CANADA / JUDGMENT

R. v. Czechowski

2020 BCCA 277

COURT
British Columbia Court of Appeal

DECIDED
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2020 BCCA 277 R. v. Czechowski

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Czechowski,

2020 BCCA 277

Date: 20201013

Docket: CA45999

Between:

Regina

Respondent

And

Jeremy Robert Czechowski

Appellant

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Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated May 16, 2018 (R. v. Czechowski, 2018 BCSC 1646, Kelowna Docket 84432-2).

Counsel for the Appellant, appearing via videoconference:

M.A. Nathanson

Counsel for the Respondent, appearing via videoconference:

M. Vojvodic

Place and Date of Hearing:

Vancouver, British Columbia

June 16, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 13, 2020

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant was convicted by judge alone on four counts stemming from events at the appellant's residence: sexual assault causing bodily harm, unlawful confinement, choking with intent to enable commission of an indictable offence, and uttering threats. He appeals against conviction on the basis that the judge erred in (1) admitting and relying on expert evidence beyond the expert's qualifications; (2) using prior consistent statements to bolster the complainant's credibility; (3) allowing the Crown to tender presumptively inadmissible evidence of the complainant's sexual history without a s. 276 hearing; (4) admitting and relying on non-expert opinion regarding PTSD and psychosis; (5) finding that the complainant lacked capacity to consent; (6) failing to conduct a proper W.(D.) analysis; and (7) failing to provide adequate reasons for rejecting the appellant's evidence.

Held: Appeal from conviction dismissed.

The judge erred by admitting and relying on expert evidence beyond the expert's qualifications and by relying on a prior consistent statement to bolster the complainant's credibility. Although the errors were serious and prejudicial to the appellant, the conviction is upheld under the curative proviso: the remaining evidence against the appellant on the issue of consent would inevitably result in conviction on a retrial.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] Jeremy Robert Czechowski appeals his conviction by judge alone on four counts: sexual assault causing bodily harm, unlawful confinement, choking with intent to enable commission of an indictable offence, and uttering threats.

Background

[2] The charges arose out of events that occurred at the appellant's residence in February 2016. The complainant, M.A., and a friend, B.J., went to the residence at about 2 a.m. after leaving a nightclub where they had been drinking (approximately ten shots of hard liquor) and consuming cocaine. B.J. was acquainted with the appellant but M.A. had not met him before that evening. It was common ground at trial that sexual acts occurred between M.A. and the appellant over the course of four hours. The only issue at trial was whether the sexual activity was consensual.

[3] M.A. had significant gaps in her memory. She testified that she had blocked a lot of the experience from her mind but described three consecutive incidents of sexual assault. M.A. said that on arrival, she entered the kitchen and met the appellant. She said he reached up under her dress, ripped her underwear off, and refused to give it back to her. He told her that she was not going to leave until he had sex with her. He took her purse with her identification and cell phone and walked upstairs. She followed him into a bedroom in an attempt to retrieve her belongings.

[4] M.A. testified that in the first incident, once they were in the upstairs bedroom, the appellant forcefully removed her dress, pushed her against the bed while holding her wrists, and placed his hand on her throat. She described telling the appellant that she did not want to have sex with him and telling him to stop. He was squeezing her throat so hard she began to see "little stars." She was afraid she was going to pass out, so stopped trying to fight him off and instead attempted to loosen his grip on her throat. She said she was terrified. She said she was angry and had become "lippy" with him, but he insisted they were going to have anal sex and said that if she would not allow that "it will be easy to bury you in the backyard." She believed he was threatening her and was concerned because no one knew where she was.

[5] After the appellant left the room, M.A. described being naked, unable to find her clothes, and afraid to leave the bedroom. She was searching for her ID and for something to defend herself with when the appellant returned and assaulted her a second time. She said she put up her hands saying, "Please stop" and "Leave me alone," which led to another struggle. The appellant again pinned her wrists over her head with one hand while squeezing her throat with the other so that he could force anal sex on her. He again left the room.

[6] M.A. testified that after the second incident, she looked around the bedroom for her clothes and purse before going downstairs naked to look for them. The appellant grabbed M.A. by her arms and hair and told her to get back upstairs. She was scared and returned to the bedroom, where the appellant grabbed her by the throat and slammed her to the bed. He forced anal sex on her again until he ejaculated, at which point he again left the bedroom.

[7] M.A. did not recall how she obtained her dress and cellphone, but once she retrieved her cellphone, she left the residence.

[8] Records of phone messages showed that M.A. texted B.J. for help starting about 6 a.m. The police eventually reached M.A. on her phone. Recordings of conversations between M.A. and the police were admitted under the res gestae exception to the hearsay rule. During the calls, M.A. was crying and choking. She said she was on the street but was afraid to walk towards the closest street sign when prompted to do so. She remained on the line with police saying, "He raped me," "He was going to kill me." When asked, "Did he harm you? Did he hurt you?" M.A. answered "yeah" while crying and then repeated, "He told me he was going to kill me." When the police cruiser arrived she was described as disheveled, scraped up, appearing terrified, and not wanting to explain what had happened to her. During the ride to the hospital, she curled up in a ball on the back seat of the police car.

[9] Dr. Martin examined M.A. at the hospital about mid-morning. She conducted a head-to-toe general examination and identified 24 injuries, including a small hematoma ("goose egg") on the left mid-scalp; bruising and significant tenderness in the left submandibular area (under the jaw); pinpoint bruising on the lower-left side of the neck; multiple deep bruises on arms, legs, and feet; and jagged, raw edges where three acrylic fingernails had been torn off. Dr. Martin opined that those injuries were consistent with the application of significant force, strangulation, physical restraint, and self-defence injuries.

[10] Dr. Martin also performed a pelvic examination of M.A. That examination revealed red streaking and blotches on the right inner thigh and two patches of bruising on the left inner thigh. An internal pelvic exam revealed significant tenderness of the vagina and two grossly visible tears through the mucosa of the anus. In Dr. Martin's opinion, the severity of the tears in combination with the other injuries led her to the opinion that the sexual encounter was most likely non-consensual.

[11] Dr. Martin set out her conclusions in a report entered at trial:

1. The submandibular bruising and petechiae at the base of the throat are consistent with the victim's report of being choked by hands.
2. The thin "wire" abrasions on the left lateral neck are consistent with marks that would be left by a chain if friction or excess tension were applied. The victim was wearing a metal jewelry chain at the time of assault and examination.
3. The bruises on the inner upper arms are consistent with forcible restraint by hands.
4. The clustering of 0.5cm bruises on the wrists are consistent with so-called "fingertip" bruising, where the force of restraint leaves a characteristic mark on the skin. This finding is also consistent with the victim's history of being forcibly restrained by the wrists.
5. The vertically oriented cuts on the right lower portion of the knee are commonly found when falling forward with momentum onto a hard or rough surface. This finding is consistent with the victim's report of being pushed down in the bathroom onto a tile floor.
6. The abrasions and skin tears/sloughing on the tops of the victim's feet are consistent with friction burns. This would be a common finding on a victim placed into a kneeling position and assaulted from behind, and is consistent with portions of the described assault.
7. The broken and torn fingernails and multiple cuts and wounds to the hands are consistent with self-defence injuries.
8. The tenderness on the posterior (back) of the neck is consistent with the reported history of being forcibly confined by the gripping of a hand around the back of the neck.
9. The hematoma and tenderness on the head, and the tenderness on the bony prominences and musculature of the neck are consistent with the report of a fall down a flight of stairs and as well are consistent with the history of being restrained with force applied to the back of the head and neck.
10. The lack of visible injury to the vagina does not exclude the use of force.
11. The mucosal tears at the opening of the anus are consistent with forced anal penetration.
12. The extent of the bruising, abrasions, cuts and other injuries are consistent with the described violence of the attack.

[12] Dr. Martin testified that the blackening of vision and "white speckles" or stars reported by M.A. were symptoms of strangulation or choking.

[13] The appellant testified at trial. He said that when M.A. arrived at the residence she was intoxicated, approached him and immediately jumped into his lap. The appellant said that M.A.'s dress rode up because of the position she was sitting in, and he could see the side strap of her thong underwear. The judge summarised the appellant's evidence about the subsequent events:

[61] He began "strumming" on the side strap of the thong panties. The side strap broke and he pulled the panties from the body of M.A. He then threw the panties across the kitchen island to J.R. The accused said M.A. was giggling, but it was clear on all the evidence she was trying to retrieve her panties. There is no suggestion that she agreed to having her underwear torn from her person or otherwise removed. The accused testified that he asked M.A. if she wanted to go upstairs and she said yes. He was then asked if there was any other conversation with M.A. at that time. He testified that he did not recall any other conversation.

[62] The accused then testified that he and M.A. went to the master bedroom on the second floor. B.J. came to the door of that bedroom and knocked. The accused said B.J. opened the door a very short distance, then he closed the door and told her to go away. The accused said it was "[his] intention to make a friend and flirt with M.A." About five minutes later, B.J. returned to the bedroom door and again knocked. There was a very brief conversation, and the door was closed again. Shortly thereafter, the accused said he performed oral sex on M.A. M.A. was not confronted with this evidence about oral sex. He then testified that M.A. and the accused took off their own clothes and they had vaginal sex.

[63] During the sex act, the accused said M.A. repeatedly said the words, "fuck me harder" in a very loud voice. He said he obliged. The accused was then again asked by his counsel if M.A. wanted to have sex. His answer was, "When we first got up there, I asked if she wanted to go upstairs and then if she wanted to have sex." Curiously, when asked earlier by his counsel if he had asked M.A. anything other than, "Do you want to go upstairs?" the accused could not remember any other conversation. The statement "fuck me harder" will be discussed further below.[1]

[64] The accused testified that the first act of sex was in the missionary position and was vaginal sex only. After that sex act, the accused testified both parties dressed and went back to the kitchen to get beer. He reported that, on returning to the kitchen, M.A. asked where B.J. was. She was told B.J. had left the premises. The accused then said M.A. obtained a beer from J.R. and pyjama pants from T.L. He said she put on the pants. The accused then said he went to the fridge and took a further six beer upstairs for the consumption of M.A. and his self, and they had sex again.

[65] After the second sexual event, the accused testified the phone belonging to M.A. continued to ring and he answered the phone. The caller was B.J. When the accused answered the call from B.J., her mother was put on the line and said she was coming back to pick M.A. up and wanted her brought outside the house. The accused said he left the house and went out to the front door to give T.J. verbal instructions of how to get to the house. Once T.J. and B.J. arrived at the house, B.J. went into the house, and shortly thereafter came out of the house with M.A. M.A. was close to the vehicle driven by T.J. when, according to the accused, she said, "I'm having fun and returned to the house." Shortly thereafter, B.J. left in the vehicle driven by T.J.

[66] After the second sexual event, the accused said he and M.A. then had some more drinks. The accused then said M.A.'s phone rang again and she went crazy. She grabbed his man purse and said she was leaving. She said if he touched the purse, which she believed was hers, that she would call the police. He testified that during the evening, she continued drinking alcohol and was getting more drunk, but in relation to the seizure of the man purse, he said she appeared irrational, delusional, and hysterical.

[67] The accused then called T.L. to assist and watch what was happening. T.L. told M.A. to give back the purse, but she refused. T.L. tried to grab the purse and, according to the accused, T.L. was then kicked by M.A. on several occasions. T.L. then pushed her by the neck backwards towards the bathroom door. She then ran down the stairs, past the two men, and out the front door.

[68] Eventually, she was brought back to the house by T.L. When she came back into the house, she again demanded to know where B.J. was. She was holding keys for the accused's vehicle and said she was looking for her car. She again wanted to know where B.J. was and then, according to the accused, she became normal and sociable. The accused said she appeared to be in a psychosis and just drunk. The accused estimated at this point they had each had three or four additional beer.

[69] M.A. and the accused then returned to the master bedroom. The accused said he asked if they could try anal sex and they tried, he said. The accused denied seeing any marks or bruises on M.A. He said he did not see the marks or bruising on her neck on February 21, 2016, and that "he did not touch her neck".

[70] He did acknowledge that he held the back of her thighs when they were having sex. He then stated that he did not see any of the markings shown in Exhibit 4 or any scrapes or scratches. The accused said he did not threaten M.A. and did not tell her that she could not leave until he ejaculated in her anus.

[14] T.L. lived at the residence and also testified for the defence. His evidence closely aligned with the appellant's. He observed M.A. come out of the upstairs bedroom holding the appellant's purse. He asked her to return the purse to the appellant and, when she refused, tried to grab it from her. M.A. kicked him several times, and, in response, he pushed her against the wall by her throat area. He said that when M.A. ran out of the house, he and the appellant went to look for her and found her at a neighbour's house. T.L. described M.A.'s behaviour at that point as "strange" and "delirious." He said that after she returned to the house, he heard the appellant tell M.A., "you haven't even made me come yet," and that she responded, "well, let's go back upstairs, and I'll finish you off," at which point M.A. and the appellant went upstairs.

[15] The defence in closing argument submitted there were significant problems with M.A.'s evidence, which counsel characterized as both unreliable and unbelievable. They pointed to a number of significant gaps in her memory. First, M.A. did not recall the event in which she took the appellant's man purse and had an altercation over it with T.L. Second, although

M.A. testified that she went to the door of a neighbour's house, she did not recall the neighbour and her husband answering the door, nor did M.A. recall entering the house saying she was looking for her shoes--events confirmed by the testimony of the neighbour, M.S., who also said M.A. appeared drunk but not distressed.

[16] Third, M.A. did not recall B.J. coming to the door of the bedroom on two occasions to see if M.A. was alright.

[17] Fourth, B.J. and her mother, T.J., testified to driving to the residence to try to collect M.A. between the second and third incidents. Both B.J. and T.J. described M.A. coming outside towards the truck and then going back into the house to retrieve her purse and identification. B.J. followed M.A. into the house to try to get her back out again, but T.L. had M.A.'s ID and was refusing to give it to her. When B.J. threatened to call the police if T.L. did not return it, B.J. described T.L. threatening to chop her up into pieces and put her in the back of his truck, so she fled in fear and screamed at her mother to drive away. They did so, leaving M.A. behind. Again, M.A. had no recollection of these events.

[18] Based on the gaps in M.A.'s memory, the appellant's testimony, and M.A.'s statement to police one year after the incident ("I don't remember shit" and "I remember everything until going upstairs") the defence submitted that M.A.'s evidence of non-consensual sexual activity should not be accepted. At a minimum, the defence argued that non-consent had not been proved beyond a reasonable doubt.

[19] The Crown in closing submitted that the non-consensual nature of the sexual activity was proved by M.A.'s evidence, her injuries, the texts for help, and her appearance and fear when interacting with police. The Crown contended further that the appellant's evidence established that by the time of the third incident of sexual assault, M.A. was in such a psychological state that she was not capable of consenting to sexual activity.

[20] The judge found the charges had been proved. He found that T.L.'s evidence was neither credible nor reliable given the significant conflicts between what T.L. told the police in his statement in 2016 and what he said in court. He also noted that none of the statements T.L. testified to hearing M.A. say had been put to her in cross-examination, contrary to the rule in Browne v. Dunn (1893), 6 R. 67 (H.L.). The judge did not believe the appellant, finding his evidence did not raise a reasonable doubt, in significant part because the appellant's version of events did not account for M.A.'s numerous injuries. The judge acknowledged the gaps in M.A.'s memory, and some inconsistencies with the evidence of other witnesses, but accepted her evidence that she had not consented to any of the sexual activity and found she did not have capacity to consent to it in any event.

Issues

[21] The appellant seeks a new trial on all counts in the Indictment. He raises seven grounds of appeal, contending the trial judge erred by:

1. Admitting and relying on expert evidence that went beyond the matters the expert had been qualified to opine on;
2. Using prior consistent statements by the complainant to bolster her credibility;
3. Allowing the Crown to tender presumptively inadmissible evidence of the complainant's prior sexual history without a s. 276 hearing;
4. Admitting, and relying on, opinions/comments regarding PTSD and psychosis without a proper evidentiary foundation;
5. Making findings with regard to the complainant's capacity to consent that were contrary to the complainant's own evidence;
6. Failing to conduct a proper W.(D.) analysis; and
7. Failing to provide adequate reasons for rejecting the appellant's evidence.

[22] For the reasons that follow, I conclude that the judge erred in relying on certain expert evidence and in using prior consistent statements to bolster M.A.'s credibility. Nonetheless, I would uphold the conviction in accordance with the curative proviso, s. 686(1)(b)(iii) of the Criminal Code.

Analysis

1. Did the judge admit and rely on expert evidence that went beyond Dr. Martin's area of expertise?

[23] Dr. Martin was qualified without challenge as an expert in the diagnosis and treatment of injuries and illnesses, the assessment and examination of sexual assault victims, and performing forensic sexual assault examinations. In her evidence-in-chief, she testified about the complainant's inability to recall details of the events as a result of the trauma of the sexual assault, saying:

[M]emory is often fragmented in an acute traumatic situation, where there will be sentinel moments and sentinel memories of - of the trauma. So moments that are embedded with fear or where there's been some sort of a change in the course of events. And often there's gaps in between those sentinel events that slowly fill in as time passes and the victim is able to - to think and process what's happened to them. And so that's not uncommon to see, sort of as a new memory comes back that they get distraught all over again.

The appellant submits that Dr. Martin was not qualified to give evidence about the effects of trauma on human memory.

[24] Although defence counsel did not object to this evidence at trial, the judge had an independent obligation to prevent the Crown from leading inadmissible evidence and was required to disregard it in his assessment of the evidence: R. v. Vassel, 2018 ONCA 721 at paras. 91, 93; R. v. Sekhon, 2014 SCC 15 at paras. 47-48.

[25] In my view, to the extent that Dr. Martin was describing M.A.'s reactions during the examination and giving her opinion on whether it was typical of what she normally observes in the examining room during an assessment of this kind, she was qualified to do so. She had been accepted as an expert in "the assessment and examination of sexual assault victims." However, to the extent that she gave opinion evidence relating to the impact of trauma on memory over time beyond the confines of an examination immediately following an assault, she went beyond her area of expertise. Although medical doctors are not without expertise in assessing and managing their patients' emotional and psychological responses, the field of memory is a distinct subject usually dealt with by neurologists, psychiatrists, or psychologists: R. v. Palmer-Coke, 2019 ONCA 106 at para. 19.

[26] The judge relied on Dr. Martin's opinion to explain the gaps in M.A.'s memory at trial, saying:

> [164] I reject the assertion that M.A. consented to have sexual relations of any kind with the accused. Having heard M.A. testify and in relation to the other evidence called by both the Crown and the accused, I am satisfied that her description of the events that she did recall were genuine and accurate. I appreciate that M.A. had no recall of certain events, such as the presence of B.J. and T.J., but such lack is explained by the evidence of Dr. Martin referring to recall of traumatic events with gaps in memory.

[Emphasis added.]

[27] I note that Dr. Martin opined that gaps due to trauma would slowly fill in as time passed. She also acknowledged in cross-examination that memory gaps can be caused by intoxication rather than trauma. The judge did not consider either of these factors. As such his reliance on this aspect of the doctor's evidence to explain the gaps in M.A.'s recall was misplaced in any event.

[28] In summary on this ground of appeal, in my view the judge erred in relying on Dr. Martin's evidence to explain the gaps in M.A's memory at trial.

2. Did the judge use M.A.'s prior consistent statements to bolster her credibility?

[29] The appellant challenges the judge's use of what M.A. said to Dr. Martin during the examination at the hospital. Dr. Martin was the first witness at trial, and she began by relaying M.A.'s description of what had happened to her at the appellant's residence earlier that morning. Defence counsel twice objected to that evidence on the basis that it amounted to a prior consistent statement, but the judge permitted the doctor to convey M.A.'s words. He noted in his reasons for judgment that the statements made by M.A. to Dr. Martin were not admissible for the truth of their contents, but to provide narrative background to explain

Dr. Martin's report: at para. 117.

[30] However, later in his reasons, when assessing M.A.'s evidence, the judge returned to Dr. Martin's evidence about what M.A. had said to her at the hospital:

[165] M.A. told the court if there were events she did not recall, and when she could not recall an event, she said so. She did not embellish or dramatize what she told the court. What she said was confirmed by what she told Dr. Martin, an experienced forensic examiner.

[Emphasis added.]

In my view, this constitutes a clear error of law. A trier of fact must never use a prior consistent statement to support the prohibited inference that a witness is more likely to be telling the truth because they have repeated the same thing more than once: R. v. Stirling, 2008 SCC 10 at para. 7.

[31] The Crown contended that the prior consistent statement was properly relied on to rebut what it claimed amounted to an allegation by the defence that M.A. had recently fabricated her evidence. In this regard, the Crown pointed to the defence's challenge to the reliability of M.A.'s evidence based on her initial comment to police that she did not remember what happened after she went upstairs.

[32] There are two problems with the Crown's submission in this regard. First, recent fabrication was not raised at trial by either counsel. Second, the judge did not identify any purpose for relying on the prior consistent statement other than to support his conclusion that M.A. was a truthful witness who did not embellish or dramatize what she told the court: "what she said was confirmed by what she told Dr. Martin." In any event, even if the statement could have been admitted to address recent fabrication, its use would have been restricted to rebutting the suggestion that M.A. had only recently come up with her version of events. It could not be used to support the truth of that version: R. v. Aksidan, 2006 BCCA 258 at para. 21; R. v. Stirling, 2008 SCC 10 at para. 7.

[33] Having concluded that the judge made the first two errors identified by the appellant, I agree with counsel for Mr. Czechowski that the real issue on appeal is whether the curative proviso can be used to uphold the convictions despite the errors. Before turning to that question, however, it is necessary to address the remaining grounds of appeal and to determine whether additional errors must inform that analysis.

3. Did the judge allow the Crown to tender presumptively inadmissible evidence of the complainant's prior sexual history without a s. 276 hearing?

[34] The Crown in examination-in-chief asked the complainant if she had ever experienced anal sex before. She said that she had not. The appellant submits that by asking this question, the Crown improperly elicited evidence of the complainant's prior sexual history, which is statute-barred unless there has been a successful application under s. 276 of the Code, or the framework established in R. v. Seaboyer, [1991] 2 S.C.R. 577. No such application was made in this case.

[35] The Crown submits that evidence that a complainant has not previously engaged in sexual activity does not engage the same privacy interests and is not subject to s. 276. That question has yet to be resolved, but it was addressed by Karakatsanis J. in R. v. R.V., 2019 SCC 41 at para. 81:

Whether sexual inactivity is captured by either s. 276 or the Seaboyer principles is not directly at issue before this Court. There is appellate authority stating that s. 276 does not prevent the complainant from testifying as to virginity: R. v. Pittiman (2005), 198 C.C.C. (3d) 308 (Ont. C.A.), aff'd 2006 SCC 9, [2006] 1 S.C.R. 381, on a different point, at para. 33; R. v. Brothers (1995), 169 A.R. 122 (C.A.), at paras. 26-29. However, these cases also recognize that admitting evidence of virginity raises further questions, including: (i) the inferences the finder of fact may be asked to draw from the fact of the complainant's virginity and (ii) how the accused may challenge this claim: see Pittiman, at paras. 34-37; Brothers, at paras. 30-35. While I leave this issue for another day, I agree with Paciocco J.A. that it would be incongruous to hold that the statement "I am a virgin" does not engage s. 276 while an answer to the contrary would clearly be a reference to sexual activity: para. 79.

[Italic emphasis in original; underline emphasis added.]

[36] It is not necessary to resolve this question on the facts of this case. Defence counsel made no objection to the question about prior anal intercourse at trial, and, in my view, whether the complainant had engaged in anal intercourse on a previous occasion was relevant to the assessment and interpretation of M.A.'s injuries. As such, the evidence likely would have been admitted in any event. M.A.'s answer in the negative eliminated an alternative explanation for the two anal tears described by Dr. Martin, who had noted that the complainant had been sexually active two days before the events at the residence. It would have been preferable for the Crown to ask the question about experience with anal intercourse in relation to a period of time prior to the events in issue, but, if the less than ideal form of the question could be said to have triggered the need for a s. 276 application or Seaboyer analysis, the error was, in my view, a harmless one. The Crown did not suggest that the complainant was less likely to have consented to anal sex because of her lack of experience with that type of sexual activity, and the judge did not rely on it in his analysis of consent.

4. Did the judge err in admitting and relying on opinions/comments regarding post-traumatic stress disorder and psychosis?

[37] The appellant argues that the trial judge improperly allowed and considered M.A.'s evidence that she suffered from PTSD when no medical evidence supporting that diagnosis had been tendered. The judge noted this evidence in assessing the bodily harm element of the offence, observing that "[b]odily harm includes psychological harm," (at para. 153) citing R. v. McCraw, [1991] 3 S.C.R. 72 at 80, and saying:

[154] In this case, M.A. had significant genital pain, neck and throat pain that lasted at least a month. M.A. suffers from post-traumatic stress disorder for which she takes Ativan. She has moved from her former home to another location because of anxiety and fear.

The appellant says that this error was prejudicial because it unfairly bolstered the conclusion that the incident was non-consensual and that its non-consensual nature caused PTSD.

[38] M.A. gave this evidence after describing her physical injuries and being asked whether she had any emotional issues after the incident. She testified that since the events, she had been experiencing "major anxiety and panic" whenever she went out in public. She said she had been seeing multiple counsellors and had been prescribed Ativan, which enabled her to control her anxiety and to sleep properly after about a month, and she said she had moved to a different community to help deal with her anxiety.

[39] Use of the term PTSD added nothing to M.A.'s clearly admissible description of her symptoms following the events and, in my view, was not prejudicial to the appellant. I note in this regard that trial counsel did not object to its use and did not challenge M.A. on her use of the term in cross-examination. Nor did the Crown rely on M.A.'s evidence as proof of a medical diagnosis.

[40] In similar vein, the appellant says the judge erred in admitting and relying on his evidence that "it was like she went into psychosis or something." The appellant used this phrase to describe M.A.'s behaviour around the purse incident and her visit to the neighbour's house. He says he was describing irrational behaviour by the complainant, and was not qualified to provide an expert opinion on psychosis. The appellant says the judge erred first, by relying on the statement to find that M.A. had suffered from "a bout of psychosis," and second, by using it to make a key legal conclusion that M.A. lacked capacity to consent.

[41] I do not agree with this characterization of the judge's reasons. The judge referred to "a bout of psychosis described by the accused, where he also referred to M.A. as irrational, delusional or hysterical": at para. 166 (emphasis added). It is apparent that the judge is here quoting the appellant's words. There is no suggestion that the judge equated the appellant's use of the term with a medical diagnosis.

[42] In summary, I would not accede to this ground of appeal.

5. Did the judge err in finding that M.A. lacked capacity to consent?

[43] The appellant submits that the judge's finding that M.A. lacked capacity to consent was inconsistent with his finding that she refused consent--a finding that relied on her recollection of what occurred that night.

[44] The appellant argues that the present case is remarkably similar to R. v. Jensen (1996), 106 C.C.C. (3d) 430 (Ont. C.A.). In that case, the judge found that the complainant either said no or lacked the capacity to consent. The complainant testified that although she was drunk or stoned, she knew what was going on. Rosenberg J.A. held that the complainant's own

evidence negated any reasonable basis for finding a lack of capacity, concluding that an equivocal statement given by the accused about the complainant being "too drunk" did not serve as a reasonable foundation for a finding that the complainant lacked capacity: Jensen at 437. As a result, the finding of lack of capacity was held to be unreasonable, and a new trial ordered.

[45] In my view, the present case is readily distinguishable from Jensen. In that case, the complainant testified that she knew what was going on and was alert. She gave details of the alleged assault and surrounding circumstances, recalling the order of events in a detailed way. There was no evidence that anyone noticed behaviour consistent with significant intoxication: Jensen at 438. In contrast, in the present case M.A. had large gaps in her memory and acknowledged that to be so. There was evidence of significant intoxication. The neighbour described her slurring her words and stumbling; the appellant said M.A. was irrational and seemed to be experiencing psychosis, and both he and T.L. described her as delirious, at least at the time of the purse incident and prior to the third incident of sexual activity, which, on the appellant's evidence, also occurred after he and M.A. had each consumed a further three or four beers.

[46] The appellant points to M.A.'s testimony that she made conscious decisions about what she did and did not want to do, and that she undertook purposive activities such as looking for her belongings and seeking help from the next-door neighbours, which suggests, on her own evidence, that she had an operating mind and a capacity to consent. He suggests the judge ignored that evidence and conflated intoxication with incapacity.

[47] It can be difficult to draw the line between intoxication and incapacity. Mere proof of drunkenness, loss of inhibitions, regret for a bad decision, or some memory loss do not on their own negate capacity for consent, but neither does the ability to walk a short distance, make a phone call, speak, and recall some events necessarily preclude a finding of incapacity: R. v. G.F., 2019 ONCA 493 at para. 38. Incapacity is a finding of fact that requires judges to consider all of the evidence before them.

[48] On the issues of consent and capacity, the reasons for judgment are not a model of clarity. But they demonstrate that the judge was convinced beyond a reasonable doubt that M.A. did not consent to the sexual activity with the appellant. He came to that conclusion on no fewer than four bases. First, he determined that the appellant inflicted bodily harm on M.A. intentionally in order to achieve sexual gratification and therefore could not rely on consent, citing R. v. Zhao, 2013 ONCA 293 and R. v. Quashie (2005), 198 C.C.C. (3d) 337 (Ont. C.A.), which hold that the intentional infliction of bodily harm vitiates consent. The judge concluded on this basis that whether consent was given was irrelevant: at paras. 144-148. (The Crown did not seek to uphold the conviction on this basis. As neither party addressed this in submissions, I will do nothing more than note that the judge identified it as one pathway to conviction.)

[49] Second, the judge found that "the evidence, including the testimony of M.A. and the physical defensive injuries," proved beyond a reasonable doubt that she did not consent to the sexual contact with the appellant: at para. 148(5).

[50] Third, the judge found that to the extent M.A. submitted to the sexual activity, she did so by reason of fear of further bodily harm, which cannot constitute consent under s. 265(3) of the Code: at paras. 150 and 152.

[51] Fourth, the judge found that in the alternative, M.A. was incapable of consenting by reason of her intoxication, saying:

[157] In the alternative, the issue to be resolved is whether the complainant was incapable of consenting by reason of her intoxication. There is no dispute on the facts, and the accused admitted, that M.A. was intoxicated by alcohol when she arrived at the Wiig Road home where the events occurred. She continued to drink alcohol, a number of beer, and acted in a delusional and psychotic manner, according to the evidence of the accused and T.L. M.A. had also ingested cocaine at the night club in Kelowna.

[158] In R. v. P., 2004 NSCA 27, the Nova Scotia Court of Appeal addressed the issue of a complainant having consumed "an incredibly large quantity of alcohol" (para. 3) in relation to consent in a sexual assault case. The trial judge found the complainant did not have an operating mind to enable her to address the issue of consent. She simply was in no condition to give consent. The features of the present case which support this finding include the inability of M.A. to remember the man purse incident, the attendance of B.J. and T.J. in an automobile, her odd presence in the home of M.S., all of which, in circumstances where her consumption of alcohol was prodigious for a "tiny" woman: see Al-Rawi.

[159] I find that M.A. was incapable of giving consent to sexual activity with the accused by reason of significant intoxication.

[52] The Crown contends there is no inconsistency in the judge finding M.A. said "no" and also finding that she did not have the capacity to consent. First, the Crown submits that the reasons for judgment can be read as the judge finding that M.A. said no to the first two incidents and by the third had become so impaired that she no longer had the capacity to consent. In my view, the judge's reasons cannot be parsed that finely. Although he refers, at one point, to the further alcohol consumed after the initial sexual activity, he does so in the context of M.A.'s consumption of alcohol in general (at para. 158) and concludes in broad terms that she was incapable of giving consent: at para. 159.

[53] I agree with the Crown, however, that on the facts of this case there is nothing inconsistent or unreasonable in the judge finding that M.A. communicated her refusal of sexual activity and finding in the alternative that she did not have the capacity to consent. As in R. v. Basra, 2009 BCCA 520 at para. 40, the circumstantial evidence of resistance and the complainant's testimony permitted only two inferences: "Either she did not have capacity or she resisted.

Either way she did not consent." As this Court said in R. v. Capewell, 2020 BCCA 82 at para. 46, the same facts may evince both non-consent and incapacity. It is permissible for a judge to find that either the complainant lacked the capacity to consent or did not consent: Capewell at 50.

[54] As Janine Benedet notes in "The Sexual Assault of Intoxicated Women" (2010) 22:2 CJWL 435 at 459:

Findings of non-consent and incapacity to consent should not be seen as mutually exclusive if it is kept in mind that non-consent is a state of mind of the complainant, rather than an active refusal to participate. Consent, on the other hand, is a voluntary agreement to participate. There is a gap between these two definitions, in that a person may both be competent to know that she does not want to participate in sexual activity and also lack the more advanced capacity for truly voluntary agreement.

[Emphasis added.]

[55] On the facts of this case, the judge was satisfied that M.A. expressed in words and actions that she was not consenting to sexual activity, and that she was incapable of the more advanced capacity for truly voluntary agreement in any event. These findings were open to him on the facts of this case. It follows that I would not accede to this ground of appeal.

6. Did the judge err by failing to conduct a proper W.(D.) analysis and by not providing adequate reasons for rejecting the appellant's evidence

[56] The appellant submits that although the trial judge correctly set out the law with regard to R. v. W.(D.), [1991] 1 S.C.R. 742, he did not apply it--instead, he rejected the evidence of the appellant because he accepted the evidence of the complainant.

[57] The appellant says further that the judge's W.(D.) analysis is perfunctory and conclusory, amounting to one paragraph:

[167] Under the instructions in W.(D.), the evidence of the accused concerning the consent of M.A. is rejected by this court and that evidence does not give rise to a reasonable doubt in this case.

The appellant submits that something more was required to explain to the appellant why his evidence did not raise a reasonable doubt: R. v. Slatter, 2019 ONCA 807 at para. 82. He contends, therefore, that the reasons are insufficient to permit appellate review.

[58] I would not accede to this ground of appeal. The judge identified a number of problems with the appellant's evidence, including inconsistencies on direct examination as to his communications with M.A.: at paras. 61 and 63. The judge also noted that during cross-examination, the appellant was at times unresponsive and repeatedly evasive in answering questions (at paras. 81 and 83) and admitted to surreptitiously glancing at notes he had prepared following the close of the Crown's case: at paras. 78-79. Further, the judge was troubled by the lack of observance of the rule in Browne v. Dunn, noting that during the

cross-examination of M.A., the appellant had failed to put to her several important components of his version of events in support of consent--as a result of which the complainant did not have an opportunity to respond to them. This led the trial judge to conclude at para. 83:

These statements were not put to M.A., despite their content being evidence vital to the defence that M.A. consented to the sexual activity with the accused. In the circumstances of this case, I do not accept the evidence of the accused with respect to any such statements attributed to M.A.

[59] The judge also took into account the defence theory that M.A.'s injuries resulted from a fall outside of the residence and the altercation with T.L. over returning the appellant's purse. The judge found the former purely speculative and the latter unsupported by the evidence--matters I will address more fully in the section below dealing with the curative proviso.

[60] I am of the view that the judge critically assessed the appellant's evidence in the context of the record as a whole and adequately explained his reasons for concluding that the appellant's evidence did not raise a reasonable doubt.

Should the curative proviso be applied?

[61] I turn now to the real issue on this appeal: whether the curative proviso should be used to uphold the conviction despite the two errors of law made by the judge: relying on expert evidence improperly, and using the complainant's prior consistent statements to bolster her credibility. The appellant says these errors go to the heart of the judge's assessment of the complainant's credibility and therefore the conviction must be set aside and a new trial ordered.

[62] As the Supreme Court of Canada observed in R. v. Van, 2009 SCC 22 at paras. 34-38, not every error in a criminal trial warrants appellate intervention. Once an error has been established, it falls to the appellate court to determine whether the convictions can be upheld with resort to s. 686 (1)(b)(iii) of the Code. The Court described that process at para. 34:

Under this provision, a conviction can be upheld providing that the error has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error. To do so, it must establish that the error of law falls into one of two categories. First, that it is an error so harmless or minor that it could not have had any impact on the verdict. In the second category are serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain: Khan; R. v. Trochym, 2007 SCC 6, [2007] 1 S.C.R. 239.

[63] I agree with the defence that the errors in the present appeal are not "so harmless or minor" that they could not have had any impact on the verdict. They are serious errors that justify a new trial unless "the evidence against the appellant was so overwhelming that any other verdict would have been impossible to obtain." As Sopinka J. said in R. v. S.(P.L.), [1991] 1 S.C.R. 909 at 916, "depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction."

[64] The appellant submits that in a case in which the credibility of the appellant and complainant are so central to resolving the element of consent, that high standard has not been met and the proviso cannot be utilized.

[65] The standard for upholding a verdict in the face of errors that cause prejudice to the accused is a demanding one. In Van, the court said:

[36] The high standard of an invariable or inevitable conviction is understandable, given the difficult task for an appellate court of evaluating the strength of the Crown's case retroactively, without the benefit of hearing the witnesses' testimony and experiencing the trial as it unfolded (Trochym, at para. 82). It is thus necessary to afford any possible measure of doubt concerning the strength of the Crown's case to the benefit of the accused person.

[66] In my view, this is a case in which the evidence against the appellant on the issue of consent is so powerful that there is no realistic possibility that a new trial would produce a different result. There was a significant body of evidence quite apart from the testimony of the complainant to support the non-consensual nature of the sexual contact.

[67] First, M.A. suffered extensive injuries that reflected her efforts to resist the sexual activity and the appellant's efforts to overcome that resistance. Some of those injuries, such as bruising and scrapes on the knees and shins, are not conclusive. But, even seen in the most favourable light from the appellant's perspective, many of the injuries cannot be understood except in the context of non-consensual sexual acts.

[68] The appellant submits that the injuries were the result of a combination of rough sex, the complainant falling after she left the residence, and T.L. forcefully grabbing M.A. by the neck and shoving her back during the purse incident. Although M.A. agreed in her evidence that T.L. had applied force to her throat when they were struggling over the purse, the judge made a clear finding of fact, based on T.L.'s demonstration at trial of where and how he pushed M.A. away from him, that T.L.'s hand was "in contact with the base of her chin, not her neck": at para. 90. The judge found that "the thrust by T.L. to the chin of M.A. does not explain the substantial and deep-seated bruising on the throat and neck of M.A described by Dr. Martin and shown in the exhibits": at para. 156.

[69] Next, the judge found the defence suggestion that M.A.'s injuries were caused by a fall outside the residence to be entirely speculative. While Dr. Martin acknowledged that some of the injuries could be consistent with a fall, she also said there was no dirt in the scrapes and cuts or other indicia of a fall outside. More importantly, she testified that some injuries could not be explained by falls. Some were, rather, consistent with strangulation, defensive efforts, and friction burns.

[70] Finally, although Dr. Martin accepted that consensual rough sex can result in vaginal tenderness, bruising, and injury to the anus, she said the degree of tearing in the anus and the combination of pelvic and defensive injuries made it probable that the activity had not been consensual.

[71] In addition to the evidence of injuries sustained during the sexual activity, the evidence included recordings of the communications between M.A. and the police immediately after she left the residence. No challenge was taken to their admission as part of the res gestae, which meant the communications were admitted for the truth of their content. They demonstrate M.A. was distressed and highly fearful of the appellant and provide contemporaneous evidence that she did not consent to sexual activity with him.

[72] In summary, even if M.A.'s testimony is not considered, the photographic evidence of her injuries, Dr. Martin's assessment of those injuries, and M.A.'s interactions with police immediately after leaving the residence are inconsistent with consensual sex.

[73] The absence of consent may be determined by circumstantial evidence even where the complainant, due to the ingestion of drugs or alcohol, has little or even no memory of the event: R. v. Kontzamanis, 2011 BCCA 184 at paras. 31 and 35; R. v. Al-Rawi, 2018 NSCA 10 at para. 69. In my view, the circumstantial evidence in this case overwhelmingly established non-consent, quite apart from M.A.'s testimony. I conclude that the appellant's conviction would be inevitable on a retrial, and I would therefore invoke s. 686(1)(b)(iii) of the Criminal Code.

Disposition

[74] I would dismiss the appeal from conviction.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

[1] The judge returned to this evidence in his discussion of the rule in Browne v. Dunn, finding the defence had not put this statement and others to M.A. in cross examination.

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