SUPREME COURT OF YUKON

Citation: *R v BAAB*, 2025 YKSC 40

Date: 20250619
S.C. No. 22-AP005
Registry: Whitehorse

BETWEEN

REX

Respondent

AND

B.A.A.B.

Appellant

Before Chief Justice S.M. Duncan

Counsel for the Appellant	Vincent Larochelle
Counsel for the Respondent	Elmer Ben Brillantes and Madeleine Williams

This decision was delivered in the form of Oral Reasons on June 19, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This is a summary conviction appeal of a decision of the Yukon Territorial Court, on May 6, 2022, convicting the appellant of two counts of criminal harassment contrary to s. 264(2)(d) of the *Criminal Code*, RSC 1985, c C-46 (the "*Criminal Code*" or the "*Code*") by engaging in threatening conduct towards his ex-intimate partner, C.B., and her mother, K.W., between September 9, 2021, and October 22, 2021; and one count of mischief contrary to s. 430(4) of the *Code* by wilfully

damaging C.W.'s doorbell camera, having a value not exceeding $5,000, on October 22, 2021.

[2] The trial of this matter occurred over three days: March 29, May 5, and May 6, 2022. The appellant received a six-month custodial sentence on each of the first counts to be served concurrently and 15 days on the mischief charge to be served concurrently with counts one and two, and a three-year probation order and a lifetime firearms prohibition.

[3] The appellant appeals his conviction on eight grounds. The eighth ground was that he did not receive effective assistance from his trial counsel. This is disputed by his trial counsel. However, the Crown has conceded this ground of appeal and agrees with the appellant that the matter should be remitted for trial. As a result, counsel proposed arguing this ground of appeal only before me and requested that I rule on it first, with the appellant reserving his right to argue the other seven grounds if I do not accept this ground or if otherwise directed. I agreed to this approach.

[4] I will briefly review the background and the test for ineffective assistance of counsel. I will then move to a review of the fresh evidence, and whether the test was met and my conclusion.

Background

[5] The backdrop of these charges is a high conflict family law dispute. The complainant, C.B., and the appellant were married in 2017. They had a child in [redacted]. They separated in July 2021. An Emergency Intervention Order ("EIO") was obtained by C.B., confirmed on August 4, 2021, and expired on October 4, 2021. The couple had lived together in a home owned by C.B. before they met and the EIO

granted C.B. exclusive occupancy of the home. K.W. was frequently at the home, as she assisted with the childcare.

[6] Four incidents gave rise to the charges.

[7] First, on September 9, 2021, C.B. and M.B. were at Superstore; K.W. was in their vehicle. K.W. saw the appellant's truck arrive and park a short distance away. The appellant appeared to be recording a video of the vehicle with his phone. When he saw her, he returned to his truck and left. The appellant testified that he was on the phone with his lawyer and not recording; it was pure coincidence he arrived at Superstore at the same time and parked near C.B.; and he went home once he realized that their vehicle was there.

[8] Second, on September 29, 2021, C.B. told the appellant she was taking M.B. to, at that time, the only COVID-19 testing location in Whitehorse and, shortly after arriving there, she saw the appellant drive by in his truck. The appellant testified that he was nearby when he received her call and he decided to get tested himself because of contact with M.B. earlier. When he saw C.B.'s vehicle he kept going and apparently never got the test.

[9] Third, on October 5, 2021, the day after the EIO expired, the appellant went to the family home and knocked on the door. C.B. opened it, saw it was the appellant and slammed it shut. The appellant remained, continued knocking, walked around the house, returned, and knocked again. C.B. texted him, telling him to leave or she would call the police, which she did, but he was already gone.

[10] Fourth, on October 22, 2021, C.B. received numerous texts from the appellant. She ignored them. The appellant texted that if she did not respond, he would send the

RCMP for a wellness check on M.B. This occurred and the police confirmed there were no issues with M.B.

[11] That same day, the appellant went to the family home, climbed over the fence in the face of a locked gate onto the front porch, rang the doorbell numerous times, knocked on the door, appeared to be recording, and circled around the house back to front. The RCMP were called. He then pulled on the doorbell camera, so it became loose from the wall, disconnected the wires, and it was temporarily damaged as a result. This gave rise to the mischief charge.

[12] Other incidents not within the time period charged were described in evidence. They included the appellant trying to get into the house to see M.B. while the EIO was in effect; driving by the house on numerous occasions; following C.B. and K.W. into town; arriving 20 minutes early for an access visit and parking outside the house; and waiting outside the house even when the access visit was cancelled because of illness of M.B.

[13] The essential elements of the offence of the crime of criminal harassment were set out by the trial judge at para. 45 of his decision. They are:

> 1) It must be established that the accused has without lawful authority engaged in the conduct set out in s. 264(2)(a), (b), (c.), or (d) of the *Criminal Code*.;
>
> 2) It must be established that the complainant was harassed [by the conduct].
>
> 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or willfully blind as to whether the complainant was harassed;
>
> 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and

> 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable. (as read)

[14] In this case, the conduct alleged was threatening conduct, and the trial judge defined it as, "…a tool of intimidation which is designed to instill a sense of fear in its recipient…". He elaborated on the threatening conduct in the case, which was "… alleged to be the repeated unwanted attendance at the house [by the appellant], driving by the house, attending [a] location where C.B. or K.W. then were, or following them around." (para. 47)

[15] The essential element of amischief charge is simply someone who wilfully destroys or damages property.

[16] So, the trial judge was satisfied that the appellant did all of these things deliberately, that the complainants' feared for their safety, and that fear was reasonable. There was no dispute at trial that they feared for their safety and the trial judge confirmed this in his reasons. The issue was whether the fear was reasonable.

[17] The testimony of C.B. and K.W. of the description of their fears included the following:

I. their fears of the appellant prevented them from sleeping;

II. they could not go anywhere because of their fear of running into him;

III. they were fearful about being anywhere alone; and

IV. they were terrorized.

[18] And as I said, this testimony was accepted by the trial judge.

Test for ineffective assistance of counsel

[19] The Supreme Court of Canada set out this test in the case of *R v GDB*, 2000 SCC 22, and the Yukon Court of Appeal confirmed and adopted it in *R v SCC*, 2022 YKCA 2, ("*SCC"*) at para. 40.

[20] There must be a factual foundation that establishes on a balance of probabilities that counsel's acts or omissions constitute incompetence and that a miscarriage of justice resulted. Thus, there is a performance component and a prejudice component.

[21] The performance component, incompetence, must be determined by a reasonableness standard. There is a strong presumption that conduct of Counsel falls within a wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of Counsel are not the result of reasonable professional judgment. Hindsight bias must be avoided in assessing the conduct in the context of trial strategy.

[22] The prejudice component, of miscarriage of justice, may take many forms: procedural unfairness or a compromised verdict. To satisfy the test, the appellant must show a reasonable possibility that the decision would have been different.

Fresh evidence

[23] I want to address the test for the admissibility of fresh evidence, as without that the issue of ineffective assistance of counsel cannot be determined.

[24] *SCC* confirmed and followed *R v Dunbar*, 2003 BCCA 165 ("*Dunbar*"), and *R v Moazami*, 2021 BCCA 328 that the test for admission is a modified *Palmer* test (*Palmer v The Queen*, [1980] 1 SCR 759), that is, the requirement of the exercise of due diligence to adduce evidence at trial is relaxed- it must be relevant, credible, and

otherwise compliant with the general rules of evidence. But the focus of the admissibility is on whether it shows that a miscarriage of justice occurred as a result of counsel's conduct; and if so, one of two acceptable approaches — and the approach taken here is for the court to receive the evidence first and then admit it once a miscarriage of justice is shown. Once admitted, a remedy is granted, and that is usually a new trial.

[25] Here, the fresh evidence filed consisted of an affidavit of the appellant setting out his concerns about the ineffective assistance of counsel and cross-examination on that affidavit by the Crown; and the affidavit of trial counsel as well as cross-examination of trial counsel, including the playing of videos provided by the appellant to counsel and not used at trial.

[26] While several allegations of incompetence or ineffective assistance of counsel were made by the appellant, I will focus on the failure to introduce certain video evidence and a failure to call witnesses, as those are of most significance to the result.

[27] As noted, the context of these charges was a high conflict family law dispute. Although the appellant was concerned about disproving that C.B. and K.W. feared him, trial counsel's strategy was to focus on whether the Crown could prove *mens rea* — that is, the intention to harass — as trial counsel thought the Crown had disclosed sufficient evidence of the complainant's fears.

[28] In a nutshell, the trial counsel's concern about the video and audio files was the risk that what they revealed would provide a further platform and opportunity for the complainants to express and elaborate on their claims against the appellant. In other words, further exposure of the tumultuous relationship between C.B., K.W., and the appellant could serve to bolster their reasons for fearing him; and harm him by

contributing to the establishment of a pattern of behaviour. Trial counsel was of the view that the material in the video and audio files and text messages demonstrated behaviour of the appellant that was identical or similar to behaviour that was the subject matter of the criminal charges. Trial counsel said this was his selected strategy and that he explained it to the appellant.

[29] During the cross-examination of trial counsel, appellant's counsel played several of the videos provided to him by the appellant and asked trial counsel whether their content was consistent with his strategic reasons for not introducing them. These videos are as follows.

[30] **September 24, 2021:** A two-minute video of K.W. recording the appellant with her phone, walking towards the appellant at his vehicle after he said, "Please, step back from my vehicle"; she showed him her middle finger and continued as he drove off.

[31] Trial counsel on cross-examination conceded that K.W. did not look scared, that it supported the appellant's statement that K.W. was aggressive, that it affected her credibility and was relevant to the issue of whether she feared for her safety, and that nothing affected the appellant's credibility on the video.

[32] **September 27, 2021**: Two minutes showing the appellant dropping off his son at the house after a visit. K.W. approached the appellant who asked her to stay back saying, ". I wish you would please stay in the yard." K.W. continues to follow him and he says, "Why are you following me? Please stop." K.W. continues to follow and record the appellant not far from his vehicle until he drives away.

[33] Trial counsel agreed on cross-examination that K.W. was shooing the appellant away, following him, and that it contradicts her testimony that she did not want to go out

in the yard alone anymore. He agreed there was no risk to the appellant in confronting K.W. with this evidence. He explained that he was not challenging the fear in this trial, as that was his strategic decision, but agreed that this video raises doubts that K.W. was subjectively scared of the appellant. Trial counsel also agreed it was possible to infer that during the whole period that she was not really scared of him — the "whole period' meaning September 9th to October 22nd.

[34] **October 5, 2021**: Shows the appellant knocking on the door of the home, asking relatively politely to see his son. When C.B. answers, she shuts the door.

[35] Trial counsel agreed that this was a relatively polite tone of the appellant, that he was not banging the door, but trial counsel thought it was threatening for the appellant to be at the house in the circumstances even though the EIO had expired and it was the family home. Although trial counsel agreed that C.B. did not look scared he did not think the introduction of this video would have affected things one way or the other.

[36] **October 8, 2021**: A series of videos of C.B. dropping off their son at the Canada Games Centre for a visit; C.B. put M.B.'s mittens in her bag, which she keeps while M.B. goes to visit with the appellant.

[37] The next video is at Boston Pizza, where the appellant had taken their son to eat after the Canada Games Centre visit. This was disapproved of by C.B. because she had expected the appellant to bring M.B. home directly from the Canada Games Centre. I note that this was a time period where there were no custody or access orders in place. These were not in effect until March 2022. In that video, C.B. searches for mittens in her son's backpack and "Where are the mittens, are they in here…no mittens, guess we're going to have to get new mittens.,"

[38] There was also a text message sent to the appellant, “It is unacceptable behaviour to keep stealing a child’s clothing.”

[39] Trial Counsel on cross-examination said he did not remember discussing this incident with the appellant nor did he focus on it because the mittens incident was not at issue at trial. but he conceded that the video could have been introduced to show C.B. being untruthful about a matter involving the child in order to gain an upper hand in the family law proceedings, which was one of the applicant’s theories, that is, that she was using the legal system to her advantage.

[40] The final example of videos I will reference was one recorded the same day, **October 8, 2021**. It was a continuing video of the three of them at Boston Pizza, which showed C.B. calling the RCMP from Boston Pizza, where the appellant wanted M.B. to have dinner before going home. She said to the RCMP, “My husband took my child from me.” At no point in the video did the appellant act or speak aggressively.

[41] Trial counsel conceded that this video did not portray the appellant in a negative light, he was not aggressive, and there was no reason not to put it before the trial judge. Trial counsel agreed it could have been used to show C.B. was trying to intimidate him through the legal system, and also to contradict her evidence that she was scared of him. She, in fact, sought him out and was waiting for him.

Witnesses

[42] Trial counsel attested in his affidavit and testified on cross-examination that he did not contact either of the potential witnesses whose names were provided to him by the appellant. R.M. was K.W.’s great aunt, who facilitated the exchange of M.B.

between the parents between January and November 2022, and could testify that C.B. was not afraid of the appellant, but was aggressive and insulting to him.

[43] Trial counsel's reason for not following up with her was that she had no knowledge of the incidents at issue at trial, which he was focused on. In his affidavit, he said he understood that her evidence was vague, contradicted incontrovertible facts, and unhelpful to the appellant's defence. On cross-examination, he could not explain what he meant by this.

[44] The other proposed witness was A.B., another facilitator of the child exchanges, who could testify that C.B. behaved aggressively to the appellant on a number of occasions and that, in October 2021, the appellant's truck was broken down so he could not have been driving around in it. Trial counsel in his affidavit explained his decision not to contact A.B. was that he could only testify to his own negative experiences with C.B., was not present during the incidents forming the basis of the charges, and therefore could not provide any insight into C.B.s fears. On cross-examination, he conceded that A.B.'s evidence could have provided corroborating evidence to contradict the drive-bys at least part of the time, and it contributed to evidence to show that C.B. and K.W. were aggressive, not fearful, and may have been using the legal system to advance their position.

[45] Finally, on the mischief charge, the video taken on October 22, 2021 showed the appellant at the door of the home. It shows the appellant fiddling with the doorbell and it coming off, not aggressively ripping it out of its socket or appearing to intentionally damage it.

Analysis

[46] The appellant attested through his affidavit evidence and testified on cross-examination of his advising trial counsel that C.B. and K.W. did not fear him and were attempting to manipulate the legal system for their own ends. Trial counsel attested in his affidavit that he was focused on the four incidents forming the basis of the charges, even though the Crown introduced evidence of other incidents outside that timeframe in an effort to establish a pattern of behaviour. Trial counsel felt that, given the volatile and tumultuous nature of the relationship, which he believed the videos would emphasize, his strategy was not to focus on disproving the subjective fear of C.B. and K.W. He did acknowledge the possibility raised by the appellant that their fears were exaggerated.

[47] As earlier noted, trial counsel was concerned that the videos would be harmful to the appellant because of the pattern of behaviour he thought they would show and the invitation that they would give to the complainants to elaborate on their fears.

[48] The videos shown on cross-examination of trial counsel, however, did not fit with trial counsel's theory. Instead, they showed the complainants as aggressors, not afraid of the appellant as testified, and did not place the appellant in a bad light. This was conceded by trial counsel. The fresh evidence establishes the factual foundation for the argument of ineffective assistance of counsel.

[49] Assessing first the prejudice component, I adopt the test described by the Court of Appeal of British Columbia in *Dunbar*, who, in turn, adopted Doherty J.'s analysis in *R v Joanisse*, [1995] OJ No. 2003 (CA):

> [26] … a miscarriage of justice can result where the appellant establishes a reasonable probability that but for

> counsel's errors, the result of the proceedings would have been different. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood". …

[50] Here, the credibility of the witnesses was a key element of the trial judge's findings. In fact, at paras. 31, 38, 40, and 53 of his decision, he stated that he did not believe the appellant. At para. 43, he stated that he accepts C.B. and K.W.'s evidence and throughout he accepted their version of events.

[51] As noted, trial counsel conceded on cross-examination that some of the video material provided to him by the appellant could have undermined the credibility of the complainant and would not have harmed the defence of the appellant by reinforcing or providing another example of his behaviour similar to that whicht was the subject of the charges. There is a reasonable possibility, then, that the results of the proceedings would have been different had these videos been introduced. This includes the video of the appellant at the door on the day he was alleged to have intentionally destroyed the doorbell, which did not support this finding.

[52] Similarly, the failure of trial counsel to speak to the two proposed witnesses before making the determination not to call them, and his decision not to call them was prejudicial, as those witnesses' testimonies may also have undermined the credibility of the complainant and corroborated the evidence of the appellant, thereby creating a reasonable possibility of a different outcome. Prejudice is established.

[53] In this case, Counsel's performance was not competent. His failure to assess fully the video evidence and the potential evidence of the two witnesses proposed by the appellant fell below the standard of reasonable professional judgment.

[54] Even accepting the requisite standard of deference towards Counsel's determination of trial strategy and choice of tactics, accepting the presumption that his choices fell within the range of reasonable professional assistance, and accepting the dangers of the revelations and clarity of hindsight I find that the fresh evidence demonstrated that trial Counsel's choices were not objectively reasonable.

[55] I make no finding on the other issues raised around ineffective assistance, that is, the timing of the preparation meetings and the meetings during the trial between counsel and the appellant, as it is unnecessary, given my findings.

[56] I do note that counsel attempted to accommodate the appellant by meeting with him over phone, email, and video, and tried to keep costs at a minimum. He also accepted a retainer in a relatively short period of time, and it was in the appellant's interest at that time to proceed with his trial on the dates set.

[57] For these reasons, the appeal is allowed. The convictions are set aside, and a new trial is ordered.

[DISCUSSIONS]

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DUNCAN C.J.