

CANADA / JUDGMENT

R. v. Conway

2021 BCCA 460

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 460 R. v. Conway

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Conway,

2021 BCCA 460

Date: 20211209

Docket: CA47086

Between:

Regina

Respondent

And

Joel James Conway

Appellant

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Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated March 26, 2019 (conviction) (R. v. Conway, 2019 BCSC 489, Victoria Docket 171279).

Counsel for the Appellant:

J. Whysall

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Counsel for the Respondent:

M.T. Ainslie, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 26, 2021

Place and Date of Judgment:

Vancouver, British Columbia

December 9, 2021

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Voith

Summary:

The appellant was found guilty of break and enter and sexual assault. He appealed the convictions on numerous grounds, including that the trial judge: (a) relied on unfounded assumptions or stereotypes in assessing the appellant's credibility; (b) misapplied the burden of proof; (c) failed to consider the defence of honest but mistaken belief in communicated consent; and (d) when assessing the complainant's credibility, failed to consider the lack of forensic evidence showing that the appellant entered the complainant's home through the balcony door. Held: appeal dismissed. The judge's factual findings and credibility assessments were supported by the record; the verdicts respect R. v. W.(D.); the defence of honest but mistaken belief in communicated consent was not raised at the trial; and the judge was aware of and took into consideration the absence of forensic evidence in support of an unlawful entry. The appellant has not demonstrated reversible error requiring a new trial.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] Following a trial by judge alone in the Supreme Court, the appellant, Joel Conway, was found guilty of breaking into the complainant's home and sexually assaulting her.
- [2] The appellant admitted to sexual contact. However, he said he was invited to the complainant's home and let in through the front door. He said the sexual activity was consensual. The complainant described a very different scene. She testified she did not let the appellant into her home. Instead, she woke to find him standing naked in her bedroom and he forced sexual contact on her, including intercourse.
- [3] As with many prosecutions for sexual assault, credibility was a critical issue at the trial. The judge had "no hesitation" in accepting the complainant's evidence that she did not consent. He rejected the appellant's testimony, finding parts of it to be "highly implausible," "tailored" and a "complete fabrication."
- [4] The appellant says the judge committed several errors in finding him guilty. He asks for a new trial. For the reasons that follow, I would dismiss the appeal.

Background

The Sexual Assault

- [5] The offence occurred in Saanich in the early morning hours of March 31, 2017.
- [6] The appellant, then in his early 30s, attended a conference in Vancouver on March 30. He told his spouse he would travel home to Vancouver Island the next morning. Instead, he took an evening ferry to Swartz Bay and met up with a friend, Mr. S. They went to a bar in downtown Victoria.
- [7] When leaving the bar at closing, the appellant and Mr. S ran into the complainant. The complainant knew Mr. S and, although the evidence is unclear on this point, it appears that she previously attended one or more church-related events at which the appellant was also present. The complainant had been downtown with a friend for dinner. She then went to a bar for drinks. After she encountered the appellant and Mr. S, all three took a cab to the complainant's home in Saanich. They arrived at 2:40 a.m. They talked and consumed alcohol and cocaine.
- [8] The appellant testified that while at the complainant's home, he had "some sexual interest" in her. He was attracted to her and felt she was attracted to him. He assumed she was interested in him "from the way that she communicated with [him] with her--her body language and the words that she was saying to [him], smiling."
- [9] At 4:16 a.m., the appellant and Mr. S began calling for a cab. They left the complainant's home and returned to downtown Victoria to retrieve the appellant's car.

- [10] The appellant said that while outside of the complainant's home and before getting into a cab with Mr. S, he told the complainant that he wanted to return and she said "sure". He then said, "well, shoot me a text, here's my number." He gave the complainant his phone number and left with Mr. S. The complainant then "shot [him] a quick text message" that said, "Hey, hurry back". He texted with the complainant "a couple of times" while in the cab.
- [11] The appellant retrieved his car and dropped off Mr. S at his home. Before doing so, he told Mr. S that he thought he had "a chance" with the complainant and that he should go back to her residence. Mr. S told the appellant to go home.
- [12] The appellant did not heed that advice. Instead, he testified that he called the complainant (at 5:07 a.m.), spoke with her and went to her house. He knocked on the front door. She did not answer. He called her two more times. She did not answer the first call (at 5:22 a.m.). She did answer the second call (at 5:29 a.m.), came to the door and let him in. They "went up to her room" and "had sex." During the sexual activity, there was "mutual communication verbal communication". There was "no force or anything like that." The complainant was not drunk. She was not high. She was not "intoxicated at all."
- [13] The appellant said his spouse called at 7:46 a.m. on March 31, while he was still with the complainant and in the midst of sexual activity. He let the call go to voicemail. He took a shower. While in the bathroom, he "erased all [of his] text messages [from] the night before." He got dressed, sat on the complainant's bed and told her that they "[could not] have any sort of a relationship or anything like that." They could not communicate. He did that "in a firm way, like really firm". He told her to "lose [his] number". In response, the complainant swore at him and told him to get out of her home.
- [14] The appellant left. He went to a nearby McDonald's, but then returned to the complainant's home. He said he "felt bad for the way [he] had left her". He went up to her front door, intending to bring her the breakfast he bought at McDonald's. However, he "just turned and got back in [his] car and went home."
- [15] He called the complainant the following day and asked how she was doing. In response, she said, "you're fucked now, bud" and hung up the phone. The appellant said he called twice more, but she did not speak to him. That was the last of their communication.
- [16] The complainant was 30 years old at the time of the trial. She testified that while downtown on March 30, 2017, she had at least ten drinks. She also used cocaine.
- [17] The complainant encountered Mr. S and the appellant downtown and they travelled in a cab to her home. She showed them around, they had drinks and they "chatted." They used cocaine. She and the appellant talked about church-related projects, and although she did not remember giving her phone number to him, she may have done so as part of that discussion. The complainant had lost a child and she spoke with the appellant about a "Little Spirits Garden" at a local cemetery that he said he was involved with.

- [18] The complainant testified that the appellant and Mr. S left her house by a cab. She saw them get into the cab, waved goodbye and closed her front door. She "latched" her door with a chain, grabbed her phone charger and then went upstairs to bed.
- [19] She was "feeling really dizzy" and "pass[ed] out pretty quick." She felt "messed up. [She had] been drinking and doing drugs all night." She described herself as intoxicated, the "complete opposite of sober". She went to bed wearing a hoodie and leggings.
- [20] The next thing the complainant remembered was being woken by something touching her. She opened her eyes to find the appellant naked and standing by her bed. She asked him how he got there. He told her she left her front door "open" or "unlocked." She said she did not invite him into her home. She did not ask him to return after he left with Mr. S so that they could have sex. There was "nothing at any point that entire night that would have made [her] think that he would even want to come back."
- [21] The complainant said the appellant pulled her leggings down and forced sexual contact, including oral sex, sexual intercourse and the use of a "sex toy." She was afraid and did not know what to do. She did not consent. She does not remember everything. Instead, she remembers the events in "flashes, like [she] was really out of it in and out. [It is] like a flash here and a flash there." She was "in and out of consciousness". She does not remember the appellant leaving her home.
- [22] She awoke at 11:00 a.m. on March 31. Her leggings were around her ankles. Later that day, she went to the hospital with a friend. The next day, she called the police and reported a sexual assault. After her call to police, the appellant phoned her. He said, "It's Joel, [Mr. S's] friend". The complainant did not say anything. She hung up.
- [23] Mr. S testified at the trial. He had known the appellant for approximately 20 years. He confirmed that on March 30 he went with the appellant for drinks in downtown Victoria. They left the bar and encountered the complainant. Mr. S did not think the appellant and the complainant knew each other. All three took a cab to the complainant's home. Mr. S and the appellant stayed there for "maybe an hour and a half," possibly two hours. They were "hanging out." The complainant was not "extremely drunk." She was "[n]ot sober, but not number 10."
- [24] Mr. S said he and the appellant left the complainant's home in a cab and went downtown to pick up the appellant's car. The appellant drove him home. The appellant told Mr. S he "wanted to continue drinking, that he might go back [to the complainant's house]." He thought he had "a chance" with the complainant. Mr. S told the appellant that he should go home: "[h]e ha[d] his kids at home, his wife at home. It was time for him to go home."

- [25] Mr. S was asked by Crown counsel whether the appellant was texting with the complainant after the two of them left her home. He said he could not 100% remember whether that occurred. He knew the appellant "got her phone number and tried to call maybe and the phone died." He agreed the appellant told him that the complainant gave him her number. He "believe[d]" the appellant used his phone to either call or text the complainant, but he was not sure.
- [26] In cross-examination, Mr. S was asked whether he saw "flirting" between the complainant and the appellant while at the complainant's home. He said, "Being friendly, sure". He was asked whether there was a "connection between them". He said he did not know. He was "not cupid." He was directed to evidence he gave at the preliminary inquiry and asked whether one of the reasons he tried to get the appellant out of the complainant's home was that he saw "some kind of connection between them and [he] thought that [the appellant] was married and [he was the appellant's friend] and trying to get him out of there". He agreed.
- [27] Mr. S was asked whether the complainant showed signs of "significant impairment by alcohol". He described her as "fine."

Entry to the Complainant's Home

- [28] There were two ways to enter the complainant's home: a front door and a door at the back of the home, which opened onto a balcony.
- [29] The front door was operated by a "Salto key system." The complainant used a key card to open that door. When she tapped the card on the door, it would unlock. Approximately three to five seconds later, the door would automatically return to lock mode, even when in the open position. Once the door closed, it would be locked and secure. Whenever the door opened from the outside, the time of entry would be recorded. Records showed that on March 31, 2017, the door was opened from the outside at 2:40 a.m. It was not opened again from the outside until 5:48 p.m.
- [30] The door leading to the balcony locked from the inside. The balcony was approximately 42 inches above the ground. There was bark mulch beneath it. The police observed two impressions in the bark mulch consisting of a "basic outline of some type of footwear." They also saw some "bark mulch on the lower portion of the [balcony's] railing." They did not see bark mulch on the balcony floor or in the complainant's home. They found no fingerprint or DNA evidence indicating that the appellant entered the home through the balcony door.

Mobile Phone Records

- [31] As part of his defence, the appellant tendered mobile phone records that he said confirmed his phone calls to the complainant and the exchange of text messages.

- [32] The records showed three calls to a number confirmed by the complainant to be hers. The calls were made at 5:07, 5:22 and 5:29 a.m. They were 34, 35 and 34 seconds long, respectively. The records did not show whether the calls were answered.
- [33] The records also showed an exchange of text messages with the appellant's phone that took place between 4:21 and 4:30 a.m. The appellant testified that this exchange was with the complainant while he was in the cab travelling away from her home. However, the number the appellant texted was not confirmed to be the complainant's number. Importantly, it was different from the number he later phoned at 5:07, 5:22 and 5:29 a.m. The appellant was unable to explain why the number he phoned and the number he texted were not the same.

Trial Reasons

- [34] The judge provided oral reasons for judgment, indexed as 2019 BCSC 489.
- [35] After reviewing the evidence, he instructed himself on the essential elements of sexual assault, referring to *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 1999 CanLII 711. This includes the requirement that the Crown prove a "lack of consent beyond a reasonable doubt" (judge's reasons at paras. 3, 33).
- [36] The judge also canvassed the principles relevant to the defence of honest but mistaken belief in communicated consent, citing *R. v. Davis*, [1999] 3 S.C.R. 759, 1999 CanLII 638; *R. v. Park*, [1995] 2 S.C.R. 836, 1995 CanLII 104; and s. 273.2 of the Criminal Code, R.S.C. 1985, c. C-46. He concluded there was no air of reality to the defence:
- [31] Mr. Conway contends that [the complainant] invited or agreed to allow him to return to her residence, answered his telephone call, and allowed him into her home, where [she] was an active and willing participant in the sexual activity that took place. He testified that she asked for sexual activity in sexually explicit terms. There is no possible third version of the events [in this case] wherein [the complainant] did not consent, but Mr. Conway honestly but mistakenly believed that she did.

[Emphasis added.]

- [37] The judge reminded himself that the "burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt" (at paras. 33, 36). Moreover, "it is not simply a matter of comparing the evidence of [the complainant] and Mr. Conway, and deciding who is worthy of belief and who is not" (para. 33). Instead, the Crown bears the onus of proving the absence of consent.
- [38] The judge noted that to the extent he was required to assess the appellant's credibility, *R. v. W.(D.)*, [1991] 1 S.C.R. 742 applied. He reminded himself of the relevant principles. He noted that a "lack of credibility on the part of the accused does not equate to proof of [their] guilt beyond a reasonable doubt" (at para. 36).

- [39] After setting out the legal framework, the judge turned to his credibility assessment and fact finding.
- [40] He found the complainant's testimony that she did not consent was credible. He found the appellant's evidence was not credible and rejected it. The judge said he had "no reasonable doubt about the complainant's version of events, or about whether on the whole of the evidence, including those areas where there is a lack of evidence, the Crown ha[d] established the complainant's lack of consent beyond a reasonable doubt" (at para. 38). As a result, he did not consider it necessary to address an alternative argument advanced by the Crown, namely, that because of her level of intoxication, the complainant did not have the capacity to consent (at paras. 85-87, citing s. 273.1(2)(b) of the Criminal Code).
- [41] In rejecting the appellant's testimony, the judge found his evidence "as it relates to consent" to be "highly implausible" and a "complete fabrication" on the "material points" (at para. 41). Parts of his evidence were "designed to lend some plausibility to his contention that [the complainant] freely consented to sexual relations in otherwise highly implausible circumstances" (at paras. 45, 54, 56).
- [42] At the end of his reasons, the judge addressed the allegation of break and enter. He found that the Crown proved this offence. In so doing, he did not make a specific finding on how the appellant entered the home:
- [88] I turn to the breaking and entering charge. At a minimum, A.B.'s front door was closed. She testified that she closed it, and latched it. Mr. Conway testified that he knocked on the door, before later being allowed in by A.B. A.B. testified that the balcony door was always locked. The balcony door was closed when A.B. went to bed. There was no evidence that it was open at any time. There is no possibility that when she went to bed the balcony door was left wide open. A possibility is that Mr. Conway entered the residence by opening the unlocked balcony door as the Crown theorizes.
- [89] The only other entrance is the front door. The evidence from the property manager is that the door automatically goes into "lock mode" 3-4 seconds after it is opened, and is secure as soon as it is closed. If contrary to her evidence, A.B. somehow left the door ajar so that Mr. Conway could enter it without a key, nonetheless he opened the door, and his entry would still amount to breaking and entering within the meaning of the Code, ss. 321, 348, and 350. As I have concluded that A.B. did not allow Mr. Conway into her home, he entered the home by breaking and entering, by one route or the other.

[Emphasis added.]

Issues on Appeal

- [43] The appellant says the judge committed four primary errors. He is alleged to have:
- a) wrongly assessed the appellant's testimony based on unfounded assumptions or generalizations about human behaviour or stereotypes;

- b) misapplied the burden of proof;
- c) failed to consider the defence of honest but mistaken belief in communicated consent; and,
- d) in finding the complainant's evidence credible, failed to consider the absence of forensic evidence in support of an unlawful entry.

Discussion

Unfounded Assumptions or Stereotypes

- [44] It is an error in principle to assess the credibility of a complainant or accused relying on "inappropriate behavioural assumptions and stereotypes": *R. v. Pastro*, 2021 BCCA 149 at para. 42. Where demonstrated to exist, this error will displace the highly deferential standard of review that governs credibility findings: *R. v. S.S.S.*, 2020 BCCA 180 at paras. 24-26.
- [45] Credibility findings, whether favourable or adverse, cannot be grounded in "assumptions about the type of behaviour that would 'normally' be expected of a person without engaging with the evidence, including the context in which contentious events arose": *Pastro* at para. 43, citing *R. v. Roth*, 2020 BCCA 240 at paras. 64-65, 71-73. See also *R. v. Greif*, 2021 BCCA 187 at paras. 60-61; *R. v. C.M.M.*, 2020 BCCA 56 at paras. 138-139; *R. v. Kodwat*, 2017 YKCA 11 at para. 41.
- [46] The appellant says the judge committed this error by negatively assessing his credibility based on unfounded assumptions or generalizations about how people would be expected to behave if the appellant's version of events were true. He says the error manifests itself in several parts of the reasons. Specifically, the judge:
- described as "preposterous" the appellant's testimony that after he and Mr. S left the complainant's home in a cab, she sent him a text and "suddenly invite[d] him to return" (at para. 53);
 - found the appellant's evidence that the complainant let him into her home, took him upstairs and that they immediately had sex, with little or no discussion, "makes no real sense" (at para. 64);
 - found it "odd" that if the complainant had wanted the appellant to stay at her home, he would leave in a cab with Mr. S rather than remaining behind (at para. 55); and,
 - concluded that the appellant's conversation with Mr. S when dropping him at his residence was "not consistent with the invitation and text message" he says he received from the complainant. If she had invited the appellant back, he "would likely have said so to his good friend", rather than tell Mr. S that he thought he had "a chance" with her (at para. 57).

- [47] I do not see this case as one in which the assessment of the appellant's credibility relied on speculative reasoning, inappropriate or generalized behavioural assumptions or stereotypes. Instead, I agree with the Crown that the judge's conclusions about whether certain aspects of the appellant's testimony were "preposterous" or "highly implausible" were grounded in his review and interpretation of the evidence considered as a whole.
- [48] It is apparent the judge viewed some of the appellant's assertions as illogical or non-sensical when considered in the context of other parts of the evidence, including evidence that was undisputed or accepted by the judge. There is nothing wrong with a judge reaching that type of a conclusion, as long as the basis for doing so is anchored in the evidence and does not rest on a "subjective assessment of what a hypothetical complainant or accused might reasonably be expected to do in the circumstances": Pastro at para. 42 (emphasis added).
- [49] During his direct examination, the appellant described a concrete and mutually-approved plan for him to return to the complainant's home. The plan was said to have taken shape at the complainant's front door before he left in a cab with Mr. S and then crystallized through subsequent text messages and phone calls.
- [50] He said that he and the complainant developed a "mutual attraction" while at the complainant's home; she texted him to "hurry back"; he knew she was "interested in having sex with [him]"; he called and spoke to her at 5:07 a.m. to let her know he was returning; and, once she let him in the front door, they proceeded upstairs and had sex, during which she was an active and encouraging participant. It was not until later that morning, when he told her they could not have a relationship, that things went awry.
- [51] At the same time, in cross-examination the appellant acknowledged that before he returned to the complainant's home, nothing had been said about possible sexual interaction. Instead, he assumed she was interested in having sex with him based on "innuendo". He also said that when he was driving to her home after dropping off Mr. S, he did not "necessarily [have] a plan to go have sex with her". Instead, he "wanted a place to be able to rest until [he] had to go home." He acknowledged that when he arrived, the complainant did not answer her door, even though he had purportedly spoken to her a short time earlier by phone and let her know that he was on his way. According to his evidence, she also did not answer the first of the two calls that he then made from his car while parked outside.
- [52] In his testimony, Mr. S said he did not believe the appellant and the complainant knew each other. He did not see them touch each other at any time while in her home. All three were talking and spending time together. He acknowledged that at the preliminary inquiry, he said he saw "some kind of connection between them" and decided it was time for him and the appellant to leave. However, at the trial, he said he did not know if there was an actual "connection."

- [53] The mobile phone records did not confirm the text messaging in which the appellant said the complainant told him to "hurry back." The exchange he pointed to as support for the complainant's desire that he return involved a different number than the one he later called. Nor did the records show that the calls made to the complainant's number at 5:07 and 5:29 a.m. were actually answered.
- [54] The complainant testified that "[t]here was nothing [the] entire night that would have made [her] think that [the appellant] would even want to come back." There was no discussion about sexual activity. She also said she felt "messed up" and "pass[ed] out pretty quick" after the appellant left with Mr. S. She denied inviting the appellant to return, denied texting with him, denied speaking with him by phone that morning, and she testified that when she woke to discover him in her bedroom, not only did it catch her by surprise, but she could not understand how he got in.
- [55] Based on this evidence, considered in its entirety, it was open to the judge to find that the appellant's assertion of a mutually manifested desire for sexual activity that then gave rise to a planned and expected return to the complainant's home, subsequent confirmatory communication and sexual contact occurring as soon as he entered the residence, did not make sense.
- [56] The judge was entitled to find that the appellant's narrative was neither supported by nor consistent with other evidence, including: the non-sexual appearance of the interaction between the appellant and the complainant earlier at her home; the fact that the appellant left the home with Mr. S, rather than stay behind; the complainant's description of her own physical condition after the two men left; her undisputed testimony about the amount of alcohol and drugs she consumed; and the text message records.
- [57] The judge was also entitled to find that the appellant's narrative was inconsistent with what he said to Mr. S when dropping him off and inconsistent with the fact that, according to the appellant's own testimony, the complainant did not answer her door when he knocked or answer the first of two subsequent phone calls, even though he said he spoke to her by phone at 5:07 a.m., she knew he was returning, she wanted him to return, and he arrived a short time later.
- [58] I do not accept the appellant's submission that this case is similar to *R. v. Cepic*, 2019 ONCA 541, in which the Court overturned a conviction for sexual assault because the "path to conviction rested largely on a series of erroneous assumptions about what a young woman would or would not do in the circumstances of [the] case" (at para. 27). Those assumptions included a belief that a young woman who had never previously attended a strip club or experienced a lap dance would be unlikely to touch a dancer's penis. This was an assumption that was grounded in the trial judge's views about young women generally, not the circumstances of the complainant as informed by the evidence. As such, the Court found that the assumption was "untethered to an evidentiary base" (at para. 23).

- [59] Nor is this case similar to Roth, in which the judge was found to have unfairly assessed the credibility of the accused based, in part, on the level of stamina expected of someone who trains as a power lifter, without any evidence relevant to that determination.
- [60] Here, the judge's rejection of the appellant's evidence was tethered to an evidentiary base. Before describing the appellant's testimony about the invitation to return as "preposterous" (at para. 53), the judge found "[o]n the whole of the evidence that there was no romantic connection whatsoever between [the complainant] and Mr. Conway" and that "nothing occurred that would suggest to [the complainant] that Mr. Conway was planning or hoping to return and have sex with her, or to return, at all" (para. 52, emphasis added). See also para. 48 of his reasons. In drawing his inferences and assessing the credibility of the appellant's testimony, the judge focused on the evidence and what he would or would not have expected to see in that context, as informed by the particular circumstances of the appellant and the complainant. This is an acceptable analytical approach: *R. v. Quartey*, 2018 ABCA 12 at para. 21, *aff'd* 2018 SCC 59.
- [61] It is also worth noting that for purposes of appellate review, the judge's descriptions of the appellant's evidence as "preposterous" or "highly implausible" must not be viewed in isolation. Rather, the language is to be considered in the context of the judgment as a whole: *Quartey* at para. 34. The judge used emphatic terms in rejecting the appellant's evidence but, standing alone, his choice of language is not indicative of error. It is not appropriate to "cherry pick" an infelicitous phrase or sentence in a judge's reasons and then seek to ascribe it meaning that it cannot reasonably bear in the larger context: *Pastro* at para. 53, citing *Quartey* at paras. 34-35. Respectfully, that is what the appellant has done here.

W.(D.) Principles

- [62] The appellant says the judge erred in law by misapplying W.(D.) principles and that this error manifests itself in various ways. The judge is said to have: (a) adopted a compare and contrast approach to his assessment of credibility, improperly treating the trial as a credibility contest; (b) erroneously believed there could be only one correct version of events and that he had to choose between the appellant and the complainant (contrary to *R. v. Avetysan*, 2000 SCC 56 at para. 21); (c) failed to recognize and grapple with significant inconsistencies in the complainant's evidence; (d) shifted the burden of proof by rejecting the appellant's evidence in the absence of independent confirmation; and (e) scrutinized the appellant's evidence more strictly than the evidence of the complainant.
- [63] I do not consider it necessary to address each of these points because, after a functional and contextual review of the judge's reasons, I am satisfied that the verdicts respect W.(D.) principles and the judge properly and fairly applied the burden of proof.

- [64] A functional and contextual review recognizes that judges need not advert to every piece of evidence in their reasons, address every conflict or issue raised by the parties, reconcile every alleged evidentiary frailty, or detail and explain each of the findings that led to a conviction: *R. v. R.E.M.*, 2008 SCC 51 at paras. 15-20, 48-57.
- [65] Moreover, it is well-established that the "order in which a trial judge makes credibility findings is inconsequential as long as the principle of reasonable doubt remains the central consideration": *R. v. Vuradin*, 2013 SCC 38 at para. 21. A guilty verdict must not be based on a choice between the evidence of the accused and the Crown (at para. 21). However, "judges are not required to explain in detail the process they followed to reach a verdict" (at para. 21).
- [66] As explained by Justice Karakatsanis in *R. v. G.F.*, 2021 SCC 20:
- [81] a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt. But, as this Court stated in [*R. v. Gagnon*, 2006 SCC 17] at para. 20:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.

[Emphasis added.]

- [67] In this case, the judge properly instructed himself on the essential elements of sexual assault (at paras. 25-30, 32). The appellant does not argue the contrary.
- [68] The judge correctly instructed himself on the Crown's burden, the criminal standard of proof beyond a reasonable doubt and the fact that this burden applies to every element of the charged offences (at para. 33). The judge understood that the burden never shifts to the accused (para. 36).
- [69] He also understood that to convict the appellant, it was "not simply a matter of comparing the evidence of [the complainant] and Mr. Conway, and deciding who is worthy of belief" (at paras. 33-35). Indeed, the appellant's trial counsel emphasized this point in his closing submissions:

It is not a contest between the Crown witnesses and the defence's [witnesses]. It's not a matter of you deciding whose evidence you prefer or whose evidence is more believable. It's your duty to decide whether the Crown has proved its case beyond a reasonable doubt, period, whether the complainant is for sure telling you a truthful account of how she was raped such that you have no doubt at all about the guilt or innocence of the accused.

[70] Before finding the appellant guilty, the judge reminded himself that an adverse credibility finding does not equate to proof beyond a reasonable doubt (para. 36). He was also alive to the fact that a "lack of evidence" can generate a reasonable doubt (para. 38). The judge was reminded by the defence that if he did not know who to believe, he was obliged to acquit:

I think the very best the Crown will do in this case is to take you to a place where you're left scratching your head not knowing who to believe and if you're in that place, then you must acquit. Otherwise, I would suggest that the evidence of the accused was wholly believable and plausible and you should accept it.

[Emphasis added.]

[71] The reasons also reveal that in assessing the complainant's credibility, the judge turned his mind to the evidentiary frailties emphasized by the defence in its closing submissions. He did not ignore the challenges to her evidence or spend greater time dissecting the appellant's testimony than the complainant's.

[72] The appellant argued that the complainant was lying, had intentionally tailored her testimony to fill in evidentiary gaps that would otherwise render it weak, and that her story was rife with inconsistencies, both internal and external. In support of that position, he pointed to the complainant's evidence about being intoxicated. She relied on the fact of intoxication to explain falling asleep after the two men left her home, as well as her "flashes" of memory during the sexual assault. However, the appellant said the level of intoxication was not corroborated. There were no receipts to confirm the amount of alcohol she consumed, corroborative testimony from friends that she encountered at the bar, or evidence from bar staff who may have served her. Her description of her level of drunkenness was said to be inconsistent with the evidence of Mr. S and the appellant, as well as the fact that she remembered a surprising number of details, including that she closed and latched the front door. The appellant said these inconsistencies should cause the judge significant concern about the credibility and reliability of the assertion of non-consent.

[73] The appellant also said there were numerous inconsistencies between the complainant's evidence at the trial, a statement she provided to the police, and her testimony at the preliminary inquiry. These included inconsistencies about: (a) whether she spent time with the appellant and Mr. S in her living room when the three of them were at her home; (b) the amount of alcohol she consumed at her home; (c) what she was wearing when she went to bed; (d) where the appellant was when she first woke up; (e) what the appellant said to her about entering her home; (f) whether she did not consent or simply did not "remember"

consenting; (g) whether the appellant ejaculated during the sexual activity; and (h) whether, when she woke, her leggings had been pulled down or the appellant was still in the process of pulling them down.

- [74] The judge considered these alleged inconsistencies, as well as others, and he explained why they did not cause him to reject the complainant's evidence. See paras. 40, 67-71, 75-81, 83 of his reasons. He found that some of the inconsistencies were "minor" and others were "unsurprising." The complainant was at times "genuinely confused" by questions asked of her and she was not "verbally sophisticated" (para. 40). She was "forthright" and "freely admitted weaknesses in her evidence" (para. 40). The judge "did not detect the slightest motivation for fabricating her evidence" (para. 40). His credibility findings are entitled to significant deference and the appellant has not persuaded me of palpable and overriding error in that assessment.
- [75] The appellant disagrees with the judge's rejection of his evidence. However, in assessing the appellant's credibility, the judge was entitled to weigh that evidence in the context of everything else, including the evidence of the complainant. Testimony provided by an accused is not assessed in isolation: *R. v. Wanihadie*, 2019 ABCA 402 at para. 31; *R. v. Redden*, 2021 BCCA 230 at para. 81. A denial or defence that relies heavily on the accused's evidence may be rejected "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence": *R. v. D.(J.J.R.)* (2006), 215 C.C.C. (3d) 252 at para. 53, 2006 CanLII 40088 (Ont. C.A.), leave to appeal refused, [2007] S.C.C.A. No. 69; *Redden* at para. 81; *R. v. G.C.*, 2021 ONCA 441 at paras. 13,15. Such is the case even where the evidence of the accused, standing alone, "does not raise any obvious problems": *G.C.* at para. 15, citing *R. v. R.A.*, 2017 ONCA 714 at para. 55, *aff'd* 2018 SCC 13.
- [76] In his closing submissions, the appellant's trial counsel acknowledged that this case would turn on the credibility findings. In that context, the task of the judge was to "direct [his] mind to the decisive question of whether the [appellant's] evidence, considered in the context of the evidence as a whole, raise[d] a reasonable doubt as to his guilt": *R. v. Dinardo*, 2008 SCC 24 at para. 23 (emphasis added). I am satisfied the judge fulfilled that obligation and I do not accept the submission that he misapplied *W.(D.)*.

Defence of Honest, But Mistaken Belief

- [77] The appellant says the judge erred by not considering the defence of honest but mistaken belief in communicated consent.
- [78] I would not give effect to this ground of appeal, for two reasons.
- [79] First, the appellant explicitly disavowed reliance on this defence at the trial. I recognize that a failure to raise a defence does not bar its pursuit on appeal: *R. v. Esau*, [1997] 2 S.C.R. 777 at paras. 26-28, 1997 CanLII 312. However, it is a factor of significance in deciding whether a judge has committed reversible error.

[80] In his closing submissions, trial counsel for the appellant made it clear that the appellant was not advancing mistaken but honest belief in communicated consent:

[the defence theory] is not that the accused had sex with her and she didn't express any non-consent in the sense that there was some mistaken belief in consent.

[T]hat's not the theory. The theory is she did consent. She expressed consent. She communicated consent by her behaviour and in words which the accused testified to quite cogently and consistently.

[Emphasis added.]

[81] Indeed, advancing the defence would have been inconsistent with (and potentially undermined) the appellant's testimony that the complainant invited him back to her home, let him in, led him upstairs to her bedroom and actively participated in the sexual activity. Moreover, the appellant testified that there was "verbal" and "mutual communication" throughout the sexual activity. There was "lots of clear communication." He said the complainant manually stimulated him and she asked him to perform intercourse in a particular way. The appellant was extensively cross-examined on what was said to and by the complainant as the events unfolded in her bedroom. He repeatedly asserted that the complainant was not only fully aware of what was happening, but verbally expressed her consent to sexual contact. From the appellant's perspective, and in his words, this was a case of "mutually agreed upon" sexual activity.

[82] The defence now raised for the first time on appeal does not fit with the appellant's narrative, which he asked the judge to believe. There may well have been important strategic and tactical reasons for the decision to not pursue this defence at the trial. We do not know. However, the appellant has not raised ineffective assistance of his trial counsel as a ground of appeal. From that, I assume he recognizes that not advancing this defence fell within the range of approaches reasonably open to his counsel in the Court below.

[83] Second, and in any event, it is apparent from the judge's reasons that he did turn his mind to the defence and found it had no air of reality (at paras. 27-31, 82). He was correct to do so.

[84] According to the complainant's testimony, the sexual activity was forced from start to finish and there was nothing preceding it from which the appellant could reasonably have understood or inferred that she wanted or agreed to sexual contact. There was no discussion about it, full stop. Based on the appellant's evidence, all of the sexual activity, including intercourse, was mutually approved and there was communication about it. The judge was right. These starkly different narratives provided no middle ground for an honest but mistaken belief in communicated consent at the time the sexual activity took place.

Unlawful Entry

[85] The appellant's fourth ground of appeal is focused on the evidence surrounding the appellant's entry into the complainant's home.

- [86] He says the issues of unlawful entry and consent were "tightly bound". If the judge had a reasonable doubt about how the appellant got into the home, he should have also had a reasonable doubt about consent to sexual contact. The complainant's assertion of non-consent was inextricably linked to her testimony that she did not ask the appellant to return to her home or let him in.
- [87] As noted, there were only two ways into the home: through the front or balcony doors. The evidence was that the complainant's front door locked automatically and was secure once it closed. She testified that she closed her front door and latched the inside chain. The balcony door locked from the inside and, although the complainant did not check the door on the date in question, she said it was "left locked unless something was being put out there." It "wasn't often used." There was evidence of possible footwear impressions in the bark mulch below the balcony and possible bark mulch on one of the railings, but nothing definitive. The police did not see bark mulch on the balcony floor or in the home. They found no fingerprint or DNA evidence in support of entry through the balcony door.
- [88] The appellant says the judge did not grapple with the evidence surrounding entry into the home in any meaningful way and that he needed to. At para. 88 of his reasons, he found that "[a]t a minimum, [the complainant's] front door was closed." He also found the balcony door was closed when she went to bed. He accepted there was a "possibility" the appellant entered through the balcony door, but he did not find that this actually occurred. He allowed for the possibility that the complainant was mistaken about closing and latching the front door and that the door may have been left "ajar", enabling the appellant to enter without a key card (para. 89). But he did not make a definitive finding about that either. Moreover, the latter scenario was contrary to the complainant's specific memory of latching a chain across the front door before going to bed.
- [89] The appellant submits that in the circumstances of this case, determining how the appellant got into the home was critical to proof of both break and enter and non-consensual sexual contact. The judge made no finding to that effect. Nor do his reasons demonstrate that he understood the importance of the issue to his assessment of the complainant's credibility regarding consent and the Crown's overall burden of proof. If he was not satisfied beyond a reasonable doubt that the appellant came through the balcony door, as theorized by the Crown, he needed to ask whether that fact undermined the credibility or reliability of the complainant's evidence, including on the issue of consent. At the very least, the judge should have explained why the weaknesses in the evidence surrounding the mode of entry did not raise a reasonable doubt and pose an impediment to guilt.
- [90] I would not accede to this ground of appeal, for several reasons.

[91] First, it is apparent the judge understood the Crown's theory that the appellant entered the complainant's home through the balcony door (at para. 22). He also appreciated that there was "no reliable forensic evidence" grounding that theory (at para. 23). He understood, as a matter of law, that a "lack of evidence" could give rise to reasonable doubt (at para. 38). He did not ignore the frailties of the evidence adduced in support of an unlawful entry or the potential for those frailties to impact the ultimate determination of guilt.

[92] Second, the appellant's position on this ground of appeal overlooks a number of fundamental criminal law principles, including that:

- The Crown does not have to prove its theory of how or why a charged offence occurred. In this case, the Crown was not bound by its theory of how the appellant entered the complainant's home. Rather, its burden was to prove the essential elements of break and enter and sexual assault: *R. v. Ranger* (2003), 178 C.C.C. (3d) 375 at 419, 2003 CanLII 32900 (Ont. C.A.); *R. v. Julson*, 2006 BCCA 41 at para. 23.
- The criminal standard of proof applies to the essential elements of the charged offences and to the issue of guilt, not to individual items or categories of evidence: *R. v. Arp*, [1998] 3 S.C.R. 339 at para. 64, 1998 CanLII 769; *R. v. Ménard*, [1998] 2 S.C.R. 109 at para. 23, 1998 CanLII 790.
- In deciding whether the Crown has met its burden of proof, a judge is entitled to accept all, none or only part of a witness's evidence: *R.E.M.* at para. 65; *R. v. J.M.H.*, 2011 SCC 45 at para. 25. The fact that a judge finds a witness to have been mistaken or even untruthful in parts of their evidence does not mean the judge is thereafter precluded from relying on that witness's testimony in deciding the issue of guilt. In this case, a finding that the complainant was mistaken about closing and latching the front door, which the judge acknowledged as a possibility, would not preclude him from accepting her testimony that she did not let the appellant in. The two propositions are not irreconcilable.
- In explaining their path to conviction, a judge is not required to refer to every item of evidence considered or to detail the way in which each item of evidence was assessed: *R.E.M.* at para. 45; *J.M.H.* at para. 32.

[93] The offence of break and enter does not require proof of a particular form of entry, or that the entry was forced or surreptitious. Under s. 350(b)(ii) of the Code, an individual is deemed to have "broken and entered" if they "entered without lawful justification or excuse by a permanent or temporary opening." This is commonly referred to as "constructive breaking": *Johnston v. The Queen*, [1977] 2 S.C.R. 646, 1977 CanLII 229; *R. v. Chanyi*, 2019 ABCA 133 at paras. 23-25. The judge cited s. 350 of the Code in his reasons.

[94] Contrary to the appellant's submission (also advanced at the trial), the judge did not have to find beyond a reasonable doubt that the appellant entered through the balcony door before he could find him guilty of break and enter and sexual assault. It was sufficient to find that the appellant entered the home without lawful justification or excuse. The judge made that finding. He rejected the appellant's testimony that the complainant opened the door for him.

It was clear to the judge that the appellant "somehow gained entry to her residence" (at para. 63); however, the complainant "did not allow" him in (para. 89).

- [95] In *R. v. Barnes*, 2021 NLCA 15, the appellant raised an argument similar to the one advanced here. Among other offences, Mr. Barnes was convicted of breaking and entering into the home of his former intimate partner with the intent to sexually assault her. The complainant testified that she was lying on her bed watching television with her children when Mr. Barnes suddenly appeared in her bedroom. He proceeded to assault her, including sexual assault (at para. 6). She could not say how Mr. Barnes entered her residence. She assumed he came in through a basement window. There was evidence that a basement window "appeared to have been tampered with and was damaged" (at para. 8).
- [96] The complainant said she did not invite Mr. Barnes into her home, had not let him in and she was shocked when he appeared in the bedroom (at para. 8). Similar to the case before us, Mr. Barnes testified that the complainant invited him into her home and let him in through the front door (at para. 11).
- [97] On appeal, Mr. Barnes argued that the trial judge was wrong to convict him of break and enter "because the Crown did not establish that he actually broke into the complainant's residence" (at para. 18, emphasis added). That submission was premised on the fact that the judge did not make a specific finding as to how Mr. Barnes entered the home. Entry through a basement window was a possible means of entry; however, the judge made no factual finding to that effect. Rather, he stated: "Whether [Mr. Barnes] obtained entry through the window or some other way, I know not" (at para. 21, emphasis added). The appeal court found no error:
- [34] while the judge did not make any factual determination as to how exactly Mr. Barnes gained entry into the complainant's residence, this is not fatal to the conviction.
- [35] What is important is that, having considered the totality of the evidence, the judge found that the complainant had not invited Mr. Barnes to the residence and that there was no consent to him being there. Additionally, there was no evidence to support any other potential legal justification or excuse for Mr. Barnes's presence there, and no suggestion that any other legal justification was in play.
- [36] The judge specifically rejected Mr. Barnes's evidence that he was invited to the residence and that the complainant had opened the door and let him in. Had Mr. Barnes's evidence been accepted, a legal justification would have existed for his presence in the residence, and there would have been no deemed break and entry under section 350. However, this was not what the judge found.
- [Emphasis added.]
- [98] The facts of this case are different from *Barnes*. In particular, there was no evidence of a damaged entry point. Nonetheless, I find the reasoning apposite.

- [99] R. v. R.M.S., 2015 NWTCA 5, also involved an appeal from a conviction for break and enter and sexual assault. Similar to Barnes, the Court held that the trial judge "did not have to find precisely how the appellant got [into]" the complainant's residence to convict of a break and entry (at para. 28). In light of the Code's deeming provision, it was sufficient that the judge found there was no lawful justification or excuse for being in the residence at the time of entry (at para. 28).
- [100] I agree with the Crown that, in its essence, this final ground of appeal alleges unreasonable verdicts based on an absence of forensic or other independent evidence confirming how the appellant got into the home.
- [101] In my view, the conclusion that the appellant entered the home without lawful justification or excuse based on acceptance of the complainant's testimony was reasonably open to the judge: R. v. Yebes, [1987] 2 S.C.R. 168, 1987 CanLII 17; R. v. Biniaris, 2000 SCC 15 at para. 36. The appellant has not persuaded me that this finding was plainly contradicted by evidence relied upon by the judge or incompatible with evidence that was not otherwise contradicted or rejected: R. v. Sinclair, 2011 SCC 40 at paras. 4, 16 and 19-21; R. v. Beaudry, 2007 SCC 5. It is also a finding that is anchored in the judge's assessment of the complainant's credibility. The appellant has not convinced me that the credibility assessment is unsupportable on any reasonable view of the record: R. v. Burke, [1996] 1 S.C.R. 474 at para. 7, 1996 CanLII 229.
- [102] The complainant testified that she did not ask the appellant to return to her home. Nor did she let him in through the front door. There was evidence from which the judge could infer possible entry through the balcony door. There was also evidence that notwithstanding the complainant's recollection that she secured the front door, the door had been left "open" or "unlocked." The complainant testified that the appellant told her this when she asked him how he got in. She repeated it several times in her evidence:
- "He said that I left my front door open"; "I asked him what he was doing in my house and he said I left the door unlocked".
 - "I asked how he got in my house and he told me that I left my front door open." "He told me that I left my door open".
 - "He said, 'Shsh', and he told me that I left my front door open"; "I just got shushed and told that I left my door open".
 - "He said I left my door unlocked or left my door open." "[He said] I left my door unlocked for him."
 - "He said, 'You left the front door open, you let me in, you let me in'".

- [103] This evidence was properly admitted through the complainant and was capable of constituting an admission by the appellant as to how he entered the residence. It was conceded at the hearing of the appeal that the evidence about the front door's automated locking system did not foreclose the possibility of the door being left in the closed position, but not fully closed, and thereby remaining insecure.
- [104] Ultimately, it was for the judge to determine on the entirety of the evidence whether the Crown proved all essential elements of the offences beyond a reasonable doubt, including entry without lawful justification. He was satisfied the Crown met that burden after a thorough canvassing of the evidence and his assessment of credibility. He did not have to accept every part of the complainant's narrative, including her memory of having latched the front door, before he could find that the Crown met its burden of proof.
- [105] Taken as a whole, the judge's reasons reveal the rationale underlying his factual findings and his assessment of credibility. He had the "benefit of the intangible impact of conducting the trial": G.F. at para. 81. His explanations for accepting the complainant's evidence, notwithstanding its frailties and the possibility that she was mistaken about some things, find support in the record: R. v. Gagnon, 2006 SCC 17 at para. 22. I accept it would have been helpful for some parts of the reasons to be more clearly articulated, including the basis for finding a break and enter at paras. 88-89. However, read in their entirety and in context, the reasons explain the "what" and the "why" of the verdicts. The legal basis for the convictions is discernable: G.F. at paras. 71, 75.

Disposition

- [106] I see no bases for appellate interference with the verdicts in this case. Accordingly, I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Voith"

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