Court of Queen's Bench of Alberta

Citation: R v Geick, 2022 ABQB 92

Date: 20220202
Docket: 190263855Q2
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

John Richard Geick

Accused

Reasons for Decision
of the
Honourable Madam Justice L. Bernette Ho

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[1] These reasons relate to the Defence application for a mistrial. The mistrial application was filed by Defence counsel days before we were to convene for the purpose of hearing sentencing submissions, and oral submissions on the mistrial application were heard on October 29, 2021. At the close of proceedings on October 29, the Crown consented to Defence counsel's request to have additional time to consider whether he wished to submit further written submissions on the mistrial application. No supplemental submissions were received during the time period allotted for this purpose.

[2] Mr. Geick seeks a mistrial for reasons related to the two Crown experts who gave evidence at trial. In particular, he seeks a mistrial on the basis that he had insufficient access to

the Crown's experts prior to trial, and that one of the Crown's experts was not impartial. The Crown opposes the application.

[3] Mr. Geick was convicted of two counts of killing, maiming or injuring dogs contrary to section 445.1(a) of the *Criminal Code*, RSC 1985, c C-46. The dogs, named Sophie and Tyler, belonged to Mr. Geick and his former common law partner, Joanna Smith. I will refer to the dogs by their names in these reasons.

Background

[4] The Crown called two experts, Dr. Chamberlain and Dr. Doyle.

Dr. Chamberlain

[5] Dr. Chamberlain was the veterinarian who attended to Tyler on the morning of February 17, 2019 at the 24-hour emergency veterinary clinic. The Crown sought to tender Dr. Chamberlain as an expert in the area of veterinary medicine. She was also a fact witness.

[6] The trial entered into a *voir dire* and the Crown examined Dr. Chamberlain on her qualifications. Defence counsel did not ask any questions in the *voir dire* and stated that Defence was "prepared to admit her qualifications". I sought further clarification from Defence counsel, who agreed that he was conceding that Dr. Chamberlain's evidence was admissible under the two-step inquiry for admissibility of expert evidence as set out in ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23 at paras 22-24: (1) the doctor's evidence was logically relevant and necessary to the trier of fact and the doctor was a properly qualified witness, having confirmed her duty to be impartial and give fair and unbiased evidence, and (2) the probative value of the doctor's evidence outweighed the prejudicial effect.

[7] I qualified Dr. Chamberlain as an expert in the area of veterinary medicine.

[8] During direct examination Dr. Chamberlain gave evidence about her examination of Tyler and opinion evidence about how Tyler sustained the injuries. Defence counsel cross-examined Dr. Chamberlain, with the focus of his questions on her opinion about the timing of Tyler's injuries relative to when she examined Tyler. Defence counsel did not cross-examine Dr. Chamberlain on whether she refused to be interviewed by Defence counsel before trial.

Dr. Doyle

[9] The Crown sought to tender Dr. Doyle as an expert in the area of veterinary medicine and forensic medicine.

[10] The trial entered into a *voir dire*. Defence counsel took the same position he had taken with Dr. Chamberlain and conceded that Dr. Doyle's evidence was admissible.

[11] I qualified Dr. Doyle as an expert in the area of veterinary medicine and veterinary forensics.

[12] During direct examination Dr. Doyle gave opinion evidence about how Sophie and Tyler sustained their injuries. Defence counsel cross-examined Dr. Doyle, and again did not ask any questions about her pre-trial communications with Defence counsel or make any inquiries about what knowledge she had about who may have been responsible for the injuries.

Reasons for Conviction

[13] The evidence of Dr. Chamberlain and Dr. Doyle were key pieces of evidence, as is clear from my reasons for conviction:

> Dr. Doyle's testimony regarding the necropsy performed on Sophie and her expert opinion are central to determining what happened to Sophie, and specifically, what caused her death on February 15, 2019. None of Dr. Doyle's evidence was seriously challenged during cross-examination and no competing expert evidence was submitted on behalf of Mr. Geick. Dr. Doyle was forthright in her testimony and was careful to express limitations or qualifications to her conclusions when appropriate. I had no concerns respecting Dr. Doyle's appreciation of the duty she owed to the Court as an expert. I have considered Dr. Doyle's evidence and have placed significant weight on her conclusions.
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> With respect to expert evidence relating to Tyler, I accepted Dr. Chamberlain's evidence regarding her examination of Tyler on February 17, 2019 as well as her interpretation of test results obtained that morning. I also accepted and placed significant weight on Dr. Doyle's conclusion that Tyler died from having sustained a blunt force trauma injury to his abdominal area, with the hit being of sufficient force to cause bruising detected on x-rays, as confirmed by elevated levels of liver enzymes. Dr. Doyle acknowledged that Tyler's injuries could have been caused anytime within 24 hours of being examined by Dr. Chamberlain, but agreed that it was more likely that Tyler died within 12 hours of sustaining the trauma.

Analysis

Requirements for a mistrial

[14] The parties agree that I am permitted to direct a mistrial post-conviction but prior to the imposition of sentence: ***R v Sauverwald***, 2019 ABQB 482 at para 21, rev'd on other grounds 2020 ABCA 388. Defence counsel acknowledges that the grounds raised in this application should have been raised during the trial but that it is not improper to raise them at this stage.

[15] Trial judges have broad common law powers to declare a mistrial where there is a real danger of prejudice to the accused or danger of a miscarriage of justice: ***R v Burke***, 2002 SCC 55 at para 74. The trial judge is in the best position to assess the circumstances of each individual case and determine if a mistrial is warranted: ***Burke*** at paras 74-75. Relevant factors to consider include: the surrounding circumstances, injustice to the accused in light of the resources available to the state, the seriousness of the offence, protection of the public, and bringing the guilty to justice: ***Burke*** at para 75.

[16] Whether a miscarriage of justice has occurred asks whether the trial was unfair, or alternatively, whether an appearance of unfairness was created: ***R v Khan***, 2001 SCC 86 at para 73, LeBel J.

[17] The Defence relies on ***R v T(LA)*** (1993), 14 OR (3d) 378, 84 CCC (3d) 90 (CA) where the Crown's failure to disclose a statement given to police warranted a mistrial. There, the

Ontario Court of Appeal held that "[t]he proper test on an application for a mistrial is, of course, whether the appellant's ability to make full answer and defence has been impaired."

[18] A mistrial should be granted only in the clearest of cases: ***R v Anderson,*** 2018 ABCA 412 at para 11, leave to appeal to SCC refused, 38502 (16 May 2019).

Access to Crown experts

[19] The Defence submits that Mr. Geick's ability to make full answer and defence was impaired as a result of not having the opportunity to interview the Crown experts in advance of trial.

[20] The Defence argues that Dr. Chamberlain was never made available to be interviewed prior to trial. The Crown acknowledges that due to staff turnover at their office, Dr. Chamberlain's contact information was mistakenly not sent to Defence counsel after it was requested.

[21] As for Dr. Doyle, the Defence argues that there was a "major inconsistency" between Dr. Doyle's evidence and Ms. Smith's evidence regarding external bruising on Sophie that was not fully explored before trial. While Dr. Doyle and Defence counsel did communicate via email prior to the trial, Defence argues that counsel was not able to have a "proper conversation" with Dr. Doyle before trial.

[22] The thrust of Defence's argument is that if counsel had known Dr. Doyle's evidence contradicted Ms. Smith's evidence, he would have cross-examined Ms. Smith further on this inconsistency which may have impacted my credibility assessment of Ms. Smith. Defence counsel also argues that if he had known the evidence the experts were going to give about the bruising to both dogs, his cross-examination of Ms. Smith would have been different which may have resulted in a different credibility finding about Ms. Smith.

[23] The Crown argues that there is no property in a witness and that neither Crown expert was required to speak with Defence counsel prior to trial. In any event, the Crown notes that the discrepancy between Ms. Smith's evidence and Dr. Doyle's evidence about external bruising was covered in direct examination, cross examination, closing arguments, and in the reasons for conviction.

[24] Defence argues that an expert is expected to meet with the Defence lawyer, and not merely correspond via email. The Crown points me to the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, more commonly known as the *Martin Report* that was released in 1993 following ***R v Stinchcombe***, [1991] 3 SCR 326. The *Martin Report* provides recommendations that form the basis of Crown disclosure policies throughout Canada. Recommendation 20 provides that:

> Where the names and addresses of witnesses are supplied to the defence by the Crown or investigative agency, the witnesses may be informed that there is no property in a witness and that the defence is entitled to interview them, but that they are not required to grant an interview: it is strictly their decision. Care must be taken, however, to ensure that the witnesses are not left with the impression that they should not grant the defence an interview. There should be a standard form of providing this advice where it is given.

[25] The evidence about the bruising on the two dogs was as follows. Dr. Chamberlain testified that there was "obvious bruising" on Tyler's abdomen. Dr. Doyle testified that there was no visible bruising on Sophie's exterior. Ms. Smith testified to seeing dark purple bruises on Sophie's body when she discovered Sophie after Sophie had died. Ms. Smith also testified to seeing bruises on Tyler's tummy.

[26] I dealt with the inconsistency between Dr. Doyle's evidence and Ms. Smith's evidence in my credibility assessment of Ms. Smith:

> In view of Dr. Doyle's testimony and the photos taken during the necropsy, Ms. Smith was clearly mistaken as to whether there were purple bruises externally visible on Sophie's body at the time of her death. I note that Ms. Smith was consistent in her belief that she saw bruises on Sophie's body, both during her initial police interview and at trial. Her mistaken belief affected her perspective on some matters, as evident in her testimony that she believed Mr. Geick put his hand down at the vet's office to block removal of the blanket and prevent her from seeing the bruises on Sophie again. I do not accept Ms. Smith's evidence regarding Mr. Geick's lack of affection for the dogs and there having been bruises externally visible on Sophie's body at the time of her death. I also do not accept any of her evidence suggesting that Mr. Geick took steps to prevent Ms. Smith from examining bruises on Sophie's body.
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> However, apart from her testimony regarding Mr. Geick's lack of affection for the dogs and instances where her testimony conflicted with Dr. Doyle's expert findings, I found Ms. Smith to be a credible witness.

[27] I do not accept Defence counsel's submission that a mistrial is warranted due to his alleged lack of access to the Crown expert witnesses before trial.

[28] Defence counsel never raised lack of access to the Crown expert witnesses as an issue at trial, either in preliminary or closing submissions, or with the experts directly. Nor did he question Dr. Doyle about her willingness to only engage in email communications with him. Had this issue been raised at trial, the seriousness of this issue could have been explored and if necessary, steps may have been taken to address the issue. For example, an adjournment could have been considered or Ms. Smith could potentially have been re-called as a witness.

[29] While Defence counsel was never provided with Dr. Chamberlain's contact information in advance of trial, when Dr. Chamberlain appeared at trial, she was still working at the same veterinary clinic where Mr. Geick and Ms. Smith attended to have Tyler examined. When asked about this during the mistrial application, Defence counsel confirmed that he did not check to see if Dr. Chamberlain was still employed there notwithstanding that information was readily available to him. While I accept that he did not want to be seen to be circumventing the Crown's office, or acting improperly in some respect, he could have at least followed up with the Crown's office or confirmed with the Crown that Dr. Chamberlain was working at the same veterinary clinic.

[30] With respect to Dr. Doyle, Defence counsel acknowledged that he exchanged emails with her but he submitted that it would have been better for him to be able to speak with her directly,

even on the phone, so that he could follow up on her answers. However, it was made clear that Dr. Doyle would only engage in email exchanges, though there is no suggestion that Dr. Doyle placed a numerical limit or similar restriction on their email communications. Again, this issue was not pursued at trial, nor was Dr. Doyle cross-examined to any degree about the answers she provided in the prior email exchange. There was no suggestion during the trial itself that she was not forthcoming or unhelpful in her responses.

[31] More significantly, I agree with the Crown that the subject of bruising on the dogs was addressed at trial. This is plainly evident from a review of the trial transcripts and my reasons for decision. Defence counsel cross-examined both experts on a wide range of issues, including their observations from examinations of Tyler and Sophie. Both experts addressed the topic of bruising. While Defence counsel may, in hindsight, wished to have cross-examined the experts and Ms. Smith differently, the circumstances surrounding this matter make it clear that Mr. Geick's ability to make full answer and defence was not impaired due to lack of access to the Crown experts before trial. There was no trial unfairness, or even an appearance of unfairness, that supports a finding that a miscarriage of justice occurred that must be remedied through a mistrial.

Impartiality

[32] The Defence submits that Dr. Doyle was not an impartial witness because prior to Dr. Doyle's examination of the dogs Dr. Doyle had seen or was aware of emails from Ms. Smith accusing Mr. Geick of being responsible for their deaths. The Crown argues that the scope of Dr. Doyle's evidence was limited to cause of death and any information about who may have caused the dog's deaths was irrelevant to her opinion.

[33] Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence: ***White*** at para 10. An expert's impartiality goes to both admissibility and weight: ***White*** at para 34. An expert who is unable to fulfill this threshold duty is not properly qualified to perform the role of expert and his or her evidence should not be admitted. Once this threshold is met, remaining concerns about impartiality should be considered in relation to the weight to be given to the evidence if admitted: ***White*** at para 45.

[34] Again, I do not agree with Defence counsel that a mistrial is warranted.

[35] Here both experts were asked whether they understood that their opinion evidence must be impartial and that they owed a duty to the Court to give fair, objective and nonpartisan evidence. Both experts answered in the affirmative. Defence counsel did not cross-examine either expert during their respective *voir dires*, nor did he challenge their qualification as experts in any fashion. Indeed, Defence counsel did not raise this issue at all during trial proper.

[36] As was made clear in my reasons for conviction, I was never concerned during the direct or cross-examination of Dr. Doyle that she did not understand or fulfil her duty to give fair, objective and nonpartisan evidence. She was clear in expressing limitations to her evidence, which was limited to her interpretation of Tyler's examination results and the necropsy she performed on Sophie. Dr. Doyle expressed opinions respecting Tyler and Sophie's cause of death from injuries sustained. She did not express any views about who caused those injuries.

There is no merit to any suggestion that Dr. Doyle did not act as an impartial expert witness at any point during Mr. Geick's proceeding.

Disposition

[37] The Defence application for a mistrial is dismissed.

Heard on October 29, 2021.

Dated at the City of Calgary, Alberta this 2nd day of February, 2022.

L. Bernette Ho
J.C.Q.B.A.

Appearances:

Rosalind Greenwood
for the Crown

Efrayim Moldofsky
for the Accused