COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nnane, 2024 ONCA 609
DATE: 20240812
DOCKET: C68027 & COA-22-CR-0342

Lauwers, Trotter, and Paciocco JJ.A.

BETWEEN

His Majesty the King

Respondent

and

George Nnane

Appellant

George Nnane, acting in person (C68027)

Jeffery Couse, for the appellant (COA-22-CR-0342)

Xenia Proestos and Yael Pressman, for the respondent

Heard: July 9, 2024

On appeal from the convictions entered by Justice P. Andras Schreck of the Superior Court of Justice, sitting with a jury, on October 29, 2019, and from the sentence imposed on February 6, 2020.

Paciocco J.A.:

2024 ONCA 609 (CanLII)

OVERVIEW

[1] The appellant, George Nnane, was convicted after a jury trial of two counts of fraud. With the assistance of counsel, Mr. Nnane appeals those convictions, alleging that his trial was unfair because of the ineffective assistance provided by his trial counsel (who was not the counsel who represented him on this appeal). He has also brought an inmate appeal of the three-year global sentence that was imposed.

[2] For the reasons that follow, I would allow Mr. Nnane's conviction appeal. This outcome has nothing to do with the manner in which the trial judge conducted the trial, which appears to have been flawless. I am nonetheless persuaded that the representation Mr. Nnane received at his trial by the lawyer representing him fell below the standards of reasonable professional judgment and undermined the fairness of his trial, requiring that the appeal be allowed.

[3] Since I would set aside the convictions and order a new trial, I will not address his sentence appeal.

THE MATERIAL FACTS

[4] Not surprisingly, given the issue before us, most of the salient facts relate to trial counsel's performance. Those facts are best unfolded when analyzing Mr. Nnane's objections to the representation he received. The factual overview

2024 ONCA 609 (CanLII)

needed to give that analysis the requisite context can be set out economically, as follows.

[5] At his trial, Mr. Nnane faced a strong Crown case on the two fraud charges against him. Both of those charges arose from false income tax returns prepared by Mr. Nnane's wholly owned corporation, Golden Capital Management Inc. ("Golden"), on behalf of numerous Golden clients. It was not contested at trial, or before us, that many of the income tax returns Golden filed in 2009, 2010, and 2011 included claims for non-existent charitable donations and business and rental expenses. On the evidence, Mr. Nnane stood to benefit, through his ownership of Golden, from the significant unwarranted income tax refunds that resulted from the false donation and expense claims. This is because, as its fee, Golden was entitled to a significant percentage of any income tax refunds paid on the returns it prepared. The evidence also showed that GST/HST returns filed on Golden's behalf between 2009 and 2013 claimed a loss and requested a refund despite the revenue the company had received from these income tax refunds. Hence the two fraud charges, one relating to the false income tax returns and the other to the false GST/HST returns.

[6] Mr. Nnane sought to defend the charges at his jury trial by claiming that the false income tax returns were prepared without his knowledge by an employee, Christine Forbes, who took control of Golden during his absence from work, and by claiming that others filed the GST/HST returns in his absence. During the

2024 ONCA 609 (CanLII)

relevant period, Mr. Nnane was experiencing personal and mental health challenges He testified to this effect, but the jury rejected his evidence and convicted him of both offences.

2024 ONCA 609 (CanLII)

THE LAW AND THE ISSUES

[7] In support of his appeal, Mr. Nnane alleges that the representation trial counsel provided was ineffective because he did not prepare properly to cross-examine Ms. Forbes and he cross-examined her ineffectively. Appellate counsel supported his challenge to the manner in which trial counsel dealt with Ms. Forbes' evidence by pointing to the inadequacy of the submissions trial counsel made about her evidence in his jury address. Mr. Nnane also argues that trial counsel failed to prepare him for his own testimony and conducted an ineffective examination-in-chief, including by projecting disbelief of what Mr. Nnane was saying. Although he did not cast his grounds of appeal in this general way, it is fair to say that Mr. Nnane was effectively submitting that trial counsel failed to offer him meaningful assistance in defending the charges he faced.

[8] The Crown's position before us is that the trial was fair because trial counsel clearly set out Mr. Nnane's position before the jury, and had made a tactical decision to focus his defence on the inadequacy of the Crown case.

[9] In order to overcome the strong presumption of competence and to succeed with an ineffective assistance of counsel appeal, an appellant must: (1) establish

on the balance of probabilities the material facts the claim is grounded upon (the "factual component"); (2) demonstrate the incompetence of the representation provided by counsel by showing that it fell below a standard of reasonable professional judgment (the "performance component"); and (3) show that the ineffective assistance caused a miscarriage of justice, either by resulting in an unreliable verdict, or by undermining trial fairness (the "prejudice component"): *R. v. Girn*, 2019 ONCA 202, 145 O.R. (3d) 420, at para. 91; *R. v. Fiorilli*, 2021 ONCA 461, 156 O.R. (3d) 582, at paras. 49-54; *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 140. In *R. v. S.T.,* 2024 ONCA 572, at para. 43, citing *Fiorilli* at para. 59, this court recently affirmed that to meet the unreliable verdict branch of the prejudice component "the appellant must 'establish a *reasonable probability* that the result would have been different'" (emphasis in original). The trial fairness branch of the prejudice component is measured by "the appearance of the fairness of the trial": *Archer*, at para. 120.

[10] As I will explain, I am satisfied that Mr. Nnane has met the factual component by establishing key allegations he is making about the ineffectiveness of the representation he received. I am also persuaded that he has met the prejudice component by showing that the representation he received undermined the appearance of the fairness of his trial, and that the representation he received fell below a standard of reasonable professional judgment, thereby satisfying the

2024 ONCA 609 (CanLII)

performance component of the test. I would allow the appeal, set aside his convictions, and order a new trial.

[11] I recognize that in undertaking an ineffective assistance analysis, an appeal court will generally not comment on the performance component unless the material facts that underpin the claim have been established and the prejudice component has been satisfied: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 29; *Girn*, at para. 92. In this case, the key submission is that the fairness of the trial has been undermined by the totality of the representation. In order to ensure that my analysis is linked to the factual findings I make, it is my view that I can best explain my reasoning by deviating modestly from the usual analytical approach and by examining concurrently whether Mr. Nnane has established each of the factual allegations I have identified, and whether the events he has established amount to ineffective representation. After engaging in that exercise, I will go on to address whether, in all of the circumstances, Mr. Nnane has satisfied the prejudice component, and I will then engage in a more general evaluation of whether he has met the performance component.

2024 ONCA 609 (CanLII)

ANALYSIS

A. HAS MR. NNANE ESTABLISHED THAT TRIAL COUNSEL PROVIDED INEFFECTIVE REPRESENTATION?

(1) Did trial counsel provide ineffective assistance by failing to prepare adequately for his defence?

[12] Mr. Nnane presented fresh evidence in support of his contention that trial counsel did not adequately prepare for his defence.

[13] I wholeheartedly accept Mr. Nnane's submission that the claims made by trial counsel about his own level of trial preparation are unreliable. At times those claims were undermined not only by the incomplete dockets trial counsel kept, but by his inherently incredible fresh evidence claims. I do not believe his testimony that when he dockets a "call", he could actually be describing other forms of communication such as emails, texts, or direct conversations. Such a practice would be so pointless and impractical that this testimony is implausible, and I reject it. I am persuaded that trial counsel offered this evidence in an attempt to exaggerate the record of the engagements he had with Mr. Nnane. Trial counsel's evidence about the length of some of the phone meetings he attested to is also flatly contradicted by Mr. Nnane's phone records.

[14] The ultimate question of whether trial counsel's preparation was inadequate is more complex. To be sure, trial counsel's dismissive email responses to the

2024 ONCA 609 (CanLII)

written account of events Mr. Nnane supplied him, without seeking clarification or pursuing further information, do provide some affirmative support for Mr. Nnane's claim that trial counsel's preparation was inadequate, and there are other red flags of inadequate preparation that emerged during trial. Those red flags include trial counsel's admission made to the trial judge that he needed an early adjournment after Ms. Forbes' examination-in-chief so that he could discuss Ms. Forbes' testimony with Mr. Nnane before commencing her cross-examination. There does not appear to be anything that should have surprised him in the testimony she gave. Similarly, the disclaimer he made to the jury at the start of his jury address that he would take a "broad" approach rather than repeating evidence because he noticed that jurors had made extensive notes of the evidence might signal that he was not equipped to take a deeper dive into the evidence. Indeed, his jury address was true to the promise he made. In my view, it was repetitive and general, with uncommon focus on generic information such as the role of reasonable doubt and with scant attention paid to the specific evidence presented.

[15] In spite of the evidence supporting Mr. Nnane's contention, I will stop short of making a firm factual finding that he has established that trial counsel was not adequately prepared. I recognize, in this regard, that trial counsel had the benefit of a preliminary inquiry before trial and that the issues in the case were quite straightforward. More importantly, I need not make a firm finding about trial counsel's level of preparation because I agree with the Crown that inadequate

2024 ONCA 609 (CanLII)

preparation does not, on its own, ground an ineffective assistance of counsel claim. It will do so only if that poor preparation has "impacted on the fairness or reliability of the criminal trial": *Fiorilli*, at para. 117. To be clear, I do not discount the possibility that the level of preparation that trial counsel undertook contributed to some of the problems with trial counsels' performance that I am about to describe but whether it did or not, those problems are serious enough on their own to require that the appeal be allowed. I will therefore turn my focus to trial counsel's performance at trial, and to the more substantive complaints Mr. Nnane has identified.

2024 ONCA 609 (CanLII)

(2) Did trial counsel conduct an ineffective cross-examination of Ms. Forbes?

[16] In my view, trial counsel conducted an ineffective cross-examination of Ms. Forbes. Specifically, he failed entirely to confront damning evidence she provided and did not confront her adequately with Mr. Nnane's version of events. As Mr. Nnane's appeal counsel points out, trial counsel's failure to challenge her testimony is reflected in the jury address.

[17] When testifying for the Crown, Ms. Forbes said that she did not begin working at Golden until 2011, an assertion that, if credited, completely undermined Mr. Nnane's position and his only prospect of defence, given that the false tax returns began as early as 2009. During cross-examination, Mr. Nnane's trial lawyer

had her repeat this damning evidence but did nothing to challenge her claims about the timeline of her employment beyond asking her what she would say if he suggested that she worked there longer than the cumulative nine-month period she claimed. He did not challenge her denial to that suggestion and did not even confront her with Mr. Nnane's claim that she worked with him from 2009 to 2011. Nor did trial counsel seek to exploit Ms. Forbes' evident uncertainty about the timelines of her employment.

[18] Ms. Forbes also testified that she was not involved in the preparation of any tax returns, and that after collecting information from clients she dropped the information off with Mr. Nnane and tax returns came back. Trial counsel did not confront this highly incriminating testimony other than to ask her, "And if I suggested to you that you did have something to do with the preparation of tax returns, you'd say to me I just told you I didn't?", to which she responded, "Right". Once again, he never put Mr. Nnane's version to her that she had taken over the business, including the preparation of tax returns. Yet there were clear opportunities to pursue these themes, including admissions she made in her testimony in chief that she assumed responsibility for the rent and utility payments of the business for a period, and brought in another person to help. This testimony provided trial counsel with an opportunity to seek confirming evidence of Mr. Nnane's absence from the office, and it furnished evidence capable of supporting her assumption of control of the business. Mr. Nnane's testimony that

2024 ONCA 609 (CanLII)

she was stealing money received from clients also provided a potential explanation for why she would assume control of the business and keep it running by paying the expenses, but none of this was addressed. Arguably, Ms. Forbes also downplayed her ability to complete tax returns in spite of her training as a bookkeeper. Yet this was not explored, nor did trial counsel challenge this incompetence claim with her own testimony that by the time of trial she had prepared tax returns for other people.

[19] I am mindful that I am not entirely familiar with counsel's brief, or with the challenges he faced. But even bearing this in mind, it is apparent that trial counsel left Ms. Forbes' damning testimony virtually unchallenged during cross-examination, despite the central role it played.

[20] As indicated, I agree with Mr. Nnane that trial counsel's approach to Ms. Forbes' testimony in his jury address reaffirms his failure to confront her testimony. Instead of challenging her evidence, he invited the jury to make its own decision about whether to credit her. If anything, his submissions assisted the Crown. The sum total of what he said about Ms. Forbes' testimony was as follows:

> You heard about Christine Forbes. You'll recall that. You saw suggestions that I made to her. It's up to you. You can accept her answers. Remember questions that the lawyers ask, you, I think you all remember that, the questions the lawyers ask are not evidence. We ask questions. We're advocates. It's the answers that matter. Do you accept Christine Forbes' evidence that she essentially had nothing to do with anything? She worked

2024 ONCA 609 (CanLII)

> there for a few months, maybe nine months. I think, I'm just not at my computer but roughly around nine months that she was there in total. Do you accept that? You heard Mr. Nnane's evidence about that. And we'll get into the cross-examination. I haven't forgotten about that. But do you accept that Mr. Nnane himself did these tax returns? Then you'll get into intent and other such things.

[21] In my view, Mr. Nnane has established his claim that trial counsel conducted an ineffective cross-examination of Ms. Forbes, leaving the damning evidence she gave virtually unchallenged.

(3) Did trial counsel provide ineffective assistance by projecting his disbelief of Mr. Nnane's testimony while examining Mr. Nnane?

[22] Mr. Nnane testified that Ms. Forbes worked at Golden for the "entire period", 2009-2013, and that she had taken control of the company during his health-related absence. If believed, Mr. Nnane's testimony supported an inference that Ms. Forbes had prepared the tax returns because she alone had the opportunity to do so.

[23] Mr. Nnane has shown that trial counsel did not believe this version of events. Surprisingly, trial counsel effectively recorded this in his dockets, along with other pejorative comments about Mr. Nnane, even though those dockets were going to be shared with Ontario Legal Aid. I agree with Mr. Nnane that when he was giving his testimony, his trial counsel did not support his testimony, but instead projected his disbelief of what Mr. Nnane was claiming.

2024 ONCA 609 (CanLII)

[24] First, it would have been apparent to the jury by the manner that trial counsel posed many of his questions that he was not asking Mr. Nnane to describe what happened, but instead was giving him an opportunity to say what he wanted to say. Trial counsel premised many of his questions, for example, by asking, “What do you say”, “What do you wish to say to the jury about that”, or by asking him, “Is that everything that you wanted to say?” At one point, when asking Mr. Nnane to comment on the fact that he was the person who owned and directed Golden, trial counsel said, “I just want you to say whatever you wish”. After Mr. Nnane responded, trial counsel commented, “Okay. And that’s your view, right?” When asking Mr. Nnane about Ms. Forbes’ role, he said, “[Y]our position to the jury is that Christine Forbes took over Golden Capital management and did the tax returns. Have I summarized your evidence correctly?” After Mr. Nnane said he did not know whose writing was on office files because he had not been in the office when the files were created, trial counsel said, “Okay. That’s your answer, alright”. When asking about when Mr. Forbes worked at Golden he said, “What period do you say Christine Forbes was employed at Golden Capital Management” and, “So she’s with you the entire period, is your evidence?” When he asked Mr. Nnane about the Crown theory that he falsified returns to increase his revenue, trial counsel said, “Could you please take over now and explain to the jury anything you’d like to say about those suggestions”. Given how these questions were posed, it would have been evident to jurors that trial counsel was attempting to

2024 ONCA 609 (CanLII)

distance himself from the answers provided by ascribing those answers to Mr. Nnane and what he wanted to say.

[25] On occasion trial counsel even posed questions as if challenging Mr. Nnane's testimony. He asked him, for example, "Are you saying, that to your knowledge, people were coming there because they heard about Christine and they were hiring Christine? Or were they coming because they heard about you and what skills and talent you had? Can you help me with that?" And he asked him, "Are you saying that those thousands and thousands and tens of thousands of dollars would go to Christine?" Given how these questions were posed, they each drew attention to plausibility problems with Mr. Nnane's testimony. Twice when asking Mr. Nnane who did the taxes, trial counsel asked Mr. Nnane whether he was speculating. I appreciate that a defence lawyer might make a tactical decision to steal the Crown's thunder by posing challenging questions to their clients in the knowledge that their clients have a ready explanation, but on the record before us there is no indication that this is what was happening. In my view, the manner in which these questions were posed made it appear as if trial counsel was sharing his own concerns about Mr. Nnane's evidence with the jury.

[26] At other times trial counsel was openly critical of answers Mr. Nnane provided, telling Mr. Nnane that he should "turn [his] mind to specific questions" and commenting gratuitously that one of his answers "was about 25 minutes." He admonished Mr. Nnane to "try to help the jury understand [his] position" and he

2024 ONCA 609 (CanLII)

asked Mr. Nnane repeatedly, including before he answered, whether he understood the question, and whether he remembered the question he was asked or the evidence. The only message jurors could have derived from these exchanges is that even Mr. Nnane's own counsel had concerns about his reliability.

[27] Based on the examination-in-chief, taken as a whole, I am therefore persuaded that trial counsel projected his disbelief of Mr. Nnane's testimony when questioning him, thereby undermining his defence.

(4) Did trial counsel nonetheless effectively defend Mr. Nnane?

[28] As indicated, the Crown argued, in response, that trial counsel clearly set out Mr. Nnane's position before the jury, making a tactical decision that was open to him to focus his defence on the inadequacy of the Crown case. I do not agree. In my view, trial counsel failed to effectively defend Mr. Nnane.

[29] In fairness, trial counsel did identify credibility issues with the testimony provided by Golden customers, and he made, what are in my view, a few isolated, tepid, and largely generic suggestions that Mr. Nnane's testimony should be believed. And, as the Crown points out, he did tell jurors that the defence position is that the Crown case was not good enough to overcome reasonable doubt. But as I will explain, trial counsel himself largely undermined these same submissions.

[30] I will begin with the credibility challenges to the testimony of the Golden customers. In his jury address defence counsel pointed to two causes for concern

2024 ONCA 609 (CanLII)

about their testimony, namely: (1) that the customers did nothing to report any concerns to the Canada Revenue Agency ("CRA") about the false returns filed on their behalf or to point the finger at Mr. Nnane until the CRA raised concerns about their own returns; and (2) that they signed retainer agreements assuming responsibility for the accuracy of their returns, which casts doubt on the testimony provided by a number of them that they had not reviewed their tax returns before signing them.

2024 ONCA 609 (CanLII)

[31] These were both worthy observations, but the credibility of the customers was not an avenue of defence. Whether the customers were complicit in the false filings could have no impact on Mr. Nnane's own criminal responsibility if he knowingly participated in their filing. Curiously, trial counsel told the jury as much, commenting, "Now, that doesn't make him not guilty or innocent". He also said, "It doesn't necessarily resolve certain of your questions and focus about what Mr. Nnane did. But that's how you assess, or one of the ways you assess a witness's credibility and reliability." And instead of submitting that jurors should reject the testimony the customers provided because of these concerns he said, "You may find that to be a completely logical and natural part of the story", and he remarked that "the stories all have that hallmark of similarity to them, the theme, the narrative is sort of similar between all of them". These, too, are worthy submissions – for the Crown. They are not points one would expect defence

counsel to be raising unless they were about to show why those submissions should not be accepted, which, in this case, trial counsel did not do.

[32] As I have mentioned, trial counsel also made isolated suggestions to the jury that Mr. Nnane's testimony should be believed, and he expressed his view that Mr. Nnane stood up to cross-examination, albeit without offering any demonstration to support that claim. But elsewhere in his closing remarks trial counsel undermined these submissions by saying, "So, if you believe, and it's only for you to decide this. I'm his lawyer, what do you think I'm going to say? It's not rocket science." I can think of no circumstance in which it is in a client's interest for defence counsel to feature the partisanship of their own submissions in a jury closing.

[33] When the record is examined as a whole, contrary to the Crown position that trial counsel provided Mr. Nnane with an avenue of defence, I am persuaded that he made no meaningful effort to do so. It is obvious, and was obvious at the time of trial, that in order to have any hope of avoiding conviction, the jury had to be left in a reasonable doubt about some of the things Mr. Nnane was testifying about, including that he did not participate in the filing of the false income tax or GST/HST returns. However, during his jury address, trial counsel did not stand behind that evidence. In my view, he distanced himself from Mr. Nnane's testimony, just as he had while conducting his examination-in-chief. He did not present Mr. Nnane's testimony to the jury as a description of what in fact happened, but rather as

2024 ONCA 609 (CanLII)

"Mr. Nnane's evidence about that". For example, instead of submitting that Mr. Nnane did not prepare the tax returns, he said, "[I]f you are not satisfied that he prepared the tax returns, that should cause you some concern in your deliberations." Instead of making submissions in support of Mr. Nnane's evidence, he remarked, "Mr. Nnane's testimony was clear as day. I didn't do them". On one occasion he even said, "You have George's evidence on that. You do with that what you think appropriate."

[34] Trial counsel also denigrated the importance of Mr. Nnane's evidence in chief by unnecessarily reminding the jury that the questions he himself asked Mr. Nnane were "softball" questions. In contrast, he said, "But cross-examination means the Crown can have at it. And I mean that". Then he commented that he saw no unfair questioning by the Crown, noting that he had made no objections during cross-examination. A short time later he told the jury, "I said to you a few minutes ago nothing is going to be more important in my view than the exchange, the cross-examination between [the Crown] and Mr. Nnane." In my view, trial counsel did not stand with his client by supporting his evidence. He did quite the opposite.

[35] Even in his final comments to the jury, trial counsel largely left Mr. Nnane without his support. Instead of aligning himself with the defence he said:

> Mr. Nnane asks you to acquit him on both charges. His position is that is the right thing to do, that the Crown has

2024 ONCA 609 (CanLII)

> not proven their case beyond a reasonable doubt. And whether, and there may be things that bother you or nag at you or you find odd or suspicious. [Emphasis added.]

[36] In making this observation, I recognize that trial counsel followed that comment up with more inclusive phrasing that could be taken to include his own support:

> The position of the defence is that that is simply not good enough and Mr. Nnane should be acquitted simply because the Crown, despite their very noble and very excellent efforts have not met the burden that in this court, in this proceeding they need to make.

[37] But even here, trial counsel did not assert that the Crown case was not good enough. He described this as “the position of the defence”, and then he found it necessary to praise the Crown’s efforts.

[38] I am therefore persuaded that, contrary to the Crown submissions, trial counsel did not adequately set out Mr. Nnane’s defence or engage in a meaningful attempt to challenge the adequacy of the Crown case. When the record is examined as a whole, it is apparent that he failed to advance Mr. Nnane’s defence both in the presentation of the evidence and in his closing submissions. Quite simply, he did not stand with his client.

2024 ONCA 609 (CanLII)

B. DID THE CONDUCT OF THE DEFENCE CAUSE A MISCARRIAGE OF JUSTICE (THE "PREJUDICE COMPONENT")

2024 ONCA 609 (CanLII)

[39] I am satisfied, based on the foregoing findings, that Mr. Nnane has met the prejudice component. I would not rest this conclusion on the unreliable verdict branch of the prejudice component. The case the Crown presented against Mr. Nnane was extremely strong, his testimony was problematic, and his defence was weak. I cannot find that there was a reasonable probability the outcome would have been different had he been defended effectively: *R. v. S.T.*, at para. 43; *Fiorilli* at para. 59.

[40] However, I am persuaded that the fairness of Mr. Nnane's trial was undermined by the representation he received. When an accused person retains defence counsel, they are entrusting their liberty and their reputation to that lawyer, and they are dependent upon the lawyer to defend the charges they face. As Doherty J.A. recognized in *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57, leave to appeal refused, [1996] S.C.C.A. No. 347 (citations omitted):

> We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by "partisan advocacy on both sides of the case". Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution,

> as well as marshal and advance the case on behalf of the defence.

[41] If trial counsel fails to meaningfully support their client's defence after they have undertaken their representation, they deprive that person of partisan advocacy and therefore of a fair trial. There can be no question, in my view, that trial counsel did not effectively support Mr. Nnane's defence or provide him with partisan advocacy. As I have found: (1) he failed to confront damning testimony given by Ms. Forbes, a pivotal witness, during cross-examination; (2) he undermined Mr. Nnane's testimony by not throwing his support behind it and by effectively signalling his disbelief of that testimony; and (3) he gave an ineffective jury address that veritably left Mr. Nnane without the support of his counsel at a crucial point in the trial. I am persuaded that Mr. Nnane did not receive a fair trial.

C. DID THE REPRESENTATION PROVIDED BY TRIAL COUNSEL FALL BELOW A STANDARD OF REASONABLE PROFESSIONAL JUDGMENT (THE "PERFORMANCE COMPONENT")?

[42] It is also obvious, in my view, that the representation provided by trial counsel fell below the standard of reasonable professional judgment. Whatever else it entails, reasonable professional judgment when acting in the defence of criminal charges requires a supportive if not zealous defence, not a half-hearted or dismissive one: see e.g., r. 5.1-1 of the Law Society of Ontario's *Rules of Professional Conduct*. I recognize that defence counsel is entitled to determine

2024 ONCA 609 (CanLII)

strategy and is not bound to pose the questions the client demands, or even to present the defence that the client promotes. However, distancing oneself from the defence that is presented or failing to stand with the client in the presentation of that defence is not a tactical choice. It is an abdication of responsibility and a betrayal of a crucial trust. I also recognize that defence lawyers are not required to support testimony they know to be perjured, but there is no suggestion before us that this explains the representation that trial counsel provided. I would find that Mr. Nnane has met the performance component of the ineffective assistance of counsel test.

CONCLUSION

[43] I am persuaded that Mr. Nnane has met his burden of establishing the ineffective assistance of counsel. I would allow the conviction appeal, set aside both fraud convictions, and order a new trial.

Released: August 12, 2024 “P.D.L.”

“David M. Paciocco J.A.”

“I agree. P. Lauwers J.A.”

“I agree. Gary Trotter J.A.”

2024 ONCA 609 (CanLII)