COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Richer, 2025 ONCA 439

DATE: 20250620

DOCKET: COA-23-CR-0006

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Sarah Richer

Appellant

Thomas Balka, for the appellant

Rachael Ward, for the respondent

Heard: November 25, 2024

On appeal from the conviction entered on June 29, 2022 and the sentence imposed on January 9, 2023 by Justice John R. McCarthy of the Superior Court of Justice, sitting with a jury.

Coroza J.A.:

I. Overview

[1] The appellant, Sarah Richer, was convicted by a jury of trafficking one ounce of fentanyl. On May 10, 2019, an undercover officer purchased fentanyl from Daniel Kochanska. The appellant facilitated the transaction. At trial, the appellant testified that she and her former partner Duncan Mastro were drug users, Mr. Kochanska was their drug supplier, and she was directed by Mr. Mastro to facilitate the transaction by introducing the undercover officer to Mr. Kochanska.

[2] The appellant attempted to advance the defence of duress. She testified that she and Mr. Mastro had an abusive relationship, he physically assaulted her and her son in the past, and she was nervous when Mr. Mastro directed her to participate in the drug transaction.

[3] The trial judge declined to put the defence of duress to the jury, as he did not believe there was an air of reality to the defence. In his final instructions to the jury, without being requested to do so, he provided instructions relating to the appellant's prior drug use. The trial judge told the jury that the appellant was not being tried by them for her past purchases of drugs and that they should not jump to the conclusion that she was guilty of drug trafficking if they accepted that she had purchased drugs in the past. The trial judge, however, then went on to tell the jury that if there was a distinctive pattern of similar behaviour between her past purchases from Mr. Kochanska and the allegations on May 10, they could use the evidence of similar behaviour to assist them in arriving at the conclusion that the appellant had committed the offence of trafficking on May 10.

[4] On appeal, the appellant submits that the trial judge erred by failing to leave the defence of duress with the jury and by providing a similar fact instruction relating to her past drug purchases. The appellant asks this court to allow the appeal and order a new trial. Alternatively, if the conviction appeal is dismissed, the appellant contends that the trial judge's sentencing reasons reveal errors in principle that would permit this court to intervene and sentence the appellant afresh. The appellant submits that we should impose a conditional sentence or, in the alternative, reduce the four-year custodial sentence imposed by the trial judge.

[5] I would dismiss the appeal from conviction. As I will explain, the trial judge properly applied the air of reality test and determined that there was nothing in the evidentiary record that gave rise to the defence of duress. There is no basis to interfere with his conclusion. As to the appellant's second argument, while I agree with the appellant that the trial judge's instruction relating to the appellant's prior drug purchases was erroneous, the conviction appeal should nevertheless be dismissed because the error caused no substantial wrong or miscarriage of justice. While the error was serious, the evidence against the appellant was so overwhelming that a jury would inevitably convict: *R. v. Pan*, 2025 SCC 12, at para. 87; *R. v. Tayo Tompouba*, 2024 SCC 16, 491 D.L.R. (4th) 195, at para. 76.

[6] I would allow the sentence appeal. The evidence established that the appellant had made great strides since her arrest. By the time of sentencing, the appellant had been drug-free for two years, and her young son was living with her again. The trial judge erred in principle in a manner that impacted the sentence. He misapprehended the evidence of the appellant's efforts to rehabilitate herself and ignored the impact that a four-year penitentiary sentence would have on the appellant and her son. In my view, after balancing the relevant factors, a fit sentence for the appellant is three years in the penitentiary.

(1) Facts

[7] On May 10, 2019, the appellant participated in the sale of fentanyl in the parking lot of an apartment complex. The purchaser was Officer Wong, an undercover officer. The purchase was part of an undercover operation called Project Big Car. As part of the operation, the officer had previously purchased fentanyl from a primary target, Jovane Jolly, on two separate occasions.

[8] On this day, Officer Wong ordered one ounce of fentanyl from Mr. Jolly for pick up. Officer Wong and Mr. Jolly met in the parking lot of an apartment building at 515 North Service Boulevard in Mississauga. Mr. Jolly exited the apartment building and joined Officer Wong in an undercover vehicle. While they waited in the vehicle, Officer Wong heard a phone call between Mr. Jolly and a female voice. Mr. Jolly told Officer Wong that he did not personally know the supplier but his friend had called a supplier who would bring them the fentanyl.

[9] After waiting for approximately one hour, the appellant approached the vehicle and entered the rear seat on the passenger side. Mr. Jolly introduced her to Officer Wong as Sarah. The appellant proceeded to discuss how the deal would happen. Officer Wong audio recorded their 18-minute conversation. During the conversation, the appellant advised Officer Wong and Mr. Jolly that the supplier was a "proper businessman", that they would have to pay the supplier before getting the drugs, that the drugs were of good quality, that the fentanyl would be in chunk form rather than powder, that the supplier trusted her, that she had been dealing with the supplier for a while, and that the deal should happen in the visitor's parking lot to avoid the surveillance cameras at the front of the apartment building.

[10] The supplier, Mr. Kochanska, drove into the parking lot. The appellant and Mr. Jolly walked over to Mr. Kochanska's vehicle and brought Officer Wong over a few minutes later. While Officer Wong and Mr. Jolly completed the drug purchase inside Mr. Kochanska's vehicle, the appellant waited outside.

[11] The appellant was arrested at the conclusion of Project Big Car. She was charged with one count of trafficking a Schedule I controlled substance, namely fentanyl, contrary to s. 5(1) of the *Controlled Drugs and Substance Act*, S.C. 1996, c. 19.

II. Conviction Appeal

[12] The appellant raises the following two issues on her conviction appeal:

- The trial judge erred in refusing to leave with the jury the defence of duress because of his finding that there was no air of reality to the defence.

- The trial judge erred in his instructions about the appellant's previous purchases of controlled substances.

[13] The respondent submits that the trial judge did not make any of the errors alleged. Alternatively, if the trial judge erred in relation to the second issue, the respondent submits that the curative proviso applies to the trial judge's legal error.

III. Analysis

Issue 1: Did the trial judge err in declining to leave the defence of duress with the jury?

[14] At the start of the trial, the appellant's trial counsel told the court that he intended to advance the defence of duress. The appellant testified that on May 10, Mr. Mastro instructed her to facilitate the drug transaction for Mr. Jolly and Mr. Kochanska and that there was "an urgency" to his request. The appellant was worried about upsetting Mr. Mastro "if things went bad" because "he had been violent" with her in the past. Mr. Mastro was on Xanax at the time of the drug transaction and the appellant was fearful because Mr. Mastro had previously been violent while taking Xanax. The appellant did not say that Mr. Mastro threatened her on the day of the drug transaction.

[15] During the pre-charge conference, at the request of the trial Crown, the trial judge ruled that there was no air of reality to the defence of duress. He declined to instruct the jury on it because there was no evidence that Ms. Mastro explicitly or implicitly threatened the appellant proximate in time to May 10. The appellant's trial counsel renewed the argument that the defence should be put to the jury as grounds for a mistrial. The trial judge denied the request and stated:

My conclusion is that the err [*sic*] of reality defence or the err [*sic*] of reality question standard that must be met in order for the defence of duress to be available to the defendant here has not been made out. What is not present on the evidentiary record in this case is any evidence of a threat of any kind against Ms. Richer proximate in time to the May the 10th, 2019 or any threat made for the purpose of compelling her to do any of the things that she allegedly did on May the 10th, 2019. There is some evidence of past abuse. Some evidence that Mr. Mastro was an unsavoury character and was prone to anger and violence. However, something more than that is needed. I find that a reasonable jury properly instructed could not find there to be a threat to kill or cause bodily harm to Ms. Richer if she did not act as demanded. [...] It is obvious when you look at the defence of duress and elements that make it up that a threat is required and that that threat be proximate in time. And that being one of the elements, threaten to kill or cause bodily harm to her or her son. There is no evidence of that. That that was going to be something that happened to either her or her son. That threat was not made. Therefore, there is no reason

to believe and no basis to imply that Sarah Richer could reasonably believe that any of those threats could be carried out. That being the case, the other elements do not apply. The threshold has not been met and the defence of duress will not go to the jury.

[16] Duress is a defence that only applies in situations where the accused has been compelled to commit a specific offence under threats of death or bodily harm. The air of reality test is whether there is evidence on which, if believed, a properly instructed jury acting reasonably could acquit: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 49, 60. Whether or not there is an air of reality to a defence such as duress is a question of law, subject to appellate review on the standard of correctness: *Cinous*, at para. 55; *Pan*, at para. 35. The air of reality test "requires the trial judge to consider whether the inferences required to be established for the defence to succeed can reasonably be supported by the evidence": *Cinous*, at para. 86. However, the trial judge does not determine the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinative factual inferences: *Cinous*, at paras. 54, 87. That is the role of the jury.

[17] The appellant argues that there was unchallenged evidence of a history of violence between herself and Mr. Mastro. Specifically, the appellant testified about three incidents where Mr. Mastro choked her, one incident where Mr. Mastro assaulted her son, and one incident where Mr. Mastro threatened to assault her father. There was also evidence that on May 10, Mr. Mastro had consumed the drug Xanax. On previous occasions, Mr. Mastro was violent with the appellant when he consumed Xanax. Consequently, the appellant submits that this history of intimate partner violence amounted to an implied threat that the trial judge ignored in his assessment of the air of reality test.

[18] I see no reviewable error in the trial judge's ruling on the defence of duress. As the trial judge correctly noted one of the elements of the defence of duress under both statute and common law, as discussed in *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at para. 81, is that there must be an explicit or implicit threat of present or future death or bodily harm.

[19] As I read his reasons, the trial judge declined to put the defence of duress to the jury because he found that there was no express or implied threat and even if there was, there was no causal nexus to the drug trafficking of May 10.

[20] The appellant testified that, in the past, Mr. Mastro had assaulted her, assaulted her son, and threatened to assault her father. These assaults occurred during their relationship but not in connection with any drug transactions. They were all assaults, according to the appellant, that were triggered by something Mr. Mastro believed the appellant had done. She also testified that when Mr. Mastro had taken Xanax in the past, he was aggressive and had been violent towards her. Consequently, the appellant testified she was on edge and

anxious when Mr. Mastro directed her to make the introduction to Mr. Kochanska on May 10.

[21] However, at its highest, the appellant's evidence was that she complied with Mr. Mastro's request because she was anxious about what would happen if she did not comply. I agree with the trial judge that there was simply no evidence that an explicit or implicit threat was made by Mr. Mastro for the purpose of compelling the appellant to facilitate the drug transaction between the undercover officer and Mr. Kochanska.

[22] While the history of any intimate partner violence may have provided important context to the appellant's evidence about her subjective belief, the fundamental problem is that, viewed as a whole, the appellant's testimony did not disclose any act, conduct or words that could be construed as a threat. I read the trial judge's comments that "something more is needed" to mean that the evidence about Mr. Mastro's past conduct that may have invoked anxiety was not sufficient to make out an implied threat.

[23] I see no basis to interfere with the trial judge's conclusion that the appellant's evidence did not disclose the kind of threat that was required to lend an air of reality to a duress defence. The trial judge's conclusion is supported by this court's decision in *R. v. Mena* (1987), 34 C.C.C. (3d) 304 (Ont. C.A.), at para. 50, where Martin J.A. held that "[t]he threat required to invoke duress may be express or it may be implied" but that "[m]ere fear does not constitute duress in the absence of a threat, either express or implied" (emphasis added). This court has also held that "[a] fearful subordination to the orders of others is miles from the kind of conduct required to bring the duress defence into play": *R. v. Aravena*, 2015 ONCA 250, 323 C.C.C. (3d) 54, at para. 89.

[24] This is not a case like *R. v. McCrae* (2005), 199 C.C.C. (3d) 536 (Ont. C.A.), which is relied upon by the appellant. In *McCrae*, the appellant admitted that he helped his cousin destroy evidence and dispose of the bodies of two hitchhikers who were murdered by his cousin while they were staying at a remote cabin. The appellant testified that he was awakened in the early hours of the morning by his cousin who asked him for help and told him that he had shot one of the hitchhikers and put his body in a fire. His cousin then woke up the other hitchhiker, shot her in front of the appellant and told the appellant to help him put her body in the fire. The appellant claimed that he was terrified and in shock, and that he feared that his cousin would kill him if he did not help him. The sole issue at trial was whether the appellant acted under duress. The trial judge rejected the defence after finding that there was no air of reality to the appellant's claim of duress based on an implied threat. On appeal, this court held that the trial judge had erred in removing the defence because there had been an implied threat. Simmons J.A. stated:

[47] In my view, the situation in which the appellant found himself could reasonably be perceived as one of stark horror involving escalating levels of irrational violence. In this respect, it is important to remember that after awakening the appellant, Robert told the appellant that he shot Mr. Barrett during an argument after Mr. Barrett picked up a shovel. Robert then directed the appellant's attention to what appeared to be a body in the fire, executed Ms. Lopez in the appellant's presence, threw her body in the fire, shot Mr. Rogers' dog and threw the dog in the fire. Looked at in the context of this series of events, the very nature of Robert's conduct, when combined with his instructions to the appellant and the appellant's testimony concerning the presence of a gun, was capable of communicating a serious threat that Robert would kill the appellant if the appellant failed to carry out his wishes.

[25] In *McCrae*, the escalating violence occurred in the presence of the appellant and immediately before the direction to commit the offence. The circumstances in this case do not reach the level of violence that occurred in the presence of the appellant in *McCrae*. Here, there is no evidence of any violent conduct by Mr. Mastro on May 10, even though he had consumed Xanax. The nature of Mr. Mastro's conduct on May 10 cannot be described as expressly or implicitly threatening.

[26] In sum, I agree with the trial judge that there was no air of reality to the defence of duress. The trial judge did not err by removing the defence from the jury's consideration. I would reject this ground of appeal.

Issue 2: Did the trial judge err in his instruction about the appellant's past drug purchases?

[27] The appellant's trial counsel elicited evidence that the appellant and Mr. Mastro were drug users who were addicted to fentanyl. According to the appellant, she regularly purchased drugs from Mr. Kochanska. The appellant was familiar with the type and quality of the fentanyl Mr. Kochanska sold, that he required payment first, and that he conducted deals in his car away from the apartment building's surveillance cameras.

[28] During the pre-charge conference, the trial judge provided two drafts of his charge to the parties. A similar fact evidence instruction with directions on prohibited propensity reasoning was included in both drafts and the ultimate charge. Neither the trial Crown nor the appellant's trial counsel requested such an instruction, nor did they object to the inclusion of this instruction. For ease of reference, I set out the relevant portions of the trial judge's instruction below:

I want to talk to you about Evidence of Extrinsic Similar Acts to Prove Conduct Occurred. Sarah Richer is charged with trafficking Fentanyl on May the 10th, 2019. You are trying her for that offence only. You are *not* trying her for any other previous conduct.

You have heard evidence that Sarah Richer has purchased or grabbed Fentanyl and other controlled substances in the past and that she was a user of Fentanyl at the time of the alleged offence and had semi-regular dealings and contact with drug dealers to obtain Fentanyl for what she said was personal use only. You are *not* trying Sarah Richer for that previous conduct. Be careful *not* to jump to the conclusion that just because that prior conduct took place, the offence charged must have taken place.

Purchasing drugs for personal use and trafficking in drugs share certain similarities: the product is a controlled substance, it involves contacting and meeting suppliers, arranging exchanges of drugs and money and handling drugs. On the other hand, there are dissimilarities between the two activities: personal use or simple possession does not involve selling, administering, giving, transporting or delivering the substance to a third party. You may, but do *not* have to find that there is a pattern of similar behaviour that tends to confirm that the offence charged took place. It is for you to say.

In deciding whether such a distinctive pattern of similar behaviour exists, you should consider all the circumstances including similarities and dissimilarities between the two activities.

If you conclude that there is a distinctive pattern of similar behaviour between the other things that Sarah Richer has done in the past and the conduct with which she has been charged in this case, you may use that evidence of that similar behaviour to conclude or help you conclude that the offence alleged here actually took place. This is the only way you can use the evidence of any other conduct in deciding whether Crown counsel has proven beyond a reasonable doubt that Sarah Richer committed the offence charged. [Emphasis in original.]

[29] The trial judge went on to instruct the jury that it must not use the evidence of prior drug purchases to conclude or help it conclude that the offence charged likely took place because the appellant is a person of bad character or disposition who likely committed the offence charged because of that character or disposition. The trial judge warned the jury not to punish the appellant for her past conduct by finding that the offence charged actually took place, or that she was guilty of it simply because other things had happened before.

[30] There is no dispute regarding the principles that apply to our review of the trial judge's instructions to the jury. In *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, the

Supreme Court stressed that we must read jury instructions as a whole, in the context of the entire trial. It is the substance of the charge that matters, not adherence to any prescribed formula or sequence. The trial judge's charge does not have to be perfect and the overriding question is whether the jury understood or was "properly equipped" with the law to apply to the evidence: *Abdullahi*, at para. 36.

[31] The Supreme Court went on to explain that a properly equipped jury is one that is both (a) accurately and (b) sufficiently instructed. This requires an appellate court to have regard both to what was said and what was not said in the trial judge's instructions: *Abdullahi*, at para. 37.

[32] The appellant argues that the fundamental error in the trial judge's instruction about her prior drug purchases is the suggestion to the jury that they could use this evidence to help them determine whether she trafficked drugs on May 10. The appellant contends that the trial judge should have told the jury that this evidence, if believed, could not have assisted them with their task.

[33] The respondent argues that the trial judge properly instructed the jury on the use they could make of the evidence. The respondent submits that it is the appellant who led this evidence and the circumstances of the prior drug purchases were relevant on the issue of the appellant's intent because her actions on May 10 were based on knowledge she had acquired from her experience in purchasing drugs.

[34] In my view, the trial judge erred by including this similar fact evidence instruction. To be fair to the trial judge, he was likely concerned that the evidence of prior drug purchases introduced by the appellant could potentially be misused by the jury. To that end, the trial judge quite properly warned the jury not to punish the appellant or find her guilty because she had previously purchased drugs. However, if the trial judge believed that the evidence of prior drug purchases had the capacity to prove some fact that was in issue then he needed to craft a specific jury instruction that would provide guidance to the jury.

[35] The inclusion of a standard similar fact evidence instruction in the circumstances of this case was not appropriate. Similar fact evidence is presumptively inadmissible and the onus is on the Crown to establish that the probative value of the evidence outweighs its potential prejudice: *R. v. Handy*, 2002 SCC 56, 213 D.L.R. (4th) 385, at para. 55. In this case, the trial Crown did not ask for a similar fact evidence instruction nor did it make any submissions as to how this evidence was relevant to a live issue at trial. Yet, the instruction permits the jury to use evidence of the prior drug purchases as a makeweight for the Crown even in the absence of a request by the trial Crown.

[36] Furthermore, even if I were to accept the respondent's arguments, raised for the first time on appeal, that evidence of prior drug purchases was somehow relevant to the appellant's intent, the instruction crafted by the trial judge, on his own initiative, was an overly broad framing of what properly constitutes similar fact evidence. The probative value of similar fact evidence comes from the objective improbability of coincidence: *R. v. Vu*, 2025 ONCA 242, at para. 37, citing *Handy*, at paras. 47-48. The trial judge's instruction purported to highlight in a general way the similarities between purchasing drugs for personal use and trafficking in drugs. According to the instruction, the similarities between purchasing and trafficking were that both offences involved a controlled substance, contacting and meeting suppliers, arranging exchanges of drugs and money, and handling drugs. However, these examples are so generic that I am not confident that the instruction could have assisted the jury in their task. Respectfully, the trial judge's instruction did not explain how any similarities between the appellant's past dealings with Mr. Kochanska were relevant to the offence the appellant was charged with. With similar fact evidence, the probative value of the evidence flows from the similarity between the evidence and the charge, and what that similarity says about the accused's disposition to act in a particular way: see Matthew Gourlay et al., *Modern Criminal Evidence* (Toronto: Emond, 2022), at p. 281. In the end, the jury was told that the prior drug purchases could be relevant to the live issues if there were similarities to the offence charged but they were left without precise direction on how this evidence could be used against the appellant.

[37] In my view, the instruction invited the jury to engage in reasoning without direction by relating it to the evidence that the jury heard. Taking a functional approach to this charge, the instruction amounts to non-direction. This is an error of law because it did not equip the jury with a sufficient understanding of how the evidence could help them decide this case: *Abdullahi*, at para. 45.

[38] I acknowledge that the appellant's trial counsel led the evidence of the prior drug purchases and remained silent when the charge was provided for review during the pre-charge conference. But, as the Supreme Court has cautioned, counsel's silence is not determinative: *Abdullahi*, at para. 67. From my review of the evidence, I cannot say that this was a tactical decision on the part of the appellant's trial counsel to remain silent about the instruction. Ultimately, while the failure to object is a relevant consideration, it is the responsibility of the trial judge to correctly instruct the jury and to provide it with accurate and sufficient instructions: *Abdullahi*, at para. 67.

[39] Accordingly, in the circumstances of this trial, I accept the appellant's submission that the trial judge erred in his instructions about the prior drug purchases.

Issue 3: Should the curative proviso apply?

[40] The respondent submits that even if the trial judge made an error in his instruction, this court should invoke the curative proviso pursuant to s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, and dismiss the appeal because no substantial wrong or miscarriage of justice has occurred. The respondent argues that any error committed by the trial judge (1) was harmless, such that it had no impact on the verdict, or (2) despite a potentially prejudicial error of law, there was an overwhelming case against the appellant, such that the jury would inevitably have convicted the appellant: *Pan*, at para. 86; *Abdullahi*, at para. 33.

[41] An instruction on how to deal with bad character evidence is an important part of the charge because of the dangers of a jury misusing this evidence to reason improperly. As noted above, the trial judge recognized that this evidence was dangerous and that it required a caution. What the trial judge told the jury was not appropriate and I would not characterize the error as harmless.

[42] However, I am satisfied that the respondent has met its burden and the proviso should be invoked because the case against the appellant was overwhelming. The evidence bearing on the appellant's intent to traffic in fentanyl was formidable. The interaction between the appellant and the undercover officer was audio recorded. At trial, there was no dispute that the undercover officer had purchased one ounce of fentanyl from Mr. Kochanska, or that the appellant was responsible for introducing the parties in what she knew was a fentanyl deal.

[43] The recording reveals that the appellant vouched for the quality of Mr. Kochanska's fentanyl and provided information and advice about how the deal with Mr. Kochanska would (or should) occur. The appellant's words captured in the recording, supplemented by the testimony of the officer and the appellant, led to only one rational conclusion: the appellant intended to facilitate the sale of drugs. As the respondent aptly notes, the appellant's investment in the sale was best captured in the following portion of the recording where the appellant says, "we have to kind of make this work because [Mr. Kochanska's] going to look at me and be like what's going on".

[44] Accordingly, while the trial judge erred in his charge to the jury it caused no substantial wrong or miscarriage of justice because the evidence against the appellant is so overwhelming that a trier of fact would inevitably convict. Therefore, I would reject this ground of appeal.

IV. Sentence Appeal

[45] During the sentencing proceedings, the appellant requested that the trial judge impose a conditional sentence. The Crown sought a custodial sentence of four years. The trial judge sentenced the appellant to four years' incarceration.

[46] At different periods in her life, the appellant was addicted to Percocet, OxyContin, and fentanyl. At the time of the offence, she was addicted to fentanyl.

[47] The appellant has a young son but was not living with him at the time of the offence. At that time, her son lived with her father because she could not look after him due to her addiction.

[48] Prior to sentencing, it was not disputed that the appellant had made significant efforts and noteworthy strides to turn her life around. Notably, the appellant completed a methadone program and has not used drugs since March 2021.

[49] The appellant has found a new partner whom she had been with for two years at the time of sentencing. She also graduated from Georgian College and completed a PSW course. Since July 2021, she has been employed full-time at a retirement home. She commenced counselling to treat her PTSD and anxiety.

[50] Above all, she has reconnected with her 12-year-old son who now lives with her full-time.

[51] The trial judge commended the appellant for overcoming her drug addiction and remaining clean, returning to school and starting a new career, disassociating herself from acquaintances involved in the drug trade, and prioritizing her relationship with her son.

[52] However, later in his reasons he found that while noteworthy, her efforts to clean up her life were "hardly stellar". The trial judge's overall impression of the appellant was that she lacked insight into the gravity of the offence and the harms of fentanyl on unknown users.

[53] Regarding the nature of the offence, the trial judge found that the appellant was not the principal dealer in the drug transaction. Rather, she acted as an intermediary or facilitator. However, he found that the appellant was instrumental because without her the transaction would not have proceeded.

[54] The trial judge considered the mitigating circumstances and recognized that the appellant was a first-time offender and a fair candidate for rehabilitation.

[55] Ultimately, the trial judge rejected the conditional sentence proposed by the appellant's trial counsel. The trial judge held that in these circumstances, a conditional sentence would not be appropriate because of the appellant's high moral

blameworthiness, the need for denunciation, and the need for specific and general deterrence. The trial judge considered the range of sentences for trafficking one ounce of fentanyl and found that it made a conditional sentence "wholly inappropriate" in this case. He imposed a sentence of four years imprisonment.

[56] The standard of review for interfering with a trial judge's sentence is well known. This court owes significant deference to the trial judge's decision. This court will only intervene where (1) the sentence imposed is demonstrably unfit, or (2) where the sentencing judge committed an error in principle, failed to consider a relevant factor or erroneously considered an aggravating or mitigating factor, and it appears from the decision that such an error had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 44.

[57] The appellant makes several submissions on the sentence appeal. It is only necessary to deal with two of those submissions.

[58] First, the appellant submits that the trial judge erred by minimizing her efforts at rehabilitation. In his reasons, the trial judge stated the following:

Ms. Richer is to be commended for overcoming her drug addiction and remaining clean since March 2021; for returning to school and embarking on a new career; for disassociating herself from former acquaintances who may still be involved using and trafficking drugs; and for prioritizing the needs of her son and the quality of her relationship with him.

[59] Later in the reasons, the trial judge repeated the strides the appellant had made:

There are some mitigating factors here: Ms. Richer has by all accounts been clean and sober for almost two years; she is in a relationship; she has gone back to school and is presently employed; she has stayed away from the drug culture and those mixed up in it; and she has the support of family and friends. She has won the admiration of family support worker Brenda Pawling [*sic*]. She has therefore made strides in her rehabilitation. I find that she remains a fair candidate for continued rehabilitation.

[60] However, in direct contrast to these observations, the trial judge said the following when reviewing the cases tendered by the appellant's trial counsel:

While the letters of support from Ms. Richer's family appear genuine and heart-felt, I find them to be merely variations on the same theme: Sarah's own victimization and lack of blameworthiness. <u>While Sarah's efforts to clean up her life are noteworthy, they are hardly stellar</u>. Specific deterrence is required here to both prevent and discourage Sarah Richer

from relapsing or drifting back into a world where easy profit from drug handling might prove attractive. [Emphasis added.]

[61] Respectfully, the trial judge made contradictory comments that lead to the inescapable conclusion that he downplayed the appellant's strides in her rehabilitation. In turn, this led him to conclude that specific deterrence was an important objective notwithstanding the agreement between the parties that the appellant had seriously engaged with her drug addiction and removed herself from the drug subculture.

[62] In my view, the appellant's significant efforts at treating her addiction and her efforts to entirely remove herself from the drug subculture were significant mitigating factors. It was an error to downplay these factors. There is no support on this record for the trial judge's description of the appellant's efforts as "hardly stellar". Indeed, the opposite is true. The trial Crown acknowledged that the appellant should be commended for the "significant steps that she has taken to change her life since she's been arrested".

[63] In my view, the error impacted the sentence imposed because the trial judge focused on specific deterrence as a relevant consideration when the evidence clearly showed that the need for specific deterrence was no longer as strong. This was because the appellant had been an addict trafficker who had made significant strides in removing the root cause of her criminality.

[64] Second, the appellant argues that the trial judge overlooked the family separation consequences for herself and her 12-year-old son in imposing a four-year sentence of imprisonment. I am persuaded by this submission.

[65] By the time of sentencing, the appellant had disassociated herself from the drug subculture and spent most of her free time with her son, her partner, and her family. She also spent a considerable amount of time facilitating her son's activities.

[66] During the submissions on sentencing, the appellant's trial counsel provided concrete examples of the appellant's efforts that were not challenged by the trial Crown:

When [the appellant's son] was residing with his father he could not regularly attend school. Since moving into Sarah's residence however she has been helping him get back on track. He keeps – she helps him with his homework and she has hired a tutor and he attends Kumon for math. All of these efforts have enabled [the appellant's son] to become a grade level individual that is working at a satisfactory or above satisfactory level. His most recent report card as received last week at her parent teacher interview went well and it was demonstrated that [the appellant's son] appears to be getting along well.

[67] The appellant's efforts were supported by the remarks of the author of the Pre-Sentence Report who pointed to the letter of support submitted by Brenda Powling, a family support worker:

Her desire is to do the best for her son's stability and health. She has worked towards a recovery plan with over 3 years of verifiable clean time. She has moved into a stable home environment with her father and step-mom in order to support [her son's] emotional wellness and her continued recovery. [The appellant's son] has been connected to therapy through New Path.

One of the first goals that Sarah shared with me is to make sure that [her son] knows how to handle hard things in life and to give him a stable future. She has huge amounts of guilt and remorse for how her unhealthy choices in the earlier part of [her son's] life have affected him and would like to continue making amends for that rough start in his life. The thought of leaving him and causing more trauma is extremely painful for her.

[68] In *R. v. Habib*, 2024 ONCA 830, 99 C.R. (7th) 110, at para. 44, Tulloch C.J.O. stated that within limits sentencing judges must "preserve the family as much as possible" and "if incarceration is necessary, sentencing judges must give serious and sufficient consideration to family separation consequences" in determining the length of the sentence. Tulloch C.J.O. concluded that depending on the facts, family separation consequences may justify a sentence adjustment or departure from the range even for grave offences that require deterrence and denunciation: *Habib*, at para. 45.

[69] The trial judge failed to consider the impact of incarceration on the appellant's family. In his reasons, he mentioned that the appellant's son was now living with her but he did not address the submissions of the appellant's trial counsel about the effect of incarceration on the relationship between the appellant and her young son and the stability that the appellant had worked hard to create before sentencing.

[70] Of course, collateral consequences cannot justify a disproportionate sentence, but on this record, it was important for the trial judge to consider the consequences to the appellant and her son when determining the length of the prison term.

[71] Given these errors in principle, this court can intervene and sentence the appellant afresh.

[72] The appellant argues that a conditional sentence of imprisonment is an appropriate sentence. I respectfully disagree. While there are significant mitigating factors that could justify a sentence at the low end of the range, the reality is that the jurisprudence generally does not support a sentence for fentanyl trafficking at the ounce-level that is less than a penitentiary term of imprisonment. As a general principle, this court has held that

offenders, even those with no criminal record such as the appellant, who traffic large amounts of fentanyl should expect to receive significant penitentiary sentences: *R. v. Loor*, 2017 ONCA 696, at para. 50. The appellant must be sentenced to a penitentiary sentence to reflect the gravity of the offence and the potential for harm to unknown users of fentanyl. Accordingly, a conditional sentence of imprisonment which can only be imposed if the appellant is sentenced in the reformatory range is not an option.

[73] However, any penitentiary sentence must reflect the appellant's significant strides at rehabilitation and the impact of incarceration on her and her 12-year-old son. Accounting for these factors, I am of the view that three years in the penitentiary is within the range of appropriate disposition. Not only does it denounce the appellant's trafficking in a dangerous drug, it also ensures that the separation from her son is as brief as reasonably possible.

V. Disposition

[74] For these reasons, I would dismiss the conviction appeal. I would grant leave to appeal sentence and vary the sentence imposed by the trial judge to three years.

Released: June 20, 2025 "B.Z."