

CANADA / JUDGMENT

R. v. Connor

2026 ONCA 87

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Connor Collection Decisions of the Court of Appeal Date 2026-02-10 Neutral citation 2026 ONCA 87 Docket numbers COA-23-CR-1003 Judges Gillese, Eileen E.; Sossin, Lorne; Monahan, Patrick J. Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. Connor, 2026 ONCA 87[1] DATE: 20260210 DOCKET: COA-23-CR-1003 Gillese, Sossin and Monahan JJ.A. BETWEEN His Majesty the King Respondent and Liam Connor Appellant Colleen McKeown, for the appellant Katie Doherty, for the respondent Heard: January 20, 2026 On appeal from the conviction entered by Justice E. Llana Nakonechny of the Superior Court of Justice, sitting with a jury, on June 21, 2023. REASONS FOR DECISION I. Overview [1] The appellant and the complainant were in a brief romantic relationship between late April and early June of 2021. The parties engaged in sexual intercourse on June 9, 2021. At trial, they both agreed that this encounter began as consensual vaginal intercourse with a condom and escalated to vaginal intercourse without a condom. They also agreed that their relationship ended that evening.

[2] The appellant testified that the sexual activity without a condom was consensual. He said that the relationship ended because of a final argument in a series of arguments, where the complainant accused him of not caring about her. The complainant testified that the intercourse without a condom was not consensual. Her evidence was that it was the unprotected sexual intercourse that caused her to end the relationship.

[3] The jury convicted the appellant of one count of sexual assault. He raises three grounds of appeal. First, the trial judge erred in her W.(D.) instructions to the jury. Second, the Crown's closing was improper and prejudiced the fairness of the trial. And third, a pre-trial s. 276/278.92 ruling led to irregularities at trial that, together with the allegedly improper Crown closing, resulted in a miscarriage of justice. For the reasons set out below, we are not persuaded of the merit of any of these arguments and dismiss the appeal. II. Decisions Below Pre-trial ss. 276/278.92 ruling

[4] The appellant brought an application pursuant to ss. 276 and 278.92 of the Criminal Code, R.S.C. 1985, c. C-46, seeking the admission of, among other things:

(1) Text messages the appellant exchanged with the complainant that showed she was frequently upset with him for not meeting her expectations; and

- (2) Evidence that he and the complainant engaged in sexual activity that did not form the subject matter of the charge. This evidence concerned two dates. First, on May 6, 2021, after the appellant and complainant had sexual intercourse for the first time, the complainant sent the appellant texts that accused him of not caring for her. Second, on June 8, 2021 (the day before the assault), after sexual intercourse, the complainant again got angry with him.
- [5] The application judge (not the trial judge) determined that the text messages that did not refer to other sexual activity were largely admissible. The application judge further determined that evidence about other sexual activity was not admissible. However, the details of the parties' arguments on May 6 and June 8, 2021, could be adduced. Some of the text messages about the May 6 argument explicitly referenced the parties' sexual activity on those days. Others implied it. The application judge set out various inadmissible portions of the text messages that referenced such activity. The application judge further concluded that the complainant could not be asked any questions that would elicit evidence about the sexual activity that occurred on these days and the jury should be given specific instructions about the relevancy of any prior sexual activity. Decision at trial
- [6] The jury found the appellant guilty of sexual assault. The trial judge delivered her charge to the jury orally over the course of two days, and subsequently provided them with written copies. She reminded the jury of the several mid-trial instructions (discussed further below) in which she directed them to disregard any evidence about any prior sexual relationship between the parties. She also explained that prior sexual activity did not make it more likely that the complainant consented to the sexual activity forming the offence alleged.
- [7] As part of her jury charge, the trial judge gave a W.(D.) instruction. She told the jury that even if they did not believe the appellant but were left in reasonable doubt on the evidence they accepted from the other witnesses, then they had to find the appellant not guilty. She also noted that if the jury could not decide "who or what to believe", they had to acquit. Finally, she instructed them that if the appellant's evidence did not leave them in reasonable doubt about his guilt, they could convict only if the rest of the evidence they accepted proved the appellant's guilt beyond a reasonable doubt.
- [8] During deliberations, the jury asked a question about the mens rea of sexual assault. As part of her re-instruction to the jury, the trial judge provided a second W.(D.) instruction. This second instruction largely repeated the contents of the first. However, it also instructed the jury that if they were left in reasonable doubt by the appellant's testimony, they had to acquit. III. GROUNDS OF appeal [9] The appellant raises the following grounds of appeal:
- (1) The trial judge erred in her W.(D.) instruction — both in her original charge and, separately, in her re-charge;
- (2) The Crown's improper closing prejudiced the fairness of the appellant's trial; and
- (3) The pre-trial ruling led to irregularities at trial, leading to a miscarriage of justice. IV. Analysis The first two grounds of appeal fail

- [10] At the oral hearing, we concluded that the first two grounds of appeal lacked merit, and accordingly did not call on the Crown to respond to them.
- [11] With respect to the W.(D.) analysis, the trial judge repeated versions of the burden of proof in the initial jury charge, and in a further clarification in response to the jury's question during deliberation. We rejected the appellant's argument that these different versions of the W.(D.) standard were inconsistent, incorrect, and confusing. Though each instruction from the trial judge had differing levels of detail, these instructions left the jury with no confusion as to their task. Further, trial counsel raised no objection to any of the instructions at the time they were given. While not determinative, the absence of an objection supports the conclusion that the instructions "conveyed what was needed and [that] the jury fully understood the task at hand": *R. v. Gibb*, 2024 ONCA 255, 436 C.C.C. (3d) 131, at para. 39, leave to appeal refused, [2025] S.C.C.A. No. 65.
- [12] Indeed, the jury was properly instructed with respect to each possible pathway to acquittal, as W.(D.) demands. The first charge (in both its oral and written forms) conveyed to the jury that they had to acquit where they either: 1) believed the appellant; 2) did not believe the appellant but accepted other witnesses' evidence that raised a reasonable doubt; or, 3) where all other evidence, regardless of whether it was accepted or not, raised a reasonable doubt. The second charge conveyed to the jury that they had to acquit if they did not believe the appellant's evidence but were left in a reasonable doubt about it. Further, the trial judge clearly explained, in both charges, that the jury could only convict if the evidence they accepted satisfied them of the appellant's guilt beyond a reasonable doubt. While it is true that the trial judge linked this pathway to conviction to the rejection of the appellant's evidence, it is clear from the whole of the charge that the jury knew that reasonable doubt could come from other sources. The appellant was entitled to a properly, not perfectly, instructed jury: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 31. He got one in this case.
- [13] With respect to the Crown's closing, we rejected the appellant's argument that the language chosen by the Crown was improper and undermined trial fairness. The Crown's reference to the bravery of the complainant in testifying notwithstanding the challenges in doing so did not cross the line into oath-helping. Similarly, the Crown's references to the appellant's testimony being implausible and unbelievable did not cross the line into inappropriate rhetorical excess. As we explain below, this aspect of the closing address also did not cause a miscarriage of justice, even when considered in conjunction with the alleged difficulties arising from the pre-trial ruling. No miscarriage of justice

- [14] With respect to the third ground of appeal, on which we heard full argument from the parties, the appellant submits the pre-trial ruling, which precluded any reference to prior sexual activity between him and the complainant, constrained his ability to answer questions asked by the Crown on cross-examination. The appellant asserts that the pre-trial ruling and the alleged difficulties to which it led in the trial evidence resulted in a miscarriage of justice.
- [15] We reject this submission.
- [16] Section 686(1)(a)(iii) of the Criminal Code empowers an appellate court to allow a conviction appeal where "a miscarriage of justice occurred". As the Supreme Court held in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 73, to determine whether a miscarriage of justice has occurred, the court must consider "whether the trial was unfair, or alternatively whether an appearance of unfairness was created." This question "should be evaluated in relation to a reasonable and objective observer, by asking if [a trial] irregularity would be such as to taint the administration of justice in his or her eyes": *Khan*, at para. 73. The appellant bears the onus. Thus, he has to satisfy the court that an irregularity occurred at trial which was serious enough to create an appearance of unfairness that would shake public confidence in the administration of justice from the perspective of a reasonable and objective person. The appellant has failed to meet that demanding onus.
- [17] Both the complainant and appellant were examined about the events of May 6 and June 8. Much of those examinations centered around a text message the complainant sent the appellant on May 6, which read: "You didn't even offer me water when I came to your place ... I feel used". The complainant characterized the upset captured in this text message as concerning the appellant's lack of care and consideration for her, including his failure to provide her with food and water after sexual intercourse. Here, and at other points during the trial, the complainant's testimony strayed into areas prohibited by the pre-trial ruling. As noted above, this necessitated two mid-trial instructions from the trial judge, where she explained to the jury that these prior instances of sexual intercourse should be disregarded and could not factor into their analysis of consent. In cross-examination, the appellant characterized the parties' argument on May 6 as merely being about his failure to provide the complainant with bottled water. Further, with respect to the June 8 incident, the appellant testified that the complainant became very upset and he did not know why.
- [18] In its closing, the Crown described the appellant's testimony on those matters as incredible. With respect to the May 6 incident, the Crown stated: Well, let's look also at May 6th. He says it's all about bottled water. And we know they spent time together that day and we know that she sends a lot of texts after. [The appellant's] explanation about why they got into a fight. Bottled water. Members of the jury, is that a satisfactory answer? Does that make sense, given what we know about all the arguments that we've painstakingly examined?

- [19] According to the appellant, the pre-trial ruling made it impossible for him to testify that the fight between himself and the complainant on May 6 was part of the complainant's self-described "freak out"[2] after the first time they had sex. It also prevented him from explaining that her desire for food and water was related to their having had sexual intercourse. The appellant contends that the jury would have been aware from the complainant's testimony that sexual intercourse preceded this argument. Despite this, the appellant contends the pre-trial ruling prevented him from relying on anything other than the absence of bottled water to explain the cause of the complainant's upset. According to the appellant, the Crown's reference to him having "no reasonable explanation" for the May 6 fight beyond his failure to bring the complainant water unfairly cast doubt on the believability of his account, given that the appellant was prevented from discussing his full understanding of the source of the argument by the pre-trial ruling.
- [20] The Crown argues that there was no irregularity arising from the appellant's reference to the lack of bottled water as the principal source of the complainant's upset. In any event, the Crown submits that the appellant has not met his burden to establish a miscarriage of justice in these circumstances.
- [21] We accept the Crown's submission. In our view, the Crown's closing submissions regarding the believability of the appellant's evidence were available on the trial record. The appellant could have stated that there were other sources for the complainant's upset on which he could not give further evidence, or indicated he had to be careful or circumspect in his answers. He did not. There is no reason to believe that his answers focusing on the bottled water reflected anything other than his recollection of the events in question. It was open to the Crown to submit that these answers were not credible. Just as it was open to the Crown to submit that the appellant's lack of explanation for the June 8 argument strained credulity.
- [22] Moreover, it is irrelevant that the jury would have been aware that the May 6 and June 8 arguments were precipitated by sexual intercourse. The trial judge expressly instructed the jury to disregard this evidence when it arose. In her charge, she clearly explained that their deliberations could only be founded on admissible evidence. She also told the jury that they were prohibited from speculating about "what other evidence there might have been" or why they "did not hear certain things". There is no reason to think that the jury ignored this instruction or decided the case on the basis of the complainant's testimony about prior sexual activity: see e.g., *Khan*, at paras. 81-82, citing *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-94, per Dickson C.J.
- [23] We see no irregularity here, and certainly no basis to conclude that there was a miscarriage of justice.
- [24] For these reasons, the appeal is dismissed. "E.E. Gillese J.A." "L. Sossin J.A." "P.J. Monahan J.A."

- [1] This appeal is subject to a publication ban under s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] As described by the complainant in the excluded May 6 text messages.
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