CITATION: R. v. Madden, 2011 ONCA 656
DATE: 20111020
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COURT OF APPEAL FOR ONTARIO

Moldaver, Cronk and Karakatsanis JJ.A.

BETWEEN

Her Majesty The Queen

Respondent

and

Kevin Madden

Appellant

Timothy E. Breen, for the appellant

John McInnes, for the respondent

Heard: September 30, 2011

On appeal from the conviction for first degree murder entered by Justice David McCombs of the Superior Court of Justice, sitting with a jury, dated February 27, 2006.

By The Court:

[1] Following a trial before McCombs J. and a jury, the appellant was convicted of first degree murder in connection with the killing of his brother, Johnathan, and attempted murder in respect of the attempted slaying of his stepfather, Ralston Champagnie. The appellant appeals solely against his conviction for first degree murder.

He raises two grounds of appeal in support of his submission that the conviction should be set aside and a new trial ordered, or alternatively, that a verdict of second degree murder be substituted.

Severance

[2] The appellant submits that the trial judge erred in refusing to sever his trial from the trial of his co-accused, Timothy Ferriman. The appellant sought severance so that he could call Ferriman as a witness once he learned that Ferriman was not going to testify on his own behalf.

[3] In support of his severance motion, the appellant relied on Ferriman's testimony from the first trial of the matter, which ended in a mistrial. According to the appellant, Ferriman's testimony from that trial was necessary to enable him to make full answer and defence, particularly in relation to the issue of planning and deliberation.

[4] At the first trial, Ferriman testified that he had instigated the plan to kill Johnathan's family and that he had done so in order to impress his girlfriend M.W. in an effort to regain her affections. According to Ferriman, he was never serious about the plan and had no intention of carrying it out; nor, in his view, did the appellant or a third co-accused intend to do so. While he and his co-accused may have pretended that they were serious about killing the appellant's family, everyone was acting on the

understanding that the plan was simply a device to assist Ferriman in regaining the affections of M.W.

[5] In the appellant's submission, Ferriman's evidence from the first trial was important because it supported his position that he did not kill Johnathan as a result of a pre-arranged plan. Rather, on his version of the events, he became angry when Johnathan taunted him after coming home from school and he killed Johnathan in a fit of uncontrollable rage. Medical evidence called on the appellant's behalf indicated that he suffered from a disorder known as "Intermittent Explosive Disorder". According to Dr. Bourget, who testified on the appellant's behalf, if the appellant was experiencing the effects of that disorder when he killed Johnathan, he may not have formed the intent necessary to sustain a conviction for murder; nor would he have engaged in the requisite planning and deliberation needed to establish the offence of first degree murder.

[6] Mr. Breen, for the appellant, submits that Ferriman's testimony from the first trial was helpful to the appellant in that it lent support to his position that the pre-homicide discussions were not serious and were never meant to be acted upon. Rather, they were purely coincidental to the actual killing of Johnathan, which, by chance, was carried out in the precise manner that the appellant described in his telephone conversations with M.W.

[7] The trial judge refused to order severance. In his view, having regard to the evidence as a whole, there was no reasonable possibility that Ferriman's evidence could

have affected the verdict in a manner favourable to the appellant. In so concluding, the trial judge properly instructed himself on the governing legal principles. As Mr. Breen points out, however, he erred factually in finding that Ferriman's position about the appellant's conduct was "already squarely before the jury in a manner favourable to [the appellant] through [Ferriman's] hearsay statements". That observation was inaccurate. In an email sent to M.W. after the event, Ferriman claimed that the appellant was the author of the plan to kill the members of his family. That error, however, was attenuated by the trial judge's instruction to the jury that the contents of Ferriman's email could only be used for or against Ferriman and not the appellant.

[8] In the end, despite Mr. Breen's able submissions, we are not persuaded that the trial judge erred in exercising his discretion against ordering severance. In particular, we do not believe it is reasonably possible that the verdict could have been different had the jury heard from Ferriman and been told that it was he, and not the appellant, who instigated the plan to kill the appellant's family.

[9] In this regard, we note that Ferriman's evidence from the first trial that he authored the plan is highly suspect and not in conformity with either the contents of his email to M.W. or his conversation with her in the second telephone call on the day of the killing. That call was tape-recorded. In it, as in his later email to M.W., Ferriman portrayed himself as an accessory to the appellant's plan, not the author of it.

[10] Beyond that, even if Ferriman did author the plan, there was ample evidence to show, at least facially, that the appellant embraced the plan and was eager to follow through with it.

[11] Thus, in our view, regardless of who authored the plan, the real issue for the jury was whether the appellant was simply playing along with Ferriman to assist him in regaining the affections of M.W. or whether he was serious about killing his family upon their return home that day, such that his discussions with his co-accused constituted the planning and deliberation necessary to support a charge of first degree murder. That issue was put squarely before the jury and the jury had all the tools it needed to fully and fairly assess it. In our view, looked at from that perspective, Ferriman's evidence from the first trial would not have assisted the appellant in any appreciable way.

[12] Moreover, although he did not elaborate on the matter, the trial judge observed that even if he had wrongly assessed the value of Ferriman's testimony from the first trial, he would nonetheless have denied the severance motion because there were other cogent matters that outweighed "any potential impairment of the right of ... [the appellant] to make full answer and defence at a joint trial".

[13] No doubt, in so concluding, the trial judge had in mind the hearsay evidence concession that the Crown agreed to make, in contemplation of a joint trial, which very much inured to the appellant's benefit. Without going into detail, suffice it to say that absent that hearsay evidence concession, unless the appellant chose to testify and subject

himself to cross examination, there would have been no evidence upon which to base his defence that he lacked the requisite intent for murder.

[14] Indeed, far from depriving the appellant of his right to make full answer and defence, it was the Crown's concession regarding the hearsay evidence – albeit one made in contemplation of a joint trial – that enabled the appellant to put forward his defence of lack of intent without testifying in his own defence.

[15] For these reasons, we would not give effect to this ground of appeal.

[16] In so concluding, we have not ignored the appellant's further submission that Ferriman could have fleshed out the taunting behaviour attributed to Johnathan that allegedly precipitated the appellant's violent rage.

[17] There was no real debate that Johnathan made comments that their stepfather would be angry when he saw the state of the house and that he [Johnathan] was not going to get into trouble for it. The appellant's statements to his psychiatrists that such comments provoked a great rage were admitted for their truth. Ferriman agreed in cross-examination that the comments were "annoying" and made with a "taunting tone" of voice. However, the issue before the jury was whether the appellant's evidence, considered in the context of the whole of the evidence, including the medical evidence called on his behalf, raised a reasonable doubt regarding the appellant's mental state following Jonathan's "taunts". Given the medical evidence, and the appellant's

statements to the psychiatrists, in our view, Ferriman's evidence that Jonathan's comments were made in a taunting tone of voice could not realistically have affected the verdict.

[18] Moreover, even if Ferriman's evidence on that subject might have been of some assistance to the appellant on the issue of planning and deliberation, the jury would have had to first reject the evidence upon which the Crown relied that the appellant had planned and deliberated the murder of his family in his discussions with his two co-accused prior to Johnathan's return from school. By its verdict, it is obvious that the jury was not left in a state of reasonable doubt on that issue. On this record, that is not surprising. The evidence emanating from the telephone conversations with M.W., along with the evidence of the manner in which Johnathan was killed and of the appellant's attempt to kill his stepfather shortly after he had killed Johnathan, made out a very strong, if not overwhelming, case that the appellant's actions were indeed planned and deliberate. In the circumstances, Ferriman's evidence fleshing out the manner in which Johnathan allegedly taunted the appellant would have added little to the appellant's position.

The Instructions on Hearsay

[19] The trial judge instructed the jury that he had admitted certain hearsay evidence (including the appellant's statements to his psychiatrists) for the truth of its contents "out of fairness to the three accused persons". According to the appellant, in doing so, the trial judge improperly undermined the weight of that evidence in the eyes of the jury.

[20] We disagree. In instructing the jury as he did, the trial judge was merely explaining why a form of evidence that he had told the jury would not normally be available for the truth of its contents was being made available to them for that purpose in the appellant's case. In our view, the trial judge's explanatory remarks were harmless and occasioned no prejudice to the appellant. In particular, the impugned remarks did not in any way telegraph the trial judge's view of the weight that should be given to the hearsay evidence.

[21] We also reject the appellant's submission that the trial judge erred in failing to make it clear that the appellant's statements to his doctors were capable of raising a reasonable doubt on the issues of planning and deliberation, as well as intent, regardless of the jury's assessment of the medical evidence offered on these issues.

[22] While it would have been preferable had the trial judge instructed the jury along the lines suggested by the appellant, his failure to do so was not fatal. In our view, there is no realistic possibility that the jury would have come to a different conclusion had they been told that they could act on the appellant's statements to find a reasonable doubt on the issues of planning and deliberation and intent, regardless of their findings concerning the medical evidence that was called in support of those defences. The appellant's statements and the medical evidence were integrally interwoven and it would have made no difference to the outcome had the instruction, which the appellant now seeks for the first time on appeal, been given to the jury.

Conclusion

[23] In our view, the appellant had a fair trial. The trial judge's decision denying his motion for severance did not impair his ability to make full answer and defence in any realistic sense. The trial judge's instructions to the jury as a whole were a model of fairness and the appellant's conviction for first degree murder is amply supported by the evidence. In sum, we are far from persuaded that any miscarriage of justice occurred in this case.

[24] In the result, the appeal from conviction is dismissed.

Signed: "M.J. Moldaver J.A."

"E.A. Cronk J.A."

"Karakatsanis J.A."

RELEASED: "EAC" OCTOBER 20, 2011