

In the Court of Appeal of Alberta

Citation: R v TJG, 2026 ABCA 252

Date: 20260727
Docket: 2401-0289A
Registry: Calgary

Between:

His Majesty the King

Respondent

- and -

TJG

Appellant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Identification Ban – See the *Youth Criminal Justice Act*, sections 110(1) and 111(1).

No person shall publish the name of a young person or any other information that may identify a young person as having been dealt with under the *Youth Criminal Justice Act*.

No person shall publish the name of or any other information that may identify a child or young person as having been a victim or witness in connection with an offence committed or alleged to have been committed by a young person.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

The Court:

The Honourable Justice William T. de Wit
The Honourable Justice Jane Fagnan
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Justice R.J. O’Gorman
Convicted on the 8th day of December, 2023
(2023 ABCJ 273, Docket: 210586103Y1)

Memorandum of Judgment

The Court:

Overview

[1] The appellant young person was convicted of sexual assault pursuant to section 271 of the *Criminal Code*, RSC 1985, c C-46. His conviction appeal turns on issues of trial fairness and ineffective assistance of trial counsel, particularly as they relate to the failure of defence counsel to present closing argument on key trial issues.¹ For the reasons that follow, we allow the appeal and order a new trial. Ineffective assistance of trial counsel in closing argument resulted in an unfair trial and a miscarriage of justice.

Factual and Procedural Context

[2] The charge against the appellant arose out of an encounter with another young person. The complainant alleges that after agreeing to meet the appellant for ice cream, the appellant sexually assaulted her in his vehicle. At trial, the Crown called only two witnesses – the complainant and a doctor who examined the complainant following the alleged assault. The appellant also testified. The complainant and the appellant gave differing accounts as to what sexual activity took place between them and whether it was consensual. The facts were clearly in issue, along with the credibility and reliability of the complainant and the appellant. An issue also arose as to the permissible scope of the doctor’s expert evidence.

[3] Following the appellant’s testimony on May 31, 2023, counsel and the court discussed proceeding by written argument with respect to both the expert evidence issue and the “actual elements of the case—like, full argument on conviction versus acquittal”. The case proceeded on the basis that closing argument would be presented in writing only. Defence counsel missed the original deadline for filing the defence argument and apologized to the court. New deadlines were set and defence counsel submitted written argument, but only on the issue of the permissible scope of the expert evidence. The written argument prepared by defence counsel did not cover the factual issues in the trial, credibility and reliability, or the reasons for which the trial judge should have reasonable doubt. The Crown’s written argument addressed all live trial issues.

[4] In the fall of 2023, there were several appearances for the purposes of setting a decision date. On two occasions, defence counsel did not attend personally and did not send an agent,

¹ Counsel for the appellant in this appeal was not trial counsel.

leaving the appellant unrepresented. The appellant did not attend on those occasions because his attendance had been excused.

[5] On December 8, 2023, the trial judge convicted the appellant. He gave oral reasons and then published a written decision: *R v TJG*, 2023 ABCJ 273 [Trial Decision]. After summarizing the evidence of each witness, the trial judge identified the primary issue as “whether the sexual activity was consensual and, if not, whether the young person had an honest but mistaken belief in communicated consent”: Trial Decision at para 66. He reviewed the legal framework for assessing credibility and reliability in a sexual assault trial, noting the conflicting narratives of the appellant and the complainant: Trial Decision at para 71. The trial judge conducted a detailed analysis of the permissible scope of the expert’s evidence. He determined that evidence as to whether injuries suffered by the complainant were more consistent with non-consensual than consensual sexual activity, and whether the injuries were more likely sustained in a non-consensual manner, was outside the doctor’s expertise: Trial Decision at paras 80-91.

[6] By comparison to the analysis of the expert evidence issue, the trial judge’s analysis of credibility, reliability and ultimately, whether the Crown had proved its case beyond a reasonable doubt, was relatively brief: Trial Decision at paras 92-97. The trial judge accepted the complainant’s evidence, rejected the appellant’s evidence on consent and concluded the Crown had proved all essential elements of sexual assault beyond a reasonable doubt.

Fresh Evidence

[7] Both the appellant and the respondent consent to the other proffering fresh evidence on appeal to shed light on the appellant’s arguments about trial unfairness and ineffective assistance of counsel. The appellant swore his own affidavit and the Crown tenders an affidavit from the appellant’s trial counsel. This Court has a broad discretion to admit fresh evidence “in the interest of justice”: *Criminal Code*, s 683(1). It is common to do so in appeals involving allegations of ineffective assistance of counsel: see e.g., *R v Sewak*, 2019 ABCA 303 at paras 19-24; *R v Breitzkreutz*, 2025 ABCA 165 at paras 44-49. In this case, we are satisfied that the new evidence is relevant, reasonably capable of belief, could change the outcome of the appeal if believed and must be admitted in the interests of justice to assist us in determining if a miscarriage of justice occurred.

[8] Trial defence counsel’s evidence is that he intended to present closing argument on not only the expert evidence issue, but also on the merits of the Crown’s case, including issues of fact and credibility. He states “[t]here were definitely live issues with respect to credibility, reliability, weight and the merits of the prosecution’s case.” Trial counsel is unable to explain exactly what happened, surmising that at the time he filed the written argument on the expert issue, he must

have intended to make supplemental argument on other issues but later forgot that this had not occurred. This is why he did not object or ask for a mistrial at the time of the conviction decision. Having now reviewed his file, trial counsel has no record of receiving the Crown's written argument, which he believes would have alerted him to the asymmetry in the written arguments. Trial counsel's evidence is that he "would have never intentionally decided to leave such a critical gap in the court record" and he did not make "a deliberate decision to forego full closing argument." Importantly, the appellant never instructed trial counsel to forego closing argument or limit its scope. Trial counsel avers that it is his practice not to agree to closing submissions in writing only; he wonders if he misheard or misunderstood the discussion about making all submissions in writing.

[9] For his part, the appellant's evidence is that he relied on trial counsel. He understood trial counsel would argue the expert issue, that the complainant should not be believed and that the appellant's evidence raised a reasonable doubt. He never instructed counsel to limit the scope of closing argument. The appellant does not recall receiving any of the written arguments prior to them being provided to him by appellate counsel. He was not aware the written argument made on his behalf was limited to one issue, nor that the Crown presented written argument on all issues. The appellant was not aware that his counsel missed deadlines or failed to appear. When the trial judge convicted him, both the appellant and trial counsel were upset, but trial counsel did not indicate that anything improper may have occurred and did not raise the possibility of a mistrial application.

Analysis

[10] The appellant argues he was denied trial fairness by the trial judge and the Crown, both of whom ought to have realized that defence counsel's written argument was incomplete. In the alternative, he alleges ineffective assistance of counsel. In our view, this case is best viewed through the lens of ineffective assistance of counsel.

[11] Ineffective assistance of counsel can give rise to a miscarriage of justice, engaging section 686(1)(a)(iii) of the *Criminal Code*: *R v GDB*, 2000 SCC 22 at paras 25-29. This Court has adopted a three-part test for assessing arguments of ineffective assistance of trial counsel. The appellant must establish:

- 1) the facts on which the claim of ineffective assistance² is based (the factual component);
- 2) that counsel's representation was ineffective (the performance component); and
- 3) that counsel's ineffective assistance resulted in a miscarriage of justice (the prejudice component).

Breitkreutz at para 4, citing *Sewack* at para 26 and *GDB* at para 26.

[12] In this case, the material facts are established by the fresh evidence and are not in dispute. With respect to the performance component, there is a strong presumption that trial counsel's representation falls within the wide range of reasonable professional assistance: *Breitkreutz* at para 6. Nonetheless, we are satisfied the appellant has met the high bar of demonstrating ineffective assistance in this case. The appellant's trial counsel either actively agreed to proceed by written argument only or left the reasonable impression that he so agreed. He then failed to submit a written argument on the key substantive trial issues. Trial counsel made no attempt to rectify the situation prior to the Trial Decision. This was not a strategy or a tactic. This was a failure of trial counsel to make argument on issues that he believed to be live and on which he intended to make argument, leaving, in his own words, a "critical gap". As a result, trial counsel left the appellant without a champion in the closing argument phase of the trial: *Breitkreutz* at para 99.

[13] In the context of ineffective assistance of trial counsel, miscarriage of justice can take many forms, ranging from procedural unfairness to an unreliable verdict on the merits: *GDB* at para 28; *Breitkreutz* at para 5. In this case, the primary concern is procedural unfairness. The respondent concedes that parties at trial have the right to present argument before judgment is rendered and that failure to provide the opportunity can be a "fatal omission": *R v Graham*, 2007 ABCA 153 at para 12. However, the respondent argues the trial judge provided an opportunity for argument and defence counsel simply made insufficient or incomplete argument, meaning there is no procedural unfairness. We disagree. While the trial judge provided an opportunity for closing argument, the conduct of defence counsel effectively negated that opportunity. The uncontroverted evidence is that the appellant wanted his trial counsel to make full closing argument and trial counsel intended to do so. Yet, through no fault of the appellant, no such argument was made. We highlight that the appellant was tried as a young person pursuant to the *Youth Criminal Justice Act*, SC 2002, c 1, making his reliance on counsel all the more reasonable. To make matters worse, the Crown made written submissions against the appellant on all trial issues. The appellant was left in substantively the same position he would have been in if the trial judge had permitted full closing argument from

² The term "ineffective assistance" has gradually become more common than "incompetence", but the test remains the same.

the Crown but restricted defence counsel to the expert evidence issue. The procedural unfairness to the appellant is no less because it was brought about by the conduct of defence counsel.

[14] The unfairness to the appellant arising from trial counsel's omission is exacerbated by two circumstances. First, the Crown cannot prove it ever served its argument on the appellant's trial counsel and trial counsel has no record of receiving the Crown's written argument. In other words, there is a serious issue about whether the trial judge effectively (though unknowingly) heard argument from the Crown in the absence of the defence. Second, there had been a delay of approximately one year between the complainant's testimony and the appellant's testimony, and a further delay of over six months between the conclusion of the appellant's testimony and the Trial Decision. The risk of prejudice created by the asymmetrical assistance available to the trial judge on issues of fact, credibility and reliability was enhanced in these circumstances.

[15] We are satisfied the appellant suffered actual procedural unfairness, resulting in an unfair trial and a miscarriage of justice. Further, this case also meets the high bar that applies to establishing a miscarriage of justice based on an appearance of unfairness: *R v Kahsai*, 2023 SCC 20 at paras 67-68; *Breitkreutz* at para 56. Allowing the conviction to stand would shake public confidence in the administration of justice and offend the community's sense of fair play and decency. The respondent refers to cases in which the absence of closing argument did not give rise to a miscarriage of justice: *R v Holder*, 2024 NBCA 61 at paras 38-41, leave to appeal to SCC refused, 41250 (26 September 2024); *Kahsai* at paras 21, 72-76. However, the assessment of whether a miscarriage of justice has occurred depends on the facts, and the facts in *Holder* and *Kahsai* are substantially different than those before us. Notably, in *Holder*, trial counsel was of the view that there were no arguments available against conviction, which is not the appellant's case.

[16] The respondent also suggests the appellant is required to demonstrate that but for the ineffective assistance of counsel, the result of the trial would likely have been different. We disagree. Having demonstrated a miscarriage of justice resulting from procedural unfairness, the appellant is not required to demonstrate that the result would have been different.

Disposition

[17] The appeal is allowed and we order a new trial pursuant to sections 686(1)(a)(iii) and 686(2)(b) of the *Criminal Code*.

[18] The appellant must appear at the Court of Justice in Calgary on August 11, 2026 at 9:30 am in Courtroom 303 to schedule the new trial, at which time either party can arrange to speak to pre-trial release if so advised.

[19] Pursuant to section 679(7.1) of the *Criminal Code*, the President of this panel directs that the appellant is granted judicial interim release until the trial court is able to deal with release under section 523(2), unless an application is brought before any single judge of this Court for different direction. If counsel are unable to agree on conditions of the release, they may contact any member of this panel for directions. If the appellant does not sign a new release order within seven days of the release of these reasons, he must surrender himself into custody.

Appeal heard on June 17, 2026

Memorandum filed at Calgary, Alberta
this 27th day of July, 2026

de Wit J.A.

Authorized to sign for: Fagnan J.A.

Grosse J.A.

Appearances:

A. Beland
for the Respondent

M.G. Bates, KC
for the Appellant