

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Rodgerson, 2015 SCC 38, [2015] 2 S.C.R. 760 | **Date:** 20150717**Docket:** 35947 |

Between:

**Her Majesty The Queen**

Appellant

and

**Jason Rodgerson**

Respondent

**Coram:** Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**(paras. 1 to 56) | Moldaver J. (Abella, Rothstein, Cromwell and Karakatsanis JJ. concurring) |

R. *v.* Rodgerson, 2015 SCC 38, [2015] 2 S.C.R. 760

Her Majesty The Queen Appellant

v.

Jason Rodgerson Respondent

**Indexed as: R. *v.* Rodgerson**

2015 SCC 38

File No.: 35947.

2015: January 14; 2015: July 17.

Present: Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for ontario

 *Criminal law — Murder — Charge to jury — Evidence — Post‑offence conduct — After killing victim, accused concealed body and cleaned up scene of death — Accused fled from and lied to police — Trial judge instructed jury on use of accused’s post‑offence conduct in assessing issue of intent for murder — Whether trial judge erred in instructions to jury on concealment and clean‑up, and if so, whether that error was fatal in conjunction with erroneous instructions on accused’s flight from and lies to police — Detrimental impact of long and complex jury charges on criminal justice system.*

 R was charged with first degree murder in connection with the death of Y. At trial, there was no dispute that R caused Y’s death. R’s primary defence was self‑defence, but he also relied on lack of intent, provocation, and an absence of evidence establishing first degree murder. He testified that after he and Y engaged in consensual sexual activity, a heated exchange occurred and she attacked him with a knife. A physical struggle ensued, culminating in Y’s death. R maintained that he did not intend to kill or seriously injure Y. Rather, he testified that he used only moderate force, and that her death was accidental. To rebut R’s position on the amount of force used and the issue of intent, Crown counsel relied on forensic analysis of Y’s injuries and of bloodstains found at R’s home, as well as on evidence of R’s post‑offence efforts to conceal Y’s body and to clean up the scene of her death. The Crown also led evidence that R fled from the police, and initially lied to them about who was responsible for Y’s death.

 R was convicted by a jury of second degree murder. On appeal from his conviction, R maintained that the trial judge failed to properly instruct the jury on the various ways in which R’s post‑offence conduct could and could not be used. A majority of the Court of Appeal agreed and ordered a new trial on a charge of second degree murder.

 *Held*: The appeal should be dismissed.

 The Crown concedes that the trial judge erred by instructing the jury that it could consider R’s flight from and lies to the police on the issue of intent. This appeal centres on the instructions related to the remaining post‑offence conduct: R’s concealment of Y’s body, and his clean‑up of the scene of her death.

 In order to establish that R was guilty of murder, rather than manslaughter, the Crown had to prove that he either intended to kill Y or to cause her bodily harm which he knew was likely to cause death. The cornerstone of its case was the nature and extent of Y’s injuries and the degree of force required to inflict them. The Crown asserted that the forensic evidence revealed a more prolonged and violent physical altercation than the version of events described by R.

 It is relatively straightforward to understand how R’s efforts at concealment and clean‑up were capable of supporting the inference that he acted unlawfully. However, these efforts were also capable of supporting the further inference that R sought to conceal Y’s body and clean up the scene of her death in order to conceal the nature and extent of her injuries and the degree of force required to inflict them. This in turn could have been relevant on the issue of intent for murder: the more severe the injuries, and the more force required to inflict them, the stronger the inference that he intended to kill, or to cause bodily harm which he knew was likely to cause death.

This chain of inferential reasoning was narrow, and the relevance of the evidence was attenuated. The trial judge should have assisted the jury with a specific instruction on how to use this evidence on the issue of intent. However, the sections of the jury charge relating to intent failed to link the concealment and clean‑up evidence to the nature and extent of Y’s injuries and the force required to inflict them. Rather, the charge merely reiterated the existence of this evidence, and instructed the jury to consider it along with all the other evidence. This was a legal error that created a risk that the jury might convict R for murder based only on the broader inference that the concealment and clean‑up pointed to a consciousness of guilt and a desire to prevent discovery of an unlawful killing.

 After the jury rejected self‑defence, the issue of R’s intent was the central issue at trial. Moreover, the Crown’s case was not overwhelming. As a result, the curative proviso does not apply and R is entitled to a new trial for second degree murder.

 Both the Crown and the dissenting judge in the Court of Appeal expressed concern that requiring a more specific instruction on the concealment and clean‑up evidence would further fuel the trend towards lengthier and more complex jury charges. While these concerns are valid, a few modest alterations would have saved this jury charge from legal error. At the same time, a great many of the instructions that were included could and should have been removed. The length, repetitiveness, and complexity of the charge were unwarranted.

 A trial judge must strike a crucial balance by crafting a jury charge that is both comprehensive and comprehensible. Over‑charging is just as incompatible with this duty as is under‑charging. Trial judges have taken to quoting large extracts from model charge manuals to safeguard their verdicts from appeal. But model charge manuals do not necessarily translate into model charges. They are there to guide, not govern. The failure to isolate the critical issues in a case and tailor the charge to them inevitably makes the instructions less helpful to the jury. The fundamental purpose of the jury charge must be to educate, not complicate.

**Cases Cited**

 **Referred to:** *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Jack* (1993), 88 Man. R. (2d) 93, aff’d [1994] 2 S.C.R. 310; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Mathisen*, 2008 ONCA 747, 239 C.C.C. (3d) 63; *R. v. Pintar* (1996), 30 O.R. (3d) 483; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. McNeil* (2006), 84 O.R. (3d) 125; *R. v. Zebedee* (2006), 81 O.R. (3d) 583.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 34(1) [am. 2012, c. 9, s. 2], (2) [*idem*], 35 [*idem*], 686(1)(*b*)(iii).

**Authors Cited**

Granger, Christopher. *The Criminal Jury Trial in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1996.

Watt, David. *Helping Jurors Understand*. Toronto: Thomson Carswell, 2007.

Watt, David. *Ontario Specimen Jury Instructions (Criminal)*. Toronto: Thomson Carswell, 2003.

 APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Feldman and MacPherson JJ.A.), 2014 ONCA 366, 319 O.A.C. 254, 309 C.C.C. (3d) 535, [2014] O.J. No. 2232 (QL), 2014 CarswellOnt 5936 (WL Can.), setting aside the accused’s conviction for second degree murder and ordering a new trial. Appeal dismissed.

 *Megan Stephens*, for the appellant.

 *Christopher Hicks* and *Kristin Bailey*, for the respondent.

 The judgment of the Court was delivered by

 Moldaver J. —

1. Overview
2. Jason Rodgerson was charged with first degree murder in connection with the death of Amber Young. He was tried by a court composed of judge and jury, and convicted of second degree murder.
3. At trial, there was no dispute that Mr. Rodgerson caused Ms. Young’s death. Rather, his primary defence was that he was acting in lawful self-defence when he killed her. Secondarily, he relied on the defences of lack of intent and provocation to reduce the charge of murder to manslaughter. Finally, he maintained that the crime of first degree murder was not made out on the evidence.
4. In the context of his self-defence claim, Mr. Rodgerson conceded that he was applying force to Ms. Young at the time of her death. He maintained, however, that the force in question was moderate and designed solely to protect himself from death or grievous bodily harm. In using the force he did, it was not his intention to kill or seriously injure Ms. Young. The fact that she died from the force used was purely accidental.
5. The Crown sought to rebut Mr. Rodgerson’s position that the force he used was moderate and not designed to kill or seriously injure Ms. Young. To that end, Crown counsel relied in part on certain aspects of Mr. Rodgerson’s post-offence conduct — namely, his efforts to conceal her body in the backyard of his home and to clean up the scene of her death.
6. The Crown also led other post-offence conduct at trial. Specifically, the Crown adduced evidence that Mr. Rodgerson fled from the police when they came to search his home, and that he initially lied to the police about who was responsible for Ms. Young’s death. The parties acknowledge that this body of evidence had no bearing on the issue of Mr. Rodgerson’s intent.
7. At trial, Mr. Rodgerson argued that the evidence of concealment and clean-up also had no bearing on the issue of his intent. The trial judge disagreed. However, in his charge to the jury, the trial judge did not explain the limited and somewhat nuanced basis upon which the evidence of concealment and clean-up could be used to establish the requisite intent for murder. Nor did he direct the jury that the other post-offence conduct — Mr. Rodgerson’s flight from the police and his attempt to mislead them — could not be used to establish intent. Rather than limiting the use of this evidence, as he should have, to negating the defence of self-defence and establishing that Ms. Young died as a result of an unlawful act, the trial judge also left it to the jury to consider in deciding the issue of intent. By its verdict, the jury obviously concluded that Mr. Rodgerson had the requisite intent for murder.
8. On appeal to the Ontario Court of Appeal from his conviction, Mr. Rodgerson raised several grounds of appeal relating to the jury charge. Among them, he challenged the trial judge’s failure to properly instruct the jury on the various ways in which Mr. Rodgerson’s post-offence conduct could be used, and the ways in which it could not be used.
9. A majority of the Court of Appeal, per Doherty J.A., concluded that (1) evidence of Mr. Rodgerson’s flight from and lies to the police was irrelevant to determining whether he had the requisite intent for murder; (2) the trial judge erred by instructing the jury that it could consider evidence of his flight from and lies to the police in assessing the issue of intent; (3) evidence of Mr. Rodgerson’s concealment and clean-up was relevant to assessing the issue of intent, but the trial judge failed to instruct the jury on the limited way in which this evidence could be used for that purpose; and (4) the curative proviso, *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(*b*)(iii), did not apply (2014 ONCA 366, 319 O.A.C. 254). As a result, the majority ordered a new trial.
10. Writing in dissent, MacPherson J.A. agreed with the majority that the trial judge erred in his instructions on the use of Mr. Rodgerson’s flight from and lies to the police. Standing alone, he considered this error to be minor. As regards the concealment and clean-up evidence, he disagreed with the majority that a more specific instruction was necessary. In his view, the trial judge’s general cautionary instruction about the dangers associated with evidence of post-offence conduct was sufficient. Finding only one minor error in the jury charge, he would have applied the curative proviso and dismissed the appeal.
11. The sole issue before this Court is whether the majority was correct in holding that the trial judge erred in his instructions on the concealment and clean-up, and if so, whether that error — in conjunction with the erroneous instructions on Mr. Rodgerson’s flight from and lies to the police — was fatal. I conclude that the majority was correct on both counts, and I would affirm the order for a new trial. Before addressing these issues, however, it is necessary to review the circumstances of Ms. Young’s death and to summarize the pertinent evidence presented at Mr. Rodgerson’s trial.
12. Factual Background
	1. Ms. Young’s Death
13. On October 26, 2008, Mr. Rodgerson and Ms. Young met for the first time in a bar in Oshawa, Ontario. Both had been drinking earlier in the day, and Ms. Young had also taken various prescription medications. They talked and drank together at the bar, and Ms. Young gave Mr. Rodgerson an ecstasy tablet. She told him it was worth five dollars. After leaving the bar, Ms. Young accompanied Mr. Rodgerson to his home. While in the living room, Ms. Young repeatedly asked Mr. Rodgerson about the five dollars she was owed.
14. Mr. Rodgerson was the sole witness to Ms. Young’s death. At trial, he testified that he and Ms. Young engaged in consensual sexual activity, first in the living room and then in his bedroom. According to Mr. Rodgerson, shortly after moving to the bedroom, he lost interest in Ms. Young and he suggested that they return to the bar. Ms. Young asked Mr. Rodgerson again about the money she was owed, to which he replied, “What are you? Some sort of whore?” Mr. Rodgerson testified that, in response, Ms. Young attacked him with a knife, and they engaged in a physical struggle. This struggle culminated in him pressing down on her face with his forearm until she appeared to pass out. Shortly thereafter, Mr. Rodgerson also passed out. He claimed that he did not know that Ms. Young was dead until he awoke the next day.
	1. Mr. Rodgerson’s Post-Offence Conduct
15. Mr. Rodgerson made extensive efforts to conceal Ms. Young’s body and clean up the scene of her death. He purchased bleach, rubber gloves, and garbage bags, and dug a shallow grave in the backyard of the house. He then dragged Ms. Young’s body from the bedroom to the backyard. He removed her clothing and jewellery, placed her body in the grave, poured bleach into the hole and filled it up with dirt. He then returned to the house and removed his bloodstained mattress from the bedroom. He cut up the bloodstained carpet and placed it in garbage bags, along with Ms. Young’s shoes and remnants of their sexual activity. He also broke Ms. Young’s cellphone and removed the battery. Finally, he used bleach to clean up the blood, and other remnants of their sexual activity and physical altercation, located on the living room carpet, the kitchen floor, and the bedroom walls.
16. Several days after Ms. Young’s death, on October 29, police officers executed a search warrant at Mr. Rodgerson’s home. When the police arrived, Mr. Rodgerson attempted to flee, but he was quickly caught and arrested near the front steps of his home. During his initial police interview, he made various false statements in which he attempted to deflect blame from himself by suggesting that someone else had killed Ms. Young.
	1. Forensic Evidence
17. At trial, the Crown relied on the testimony of two key expert witnesses: Dr. Michael Pollanen, the forensic pathologist who conducted Ms. Young’s autopsy, and David Sibley, a forensic analyst who conducted a bloodstain pattern analysis at Mr. Rodgerson’s home. The Crown also put forward the testimony of Dr. Marie Elliot, a forensic toxicologist who analysed the drug and alcohol content of Ms. Young’s blood.
18. Dr. Pollanen described the injuries he found on Ms. Young’s head and face, including bruising, abrasions, and cuts on the inside of her lips. While he could not ascertain a conclusive cause of death, he testified that the types of injuries he observed were consistent with death by smothering. Mr. Sibley described the results of his bloodstain pattern analysis, which shed light on the nature of the physical altercation between Mr. Rodgerson and Ms. Young, as well as on Mr. Rodgerson’s efforts to clean up the scene after her death.
19. Analysis
	1. The Relevance of the Post-Offence Concealment and Clean-Up in Determining Mr. Rodgerson’s Intent
20. The Crown concedes that the trial judge erred by instructing the jury that it could consider Mr. Rodgerson’s flight from and lies to the police on the issue of intent (A.F., at para. 5). It is the remaining post-offence conduct — Mr. Rodgerson’s concealment of Ms. Young’s body, and his clean-up of the scene of her death — which is at the heart of this appeal.
21. The Court of Appeal unanimously rejected Mr. Rodgerson’s assertion that the concealment and clean-up evidence was irrelevant to establishing the requisite intent for murder. The Court of Appeal was split, however, on whether the trial judge provided sufficient direction to the jury on *how* it could use that evidence in assessing the issue of intent. Before determining whether the majority was correct to find that the lack of instruction constituted a legal error, it is first necessary to clarify, as a preliminary matter, precisely how the post-offence concealment and clean-up evidence is probative on the issue of Mr. Rodgerson’s intent.
22. In order to establish that Mr. Rodgerson was guilty of murder, rather than manslaughter, the Crown had to prove that he either intended to kill Ms. Young, or he intended to cause her bodily harm which he knew was likely to cause death. In this regard, the cornerstone of the Crown’s case was the nature and extent of the injuries suffered by Ms. Young, and the degree of force required to inflict them. The more severe the injuries caused by Mr. Rodgerson, and the more force required to inflict them, the stronger the inference that he intended to kill Ms. Young or cause her serious injury. To show that the nature and extent of the injuries and the degree of force used pointed to murder, the Crown introduced Dr. Pollanen’s autopsy evidence and Mr. Sibley’s bloodstain pattern analysis.
23. It is relatively straightforward to understand how Mr. Rodgerson’s efforts at concealment and clean-up were capable of supporting the inference that he acted unlawfully. The jury could reasonably have concluded that he was attempting to conceal evidence of a crime that he had committed — that is, unlawfully causing Ms. Young’s death. However, these efforts were also capable of supporting the further inference that he was acting not merely to hide *the fact* that a crime had occurred, but to hide *the extent* of the crime. In other words, the jury might reasonably have concluded that he sought to conceal Ms. Young’s body and clean up the scene of her death in order to conceal the nature and extent of Ms. Young’s injuries and the degree of force required to inflict them. As indicated, the more severe the injuries, and the more force required to inflict them, the stronger the inference that he intended to kill Ms. Young or cause her bodily harm which he knew was likely to cause death. This is not the only inference that could be drawn from the concealment and clean-up, but it is one the jury was entitled to draw.
24. In this regard, the post-offence concealment and clean-up is simply *some* evidence that the jury could look to — in addition to the evidence of Dr. Pollanen and Mr. Sibley — in deciding the nature and extent of the injuries and the degree of force required to inflict them. While the meaning of the forensic evidence was vigorously contested at trial, the Crown’s interpretation was that it revealed a more prolonged and violent physical altercation than the version of events described by Mr. Rodgerson. It was open to the jury to look to the post-offence concealment and clean-up as evidence that tended to confirm this interpretation.
25. On this point, I reach the same conclusion as the Court of Appeal. Doherty J.A. summarized the necessary inferential reasoning in the following manner:

Before the post-offence conduct relating to the hiding of the body and the clean-up of the homicide scene could assist the Crown in proving the appellant’s state of mind, the jury first had to be satisfied that there was a somewhat prolonged and bloody struggle during which the appellant struck Ms. Young in the head or face several times, or at least more than twice.  The jury could come to that conclusion only after a careful consideration of the competing interpretations of the forensic evidence placed before it. Second, the jury had to be satisfied that the appellant had engaged in the post-offence conduct to destroy evidence that would reveal an extensive struggle and assault well beyond that admitted by him in his evidence. [Emphasis added; para. 76.]

1. I do not disagree with this description of the different inferences required to make use of the concealment and clean-up evidence on the issue of intent. I am concerned, however, that this paragraph could be misinterpreted to suggest that, on this issue, it would have been impermissible for the jury to consider the concealment and clean-up evidence *at all* until it had first satisfied itself, based on *other* evidence, that the altercation between Mr. Rodgerson and Ms. Young had taken a particular form. I do not ascribe such an interpretation to Doherty J.A., but I wish to avoid any possible confusion on the matter. In my view, such an approach would needlessly complicate the jury’s already complicated analytical task. Moreover, it would represent an unwarranted requirement that the evidence be placed in artificial silos before being considered by the jury. The jurisprudence disfavours this type of evidentiary segregation: see *R. v. Morin*, [1988] 2 S.C.R. 345. The jury was entitled to consider both the forensic evidence and the evidence of post-offence concealment and clean-up simultaneously, as a whole, in determining the nature and extent of Ms. Young’s injuries and the degree of force required to inflict them.
	1. The Trial Judge Failed to Adequately Instruct the Jury on the Use of the Post-Offence Concealment and Clean-Up Evidence in Assessing Mr. Rodgerson’s Intent
2. I agree with the Court of Appeal majority that the trial judge erred in his instructions to the jury by failing to provide sufficient guidance on how to use the evidence of concealment and clean-up on the issue of intent.
	* 1. The Trial Judge’s Instructions on Post-Offence Conduct
3. The trial judge referred to Mr. Rodgerson’s concealment and clean-up on numerous occasions in his lengthy jury charge. He provided an initial, “general instruction” on post-offence conduct, in which he gave an overview of its various permissible uses and cautioned the jury about the dangers commonly associated with this type of evidence. In particular, as MacPherson J.A. observed in his reasons, the trial judge instructed the jury in accordance with the cautionary requirements set forth in this Court’s decisions in *R. v. White*,[1998] 2 S.C.R. 72 (“*White 1998*”), and *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 (“*White 2011*”). The trial judge stated:

3. . . . I wish to *caution* you about a potential danger concerning post offence conduct. Post offence conduct may appear more probative than it really is, and may be, by its very nature, less reliable than it seems, or may be consistent with other less obvious explanations than the one advanced by Crown counsel. You must consider evidence of post offence conduct with care and the caution I have provided to you. I would also direct you to reserve your final judgment about . . . Jason Rodgerson’s post offence conduct until *all* the evidence has been considered during your deliberations.

4. What a person said or did *after* an offence was committed *may* indicate that he acted or spoke in a way which, according to human experience and logic, is consistent with the conduct of a person who committed the offence and inconsistent with the conduct of someone who did not do so. On the other hand, there may be other explanations for what Jason Rodgerson said or did afterwards, such that the conduct does not assist in deciding whether he acted unlawfully or whether or not he intended to kill Amber Young. [Emphasis in original; A.R., vol. IX, at p. 63.]

1. Throughout the charge, the trial judge repeatedly referred back to the evidence of concealment and clean-up in his instructions on the elements of the relevant offences and of Mr. Rodgerson’s defences. On each occasion, he provided the same type of generic instruction. He did not draw any distinction between using the concealment and clean-up evidence to evaluate whether Ms. Young died as a result of an unlawful act, and using it to evaluate Mr. Rodgerson’s intent. Each time, he simply instructed the jury that “[o]nce again you also have to consider the post offence conduct which I have previously outlined to you”, or words to that effect (A.R., vol. IX, at p. 119). On some occasions, the trial judge provided a brief factual summary of the relevant evidence, while on others he did not. At no point, however, did he assist the jury in understanding *how* it could use the concealment and clean-up evidence in determining whether Mr. Rodgerson had the requisite intent for murder. Nor did he explain how the inferential reasoning was different on this issue than on the question of whether Mr. Rodgerson had acted unlawfully.
	* 1. A More Specific Instruction Was Required
2. The jury was entitled to consider the concealment and clean-up evidence in respect of Mr. Rodgerson’s self-defence claim and whether he *unlawfully* killed Ms. Young. It was also entitled to consider this evidence in evaluating whether he had the requisite intent for murder. Regarding self-defence and unlawful killing, the relevance of the concealment and clean-up and the nature of the available inference was a matter of common sense: concealing the body and cleaning up the scene of Ms. Young’s death could be viewed as evidence that Mr. Rodgerson knew he had killed Ms. Young unlawfully and was acting to cover it up. Once the jury moved on to the issue of intent for murder, however, this simple inferential reasoning was no longer of any use. Rather, the limited relevance of this post-offence conduct on the issue of intent rested on the following, narrower inference: the jury might reasonably conclude that Mr. Rodgerson concealed Ms. Young’s body and cleaned up the scene of her death in order to conceal the nature and extent of her injuries and the degree of force required to inflict them.
3. In the sections of the jury charge relating to the issue of intent, the trial judge failed to link the evidence of concealment and clean-up to the nature and extent of Ms. Young’s injuries and the force required to inflict them. Rather, his charge merely reiterated the existence of the evidence, and instructed the jury to consider it along with all the other evidence adduced at trial. This was a legal error. Having first used the concealment and clean-up evidence in a common sense manner based on clear and readily accessible inferences, there was a risk that the jury might continue to rely on the evidence in this same manner on the issue of intent. The failure to instruct the jury on the narrower basis for using the evidence created a risk that the jury might convict Mr. Rodgerson for murder based only on the broader inference that had previously been sufficient: that the concealment and clean-up pointed to a consciousness of guilt and a desire to prevent discovery of an unlawful killing.
4. A more specific instruction was required. It need not have been long or complex. After first explaining to the jury the factual link between Mr. Rodgerson’s concealment and clean-up efforts and the resulting concealment of the injuries to Ms. Young’s body and the blood at the scene, the trial judge need only have added a few sentences, along these lines:

The nature and extent of the injuries and the force used to inflict them are factors you may consider in assessing Mr. Rodgerson’s intent at the time he caused Ms. Young’s death. In this regard, you may take into account the evidence of Mr. Rodgerson’s concealment and clean-up in determining whether he intended to kill Ms. Young, or to cause her serious bodily harm which he knew was likely to cause death. On this issue, you will need to consider this evidence in a different way than I have instructed you previously. You may conclude that Mr. Rodgerson sought to conceal Ms. Young’s body and clean up the scene of her death in order to conceal the nature and extent of Ms. Young’s injuries and the degree of force required to inflict them. You may or may not reach this conclusion — it is up to you — but if you do reach this conclusion, you may consider this along with all of the other pertinent evidence in determining whether Mr. Rodgerson had the requisite intent for murder.

1. In crafting the jury charge, a trial judge has a general duty to inform the jury of the relevant evidence, and to assist the jury in linking that evidence to the issues that it must consider in reaching a verdict. The level of detail that is required varies depending on the context. As the majority of this Court stated in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, perBastarache J.:

The extent to which the evidence must be reviewed “will depend on each particular case.  The test is one of fairness.  The accused is entitled to a fair trial and to make full answer and defence.  So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the issues and the defence presented, the charge will be adequate” . . . . [para. 57]

(Quoting C. Granger, *The Criminal Jury Trial in Canada* (2nd ed. 1996), at p. 249.)

1. I do not suggest that the evidence of concealment and clean-up in this case was technical or unusually involved. However, its relevance to the issue of intent was more than a matter of common sense, and a more specific instruction was required in order to present the evidence and the available inferences to the jury in a comprehensible form. As described in *Daley*, “the task of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language” (para. 57 (emphasis added), quoting *R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.), at para. 39, aff’d [1994] 2 S.C.R. 310). The failure to do so here amounts to a legal error.
	* 1. Requiring a More Specific Instruction Is Consistent With This Court’s Jurisprudence on Post-Offence Conduct
2. MacPherson J.A., writing in dissent, found no error in the trial judge’s instructions related to the post-offence concealment and clean-up. He concluded that the jury charge conformed to the requirements for instructions on post-offence conduct established in *White 1998* and *White 2011*.
3. Those two cases relate to a trial judge’s obligation to caution the jury about the dangers associated with post-offence conduct in general. I agree with MacPherson J.A. that the jury charge in this case provided an adequate caution against those dangers. With respect, however, I do not share his view that this conclusion disposes of the appeal.
4. The legal error in the jury charge was the failure to assist the jury in understanding the limited and somewhat nuanced relevance of the concealment and clean-up evidence on the issue of intent for murder. This error is unrelated to the required caution on the dangers associated with post-offence conduct in general. *White 1998* and *White 2011* do not serve to insulate jury instructions on post-offence conduct from challenge on other grounds. They do nothing to circumscribe the need to provide specific instructions where the relevance of the evidence on a particular issue is not readily apparent and where the natural inclinations of the jury might lead it down a wrong path. Correctly cautioning the jury in accordance with *White 1998* and *White 2011* is therefore necessary, but not always sufficient.
	* 1. The “Gaps” in the Jury Charge Were Not Filled by the Crown’s Closing Argument
5. The Crown asserts that its closing submissions at trial “arguably filled precisely the ‘gaps’ in the charge that concerned the majority at the Court of Appeal” (A.F., at para. 62). As the majority of this Court stated in *Daley*, the “charge to the jury takes place not in isolation, but in the context of the trial as a whole”, and therefore “[a]ppellate review of the trial judge’s charge will encompass the addresses of counsel as they may fill gaps left in the charge” (para. 58). On the facts of this case, however, I am unpersuaded that the Crown’s closing address was sufficient to remedy the deficiency in the jury charge.
6. The Crown made several statements during its closing submissions that were of some value in explaining to the jury how the evidence of concealment and clean-up related to the issue of intent. However, they were scattered throughout a lengthy closing argument, and many of them were vague and oblique. Most important, just like the trial judge, the Crown never hit the nail on the head. The Crown’s closing argument did not contain a clear and simple description of the way in which the concealment and clean-up evidence could be used in evaluating the issue of Mr. Rodgerson’s intent. The submissions lacked a direct explanation of the permissible inference, as described by Doherty J.A., that Mr. Rodgerson attempted to conceal Ms. Young’s body and clean up the scene of her death “because the injuries to the body and the blood at the scene would reveal an assault consistent only with an intention to cause bodily harm that would likely cause death” (para. 68). As such, the closing submissions do not suffice to fill the gap and correct the legal error in the jury charge.
7. I should also note, in regard to the instructions on Mr. Rodgerson’s flight from and lies to the police, that the legal error amounted to misdirection, not non-direction. The trial judge instructed the jury that it could use the evidence to infer that Mr. Rodgerson had the requisite intent for murder, when no such inference was available. The error was unrelated to a gap in the charge, and as such, the gap-filling principle contemplated by *Daley* could have no application.
	1. The Curative Proviso Does Not Apply
8. The charge contained two legal errors. First, it is not disputed that the trial judge erred by instructing the jury to consider Mr. Rodgerson’s flight from and lies to the police on the issue of intent. Second, the trial judge erred in his instructions on Mr. Rodgerson’s concealment and clean-up efforts.
9. The Crown argues that, notwithstanding any such errors, the curative proviso should apply. I agree with Doherty J.A.’s analysis on this point. As he noted, after the jury rejected self-defence, the issue of Mr. Rodgerson’s intent was “the central issue at trial”, and these two errors “went directly to the jury’s consideration of that issue” (para. 79). Furthermore, the Crown’s case was not overwhelming. The curative proviso does not apply, and Mr. Rodgerson is entitled to a new trial for second degree murder.
	1. The Jury Charge as a Whole
10. In his dissenting opinion, MacPherson J.A. expressed concern about requiring a more specific instruction on the concealment and clean-up evidence, in part because he did not wish to further fuel the trend towards lengthier and more complex jury charges. In his view,

appellate courts should be very wary of expanding jury instructions . . . . A common theme of contemporary judicial and counsel discourse is that jury charges today are not as helpful to juries as in times past. That is because the modern jury charge is, especially in most murder cases, exceptionally long and complex, rendering doubtful a jury’s comprehension and comfort. [para. 103]

In her factum, Ms. Stephens for the Crown echoes this concern, noting that “[t]his charge was already incredibly long and complex” (para. 71). Quoting from both *Daley*, at para. 56, and *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 13, the Crown emphasizes that “[b]revity in the jury charge is desired” and “[t]he judge’s role is to ‘decant and simplify’” (para. 41).

1. While I differ on the disposition of this appeal, I share these concerns about the proliferation of long and unnecessarily complex jury charges. The jury charge in this case spans over 200 pages and took a full day to present in court. I have concluded that the trial judge erred by failing to sufficiently aid the jury in understanding how to use the evidence of post-offence concealment and clean-up on the issue of intent. I emphatically reject any suggestion, however, that an even longer jury charge was required in this case.
2. I start with the observation that a jury charge may be “so unnecessarily confusing that it constitute[s] an error of law” (*R. v. Hebert*, [1996] 2 S.C.R. 272, at p. 277). It is apparent that taming the unchecked expansion of jury charges is not merely advisable — it is a legal necessity. Mr. Rodgerson does not argue that the jury charge in this case was so complex and confusing that it meets the *Hebert* standard. However, having reviewed the charge in its entirety, I feel obliged to comment on the detrimental impact that increasingly long and complex jury charges are having on our criminal justice system. In doing so, I intend no disrespect to the trial judge, who obviously put a great deal of time and effort into preparing the charge.
3. The basic facts of Ms. Young’s death were not disputed at trial. Mr. Rodgerson’s testimony asserting self-defence and the Crown’s contradictory theory were both clear and readily comprehensible. In my respectful view, the length, repetitiveness, and complexity of the jury charge were unwarranted. The unwieldy final product resulted from a combination of decisions taken by the Crown, defence counsel, and the trial judge. Each of these actors, both in this case and in the justice system at large, bears a responsibility for ensuring that jury charges are as clear and comprehensible as possible. Rote, repetitive and generic charges are of little value, and are often harmful to the jury’s comprehension. Indeed, they can and do lead to instruction that is all but meaningless. Charges should be thoughtfully tailored to focus on the key evidence and the key issues that are relevant in the particular context of the case.
	* 1. The Role of the Crown
4. A significant contributing factor to the lengthy and convoluted jury charge in this case was the decision by Crown counsel at trial (not Ms. Stephens) to pursue a conviction for first degree murder. Ms. Stephens concedes that the first degree murder count was “entirely based on circumstantial evidence” (transcript, at p. 8). I would go further and suggest that the evidence supporting first degree murder was paper thin, and more a matter of speculation than of inferences that could reasonably be drawn from the circumstantial evidence. Put simply, I have difficulty seeing how it could pass the reasonable prospect of conviction threshold. The decision to proceed with first degree murder required the trial judge to include instructions on each of the four separate theories of constructive first degree murder advanced by the Crown: that Mr. Rodgerson intentionally killed Ms. Young in the course of (1) a sexual assault; or (2) an unlawful confinement; or (3) an attempted sexual assault; or (4) an attempted unlawful confinement. This increased the length of the jury charge by almost 40 pages.
5. The jury in this case did not convict Mr. Rodgerson of first degree murder, but rather of the lesser included offence of second degree murder. As such, in a new trial, only the second degree murder charge will be before the jury. This will reduce the complexity of the jury charge. This same concern will arise in future cases, however. Certainly, it is within the Crown’s discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete.
6. While trial judges must proceed with caution, I see no difficulty in questioning Crown counsel about the efficacy of proceeding with a more serious charge or charges in circumstances where the evidence surpasses the directed verdict threshold, but only barely. Apart from increasing the length and complexity of the jury charge and the burden on the jury in its deliberation process, charging a more serious offence risks deflecting the jury’s attention away from the crucial issue or issues upon which the case truly hinges.
	* 1. The Role of Defence Counsel
7. The defence theory of the case was relatively straightforward. Mr. Rodgerson, testifying in his own defence, asserted that Ms. Young attacked him unexpectedly with a knife causing him to fear for his life, that he used physical force only to protect himself, and that she died during the course of their struggle — a death which he did not intend to cause. This simple narrative generated jury instructions on the defence of “involuntary act” accident, and three different bases of self-defence under ss. 34(1), 34(2), and 35 of the *Criminal Code*, as they then existed (amended S.C. 2012, c. 9, s. 2). Nearly a quarter of the jury charge was dedicated to instructions on these four topics, three of which were unnecessary and only served to complicate the charge.
8. To begin, there was no basis for providing instruction on the defence of “involuntary act” accident. While Mr. Rodgerson did testify that Ms. Young’s death was an accident, this was a case of accident going to *mens rea* — i.e., Mr. Rodgerson’s claim that he did not intend to kill Ms. Young. In oral submissions on behalf of Mr. Rodgerson, Mr. Hicks, who was not counsel at trial, acknowledged that there was no basis for an instruction on “involuntary act” accident, and indicated that none would be sought should the order for a new trial be upheld (transcript, at p. 53).[[1]](#footnote-1) Mr. Hicks also acknowledged that s. 34(2) alone would have encompassed the basis of self-defence asserted by Mr. Rodgerson’s testimony (pp. 53-54). Section 34(2) was available if Mr. Rodgerson accidentally killed Ms. Young, or if he did so intentionally: see *R. v. Pintar* (1996), 30 O.R. (3d) 483 (C.A.), at p. 497. Mr. Rodgerson received no benefit from having two additional forms of self-defence put to the jury. Such instruction could only serve to complicate the charge and confuse the jury (*Pintar*, p. 497).
9. Defence counsel, while of course seeking to advance the client’s defence by all lawful and ethical means, also has an obligation to assist the trial judge in crafting a jury charge that provides clear and comprehensible instructions on the defences that are actually implicated by the defence theory of the case. Had that been done here by defence counsel at trial, the charge could have been shortened by nearly 50 pages.
	* 1. The Role of the Trial Judge
10. While the Crown and defence counsel both have roles to play, the role of the trial judge is the most vital, and the most difficult, in formulating jury instructions. A trial judge must strike a crucial balance by crafting a jury charge that is both comprehensive and comprehensible. Recognizing the difficulty inherent in this task, this Court has “repeatedly endorsed” the functional approach to reviewing jury charges (*R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 49). This functional approach is designed to “ensure that the yardstick by which we measure the fitness of a [jury charge] does not become overly onerous”, in order to reduce “the proliferation of very lengthy charges in which judges often quote large extracts from appellate decisions simply to safeguard verdicts from appeal” (*Jacquard*, at para. 1). Under the functional approach, the trial judge’s duty is to “decant and simplify” (*ibid.*, at para. 13). Over-charging is just as incompatible with this duty as is under-charging.
11. More than 15 years later, the concern expressed in *Jacquard* remains. However, rather than quoting large extracts from appellate decisions, trial judges have taken to quoting large extracts from model charge manuals to safeguard their verdicts from appeal. This has resulted in an overreliance on the rote reproduction of excerpts from model jury instructions. But model charge manuals do not necessarily translate into model charges. They are a tool, not the final product. They are there to guide, not govern. In my view, the failure to isolate the critical issues in a case and tailor the charge to them inevitably makes the instructions less helpful to the jury and adds unnecessarily to their length and complexity.
12. Courts have repeatedly emphasized that the jury charge must “be tailored to the facts of the specific case” (*R. v. McNeil* (2006), 84 O.R. (3d) 125 (C.A.), at para. 21). While “[t]he model instructions are intended to provide a starting point for trial judges”, modification will frequently be required to provide the jury “with the applicable legal principles in a format that facilitates the application of those principles to the specific circumstances of the case” (*ibid.*). Trial judges must “separate the wheat from the chaff” when determining which defences may be applicable, and must engage in a “careful and considered culling . . . to avoid unnecessary, inappropriate and irrelevant legal instruction of a kind that might well divert the jury’s attention” from the primary disputed issues in the case (*Pintar*, at p. 494).
13. This principle was endorsed in *Helping Jurors Understand* (2007), at p. 82, by no less authority than Justice Watt of the Ontario Court of Appeal (then of the Superior Court of Justice), also the author of the *Ontario Specimen Jury Instructions* *(Criminal)* (2003):

A specimen is a sample.  A specimen instruction is a sample instruction about its subject-matter.  Specimen instructions do *not* and cannot be expected to provide legally accurate directions for every set of circumstances that fall within their reach.  There are no one-size-fits-all jury instructions.  At best, specimen instructions provide the basic building blocks for finals and other instructions.  The twists and turns of individual cases will dictate the nature and extent of modification required to ensure legal accuracy. [Emphasis in original.]

1. In the present case, a few modest alterations would have saved this jury charge from legal error. At the same time, a great many of the instructions that were included could and should have been removed. In the event that Mr. Rodgerson’s new trial adduces substantially similar evidence, and the positions of the parties on that evidence remain the same, it is my view that a substantially more streamlined jury charge would suffice. Mr. Rodgerson would benefit from a jury keenly focused on the evidence and arguments forming the basis of his defence, and not distracted by hours of confusing and repetitive generic instruction. The Crown would also benefit from a simplified charge, with fewer unnecessary contours in which grounds for an appeal of conviction may lay hidden. I do not wish to appear naïve, and I recognize that such an everybody-wins approach is easier said than done. Nevertheless, I remain firmly of the view that “common sense and the law need not be strangers”, and that the fundamental purpose of the jury charge must be “to educate, not complicate” (*R. v. Zebedee* (2006), 81 O.R. (3d) 583 (C.A.), at para. 82).
2. Conclusion
3. It was open to the jury to conclude that Mr. Rodgerson sought to conceal Ms. Young’s body and clean up the scene of her death in order to conceal the nature and extent of her injuries and the degree of force required to inflict them. This in turn could have been relevant on the issue of whether Mr. Rodgerson had the requisite intent for murder: the more severe the injuries, and the more force required to inflict them, the stronger the inference that Mr. Rodgerson intended to kill, or to cause bodily harm which he knew was likely to cause death.
4. This chain of inferential reasoning was narrow, and the relevance of the evidence was attenuated. The trial judge should have assisted the jury with a specific instruction on how to link the concealment and clean-up evidence with the issue of intent. His failure to do so was a legal error, and one that is sufficiently serious, in conjunction with the erroneous instructions on Mr. Rodgerson’s flight from and lies to the police, that the curative proviso cannot apply. I would dismiss the Crown’s appeal and affirm the Court of Appeal’s judgment ordering a new trial on a charge of second degree murder.

 *Appeal dismissed.*

 Solicitor for the appellant: Attorney General of Ontario, Toronto.

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1. During the pre-charge conference, defence counsel relied on *R. v. Mathisen*, 2008 ONCA 747, 239 C.C.C. (3d) 63, to support his request for an instruction on the defence of “involuntary act” accident. The trial judge expressed skepticism that this defence had an air of reality on the record, but agreed to include the instruction because Crown counsel did not oppose the request. In my view, the facts of this case on this issue bear little resemblance to *Mathisen*. On cross-examination, Mr. Rodgerson testified that he applied pressure to Ms. Young’s face with his arm using as much force as he thought was necessary in order to restrain her from stabbing him. In his closing submission to the jury, defence counsel reiterated that Mr. Rodgerson “was pressing down on her face as hard as [he] could” (A.R., vol. VIII, at p. 153). On this record and these submissions, there was no basis to instruct the jury on the defence of “involuntary act” accident. [↑](#footnote-ref-1)