SUPREME COURT OF CANADA

CITATION: R. *v.* Saddleback, 2026 SCC 18

APPEAL HEARD: November 12, 2025
JUDGMENT RENDERED: May 22, 2026
DOCKET: 41567

BETWEEN:

His Majesty The King
Appellant

and

Dylon Saddleback
Respondent

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 48) O'Bonsawin J. (Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and Moreau JJ. concurring)

DISSENTING REASONS: (paras. 49 to 97) Côté J.

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His Majesty The King *Appellant*

v.

Dylon Saddleback *Respondent*

Indexed as: R. *v.* Saddleback

2026 SCC 18

File No.: 41567.

2025: November 12; 2026: May 22.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Criminal law — Evidence — Hearsay — Assessment — Accused convicted of second degree murder at trial — Conviction quashed by Court of Appeal and new trial ordered — Whether trial judge impermissibly relied on out-of-court statement made by murder victim in phone call to girlfriend for truth of its contents.

The accused and others had gathered outside a trailer to socialize. At some point, most of the group left to attend a nearby birthday party, leaving the accused and

the victim alone at the trailer. The victim was later discovered dead, having been struck more than 45 times with a blunt instrument. When police arrived, they found the accused standing between the trailer and a nearby vehicle. The accused fled but was later apprehended. The victim's blood was found on the accused's shoes and clothing, as well as on an axe located where he had been standing. The accused was charged with second degree murder.

At trial, members of the group testified that, as they were leaving for the birthday party, the victim was on the phone and the accused was in the trailer. It was uncontested that the victim was on the phone with his girlfriend for 10 to 20 minutes in the window of 10:00 to 10:30 p.m. The Crown asked the girlfriend whom the victim had said he was with during the call, which triggered an objection and a *voir dire* concerning the admissibility of that evidence; however, the Crown abandoned its application to have this evidence admitted. Later in the trial, defence counsel asked the girlfriend, on cross-examination, whether the victim had told her "he was being ditched by those guys" during this phone call. She eventually agreed. The trial judge convicted the accused of second degree murder in brief oral reasons that referenced the victim's out-of-court statement about being "ditched". The accused appealed his conviction. A majority of the Court of Appeal allowed the appeal, quashed the conviction and ordered a new trial, on the basis that the trial judge erred in relying on the victim's out-of-court statement for an impermissible hearsay purpose.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, **O'Bonsawin** and Moreau JJ.: The trial judge used the victim's out-of-court statement as hearsay, that is, to make proof of the truth of its contents. Even if the statement could have been relied on for a purpose other than establishing the truth of its contents or could have been admissible to prove the truth of its contents under a hearsay exception, the trial judge's reasons, read in light of the trial record as a whole, are insufficient to allow an appellate court to infer or reconstruct an analysis supporting either basis. Given that the Crown did not rely on the curative proviso, a new trial is required.

Evidence relevant to an issue at trial may nevertheless be inadmissible if it is subject to an exclusionary rule, such as the rule against hearsay. Hearsay is an out-of-court statement tendered for the truth of its contents and is defined by the use to which the statement is sought to be put, namely, to prove that what is asserted is true. Hearsay is presumptively inadmissible mainly because, without the declarant in court, it is often difficult to assess the truthfulness of the statement. However, there are exceptions. A party seeking to rely on an out-of-court statement for the truth of its contents can attempt to have it admitted under one of the common law categorical exceptions or under the more flexible principled exception. Under the principled exception, hearsay evidence can only be admitted when the party tendering it demonstrates on a balance of probabilities that it is necessary and sufficiently reliable, a determination normally made through a *voir dire* on admissibility. Where no *voir dire* is held, the question is whether the trial judge erred in law by relying on the evidence for an impermissible purpose without having properly admitted it in evidence. In

reviewing how a trial judge used an out-of-court statement, appellate courts must take a functional and contextual reading of the reasons while being mindful that trial judges are presumed to know the law. Appellate intervention is not justified merely because the trial judge's reasons are ambiguous. Rather, the reasons must disclose an error or an ambiguity that renders the path taken by the trial judge unintelligible, frustrating appellate review of the use of the out-of-court statement.

The victim's statement to his girlfriend was made out of court, and the trial judge's reasons indicate unambiguously that the statement was relied on to establish the truth of its contents. Based on the group members' testimonies, the trial judge established that the group left the trailer while the victim was on the phone. He then found that the phone call the group witnessed upon leaving was the one that took place between the victim and his girlfriend, at around 10:00 p.m., by relying on the victim's out-of-court statement to his girlfriend on the phone, telling her that "he was being ditched by those guys". Therefore, the victim and the accused were left alone at the trailer very soon before the victim's death. The validity of the syllogism hinges on the group having left while the victim was on the phone with his girlfriend, and the relevance of the victim's statement to support the conclusion that the group left during that phone call *prima facie* depends on its truth. Although it is possible that some use could still have been made of the victim's out-of-court statement, either because the presumption of inadmissibility was rebutted by a hearsay exception or because the statement had some other non-hearsay use, the trial judge's reasoning does not reflect this possibility. These hypothetical uses of the statement are completely unstated and

cannot be intelligibly reconstructed from the record. Appellate review on the issues raised by these hypothetical uses is thus not possible.

The scope of the Crown's appeal as of right is limited to the hearsay question on which there was a dissent at the Court of Appeal, and to matters that can be said to be inextricably linked with that issue, such as whether the error of law is so serious that it justifies setting aside the trial verdict. An error of law is presumed to be prejudicial to the accused, and the Crown bears the onus of establishing the absence of prejudice under the curative proviso. In the instant case, the Crown never argued, even implicitly, that no substantial wrong or miscarriage of justice occurred or that the evidence of guilt is so overwhelming such that the verdict would have been the same notwithstanding the error. Because the curative proviso cannot be applied by the Court of its own motion, it is not possible to consider whether a new trial could have been avoided by operation of the proviso.

Per **Côté** J. (dissenting): The appeal should be allowed, the judgment of the Court of Appeal set aside and the accused's conviction restored. There is disagreement with the majority with regard to the conclusions that can be drawn from the trial judge's reasons as to the precise use he made of the victim's out-of-court statement. The statement was not used for the truth of its contents, but rather for the trial judge's reliability assessment. While the trial judge's reasons are brief, they are not so fragmentary as to be insufficient and do not disclose any misapprehension of evidence.

Trial judges are presumed to know the law and apply it correctly. Where a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. In the instant case, when the trial judge's reasons are read as a whole and with reference to the entirety of the record, it is clear that he was very much alive to the fact that the victim's out-of-court statement about persons leaving would be inadmissible for the purpose of proving the truth of its contents. This is evidenced by an exchange between the trial judge and counsel at the *voir dire* regarding the admissibility of the victim's out-of-court statement about who was present at the trailer and by the fact that, at the conclusion of the parties' final submissions, the trial judge raised concerns about the use of another witness's testimony for hearsay purposes. The trial judge's conclusion as to the chronology of the group's movements on the night of the murder was circumscribed by the interconnected web of witness testimony, which he found to be reliable because it was consistent among the members. As for the girlfriend's testimony, the trial judge noted it was consistent with the evidence given by the other witnesses who had observed the victim on the phone at the moment of their departure.

The standard of review applicable to the sufficiency of reasons requires that a reviewing court engage in a functional and context-specific reading of the reasons to determine whether they fulfill their functions of explaining why an accused was convicted or acquitted, providing public accountability and permitting effective appellate review. In the instant case, the trial judge's factual conclusions with respect to the DNA and blood spatter evidence did not raise a reasonable doubt about the

accused's identity as the assailant. Given the particularly damning nature of the physical evidence, in particular the numerous blood transfer stains on the accused's T-shirt, jeans, and shoes, there was no need for the trial judge to offer a more extensive justification for dismissing the accused's argument that the lack of blood spatter on the exposed portions of his body raised a reasonable doubt. Furthermore, with regard to the reasonable possibility of an unknown or third-party assailant being responsible for the murder, the evidence established beyond a reasonable doubt that the accused intended to unlawfully cause the victim's death.

A material misapprehension of evidence is an error that plays an essential role in the reasoning that resulted in the conviction, such that, without it, the conviction would be left on unsteady ground. In respect of the trial judge's conclusion that the victim mentioned persons leaving, it was open to the trial judge to conclude that the general thrust of the line of questioning during the girlfriend's cross-examination showed that she had stated in her preliminary inquiry testimony that the victim had complained of being ditched by "those guys", and that she adopted this prior statement in its entirety. The girlfriend's prior statement could properly be considered evidence even though the preliminary inquiry transcript had not been tendered in evidence because where a witness adopts a prior statement as true, the adopted statement becomes part of the witness' evidence at trial. Even when there is doubt as to a witness' adoption of a prior statement, the decision as to whether a witness adopts all, part, or none of their prior testimony falls well within the province of the trier of fact, and such a decision invites a high degree of deference from reviewing courts. Moreover, the trial

judge could logically infer from the whole of the evidence that the expression “those guys” was used in reference to the victim’s group of friends who were in the process of leaving the trailer as he spoke to his girlfriend, and that the use of the past continuous tense in the cross-examination suggests that the event was unfolding as they spoke.

Cases Cited

By O’Bonsawin J.

Distinguished: *R. v. Evans*, [1993] 3 S.C.R. 653; **referred to:** *R. v. Schneider*, 2022 SCC 34, [2022] 2 S.C.R. 619; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Charles*, 2024 SCC 29; *R. v. Saddleback*, 2014 ABCA 166, 1 Alta. L.R. (6th) 259; *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Maxie*, 2014 SKCA 103, 316 C.C.C. (3d) 396; *R. v. Li*, 2023 BCCA 47; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Bridgman*, 2017 ONCA 940, 357 C.C.C. (3d) 213; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Tayo Tompouba*, 2024 SCC 16; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Samaniego*, 2022 SCC 9, [2022] 1 S.C.R. 71.

By Côté J. (dissenting)

R. v. G.F., 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Dipnarine*, 2014 ABCA 328, 316 C.C.C. (3d) 357; *Ujvari v. R.*, 2019 QCCA 2001; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Candir*, 2009 ONCA 915, 257 O.A.C. 119; *R. v. Robert*, 2023 QCCA 379, 428 C.C.C. (3d) 439; *R. v. Medford*, 2021 ONCA 27; *R. v. Abdulle*, 2020 ONCA 106, 149 O.R. (3d) 301; *R. v. Kruk*, 2024 SCC 7; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 686(1)(b)(iii), 693(1)(a).

Rules of the Supreme Court of Canada, SOR/2002-156, r. 29(3).

Authors Cited

Paciocco, David M., Palma Paciocco and Lee Stuesser. *The Law of Evidence*, 8th ed. Toronto: Irwin Law, 2020.

APPEAL from a judgment of the Alberta Court of Appeal (Crighton, Kirker and Grosse JJ.A.), 2024 ABCA 352, [2024] A.J. No. 1258 (Lexis), 2024

CarswellAlta 2758 (WL), quashing the conviction of the accused for second degree murder and ordering a new trial. Appeal dismissed, Côté J. dissenting.

Jason R. Russell, for the appellant.

Brian A. Beresh, *K.C.*, and *Kristofer Advent*, for the respondent.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. was delivered by

O'BONSAWIN J. —

I. Overview

[1] This appeal requires the Court to apply the well-established principles regarding hearsay evidence and the sufficiency of reasons to the specific facts of this case.

[2] In brief oral reasons, the trial judge convicted the respondent, Dylon Saddleback, of the second degree murder of Joshua Dennehy. In support of his conclusion that the two men were left alone at the crime scene shortly before the murder, the trial judge referenced an out-of-court statement made by the deceased during a phone call with a witness. A majority of the Court of Appeal of Alberta

concluded that the trial judge erred in relying on the statement for an impermissible hearsay purpose and, on this basis, quashed the conviction and ordered a new trial.

[3] The Crown submits that the majority erred in concluding that the trial judge made an impermissible use of hearsay evidence. It argues that the trial judge's conclusion drawn from the out-of-court statement does not rest on accepting the truth of the statement's contents, but rather on common sense inferences about human behaviour and the circumstances in which the statement was made. Mr. Saddleback disagrees. He contends that the majority was right that the trial judge erred in his use of the hearsay evidence and that, in any case, a new trial is required because the trial judge misapprehended the evidence and because the reasons are insufficient.

[4] For the reasons that follow, I would dismiss the appeal. Based on a plain reading of the trial reasons, the trial judge used the out-of-court statement as hearsay, that is, to make proof of the truth of its contents. Even if it were true that the out-of-court statement could have been relied on for a purpose other than establishing the truth of its contents or could have been admissible to prove the truth of its contents under a hearsay exception, the trial judge's reasons, read in light of the trial record as a whole, are insufficient to allow an appellate court to infer or reconstruct an analysis supporting either basis. It should be noted that the Crown does not rely on the curative proviso. In the circumstances, a new trial is required.

II. Context

[5] On July 28, 2020, Mr. Dennehy, Mr. Saddleback and others had gathered to socialize outside a trailer in central Alberta. At some point that evening, most of the group left to attend a nearby birthday party, leaving Mr. Dennehy and Mr. Saddleback alone at the trailer.

[6] Another man, returning to his home beside the trailer, discovered Mr. Dennehy lying dead on the ground and called 9-1-1 at around 10:44 p.m. He had been struck by more than 45 blows from a blunt instrument. When police arrived a short time later, they found Mr. Saddleback standing between the trailer and a vehicle parked nearby. When they identified themselves, Mr. Saddleback fled and was later found hiding under the deck of his mother's house. He had Mr. Dennehy's blood on his shoes and clothing. An axe, also bearing Mr. Dennehy's blood, was found between the vehicle and the trailer where Mr. Saddleback had been standing. Mr. Saddleback was arrested and charged with second degree murder.

[7] At trial, Mr. Saddleback argued there was a reasonable possibility that, sometime after the group had left for the birthday party, someone else had arrived at the trailer and killed Mr. Dennehy. A material issue at trial was therefore whether Mr. Saddleback had had the exclusive opportunity to kill Mr. Dennehy, and the time the group had left them alone at the trailer was of particular importance to that question. Members of the group gave inconsistent evidence about when they left, but testified that Mr. Dennehy was on the phone and Mr. Saddleback was in the trailer when they were leaving.

[8] It was uncontested that Mr. Dennehy was on the phone with his girlfriend, Delayna Bull, for 10 to 20 minutes in the window of 10:00 to 10:30 p.m. She testified to the line becoming distorted and to hearing shuffling, tussling and thudding sounds before the call ended. The Crown asked Ms. Bull whom Mr. Dennehy had said he was with during the call, which triggered an objection and a *voir dire* concerning the admissibility of that evidence. Following the close of the *voir dire*, the Crown abandoned its application to have this evidence admitted.

[9] Later in the trial, Mr. Saddleback's counsel asked Ms. Bull, on cross-examination, whether Mr. Dennehy had told her "he was being ditched by those guys" during this phone call (A.R., vol. II, at p. 202). She initially gave a negative answer. But when taken to her preliminary inquiry testimony, she agreed that Mr. Dennehy had used the word "ditched", meaning that the others had left him. This appeal primarily concerns the manner in which the trial judge relied on that statement in assessing the timing of the group's departure from the trailer.

III. Judicial History

A. *Court of King's Bench of Alberta (Clackson J.)*

[10] The trial judge convicted Mr. Saddleback of second degree murder in very brief oral reasons.

[11] He noted the evidence from members of the group that when they left the trailer for the birthday party, Mr. Dennehy was on the phone and Mr. Saddleback was in the trailer. The trial judge found this evidence was consistent with Ms. Bull's evidence that she spoke to Mr. Dennehy on the phone around 10:00 p.m., during which conversation he "mentioned persons leaving" and that he had to fight someone younger than him (A.R., vol. I, at p. 3). Mr. Saddleback was younger than Mr. Dennehy.

[12] After considering the physical evidence, the trial judge concluded there was no reasonable possibility that someone else had killed Mr. Dennehy. Ms. Bull's evidence about what she was told on the phone permitted the trial judge to conclude that Mr. Dennehy died briefly after the group had left the trailer, giving Mr. Saddleback the exclusive opportunity for the killing. Mr. Dennehy's state of mind was that he had to fight and Ms. Bull heard sounds through the phone which the trial judge found to be the blows that killed Mr. Dennehy. Given this sequence of events, it lacked common sense that anyone else would have killed Mr. Dennehy. Furthermore, he concluded that the absence of more blood spatter on some of Mr. Saddleback's clothes was "a function of the physics associated with [blood splatter]" (A.R., vol. I, at p. 5).

B. *Court of Appeal of Alberta, 2024 ABCA 352 (Crighton, Kirker and Grosse JJ.A.)*

(1) <u>Kirker and Grosse JJ.A.</u>

[13] A majority of the Court of Appeal allowed Mr. Saddleback's appeal, quashed the conviction and ordered a new trial. The majority concluded that the trial

judge had relied on Mr. Dennehy's out-of-court statement to the effect that persons were leaving, uttered during the phone call with Ms. Bull, for the truth of its contents. This was therefore an impermissible use of hearsay evidence.

[14] In the majority's view, the trial judge determined the approximate time of the group's departure to the nearby party by relying on the statement's implied assertion that the group was leaving *as* Mr. Dennehy spoke to Ms. Bull on the phone. In essence, the majority concluded that the relevance of Mr. Dennehy's statement to establish the timing of the group's departure depended on the truth of the implied assertion, and it was therefore impermissible to use it for that purpose.

[15] The Court of Appeal noted that "[t]he trial judge may well have reached the same conclusion on the other evidence, in the absence of the impugned statement" (para. 18). However, the Crown did not rely on the curative proviso (s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46). The majority concluded it had no choice but to order a new trial.

(2) Crighton J.A. (Dissenting)

[16] The dissenting judge would have dismissed the appeal. In her view, the trial judge did nothing more than find that the statement about "persons leaving" was consistent with the evidence of the various witnesses who testified they left the trailer when the victim was on the phone. The existence of the statement itself was admissible circumstantial evidence from which could be drawn the inference that the call

witnessed by the members of the group when they left was the same call Mr. Dennehy had with Ms. Bull.

[17] Furthermore, she concluded that the trial judge's reasons were sufficient and that there was no misapprehension of evidence, both questions the majority did not have to address given its conclusion that a new trial was required on the hearsay ground.

IV. Issue

[18] The Crown raises one issue on appeal: did the trial judge err in relying on Mr. Dennehy's out-of-court statement?

[19] In addition to endorsing the majority position of the Court of Appeal on this issue, Mr. Saddleback raises two additional arguments in support of the order below. He contends that a new trial is required because the trial judge misapprehended critical evidence and because the trial judge's reasons are insufficient to permit appellate review. In light of my conclusion on the hearsay issue, it is not necessary to examine these two ancillary arguments.

V. Analysis

A. *Principles Governing the Use of Out-of-Court Statements*

[20] Evidence relevant to an issue at trial may nevertheless be inadmissible if it is subject to an exclusionary rule (see *R. v. Schneider*, 2022 SCC 34, [2022] 2 S.C.R. 619, at para. 36). Among the exclusionary rules is the rule against hearsay (see *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 2; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 157). Hearsay is "an out-of-court statement tendered for the truth of its contents" (*R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 20; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 18). It is not defined by "the nature of the evidence *per se*, but by the use to which the evidence is sought to be put: namely, to prove that what is asserted is true" (*Starr*, at para. 162). Hearsay is presumptively inadmissible mainly because, without the declarant in court, it is often difficult to assess the truthfulness of the statement (see *Khelawon*, at paras. 2-3; *R. v. Charles*, 2024 SCC 29, at para. 43).

[21] However, the rule against hearsay has exceptions. A party seeking to rely on an out-of-court statement for the truth of its contents can attempt to have it admitted under one of the common law categorical exceptions or under the more flexible principled exception (see *Charles*, at para. 45; *Khelawon*, at para. 42; D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 151). Under the principled exception, hearsay evidence can only be admitted when the party tendering that evidence demonstrates on a balance of probabilities that it is necessary and sufficiently reliable (see *Bradshaw*, at para. 23). A *voir dire* on the admissibility of the hearsay evidence is normally held for this purpose (see *Schneider*, at para. 37).

[22] Where, as here, no *voir dire* was held to determine the statement's admissibility, the question is whether the trial judge erred in relying on it for an impermissible purpose without having properly admitted it in evidence. The identification of evidence as hearsay is a question of law reviewable on the standard of correctness (see *R. v. Saddleback*, 2014 ABCA 166, 1 Alta. L.R. (6th) 259, at para. 8; *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334, at para. 12). It is an error of law for a judge to rely on an out-of-court statement for the truth of its contents when it was not properly admitted for that purpose (see *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 45; *R. v. Maxie*, 2014 SKCA 103, 316 C.C.C. (3d) 396, at para. 27; *R. v. Li*, 2023 BCCA 47, at paras. 62-73). Reliance on inadmissible hearsay can compromise trial fairness and the just pursuit of truth (see *Bradshaw*, at para. 20).

[23] In reviewing how a trial judge used an out-of-court statement, it is of course true that an appellate court must take a "functional and contextual reading" of the reasons, mindful that trial judges are presumed to know the law with which they work every day (see *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 69 and 74). Therefore, to justify intervention on appeal, the trial judge's reasons must not be simply ambiguous. Rather, read in the context of the record as a whole, the reasons must disclose an error or an ambiguity that renders the path taken by the trial judge unintelligible, frustrating appellate review of the use of the out-of-court statement (see, generally, *G.F.*, at para. 79).

B. *The Trial Judge's Reasons Are Unambiguous in Relying on an Out-of-Court Statement for the Truth of its Contents*

[24] During her cross-examination by defence counsel, Ms. Bull adopted her previous testimony to the effect that Mr. Dennehy had told her on the phone that "he was being ditched by those guys" (A.R., vol. II, at p. 204). For her, this meant that the group had left him at the trailer. The exchange unfolded as follows:

> Q Okay. And [Mr. Dennehy] said he was being ditched by those guys; is that correct?
> A No. He didn't say ditch.
>
> Q Okay. Have you had a chance to read the preliminary hearing transcript where you gave your evidence?
> A I skimmed it.
>
> . . .
>
> Q . . . And at page 32 of the transcript, at line 27, this question is asked: (as read)
>
> > Q Okay. Did . . . [Mr. Dennehy] say that he was being ditched by those guys? At any point did he use that word?
>
> And your answer was: (as read)
>
> > A Yes. I'm pretty sure. Yes.
>
> Did I read that correctly?
> A Yes.
>
> . . .
>
> Q Okay. No, that's fine. So today you accept that that's what happened?
> A Yes.
>
> . . .
>
> Q Okay. And you had indicated at the preliminary hearing that for you what that meant to [Mr. Dennehy] was that they had left him; correct?
> A Yes.

(A.R., vol. II, at pp. 202-4)

[25] All agree that Mr. Dennehy's statement to Ms. Bull, which she relayed in this passage of the transcript, was made out of court. The controversy between the parties to the appeal is whether the trial judge used it for the truth of its contents, thereby engaging hearsay concerns.

[26] On the face of the reasons he gave, the trial judge specifically relied on this statement to support his conclusion as to when Mr. Dennehy and Mr. Saddleback were left alone at the trailer, which was a point of controversy at trial:

> In addition, the evidence of the witnesses is consistent that [Mr. Dennehy] had woken from his stupor and was on his phone when the group left for the final time. At that time [Mr. Saddleback] was said to be in the recreational trailer where he had gone to pass out. The text messages and evidence of [Ms. Bull] served to corroborate those conclusions. [Ms. Bull]'s evidence and the text messages establish that she spoke with [Mr. Dennehy] for 10 to 20 minutes after the last text message which was recorded at 9:57 PM. During that telephone conversation [Mr. Dennehy] said he had to fight that little guy. To [Ms. Bull] that meant someone younger than [Mr. Dennehy]. [Mr. Saddleback] is younger. [Ms. Bull] told us that she heard sounds and noises which I have concluded are consistent with the beating which [Mr. Dennehy] suffered and ultimately caused his death.
>
> Also, during that telephone call, it is [Ms. Bull]'s evidence which I accept that [Mr. Dennehy] mentioned persons leaving. That is consistent with the evidence of . . . others that they left . . . at a time when [Mr. Dennehy] was on a cell phone. That left only [Mr. Dennehy] and [Mr. Saddleback] at the scene. The time had to be between 10:10 PM and approximately 10:30 PM. At approximately 10:30 PM, [the neighbour] found [Mr. Dennehy] unresponsive despite his [resuscitation] efforts. At 10:44 PM [the neighbour] called the police. They arrived one minute prior to 11. [Emphasis added.]

(A.R., vol. I, at pp. 2-3)

[27] This finding was central to the trial judge's rejection of a key defence theory. Mr. Saddleback had argued that, given the inconsistent testimony from members of the group about when they left, it was plausible that the phone call they witnessed Mr. Dennehy having upon leaving was not the phone call he had with Ms. Bull, but rather an earlier phone call with another individual. The trial judge relied on the timing of the phone call between Mr. Dennehy and Ms. Bull, and his statement to her that he was being ditched by other people, to conclude that Mr. Saddleback was the only person with the opportunity to kill Mr. Dennehy:

> Within minutes of the telephone call between [Mr. Dennehy] and [Ms. Bull], . . . the [group] had left. That left just [Mr. Dennehy] and [Mr. Saddleback] at the scene. Within minutes of that event, [Mr. Dennehy]'s state of mind was that he had to fight, and [Ms. Bull] heard the sounds which are, as I have found, part of the events that led to [Mr. Dennehy]'s death. That someone had been laying in wait to attack [Mr. Dennehy] once . . . the [group] had left, or happened on the scene just after they left, intent on murder and viciously attacked [Mr. Dennehy] with an axe lacks common sense. That [a member of the group], for some unknown reason, left the group, returned, attacked, and killed [Mr. Dennehy] and then left, and changed and returned to the scene is simply not possible in the timeframe outlined and not consistent with the evidence as to the comings and goings that evening. [Mr. Saddleback] killed [Mr. Dennehy]. [Emphasis added.]
>
> (A.R., vol. I, at p. 5)

[28] To summarize, the trial judge's reasoning can be broken down as follows:

1. The group left the trailer while Mr. Dennehy was on the phone (this finding is based on the testimonies of the group members at trial);

2. The phone call the group witnessed upon leaving was the one that took place between Mr. Dennehy and Ms. Bull, at around 10:00 p.m. (this finding relied on Mr. Dennehy's out-of-court statement to Ms. Bull on the phone, telling her he was being "ditched");

3. Therefore, Mr. Dennehy and Mr. Saddleback were left alone at the trailer very soon before Mr. Dennehy's death.

[29] The validity of the syllogism hinges on the group having left while Mr. Dennehy was on the phone with Ms. Bull, a finding the trial judge grounded in Mr. Dennehy's out-of-court statement relayed in Ms. Bull's cross-examination. Based on his own words, it is clear that the trial judge reasoned that the moment where the group left the trailer occurred during the phone call between Mr. Dennehy and Ms. Bull, at around 10:00 p.m., because Mr. Dennehy told Ms. Bull on the phone that people were leaving. In the context of the trial record, this must refer to Ms. Bull's evidence that Mr. Dennehy had told her on the phone that "he was being ditched by those guys".

[30] The relevance of this statement to support the conclusion that the group left during the phone call *prima facie* depends on its truth. If this statement were not true, that is if Mr. Dennehy said the group was leaving when they were not actually

leaving, it would be irrelevant to discerning who left when. It is only if relying on its truth that this statement supports the conclusion for which the trial judge cited it.

[31] The Crown submits that nothing in the record suggests that the trial judge used Mr. Dennehy's utterance for the truth of its contents (A.F., at para. 79). It says that, considering the full context, one reasonable reading of the trial judge's reasons is that he only used the out-of-court statement to corroborate "the evidence of other witnesses that [Mr. Dennehy] was on the phone when the others left for the party", which is not a hearsay use of the statement (para. 85; see also paras. 82-84). My colleague adopts the same reading of the trial judge's reasons, suggesting that he referred to Ms. Bull's testimony only because it was consistent with the evidence of the other witnesses who had observed Mr. Dennehy on the phone at the moment of their departure, and whose reliability was a live issue at trial (para. 61).

[32] With respect for other views, I cannot accept the Crown's argument. Even accepting this is what the trial judge did, the corroborative value of the statement on this record depended on its truth. If the statement was untrue, it would not corroborate the evidence from other witnesses that Mr. Dennehy was on the phone when they left. The mere fact that the statement was made is not relevant, on its own, for this purpose. The Crown's reading of the trial judge's reasons is also a clear hearsay use of the statement.

[33] This is not a case like *R. v. Evans*, [1993] 3 S.C.R. 653, where the out-of-court statements were found to be relevant to the issue of the identity of the declarant

even where they could not be relied on for the truth of their contents. There is no issue here that Mr. Dennehy was the declarant. The trial judge did not purport to rely on the statement to establish Mr. Dennehy's identity, but rather to establish that the group was actually leaving as Mr. Dennehy stated out of court to Ms. Bull on the phone that he was being "ditched", as part of his exclusive opportunity analysis. Unlike in *Evans*, the out-of-court statement at issue here, when placed in context, serves no purpose in the trial judge's chain of reasoning unless the truth of its contents is accepted.

[34] Fundamentally, the Crown's position is that while the statement could not be used to directly support its truth, it "could properly be used as circumstantial evidence to conclude that the others left during [Mr. Dennehy]'s call with [Ms. Bull]" (A.F., at para. 58). With respect, this wording shows that even on the Crown's own theory, the statement was used for the purpose of proving that the group was leaving, which is precisely the content of the out-of-court statement at issue. This is definitional hearsay.

[35] Accepting the Crown's position on this point would be to permit "an end-run-around the hearsay rule" (*R. v. Bridgman*, 2017 ONCA 940, 357 C.C.C. (3d) 213, at para. 76). It would mean any out-of-court statement could be used for the purpose of proving its content is true, without hearsay scrutiny, as long as that use is characterized as circumstantial. As I have explained, under the hearsay rule, admissibility of evidence "depends on the *purpose* for which [the evidence] is sought to be admitted" (*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 36 (emphasis in original); see also

Starr, at para. 162), not on whether the evidence is direct or circumstantial. Indeed, this Court has said that there is no substantive distinction between express and implied hearsay (*Baldree*, at para. 5). If the "value of the evidence turns on the truth of the assertion made by the [declarant], then the traditional hearsay concerns will be present" (*Bridgman*, at para. 76). The trial judge's reasons clearly engage those concerns because the probative value of Mr. Dennehy's statement that he was being "ditched" turns on whether it was truthful.

[36] Further, the fact that a hearsay *voir dire* had been held earlier in the trial concerning another statement Mr. Dennehy had made on the phone, alerting the trial judge to potential hearsay issues in this record (see A.R., vol. II, at p. 189), does not, on its own, cure the reliance on the out-of-court statement made plain in the trial judge's reasons (*contra*, A.F., at para. 80). If anything, the fact that hearsay concerns with Ms. Bull's evidence were live at trial, and ended with evidence not being admitted, creates an expectation that the trial judge would have carefully justified his reliance on what Mr. Dennehy relayed to Ms. Bull over the phone, had he been alive to hearsay concerns when delivering his reasons.

[37] In sum, the reasons suggest on their face that the trial judge went beyond merely relying on the fact that the out-of-court statement was made. Rather, he purported to rely on the content of the statement for its truth, the fact that people were leaving Mr. Dennehy, in his exclusive opportunity analysis.

C. *The Trial Judge's Reasons Are Insufficient to Justify Reliance on the Out-of-Court Statement*

[38] This is not to exclude the possibility that some use could still have been made of the statement, either because the presumption of inadmissibility was rebutted by a hearsay exception or because the statement had some other non-hearsay use that is not obvious from the reasons. Nor does this exclude the possibility that the trial judge could have reached the same conclusion about the timing of the group's departure on other evidence.

[39] The Crown does not take the position that the trial judge's reasoning reflects either of these possibilities. Rather, "the Crown chose to ride the horse that this was not hearsay" for the reason I have considered and rejected above (transcript, at p. 9). In particular, whether the statement could be admitted based on a hearsay exception was not argued before this Court or before the Court of Appeal. The Crown argues, relying on this Court's decision in *G.F.*, at paras. 78-79, that without clear indication to the contrary it should be presumed that the trial judge's reliance on the statement was proper. In other words, mere ambiguity in the reasons is not enough to warrant appellate intervention (A.F., at paras. 79-80).

[40] I have concluded that the trial judge's reasons indicate unambiguously that he relied on the out-of-court statement to establish the truth of its contents. The Crown advances no theory on which the hearsay use could be justified. But even assuming, in the alternative, that the trial judge relied on the statement because he felt it was

admissible based on a hearsay exception or because he found the statement had an idiosyncratic or novel non-hearsay use, the chain of reasoning supporting that reliance would still have had to have been perceptible, reading his reasons in context. This is not the case here. These hypothetical paths of reasoning are completely unstated and cannot be intelligibly reconstructed from the record. Appellate review on the issues raised by these paths would not be possible and the Crown's reliance on *G.F.* is accordingly misplaced.

[41] In short, even if the trial judge had used the statement in a legally permissible way, his reasons do not explain *what* that hearsay exception or non-hearsay use was and *why* it was justified, and the answers to these questions are not clear in the record. This problem would be particularly serious because, as I have explained, reliance on the statement went to timing, which was central to the trial judge's reasons for finding Mr. Saddleback was the one who killed Mr. Dennehy.

[42] I note parenthetically that the entirety of the oral reasons for finding Mr. Saddleback guilty of second degree murder fit on just over four transcribed pages of the record. The sufficiency of reasons must always be assessed functionally and contextually (see *G.F.*, at para. 69). However, reasons this short in a murder case involving multiple forensic experts, and inconsistent witness testimony found not to be generally reliable on points of detail, are difficult to square with the goals of ensuring transparency in the adjudicative process and of satisfying observers that justice has been done (see para. 68).

[43] In conclusion, on their face, the reasons purport to rely on an out-of-court statement for the truth of its contents. Even if the trial judge could have justified his reliance on the out-of-court statement, the reasons are insufficient for that purpose on this record.

D. *A New Trial Is Required*

[44] An error of law is presumed to be prejudicial to the accused, and the Crown bears the onus of establishing the absence of prejudice under the curative proviso (see *R. v. Tayo Tompouba*, 2024 SCC 16, at paras. 57-58 and 64). Given the position of the Crown, the curative proviso is not available in this case.

[45] The scope of the Crown's appeal as of right is limited to the hearsay question on which there was a dissent at the Court of Appeal, and to matters that can be said to be inextricably linked with that issue, such as "the question of whether [the] . . . error of law is so serious that it justifies setting aside the trial verdict" (*R. v. Keegstra*, [1995] 2 S.C.R. 381, at para. 31; see s. 693(1)(a) of the *Criminal Code*).

[46] The Crown did not rely on the curative proviso, whether before the Court of Appeal or before this Court. When the Crown's position was solicited at the hearing, the Crown confirmed it had not relied on the curative proviso below and did not purport to invoke it (see transcript, at pp. 9 and 16; see also C.A. reasons, at para. 18). The Crown never argued, even implicitly, that no substantial wrong or miscarriage of justice occurred or that the evidence of guilt is so overwhelming such that the verdict would

have been the same notwithstanding the error (compare *R. v. Samaniego*, 2022 SCC 9, [2022] 1 S.C.R. 71, at para. 66).

[47] The proviso cannot be applied by the Court of its own motion (see *Tayo Tompouba*, at para. 104). It needs to be at least implicitly raised by the Crown, whose exercise of prosecutorial discretion not to rely on the curative proviso must be respected (paras. 104-5). This Court is not, therefore, empowered to consider whether a new trial could have been avoided in this case by operation of the curative proviso.

VI. Disposition

[48] The appeal should be dismissed, without costs.

The following are the reasons delivered by

CÔTÉ J. —

I. Overview

[49] I have had the opportunity to read my colleague's reasons for dismissing the Crown's appeal and affirming the judgment of the majority of the Court of Appeal of Alberta. With respect, I dissent. For the reasons that follow, I am of the view that the trial judge did not rely upon Joshua Dennehy's out-of-court statement for the truth of its contents. I would therefore allow the Crown's appeal, set aside the judgment of

the Court of Appeal, and restore the conviction of the respondent, Dylon Saddleback, for second degree murder.

[50] I would also dismiss the two grounds that Mr. Saddleback raises in his factum in support of the judgment below. Firstly, while the trial judge's reasons are brief, they are not so fragmentary as to be insufficient. When read functionally and with reference to the trial record, the reasons allow us to readily discern the "how" and the "why" of his decision. Accordingly, appellate review is not frustrated and, as a result, this ground must fail. Secondly, a thorough analysis of witness testimony and of the trial judge's reasons does not disclose any misapprehension of the evidence. On this final ground, Mr. Saddleback essentially disagrees with the trial judge's assessment of the evidence. Ultimately, however, he is unable to put his finger on any crucial flaws in the trial judge's reasoning.

II. The Trial Judge Did Not Rely Upon Mr. Dennehy's Out-of-Court Statement for an Impermissible Hearsay Purpose

[51] I broadly agree with my colleague's summary of the facts and of the judgments below. Therefore, I shall endeavour to limit my comments on the hearsay ground to the source of our disagreement. I also note from the outset that there is no real disagreement in relation to the law governing hearsay. Rather, our disagreement hinges upon the conclusions that can be drawn from the trial judge's reasons as to the precise use he made of the evidence. Contrary to my colleague, I believe that Mr. Dennehy's out-of-court statement about persons leaving was not used for the truth

of its contents, but rather for the trial judge's reliability assessment. Although the trial judge's reasons may give rise to a certain degree of ambiguity, his comments relating to Delayna Bull's testimony and Mr. Dennehy's statement should not be interpreted as an impermissible reliance on the statement for a hearsay purpose.

[52] It must not be forgotten, as my colleague rightly notes, that trial judges are presumed to know the law and apply it correctly (*R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 74). Hence, where "a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error" (para. 79). In analyzing a supposed error, a reviewing court "must be rigorous in its assessment, looking to the problematic reasons <u>in the context of the record as a whole</u> and determining whether or not the trial judge erred or appellate review was frustrated" (para. 79 (emphasis added)). In the case at bar, these presumptions must colour our analysis of the trial judge's comments as they relate to the hearsay issue.

[53] A review of the record leads me to conclude that the trial judge did not rely upon Mr. Dennehy's out-of-court statement for the truth of its contents. I acknowledge that, at first blush, the trial judge's comments about Ms. Bull's testimony and Mr. Dennehy's statement may appear problematic. However, reading his reasons as a whole and with reference to the entirety of the record suffices to dispel any doubt as to whether he made an impermissible use of Mr. Dennehy's statement.

[54] First of all, the trial judge was very much alive to the fact that Mr. Dennehy's out-of-court statement about persons leaving would be inadmissible for the purpose of proving the truth of its contents. This is in part evidenced by the final exchange between the trial judge and counsel at the end of the *voir dire* regarding the admissibility of Mr. Dennehy's out-of-court statement about who was present at the trailer:

> [DEFENCE COUNSEL]: Okay. <u>What was said during the brief voir dire about other people present</u>, I don't think that's admissible. That's simply hearsay --
>
> THE COURT: Your friend doesn't want that anyway.
>
> [DEFENCE COUNSEL]: Yeah.
>
> . . .
>
> THE COURT: All right. Then we're ad idem, and the Crown is abandoning the application to admit the evidence <u>with respect to what [Mr. Dennehy] said as to who was present</u>?
>
> [CROWN COUNSEL]: Yes, Sir.
>
> THE COURT: All right. Done. [Emphasis added.]
>
> (A.R., vol. II, at p. 189)

[55] This exchange demonstrates that the trial judge was well aware of the fact (1) that Mr. Dennehy's statement about who was present at the trailer was inadmissible for hearsay purposes, (2) that the Crown did not intend to rely upon this statement, and

(3) that the Crown had abandoned the *voir dire* to have the statement admitted for the truth of its contents.

[56] Moreover, in their final submissions to the trial judge, neither party made any mention of the deceased's comment about people leaving. For its part, the Crown relied on a web of interconnected testimony that temporally circumscribed the movements of the group. This testimony was used to establish Mr. Saddleback's exclusive opportunity to kill Mr. Dennehy (A.R., vol. III, at p. 648). Moreover, when discussing Ms. Bull's conversation with Mr. Dennehy, the Crown made no reference to Mr. Dennehy's statement about people leaving (p. 649). At the conclusion of the parties' final submissions, the trial judge once more raised his concerns about the use of another witness's testimony for hearsay purposes (p. 657).

[57] In light of these portions of the record, it can be concluded that the trial judge was well aware of the fact that the out-of-court statement made by Mr. Dennehy about persons leaving was inadmissible for the purpose of proving the truth of its contents.

[58] In his judgment, the trial judge arrived at the following conclusions:

> Also, during that telephone call, it is [Ms. Bull]'s evidence which I accept that [Mr. Dennehy] mentioned persons leaving. That is consistent with the evidence of Joseph, Ryle[y], and others that they left with Bryce and his group at a time when [Mr. Dennehy] was on a cell phone. That left only [Mr. Dennehy] and [Mr. Saddleback] at the scene. The time had to be between 10:10 PM and approximately 10:30 PM. At approximately 10:30 PM, Trevor Moonias found [Mr. Dennehy] unresponsive despite his

> [resuscitation] efforts. At 10:44 PM Trevor called the police. They arrived one minute prior to 11.
>
> (A.R., vol. I, at p. 3)

[59] My colleague asserts that the trial judge necessarily used Mr. Dennehy's out-of-court statement for the truth of its contents, because it had no use beyond temporally circumscribing the killing and therefore had to be accepted for the truth of its contents.

[60] I accept that this portion of the trial judge's reasons may, *prima facie*, appear ambiguous. However, as will be demonstrated in the present reasons, on Mr. Saddleback's first ground in support of the judgment below, the chronology was circumscribed not by reliance upon Mr. Dennehy's out-of-court statement as my colleague asserts (at paras. 27-30), but rather by the interconnected web of witness testimony relating to the movements of the group on the night of the event. Therefore, it is an error to infer, without more, that the trial judge was relying on Mr. Dennehy's statement for the truth of its contents.

[61] In my view, the trial judge was simply noting that Ms. Bull's testimony was consistent with the evidence given by the other witnesses who had observed Mr. Dennehy on the phone at the moment of their departure. This was an important conclusion to reach, given that witness reliability had been a live issue at trial. Furthermore, it ties into the trial judge's earlier conclusions that the evidence of various

members of the group was reliable *because it was consistent among the members* (A.R., vol. I, at pp. 2-3).

[62] I therefore conclude that the majority of the Court of Appeal erred when it held that the trial judge had relied upon Mr. Dennehy's out-of-court statement for an impermissible hearsay purpose.

III. The Grounds in Support of the Judgment Below Raised by Mr. Saddleback

[63] In his factum, Mr. Saddleback raises two grounds in support of the judgment of the Court of Appeal, not relied on in the majority's reasons: (1) sufficiency of the reasons and (2) material misapprehension of the evidence.

[64] Mr. Saddleback is entitled to raise and advance any argument to sustain the judgment below, given that he does not seek to vary the judgment made by that court. Therefore, a cross-appeal is not required (*Rules of the Supreme Court of Canada*, SOR/2002-156, r. 29(3); see also *R. v. Keegstra*, [1995] 2 S.C.R. 381, at paras. 23 and 26; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 620-21; *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 240).

A. *The Trial Judge's Reasons Are Sufficient Under the Circumstances*

(1) Parties' Positions

[65] Mr. Saddleback contends that the trial judge's reasons are insufficient. In his view, this was a case involving a complex set of overlapping evidentiary issues relating to witness credibility and reliability, exclusive opportunity, and expert forensic evidence. These complexities were further "compounded by substantial investigative shortcomings" (R.F., at para. 101). The trial judge's brief reasons provide no clear explanations as to how he resolved two key issues at trial: (1) whether the expert testimony on blood spatter could undermine the conclusion that Mr. Saddleback was the assailant, and (2) whether reasonable alternative inferences as to the assailant's identity could be drawn.

[66] The Crown argues that the reasons are sufficient and permit appellate review. In the Crown's view, the central issue of identity was straightforward. The trial judge was under no duty to explain every inference he drew, nor was he required to explicitly reconcile every contradiction in the evidence. He dealt with the central issue of identity, expressly considered the evidence that Mr. Saddleback identified as being capable of raising a reasonable doubt, and nonetheless concluded that Mr. Saddleback's guilt was the only reasonable inference in light of the whole of the evidence.

(2) Standard of Review

[67] The standard of review applicable to the sufficiency of reasons is well established (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 55). The reviewing court must engage in a functional and context-specific reading of the reasons

to determine whether they "fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review" (*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15; see also para. 16). This is not a sterile, abstract exercise; it must be directed "at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel" (*R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25).

(3) Analysis

[68] Mr. Saddleback has failed to convince me that the trial judge's reasons are insufficient.

(a) *Blood Spatter Evidence*

[69] The trial judge drew three factual conclusions in relation to the DNA and blood spatter evidence: (1) Mr. Saddleback's T-shirt, jeans, and shoes were covered with Mr. Dennehy's blood, and the jeans had much more blood on them than the T-shirt, meaning that they were closer to the blood source when force was applied to it; (2) there was no blood on Mr. Saddleback's hands, arms, or face, except for a stain on his hand that contained insufficient DNA material for analysis; and (3) the lack of blood spatter on the exposed portions of Mr. Saddleback's body was "simply a function of the physics associated with [striking Mr. Dennehy with the axe handle]" (A.R.,

vol. I, at p. 5). These conclusions did not raise a reasonable doubt about Mr. Saddleback's identity as the assailant (pp. 3-5).

[70] There was no need for the trial judge to offer a more extensive justification for dismissing Mr. Saddleback's argument that the lack of blood spatter raised a reasonable doubt, given the particularly damning nature of the physical evidence. A brief review of the key portions of the expert witness's testimony on bloodstain patterns and of the parties' final submissions to the trial judge is sufficient to understand why the trial judge rejected Mr. Saddleback's argument.

[71] In his final submissions to the trial judge, counsel for Mr. Saddleback made the following argument in relation to the blood and DNA evidence:

> Now I want to touch on the evidence of Sergeant Knopp because his evidence, in my respectful submission, is very telling. The Crown, in my submission, has to lean heavily on his evidence to establish my client as a party to this homicide. It's my submission that the evidence of Sergeant Knopp can do no more than place [Mr. Saddleback] in an ill-defined vicinity or proximity to Joshua Dennehy when force is being applied to [Mr. Dennehy] after that blood has been exposed. Knopp can't say that [Mr. Saddleback] was within an axe handle's length when the <u>spatter</u> lands on [Mr. Saddleback]. He simply can't be that precise. There is some <u>spatter</u> as well on the T-shirt of [Mr. Saddleback] that is consistent with [Mr. Saddleback] being further away from [Mr. Dennehy] than at other times than, for example, when <u>spatter</u> lands on the jeans. That is inconsistent with my client standing at more or less the same spot or distance, swinging an axe repeatedly on [Mr. Dennehy]. It's critical that Knopp says it is reasonable to expect that <u>spatter</u> blood would be on the exposed hands or arms of someone swinging an axe or otherwise exerting force on an open blood source. [Emphasis added.]
>
> (A.R., vol. III, at pp. 628-29)

[72] It is worth noting that, in his final oral submissions to the trial judge, counsel for Mr. Saddleback omitted any reference to blood transfer stains and focused solely on the question of blood spatter. However, the Crown's expert witness, Sergeant Trevor Knopp, opined at considerable length on the presence of a large number of blood transfer stains on Mr. Saddleback's T-shirt, jeans, and shoes (A.R., vol. III, at pp. 451-63). Such stains, explained Sgt. Knopp, occur only where a person or an object enters into *direct contact* with a source of blood, which differentiates them from mere spatter stains (pp. 452-54).

[73] Referring to the stains observed on the back and side of Mr. Saddleback's T-shirt as spatter stains, defence counsel then made the following remarks:

> My submission is what the officer is there saying is that when he's talking about the lower left or left back side of the T-shirt, that it's only a possibility that it was facing towards the blood source. That it's certainly also a possibility it wasn't facing toward the blood source. That it could, as one would expect, have been worn to -- with that portion of the T-shirt being at the side or toward the rear of the blood source. <u>Which is inconsistent with somebody applying force and having spatter come back towards their fore person, if I can put it that way, or to the front of them. That is consistent, in my respectful submission, with somebody else applying force while my client is standing to the side or facing away, at least somewhat, from [Mr. Dennehy].</u>
>
> There's nothing in the evidence to suggest he, if he was the axe swinger, for whatever reason twisted his T-shirt so that it would be in a different position when that <u>blood spatter</u> happened. [Emphasis added.]
>
> (A.R., vol. III, at p. 631)

[74] In his testimony, Sgt. Knopp was unequivocal that the stains on the back and side of Mr. Saddleback's T-shirt were *transfer stains* (A.R., vol. III, at p. 461). It

was the expert's opinion that these stains did not result from spatter, but rather from the T-shirt entering into direct contact with the blood source. The presence of a significant number of transfer stains on all of Mr. Saddleback's garments was particularly damning for the defence. The fact that no blood was observed on the exposed portions of Mr. Saddleback's body once at the police station was of no moment. It was open to the trial judge to conclude that the lack of observable blood spatter on these portions of Mr. Saddleback's body did not raise a reasonable doubt (A.R., vol. I, at p. 5).

(b) *Reasonable Alternative Inferences to Guilt*

[75] Mr. Saddleback further argues that both the record and the trial judge's reasons do not disclose why he was convicted. In his view, "his convenience as a suspect appears to have led to a superficial assessment of the evidence, as though his guilt was assumed" (R.F., at para. 117).

[76] Respectfully, this argument is without merit.

[77] In *R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), Doherty J.A. underscored that "appellate courts [should not] overestimate the complexity of most criminal litigation or underestimate the ability of those involved in the trial process to understand the reasons for the outcome. Most criminal trials, even the difficult ones, are not particularly complicated. Most accused, even those who vehemently disagree

with the result, understand only too well why they were convicted" (para. 33 (emphasis added)).

[78] As in *D. (J.J.R.)*, the reasons for Mr. Saddleback's conviction are evident on the face of the record: taken as a whole, the evidence convincingly excluded the reasonable possibility of an unknown or third-party assailant and established beyond a reasonable doubt that Mr. Saddleback had intended to unlawfully cause the death of Mr. Dennehy. However, for the sake of demonstration, and in fairness to Mr. Saddleback, it is worth reviewing some of the key parts of the evidence that bear out that conclusion.

[79] The group of witnesses who were at the trailer during the night of the offence testified that, as they departed, Mr. Saddleback and Mr. Dennehy were left alone together. They observed Mr. Dennehy on the phone at this time. Although there were inconsistencies about the precise moment of the group's departure, there is agreement among the witnesses that they were not gone for long before they returned. The group was observed at the birthday party by the host, Bernadette Standingontheroad. Upon arrival, "it was already getting kind of late", and they then spent roughly 30 minutes to an hour there before leaving (A.R., vol. III, at p. 323; see also pp. 326-27). Within roughly 20 to 25 minutes of leaving the party, one of the group members, Cree Lightfoot, received a call alerting her to the discovery of Mr. Dennehy's body (pp. 488 and 490). This was around the time that Ms. Standingontheroad heard police sirens (p. 327). Not only does this time frame align with the time of Ms. Bull's

phone call with Mr. Dennehy, but it also makes it nigh on impossible that there was a window in which another member of the group, Ryley Standingontheroad, could have theoretically killed Mr. Dennehy.

[80] The trial judge explicitly adverted to this fact when he observed that the contention that "[Mr. Standingontheroad], for some unknown reason, left the group, returned, attacked, and killed [Mr. Dennehy] and then left, and changed and returned to the scene is simply not possible in the timeframe outlined and not consistent with the evidence as to the comings and goings that evening" (A.R., vol. I, at p. 5). Moreover, he concluded, it lacked common sense that someone else "had been laying in wait to attack [Mr. Dehenny] once Joseph and the rest had left, or happened on the scene just after they left, intent on murder and viciously attacked [Mr. Dehenny] with an axe" (p. 5).

[81] These were findings that were freely available on the face of the record. The trial judge concluded that the alternatives proposed by Mr. Saddleback were not reasonable. On this last point, it must not be forgotten that, "[m]ost importantly, '[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt'" (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 56, quoting *R. v. Dipnarine*, 2014 ABCA 328, 316 C.C.C. (3d) 357, at para. 22; see also *Villaroman*, at para. 55; *Dipnarine*, at paras. 23-24). Here, Mr. Saddleback was discovered alone at the scene of the crime dressed in clothes covered with the victim's blood and immediately took flight upon

being challenged by the attending police officers. Such compelling evidence was more than enough to find him guilty beyond a reasonable doubt (see, e.g., *Ujvari v. R.*, 2019 QCCA 2001, at paras. 11-12).

B. *The Trial Judge Did Not Materially Misapprehend the Evidence*

(1) Parties' Positions

[82] Mr. Saddleback contends that the trial judge misapprehended Ms. Bull's testimony by attributing to her a clear and reliable account of the victim's statement that people were leaving. In his opinion, this amounted to a misapprehension of the evidence because her evidence was, in truth, "vague, ambiguous, and never affirmatively linked to a specific time or group" (R.F., at para. 67). He argues that this conclusion was central to the trial judge's finding of guilt and, consequently, material in nature.

[83] In response, the Crown argues that the trial judge's conclusion was a reasonable and limited factual finding that was open to him on the basis of the record, as Ms. Bull's testimony in this respect was confirmed by independent witness testimony. In the Crown's view, Mr. Saddleback's argument must fail because it is insufficient for a party, when alleging a material misapprehension of evidence, to simply suggest that an alternative inference was available or that another interpretation of the evidence was possible.

(2) Standard of Review

[84] An allegation of a material misapprehension of evidence invites a "stringent standard" of review (*R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.); see also *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3). Where this type of error is alleged, the "misapprehension of the evidence must go to the substance rather than to the detail" and "must be material rather than peripheral to the reasoning of the trial judge" (*Lohrer*, at para. 2). In short, the error must play an essential role in the reasoning that resulted in the conviction (para. 2), such that, without it, the conviction would be left on unsteady ground (*Sinclair*, at para. 56).

(3) Analysis

[85] Mr. Saddleback takes issue with the following portion of the trial judge's conclusions relating to Ms. Bull's testimony:

> Also, during that telephone call, it is [Ms. Bull]'s evidence which I accept that [Mr. Dennehy] mentioned persons leaving. That is consistent with the evidence of Joseph, [Mr. Standingontheroad], and others that they left with Bryce and his group at a time when [Mr. Dennehy] was on a cell phone. That left only [Mr. Dennehy] and [Mr. Saddleback] at the scene. The time had to be between 10:10 PM and approximately 10:30 PM. At approximately 10:30 PM, Trevor Moonias found [Mr. Dennehy] unresponsive despite his [resuscitation] efforts. At 10:44 PM Trevor called the police. They arrived one minute prior to 11. [Emphasis added.]

[86] He argues (1) that the scope of the questions posed to Ms. Bull and the answers that she gave in response limited the possible conclusions that could be drawn from her testimony and (2) that her evidence was ambiguous, unclear, and unreliable.

[87] In order to properly grasp Mr. Saddleback's first argument, it is necessary to review the relevant portions of Ms. Bull's testimony at trial. During the examination-in-chief, no evidence was elicited on the question of the departure of the other persons from the trailer. Only in cross-examination was the issue raised, and only in relation to Ms. Bull's prior testimony at the preliminary inquiry.

[88] During the cross-examination, the following exchange occurred between defence counsel and Ms. Bull:

> Q All right. At the preliminary hearing, which you testified at on April 27th of last year, you said that that comment was made before or at about the time Joseph and [Mr. Standingontheroad] were leaving.
>
> A Yes.
>
> . . .
>
> Q <u>Okay. And [Mr. Dennehy] said he was being ditched by those guys; is that correct?</u>
>
> A <u>No. He didn't say ditch.</u>
>
> Q Okay. Have you had a chance to read the preliminary hearing transcript where you gave your evidence?
>
> A I skimmed it.
>
> . . .
>
> Q Going to show you the date first. Just April 27th of 2021; is that correct?
>
> A Yeah.

. . .

Q Okay. On page 18, we see that your evidence commences, Delayna Saddleback Bull.
A M-hm.

. . .

Q . . . And at page 32 of the transcript, at line 27, this question is asked: (as read)

> Q Okay. Did Joseph or -- or [Mr. Dennehy] say that he was being ditched by those guys? At any point did he use that word?

And your answer was: (as read)

> A Yes. I'm pretty sure. Yes.

Did I read that correctly?
A Yes.

Q All right. And that is the answer you gave at that time?
A Yes.

Q And --
A Mind you, that was 2 years ago, so.

Q It was 10 years ago, you said?
A I said it was 2 years ago, so thank you for refreshing my memory.

Q Okay. No, that's fine. So today you accept that that's what happened?
A Yes.

Q That he said he was being ditched; right? And I take it you knew [Mr. Dennehy] well enough to be able to say he did not like being ditched.
A I guess.

Q Okay. Well -- well, I -- do you think you knew him that well?
A Well, who would like being ditched? I wouldn't.

Q All right. So your evidence is that when he said that, he wasn't happy in tone when he said, I'm being ditched.

A He was normal in tone. He had no tone about him.

Q Okay. And you had indicated at the preliminary hearing that for you what that meant to [Mr. Dennehy] was that they had left him; correct?

A Yes. [Emphasis added.]

(A.R., vol. II, at pp. 201-4)

[89] In light of Ms. Bull's testimony, Mr. Saddleback takes issue with the trial judge's conclusion that "[Mr. Dennehy] mentioned persons leaving", which he argues is unsupported by the evidentiary record. He contends that, while Ms. Bull agreed at trial that she had related Mr. Dennehy's use of the word "ditched" in her preliminary inquiry testimony, she nonetheless never adopted the broader proposition that Mr. Dennehy "was being ditched by those guys". Therefore, in Mr. Saddleback's view, the trial judge could only conclude that Mr. Dennehy had used the word "ditched".

[90] Mr. Saddleback's argument on this question is tenuous at best. During the cross-examination, counsel for Mr. Saddleback began by relating a two-part question and the answer that was given. For the first part of the question, Ms. Bull was asked whether Mr. Dennehy had stated that "he was being ditched". The second part of the question related solely to whether the word "ditched" had been used. In the preliminary inquiry transcript, she appears to have simply answered "Yes" to both questions. Counsel then asked Ms. Bull whether he had read her statement correctly, to which she responded in the affirmative. He then inquired, "So today you accept that that's what happened?" Once more, Ms. Bull responded in the affirmative.

[91] It was open to the trial judge to conclude that the general thrust of this line of questioning showed (1) that Ms. Bull had stated in her preliminary inquiry testimony that Mr. Dennehy had complained of (a) *being* ditched (b) *by those guys*, and (2) that she adopted this prior statement in its entirety. Therefore, it could properly be considered evidence even though the preliminary inquiry transcript had not been tendered in evidence. This is because, as Watt J.A. explained in *R. v. Candir*, 2009 ONCA 915, 257 O.A.C. 119, "[w]here a witness adopts a prior statement as true, the adopted statement becomes part of the witness' evidence at trial" (para. 113; see also *R. v. Robert*, 2023 QCCA 379, 428 C.C.C. (3d) 439, at para. 45).

[92] Of course, it could be argued — as Mr. Saddleback does — that Ms. Bull's response of "I guess" to the subsequent compound question may have suggested a certain hesitation or ambivalence toward adopting this part of her preliminary inquiry testimony (*R. v. Medford*, 2021 ONCA 27, at paras. 23-24). However, her unequivocal response of "Yes" at the very end of this line of questioning leaves little doubt that Ms. Bull adopted her prior statement in its entirety. I further note that, even were there to be doubts in this regard, the decision as to whether a witness adopts all, part, or none of their prior testimony falls well within the province of the trier of fact (*R. v. Abdulle*, 2020 ONCA 106, 149 O.R. (3d) 301, at para. 136). As a consequence, the trial judge's conclusions in this regard invite a high degree of deference from reviewing courts (*R. v. Kruk*, 2024 SCC 7, at paras. 83-85; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 10).

[93] Finally, Mr. Saddleback also argues that Ms. Bull's testimony does not support the trial judge's conclusion that Mr. Dennehy mentioned people leaving. He suggests that her testimony suffers from two fundamental limitations, namely a lack of identifiable subjects and ambiguous timing. In short, Mr. Saddleback argues that (1) "those guys" is too vague to know to whom Mr. Dennehy was referring, and (2) it is not clear whether he was describing a contemporaneous situation.

[94] This argument must also fail. Firstly, the inference that the trial judge drew was one that was available to him when the evidence was analyzed as a whole. He could logically conclude that the expression "those guys" was used in reference to Mr. Dennehy's group of friends who were in the process of leaving the trailer as he spoke to Ms. Bull. Secondly, while the transcript of the preliminary inquiry is not in the record before us, I note that the use of the past continuous tense in the cross-examination suggests that the event was unfolding as they spoke. Once more, this was at the very least an inference that was open to the trier of fact. Mr. Saddleback may argue that other inferences were possible or that the evidence was ambiguous in certain respects, but it remained open to the trial judge to draw the conclusions that he did.

[95] Accordingly, Mr. Saddleback has failed to convince me that the trial judge misapprehended the evidence in any way or that his conclusions otherwise evince palpable and overriding error.

IV. Conclusion

[96] In the result, I would allow the Crown's appeal, set aside the judgment of the Court of Appeal of Alberta, and restore Mr. Saddleback's conviction for second degree murder.

[97] I would also dismiss the two grounds in support of the judgment below that Mr. Saddleback raises.

Appeal dismissed without costs, CÔTÉ J. *dissenting.*

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