

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Zhou*,
2022 BCSC 362

Date: 20220308
Docket: X080641
Registry: New Westminster

Between:

Regina

Respondent

And:

Xin Ying Zhou

Appellant

Before: The Honourable Mr. Justice Riley

On appeal from: An order of the Provincial Court of British Columbia, dated May 9,
2018 (*R. v. Zhou*, 2018 BCPC 425, File No. 218548-1).

Reasons for Judgment

Counsel for the Appellant: L.J. Helps

Counsel for the Respondent: E. Lehrer

Place and Dates of Hearing: July 8–9, 2021
October 7–8, 2021
New Westminster, B.C.

Place and Date of Judgment: March 8, 2022
New Westminster, B.C.

Introduction

[1] Following a trial in the Provincial Court of British Columbia, the appellant Ms. Zhou was convicted of an animal cruelty offence, namely causing, permitting, or allowing distress to a number of cats and dogs under her care at an acreage property in Surrey, British Columbia. The reasons for that decision are indexed as *R. v. Zhou*, 2018 BCPC 425. This is a summary conviction appeal, with the sole ground of appeal being an alleged miscarriage of justice based upon ineffective assistance of trial counsel.

Facts

[2] Ms. Zhou was charged with a single count of causing, permitting, or allowing animals under her care to be in distress contrary to s. 9.1(2) of the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372, between 6 February 2016 and 18 February 2016. The charge related to a number of cats and dogs under Ms. Zhou’s care at an acreage property on Colebrook Road in Surrey.

[3] Ms. Zhou had previously been running an animal boarding business at a property on Partridge Crescent in Surrey, and had recently relocated her operation to the Colebrook Road property. It was described in evidence as a “large farm property”, where Ms. Zhou kept animals in various rooms in a house, and two outbuildings referred to as the “cat barn” and the “dog barn”.

[4] The Crown presented evidence about a number of interactions between Ms. Zhou and various officials with the Society for the Prevention of Cruelty to Animals (“SPCA”), municipal animal control officers, and veterinarians, in late 2015 and into 2016. Commencing in early 2016, these interactions were focused on the Colebrook Road property. On 16 February 2016, the SPCA obtained a warrant to search the property. The warrant was executed by SPCA Special Constable Thomson, assisted by several other SPCA officials, and a City of Surrey animal control officer. Dr. Walton, a veterinarian retained on contract by the SPCA, was also present. Ms. Zhou was on the property when the authorities showed up with the warrant.

[5] Acting under the warrant, the SPCA removed 69 cats and 15 or 16 dogs from the Colebrook Road property. The circumstances in which the animals were being kept at the property can be summarized as follows.

[6] The main house was noted to have animal feces on the floor throughout. There were animals in at least five different rooms, specifically: (i) two adult cats and some kittens in a small furnace room with no ventilation; (ii) at least seven adult cats, a number of kittens, a small dog, and some pups in the attic; (iii) a cat and some kittens in the laundry room; (iv) a dog in a crate in a bathtub; and (v) a dog under the bed in a bedroom.

[7] The conditions in the attic were particularly deplorable. It had no windows, no natural light, and only one light fixture in the ceiling which appeared to be off when the authorities first entered this part of the house. The entire space was very hot, the ventilation was poor, and there was a strong smell of urine and feces throughout. Half of the floor was covered with linoleum, and the other half consisted of rows of exposed insulation. There was one kennel housing a mother cat and some kittens, and another kennel housing a small dog and some pups. There were six other adult cats and some more kittens roaming around on the insulation. One of the cats was curled up in a ball in the insulation, emaciated, with visible signs of discharge from its eyes and nose. This particular cat, referred to at various points in the trial as Peter the cat, ultimately had to be euthanized. None of the Crown witnesses were able to say how long the animals had been in the attic prior to the search.

[8] The cat barn appeared to have been a former horse stable, with eight stalls that had been converted into separate rooms, four on each side. There was a pervasive smell of urine, feces, and chemical cleaners throughout the building. There was negligible heat available in this structure, and the bedding in the cat rooms was damp. There appeared to be spaces for six to eight cats in each room. At least 20 cats were noted to have eye and nasal discharge; they were sneezing, coughing, and shaking their heads. One cat was laying next to a puddle of vomit.

The attending veterinarian noted inadequate ventilation, and signs of fecal contamination that would contribute to gastro-intestinal illness.

[9] The dog barn had no lighting and no bedding. Those involved in the search made observations of mouldy feces on the floor in the back of the building. There were four dogs inside the barn, and four others in an “in-out” area connected to the building.

[10] The Crown called evidence from three veterinarians, specifically Dr. Gordon, Dr. Walton, and Dr. Brar. The trial judge recognized each of these witnesses as an expert in various aspects of veterinary medicine for cats and dogs. This evidence was an important aspect of the case against Ms. Zhou at trial, and the evidence of one of the experts in particular, Dr. Brar, is a focal point of Ms. Zhou’s appeal. For these reasons, I will review the evidence of these three witnesses in some detail.

[11] Dr. Gordon had been a licenced veterinarian since 2005 and worked for the SPCA, supervising some 36 SPCA-run animal shelters across British Columbia. Dr. Gordon testified about some prior dealings with Ms. Zhou at the Partridge Crescent property, but the bulk of her evidence related to her examination of the animals removed from the Colebrook Road property pursuant to the search warrant on 16 February 2016. Dr. Gordon testified that of the 75 samples taken from different animals to test for ringworm, there were 71 positive results, meaning those animals were either infected or had contaminated coats. Dr. Gordon later clarified that approximately one-third of these animals had visible hair loss, consistent with actual ringworm infection. Of the 69 cats removed from the property, approximately 50% had upper respiratory tract infections, 20% had herpes, and 27% were infected with calicivirus. Dr. Gordon opined that the level of illness in these animals was noticeably higher than in the general population, and higher than any other large-scale animal investigation in which Dr. Gordon had been involved during her time with the SPCA. Dr. Gordon further opined that the hygiene, biosecurity, and enrichment needs of all of the cats removed from the Colebrook Road property were

not being met. With respect to the dogs, eight of the 15 or 16 dogs removed from the property had gastrointestinal parasites.

[12] Dr. Walton had been a licensed veterinarian since 2000, operated his own veterinary hospital at which 90% of his practice related to dogs and cats, and also performed contract work for the SPCA. It was in that capacity that Dr. Walton attended the Colebrook Road property on 16 February 2016 to observe the condition of the property, inspect the animals, and triage any treatment needs.

[13] In addition to his evidence about the state of the property on the date of the SPCA search, Dr. Walton gave opinion evidence about two cats that had to be euthanized. One of these was a kitten, a matter of weeks old, with a fatal congenital defect. The other was the cat referred to by Dr. Walton as the “A1 cat”, which the trial judge ultimately found to be the same cat referred to by Ms. Zhou as Peter. This cat was found curled up in a ball on the exposed insulation in the attic. It was missing most of its hair and had severe dermatitis, with skin that was wrinkled and crunchy to the touch. When Dr. Walton examined the cat with a special lamp to test for ringworm, the cat “glowed like a Christmas tree”. Dr. Walton had never seen a cat with a ringworm condition worse than this in his 18 years as a veterinarian. The cat was also emaciated and underweight, scoring 1 out of 9 on the relevant body weight scale. Dr. Walton testified that this cat was malnourished and so underweight that it was at risk of organ failure. It had a large ulcer on the tongue, preventing it from eating.

[14] Dr. Walton made the decision to euthanize this particular cat because: (i) it had severe ringworm; (ii) it had an oral ulcer; (iii) it could only be fed intravenously, which would require an incision into the skin, which was in very poor condition; (iv) treatment would require constant handling, which was not feasible because of the severity of the ringworm condition; (v) it would require pain medication, which the cat would be unable to process if organ failure had already set in; and (vi) the cost of treatment would be substantial. Dr. Walton testified that in order to treat the cat rather than euthanize it, he would have to be satisfied that: (a) he could alleviate the

animal's distress in a timely manner, and (b) there was a good chance of a successful treatment outcome. Dr. Walton was not satisfied that these criteria were met, so he made the decision to euthanize. Dr. Walton also testified that this cat's symptoms of illness would have been apparent to a lay person. In cross-examination, Dr. Walton agreed that he had no knowledge about whether the cat was being treated or if its condition was improving, although he also testified that the cat was emaciated and clearly not getting enough calories to survive.

[15] With regard to the overall condition of the cats removed from the Colebrook Road property, Dr. Walton testified that their health was poor. Most of them had upper respiratory tract infections, and some had skin infections from ringworm. Dr. Walton acknowledged that upper respiratory tract infections are not uncommon, and that at his own clinic he sees at least one case of ringworm every month. Dr. Walton testified that for the most part, the dogs were healthy.

[16] Dr. Brar had been a licensed veterinarian since 2012, practicing at a clinic with three other vets. The majority of his work at the clinic was with cats. Dr. Brar first met Ms. Zhou when she came to his clinic seeking treatment for some of her animals in April of 2015. From then until January of 2016, Ms. Zhou attended the clinic with some regularity, sometimes multiple times in a week, and sometimes once every two to three weeks. Dr. Brar normally spoke to Ms. Zhou with the assistance of a Mandarin-speaking staff member acting as an interpreter. Ms. Zhou mostly brought cats into the clinic, but sometimes she also brought dogs. Most of the time Ms. Zhou sought "preventative" care for her animals, for things such as vaccines. The most common symptoms or illnesses Dr. Brar saw in Ms. Zhou's cats were eye and nasal discharge, eye infection, ringworm, and skin problems. Dr. Brar testified that Ms. Zhou had come into the clinic with SPCA orders for particular animals on four or five occasions prior to her last visit in January 2016. In cross-examination, Dr. Brar agreed that the two "categories of sickness" he had observed in Ms. Zhou's animals were ringworm and respiratory issues. Dr. Brar gave evidence about the nature of these conditions and the treatments he offered to Ms. Zhou's animals.

[17] Dr. Brar also testified about two specific occasions when he made site visits to Ms. Zhou's properties. The first was at the Partridge Road property some time in 2015, and the second was at a different property – which the trial judge inferred was the Colebrook Road property – on 7 January 2016, about five weeks before the SPCA executed its search warrant.

[18] During the 7 January 2016 site visit, Dr. Brar observed construction materials and some indications of continuing construction. With regard to the cat barn, Dr. Brar's sense was that it was an improvement from the prior location, because there was more space for the cats, and more natural light in the building. Dr. Brar recalled that there were four to five cats per room, the rooms were spacious, and the cats were free to move about. Dr. Brar found "no major issues" at the property during this site visit. He did note some cats with eye discharge, sneezing, skin issues, and upper respiratory tract issues. He threw out some expired medications, and Ms. Zhou attended his clinic to pick up renewals a few days later.

[19] Dr. Brar made a number of recommendations to Ms. Zhou, including: (i) using separate gloves when treating each cat; (ii) taking steps to improve the cleanliness of the facility, including the use of a veterinary grade cleaning solution which he provided to her; (iii) taking steps to better identify each cat, and retaining a separate document and records folder for each one; (iv) getting heaters for the cat barn, which Dr. Brar believed Ms. Zhou did the next day; and (v) throwing out all the litter boxes and cat carriers and replacing them with new ones, which Dr. Brar believed Ms. Zhou had not done by the time the SPCA attended with the warrant.

[20] Ms. Zhou testified at trial through an interpreter. Ms. Zhou was 51 years old at the time of trial. She had limited capacity to speak and read English. She had a vocabulary of no more than 50 words and could not carry on a basic conversation.

[21] Ms. Zhou testified that she ran a business taking care of cats and dogs. She initially operated out of a property on Partridge Crescent. She had a kennel license for that property, where she operated a cat and dog daycare and boarding facility. The license was later "cancelled" due to some "administrative issue".

[22] Ms. Zhou testified that she had no license to breed pets, but she admitted to breeding on a non-commercial basis. She had done commercial breeding of pets for 20 years in China, and wanted to get back into that business in Canada. She found an investor and purchased the Colebrook Road property for that purpose. She moved into the Colebrook Road property near the end of 2015. She continued to use the Partridge Crescent property to house cats while improvements were being made to the Colebrook Road property. In chief, Ms. Zhou testified that she spent approximately \$170,000 on renovations, but in cross-examination she estimated that it was closer to half a million dollars. By February of 2016, the move to the new property was complete and she was no longer using the old property.

[23] Ms. Zhou testified both in chief and in cross-examination about her prior dealings and issues with the SPCA. She said the SPCA had seized animals from her on three or four occasions, but only once with a warrant. Ms. Zhou expressed the view that the SPCA only took the good animals, and left the old and sick ones. In cross-examination, Ms. Zhou estimated that the SPCA did approximately 50 inspections of her facilities, and they only brought a Mandarin interpreter once. Ms. Zhou said she only understood about 10% of what the SPCA officials said to her. Since her move to the Colebrook Road property, the SPCA came to see her once every two or three days. They took pictures of her cats and asked her if they could take them away for free. Ms. Zhou testified that 90% of the cats she bred were “rare and expensive”, and she suspected that the SPCA only wanted her cats because they were expensive.

[24] Ms. Zhou also testified about the assistance Dr. Brar had given in treating her animals. Ms. Zhou testified that Dr. Brar in fact attended the Colebrook Road property twice. The last visit was, on the trial judge’s findings, on 31 January 2016. Ms. Zhou testified that at that time, the conditions were totally under control. There were five or six cats that were sneezing; Dr. Brar told Ms. Zhou they had a cold, and she informed him she would quarantine them in a room. Elsewhere in her testimony, Ms. Zhou said the sick cats had two problems, namely colds and ringworm. Ms. Zhou testified that the sick cats and the healthy cats were kept in separate

buildings, about 300 meters apart. By the time of the SPCA search, the sick cats were on their way to recovery, and their illness did not get passed on to any of the other animals.

[25] With regard to the cat referred to during the trial as Peter, Ms. Zhou testified that it often had eye discharge caused by a genetic defect. She said she had obtained a specialist report to this effect. Ms. Zhou said Dr. Brar had seen this cat approximately ten times, and that he was treating it regularly with monthly injections. Ms. Zhou maintained that the eye infection was not due to improper care, but rather to a genetic defect. With regard to the ringworm condition, Ms. Zhou used a kind of white solution medication that Dr. Brar had given her, and by 16 February 2016 the condition was improving or had resolved, although the cat's hair did not grow back. With regard to the oral ulcer, Ms. Zhou said that she had been soaking it in water, it was improving, and it had reduced in size. She said the cat's eating, drinking, bowel and urinary functions were normal and that the cat simply would not put on weight. Ms. Zhou testified that she kept this cat alone in a cage with two levels in it. In reviewing Ms. Zhou's evidence, the trial judge noted that some of these details were not put to Dr. Brar, and further that Dr. Brar's record of the 17 January 2016 visit made no reference to a cat named Peter. When this was put to Ms. Zhou in cross-examination, Ms. Zhou speculated that Dr. Brar may have recorded the name wrong in his records, or he may have used a phonetic translation of the name.

[26] Ms. Zhou gave extensive evidence about her daily routine for the care of the animals at the Colebrook Road property. This included steps taken to clean the animal barns, and to quarantine and care for sick animals.

[27] Ms. Zhou testified that clients would bring an assortment of animals to her property every day. Some animals arrived on the morning of 16 February 2016, and Ms. Zhou did not have time to inspect them before the SPCA showed up with the warrant. Ms. Zhou's father called to report that the SPCA was at the property, and then she was "in a hurry to hide" some of the animals. Ms. Zhou said she did not normally keep animals in the particular room which the trial judge found to be the

furnace room, but there were cats in that room on the date of the search because the kittens were being weaned and she wanted them close to the kitchen where she could hear them. With regard to the animals found in the attic, Ms. Zhou said she did not normally keep animals in that space. At some point she had “an inkling” that the SPCA might come and seize some animals so she instructed the contractor to make certain renovations to the attic, including installing what Ms. Zhou referred to as “bacteria-free” flooring. Thus, she had animals in the attic on the date of the search because she thought the SPCA would come and take them. Ms. Zhou believed the SPCA would “kill” the old cat that was sick. She said the animals had only been in the attic for about ten minutes when the SPCA located them. With regard to the sick cat, Peter, Ms. Zhou put it in a cage and she does not know how it ended up lying in a ball in the insulation when the SPCA found it.

[28] Ms. Zhou disputed the evidence of the Crown’s veterinary experts about the condition of the animals when the SPCA arrived with the warrant. She said only five or six cats had ringworm. She said that Peter the cat had previously been treated for ringworm, but the condition had cleared up by the time of the SPCA search, although the cat’s hair did not grow back. In cross-examination, Ms. Zhou agreed that Peter had ringworm and was still infectious, which was contrary to her evidence in chief. Ms. Zhou denied trying to hide Peter from the SPCA on an ongoing basis, claiming that she only did so on the date of the search because she was fearful that the SPCA will kill it. When challenged on why she would hide the cat when it was allegedly under the care of a veterinarian and was improving, Ms. Zhou said the SPCA would have to kill one or two cats to frame her. She denied that any of the animals in her care on 16 February 2016 were under distress. Ms. Zhou claimed that 98% of the ringworm infection in the cats at her property was caused by the SPCA in not using separate gloves to handle each cat.

The Trial Judge’s Reasons

[29] The trial judge began his analysis by noting that causing or permitting an animal under one’s care to be, or continue to be in distress under s. 9.1(2) of the *Prevention of Cruelty to Animals Act* is a strict liability offence. In addition to the

common law defence of due diligence, s. 24.02 expressly provides that an accused will not be convicted of an offence under the *Act* where: (a) the distress arises from an activity that is carried out by an “operator” in accordance with prescribed standards, or (b) the distress results from activity that is carried out in accordance with generally accepted animal management practices. Thus, the burden is on the Crown to prove the *actus reus* beyond a reasonable doubt. If the *actus reus* is made out, the burden shifts to the defence to establish the defence of due diligence on a balance of probabilities.

[30] The trial judge went on to address the arguments of the parties with respect to the credibility and reliability of the evidence. The judge found no credible evidence to support defence counsel’s submission that the SPCA witnesses were biased toward Ms. Zhou.

[31] In assessing the credibility of Ms. Zhou’s evidence, the trial judge said this:

[272] I did not find Ms. Zhou to be a credible witness. At times, I found her evidence to be internally inconsistent. At times, her evidence made no logical sense. At times, I found her evidence to be evasive. Her evidence, at times, was not consistent with the physical evidence, for example, the laboratory finding.

[273] I provide the following examples which I note are examples of only some of the problems I had with her evidence:

She said that Peter the cat that was found in the attic and was ultimately euthanized was under the care of Dr. Brar and was getting better. Dr. Brar was never asked about this cat in his evidence and he should have been. Pursuant to the rule in *Browne v. Dunn*, I give little weight to her evidence on that point. Also, Dr. Brar’s reports from the examinations that he did on January 31st while visiting the Colebrook Road property, which are exhibits in this proceeding, reference no cat named Peter or any cat that would have been in the physical condition Peter would have been in at the time. When confronted with this point in cross-examination, she responded that sometimes the name she mentioned to Dr. Brar was different than the name he would write down and she thought he used the phonetic translation. This also was not put to Dr. Brar and I reject her evidence with respect to Dr. Brar’s ongoing treatment of Peter.

She said that the SPCA was aware of Peter because of the reports that Dr. Brar sent to the SPCA. Dr. Brar was never asked specifically if he sent the SPCA a report pertaining to Peter and, in my view, he should have been. Furthermore, it makes no sense for her to hide Peter when the SPCA comes on February 16th, 2016, if the SPCA is aware of Peter and presumably would

be on the lookout for him. I reject her evidence that it was her understanding the SPCA was aware of Peter.

Ms. Zhou testified that the SPCA was only interested in taking away the healthy, expensive cats but not the sick, old cats, which is inconsistent with why she would hide Peter in the attic. When asked about this, she then said she put Peter in the attic, as he was old and sick and she thought the SPCA would kill it. Subsequently, she said that she thought the SPCA would use Peter's condition as an excuse to take all her cats. Also, at one point in cross-examination, she said that on February 16th, Peter was not seriously ill and was not in distress. I reject her evidence on this point.

Ms. Zhou mentioned several times that the SPCA and city employees wanted some of her healthy cats to be given to them for free. She described an occasion at the Colebrook Road property where she said that SPCA Employee Thomson and a city supervisor in charge of licenses had discussed which cats they liked and they took their pictures with them and asked if they could take them away that day, free. Ms. Zhou's evidence earlier was that she could only understand a very little English and only once, on an earlier occasion, did they bring an interpreter yet she did not offer any explanation as to how she could have understood the discussion these people were apparently having with one another or how she could understand what they were saying to her. Only Ms. Thomson was asked in a general sense about this and she denied trying to get Ms. Zhou to give her a free animal. I do not accept Ms. Zhou's evidence on this point or any of her evidence about SPCA employees trying to get her to give them healthy animals for free.

Ms. Zhou said in her evidence in chief that in January 2016, she was still using the Partridge property for her cats, as the Colebrook Road property was not yet completed. In cross-examination, she said that she thought it was December 31st, 2015, when she moved all the cats to the Colebrook Road property.

Ms. Zhou said that Peter had had a serious case of ringworm. She said that after using medication on the cat given to her by Dr. Brar, although its fur did not grow back, there was no longer a ringworm condition. This is contrary to the physical findings of Dr. Walton, who testified that when he put the Wood's lamp on the cat to test it for ringworm that it "glowed like a Christmas tree" and that in his 18 years as a vet he never experienced a cat with ringworm to such an extent. I do not accept her evidence on this point.

Ms. Zhou testified that on February 16th, 2016, only three of her cats had issues with hair falling out due to ringworm. This is contrary to the evidence of Dr. Gordon, who testified that 71 of 75 of the animals, both cats and dogs, whom they cultured for ringworm came back positive and that one-third of these animals had hair loss. Given that there were 69 cats and 15 or 16 dogs seized, there would have been far more than three cats that would have had hair loss. I do not accept her evidence on this point.

Ms. Zhou suggested in her evidence that her animals became infected by the way that they were dealt with by the SPCA. She offered no evidence to support her claim. The evidence of Dr. Walton on this point was that it would take a week or 10 days for them to become infected. He said that all of the

animals were tested within 48 hours of being seized and the ones that tested positive could not have acquired the disease at the SPCA in that time period. He added that most of the cats that tested positive also showed clinical signs of being infected. I reject her evidence on this point.

[274] As stated above, these are but some examples of the difficulties I had with her evidence. In applying the test in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.), I do not believe her evidence and I am not left in a reasonable doubt by it. Turning to the third stage of the *W.(D.)* test, as it applies to this case, I must now consider whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt that she did cause or permit an animal or animals that she was responsible for to be in distress or to continue to be in distress.

[Emphasis added.]

[32] The trial judge went on to conclude that he was satisfied, beyond a reasonable doubt, that animals under Ms. Zhou's care were in distress. In reaching this conclusion, the trial judge referred specifically to the condition of the animals in the attic, the furnace room, the cat barn, and the dog barn.

[33] With respect to the attic, the trial judge noted the inadequate ventilation, the complete darkness when the SPCA entered, and the bare insulation that was an irritant for the animals. The trial judge found beyond a reasonable doubt that the animals in this room had no access to food and water, were all deprived of ventilation and light, and were thus in distress as contemplated in the legislation. The judge specifically noted the condition of the cat referred to in evidence as Peter. In addition to the circumstances in which he was found in the attic, this cat was sick, in pain, and suffering, and clearly in need of veterinary care. He was in distress for those reasons.

[34] With regard to the furnace room, the trial judge also found that the cats in this room were in distress because they were deprived of adequate light and ventilation.

[35] With regard to the cat barn, the trial judge found that all of the cats in this building were in distress. They were deprived of adequate ventilation, kept in unsanitary conditions, and deprived of adequate care and veterinary treatment. Many were sick, with discharge coming from their noses and eyes. Some were

coughing and sneezing. The trial judge accepted the evidence of Dr. Gordon that the needs of the cats were not being met with respect to basic hygiene and biosecurity.

[36] With regard to the dog barn, the trial judge found that the dogs in this structure were in distress due to inadequate light and unsanitary conditions.

[37] The trial judge also found beyond a reasonable doubt that Ms. Zhou caused or permitted the animals to be in distress, or continue to be in distress. The judge found on the totality of the evidence that the animals were at the Colebrook Road property for a number of weeks. With the exception of the animals in the attic, all of the other animals in distress were in that state for a period of days or weeks. With respect to the animals in the attic, His Honour found that Ms. Zhou caused them to be in distress by placing them in the attic and permitting them to continue to be in distress for 10 to 15 minutes.

[38] Finally, the trial judge considered and rejected Ms. Zhou's common law due diligence defence, noting at para. 288 of the reasons that due diligence involves "the absence of negligence", and contemplates taking every precaution that a reasonable person would take. The trial judge was not satisfied on a balance of probabilities that Ms. Zhou's conduct met this standard, listing at para. 289 seven particular points in support of this conclusion:

(1) Ms. Zhou's conduct in response to the attendance of the SPCA on 16 February 2016. In particular, Ms. Zhou responded by placing some of the animals in the attic, in lightless, inadequately ventilated conditions, exposing them to bare insulation. In doing so, Ms. Zhou did not properly secure the sickest cat, Peter, who was already extremely sick and highly infectious or contagious.

(2) The generally unsanitary conditions in the cat barn and the dog barn, and the failure to properly segregate sick animals from healthy ones.

(3) Ms. Zhou's neglect in failing to inform and train herself regarding the proper care of animals.

(4) Ms. Zhou's conduct in spending "a great deal of money" on renovations without properly informing herself as to the kind of materials suitable for sanitary housing of animals.

(5) Ms. Zhou's failure to recognize when animals should be seen by a vet. On this point, the trial judge accepted that Ms. Zhou took animals to Dr. Brar on a regular basis for preventative care and treatment. However, given the number of animals under Ms. Zhou's charge, simply pointing to the number of vet visits was not sufficient to establish due diligence. The "vast majority" of the animals at her property were sick, yet Ms. Zhou maintained that only a few were ill. Notwithstanding her prior history with the SPCA, Ms. Zhou did not take adequate steps to inform herself about when an animal should be taken to the vet, in circumstances where a reasonable person would have done so.

(6) Ms. Zhou had "far more animals in her care that she could properly care for". A reasonable person would have reduced the number of animals under his or her care or would have hired enough staff to assist in the care of the animals.

(7) With respect to Peter the cat, this animal was "critically ill" on 16 February 2016. It would have been apparent to a reasonable person that this cat was in "immediate need of veterinary care". The trial judge accepted Dr. Walton's evidence as to why the cat had to be euthanized. His Honour rejected Ms. Zhou's testimony that Dr. Brar examined this cat on 31 January 2016 and it was in "worse condition on that date". In the trial judge's view, a reasonable person would have had this cat examined by a vet on and prior to 16 February 2016.

The Ineffective Assistance of Counsel Allegations and the Fresh Evidence

[39] Ms. Zhou raises a single ground of appeal from conviction, namely an alleged miscarriage of justice based on ineffective assistance of her trial counsel, Mr. Shen. The allegation of ineffective assistance of counsel was framed in a number of ways

in Ms. Zhou's factum, her supporting affidavit, and her counsel's oral submissions at the hearing of the appeal. The central complaint is an allegation that her trial counsel failed to obtain, thoroughly and critically review, and use certain veterinary records at trial. She further asserts that trial counsel failed to properly prepare for and conduct the cross-examination of a key Crown witness, and the examination of Ms. Zhou herself. Ms. Zhou argues that these failures prejudiced her defence because they impacted on the trial judge's assessment of her credibility as a witness, and the judge's conclusion that she was not duly diligent in taking reasonable steps to ensure that the animals under her care were not in distress.

[40] In support of her ineffective assistance of counsel allegations, Ms. Zhou has tendered fresh evidence in the form of: (i) Ms. Zhou's own affidavit, sworn 24 September 2020; (ii) a single document attached to an earlier affidavit from Ms. Zhou, the significance of which is explained below; and (iii) an affidavit from Dr. Brar, sworn on 18 June 2021. In response to Ms. Zhou's fresh evidence, the Crown tendered an affidavit from trial counsel, Mr. Shen, sworn 8 January 2021.

[41] Fresh evidence tendered on a summary conviction appeal is governed by the combined operation of s. 822(1) and s. 683(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*]. Normally, the admissibility of fresh evidence on appeal is determined under the four-part analysis set out in *The Queen v. Palmer*, [1980] 1 S.C.R. 759. However, where the fresh evidence goes to the integrity of the trial process rather than to issues of guilt or innocence on the merits of the case, a different approach is taken. An allegation of ineffective assistance of counsel is an example of an issue going to the integrity of the trial process. In such cases, fresh evidence may be admitted on appeal for the limited purpose of assessing the appellant's complaint about the integrity of the process, provided that: (i) it complies with the rules of evidence, (ii) it is relevant to the issue raised on appeal, and (iii) it is credible: *R. v. Ball*, 2019 BCCA 32 [*Ball*] at paras. 103-104, applying *R. v. Aulakh*, 2012 BCCA 340 [*Aulakh*] at paras. 59, 64.

[42] With the exception of some self-serving hearsay statements of Ms. Zhou that are contained within the clinical records, the balance of the material tendered on appeal complies with the rules of evidence. All of the fresh evidence is also relevant to an issue raised on appeal, namely the issue of whether Ms. Zhou was denied effective assistance of counsel at trial. The only remaining consideration is credibility. There are conflicts in the affidavit evidence of the appellant Ms. Zhou and her trial counsel Mr. Shen. In these circumstances, I would admit the fresh evidence for the limited purpose of assessing the integrity of the trial process, with the unresolved issues about credibility to be dealt with as a matter of weight.

General Credibility and Reliability Concerns

[43] Rather than reviewing the evidence of Ms. Zhou, Dr. Brar, and trial counsel Mr. Shen serially, it makes more sense to integrate and summarize all of the evidence adduced on appeal under various topical sub-headings. However, before addressing the particular allegations raised by Ms. Zhou, it is necessary to make some general comments about the credibility and reliability of the fresh evidence.

[44] The Crown opted not to cross-examine Ms. Zhou on her affidavit, but reserved the right to argue that her affidavit evidence was not credible when assessed against the evidence as a whole. I have some concerns about the reliability of some of Ms. Zhou's allegations based on her apparent lack of understanding of the disclosure process, and an apparent inclination to characterize her trial counsel's conduct based on her subjective perceptions of his lack of professionalism. For example, when Ms. Zhou says that Mr. Shen refused to take documents from her, I find that this is an oversimplification of what happened based on Ms. Zhou's lack of understanding of the disclosure process. In fact, I find that Mr. Shen took reasonable steps to satisfy himself that the documents Ms. Zhou presented to him were duplicative of the documents contained within the Crown disclosure. Some of Ms. Zhou's other allegations against trial counsel appear to be colored by a similar subjective perception of his lack of professionalism.

[45] I also have concerns about the credibility of Ms. Zhou's repeated assertion that she did everything her veterinarian, Dr. Brar, told her to do to care for the animals under her control. There is good reason to question the veracity of this assertion based on the content of the clinical records within the appeal record. I should note, however, that while in the context of a strict liability offence the burden at trial would have fallen on Ms. Zhou to prove that assertion on a balance of probabilities, for the purposes of this appeal the question is not whether I believe Ms. Zhou but whether she has shown that there was a miscarriage of justice based on a failure of her trial counsel to effectively assist her.

[46] I turn then to the credibility and reliability of the responding evidence filed by the Crown. Ms. Zhou's trial counsel Mr. Shen was cross-examined at length on his affidavit. On the first date of the hearing Mr. Shen did not have his trial file with him, so the cross-examination was extremely stilted and unhelpful, and the matter had to be adjourned. (To be fair to Mr. Shen, Ms. Zhou's appellate counsel had not requested the file in advance of the hearing).

[47] When the hearing continued, Mr. Shen was at first exceptionally careful in answering questions, not volunteering any more information than necessary to respond to the particular questions put to him. There is nothing wrong or in any way dishonest about this, but I find that it did result in a fair bit of what I would call "jousting" between appellate counsel and Mr. Shen.

[48] Mr. Shen was thoroughly cross-examined on the extent of his notes and his note-taking practices. I was left with a fair bit of confusion regarding Mr. Shen's note-taking practices, but in the end I find nothing really turns on this. Counsel prepare their cases in different ways. Some lawyers make extensive notes of their trial preparations and others do not. Of course, the purpose of making such notes is not to prove what counsel did or did not do in preparing for trial, but rather to assist counsel in his or her preparations, and in remembering important details later. There is certainly no suggestion in this case that Mr. Shen failed to properly document essential instructions from Ms. Zhou.

[49] One area of concern arising from the cross-examination of Mr. Shen had to do with the assertion at para. 6 of his affidavit that “[a]t the final moment, and despite having given me instructions to pursue a plea agreement, Ms. Zhou changed her instructions such that a trial was necessary”. This assertion does not fit with the notes and records in Mr. Shen’s file. Mr. Shen agreed in cross-examination that he had a discussion with Ms. Zhou about a possible plea at or around the time of arraignment, at which time Ms. Zhou was not amenable to a guilty plea. Thus, when the trial date was fixed – about one year before the trial itself – Mr. Shen had clear instructions to proceed to trial. The issue of a plea resolution did not come up again until the Crown raised it on 18 April 2018, five days before trial. Mr. Shen discussed it with Ms. Zhou the next day, but she was not prepared to plead guilty. In cross-examination, Mr. Shen agreed that this was an accurate summary of the timeline. All of this is difficult to square with the assertion at para. 6 of Mr. Shen’s affidavit. The clear thrust of Mr. Shen’s affidavit is that, based on instructions from Ms. Zhou, his time and effort leading up to trial was focused more on plea discussions than on running a trial. This is misleading. Mr. Shen’s contemporaneous records are inconsistent with the assertion in his affidavit that Ms. Zhou “changed her instructions such that a trial was necessary”. There was no change in instructions. The most that could be said is that a portion of the final meeting before trial was focused on consideration of a possible plea.

[50] These general observations do not cause me to reject outright the fresh evidence of either the appellant Ms. Zhou or her trial counsel Mr. Shen. They simply highlight the importance of confirmatory or objectively reliable independent evidence, where available, in resolving the conflicts in the affidavit evidence.

Alleged Failure to Advise Ms. Zhou about Challenging the Warrant

[51] There was no challenge to the validity of the SPCA search warrant at trial. In her affidavit, Ms. Zhou avers that her trial counsel never told her that this was an option. In his affidavit, Mr. Shen avers that he does not recall whether he discussed the validity of the search warrant with Ms. Zhou, but he does remember considering the warrant and determining that there was no basis on which to challenge its

validity. In those circumstances, it would not be Mr. Shen's normal practice to discuss a challenge to the validity of the warrant with the client.

[52] There is nothing in the record before me to show that there was a basis in fact or in law for challenging the validity of the SPCA warrant. Neither the warrant nor the information to obtain the warrant are included in the appeal record.

Alleged Failure to Use Dr. Brar's Clinical Records at Trial

[53] Having carefully reviewed the affidavit evidence of Ms. Zhou, Dr. Brar, and Mr. Shen, the net result is as follows. Ms. Zhou originally obtained a collection of records directly from Dr. Brar's office on 2 March 2016, shortly after the SPCA search that led to the charge. When she met with her trial counsel Mr. Shen, Ms. Zhou showed him the records. However, Mr. Shen was aware that Dr. Brar had also sent the records to the SPCA, who in turn had forwarded them to the Crown, who in turn included them in the Crown disclosure provided to the defence. Mr. Shen checked the records Ms. Zhou presented to him against the records included within the Crown disclosure, and concluded that these two sources of records were "largely duplicative". The only exception was that Ms. Zhou's records included copies of receipts for vaccinations for her animals.

[54] While Ms. Zhou asserts in her affidavit that Mr. Shen refused to take the records from her, I do not accept that as a fair characterization of what happened. I note, as pointed out by Mr. Shen in his affidavit, that at one point in her affidavit Ms. Zhou deposes that she gave him "all the documents [she] had", whereas in another part of her affidavit, Ms. Zhou asserts that he refused to take the documents from her. I find that in fact what happened is that Mr. Shen took the documents from Ms. Zhou, compared them to the disclosure, and determined that the two sets of records were "largely duplicative".

[55] Ms. Zhou also complains in her affidavit that she specifically instructed Mr. Shen to obtain copies of the clinical records directly from Dr. Brar's office and that he refused to do so. Again, I do not accept that this is an accurate picture of what actually happened. The objective reality of the situation is that Mr. Shen had

been given good reason to believe Dr. Brar had sent all of his records to the SPCA, the SPCA had sent them to the Crown, and the Crown had disclosed them to the defence. Mr. Shen was also aware that Ms. Zhou had obtained copies of the records directly from Dr. Brar. Mr. Shen compared the two sets of records at his disposal (one set for the Crown disclosure, and the other set from his client) and determined that they were substantially the same. In these circumstances, Mr. Shen concluded that there was no practical utility in contacting Dr. Brar to get another copy of the same records directly from his office. Mr. Shen may not have fully communicated this to Ms. Zhou, or she may not have fully understood it, but I find that this is the gist of what happened.

[56] In her affidavit, Ms. Zhou alleges that Mr. Shen failed to make use of Dr. Brar's clinical records at trial. Ms. Zhou says she gave Mr. Shen "all the documents that I had and I also told him everything that I had done to help the animals in my care". Ms. Zhou wanted Mr. Shen to "ask questions about the veterinary documents and reports", but Mr. Shen said it "wasn't necessary".

[57] In response to the allegation that he failed to effectively use Dr. Brar's clinical records at trial, Mr. Shen explained in his affidavit how he made use of these records. He put the records to Dr. Brar during his testimony, as a means of showing that Ms. Zhou took animals to Dr. Brar's clinic for treatment on a regular basis. As Mr. Shen put it in his affidavit, "I cross-examined Dr. Brar on the records as a whole and the frequency which Ms. Zhou brought animals to him for care". Mr. Shen's affidavit refers to specific passages in the trial transcript where the records were put to Dr. Brar. However, Mr. Shen's overall strategy was to avoid delving too far into the specifics of any particular animal's care, most specifically the euthanized cat, Peter, who was "in particularly bad shape" when the SPCA searched Ms. Zhou's property.

[58] Ms. Zhou raises a number of more specific complaints in her affidavit about the manner in which Mr. Shen dealt with, or failed to deal with, the clinical records relating to Peter the cat.

[59] Ms. Zhou asserts that Mr. Shen failed to elicit evidence that Dr. Brar knew Peter the cat because he treated this animal on multiple occasions. Ms. Zhou avers that Dr. Brar saw Peter the cat at least 10 times prior to the SPCA seizure, that she communicated this to Mr. Shen, and Mr. Shen failed to make use of this information at trial. Ms. Zhou further asserts in her affidavit that when Dr. Brar testified that he was not specifically aware of treating Peter the cat, or not aware of this cat by name, Ms. Zhou raised this issue with Mr. Shen. Ms. Zhou referred to an incident on the fourth day of the trial when she tried to refer Mr. Shen to a particular document showing that Dr. Brar treated a cat specifically identified as Peter, in response to which Mr. Shen said he could not find the document and told Ms. Zhou to stop talking. I note that a number of Dr. Brar's clinical records refer to a 10-year-old cat called "Peter". I will address the significance of that evidence in more detail below.

[60] Mr. Shen's response to the allegation that he failed to make use of the clinical records with respect to Peter the cat is that he considered it "strategically unsound to focus Ms. Zhou's defence on the animal arguably in the worst shape and it served no purpose in light of the number of animals in Ms. Zhou's home". Mr. Shen avers in his affidavit that he has no specific recollection of a conversation with Ms. Zhou about a particular document on the fourth day of trial, but he may well have told Ms. Zhou not to talk to him or distract him during the testimony.

[61] Ms. Zhou also asserts that Mr. Shen failed to elicit evidence that Peter the cat had a genetic pre-disposition which was the cause of much of his illness. Ms. Zhou says the records she provided to Mr. Shen prior to trial verify that Peter the cat was in fact determined to have a genetic pre-disposition, and that Mr. Shen failed to make use of them. Once again, I note that several of the clinical records Mr. Shen had prior to trial showed that Peter the cat was diagnosed with a genetic pre-disposition.

[62] In his affidavit, Mr. Shen explains that it would have been contrary to the overall, agreed-upon defence strategy to focus on any particular animal, most specifically the euthanized cat, Peter. Mr. Shen points out that many of Dr. Brar's

records “predate the search by months”. Moreover, while some parts of the records relating to Peter provided support for Ms. Zhou’s defence, other portions of the records hurt her case. For example, a clinical record dated 4 June 2015 referred to the fact that Peter had a “genetic predisposition” to certain symptoms, but also noted a concern about “multifactorial cause” for the animal’s ailments, including “environmental stress”, “diet”, “viral”, and “bacterial” issues. In a clinical record dated 2 January 2016, Dr. Brar noted that Peter’s condition was not improving, and advised that the “best option is to refer to specialist”, although Dr. Brar left it up to the “owner” to decide.

[63] In cross-examination on his affidavit, Mr. Shen agreed that he had notes from the second or third day of the trial in which Ms. Zhou said something to him about an expert or a report indicating that the “A1 cat”, which from the context I infer to be a reference to Peter, had a genetic defect and that Ms. Zhou had spent money to treat it and it was getting better. At the time of his testimony before me Mr. Shen had no independent recollection of this event but he agreed that his notes made reference to a discussion with Ms. Zhou about some kind of report about a genetic defect. However, as noted above, Mr. Shen’s overriding concern was that while some portions of the records might have advanced Ms. Zhou’s defence, other portions undermined her position. Hence, Mr. Shen’s considered strategy was to allude to Dr. Brar’s records to underscore the frequency with which Ms. Zhou took her animals to the vet, while at the same time trying not to focus on any one record or the particular treatment of any one specific animal, particularly Peter the cat.

Omitted Records

[64] Ms. Zhou further alleges that as a result of Mr. Shen’s failure to obtain records directly from Dr. Brar’s office, counsel did not have a complete copy of Dr. Brar’s clinical records at the time of trial. Ms. Zhou’s affidavit and the string of emails marked as an exhibit to her earlier affidavit indicate that in mid-May of 2018 – after the trial judge’s decision finding Ms. Zhou guilty – Ms. Zhou asked Dr. Brar’s office to “re-forward” the records to her. Dr. Brar’s office subsequently sent the

records to Ms. Zhou again. Dr. Brar's office later located "2-3 more pages" of documents that had not been provided earlier, and forwarded them to Ms. Zhou.

[65] Based on a comparison of the records within his file and the records attached to Ms. Zhou's affidavit, Mr. Shen concluded in his affidavit that there were "three additional records relating to the treatment of Peter" that he had not previously received from either the Crown disclosure or Ms. Zhou, specifically clinical records dated 14 August 2015, 10 October 2015, and 2 January 2016. I will go on to briefly review the contents of each of these three records. I note that I do not have the benefit of any *viva voce* testimony or even affidavit evidence as to the significance or meaning of the entries in the records. However, these records have been identified as clinical records of Dr. Brar's veterinary practice at the Columbia Square Animal Hospital, hence there is a basis for their admission as hospital records under the common law as discussed in *Ares v. Venner*, [1970] S.C.R. 608. At the hearing before me, neither party suggested that the records themselves were inadmissible or unreliable, although the Crown fairly points out that the assertions attributed to the "client", Ms. Zhou, are self-serving out of court statements not admissible for the truth of their contents. Beyond this, there are also limits on the meaning that can be ascribed to certain technical terms set out in the records, a concern which goes to weight and not admissibility. Where a particular entry is ambiguous or too technical to understand, I would not place any weight on that entry.

[66] The first of the three omitted records is a clinical record of a physical examination by Dr. Brar on 14 August 2015. The client is identified as Ms. Zhou and the patient is referred to as Peter, a 10-year-old cat, weight 9.8 pounds. The reason for the visit is indicated to include "diarrhea" for the past two to three days. The record suggests that the client was given two treatment options. The first option included blood work, fecal analysis, radiographs, and intravenous fluids and supportive therapy. The second option was more conservative treatment with drugs. The client chose the second option. The doctor prescribed a drug to be administered every 12 hours as directed for seven days.

[67] The second of the three omitted records is a clinical record of a physical examination by Dr. Brar on 10 October 2015. Again, the client is identified as Ms. Zhou and the patient is Peter, a 10-year-old cat, weight 9.9 pounds. The reason for the visit is indicated as “[m]ild stomatitis / mucositis”. The record includes the reported condition of the animal as indicated by the client, which is hearsay. The doctor recommended prednisone injections to be given once every two months, and the client agreed.

[68] The third of the three omitted records is a clinical record dated 2 January 2016. The client is Ms. Zhou and the patient is Peter. The record refers to a report of “[m]ild caudal stomatitis, mild alvel[a]r mucositis”. The record includes statements from the client which are hearsay. Dr. Brar advised the client to continue with injections “every 2 to 2.5 months as needed.” The significance or added value of this 2 January 2016 omitted record is greatly attenuated by the fact that the previously disclosed records, available to Mr. Shen for use at trial, included a much more detailed “check in report” dated 2 January 2016. This report, described earlier, included notations from Dr. Brar that Peter was “still not improving since last few months”, and advising that the “best option” was to refer this cat to a specialist.

[69] With regard to the overall significance of the three omitted records, Mr. Shen explains in his affidavit that even if he had been aware of these records at trial, he would not have cross-examined Dr. Brar on them. He “viewed cross-examination of Dr. Brar on individual animals and records as an unhelpful area for Ms. Zhou’s defence”. This harkens back to Mr. Shen’s earlier assertions that he considered it strategically unsound to focus Ms. Zhou’s defence on specific animals, particularly Peter the cat, an animal that was in very bad physical condition when the SPCA discovered it.

Alleged Failure to Properly Prepare for Cross-Examination of Dr. Brar

[70] In her affidavit, Ms. Zhou asserts that prior to trial she met with her trial counsel twice for less than half an hour on each occasion. Ms. Zhou told her trial counsel that her practice was to take sick animals to her veterinarian, Dr. Brar.

Ms. Zhou repeats several times in her affidavit that she did everything Dr. Brar told her to do to care for her animals. Dr. Brar was called as a witness for the Crown and cross-examined by her trial counsel. Ms. Zhou wanted her trial counsel to ask Dr. Brar questions about the treatment of her animals.

[71] With regard to his efforts to prepare for trial generally, Mr. Shen disputes the that he only had two meetings with Ms. Zhou for less than 30 minutes each. Mr. Shen says the meeting on 19 April 2018 lasted 90 minutes. Mr. Shen also explains that he “spent many hours on the phone with Ms. Zhou” in advance of the trial.

[72] With regard to his preparation for examination of Dr. Brar specifically, Mr. Shen considered Dr. Brar to be “the most helpful Crown witness for Ms. Zhou’s case” for a variety of reasons, including the fact that he had previously treated Ms. Zhou’s animals. One of his goals in cross-examining Dr. Brar was to elicit evidence regarding Ms. Zhou’s efforts to have the animals treated. Mr. Shen originally asserted in cross-examination that he spoke with Dr. Brar in advance of his trial testimony, but on further cross-examination Mr. Shen conceded that he could not be sure whether he actually did so. Mr. Shen maintained that he was prepared to deal with Dr. Brar’s evidence. His view was that as defence counsel, his job would be to elicit evidence from the witnesses that would be helpful to the defence case. Mr. Shen’s overall view was that Dr. Brar’s evidence would be helpful to the defence position. His approach was to elicit evidence about Ms. Zhou’s efforts to have her animals treated, without focusing on the treatment of any one specific animal.

[73] Mr. Shen explains in his affidavit that he did not feel it would be helpful to focus his examination of Dr. Brar on particular animals because (i) it might draw the judge’s attention to the condition of specific animals, including Peter the cat, who was arguably the animal in the worst condition, and (ii) there were many animals under Ms. Zhou’s care, and to mount a successful due diligence defence, she would have to show that she took reasonable efforts to care for all of them. Mr. Shen also explains that he did not want to challenge or undermine Dr. Brar’s credibility,

because he intended to rely on Dr. Brar's testimony to support Ms. Zhou's position that she made regular efforts to get treatment for her animals when necessary.

[74] Mr. Shen felt that Dr. Brar's evidence would be helpful to the defence, but did not believe it would be the lynchpin of the case. In cross-examination before me, Mr. Shen agreed that he could have tried to interview Dr. Brar in advance of the trial, but Mr. Shen could not recall whether he ever spoke with Dr. Brar in advance of trial. Mr. Shen maintained that his objective at trial was to elicit evidence from Dr. Brar that would be helpful to the defence case, but he would not agree with the suggestion that Dr. Brar's testimony was essential to the defence case.

[75] Ms. Zhou alleges in her affidavit that she told Mr. Shen that at some unspecified time prior to the SPCA search of the Colebrook Road property, Dr. Brar told her that five or six of her cats had ringworm, including Peter. In response to this allegation, Mr. Shen deposes in his affidavit that while he cannot recall whether he turned his mind to this issue at the time, his perusal of Dr. Brar's records do not reflect the extent of ringworm, skin condition, emaciation, or oral lesion that were described by Dr. Walton in his expert report or in photographs taken at the time of Dr. Walton's examination of the "A-1 cat", which is the designation Dr. Walton used for the cat that had to be euthanized.

[76] Ms. Zhou asserts that she told her trial counsel about Dr. Brar giving Peter the cat an injection on 17 January 2016, approximately one month before the SPCA search. Ms. Zhou complains that Mr. Shen never put this assertion to Dr. Brar in cross-examination. In support of this position, Ms. Zhou attaches to her affidavit copies of records showing that Dr. Brar did in fact prescribe injections for Peter the cat on 4 June 2015, 10 October 2015, and 2 January 2016. In response to this particular allegation, Mr. Shen points to another report dated 2 January 2016, referring to Peter the cat, which includes a handwritten entry from Dr. Brar that reads as follows:

R/C in 1 month. Advised referral to a dental specialist. Advised O stomatitis in cats is a complex condition Peter is still not improving since last few months, adv best option is refer to a specialist. Owner to decide.

I note as well that there is no record of an injection or treatment of Peter the cat by Dr. Brar on 17 January 2016. The clinical records tendered before me do not include any reference to Dr. Brar treating Peter the cat after 2 January 2016.

[77] Ms. Zhou avers in her affidavit that she told trial counsel that after visiting the Colebrook Road property in January 2016, Dr. Brar sent a report to the SPCA indicating that her animals were “being well cared for and to a proper standard”. Ms. Zhou complains that Mr. Shen did not cross-examine Dr. Brar on this. In response to this allegation, Mr. Shen deposes in his affidavit that he was in possession of a letter sent to the SPCA by Dr. Brar following his visit to the Colebrook Road property in January of 2016. Mr. Shen deposes that Dr. Brar was examined both in direct examination and in cross-examination with respect to the contents of this letter. At the hearing of the appeal, the Crown conceded that Dr. Brar in fact sent documents to the SPCA regarding the condition of Ms. Zhou’s animals, including Peter the cat, at some point prior to the SPCA search. However, the Crown maintains that these documents were peripheral and did not go to the key issue of the condition of the animals when the SPCA seized them on 16 February 2016.

Alleged Failure to Properly Prepare Ms. Zhou for Her Trial Testimony

[78] As noted above, Ms. Zhou maintains that Mr. Shen only met with her twice, for less than 30 minutes on each occasion, to prepare for the trial. Mr. Shen denies this. In his affidavit, Mr. Shen states that his trial preparations were ongoing. His final meeting with Ms. Zhou on 19 April 2018 lasted some 90 minutes. In addition to this he says he spoke with Ms. Zhou on the phone for “hours” in advance of the trial.

[79] In cross-examination, Mr. Shen agreed that his only notes about a specific meeting with Ms. Zhou to prepare for trial were his notes from 16 April 2018, seven days before the start of the trial. Mr. Shen testified that he did not do all of the trial preparation at one meeting; rather, he prepared the client for trial in a series of meetings over time.

[80] Mr. Shen testified that he made notes of what Ms. Zhou told him on various documents in his file including the Crown disclosure and witness statements. Mr. Shen confirmed that he had handwritten notes on various documents in the Crown disclosure, although he could not say when the notes were made.

[81] To return to the 16 April 2018 meeting, Mr. Shen agreed that it was the last scheduled trial preparation meeting with Ms. Zhou before the start of the trial. The purpose of that meeting was to review the overall strategy of the case, the areas they wanted to focus on and the areas they wanted to avoid. Mr. Shen did not go through the specific questions that he would ask Ms. Zhou during her testimony. Later in the cross-examination, Mr. Shen added that during the 16 April 2018 meeting, Ms. Zhou offered to provide a complete statement of her involvement. Mr. Shen said he does not normally require such a document, but Ms. Zhou offered to provide an outline, and Mr. Shen thought it would be helpful to keep her organized and to review the areas that they should address and areas they should avoid in Ms. Zhou's evidence. (On the whole of Mr. Shen's evidence, it is not clear to me whether Mr. Shen asked Ms. Zhou for a written outline, or alternatively whether Ms. Zhou simply volunteered to provide it.)

[82] Mr. Shen did not have notes of any further meetings with Ms. Zhou until 19 April 2018. The principal purpose of that meeting was to discuss the Crown's plea proposal, and there was only a limited discussion of trial preparation. More specifically, after confirming that Ms. Zhou maintained her innocence and would not plead guilty, Mr. Shen discussed witness availability. Again, there was some discussion about Ms. Zhou providing a "coherent statement" of her evidence. However, in the end Mr. Shen never actually obtained such a document from Ms. Zhou. Mr. Shen agreed that he did not sit down with Ms. Zhou to prepare her direct examination, nor did he review any specific questions and answers with her.

[83] Mr. Shen agreed that it was an expectation that Ms. Zhou would testify at trial and that her evidence would be a "cornerstone" of the defence. Mr. Shen did not regard this as a classic "*W.D.* case", since Ms. Zhou was charged with a strict

liability offence and she had the evidentiary burden of establishing a defence of due diligence. Mr. Shen testified that he was aware of the obligation to put his client's version of events to the Crown witnesses. He agreed that he did not have an actual witness statement from Ms. Zhou. Mr. Shen repeated that the written outline that he had discussed with Ms. Zhou would be helpful, but he did not consider it necessary to do his job. Mr. Shen agreed that he never obtained or put together a "point by point" written summary of Ms. Zhou's anticipated evidence.

[84] In para. 18 of his affidavit, Mr. Shen avers that the "extent of Ms. Zhou's evidence in cross-examination regarding the euthanized cat and the ongoing care of him by Dr. Brar" was "more detailed" than he had anticipated. In his testimony before me, Mr. Shen did not agree that his failure to anticipate "the extent of detail" that came out in Ms. Zhou's cross-examination was a product of his failure to properly prepare Ms. Zhou's testimony. Mr. Shen maintained that he was aware of the facts from his meetings with Ms. Zhou, even though she had never given him a detailed written outline as referred to in their pre-trial meetings of 16 April and 19 April 2018.

Alleged Breach of the Rule in *Browne v. Dunn*

[85] After Ms. Zhou was found guilty, Mr. Shen reflected on the trial judge's comments about Ms. Zhou's position not being put to Dr. Brar, which the trial judge described as a failure to adhere to the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) [*Browne v. Dunn*]. In cross-examination before me, Mr. Shen testified that immediately after Ms. Zhou's testimony he considered whether he should apply to recall Dr. Brar to put the specifics of Ms. Zhou's testimony to him, but decided against it because the risk was greater than the potential benefit. Mr. Shen agreed that he did not speak with Dr. Brar before making this decision. As I understood Mr. Shen's evidence on this point, the gist of his reasoning was that the decision not to put certain details to Dr. Brar was tactical. Among other things, Mr. Shen did not want to draw attention to specific animals because it could undermine the overall defence strategy.

[86] Mr. Shen asserts in his affidavit that, in his view, the risks associated with recalling Dr. Brar to put specifics to him far outweighed the benefits. Mr. Shen explained that there was a risk Dr. Brar might agree that the euthanized cat was in fact Peter, and that Peter should indeed have been euthanized based on his condition at the time of the SPCA search. This would have seriously damaged Ms. Zhou's case. Alternatively, if Dr. Brar agreed that the euthanized cat was Peter and asserted that Peter should not have been euthanized, that would likely have undermined the weight of Dr. Brar's evidence when placed up against the expert evidence of Dr. Walton and the other Crown witnesses as to the condition of Peter the cat at the time of the SPCA search. This in turn would have undermined the defence position that Dr. Brar was a reliable witness whose evidence tended to support to the testimony of Ms. Zhou that she frequently brought animals to his clinic for treatment. In other words, Mr. Shen viewed Dr. Brar as the most helpful Crown witness for the defence case, but Mr. Shen did not want to ask this witness specific questions about the treatment of specific animals, particularly Peter the cat, because this would only serve to underscore weaknesses in the defence case.

Analysis

Legal Principles Governing Claims of Ineffective Assistance of Counsel

[87] An accused who is represented by counsel at trial is entitled to effective legal assistance. A denial of effective assistance of counsel may undermine the reliability of the verdict, or alternatively it may result in an unfair trial. In either case, the result would be a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*: *Aulakh* at para. 41.¹

[88] There are two constituent legal elements to a claim of ineffective assistance of counsel, namely the performance component and the prejudice component. The performance component addresses whether trial counsel's conduct fell below the

¹ This is a summary conviction appeal governed by Part XXVII of the *Criminal Code*. By virtue of s. 822 of the *Criminal Code*, many of the provisions governing indictable appeals – including s. 686 – apply to summary conviction appeals.

standard of professionalism and diligence that could reasonably be expected, allowing for a wide margin of deference toward elements of professional judgment, and being careful not to scrutinize counsel's conduct with perfect hindsight. The prejudice component is concerned with whether the conduct in issue could be said to have negatively affected the result or created some procedural unfairness so as to give rise to a miscarriage of justice: *R. v. G.D.B.*, 2000 SCC 22 [*G.D.B.*] at paras. 26-29. The burden is on the appellant, as the party advancing the claim of ineffective assistance of counsel, to prove both of these components on a balance of probabilities: *Aulakh* at para. 45.

[89] In terms of the order in which the two components of the claim are assessed, Mr. Justice Major explained at para. 29 of *G.D.B.* that “[i]n those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis”. Thus, if the appellate court is satisfied that no prejudice has occurred, it is appropriate to dispose of the matter on that basis, without wading unnecessarily into the realm of grading counsel's performance or professional conduct: *G.D.B.* at para. 29. As Madam Justice Dickson stated in *Ball* at para. 109, “[i]f prejudice is not proven to the requisite standard, the court should typically end the analysis”.

(i) Prejudice Component

[90] To satisfy the prejudice component of the test, the appellant must establish a “reasonable probability” that the alleged ineffective assistance of counsel caused a miscarriage of justice, by impacting upon either the reliability of the verdict, or the fairness of the trial: *Aulakh* at para. 52. In this context, a “reasonable probability” is a probability that is “sufficient to undermine confidence in the outcome”. This is a standard falling “somewhere between a mere possibility and a likelihood”: *Aulakh* at para. 42, citing *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.) at 64.

[91] Turning to the allegations of ineffective assistance of counsel advanced by Ms. Zhou in the case at bar, I will deal firstly with her complaint that Mr. Shen did not advise her of the option of challenging the validity of the search warrant. I have no

difficulty concluding that Ms. Zhou has failed to establish any prejudice to either the reliability of the outcome or the fairness of the trial in connection with the validity of the search warrant. Nothing has been placed before me to show that a challenge to the search warrant would have stood any chance of success.

[92] I turn next to the allegations that Mr. Shen failed to: (i) make proper use of Dr. Brar's clinical records, (ii) properly prepare for the cross-examination of Dr. Brar, (iii) properly prepare Ms. Zhou for her testimony, and (iv) adhere to the rule in *Browne v. Dunn*. Ms. Zhou advanced some of these arguments as separate or discrete points, but I intend to deal with them all at once because in my view they all relate in one way or another to the manner in which Mr. Shen integrated, or failed to integrate, Dr. Brar's clinical records into the defence position.

[93] In assessing the significance of these points, it must be borne in mind that the case against Ms. Zhou was very strong. The objective evidence that a number of the animals under her control were in distress as of the date of the search warrant was very compelling, indeed overwhelming. Against this backdrop, I fail to see how a more detailed reliance on Dr. Brar's clinical records at trial could have had any hope of assisting Ms. Zhou in raising a doubt as to the *actus reus* element of the charge, namely that Ms. Zhou permitted animals under her care to be in distress at the time of the SPCA search on 16 February 2016. Most of Dr. Brar's records related to treatment of animals that took place months before the date of the search. The most recent records were for January of 2016. They were not likely to shed much light on the condition of the animals when the SPCA found them.

[94] With regard to the *mens rea* element, it is common ground that the charge Ms. Zhou was facing was a strict liability offence. As such, the burden was on Ms. Zhou to demonstrate that she took all the precautions a reasonable person would be expected to take to ensure that the animals under her care were not in distress. Again, I fail to see how a more focused use of Dr. Brar's clinical records could realistically have assisted Ms. Zhou in establishing that her conduct met the standard of due diligence. In the circumstances of this case, the mere fact that

Ms. Zhou took animals to a veterinary clinic with some degree of frequency was not enough. Indeed, the trial judge accepted that “Ms. Zhou, on a very regular basis, took animals to Dr. Brar for preventative care and for treatment”, but reasoned at para. 289(5) that “[s]imply pointing to the number of visits made to the vet is not an answer”. I see no reasonable possibility that cross-examining Dr. Brar more pointedly on his clinical records would have altered the trial judge’s conclusion on this point.

[95] Ms. Zhou also says trial counsel’s failure to effectively use the clinical records impacted upon the trial judge’s assessment of her credibility as a witness. Recall that at para. 273 of his reasons the trial judge listed eight “examples”, considered to be “only some of the problems” with Ms. Zhou’s trial testimony. Four of these examples appear to be implicated by Ms. Zhou’s argument about the manner in which trial counsel made use of Dr. Brar’s clinical records. I will address each of them briefly as follows:

- (a) The trial judge’s example #1 related to Ms. Zhou’s assertion that Peter the cat was under the care of Dr. Brar and was “getting better”. The trial judge was critical of the fact that Dr. Brar was not questioned about this cat and he should have been. It is true that Dr. Brar’s clinical records make express reference to his treatment of Peter the cat. I accept that if Dr. Brar had been cross-examined on this, he would almost certainly have agreed that he treated this cat. However, extracting that acknowledgement from Dr. Brar would inevitably have carried with it a high risk of drawing out evidence that was damaging if not fatal to Ms. Zhou’s credibility and to her case at large. In particular, according to Dr. Brar’s clinical records, Peter was not “getting better” when Dr. Brar last saw him on 2 January 2016. This would have undermined Ms. Zhou’s credibility on a key point. Moreover, the clinical records indicate that on 2 January 2016, Dr. Brar recommended that Peter see a specialist to address multifactorial problems. There is no evidence that Ms. Zhou did ever acted on this veterinary advice. If this evidence came

out, it would most likely have been fatal to Ms. Zhou's position that she did everything a reasonable person could be expected to do in caring for this animal.

- (b) The trial judge's example #2 related to Ms. Zhou's testimony that the SPCA was aware of Peter the cat based on reports sent by Dr. Brar. Again, the trial judge was critical about the fact that this was not put directly to Dr. Brar. Mr. Shen contends in his affidavit that he actually elicited evidence that Dr. Brar sent correspondence about his treatment of Ms. Zhou's animals to the SPCA. On appeal, the Crown concedes that Dr. Brar in fact sent records to the SPCA and that those records referenced Peter the cat. The Crown cites *R. v. Trejo*, 2020 BCCA 302 at paras. 57-63 and 91-93 for the proposition that an adverse credibility finding on a peripheral matter of marginal relevance is unlikely, on its own, to satisfy the prejudice component of the ineffective assistance of counsel test. Accepting that Dr. Brar might have been questioned more directly on this point, in my view it is a matter of peripheral importance. The more important and damaging point, emphasized in the latter part of the trial judge's example #2, is that if Ms. Zhou believed that the SPCA was specifically aware of the condition of Peter the cat, then it made no sense for her to hide this animal in the attic, as she admittedly did, in conditions which the trial judge found to be distressing.
- (c) The trial judge's example #3 related to Ms. Zhou's testimony in asserting that the SPCA was only interested in taking away the healthy cats, and that Peter the cat was not seriously ill and not in distress when the SPCA seized it on 16 February 2016. I see no prospect that more detailed cross-examination of Dr. Brar on the clinical records, or any other use of the clinical records at trial, would have altered the trial judge's finding on this point. There was overwhelming evidence that Peter the cat was in distress on 16 February 2016, and I have not been shown anything in Dr. Brar's clinical records that would realistically have

altered the trial judge's conclusion on this point. Further, as the trial judge also noted, Ms. Zhou's assertion that Peter the cat was not seriously ill was inconsistent with her own testimony that she put this cat in the attic because it was old and sick and she thought the SPCA would kill it, and then use Peter's condition as an excuse to take her other cats. More detailed cross-examination of Dr. Brar would not resolve these contradictions within Ms. Zhou's testimony.

- (d) The trial judge's example #6 pertained to Ms. Zhou's assertion that Peter the cat previously had a serious case of ringworm but that after using the medication prescribed by Dr. Brar, this cat no longer had a ringworm condition at all. The trial judge found that this testimony was inconsistent with the evidence of Dr. Walton that when Peter the cat was examined with a diagnostic lamp after its seizure on 16 February 2016, it "glowed like a Christmas tree", to an extent that Dr. Walton had never previously seen in 18 years as a veterinarian. I see nothing in Dr. Brar's clinical records that could have been used to reinforce Ms. Zhou's assertion on this point, or to contradict the objective observations made by Dr. Walton. There is nothing in the records to corroborate Ms. Zhou's assertion that Dr. Brar saw Peter the cat on 17 January or 31 January 2016. If the records are to be relied upon, the last time Dr. Brar treated Peter the cat was on 2 January 2016. Dr. Walton's evidence of this animal's condition upon examination some six weeks later was, frankly, overwhelming.

[96] Dr. Brar's clinical records have no apparent connection to the balance of the problematic aspects of Ms. Zhou's testimony listed as "examples" by the trial judge. Considering the points raised in the preceding paragraph both individually and cumulatively, I see no realistic possibility that making more specific use of the clinical records relating to Peter the cat would have significantly impacted on the trial judge's assessment of Ms. Zhou's credibility. This is because making more pointed use of Dr. Brar's clinical records would inevitably have drawn attention to details that

contracted Ms. Zhou's testimony on key points. Moreover, adopting this approach would have involved reference to records containing details that would in all likelihood have been fatal to the defence position on due diligence.

[97] Ms. Zhou points to the trial judge's observation that certain aspects of Ms. Zhou's testimony were not put to Dr. Brar, which the trial judge considered to offend the rule in *Browne v. Dunn*. Ms. Zhou argues that this was a product of trial counsel's failure to properly prepare for cross-examination of Dr. Brar, and the examination in chief of Ms. Zhou herself. Ms. Zhou says that if her lawyer had properly prepared her for her trial testimony, for example by having her provide a comprehensive written summary of her position, or sitting down with her and developing a bullet list of things to be addressed in her testimony, counsel would have known what Ms. Zhou would say in her testimony, putting him in a position to put these things to Dr. Brar in cross-examination during the Crown's case.

[98] As I understand it, trial counsel's response to this allegation is twofold. First, Mr. Shen denies that he was not prepared to examine the witnesses at trial; the fact that he did not produce or obtain a comprehensive written summary of Ms. Zhou's anticipated evidence does not mean he was unprepared. Second, Mr. Shen says the so-called *Browne v. Dunn* problem arose in this case not because of lack of preparation, but was rather an inherent risk of the overall defence strategy to elicit general evidence about Ms. Zhou's efforts to have the animals treated by a veterinarian, without focusing on the specifics of any particular animal. Mr. Shen was particularly concerned with avoiding any focus on the treatment history for Peter the cat, the sickest of the animals at the time of the SPCA search, who ultimately had to be euthanized.

[99] Whether Mr. Shen properly prepared for the examination of Ms. Zhou or cross-examination of Dr. Brar is a subject falling under the performance component of the ineffective assistance of counsel analysis. Focusing for the time being on the prejudice component, the question is whether the fact that trial counsel did not put certain details to Dr. Brar in cross-examination, which Ms. Zhou later testified about

in her evidence, prejudiced Ms. Zhou's case. In one sense, it did hurt the defence case because the trial judge cited the failure to put certain details to Dr. Brar as a factor weighing against Ms. Zhou's credibility. However, that is not the end of the analysis, but just the starting point. The question is whether there is a reasonable probability that failure to put certain specific details to Dr. Brar in cross-examination somehow impacted on either the reliability of the verdict, or the fairness of the trial process. In my view, it did not, for the reasons that follow.

[100] It is certainly a reasonable possibility that, when shown the records reflecting his treatment of Peter the cat, Dr. Brar would have agreed with the suggestion that he knew that cat by name, and that it was "under his care". However, in my view it is not a reasonable possibility that, if shown the records with respect to his treatment of Peter, he would have agreed with the suggestion that this cat was "getting better". Indeed, the most recent record for Dr. Brar's treatment of Peter was dated 2 January 2016, at which time the doctor noted that this cat's condition had not improved in several months, and that the recommended course of action was to refer it to a specialist. Moreover, it is quite likely that if Dr. Brar had been shown the records for his treatment of Peter the cat, it would have come out that Dr. Brar did not see this cat as recently as Ms. Zhou claimed in her testimony. In this sense, while the failure to put certain specific details in the clinical records to Dr. Brar caused the trial judge to question the credibility of Ms. Zhou's testimony, I find it more likely than not that putting those specific details to Dr. Brar would inevitably have drawn the court's attention to other details that were both harmful to Ms. Zhou's credibility and damaging to her position on the issue of due diligence.

[101] It is also true that the records Dr. Brar sent to the SPCA specifically referenced Peter the cat, a detail which could have been elicited from Dr. Brar during cross-examination. However, getting Dr. Brar to acknowledge his treatment of Peter the cat carried with it the risk that more damaging details of the treatment history would become the focus of inquiry at trial. Moreover, the key point in the trial judge's example #2 with regard to Ms. Zhou's credibility was not that the SPCA had been given records specifically referencing Peter the cat; the key point was that even

though Ms. Zhou claimed to hold a belief that the SPCA was aware of Peter the cat, she still chose to hide this animal in the attic when the SPCA came to search the Colebrook Road property. It was really Ms. Zhou's inconsistent conduct and position, not the failure to put details to Dr. Brar, that was at the heart of the trial judge's finding in this regard.

[102] It cannot be overlooked in the prejudice analysis that the trial judge set out eight specific examples or reasons for questioning Ms. Zhou's credibility, pointing out that these were merely examples and not an exhaustive list of the problems with Ms. Zhou's testimony. Only two of the eight examples involved any reliance whatsoever on *Browne v. Dunn* adverse inference reasoning. I consider it more likely than not that if counsel had put the offending particulars to Dr. Brar, the net effect would have been worse for Ms. Zhou, not better. And even excluding those two specific examples, the trial judge listed six other credibility problems that were completely unaffected by *Browne v. Dunn* reasoning. Thus, if trial counsel had made more extensive use of the clinical records in cross-examining Dr. Brar, I see no realistic possibility on this record that the trial judge would have found Ms. Zhou to be a credible witness. The very clinical records that Ms. Zhou now complains were not properly used by her trial counsel would in all likelihood have further undermined her credibility, rather than bolstering it.

[103] Finally, I must consider the impact of the omitted records. Recall that there were three specific clinical records that Mr. Shen did not have in his possession at the time of the trial. I have described the content of the omitted records in paras. 66 to 68 above. The content of these records is similar to the content of many of the clinical records that Mr. Shen did have at his disposal during the trial. In light of all of the points and concerns identified above, I find no reasonable possibility that counsel's failure to seek out and obtain these three records for use at trial impacted on either the reliability of the verdict, or the fairness of the trial process. I would simply be repeating myself in identifying the various ways in which reliance on these records at trial would have undermined Ms. Zhou's position. Those considerations

far outweigh any potential benefit Ms. Zhou might have realized if counsel had access to and made use of these records at trial.

(ii) Performance Component

[104] Having found that the appellant has failed to satisfy the prejudice component of the analysis, I consider it unhelpful to address the performance component merely as an academic exercise in grading trial counsel's performance. I will simply observe that the spectrum of reasonable professional judgment is broad, and appeal courts accord deference to trial counsel's strategic and tactical decisions: *G.D.B.* at para. 27; *Ball* at para. 108.

Conclusion

[105] I conclude by observing that the trial judge found Ms. Zhou guilty based not only on her failure to prevent distress to Peter the cat, but also on her failure to prevent distress to many other animals under her care. These reasons are focused largely on Peter the cat, because Ms. Zhou's arguments on appeal related more directly to this animal than any of the others. However, the case against Ms. Zhou could fairly be described as overwhelming based upon the sheer number of animals she had under her care, the extent of sickness observed in them at the time of the SPCA search, and the deplorable physical conditions in both the cat barn and the attic. There is nothing in the fresh evidence, or the allegations of ineffective assistance of counsel, that would call into question the soundness of the trial judge's findings on these points.

[106] Despite the forceful submissions of appellate counsel – who has said everything that might fairly be said on Ms. Zhou's behalf – the appellant has failed to show a reasonable probability that the conduct of trial counsel impacted on either the reliability of the verdict, or the fairness of the trial, in a manner that would give rise to a miscarriage of justice. The appeal is dismissed.

“Riley J.”