COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Alvarez, 2021 ONCA 851
DATE: 20211130
DOCKET: C68202

Watt, Hoy, and Nordheimer JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Tesean Alvarez

Appellant

Delmar Doucette and Zahra Shariff, for the appellant

Andrew Cappell, for the respondent

Heard: March 22, 2021 by video conference

On appeal from the conviction entered by Justice Jamie K. Trimble of the Superior Court of Justice, sitting with a jury, on August 8, 2019.

Watt J.A.:

[1] Two men in a pickup truck. Driving along a residential street. Each in his fifties. Each white. Brothers.

[2] Two pedestrians. Walking along the same residential street. Both young. And Black.

[3] Some insults. Anti-Black racial epithets. An argument starts. The passenger gets out of the truck. He picks up a baseball bat from the back of the truck. He moves forward. Maybe he puts the bat back. Maybe not.

[4] One of the pedestrians fires four shots. The passenger from the truck was hit. The shooter and his companion leave in a car. Next day, police arrest two men. And they find the gun from which the shots were fired.

[5] A jury found the appellant guilty of aggravated assault and possession of a weapon for a purpose dangerous to the public peace. He appeals his convictions. He says the judge made several mistakes in his charge to the jury. And the jury's verdict is unreasonable.

[6] In these reasons, I explain why I would allow the appeal, set aside the convictions, and order a new trial.

The Background Facts

[7] The central issue at trial was the identity of the shooter. What the jury had to decide was whether the Crown had proven beyond a reasonable doubt that the appellant shot and wounded Tyler Bradley.

[8] For all practical purposes, the case for the Crown consisted of the testimony of Tyler Bradley and his brother, Shane, about the circumstances of the shooting. Some additional circumstantial evidence linked the handgun used in the shooting to premises in which the appellant had stayed the night after the shooting. But, on its own, the trial Crown acknowledged, this additional evidence fell short of the standard of proof required if the jury rejected or had a reasonable doubt about the Bradley brothers' accounts of the shooting.

[9] And so it was that the criminal liability of the appellant fell to be decided on the basis of the jury's assessment of the eyewitness identification evidence given by two *Vetrovec* witnesses. Each contemptuous, to a greater or lesser extent, of the court and its processes. Both, at best indifferent to truth-telling, save as a last resort.

[10] Some background is helpful in understanding the grounds of appeal urged and how I suggest that they be resolved.

The Bradley Brothers

[11] Tyler Bradley lived in a basement apartment at 175 Morton Way, a D-shaped street that meets itself at a T-intersection. When he testified at trial, Tyler Bradley was in custody awaiting trial on unrelated charges. In over three decades, Tyler Bradley had been convicted of 70 criminal offences. Those convictions included 39 for offences of dishonesty and a further 19 for offences against the police or the administration of justice.

[12] Shane Bradley is Tyler Bradley's older brother. Over a period of 37 years, he had been convicted of 25 criminal offences. Eleven convictions involved offences of dishonesty. Three were for offences against the administration of justice. And seven involved offences of violence. When Shane Bradley gave evidence at trial, he was in custody serving a sentence for an unrelated offence.

[13] Both Bradley brothers were drug users, if not addicts. Each was enrolled in a methadone program.

The Relationship of the Parties: The Garage Incident

[14] One or two nights before the shooting, an incident occurred in the garage at 175 Morton Way. Tyler Bradley and Brian Larman lived in the house at that address. Shane Bradley was a frequent visitor.

[15] Tyler Bradley recalled that he and Shane were in the garage. Two Black youths, whom Tyler Bradley identified as “O” and “Rico”, were also there. “O” was Voshaun Grant. “Rico” was the appellant. As usual, Shane Bradley was arguing with both youths. Brian Larman, who lived on the main floor at 175 Morton Way, intervened. He told the youths to leave. They left.

[16] Brian Larman remembered things differently. Tyler Bradley was yelling at a Black youth in the garage. Shane Bradley was not there. Tyler Bradley restrained the youth who was trying to leave the garage. They began to fight. Brian Larman restrained Tyler. He told the youth to leave. The youth ran away. Brian Larman noticed a second person on the street, but had no reason to think this person was connected to the youth fighting with Tyler in the garage.

[17] Brian Larman did not recognize the youth in the garage. He asked Tyler the youth’s name. Tyler explained that the youth was “C’s” younger brother, “Rico”. Mr. Larman had seen Rico previously walking back and forth from 175 Morton Way. Rico, according to Brian Larman, was a “small kid” in his early or mid-teens, maybe five feet tall and about 100 pounds.

[18] Brian Larman testified that Rico had a tattoo on his neck. When interviewed by police shortly after the shooting, Mr. Larman said that he did not notice whether Rico had a tattoo. At trial, he recalled that he had remembered seeing a tattoo on Rico right after he left the police station. In re-examination, after his memory had been refreshed, Mr. Larman further remembered that he had told the police about the tattoo before he left the police station.

[19] An Agreed Statement of Facts (“ASF”) was filed at trial. The parties agreed that Brian Larman remained at the police station for three hours and fifteen minutes following the conclusion of his police interview. During that time, according to Larman, police officers kept coming into the room where he was sitting. They asked him questions. They showed him an array of six – eight photographs on a single page. The officers asked whether Rico’s picture was included in the array. Larman was unable to identify Rico among the photographs.

[20] According to the ASF, the Crown was unable to refute:

i. Larman’s claim that he had been shown an array of photographs; and
ii. if such photographs existed, they have been destroyed or lost.

There was no record of any interaction between the police and Larman after his interview had concluded and before he left the station over three hours later.

[21] Shane Bradley did not give evidence that he had been in the garage when an altercation took place between his brother and Rico one or two days before Tyler was shot.

The Shooting

[22] Late one afternoon in November, the Bradley brothers left 175 Morton Way in a pickup truck. Shane Bradley was driving. Either just before or shortly after they got underway, one of them got into an argument with two young Black men who were on foot. The two young men walked by the truck. They egged the Bradley brothers on. The exchange of words included racial epithets from Shane Bradley. Tyler Bradley got out of the truck. He took a baseball bat from the area behind the cab of the truck. He walked towards the two young men. Accounts differed as to whether he had the bat with him or had already returned it to the back of the truck.

[23] The appellant, known to the Bradleys as Rico, fired four shots. According to the Bradleys, the first two shots struck Tyler in his left hand and arm, the last two in his abdomen.

[24] Investigators recovered three spent .40 calibre cartridge casings and a spent bullet at the scene of the shooting. They found a second spent bullet on the gurney in the ambulance that transported Tyler Bradley to the hospital. The pickup truck received no bullet damage.

After the Shooting Stopped

[25] Tyler Bradly either walked or was assisted back to the passenger side of the pickup truck. Rico dropped the gun. O picked it up. Rico and O headed towards a silver-grey car that was already parked or had just arrived on the street. They left in this vehicle.

[26] Shane Bradley drove back to 175 Morton Way. He called 911. He identified the shooter as Rico, the other man as O. He explained that Tyler had argued with these men. He claimed not to know how Tyler knew his assailants.

[27] The police arrived. They arrested Shane Bradley on an outstanding warrant and took him into custody.

The Arrest of the Appellant

[28] Two police officers were assigned to find the silver-grey vehicle in which the appellant and O had left the area of the shooting. They noticed O in a line up at a Tim Hortons where they had stopped for coffee. They arrested O. They learned from a taxi driver that O had come from 92 Arizona Drive. Police began surveillance of that address.

[29] About 45 minutes later, the appellant walked out of 92 Arizona Drive. He went to the same Tim Hortons where O had been arrested. As he headed back towards 92 Arizona Drive, a marked police cruiser drove by. The appellant ran back to 92 Arizona Drive. He was arrested there within minutes of his arrival.

[30] Police seized the appellant's jacket on arrest. They learned that the appellant was also known as "S.T.". He was 5'5" in height. During a search of the residence, police found none of the appellant's personal effects. However, secreted in a toque behind the cushions of a loveseat in a second floor living room, they found the .40 calibre handgun used to shoot Tyler Bradley. There was no round in the chamber, but 14 rounds in the magazine. No DNA or fingerprints of the appellant were found on the handgun, the magazine or the ammunition inside the magazine.

[31] When arrested, the appellant was wearing a winter jacket. Forensic examiners found two particles of gunshot residue (GSR) on the jacket but none on his jeans. GSR can be transferred from one source to another, including police officers, their equipment, vehicles, and furniture in police stations. The appellant had contact with five armed police officers, the rear seat of a police cruiser, and an interview room at the police station.

The Identification Evidence

[32] The identification of the appellant as the shooter – Rico – rested entirely on the eyewitness testimony of Shane and Tyler Bradley. Their evidence was also the subject of a *Vetrovec* caution. Each gave extensive evidence at trial about the circumstances of their identification of the appellant as the shooter. This included their contact with police after the shooting, the display of photographs, and their demands of police throughout the identification process.

Shane Bradley

[33] In his 911 call, Shane Bradley told the operator that "Rico" shot Tyler Bradley and that "O" was with him.

[34] Shane Bradley was arrested on an outstanding warrant when police arrived to investigate the shooting of his brother. He remained in custody during the course of the investigation. On several occasions, he spoke to police about the circumstances of the shooting and the identity of the shooter. Only some of the interviews were recorded.

[35] In his first statement, recorded within hours of the shooting, Shane Bradley told police that he did not know either the shooter or his companion. He told the interviewer, Cst. Lovell, that if he (Lovell) wanted to know the identity of the shooter (he) Lovell should release him (Shane Bradley) on a promise to appear. He also said, "I don't even know these fucking punks…fuck off, go catch the fucking little n***ers yourself".

[36] Shane Bradley also wanted his prescribed methadone. He demanded to be driven to a pharmacy to obtain his prescription. En route to the pharmacy, police took Shane Bradley by the scene of the shooting. Shane pointed to three houses, 69-71-73 Morton Way. He said that one of the three of them, Jay or Rico, who were brothers, or their friend, Chris, lived there. On the way to the pharmacy, Shane gave Cst. Lovell phone numbers for Jay and the appellant. Subsequent police investigation linked the numbers to 75 Morton Way through taxi dispatches.

[37] Cst. Lovell showed Shane Bradley single photos of both O and Rico, Voshaun Grant and the appellant. This occurred in the cells. Shane Bradley said that the photos were of O and Rico. This exchange was not recorded. Prior to this discussion at the cells, Bradley said that Cst. Lovell had shown him an array of six – eight photographs which included photos of O and Rico. No documentation supports this display of an array. Nor could Bradley's claim of an array be refuted. When Shane Bradley confirmed in a brief recorded statement that the single photographs were of O and Rico, he was released from custody on a promise to appear.

[38] Cst. Lovell knew that best practices required an independent non-investigating officer to show a randomized group of photographs to an eyewitness. Despite his role as the principal investigator, Cst. Lovell showed the single photographs to Shane Bradley. The officer considered the police protocol inapplicable. He was investigating a "recognition" case, not an identification case. Nor did the difference between Larman's description of Rico as a small kid, as short as 4'5", and the appellant's actual age and height, being in his twenties and 5'5", cause Cst. Lovell any concern. He showed the single photographs to Shane Bradley in the cells because Bradley refused to come out of his cell. Cst. Lovell did not make efforts to preserve the video recording of the cell area.

[39] At trial, Shane Bradley testified that the shooter was "just a Black guy" about 5'5" tall. He had a regular build and weighed between 140 and 150 pounds. Shane Bradley "sort of" knew the two men. They looked familiar. He then went on to say that their names were O and Rico. He had met them at different times to buy drugs from them. His testimony varied as to the number of times he had met them. However, despite these many prior meetings, Shane Bradley could not say whether Rico had a tattoo. At both the preliminary inquiry and trial, Shane Bradley identified the appellant as Rico.

Tyler Bradley

[40] Tyler Bradley provided a statement to police three weeks after he had been shot. He refused to have the statement recorded. He told police that he had dealt with O through his brother Shane Bradley. He had seen Rico, but had never dealt with him. O and Rico looked the same. They always had the hoods of their hoodies up. He believed they were brothers. One of them had a tattoo around his face or neck. Both had been in the garage at Brian Larman's house to deal with Shane.

[41] According to Tyler Bradley, the police showed him “a bunch of photos”, possibly when he gave his statement. However, in an ASF filed at trial, no police officer had any recollection, notes, or record that Tyler Bradley had been shown photographs, whether in an array or separately. If there had been any photographs displayed, they had been destroyed or lost.

[42] When he testified at the preliminary inquiry, Tyler Bradley made an in-dock identification of both the appellant and Grant, the only two persons sitting in the prisoner’s box. This was the first time Tyler identified the appellant as the shooter. Tyler denied that his brother’s comment “You fucking put him away, Tyler. He, he done it, you seen him do it. Now you got to put him away” influenced him in any way. Tyler also testified that both O and Rico had guns. This was something Shane had told him even though Tyler himself had not seen O with a gun. From the witness box, Tyler Bradley could see that the appellant had a tattoo on his neck. He testified that Rico had a tattoo on his neck.

[43] Tyler Bradley was a problematic witness at trial. As a result of his antagonistic attitude and the substance of his early testimony, Crown counsel brought an application for leave to cross-examine under section 9(2) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, and later sought admission of his preliminary inquiry testimony under *R. v. B.(K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740.

[44] On the first day of his testimony, Tyler gave evidence that he and his brother encountered two men with dark complexions at the T-intersection of Morton Way. The men, who were of medium size, wore hoodies. He could not tell whether they were Black or South Asian. He believed that his brother had referred to one of them as “Rico” and the other as “O”. He wasn’t sure whether he had ever seen the men among those who came to 175 Morton Way to sell drugs to his brother. He had never spoken with these men.

[45] Initially, Tyler Bradley testified that both men were about 5’8” tall. Then he described the shorter as “maybe a foot shorter” than the other man. He could not provide any identifying features of the shooter, such as facial hair or tattoos. He said he would be lying if he identified the appellant as the shooter. He explained that his brother pressured him to identify the appellant as the shooter at the preliminary inquiry. When asked whether he saw the shooter in the courtroom at trial, Tyler Bradley said that he did not see the shooter there. At one point, he indicated that one of the jurors could have been the shooter.

[46] At this point, the Crown brought an application under s. 9(2) of the *Canada Evidence Act* seeking to cross-examine Tyler Bradley on his preliminary inquiry evidence, in which he identified the appellant as the shooter. During Crown counsel’s cross-examination of Tyler on his testimony at the preliminary inquiry, the witness said that he didn’t know whether the shooter had a tattoo on his neck because he (Tyler) had not been close enough to see that and the shooter had the

hood of his hoodie up. He identified the appellant and Grant as the shooter at the preliminary inquiry because they were the only two persons “in the penalty box”.

[47] The Crown then brought a *B.(K.G.)* application to have Tyler Bradley’s preliminary inquiry testimony admitted. During his testimony in-chief on the *B.(K.G.) voir dire*, Tyler Bradley claimed that he had been subjected to general threats for being a “rat”. As he later clarified, the threats were not connected to the appellant. He also said that he didn’t want to “put a guy away if he didn’t do it”. He said he could not recall whether he knew the person who shot him.

[48] A weekend intervened before Tyler Bradley resumed his testimony on the *B.(K.G.) voir dire*. Tyler Bradley had a change of heart. Some court officers, as well as cell and transfer staff, warned him about the prospects of perjury or obstructing justice charges if he deviated from his testimony at the preliminary inquiry. The officers didn’t want to see him charged. So, he decided to testify in accordance with his testimony at the preliminary inquiry. The parties agreed that the *B.(K.G.)* application should be dismissed. The *voir dire* ended and Tyler Bradley returned to the witness box in the presence of the jury.

[49] On his return to the witness box, Tyler Bradley admitted that he had testified falsely for fear of being labelled a rat. He reiterated that none of the threats he received were connected to the appellant. He explained the information that he had received from the guards and his concern that, if he were charged with perjury or the obstruction of justice, his plan to plead guilty to an outstanding charge for a sentence of time served would be derailed.

[50] Tyler Bradley then testified about his knowledge of Rico, whom he said was the appellant, and O. He had seen both during drug transactions at 175 Morton Way. The number of occasions varied widely as he tried to convey “that I do know the people”. The garage in which the drug transactions took place was small. He saw both Rico and O at close quarters and had also seen them several times on the street.

[51] According to Tyler Bradley, the appellant was a light-skinned Black man about 5’2” or 5’4” tall. He had a tattoo about four or five inches long on the left side of his neck. Tyler Bradley saw the tattoo when he spun around between the second and third shots. Confronted with a front-view photograph of the appellant, with the hood of his hoodie down, Tyler Bradley admitted that the appellant’s tattoo was not visible. Nonetheless, he insisted that he had seen the tattoo at the time of the shooting. He was “100 and fucking 50 percent” sure that the appellant was the shooter.

The Defence Case

[52] The appellant did not testify or call any witnesses in his defence.

The Position of the Parties at Trial

[53] At trial, the Crown relied on the eyewitness identification evidence of the Bradley brothers to establish that the appellant, known to them as Rico, was the shooter. They were familiar with him from their drug purchases in the garage at 175 Morton Way and having seen both Rico and O around the neighbourhood where they lived. Their evidence was confirmed by the testimony of Brian Larman who also noted the tattoo on the appellant's neck. Other evidence tended to link the appellant to the handgun used in the shooting and, through the GSR found on his jacket, to the discharge of a firearm.

[54] In support of its submission that the appellant intended to kill Tyler Bradley, the Crown relied on the evidence of motive arising out of the altercation between the appellant and Tyler Bradley a couple of nights earlier. Bested by Tyler Bradley in the altercation, the appellant sought to get even by shooting him on the street. The appellant and O manoeuvred themselves into an advantageous position. The shots were fired from a matter of feet away and continued, according to Tyler, after the first two shots hit his hand and arm, and the last two the centre mass of his body. The appellant and O then escaped from the shooting ground by summoning a vehicle, already in the area, to execute their getaway.

[55] The position of the appellant was that, initially, the evidence pointed to Voshaun Grant as the shooter. The critical inflection point occurred when Cst. Lovell became involved in the investigation. Cst. Lovell knew that the appellant and Grant were brothers. He formed the view that the appellant was guilty because he was Grant's brother. From that point forward, the investigation was directed to verifying Cst. Lovell's premature conclusion and not to determining the truth.

[56] Defence counsel invited the jury to consider the descriptions of the shooter before Cst. Lovell gave the appellant's picture to Shane Bradley. Prior to that inflection point, Shane Bradley had no motive to frame the appellant whom he didn't even know. Thereafter, the evidence of the Bradley brothers mutated to fit the person they had been told by Cst. Lovell was the shooter – the appellant. The description provided by the Bradley brothers and Brian Larman prior to the inflection point were truthful and more reliable because of their proximity to the shooting itself. And according to those descriptions, the shooter could not have been the appellant.

[57] After the inflection point, the evidence of Shane, and then Tyler Bradley, evolved to fit the police theory that the appellant was the shooter. No records were maintained about interactions between the police and the Bradley brothers and Brian Larman. Police records contain no references to the appellant as "Rico". The initial and subsequent in-dock identifications are worthless. The Bradley brothers are liars and bigots. Their identification of the appellant as the shooter is driven by vengeance – their desire to have a young Black man punished for shooting Tyler Bradley. They could care less that the person they identified was not in fact the shooter.

The Grounds of Appeal

[58] The principal grounds of appeal allege deficiencies in the trial judge's charge to the jury. In the result, the appellant says, the jury was not adequately equipped to make an informed evaluation of the credibility of the principal witnesses and the reliability of their evidence.

[59] The appellant says that the trial judge erred:

i. by failing to adequately instruct the jury on the reliability of the evidence of Shane and Tyler Bradley;
ii. by misdirecting the jury on the evidence that was capable of confirming the testimony of the *Vetrovec* witnesses, Shane and Tyler Bradley;
iii. by failing to instruct the jury in express terms that a single difference between the described and known features of an alleged perpetrator undermines the identification of that person as perpetrator and exonerates or raises a reasonable doubt about his participation; and
iv. by failing to instruct the jury on the frailties of cross-racial identification and racism as a factor to consider in assessing the reliability of the identification evidence.

The final ground of appeal impeaches the reasonableness of the jury's verdict.

Ground #1: Jury Instructions on the Reliability of the Identification Evidence

[60] This ground of appeal alleges several inadequacies in the trial judge's charge on identification evidence, in particular, the reliability of that evidence. The substance of the evidence has been described already. A brief overview of the charge followed by the parties' submissions about its adequacy will provide a suitable framework for the discussion that follows.

The Charge to the Jury

[61] The trial judge provided counsel with drafts of his proposed charge in advance of its delivery. Discussions followed as the trial judge and counsel worked towards a final product that accommodated the parties' concerns and equipped the jury to make an informed decision.

[62] Early in his charge, the trial judge instructed the jury on the assessment of evidence. He introduced the terms "credibility" and "reliability" and explained the meaning of both before schooling the jury on the questions they should ask themselves in assessing the evidence of each and every witness who testified. The trial judge then explained the difference between "inculpatory" and "exculpatory" evidence and illustrated each with several examples drawn principally from the testimony of the Bradley brothers. This distinction had its origins in the closing address of defence counsel.

[63] The trial judge included a modified *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, instruction at the end of his discussion of the inculpatory and exculpatory evidence relating to the identity of the appellant as the shooter. Among other things, this instruction made it clear that even if the jury rejected the exculpatory evidence, they could only find that the appellant shot Tyler Bradley if the rest of the evidence that they accepted proved that fact beyond a reasonable doubt.

[64] The trial judge instructed the jury at considerable length about eyewitness identification evidence. Its inherent frailties. Its link to miscarriages of justice. The difference between its apparent and actual reliability. The applicability of the same principles to recognition evidence, but not to exculpatory evidence. The trial judge included specific instructions about the essential worthlessness of in-court identifications and the impact of flawed identification procedures on the reliability of subsequent identifications.

[65] As he had with his general instructions on the assessment of the evidence, the trial judge instructed the jury to consider a panoply of factors in assessing the eyewitness testimony. The circumstances in which the identification was made. Inconsistencies in the descriptions of the shooter and the events. And any explanation offered for them by the witnesses. The familiarity of the witness with the person identified. The reliability of the witnesses' memories. The circumstances of the identification procedure such as the display of single or an array of photographs including any photographs of the appellant. The influence of others in the descriptions and identification by a particular witness.

The Arguments on Appeal

[66] The appellant says that the key to an informed assessment of the reliability of the eyewitness identification evidence at trial was the process through which the identification was generated and documented. The focus of the instructions should have been directed to the crux moments where the witnesses first identified the appellant as the shooter and what led up to those crux moments. Several gaps are evident in the instructions such that the jury's verdicts cannot stand.

[67] In his first statements, Shane Bradley told police that he did not know who shot his brother. During the next interview, he told the police that the photographs of others shown to him "could be Rico". He looked for clues about what the officer wanted him to say. Shane Bradley spoke about a "qualified memory" of having been shown an array of six – eight photographs that probably included the persons the police suspected of the shooting. Then shown single photographs of the appellant and Grant, for the first time, at this "crux moment", he identified the appellant as Rico. Then Shane Bradley got released on a promise to appear after he had been arrested on an outstanding warrant.

[68] The appellant concedes that the trial judge reviewed *some* aspects of the process through which Shane Bradley's initial "I don't know" the shooter became an identification of the appellant as the assailant. But the judge failed to provide guidance on other aspects of the process when it was essential that he do so. Among the critical omissions were the failure to explain several inherent dangers:

i. showing an eyewitness a single photograph of the suspect;
ii. the absence of any record of what they officer said when he displayed the single photograph; and
iii. the fact that the investigator, not an officer unconnected with the investigation, displayed the single and array of photographs.

[69] Further, the appellant continues, the trial judge's lengthy review of the provenance of the single photographs shown to Shane Bradley was inadequately linked to the failure of Cst. Lovell to follow the protocol of his own police service. The trial judge should have made it plain that, irrespective of the application of the protocol, the reliability of the purported identification was severely compromised.

[70] In connection with Tyler Bradley who first identified the appellant and Grant as each sat "in the penalty box" at the preliminary inquiry, the trial judge failed to expand upon the traditional "in-dock" identification instruction to include a further specific danger. The additional danger left unsaid linked the identification to Shane's advice to Tyler about putting the shooter away, itself a product of a flawed identification based on a single photograph.

[71] The final omission has to do with the absence of any record about the photographs shown to the Bradley brothers and Brian Larman that preceded their identification. The trial judge failed to point out that the parties agreed that the Crown could not refute that, as the witnesses claimed, other photographs were shown prior to the identifications being made. This absence of evidence was of critical importance to an informed assessment of the reliability of the identification witnesses' evidence. It ought to have been brought to the jury's attention.

[72] The respondent accepts that in a prosecution where the case for the Crown depends significantly on eyewitness identification evidence, the trial judge must instruct the jury about the inherent frailties of that evidence. The reasons underlying the need for caution. That faulty identification by honest witnesses have resulted in previous miscarriages of justice where accused persons have been wrongly convicted of crimes they did not in fact commit. That the confidence of witnesses in the correctness of their identifications is no measure of their accuracy. And that these same concerns and cautions apply to recognition evidence which is simply a form of identification evidence.

[73] In addition to these general instructions about the inherent frailties of eyewitness identification evidence and its subset recognition evidence, the respondent acknowledges that a charge to the jury should identify the specific

weaknesses alleged in the evidence adduced at trial. In this way, the decision-maker is informed not only of the inherent frailties of eyewitness identification evidence, but also the specific weaknesses in the evidence they are required to consider in reaching their verdict.

[74] In reviewing the adequacy of the trial judge's instructions, the respondent reminds us, we must keep in mind that trial judges are accorded significant latitude in the manner in which they apprise jurors about the inherent frailties of eyewitness identification evidence and the substance of what they say. These instructions must be examined in the context of the charge as a whole, the evidence adduced at trial, and the positions advanced by the parties.

[75] In this case, the respondent continues, the trial judge carefully and correctly instructed the jury about the frailties of eyewitness identification evidence. He gave a mid-trial instruction during Shane Bradley's evidence and more extensive instructions in his charge. The charge made it clear that the inherent frailties in eyewitness identification evidence applied to recognition evidence, and thus to the testimony of the Bradley brothers at trial.

[76] The respondent says that the trial judge's instructions about the display of photographs to the eyewitnesses adequately canvassed the issue for the jury. He explained the role of the police directive or protocol and told the jury that if they found the directive applicable, failure to follow it, on its own, could cause them to reject Shane Bradley's identification of the appellant as the shooter. In addition, the failure to strictly adhere to the police directive did not undermine the reliability of the identification evidence of a witness who previously knew the person they identified.

[77] According to the respondent, the trial judge was not required to warn the jury that Tyler Bradley's in-court identification of the appellant as the shooter might have been responsive to Shane's exhortation "you got to put him away". This was nothing more than one brother urging another to testify against the person whom Tyler knew had shot him.

[78] Nor was any further caution required in connection with the groups of photos that might have been shown by Cst. Lovell to the Bradley brothers and Brian Larman, but not preserved. The evidence is unclear whether this array of photographs was in fact shown to these witnesses. The uncertainty surrounding these alleged displays provides no basis upon which a warning or caution was required in the charge to the jury. To some extent at least, such an instruction would have been at odds with the defence theory at trial that Cst. Lovell showed Shane Bradley a single photo of the appellant to prompt identification of the appellant as the shooter.

The Governing Principles

[79] The principles that control our conclusion on this ground of appeal spark little controversy between the parties. Typically, their divergence has to do with the result the application of these principles should yield in this case.

Appellate Review of Jury Instructions

[80] The parties in a criminal jury trial are entitled to a properly instructed jury. Their due is not a perfectly instructed jury: *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314, at paras. 2, 32; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 31. The function of jury instructions is to equip the jury as decision-maker to make an informed decision on the evidence adduced at trial. And so it is that, as a reviewing court, we test the adequacy of jury instructions according to their ability to achieve their purpose: *Jacquard*, at para. 32.

[81] In our functional approach to evaluating the adequacy of jury instructions, we consider the charge as a whole in the context of the trial in which the charge was given. The context includes the evidence adduced, the positions advanced by the parties, and a recognition that the charge to the jury is but a part, albeit a critical part, of a criminal jury trial: *Jacquard*, at paras. 14, 20; *Daley*, at paras. 28, 58; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 153, *per* Martin J. (dissenting but not on this point).

[82] Complaints about non-direction amounting to misdirection are equally subject to a functional approach, and a contextual analysis, with a weather eye on the evidence adduced, the positions put forward by the parties, and the circumstances of the case under appeal.

[83] Without more, non-direction is not misdirection. Misdirection occurs when the judge tells the jury something that is wrong, or when the judge tells the jury something that would make wrong what the judge has left the jury to understand: *R. v. Demeter* (1975), 1975 CanLII 685 (ON CA), 25 C.C.C. (2d) 417 (Ont. C.A.), at p. 436, aff'd 1977 CanLII 25 (SCC), [1978] 1 S.C.R. 538; *R. v. B.(P.)*, 2015 ONCA 738, 127 O.R. (3d) 721, at para. 131; *R. v. Luciano*, 2011 ONCA 89, 267 C.C.C. (3d) 16, at para. 70.

[84] Nor is it non-direction, much less non-direction amounting to misdirection, for the judge to fail to tell the jury everything that could be said about a particular subject. But this general rule is not inviolable. It gives way in at least two instances.

[85] Non-direction on the evidence adduced at trial will amount to misdirection where the item of evidence omitted constitutes the sole basis for a defence, justification or excuse advanced at trial: *Demeter*, at p. 437.

[86] Non-direction may also amount to misdirection when the omission leaves the jury inadequately equipped to evaluate important evidence essential to determination of the issues raised at trial. Omissions of this kind cannot be overcome by the singular failure of counsel to object to the non-direction: *R. v. Bailey*, 2016 ONCA 516, 339 C.C.C. (3d) 463, at paras. 56-57.

Jury Instructions on Eyewitness Identification Evidence

[87] Where the case for the Crown consists entirely or substantially of the evidence of eyewitnesses who purport to identify the accused as the perpetrator of the offence charged, the trial judge is required to caution the jury about the well-recognized frailties of eyewitness identification evidence. The instructions should explain the reasons underlying the caution and make it clear that the caution applies to all eyewitnesses who give this evidence, even those whose honesty and integrity is not challenged: *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, at para. 40; *R. v. McFarlane*, 2020 ONCA 548, 393 C.C.C. (3d) 253, at para. 79.

[88] Trial judges are afforded considerable latitude in the language they use in their instructions to the jury on eyewitness identification evidence. They are not required to adhere to any particular word formula: *Hay*, at para. 48; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at para. 52; *McFarlane*, at para. 79.

[89] The specific weaknesses or problems associated with eyewitness identification evidence varies. In each case, the jury instructions should forge a link between the general instructions on the frailties of eyewitness identification evidence and the specific frailties of the evidence adduced at trial: *R. v. Bouvier* (1984), 1984 CanLII 3453 (ON CA), 11 C.C.C. (3d) 257 (Ont. C.A.), at p. 271, aff'd 1985 CanLII 17 (SCC), [1985] 2 S.C.R. 485; *R. v. Brown*, 2007 ONCA 71, 216 C.C.C. (3d) 299, at para. 18; *R. v. Vassel*, 2018 ONCA 721, 365 C.C.C. (3d) 45, at para. 188; *R. v. Lewis*, 2018 ONCA 351, at para. 18.

[90] In general terms, the problem in eyewitness identification cases is an honest but inaccurate identification by a credible and confident witness. In other words, the problem usually resides in the reliability of the witness's evidence, not their credibility. Hence, the need to instruct the jury that the confidence of the witness in the correctness of their identification is no measure of its accuracy: *Hibbert*, at para. 52; *R. v. Jack*, 2013 ONCA 80, 294 C.C.C. (3d) 163, at para. 14; *McFarlane*, at para. 79.

[91] The principles that apply to eyewitness identification evidence also apply to a subset of eyewitness identification evidence, recognition evidence: *R. v. Chafe*, 2019 ONCA 113, 371 C.C.C. (3d) 91, at para. 30; *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at para. 39.

[92] In some cases, as for example where an eyewitness fails to identify a distinctive feature of an alleged perpetrator, or where there is a significant discrepancy between the description provided and the actual features, a trial judge may be required to instruct the jury about the importance of those omissions: *R. v. Huerta*, 2020 ONCA 59, 385 C.C.C. (3d) 481, at paras. 35, 37; *Jack*, at paras. 16, 27; *R. v. Savoury* (2005), 2005 CanLII 25884 (ON CA), 200 C.C.C. (3d) 94 (Ont. C.A.), at para 14.

[93] It is often necessary for the police in their search for the person responsible for a crime to display photographs to those who may be able to pick out the person responsible. But care must be taken in the manner in which any photographs are displayed. There is always the risk, especially with a single photograph, that the witness who has seen the photograph will have impressed upon their memory the face they saw in the photograph, rather than the face they saw when the offence was committed. This may impair the utility of that person as a witness. Equally, it would be improper to inform an identification witness beforehand of the features of an accused by showing that witness a photograph of the accused: *R. v. Goldhar* (1941), 1941 CanLII 311 (ON CA), 76 C.C.C. 270 (Ont. C.A.), at p. 271; *R. v. Smierciak* (1946), 1946 CanLII 331 (ON CA), 87 C.C.C. 175 (Ont. C.A.), at pp. 178-179.

The Principles Applied

[94] As I will explain, I would give effect to this ground of appeal. In my respectful view, the charge to the jury, taken as a whole, failed to adequately equip the jury to deal with the inherent and specific frailties of the identification evidence adduced at trial.

[95] It is uncontroversial that the case for the Crown at trial depended substantially, better said, entirely, on the eyewitness testimony of the Bradley brothers. The trial Crown conceded that if the jury was not satisfied beyond a reasonable doubt on the basis of the evidence of the Bradley brothers that the appellant was the shooter, the balance of the evidence was insufficient to support a conviction. Thus, it became critical that the jury be fully equipped to deal with the inherent frailties and specific weaknesses of this evidence.

[96] For the most part, in eyewitness identification cases, the problem is an honest but allegedly inaccurate identification by a credible and confident witness. Said in different words, the problem with identification evidence is its reliability, not the credibility of the eyewitness who gives that evidence. Thus, the need for instructions about the inherent weaknesses in eyewitness identification evidence lest the jury overvalue its reliability because of the honesty and integrity of the witnesses giving it.

[97] In this case, the sources of the eyewitness testimony were not honest witnesses doing their best to provide reliable testimony about what they saw. Their evidence of claimed recognition was not only subject to the frailties associated with eyewitness testimony, but it was also testimony from witnesses whose credibility attracted a *Vetrovec* caution. They were dishonest, manipulative witnesses with a purpose of their own to serve and a disturbing undercurrent of racism. One of them, Tyler Bradley, admitted having committed perjury in his initial testimony before the jury.

[98] To borrow the language of Miller J.A. in *McFarlane* at para. 80, this atypical eyewitness identification case required a bespoke instruction on the specific frailties of the eyewitness evidence. There were several badges of unreliability of the witnesses' identification of the appellant as the shooter. It was incumbent upon the trial judge to identify these issues and link them to the reliability assessment the jury was required to undertake.

[99] Critical to an informed assessment of the reliability or otherwise of this evidence were instructions about the impact of several flaws in the process through which police generated and then documented the identifications made by the Bradley brothers.

[100] Shane Bradley first told the police that he didn't even know "these fucking punks". But then he proposed a *quid pro quo*: their identity for his release from custody on a promise to appear. His claimed resemblance to the appellant of photos of others that "could be" Rico. His search for clues about what Cst. Lovell wanted him to say. His "qualified memory" of an array of photographs including those of the suspects. An array that was undocumented and unpreserved if it existed. And his identification of a single photograph of the appellant and Grant, followed by his release on a promise to appear.

[101] In a narrative of the evidence, the trial judge did review some aspects of the identification process in connection with Shane Bradley. But the narrative lacked specific instructions on problematic aspects of the process. The inherent danger of Cst. Lovell showing a single photograph of a suspect to an identification witness who claimed he couldn't identify the shooter. The inherent danger created by the absence of any record of the discussions leading to the display of photographs, the single photograph, and Shane Bradley's identification of the appellant as the shooter. The reliability of the photo identification irrespective of the application of the governing police protocol.

[102] A similar narrative was provided in connection with Tyler Bradley who did not identify the appellant as Rico until he saw the appellant and Grant, the only two persons "in the penalty box", at the preliminary inquiry. The initial reliability concerns were exacerbated by the inconsistent and admittedly perjured testimony at trial.

[103] One other aspect of the trial judge's charge to the jury raises concerns about its adequacy.

[104] The trial judge characterized the evidence adduced at trial as being either "inculpatory evidence" or "exculpatory evidence". He explained what he meant by each term. As it seems to me, such a distinction is at once unhelpful and apt to mislead jurors in their deliberative process.

[105] The distinction is unhelpful because individual items of evidence are unlikely to be exclusively inculpatory or exculpatory, and are more likely to be an amalgam

of both. The distinction is apt to mislead because it tends to advocate an item by item evaluation of the evidence rather than an evaluation of the evidence as a whole and an assessment of whether it sustains or falls short of the standard of proof required. In this respect it comes uncomfortably close to violating the injunctions of *R. v. Morin*, 1988 CanLII 8 (SCC), [1988] 2 S.C.R. 345 and *R. v. Miller* (1991), 1991 CanLII 2704 (ON CA), 68 C.C.C. (3d) 517 (Ont. C.A.).

[106] I would give effect to this ground of appeal.

Ground #2: The *Vetrovec* Warning

[107] The second ground of appeal assigns error to one aspect of the *Vetrovec* warning the trial judge included in his charge in connection with the testimony of Shane and Tyler Bradley. The complaint has to do with the evidence the trial judge told the jury they could consider as potentially confirmatory of the testimony of the *Vetrovec* witnesses.

[108] Assessment of the merits of this ground of appeal does not require any further elaboration of the evidence adduced at trial. It is sufficient to recall some aspects of the charge and the arguments advanced about their adequacy.

The Charge to the Jury

[109] Despite the objections of defence counsel (not counsel on appeal), the trial judge included a *Vetrovec* warning about the evidence of Shane and Tyler Bradley in his charge to the jury. He described them as witnesses of unsavoury character because of their criminal records, which included offences of dishonesty and offences against the administration of justice; their motive to ensure the appellant's conviction; and their drug addiction and ongoing drug consumption.

[110] The *Vetrovec* warning included the traditional components. The warning identified the evidence that required special scrutiny and explained why this added scrutiny was required. It cautioned the jury that it was dangerous to convict on unconfirmed evidence of this kind, but that it was open to the jury to do so, provided they were satisfied that the evidence was true. The warning concluded with an instruction that, in determining the veracity of the unsavoury witnesses' accounts, the jury should look for evidence from another source tending to show that the witnesses were telling the truth about the appellant's participation as the shooter.

[111] In his instructions about confirmatory evidence, the trial judge explained that to be confirmatory, evidence must be independent of the unsavoury witness, that is to say, it must come from a witness or witnesses other than the unsavoury witness himself. To be confirmatory, the evidence must also tend to show the unsavoury witness is speaking the truth. The evidence of one unsavoury witness could corroborate that of another, provided the corroborating witness's evidence was trustworthy.

[112] In illustrating the potential confirmatory evidence, the trial judge told the jury that the fact Shane Bradley was also confident about the appellant's identity as the shooter could confirm Tyler Bradley's identification of the appellant as the shooter. No similar instruction was given about Tyler's identification as confirmatory of the identification of the appellant by Shane.

The Arguments on Appeal

[113] The appellant does not concede the appropriateness of a *Vetrovec* instruction concerning the testimony of the Bradley brothers. However, he takes no issue with the basis for or form of the warning, the definition of confirmatory evidence, the availability of mutual confirmation, or the "mixed" witness instruction given later.

[114] The principal complaint the appellant advances relates to the trial judge's illustration of evidence that the jury could find confirmed the identification by each brother of the appellant's identity as the shooter. In particular, the trial judge told the jury that Shane's evidence that he was *confident* that the appellant was the shooter confirmed Tyler's identification of the appellant as the shooter. Tyler's identification did the same for Shane.

[115] The suggestion that the confidence level of each and the correctness of his identification of the appellant as the shooter could constitute confirmatory evidence of the other's identification was at once wrong as a matter of law and at best confusing. It was inconsistent with the instruction that the degree of confidence expressed by an eyewitness about the accuracy of their identification was not evidence of the reliability or accuracy of their observations.

[116] The respondent points out that a trial judge has a well-established discretion whether to include or omit a *Vetrovec* caution about witnesses called by the Crown. On appellate review, the decision of the trial judge, one way or the other, is subject to significant deference. In this case, the decision was well grounded in the evidence adduced at trial. The testimony of the Bradley brothers was central to the proof of guilt. They were witnesses with lengthy criminal records including convictions for offences with a material bearing on their credibility. They were drug users with a motive to fabricate the appellant's involvement and unabashed racists.

[117] The manner in which the trial judge dealt with the confirmatory evidence, the respondent says, caused the appellant no unfairness. Both Tyler and Shane Bradley were confident about the correctness of their identification of the appellant as the shooter. This was an accurate characterization of their evidence. It was not left as an enhancement or makeweight, simply a description of their evidence. The trial judge made it clear in a mid-trial instruction, as well as in final instructions before and after the reference about which the appellant complains, that little connection existed between the great confidence a witness had in the correctness of their identification and the accuracy of that identification. These instructions

were sufficient to eliminate any danger that the jury would rely on the confidence level of each brother in their identification of the appellant as shooter as confirmatory of the reliability of the other brother's evidence.

The Governing Principles

[118] Among the foundational elements of a *Vetrovec* warning is an instruction that, in determining the veracity of the suspect's evidence, the jury should look for evidence from another source tending to show that the untrustworthy witness is telling the truth about the guilt of the accused: *R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 17-19; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 37.

[119] It does not follow from the fact a *Vetrovec* warning is given that the trial judge must in all cases go on to point out in exquisite detail every item of evidence which is capable of confirming the testimony of the tainted witness. The evidence itemized is illustrative, not exhaustive: *R. v. Vetrovec*, 1982 CanLII 20 (SCC), [1982] 1 S.C.R. 811, at p. 832; *R. v. Bevan*, 1993 CanLII 101 (SCC), [1993] 2 S.C.R. 599, at p. 612.

[120] Trial judges are accorded considerable discretion in charging juries on the evidence of unsavoury witnesses. This includes the manner in which they deal with confirmatory evidence: *Vetrovec*, at pp. 823, 831; *Bevan*, at pp. 610-611; *R. v. Ranglin*, 2018 ONCA 1050, 370 C.C.C. (3d) 477, at paras. 32, 46.

[121] Two components are essential to confirmatory evidence.

[122] The first is independence. This defines the kind of evidence that can provide comfort to the trier of fact that the tainted witness is telling the truth. Evidence that is not sufficiently independent of the *Vetrovec* witness, due to its connection to the witness, cannot serve as confirmation of that witness's evidence: *Khela*, at para. 39; *R. v. Spence*, 2018 ONCA 427, 360 C.C.C. (3d) 425, at para. 48, leave to appeal refused, [2019] S.C.C.A. No. 7; *R. v. Magno*, 2015 ONCA 111, 321 C.C.C. (3d) 554, at para. 30, leave to appeal refused, [2015] S.C.C.A. No. 145.

[123] The second, materiality, is somewhat more elusive. To be material, the evidence need not implicate the accused. But, when looked at against the background of the case as a whole, the items of confirmatory evidence should give comfort to the trier of fact that the tainted witness can be trusted when they say that the accused is the person who committed the offence: *Khela*, at paras. 40-42; *Kehler*, at para. 15; *Vetrovec*, at p. 833.

[124] The presence of tainting does not, without more, disqualify a witness's evidence from being confirmatory of another witness. The taint is a factor, to be sure an important factor, to be considered by the trier of fact when assessing whether the evidence of the witness can play any role in restoring the trier of fact's confidence in the veracity of the tainted witness's testimony: *Spence*, at para. 48.

[125] It is not enough that mutually confirmatory *Vetrovec* witnesses are tainted by allegations of collusion to disqualify their evidence from being mutually confirmatory. The evidence they provide that has mutually confirmatory potential must be so tainted by collusion that it lacks independence and thus cannot reasonably be of service as confirmation: *Magno*, at para. 30.

The Principles Applied

[126] I would not give effect to this ground of appeal.

[127] To begin, whether to give a *Vetrovec* warning, as well its content, nature, and extent are all matters that reside within the sound discretion of the trial judge. This decision, absent an error of law or of principle, or a decision that is plainly unreasonable is entitled to significant deference in this court.

[128] In this case, the testimony of Shane and Tyler Bradley, as eyewitnesses to the shooting, occupied a central role in the demonstration of guilt. As the trial Crown conceded, the balance of the evidence could not sustain the standard of proof required if the jury rejected the testimony of the Bradley brothers.

[129] In addition, there was ample reason to be suspicious of the testimony of both Bradley brothers. They had lengthy criminal records. Their convictions included offences of dishonesty and offences against the administration of justice. They had purposes of their own to serve and a motive, which they made little effort to hide, to implicate the appellant as the shooter. Each was either addicted to or a frequent user of drugs. They showed little regard for the investigative process and a casual indifference to the obligation to testify truthfully.

[130] The principal complaint about the trial judge's *Vetrovec* caution relates to his instructions about confirmatory evidence. The instructions properly described the essential qualities required of confirmatory evidence – independence and materiality – as well as the relationship between collusion and independence. However, according to the appellant, the trial judge erred when he said that Tyler Bradley's identification could be confirmed by the fact that "Shane Bradley *also* was *confident* about the identity of the shooter as Mr. Alvarez" (emphasis added).

[131] The reference to "confident" would have been better omitted. The level of confidence a witness expresses in the correctness of their identification is not itself confirmatory evidence. The level of confidence adds no plus value or enhancement to the substance of the evidence. It says nothing about its accuracy. In an eyewitness identification case, such an instruction can work mischief because it is at odds with the instruction given on the same subject in connection with eyewitness testimony. However, in this case, I am satisfied that the appellant suffered no prejudice in light of the repeated instructions that the confidence expressed by the witness was no measure of the accuracy of their observations.

[132] Neither did the trial judge err in saying "[t]he identity of the shooter is *confirmed* by Tyler Bradley *as well*" (emphasis added). This reference occurred in the trial judge's catalogue of evidence that was potentially confirmatory of Shane Bradley's testimony. It is neither more nor less than a recitation of the substance of Shane's evidence. It says nothing of the confidence level of Shane in his identification. It reflects no error.

Ground #3: The Exculpatory Evidence Instruction

[133] This ground of appeal also focuses upon the trial judge's final instructions on eyewitness identification evidence. In particular, the appellant says that the instructions were fatally flawed because they failed to draw the jury's attention to significant discrepancies between the eyewitness testimony and the actual physical appearance of the appellant. These discrepancies tended to exculpate the appellant as the shooter and supported his claim of misidentification. The principal disparities related to the shooter's height and whether he had a tattoo that would have been visible at the time the shots were fired.

The Essential Background

[134] Shane and Tyler Bradley were the only two eyewitnesses to the shooting who testified at trial. Brian Larman did not see the shooting. He did not become involved until Tyler and Shane Bradley returned to 175 Morton Way after the shooting. However, Larman had seen Rico in the garage at 175 Morton Way when Rico and Tyler had an altercation. The evidence of the Bradley brothers was that Rico was the shooter and that Rico was the appellant.

[135] On the first day of his trial testimony, Tyler Bradley testified that Rico was "maybe a foot shorter" than O, the co-accused Grant who absconded during the trial and who was around 5'6" tall. Brian Larman confirmed that Rico was shorter than O. Rico could have been as short as 4'5" or maybe five feet tall.

[136] Tyler Bradley said that he noticed the tattoo on Rico's neck as he (Tyler) turned to face the shooter between the second and third shots fired at him. In his police statement, Brian Larman said Rico had no tattoo. However, his recall changed before he left the police station hours after having completed his statement. Shane Bradley had frequent contact with Rico in drug transactions. He did not notice any tattoo.

The Charge to the Jury

[137] During the pre-charge conference, defence counsel sought an instruction that the difference between the known attributes of the appellant and the described features of the shooter, in particular, height and the presence of a tattoo on the neck, undermined the claimed identification of the appellant as Rico, the shooter. This evidence, defence counsel argued, was exculpatory of the appellant as the shooter and should have been the subject of an express instruction to the jury to that effect. The trial judge gave no such instruction. Instead, he pointed out that

Brian Larman's testimony corroborated Shane and Tyler Bradley's testimony that Rico was the shooter. However, the instruction did not go further and point out that his description of Rico was at odds with the features of the appellant.

[138] Defence counsel also requested an express instruction about the presence of a tattoo on the shooter's neck, a critical feature of Tyler Bradley's description of his shooter. Although the evidence was somewhat unclear about whether Rico, thus the appellant, had such a tattoo, there was evidence from Shane Bradley that Rico did not have a tattoo on his neck. Defence counsel sought an instruction that if the jury concluded or had a reasonable doubt whether Rico had a tattoo on his neck, then they must acquit since the appellant had a tattoo on his neck.

The Arguments on Appeal

[139] The appellant contends that the trial judge erred in failing to instruct the jury in express terms that differences between the known attributes of the appellant, and the described attributes of the shooter, Rico, such as height and the absence of a tattoo, undermined the identification of the appellant as Rico and thus exonerated or raised a reasonable doubt about the appellant as the shooter.

[140] If the jury accepted or had a reasonable doubt that the shooter, Rico, was between 4'5" and five feet tall, as Brian Larman testified and as Tyler Bradley's initial testimony indicated, the appellant, who is 5'5" in height, could not have been the shooter. This was important evidence exculpatory of the appellant and should have been drawn to the jury's attention.

[141] Although the evidence about the tattoo was less clear, there was evidence from Shane Bradley that the shooter did not have a tattoo. In his police statement, Brian Larman said that Rico did not have a tattoo, although Larman claimed that he later realized that Rico did have a tattoo on his neck. Thus, there was evidence that contradicted Tyler Bradley's evidence that the shooter had a tattoo, a characteristic he shared with the appellant. The failure to provide such an instruction was non-direction amounting to misdirection on the critical issue at trial – identity.

[142] The respondent resists the appellant's claims of prejudicial omissions from the charge. The trial judge instructed the jury at length about the exculpatory evidence and its impact on the Crown's burden to establish the appellant's guilt beyond a reasonable doubt. The trial judge divided up the evidence into "inculpatory" and "exculpatory" evidence, defined each category, and explained their impact on proof of guilt. The judge pointed out that to the extent that aspects of the description of the shooter differed from the appellant, those aspects were exculpatory of the appellant. Defence counsel was content with the manner in which this issue was left to the jury. The trial judge was not required to have done more.

[143] Further, the respondent says, the trial judge was not wrong in instructing the jury that Brian Larman's evidence could corroborate the Bradley brothers' identification of the appellant as the shooter. To be sure, Larman's estimate of Rico's height as he observed it during the earlier altercation in the garage with Tyler Bradley did not match the appellant's actual height. But other descriptives provided by Brian Larman did match the appellant, in particular, the tattoo on his neck. In the end, the instruction given was appropriate.

[144] A final point concerns the substance of the evidence of Shane Bradley and the police statement of Brian Larman about the absence of a tattoo on Rico's neck. In each case, the witness did not *notice* a tattoo on the shooter's neck. This is not the same as a positive statement that the shooter did not have a tattoo. And, before he left the police station, Brian Larman remembered that Rico had a tattoo and advised the police of that fact.

The Governing Principles

[145] This ground of appeal has its origins in the decision of the Supreme Court of Canada in *Chartier v. A.G. Québec*, 1979 CanLII 17 (SCC), [1979] 2 S.C.R. 474.

[146] *Chartier* was not a criminal case, much less an appellate review of the adequacy of jury instructions on eyewitness identification evidence. In particular, it did not decide what if anything should be said to a jury about the effect of discrepancies between an eyewitness's description of a suspect's features and the actual features of the suspect.

[147] *Chartier* involved a petition of right against the respondent claiming damages for the injuries resulting from a false arrest and wrongful charge. On appeal, it was alleged that the judge at first instance had misapprehended the evidence of a witness. The judge had mischaracterized the evidence as a positive recognition when in fact the witness had pointed out a feature – hair colour – that differed. Thus, the witness's testimony was of a resemblance, not an identification. In that context, the majority said:

> Regardless of the number of similar characteristics, if there is one dissimilar feature there is no identification.

See, *Chartier* at page 494.

[148] In *R. v. Boucher* (2000), 2000 CanLII 3270 (ON CA), 146 C.C.C. (3d) 52 (Ont. C.A.), the appellant challenged the decision of a judge of the superior court of criminal jurisdiction. The judge refused to quash a committal for trial on counts charging robbery and other offences. The charges arose out of a bank robbery. As against one of the alleged robbers, the case for the Crown depended upon the nexus provided by a pair of tear-away pants worn by one of the robbers and the clothing worn by a person said to be that robber as he ran into a hotel shortly after the robbery. The descriptions of the pants did not match.

[149] This court applied the principles in *Chartier* to hold that the discrepancy meant that there was *no* evidence of an identification, only evidence of a resemblance. In the absence of some other inculpatory evidence, a resemblance is no evidence: *Boucher*, at para. 19. If there was other inculpatory evidence, a trier of fact may have had a good reason for finding the testimony about the robber's pants unreliable. But, in the absence of other inculpatory evidence, the dissimilarity at worst rendered the resemblance of no probative value and possibly stood as an exculpatory feature: *Boucher*, at para. 19. See also, *Jack*, at para. 16.

The Principles Applied

[150] As I will briefly explain, I would give effect to this ground of appeal in part.

[151] This court has previously decided that a notable dissimilarity in identification evidence, absent some other inculpatory evidence, renders the identification evidence of a resemblance of no probative value: *R. v. Bennett* (2003), 2003 CanLII 21292 (ON CA), 67 O.R. (3d) 257, at p. 259. The impact of the dissimilarity varies. Some are of greater significance than others. And the impact must also be assessed in light of the balance of the description and the evidence as a whole. However, no one gainsays that such dissimilarities are of significance for the trier of fact in the evaluation of the reliability of the identification evidence.

[152] In this case, there were significant differences between the height estimates provided by Tyler Bradley and Brian Larman about the shooter – Rico – and the person alleged to be Rico – the appellant. Defence counsel sought an instruction that linked this dissimilarity to the reliability of the identification evidence. No instruction was given. This was an error. This evidence, if accepted, generated a clear dissimilarity in the identification evidence, impacting, in turn, its reliability. And the omission was exacerbated by an instruction that permitted the jury to use Larman's evidence to confirm the identification evidence of Tyler Bradley, a *Vetrovec* witness. This was a further error. While Larman's evidence corroborated Tyler's evidence that the shooter was someone named Rico, it undermined Tyler's evidence that the appellant was Rico insofar as Tyler described Rico as being substantially shorter than the appellant's height. However, unlike in some cases such as *Bennett*, there was other evidence, albeit subject to a *Vetrovec* warning, that the appellant was the shooter. That said, the dissimilarity between the estimated height of the shooter and the actual height of the appellant was of sufficient significance to warrant an instruction to the jury.

[153] The presence of a tattoo on the shooter's neck was an essential feature of Tyler Bradley's identification of Rico as the shooter. And the fact that the appellant has a tattoo on his neck tends to link him with Rico, thus to his involvement as the shooter. Shane Bradley did not notice a tattoo on Rico's neck despite several meetings with him to purchase drugs. And Brian Larman first told police that Rico had no tattoo, but later reversed course while he remained at the police station, hours after concluding his interview there.

[154] It is debatable whether the principles the appellant seeks to invoke about the impact of a notable dissimilarity in appearance – between the alleged shooter and the appellant on the reliability of identification – apply to the tattoo evidence. Unlike the evidence with respect to the shooter's height, where there was evidence that the shooter was substantially shorter than the appellant, there was no affirmative evidence to the effect that the shooter did not have a tattoo. Tyler Bradley said the shooter was Rico. The shooter had a tattoo. Rico is the appellant who also has a tattoo. Brian Larman, after an initial denial later told police Rico had a tattoo. Shane Bradley did not notice a tattoo on Rico. He did not say that Rico did not have a tattoo. Trial counsel did not object to the instruction now said to have been omitted in error. This aspect of the complaint fails.

Ground #4: The Instruction on Cross-Racial Identification

[155] This ground of appeal also fastens upon an omission in the charge to the jury. The evidentiary background upon which the claim of non-direction amounting to misdirection rests are the statements of the Bradley brothers to police. Shane Bradley denied knowing who his brother's assailants were, adding a racial epithet consistent with his proclaimed and palpable anti-Black racism. Tyler Bradley claimed that the two young Black men involved in the shooting "look the same".

The Arguments on Appeal

[156] The appellant contends that the trial judge erred in failing to instruct the jury on the frailties of cross-racial identification. This instruction was necessary because of Shane Bradley's comment in his first recorded police statement "I don't know who the fucking n***ers are". And Tyler Bradley's observation in his police interview that the two young Black men looked "the same". Further, the instruction was necessary because of Shane Bradley's palpable anti-Black racism.

[157] The respondent acknowledges that Shane Bradley repeatedly uttered vile and racist epithets. They began in the argument preceding the shooting. They continued unabated through various police interviews. However odious and hateful these comments were, they did not trigger an obligation to caution jurors about the frailties of cross-racial identification. There was nothing in the evidence adduced to suggest the cross-racial nature of the identification was a source of potential error. Neither witness suggested any difficulty in distinguishing between individual Black people. Trial counsel, with ample opportunity to do so, did not ask for inclusion of such an instruction in the charge.

The Governing Principles

[158] Where cross-racial identification is an issue in a jury trial, it may be appropriate to caution the jury about the difficulties it can present for particular witnesses. The evidence of some witnesses may raise a concern that they are experiencing difficulty with cross-racial identification: *R. v. Richards* (2004), 2004 CanLII 39047 (ON CA), 70 O.R. (3d) 737, at p. 746, citing *R. v.*

McIntosh (1997), 1997 CanLII 3862 (ON CA), 35 O.R. (3d) 97 (Ont. C.A.), at p. 105-106, leave to appeal refused, [1997] S.C.C.A. No. 610.

[159] Where cross-racial identification is an issue, it may be helpful to include an instruction about it in describing these specific features of the identification evidence that may compromise its reliability in the case under consideration: *R. v. Bailey*, 2016 ONCA 516, 339 C.C.C. (3d) 463, at para. 49.

The Principles Applied

[160] In my respectful view, this ground of appeal cannot prevail on the basis on which the claim is advanced.

[161] In support of the submission that the trial judge should have instructed the jury on the potential frailties of cross-racial identification, the appellant points to two comments made by the Bradley brothers in their police statements. The vile racist epithet of Shane Bradley, "I don't know who the fucking n***ers are". And Tyler Bradley's comment that the two young Black men – O and Rico – "look the same".

[162] The jury was well aware of Shane Bradley's overt racism. It began with the racial epithets uttered shortly before the shooting. Equally so, his apparent motive to identify a Black man as his brother's shooter. This was made plain to the jury.

[163] The appellant seeks support for the instruction on the basis of Tyler Bradley's comment in his police statement. But it is important to bear in mind that Tyler said more than the two young Black men – O and Rico – look "the same". The remark was "both look the same, they always have hoodies up, believe they are brothers". O and Rico are, in fact, related.

[164] The central issue at trial was the identity of the shooter. Critical to the determination of that issue was the jury's assessment of the credibility of the Bradley brothers and the reliability of their testimony. Prior to delivery of his final instructions, the trial judge and counsel conducted lengthy pre-charge conferences. Drafts of the instructions proposed for delivery were provided to counsel. Discussions followed. At no time did trial counsel request or complain about the omission of an instruction about the frailties of the cross-racial identification. In these circumstances, I am not satisfied that such an instruction was required or that its omission caused the appellant any prejudice.

Ground #5: Unreasonable Verdict

[165] The final ground of appeal does not involve a complaint about what the trial judge said or failed to say in his final instructions to the jury. The challenge here is to the verdict of guilt rendered by the jury. Each is said to have been unreasonable, unsupported by the evidence adduced at trial.

[166] A repetition of the substance of the evidence adduced at trial is unnecessary to determine this allegation of error.

[167] The central issue at trial was whether the Crown had proven beyond a reasonable doubt that the appellant was the person who shot Tyler Bradley. Proof of this issue depended on the jury's assessment of the evidence of witnesses who identified the appellant as the shooter. There were significant problems with these witnesses and the chameleon-like characteristics of their evidence. Some additional evidence was also adduced, but the trial Crown conceded it was not sufficient to sustain the standard of proof required in the event the jury rejected the identification evidence or had a reasonable doubt about its accuracy.

[168] The verdict of the jury indicates that they were satisfied beyond a reasonable doubt that the appellant shot Tyler Bradley but were unsure that he intended to kill him when he shot him. The jury was also satisfied beyond a reasonable doubt that the appellant had the handgun in his possession for a purpose dangerous to the public peace.

The Arguments on Appeal

[169] The appellant says that there was no evidence upon which a reasonable jury, acting judicially, could render guilty verdicts. The single photograph identification of the appellant by Shane Bradley was worthless, devoid of probative value and the stuff of wrongful convictions. A single photograph shown by the investigating officer bankrupt of any evidence about the circumstances of the showing and the claimed identification. The in-dock identification by Tyler Bradley was equally barren of any probative value. The only men "in the penalty box" in the courtroom. And an identification made after Shane Bradley's direction to Tyler to make an identification. The remaining evidence, as the trial Crown acknowledged, could not meet the standard of proof required. Acquittals should follow.

[170] The respondent contends otherwise. It was reasonably open to the jury to conclude beyond a reasonable doubt that the appellant was the person who shot Tyler Bradley. Shane Bradley said so. And so did Tyler Bradley, eventually. Considered individually or in combination this evidence was sufficient to establish the appellant's guilt. But there was more. A body of circumstantial evidence was supportive of the identification evidence including expert evidence linking the appellant to the gun used in the shooting.

The Governing Principles

[171] A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed jury acting judicially could not reasonably have rendered: *R. v. H.(W.)*, 2013 SCC 22, [2013] 2 S.C.R. 180, at para. 26; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36.

[172] To persuade an appellate court that a verdict rendered at trial is unreasonable, an appellant must show that no properly instructed jury acting judicially could reasonably have found him guilty: *R. v. Arias-Jackson*, 2007 SCC 52, [2007] 3 S.C.R. 514, at para. 2.

[173] In deciding whether a verdict rendered at trial is unreasonable, an appellate court may consider the failure of an accused to testify as indicative of the absence of an exculpatory explanation: *R. v. George-Nurse*, 2018 ONCA 515, 362 C.C.C. (3d) 76, at para. 33, aff'd 2019 SCC 12, [2019] 1 S.C.R. 570.

The Principles Applied

[174] I would not give effect to this ground of appeal.

[175] As a general rule, a properly instructed jury may conclude, despite the frailties of eyewitness identification evidence, that the eyewitnesses' testimony is reliable and may enter a conviction on that basis. Admittedly, this general rule is not free of exception. A jury may not convict on the basis of eyewitness testimony alone where that testimony, even if believed, would necessarily leave a reasonable doubt in the mind of a reasonable juror: *Hay*, at paras. 40-41.

[176] In this case there was eyewitness identification evidence, confirmed to some extent by circumstantial evidence, that identified the appellant as the shooter. It was open to the jury to rely on that evidence in reaching its verdict. They did so, but not unqualifiedly, since they acquitted the appellant of attempted murder. This is not a case in which it can be said with any degree of confidence that the identification evidence, even if believed, would necessarily give rise to a reasonable doubt in the mind of a reasonable juror.

[177] It is also not without significance that the appellant did not testify at trial, thus did not provide an alternative narrative to that furnished by the eyewitnesses.

Disposition

[178] For these reasons, I am not satisfied that the instructions to the jury, taken as a whole, properly equipped them to engage in an informed assessment of the reliability of the identification evidence adduced at trial. This is not a case for the application of the proviso. The evidence is not overwhelming. Nor are the errors harmless. I would allow the appeal, set aside the convictions, and order a new trial on the indictment.

Released: November 30, 2021 "D.W."

"David Watt J.A."
"I agree. Alexandra Hoy J.A."
"I agree. I.V.B Nordheimer J.A."