In the Court of Appeal of Alberta

Citation: R v Grey, 2026 ABCA 349

Date: 20261030
Docket: 2403-0234A;
2503-0048A;
2503-0151A
Registry: Edmonton

Docket: 2403-0234A

Between:

His Majesty the King

Respondent

- and -

Dakota Jackson Grey

Appellant

Docket:2503-0048A

And Between:

His Majesty the King

Respondent

- and –

Nicholas Richard Harris

Appellant

Docket: 2503-0151A

And Between:

His Majesty the King

Respondent

- and **-**

Gokding Ter Gokdieng

Appellant

The Court:

The Honourable Justice Tamara Friesen
The Honourable Justice Joshua B. Hawkes
The Honourable Justice Karan M. Shaner

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Justice L.C. Tchir
Convicted on the 15th day of October, 2024
(Docket: 220787521P1)

Memorandum of Judgment

Introduction

[1] After a joint trial, the appellants and a fourth co-accused were convicted of aggravated assault for a group beating of an inmate in a correctional facility. As a result of the beating, the complainant, who did not testify, suffered a fractured skull and associated intercranial hemorrhage as well as a laceration to his arm. All three appellants argue the trial judge erred in not permitting them to introduce evidence relating to the complainant's prior acts of violence in support of their claim that the four-on-one beating was in self-defence. Mr Grey also argues the trial judge erred in not granting him a stay of proceedings due to unreasonable delay. The appeals are dismissed for the following reasons.

Background

[2] All but the first few seconds of the altercation were captured on CCTV recordings from two different vantage points in a hallway. The recordings show the complainant walking as if to enter one cell before continuing down the hallway and entering a second. There is no recording of what occurred once the complainant entered that cell, but he is forcibly ejected almost immediately by its occupant, Mr MacIntyre, who is not one of the appellants. The three appellants then joined the fray in the hallway, and their violent actions thereafter are completely captured in the video recordings. Those actions include Mr Gokdieng and Mr MacIntyre punching the complainant while he is still standing up; Mr Harris punching him in the back of his head prior to Mr Gokdieng, Mr MacIntyre and Mr Harris dragging him to the ground; and Mr Grey then entering the altercation and stomping and kicking the complainant in the head while he is down. Eventually they leave the complainant laying in the hallway in a pool of blood.

[3] Prior to trial, understanding the complainant would not be testifying, Mr Harris obtained an adjournment order so he could make an application to obtain the complainant's correctional records, as well as other third party records. The trial was then further delayed when the Crown advised it had not yet disclosed further potentially relevant records and information.

[4] Prior to recommencing the trial, Mr Grey, who had not taken any position on the initial adjournment to obtain the complainant's correctional records, applied for relief pursuant to section 11(b) of the *Charter of Rights and Freedoms* asserting that his right to have his trial heard in a reasonable time had been breached. The trial judge dismissed Mr Grey's application and the trial proceeded with all four co-accused participating.

[5] During the Crown's case, in support of their anticipated defence of self-defence, the appellants applied to introduce the complainant's correctional records and other information as

evidence of the complainant's propensity for violence pursuant to the principles and process described in *R v Scopelliti*.[1] They argued the evidence was relevant to determining whether the complainant was the aggressor during the altercation, and whether a reasonable perception of danger existed because of the complainant's actions, considering all the circumstances.

[6] The trial judge denied the *Scopelliti* applications, primarily on the basis that there was no air of reality to the defence of self-defence based on the evidence before the Court at the time the applications were made. She found the recorded video evidence of the beating sufficient to prove the charges of aggravated assault against all four participants.

Grounds of Appeal

[7] The appellants contend the trial judge erred in denying the applications to admit evidence of the complainant's prior acts of violence both known and unknown to the appellants. They assert this error led her to erroneously conclude that the appellants' claims of self-defence had no air of reality and undermined the fairness of the trial.

[8] In addition, Mr Grey contends the trial judge erred in dismissing his application under section 11(b) of the *Charter* for a stay of proceedings due to unreasonable delay. Specifically, he argues the trial judge erred in finding he had implicitly waived 9.5 months of that delay (bringing the total delay below 18 months).

Standards of Review

[9] Decisions regarding the admissibility of evidence are questions of law.[2] The identification of the correct legal test and determination of whether the proffered evidence is relevant are reviewed on a correctness standard. Where the application of the test requires a balancing of other factors such as probative value and prejudicial effect, that balancing exercise is reviewed on a deferential standard.[3] Underlying findings of fact and the exercise of discretion to exclude evidence are shown deference.[4]

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[1] See *R v Scopelliti*, [1981] O.J. No. 3157.

[2] *R v Singh*, 2025 ABCA 164 at para 9.

[3] *R v PE*, 2025 ABCA 272 at paras 17, 29.

[4] *R v Schneider,* 2022 SCC 34 at paras 36-39, 59-62; *R v Demetroff*, 2025 ABCA 373 at para 12; *R v Samaniego,* 2022 SCC 9 at para 148.

[10] Findings of fact in a section 11(b) *Charter* analysis are entitled to deference and can only be set aside if palpable and overriding error is shown. Characterization of periods of delay and the ultimate decision regarding the reasonableness of a period of delay are reviewed for correctness.[5]

The *Scopelliti* Evidence

[11] The primary appeal ground common to all three appellants is the trial judge's refusal to admit the *Scopelliti* evidence. An accused claiming self-defence may seek to admit evidence of the complainant's prior acts of violence. If the accused knew of those acts, that evidence is relevant to show that the accused believed the victim used or threatened the use of force and that the act committed by the accused was reasonable. If the accused did not know about the prior acts, that evidence is relevant to show the probability that the complainant was the aggressor.[6] In *R v JJ*, the Supreme Court of Canada affirmed that admitting such evidence involves an exercise of discretion:

> [159] In addition, if an accused wants to lead evidence of a deceased victim's propensity for violence, they must bring a *Scopelliti* application. A screening procedure for this type of evidence is permitted because it "is likely to arouse feelings of hostility against the [victim]" (*R. v. Scopelliti* (1981), 1981 CanLII 1787 (ON CA), 34 O.R. (2d) 524 (C.A.), at pp. 538-39). As such, "there must inevitably be some element of discretion in the determination whether the proffered evidence has sufficient probative value for the purpose for which it is tendered to justify its admission" (*Scopelliti*, at p. 539).[7]

The admission of such evidence is therefore subject to a threshold requirement of "some other appreciable evidence of the [complainant's] aggression on the occasion in question".[8]

[12] In their applications the appellants argued this threshold requirement was satisfied by the correctional officers' evidence to the effect that uninvited entry into another inmate's cell may be considered an aggressive act. Other circumstances also presented as appreciable evidence of the complainant's aggression included the complainant's presence on a range where he was not an inmate, his request to open the cell door where the altercation began, his ejection from that cell almost immediately by another inmate, and the presence of another injured inmate in that cell. The trial judge disagreed. She characterized the proffered evidence as speculative, in the absence of

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[5] *R v WG*, 2024 ABCA 396 at para 6.

[6] Gerry Ferguson et. al., *Canadian Criminal Jury Instructions* (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) (loose leaf updated 2025) at § 136.21.

[7] *R v JJ*, 2022 SCC 28 at para 159.

[8] *Scopelliti* at para 32.

other evidence, and therefore found it to be insufficient to meet the threshold requirement for admissibility. She maintained that position both in her initial ruling on the *Scopelliti* evidence and in dismissing a subsequent request to reconsider her initial decision.

[13] The respondent correctly notes that the trial judge never made a final determination regarding the admissibility of the *Scopelliti* evidence. Rather, on both occasions she deferred a final ruling and concluded that the requisite threshold had not been established on the evidence to that point in the trial. She also concluded that as the evidence sought to be introduced was relevant to the defence of self-defence, its admissibility could not be fully determined until that defence was advanced.

[14] The trial judge made no identifiable error of principle in determining the applications to introduce *Scopelliti* evidence. In both cases, she correctly identified the threshold for admissibility and carefully considered the proposed evidence within that framework. Neither her factual findings, nor the way she exercised her discretion, disclose reversable error.

The Fairness of the Trial

[15] The appellants each contend that the impugned ruling on the *Scopelliti* evidence undermined the fairness of the trial, and particularly, their right to make an informed decision about whether to testify.

[16] In some cases, an erroneous evidentiary ruling can have such a profound impact on the conduct of the defence or the decision to call evidence that the fairness of the trial is undermined, resulting in a miscarriage of justice. For example, in *R v Lyttle,* the court concluded the erroneous ruling forced the defence to call witnesses which resulted in both procedural and substantive unfairness as he then lost the statutory right to address the jury last.[9] Other cases affirm that to ensure trial fairness, an accused must be informed of certain things, such as whether they will be cross-examined on a criminal record, or whether the Crown is in possession of bad character evidence, before making a decision to put character in issue.[10]

[17] While an accused must know the "case to meet" in making an informed decision as to whether to call evidence, this does not extend to a right to obtain advance rulings regarding possible defences. The Supreme Court in *R v Latimer* emphasized this distinction as follows:

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[9] *R v Lyttle*, 2004 SCC 5 at paras 8-9.

[10] *R v Underwood,* 1998 CanLII 839 (SCC) at paras 5-9; *R v Hutter,* [1993] O.J. No. 2684 at paras 24-26, 1993 CanLII 8478 (ONCA).

> The "case to meet" principle is a component of the accused's constitutional right to make full answer and defence. It means that an accused has the right to know the case he must meet before answering the Crown's case: *R. v. Underwood*, 1998 CanLII 839 (SCC), [1998] 1 S.C.R. 77, at para. 6; R. v. Rose, 1998 CanLII 768 (SCC), [1998] 3 S.C.R. 262, *per* Cory, Iacobucci and Bastarache JJ., at para. 102. The rationale behind this principle is that the accused, before embarking on his defence, should be able to assume that the Crown has called all the evidence it will rely on to establish guilt. Both *Underwood* and *Rose* affirm this principle, but do not require all rulings by the trial judge to take place prior to counsel addressing the jury. *Underwood* and *Rose* deal with the accused person's right to respond to the Crown, not a right to reply to the trial judge. (In *Underwood*, the issue arose in the context of a judge's ruling, but the concern was that the Crown would lead additional evidence — in that case, the accused's criminal record.) As such, there is no broad right to have all rulings on the availability of defences take place prior to closing submissions. The right to respond to the Crown's case is not equivalent to a right to respond to the trial judge's rulings.[11]

[18] Here, the *Scopelliti* evidence was to be put forward in support of the defence of self-defence; it was not evidence in the Crown's case. As such, neither the constitutional principle of knowing the "case to meet" prior to giving evidence nor the principle of trial fairness were undermined.[12] Furthermore, the trial judge provided the appellants with guidance as to the evidence that would be required and the procedures to be followed had the appellants sought to admit *Scopelliti* evidence as part of their case. As a result, we conclude that no miscarriage of justice arose in the circumstances of this case.

The Curative Proviso

[19] Had we found the trial judge erred in not admitting the *Scopelliti* evidence, we would have applied the curative proviso under section 686(1)(b) of the *Criminal Code* and upheld the convictions. An appellate court can uphold a conviction through the curative proviso only where the high standard of an invariable or inevitable conviction is met.[13] The accused benefits from any

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[11] *R v Latimer,* 2001 SCC 1 at para 47.

[12] *Latimer* at paras 47-48.

[13] *R v Van,* 2009 SCC 22 at para 36.

measure of doubt. The underlying question is whether the verdict would be the same if the error had not been committed.[14]

[20] The trial judge concluded there was no air of reality to any of the elements of self-defence based on her careful review of the CCTV recording of the group assault. Her conclusions are summarized as follows:

(a) Mr MacIntyre ejected the complainant two seconds after he entered Mr MacIntyre's cell and continued to attack the complainant in the hallway.

(b) Mr Gokdieng ran down the hallway and joined Mr MacIntyre in striking the complainant after he was ejected from the cell. This was a two on one fight and within six seconds Mr Gokdieng and Mr MacIntyre had the upper hand. Mr MacIntyre then produced a weapon.

(c) Mr Harris then became involved, punching the complainant in the back of the head and bringing him to the ground while Mr MacIntyre stabbed him and Mr Gokdieng kicked him.

(d) Mr Grey became involved while the complainant was on the ground being held down, stabbed, and kicked.

[21] Based on the sequence of events, the trial judge held there was no air of reality to the appellants' claims that they reasonably believed the complainant was using force or the threat of force against them or another person; that their motive for use of force was protective; or that their response was reasonable in the circumstances. There is no error in these conclusions, which are supported abundantly by the evidence, particularly the CCTV video. There is no air of reality to the argument that any of the three appellants were acting in self-defence.

Unreasonable delay

[22] Finally, the appellant Mr Grey argues the trial judge erred in finding his right to trial within a reasonable time was not breached. This argument centers around the trial judge's conclusion that 9.5 months of delay was attributable to the defence.

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[14] *R v Perkins*, 2016 ONCA 588 at paras 28-31.

[23] We find no error in the trial judge's decision. *R v Jacques-Taylor*,[15] released after the trial judge rendered her decision, confirms several important principles directly applicable to this case, including:

(a) the responsibility of all parties to cooperate in ensuring trials are completed within a reasonable time;

(b) the strong policy reasons for joint trials, coupled with an affirmation of the test for when the delay caused by a co-accused may be attributed to other jointly charged individuals; and

(c) that failure to comply with court directions and timelines will result in any consequential delay being attributed to the party at fault.[16]

[24] *Jacques-Taylor* adopts the four-part test set out in *R v Tran*[17] in assessing whether delays resulting from co-accused's conduct may be deducted from the net delay in the trial of an accused:

(a) proceeding jointly must be in the interests of justice;

(b) the delay must arise as a direct result of the joint proceedings;

(c) the exceptional circumstance giving rise to the delay must be either reasonably unforeseen, or reasonably unavoidable; and

(d) the Crown could not have ameliorated the delay stemming from the decision to proceed jointly.[18]

[25] We are satisfied the four-part test is met in this case. All parties agreed that a joint trial was appropriate. The delay arose almost entirely from the joint proceedings. Other aspects of the delay were caused directly by the failure of the defence to take appropriate steps to pursue third party disclosure and were therefore reasonably avoidable. Finally, and in addition to trying to assist by seeking disclosure directly from third parties at defence counsels' request, the Crown repeatedly notified defence counsel that the disclosure the appellants sought was legally in the control of third parties and thus required a court order for production. There were no other steps the Crown could

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[15] *R v Jacques-Taylor,* 2026 SCC 20.

[16] *Jacques-Taylor* at paras 41-43, 47-56, 64-71, 87-91.

[17] *R v Tran,* 2023 ONCA 532.

[18] *Jacques-Taylor* at paras 64-71.

have taken to facilitate disclosure. Certainly, there was nothing the Crown could do to compel the appellants to make the application on a timelier basis.

Conclusion

[26] The appeals are dismissed.

Appeal heard on September 3, 2026

Memorandum filed at Edmonton, Alberta
this 30th day of October, 2026

Friesen J.A.

Hawkes J.A.

Shaner J.A.

Appearances:

K.A. Joyce
for the Respondent

D. Coulson
for the Appellant D.J. Grey

R.J.A. Gregory, KC
H.R. Warren
for the Appellant N.R. Harris

J. Klassen
for the Appellant G.T. Gokdieng