COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Fox,*
2023 BCCA 198

Date: 20230515
Docket: CA48145

Between:

Rex

Respondent

And

Patrick Henry Fox

Appellant

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Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Provincial Court of British Columbia, dated February 25, 2022 (*R. v. Fox,* Vancouver Docket 244069-8-B).

The Appellant, appearing on his own behalf:	P. Fox
Counsel for the Respondent:	M. Shah
Place and Date of Hearing:	Vancouver, British Columbia April 21, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 15, 2023

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Horsman

Summary:

This is an appeal from a conviction for breach of probation. The appellant says the trial judge made legal errors and the trial was unfair. Among other things, the appellant alleges that the trial judge misinterpreted the probation order; misapprehended evidence; and failed to ask him clarifying questions when he testified. Held: Appeal dismissed. The appellant has not established reversible error or a miscarriage of justice. The trial judge did not believe the appellant's evidence. She found, as a fact, that he is the owner and in control of a website that the probation order required him to render inaccessible via the Internet. She also found, as a fact, that he failed to do so. With these key findings, there was a sound basis for the conviction.

Introduction

[1] The self-represented appellant, Patrick Fox, appeals a conviction for breach of probation. The conviction was entered following a trial in the Provincial Court in February 2022.

[2] Mr. Fox says the judge committed legal errors and that his trial was unfair. The Crown asks that the appeal be dismissed.

Background

[3] This case forms part of a series of trials and appeals arising out of Mr. Fox's 2017 conviction for criminal harassment of a former intimate partner and breaches of related and subsequent court orders. For present purposes, it is not necessary to detail that history. The chronology and surrounding circumstances are available through various published court decisions, including: 2022 BCCA 404; 2022 BCSC 1692; 2019 BCCA 211; and 2017 BCSC 2361.

[4] The probation order underlying the conviction in this appeal was imposed on April 12, 2021. By operation of law, the order took effect after Mr. Fox was released from a prison term that had been imposed at the same time: *Criminal Code*, R.S.C. 1985, c. C-46, s. 732.2(1)(b).

[5] The probation order included a condition requiring that within 48 hours of his release from custody, Mr. Fox:

> … take all necessary steps to ensure that any website, social media page or any other publication, which [he has] authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, [D.C.] or any of her friends, relatives, employers, or co-workers, including the websites published under the domain [redacted due to publication ban] are no longer available via the internet or any other means.
>
> [Emphasis added.]

[6] Mr. Fox was released from prison on August 12, 2021. An employee of the Vancouver Police Department searched the Internet each day between August 12–15, 2021, to see if the websites named in the probation order were accessible. The first website was not active. However, the second one was, and it was accessible more than 48 hours past Mr. Fox's release.

[7] On this website, the witness saw "blog posts, historical documents … [c]ourt documents from previous trials, photographs of the victim [of the criminal harassment] and her family members and friends …". A last blog was dated April 12, 2021. (The date the probation order was imposed.)

[8] In cross-examination, the witness acknowledged that she checked for the named websites only once on each of the cited days. She accepted the possibility that the second website could have been taken offline at some point between August 12–15, 2021, and then reactivated during that same period. She agreed that she did not know who authored the blog dated April 12, 2021.

[9] Mr. Fox was arrested for breach of probation on August 17, 2021. He was interviewed by a police officer. At his trial, he waived the necessity of proving that this statement was voluntary. The Crown tendered the statement as evidence.

[10] Unfortunately, the Crown did not introduce the whole of the statement, which had been transcribed. Instead, it led portions of what Mr. Fox said to the officer during the interview. Additional portions and clarifications were then elicited by Mr. Fox in cross-examination. The manner in which the Crown tendered this evidence was erroneous. The statement was a mixed statement. It contained both inculpatory and exculpatory content. In that context, if the Crown sought to rely on

the statement for the truth of some of its contents (which it did), it was obliged to adduce the whole statement: *R. v. Sanhueza*, 2020 BCCA 279 at paras. 23–24; *R. v. Rojas*, 2008 SCC 56 at para. 37.

[11] However, this has not been raised as an issue on appeal and, in the circumstances of this particular case, I am satisfied that because Mr. Fox was able to elicit the exculpatory portions of the statement that he considered necessary in his cross-examination of the interviewing officer, the Crown's approach in the context of a judge-alone trial did not render the trial unfair. Mr. Fox has not alleged that there were portions of the statement that should have been before the judge, but were not. He received the benefit of the parts that he considered relevant to his defence, ensuring that the allegedly inculpatory comments were not considered in isolation.

[12] The interviewing officer asked Mr. Fox questions about the active website. He said he had transferred ownership and control of this website to a third party so that he could not be compelled to take it down. He did not provide the name of the third party.

[13] Mr. Fox acknowledged that after his release on August 12, 2021, he had access to the Internet. He said he emailed the "editor" of the website, requesting that it be taken down. He was asked if he would provide the email. He said he would, but at a later date, once he was "released from custody in three years or so". He "[did not] have access to [his] email in jail". Mr. Fox told the officer that he did not receive a reply from the editor. He said he did not know who the editor was. He sent his email to an address posted on the website.

[14] The officer asked Mr. Fox if it had been his plan to take the website "back over" when his probation was over. He said: "Yes. And … even if control of it wasn't given back to [him] after the probation is finished, it would be easy enough to just create another … copy of it, or another version because if you have all the source material, you just put up a new website" (emphasis added).

[15] Mr. Fox told the officer that he had been "demanding [that] they [the Crown] prosecute [him] for criminal harassment based on the current website …" (emphasis

added). "… [I]f the "new website is the exact same thing as the old website and still online, it must still be criminal harassment …" (emphasis added). "How could [he] be convicted of something the first time and do the exact same thing and be acquitted?" (emphasis added).

[16] Mr. Fox explained to the officer that if he were prosecuted for criminal harassment and had "another trial, then [his] ex-wife committed so much perjury and there was so much corruption and collusion that went on at that first trial … [he] would be able to confront [his] ex-wife with … all of the perjury and then she would have no credibility".

[17] In cross-examination, the officer confirmed that Mr. Fox had said he transferred ownership and control of the website before he was placed on probation. She confirmed that she asked him who would have access to the website. He said he was not going to answer that question: "partially because I can't answer it right now. I don't know and that was done very deliberately before the probation began in 2018 … I transferred ownership and control to another party, so that way, I couldn't be compelled to take it down or do anything with it, with the understanding that once I'm no longer on probation, then I would take back the website".

[18] A second police officer testified at the trial. Detective Constable Kent said that in August 2021, he received information suggesting that Mr. Fox was unlikely to comply with his probation order when released from custody. Detective Kent was tasked with monitoring his conduct. He confirmed that Mr. Fox was released the morning of August 12, 2021 and arrested five days later for breach, on August 17.

[19] In cross-examination, Detective Kent confirmed that: (1) he had no evidence about whether the second website was taken offline and then reactivated within 48 hours of Mr. Fox's release; (2) he had not contacted the host provider of the website to verify whether Mr. Fox had anything to do with it; (3) the police applied for a search warrant to obtain Mr. Fox's laptop, searched the laptop, and found no emails sent to the host provider; (4) the police did not seek a warrant to search Mr. Fox's Gmail account (Mr. Fox told the police the email was in a Gmail account); and (5) he

found no evidence to "contradict [Mr. Fox's] claims that [he] relinquished ownership and control of the website to a third party prior to … being on probation".

[20] Detective Kent gave evidence about prior testimony in a prosecution involving Mr. Fox (November 2020), wherein he relayed parts of an interview that he had conducted of the appellant (this evidence was elicited by Mr. Fox). Detective Kent testified that Mr. Fox made "multiple statements" to the effect that he had "transferred access from the website to a person who [he] refused to identify". He said Mr. Fox:

> … also made numerous statements about regaining access and control, as well as monitoring it and in fact, [he] told [the officer] that [he was] aware that the police were specifically monitoring the website as [he] could see IP addresses of people who had logged on to that website …
>
> [Emphasis added.]

[21] Mr. Fox testified. He said that while serving his original prison sentence for criminal harassment in 2018, the first of the two websites named in the probation order went offline because the hosting plan had expired. At "some point thereafter, in 2018", the second of the two websites went online.

[22] Mr. Fox said this latter website "was set up with all the … same content as the original website". He testified that a friend in Los Angeles "informed [him] that she had taken care of that, that the website had been put back online". He said he told his friend that because of the probation order that would follow his custodial sentence, he did not "want to know anything about who had put it online, or any other information about it because as long as [he did not] know … [he could not] be compelled to say who it is that's running it".

[23] Mr. Fox gave evidence that on August 13, 2021, he sent an email to the editor of the second website, requesting that they take it down. He did not know if anyone was actually monitoring the email address. He said that apart from sending the email, he did not think there was more he could do. He "could contact the hosting provider, GoDaddy, but since [he was] not the account holder … they're not going to make any changes to the account at [his] request".

[24] In cross-examination, Mr. Fox was asked about a letter he sent of his own accord to the Vancouver Police Department in June 2019. In that letter (marked as an exhibit at the trial), Mr. Fox sought an explanation for not being prosecuted for criminal harassment on the basis of the second website:

> … how do you and the Crown explain NOT pursuing another criminal harassment charge … *Particularly since by publishing the new website I have engaged in exactly the same conduct* which Justice Heather Holmes declared formed much of the basis of the guilty verdict in 2017 (at the first criminal harassment trial). I mean, if the website constituted criminal harassment at that point then it must certainly still constitute criminal harassment now! Right?
>
> …
>
> … I respectfully request you charge me with criminal harassment and with violating probation *by publishing the new website* …
>
> [Underlining in original, italic emphasis added.]

[25] Mr. Fox acknowledged the letter, saying that at the material time, he was "very actively seeking to convince the [B.C. Prosecution Service] to prosecute [him] for criminal harassment based on the new website". Doing so would provide him with an opportunity to "bring up or draw attention to all of the corruption and the misconduct and the perjury that occurred at [his] first trial" for criminal harassment.

[26] When asked about describing himself as the person who was "publishing" the new website, he said:

> … in my interviews with [police], I have admitted to a great many … potential criminal offences that I clearly had nothing to do with …

[27] Mr. Fox confirmed that after his release from custody on August 12, 2021, the only step he took towards getting the second website offline was to send an email to the editor. In his view, doing so met the requirement that he "take all necessary steps" because he neither owned nor controlled the second website.

[28] It was pointed out to Mr. Fox that his laptop was in the courtroom for the trial, and, had he wanted to produce the email he said he sent to the editor, he could have used the opportunity to do so. He responded:

> Well, … one concern that I would have with if I had brought the laptop into the courtroom in order to pull up that particular email, once the laptop becomes

> evidence in the matter, that could potentially open the entire laptop up to being scrutinized or investigated and that's one thing that I certainly would want to avoid because there may be other unrelated information or artifacts on the laptop that I would not want to share with everybody, perhaps related to my birth identity or citizenship, or my cases against the B.C. Prosecution Service … or CBSA.

[29] In his closing submissions, Mr. Fox argued that statements he has made about wanting to take control of the second website after completing probation do not mean he actually had the capacity to do so. He reiterated his position that he has neither ownership nor control over the second website and does not know who is "actually running" it.

[30] Mr. Fox also alleged an improper purpose for the prosecution. He said the Crown was prosecuting him for breach because Crown disclosure material and "other evidence keeps ending up on the internet", and the prosecution wants that material taken down.

Reasons for Judgment

[31] The judge understood the probation order to impose a "positive obligation" on Mr. Fox to take all necessary steps within 48 hours of his release to ensure that the websites named in the order were no longer available via the Internet. From her perspective, the "term "no longer available" has the ordinary meaning of being available in the past but not continuing to be available": at para. 28.

[32] In finding that Mr. Fox breached this condition, the judge noted a contradiction between his statement to the police that he transferred ownership and control of the second website to a third party before his probation, and his testimony that the second website was launched independently of him by a friend in Los Angeles while he was in custody. The judge found it "simply absurd" that a friend who is not in regular contact with Mr. Fox would "pay for a website that is entirely related to Mr. Fox's harassment of [his former intimate partner] and to Mr. Fox's criticisms of his legal processes": at para. 18.

[33] In convicting Mr. Fox, the judge relied on the June 2019 letter that Mr. Fox sent to the police, as well as one or more statements made by him indicating that he would take control of the website when his probation was over.

[34] The judge interpreted the June 2019 letter as "making a clear admission that [Mr. Fox] launched, owned and controlled" the second website: at para. 20. This admission directly contradicted his testimony. The judge interpreted the statements about taking back the website, or regaining control, as evidence of Mr. Fox having retained control over it: at para. 21.

[35] The judge found, as a fact, that "Mr. Fox launched the website in order to continue to harass [his former partner] and to encourage the police to charge him so as to be able to cross-examine [her]": at para. 20. The website is "entirely related to Mr. Fox's harassment of [D.C.] and to [his] criticisms of his legal processes": at para. 18.

[36] The judge rejected Mr. Fox's testimony that he sent an email to the editor of the second website, asking that it be taken down: at para. 23. She did not believe him. "Mr. Fox refused to produce the email to the police when asked and also failed to offer to produce the email when his laptop was available in court during the trial": at para. 23.

[37] The judge was satisfied that Mr. Fox did not take "all necessary steps" to ensure the website was taken down: at para. 26. Even if it was his friend who was managing the website, rather than Mr. Fox (which the judge did not believe), Mr. Fox "clearly maintained control": at paras. 21, 25, 29. He could have contacted his friend to regain control and ensure that the website was no longer available: at para. 25. If unable to do that, he could have provided her name and contact information to the police so that the police could have made the request: at para. 26.

[38] The judge convicted Mr. Fox of a breach and sentenced him to 12 months' imprisonment, followed by three years of probation. He received nine months and 12 days' credit for pre-sentence custody.

Issues on Appeal

[39] Mr. Fox has raised 14 issues on appeal. There is overlap between them. Some of his stated grounds of appeal raise questions of law. Others are focused on the judge's factual findings and inferences drawn from the evidence. I will set out the issues when discussing the overall merits.

[40] Generally, questions of law are reviewed on a correctness standard. Findings of fact, including inferences, cannot be reversed without establishing palpable and overriding error. Questions of mixed fact and law also attract a deferential standard: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 19, 36.

[41] Mr. Fox has brought a fresh evidence application. This too will be addressed when discussing the merits of the appeal.

Discussion

[42] Section 733.1 of the *Criminal Code* makes it an offence to fail or refuse to comply with a probation order without reasonable excuse. To sustain a conviction for this offence, the Crown must prove:

- First, that the accused did not do what the probation order required of them (the *actus reus*);
- Second, that the accused knew of the circumstances requiring them to comply with the order (or were wilfully blind to them), and failed to comply despite that knowledge, or, recklessly failed to act according to the conditions of the order (the *mens rea*).

See *R. v. Zora*, 2020 SCC 14 at paras. 50, 51, 109; *R. v. Docherty,* [1989] 2 S.C.R. 941 (S.C.C.), 1989 CanLII 45.

[43] Mr. Fox did not dispute that he was bound by the April 2021 order. He also acknowledged that he was aware of the condition of the order he was alleged to have breached. He did not dispute the fact that the second website contained material prohibited by the order.

[44] Mr. Fox did not advance a reasonable excuse for failing to comply. Instead, his defence was that he was not the owner of the website, had no control over it, and, importantly, that he did comply with the probation order by sending an email to the website's editor within 48 hours of his release from custody asking that the website be taken down.

[45] As a result, the live issues at trial were whether the Crown proved: (1) that the website accessed between August 12–15, 2021, was authored, created, maintained or contributed to by Mr. Fox; and (2) that Mr. Fox failed to take all necessary steps within 48 hours of his release from custody to ensure that this website was no longer available via the Internet, or any other means.

Merits of the Appeal

[46] The judge did not believe Mr. Fox's testimony that he had neither ownership nor control of the second website between August 12–15, 2021, and, therefore, no authority or capacity to render the website inaccessible within 48 hours of his release. To the contrary, the judge found, as a fact, that it is Mr. Fox who launched the second website and that he has "retained control" over it: at paras. 20–22.

[47] With this critical factual finding, it was open to the judge to conclude that Mr. Fox was in breach of the April 2021 probation order. The website was "available via the Internet" more than 48 hours after he was released from custody. In my view, Mr. Fox has not established that the judge committed reversible error in reaching this conclusion. Nor has he established an unfair trial resulting in a miscarriage of justice.

Interpretation of the Order

[48] Mr. Fox says the judge erroneously understood that the order obliged him to render the website unavailable for the duration of his probation. He argues that if there was no such obligation, then the Crown failed to prove a breach because the evidence could not rule out the possibility that the website was taken down between August 12–15, 2021, in compliance with the order, but then reactivated by someone else during that same period.

[49] The judge properly understood the probation order. Mr. Fox was obliged to render the website unavailable for the whole of his probation. The fact that the order also included a condition that he "not disseminate, distribute, publish or make publicly available" information referring to D.C., does not make a difference. The two terms appropriately run in tandem. To interpret the "necessary steps" term in the manner suggested by Mr. Fox would render it meaningless. I would dismiss this ground of appeal for substantially the same reasons provided by the Court at para. 28 of 2022 BCCA 404.

Misapprehensions of Evidence

[50] Mr. Fox alleges various misapprehensions of the evidence. Many of these complaints do not involve a misapprehension; rather, they take issue with the judge's interpretation of the evidence and the inferences she drew from it. Disagreements with a judge's interpretation of the evidence do not provide a proper basis for appellate intervention.

[51] Establishing a misapprehension of evidence is a "high standard": *R. v. Osinde*, 2021 BCCA 124 at paras. 17–20. To justify appellate intervention on this basis, Mr. Fox must show that his conviction "depend[ed] on a misapprehension of the evidence *and* the misapprehension [went] to the substance rather than the detail of the trial judge's reasons": *R. v. S.S.*, 2022 BCCA 392 at para. 53, italics in the original.

[52] In my view, he has not met this test.

[53] I accept that the judge's recitation of the evidence is not a model of clarity. The evidence is summarized in general terms and because of the conclusory nature of some of the language, it is sometimes difficult to distinguish between a recitation of the evidence and a factual finding.

[54] However, this was an oral judgment delivered shortly after completion of the trial in the context of a fairly straightforward case. A judge is not obliged, in their reasons, to recite every piece of evidence or to lay out, in detail, what they

considered or how they grappled with each factual nuance or possible competing inference.

[55] On a fair reading of the reasons, as a whole and in context, I am satisfied that six factual findings were central to the judge's conclusion that an online website authored, created, maintained or contributed to by Mr. Fox was accessible between August 12–15, 2021, and that Mr. Fox did not take all necessary steps to ensure that the website was rendered unavailable via the Internet.

[56] These findings were: (1) the civilian witness accessed the second website on each of August 12, 13, 14 and 15, 2021; (2) the website contained all of the information from the first website (which Mr. Fox acknowledged having published), as well as updates about his court processes; (3) Mr. Fox had access to the Internet after his release from custody; (4) he told the police that at one time he had ownership and control of the website, but had then transferred it to a third party; (5) he made one or more statements that he intended to regain control of the website; and (6) Mr. Fox previously admitted to having personally published the second website, with specific reasons for doing so that were unique to him.

[57] These findings were open to the judge on the evidence and they are not tainted by misapprehension.

[58] Mr. Fox did not dispute that the website could be accessed on the dates in question. Nor did he dispute that the August 15, 2021, access occurred more than 48 hours past his release from custody. Mr. Fox did not challenge the description of what was seen on the website or that it was information prohibited by the probation order. He acknowledged that he had access to the Internet once released from custody and before his arrest on August 17, 2021. The statement he provided to the police after his arrest was focused on the second of the two websites named in the order, and, in that statement, Mr. Fox admitted to the second website having originated with him (before he allegedly transferred it). He also said that he intended to regain control of that website. And, in his testimony, he acknowledged having written the June 2019 letter to the police in which he said he was the person responsible for publishing the second website. Similar comments were made to the

police officer who took his statement on August 17, 2021. He told that officer that he had been demanding to be prosecuted for criminal harassment based on the second website.

[59] From this evidence, direct and circumstantial, it was open to the judge to reject Mr. Fox's testimony that he did not have ownership or control of the website, and to conclude that he was, in fact, the person who created and launched the website, maintained control over it (directly or indirectly), and was in a position to have it taken down upon his release from custody. Mr. Fox acknowledged, in his testimony, that doing so "would be a very easy thing to do" if one has the user account name, the password, and is the owner of the account.

[60] At his trial, Mr. Fox argued that some of the things previously said by him were not true, had been misconstrued, or did not support the inferences drawn by the judge. But, the judge was entitled to accept all, none or only part of what each witness had to say, including Mr. Fox. She was entitled to reject his evidence that he had neither ownership nor control and to conclude the contrary from the rest of the evidence, considered in its entirety.

[61] Mr. Fox has not persuaded me of any misapprehensions of the evidence that underlay the six key findings, and, importantly, were central to the finding of guilt.

Erroneous Assumption About Access to The Internet

[62] At sentencing, the judge indicated that she did not appreciate Mr. Fox was not able to "receive or send emails" while in custody, or access the Internet. Mr. Fox alleges that this misunderstanding formed the basis for the judge rejecting his explanation for not providing police with the email he said he sent to the editor of the website, and, more critically, his assertion that the second website was created and published independent of him in 2018.

[63] In my view, any misunderstanding by the judge about access while in custody was of no consequence.

[64] First, there is no dispute that Mr. Fox had access to the Internet between August 12–15, 2021. This is the time period that gave rise to the charge at issue in and underlies the conviction.

[65] Second, the judge's conclusion that Mr. Fox is the person who launched and retained control over the second website did not depend on rejecting his testimony about sending the email (a point Mr. Fox conceded before us), or its non-production to the police. Rather, it was grounded in the key findings I cited earlier, which were supported by the record and focused on Mr. Fox's personal connection to the website.

[66] Third, a lack of access to the Internet while in custody only had the capacity to make a difference on the issue of ownership and control if the judge accepted (or had a reasonable doubt) that the second website was launched independent of Mr. Fox in 2018, while he was incarcerated. This evidence came exclusively from Mr. Fox. The judge did not find Mr. Fox credible and she rejected his testimony. Indeed, the letter of June 2019 directly contradicts this assertion.

The Judge Failed to Seek Clarification

[67] Mr. Fox says that instead of making "numerous erroneous assumptions and/or inferences" about his testimony, the judge should have requested clarification or further explanation from him. He says she should have known that as a self-represented accused, he "may not have been aware of what additional, unstated information may have been helpful for the court or required for [him] to make full answer and [defence]" (emphasis added).

[68] There is no merit to this submission. The judge was not obliged to assist Mr. Fox in determining how best to present his testimony or the topics he wished to cover; probe his evidence in depth; or ask him for "additional, unstated information", particularly given the risk of eliciting incriminatory testimony. When managing a trial involving a self-represented accused, a judge "must exercise caution to avoid becoming an advocate for, or legal advisor to, the accused": *R. v. Neidig*, 2018 BCCA 485 at para. 92.

[69] At the close of the Crown's case, it was explained to Mr. Fox that it was up to him whether he would call evidence in support of a defence. He initially said that he would not testify. He then changed his mind. He was given time to think it over. When court resumed, he confirmed his decision to give evidence and he was provided with ample opportunity to respond to the case against him. Before us, he acknowledged this latter fact.

Crown's Burden to Prove a Capacity to Remove the Website

[70] Mr. Fox contends that a conviction should not have been entered without the Crown proving beyond a reasonable doubt that he had the actual capacity to remove the website.

[71] This argument fails to appreciate that Mr. Fox's testimony about not having ownership or control of the website was rejected by the judge. The judge's conclusion to the contrary is a finding that he had the capacity to deactivate the website. In his testimony, Mr. Fox acknowledged that rendering the website inaccessible via the Internet "would be a very easy thing" for an owner to do.

Crown Failed to Disclose the June 2019 Letter

[72] The June 2019 letter was not included in the Crown disclosure package provided to Mr. Fox in advance of trial. He says that had he known the Crown intended to use the letter in cross-examination, he may have declined to testify, or, he may have asked different questions when cross-examining the Crown's witnesses.

[73] Mr. Fox is correct that the Crown should have provided this letter as first party disclosure: *R. v. Stinchcombe*, [1995] 1 S.C.R. 754 (S.C.C.), 1995 CanLII 130. The trial prosecutor had the letter in his possession and the letter's relevance to ownership and control of the websites named in the probation order was obvious: *R. v. McNeil*, 2009 SCC 3. Mr. Fox's connection to the second website was a live issue at the trial.

[74] Moreover, it is my view that if the Crown intended to rely on the letter for the truth of its contents (which it ultimately did), it should not have produced the letter for the first time in cross-examination. Rather, it should have tendered the letter as part of its case. Producing the letter in cross-examination as proof of the fact that Mr. Fox was responsible for "publishing" the second website ran a serious risk of splitting the Crown's case. This is not something the Crown is generally allowed to do. As a matter of trial fairness, an accused is entitled to know at the end of the Crown's case what it is they must respond to: *R. v. K.T.*, 2013 ONCA 257 at paras. 41–42 [*K.T.*]; *R. v. Krause*, [1986] 2 S.C.R. 466 (S.C.C.), 1986 CanLII 39 at pp. 473–74.

[75] There is an exception to the rule against case-splitting, namely, where the accused testifies about "some new matter or defence with which the Crown had no opportunity to deal and that the Crown could not reasonably have anticipated": *K.T.* at para. 43. The Crown says this is what happened here. In his August 17, 2021, statement, Mr. Fox said he transferred ownership of the website to a third party before he was placed on probation. Then, in his testimony, he said he never owned or had control of the website. Instead, he said it was launched without his knowledge by a friend in Los Angeles while he was incarcerated. At that point, says the Crown, the letter took on significance because it contained an admission that Mr. Fox was the publisher.

[76] I consider what happened here to be close to the line. Although there certainly was a contradiction between Mr. Fox's testimony and his August 17, 2021, statement to police, the Crown knew, heading into the trial, that Mr. Fox was denying he had control of the website in August 2021, and any ability to independently render the website inaccessible. An attempt by Mr. Fox to distance himself from the website in responding to the Crown's case could not have been unanticipated. Nor was the Crown prevented by a presumptive exclusionary rule, or otherwise, from tendering the letter as part of its case. It did not have to wait for Mr. Fox to call a defence before it could do so. Before us, Mr. Fox argued that the June 2019 letter was irrelevant to the allegation of breach; however, such is not the case. Although the letter had been authored more than two years prior (which would go to weight, not

admissibility), it had obvious relevance to Mr. Fox's personal engagement with the website.

[77] However, in the particular circumstances of this case, I do not consider the production of the letter to have resulted in a miscarriage of justice.

[78] First, this was a judge-alone trial, which mitigates the prejudice of late-produced evidence: *K.T.* at para. 46. Second, Mr. Fox was aware of the letter. It originated with him and the letter had been marked as an exhibit at a previous (unrelated) trial for breach of probation. As such, he could not have been surprised by its contents. Third, the substance of the claims made in the letter already formed part of the Crown's case when Mr. Fox made his decision to testify. In his August 17, 2021 statement, Mr. Fox told the police that he had been demanding to be prosecuted for criminal harassment based on the second website and the fact that he was doing the "exact same thing" that resulted in his original conviction. This was, in essence, the same assertion that was contained in the letter. He knew when electing to testify that this information formed part of the Crown's case against him. Fourth, Mr. Fox had opportunity in his testimony and in closing submissions to explain the letter, possible reasons for saying the things that he did, and why he considered the letter to be of no or diminished value in light of the other evidence. Finally, the judge used the letter only as evidence that Mr. Fox had previously acknowledged publishing and managing the website. She did not rely on parts of the letter that addressed other issues.

[79] In my view, when these points are considered cumulatively, the non-disclosure and use of this letter by the Crown and the judge did not adversely affect the outcome of the trial or the overall fairness of the process: *R. v. Dixon*, [1998] 1 S.C.R. 244 (S.C.C.), 1998 CanLII 805; *R. v. Mohsenipour*, 2023 BCCA 6 at para. 48.

Rejecting Testimony About a Friend Publishing the Website

[80] Mr. Fox takes issue with judge's rejection of his testimony that a friend published the website in 2018. The judge found this suggestion to be "absurd". Mr. Fox says that the finding was unreasonable, grounded in false assumptions, and

even if not believed, this evidence should have been sufficient to raise a reasonable doubt.

[81] As explained, I consider it to have been open to the judge to reject this narrative. Mr. Fox has not shown palpable and overriding error in the judge's assessment of his credibility. He has attempted to do so in his factum with reference, at least in part, to factual assertions that did not form part of the evidence at trial. He cannot do so.

The Prosecution is Improperly Motivated

[82] In the Provincial Court, Mr. Fox alleged that his prosecution was an abuse of process. From his perspective, the prosecutors have been "using [the prosecutions against him] as retaliation against [him] for publishing proof of the corruption and misconduct that has been going on in [his] cases". Mr. Fox also argued that "neither the [B.C. Prosecution Service], the RCMP, nor the [Vancouver Police Department], have taken a single step toward actually getting the website taken down, other than arresting, prosecuting, and imprisoning [him]".

[83] Mr. Fox seeks to bolster the abuse of process argument with a fresh evidence application. The application attaches four court transcripts, ranging in dates from February 2, 2021 (pre-trial), to June 24, 2022 (post-trial). In these transcripts, Crown counsel make various submissions to the court about Mr. Fox's conduct, possible motivations for it, the reasons why he is in custody, and the adverse impact on the administration of justice if he is allowed to openly defy court orders without consequence.

[84] I would not admit the fresh evidence. In my view, it does not meet the criteria for admissibility in *Palmer v. The Queen,* [1980] 1 S.C.R. 759 (S.C.C.), 1979 CanLII 8. This is not evidence that could reasonably be expected to have affected the finding of guilt. It would not realistically support a finding of state conduct that is "egregious and seriously compromises trial fairness and/or the integrity of the justice system": *R. v. Anderson*, 2014 SCC 41 at para. 50. That is the type of proof Mr. Fox would require to justify a stay of proceedings.

The Condition of the Probation Order is Vague and Ambiguous

[85] Mr. Fox says the condition that formed the basis for his conviction is unduly vague and therefore unenforceable because it "imposes on [him] a requirement to engage in conduct but it does not state what conduct [he is] required to engage in".

[86] I do not consider the condition to be vague. In any event, the enforceability of this condition is not something Mr. Fox can raise on appeal as it constitutes a collateral attack on the probation order. Generally, an order issued by a court must be obeyed unless the order is set aside in a proceeding taken for that specific purpose: *R. v. Bird*, 2019 SCC 7 at para. 21. The validity and enforceability of the April 2021 probation order has not been the subject of an appeal. Mr. Fox told us that he filed an application for leave to appeal the sentence of which the probation order forms a part. However, that application has not proceeded to a hearing. In fact, Mr. Fox told us that he will be filing a notice of abandonment in that appeal.

Disposition

[87] For all of these reasons, I would dismiss the fresh evidence application and the appeal from conviction.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Horsman"