SUPREME COURT OF QUEENSLAND

CITATION:	*R v Penny* [2020] QCA 106
PARTIES:	**R** **v** **PENNY, Jason Wayne** (appellant)
FILE NO/S:	CA No 333 of 2018 DC No 507 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh – Date of Conviction: 29 August 2018 (Kent QC DCJ)
DELIVERED ON:	22 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2020
JUDGES:	Fraser JA and Boddice and Burns JJ
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was found guilty by a jury of one count of threatening violence, one count of burglary with violence and one count of grievous bodily harm – where the appellant pleaded guilty to one count of stealing – where the appellant was sentenced to imprisonment for six years for the offence of burglary with violence and lesser but concurrent periods of imprisonment for the remaining counts – where the appellant appeals the conviction on the count of burglary with violence on the ground that the verdict was unreasonable – where the appellant entered the complainant's bedroom through an open window – where the complainant was woken by the appellant punching him – where the complainant's jaw was fractured – where the jury had the complainant's account regarding how the appellant entered the bedroom through the window and evidence of the complainant's mother and father regarding damage to venetian blinds in the bedroom – whether it was open to the jury to reject the appellant's contention that he had been allowed into the residence by the complainant through a door – whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence CRIMINAL LAW – APPEAL AND NEW TRIAL –

MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO A MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant appeals the conviction on the count of burglary with violence on the ground that there was a miscarriage of justice in that the verdict was unsafe or unsatisfactory on the evidence – whether there was a miscarriage of justice in the jury not being directed as to an alternative verdict

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO A MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant appeals the conviction on the count of burglary with violence on the ground that evidence of lies and cross-examination of the appellant as to his character was improperly or unfairly admitted into evidence – whether there was any unfairness in the Crown prosecutor's characterisation of the appellant's differing accounts as lies – whether there was a material risk that the appellant had been deprived of a reasonable prospect of acquittal

Pell v The Queen (2020) 94 ALJR 394; [2020] HCA 12, cited

COUNSEL: M W C Harrison for the appellant
S J Bain for the respondent

SOLICITORS: Lawler Magill Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Boddice J and the order proposed by his Honour.

[2] **BODDICE J:** On 29 August 2018, a jury found the appellant guilty of one count of threatening violence, one count of burglary with violence and one count of grievous bodily harm.

[3] On 30 August 2018, the appellant was sentenced for those offences and for an offence of stealing, to which he pleaded guilty on 28 August 2018. The appellant was sentenced to imprisonment for six years for the offence of burglary with violence and lesser but concurrent periods of imprisonment for the remaining counts. His parole eligibility date was fixed at 28 May 2021.

[4] The appellant appeals his conviction of the count of burglary with violence only. His grounds of appeal are that the verdict was unreasonable; that there was a miscarriage of justice in that the verdict is unsafe and unsatisfactory on the evidence; and that evidence of lies and cross-examination of the appellant as to his character was improperly and/or unfairly admitted into evidence.

Background

[5] The appellant was born on 2 August 1984. He was aged 30 at the time of the offences and 34 at the date of sentence.

[6] The offence of threatening violence was committed on 24 January 2015. The remaining offences were committed two days later, on 26 January 2015. The complainant in those latter offences was Scott Ronald Woodeson. He had known the appellant since his early teenage years.

Evidence

[7] Woodeson was living with his parents at Beaudesert. He occupied a bedroom downstairs. His parents occupied a bedroom upstairs, directly above his bedroom.

[8] There were several access points to the downstairs area of the house. There was a garage door, which did not open via a key. It only opened from the inside. There was a front door, which had a double lock, a double locked backdoor, and a three foot door which was bolt locked. All were locked on the morning of 26 January 2015.

[9] Woodeson went to sleep at about 8 o'clock on the evening of 25 January 2015. There was a fan on in the room. The curtains were across the window and the blinds were down. The window was open about 400 millimetres or so, which is about three quarters of the way open. A grown adult male could fit through that window.

[10] On the morning of 26 January 2015, Woodeson was awoken by the appellant being on top of him, pinning him down to the bed. Woodeson was lying roughly in the middle of his bed.

[11] Woodeson said there were at least three blows from the appellant before the last one that woke him up. One connected to the right-hand side of his face, above the eyebrow. Others connected to the jaw area and just below the eye. The first punches were quite powerful. The last of the punches struck his hand, which he had positioned to block a punch to his face.

[12] Woodeson said the appellant said "where – where's your money?" before dragging Woodeson out of the bed. The appellant then pointed to the TV and a surround sound DVD player and said "we're going for a drive. You're going to cash this in for me".

[13] Woodeson said that, as they were taking apart the TV and surround sound system, his mother came down the stairs. Before she entered the bedroom, the appellant hid himself behind the bedroom door. Woodeson's mother said "I heard the blinds" and asked what was going on. Woodeson said "nothing". He did not want to get his mother involved in the incident. His mother replied "no. I heard the blinds go. There's someone down here".

[14] Woodeson said his mother began to search the underneath of the house. She then returned and pulled the bedroom door open. At that point, the appellant hopped straight out from the door and said "oh, how are you going?".

[15] Woodeson said his mother saw the blood over him and told the appellant to get out, saying "you've assaulted my son". She then commenced yelling for Woodeson's

father to call the police. At that point one of the neighbours came running down. His mother ran to the front and said "someone call the police".

[16] Woodeson said a heated argument began between the appellant and his mother just outside the bedroom door. The appellant was going to leave with Woodeson's car key, wallet, phone and his pouch of tobacco.

[17] Woodeson said his mother managed to get the keys back off the appellant, who threw them down and then began to walk away. The appellant said "oh you know what happens if you call the police".

[18] Woodeson said that, whilst the exchange was occurring between his mother and the appellant, he was "pretty out to it". He said he had quite a lot of blood and could not see out of one eye.

[19] Woodeson was not sure whether the appellant left Woodeson's wallet behind as well as the keys. The appellant took Woodeson's phone and pouch of tobacco. He went up the hill ranting and raving. Not long after, police arrived.

[20] Woodeson said he was struggling to talk to police as he was in quite a lot of pain. The police took him for a medical examination. X-rays revealed a fracture to his jaw. He was taken to hospital where he underwent surgery.

[21] In cross-examination, Woodeson accepted that he and the appellant spent time together. Neither were working at the time. He had not seen the appellant for four or five days before this incident. Woodeson said he had obtained about $100 from the appellant for petrol money to put into his vehicle for driving the appellant around.

[22] Woodeson accepted that, at the time of the incident, he was using drugs. He had had difficulties with drugs for some time. He had previous convictions for possession of drugs and other paraphernalia. Woodeson denied that he was in party mode for the Australia Day weekend.

[23] Woodeson accepted he had consumed crystal methylamphetamine before that weekend. He denied that he was smoking a pipe of crystal methylamphetamine on the morning of 26 January 2015. He denied the appellant woke him up by putting his hand through the blinds of the window, asking for $200 that was owed to him. He denied that he let the appellant into his bedroom.

[24] Woodeson accepted he did not hear the rustle of blinds before he woke up. He did not hear the appellant step through the window. He denied that he hit his head as a result of the appellant pushing and then punching him after Woodeson had attempted to punch and push the appellant. He denied the appellant left his home without argument that morning.

[25] Woodeson accepted that, in his statement to police on 26 January 2015, he described the incident as follows:-

> "At about 7am, I was asleep in my bed and I felt an impact on the right-hand side of my face. I woke, opened my eyes and could see Jason Penny standing beside my bed, on the window side, holding my shirt and forcing me down on the bed, whilst punching me with

> his right, closed fist three more times on the right-hand side of the face."

[26] In re-examination, Woodeson said that his blinds were damaged in the incident. They no longer went up and down. Woodeson also said, if the appellant had come knocking at his door, he probably would not have heard him. The fan was going and he was deeply asleep. He would not have let the appellant in as he was in an agitated state.

[27] Woodeson's mother said the appellant arrived at their home at about 8 o'clock in the morning on 24 January 2015. The appellant became agitated and upset when she said Woodeson was not at home. He was swearing and clenching his fist. He struck out at the glass doors around three times but not very hard. He left after about six to eight minutes, saying "I'll be back".

[28] Two days later Woodeson's mother was awoken by the noise of the bending of the venetians in Woodeson's bedroom. They were bumping up against the sides of the walls in the bedroom. Her bedroom was directly above Woodeson's bedroom. The noise of the blinds lasted for 10 to 20 seconds. It sounded like someone was caught in amongst the blinds and could not get out.

[29] Woodeson's mother went downstairs to the front door. She found it was still locked. All of the downstairs doors were locked on that day.

[30] Woodeson's mother heard voices, not loud voices but someone talking, before she reached the front door, unlocked the front door and then walked to Woodeson's bedroom door. Woodeson was well down near the bottom of the bed, towards the television. The window was completely open and the venetians "were pretty badly bent". They were thrown away after this incident.

[31] Woodeson's mother could only see Woodeson. She asked Woodeson "where is he? Did he just rush in and out again?". Woodeson shrugged his shoulders. Woodeson started to unplug the television. She asked what he was doing. He did not say very much. She described Woodeson as not really seeming like himself. He was dazed. She noticed blood on his face, near the right eyebrow. It came down his nose.

[32] As Woodeson's mother started to go back up the steps, she heard the same voices as the first time.[1] There were two voices. When she returned to the bedroom, she saw the appellant standing in the doorway. He, very nicely, said "hello" and asked how she was, to which she replied "I'm not too bad. Thank you". The appellant claimed Woodeson owed him money and he wanted the television for payment. She told him he could not have it, it belonged to her and her husband.

[33] At one point, the appellant said that Woodeson was coming with him. She did not think Woodeson wanted to go with him. She told the appellant "no. He's not. He's not going anywhere". She told the appellant to leave. As the appellant was leaving, he asked for money. She told him she had no money for him. The appellant started to walk off. He had Woodeson's car keys and mobile phone. At that point she told her husband to ring the police. The appellant brought the keys back before walking off up the hill. She did not notice any injuries on the appellant that morning.

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1 AB125/15.

[34] In cross-examination, Woodeson's mother accepted Woodeson had struggles in his life. He had four children he was not seeing and he was struggling with a drug addiction. She always worried about her children.

[35] Woodeson's mother accepted that she did not see the appellant break into the house. She did not see the appellant assault her son. When she first saw her son that morning, he was unplugging the cord to his television. He looked a little bit dazed.

[36] Woodeson's mother accepted that when she returned to the bedroom, the appellant, he was quite friendly. The appellant was requesting money. He was also wanting the television and saying that Woodeson was coming with him.

[37] Woodeson's father saw the appellant at the front door of their home on 24 January 2015. He described the appellant as "pretty irrational". He was swearing and saying that Woodeson owed him money. On a couple of occasions he rushed towards the sliding door and threatened to put his fist through it. He told the appellant to get out or he would call the police. Eventually, he left the residence.

[38] Woodeson's father said that, on Australia Day 2015, he was asleep in the upstairs bedroom when he heard his wife yell out something like "ring the police. He's back". Whilst he was on the telephone, his wife yelled out that the appellant had taken Woodeson's car keys and mobile phone. Shortly after, his wife said "oh Jason has brought the keys back".

[39] Woodeson's father looked through the front sliding door and saw the appellant out towards the front of the neighbour's residence. He went back to the operator and told them that the appellant had left and was going up the street.

[40] Woodeson's father then went downstairs. Woodeson was bleeding from a wound to the head, around the eyebrow area. Blood was running down his nose. Woodeson's father also noticed that the venetian blinds had been damaged in his bedroom. They had been bent and broken. The venetian blinds were not functional after the incident. They would not close like a normal blind.

[41] In cross-examination, Woodeson's father accepted that the venetian blinds remained attached to the top of the window and had not fallen off. They remained in that position for some months after the incident. Woodeson's father agreed that he did not hear any bending of venetian blinds. He did not see the appellant break into his house. He did not see the appellant assault his son.

[42] Michael Berry, a police officer, attended the Woodeson residence on the morning of 26 January 2015 in response to a complaint of a disturbance. Woodeson had a cut to his right eye and a swollen cheek. He looked to be in pain. He was having trouble talking. He arranged for other police officers to attend the scene.

[43] Berry said, when he entered Woodeson's bedroom, the window to the bedroom was open. The venetian blinds were a little bent out of shape. It looked like someone had pushed their way through them. When photographs were taken of the area, the window was closed. Berry had secured the scene before police returned to the station.

[44] Berry later executed a search warrant on a residence. The appellant was at that residence. The appellant nominated a coffee table as where they would find a

mobile phone, tobacco and some tobacco papers, specific items sought in the search warrant. Woodeson had been specific about the items taken from his residence.

[45] Berry recorded his conversation with the appellant at the time of execution of the search warrant. In that conversation, the appellant gave an account of what had happened at Woodeson's residence. He said:

> "He's a fucking scumbag. I'm telling you now. I go there, knock on his fucking door. He wakes up. Fucking answers the front door and has a fucking go at me and starts swinging at me."

[46] The appellant later said "I've done nothing fucking wrong, and he goes fucking has a big swing at me". The appellant also said:-

> "He's put me in a position then I have to go up there, knock on the door, he comes out, fucking starts arguing, he started to fucking, fucking push me first and all this sort of shit and he started … so I gave him a few …"

[47] Berry recorded a subsequent interview with the appellant at the Beaudesert police station. It commenced just after 1 pm on 26 January 2015. In that interview, the appellant gave the following response to a question that he tell police what happened today:-

> "I walked from my house up there to get my money that he owed me from last week which is two hundred dollars. I knocked on the door downstairs, no sorry I knocked on his window that was open first. It had this venetian blind there, um and I opened up the venetian blind and there he was sleeping and I woke him up and I've asked him where's the 200 bucks you owe me and he's kind of just woken up. I said mate, just get out of bed and open the door and let me in so we can talk about this, so, and then he said something and I fucking you know, I said oy don't piss me off ra-ra-ra, otherwise it's going to end up in a fuckin argument. You owe me 200 bucks, that's all I want, that's all I want. You've been ignoring me and just man, everything just started from there. So he's come around, got out of bed. He went around and opened the door just down near the garage and he said come in, I went to, in, just got into his bedroom and then we started arguing just underneath the house and then he's pushed me and told me to get out of his house and that's when I've hit him a couple of times and he fuckin and then his mum's come down the stairs and ranted and raved on and I didn't want to fight with an elderly lady at the front of the house. I said your son owes me two hundred bucks, that's all I want and I walked off and that was it. That was it, and I've taken his phone, yeah, sorry, I've taken his phone but I was that fuckin angry, you know we didn't plan on keeping a stupid little LD phone that costs fifty dollars, you know and that tobacco, that tobacco is mine and that's, that's, and then I'm sitting at home having a smoke watching a movie and you guys come and pick me up and yeah that's, that's it. That's exactly what happened."[2]

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2 AB220/15 – 45.

[48] The appellant elaborated that the window was Woodeson's bedroom window. He said he lifted up the blind, poked his head in and told Woodeson wake up. When Woodeson let him into the bedroom, an argument started between them. The appellant said Woodeson pushed him and he just reacted and hit him a couple of times. He said the whole episode did not last very long. "[I]t only last fuckin thirty seconds and I was out of there."[3]

[49] The appellant described the altercation as follows:-

> "… we've started arguing just outside his fuckin bedroom door and he's turned round and fuckin pushed me, get the fuck out of here, you don't come here fuckin arguing and starting shit in my fuckin parents' house and then um as he's pushed me I've gone what the fuck, I just want my two hundred bucks and then I hit him twice after he's fuckin pushed me. You know, like what the fuck, it's just a, just a reaction. I'm not going to fuckin, it's more fuckin self-defence there than anything else. Mate, I wasn't going to stand there and fuckin couple of punches and fuck punch in the head from him inside his own parents' house just cause he owes me two hundred dollars."[4]

[50] The appellant said Woodeson pushed the appellant in the chest. When asked what happened then, he replied "it was just an instant reaction, just hit him in the head a couple of times and then I stopped … I threw fucking left and a right and that's about it". The appellant denied forcing his way into Woodeson's house. He also denied picking up Woodeson's car keys.

[51] Dr Tuckett treated Woodeson's fractured jaw on 26 January 2015. Dr Tuckett said Woodeson presented with some pain on the right side of the face in the temporal region and behind his ear. He also had some reduced sensation in his lower lip and chin. He had a malocclusion which means his teeth did not fit together, with premature contact of his teeth on the left-hand side. There was bruising behind his ear on the right side, some small lacerations to the right cheek and upper lip and bruising over the right mandibular gums.

[52] Woodeson underwent surgery that day to reduce the fracture to his jaw. Plates and screws were inserted to repair that injury. The jaw was completely broken in two. Dr Tuckett described the injuries as consistent with blunt force trauma to the head. It would take a significant amount of force to break the jaw from some sort of force being applied to the jaw. He could not say whether it would be several blows or one or two. The more times heavy blunt force is applied to the jaw, the more likely it is to be broken.

[53] At the conclusion of the Crown case, the appellant elected not to give or call evidence.

Appellant's submissions

[54] The appellant submits that both in the Crown's opening and closing address, the Crown flagged the difference between the version given by the appellant at his residence and in the interview. The Crown alleged they revealed a different story. When the appellant first spoke to police at his house, he spoke of Woodeson

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3 AB225/12.
4 AB225/30.

punching him before the appellant throws back some retaliatory blows. In his interview with police the appellant was adamant he was not punched, he was only pushed by Woodeson.

[55] The Crown also alleged the appellant's version changed as to the circumstances of taking Woodeson's mobile phone. At his residence, he told police he took Woodeson's phone to check his messages. Later, he said he took it because he was angry and in the heat of the moment. The Crown contended the appellant was trying to downplay the seriousness of his crime by lying to police in a fairly short space of time. The appellant submits that the categorisation of a changing or shifting story, which constituted lies, was unfair. At his residence, the appellant had used the expression "start swinging at me" and said that Woodeson "started to fucking push me first and all this sort of shit and he started … so I gave him a few …" and that Woodeson "goes fucking, has a big swing at me and then I swing back at him". In his interview with police, the appellant said on a number of occasions that Woodeson "pushed me" but also said he was not going to stand there "and fuck a couple of punches and fuck punch in the head from him inside his own parents' house".

[56] Similarly, at this residence, the appellant said, in respect of the telephone, "all the messages are there on his fucking phone. That's why I did grab his fucking phone to see what he's fucking been up to". In the interview, he said "I've taken his phone but I was that fucking angry you know, we didn't plan on keeping that stupid little LD phone …".

[57] The appellant submits that the punch/push dichotomy do not constitute lies. The appellant never used the word punch. He used the words swing and push. It is unfair for a characterisation or interpretation adopted by the Crown prosecutor to be relied upon to establish lies rather than the appellant's own words. Further, the alleged lies with respect to the telephone were led despite the appellant pleading guilty to the count of stealing. Whilst the use of that lie went no further than the appellant's credit, the use of lies about the telephone was simply prejudicial and devoid of any probative value and, therefore, unfair. The appellant also submits that the interviews were unfair. They involved cross-examination by the police office. It was unfair for that to be led in the context of the appellant being improperly painted as a liar.

[58] The appellant further submits that the verdict was unreasonable. The evidence left a reasonable doubt as to whether the appellant had entered Woodeson's residence without consent. Whilst Woodeson gave evidence that the curtain was across and the blinds were down in respect of the open window, and Woodeson's mother gave evidence that she woke to the sounds of the venetian blinds, the photograph of the window depicted the window as shut, not open. There was also inconsistency in Woodeson's account of being assaulted in the bedroom.

[59] The appellant submits that, in circumstances where the photographs of the room were not consistent with a burglary and depicted a bed in good order, inconsistent with a disturbance of the type described by Woodeson, and where there was no evidence as to what happens when the complainant is absent in respect of locked doors, it was unreasonable for the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of burglary with violence. There was also a miscarriage of justice as the jury were not left with any alternative count, for

example, a conviction based on the appellant's version that he entered the dwelling and committed an indictable offence.

Respondent's submissions

[60] The respondent submits that the verdict of the jury in respect of the count of burglary with violence was not unreasonable. There was ample evidence upon which the jury could be satisfied beyond reasonable doubt that the appellant entered the complainant's open window and thereafter delivered blows causing him grievous bodily harm. That evidence supported an inference that the appellant entered the dwelling with the requisite intent to cause grievous bodily harm.

[61] The respondent submits that the prosecutor's description of the appellant's words were not misleading. To describe someone as "swinging at me", in context, would be properly understood as punching. The internal inconsistencies in the versions given by the appellant also meant it was not inappropriate for the Crown to suggest they were lies.

[62] The respondent submits that the trial Judge directed the jury appropriately on whether the lies were deliberate and as to the limited use such a finding could have in their deliberations. There was no miscarriage of justice.

[63] The respondent submits evidence about the mobile telephone was relevant, notwithstanding the appellant's plea to the count of stealing. The questioning of the police officer was not unfair. It occurred in the context of inconsistent, or at least unclear, accounts.

Consideration

Unreasonable verdict

[64] The determination of this ground requires the Court to independently examine the record to determine whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of burglary with violence.

[65] In undertaking that assessment, due regard must be given to the jury's role as the ultimate decider of facts. Where, or in order to be satisfied beyond reasonable doubt of guilt, it is necessary for a jury to accept a witness is reliable and credible, the Court presumes the jury did accept that witness as reliable and credible.

[66] Notwithstanding that assumption, if the Court is satisfied that, having regard to other aspects of the evidence, there were inconsistencies or discrepancies such that there is a material risk that an innocent person has been wrongly convicted of the offence, the verdict is unreasonable and is properly to be set aside on appeal.[5]

[67] In the present case, the jury had not only the complainant's account that the appellant had entered his bedroom through the window on the morning of 26 January 2015. It also had the evidence of Woodeson's mother and father as to the damage to the blinds and, importantly, the evidence of Woodeson's mother as to

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5 *Pell v The Queen* [2020] HCA 12.

being woken to the sound of the venetian blinds bending, consistent with a person entering the bedroom through those blinds.

[68] When that evidence was coupled with the evidence of Woodeson's mother and father that all other means of access to the downstairs area to the house on that morning were securely locked, it was open to the jury, on the whole of the evidence, to reject the appellant's contention that he had been let into the residence by Woodeson through a door.

[69] The fact that the photographs of the bedroom depicted a closed window, with no obvious damage to the venetians, did not detract from the reliability and credibility of the evidence of damage to the blinds from the appellant's entry into the bedroom through that window that morning. There was an explanation by Berry as to why the photograph depicted a closed window. Berry also gave evidence that, when he arrived at the scene, the window was open and the venetians exhibited damage.

[70] Nothing in the remaining evidence detracted from an acceptance of the evidence of Woodeson, his parents and Berry as to the state of the window and the venetian blinds on the morning in question.

[71] Once that conclusion is reached, there was ample evidence upon which it was open to the jury to be satisfied beyond reasonable doubt that the appellant had entered Woodeson's bedroom without his consent.

[72] There was also ample evidence upon which it was open to the jury to be satisfied beyond reasonable doubt that the appellant had inflicted the various injuries sustained by Woodeson that morning. There was medical evidence of those injuries. There was Woodeson's mother's evidence of the injuries she observed on Woodeson that morning. There was Woodeson's own evidence of how he sustained those injuries.

[73] A consideration of the record as a whole supports a conclusion that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of the offence of burglary with violence. Nothing in the appellant's account or the remaining evidence gave rise to inconsistencies or discrepancies, such that there is a material risk an innocent person has been wrongly convicted of the offence. The verdict of the jury was not unreasonable.

[74] This ground fails.

Miscarriage of justice – unsafe and contrary to evidence

[75] Whilst this was contended to be a separate ground of appeal, a ground relying upon a conclusion that the conviction was unsafe and contrary to the evidence is an example of an unreasonable verdict. For the reasons outlined above, the jury's verdict of guilty of the offence of burglary with violence was neither unsafe not contrary to the evidence.

[76] There also was no miscarriage of justice in the jury not being directed as to an alternative verdict, such as a conviction of entering the dwelling and committing an indictable offence therein.

[77] Having regard to the evidence of the lack of any other means of entry on that morning, apart from the bedroom window, and the evidence as to the damage to the blinds, there is no reasonable prospect that a failure to direct the jury as to the availability of an alternative verdict deprived the appellant of a fair chance of acquittal on the offence of burglary without violence.

[78] This ground fails.

Lies – cross-examination

[79] Whilst aspects of the recorded interview with police are suggestive of police engaging in cross-examination of the appellant on his account, a consideration of the interview as a whole supports a conclusion that there was no impermissible cross-examination by police.

[80] The appellant had given an initial account to Berry at the time of the execution of the search warrant. That initial account had referred to Woodeson swinging at the appellant prior to the appellant striking Woodeson. In the subsequent interview, the appellant had referred to pushing by Woodeson prior to the altercation.

[81] Similarly, at the execution of the search warrant, the appellant had given an account as to why he had taken Woodeson's mobile telephone, that it was to search for messages. In the subsequent interview, the appellant gave an account that it was in anger and an oversight that he had taken the mobile telephone.

[82] These differing accounts were such that it was permissible for police, in the particular circumstances, to press the appellant on the versions he had given in respect of the incident in Woodeson's bedroom. There was no unfairness in the interview being led in evidence in those circumstances. There was no miscarriage of justice as a consequence of the admission of that evidence.

[83] Similarly, whilst a prosecutor must be very careful not to attribute to a defendant the telling of lies simply because of a change in terminology in discussions with police, the difference in versions given by the appellant supports a conclusion that there was no unfairness in those differences being characterised as lies.

[84] The appellant described Woodeson as "swinging" at him. That word connotes punching. There is no other reasonable interpretation of that description. In those circumstances, it was open to the prosecutor to draw a distinction between an initial account of punching and a subsequent account of pushing. It was also appropriate for the prosecutor to refer to the differing accounts in relation to why the mobile telephone had been taken by the appellant.

[85] In respect of both of those matters, the jury were carefully directed by the trial Judge as to the use they could make of those matters in their deliberations. Relevantly, the trial Judge directed the jury:-

> "You have heard some submissions from the prosecution in this case which attribute lies to the defendant in out of court statements, those statements to the police that were made and referred to by Mr Muir in his closing address. You will make up your own mind about whether he was telling lies, and if so, whether he was doing so deliberately. If you conclude that the defendant did deliberately tell

> lies, that is relevant only to his creditworthiness, that is, his believability, when he gave that version to the police. It is for you to decide whether those suggested lies do, in fact, affect his credibility.
>
> But you should bear in mind this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is some evidence of his guilt. The mere fact that the defendant tells a lie, if that is what you conclude, is not itself evidence of guilt. A defendant may lie for many reasons: for example, to bolster a true defence, to protect somebody else, to conceal disgraceful conduct of his short of a commission of the offence, or out of panic or confusion. If you think there is or may be some innocent explanation for his lies, you should take no notice of them."

[86] By these directions, the jury were properly restricted to considering those matters only as to credit. They were given appropriate warning as to the care to be taken in attributing such a conclusion in the circumstances of the case.

[87] A consideration of those directions supports a conclusion that there was no unfairness in the Crown prosecutor's characterisation of the appellant's differing accounts and there was no miscarriage of justice in the manner in which those matters were left to the jury.

[88] There is no material risk that, as a consequence of those matters, the appellant has been deprived of a reasonable prospect of acquittal of the offence of burglary with violence.

[89] This ground also fails.

Order

[90] I would order that the appeal be dismissed.

[91] **BURNS J:** I agree with the reasons expressed by Boddice J as well as the conclusion reached by his Honour that the appeal be dismissed.