COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Brace and Stewart***,
Citation Number YKCA 1

Date: 20090119
Dockets: YU606, YU607

Docket: YU606

Between:

Regina

Respondent

And

Roger Earl Brace

Appellant

- and -

Docket: YU607

Between:

Regina

Respondent

And

Tyler James Stewart

Appellant

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

J. Van Wart — Counsel for the Appellant Roger Earl Brace

Z. Brown — Counsel for the Appellant Tyler James Stewart

P. Chisholm	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia November 24, 2008
Place and Date of Judgment:	Vancouver, British Columbia January 19, 2009

Written Reasons by:
The Honourable Madam Justice Prowse

Concurred in by:
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

[1] On February 13, 2008, Mr. Brace and Mr. Stewart were convicted of one count of breaking and entering a dwelling house and committing therein the indictable offences of uttering threats and assault causing bodily harm. A second count of assault causing bodily harm was stayed as being subsumed within the first count. Mr. Stewart was convicted of a third count of stealing a case of beer from the residence.

[2] Mr. Brace and Mr. Stewart are appealing their convictions for breaking and entering and are seeking a new trial.

[3] Mr. Stewart's sentence appeal was adjourned generally pending the outcome of his conviction appeal.

BACKGROUND

[4] The events giving rise to the charges against the appellants occurred on November 22, 2007 in Watson Lake, Yukon. The trial judge found that Mr. Brace and Mr. Stewart broke into a residence occupied at the time by Mr. Cardinal, Mr. Frank, Mr. Hanchar and Mr. LaFlamme; that Mr. Hanchar was assaulted by one of the appellants; that Mr. Frank was also assaulted, resulting in a cut to his mouth which required stitches; and that Mr. Cardinal managed to escape and run to a hospital across the street to call the police. A member of the R.C.M.P. attended the

residence shortly thereafter and took statements from Mr. Cardinal, Mr. Hanchar and Mr. Frank. The appellants were arrested the following day.

[5] At trial, the appellants' versions of the events giving rise to the charges were completely at odds with those of Mr. Cardinal, Mr. Frank and Mr. Hanchar. In essence, the appellants said that they were set upon by Mr. Cardinal and three or four others on the street outside Mr. Cardinal's residence for no apparent reason; that during the ensuing melee, Mr. Cardinal struck Mr. Brace on the head several times with a baseball bat; and that Mr. Brace defended himself, in the course of which he struck one or more of the assailants.

[6] Mr. Brace's common-law wife, Ms. Merrick, testified that she felt bumps on Mr. Brace's head the morning following the incident when Mr. Brace returned home. A witness who had been socializing with the appellants just prior to the incident, Mr. Wolfe, testified that he observed some form of altercation involving these parties on the street in front of Mr. Cardinal's residence from the front porch of his nearby home. He testified that he did not observe anyone being struck.

[7] Mr. Cardinal, Mr. Frank and Mr. Hanchar, testified that the appellants broke into Mr. Cardinal's residence and assaulted Mr. Frank and Mr. Hanchar before Mr. Cardinal managed to flee out the front door. Mr. Hanchar stated that Mr. Stewart stole a partial case of beer on his way out of the residence. Mr. Cardinal said that he managed to get out of the residence without being assaulted, and that he ran across the street to the hospital where he called the police. He then went back to his residence, took Mr. Frank to the hospital and returned in time to be interviewed

by the police. Mr. Frank remembered the appellants breaking in, but had minimal recollection of the events after he was struck.

[8] The R.C.M.P. officer testified that she received a dispatch report of a breaking and entering and that she attended the Cardinal residence, took photographs, and obtained statements from Mr. Cardinal, Mr. Frank and Mr. Hanchar. She testified that the lock to the front door of the residence was broken and that there was what appeared to be fresh blood on the floor near where Mr. Frank was alleged to have been assaulted.

[9] After Mr. Brace was arrested, the police took him to the hospital and also took photographs of his head. The photographs were entered as evidence; the hospital admissions report was not.

THE TRIAL JUDGE'S DECISION

[10] The trial judge noted that credibility was a critical issue. After referring to the application of reasonable doubt to the issue of credibility set forth in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, he concluded that the Crown had proven its case against the appellants beyond a reasonable doubt. In coming to that conclusion, he gave numerous reasons for accepting the general version of the events proffered by the Crown witnesses, and rejecting the version of the events proffered by the appellants. His reasons, several of which are challenged on appeal, are set forth at paras. 12-21 of his decision as follows:

> [12] In coming to my conclusions in this case on credibility, I have had particular regard to the following factors. One, while I recognize

that Mr. Frank's injuries could have occurred outside of the home and that he went into the house afterward, nevertheless, in my view, the bloodstains found on the kitchen of the home are much more consistent with the idea that the affray occurred in the house, as the Crown witnesses allege, particularly, as there was no evidence presented of blood being found elsewhere.

[13] Two, the finding of the damaged hasp and lock is consistent with the claim that the accuseds [sic] broke into the house, and utterly inconsistent with the theory that everything happened outside. I recognize, of course, that the damage to the lock could have occurred at an earlier date. However, both Mr. Cardinal and Mr. Hanchar said that the lock was damaged in this incident. It seems to me that if Mr. Cardinal was attempting to frame the defendants, he would have attributed to them all of the damage in the house, and not simply the damage to the lock. Accordingly, there is good reason to believe that the damage to the lock is indeed an artefact of the offences complained of.

[14] Three, if Mr. Cardinal's story is indeed a concoction, as alleged, then it was obviously concocted immediately after the incident, since his complaint to the police contains all of the essentials of his allegations. Moreover, he would have to have made up the story before he knew that he could enlist the aid of Hanchar and Frank to back him up.

[15] Four, although Mr. Brace claims to have gained control of the bat and disposed of it within a fairly defined area, no bat or other weapon was found.

[16] Five, the physical injuries to Mr. Frank are explained by the Crown theory, but left unexplained by the defence theory. Moreover, Mr. Brace claims to have struck Mr. Cardinal, but there is no evidence of any injury to Mr. Cardinal. Indeed, Mr. Cardinal says that he avoided being hit. Again, it seems unlikely that if Mr. Cardinal had been struck during this event, he would have claimed otherwise in making his story to the police.

[17] Six, although Mr. Brace claimed to have suffered head injuries in the attack on him, there is no independent verification of this. The only witness to testify in this regard, other than Mr. Brace himself, was his common-law wife. The alleged injuries are not detectable in the police photos, and although Mr. Brace apparently went to the hospital the following day, no medical evidence was called in this regard and an adverse inference may be drawn from its absence.

[18] Seven, the actions of Mr. Cardinal immediately after the incident are more consistent with him being the victim of an attack than are the actions of Mr. Brace and Mr. Stewart, who appear to have carried on more or less as if nothing untoward had happened to them.

> [19] Eight, it is perfectly true that the interview method adopted by Constable Hunter left much to be desired. She interviewed all the inmates of Mr. Cardinal's house together, and as the portion of the audio tape played for the Court shows, Mr. Cardinal and Mr. Hanchar were quite prepared to answer for Mr. Frank when he appeared uncertain of what had occurred. Indeed, it appeared that what Mr. Frank is now telling us includes things that he was told as opposed to what he himself observed.
>
> [20] However, I am satisfied that the story that emerges from the Crown witnesses is not a confabulation or a concoction, since it is, as I have already observed, consistent with Mr. Cardinal's initial complaint. As well, the three Crown witnesses do not tell a nicely crafted story. For example, Mr. Cardinal says that he does not know which assailant attacked Mr. Hanchar. Mr. Hanchar is the only person who mentions the threat and the beer theft, and Mr. Frank, for his part, remembers precious little of the events at all.
>
> [21] Nine, Mr. Brace and Mr. Stewart were both more articulate and confident in giving their evidence. However, I prefer to look at what the witness has said, not the manner and demeanour of its telling. Indeed, it might be said that the degree of unsophistication of Messrs Cardinal, Hanchar and Frank is such that it would have been a considerable feat for them to concoct this story out of whole cloth and to successfully stick to the script throughout the trial.

[11] At para. 22 of his reasons, the trial judge stated his conclusion as follows:

> [22] At the end of the day, having adjourned to consider the matter carefully, I find the defence witnesses unworthy of credit. Moreover, I am satisfied that the evidence I do accept satisfied me beyond a reasonable doubt as to the guilt of the accused. I should add that there is some degree of uncertainty as to who struck some of the blows, particularly those directed at Mr. Hanchar. However, in my view, this was a joint enterprise and both accused are clearly full parties, regardless of which assailant actually assaulted Mr. Hanchar, or even Mr. Frank.

ISSUES ON APPEAL

[12] Mr. Brace submits that the trial judge misapprehended certain evidence which was central to his decision; that he failed to deal adequately with some of the

evidence, particularly that of Mr. Wolfe; and that he erred in his application of the burden of proof.

[13] Mr. Stewart also submits that the trial judge misapprehended the evidence; that he erred in drawing an adverse inference from Mr. Brace's failure to call medical evidence as to his alleged head injuries; that he rejected the evidence of Ms. Merrick and Mr. Wolfe "for no discernible reason"; and that he engaged in circular reasoning.

[14] In support of their submissions, the appellants reviewed the evidence at some length.

DISCUSSION OF THE ISSUES

(1) Misapprehension of the Evidence

[15] In his recitation of the evidence, the trial judge stated that Mr. Brace testified that he struck Mr. Cardinal with a bat, after taking the bat away from Mr. Cardinal. In fact, the transcript reveals that Mr. Brace did not say that he struck Mr. Cardinal with a bat, but that he struck him with his fists. Mr. Brace says the trial judge's misapprehension of his evidence in this regard is significant because the trial judge relied on the fact that Mr. Cardinal had no injuries arising from this altercation as one basis for disbelieving Mr. Brace's evidence.

[16] I note, however, that Mr. Stewart's evidence suggests that Mr. Brace grabbed a bat away from Mr. Cardinal and struck him with it. This is evident from the following extracts from Mr. Stewart's evidence:

A. ... And I remember Roger [Brace] went down on the ground, and then he got up, grabbed one of the bats when he was in the process of getting hit, and he fought back.

...

Q. And this -- how did it -- how did it end?

A. It ended with Roger getting control of one of the bats, and the fighting back. And as soon as that one guy got hit and he hits the ground, and then they all -- that one guy, I think he -- I'm pretty sure he got up and he ran away.

Q. And do you know who that was?

A. I thought it was M.J. [Mr. Cardinal] --

Q. But you're not --

A. -- but I'm not certain. It was one of them.

[17] In my view, nothing turns on this error in the trial judge's recitation of Mr. Brace's evidence. Mr. Brace stated that he hit Mr. Cardinal with his fists; Mr. Stewart's evidence suggests that Mr. Brace hit Mr. Cardinal with a bat. In either case, their evidence is inconsistent with Mr. Cardinal's evidence that he was not hit and with his apparent lack of injuries. As noted by the trial judge, if Mr. Cardinal had been struck by one or both of the appellants, it defies common sense for him to deny it.

[18] Mr. Brace also submits that the trial judge erred in finding that Mr. Frank's facial injuries were left unexplained by the appellants' evidence. In that respect, Mr. Brace refers to one line in his evidence in which he stated that he knew that he hit Mr. Cardinal and that he was "pretty sure" he may have struck another person. Mr. Stewart said that Mr. Brace hit someone in the face, but he was unable to identify that person and he stated that the person who had been hit ran down the road in the opposite direction from the hospital. It is apparent that he thought this person was

Mr. Cardinal, not Mr. Frank. In short, the evidence of the appellants on this point was both weak and inconsistent. In my view, it was open to the trial judge to find that their evidence did not account for Mr. Frank's injuries. In any event, this was a minor factor in the trial judge's analysis.

[19] Mr. Stewart supports Mr. Brace's submissions with respect to the trial judge's alleged misapprehension of the evidence to which I have already referred. Mr. Stewart also submits that the trial judge erred in finding that Mr. Cardinal's version of the evidence was more believable because he immediately reported the incident to the police, whereas Mr. Brace and Mr. Stewart "had carried on more or less as if nothing untoward had happened to them." Mr. Stewart points to his evidence that he immediately went home because he was late for his court-ordered curfew, and that he called his uncle to tell him about the events as an indication that he had not carried on as if nothing had happened. Mr. Brace said that he was shaken up by the events and went to a friend's house, as he had seen Mr. Cardinal heading toward the hospital.

[20] In my view, the trial judge was saying no more than that Mr. Cardinal's unchallenged evidence that he had called the police and reported the incident was consistent with, but not determinative of, his having been a victim, rather than a perpetrator. The appellants neither called the police nor, in the case of Mr. Brace, sought assistance for his alleged injuries until the following day after he had been arrested. In my view, the trial judge was entitled to consider the behaviour of the parties following the event as one of many factors touching upon their overall credibility.

[21] It is also important to note that the trial judge had the benefit of seeing and hearing the witnesses in making his determinations as to credibility. Although he stated that he did not place very much weight on demeanour, *per se*, he obviously preferred the unadorned and unsophisticated testimony of Mr. Cardinal, Mr. Frank and Mr. Hanchar over the more polished testimony of the appellants. This type of judgment call made by trial judges must be given significant credit by this Court, which only has the benefit of transcripts.

[22] In the result, I am not persuaded that the trial judge misapprehended the evidence in any significant way.

(2) Failure to Give Reasons

[23] Mr. Brace and Mr. Stewart submit that the trial judge erred in failing to give any, or adequate, reasons for rejecting the evidence of Mr. Wolfe, in particular. They submit that the evidence of Mr. Wolfe was critical to the defence on the theory that he was an independent witness whose evidence placed the altercation on the street outside Mr. Cardinal's residence, as testified to by the appellants.

[24] The trial judge dealt with Mr. Wolfe's evidence at para. 10 of his reasons, as follows:

> ... Cheyenne Wolf, who is a friend of both accused, (and both accused indicated had been their host at his home immediately prior to these events), he claims to have observed an altercation on the road from some distance away. While his observations were somewhat sketchy, they are generally consistent with the version of the events advanced by the two accused persons.

[25] After reviewing the evidence as a whole, the trial judge rejected Mr. Wolfe's evidence. This is evident at para. 22 of his reasons where, without referring to Mr. Wolfe specifically, the trial judge stated that "I find the defence witnesses unworthy of credit."

[26] Mr. Brace submits that it was incumbent on the trial judge to expressly state why he rejected the evidence of Mr. Wolfe and that his failure to give further reasons in this regard, substantially undermines his conclusion. At the very least, the appellants say that Mr. Wolfe's evidence should have raised a reasonable doubt as to their guilt.

[27] In my view, it was not incumbent on the trial judge in these circumstances to set forth all of the reasons he did not find Mr. Wolfe to be a credible witness. Mr. Wolfe was a "reluctant" witness called by the defence. He stated he had witnessed these events three months earlier, but was unable to say much about them except that they occurred in the street two doors down and that he recognized the participants. He said that the parties appeared to be going "toe to toe" but he did not see any blows struck, or anyone running away. He also stated that he was drunk at the time.

[28] The trial judge accurately referred to Mr. Wolfe's evidence as "sketchy." He described Mr. Wolfe as a friend of the appellants with whom the appellants had been visiting shortly before these events occurred. The inference one draws from his reasons is that he did not regard Mr. Wolfe as either a reliable or an unbiased witness. The transcript reveals that there had been some kind of run-in between Mr.

Wolfe and Mr. Cardinal in the past, although the details were not provided, and Mr. Wolfe said he did not hold a grudge. In viewing the evidence as a whole, the trial judge was entitled to reject Mr. Wolfe's evidence as being inconsistent with the weight of the evidence.

[29] Similarly, the trial judge was entitled to reject the evidence of Ms. Merrick, who testified that she saw bumps on Mr. Brace's head the morning after the incident, when he returned home. The trial judge found her evidence to be inconsistent with the photographs taken by the police, which did not reveal any injuries to Mr. Brace's head. The trial judge was entitled to draw the inference that if Mr. Brace had significant injuries, he would have sought treatment for them earlier, rather than waiting until after he was arrested the following morning. It was also open to the trial judge to find that Ms. Merrick was not an uninterested witness because of her longstanding common-law relationship with Mr. Brace. As with Mr. Wolfe, the trial judge was entitled to conclude that Ms. Merrick's evidence did not ring true having regard to the evidence as a whole. Again, he had the advantage of seeing and hearing these witnesses give evidence.

[30] In brief, I am not persuaded that the trial judge erred in failing to give more complete reasons for his rejection of the evidence of Mr. Wolfe and Ms. Merrick.

(3) The Adverse Inference

[31] The appellants submit that the trial judge erred in drawing an inference adverse to Mr. Brace arising from his failure to enter as evidence some form of medical or hospital admissions report relating to his visit to the hospital following his

arrest. This ground of appeal arises from the trial judge's statement, at para. 17 of his reasons, that: "... although Mr. Brace apparently went to the hospital the following day, no medical evidence was called in this regard and an adverse inference may be drawn from its absence." While the trial judge said that an adverse inference "may" be drawn, I agree with the appellants that it is reasonable to assume that the trial judge actually drew an adverse inference; that is, he inferred the report would not have supported Mr. Brace's claim of head injuries arising from the altercation.

[32] I also agree with the appellants that it was inappropriate for the trial judge to draw an adverse inference in these circumstances. The trial judge raised the question of Mr. Brace's visit to the hospital in the following exchange with Mr. Brace's counsel:

> THE COURT: ... On the business of the bumps to the head, your client, if I understood him correctly, said he sought medical attention for that.
>
> [COUNSEL]: He did, yes.
>
> THE COURT: So it would have been an easy matter to produce some evidence of that.
>
> [COUNSEL]: Well, as circuit court goes, sometimes we get disclosure really late, and I received it right before the trial started and didn't put that into evidence. It was just a visit to the hospital. There wasn't photographs taken by the hospital, so I don't -- don't think that that's --
>
> THE COURT: Well, you can't blame that on late disclosure. That was --
>
> [COUNSEL]: You're right. Someone -- if someone went to the hospital, Your Honour, then you can use that to say they went to the hospital and his evidence that he went to the hospital is enough. I didn't choose to put the report in because I didn't think that it was relevant.

> THE COURT: Well, he might have gone to the hospital to have an ingrown toenail pulled out, for all I know. It doesn't prove anything.
>
> [COUNSEL]: Well, I'm relying on his statements and Ms. Merrick's statements in terms of the injuries. .... [Emphasis added.]

[33] Thus, Mr. Brace's counsel offered a tenable explanation for not tendering the report or other evidence of Mr. Brace's visit to the hospital, and stated that she did not regard the report as relevant.

[34] It is noteworthy that the Crown received the report from the hospital and provided that report to counsel for Mr. Brace shortly before trial. Assuming that the report was admissible, it appears that both parties took the position that it was not relevant or probative.

[35] The law with respect to the circumstances in which it is appropriate for the trier of fact to draw an adverse inference from the failure of the accused to call a witness is fairly summarized in the following extract from *The Law of Evidence in Canada*, (John Sopinka, Sidney N. Lederman & Alan W. Bryant), 2d ed., (Toronto: Butterworths, 1999) at para. 6.322):

> In criminal cases, an adverse inference against an accused for the failure to call a particular witness is to be made rarely and only with great caution, since it calls for dangerous speculation about counsel's conduct of the case and because there is no onus on the defence to produce corroborative evidence of an accused's testimony. In certain circumstances, as where the accused puts forward a defence of alibi, a limited adverse inference can be drawn from the accused's failure to call an important witness. In such cases, the trier of fact may only infer that, had the witness been called, his or her testimony would have been unfavourable to the accused. The trier of fact may not draw the inference of guilt from the failure of the defence to call a particular witness. [footnotes omitted]

[36] In these circumstances, where both parties had the report; neither party tendered the report; and counsel for Mr. Brace advised the trial judge that she was relying on other evidence with respect to Mr. Brace's injuries, and that she considered the report irrelevant, I conclude that the trial judge should not have drawn an adverse inference against Mr. Brace for not having tendered the report.

[37] In my view, however, the fact that the trial judge drew an adverse inference from Mr. Brace's failure to tender the report did not result in significant prejudice to Mr. Brace. It is apparent from his reasons that the trial judge did not rely on the adverse inference to draw the inference that Mr. Brace was guilty of the offences with which he was charged. Nor am I persuaded that he fell into the error of effectively reversing the burden of proof on the Crown to prove its case beyond a reasonable doubt. Rather, the trial judge relied on the failure of Mr. Brace to lead evidence of his attendance at the hospital as but one of many factors he took into account in his overall assessment of the evidence. In the result, I am not satisfied that the trial judge's treatment of the report amounted to reversible error.

(4) Prior Consistent Statements and Circular Reasoning

[38] The appellants submit that the trial judge used the prior consistent statement Mr. Cardinal made when he called in his complaint to the police, to bolster his credibility at trial, and that the trial judge engaged in circular reasoning in so doing. They submit that this erroneous reasoning is revealed in paras. 14 and 20 of his reasons, which I will repeat here for convenience:

> Three, if Mr. Cardinal's story is indeed a concoction, as alleged, then it was obviously concocted immediately after the incident, since his complaint to the police contains all the essentials of his allegations. Moreover, he would have to have made up the story before he knew that he could enlist the aid of Hanchar and Frank to back him up.
>
> ...
>
> However, I am satisfied that the story that emerges from the Crown witnesses is not a confabulation or a concoction, since it is, as I have already observed, consistent with Mr. Cardinal's initial complaint. As well, the three Crown witnesses do not tell a nicely crafted story ...

[39] In my view, there is nothing objectionable in what the trial judge stated at para. 14 of his reasons. He was simply stating the obvious fact that, if Mr. Cardinal were concocting a story, he did so immediately after the altercation, and before he had an opportunity to ensure that his story would be supported by Mr. Frank and Mr. Hanchar.

[40] The trial judge's statement at para. 20 is more problematic, since it could be read as suggesting that Mr. Cardinal's evidence at trial was more believable because it was consistent with his initial complaint to the police. In that respect, it is not disputed that it was open to the Crown to introduce the statement Mr. Cardinal made to the police as part of the narrative of the events (although, for that purpose, it is only the fact and timing of the statement, not its contents, which are relevant), or if the defence were alleging recent fabrication. In neither case could the prior statement be used by the trial judge as proof of its contents. (See, for example, *R. v. Stirling*, 2008 SCC 10.)

[41] Here, the trial judge and counsel for Mr. Brace engaged in a rather confusing dialogue as to whether the defence was alleging that Mr. Cardinal's testimony was a

recent fabrication, such that Mr. Cardinal's original complaint to the police could be considered in relation to his credibility. The trial judge's conclusion arising from this discussion is reflected in the following passage from the transcript:

> THE COURT: No, but since you're alleging that [Mr. Cardinal's evidence] is a concoction, I can compare it to what he said originally when the police – when he called the police. And what he told the police was that the two accused had kicked in the door and assaulted two men, which is basically exactly what he said right then and thereafter.

[42] In my view, however, it is apparent that the defence was not alleging recent fabrication, but, rather, was alleging that Mr. Cardinal's version of the events was a concoction from start to finish. In other words, the position of the defence was that Mr. Cardinal had lied from the outset, including his initial complaint to the police. The appellants say that the trial judge found it more likely that Mr. Cardinal was telling the truth at trial because he said the same thing in his initial report to the police. This is said to be impermissible circular reasoning, since it assumes that Mr. Cardinal's version of the events at trial was true when that was the principal issue to be resolved.

[43] I agree with the appellants that Mr. Cardinal's prior consistent statement, made immediately following the altercation, could not be used in these circumstances to bolster the testimony of Mr. Cardinal or the other Crown witnesses. It was a neutral factor – as consistent with Mr. Cardinal having lied throughout, as with Mr. Cardinal having told the truth throughout. While the fact of the statement was admissible as part of the narrative and as shedding some light on the timing of

the events, any other use of the prior statement in these circumstances was impermissible.

[44] As with the adverse inference, however, the fact of consistency between Mr. Cardinal's initial complaint to the police and his testimony at trial was only one of many reasons given by the trial judge for finding that the complainants' evidence was credible; that the appellants' evidence was not credible, and that the evidence as a whole satisfied him beyond a reasonable doubt of the appellants' guilt. In this case, the trial judge was obviously impressed with the manner in which the Crown witnesses gave their evidence. It is particularly telling that, in his view, they did not have the wherewithal to put together a consistent, fabricated account of the events. The physical evidence, including the broken lock and the bloodstains on the kitchen floor, and the absence of any blood on the snow outside, or of the bat Mr. Brace said he threw away at the scene, were other significant factors which tended to support the credibility of the Crown witnesses.

[45] In these circumstances, and based on the reasons of the trial judge as a whole, I am not persuaded that the trial judge's use of Mr. Cardinal's prior consistent statement amounted to reversible error, either alone, or in combination with the trial judge's error relating to the adverse inference.

CONCLUSION

[46] I would dismiss the appeals.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Mr. Justice Chiasson"

I Agree:

"The Honourable Madam Justice Neilson"