial evidence -- Previous record of accused -- Appeal by Stubbs from convictions for a number of offences, including attempted murder, arising from incident wherein appellant broke into his ex-girlfriend's apartment and shot her in head dismissed -- Trial judge did not err in admitting evidence of appellant's prior disreputable conduct -- Evidence of his prior convictions for assaulting complainant and evidence of nature of their relationship was relevant to prove identity of complainant's assailant and state of mind with which shot had been fired.

Criminal law -- Sentencing -- Criminal Code offences -- Weapons offences -- Using firearm in commission of offence -- Possession of prohibited or restricted weapon or ammunition -- Offences against the administration of law and justice -- Corruption and disobedience -- Disobeying a court order -- Offences against person and reputation -- Homicide -- Attempted murder -- Offences against rights of property -- Breaking and entering -- Break and enter -- Particular sanctions -- Imprisonment -- Concurrent sentences -- Consecutive sentences -- Sentencing considerations -- Aggravating factors -- Effect on victim -- Procedure -- Appeals -- Application for leave to appeal -- Application by Stubbs for leave to appeal and appeal by Stubbs from his sentences for attempted murder, break and enter to commit attempted murder, use of a firearm while committing an indictable offence, possession of a firearm while prohibited from doing so and disobeying a court order dismissed -- Appellant had been found guilty of breaking into his ex-girlfriend's apartment and shooting her in the head at close range -- Trial judge sentenced appellant to a total of 22 years' imprisonment -- Court disagreed with appellant's assertion sentences imposed were disproportionate -- Fact complainant survived was fortuitous.

Appeal by Stubbs from his convictions for attempted murder, break and enter to commit attempted murder, use of a firearm while committing an indictable offence, possession of a firearm while prohibited from doing so and disobeying a court order. Application by Stubbs for leave to appeal and appeal by Stubbs from the sentences imposed, which totalled 22 years' imprisonment. On the evening of New Year's Day 2007, the complainant, Steele, spent a quiet evening with a friend, Green, listening to music and smoking weed. That evening was interrupted when the appellant, who was the complainant's ex-boyfriend, broke down the door to the complainant's apartment. The complainant took her cell phone and hid on the balcony while she called 911. While on the phone with the 911 operator, the complainant was shot in the head at close range. She survived. The key issue at trial was the shooter's identity, as the complainant had no memory of the incident after dialing 911. On the appeal from conviction, the appellant argued the trial judge erred in (1) admitting evidence of prior disreputable conduct of the appellant towards the complainant or, alternatively, in failing to provide adequate instructions to the jury regarding its limited use; (2) responding to a question from the jury about the standard of proof; and, (3) failing to instruct the jury in a fair and balanced manner. With respect to his appeal from sentence, the appellant argued the sentence imposed was disproportionate.

HELD: Appeal from conviction dismissed; application for leave to appeal from sentence allowed;

appeal from sentence dismissed. First, trial counsel did not object to the impugned evidence of prior discreditable conduct, which included the appellant's convictions for assaults against the complainant and the complainant's evidence regarding the volatile nature of their relationship. The impugned evidence was relevant to prove the complainant's assailant's identity and the state of mind with which the shot was fired. Although the impugned evidence also included evidence of other offences that were irrelevant to the offences charged, their inclusion did not cause a miscarriage of justice. Second, although the trial judge's response to the jury's question on reasonable doubt was problematic because he provided examples of reasonable doubt using evidence from the trial itself and implied he had nothing more to say on the issue even if the jury required further clarification, there was no substantial wrong or miscarriage of justice that could have occurred from the errors in the jury instructions. This was an appropriate case to apply s. 686(1)(b)(iii) of the Criminal Code given the overwhelming case against the appellant. With respect to the jury charge as a whole, it was not so unfair or unbalanced that it deprived the appellant of his right to a fair trial. The case was not complicated. The trial judge clearly explained the defence position in terms that attracted no objection from trial counsel. Thus, the appellant's conviction appeal was dismissed. With respect to the appellant's sentence appeal, the sentences imposed were not disproportionate. The trial judge correctly considered the significant aggravating factors, including the appellant's record of assaulting the complainant and ignoring court orders, and the impact of the injury inflicted. The fact the complainant largely recovered from the physical effects of the gunshot wound to her head was fortuitous. Sentence: 22 years' imprisonment, including 16 years' for attempted murder.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 655, s. 686(1)(b)(iii)

Appeal From:

On appeal from the convictions entered by Justice J. F. Hamilton of the Superior Court of Justice, sitting with a jury, on March 24, 2009, and from the sentences imposed by Justice Hamilton on April 28, 2009.

Counsel:

John Norris, for the appellant.

Megan Stephens, for the respondent.

The judgment of the Court was delivered by

1 D. WATT J.A.:-- Marshalea Steele had plans for a quiet evening at home on New Year's Day, 2007. She and her friend, Ian Green, listened to some music and smoked some "weed". The quiet was shattered when Sheldon Stubbs broke down the door to Ms. Steele's apartment.

2 Ms. Steele ran out to the balcony. She called 911 on her cell phone. As she cowered in the corner of the balcony, and spoke to the 911 operator, Ms. Steele was shot in the head from close range. She survived.

3 About two months later, police arrested Sheldon Stubbs, Ms. Steele's ex-boyfriend, and charged him with several offences, chief among them attempted murder.

4 A jury convicted Sheldon Stubbs of the offences with which he was charged. He appeals his convictions and applies for leave to appeal the sentences imposed at trial.

5 Sheldon Stubbs (the appellant) says that his convictions should be set aside because the trial judge admitted evidence of his prior discreditable conduct that should have been excluded, charged the jury in an unfair and unbalanced way, and answered a jury question improperly. He also says that the sentences imposed were too long, outside the range of sentence appropriate in such cases, and reflected errors in principle.

6 These reasons explain why I would dismiss the appeals from conviction and sentence.

THE BACKGROUND FACTS

7 A brief overview of the relevant events is sufficient to place the claims of error in their appropriate setting. Further detail can await the individual grounds of appeal. The narrative is less detailed than it might otherwise have been because of the three principals, Ms. Steele, the appellant, and Ian Green, only Ms. Steele testified at trial. The nature of the injuries she suffered left her with little memory of many of the events of January 1, 2007.

The Principals

8 The appellant and Ms. Steele began dating when Ms. Steele was a 14-year-old grade ten student. Shortly after their relationship began, Ms. Steele ran away from home and began living with the appellant. The couple moved around together a lot over the next couple of years.

9 In the beginning, the relationship was satisfactory to Ms. Steele. Soon thereafter, however, the relationship became volatile. The couple began to argue frequently. Physical altercations took place. Each punched or hit the other. The appellant never used a gun or knife, but often hit Ms. Steele with a cell phone or a plate. The appellant was very jealous of Ms. Steele's contacts with other people, whether male or female.

10 The relationship of Ian Green and Ms. Steele was of recent origin: Ms. Steele had met Mr. Green through her cousin and known him for less than a year. According to Ms. Steele, their

relationship was platonic.

The End of the Stubbs-Steele Relationship

11 During the early fall of 2006, Ms. Steele and the appellant resumed their relationship intermittently until she packed her bags and left in October of that year. By chance, Ms. Steele ran into a former school friend, Natalie Williams, who had an extra room in her 20th floor apartment at 2240 Weston Road. Ms. Steele joined Ms. Williams in the apartment.

12 From time to time, despite the hiatus in their relationship when Ms. Steele moved in with Ms. Williams, the appellant and Ms. Steele resumed their romantic relationship and likewise their confrontations and violence. During one argument, the building superintendent intervened and told both of them that, if they did not stop their argument, they would be removed from the building.

13 The appellant did not live in the apartment Ms. Steele shared with Ms. Williams although some of his clothes remained in the apartment. The appellant had no key to the apartment.

New Year's Day, 2007

14 Ms. Steele spent New Year's Day at her parents' home until after supper when her father drove her to the subway. At the end of her subway ride, she waited for an hour for a bus before she called Ian Green to ask him to drive her home. He agreed to drive her back to her apartment.

The Return Home

15 Ms. Steele and Ian Green arrived back at her apartment sometime after 11:00 pm on New Year's Day, 2007. Green accompanied her into the apartment. The couple listened to some music and smoked some "weed" together.

The Knock on the Door

16 While she was alone with Ian Green in the apartment, Ms. Steele heard a knock on the door. She looked through the security peep hole and saw the appellant standing there, visibly angry. His knocks became increasingly loud. He repeatedly said that he wanted to get his "stuff". He made it clear from the hallway that he knew Ms. Steele was in the apartment.

The Visit by the Superintendents

17 Around 11:30 p.m., a tenant called the superintendents to complain about a "loud ruckus" that had been going on for several minutes in the hallway on the 20th floor. The superintendents took the elevator upstairs. They saw a man standing outside the door to Ms. Steele's apartment. The man cursed, swore, and yelled inside the mail slot: "I want my clothes. I know you're in there."

18 The male superintendent asked the man to leave, but the man refused to go until he got his

clothes from the apartment. The superintendent called Ms. Steele's apartment but got no response. He told the man that no one was home in the apartment and that the man should leave. The superintendent identified the man as the appellant because both had been involved in a similar incident about a month earlier.

19 Several residents of the apartment building identified the appellant from a surveillance video that showed a man wearing a distinctive athletic jacket entering the building at 11:07 p.m. and leaving at 11:48 p.m. on New Year's Day. No evidence was adduced at trial about the accuracy of the times disclosed on the surveillance video.

The Forced Entry

20 A neighbour across the hall from Ms. Steele's apartment saw the same man kick down the door and enter the apartment. She then heard two men's voices, one angry and the other calm, followed by another man leaving the apartment.

21 The superintendent returned to the 20th floor, noticed the door to Ms. Steele's apartment had been broken down, and called 911 before he returned to the lobby to await the arrival of the police.

22 When the door was broken down, Ian Green ran out of the apartment. He provided a statement to police later that evening but did not testify at trial because he had been deported to Jamaica several months earlier.

23 Ms. Steele fled to the balcony of her apartment as the door was broken down. She took her cell phone with her.

The 911 Call

24 At 12:03 a.m. on January 2, 2007 Ms. Steele called 911 from the corner of her apartment balcony. She told the operator that her boyfriend or ex-boyfriend had come into her house and that he was trying to hurt her and her friend. She explained that the boyfriend/ex-boyfriend was looking for her and told the operator that she was on the balcony of the apartment.

25 The 911 operator put Ms. Steele on hold while she (the operator) dispatched the police. When the operator came back on the line to speak with Ms. Steele, only a gurgling sound could be heard, and there was no reply from her.

Finding Ms. Steele

26 Police officers were dispatched at 12:04 a.m. and arrived at Ms. Steele's apartment about five minutes later. The first responders saw no one in the apartment. Music was playing. The smell of marijuana was evident. One officer walked out to the balcony. She found Ms. Steele slouched down in the corner furthest from the door to the balcony, a cell phone open in her hand. Blood and vomit were visible on her body.

The Injuries to Ms. Steele

27 Ms. Steele had been shot in the right temple. The bullet had passed through the ear flap of the hat she was wearing. She was not expected to survive. The bullet remains lodged in the right side of her head. The hat was not tested for gunshot residue, but an identification officer noticed blackening around the hole on the outside of the hat, a finding normally associated with the discharge of a gun close to the point of entry. No shell casings were found.

28 When Ms. Steele awakened in hospital, she could not walk or talk. She could not hear out of her right ear, a condition that continued at trial. Ms. Steele remained in hospital for three months, followed by two months in a rehabilitation facility, and further rehabilitative therapy as an outpatient. She has no memory about what happened after she called 911, including the identity of the person who shot her.

The Police Investigation

29 The investigation that followed the shooting detected blood or a blood-like substance in the bathroom and on a washcloth, but none were tested to confirm the nature or origins of the blood. No tests were conducted to determine whether anyone had tried to clean up the apartment after the shooting.

30 Ian Green approached police officers in the lobby of the apartment building where the shooting had occurred. He told the police that he and Ms. Steele had been in the apartment listening to music and smoking when someone began banging very loudly on the door. Ms. Steele said that the person at the door was her ex-boyfriend, but she didn't say his name. When the man broke down the door, Green ran by him and out the door.

31 Ian Green was deported to Jamaica on March 18, 2008, about one year prior to the appellant's trial. His statement was admitted into evidence at trial under the principled exception to the rule against hearsay.

THE GROUNDS OF APPEAL

32 On the appeal from conviction, the appellant advances three grounds of appeal. He says that the trial judge erred in

- i. admitting evidence of prior discreditable conduct of the appellant towards Ms. Steele or, alternatively, in failing to provide adequate instructions to the jury about its limited use;
- ii. responding to a question from the jury about the standard of proof; and
- iii. failing to instruct the jury in a fair and balanced way.

33 On the appeal from sentence, the appellant contends that the trial judge imposed a sentence

that was unfit because it exceeded the applicable range of sentence for these offences and the offender, and was disproportionate to the gravity of the appellant's offence and the degree of his responsibility for it.

THE APPEAL FROM CONVICTION

Ground #1: Evidence of Prior Discreditable Conduct

34 This ground of appeal has a dual aspect. The principal complaint is that evidence of prior discreditable conduct by the appellant was wrongly admitted at trial. The alternative grievance is that the trial judge failed to adequately instruct the jury about the limited use they could make of this evidence.

The Evidence

35 Prior to selection of the jury, the trial Crown sought to have ruled admissible what she described as prior discreditable conduct of previous acts of violence by the appellant towards Ms. Steele.

36 The evidence proposed for admission consisted of a transcript of proceedings in which the appellant, who was represented by counsel, entered pleas of guilty to two counts of assaulting Ms. Steele and another of contacting her in contravention of the terms of his recognizance. The transcript included:

- * the entry of the guilty pleas
- * the recital of the allegations by Crown counsel
- * an acknowledgment of the accuracy of the allegations by the appellant's counsel
- * the submissions on sentence
- * the sentence imposed by the trial judge

The transcript also included the appellant's pleas of guilty to unrelated counts of possession of marijuana and obstructing a peace officer in the execution of his duty.

37 The assault counts to which the appellant pleaded guilty involved incidents that occurred in April and December of 2005. The shooting of Ms. Steele occurred on January 1-2, 2007.

38 In April 2005, the appellant confronted Ms. Steele at her school, grabbed her cell phone, and scrolled through it to determine the identity of persons with whom she had been in contact. He grabbed her by the hair and wrapped his arm around her neck. When Ms. Steele bit his hand, the appellant punched her and kept her under his control. When others from the school arrived to help her, the appellant ran away.

39 In December 2005, the appellant came to Ms. Steele's apartment despite a non-communication term in his recognizance. The couple argued. The appellant grabbed Ms. Steele, punched and

choked her. A neighbour called 911. The appellant fled.

40 At trial, Ms. Steele gave evidence about the nature of her relationship with the appellant. She said that they argued frequently and were often involved in physical altercations during which each hit the other. The altercations began when she received phone calls from persons whom the appellant did not know. Some callers were male, others female. The appellant struck Ms. Steele with various objects, including her cell phone, but never used a knife or a gun during their confrontations.

The Ruling of the Trial Judge

41 In his brief ruling on admissibility, the trial judge concluded that the evidence was admissible to

- * provide context and narrative of the relationship of the appellant and Ms. Steele; and
- * show the state of mind of both parties at the time of the offences charged.

The Jury Instructions

42 In his charge to the jury, the trial judge explained the use jurors could make of this evidence in these terms:

Evidence of previous bad character. You have heard that he has been convicted twice of assaulting her and those transcripts are with you. You cannot use the previous convictions to prove that he is the type of person who did this offence. Decide this case on the evidence which is before you. You can use the previous discreditable conduct to put their relationship in perspective, but you cannot use it to say, "Well, he must [be] guilty because he assaulted her in the past."

The previous bad character gives some explanation why he behaves on those occasions towards the victim or why he has a motive to behave the way he did. It explains her behaviour of not opening the door or her call to 911 or hiding on the balcony. She knows how jealous and angry he gets.

43 Trial counsel for the appellant did not object to the charge to the jury about the use jurors could make of this evidence, or to the adequacy of the caution about the chain of reasoning that was not open to them.

The Arguments on Appeal

44 For the appellant, Mr. Norris begins with the unassailable proposition that evidence of an

accused's prior discreditable conduct is presumptively inadmissible. He submits that to overcome this presumption of inadmissibility, the Crown must demonstrate, on a balance of probabilities, that the probative value of the evidence exceeds its prejudicial effect. He says that the probative value of the evidence must be evaluated in relation to the issue on which the evidence is proffered. In order to determine the evidence's probative value, Mr. Norris contends, the trial judge must consider the strength of the evidence that the conduct actually occurred, the extent to which the evidence supports the inferences advanced, and the extent to which the matters the evidence tends to prove are at an issue in the trial.

45 Mr. Norris acknowledges that the Crown may adduce evidence of prior discreditable conduct to provide context essential to an accurate interpretation of relevant events. On this basis, he says, the Crown can lead evidence showing that an accused has a strong disposition to act violently towards the victim. This evidence can support specific inferences that the accused is disposed to act violently and had that disposition at the time of the offence charged. That said, Mr. Norris continues, this evidence, as well as its permitted and prohibited use, must be explained to the jury.

46 Mr. Norris also concedes that evidence of prior discreditable conduct may be used to establish motive, provided its probative value on that issue exceeds its inherent prejudicial effect through its tendency to promote impermissible propensity reasoning.

47 The problem here, Mr. Norris says, is that the evidence was admitted to provide context and narrative to the relationship and the offence, as well as to show the state of mind of each of the principals, but was left to the jury as evidence that tended to suggest that the appellant was the shooter. This contradicted the defence's theory that the person responsible was the third party Green. This use of the evidence, disposition as circumstantial evidence of conduct, was exacerbated by Ms. Steele's statements that the appellant was the "kind of person "to behave violently towards her, in contradistinction to her description of Green as not "the kind of person" to act violently. The trial judge's instructions did nothing to curb the possibility of impermissible propensity reasoning inherent in this evidence, and rather compounded it.

48 For the respondent, Ms. Stephens resists any suggestion of error in the reception of the evidence or in final instructions about its limited use.

49 Ms. Stephens says that this evidence was admissible to demonstrate *animus* and motive, each of which is relevant to establish the identity of the appellant as the shooter and to prove his state of mind when he shot Ms. Steele. Propensity reasoning in this context is not prohibited, and conversely, is expressly permitted by a long line of authority in this province and elsewhere. Further, Ms. Stephens reminds us, the trial judge's decision assigning predominance to probative value over prejudicial effect is entitled to substantial deference by this court. His decision was neither unreasonable, nor undermined by legal error, or any misapprehension of the evidence.

50 Ms. Stephens contends that the evidence of the appellant's prior discreditable conduct was not offered and did not amount, in its essence, to evidence of "similar acts". There was no need to

marshal the similarities and dissimilarities as if this were evidence to prove identity on the basis that the prior and current conduct was sufficiently similar that the jury could find their author was likely the same person -- the appellant. This evidence could found an inference that the appellant had a motive to harm Ms. Steele and bore an *animus* towards her. Evidence of *animus* and motive is relevant to establish identity and state of mind, both of which were in issue here.

51 Ms. Stephens adds that the judge's instructions about the manner in which the jury could use, or must not use, this evidence were sufficient. The instructions enjoined propensity reasoning of the general kind. As evidence of motive or *animus*, no limiting instruction was required.

The Governing Principles

52 The appellant's alternative arguments about admissibility and the adequacy of limiting instructions require a brief review of the authorities that inform our determination of each issue. The paths are well-trodden, but their terminus is often difficult to locate.

53 The threshold issue is admissibility. Several principles are informative.

54 First, as a general (but not unyielding) rule, evidence of misconduct beyond that charged in an indictment, which does no more than portray an accused as a person of (general) bad character, is inadmissible: *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 31 and 36; *R. v. Moo*, 2009 ONCA 645, 247 C.C.C. (3d) 34, at para. 96; and *R. v. Cudjoe*, 2009 ONCA 543, 68 C.R. (6th) 86, at para. 63.

55 Said in a different way, what the law prohibits as a general rule is the introduction of evidence of bad character (as revealed by evidence of other discreditable conduct) for use as circumstantial evidence or proof of conduct on the occasion charged: *Handy*, at para. 31; *Moo*, at para. 96. The general exclusionary rule is based on several policy considerations, including the potential for evidence of other discreditable conduct to foster prejudice, to distract the trier of fact from the true focus of the trial, and to waste time: *Handy*, at para. 37. The prejudice this evidence engenders has been characterized as moral prejudice, the danger that a finding of guilt will be grounded on "bad personhood", and reasoning prejudice, the danger that the evidence will create confusion or distract a lay trier of fact from its true task: *Handy*, at paras. 139 - 146.

56 Second, the general rule excluding evidence of other discreditable conduct is not unyielding. After all, sometimes this evidence is so relevant and cogent that its probative value exceeds its prejudicial effect: *Handy*, at para. 41; *Moo*, at para. 97; *Cudjoe*, at para. 63. To engage the exception to the general exclusionary rule, Crown counsel must establish, on a balance of probabilities, that the probative value of the evidence exceeds its prejudicial effect: *Handy*, at para. 55.

57 Third, in prosecutions for domestic homicide, evidence may be admitted of other discreditable conduct of the accused that shows or tends to show the nature of the relationship between the principals, or *animus* or motive on the part of the accused. This evidence is relevant to prove the

identity of the victim or deceased's killer and the state of mind that accompanied the unlawful killing: *Moo*, para. 98; *Cudjoe*, at para. 64. As a threshold requirement, the evidence of other discreditable conduct must be capable of establishing *animus* or motive: *R. v. S. (P.)*, 2007 ONCA 299, 221 C.C.C. (3d) 45, at paras. 27 and 39; *R. v. Johnson*, 2010 ONCA 646, 262 C.C.C. (3d) 404, at paras. 97-100. The same principles apply to domestic attempted homicides.

58 Fourth, when evidence of other discreditable conduct is excluded under the general rule, or admitted by exception, the standard applied on appellate review is deferential: *Handy*, at para. 153; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 733; and *R. v. James* (2006), 213 C.C.C. (3d) 235 (Ont. C.A.), at para. 33. Appellate courts will defer to the trial judge's assessment of where the balance falls between probative value and prejudicial effect unless an appellant can demonstrate that the result of the analysis is unreasonable, or is undermined by a legal error or a misapprehension of material evidence: *Handy*, at para. 153; *James*, at para. 33.

59 Finally, when evidence of other discreditable conduct is admitted because it shows or tends to show *animus* or motive on the part of an accused, limiting instructions usually required for this evidence are not necessary: *Moo*, at para. 100; *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.), at pp. 168-169; *R. v. Merz* (1999), 46 O.R. (3d) 161 (Ont. C.A.), at para. 59; *R. v. Krugel* (2000), 143 C.C.C. (3d) 367 (Ont. C.A.), at paras. 85-90; and *R. v. Pasqualino*, 2008 ONCA 554, 233 C.C.C. (3d) 319, at paras. 65-68.

The Principles Applied

60 I would not give effect to this ground of appeal on either basis advanced in argument for reasons that I will explain.

61 First, I will address counsel's submission that the evidence of other discreditable conduct should not have been admitted at trial.

62 The evidence of other discreditable conduct adduced at trial involved conduct towards Ms. Steele that included assaults on April 26 and December 6, 2005 of which the appellant was convicted, as well as a breach of a term of a recognizance that prohibited the appellant from communicating with Ms. Steele. The evidence also extended to include the circumstances underlying convictions on pleas of guilty to possession of marijuana and obstructing police for giving a false name when stopped riding a bicycle without a light. Trial counsel did not object to the manner in which the evidence was adduced -- by filing a transcript of the proceedings, including the pleas of guilty and sentencing, and reading its contents to the jury.

63 Ms. Steele gave evidence about the nature of her relationship with the appellant, including physical altercations and other controlling behaviour that caused her to move out in October 2006, about two months prior to the shooting. Trial counsel for the appellant appears not to have objected to the admission of her evidence.

64 First, the evidence of the prior discreditable conduct towards Ms. Steele must be capable of sustaining an inference (not merely inviting speculation) of an *animus* or motive on the appellant's part to commit the offence charged: *P. (S.)*, at para. 27; *Johnson*, at paras. 100-101. While it could be argued that, on its own, the conduct that underpinned the convictions of assault and breach of recognizance was somewhat remote in time, thus engendering potential moral prejudice, the evidence did not stand alone, but rather was given currency by the evidence of Ms. Steele leaving her relationship with the appellant months before the shooting.

65 Second, as evidence of *animus* or motive, the evidence was relevant to prove the identity of the appellant as the shooter and the state of mind with which he fired the near-fatal shot: *Moo*, at para. 98; *Cudjoe*, at para. 64.

66 Third, the trial judge's determination that the probative value of this evidence exceeded its prejudicial effect is entitled to deference on appeal unless it is unreasonable, tainted by legal error, or cumbered by a misapprehension of material evidence. No such contaminant has been identified here.

67 It follows, in my view, that evidence of other discreditable conduct of the appellant towards Ms. Steele was relevant to material issues at trial: as evidence of motive or *animus* to prove the identity of Ms. Steele's assailant and the state of mind with which the shot was fired. That said, it is necessary to consider the manner in which the evidence was adduced -- by filing (and reading into the trial record) a transcript of the guilty plea proceedings -- to determine whether the manner of proof tilted the balance in favour of inadmissibility.

68 In most cases, evidence of other discreditable conduct is introduced through the testimony of those who suffered it (if alive), observed it, or, as admissible hearsay, by those to whom the victim reported it. But there is no closed list of the methods of proof.

69 Where evidence of other discreditable conduct has been ruled admissible at trial, the substance of the evidence could be incorporated in an agreed statement of facts and filed as a formal admission under s. 655 of the *Criminal Code*. Indeed, such a practice would reduce the risk associated with the spontaneity and unpredictability of *viva voce* testimony from witnesses more interested in skewering the accused than obeying judicial constraints.

70 What occurred here approached the functional equivalent of a formal admission. The appellant, represented by counsel, pled guilty. He admitted the accuracy of the facts alleged by Crown counsel. There could be no doubt that he engaged in the conduct underpinning the convictions. The fact that the convictions were revealed to the jury does not tip the balance in favour of exclusion: *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716, at paras. 51-57. Trial counsel for the appellant does not appear to have objected to the manner in which the evidence of the other discreditable conduct was introduced.

71 The guilty plea proceedings included pleas of guilty to two offences -- possession of

marijuana and obstructing a peace officer in the execution of his duty -- that were irrelevant to proof of any *animus* towards Ms. Steele or motive to shoot her. The portion of the guilty plea proceedings relating to these offences should have been redacted. The same could be said of the sentencing proceedings for all the offences.

72 Despite this irrelevant clutter included in the transcript filed as an exhibit and read aloud at trial, I am satisfied that what occurred here caused the appellant no substantial wrong or miscarriage of justice. I reach this conclusion for several reasons.

73 First, neither counsel at trial nor on appeal raised any objection to the manner of proof followed at trial.

74 Second, all the incidents included in the transcript filed at trial involved conduct much less serious than what was alleged here.

75 Third, the unrelated conduct was so different in kind than that alleged in the shooting of Ms. Steele that it surpasses belief that a contemporary Canadian jury would reach a conclusion of guilt on a charge of attempted murder by propensity reasoning founded on convictions for possession of marijuana or giving a false name to a police officer when stopped for riding a bicycle without a proper light.

76 Finally, it is worth recalling that the trial judge did give the jury an express instruction about the limited evidentiary value of the evidence of other discreditable conduct which was similar in kind, but markedly less serious, than the offence charged. This instruction, which enjoined propensity reasoning, was more favourable than the appellant's due under the existing jurisprudence.

77 This ground of appeal fails.

Ground #2: The Response to the Jury's Question

78 The second ground of appeal relates to the answer the trial judge gave to a question asked by the jury about five hours into their deliberations. To frame the discussion that follows, it is helpful to set out briefly the question asked by the jury, the positions of trial counsel about how the question should have been answered, and portions of the trial judge's response to the jury.

The Jury's Question

79 The jury's question was in these words:

"The jury is requesting that you would re-explain what constitutes reasonable doubt before we break this evening. Please offer examples."

The Positions of Counsel at Trial

80 Trial counsel for the appellant asked the trial judge, in his response to the jury's question, to include an instruction that proof of probable or likely guilt was not the equivalent of proof beyond a reasonable doubt, thus not sufficient for a finding of guilt.

81 The trial Crown sought an express instruction that a reasonable doubt must relate to an essential element of the case for the Crown, namely the identity of the appellant as the shooter, or his intention to kill Ms. Steele, before the jury could find the appellant not guilty of attempted murder.

82 Neither counsel at trial made any submissions about the jury's request for "examples" of reasonable doubt.

The Answer of the Trial Judge

83 The trial judge began his response to the jury's question by reiterating part of his earlier instructions to the jury on reasonable doubt.¹ He then turned to some examples of reasonable doubt concerning the identity of the person who shot Ms. Steele. The judge explained that a conclusion that Ms. Steele shot herself would amount to speculation and could not form the basis of a not guilty verdict.

84 The trial judge gave, as a second example, the potential involvement of Ian Green, the person the defence advanced as the shooter. Of Ian Green's participation, the trial judge said:

Ian Green, the man that was up in the apartment with her that drove her home or came home with her, say he shot her. He was there. She indicates that he has never been more than an acquaintance. He is not a lover nor ever used violence against her. He argued with the accused, but somebody said that the accused was louder. He was never considered a suspect and there was no motive to shoot her. Is there some reasonable motive to say, well, why shoot her because you are up there and this guy comes in? If you find that would be a motive to shoot her, then you can say, well, he is most likely the shooter and not the accused.

85 With respect to the appellant as the shooter, the trial judge said:

About the accused, he had a history of violence towards Miss Steele, he was in a rage and he kicks down the door and he comes into the apartment demanding, "Like who are you? Is this the nigger? She is my girl." Words to that effect.

The Crown says there was motive to injure her. She in his mind is cheating on him and he is jealous and has shown examples of jealousy when he went to her

high school and is scrolling through her cell phone and seeing who is calling her and so forth and supposedly beat her on that occasion. She is in his mind cheating on him and he is jealous. She did not open the door. He smashes it down and the 911 call says he is in the apartment and he is trying to hurt me and my friend. Someone shot her and who is most likely to have shot her? The one in the rage? Is it reasonable to conclude that he was the shooter? If you have a reasonable doubt he was the shooter, you will acquit him.

86 The trial judge concluded his response to the jury's question in this way:

... No one saw the accused shoot Miss Steele. Is it reasonable to conclude he did when after he breaks down her door in a rage comes into the apartment demanding answers and he has a history of abuse towards her and she knows how jealous he is and she has a man in the apartment. Is it logical to conclude that? Because if it is, then you would not have a reasonable doubt. If you say: No, I could conclude that, nobody saw him, I have a reasonable doubt as to he being the shooter, you will keep that reasonable doubt and you will acquit him.

I do not have anything more to say on reasonable doubt. Now, I am going to discharge you for the evening and we will see you tomorrow.

87 Trial counsel for the appellant objected to the judge's response to the jury's question. She submitted that the effect of the instruction was to eliminate Ian Green as a viable alternative suspect and reaffirm the absence of any reasonable doubt about the identity of the appellant as the shooter.

88 The trial judge did not recall the jury for further instructions on reasonable doubt, nor did the jury ask any further questions on that subject.

The Arguments on Appeal

89 For the appellant, Mr. Norris begins his submissions by emphasizing the importance of correct and comprehensive responses to questions posed by a deliberating jury. He reminds us that an error in a judge's answer to a jury question cannot be rendered harmless by a prior correct instruction on the same issue in the main charge.

90 Mr. Norris submits that the error here was threefold. First, the trial judge was wrong to reiterate his earlier instructions about reasonable doubt when it was clear from the jury's question that they did not understand those instructions. Second, the trial judge erred in giving examples about reasonable doubt drawn from the case being tried. This mistake was compounded by the substance of the instructions that effectively removed the third party suspect defence (Green as shooter) as speculative, and left the appellant as the only logical candidate for the shooter. Third, the manner in which the trial judge responded to the question discouraged jurors from any further

questions about the standard of proof.

91 For the respondent, Ms. Stephens says that the trial judge's instructions about the standard of proof are correct and that he did not err in repeating his original instructions of which the jurors did not have a written copy.

92 Turning to the examples provided by the trial judge, Ms. Stephens submits that the trial judge did not, in express terms or by necessary implication, dismiss Green as an alternative suspect or say that the appellant had to be the shooter. The speculative nature of the third party suspect defence was a product of an inadequate evidentiary underpinning. That what remained was an overwhelming case against the appellant as the shooter was the harsh reality of the evidence adduced at trial.

93 Ms. Stephens concludes by saying that the trial judge's response did not foreclose further questions on any subject, as their subsequent question on another issue demonstrates.

The Governing Principles

94 This ground of appeal does not require any elaborate recitation of principle, but does warrant some discussion about the principles that govern judges' responses to jury questions and the use of case-specific examples to illustrate or explain the principle of reasonable doubt.

95 First, questions from the jury are important, require careful consideration, and must be answered clearly, correctly, and comprehensively: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, at p. 528. It is the trial judge's obligation, with the assistance of counsel, to ensure that the jury's question is fully and properly answered: *S. W. (D.)*, at p. 528. A complete and careful response is necessary even if the subject-matter of the question has been carefully reviewed in the main charge: *S. (W.D.)*, p. 528.

96 Second, as a general rule, if an error is made in a recharge in response to a jury question, then the correctness of the original charge on the same subject cannot be summoned to excuse the subsequent error on the very subject on which the jury seeks clarification: *S. (W.D.)*, at pp. 530-531.

97 Third, where a jury remains in doubt after listening to the charge and asks a question about the standard of proof, the trial judge must try to answer the question in an effort to assist them in understanding what is required of them: *R. v. Layton*, 2009 SCC 36, [2009] 2 S.C.R. 540, at para. 3. Although it is preferable for a judge to clarify the standard of proof in response to a jury's questions about it, it is not necessarily fatal to repeat verbatim the original instruction, provided the judge makes it abundantly clear to the jury that it was welcome to return to the courtroom with further questions on the subject if jury members remain confused or uncertain of their ground as a result of the judge's response: *Layton*, at paras. 29 and 32. Nothing the judge says in answer to the jury's question should discourage further questions on the subject: *Layton*, at para. 33.

98 Fourth, no matter how carefully crafted they may be, examples of what constitutes a reasonable doubt, like examples of what constitutes proof beyond a reasonable doubt, are fraught with difficulty: *R. v. Bisson*, [1998] 1 S.C.R. 306, at p. 310.

99 In *Bisson*, the trial judge illustrated proof beyond a reasonable doubt by giving the example of the steps a driver would take to determine that his motor vehicle had sufficient oil in it to run without damage. The example was given to illustrate the degree of certainty required by the phrase "beyond a reasonable doubt", which the trial judge equated with the level of certainty associated with important decisions in our daily lives. The court criticized the example because it tended to indicate to jurors that the decision about whether guilt had been proven beyond a reasonable doubt could be made on the same basis as any decision in the course of their daily routines: *Bisson*, at pp. 310-311. The instruction was misleading, tended to lower the requisite standard of proof to something more akin to proof on a balance of probabilities, and through the use of examples, was likely to be applied subjectively: *Bisson*, at p. 311.

100 In *R. v. Palmer*, [1970] 3 C.C.C. 402, the trial judge gave an example based on the evidence adduced at trial of where a reasonable doubt might arise. The British Columbia Court of Appeal concluded that the example, immediately prefaced by a proper definition of reasonable doubt, could not have misled the jury. The appeal was dismissed.

101 In *R. v. Stavroff*, [1980] 1 S.C.R. 411, the jury sought clarification of "the law related to the phrase 'dangerous to the public peace' with particular reference to its application within the confines of a person's home" (p. 415). The trial judge offered to refer to some decided cases that took place in private homes to illustrate the meaning of the phrase "dangerous to the public peace". The Court held that in explaining the law to the jury, a trial judge may properly refer to illustrations to assist the jury, but must not, in doing so, take from the jury the right to reach their own conclusions on issues of fact that are theirs to decide: *Stavroff*, at p. 416.

102 Reference to decided cases and other authorities in order to provide illustrations to assist jurors in their task is not free of danger. A trial judge must not by the use of illustrations leave an issue to the jury in such a way to effectively remove a defence from the jury or convert into a legal requirement what is a question of fact for the jury to decide: *Stavroff*, at pp. 420-421. The trial judge must make it clear that his or her explanations are explanations of law, and that they must apply that law to the peculiar facts of the case they are trying only after finding the facts themselves: *Stavroff*, at p. 421. In each case, it is a matter of degree involving consideration of the influence the trial judge's words had, or could have had, on the jury: *Stavroff*, at p. 422. See also *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, at paras. 5, 31 and 35.

103 A final point. In responding to a question posed by a deliberating jury, a trial judge should not, whether by express words or by necessary implication, foreclose or appear to foreclose further questions by the jury on the same or another issue: *Layton*, at paras. 29, 31, and 33.

The Principles Applied

104 This ground of appeal involves two discrete complaints about the adequacy of the trial judge's response to a jury question about the standard of proof. Although I agree with the appellant that the trial judge erred in his response to the jury's question, in the circumstances I do not find that this error could have affected the verdict. Accordingly, I would apply the curative proviso and reject this ground of appeal.

105 The first complaint concerns the trial judge's use of case-specific examples to illustrate the operation of the principle of reasonable doubt.

106 The question asked by the jury several hours into their deliberations requested the trial judge to "offer examples" of reasonable doubt. It is well-settled that the trial judge was required to provide a clear, comprehensive, and correct answer to the jury's question: *S. (W.D.)*, at p. 528. He was entitled to the assistance of counsel in formulating his response, but neither defence counsel nor the Crown offered any assistance on this issue.

107 The authorities make it clear that in providing legal instructions to a jury a trial judge may use illustrations or give examples to assist the jury's understanding: *Stavroff*, at p. 416. But the use of illustrations or examples to help jurors understand must not have the effect of directly or indirectly

- i. converting a question of fact for the jury to decide into a legal instruction to reach a particular conclusion;
- ii. removing a defence, justification, or excuse (for which there is an air of reality) from the jury; or
- iii. taking away from the jury their right to form their own conclusion on a question of fact that is theirs to decide.

Stavroff, pp. 416; 420; and 421.

108 Examples or illustrations from the evidence adduced at trial, used here to illustrate the principle of reasonable doubt, are especially problematic. Examples of this kind adopt an appearance of legal instructions. They convert what is a question of fact for the jury to decide into a legal instruction that breaches the divide between the function of the judge and that of the jury.

109 When the last two examples are read together, it is possible to conclude that the jury could be left with the impression that evidence about Ian Green's potential participation in the attempted murder did not amount to a reasonable doubt, but that the evidence concerning the appellant led to a reasonable conclusion he was the shooter, thus proving his participation beyond a reasonable doubt. This instruction also reflects a legal error: the reasonableness of a conclusion does not amount to proof beyond a reasonable doubt unless the conclusion of guilt is the only rational inference to be drawn from all the evidence: *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33.

110 The second alleged error is that by telling the jury that he had nothing more to say on

reasonable doubt, the trial judge implied that, even though the jury was uncertain about the meaning of reasonable doubt, the judge could not assist them with the concept, and that there was no reason for the jury to return with a further question or to clarify precisely the source of their confusion.

111 The trial judge repeated his oral instructions on reasonable doubt. That he did so does not, without more, reflect error: *Layton*, at para. 32. This is not a case, like *Layton*, in which the jury had a written copy of the judge's instructions. The answer was responsive to the first part of the jury's question and may have been sufficient had the judge confirmed its adequacy with the jury, or reminded them of their entitlement to further clarification if it failed to do so. Unfortunately, the trial judge did neither. To the contrary, the trial judge's parting words arguably discouraged further questions on reasonable doubt.

112 Nonetheless, in the circumstances of this case, given the strength of the Crown's case and the paucity of evidence substantiating the suggestion that Ian Green shot Ms. Steele, no substantial wrong or miscarriage of justice could have occurred from these errors. For reasons that I will develop, this is an appropriate case for applying s. 686(1)(b)(iv) of the *Criminal Code*.

The Curative Proviso: Governing Principles

113 Section 686(1)(b)(iii) of the *Criminal Code* allows an appellate court to dismiss an appeal notwithstanding that "the appeal might be decided in favour of the appellant" on an error of law if the court is of the opinion that "no substantial wrong or miscarriage of justice has occurred."

114 In *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-36, the Supreme Court of Canada reviewed the jurisprudence regarding the application of the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*. LeBel J., writing for the majority, found that the jurisprudence established two categories of error that could be cured by application of the proviso. The first is "an error so harmless or minor that it could not have had any impact on the verdict." The second category contains "serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain." In my view, the trial judge's error in the present case falls into the second category.

115 The inadequacies in the trial judge's re-charge to the jury cannot be called "harmless" or "minor" errors. Thus, the question in this case must be whether the evidence against Stubbs was so overwhelming that there is no realistic possibility that a new trial would produce a different verdict.

116 LeBel J. described errors falling into the second category as follows, in para. 36:

An appellate court can also uphold a conviction under s. 686(1)(b)(iii) in the event of an error that was *not* minor and that *cannot* be said to have caused no prejudice to the accused, if the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted. ...

The high standard of an invariable or inevitable conviction is understandable, given the difficult task for an appellate court of evaluating the strength of the Crown's case retroactively, without the benefit of hearing the witnesses' testimony and experiencing the trial as it unfolded. It is thus necessary to afford any possible measure of doubt concerning the strength of the Crown's case to the benefit of the accused person.

[Emphasis in original, citations omitted.]

117 The rationale for upholding a conviction in these circumstances is persuasive; in the words of Binnie J. in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46:

Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.

[Citations omitted.]

The Principles Applied

118 Despite the trial judge's erroneous response to the jury's question, I am satisfied that in the circumstances no prejudice was caused to the appellant.

119 I turn first to the trial judge's references to Ian Green as a third party suspect. First, this was a very strong circumstantial case for the Crown. Several eyewitnesses confirmed the appellant's presence outside of Ms. Steele's apartment, angrily beating down her door. The appellant had an extensive history of violent assaults against Ms. Steele, which could be used to draw inferences about his animus towards her.

120 Second, the thrust of the defence's focus at trial was that the Crown had failed to prove its case due to a dearth of reliable evidence linking the appellant to the victim's shooting. The trial judge properly addressed the evidentiary weaknesses highlighted by defence counsel in his main charge. Defence counsel commented on, and did not object to, the main charge.

121 Conversely, there was no evidence led at trial to lend cogency to the defence's theory that Ian Green shot Ms. Steele. The evidence led with respect to Green tended to diminish the likelihood of his involvement, as Green immediately went to give a statement to the police and was never considered a suspect by police. As a result, the defence theory that Green shot Ms. Steele was always thin. The trial judge's instruction that "if you can find that [Stubbs entering the apartment] would be a motive to shoot her, then you can say, well, he is most likely the shooter and not the

accused" sufficiently captured the strength of the defence's theory vis-à-vis Green.

122 Next, I will consider counsel's submission that the trial judge effectively discouraged any further questions from the jury on reasonable doubt. In my view, although the trial judge erred in giving the impression that the jury should not require further explanation of reasonable doubt, in the circumstances the error did not cause any prejudice to the appellant. In *Layton*, at paras. 30-32, the Supreme Court of Canada found a trial judge to have erred fatally in her reply to a jury question on reasonable doubt for two reasons. First, the trial judge erred by declining to provide any clarification to the jury which indicated that it was having difficulty with the concept, and second, exacerbating the first error, she implied that there was no reason for the jury to return with another question.

123 In this case, the trial judge's error was less severe than that in *Layton*. The trial judge provided a responsive answer to the jury's question, communicating the legal meaning of proof beyond a reasonable doubt. He repeated his original charge on reasonable doubt and provided several examples, both relating to the case and more general examples. Counsel did not object to the adequacy of the trial judge's response on reasonable doubt, but merely his instruction regarding Ian Green. I thus conclude that the error did not cause any prejudice to the appellant and falls within the ambit of the curative proviso.

124 Accordingly, I would reject this ground of appeal.

Ground #3: Unbalanced Jury Charge

125 The final ground of appeal against conviction attacks the overall fairness of the charge to the jury. It is advanced in a case in which the appellant did not testify or call evidence, and where his trial counsel did not object to the charge to the jury on this or any other ground.

The Positions at Trial

126 The central issue at trial was the identity of the person who shot Ms. Steele.

127 The appellant contended that the Crown had failed to prove beyond a reasonable doubt that he was the person who shot Ms. Steele. There was no reliable evidence, the appellant submitted, that he was at the apartment when Ms. Steele was shot. No one identified him as the shooter and the surveillance video showed him leaving the building before the shooting occurred. There were gaps in the investigation, and a viable third party suspect, Ian Green, whom the police really did not investigate. To conclude that the appellant was the shooter was stereotypical thinking, shored up by an inadequate investigation.

128 At trial, the Crown contended that the appellant shot Ms. Steele intending to kill her. There was ample evidence from those who saw the man at Ms. Steele's apartment door, and from what he said there, to conclude that it was the appellant who broke down the door and entered the apartment.

He was jealous and controlling. He harboured an *animus* towards Ms. Steele and had a motive to kill her. Ian Green, the third party suspect advanced by the appellant as the shooter, had no such *animus* or motive and fled the apartment as soon as the appellant entered.

The Arguments on Appeal

129 For the appellant, Mr. Norris submits that the trial judge had an obligation to present the case to the jury in a fair and balanced manner. Whether the trial judge did so, Mr. Norris acknowledges, requires a functional assessment of the charge as a whole. Judged by that standard, he says, the charge failed to present any issues raised by the appellant about the credibility of Ms. Steele or the reliability of her evidence. The trial judge misstated evidence relied upon as supportive of the defence position and mischaracterized the position itself.

130 Mr. Norris says that the trial judge's instructions, considered as a whole, usurped the role of the jury by being dismissive of the defence position that a third party, Ian Green, shot Ms. Steele. In essence, the charge left only the Crown's theory of liability to the jury, not the position advanced on the appellant's behalf.

131 For the respondent, Ms. Stephens reminds us that we should review the charge, as a whole, on a functional basis to determine whether the jury was *properly* instructed, not perfectly instructed. We should also look to the addresses of counsel to determine whether salient features of the evidence have been marshalled for the jury's consideration.

132 In our assessment of the adequacy and fairness of the charge, Ms. Stephens says, we should also look at the position advanced by the appellant's trial counsel. The credibility concerns advanced here were not raised at trial, and trial counsel made only a glancing reference to any reliability concerns in connection with Ms. Steele's evidence. Trial counsel did not object to the charge on any basis now urged to be fatally flawed.

The Governing Principles

133 Several well-established principles inform any decision about the adequacy of final instructions to the jury in a criminal case.

134 First, we test final instructions according to a functional approach that assesses their ability to fulfill the purposes for which they are given, not by reference to whether any particular formula or approach has been followed: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 14; *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.), at para. 27. Considered as a whole, a charge should leave the jury with an understanding of

- * the factual issues to be resolved
- * the legal principles that govern those issues and the evidence adduced at trial
- * the positions of the parties; and

- * the essential features of the evidence relevant to the positions of the parties on the issues.

MacKinnon, at para. 27.

135 Second, the extent to which the trial judge must review the evidence and relate it to the issues so that the jury appreciates its value and effect depends on the circumstances of each case: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 57. The fundamental obligation of the trial judge, except in rare cases in which it would be needless to do so, is to review the substantial parts of the evidence, and give the jury the position of the defence, so that the jury may appreciate the value and effect of the evidence and how the law is to be applied to the facts as they find them: *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at pp. 497-498; *Daley*, at para. 54.

136 Third, a trial judge need not review all the evidence upon which an accused relies: *Azoulay*, at p. 498; *Daley*, at para. 55. Non-direction on a matter of evidence constitutes reversible error *only* where the omission is of a single item of evidence that constitutes the sole evidentiary support for a defence: *Daley*, at para. 55; *R. v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.), at p. 436, *aff'd* on other grounds, [1978] 1 S.C.R. 538.

137 Fourth, it is fundamental that a jury charge does not take place in isolation, but in the context of the trial as a whole. Appellate review of the adequacy of a jury charge encompasses the closing addresses of counsel. Those addresses may fill in some of the gaps, especially of evidentiary references, left in the charge: *Daley*, at para. 58.

138 Fifth, failure of counsel to object to a charge is a factor in appellate review. Failure to object is not dispositive on appeal. But a failure to object about an aspect of the charge that later becomes a ground of appeal may be indicative of the seriousness of the alleged violation and of the overall fairness of the charge: *Daley*, at para. 58; *Jacquard*, at para. 38.

139 Finally, in some cases, evidence that tends to show an accused committed an offence far exceeds the evidence to the contrary. A balanced charge does not require a trial judge to ignore evidence that implicates an accused. Nor is a trial judge obliged to spin a web of exculpatory inferences, turning each piece of circumstantial evidence every which way to reveal its every possible inference. This proposition is all the more applicable where the defence position appears to be that the cumulative effect of all the evidence falls short of proof beyond a reasonable doubt: *R. v. Lawes* (2006), 80 O.R. (3d) 192 (C.A.), at para. 62.

The Principles Applied

140 I would not give effect to this ground of appeal. I am simply not persuaded that, considered in its entirety as it must be, the charge to the jury was so unfair and unbalanced that it deprived the appellant of his right to a fair trial.

141 First, this was not a complicated case. The principal issue for the jury to decide was the identity of the person who shot Ms. Steele. The evidence adduced at trial disclosed two possible candidates: Ian Green and the appellant. The evidence tended to support a finding that, when the appellant broke down the door, Green bolted from the apartment. That left the appellant, the only occupant who bore Ms. Steele an *animus* and had a motive, jealousy, to harm her. The case against the appellant was formidable if not overwhelming.

142 Second, the task for the jury consisted principally of drawing inferences from largely uncontroverted evidence in determining whether the cumulative effect of that evidence satisfied the standard of proof the law requires of the Crown. This is routine fare for juries. A trial judge is under no obligation to turn over every piece of circumstantial evidence and recite the entire catalogue of inferences that may be available from it.

143 Third, the trial judge clearly explained the defence position to the jury in terms that attracted no objection from trial counsel. It is a reasonable inference that the jury understood that position.

144 Fourth, the core of the complaint here, that the trial judge did not draw the jury's attention to factors that diminished Ms. Steele's credibility and rendered her evidence unreliable, was not an essential feature of the defence advanced at trial. The closing address of trial counsel did not raise any real credibility concerns and made only limited and passing reference to the reliability of the evidence of Ms. Steele.

145 Fifth, this is not a case of competing or contradictory accounts of the same events. The appellant proffered no such evidence, rather relied on evidence of Green's presence (and his absence at trial), an inadequate police investigation, and the accuracy of the time impressed on the surveillance video to raise a reasonable doubt that he was the shooter. Any evidentiary references omitted did not result in the appellant's defence not being fairly put to the jury.

146 Finally, while not dispositive of this ground of appeal, the failure of trial counsel to object to a charge that is now portrayed as unfair and unbalanced is of particular significance. The lack of objection signals to me at least that counsel who conducted the trial and heard the charge as it was delivered considered that it lacked neither fairness nor balance.

THE SENTENCE APPEAL

147 The trial judge imposed a total sentence of 22 years: 16 years for attempted murder, 16 years, concurrent, for break and enter to commit attempted murder, 4 years, consecutive, for use of a firearm while committing an indictable offence, 1 year, consecutive, for possessing a firearm while prohibited from doing so; and 1 year consecutive for disobeying a court order.

148 The appellant says that in the circumstances, this sentence is disproportionate. I do not agree. The sentence of 16 years for attempted murder falls within the range of sentences established by this Court for attempted murder committed in the context of a domestic relationship: see *R. v. K.G.*,

2010 ONCA 177, 266 O.A.C. 334; *R. v. Tan*, 2008 ONCA 574, 268 O.A.C. 385, and *R. v. Boucher*, (2004) 186 C.C.C. (3d) 479 (Ont. C.A.). The trial judge correctly considered the significant aggravating factors in imposing this sentence, including the appellant's record of assaults against Ms. Steele, ignoring court orders, and the impact of the injury on her family.

149 Nor can I accept the appellant's submissions that, in light of Ms. Steele's recovery, the injuries inflicted upon her by the gunshot were not serious. Ms. Steele remains with a bullet lodged in her head,. She has suffered long-lasting and severe physical and psychological injuries. The appellant, having been convicted for attempted murder, should not be entitled to benefit from Ms. Steele's fortuitous recovery.

150 Accordingly, I would dismiss the appeal from sentence.

CONCLUSION

151 For these reasons, I would dismiss the appeal from conviction. I would grant leave to appeal from sentence, but dismiss the sentence appeal.

D. WATT J.A.

R.J. SHARPE J.A.:-- I agree.

E.E. GILLESE J.A.:-- I agree.

¹ The trial judge did not provide the jury with a written copy of his charge or any portion of it.

---- End of Request ----

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