

CANADA / JUDGMENT

R. v. Chokrev-Evans

2025 BCCA 311

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 311 R. v. Chokrev-Evans

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chokrev-Evans,

2025 BCCA 311

Date: 20250924

Docket: CA49924

Between:

Rex

Respondent

And

Hayden Chokrev-Evans

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify the complainant. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Willcock

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia,
dated February 9, 2024 (R. v. Chokrev-Evans, Victoria Docket 185456).

Counsel for the Appellant:

T.M. Arbogast, K.C.

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Victoria, British Columbia

June 3, 2025

Supplementary Written Submissions Received:

July 4 and July 15, 2025

Place and Date of Judgment:

Vancouver, British Columbia

September 24, 2025

Written Reasons by:

The Honourable Chief Justice Marchand

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Justice Riley

Summary:

The appellant was convicted by a jury of sexual assault causing bodily harm. His appeal raises two issues concerning how the judge dealt with evidence of other sexual activity between the appellant and the complainant that occurred apart from the sexual assault. First, he claims the judge erred by failing to hold an inquiry under s. 276 of the Criminal Code regarding alleged prior sexual "instances" between the appellant and the complainant. Second, he argues the judge erred by failing to conduct a voir dire before admitting sexualized communications into evidence. Held: Appeal dismissed. No evidence was presented to the jury about any alleged prior sexual "instances". Neither the appellant nor the Crown brought an application to adduce evidence of prior sexual activity. Rather, they both took steps to avoid eliciting testimony relating to any prior sexual interactions. There was therefore no reason for the judge to initiate a s. 276 inquiry. Although the judge erred by failing to conduct a voir dire prior to admitting a number of

sexualized communications between the appellant and the complainant, the errors were harmless individually and cumulatively. The curative proviso applies.

Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

- [1] On February 9, 2024, the appellant, Hayden Chokrev-Evans, was convicted by a jury of one count of sexual assault causing bodily harm and acquitted of one count of uttering threats to cause death or bodily harm. On May 21, 2024, he was sentenced to three years and eight months imprisonment: 2024 BCSC 917 [Reasons for Sentence].
- [2] Mr. Chokrev-Evans appeals his conviction. His appeal raises two separate issues concerning how the judge dealt with evidence of sexual activity between Mr. Chokrev-Evans and the complainant that occurred apart from the sexual assault.
- [3] First, he claims the judge erred by failing to hold an inquiry under s. 276 of the Criminal Code, R.S.C. 1985, c. C-46, regarding alleged prior sexual "instances" between Mr. Chokrev-Evans and the complainant. Second, he argues the judge erred by failing to conduct a voir dire before admitting sexualized communications between Mr. Chokrev-Evans and the complainant into evidence.
- [4] For the reasons that follow, I would dismiss the appeal.

Background

- [5] This was a two-witness trial. The complainant testified for the Crown and Mr. Chokrev-Evans testified in his defence.
- [6] In October 2022, the complainant and Mr. Chokrev-Evans met on a dating app. They were both in their early twenties. The complainant was living and working in Port Alberni. Mr. Chokrev-Evans was in the armed forces and living in a dormitory at a naval base in Esquimalt. They began communicating on a social media platform, Snapchat, and through text messages and phone calls. They met in person in Nanaimo on October 11. The sexual assault occurred at their second meeting on October 15, 2022, when the complainant drove to meet Mr. Chokrev-Evans at the naval base.
- [7] The complainant testified she arrived at Mr. Chokrev-Evans' dorm room around noon. After watching TV for a few hours, Mr. Chokrev-Evans went to the gym for about 30 minutes while she stayed in his room.
- [8] The complainant's evidence was that Mr. Chokrev-Evans assaulted her immediately after returning from the gym. She described a violent sexual assault in which Mr. Chokrev-Evans choked her, struck her repeatedly in the head, and bashed her head against the wall. She testified that at certain points she felt like she was being strangled, could not breathe and was beginning to lose consciousness.

- [9] The Crown introduced photographs of her injuries to corroborate her testimony.
- [10] Following the assault, the complainant did not feel she could safely leave Mr. Chokrev-Evans' apartment. She testified Mr. Chokrev-Evans said vulgar things to her, including that he wanted to bring other cadets into the room so they could rape her. She also said he told her if she spoke about what happened he would kill her. She left the following morning when Mr. Chokrev-Evans was out of the apartment.
- [11] On cross-examination, defence counsel suggested to the complainant she had fabricated allegations of a violent sexual assault because she was upset with Mr. Chokrev-Evans for misleading her into thinking he was interested in a long-term relationship and for mistreating her after they had consensual sex. The complainant denied these suggestions.
- [12] Mr. Chokrev-Evans, by contrast, testified he and the complainant had consensual sex. He denied the violent assault described by the complainant. He also denied threatening her.
- [13] Mr. Chokrev-Evans testified he had misled the complainant about his intentions and manipulated her into having sex with him. Mr. Chokrev-Evans admitted that after they had consensual sex in his dorm room, he said vulgar, insensitive things to the complainant and told her he did not want to see her again. He agreed he did not care about the complainant's feelings after he had sex with her.

Sexual activity before and after the sexual assault

- [14] As I noted at the outset, Mr. Chokrev-Evans' appeal centers on how the judge dealt with sexual activity between Mr. Chokrev-Evans and the complainant falling outside the sexual activity that formed the subject-matter of the sexual assault charge.
- [15] Two categories of sexual activity are at issue: (1) prior sexual contact alluded to by counsel in discussions with the judge but not raised in evidence before the jury; and (2) evidence of sexualized communications between Mr. Chokrev-Evans and the complainant, namely pre-incident text communications, post-incident text communications and a short video.
- (1) Prior sexual contact
- [16] Discussions at trial between defence counsel, the Crown and the judge alluded to prior sexual "instances" between Mr. Chokrev-Evans and the complainant. These discussions occurred on several occasions, all outside the presence of the jury. Both defence counsel and the Crown emphasized the need to avoid raising evidence of any previous sexual encounters because it would be presumptively inadmissible under s. 276 of the Criminal Code. They noted there had never been a Seaboyer or s. 276 application, nor a determination of admissibility, in relation to any prior sexual activity.
- [17] Counsel for Mr. Chokrev-Evans highlights three points at which these discussions occurred. First, during defence counsel's cross-examination of the complainant, this exchange occurred with the judge (but not in the presence of the jury):

THE COURT: Counsel, we're ready for the jury?

CROWN: Not quite, Justice. There's one issue we wanted to advise the court about just because we've been discussing how to avoid a possible 276 issue. And so, I believe my friend wanted to advise the court of what our intention is so that we don't start raising any alarm bells in your mind when you hear the potential cross-examination.

DEFENCE COUNSEL: Yes, Justice, and I thank my friend for -- and the court, of course, for your indulgence this morning. I'm just trying to make sure that we don't go into any potential minefields. The issue I raised with my friend and that we discussed was over the video and the intention is to challenge -- or the intention was to challenge [the complainant] about when the video was taken and the timeline.

And this is something that, depending on how it's asked, might bring forward 276 issues that we're very much trying to avoid. So, what we've -- what I've discussed with my friend is as far as the video and my questions -- and we thought we'd raise with the court just in case the court had any thoughts or additional guidance.

[Emphasis added.]

[18] And again, just prior to the cross-examination of Mr. Chokrev-Evans, a similar exchange occurred:

THE COURT: [I]s there an issue to be addressed?

CROWN: Just briefly. It's an issue we're trying to avoid, actually.

THE COURT: Okay.

CROWN: I'm not sure if, Justice, you've had a chance to read the Crown synopsis that was filed at the pretrial conference some time ago.

THE COURT: I would've printed it off in this binder here. I may have read it. Okay, go ahead.

CROWN: Essentially, there are prior sexual instances in this case that defence counsel and I have been careful to avoid. There was never a Seaboyer application, there was never any sort of declaration of admissibility, so we have been avoiding those issues. This has proven to be a little bit of a line for us to walk and we are continuing to try to walk that line. I just had a brief discussion with my friend outside of court regarding my cross-examination and clarifying issues so I better understand it. And as I understand now, Mr. Chokrev-Evans' evidence is that the sexual encounter after the gym is not related to ones that occurred before which was something that was a little unclear in my mind -

THE COURT: Not related to ones that occurred before?

CROWN: Yes.

THE COURT: Before he went to the gym?

CROWN: Correct.

THE COURT: Okay.

CROWN: And that the gym is kind of our timeframe for -

THE COURT: Right. Okay

CROWN: Instances that occurred before the gym were never declared admissible, so we're just dealing with the versions after the gym. And my friend clarified for me some confusion I'd had because in my mind some of his evidence sounded like he was describing one of the earlier instances. So, in short, hopefully I say nothing that my friend will find objectionable, but I just wanted to provide the court a bit of background in case -

[19] And finally, during the cross-examination of Mr. Chokrev-Evans, the issue was again raised before the judge:

DEFENCE COUNSEL: Justice, I'm not -- I don't think this is adverten[ce] on my friend's part, but we're coming very, very close to opening up a 276 can of worms, and I just want to raise that because I think the next question -- I don't know what the next question is, so my friend might be able to say no, we're not, and then I'm satisfied, but I thought I would object because we're -- and generally, we're also going to have to discuss what purposes this video can be used for after Mr. Chokrev-Evans finishes his evidence. But as you see in the synopsis there's other sexual activity and it may be that Mr. Chokrev -- I don't want to predict what his evidence is, but I'm worried that the questioning is going to bring that sexual activity into play.

THE COURT: All right. Well, I understand we're trying to avoid that, so I don't -- the question that was asked, "why", and he had said "because of the words used", to try and establish a timeline for this [video].

CROWN: That was my intention. And I -- I really know nothing about the background as to when or why this [video] was taken. I don't have any evidence from Mr. Chokrev-Evans regarding that. My intention was to ask about who he was speaking to [in the video] because he was referring -- talking about it in the third person, and why he made it. If asking when he made it raises problems, I can move on from that, but, I mean, as I mentioned, I really know nothing about the background and I'm trying to explore this bit of evidence.

THE COURT: Okay. Well, why don't we take the morning recess? Perhaps you and counsel can discuss again how to avoid getting into any issues of any prior sexual activity.

[Emphasis added.]

[20] Reference to sexual activity was also made in the Crown's synopsis, filed with the court at a pre-trial conference. The synopsis said:

NOTE: no application has been filed regarding admissibility of sexual contact earlier on October 15th. Although the subject was canvassed at the preliminary hearing, Crown is not conceding admissibility at trial.

[21] The jury did not hear any evidence of prior sexual contact between Mr. Chokrev-Evans and the complainant.

(2) Sexualized communications

a) Pre-incident text communications

[22] During the complainant's examination-in-chief, the Crown entered a book of documents as a trial exhibit ("Exhibit 1") without objection from the defence.

[23] Exhibit 1 includes text messages of a sexual nature that fall squarely within the scope of s. 276 and, more specifically, s. 276(4). At trial, the text messages would have been subject to a presumptive publication ban under s. 278.95(1). The complainant's personal interests in privacy and dignity are equally present on appeal, but the presumptive protections under s. 278.95(1) do not extend to appellate proceedings: *R. v. T.W.W.*, 2024 SCC 19 at para. 69. Instead, this Court must start from a presumption of openness and balance the complainant's personal interests against the interests of justice, as informed by the particular function of this Court as the apex appellate Court in British Columbia: *T.W.W.* at para. 69.

[24] In this case, it is necessary to include some limited excerpts from the text messages in order to adequately address Mr. Chokrev-Evans' submissions and provide clarity in the law. The portions of the text messages reproduced below have been limited to the extent possible and the mandatory ban on publication of information that would identify the complainant affords significant protection of her personal interests.

[25] Exhibit 1 included a text message exchange on October 12, 2022 (three days prior to the sexual assault), where Mr. Chokrev-Evans and the complainant discussed the complainant's health benefits plan. Mr. Chokrev-Evans characterizes their exchange as being sexually explicit. This is the full exchange:

Mr. Chokrev-Evans: I wanna hear about the zero benefits u job has

Complainant: Actually we have acupuncture fully covered

Complainant: If you wanted some needles stuck into you

Mr. Chokrev-Evans: What if I want additional 2 inches?

Mr. Chokrev-Evans: Is that covered

Complainant: I'll look into the policy for you

Mr. Chokrev-Evans: Looks like your out of luck

Complainant: Have to stick with the 3 inches for now :(

Mr. Chokrev-Evans: What if it's medical

Mr. Chokrev-Evans: Like my penis is so small I can't use it

Complainant: I think there's a support group for people with a micro penis

Mr. Chokrev-Evans: The support group won't solve that problem though

Mr. Chokrev-Evans: :(

Complainant: Use your military coverage

Mr. Chokrev-Evans: I will try

Mr. Chokrev-Evans: And hopefully get us some implants too

Complainant: For my ass or my tits?

Mr. Chokrev-Evans: Tits

Mr. Chokrev-Evans: I can talk on the phone

Complainant: How big are you trying to make my tits? Goddamn

Complainant: And I'm just about to hop into the shower but if you're still free around 7:30 I can call then

[26] Neither the complainant nor Mr. Chokrev-Evans was asked about these specific messages during their testimony.

b) Post-incident text communications

[27] Exhibit 1 also included text messages exchanged after the complainant left Mr. Chokrev-Evans' dorm. Again, I reproduce only what is necessary to adequately address Mr. Chokrev-Evans' submissions and provide clarity in the law.

[28] Approximately two hours after she left, this exchange occurred:

Mr. Chokrev-Evans: It sucks u left my buddy wanted to hit it

Mr. Chokrev-Evans: This is him

Complainant: Damn I missed out

Mr. Chokrev-Evans: I know

Mr. Chokrev-Evans: I'm being serious

Complainant: Are you actually?

Mr. Chokrev-Evans: Yeah

Mr. Chokrev-Evans: Too late now

Complainant: Aww damn

Mr. Chokrev-Evans: I showed him a picture

- [29] The complainant interpreted the message, "It sucks u left my buddy wanted to hit it", as referring to Mr. Chokrev-Evans' previous threat to her that he wanted to bring other cadets into his room so they could rape her. The complainant testified that, even though she had left, she remained fearful and didn't want to seem suspicious in her response. She decided to respond in a casual manner.
- [30] Mr. Chokrev-Evans agreed he messaged the complainant to tell her his "buddy" wanted to "hit it". He denied this was a threat. He testified he was just telling the complainant his friend wanted to have sex with her and it was a "shame that she had left and that it didn't happen".
- [31] The complainant testified she also received another message from Mr. Chokrev-Evans two days after the sexual assault. This message attached a news story about a woman who stabbed her Tinder date. This message was also in Exhibit 1. The complainant testified she interpreted this message as another threat. Mr. Chokrev-Evans testified he sent this story to her as a joke because he "thought it was funny".
- c) Video recording
- [32] Finally, in the complainant's examination-in-chief, the Crown entered a video as an exhibit, without objection. It was common ground Mr. Chokrev-Evans was heard on this video saying "yo, fuck this bitch, fuck, smash and dash, I'm about to kick her out".
- [33] The complainant testified this appeared to be a video of when she was in Mr. Chokrev-Evans' room, although she had no specific recollection of Mr. Chokrev-Evans making the video at the time. The complainant thought the video was taken around the time she first arrived because she had her shoes on in the video, but she was not sure.
- [34] Mr. Chokrev-Evans admitted he made the video. He considered the video to be a "joke" and testified it was "supposed to be funny". He was unable to say when he took the video but thought he took the video "later", contrary to the complainant's suggestion it was taken soon after she arrived in his dorm room.

Legal framework

- [35] Section 276 of the Criminal Code restricts the admissibility of defence-led evidence of a complainant's "sexual activity other than the sexual activity that forms the subject-matter of the charge" in proceedings in respect of enumerated offences, including sexual assault causing bodily harm. Section 276 is designed to prohibit twin-myth reasoning that a complainant with a prior sexual history is more likely to have consented to the sexual activity charged and/or is less worthy of belief.
- [36] Under s. 276, evidence of other sexual activity shall not be adduced by the accused unless the judge determines it: (a) is not being adduced for the purpose of supporting twin-myth inferences; (b) is relevant to an issue at trial; (c) is of specific instances of sexual activity; and (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice: s. 276(2).
- [37] Sections 278.93 and 278.94 of the Criminal Code establish a two-stage in camera procedure for applications made under s. 276. If evidence is admitted under s. 278.94(4), the judge is obliged to instruct the jury regarding the appropriate use it can make of the evidence: s. 278.96.
- [38] A substantively similar regime exists at common law to restrict the admission of Crown-led evidence of a complainant's sexual history: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 1991 CanLII 76; *R. v. Kinamore*, 2025 SCC 19 at paras. 35, 42.
- [39] The Supreme Court of Canada's recent decision in *Kinamore* clarified that, despite some technical discrepancies between the two regimes (none of which are relevant here), the rationale for treating Crown-led evidence as presumptively inadmissible "is rooted in the same three purposes as the s. 276 regime: to exclude irrelevant or misleading evidence, to protect an accused's right to a fair trial, and to safeguard the dignity, privacy, and equality interests of complainants": at para. 35.
- [40] The failure to conduct a voir dire prior to admitting such evidence is therefore an error of law. However, s. 686(1)(b)(iii) of the Criminal Code allows a Court of Appeal to dismiss an appeal where, despite having identified an error of law, it is of the opinion that no substantial wrong or miscarriage of justice has occurred. As the Court explained in *Kinamore*:
- [89] this provision generally applies where there is no reasonable possibility that the verdict would have been different in the absence of the error. This occurs in two cases: first, where the error or irregularity in question is minor or harmless, such that it had no impact on the verdict, or second, where the error or irregularity, despite being serious enough to warrant a new trial, caused no substantial wrong or miscarriage of justice because the evidence against the accused is so overwhelming that a trier of fact would inevitably convict (para. 76).

Issue 1: Did the judge err by failing to initiate a s. 276 inquiry to determine the admissibility of any prior sexual contact between Mr. Chokrev-Evans and the complainant?

Mr. Chokrev-Evans' position on appeal

- [41] Mr. Chokrev-Evans submits the trial judge erred in law by failing to order a s. 276 voir dire to evaluate whether evidence of prior sexual contact between Mr. Chokrev-Evans and the complainant should be put before the jury.
- [42] He suggests counsel erred by "tip-toeing" around prior sexual encounters and "avoiding" s. 276. In his submission, "as soon as the trial judge became alerted to very apparent issues relating to s. 276, scrutiny was mandated and the trial judge should have declared an inquiry--a voir dire--notwithstanding that both counsel were at fault for not doing so".
- [43] He submits the failure to do so led to three issues.
- [44] First, Mr. Chokrev-Evans claims the jury "was left with disjointed, incomplete and misleading evidence about the nature of the interactions" between Mr. Chokrev-Evans and the complainant. He argues evidence of their prior sexual interactions might have helped the jury to understand and interpret evidence of sexual activity already before the jury--namely, the video recording and text communications.
- [45] Second, Mr. Chokrev-Evans claims Crown counsel was able, through questions and submissions, to imply "there was no prior sexual contact between the two and that the alleged incident was predatory and premeditated, akin to almost a stranger attack."
- [46] He submits this presented a false narrative, as there "was at least one (and possibly two) prior consensual physical sexual interaction[s] in the period just before the appellant went to the gym, which calls into question whether that evidence should have been admitted as part of the actual event in question." He claims there was "possibly also an initial consensual physical interaction in Nanaimo".
- [47] Mr. Chokrev-Evans also suggests the sexual history evidence could have been relevant to understanding Mr. Chokrev-Evans' defence. He submits the absence of such evidence instead allowed the Crown to engage in "inverse twin-myth reasoning" similar to that identified in *Kinamore*.
- [48] Third, Mr. Chokrev-Evans argues the jury should have been but was not provided with any limiting instruction as to how to approach and assess the evidence in question.

Discussion

- [49] In my respectful view, there was no basis for the judge to initiate a voir dire. Nor was the judge obligated to instruct the jury about how to approach sexual history evidence it had not seen or heard.

- [50] Crown counsel, in its synopsis, flagged that the issue of prior sexual contact had been canvassed at the preliminary hearing but did not concede admissibility at trial. Neither counsel brought an application to adduce evidence of any prior sexual activity. Rather, they both took steps to avoid eliciting witness testimony relating to prior sexual interactions during trial. Given this decision, it appears both Crown and defence considered evidence of alleged prior incidents to be inadmissible. They were therefore correct to "tip-toe" around the issue. On their view of the evidence, they were required by the Criminal Code and the relevant authorities to do so.
- [51] Further, the prejudice alleged by Mr. Chokrev-Evans--that the failure to hold a s. 276 hearing led to misleading evidence or allowed Crown to present a false narrative--is entirely speculative.
- [52] As the Crown highlights, it is important to appreciate what little was said about any previous sexual interactions. The judge (not the jury) was simply told there was "other sexual activity" or "prior sexual instances" between Mr. Chokrev-Evans and the complainant. The Crown synopsis referred to "sexual contact earlier on October 15th". That is all. There were no details about where or how often these incidents may have occurred.
- [53] Again, as the Crown notes, before a trial judge can hold an admissibility hearing under s. 276(2), they must first be satisfied the accused has set out "detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial": Criminal Code, s. 278.93(2); R. v. T.W.W., 2024 SCC 19 at para. 36. No such details were disclosed to the judge.
- [54] Mr. Chokrev-Evans has not applied to adduce evidence to provide detailed particulars on appeal. There is therefore nothing before us to support his claim that prior sexual contact consisted of "at least one and (possibly two)" consensual sexual interactions "just before the appellant went to the gym" on October 15th and "possibly also an initial consensual interaction in Nanaimo" (emphasis added).
- [55] Given the lack of evidence, there is also nothing to explain how these (possible) interactions might have helped explain or contextualize the sexualized communications between Mr. Chokrev-Evans and the complainant. Similarly, there is nothing--beyond speculation--demonstrating how the absence of this evidence allowed the Crown to present a "false narrative" or how its presence might have helped in understanding Mr. Chokrev-Evans' defence.
- [56] Mr. Chokrev-Evans' claim that the Crown engaged in "inverse twin-myth reasoning" is similarly unfounded. In Kinamore, the Supreme Court made clear evidence about a complainant's sexual inactivity risked evoking impermissible reasoning that: "(1) [the complainant has] a propensity to not consent and therefore [was] less likely to have consented to the sexual activity that forms the subject matter of the charge; and (2) they are more worthy of belief": Kinamore, at para. 71 (emphasis in original).

- [57] Here, Mr. Chokrev-Evans' claim is rooted in the unproven assumption there was, in fact, prior sexual activity in Nanaimo. And as the Crown points out, Mr. Chokrev-Evans acknowledged he did not talk about "anything sexual" with the complainant when they were in Nanaimo together. Respectfully, there was nothing in the record that would have invited the jury to engage in impermissible inverse twin-myth reasoning. This aspect of the Supreme Court's decision in Kinamore is therefore not applicable.
- [58] Finally, there is nothing in the record to indicate the evidence of any prior sexual "instances" would even be admissible. Again, the presumption is such evidence is inadmissible.
- [59] The result is Mr. Chokrev-Evans has raised possible instances of previous sexual contact outside of the subject-matter of the charge without following any of the procedural protections in place to deal with this highly sensitive evidence. In addition, he has not explained how or why the alleged sexual history evidence was at all relevant.
- [60] In these circumstances, there was simply no reason for the judge to initiate a s. 276 inquiry.

Issue 2: Did the judge err by failing to conduct a voir dire before admitting evidence of communications of a sexual nature that occurred both before and after the sexual assault?

Mr. Chokrev-Evans' position on appeal

- [61] Mr. Chokrev-Evans argues the judge should have held a voir dire concerning the text communications and video recording evidence adduced by the Crown.
- [62] Mr. Chokrev-Evans points out the judge, in the Reasons for Sentence, described the "hit it" text message as "disturbing": at para. 22. Although Mr. Chokrev-Evans acknowledges this is one possible interpretation of the message, he claims the sexual communications as a whole (including the pre-incident text communications and the video recording) could be interpreted as "bawdy and lewd", and the "hit it" message "could be read as simply part of the unique vulgar repartee between the two". The failure to hold a voir dire meant the court never assessed how this evidence might be interpreted prior to its admission.

Discussion

Pre-incident text communications

- [63] Section 276(4) of the Criminal Code defines "other sexual activity" broadly to include "any communication made for a sexual purpose or whose content is of a sexual nature". The Crown acknowledges the text communications fall within this definition and, because they were entered into evidence by the Crown, should have been subject to a voir dire. However, it claims the failure to hold a voir dire did not result in any prejudice to Mr. Chokrev-Evans.
- [64] I agree. The Crown should not have adduced these sexualized communications without applying to do so. Though defence counsel did not object to the evidence, the trial judge was required to conduct a voir dire. She erred in law by failing to do so.

- [65] But the error was harmless. The sexual banter between Mr. Chokrev-Evans and the complainant about her benefits package was innocuous and could not possibly have impacted the jury's deliberations. The sexual content of the messages was not brought up during witness testimony. Nor was it mentioned in the closing arguments of either party.
- [66] There is no reasonable possibility the verdict would have been different in the absence of the error. The curative proviso (Criminal Code, s. 686(1)(b)(iii)) therefore applies.

Post-incident text communications

- [67] As was the case for the pre-incident text communications, the judge erred in law by failing to conduct a voir dire prior to admitting the post-incident communications into evidence.
- [68] But again, the error was harmless.
- [69] First, both the "hit it" text message and Tinder date screenshot message were relevant to the uttering threat charge, not the sexual assault charge.
- [70] Second, there was no defence objection to the "hit it" text message being admitted. This is not surprising. That is because Mr. Chokrev-Evans' message to the complainant (whether characterized as "disturbing" or simply "vulgar repartee") supported the defence theory of just how "awful" he had treated her after the incident. This, according to defence counsel in closing submissions, demonstrated the complainant's motive to fabricate: the complainant made up allegations of non-consensual sex because Mr. Chokrev-Evans treated her in such a rude and insensitive manner after they had consensual sex.
- [71] Finally, the Tinder date message was also entered without objection and was consistent with the defence theory and Mr. Chokrev-Evans' own portrayal of himself.
- [72] Given the symmetry between the post-incident communications and Mr. Chokrev-Evans' defence, there is no reasonable possibility the verdict would have been different absent the judge's error. The curative proviso therefore applies.

Video recording

- [73] At the outset, I note it is not entirely clear whether the video was a "communication" in the sense it is not clear it was communicated to the complainant--or anyone else for that matter. In the video, Mr. Chokrev-Evans refers to the complainant only in the third person. The complainant, for her part, testified she was not aware she was being recorded and claimed she only learned of the video's existence at trial.
- [74] In any event, there is no need to decide the issue.
- [75] Accepting, for present purposes, the video constitutes "other sexual activity", the Crown should not have adduced the video without applying to do so and the judge erred in law by failing to conduct a voir dire prior to its admission into evidence. But the error was once again harmless.

- [76] The evidence played little, if any, role at trial.
- [77] The Crown claims it introduced the video for the narrow purpose of confirming the complainant was in Mr. Chokrev-Evans' room. The questions it asked of the complainant during direct examination--which focused on her confirming where she was, who else was there, and when the video was made--support this contention. Defence counsel did not object to its admission.
- [78] In closing submissions, defence counsel reiterated the video was recorded as a joke. Again, this supported Mr. Chokrev-Evans' defence that he had treated the complainant disrespectfully, leading her to fabricate the sexual assault.
- [79] The Crown then touched briefly on the video in its closing submissions. It claimed Mr. Chokrev-Evans' explanation of why he made the video "doesn't make any sense" and that "[i]t's not at all clear why he thought [the complainant] would find [the video] funny". The Crown went on to respond to defence counsel's characterization of the video:

The reason for his actually recording this encounter was so they could watch it later and maybe have a laugh about it but think about that for a minute and remember some of the other things he said, too, when he testified. He told you in court that this was a woman he cared nothing about, never wanted to see again. So, why would he make this recording to chat and laugh about it later with her? His evidence simply just doesn't make sense.

I put it to him that he was actually a Snapchat blogger, and he denied that he posted this evidence on chat -- this video on Snapchat, and you can decide if he was telling the truth about that.

- [80] As can be seen, the Crown did not misuse the video. The Crown did not argue, for example, that the video corroborated the complainant's testimony. In essence, defence counsel put forward an interpretation of the video supporting Mr. Chokrev-Evans' theory of the case. The Crown responded by attempting to undermine the credibility of his theory.
- [81] In the circumstances, although the video should have been the subject of a voir dire, the failure to conduct one was trivial and ultimately harmless. The curative proviso applies.

Cumulative impact of errors

- [82] Although considering the impact of each of the judge's errors individually is important, the analysis does not stop there. I must also consider the cumulative impact of the errors: *R. v. Charlebois*, 2000 SCC 53 at paras. 12, 39.
- [83] Having done so, I remain of the view the curative proviso applies. The evidence admitted without screening caused no prejudice to Mr. Chokrev-Evans' defence, even when considering its potential cumulative effect. He did not object to its admission, and it was either innocuous or entirely consistent with his defence. Its admission was harmless.

Disposition

[84] For the reasons above, I would dismiss the appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Riley"

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