

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Fitzpatrick, 2026 ONCA 262¹

DATE: 20260414

DOCKET: C70518 & COA-22-CR-0333

Roberts, Pomerance and Rahman JJ.A.

DOCKET: C70518

BETWEEN

His Majesty the King

Respondent

and

Philip Fitzpatrick

Appellant

DOCKET: COA-22-CR-0333

AND BETWEEN

His Majesty the King

Respondent

and

Evan Wright

Appellant

¹ This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46 with respect to the identification of the deceased's mother.

John Fennel, for the appellant Philip Fitzpatrick

Delmar Doucette and Madalyn Bavaro, for the appellant Evan Wright

Avene Derwa and Molly Flanagan, for the respondent

Heard: June 11, 2025

On appeal from the convictions entered by Justice Irving W. André of the Superior Court of Justice, sitting with a jury, on February 17, 2022.

Table of Contents

A.	Introduction	3
B.	Background.....	6
1.	Events surrounding the shooting and the parties involved	6
2.	C.H.'s account of the shooting	7
3.	The evidence against the appellants	9
4.	Wright's testimony.....	17
C.	Issues.....	19
D.	Fitzpatrick's Appeal.....	20
1.	The trial judge erred by admitting prejudicial "resemblance evidence".....	20
2.	An acquittal is not warranted.....	29
E.	Wright's Appeal.....	33
1.	The <i>W.(D.)</i> instructions were deficient	33
2.	The Crown's closing address prejudiced trial fairness.....	45
F.	Disposition	53

Rahman J.A.:

A. INTRODUCTION

[1] On June 21, 2018, two men went to Brandon Hall's home. One of them shot Hall multiple times, killing him. Both appellants were charged with first degree murder in Hall's death. The Crown alleged that the appellant Wright was the shooter, and that the appellant Fitzpatrick had accompanied him as an accomplice. The Crown's theory was that Wright went to Hall's home planning to murder him because Hall had stolen some of Wright's guns and money, and that Wright enlisted his cousin, Fitzpatrick, to help him.

[2] In support of its theory with respect to Wright, the Crown relied heavily on the testimony of Wright's friend, Marquis Grant-Mentis ("MGM"), and Wright's cousin, Jenna Parsons. Both testified that Wright had confessed to them that he shot Hall. Also tying Wright to the murder were Air Jordan sneakers that matched those worn by the alleged shooter and an ammunition cartridge matching the rifle used to kill Hall.

[3] The Crown's case against Fitzpatrick was weaker. It relied on security camera footage that all parties agreed showed the two assailants on their way to Hall's home. Fitzpatrick's father and stepmother told police that one of the men in the video reminded them of Fitzpatrick. Also tying Fitzpatrick to the killing was a

latex glove recovered near the crime scene that contained his DNA and resembled a glove worn by one of the men in the security video.

[4] Wright testified in his own defence, advancing an exculpatory theory that was relied on by himself and Fitzpatrick. Wright testified that it was he and MGM who broke into Hall's home, thinking it was unoccupied, to recover the guns and money Hall had stolen. On this version of events, MGM was the shooter, Fitzpatrick was not involved, and Wright was the person in the security video that the Crown alleged was Fitzpatrick. Wright maintained that he did not know MGM was armed and that he fled the home immediately as MGM started to shoot Hall.

[5] In support of this theory, the defence relied on the evidence of Hall's mother, C.H. C.H. was called by the Crown and was the only witness to the shooting. She told police that the shooter was an unmasked Black man. MGM is Black. Wright and Fitzpatrick are white. At trial, she resiled from this description of the shooter, expressing uncertainty over his appearance.

[6] In his closing address, Crown counsel referred to this court's decision in *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.) to wrongly rely on inadmissible alleged scientific opinion about the reliability of eyewitness evidence that was not before the court, which counsel inappropriately buttressed with his own personal experience. Counsel did this for the purpose of suggesting that C.H.'s eyewitness account, like all instances of eyewitness identification, was therefore unreliable.

Although he found the impugned part of the Crown's closing to be improper, the trial judge rejected the appellants' motion for a mistrial in favour of a jury instruction to disregard the Crown's suggestions.

[7] After a six-week trial, the jury found Wright guilty of first degree murder and Fitzpatrick guilty of manslaughter. Both appeal their convictions.

[8] For the reasons that follow, while I do not accept all of the appellants' submissions, I would allow both of their appeals. Respecting Fitzpatrick's appeal, I conclude that his parents' "resemblance evidence" should not have been admitted. Its near non-existent probative value, highly prejudicial effect, and centrality to the Crown's case justify allowing his appeal. Respecting Wright's appeal, the trial judge failed to explain to the jury that if C.H.'s exculpatory eyewitness evidence helped to raise a reasonable doubt, they had to acquit. Instead, the trial judge's instructions on credibility, pursuant to *R. v. W.(D.)*, [1991] 1 S.C.R. 742, only told the jury that a reasonable doubt could come from Wright's evidence. When coupled with the Crown's inappropriate closing address, which denigrated C.H.'s exculpatory evidence, this error justifies allowing Wright's appeal.

[9] I would therefore order new trials for both appellants.

B. BACKGROUND

1. Events surrounding the shooting and the parties involved

[10] The appellants are first cousins. At the time of Hall's shooting, Wright was 19 years old and Fitzpatrick was 21 years old. The Crown contends that the cousins had a close relationship growing up. The appellants both assert that though they are family, they were not friends, nor did they see each other outside of family obligations. They did not have mutual friends, go to the same school, or engage in overlapping social activities.

[11] Wright testified that he became friends with Hall in 2017, as they bonded over their shared interest in firearms. The closeness of this relationship was confirmed by Jenna Parsons, Wright and Fitzpatrick's first cousin, who testified that she met Hall through Wright in 2018. Wright testified that, in December 2017, he and Hall began a business venture together in which they would illegally acquire and resell firearms. Unlike Wright, there was no evidence that Fitzpatrick and Hall knew one another. Nor did the Crown allege that Fitzpatrick had any animus towards Hall.

[12] In January or February 2018, the business relationship grew increasingly fractured. Wright testified that he continuously pressed Hall about his failure to sell the firearms and that Hall eventually threatened to kill him. Wright testified that he took this threat seriously and stayed, along with his mother and sister, at Fitzpatrick's house for a few days before returning home. During his visit, Wright

testified that he borrowed a black hoodie with a Toronto Raptors logo on it from Fitzpatrick, but he never returned it. As explained below, the Raptors hoodie became a significant piece of evidence respecting the identity of the assailants.

[13] MGM was a mutual friend of both Wright and Hall and testified that he was aware of their business arrangement. According to MGM's testimony, Wright accused Hall of stealing \$300 and two guns from him about a month before Hall was killed. Wright told MGM he wanted revenge against Hall for the stolen money and guns.

[14] Parsons testified that Wright and Hall's friendship changed in the spring of 2018. She said that Wright told her that he got into an argument with Hall about a firearm. She also said that Wright and Hall were threatening each other, and that in the aftermath of their falling out, Wright had become fearful. Parsons further testified that shortly after the firearm dispute, Wright said he would have to kill Hall before Hall could kill him.

2. C.H.'s account of the shooting

[15] As already mentioned, Hall's mother, C.H., witnessed the shooting. It occurred in her basement apartment in Brampton, where Hall sometimes stayed. She testified that she saw her front door being kicked down and that one man in a red shirt armed with a long gun entered the apartment. Following this, Hall said, "Oh shit" or "Oh shit, it's you", then the gunman started to shoot. C.H. testified that

she did not see any other men, but that it sounded like multiple men were outside from the stomping on the door. After seeing her son get shot, C.H. locked her bedroom door and hid in the closet until the shooting stopped. She then called 911.

[16] C.H.'s testimony at trial was not entirely consistent with her two prior statements to police. In her first statement, C.H. said that she only saw the intruders through the crack in her bedroom door, but remembered seeing a group of men kicking down the door. She specifically recalled that one man was wearing a red hoodie. She said the men had guns, with the one in the red hoodie holding a long black gun, and that they were all Black men. In her second statement, C.H. said she believed at least four men broke into her home. She described the shooter as a short, stocky Black man who did not try to cover his face. The man had a "really dark" complexion and tight "afro like black hair."

[17] In her trial testimony, C.H. resiled from her initial impression of events. She said that her visibility was poor and that all she saw was someone in a red shirt with a long gun moving towards Hall. She did not know if the shooter was a Black man or if he was wearing a mask. C.H. testified that she was being truthful in her statements to police, but she was in shock after the events occurred and was mistaken about several things, including that she saw multiple men with guns. She also agreed that the fact that no Black man was charged with the crime could be affecting her recollection. C.H. further testified that because the police arrested two white men for the crime, the police must be correct.

[18] Fitzpatrick brought a *K.G.B.* application,² seeking to admit C.H.'s two police statements identifying the shooter for the truth of their contents. The trial judge concluded that, subject to some editing, the earlier statements should be played for the jury and admitted for their truth.

3. The evidence against the appellants

a. Surveillance footage

[19] Surveillance videos from the area of Hall's shooting showed two unknown males, referred to throughout the trial as "Person #1" and "Person #2", heading towards Hall's home. Police believed these two men to be the killers.

[20] As is discussed above, the Crown alleged that Person #1 was Wright and that Person #2 was Fitzpatrick. Both appellants took the position, based on Wright's testimony, that MGM was Person #1 and Wright was Person #2. The identity of each person became significant because of their respective clothing and, in particular, the red and black shoes and Raptors sweater Person #2 was wearing and the Air Jordan shoes worn by Person #1. The footage was also significant because the gloves the assailants appeared to be wearing looked like those recovered near the scene of Hall's killing. As is discussed in further detail below, these gloves likely contained the appellants' DNA.

² Pursuant to *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740.

[21] Footage from before the shooting showed that Person #1 was wearing a blue jacket, black shoes with white soles, black pants with white stripes, and red gloves, and was carrying a blue sports bag. The Crown alleged this bag contained the rifle used to kill Hall. Person #2 was shown wearing a black sweater with a red Raptors logo on the front, a white glove on their right hand, a green-yellow glove on their left hand, black pants, and black shoes with red laces. Both individuals had their faces covered, and at one point, Person #2 stumbled over a curb. Later in the video, Person #2 is shown pulling up his pants using two hands.

[22] Videos from homes along the killers' route showed Person #1 and #2 going in different directions after the shooting.

b. The purported *Leaney* evidence

[23] The Crown brought a successful *Leaney* application³ to admit the non-expert opinion evidence of Fitzpatrick's father (and Wright's uncle), Shawn Wright, and Fitzpatrick's stepmother, Jordana Diamond. The Crown relied on their evidence that Person #2 supposedly resembled Fitzpatrick to help establish that Person #2 was Fitzpatrick and, by implication, Person #1 was Wright. That said, in its closing submissions, the Crown only relied on this evidence against Fitzpatrick.

[24] Ms Diamond and Shawn Wright were interviewed separately by police after the appellants' arrests. During these interviews, both were shown the surveillance

³ Pursuant to *R. v. Leaney*, [1989] 2 S.C.R. 393.

videos capturing Hall's killers. Neither could identify Fitzpatrick as one of the persons in the video. Ms Diamond told police that the sweater Person #2 was wearing reminded her of the Raptors sweater she bought Fitzpatrick for his birthday that year. She also said that the shoes Person #2 was wearing looked like Fitzpatrick's, though Fitzpatrick's were more "ratty". Ms Diamond said the green-yellow gloves worn by Person #2 looked like gloves they had around the house.⁴ In his police interview, Shawn Wright confirmed Ms Diamond's evidence on these points, but he also said that Person #2's gait did not look like Fitzpatrick's. He also offered mixed evidence as to whether Person #2 looked like Fitzpatrick. Importantly, both Ms Diamond and Shawn Wright also had the same initial reaction to seeing Person #2 stumble or trip on a curb. Both witnesses' evidence was that this reminded them of Fitzpatrick because of his clumsiness.

[25] The trial judge admitted this evidence, finding that:

[T]he constellation of factors, including the wearing of the Raptor [sic] shirt, a distinctive pair of black shoes with red laces, gloves that are similar to that shown in Fitzpatrick's garage and the evidence that the wearer was of the right height and build as Philip Fitzpatrick may well have probative value regarding the issue of non-identification opinion evidence of [a] nonexpert.

⁴ Photos of those gloves were also admitted into evidence.

[26] Ms Diamond's testimony largely mirrored her statements to police. She added that Person #1 and #2's relative heights looked similar to Wright and Fitzpatrick's but that their walks were not similar.

[27] Shawn Wright seemed to be a more reluctant witness than Ms Diamond. He was not able to recall much of what he had said to police. Nor did his police statements refresh his memory. Consequently, the Crown successfully applied to admit portions of his prior police statements as past recollections recorded. In these admitted portions of the statements, Shawn Wright confirmed that the Raptors hoodie and shoes worn by Person #2 were similar to those Fitzpatrick owned. Shawn Wright also said that he could not identify either of the two people in the videos. When shown the videos at trial, he said that he could not say whether the assailants' heights were similar to Wright and Fitzpatrick's, but confirmed he thought that Person #1 walked like Wright and Person #2 did not walk like Fitzpatrick.

[28] The Crown relied on the witnesses' initial reaction to Person #2 stumbling as a significant piece of evidence identifying Fitzpatrick as Person #2. In its closing address to the jury, the Crown would also go on to highlight the witnesses' apparent reluctance to testify according to their police statements to demonstrate the importance of this evidence.

c. Wright's confession

[29] Jenna Parsons and MGM both testified at trial that Wright confessed to shooting Hall. As noted above, before Hall's shooting, Parsons testified that Wright had told her that Hall had threatened Wright and his family. Wright also told her that he had threatened Hall and that he planned to kill Hall before Hall killed him. After seeing coverage of Hall's murder on the news, Parsons called Wright asking whether Wright was the killer, to which he said no. In late summer 2018, Parsons asked him again, and he admitted to killing Hall. Wright mentioned to Parsons that his accomplice "chickened out", but he would not identify this person. He said he shot Hall, saw his mother and heard her scream, and left the apartment and went home.

[30] MGM also testified that he asked Wright about Hall's death approximately two weeks after it occurred. Wright denied killing Hall. A few months later, MGM asked Wright again. This time Wright admitted to killing Hall. MGM testified that Wright said he kicked the door down to Hall's apartment and told him to hand over the guns. MGM said that Wright told him that he heard Hall's mother screaming. MGM also said that Wright described the gun he used to shoot Hall — an SK semi-automatic rifle. MGM testified that this gun was familiar to him, as he saw it in Wright's basement months prior, stowed in a blue sports bag that MGM recognized as the same bag Person #1 held in the surveillance footage. At the time, Wright said he obtained the gun for protection. Wright told MGM that if MGM told anyone

about his confession, “problems would happen.” MGM understood this to mean that Wright was threatening to kill him if he told anyone about the confession.

[31] MGM’s testimony came after the Crown had withdrawn its accessory after the fact charge against him. It diverged sharply from two of the three statements MGM gave to police while he was an active suspect in their investigation. At trial, he acknowledged that he had lied in these previous statements and explained that he did not identify anyone by name because, as he put it, “snitches get stiches.”

[32] In his first statement, given October 17, 2018, MGM did not mention Wright having confessed to him, despite his trial testimony that Wright had already made such a confession by that date. MGM also did not mention any dispute between Hall and Wright regarding the firearms. Contrary to his concern that “snitches get stiches”, MGM directed the police’s attention toward another Black man known as “Chief” (Comoy Cox). He alleged that Hall and Cox had a disagreement and even provided information to help locate Cox. At trial, MGM admitted that he had fabricated the story about the dispute between Hall and Cox, stating he was lying “through his teeth” to deliberately mislead the police investigation. However, he denied doing this out of fear that Wright might implicate him as the shooter.

[33] On November 9, 2018, one week after Wright and Fitzpatrick were arrested and charged with murder, MGM gave his second statement to police. During this interview, he was uncooperative and again failed to disclose that Wright had

confessed to him. Upon realizing that the police were aware he had received a pair of Air Jordan sneakers (discussed below) and were investigating his involvement in the homicide, MGM began reciting a Psalm — a prayer for forgiveness of sins. Before the end of this statement, police arrested him on the charge of being an accessory after the fact to Hall's murder because he took possession of the Air Jordans.

[34] It was only in his third statement to police, given after his arrest and while he was in custody, that MGM disclosed that Wright confessed to killing Hall. A few days after he made this statement, the accessory after the fact charge was withdrawn and MGM was released from jail.

d. The Air Jordan shoes

[35] On September 17, 2018, after Hall's murder, police observed Wright giving a pair of Air Jordans to MGM. MGM testified that this was in repayment for a \$200 debt Wright owed. At this time, Wright had not told MGM he shot Hall. MGM said he took the shoes and tried them on, but they were too big, so he gave them to a friend.

[36] When MGM was shown the surveillance footage of Person #1 and Person #2 from the night of Hall's murder, he identified the shoes Person #1 wore as the same shoes Wright gave him as debt repayment.

e. Physical evidence from Wright's home

[37] The police conducted a search of Wright's home. In a bedroom with Wright's photo ID and birth certificate, the police found several different types of gloves. The police also found an unfired ammunition cartridge in the basement of Wright's home that had the same numbered headstamp as the spent casings found at the crime scene. The police determined that all the cartridge casings were fired from the same firearm. An SK rifle could fire both the bullets found at the crime scene and those found at Wright's home.

f. DNA evidence

[38] Two gloves similar to those worn by Person #2 in the surveillance footage were found by police near Hall's home. The police found a torn white latex glove on Hall's street that contained a mixed profile of DNA. This profile was compared to Hall, Wright, Fitzpatrick, and MGM. Hall, Wright, and MGM were all excluded as contributors. Fitzpatrick could not be excluded at a likelihood ratio of greater than 1:1 trillion. The Crown alleged that this glove was discarded by Person #2 after fleeing the scene.

[39] The police also found a green-yellow glove on a path leading to a park near Hall's home. As noted above, Person #2, whom the Crown alleged to be Fitzpatrick and the defence contended was Wright, was shown to be wearing what appeared to be a green-yellow glove. Neither Wright nor Fitzpatrick could be excluded as contributors to the DNA profile found on the glove, but Wright was determined to

be the more likely contributor, with a likelihood ratio of 1:60 trillion, compared to Fitzpatrick's likelihood ratio of 1:1100.

4. Wright's testimony

[40] In his testimony, Wright admitted to being present when Hall was fatally shot. On his account, he went with MGM to Hall's house to steal firearms and money because they believed Hall would be out of town. Ultimately, it was MGM who shot Hall. Wright testified that he did not know MGM brought a firearm and he denied Fitzpatrick had anything to do with the murder.

[41] Specifically, Wright testified that in the early morning of June 21, 2018, MGM told Wright that an opportunity opened up to get the guns from Hall, because Hall was going to be out of town. MGM proposed that they break into Hall's home and steal the guns. MGM explained that he needed Wright's help because he did not know Hall's address. Wright testified that MGM proposed breaking into the home if it was unoccupied. If Hall's mother was present, they would not break into the home but rather tell her that they needed Hall's bag for an emergency.

[42] Wright testified that Person #1 in the security videos was MGM and that he was Person #2. He thus offered a contrary explanation for the attire seen in the videos to that advanced by the Crown.

[43] He testified that MGM wore latex gloves under a pair of red gloves. Wright grabbed a green glove and a white latex glove from his bedroom. They tied t-shirts

around their faces to conceal their identities. Wright wore the Raptors sweater he had borrowed from Fitzpatrick when Wright had stayed over at Fitzpatrick's home. Fitzpatrick, for his part, submitted that DNA from his sweatshirt could have transferred onto the torn white glove recovered from the crime scene. Wright also testified that he lent MGM his Air Jordan shoes because the shoes MGM arrived with were too bright. MGM arrived at Wright's house with a hockey bag. When Wright asked MGM what was in the bag, MGM said that he had brought something "just in case" they needed it. Wright did not think this was a firearm, but perhaps a crowbar to help the pair force their way into Hall's home.

[44] Wright said that it was MGM who shot Hall. For his part, when the shooting started, Wright said he ran away in a panic. When he arrived home, MGM was waiting for him. MGM panickily explained that Hall's mother saw his face. He then asked Wright to give him a change of clothes. MGM changed and put everything he was wearing in a bag that also contained his gun, and left. Wright testified that MGM returned the Air Jordans the next day. After learning that police had interviewed his ex-girlfriend, Wright wanted to get rid of the shoes, which is why he gave them back to MGM.

[45] At trial, Wright acknowledged saying to Jenna Parsons that he had to kill Hall before Hall killed him. Wright explained this comment by saying he did not mean he was going to seek out Hall, but that he would have to kill him in self-defence if Hall came after him. Wright also admitted that he was upset by Hall's

betrayal and that he felt “ripped off”. Wright admitted to confessing to Parsons, but said that the confession was a lie. He also admitted that he lied to police when he was arrested, saying he had nothing to do with the murder. Wright did not give evidence about his confession to MGM, but his trial counsel attacked the veracity of MGM’s testimony in cross-examination and closing submissions.

C. ISSUES

[46] Fitzpatrick advances four grounds of appeal. First, he alleges that the trial judge erred in admitting his parents’ “resemblance evidence”, given that they merely pointed out similarities and differences between the appellants and the persons in the surveillance videos. Second, he alleges that the trial judge’s *W.(D.)* instructions were flawed. In particular, he argues that the *W.(D.)* instructions were confusing because they were not consistent as between himself and Wright. Third, he alleges that the trial judge erred in not granting a mistrial based on the Crown’s improper closing address. Fourth, Fitzpatrick alleges that the verdict against him was unreasonable.

[47] Wright advances two grounds of appeal. First, he alleges that the trial judge’s *W.(D.)* instructions were flawed. In particular, he says that the instructions improperly removed the lesser included offence of manslaughter from the jury’s consideration. Wright also argues that the trial judge was required to include a modified *W.(D.)* instruction to make clear that C.H.’s initial description of the shooter could leave the jury with a reasonable doubt, either on its own, or in

combination with Wright's evidence. Second, like Fitzpatrick, Wright alleges that the trial judge erred in not granting a mistrial after Crown counsel's improper closing address. He argues that no instruction could cure the prejudice caused by Crown counsel's improper reference to *Miaponoose* and the frailties of eyewitness identification evidence. Wright argues that both errors, individually and together, improperly de-valued C.H.'s important exculpatory identification.

[48] I begin by explaining why I would allow Fitzpatrick's appeal on the first ground he advances. I then address Wright's grounds of appeal. I accept Wright's argument that the absence of a *W.(D.)* instruction respecting C.H.'s evidence, combined with Crown counsel's improper devaluation of that evidence in his closing address, entitles Wright to a new trial. For completeness, I will briefly address Wright's allegation that the *W.(D.)* instructions were unfair because they were over-inclusive.

D. FITZPATRICK'S APPEAL

1. The trial judge erred by admitting prejudicial "resemblance evidence"

a. The law

[49] Where there is video evidence relating to the commission of an offence and the identity of the perpetrator is at issue, the Crown may seek to prove that the accused is the perpetrator by adducing evidence from a witness who is sufficiently familiar with the accused to recognize them as the person in the video: *Leaney*, at p. 413; *R. v. Hudson*, 2020 ONCA 507, 391 C.C.C. (3d) 208, at para. 28. This

recognition evidence is a form of identification evidence, which is itself a form of admissible lay opinion evidence: *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at para. 39; *R. v. Brown* (2006), 219 O.A.C. 26 (C.A.), at para. 39.

[50] In *R. v. Berhe*, 2012 ONCA 716, 113 O.R. (3d) 137, Blair J.A. explained the test for threshold admissibility of recognition evidence. He referred, at para. 14, to this test as the “prior acquaintance/better position” test. The trial judge must determine whether: 1) the witness is sufficiently familiar with the accused to have “some basis” for their identification opinion; and 2) the witness, as a result of their prior acquaintance with the accused, is in a better position than the trier of fact to identify the perpetrator, in the sense that they have “some advantage that can shed light on the evidence in question”: *Hudson*, at para. 30, citing *Berhe*, at paras. 14, 21.

b. The evidence before the trial judge and his ruling

[51] In support of its application, the Crown relied on excerpts from Ms Diamond and Shawn Wright’s police statements and preliminary inquiry evidence. As discussed above, neither could identify Fitzpatrick in the video footage. However, both said that Fitzpatrick had the same Raptors sweater and the same sneakers as Person #2, albeit a pair that looked “rattier” than the ones on Person #2. Both also said that the green-yellow glove Person #2 was wearing resembled those they had at their home. More importantly, both had told the police that the way Person

#2 stumbled reminded them of Fitzpatrick because of his clumsiness. It was on this basis that the Crown sought to admit this purported recognition evidence.

[52] The defence opposed the *Leaney* application, submitting that the lay opinion was too generic to constitute identifying features of Fitzpatrick. In particular, the defence pointed to the absence of a positive identification from either witness and Shawn Wright's mixed evidence about whether Person #2 walked and looked like Fitzpatrick. The defence also raised concerns about police tainting because both witnesses knew that the appellants had been arrested.

[53] The trial judge ultimately admitted the evidence, finding that the constellation of factors supposedly going to Fitzpatrick's resemblance to Person #2, and the witnesses' familiarity with the appellants could constitute evidence relevant to the issue of identification of those involved in the murder. Relying on this court's decision in *Berhe*, at para. 19, he concluded the law did not require a recognition witness to have "familiarity with an [accused's] unique features to enable a witness to identify an accused's idiosyncrasies for nonexpert identification evidence to be admissible", as the defence contended. The trial judge concluded that "the bare conclusory recognition evidence of a person long and closely familiar with the accused may have substantial value, even where the witness does not articulate the particular features or idiosyncrasies that underlie the recognition." The trial judge similarly concluded that any concerns about tainting only affected the ultimate reliability of the evidence, rather than its admissibility.

[54] In concluding that the evidence was admissible, the trial judge said that the witnesses' evidence about Person #2 stumbling, on its own, was not sufficient to constitute recognition evidence. This was partially because neither witness was purporting to definitively identify anyone in the video. The trial judge also recognized that a trip or stumble could not be the basis for identifying someone because it is not a characteristic of someone's gait. However, he stated that the stumble was "not the sole basis for [the] proffered identification evidence." Rather, he found that both witnesses had "given limited identification evidence based on their long knowledge of both accused that may be relevant to the issue of identification of those involved in Mr. Hall's murder." The trial judge concluded that any issues with the evidence were ones that concerned the ultimate weight to be given to the evidence and not its admissibility.

[55] Fitzpatrick submits that the trial judge erred in admitting this purported recognition evidence. In his oral submissions, Mr. Fennel focussed on the impropriety of admitting the stumble evidence. He argues that this evidence is properly classified as resemblance evidence, and not recognition or identification evidence. He argues that the "resemblance evidence" here was the result of the witnesses "thinking out loud" with the police. Fitzpatrick argues that though Ms Diamond and Shawn Wright's evidence should have been considered exculpatory, because they did not make any identification and pointed out

dissimilarities, the Crown “unfairly harnessed” their evidence to suggest that they were covering for the defence.

[56] On appeal, the Crown does not justify the admission of this evidence as recognition evidence. Rather, the Crown argues that whatever label this evidence is given, it was properly admitted because it had some probative value about the identity of Person #2. The Crown says that arguments about the strength of the evidence went to its weight, not its admissibility. Moreover, the Crown also says that the trial judge’s instructions to the jury about how they could use this evidence minimized any potential prejudicial effect that it might have had.

c. Discussion

[57] I agree with Fitzpatrick that Shawn Wright and Ms Diamond’s evidence about Person #2 supposedly resembling their son should not have been admitted. Their trial evidence about his supposed resemblance to Person #2 was largely just an impression they formed because Person #2’s stumble over a curb reminded them of Fitzpatrick’s clumsiness. The stumble evidence had virtually no probative value regarding identity and a significant prejudicial effect. And the prejudicial effect of the evidence became heightened because of the way the evidence was adduced from the witnesses, particularly Shawn Wright, and reiterated during the Crown’s closing.

[58] First, it is important to properly characterize this evidence according to the framework set out above. It was not identification or recognition evidence. As the trial judge concluded, neither witness purported to identify either Person #1 or Person #2. It follows that this evidence was also not recognition evidence. If neither witness could identify the people in the video, it cannot be said that they recognized either person.

[59] The difficulty is that, though it cannot properly be characterized as recognition evidence, that is the way Ms Diamond and Shawn Wright's evidence was effectively treated by the trial judge and the Crown. The trial judge concluded that the evidence was admissible because of the witnesses' familiarity with the appellants. But their familiarity was ultimately meaningless because it did not help them recognize either person in the video. Instead, the stumble, and the witnesses' initial emotive reaction to that stumble, took on an outsized role and became the focal point of their evidence at trial, even though that was not the basis for the evidence's admission. The stumble evidence had no probative value respecting identity and was not properly admissible as recognition evidence. If the Crown had only relied on Ms Diamond and Shawn Wright's evidence on the Raptors sweater and shoes, it would have had limited probative value (given the ubiquity of those items) but a correspondingly low prejudicial effect. However, the Crown clearly wanted to rely, and did rely, on their evidence regarding the significance of the stumble — the very evidence that the trial judge had said could not, on its own,

provide a basis for admitting Ms Diamond and Shawn Wright's lay opinion. This was highly prejudicial.

[60] By the end of the trial, the stumble evidence became a central feature of the Crown's case against Fitzpatrick. In addition to relying on the witnesses' reactions when they first saw the video, the Crown also relied on the witnesses' apparent reluctance to agree at trial that they had told police they saw a resemblance. In closing submissions, Crown counsel referred to the crucial importance of the witnesses' initial reactions as follows:

It's the Crown's respectful submission that the most important piece of evidence that comes from Jordana Diamond and Shawn Wright was their initial unadulterated reactions to watching the [surveillance videos]....These initial impressions are likely the best and most accurate versions of their evidence because now they've been through the court process and a number of years have passed and they've had a chance to mull things over, your common sense and human life experience will tell you that sitting in court, directly in front of your son and your Godson, and being expected to give evidence that will either help or hurt them, it's got to be a very difficult experience. [Emphasis added.]

[61] Having set up the importance of these initial impressions, Crown counsel then referred to what he described as Shawn Wright and Ms Diamond "back[ing] off" and "water[ing] down" their evidence, noting that these "retreats" from their earlier statements favoured the defence position. Crown counsel highlighted the reticent nature of Shawn Wright's testimony in particular. He described getting

evidence from Shawn Wright as “like pulling teeth”, especially on “his initial reactions” to the surveillance footage, which Crown counsel characterized as “the most important parts of his evidence”.

[62] After reminding the jury that the Crown had to resort to having Shawn Wright’s initial evidence admitted as past recollection recorded, Crown counsel summed up why both witnesses’ initial reactions to the stumble were so important when coupled with their other evidence:

It’s our respectful submission that the most reliable and untainted evidence given by these folks was their initial reactions and impressions to the videos. For instance, what are the odds that both Shawn Wright and Jordana Diamond would each have watched the videos separately, not [having] an opportunity to speak to each other and then both remark that watching the gentleman in the Raptors sweater stumble over the curb reminded them of Philip Fitzpatrick because of his clumsiness. What are the odds, ladies and gentlemen? Recall, the initial police interview. Shawn Wright acknowledged that the party wearing the Raptors sweater...the apparently taller guy, who stumbled, reminded him of his son Philip Fitzpatrick. While he definitely did not say it was Phil for sure he did note that stumble and the fact that the same height and build as Philip, and that he had similar clothing and that he had a Raptors sweater, and that Philip had similar looking shoes. [Emphasis added.]

[63] To be clear, in referring to these passages, I am not suggesting that Crown counsel’s comments about the witnesses’ reluctance were improper. I mention them to underscore how Crown counsel used this evidence during his closing address and how he highlighted that even the witnesses understood the

importance of their initial reaction to Person #2's stumble. This is despite the fact that the evidence of the stumble was not probative and posed a substantial risk of confusing the jury on the issue of identity.

[64] I cannot accept the Crown's submission that the stumble evidence constituted resemblance evidence that was admissible because there was other inculpatory evidence linking Fitzpatrick to Person #2: see e.g., *R. v. Rybak*, 2008 ONCA 354, 90 O.R. (3d) 81, at para. 121. Resemblance evidence is typically used to describe something specific about a suspect that resembles the accused. That resemblance may come from a suspect's physical features, a distinctive gait, or clothing: see e.g., *R. v. Boucher* (2000), 146 C.C.C. (3d) 52 (Ont. C.A.). In other words, its probative value comes from its specificity. A non-distinctive stumble or trip over a curb cannot reasonably amount to evidence of a suspect resembling the accused. Indeed, this evidence had no bearing on the issue of Person #2's identity and was accordingly inadmissible: *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, at pp. 730-31.

[65] I also cannot agree with the Crown that the trial judge's instructions minimized the prejudicial effect of this evidence. The trial judge told the jury that they could rely on both witnesses' evidence about the stumble to help determine whether Fitzpatrick killed Hall. Indeed, the evidence was repeated again in the trial judge's summary of each witnesses' evidence. Though the trial judge also mentioned the aspects of the witnesses' evidence that were not helpful to the

Crown, he did not caution them about relying on the witnesses' initial reaction to seeing Person #2 stumble.

[66] This evidence was central to the Crown's case against Fitzpatrick. It went directly to the identity of Person #2, someone all parties agreed participated in Hall's killing. Thus, its improper admission warrants a new trial: see e.g., *R. v. Dupe*, 2016 ONCA 653, 340 C.C.C. (3d) 508, at para. 6.

[67] I need not address Fitzpatrick's grounds of appeal regarding alleged errors in the trial judge's *W.(D.)* instructions, nor the effect of the Crown's improper closing on the fairness of his trial. However, because Fitzpatrick seeks an acquittal on the ground that the verdict against him (based on all the evidence) was unreasonable, I must consider whether he is entitled to an acquittal or a new trial.

2. An acquittal is not warranted

[68] Fitzpatrick's original argument on appeal was that the verdict was unreasonable even when the stumble evidence was considered. Though the parties did not specifically address the reasonableness of the verdict without this "resemblance evidence", it is necessary to consider whether the remaining evidence can support the manslaughter verdict.

[69] As the Supreme Court observed in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916, an error of law necessitates a new trial only "if there is legally admissible evidence on which a conviction could reasonably be based". Accordingly, I must

apply the well-established test for determining whether a verdict is unreasonable, which asks “whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered”: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 34. The application of the test is not an opportunity for an appellate court to simply retry the case. The entirety of the evidence is reviewed “to determine not whether the appellate court would have convicted the appellant, but whether a reasonable trier-of-fact properly instructed and acting judicially could have convicted”: *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 3; *R. v. Marrone*, 2023 ONCA 742, 431 C.C.C. (3d) 330, at para. 30.

[70] The remaining legally admissible evidence against Fitzpatrick (after removing the evidence regarding the stumble) can be summarized as follows:

- (a) Fitzpatrick could not be excluded as a contributor to DNA found on the torn white latex glove that had been found near the scene and on the same street as Hall’s home.
- (b) Person #2 appeared to be wearing a white glove on his right hand and a green-yellow glove on his left hand.
- (c) Person #1 and Person #2 had been seen walking in the general direction of Hall’s home, and then away from Hall’s home in the time around Hall’s shooting.

- (d) A green-yellow glove resembling those Shawn Wright and Ms Diamond kept around their house was found on a path leading from Hall's street to a nearby park. Both Wright and Fitzpatrick could not be excluded as contributors, although Wright was more likely to be the contributor than Fitzpatrick.
- (e) Fitzpatrick owned a Raptors hoodie and red and black shoes resembling the sweater and shoes worn by Person #2. This evidence comes from Wright's testimony that he borrowed Fitzpatrick's hoodie and wore it when he went with MGM to break into Hall's home. It also comes from Ms Diamond and Shawn Wright's evidence regarding the kinds of clothing they knew Fitzpatrick owned, which could have been admitted without a *Leaney* application.

[71] This evidence is entirely circumstantial. Thus, the question to be answered is "could a trier-of-fact acting judicially be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence?": *Mars*, at para. 4.

[72] When a court assesses the reasonableness of a verdict based on forensic evidence, it must consider two questions: first, whether the whole of the evidence permits the inference that the forensic evidence was deposited in connection with the offence and not at some other time or place; and second, whether it would be

open to the jury to conclude that the appellant's guilt is the only rational conclusion available on the totality of the evidence or lack of evidence: *R. v. Browne*, 2021 ONCA 836, at para. 32.

[73] In answering the first question, there is an available inference that the white and green-yellow gloves were deposited where they were in the time surrounding Hall's shooting. Person #2 was seen wearing a white glove on his right hand and a green-yellow glove on his left hand. The white glove was found on Hall's street near the crime scene. The green-yellow glove was found on a path in a local park nearby Hall's home. This park was in the direction Person #2 ran in the time period after the shooting.

[74] In answering the second question, it would be open to a jury to conclude that Fitzpatrick's DNA was found on the white latex glove and that the only reasonable explanation for this was because he had been wearing it. The same could be said of the green-yellow glove. Again, Person #2 was seen wearing a white glove and a green-yellow glove. Additionally, Person #1 and Person #2 were seen going in the direction of the crime scene and leaving it around the time of the shooting. It would be open to a jury to find that the only rational inference from this evidence was that Person #2 was at Hall's home when the shooting occurred. Such an inference would be sufficient to uphold the manslaughter verdict.

[75] Similarly, when combined with all the other evidence, it would be open to a jury to find that the only rational inference arising from Person #2 wearing a Raptors hoodie that looked identical to one Wright said Fitzpatrick owned is that Person #2 was Fitzpatrick. This is notwithstanding Wright's testimony to the contrary.

[76] It would be similarly open to the jury to rule out as "fanciful" certain innocent explanations arising from the evidence, such as Fitzpatrick's DNA getting on the white glove due to transference with his hoodie: see *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 37.

[77] Accordingly, I would not enter an acquittal.

[78] I turn now to Wright's appeal.

E. WRIGHT'S APPEAL

1. The *W.(D.)* instructions were deficient

[79] The trial judge gave six separate *W.(D.)* instructions in the jury charge. Three of the instructions related to Wright, two related to Fitzpatrick, and one related to both. Wright argues that the four *W.(D.)* instructions relating to him were deficient in two respects.

[80] First, he alleges that the instructions were over-inclusive. He says that the instructions were over-inclusive because they instructed the jury that if they believed Wright's testimony, or were left in a reasonable doubt by it, they had to

acquit him entirely. This excluded the possibility of finding Wright guilty of manslaughter if they believed or were left in a reasonable doubt by his testimony. Second, Wright argues that the trial judge erred by not modifying his *W.(D.)* instruction relating to whether Wright caused Hall's death to refer to C.H.'s initial description of the shooter as an unmasked Black man.⁵ Wright argues that the charge did not make clear that the jury did not have to accept C.H.'s evidence about the shooter being Black to have been left with a reasonable doubt by it. The jury should have been told that C.H.'s evidence alone, or together with Wright's evidence, could leave them with a reasonable doubt about Wright being the shooter.

[81] I will deal first with Wright's submission regarding the modified *W.(D.)* instruction.

a. The trial judge should have included C.H.'s evidence in his *W.(D.)* instructions

[82] I agree that the trial judge erred by failing to include C.H.'s evidence in his *W.(D.)* instruction on Wright's liability.

[83] The problematic instruction was in the trial judge's second instruction, contained under the heading "Did Evan Wright cause Brandon Hall's Death?".

⁵ In his factum, Wright had also argued that the *W.(D.)* instruction was underinclusive because it did not tell the jury that if they accepted or had a reasonable doubt based on Wright's evidence that he was not the shooter, they had to consider whether he had the intent to commit murder by aiding MGM in committing a break-in. Mr. Doucette abandoned this argument in his oral submissions.

Under this heading, the jury was to consider the identity of the shooter as part of the causation element of murder. In this instruction, the trial judge explained that reasonable doubt could come from Wright's evidence. He did not explain that reasonable doubt could come from other witnesses' evidence, including and especially C.H.'s. As I will explain, this was an error.

[84] The Crown argues that there was no need for such an instruction and that giving one would have been incorrect here because C.H.'s initial description would not have resulted in Wright's acquittal. If the jury accepted or had reasonable doubt about C.H.'s description of the shooter as being Black, that would only have meant Wright was not the shooter. He could still have been convicted of murder even if he was not the shooter. The Crown contends that, when read as a whole, the charge properly equipped the jury to apply the reasonable doubt standard to the evidence. Finally, the Crown argues Wright's counsel did not ask for such an instruction and did not object to the final charge. I would reject each of these submissions.

[85] The *W.(D.)* instruction is directed at ensuring that the jury understands that which is not intuitive: a trial is not a contest between two competing versions of events; evidence does not have to be accepted or believed to still leave a trier of fact with a reasonable doubt; and mere disbelief of exculpatory evidence does not lead to a conviction. As Paciocco J.A. explained in *R. v. Hoffman*, 2021 ONCA 781, at para. 36:

W.(D.) directions are provided to ensure that jurors properly apply the criminal standard of proof when making credibility and reliability determinations relating to exculpatory evidence on vital issues, most commonly the essential elements of charged offences or applicable defences. [Citations omitted.]

[86] Where there is exculpatory evidence from other sources than the accused or defence witnesses, this court has held that it is appropriate to modify the *W.(D.)* instruction to refer specifically to that exculpatory evidence: see e.g., *Hoffman*, at para. 40; *R. v. B.D.*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at paras. 105-14; and *R. v. Charlton*, 2019 ONCA 400, 146 O.R. (3d) 353, at para. 45. As the foregoing cases demonstrate, a modified instruction is most often included where the exculpatory evidence comes from the Crown's witnesses. Exculpatory evidence in this context refers to evidence which, if accepted, would be inconsistent with an accused person's guilt: *R. v. Panovski*, 2021 ONCA 905, at para. 86; *R. v. Boucher*, 2022 ONCA 40, at paras. 77-78; and *R. c. Sarroino*, 2025 QCCA 573, at paras. 22-27, leave to appeal granted, [2025] S.C.C.A. No. 298. Nevertheless, a *W.(D.)* instruction is not required for every aspect of the evidence on which an accused relies: *R. v. Cyr*, 2012 ONCA 919, 294 C.C.C.(3d) 421, at para. 57. Nor are trial judges required to relate the reasonable doubt instruction to specific pieces of evidence: *Boucher*, at para. 69.

[87] It is clear that C.H.'s initial account that the shooter was a Black man is exculpatory evidence in the sense that it is inconsistent with Wright's liability as the

shooter. It thus speaks to one of the essential elements of murder — the identity of the person who caused Hall's death — and merited a reference in the trial judge's *W.(D.)* instructions.

[88] Here, the *W.(D.)* instructions respecting Wright did not make clear to the jury that any reasonable doubt on steps 1 and 2 of *W.(D.)* did not have to be based solely on Wright's testimony. Specifically, the instruction did not refer to C.H.'s evidence along with Wright's with respect to Wright's liability as the shooter. The instructions left the impression that the *W.(D.)* principles applied only to Wright's evidence. Given the exculpatory nature of C.H.'s initial description of the shooter, it was especially important for the *W.(D.)* instructions to make clear that her evidence, alone or in conjunction with Wright's, was relevant at steps 1 and 2 of *W.(D.)*. That is to say, if the jury accepted her evidence, or were left in a reasonable doubt by it (alone or together with Wright's), they could not find Wright guilty of murder as the shooter. The modified *W.(D.)* instruction was appropriate in this case because the exculpatory evidence arose from the Crown's case and that evidence was inconsistent with Wright's guilt on the Crown's principal theory that he was the shooter.

[89] The failure to mention C.H.'s evidence in the *W.(D.)* instructions relating to Wright was potentially more consequential because the charge did mention her evidence in the section regarding Fitzpatrick's liability as the shooter. The difference between each appellant's respective *W.(D.)* instruction, at best, could

have confused the jury and, at worst, could have led them to believe that C.H.'s evidence was not relevant when considering whether Wright was the shooter. In general, jury instructions should not undermine an eyewitness account's "capacity to raise a reasonable doubt": *R. v. Bowcock*, 2025 BCCA 124, at para. 40, leave to appeal granted, [2026] S.C.C.A. No. 13.

[90] The Crown also says that the trial judge's instructions on C.H.'s evidence in this section of the charge would have made clear to the jury the import of her evidence. The difficulty with this submission is that it is not clear from the instructions about C.H.'s evidence that the jury did not have to accept her evidence or find it reliable to be left with a reasonable doubt that Wright was the shooter.

[91] The Crown also argues that a modified *W.(D.)* instruction would not have been appropriate because, even if the jury had a reasonable doubt that the shooter was Black, Wright would not have been entitled to a complete acquittal. As mentioned earlier, Wright could still have been found guilty of murder as the non-shooter via party liability. In support of this submission, the Crown relies on this court's decision in *R. v. Dadollahi-Sarab*, 2021 ONCA 514, leave to appeal refused, [2021] S.C.C.A. No. 356. The Crown acknowledges that the more recent case of *Hoffman* supports Wright's argument that a trial judge can provide a modified *W.(D.)* instruction where it will only result in an acquittal on one theory of liability, but not on another or others. I do not consider these cases to be inconsistent on the appropriateness of a *W.(D.)* instruction in these circumstances.

[92] In *Dadollahi-Sarab*, this court considered the appropriateness of a *Vetrovec* instruction⁶ for a so-called mixed witness — a witness who gives both inculpatory and exculpatory evidence. When considering the appropriateness of jury instructions in that case, the court commented that a *W.(D.)* instruction on the *Vetrovec* witness's evidence would not have been appropriate because their exculpatory evidence would not necessarily have resulted in the appellant's acquittal: *Dadollahi-Sarab*, at paras. 101, 120 and 126. Instead, as here, the appellant could still have been found guilty of murder on a different theory of liability.

[93] However, there is an important distinction between Wright's circumstances and those in *Dadollahi-Sarab*. In *Dadollahi-Sarab*, the court observed that though the evidence was exculpatory on the Crown's main theory of liability, it was inculpatory on the Crown's other theory of liability: at para. 101. Consequently, the court concluded that a *W.(D.)* instruction would have been problematic: *Dadollahi-Sarab*, at paras. 120, 124-26. Here, there is no suggestion that C.H.'s evidence was inculpatory on the Crown's alternate theory that Wright was not the shooter but was still liable for Hall's killing. Instead, it was purely exculpatory on its primary theory that he was the shooter.

⁶ Pursuant to *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811.

[94] It is also not entirely clear from *Dadollahi-Sarab* at what point in the jury charge the court is referring to the appropriateness of including a modified *W.(D.)* instruction. If the court was referring to referencing supposedly exculpatory evidence as part of a general instruction, rather than one directed at a particular element of the offence (as is at issue here), then I agree that including a modified instruction at this stage would have been inappropriate.

[95] Consequently, I do not read *Dadollahi-Sarab* as creating a general rule that a *W.(D.)* instruction is inappropriate whenever exculpatory evidence would not lead to an outright acquittal. Moreover, as I will explain, *Hoffman* makes clear why a *W.(D.)* instruction is appropriate even when exculpatory evidence does not lead to an outright acquittal.

[96] In *Hoffman*, this court held that a modified *W.(D.)* instruction will be appropriate even if it results in an acquittal on only one theory of liability: at para. 46. The victim in *Hoffman* was swarmed by a group of people and violently assaulted. While the victim was on the ground, someone struck him with a tree branch. The Crown pursued two alternate theories of liability. The Crown alleged that Hoffman was part of the group that swarmed the victim, or that he was the person who struck the victim with the tree branch. A witness gave evidence that was exculpatory on the Crown's theory that Hoffman struck the victim with the branch. It was not exculpatory of Hoffman's involvement in the swarming. Notably, unlike the evidence in *Dadollahi-Sarab*, it was not inculpatory either.

[97] In concluding that the trial judge ought to have provided a modified *W.(D.)* instruction, Paciocco J.A. made clear, at para. 46, that “a *W.(D.)* direction is required where evidence is exculpatory on only one of the Crown’s theories of culpability, but not others.” Paciocco J.A. reasoned, at para. 47, that “[I]f a version of events is vital enough to support a conviction if it is proved by incriminating evidence, it is vital enough to require a *W.(D.)* direction if challenged by exculpatory evidence.”

[98] To be clear, I do not read cases which have required a modified *W.(D.)* instruction, including *Hoffman*, as establishing a hard and fast rule that the absence of such a modified instruction will automatically render a jury charge deficient. Appellate review of jury charges is functional: *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, at para. 35. The sufficiency of instructions relating to exculpatory eyewitness evidence requires “a case-by-case determination that will invariably result in different outcomes on appeal given the functional and contextual approach to appellate review”: *Bowcock*, at para. 41. The question is not whether the trial judge used a particular formula, “but whether the charge as a whole, in the context of the particular case served its purpose by delivering the necessary message”: *Dadollahi-Sarab*, at para. 112. That is why even an erroneous *W.(D.)* instruction does not automatically require a new trial. The ultimate question is whether the jury was properly equipped to apply the reasonable doubt standard to exculpatory evidence. The *W.(D.)* instruction is a

helpful way of explaining how to apply the reasonable doubt standard. But it is not the only way: *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 13. As long as the jury instructions as a whole properly explain how the reasonable doubt standard should be applied on the evidence heard at trial, the charge will be sufficient.

[99] In this case, given how central C.H.'s initial description was to Wright's defence, it should have been part of a modified *W.(D.)* instruction on the question of whether Wright caused Hall's death.

[100] In fairness to the trial judge, Wright's trial counsel did not ask him to provide a modified *W.(D.)* instruction, nor did trial counsel raise any objection to this aspect of the charge. Only Fitzpatrick's counsel asked that the *W.(D.)* instruction refer to other evidence. However, there was no tactical advantage for Wright not to have asked for C.H.'s evidence to be referenced in the *W.(D.)* instructions, nor could this have benefitted him.

[101] Wright submits that the absence of the modified *W.(D.)* instruction, on its own, justifies ordering a new trial. As noted above, not every error in a *W.(D.)* instruction will result in a new trial. Again, the question is not whether the trial judge uses specific words or a precise formula, but whether the charge as a whole properly equips a jury to apply the criminal standard of proof: *R. v. Darnley*, 2020 ONCA 179, 387 C.C.C. (3d) 200, at para. 38.

[102] I need not decide whether the absence of a modified instruction here, on its own, warrants ordering a new trial. Considered together with Crown counsel's inappropriate closing address, I am satisfied that its absence undermined the fairness of the trial. Before turning to that ground of appeal, I will briefly address the other alleged error in the trial judge's *W.(D.)* instructions — that they were over-inclusive.

b. The over-inclusive instructions were incorrect

[103] Although not strictly necessary for the disposition of this appeal, I address the over-inclusiveness error briefly for the benefit of the trial judge at the new trial.

[104] As mentioned above, Wright alleges that the *W.(D.)* instructions had the effect of removing the included offence of manslaughter from the jury's consideration. That is because the trial judge instructed the jury on four occasions that if they believed Wright or were left in a reasonable doubt by his testimony, they should acquit him.

[105] These over-inclusive instructions were not correct. If the jury believed or were left in reasonable doubt about Wright's testimony, he was not necessarily entitled to an outright acquittal. For example, in answering the question "Did Evan Wright cause Brandon Hall's death?", the jury were being asked to decide if the Crown had proven beyond a reasonable doubt whether he was the shooter. The jury was instructed that a reasonable doubt on this element should end their

deliberations and lead to an outright acquittal. This instruction was incorrect because all parties agreed that Wright could still be found guilty of culpable homicide (murder or manslaughter) even if he was not the shooter.

[106] Given my conclusion that a new trial is required based on the other errors, it is not necessary to decide whether these instructions led to any unfairness to Wright. On the one hand, the instructions were favourable to Wright when read in isolation. Indeed, if the jury concluded he was not the shooter and thus acquitted him of murder, they could not convict him of anything else because the impugned instructions required the jury to end their deliberations. On the other hand, these instructions, when read in the context of the charge as a whole, may have left the jury unclear about the route to a manslaughter conviction. This is because other instructions in the charge explained that Wright could be guilty of manslaughter if he merely accompanied MGM to do a nighttime robbery.⁷ I accept that this framing of Wright's exposure to liability may have been confusing.

[107] It does not appear that the trial judge or the parties appreciated that these over-inclusive instructions were incorrect. This is not a case where the trial judge deliberately removed manslaughter from the jury's consideration. At Wright's new trial, it is important that the trial judge carefully craft the *W.(D.)* instructions at each

⁷ Indeed, Mr. Doucette's position on appeal is that this was the most realistic verdict even on his client's own evidence.

stage to ensure that they do not inadvertently remove a theory of liability that is available on the evidence.

[108] I turn next to the ground of appeal concerning the Crown's closing address.

2. The Crown's closing address prejudiced trial fairness

[109] Wright alleges⁸ that Crown counsel's improper closing address required the trial judge to order a mistrial. Although both appellants advanced several grounds in support of their mistrial application at trial, on appeal, Wright relies on only the most serious of the Crown's transgressions. That is, the Crown's reference to *Miaponoose* and the frailties of eyewitness evidence with respect to C.H.'s initial identification of the shooter as a Black man. Wright argues that Crown counsel's treatment of C.H.'s evidence in the closing address could not be remedied with a corrective instruction and that the corrective instruction that the trial judge gave was insufficient.

[110] The closing addresses were delivered over three days, with each party having a separate day to deliver its address. C.H.'s testimony figured prominently in all three closing addresses to the jury. Both appellants' trial counsel emphasized the reasons why C.H.'s initial description of the shooter should be accepted. Crown counsel's closing address sought to explain why the jury should not accept that

⁸ As already mentioned, Fitzpatrick also advanced this ground of appeal, but it is not necessary to deal with it, given his success on his other ground of appeal.

description as being reliable. It was at this point in his closing address that Crown counsel made the improper comments.

[111] In an attempt to explain why the jury should reject C.H.'s initial description, Crown counsel focused on the frailties of eyewitness evidence. In doing so, he referred to this court's decision in *Miaponoose*, which cites the Law Reform Commission of Canada's study paper on Pretrial Eyewitness Identification Procedures⁹:

Earlier I talked about eye witness identification and I just wanted to, to give you ... a kind of famous case about eyewitness identification called Mianopoose [sic] And it's from the Ontario Court of Appeal and it really sets out what... I think and what [co-counsel] think are, are some really key considerations you should all bear in mind as you're assessing [C.H.'s] evidence. In it they cite from a study paper by the Law Reform Commission of Canada from 1983 called Pre-trial Eyewitness Identification Procedures, and they cite one example pointed out by the commission about the dangers of eyewitness identification evidence and it says and I quote

Simply by way of illustration psychologists have shown that much of what one thinks one saw is really a perpetual filling in. Contrary to the belief of most laymen, and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality. The work of psychologists has shown the process whereby sensory stimuli are converted into

⁹ Neil Brooks, *Pretrial Eyewitness Identification Procedures* (Ottawa: Law Reform Commission of Canada, 1983).

conscious experience is prone to error ...
[Emphasis added.]

[112] After reading the foregoing quotation, Crown counsel added that he had himself been unaware of how the brain records and processes information until he became a criminal lawyer:

Now, frankly I wasn't aware of that in the [s]cientific and psychological evidence relating to how our brains record and process material until I became a criminal lawyer, but I'll tell you what I just read to you. Think of that as it relates to [C.H.] and her experiences and what she's what she is processing and what's happening in her brain as she's being asked to recount what happened and what she witnessed we respectfully submit that [C.H.] is unconsciously filling things in regarding what she witnessed in the events surrounding [Hall's] death and that is why her evidence is all over the place and why we say you can't rely upon her. It's just not reliable.
[Emphasis added.]

[113] After Crown counsel had finished his closing address, both appellants' counsel raised several concerns about the Crown's closing, including the reference to *Miaponoose*. Wright's counsel suggested that the transgressions might be serious enough to warrant a mistrial. Because appellants' counsel had raised these issues at the end of the day (Wednesday, February 9), the trial judge decided to hear submissions the following morning.

[114] Both appellants formally applied for a mistrial the next morning. The trial judge heard these submissions on Thursday, February 10. He excused the jury, who had returned to court that morning expecting to hear the jury charge. Both

appellants' trial counsel raised a combined 17 unique grounds in support of their mistrial application, all concerning Crown counsel's closing address. The most significant concern was Crown counsel's reference to *Miaponoose*. The Crown acknowledged that the references to *Miaponoose* were improper. However, the Crown argued that a mistrial was not necessary if the trial judge provided a strong corrective instruction. Both appellants argued that a mistrial was required, and that no corrective instruction could remedy the prejudice from the improper remarks.

[115] The trial judge reserved his decision on the mistrial application over the weekend. He delivered his ruling dismissing the application on Monday, February 14. Despite this, he found three areas of the Crown's closing address, including its reference to *Miaponoose*, to be problematic. After delivering his ruling, the trial judge provided a draft corrective instruction to counsel and allowed counsel to make submissions on what should be included in the instruction. Fitzpatrick's counsel, speaking on behalf of both appellants, read out their proposed instruction. After Crown counsel made comments about the instruction, Wright's counsel repeated that she did not think any instruction could cure the prejudice.

[116] On the afternoon of February 14, after the lunch break, the trial judge provided corrective instructions to the jury on the three problematic areas of the Crown's address. He used the language proposed by the appellants. The trial judge's instruction regarding Crown counsel's improper reference to *Miaponoose* explained that the Crown's reference to it was inappropriate and should be

disregarded. The trial judge explained that expert evidence about eyewitness identification is inadmissible and that neither party could have called evidence about it and that expert evidence would normally be subject to cross-examination. The trial judge also told the jury that the passage read by the Crown was a summary of scientific evidence that explained the frailties that exist in some instances with identification evidence. Finally, the trial judge explained that since C.H. was a description witness and not an identification witness, the passage that Crown counsel read had no application to her evidence.

[117] Wright argues that the trial judge erred in not granting a mistrial based on Crown counsel's reference to *Miaponoose* and the frailties of eyewitness identification evidence. He argues this court owes no deference to the trial judge's decision not to grant a mistrial because the trial judge did not give any reasons explaining why corrective instructions were capable of curing the improper comments. Putting aside the trial judge's reasons, Wright argues that Crown counsel's comments were so prejudicial that there was no instruction capable of curing the prejudice caused by them. Wright submits that the manner in which Crown counsel personalized his knowledge of the frailties of eyewitness identification was particularly problematic. He contends that it was this personalization that made this transgression incurable by any instruction.

[118] The Crown on appeal, while acknowledging that the comments were improper, argues that the corrective instruction cured any potential prejudice. The

Crown also argues that the corrective instruction incorporated everything that the defence suggested. The Crown observes that the instruction was also sufficient here because it actually went further than it should have by incorrectly telling the jury that the frailties associated with eyewitness identification evidence did not apply to C.H.'s evidence because she was not an identification witness, but merely a description witness.

[119] I agree with Wright that the corrective instruction fell short in curing the prejudice caused by Crown counsel's impugned comments. I do not need to address Wright's argument regarding the trial judge's failure to explain why a mistrial was not required. I agree with Wright that the corrective instruction here was not sufficient in the circumstances. I conclude that the instruction was insufficient for the following reasons.

[120] First, it is important to understand precisely how prejudicial the Crown's comments were. While it is true that the Crown tried to insert inadmissible expert evidence on the supposed frailties of C.H.'s initial description of the shooter into its closing address, this understates the prejudice caused by its reference to *Miaponoose*: see *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.). Indeed, the impugned comments went beyond introducing inadmissible information or evidence. Crown counsel personalized this information. It is well accepted that Crown counsel should not express personal opinions in their closing addresses: *R. v. Mallory*, 2007 ONCA 46, 217 C.C.C. (3d) 266, at paras. 340-42. However,

this is also not simply a case where Crown counsel expressed a personal opinion that the jury could be told to disregard. By saying that he did not learn about the frailties of eyewitness identification until he started practicing criminal law, Crown counsel was effectively telling the jury he was letting them in on some inside information that all lawyers and judges know.

[121] It is questionable whether any corrective instruction could remove the tainting done by this kind of personal comment. There was a real risk that the jury would regard any corrective instruction as the trial judge trying to hide something from them, rather than simply giving them a correct legal instruction.

[122] Second, the length of time between the impugned comments and the corrective instruction was significant. Crown counsel's closing address happened on Wednesday, February 9. The corrective instruction was not delivered until Monday, February 14 — five days later. The Crown correctly observes that this was the first reasonable opportunity for the trial judge to have delivered the instruction. The trial judge cannot be faulted for taking the decision under reserve, especially since the appellants raised numerous grounds in their mistrial application. But the fact remains that the jury was left with these comments for a significant period before they were told to forget them.

[123] Third, the impugned comments related to evidence that was central to both appellants' defences. If the jury accepted C.H.'s initial description that the shooter

was a Black man, this would have meant an acquittal for Fitzpatrick, because the Crown did not submit that Fitzpatrick could have been MGM's accomplice. For Wright, while C.H.'s evidence would not have guaranteed an acquittal, it would have made a manslaughter verdict more likely. It could also have had the effect of enhancing his credibility by confirming his testimony that a Black man (MGM) was the shooter.

[124] Fourth, the corrective instruction did not explain to the jury that they did not have to accept or find C.H.'s evidence reliable in order to use it to acquit. As discussed above, this is the explanation that was missing from the *W.(D.)* instruction regarding Wright. Because Crown counsel's comments had the effect of undermining the reliability of C.H.'s evidence, it was essential that, at some point, the jury be instructed that C.H.'s evidence could leave them with a reasonable doubt even if they did not accept it.

[125] None of this is to say that Crown counsel was not permitted to highlight what he considered to be the weaknesses in C.H.'s initial description. Indeed, there were reasons to doubt the accuracy of C.H.'s initial description. She made her observations through a very small opening in the door. She also initially thought a group of men entered her home. Crown counsel could have referred to these facts in raising concerns about the reliability of her initial description. But Crown counsel's comments crossed the line by referring to inadmissible information about

the frailties of eyewitness evidence in relation to C.H.'s exculpatory evidence, and then by personalizing this evidence as something all legal experts are aware of.

[126] I am satisfied that, based on the Crown's improper closing address and the trial judge's failure to give a modified *W.(D.)* instruction, Wright has established that the jury was not properly instructed on how to apply the fundamental concept of reasonable doubt. The absence of a modified *W.(D.)* instruction left unclear to the jury the role C.H.'s initial description could play in their deliberations on the identity of the shooter. And Crown counsel's improper closing address undermined the significance of her evidence.

[127] These errors meant Wright did not have a fair trial. I would accordingly allow Wright's appeal.

F. DISPOSITION

[128] I would allow Fitzpatrick's appeal and order a new trial on the charge of manslaughter.

[129] I would allow Wright's appeal and order a new trial on the charge of first degree murder.

Released: April 14, 2026 "L.B.R."

"M. Rahman J.A."
"I agree. L.B. Roberts J.A."
"I agree. R. Pomerance J.A."