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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. M.K.A.,*
2025 BCCA 28

Date: 20250204
Docket: CA48387

Between:

Rex

Respondent

And

M.K.A.

Appellant

File Sealed in Part

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Before: The Honourable Madam Justice Fisher
The Honourable Justice Griffin
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated [redacted date] (*R. v. M.K.A.*, [redacted citation], [redacted docket number]).

Counsel for the Appellant:	D.M. Turko, K.C.
Counsel for the Respondent:	S.E. Elliott, K.C. E. Purtzki
Place and Date of Hearing:	Vancouver, British Columbia November 28, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 4, 2025

Written Reasons by:
The Honourable Justice Winteringham

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Griffin

2025 BCCA 28 (CanLII)

Summary:

The appellant appeals his conviction for sexual assault, alleging: (1) the trial judge misapprehended material evidence by relying on inadmissible text messages; and, (2) his trial was unfair and he suffered a miscarriage of justice because of the ineffective assistance provided by his trial counsel.

Held: Appeal dismissed. Reviewing the record as a whole, there is no indication the judge used the messages for any improper purpose, let alone that they played an 'essential role' in the reasoning process leading to the conviction. Regarding the ground alleging ineffective assistance of counsel, the appellant has failed to establish that any of the conduct alleged fell below a standard of reasonable professional judgment or that the conduct caused a miscarriage of justice, either by an unreliable verdict or by undermining trial fairness.

2025 BCCA 28 (CanLII)

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

[1] On July 9, 2021, following a judge-alone trial, the appellant was convicted of sexually assaulting his daughter, S.A., contrary to s. 271 of the *Criminal Code,* R.S.C. 1985, c. C-46. The assaults occurred over a period of nine years, from when S.A. was four until she was thirteen years old: *R. v. M.K.A*., 2021 BCSC 1966 (unreported) ("Reasons for Conviction").

[2] The appellant appeals his conviction, alleging that: (1) the trial judge misapprehended material evidence by improperly relying on inadmissible evidence; and (2) his trial was unfair and he suffered a miscarriage of justice because of the ineffective assistance provided by his trial counsel (who were not the counsel who represented him on this appeal). The appellant alleges numerous failures of his trial counsel's representation of him, asserting these failures constitute ineffective assistance of counsel amounting to a miscarriage of justice such that this Court should set aside his conviction and order a new trial.

[3] The Court received a number of affidavits as fresh evidence at the hearing of the appeal. The affidavits were admitted into evidence for the limited purpose of determining the allegation of ineffective representation in accordance with this Court's decision in *R. v. Aulakh*, 2012 BCCA 340.

[4] For the reasons that follow, I would dismiss the appeal. The judge's reasons clearly and precisely demonstrate the limited use she made of the impugned text messages, which were properly before her. That is, the judge did not misapprehend the evidence and was entitled to make the factual findings she did concerning the appellant's evidence about the text messages. Additionally, the appellant has failed to establish that his trial counsel's conduct of the case and representation of him throughout the trial proceedings amounted to ineffective assistance of counsel. Accordingly, I would dismiss the appellant's fresh evidence application as well as the appeal from conviction.

2025 BCCA 28 (CanLII)

The Material Facts

[5] The appellant was charged with sexual assault under s. 271 of the *Criminal Code*. The appellant's daughter, S.A., alleged that the appellant had sexually assaulted her on an almost-daily basis over a period of nine years, beginning in 2008 when she was four years old.

[6] S.A. is one of several children born to the appellant and I.A. Over the material period, the family lived in [redacted location], British Columbia, before moving to [redacted location], British Columbia. Though the family all lived together, I.A. was less involved in parenting the couple's children. The appellant was the primary parent for their children.

[7] S.A. testified that she never told anyone about these assaults during the time period when they were happening, out of fear and shame. However, a few years after the assaults ended, she told her then-boyfriend (E.E.) that her father had abused her for years. E.E. reported S.A.'s disclosure to a counsellor. The counsellor subsequently reported the disclosure to the Ministry of Children and Family Development ("MCFD") which investigated and ultimately removed the appellant from the family home. At the time of the appellant's removal from the home on November 2, 2018, MCFD imposed a no-contact order. The police arrested the appellant on December 14, 2018, and he was released thereafter on an undertaking that included a condition that he have no direct or indirect contact with his children.

In June 2019, the appellant was charged with breaching his undertaking by having contact with J.A., S.A.'s brother.

First trial and subsequent mistrial

[8] The appellant was first tried in August 2020. Mr. R. and Mr. K. represented the appellant. The Crown called several witnesses including S.A., her mother (I.A.), her sister (C.M.), and her brother (J.A.). The appellant testified in his defence.

[9] J.A. testified that he continued to communicate with the appellant via text messages after the appellant's removal from the family home. He testified that he met the appellant in person at a Boston Pizza a few months after he left the family home. J.A. testified that the appellant asked him to convince S.A. to recant her evidence. There was some suggestion that the appellant offered him a car if he dissuaded S.A. from testifying.

[10] In his direct examination, the appellant denied that he asked J.A. to discourage S.A. from testifying. During cross-examination at the first trial, the appellant denied "talking" to his children and denied "meeting" with J.A. in person:

> Q: After you were made to leave the home in [redacted location] --
> A: Yes?
> Q: -- did you ever talk to any of your children again?
> A: No.
> Q: None of them?
> A: No.
> Q: Did you ever meet up with [J.A.]?
> A: No, I did not.

[11] In response to the appellant's answer, the Crown sought to introduce photocopies or photographs of text messages between the appellant and J.A. Trial counsel objected on the basis that the messages had not been disclosed. Trial counsel also learned that there was a second set of messages between the appellant and a family friend named "Josh" that had also not been disclosed. Both sets of messages were apparently sent after the appellant was removed from the

2025 BCCA 28 (CanLII)

family home and while on an undertaking to have no contact with his children or family members: *R. v. M.K.A.*, 2020 BCSC 2320 (unreported) (“Mistrial Reasons”) at para. 4.

[12] Crown counsel conceded that the text messages were not previously disclosed to trial counsel (before the first trial, the appellant had changed lawyers) and this was the first time that trial counsel had seen these messages.

[13] Trial counsel assert that the appellant instructed them to proceed with the mistrial application on the basis that the Crown had failed to disclose relevant and material evidence. The Crown opposed the mistrial application, instead suggesting other remedies to cure the s. 7 violation of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*]. The Crown suggested that the Crown witnesses could be recalled for further cross-examination or the text messages could be excluded from evidence at the trial. The Crown submitted that these remedies would be more appropriate than a mistrial and would achieve the balance between the injustice to the accused and the other factors, such as seriousness of the offence, protection of the public, and bringing the guilty to justice: Mistrial Reasons at para. 55.

[14] The first trial judge considered the question of whether a mistrial was needed to prevent a miscarriage of justice and determined it was, stating it this way:

> [67] A mistrial for late disclosure should only be granted in the clearest of cases and when the impugned conduct undermines trial fairness. It is a remedy that is granted only in those cases where it is necessary to prevent a miscarriage of justice. It is certainly not a decision that I make lightly, particularly given the very serious nature of the charge and the prospect that such a declaration may lead to a new trial in which a very young complainant will have to testify again about very difficult allegations.

[15] In response to the appellant’s application, the first trial judge granted a mistrial. She concluded that no remedy short of a mistrial could cure the prejudice to the appellant’s right to full answer and defence (pursuant to *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45), given the relevance of the text messages

2025 BCCA 28 (CanLII)

and the failure to produce them until very late in the trial: Mistrial Reasons at paras. 68–69.

Second trial

[16] The second trial took place in May 2021, before a different trial judge. The appellant was represented by the same counsel, Mr. R. and Mr. K. The appellant denied that he had ever sexually assaulted S.A. at any time. The main issue at the second trial was the credibility and reliability of S.A. and the appellant.

[17] The trial judge delivered her reasons for judgment on July 9, 2021. She found the appellant to be an untruthful witness and convicted him of sexually assaulting S.A. On June 7, 2022, the trial judge sentenced the appellant to twelve years of imprisonment.

S.A.'s evidence

[18] At the second trial, S.A. was seventeen years old. She detailed the sexual assaults, testifying that the abuse started when she was about four years old and ended when she was thirteen. She described various incidents of sexual assault that included the appellant kissing or licking her face, breasts, neck, chest, and stomach, putting his fingers in her vagina, putting his mouth on her vagina, and forced penetration of her vagina and anus with his penis: Reasons for Conviction at paras. 48, 50, 51. She stated that she had gotten her period when she was 12, and after learning from a Google page that her father's abuse could result in pregnancy, she asked him to stop; the abuse continued for about another year and a half after that: at para. 22. She testified that the assaults occurred at various locations in and out of the residence in [redacted location] and in the residence in [redacted location]. At times, the assaults occurred daily or a couples of times a week, and at other times, they occurred less frequently.

2025 BCCA 28 (CanLII)

I.A.'s evidence

[19] S.A.'s mother, I.A., testified at trial. She stated she suffered from mental illness and frequently drank alcohol during the years the sexual abuse was said to have occurred. Some of the witnesses described I.A.as a distant parent. Though she did not work outside of the home, I.A. spent most of her time alone and relied on the appellant to raise the children.

C.M.'s evidence

[20] S.A.'s older sister, C.M., testified that S.A. and J.A. were the appellant's favoured children and that S.A. received more physical attention from the appellant than the other siblings : at para. 66. There was evidence that the appellant allowed S.A. to join a soccer team when the other children had not been allowed, and he permitted her to use the family Netflix account whenever she wanted: at paras. 54–55. S.A. described the appellant separating her from the other members of the family, or coming to find her after everyone else had gone to bed: at para. 53.

[21] C.M. testified that she learned about S.A.'s allegations from their mother, I.A. At that point, she remembered something she had seen when she was sixteen and S.A. was four: at paras. 67–68. She described being in the living room in [redacted location] with some of the other children and the appellant. The appellant asked S.A. to come and cuddle with him: at para. 68. S.A. hesitated, then climbed onto the couch, where the appellant placed a blanket over them. C.M. testified that she saw movement under the blanket. She testified that it seemed like S.A. wanted to get down off the couch, but the appellant told her to "shush": at para. 69. C.M. testified that in her peripheral view she saw the appellant grabbing S.A. under the blanket in her groin area, S.A. wiggling and uttering "stop", and the appellant pulling S.A. tighter: at paras. 70, 77. C.M. felt sick and "paralyzed": at para. 70. She left the room to get some air and did not tell anyone about this incident. She eventually disclosed these observations to her now-husband when they were dating: at para. 71.

2025 BCCA 28 (CanLII)

[22] This was not the only incident C.M. recalled. She described other incidents that occurred between the time of the couch incident when she was 16 and when she moved out at age 18. C.M. said she saw the appellant bringing S.A. upstairs to her room crying or carrying her downstairs asleep in the middle of the night, sometimes after midnight: at para. 73. On one of these occasions, C.M. asked the appellant what was going on. He responded that it was none of her business and that she should go to bed: at para. 74. Sometimes C.M. would check on S.A. after she returned to her bedroom, finding that S.A. was upset: at para. 74. C.M. would ask if something was wrong and S.A. would say nothing, whimper, or say she had a nightmare: at para. 74.

J.A.'s evidence

[23] J.A. is two years older than S.A. and is the sibling closest in age to her. J.A. testified that he and S.A. were the appellant's favourite children. J.A. testified that after the family moved to [redacted location], he noticed that the appellant spent more time alone with S.A: at para. 82. J.A. did not witness any of the sexual assaults: at para. 90. However, J.A. described observing the appellant taking S.A. to her room at night to do homework and shutting the door: at para. 82. J.A. testified that he would knock on the door and the appellant would tell him not to come in.

[24] After the appellant was removed from the family home and was placed under a no-contact order, J.A. described communications he had with the appellant. He testified about text messages between him and his father and those were entered as exhibits at the trial. J.A. testified that he and his father texted almost daily over about a month or two: at para. 85. In the text exchanges, the appellant asked J.A. what he knew or had been told about the proceedings, what S.A. had alleged, and asked who reported it to social services: at paras. 87–88. J.A. understood that the appellant wanted him to "talk some sense" into S.A. and encourage her to say she was lying about the allegations: at paras. 86–87.

2025 BCCA 28 (CanLII)

The appellant's evidence

[25] At the second trial, trial counsel asked the appellant in his direct examination about the text messages and his conflicting testimony at the previous trial. The appellant admitted to having contact with J.A. He testified that he lied about this at the first trial because he was scared and confused, and he felt he needed to communicate with J.A. to support him at that time: at para. 111. Crown counsel, in cross-examination, confronted the appellant with his previous testimony about this. In so doing, the Crown read portions of the testimony to the appellant and he acknowledged that he had lied under oath.

[26] During the cross-examination, the Crown also attempted to lead evidence of Facebook messages allegedly sent between the appellant and someone named "Josh". The appellant did not identify the messages and denied having sent them although his evidence was equivocal regarding some of the messages. In her direct examination, S.A. identified the appellant's Facebook account as the sender of the messages. Trial counsel objected to the admission of the messages into evidence, and the "Josh" messages were marked only for identification.

[27] With respect to S.A.'s allegations, the appellant denied sexually assaulting S.A. at any time during the period in question. He advanced several arguments to support his position, including that his back injuries would have made the assaults physically impossible, that the shower (where the anal assault was alleged to have occurred) was not installed until much later than the time period alleged, and that there would have been no opportunity to be alone with S.A. and out of the sight of the neighbours: at paras. 96, 142, 163.

Credibility assessment at second trial

[28] In the Reasons for Conviction, the trial judge considered the testimony of S.A. and her mother, sister, brother, and ex-boyfriend. She also considered the appellant's testimony. The trial judge found that S.A. was a credible witness. She attributed any inconsistencies in S.A.'s testimony compared to her prior testimony at the preliminary inquiry and first trial to the fact that S.A. was recalling early

2025 BCCA 28 (CanLII)

childhood memories of trauma. She also accepted the testimony of S.A.'s mother and siblings, and E.E., S.A.'s ex-boyfriend.

[29] By contrast, the trial judge found that the appellant's testimony was internally contradictory and inconsistent with the testimony she accepted from his children and their mother. She found that the appellant had lied about a number of things, including the date that a shower was installed in the bathroom at the house in [redacted location] and about the extent of his incapacity due to a workplace injury from 2005. She noted that the appellant admitted to having lied under oath at the first trial about having contacted J.A. after the appellant was removed from the family home. She found that he was lying when he said that he had not sent the Facebook messages to "Josh", which were consistent with the messages he admitted to having sent to J.A. She found that these messages were an attempt to manipulate J.A. into influencing S.A. to retract her allegations.

[30] As she methodically assessed credibility and reliability, it is clear from the Reasons for Conviction that the trial judge examined the evidence as a whole. She summarized her conclusion as follows:

> [187] Ultimately, I find that [the appellant] is an untruthful witness. He lied about the lack of opportunity to sexually assault S.A. According to [C.A.], [the appellant] did not even bother to be alone with S.A. to sexually assault her. He lied about never being alone with S.A. He lied about when the shower was installed in the [redacted location] home. He lied about the extent of his limitations due to his back injury. He lied about the texts that he sent.

[31] The trial judge then moved to consider the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93. Of some importance to the first ground of appeal, the trial judge did not refer to the text messages in her overall rejection of the appellant's evidence, stating:

> [188] I must move on to apply the *W.(D.)* tests. The first question is, if you believe the evidence of the accused, obviously you must acquit. I do not believe the evidence of the accused. The second question is if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit. I am not left with a reasonable doubt about [the appellant's] evidence. The lies about the shower, being alone with S.A., the limitations on his activities due to his back injuries were an attempt by [the

2025 BCCA 28 (CanLII)

> appellant] to demonstrate that his sexually assaulting S.A. in the manner that she described could not have happened. I do not believe that evidence.

[32] On the whole, the trial judge accepted the testimony of S.A. and the other witnesses over the testimony of the appellant. She found that the appellant had sexually assaulted S.A. on an almost-daily basis for nine years and convicted him.

Grounds of Appeal

[33] The appellant raises two grounds of appeal:

a) The trial judge materially misapprehended the evidence by improperly relying on Facebook messages between the appellant and "Josh", not entered as exhibits proper at trial; and,

b) Trial counsel were ineffective, resulting in a miscarriage of justice, because trial counsel:

   i. Did not attempt to remedy the prejudice to the appellant's defence from the *Stinchcombe* violation at the first trial;

   ii. Failed to adequately prepare the appellant to testify; and

   iii. Failed to seek out and lead available evidence, or effectively cross-examine Crown witnesses.

Analysis

Ground #1: Misapprehension of the messages

[34] The appellant contends that the trial judge misapprehended the admissibility of the Facebook messages between the appellant and "Josh". He argues that this evidence was not properly before her when she relied on the messages as part of her adverse credibility finding against the appellant. The appellant submits that these text messages were inadmissible because they had not been forensically analyzed and could have been altered by the recipient. The appellant asserts that the judge's reliance on the text messages constituted a material misapprehension because the

2025 BCCA 28 (CanLII)

judge relied on the messages when she made a negative credibility finding against him.

[35] I address both complaints raised by the appellant regarding the messages: improper reliance on the messages and secondly, the failure to authenticate the messages. The appellant framed the issue this way:

> Appeal Crown has advised the appellant that the Facebook messages (Josh) and the text messages (J.A.) came from I.A. There was no attempt by Crown to assess accuracy of these Facebook messages [which] were not subject of any search warrant or forensic analysis. There is no evidence that the receiver of a Facebook message could not alter the same. Trial counsel did not advise the [C]ourt of the problematic nature of continuity of the messages.
>
> Erroneously, the trial judge relied upon the Facebook messages when determining the appellant's credibility.

[36] Neither of these complaints are supported by the record. It is my view that the trial judge committed no error when she referred to the messages between the appellant and "Josh" in her credibility assessment. That is, she did not rely on the evidence that was not properly before her to make a credibility finding. The judge's reasons and a review of the transcript makes this clear.

Did the judge misapprehend the evidence by relying on messages not properly admitted before her?

[37] A judge must decide a case based on the admissible evidence properly presented at trial. The judge has an obligation to monitor the admission of evidence to ensure both that the record is restricted to admissible material and that the evidence is used only for the purpose for which it was admitted: *R. v. Smith*, 2011 ONCA 564 at para. 59. If a judge refers to material not properly admitted or uses the material for a purpose beyond which it was admitted, this can be characterized as a misapprehension of the evidence: *Smith* at para. 61. In *R. v. Tyers*, 2015 BCCA 507, Justice Stromberg-Stein neatly considered the judge's obligations regarding material presented during a trial but not entered as an exhibit proper. Importantly, she noted that the fact a judge looked at material that was not in evidence does not automatically mean that the material influenced their reasons: at para. 35. In other

2025 BCCA 28 (CanLII)

words, the appellant "… must demonstrate more than the mere fact that the judge read or referred to material not in evidence": *Tyers* at para. 39.

[38] The appellant has not pointed to any aspect of the judge's reasons that demonstrate that the judge relied improperly on the messages in reaching her verdict. In this case, the appellant was cross-examined about the messages between he and "Josh" and he testified about the messages. The evidence considered by the judge is what the appellant said about the messages in cross-examination, not the messages themselves. The messages can be properly used to impeach credibility: *R. v. J.B*., 2019 ONCA 591 at para. 48.

[39] In her reasons, the trial judge specifically noted that the messages were "marked for identification only": at para. 178. It is clear from her reasons that the trial judge used the messages to assess the appellant's testimony when she found that he was lying by denying authorship of some of them. Nowhere in her reasons does the judge imply that she attached any value to the content of the messages as proof of sexual assault. I agree with the Crown's submission that the judge's finding that "… [the appellant was] lying when he said he did not send the texts to Josh" (at para. 184) was a finding of fact open to her.

[40] Further support for this conclusion is found in the transcript of the cross-examination of the appellant. The Crown placed the messages before the appellant. Counsel did not object or raise any issues regarding the authenticity of the messages. In this case, there was no basis for counsel to object to the Crown's cross-examination about the messages because the appellant admitted that he recognized the material placed before him. He was asked whether he recognized the messages and the appellant responded, "Yes … [c]ommunications between myself and Josh". The appellant denied authorship of some of the messages, and pointed to the poor grammar and spelling in the messages as proof that he did not send them. In the end, the appellant had adopted some of the messages as his own but refused to acknowledge the messages pertaining to S.A. The reasons reveal that the judge did what was permitted regarding the messages.

2025 BCCA 28 (CanLII)

[41] The trial judge rejected the appellant's explanation, finding it was not credible. The judge rejected his suggestion that someone else may have sent the messages (and that he did not) because he was quite particular about grammar and spelling and some of the messages contained obvious errors. She rejected this explanation because other text messages, where the appellant admitted being the author, contained similar errors. This was a finding of fact that was open to the judge on the admitted evidence before her. In assessing the appellant's credibility, the judge was entitled to consider not only that the substance of his answers changed but also the manner in which he gave those answers: *R. v. Hume*, 2016 BCCA 105 at paras. 44–48.

Was an admissibility hearing required?

[42] The messages were marked for identification only. Crown counsel was satisfied that there was no need to do more in order to invite the judge to assess the appellant's testimonial trustworthiness about them. On appeal, the Crown says that the appellant's arguments contesting admissibility therefore have no import but submits that in any event, the messages could have been marked as an exhibit proper. This is because they had been sufficiently authenticated by the appellant during his cross-examination. That is, he testified that he recognized the package as communications between himself and "Josh".

[43] The appellant admitted that he sent some of the messages, though he denied authoring others (the incriminating messages referring to S.A.). It was thus open to the judge to determine factually whether the appellant was truthful about not authoring some of the messages. This does not raise an issue about admissibility. Rather, it was perfectly permissible for the judge to consider the appellant's testimony about the messages (and his suggestion that others had written the incriminating ones) and reject it. That is what she did.

[44] In sum, from reading the reasons as a whole and considering the record, it is my view that there is no indication that an admissibility hearing was required. Further, there is no indication that the judge used the messages for any improper

2025 BCCA 28 (CanLII)

purpose, "… let alone that they played an 'essential role' in the reasoning process leading to the conviction": *Tyers* at para. 42.

[45] I would dismiss this ground of appeal.

Ground #2: Has the appellant established that trial counsel provided ineffective representation?

[46] The appellant asserts, as his second ground of appeal, that he received ineffective assistance from trial counsel. He argues that trial counsel were ineffective in failing to obtain a remedy beyond the mistrial for the *Stinchcombe* violation at his first trial, which he alleges caused him irreparable prejudice. He alleges that trial counsel were ineffective in preparing him for the second trial, failing to advise him of the trial dates and only receiving the transcripts from the first trial days before the second trial began. He further alleges that trial counsel were ineffective in not attempting to obtain exculpatory evidence. Finally, he alleges that trial counsel were ineffective at cross-examination.

[47] In support of these allegations, the appellant seeks to rely on affidavits to be admitted as fresh evidence. The affidavits provided in support of the appellant's position were filed by: (1) an articled student, appending various documents, including transcripts, LegalAid BC forms, and correspondence; (2) the appellant; and (3) the appellant's friend, Ms. C, alleging inadequate representation by trial counsel. In turn, the lawyers filed affidavits responding to the allegations against them.

[48] The affidavit evidence can be briefly summarized:

a) The appellant tendered three affidavits. In each, he described the advice and preparation he received from his trial lawyers, Mr. R and Mr. K. He deposed that counsel had ignored many suggestions made by himself and Ms. C., had failed to lead evidence that the appellant believed could have assisted him at trial, and generally failed to keep him informed and prepare him properly to testify.

2025 BCCA 28 (CanLII)

b) Mr. R. provided two affidavits responding to the appellant's allegations of ineffective assistance. In essence, Mr. R. refuted the allegations and disagreed with the appellant and Ms. C.'s recollections about how trial counsel prepared the appellant for trial, what information they had shared with the appellant and what advice they had given him, and what instructions they received. Mr. K. presented an affidavit, largely adopting the content of Mr. R.'s affidavit. He similarly deposed that they had provided the appellant proper advice and representation.

c) Ms. C., the appellant's friend, detailed her belief that Mr. R. and Mr. K.'s assistance was ineffective and she tried to corroborate the appellant's recollection of the advice and information he had received from counsel.

d) Appellate counsel's articled student filed four affidavits, appending various documents including transcript requests, LegalAid BC's authorization history, and emails.

[49] In short, the appellant attempted to establish that trial counsel did not adequately prepare for his defence, did not effectively cross-examine witnesses and did not adduce potentially exculpatory evidence, despite his instructions. In his factum, the appellant raised 14 discrete shortfalls in trial counsel's performance. At the hearing, the appellant focused his submissions on the issues related to the disclosure violation and preparation. However, he did not abandon the other issues raised.

[50] I have organized the alleged shortfalls into three categories: (1) trial counsel did not attempt to remedy the prejudice to the appellant's defence from the *Stinchcombe* violation at the first trial; (2) trial counsel failed to adequately prepare the appellant to testify; and (3) trial counsel failed to seek out and lead available evidence, or effectively cross-examine Crown witnesses. As will be seen, the appellant's primary complaint relates to the mistrial application. For the most part, trial counsel counter each of the specific complaints raised.

2025 BCCA 28 (CanLII)

[51] The governing legal framework is not in dispute.

[52] All accused persons have a right to effective assistance of counsel: *R. v. G.D.B.*, 2000 SCC 22 at para 24. It is a principle of fundamental justice. Ineffective assistance of counsel may result in a miscarriage of justice where it affects the reliability of the verdict or where it undermines procedural fairness in arriving at a verdict: *Aulakh* at para. 52.

[53] An appellant who seeks to quash a conviction on the ground of the ineffective assistance of counsel must establish three criteria: (i) the underlying facts on which the claim is based; (ii) the representation by trial counsel fell below the standard of reasonableness expected from professionals; and (iii) the professional incompetence of trial counsel resulted in a miscarriage of justice: *Aulakh* at para. 44.

[54] In other words, to establish ineffective assistance of counsel, the appellant must demonstrate that their lawyer's advice or advocacy was ineffective, falling outside the range of reasonable professional judgment (the performance component), and that it resulted in a miscarriage of justice (the prejudice requirement): *R. v. White*, 2022 SCC 7 at para. 6, citing *G.D.B.* at para. 26. The appellant bears the onus of establishing the performance and prejudice components on a balance of probabilities. Establishing a miscarriage of justice is a high bar: *R. v. Tayo Tompouba*, 2024 SCC 16 at paras. 72–73.

[55] In *Aulakh*, Justice Smith described the appellant's burden:

> [42] A miscarriage of justice will occur where there is a reasonable probability or reasonable possibility (the terms are used interchangeably in the jurisprudence) that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" … The standard of reasonable probability/possibility falls somewhere between a mere possibility and a likelihood …
>
> [43] A miscarriage of justice will also occur where counsel's performance was so incompetent as to have undermined the "fairness of the adjudicative process" … Thus, prejudice occurs where a reasonable probability is established that professional error resulted in an unreliable verdict or in an unfair adjudicative process.
>
> [Internal citations omitted.]

2025 BCCA 28 (CanLII)

[56] The performance component relates to acts or omissions of trial counsel that are alleged to have been incompetent. This may include failing to adequately challenge the Crown's case (for example, conducting a deficient cross-examination), failing to pursue an essential application, or not making due diligence efforts to adduce relevant evidence in support of a defence. Alternatively, trial counsel's acts or omissions might constitute ineffective representation by failing to comply with the instructions of their client. A failure to comply with client instructions was described by Justice Doherty as a form of "actual or constructive denial of the assistance of counsel" that may not have impacted the reliability of the verdict but renders the adjudicative process by which the verdict was reached unfair: *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35, 1995 CanLII 3507 (Ont. C.A.) at para. 63.

[57] Appellate courts are directed to focus on the prejudice component of the claim first. If prejudice is not proven to the requisite standard, then the appropriate course is to dispose of the ineffectiveness claim: *G.D.B.* at para. 29, citing *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J at p. 697. If it is apparent from the trial record that an appellant did not suffer prejudice by the manner of trial counsel's representation, then the claim will not succeed and it is unnecessary and undesirable for an appellate court to consider the performance component of the test: *Aulakh* at para. 54.

[58] The prejudice component of an ineffective assistance claim is established where the appellant proves that professional incompetence is linked to a miscarriage of justice. A miscarriage of justice can result where there is a reasonable probability that the outcome of the proceedings below would have been different but for the errors made by counsel.

[59] If the performance component needs to be addressed, there is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. Deference will be accorded to counsel's strategic and tactical decisions: *Aulakh* at para. 48. The "wisdom of hindsight" has no place in the analysis: *G.D.B.* at para. 27.

2025 BCCA 28 (CanLII)

[60] In sum, to overcome the strong presumption of competence and to succeed with an ineffective assistance of counsel appeal, an appellant must: (1) establish on the balance of probabilities the material facts the claim is grounded upon; (2) demonstrate the incompetence of the representation provided by counsel by showing that it fell below a standard of reasonable professional judgment; and (3) show that the ineffective assistance caused a miscarriage of justice, either by resulting in an unreliable verdict or by undermining trial fairness.

(1) Trial counsel did not attempt to remedy the prejudice to the appellant's defence from the Stinchcombe violation at the first trial

[61] The appellant focused his complaints on trial counsel's management of the *Stinchcombe* violation, when the issue of the Crown's non-disclosure of the text messages arose in the first trial. He asserts there were two fundamental problems with trial counsel's performance on this front. First, trial counsel failed to seek a more fulsome remedy once it was determined that there had been a *Stinchcombe* violation. Second, trial counsel failed to prepare for the mistrial application and seek the appropriate remedy.

[62] Regarding the first complaint, the appellant reminds the court that the disclosure issue only arose during the appellant's cross-examination, when the trial was coming to a close. In his factum, the appellant alleged that trial counsel should have applied for a stay of proceedings. During the appeal, counsel modified the appellant's position; that is, trial counsel should have sought a declaration of mistrial in the first trial and an order for exclusion of evidence that would apply in a second trial. Appellate counsel candidly admitted that she was aware of no authority for the proposition that the appellant, in the circumstances presented here, should have been granted two remedies in successive trials.

[63] I address this point by highlighting that this was not the position taken by the appellant at the first or second trial. In my view, the appellant has failed to establish that trial counsel's approach was incompetent or otherwise deficient. It is of some significance that trial counsel was successful on the application for a

2025 BCCA 28 (CanLII)

mistrial, an “exceptional” remedy that is appropriate in “extreme circumstances” *R. v. O’Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51 at para. 77. In my view, the appellant cannot now complain that something more was required, particularly where he has failed to establish that exclusion of evidence in a second trial was available as an additional remedy. It is also of no moment that trial counsel failed to obtain a transcript prior to proceeding with the mistrial application. The lawyers were in the courtroom when the disclosure issues arose and could advance informed submissions without the need for a transcript.

[64] As an aside, Mr. K. turned his mind to advancing an application to exclude the text messages. He deposed that he thought it somewhat unfair for the Crown to proceed in the face of this nondisclosure. However, after he researched the point, he concluded that an application to exclude the text messages was not viable. It is my view trial counsel exercised reasonable professional judgment in the circumstances.

[65] Mr. R. explains in his affidavit that the Crown, having conceded to the non-disclosure, had offered to withdraw the text messages if trial counsel did not pursue a mistrial application, and simply continued the first trial without them. Mr. R. deposed that he thought this was the best possible strategy to pursue in the circumstances. He stated, “… the better strategy was to get the Text Messages excluded by leveraging the Crown’s failure to disclose them”. Mr. R. was of the view that the text messages were very damaging evidence because: (1) they establish the appellant had lied in his testimony when he said he had not spoken with his children and never had any contact with them; and (2) the text messages themselves arguably amounted to evidence of post-offence conduct because they showed that the appellant was trying to get J.A. to dissuade S.A. from proceeding with her allegations. Mr. R. was thus of the view that the Crown’s offer to exclude them was the best possible outcome in the circumstances. Notably, Mr. R. gave “clear advice” to the appellant to accept the Crown’s offer and explained the risk of proceeding with a mistrial—that the Crown would be able to use the text messages at a new trial.

2025 BCCA 28 (CanLII)

[66] However, despite this advice, the appellant insisted that his lawyers advance a mistrial application. Mr. K. attached his personal (contemporaneous) notes of this communication, stating:

> -Crown has offered not to rely on [the text messages] if there is no mistrial app[lication], otherwise will use them
>
> -[Mr. R.] and I think we should take this offer as texts could be damaging at future trial.
>
> -[The appellant] wants mistrial app[lication] even though case gets stronger next time with them and his perjury this time.

[67] The appellant disputes this communication with his lawyers. I have no hesitation accepting the affidavit evidence from trial counsel on this point. The lawyers were not challenged on this evidence. In addition, trial counsel produced a contemporaneous note documenting the exchange on this very point. Trial counsel's evidence is consistent with the Crown's submission at the first trial and the record generally on this point.

[68] The appellant instructed his lawyers to pursue the remedy he wanted, at that moment in time, and they succeeded in doing so—he was granted a mistrial and the Crown was required to start again.

[69] The appellant asserts that trial counsel should have sought to exclude the appellant's testimony from the first trial. The appellant submitted that trial counsel should have sought a *voir dire* to determine its admissibility pursuant to the principles enunciated in *R. v. Nedelcu*, 2012 SCC 59 and that trial counsel was ineffective for failing to adopt what he called a "*Nedelcu* approach". The appellant framed his submission this way:

> As per *Nedelcu*, the appellant's counsel ought to have asked the [C]ourt for an advance ruling regarding what the [C]rown could pursue in cross examination. The [C]rown must seek leave to question a witness in respect of prior testimony. A *voir dire* is held and the circumstances surrounding the prior statement are examined.

2025 BCCA 28 (CanLII)

[70] With respect, this submission is misconceived. *Nedelcu* addresses s. 13 of the *Charter* and the use to be made of compelled testimony from another proceeding. Section 13 of the *Charter* precludes "incriminating evidence" given in one proceeding from being "… used to incriminate that witness in any other proceedings …". To claim the protection of s. 13, the self-incriminating evidence at the prior proceeding must be "compelled testimony": *R. v. Henry*, 2005 SCC 76 at paras. 33–34. The Supreme Court of Canada, in *Henry*, set out that an accused is not a compellable witness at their own trial:

> [47] In *Noël*, the Court saw the unfairness of putting *compelled* testimony to the accused and held that the Crown would be permitted to cross-examine an accused on prior testimony only
>
> > when there is no possibility that the jury could use the content of the prior testimony to draw an inference of guilt, except to the limited extent that a finding that the accused has been untruthful under oath could be damaging to his defence. [Emphasis added; para. 54.]
>
> The "no possibility" test significantly raises the bar set in *Kuldip*, yet one can readily see the need for such a stringent test on the facts of *Noël*, where the prior statements were made by a compelled witness who had invoked s. 5(2) of the *Canada Evidence Act*. However, the stringency of the "no possibility" test in *Noël* does not provide a satisfactory resolution in the case of a retrial of the accused who volunteers testimony at both trials and then seeks to shelter self-serving inconsistencies behind a *Charter* barrier. While the appellants argue (with some justification) that such an immunity flows from the *Mannion* line of cases, such a result is completely inconsistent with a purposive reading of s. 13. For these reasons, I believe *Mannion* should not be followed. Accused persons who testify at their first trial and then volunteer inconsistent testimony at the retrial on the same charge are in no need of protection "from being indirectly compelled to incriminate themselves" in any relevant sense of the word, and s. 13 protection should not be available to them.
>
> [Emphasis in original, emphasis added in third para.]

[71] On this point, I agree with the Crown's submission that *Nedelcu* did not alter the basic rule articulated in *Henry* that an accused's prior testimony is not compelled for s. 13 purposes. *Nedelcu* only clarified the holding in *Henry* that compelled prior testimony applies to incriminating evidence and that the protection of s. 13 did not extend to non-incriminating evidence: at para. 26. Trial counsel was correct in advising the appellant that he could be questioned about his previous perjured testimony, and that this was an important reason not to pursue a mistrial. On this

2025 BCCA 28 (CanLII)

point, the appellant has failed to demonstrate that trial counsel's conduct fell below a standard of reasonable professional judgment in the manner in which they managed the appellant's damaging testimony.

[72] In addition, the appellant has not established a reasonable probability that counsel's errors caused prejudice that resulted in a miscarriage of justice in the form of an unreliable verdict or unfair adjudicative process. Absent the causal connection between the demonstrated incompetence and prejudice, there is no basis to find a miscarriage of justice: *Aulakh* at para 52. In my view, the appellant instructed his lawyers to seek a mistrial and they successfully obtained what the appellant sought. There is no merit to the submission that more was required.

(2) Trial counsel failed to adequately prepare the appellant to respond to the false evidence at the second trial

[73] The appellant submits that his lawyers failed to properly manage the appellant's testimony about the text messages. In the fresh evidence affidavits, the appellant tried to explain that he in fact had not lied at the first trial about communicating with his son. He explained that he was asked whether he had "talked" to his son. He was not asked whether he had "communicated" with his son (via text messaging). Therefore, according to the appellant, his evidence was not false and his trial lawyers should not have presented it as such.

[74] In my view, the appellant's explanation is untenable on the record before this court. Here is how.

[75] At the first trial, the appellant denied talking to his children after he left the house. He denied meeting with J.A. in person. The appellant's evidence on this point:

> Q: After you were made to leave the home in [redacted location] --
> A: Yes?
> Q: -- did you ever talk to any of your children again?
> A: No.
> Q: None of them?

2025 BCCA 28 (CanLII)

A: No.

Q: Did you ever meet up with [J.A.]?

A: No, I did not.

[76] Trial counsel, in their affidavit, deposed that the appellant's attempt on this appeal to distinguish "talking" from "texting" is a "fresh concept" and one that the appellant did not raise previously with them. Trial counsel deposed that before (and after) the mistrial application, the appellant admitted he had lied about communicating with J.A.

[77] At the second trial, the appellant's counsel elicited the appellant's explanation about his false testimony from the first trial in this way:

Q: You've testified in a prior trial on these allegations, correct?

A: Yes.

Q: Did you give evidence denying contact with any of your children after the allegations?

A: Yes.

Q: Why?

A: I was -- I was scared. Confused. I didn't want to -- I knew I was going to get into trouble, but it was a chance I was willing to take to be in touch with [J.A.]. [J.A] -- [J.A.] was -- I believe he was going through a point where he was hurting himself. He would message me and say that he crashed on his motorbike on purpose without wearing his helmet. And I already -- I already had one child that tried to commit suicide. I didn't want another one trying to do the same thing.

Q: [M.K.A.], did you -- since the -- these allegations have come to light, have you communicated with any of your other children?

A: No, I have not.

[78] Crown counsel cross-examined the appellant. After confronting the appellant with his testimony from the first trial about his contact with his children after being removed from the family home, the cross-examination proceeded as follows:

Q: Was that your testimony as you recall it, [M.K.A.]?

A: Yes, it was.

Q: And so can you enlighten me as to why your testimony has changed today?

2025 BCCA 28 (CanLII)

> A: Because I realized what I had done -- what I had said before was not the truth and I knew I would -- yeah, it wasn't the truth.
>
> Q: But you knew you were under oath when you were testifying, is that correct?
>
> A: Yes, I did.

[79] In response to trial counsel's evidence on this point, the appellant provided a further affidavit wherein he claims that he was not lying about meeting J.A. at the Boston Pizza. He deposed that he simply forgot about the meeting and that it is not surprising that he forgot considering the passage of time.

[80] The appellant's explanation is flawed. First, he has ignored the part of his evidence from the first trial where he denied he "met up" with J.A. At the second trial, he admitted that he lied at the first trial about this and that he had met with J.A. at the Boston Pizza. His explanation that he forgot about the meeting at Boston Pizza is not credible given that J.A. testified about the meeting during his testimony. Second, the appellant agreed that he met with J.A. at Boston Pizza and they would have clearly "talked". The appellant's attempt to explain away this inconsistency with the distinction between talking and texting fails on both of these bases.

[81] In my view, trial counsel's evidence is to be preferred to that of the appellant on this point. In part, because of the appellant's flawed and inconsistent explanations; and in part, because it would make no sense for trial counsel to have conducted the direct examination in the manner they did at the second trial—and for the appellant to testify, under oath, that his earlier testimony was false.

[82] The appellant also asserts that trial counsel failed to properly prepare him for the second trial. He contends that trial counsel did not meet with him on the telephone or in private to prepare for the second trial. Relying on telephone records from Ms. C., the appellant asserts that Mr. R. spent less than five minutes with him on the telephone the day before the second trial was to commence. In his affidavits, the appellant deposed that he did not know that his prior testimony could be used at the second trial. In the affidavit material, he relies on various records, including

2025 BCCA 28 (CanLII)

records from LegalAid BC and Ms. C., to demonstrate when phone calls were made and when transcripts were ordered.

[83] In my view, this evidence is at odds with the affidavit evidence of trial counsel. It is also inconsistent with the record as set out above when the appellant was questioned about his testimony from the first trial. Mr. R. deposed that he met and spoke with the appellant several times before the second trial, starting in February 2021. Mr. R. stated that he travelled to [redacted location] the day before the trial commenced and met with the appellant in his hotel room. He deposed that he provided the appellant with the transcripts of the first trial. It is my view that Ms. C.'s call logs do not contradict Mr. R.'s evidence.

[84] I do not accept the appellant's contention that trial counsel failed to prepare him for his testimony at the second trial. Trial counsel state otherwise. It is also clear from the trial transcript that the appellant was prepared to address his own false testimony. Trial counsel elicited the appellant's explanation about his false evidence with reasonable skill and judgment in the circumstances. There is no basis to the appellant's allegation that trial counsel failed to prepare him for the second trial or that they incompetently managed his earlier false testimony.

(3) Trial counsel failed to seek out and lead available evidence or effectively cross-examine Crown witnesses

[85] The appellant raises a litany of complaints about trial counsel's conduct of the trial more generally, alleging they failed to adduce available evidence that would have supported his defence and failed to effectively cross-examine Crown witnesses. I would dismiss each of these complaints. Trial counsel answer each of these complaints in their affidavits and contradict much of what the appellant asserts. At times, trial counsel's explanations are supported by the transcript and at others, by their contemporaneous notes. Trial counsel provided logical and reasonable basis for proceeding in the manner that they did. And they typically proceeded after receiving express instructions from the appellant.

2025 BCCA 28 (CanLII)

Available evidence

[86] In support of his allegation that trial counsel failed to seek out and lead available evidence, the appellant highlights six separate examples of evidence he contends would have assisted in his defence.

[87] I address first the appellant's complaint that trial counsel failed to use photographs and diagrams depicting the location of the property where the assaults took place. The appellant asserts that the photographs would have demonstrated that the appellant could not have committed the sexual assaults without being visible to others. Mr. R. deposed that he and Mr. K. discussed the use of the photographs and concluded that they were of no evidentiary value. The photographs had been taken more than a decade after the alleged conduct. More importantly, the assaults occurred in a rural community "with low foot and vehicle traffic" so the low visibility of the locations would not have assisted in the appellant's argument on this point.

[88] Second, the appellant alleges that trial counsel were ineffective because they failed to call expert evidence of the appellant's back injury. The appellant alleged that he could not have committed the repeated sexual assaults as alleged because of his physical disability, rendering the acts impossible.

[89] Trial counsel deposed that they considered obtaining medical evidence of the appellant's back injury, which occurred in 2005. However, they decided against doing so, partly because the appellant agreed that he engaged in sexual activity with I.A. after his back injury. The trial judge relied on I.A.'s evidence about sexual activity with the appellant, in part, to reject the appellant's claim that his back injury would have prevented him from assaulting S.A., stating, "… [I.A.] said that [the appellant's] back injuries did not interfere with him having sex with her": at para. 167.

[90] Mr. R. deposed that, for this evidence to assist in the appellant's defence, the physicians would have had to agree that the appellant's back injury would have prevented him from having sexual intercourse. However, evidence led by I.A about their sexual activity after his back injury—confirmed by the appellant in his own

2025 BCCA 28 (CanLII)

evidence and by I.A.'s three pregnancies following his back injury—established that the appellant was not physically prevented from engaging in sexual activity.

[91] Trial counsel's decision about the medical evidence was reasonable. Further, the appellant has not produced a medical opinion that supports this contention or detracts from the trial judge's findings on this point. Instead, he asks this Court to speculate whether his contention could even be established. In my view, the appellant has not demonstrated any prejudice in trial counsel's decision not to adduce medical evidence about the appellant's incapacity due to a back injury.

[92] Third, the appellant alleges trial counsel failed to obtain records from S.A.'s school or from MCFD. The appellant suggests that these records were material because they would have included S.A.'s first "disclosure" about the allegations and the records could have been used to challenge her credibility. Mr. R. observed (correctly, in my view) that the mere fact that S.A. or the family members gave statements to the MCFD was not sufficient to meet the criteria for a third party records application set out in *O'Connor*. There is nothing presented in the fresh evidence or that arose during the trial that supports the suggestion that trial counsel should have applied for the school or MCFD records, or that there was a legitimate basis for advancing such an application.

[93] The appellant has not established on the record here that the school or MCFD records would demonstrate the inconsistencies suggested. In my view, prejudice has not been shown.

[94] Fourth, the appellant suggests that trial counsel should have sought S.A.'s medical records. He asserts that the medical records would have shown that S.A. had not suffered any type of injury consistent with an adult male forcing intercourse on a child. After all, he asserts, "… the frequency of assaults could have caused medical concerns". However, there was nothing in the evidence, from Crown witnesses or the appellant, that S.A. ever visited a doctor when she was young while she was being sexually assaulted by her father. The appellant does not suggest in his affidavits that he took S.A. to the doctor in order to support the

2025 BCCA 28 (CanLII)

existence of medical records showing that S.A. sustained no injuries consistent with sexual assaults. Mr. R.'s position on this point demonstrates reasonableness where he states, "[t]here was no reason to believe that [counsel] could procure medical evidence proving or disproving sexual assaults from over a decade before". There was no prejudice caused by counsel's decision not to pursue this evidence.

[95] Fifth, the appellant suggests that trial counsel failed to obtain opinion evidence about the frailties of a young child's memory. Even if such an opinion could have been obtained, the appellant has not produced such an opinion now to support his allegation. Even so, it is difficult to conceive how such an opinion would assist a trier of fact considering S.A. alleged the conduct continued until she was twelve or thirteen and no longer a young child. This complaint is without merit, and the appellant has not demonstrated any prejudice.

[96] Sixth, the appellant alleges trial counsel provided ineffective assistance because they failed to call Ms. C. as a character witness. Presenting Ms. C. to speak about the appellant's character would have opened a door to put the appellant's character in issue. That consideration aside, Mr. R. deposed that they considered whether to call Ms. C. but decided against it for a number of reasons, including: (1) Ms. C.'s comments to him about the case tended to be coloured by sexual assault myths and stereotypes; and (2) her conduct in the courtroom was not fitting of a suitable character witness. On this latter point, the sheriffs had warned Ms. C. about her language and behaviour as the trial was proceeding. The appellant has not demonstrated any prejudice caused by the decision not to call Ms. C.

[97] On each of these six points, the appellant has not demonstrated that trial counsel was ineffective. He has shown neither prejudice or that trial counsel's conduct reflected anything but reasonable judgment with respect to each of the criticisms raised. The appellant has not demonstrated that he suffered any miscarriage of justice. In sum, the appellant has not discharged his burden of

2025 BCCA 28 (CanLII)

establishing on a balance of probabilities how he was prejudiced by trial counsel's conduct of the trial. I would not accede to any of these complaints.

Cross-examination

[98] The appellant suggests that trial counsel failed to conduct effective cross-examinations and he raises a number of specific complaints.

[99] First, the appellant asserts that trial counsel failed to use J.A.'s text messages to suggest collusion between the various family members. The appellant points to one specific message where the appellant asked J.A. if S.A. ever spoke with anyone about "this stuff". J.A. replied, "No only mom". Trial counsel deposed that they decided not to cross-examine I.A. about this message because this message did not, in their view, tend to support a finding of collusion. The texts were also inadmissible hearsay. Trial counsel was thus limited with how they could properly use the messages.

[100] Second, the appellant criticized trial counsel for failing to use the family group chat communications to impeach witnesses. Trial counsel explained, with good reason, why they chose not to use the family group chat. Trial counsel noted that the appellant had "hacked" into the family discussion. As Mr. R. outlined, this raised a "host of concerns" and proceeded cautiously.

[101] Third, the appellant raised two specific complaints about trial counsel's cross-examination of C.M. The appellant suggests that C.M.'s testimony changed between the first and second trial. The appellant claims that in the first trial, C.M. only testified to "some concerning touching" but in the second trial, she described a more forceful type of touching. The appellant alleges trial counsel was ineffective because they failed to cross-examine C.M. about this purported inconsistency.

[102] Having reviewed C.M.'s testimony from the first and second trial on this point, the Crown correctly notes that there is no meaningful distinction between C.M.'s evidence about the nature of the conduct she observed and that it is unsurprising that there was no cross-examination on this subject.

2025 BCCA 28 (CanLII)

[103] Similarly, the appellant suggests C.M. was inconsistent about her own reaction to what she observed between the appellant and S.A. At the first trial, C.M. testified that she felt "sick" about what she had just seen and she "… tried to pretend that I wasn't seeing what I was seeing". During cross-examination, counsel elicited that she went outside and cried after she witnessed the conduct. At the second trial, C.M. testified that she went "… outside for a breather and was really upset". There was no material difference with C.M.'s trial testimony on this point. She was describing the emotional impact of witnessing the abuse. Cross-examining her about her emotional state would have had no impact on the verdict.

[104] It is my view that none of the conduct complained of amounts to ineffective assistance in isolation or cumulatively. Trial counsel demonstrated reasonable professional judgment as they worked through, with the appellant, his defence and how best to pursue it. Trial counsel demonstrated a careful approach to the conduct of the appellant's criminal trial. Their conduct falls well within the broad spectrum of reasonable professional assistance. Ineffective assistance of counsel may result in a miscarriage of justice where it affects the reliability of the verdict, or where it undermines procedural fairness in arriving at a verdict. In my view, the appellant has failed to demonstrate prejudice with respect to any one of his complaints.

[105] In sum, I have assessed the performance component of the ineffective assistance claim in light of the numerous allegations and the submission by the appellant of the cumulative effect of the errors. It is my view, for the reasons stated, the appellant has failed to establish that any of the conduct alleged fell below a standard of reasonable professional judgment or that the conduct caused a miscarriage of justice, either by an unreliable verdict or by undermining trial fairness.

[106] I would not accede to this ground of appeal.

2025 BCCA 28 (CanLII)

Disposition

[107] In the result, I would dismiss the application to adduce fresh evidence. For the foregoing reasons, I would dismiss the appeal.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Griffin"

2025 BCCA 28 (CanLII)