Court of Appeal for Saskatchewan **Citation: *R v Whitehead*, 2022 SKCA 19**

Docket: CACR3193 **Date: 2022-02-10**

Between:

Davis Demery Lester Whitehead

Appellant

And

Her Majesty the Queen

Respondent

Before:	Jackson, Ryan-Froslie and Tholl JJ.A.
Disposition:	Appeal allowed
Written reasons by:	The Honourable Madam Justice Jackson
In concurrence:	The Honourable Madam Justice Ryan-Froslie The Honourable Mr. Justice Tholl
On appeal from:	CRM 32 of 2017 (QB), Melfort
Appeal heard:	December 10, 2021
Counsel:	Brian Pfefferle and Thomas Hynes for the Appellant Pouria Tabrizi-Reardigan for the Respondent

Jackson J.A.

I. Introduction

[1] Following a trial by jury, Davis Whitehead was convicted of the first degree murder of Ramsay Whitehead contrary to s. 235(1) of the *Criminal Code*. He appeals his conviction.

[2] His appeal concerns the use of similar fact evidence to prove the necessary element of planning and deliberation required to return a verdict of first degree murder. The proposed similar fact evidence was an unproven allegation of assault causing bodily harm that had occurred earlier the same evening at a different location and on a different individual than the man who was killed.

[3] Following a *voir dire*, the trial judge held that the evidence of the prior assault was admissible for the purposes of allowing the Crown to argue that it was some evidence of planning and deliberation. When she weighed the probative value of the evidence with its prejudicial effect, she concluded it should be admitted. The issues on appeal concern whether the trial judge erred by so deciding.

[4] With respect, notwithstanding the deference owed to a trial judge's admission of similar fact evidence, two errors justify this Court's intervention. First, the trial judge committed an error in law by finding that the evidence of the prior assault was evidence that could be considered to determine whether the appellant had planned and deliberated upon the murder of the deceased. Second, the trial judge's conclusion that the probative value of the evidence outweighed its prejudicial effect to the appellant is unreasonable. I would set aside the conviction and order a new trial.

II. Background

[5] As there must be a new trial, I will provide a brief overview of the evidence only, before indicating what happened during the *voir dire* and the trial.

A. Overview

[6] The events that I am about to describe occurred during the night of December 9, 2016. Four incidents of violence happened within an approximately two hour time period:

(a) First incident – The appellant visited House 105. He and Ramsey Whitehead got into a fight involving fists and words. Ramsey Whitehead threw the appellant to the floor. The appellant left House 105 without his jacket.

(b) Second incident – The appellant walked to House 608, the Garvin residence, which is 700 metres from House 105. He walked in, pushed Harriet Garvin to the ground and then said to his brother-in-law (a guest at the residence), Jamie McKay, "You should be home with your kids" or words to like effect. The appellant then took a swing at Mr. McKay and left after having been in the Garvin residence for approximately 15 seconds. Mr. McKay then discovered he had been struck with a knife. Mr. McKay needed day-patient care at a hospital and two stitches to close the wound.

(c) Third incident – In between the Garvin residence and House 105, the appellant met Spencer Head. The appellant threatened Mr. Head with a knife, saying words to the effect of, "Do you want to fight me?" or "Are you trying to pick a fight?"

(d) Fourth incident – Approximately 30 minutes after the second incident, the appellant returned to House 105. This time he ran or "speed-walked" straight at Ramsey Whitehead and stabbed him either two or three times. Ramsey Whitehead died almost immediately from the wounds inflicted by the stabbing.

To avoid confusion between the appellant, Davis Whitehead, and the victim, Ramsey Whitehead, from this point on in these reasons, I will refer to the latter as the deceased unless his name appears in quoted material.

[7] The appellant was initially charged in two separate informations. In the first information, sworn on December 10, 2016, he was charged with committing first degree murder, contrary to s. 235(1) of the *Criminal Code*, and endangering the life of Jamie McKay, thereby committing an aggravated assault, contrary to s. 268 of the *Criminal Code*. In a second information, he was

charged with assaulting Harriet Garvin. By the time of trial, the Crown had preferred an indictment alleging the commission of all three counts. It was the Crown's intention that all three counts be tried by the same jury at the same time in one trial.

[8] The defence objected to the three counts being heard together on the basis of s. 589 of the *Criminal Code*:

> **Count for murder**
>
> **589** No count that charges an indictable offence other than murder shall be joined in an indictment to a count that charges murder unless
>
> > **(a)** the count that charges the offence other than murder arises out of the same transaction as a count that charges murder; or
> >
> > **(b)** the accused signifies consent to the joinder of the counts.

Faced with the defence's objection to the inclusion of the McKay and Garvin assault charges with the murder count, the Crown agreed to sever them and to proceed with the murder charge first.

B. *Voir dire* on the admissibility of the evidence of what occurred at the Garvin residence

[9] After the jury had been chosen, a *voir dire* was held to determine whether the evidence of what had happened at the Garvin residence (the McKay and Garvin assaults) was admissible as similar fact evidence to support a finding that the appellant had planned and deliberated upon the murder of the deceased. The Crown called the individuals who had been present at the Garvin residence as witnesses. This included (a) three lay witnesses, who described in some detail the nature of the stabbing, the amount of blood and the effect of the stabbing on Mr. McKay, (b) the EMS paramedic who attended at the Garvin residence and described the state of Mr. McKay, and (c) the RCMP officers who attended there and described what they saw. The Crown also filed photographs of the interior of the home as exhibits.

[10] In his submissions to the trial judge, Crown counsel argued that all of the evidence of what happened at the Garvin residence should be admitted for two reasons: (a) the striking of Mr. McKay was so similar to what had happened to the deceased as to be probative of planning and deliberation beyond the extent of its prejudicial effect, and (b) it was part of the narrative. On the question of similarity, the following points were stressed: (a) the short period of time between the incidents, (b) an immediate act of violence after entering each of the two homes, and (c) a

sudden stabbing with a knife in each home seemingly without provocation. Crown counsel also submitted that planning and deliberation could not be proven in any other way such that the evidence was crucial to its case.

[11] Defence counsel resisted these arguments, saying the admission of the evidence from the Garvin residence would put the appellant on trial for what had happened there to *shore up* the Crown's case through the use of past discreditable conduct. It was the position of the defence that there was not sufficient similarity or connectedness between the events at the two houses. The similarity, according to the defence, was limited to the fact that the same person stabbed Mr. McKay and the deceased. There was no cross-over of witnesses from one house to the other. Defence counsel submitted further that any evidence of a continuing narrative should be of inconsequential matters intended to provide context only and not to show the possible commission of other crimes.

C. Trial judge's *voir dire* decision

[12] The trial judge began by noting that the Crown had consented to the severance of the assault charges and to proceed with the murder charge only. She said that this meant it had not been necessary "to decide whether the three charges occurred as part of the same transaction for the purposes of the severance application". She then observed that, "as a practical matter, what occurred on December 9 through to the early hours of December 10, 2016, was an interconnected sequence of events".

[13] What follows is the substance of the trial judge's reasons for deciding to admit the bulk of the evidence as to what happened at the Garvin residence:

> The overarching principle that guided me in my decision is, of course, the need to balance the probative value of the evidence that the Crown seeks to tender as against the prejudicial effect of that evidence. If the evidence of what occurred at House Number 608 [the Garvin residence] has no purpose but to demonstrate that Mr. Whitehead is of bad character and therefore has a propensity to commit this type of offence, there is no place for that evidence at this trial. The door to its admission must be presumptively shut. In order for that door to be opened, there must be a significant and identifiable purpose for tendering the evidence of what occurred at House 608 beyond merely attempting to demonstrate bad character or propensity towards criminal behaviour. In other words, the argument that Mr. Whitehead assaulted Harriet Garvin and assaulted Jamie McKay at House Number 608, ergo, he must have committed [*sic*] Ramsey Whitehead, cannot succeed. There must be something more.

And it is the Crown's burden to show that there is something more, on a balance of probabilities.

I accept the Crown's position that there is, indeed, something more to this evidence, and that the balance is tilted in favour of admission of the evidence relating to House Number 608. In particular, I have considered the following. The proposed evidence is not simply that Mr. Whitehead committed another offence or offences at some other time, some other place, in some fashion, and therefore that the jury should conclude that he committed the alleged first degree murder. The connection is not so tenuous. Rather, there is proximity of both time and place. The events took place within a very short time period, it appears within two hours at most, and both on the Red Earth First Nation, it appears within blocks of each other.

Although counts 2 and 3 were severed from the indictment in question at this trial, it is arguable that the offence at both houses were part of the same transaction. They form a cohesive sequence of events, and one cannot be excised from the other with any sort of surgical precision.

Although the defence argued that the only commonality between what occurred at House 105 and House 608 was Mr. Whitehead himself, I find that not to be the case. The similarities, which I would characterize as striking, are broader than that. In particular, based on the evidence at the *voir dire*, it appears that there was an unprovoked attack with no warning upon Mr. Jamie McKay at House Number 608. Mr. Whitehead came in, said something to the effect that Mr. McKay should be home with his kids, and then stabbed him once.

Mr. Whitehead left, and within a very short time period, there was an unprovoked attack upon Mr. Ramsey Whitehead at House Number 105. Both were stabbings. Both events were described by the witnesses to have occurred in a physically similar fashion, and whether or not it was the same weapon that was used, it was the same type of weapon.

The evidence of what occurred at House Number 608 goes to the question of whether the alleged offence at House 105 was planned and deliberate. It is logically probative to the mind-set and intentions with which Mr. Whitehead approached House Number 105. There is no direct evidence of such planning and deliberation, and therefore, the jury will have to draw that inference from the totality of the evidence.

Having embarked upon the necessary balancing exercise, weighing the probative value against the prejudicial effect of the evidence that the Crown seeks to put to the jury, I have determined that the evidence with respect to House Number 608 can be put to the jury with the following caveats. First, there is no need for the photographs of the interior of House Number 608 showing where the stabbing of Jamie McKay took place or of the bloodstains or blood-soaked towels to go before this jury. Therefore, only photos number 71 to 78, inclusive, from Exhibit P-4VD can be put to the jury [these were photos of the exterior of the Garvin residence].

…

And second, there is no need for any evidence with respect to the alleged assault on Harriet Garvin, allegedly pushing her to the ground to go before the jury. I see no value to this evidence on the charge that is actually before the jury.

I have also concluded that I can sufficiently ameliorate the potential prejudice of the evidence regarding House Number 608 through clear instructions to the jury as to the very limited use to which they can put the evidence.

D. Mid-trial instructions

[14] The trial judge gave these instructions to the jury on day 3 of the 7-day trial:

> Before we get started with the witnesses that the Crown is going to call this morning, you did hear some evidence yesterday, and you will continue to hear some evidence throughout the trial with respect to events that took place at House Number 608 [the Garvin residence], and that was the evidence in relation to a Jamie McKay. The only purpose that -- sorry. The -- it's being admitted for a limited purpose, and I'll explain that to you at the end of the trial. But I want you to keep in mind as you're hearing the evidence that the only charge that's before you is first degree murder, and that relates to House Number 105. And so the Crown is required to prove the elements of first degree murder which occurred at House 105. You cannot take the evidence with respect to House 608 in any fashion to the extent that Mr. Davis Whitehead is of a bad character or that because of what happened in House 608, he's more likely to have taken actions as alleged at House 105. So I would ask that you just keep in mind, that Mr. Whitehead is not on trial for anything that occurred at House Number 608. What has to be first and foremost in your minds is whether the Crown has proven the offence of first degree murder at House 105. All right.

E. Directions contained in the jury charge

[15] The jury was charged with respect to the question of similar fact evidence as follows:

> As I will discuss in further detail shortly, two of the essential elements of the offence of first degree murder are intent and planning and deliberation. And the Crown must prove both of those elements beyond a reasonable doubt in order for Mr. Whitehead to be convicted of first degree murder.
>
> You will recall that there was evidence tendered by the Crown as to what occurred at House Number 608 [the Garvin residence]. The Crown argued that the similarities between what occurred at the two houses are so striking that you should infer that Davis Whitehead both intended to kill Ramsey Whitehead and that his actions at House 105 were planned and deliberate, and I will discuss the Crown's theory in that regard shortly. As I instructed during the trial, the evidence of what happened at Number 608 can be considered by you for the limited purpose of deciding whether or not Davis Whitehead had intent and whether the killing was planned and deliberate. You must remember that Davis Whitehead was charged with and is on trial solely for first degree murder. You are not trying him for any other crime. Therefore, the fact that there were similarities between Davis Whitehead's actions at House Number 608 and his actions at House Number 105 cannot and must not be used by you to conclude that Davis Whitehead is a bad character and therefore is the type of person who was likely to have killed Ramsey Whitehead. To make use of that evidence in such a fashion to draw such a conclusion is absolutely prohibited.
>
> …
>
> The Crown says that this sequence of events that occurred demonstrates that Davis Whitehead intended to kill Ramsey Whitehead, and that his actions in fatally stabbing Ramsey Whitehead were planned and deliberate.

[16] The trial judge then related the sequence of events that lead to the death of Ramsey Whitehead:

> Beginning at House 105, the Crown's position is there was an argument between Ramsey and Davis at this location. Whether he was escorted out or simply walked out himself, Davis left the house and made his way to House 608.
>
> At House 608, Davis Whitehead entered the home, said something to Jamie McKay to the effect of, "Get the hell home to your kids" and stabbed him once. He didn't say anything to Davis. Jamie didn't make any sort of threatening gesture, didn't get into an argument. Essentially, Davis entered the house, and the Crown's position is he stabbed Jamie with the knife without provocation.
>
> Next, the Crown points to the meeting at the bridge between Spencer Head, who was leaving House 105, and Davis Whitehead, who was heading into the direction of House 105. The Crown's position is that [Davis] said something to the effect of, "Do you want to fight me or are you trying to pick a fight" and showed Spencer a knife. Spencer hadn't said anything, didn't make any sort of threatening gesture. They hadn't argued. He hadn't done anything to provoke Davis, and yet Davis threatened Spencer with a knife, which Spencer identified as the knife that was exhibited during trial, which was the same knife that had traces of Ramsey Whitehead's blood on it.
>
> Finally, the evidence from [House] 105, the second incident. The Crown states that Davis barged into House 105, speed walked over to Ramsey Whitehead, and stabbed him … three times. The evidence was that he did not talk to anyone. No one said anything to him. He didn't stop on his way over. He didn't look anywhere other than straight to Ramsey. Ramsey didn't make any sort of threatening gesture. He didn't say anything to Davis. Davis just stabbed him three times.

[17] The judge continued the charge:

> I think that's the characterization of the Crown's position with respect to the evidence that came out. And from what, what the Crown is asking you to conclude is that the similarities between the events at House 608 and House 105 demonstrate beyond a reasonable doubt not only that Davis intentionally killed Ramsey Whitehead, but did so in a planned and deliberate fashion. The Crown states that Davis's actions were not impromptu or spur of the moment. He left House 105, went to House [6]08 , where he stabbed Jamie McKay, and chose to return to House 105, where he stabbed Ramsey Whitehead, with whom he'd argued approximately an hour earlier.

F. Question from the jury

[18] Early in their deliberations, the jury asked for "clarification of the definition of first degree murder and second degree murder, the difference between them, particularly the planning". The trial judge recharged the jury on this point as follows:

> So second degree murder is when an accused intentionally kills someone. To move up to first degree murder, you have to have intentionally killed someone and it has to have been planned and deliberate. When you are looking at the planned and deliberate, the planning means that there's a calculated scheme or a design, that it was thought out and considered by the accused. Deliberate means that it was [*sic*] impulsive. It was not just a spur of the

> moment decision. It wasn't done in the heat of the moment. And you'll recall I also talked about that planned didn't have to be complicated, and it needn't have been planned over a lengthy period of time. It can be a simple plan. It just has to be a design or a scheme to have committed the intentional killing.

[19] Shortly thereafter, the jury returned a verdict of guilty of first degree murder.

III. Issues

[20] The appellant identifies the following issues:

(a) Did the trial judge err by finding that the evidence of what happened at the Garvin residence had any probative value as similar fact evidence going to the issue of planning and deliberation of the murder of the deceased?

(b) Did the trial judge err by concluding that the probative value of the evidence from the Garvin residence outweighed its prejudicial effect?

IV. Analysis

A. Standard of review on admission of similar fact evidence

[21] It is appropriate to begin by mentioning the applicable standard of review and how it applies in this appeal. In *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908 [*Handy*], Binnie J. wrote for the Court:

> [153] A trial judge has no discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value. Nevertheless, a trial judge's decision to admit similar fact evidence is entitled to substantial deference: *B.(C.R.)*, [[1990] 1 SCR 717], at p. 739; and *Arp*, [[1998] 3 SCR 339], at para. 42. In this case, however, quite apart from the other frailties of the similar fact evidence previously discussed, the trial judge's refusal to resolve the issue of collusion as a condition precedent to admissibility was an error of law. A new trial is required.
>
> (Emphasis added)

[22] In a companion case, *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33 [*Shearing*], the following was observed:

> [73] In the weighing up of probative value versus prejudice, a good deal of deference is inevitably paid to the view of the trial judge: *B.(C.R.)*, *supra*, at p. 733. This does not mean that the trial judge has a discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value, but it does mean that the Court recognizes the trial

> judge's advantage of being able to assess on the spot the dynamics of the trial and the likely impact of the evidence on the jurors. These are evidentiary issues on which reasonable judges may differ and, absent error in principle, the decision should rest where it was allocated, to the trial judge.
>
> (Emphasis added)

[23] Since *Handy* and *Shearing*, appellate courts have probed what is meant by these two decisions regarding the standard of review to apply to the admission or rejection of similar fact evidence. Justice Doherty's reframing of the standard of review in *R v James* (2006), 213 CCC (3d) 235 (Ont CA) [*James*], leave to appeal to SCC refused, 2007 CanLII 40490, appears to be the most widely accepted statement of the standard:

> [33] The process of balancing probative value against prejudicial effect is the trial judge's responsibility. Appellate courts will defer to the trial judge's assessment of the comparative probative value and prejudicial effect of the proffered evidence unless an appellant can demonstrate that the result of the trial judge's analysis is unreasonable, or is undermined by a legal error or a misapprehension of material evidence: [citations omitted].

Also see *R v Stubbs*, 2013 ONCA 514 at para 58, 300 CCC (3d) 181 [*Stubbs*], and *R v Percy*, 2020 NSCA 11 at para 67, 61 CR (7th) 7.

[24] I have reviewed this appeal with the standard of review from *James* in mind. I acknowledge the privileged position of the trial judge. Nonetheless, I find that she committed legal errors in her assessment of the probative value of the evidence of the McKay stabbing. She assumed that the evidence had probative value directed to the issue of planning and deliberation, without deciding the question; or, if, she did consider the issue, she erred by finding that it had *any* probative value. I also find the appellant has demonstrated that the result of the trial judge's analysis of probative value and prejudicial effect is unreasonable. I will now provide my reasons for reaching these conclusions.

B. Legal errors in assessing probative value

[25] An analysis of probative value in this case must begin with what is meant by planning and deliberation in the context of killing another. The *Criminal Code* provisions set the outer limits, but provide little guidance:

> **Murder, Manslaughter and Infanticide**
> **Murder**
> **229** Culpable homicide is murder
>
> **(a)** where the person who causes the death of a human being

> **(i)** means to cause his death, or
>
> **(ii)** means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
>
> **(b)** where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
>
> **(c)** if a person, for an unlawful object, does anything that they know is likely to cause death, and by doing so causes the death of a human being, even if they desire to effect their object without causing death or bodily harm to any human being.
>
> **Classification of murder**
> **231(1)** Murder is first degree murder or second degree murder.
>
> **Planned and deliberate murder**
> **(2)** Murder is first degree murder when it is planned and deliberate.
>
> …
>
> **Second degree murder**
> **(7)** All murder that is not first degree murder is second degree murder.

[26] The courts have developed what is meant by *planning and deliberation*. Gerry Ferguson, Justice Michael Dambrot, and Michelle Lawrence, *Canadian Criminal Jury Instructions: CRIMJI*, online (current to 15 September 2021) 4th ed (Vancouver: CLEBC, 2021) [*CRIMJI*], captures that jurisprudence well.

[27] With respect to the meaning of *planned*, *CRIMJI* states as follows (at §95.4):

> **B. Section 231(2)—The Meaning of "Planned" [§95.4]**
> 2. … A planned murder is a murder that was conceived and (carefully) thought out before it was committed. In other words, it is a murder for which a scheme, plan, or design for committing the murder has been created before the murder is carried out. The scheme or plan may be quite simple. The scheme or plan can be formulated long before the murder or very shortly before the murder. Thus a planned murder is a murder that was committed as a result of a plan or scheme that was formulated before the murder was committed. It is important to note that a murder can be intentional without being planned. A person can intentionally kill someone without having planned to kill that person. For example, a person may get into an argument with someone, lose their temper, and intentionally kill that person on the spur of the moment. In that example, the murder was intentional, but it was not planned.
>
> (Emphasis added)

[28] With respect to *deliberate*, *CRIMJI* states as follows (§95.5):

> **C. Section 231(2)—The Meaning of "Deliberate" [§95.5]**
> 3. The word "deliberate" also means something more than intentional. It means carefully thought out, slow, cautious, and not hasty, rash, or impulsive. A person commits deliberate

> murder when he or she takes the time, before committing the murder, to consider or think about the consequences and weigh the advantages and disadvantages of his or her intended acts of murder. The time for careful thought need not be long, but before you can convict of first degree murder you must be satisfied beyond a reasonable doubt that the killing was done after careful thought and not on the spur of the moment, suddenly or impulsively under the influence of some emotion or passion. You must be satisfied that the killing was done after real consideration.
>
> (Footnotes omitted, emphasis added)

[29] It is also worth observing that the plan need not necessarily involve planning to cause death. Based on s. 229(a)(ii) of the *Criminal Code*, first degree murder can be established by proof that the accused planned and deliberated upon an action that would cause bodily harm that the accused knew was likely to cause death and was reckless as to whether death ensued: *R v Nygaard*, [1989] 2 SCR 1074. Thus, in this case, it is understood that the appellant could be convicted of first degree murder based on a finding by the jury that he planned and deliberated to cause death pursuant to s. 229(a)(i) or to cause bodily harm he knew was likely to cause death pursuant to s. 229(a)(ii) or he was reckless in that regard.

[30] That brings me to when planning and deliberation can be proven by evidence of other acts of violence committed by the accused against individuals other than the murder victim and the admissibility of such evidence, commonly referred to as similar fact evidence.

[31] Every decision regarding the admissibility of similar fact evidence, or the review of such a decision by an appellate court, must begin with the cautionary comment from *Handy*: “Similar fact evidence is … presumptively inadmissible” (at para 55). Justice Binnie continues in the same paragraph saying, “The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception”.

[32] Justice Binnie notes that certain factors must be borne in mind in determining the “cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves” (at para 82). In summary, Binnie J. identifies seven connecting factors:

> [82] … Factors connecting the similar facts to the circumstances set out in the charge include:
>
> (1) proximity in time of the similar acts … ;

> (2) extent to which the other acts are similar in detail to the charged conduct … ;
>
> (3) number of occurrences of the similar acts … ;
>
> (4) circumstances surrounding or relating to the similar acts … ;
>
> (5) any distinctive feature(s) unifying the incidents … ;
>
> (6) intervening events … ;
>
> (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.
>
> (Citations omitted)

[33] With this list, I do not take Binnie J. as saying that the trial judge has no obligation to determine whether the proposed similar fact evidence is *probative* of the fact in question. Indeed, earlier in his reasons, at paragraph 26, Binnie refers with approval to this statement by Wilson J., in *R v Robertson*, [1987] 1 SCR 918: "In discussing the probative value we must consider the degree of relevance to the facts in issue and the strength of the inference that can be drawn" (at 943). See also: *R v Luciano*, 2011 ONCA 89 at para 230, 267 CCC (3d) 16 [*Luciano*]; *R v Capewell*, 2020 BCCA 82 at para 80, 386 CCC (3d) 192 [*Capewell*], leave to appeal to SCC refused, 2020 CanLII 55865.

[34] In clarifying the law regarding similar fact evidence in *Handy*, the Supreme Court's task was to determine and to set out "the test for the admissibility of discreditable similar fact evidence where the credibility of the complainant (as distinguished from the identification of the accused) [was] the issue …" (at para 1). In other words, the trial court in *Handy* had to decide whether the act underlying the offence charged, i.e., the sexual assault, took place at all. It was with that purpose in mind that the cogency of the proposed similar fact evidence had to be assessed.

[35] However, in the within case, the issue before the trial judge was whether evidence of an assault on another victim was probative of the mental element necessary to prove that the appellant had planned and deliberated upon the murder of the deceased. It appears to me that, rather than determining whether the evidence of the prior assault on Mr. McKay had *any* probative value in relation to that question, the trial judge moved directly to a consideration of whether its assumed probative value outweighed its prejudicial effect. If she did determine that the evidence was probative of the central issue in the case, she erred by finding that the evidence of what occurred at the Garvin residence was probative of whether the appellant had planned and deliberated upon the murder of the deceased.

[36] The trial judge offered these reasons as to why she believed that the proposed evidence should be admitted as similar fact evidence:

(a) "there is proximity of both time and place. The events took place within a very short time period, it appears within two hours at most, and both on the Red Earth First Nation … within blocks of each other";

(b) "the offence[s] at both houses were part of the same transaction. They form a cohesive sequence of events, and one cannot be excised from the other with any sort of surgical precision";

(c) "there was an unprovoked attack with no warning upon Mr. Jamie McKay at House Number 608. Mr. Whitehead came in, said something to the effect that Mr. McKay should be home with his kids, and then stabbed him once. Mr. Whitehead left, and within a very short time period, there was an unprovoked attack upon Mr. Ramsey Whitehead at House Number 105";

(d) "[b]oth were stabbings";

(e) "[b]oth events were described by the witnesses to have occurred in a physically similar fashion …"; and

(f) "whether or not it was the same weapon that was used, it was the same type of weapon".

[37] The trial judge is clearly tracking the factors from paragraph 82 of *Handy*; but there is no indication in her reasons that she asked the preliminary question of whether the evidence of the prior attack amounted to some evidence going to planning or deliberation of the killing of the deceased. The trial judge's conclusory statement that the two stabbings were part of the same transaction also appears to overstate the law regarding s. 589. See: *R v Manasseri*, 2016 ONCA 703, 344 CCC (3d) 281. In any event, finding that two crimes are part of the same transaction does not determine whether evidence of one crime can be used as similar fact evidence to prove planning and deliberation in relation to the other.

[38] Finding that both were stabbings that occurred in a physically similar fashion with the same type of weapon is reasoning that might be probative of trying to determine the identity of an accused or to overcome a defence of some sort. However, making such a finding says nothing about whether the appellant had *formulated* a plan before murdering the deceased so as to meet the definition of planning. Similarly, determining that both stabbings were *unprovoked* is not probative of whether the appellant had "carefully thought out" – to use the words from *CRIMJI* – the second attack so as to have met the element of deliberation. Finally, a finding that the similarities were "striking" does not get to the heart of the matter, which is in what way did the stabbing of Mr. McKay permit an inference that the murder of the deceased was planned and deliberate.

[39] On appeal, Crown counsel uses various descriptors to make its case to sustain the trial judge's conclusion. The Crown argues that the stabbing of Mr. McKay was merely a dress rehearsal or template for the killing of the deceased and that the time spent between the first altercation and the second was spent planning and deliberating the murder. But in what way? The single stab wound with a knife committed while chastising his brother-in-law about not being home with his kids does not appear to be a dress rehearsal for two or three stabbings of another person with a knife that leads to death. In my view, the Crown is saying that, because the appellant *planned and deliberated* the stabbing of Mr. McKay, this can be evidence of the planning and deliberation of the murder of the deceased, but the fundamental flaw in this reasoning is that planning and deliberation is not an element of assault. Proving the appellant assaulted Mr. McKay in a planned and deliberate manner contributes nothing to the question of whether the appellant planned and deliberated upon the murder of the deceased.

[40] Most accused do not recount their preparatory steps or describe the thought process they followed prior to committing a homicide, which means that evidence of planning and deliberation under s. 231 is usually circumstantial only. The most common type of circumstantial evidence derived from similar fact evidence, directed to the question of planning and deliberation, is one or more prior acts of violence against the same victim: *R v Banash* (1991), 75 Man R (2d) 70 (CA) at paras 5 and 7, leave to appeal to SCC refused, [1992] 1 SCR v; and *R v Pasqualino*, 2008 ONCA 554 at para 31, 233 CCC (3d) 319. But even acts of violence or aggressiveness directed to the same victim may not be sufficiently probative of planning and deliberation in all circumstances: *R v*

Evaloakjuk, 2001 CanLII 39421 (Nu CA) at paras 17, 18, 20 and 21; and *R v McKenzie*, 2018 ONSC 2006 at para 34.

[41] Evidence of violence directed towards a different victim can be used in some circumstances to prove elements of an offence, including planning and deliberation sufficient to ground a first degree murder conviction, or to disprove a defence, but the list of decisions is more circumscribed and the purpose for which the evidence is used is always made clear. The following list is illustrative of such decisions:

(a) proving that the criminal act had in fact occurred – *Handy*; *Shearing*; *R v Dueck*, 2011 SKCA 45, 371 Sask R 134; and *Capewell* at para 85;

(b) proving identity by *modus operandi* or some form of calling card evidence – *R v Arp*, [1998] 3 SCR 339 [*Arp*]; *R v Pickton*, 2009 BCCA 300 at paras 94–97, 260 CCC (3d) 132 [*Pickton*]; *R v Jesse*, 2012 SCC 21, [2012] 1 SCR 716; *R v Legebokoff*, 2014 BCSC 1636, aff'd 2017 CanLII 6743 [*Legebokoff*]; and *R v Weese*, 2016 ONCA 449, 350 OAC 170;

(c) rebutting a defence of accident or some other defence – *R v Boulet*, [1978] 1 SCR 332 [*Boulet*], and *Capewell* at para 85;

(d) proving a system of killing and rebutting the defence that the accused was caught up in an unforeseen misadventure – *Boulet*; and

(e) proving planning and deliberation of one or more murders by virtue of proof of planning and deliberation of other murders: *Pickton* and *Legebokoff*.

[42] The Crown relies in particular on *Pickton*, *Legebokoff*, *Boulet*, and *R v Douglas*, 2017 BCSC 844, rehearing refused, 2017 BCSC 2579 [*Douglas*], in support of the proposition that proof of the assault on Mr. McKay was probative of the planning and deliberation of the murder of the deceased. While not cited to the Court, I would also add to this list *R v Nimoh*, 2018 ONSC 2745 [*Nimoh*]. In my respectful view, each of these decisions is distinguishable from the case before this Court.

[43] In *Pickton*, the appellant had been accused of murdering 26 individuals. The Crown sought to adduce cross-count, similar fact evidence for the purpose of proving a *modus operandi* that would establish both the identity of the killer and the planning and deliberation of the murders. Violence against other victims was held by the British Columbia Court of Appeal to be admissible for the purpose of establishing planning and deliberation, but the facts in *Pickton* are so radically different from the present case as to be of little assistance. Further, in *Pickton*, the similar fact evidence related to other murder victims, and not to victims of an assault.

[44] *Legebokoff* is also a case where violence against each of the four victims was admitted in a multi-count indictment for the purpose of proving planning and deliberation of the murders of the other victims of the accused. Like *Pickton*, the primary issue was the identity of the perpetrator. A significant characteristic of the case was the distinct *modus operandi* linking the crimes and the accused and pointing "to these homicides being planned and deliberate" (*Legebokoff* at para 167). As in *Pickton*, the proffered similar fact evidence related to other murders.

[45] The facts in *Boulet* are complex, and a precise ratio is difficult to discern. In *Boulet*, the accused directed the police to a grave where a man's body was found. The advanced state of the body's decomposition was likely explained by an alkaline substance, probably caustic soda, which when activated by water dissolves fat and turns it into soap. In the neck area of the body, doctors found a .32 calibre bullet which had been fired from the front. When the accused testified, he described his role in the events that led to the murder of the man in exculpatory terms.

[46] In rebuttal to this evidence, the Crown sought to lead what it described as similar act evidence. The proffered evidence was that the accused had actually led the police to another body of a man located about 1,000 feet from the first. This body was decomposed by a caustic substance. The chest cavity contained two .32 calibre bullets. The trial judge admitted this evidence. The accused was convicted. On appeal to the Supreme Court of Canada, the Court found the trial judge did not err in admitting this evidence. The Court said this at page 353:

> … The similar act evidence was relevant and at the very least admissible as rebuttal evidence: even if it had the effect of reinforcing or confirming the evidence in chief, that was not its purpose, which was to rebut the evidence of premeditated aggression by the victim, in particular the evidence that the victim was carrying in the trunk of his car enough caustic soda to burn a body.

[47] I do not read the decision in *Boulet* as saying anything more than this. To be specific, I do not take the Court as saying that evidence of an accused's prior participation in a crime against one person constitutes evidence of planning and deliberation of a subsequent act that leads to murder as a matter of law. There must be a basis upon which a court can hold that the accused's participation in a prior crime is in fact probative of planning and deliberation.

[48] There are only a few decisions where evidence of a crime perpetrated on one victim has been admitted as similar fact evidence to prove planning of deliberation of the murder of another person. *Douglas* is one such case and *Nimoh* is another. But, in neither of these cases did the trial judge analyse how evidence of the prior crime committed against one victim constitutes evidence of planning and deliberation of the murder of another. *Douglas* is also distinguishable on the basis that the Court held that it would not be possible for Mr. Dalke to explain his own actions and conduct on the night in question without reference to the prior threats and actions of the accused. I see no parallels between the case before this Court and *Douglas.*

[49] Finally, it is worth observing that the Crown also relies on the *voir dire* decision of *R v Beamish* (1996), 144 Nfld & PEIR 326 (PEISC (TD)), wherein the trial judge admitted evidence of prior assaults against one person to prove planning and deliberation of the murder of another person. With this similar fact evidence admitted, the accused would later be found guilty of second degree murder in a trial by jury (*R v Beamish* (19 July 1996) Charlottetown, GSC-14664 (PEISC (TD)), aff'd (curative proviso) (1999), 177 Nfld & PEIR 265 (WL) (PEISC (AD)) [*Beamish CA*], leave to appeal to SCC refused, Nfld & PEIR 360). However, the trial judge's decision to admit evidence of prior acts of violence against a former domestic partner was in fact reversed by the PEI Court of Appeal. That court ruled that the "evidence was clearly very prejudicial and … there is nothing that gives it much probative value beyond showing that the appellant was a bad person capable of committing acts of extreme violence against women" (at para 7). It was further agreed that the "only real issues in the case were whether the appellant was the killer … and if so, whether it was planned and deliberate".

[50] In that regard, *Beamish CA* resembles *R v Reynolds* (1978), 44 CCC (2d) 129 (WL) (Ont CA) [*Reynolds*], where the Ontario Court of Appeal allowed an appeal from a conviction based on the use of a subsequent assault on a different individual as being probative of planning and

deliberation of a prior murder. The Court described the evidence of the assault on another person as being manifestly "of no probative value in determining whether the killing of the deceased was planned and deliberate" (at para 18).

[51] It would be an error to approach this area of the law by looking for similar cases or attempting to categorize the cases. As Watt J.A. observed in *Luciano*, at paragraph 230, "probative value is a relative concept to be determined in the context of the case being tried". Determining whether similar fact evidence ought to be admitted requires a principled approach that is responsive to the issue for which the evidence is adduced: *Arp* at para 38. Here, the question that the trial judge had to ask was whether the evidence of what happened at the Garvin residence was probative of both the planning and the deliberation of the murder of the deceased.

[52] In my respectful view, the evidence of what happened at the Garvin residence to Mr. McKay merely establishes, at most, a general propensity towards violence on the appellant's part and some generic similarities between the incidents. The aggressiveness and the animosity demonstrated by the appellant toward Mr. McKay were not probative of planning and deliberation of the killing of the deceased. The trial judge erred by ascribing any probative value to the impugned evidence. It should not have been admitted.

C. Unreasonable balancing of probative value and prejudicial effect

[53] If the trial judge did not err in her assessment of the probative value of the evidence at the Garvin residence, I would nonetheless still intervene in this appeal to order a new trial. In my respectful view, applying the standard of review as stated in *James* at paragraph 33, the appellant has demonstrated that the trial judge's weighing of probative value and prejudicial effect resulted in an unreasonable decision. I will expand on this conclusion.

[54] In *Handy*, Binnie J. stated that the "strength of the similar fact evidence must be such as to outweigh 'reasoning prejudice' and 'moral prejudice'" (at para 42). Moral prejudice is described as the danger that a finding of guilt will be founded on "evidence of nothing more than general disposition ('bad personhood')" (*Handy* at para 116, also see paras 139 to 143). As Binnie J. noted, the prejudice in this context is the "risk of an unfocussed trial and a *wrongful* conviction" (emphasis in original, at para 139). Reasoning prejudice is seen as the danger that the evidence

will create confusion or distract the jury from "their proper focus on the charge itself" (at para 144), being whether the Crown has proven the charge beyond a reasonable doubt. This is a matter of particular concern where the proposed similar facts are denied by the accused, which is precisely the situation in this appeal. Instead of defending himself against a single charge of first degree murder, the appellant had to effectively defend himself from two charges. Since, in my view, the strength of the similar fact evidence is dubious at best, it does not outweigh reasoning and moral prejudice and should have been excluded.

[55] The jury was instructed that the trial judge was the arbiter of the law and they were the arbiters of the facts. They were told that they could not use what happened at the Garvin residence in an improper way, i.e., they were "absolutely prohibited" from using the McKay stabbing to conclude that the appellant "is a bad character and therefore is the type of person who was likely to have killed Ramsey Whitehead". They were instructed that "the evidence of what happened at [the Garvin residence] can be considered by you for the limited purpose of deciding whether or not Davis Whitehead had intent and whether the killing was planned and deliberate" (emphasis added).

[56] However, the inflammatory nature of the evidence from the Garvin residence is clear. Although the appellant was on trial for the first degree murder of the deceased, the jury was first required to listen to a string of witnesses, all of whom described over and over the nature of the attack on Mr. McKay. It is also worth noting the caution provided by Binnie J. in *Handy*:

> [146] … the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in Sopinka, Lederman and Bryant, [*The Law of Evidence in Canada* (2nd ed. 1999)], at §11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

[57] In my respectful view, the admission of the evidence of the stabbing of Mr. McKay, and its comparison with the fatal stabbing of the deceased, was a materialization of the risk identified in *R v Blake* (2003), 181 CCC (3d) 169 (Ont CA) [*Blake*], aff'd 2004 SCC 69, [2004] 3 SCR 503:

> [64] The risk in relying primarily on generic similarities to support an inference that the *actus reus* occurred is twofold. One, the initial inference arising from the prior conduct

> becomes so general, that it approaches bad personhood. Two, because of their non-specific character, generic similarities may mask underlying dissimilarities that could be important in a particular case.
>
> (Emphasis added)

[58] In *Blake*, the similarities were that the appellant had sexually touched children under ten in the past, and that those incidents occurred in private, involved genital touching and concluded with the appellant apologizing and promising that "it would not happen again" (at para 62). In ordering a new trial, the majority of the Ontario Court of Appeal noted that, while the inferences that could be drawn from this similar fact evidence may not be irrelevant, it contributed "only marginally to determining whether the specific incident … actually took place" (at para 65). The dissenting judge would have admitted the evidence involving other victims on the basis that "[t]he evidence was highly relevant" (at para 33). The Supreme Court dismissed the appeal, saying that the trial judge did not have the benefit of *Handy*.

[59] In this case, the issue was the specific mental element that is required for first degree murder. As in *Blake*, the trial judge's reasoning led her to set the threshold for admissibility of the discreditable conduct too low by relying on generic similarities in the commission of the acts in the two different locations against two different victims to allow proof of the appellant's intent when he stabbed the deceased. In my respectful view, the fact that the appellant stabbed Mr. McKay and the deceased, and that he did so with a knife, are precisely the type of generic similarities that tend to mask the underlying dissimilarities between the two attacks and that obscure the true nature of the fact-finding process. Admission of the evidence from the Garvin residence invited speculation and likely led to a prohibited type of reasoning: the appellant *must have* planned and deliberated the murder because he had earlier assaulted someone else.

[60] As Binnie J. said in *Handy*, a court must also consider "whether the Crown can prove its point with less prejudicial evidence" and "the potential distraction of the trier of fact from its proper focus on the facts charged …" (at para 83). The evidence of the stabbing at the Garvin residence was not the only evidence of planning and deliberation available to the Crown to prove its case. There was other evidence as to what had happened earlier that evening when the appellant first went to House 105: he fought with the accused and then left, only to return within no more than two hours. It also must be pointed out that the trial judge erred when she said that the evidence of what happened at the Garvin residence could not be "excised … with any sort of surgical precision"

from what had happened at House 105. Contrary to her finding, the only person in common between the two houses was the appellant. None of the witnesses who testified about what happened at House 105 were also present at the Garvin residence.

[61] Thus, for the above reasons, I have concluded that the trial judge erred by finding that the probative value of the stabbing of Mr. McKay outweighed the prejudicial effect of admitting that evidence. Since we cannot know what the jury did with the other potential evidence of planning and deliberation, a new trial must take place.

V. Conclusion

[62] The appeal is allowed and a new trial ordered.

"Jackson J.A."

Jackson J.A.

I concur. "Ryan-Froslie J.A."

Ryan-Froslie J.A.

I concur. "Tholl J.A."

Tholl J.A.