

CANADA / JUDGMENT

R. v. D.F.

2020 BCSC 2215

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2215 R. v. D.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D.F.,

2020 BCSC 2215

Date: 20201215

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Registry: Nanaimo

Regina

v.

D.F.

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Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Crown:

N. P. Barber

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W. M. Finch, Q.C.

Place and Date of Trial/Hearing:

Nanaimo, B.C.

August 18-21, 2020

Place and Date of Judgment:

Nanaimo, B.C.

December 15, 2020

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Introduction

- [1] The complainant, T.W. is now 20 years old. At the time of the events giving rise to the sexual interference charge faced by D.F., T.W. was living with her parents in [content redacted], BC. Since the events, T.W. has transitioned to the male gender and has officially changed his name. Throughout these reasons, I will refer to the complainant in male gender pronouns, and as M.W., as that is how he prefers to be addressed.
- [2] D.F. is M.W.'s mother's uncle. I have anonymized his name to protect the identity of M.W. In the published version of the reasons, I will also remove any information which might otherwise identify either M.W. or D.F.
- [3] The Crown alleges that the sexual interference occurred between January 1, 2008 and December 31, 2011, while D.F. was visiting M.W.'s family in their home at [content redacted].
- [4] While D.F. was playing an online computer game with M.W. and his younger brother, M.A.W., D.F. is alleged to have rubbed or fondled M.W. under his shirt on a number of occasions. In the course of doing so, he is alleged to have rubbed M.W.'s chest, primarily in the left nipple area, and pinched his nipples.
- [5] At trial, in addition to hearing M.W.'s evidence, I heard from his father, J.W.
- [6] D.F. testified in his own defence and denied the allegations. In addition, he called his sister, V.C., and his twin sister, D.P., as character witnesses. D.F. submits that his evidence ought to be believed, or ought to raise a reasonable doubt, resulting in his acquittal.

Applicable Legal Principles

The Offence

- [7] A discussion of the applicable legal principles begins with the presumption of innocence; the most important principle of law applicable to every criminal case. It guarantees that an accused is presumed innocent until the Crown has proven every element of the offence of sexual interference beyond a reasonable doubt.
- [8] Two rules flow from the presumption of innocence in this case. The Crown bears the burden of proving D.F.'s guilt. That burden of proof always remains with the Crown and never shifts to D.F. who does not have to prove anything. The other is that guilt must be proved beyond a reasonable doubt.
- [9] A reasonable doubt is a doubt that is based on reason and common sense; it is logically derived from the evidence or absence of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 39.

[10] Believing that D.F. is probably guilty is not enough to convict him, but the Crown does not have to prove guilt to an absolute certainty. Having said that, proof beyond a reasonable doubt is "much closer to absolute certainty than to a balance of probabilities": R. v. Starr, [2000] 2 S.C.R. 144 at para. 242.

[11] The Indictment, as amended at trial, reads:

[D.F.], between January 1, 2008 and December 31, 2011, at or near [content redacted], in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of [M.W.], a person under the age of fourteen years, contrary to Section 151 of the Criminal Code.

[12] Section 151 of the Criminal Code, R.S.C., 1985, c. C-46 [Code] defines the offence of sexual interference. It reads:

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[13] On May 1, 2008, after the first date of alleged sexual interference referred to in the indictment, amendments to the Code came into force increasing the age of a complainant from under 14 years of age to under 16 years of age: see Tackling Violent Crime Act, S.C. 2008, c. 6, s. 54, in force May 1, 2008. Whether M.W. was nine or 11 years old when the sexual interference is alleged to have occurred, he was below the age of 14 then required by the section.

The Elements of the Offence

[14] In addition to proving that D.F. is the person who committed the offence on the date(s) and in the place described in the indictment, the Crown must also prove that:

- M.W. was less than 14 years old at the time of the alleged sexual touching;
- D.F. intentionally touched him, either directly or indirectly; and
- the touching was for a sexual purpose.

[15] Touching for a sexual purpose is not defined in the Code. It has been defined in a number of cases and includes touching for sexual gratification or to violate a person's sexual integrity: see, for example, R. v. Morrissey, 2011 ABCA 150 at para. 21, R. v. Colley, 2009 BCCA 289, leave to appeal ref'd, [2009] S.C.C.A. No. 358.

- [16] There is no issue that the Crown has proven, beyond a reasonable doubt, that M.W. was less than 14 years old throughout the range of dates set out in the indictment and that the events occurred in [content redacted], BC.
- [17] D.F. conceded at trial that identity was not an issue. Finally, in closing submissions, D.F. conceded that, if I conclude that the Crown has proven beyond a reasonable doubt that the touching occurred as described by M.W., it was touching for a sexual purpose.

The Applicable Evidentiary Principles

The Assessment of Credibility and Reliability

- [18] As the Supreme Court of Canada explained in *R. v. Morin*, [1988] 2 S.C.R. 345, a trier of fact does not conduct a piecemeal analysis of the evidence in a case. It is not each piece of evidence that requires proof beyond a reasonable doubt. Rather, a trier of fact must consider the cumulative effect of the evidence. It is only the elements of an offence that are subject to a criminal standard of proof. Individual pieces of evidence may be proven on a balance of probabilities.
- [19] M.W. was an adult when he testified, but he was recounting events that occurred when he was a child. In *R. v. W. (R.)*, [1992] 2 S.C.R. 122 at 133-134, Justice McLachlin, as she then was, discussed the approach to the evidence of children. She concluded:

In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

- [20] Thus, when assessing the credibility of M.W.'s evidence, I must take into account that children may not perceive and recall events in the same way as an adult, particularly when it comes to peripheral matters.
- [21] D.F. testified in this case. In assessing the credibility of his evidence, the Supreme Court of Canada set out a framework for the application of reasonable doubt in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 757-758:
- if I believe D.F.'s evidence, I must acquit him;
 - if I do not believe D.F.'s evidence, but I am left in a reasonable doubt by it, I must acquit him;
 - and
 - even if I am not left in a reasonable doubt by D.F.'s evidence, I must consider whether, on the basis of the evidence I do accept, I am convinced, beyond a reasonable doubt, by the evidence of D.F.'s guilt.

- [22] In addition to the W.(D.) framework, it is also the case that if, after careful consideration of all of the evidence, I am unable to decide whom or what to believe, I must acquit D.F.: R. v. C.W.H. (1991), 68 C.C.C. (3d) 146 (B.C.C.A.).
- [23] The Supreme Court of Canada has acknowledged that W.(D.) may require refinement. In R. v. J.H.S., 2008 SCC 30 at paras. 10-13, the Court explained that the W.(D.) instruction is designed to help juries understand the meaning of "reasonable doubt" in the context of conflicting testimonial accounts and to emphasize that disbelieving an accused's evidence or preferring a complainant's evidence does not satisfy the Crown's burden of proof. The first element of the framework may be an oversimplification because some, none, or all of the testimony of a witness, including an accused, may be believed. The second element recognizes that some aspects of the evidence of an accused may raise a reasonable doubt even though most of it is rejected and a reasonable doubt may arise from an inability to decide whether to believe an accused's testimony. In either circumstance, the accused is entitled to an acquittal.
- [24] The W.(D.) framework should not be applied formulaically. As has been repeatedly said, the framework is not a magical incantation or something to be slavishly followed. Rather, it is the principles underlying the W.(D.) framework that are important.
- [25] In his recent article, Justice Paciocco, now of the Ontario Court of Appeal, discussed those principles:
1. Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred.
 2. A criminal fact-finder who believes evidence that is inconsistent with the guilt of the accused cannot convict the accused.
 3. Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder is left unsure whether that evidence is true, there is a reasonable doubt and an acquittal must follow.
 4. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt.
 5. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.
- (David M. Paciocco, "Doubt about Doubt: Coping with R. v. W. (D.) and Credibility Assessment" (2017) 22 Can. Crim. L. Rev. 31.)
- [26] Recently, in R. v. Ryon, 2019 ABCA 36 at para. 51, the Alberta Court of Appeal reviewed the W.(D.) instruction and suggested that an "improved version" of the W.(D.) instruction should impart the following:

[51]

(i) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown. (Subject to the caveat that this does not apply to defences, such as that found in s 16 of the Criminal Code, where the onus rests with the proponent of the defence.)

(ii) In that context, if the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit. (Subject to defences with additional elements such as an objective component).

(iii) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.

(iv) Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

[27] While these comments are directed at juries, they apply equally to judge alone trials. I agree with the comments and have applied them in my assessment of the evidence in this case.

[28] In this case, as is not unusual in cases under s. 151, only M.W. and D.F. can testify about what happened between them. Allegations of criminal sexual behaviour often involve such "he said/she said" scenarios. It is important that a judge does not decide that an accused is guilty merely because they conclude that the complainant's version of events is more likely to be true. Put another way, a criminal trial is not a credibility contest in which an accused must present a more credible version.

[29] Deciding a "he said/she said" case merely on the basis of which version is more likely to be true misapplies the burden of proof on the Crown to establish guilt beyond a reasonable doubt. The correct application of the burden of proof requires the judge to acquit the accused if the evidence, as a whole, raises a reasonable doubt about guilt. In other words, it is possible that a judge might find the complainant's version of events to be more believable but still have a reasonable doubt about what actually happened. In that situation, the benefit of the doubt must go to the accused.

[30] I must assess the credibility of M.W.'s and D.F.'s evidence, referring to their truthfulness or honesty. I must also address the reliability of their evidence, referring to its accuracy.

- [31] Justice Dillon summarized the factors that might be helpful to both assessments in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[Citations omitted.]

- [32] To those factors, I add that a court may believe some, all, or none of the evidence of a witness, and that credibility determinations "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. R.E.M.*, 2008 SCC 51 at para. 49. It is important not to base determinations of credibility on emotional evaluation, stereotypes, guesswork, or other kinds of impermissible reasoning. Credibility and reliability decisions have to be grounded in reason and made as objectively as possible.
- [33] It is also important to be cautious in placing too much reliance on the demeanour of a witness. My first encounter with the witnesses in this case was at trial. Thus, my assessment of their demeanor is a first impression, I have no baseline against which to measure it. Trials are unfamiliar to most witnesses, and many find them an intimidating experience, particularly when the stakes are high, as they are in a criminal case.
- [34] It is with all these evidentiary principles in mind that I will approach my assessment of the evidence in this case.

The Crown's Evidence

The Facts That Are Not in Dispute

- [35] D.F. is a 71-year-old man who is a retired federal civil servant.
- [36] D.F. was born and spent his early years in [content redacted] where he was one of six siblings. He has three sisters, one of whom is his twin, and two brothers. He moved to [content redacted] and graduated from high school there.

- [37] D.F. graduated from the [content redacted] in 1971 with a Bachelor's degree in computer science. He moved to [content redacted] where he worked for 32 years for the federal government, starting as a computer programmer. He was promoted to a position as a systems analyst and, latterly, as a supervisor. He retired as a manager.
- [38] After his retirement, D.F. moved to Calgary where D.P., her husband, and her two sons and their families resided. In 2007, he moved to [content redacted] where V.C. resided with her family. D.F. spends about five months each winter in Mexico.
- [39] D.F. never married and has no children. He has 14 nieces and nephews and 19 grandnieces and grandnephews. Over the years, and to varying degrees, he spent time with all of his siblings and their extended families. He testified that he visited one or more of his siblings, and their children, each year.
- [40] D.F. has had no prior involvement of any kind with the criminal justice system and, before this charge, has never been the subject of any complaint with respect to his conduct with children.
- [41] D.F.'s third sister is B.T. who is the mother of C.W. C.W. is M.W.'s mother and J.W.'s wife.
- [42] D.F. testified that he had known C.W. all her life and J.W. from about 1990. J.W. said that he met D.F. in about 1993 but nothing turns on the difference.
- [43] B.T. used to live in [content redacted], in a property that backed onto the W. family's first home on [content redacted]. When D.F. visited his sister, he also visited the W. family. He testified that he did so in 2005, 2006, and 2007. In addition to M.W., J.W. and C.W. are the parents of two younger children: a son M.A.W., who was about two years younger than M.W., and a daughter, A.W., who was about eight years younger than M.W. Both M.W. and J.W. described their family as close-knit but not overly physically demonstrative.
- [44] D.F. testified that he had a good relationship with J.W. and that he was closer to him than he was to his niece. D.F. and J.W. had similar interests. Both golfed and like computing.
- [45] Over time, D.F. loaned J.W. a considerable sum of money to support the [redacted] business that J.W. operates. J.W. testified that he borrowed at least \$180,000 from D.F. He recalled a loan of \$127,500 followed by two additional loans of \$40,000 and \$45,000. The money has all been repaid.
- [46] In about 2008, the W. family moved to their second [content redacted] home on [content redacted].
- [47] D.F. testified that, in 2008, 2010, 2011, and 2013, he spent overnight visits with the W. family at [content redacted]. For the visits in 2008, 2011, and 2013, he arrived one day, stayed overnight and left the next.

- [48] At some point, J.W. introduced D.F. to World of Warcraft ("WoW"), an online computer game. J.W., M.W., and M.A.W. were all avid WoW players. D.F. testified that the reason for his visit in 2008 was to play WoW. J.W. testified that D.F. had not stayed overnight until after he borrowed money from D.F. in 2010. Nothing turns on this discrepancy, as it appears that both J.W. and D.F. agree that it was the 2010 visit on which the incidents giving rise to this charge are alleged to have occurred and that it was a five-day visit. I accept, on the evidence, that the 2010 visit was likely over the Christmas holiday.
- [49] Based on the combined evidence of J.W., M.W., and D.F., I understand that WoW is a multiplayer, online, internet game in which players log on to WoW platform and create an online character with which they role-play within the world. Role-playing involves exploring a world and trying to complete quests while facing challenges from enemies, mobs, and monsters. Players earn points by successfully completing quests, and they move up levels in the game. In the game, players move their characters by using a computer keyboard and/or mouse.
- [50] Within the game, WoW allows players to register other players as "friends". Friends are able to see each other when they are online, to send messages within a chat feature in the platform, and to cooperate, or play, as a member of a team, to complete quests.
- [51] M.W. testified that his parents and siblings had upstairs bedrooms in the [] home and his was downstairs. When D.F. came to visit the family, he slept in M.W.'s bedroom, and M.W. slept in what was known as the "green room", a downstairs family/TV room.
- [52] The downstairs floor at [content redacted] had a number of rooms in addition to M.W.'s bedroom and the green room. One was used by J.W. as his office and beside it, sharing a wall, was a games room. The games room was at the end of a hallway. A door from it exited to the backyard, underneath a main floor deck. It also had a door that led into J.W.'s office.
- [53] M.W. described that, in the games room, there was a large desk, beside which was a fold-out table. On a plan of the home, which was marked as Ex. 1, the desk and the table were marked by red rectangles beside each other. To the left of the desk and table, the plan shows three squares depicting the chairs.
- [54] M.W. testified that on D.F.'s visits, he, his brother, and his father interacted with D.F. around video games, primarily WoW. On the five-day visit in 2010, J.W. and M.W. testified that the two boys and D.F. played WoW in the games room. M.A.W. was always on D.F.'s left and M.W. on his right. Although, at first during his testimony, D.F. reversed the positions of the children, he later confirmed that M.A.W. was always on his left and M.W. on his right. I accept that this was the case.

- [55] At the other end of the hallway from the games room, stairs led up to the main floor of the home. A person coming down from upstairs would turn left at the bottom of the stairs into the family room or would keep turning, pass the laundry room and a bathroom, and walk down the hall to the games room. M.W. testified that when sitting at the computer desk, you could not see into J.W.'s adjacent office but, from the table, you might have an incomplete view.

M.W.'s and J.W.'s Evidence

- [56] M.W. testified that on the visit in issue, the date of which he could not recall, D.F. was staying for a few days. He was excited to have D.F. there as a "new buddy" to play WoW with.
- [57] M.W. testified that his father set up the arrangements in the games room and installed the computers. He sat at a laptop on a fold-out table. To his left was a desk with two computers on it. M.A.W. and D.F. sat at the desk. The setup allowed the three players to play WoW together.
- [58] J.W. testified that he believed that the computers were set up on a table and a desk. He recalled that all three were desktop computers and the towers were on the floor. He said that the three computers and chairs were in close proximity. He described it as "pretty tight" with little or no distance between the computers, or about six inches. The screens were flat screens, and each computer station had a mouse and a keyboard.
- [59] J.W. estimated that the desk and the table measured approximately eight feet in total and that there was approximately 2-2.5 feet per computer station. J.W. said that there were two computer chairs and that M.A.W. might have been sitting on his drum stool.
- [60] M.W. testified that during the game, while the three players were "flying" on an automated system, waiting to land to continue playing, and without turning his body towards M.W., D.F. reached out to his right and gave M.W. a back rub. M.W. said it was "sort of weird". He said that the back rub progressed slowly from over his shirt, to under his shirt. D.F. then moved his arm around to the front of M.W.'s body and moved his hand upward. He used the back of his hand to touch M.W.'s chest. He then rotated his hand and used his palm against M.W.'s chest. M.W. described that D.F. mainly touched his left nipple, but sometimes the right, with his fingertips, rubbing and sometimes using a "sort of like a pinching motion".
- [61] M.W. and D.F. did not speak. M.W. testified that he heard D.F. making weird noises which he described as grunts and huffs. M.W. recalled moving his body away but said that D.F. did not stop touching him. M.W. said that the touching confused him because it had never happened before and, although he had been given back rubs before, they were from his parents.
- [62] M.W. testified that the touching occurred on one of D.F.'s visits, for a few hours, on more than one day. He estimated that the touching lasted three hours on each occasion. He said that there was a progression to D.F.'s touching and that he would rub his back both over and under his shirt for some time, which he approximated at about 30-45 minutes, before

moving his hand around to the front. He recalled the touching occurring on more than one day because he was wearing a training bra on one day and not on the other. He testified that D.F. put his hand underneath the training bra and touched his chest and nipples.

- [63] In cross-examination, M.W. testified that, on the second day of touching, D.F. progressed more quickly from touching his back to touching his chest. M.W. testified that when D.F. was not touching him, he was using his hands on the keyboard and the mouse to play WoW. M.W. also said that, at times, D.F. would remove his hand from M.W.'s body.
- [64] In cross-examination, M.W. could not recall the time of year but thought it was spring or fall as he recalled the back door being open. M.W. did not recall that the visit in question was at Christmas. M.W. recalled that the touching occurred near the end of D.F.'s visit.
- [65] M.W. testified that no one else came into the games room when D.F. was touching him. He remembered his father passing through, and said his mother might have done so, but she spent most of her time with his sister. During the touching, he did not see his father in or near to the games room.
- [66] J.W. testified that when his sons and D.F. were playing WoW, he was in and out of the games room throughout the day. He could not estimate how often. On one occasion, in mid-morning, he walked into the computer room and observed D.F.'s right hand on M.W.'s right shoulder. He said that it made him feel uneasy as the W. family is not a "touchy-feely" family. He testified that what he saw "did not sit right with him" and it caused him to check back in on them more frequently.
- [67] In cross-examination, J.W. said the games room was open. He said he stood behind his sons and D.F. who was not playing at the time but watching. D.F. had his arm around M.W.'s back and his hand on M.W.'s shoulder. He took it off when J.W. walked in.
- [68] On a second occasion, J.W. saw D.F.'s right wrist on M.W.'s shoulder and his right hand hanging down over his shoulder, at the front of M.W.'s chest. As J.W. walked in, he described seeing D.F.'s hand slip back to M.W.'s shoulder and then come off entirely. J.W. said that it did not feel right to him. In cross-examination, J.W. described his gut twisting when he saw D.F.'s hand. He spoke to his wife, and they agreed that he should talk to D.F. about it.
- [69] J.W. testified that, before he spoke to D.F. about what he had seen, he thought he should speak to M.W. He called him out of the games room and asked him how he felt about D.F.'s hand being on his shoulder. M.W. said he did not like it and did want it to happen again. J.W. said it was not a long conversation. In cross-examination, J.W. said that he asked M.W.'s permission to speak to D.F.
- [70] Following his conversation with M.W., J.W. had what he described as an "awkward" conversation with D.F. J.W. testified that he was reluctant to speak to D.F., as he did not like conflict. However, he told D.F. that M.W. was not comfortable with D.F.'s hand on his shoulder and J.W. was not comfortable with it either.

- [71] J.W. described D.F.'s response as odd. At the time, he thought that D.F.'s reaction was a "little off". D.F. said he thought M.W. was getting "too old for that anyway". J.W. said he did not know what D.F. meant, but his response was etched in his brain. J.W. did not observe any further touching between D.F. and M.W.
- [72] In cross-examination, J.W. agreed that he returned to the games room between the two occasions on which he observed D.F. touching M.W.
- [73] M.W. recalled having a conversation with his father about D.F. touching him. M.W. said the conversation occurred in the car while he was driving with his parents, possibly on the way to a grocery store. He was in the back, his mother was driving, and his father was in front of him. His father asked whether D.F. was touching him in ways he did not want. M.W. testified that although he was embarrassed, he told his father that D.F. was touching him. He described feeling relieved that his father would do something about it and it would stop. M.W. said he did not describe the touching to his father and never talked to his mother.
- [74] After the visit, M.W. described that he was uncomfortable any time D.F. touched him, but not to the same extent. He did not believe that he behaved any differently around D.F.; he felt differently inwardly but did not act differently.
- [75] J.W. testified that, after his discussion with D.F., he did not sleep because he was "worried to death". While he told himself there was nothing to worry about, he was concerned that D.F. would go into M.W.'s room. Uncharacteristically, J.W. slept with his bedroom door open. He testified that he "hoped for the best but feared the worst".
- [76] As planned, D.F. left for his home the following day.
- [77] In cross-examination, J.W. acknowledged that D.F. visited the W. family again but said he did not recall another overnight visit.
- [78] The W. family visited D.F.'s home in [content redacted] and stayed with him overnight. J.W. said he was uneasy during the visit, and, despite not believing that anything had happened between D.F. and M.W., He said he orchestrated his children's sleeping arrangements so that to access M.W., D.F. would have to go past M.A.W.
- [79] About a year and a half ago, M.W. talked to his father and told him what had happened. He said he was very anxious to talk to his father about it and did not know what to expect. He thought his father already knew what had happened. He said his father was very angry. M.W. said he was relieved that his father now knew, but felt guilty for making him angry.
- [80] J.W. testified that, after M.W. told him what had happened, he did not want to pry into the details. He spoke to his wife and they arranged for M.W. to attend counselling. J.W. told M.W. that he would support whatever decision M.W. made about reporting the allegations to the police. J.W. did not push M.W. to report, and he told M.W. that what happened did not define him.

- [81] J.W. said that his relationship with D.F. ended the day M.W. disclosed what had happened and he immediately arranged to pay back the remaining outstanding loan.
- [82] On September 1, 2019, M.W. reported what had happened to the [content redacted] RCMP.
- [83] M.W. testified that he was seeking closure. He described the effect of his reporting, and the resulting charges against D.F., on his extended family. His immediate family's connections with their extended family are now limited, and they no longer have a relationship with M.W.'s maternal grandmother B.T., D.F.'s sister. J.W. confirmed that to be the case.

The Defence Evidence

D.F.'s Evidence

- [84] D.F. testified in his own defence. He said that he had visited the W. family at their [content redacted] home in 2008, 2010, 2011, and 2013. He believed that he had stayed overnight in 2008. J.W. had introduced D.F. to WoW, and D.F. recalled that his visit in 2008 was to play the game.
- [85] D.F. testified that, in 2010, he stayed with the W. family for five days over Christmas. He said that he travelled to [content redacted] on the first day, spent three full days with them, and travelled home on the fifth day.
- [86] D.F. said that his visits in 2011 and 2013 involved him arriving on the first day, staying overnight, and leaving the next. D.F. also said that the W. family visited him in [content redacted] and stayed over night.
- [87] D.F. testified that on the first full day of his 2010 visit, he played WoW with M.A.W. and M.W. for a couple of hours in both the morning and afternoon. They also played for an hour or two the next day which was Christmas day, and again on the following day, for two hours in the morning and two or three hours in the afternoon.
- [88] D.F. testified that they played in the games room in the basement at a long table that he estimated was 12 feet long. He testified that he did not measure the table, but he knew it went past the end of the office which was about ten feet in length.
- [89] D.F. testified that the far left and far right monitors were about one foot in from the ends of the table and the three monitors were spaced about two feet apart. Each monitor had a keyboard and a mouse.
- [90] In his direct evidence, he said that M.W. was on his left and M.A.W. was on his right and that was always the same. He said that if he stretched out his arms, he could not touch either of the children. He changed his evidence in cross-examination and acknowledged that M.W. was on his right and M.A.W. on his left. As discussed below, he also changed his evidence about his ability to touch the boys.

- [91] D.F. testified that he and the children played together as a group. They discussed where they wanted to explore next, what quests they wanted to complete, and whether to fly or use a mount to get there. They completed quests together. D.F. said that they were talking at least every few minutes.
- [92] D.F. testified that M.W. and M.A.W. were wearing T-shirts and pants which they changed every day.
- [93] D.F. testified that, while he and the children were playing, J.W. was up and down and worked in his office next to the games room. C.W. came down to do laundry. He never knew when they would come down.
- [94] D.F. testified that he bought WoW gift certificates for M.W., M.A.W., and J.W. that were redeemable for in-game purchases such as a virtual mount, which they could fly or ride, or a virtual pet. He recalled that J.W. printed the certificates and rolled them up and put them under the tree. He recalled receiving a similar gift from the W. family. M.W. had no recollection of the gift certificates. J.W. had a vague recollection of printing them off.
- [95] D.F. said that he vaguely recalled J.W. making a remark to him about M.W. He could not recall the specifics of the conversation but he recalled J.W. saying something about the children getting older. He described it as just a normal remark; J.W. could have been telling him that a new version of WoW was about to come out.
- [96] D.F. described his relationship with M.W. as a normal relationship; like the relationships he had with his other grandnieces and grandnephews. M.W. was affectionate with D.F., and when they watched television or a movie together, M.W. would snuggle up with him on the couch.
- [97] D.F. said that when he was playing WoW, he used both the keyboard and mouse for shooting, moving right or left, or jumping. He explained that it was extremely important to be quick. He testified that he used the mouse all the time and the keyboard most of the time, and that both were constantly in use.
- [98] D.F. explained that he would sometimes play WoW with M.W. and M.A.W. remotely from [content redacted]. After the Christmas visit, in a remote game, D.F. recalled receiving a message from M.W. asking why D.F. was not coming to visit them. D.F. said he had not been invited. M.W. said he was inviting him, but D.F. said he would only come if he was invited by J.W. or C.W. D.F. called J.W., who said he would speak to C.W. J.W. called back and invited him to visit in 2011. He also visited again in 2013.
- [99] D.F. categorically denied that he touched M.W. as M.W. described in his evidence. He said he did not, and would not do, what he was accused of doing. He testified that he was not that kind of person.

V.C.'s and D.P.'s Evidence

- [100] Both V.C. and D.P. are D.F.'s sisters. D.P. is his twin. Both testified in support of D.F. and about D.F.'s character and reputation. The rift in the family was palpable in the courtroom.
- [101] V.C. testified that she has lived in [content redacted] for most of her life and works in the insurance industry with her daughter. D.F. now resides in [content redacted].
- [102] V.C. testified that some of her clients knew D.F. and he had a good reputation in the community as someone you would trust. She testified that a friend has D.F. watch his house while he is away.
- [103] V.C. testified that D.F. babysat her four children. She testified that D.F. had never done anything inappropriate or wrong and that if he had not been an upstanding member of society, she would not have allowed him access to her children.
- [104] D.P. testified that she grew up with D.F. and knows him very well. She lived in Calgary and worked in the oil industry. She has two sons and six grandchildren, four girls and two boys, between the ages of six and ten. D.F. regularly visited her family and her grandchildren.
- [105] D.P. testified that she had never heard any complaint about D.F.'s conduct with children and had no concerns of her own. She had asked D.F. to babysit her children. She had no reason to believe that D.F. had ever been involved in sexual impropriety.
- [106] D.P. testified that she knew people in the community who also knew D.F. and he had a reputation of being generous, extremely honest, self-disciplined, and loyal. She described D.F. as never stepping over a legal boundary and being careful to the extreme.
- [107] D.P. described D.F. as being extremely prone to anxiety and stress, particularly in situations in which he was uncomfortable or that were out of his control.

Assessment of M.W.'s and J.W.'s Evidence

M.W.

- [108] M.W.'s evidence about the sexual touching was consistent in direct and in cross-examination. In cross-examination, he resisted counsel's attempt to have him fill in gaps in his evidence. He clearly said what he remembered and what he did not. He did not alter his testimony to fit a particular narrative. Some examples will suffice.
- [109] M.W. recalled that the touching occurred over two days, but not when it had occurred. When asked about the year, he said he was not able to say with confidence and explained that he knew the date range but not the year and did not know how old he was. M.W. did not recall the visit being over Christmas, despite being prompted about D.F. giving him a gift certificate for an in-game WoW purchase. He acknowledged that it might have occurred at Christmas.

- [110] Except for M.W. recalling that he was wearing a training bra on one of the two days on which he said he was touched, M.W. could not recall what he or his brother was wearing. He said he was not wearing a button-up shirt because he did not own one. I accept that M.W. would recall wearing a training bra because he had recently started doing so.
- [111] M.W. did not recall what D.F. was wearing but said that he generally wore tan pants and a polo shirt. He did not recall the height of the adjustable stool on which he was sitting, or the size or height of the desk at which he was sitting either in absolute terms or in comparison to the height of the desk at which D.F. and M.A.W. were sitting. In cross-examination, he agreed that the table he was using was less stable than the desk and that it was lower than the desk. He thought that D.F. was wearing a ring, a gold band, but did not recall what hand or finger it was on. When asked if there was a ring on the hand D.F. had on his chest, M.W. did not recall.
- [112] When asked when he reached puberty, M.W. said that he thought it was at about the age of ten or 11. He was asked when he started wearing a training bra, he said he believed he was nine or ten, but could not say precisely. When asked in cross-examination about whether the sexual touching continued on a third day, M.W. responded that he knew it had occurred on at least two days--one on which he wore a training bra and one on which he did not--but he did not recall what had happened on the following day.
- [113] When it was put to him that the width of his chest or shoulders was between 14 and 20 inches, he responded that he was a small, narrow child but did not know the width of his shoulders. He agreed they were at least 12 inches wide. Further, when he was asked whether his father and/or mother were at home during the sexual touching, he said he thought so, but did not know.
- [114] M.W. recalled where the events happened, and what he and D.F. were doing at the time. He recalled that he was on D.F.'s right and that M.A.W. was on his left. He recalled the progression of the sexual touching and, when pressed in cross-examination, he did not waiver on the progression. His evidence in that regard was clear and detailed.
- [115] M.W. estimated that the touching lasted for three hours in total on the first day. In cross-examination, he estimated that D.F. was rubbing his chest for one-third to one-half of that time. M.W. said he felt embarrassed when D.F. moved his hand around to his chest because it had never happened to him before and he knew it was not supposed to happen. He said he kept it to himself. He felt a little scared, it felt wrong, it felt like a long time, and he waited for it to stop.
- [116] In cross-examination, M.W. acknowledged that he engaged in conduct which might be considered inconsistent with his evidence about the sexual touching. For example, he acknowledged that when D.F. first started to rub his back, he did not move away and described it as a familiar feeling. He recalled thinking that it was odd but did not say anything about it because that would be rude.

- [117] When it was put to M.W. that, on one occasion after the touching incident, he invited D.F. to come over again to play WoW, he agreed that was possible, as he liked playing the game. He said he could not disagree that it happened; he said he could not remember.
- [118] M.W. also admitted that he interacted with D.F. in a way that might call into question his evidence. In cross-examination, M.W. acknowledged that he cuddled up with D.F. when they watched TV.
- [119] M.W. also agreed that he has seen D.F. on occasions after the touching occurred and that D.F. always treated him with affection and respect.
- [120] M.W. agreed that playing the game was highly engaging, the players were all involved in the same game, and their characters were involved with each other. A player uses a mouse and keyboard to control their character's movement. He agreed that, throughout the days on which the touching occurred, and while playing WoW, he, D.F., and M.A.W. spoke frequently. They asked each other what they were doing and discussed their next moves. He agreed that when D.F. was touching him, D.F.'s character was not moving in the game and his brother had not asked why. He agreed that he was not afraid of D.F.; he described feeling confused and uneasy. He said he did not like what had happened.
- [121] Finally, in cross-examination, M.W. acknowledged that he did not have a complete memory of what happened. He said his memory was fragmented, and he was not sure of the order of events or the timeline. He said he remembered very clearly what happened with respect to the touching, and denied that he made it up as an explanation for his gender dysphoria. His answer was straightforward. Although the Crown did not object to this line of questioning, it appears to be rooted in unproven and unfounded stereotypes about gender dysphoria.
- [122] Overall, I considered M.W. to be a careful witness who answered questions to the best of his memory. The things that he could not recall were not surprising or of concern to his credibility as he was a ten-year-old child at the time of the events he was being asked about. I would have been more concerned if he had a detailed recollection of some of the peripheral things about which he was questioned at length.

J.W.

- [123] J.W.'s evidence was also credible. He acknowledged when he did not recall something and said so. For example, he did not recall that D.F.'s visit was over Christmas in 2010. He agreed it was a five-day visit--three full days and a travel day on either end. J.W. recalled that D.F. had given M.W. and M.A.W. in-game gift certificates that J.W. printed out and put under the Christmas tree, but could not confirm that he did so on the visit of concern in these proceedings.

- [124] J.W. also acknowledged that, after the alleged touching incident, he did not restrict D.F. from visiting the W. family. He agreed that D.F. visited the family on two subsequent occasions for overnight visits. J.W. agreed that it was possible for M.W. to have extended D.F. an invitation to visit through WoW. He said he did not recall the invitation but agreed that D.F. visited overnight in the spring of 2011.
- [125] J.W. also agreed that D.F. stayed overnight in 2013 when he came to learn how to play the computer game Clash of Clans. He said that M.W. did not demonstrate any reluctance to engage with D.F.
- [126] J.W. also acknowledged that the W. family visited D.F. at his home, after the alleged touching incident.

Assessment of D.F.'s Evidence

- [127] D.F. appeared to be very nervous when testifying. His nervousness may well be explained by his general anxiety as described by D.P. and his lack of control over the situation.
- [128] Nevertheless, there were troubling aspects of D.F.'s evidence.
- [129] My overall impression of D.F.'s evidence was that, in direct, he presented as having a clear recollection of the events of his visit to the W. family in 2010. But, when his evidence was probed in cross-examination, it was to be a recreation of events, based on the evidence he heard at trial from M.W. and J.W., rather than an independent recollection of the events.
- [130] For example, he testified that he had a fair but not perfect memory. Despite having only a fair memory, he was able to recall the specific years and months of his visits to the W. home. He recalled the setup of the games room, including the length of the desk, which he estimated to be 12 feet, the distance of the monitors from the ends of the desk, which he estimated to be a foot, the space between the monitors, which he estimated to be two-and-a-half feet, and the size of the monitors, which he estimated to be 17 inches.
- [131] D.F.'s estimate of the length of the table was four feet longer than J.W. said it was. Because a 12-foot table would not fit in the room as it appears on Ex. 1, he testified that the table extended past the end of the office. The dimensions of the room in Ex. 1 make it unlikely that the room could accommodate a desk or table that was 12 feet long. In my view, it does not accord with common sense that D.F. would recall the setup of the games room, and the dimensions of the furniture, in such detail almost ten years after the touching incident was alleged to have occurred.
- [132] In direct, D.F. testified that, if he stretched his arms out, he could not touch either M.W. or M.A.W. In cross-examination, he said that he "might not have meant that" and that he thought he could have touched them. When it was suggested that he had exaggerated the distance to help his evidence, he replied that he thought he was mistaken and he acknowledged that he was a bit closer to M.W.

- [133] I conclude that D.F.'s evidence about the length of the table in the games room, the space between the monitors, and his initial evidence about being unable to touch the boys when his arms were stretched out, were exaggerated and tailored to make it appear less likely that he could physically have engaged in the sexual touching described by M.W.
- [134] In cross-examination, D.F. was asked whether he might have rubbed M.W.'s back, and he said he did not think so. When given time to think about his answer, he reiterated that it was not possible. He agreed that it was possible that he had put his arm on M.W.'s shoulder and, while he said he did not recall doing so, he agreed that it was possible that his hand draped over the front of M.W.'s chest. His evidence about the possibility that he had his arm on M.W.'s shoulder and his hand draped over the front of M.W.'s chest belies his evidence about the distance between them in the games room.
- [135] With respect to what M.W. and M.A.W. were wearing, in direct, D.F. recalled that they were wearing T-shirts and pants, which they changed every day. In cross-examination, he said he recalled most of it but not all of it. When asked why he said that he remembered what they were wearing, he responded that that was what he believed they were wearing, but that he could not say for sure. It is not likely that D.F. would recall what M.W. and M.A.W. were wearing, and whether they changed their clothes. D.F. appeared to be echoing M.W.'s evidence in that regard, as opposed to providing his true recollection.
- [136] D.F. testified that, while he was in the games room with M.W. and M.A.W., C.W. went in and out of the laundry room. In cross-examination, he was asked whether he remembered C.W. doing laundry over the Christmas visit, and he said he believed he did. In my view, it is highly unlikely that D.F. would have a specific memory of C.W. going in and out of the laundry room. There is nothing about that event that would make it memorable. However, testifying that he remembered it furthered his eventual argument that he was not likely to have taken the risk of sexually touching M.W. when there was a chance he would be observed.
- [137] D.F. did not deny that J.W. spoke to him about M.W. However, despite D.F.'s purported detailed recall of most of the events of 2010, he had only a vague recollection of J.W. making a remark to him about M.W. being uncomfortable with the way he was being touched.
- [138] When it was put to him that he would remember being approached about untoward touching, he agreed that he would. He said he did not recall a specific conversation. When he was asked why he had no recollection, he answered, "some things stick around", suggesting this conversation had not.
- [139] When it was put to D.F. that J.W. had told him that M.W. was uncomfortable, D.F. responded that it was a "remark", and "if there was anything", he did not remember the specifics. He then changed his evidence and said he did not remember it. He recalled a remark but not the specifics of it.

- [140] It is unlikely that a remark about unwanted touching would not have "stuck around" in D.F.'s memory particularly because of the impact such an allegation would have had on D.F.'s reputation in the community, which he said was important to him.
- [141] When he was cross-examined about his direct evidence that he never spent time alone with the W. children at their first [content redacted] home, he recalled giving that evidence. When probed, D.F. said that he made sure that he did not stay in a room alone with any children because he wanted to "be proper". He said that it was "propriety on his part". He acknowledged that he had not given that evidence in direct but described it as a "safety thing".
- [142] D.F. expanded his evidence and said that, even before he was aware of M.W.'s allegation, he made sure that he never spent time alone with "pretty much" all children. He clarified that this applied to all children. When it was pointed out to him that he babysat his nephews and nieces, he said there were exceptions to him not spending time alone with children. He acknowledged that his statement that he never spent time alone with children was not true; he did so when he was trusted. He modified his answer to say that, when he was not engaged to babysit children, he tried not to be alone with them. These changes in his evidence, in an area not specific to the allegations in question, suggested that D.F. was making this evidence up as he went along.
- [143] Overall, I did not believe D.F.'s evidence, and, on the basis of his evidence alone, I was not left with a reasonable doubt that the alleged touching occurred.
- [144] However, my assessment of the evidence does not end there. A finding that D.F.'s evidence was not credible or reliable does not prove his guilt. In a case such as this, where the evidence consists primarily of the allegations by M.W. and the denial by D.F., my role is not to decide whom to believe. That would have the effect of shifting the burden to D.F. to disprove his guilt. Although I have rejected much of D.F.'s testimony, I must assess whether, based on the evidence as a whole, including the evidence that I accept and that I do not, the Crown has proven that D.F. is guilty beyond a reasonable doubt.

Assessment of the Evidence Overall

- [145] There is no independent evidence about D.F.'s and M.W.'s interaction. What J.W. observed--D.F.'s hand on M.W.'s shoulder--did not amount to touching for a sexual purpose and is not the basis of this indictment. Nor can J.W.'s impressions of D.F.'s behaviour, and the concern it raised, without more, lead me to conclude that the alleged offence took place. Certainly, the W. family did not feel concerned enough about what J.W. observed to cut off contact with D.F. That did not occur until after M.W.'s disclosure to his father in 2018.
- [146] I accept that M.W. credibly recalled the events as he remembered them. The things that he was unable to recall were, for the most part, things that I would not expect a child to recall. For example, a child is unlikely to recall what he, his brother, or D.F. was wearing.

- [147] However, having considered the evidence as a whole, I am not satisfied that the Crown has proven, beyond a reasonable doubt, that events happened as M.W. remembers them.
- [148] For example, M.W. had a detailed and firm recollection of the circumstances in which his father asked him whether D.F. had touched him inappropriately. M.W. testified in both direct and cross-examination that the conversation occurred when he was in the back seat of his family's car. His mother was driving, and his father was in the front with her. He even recalled where he thought they were going.
- [149] In contrast, J.W. testified that, after speaking to his wife, he called M.W. out of the games room for the conversation. His evidence was equally firm in cross-examination.
- [150] I conclude that J.W.'s recollection is more reliable given his level of discomfort about confronting D.F. and the fact that he was testifying about events that occurred when he was an adult.
- [151] The conversation was part of J.W.'s focussed attention on what he observed, which as I have said was not the touching on which the indictment is based. In light of J.W.'s evidence about his reaction to what he observed, and his reluctance to speak to D.F., it is unlikely that J.W. would be mistaken about where his conversation with M.W. occurred.
- [152] I am also concerned about the plausibility of M.W.'s evidence. In assessing plausibility, I am permitted and expected to apply common sense derived from life experience. I am alert to the fact that applying common sense brings with it a danger that it is based on stereotypical assumptions about human behaviour.
- [153] For D.F. to have touched M.W. in the way M.W. described, over an extended period of time, on two different days would have been very risky. This is particularly because M.A.W. was also in the games room and could have observed him, and J.W. was in and out of the games room. In fact, J.W. said that he visited the games room more frequently after he observed D.F.'s arm and hand on M.W.'s shoulder. C.W. could also have come in at any time. The games room was at the end of a hall, and the door to it was open.
- [154] While it is possible that D.F. would have taken the risk, there are a number of reasons why it is unlikely that he would have done so. If discovered, D.F.'s reputation for honesty and trustworthiness in the community would have been ruined, and his relationship with his extended family would be negatively impacted.
- [155] There was no evidence to suggest that D.F. was a risk taker. The evidence shows that he had not taken risks with his career, or his personal life.

- [156] It is also the case that if D.F. was touching M.W. as described, he is unlikely to have been able to continue playing WoW which required the use of a mouse and keyboard. According to M.W., the fact that D.F.'s character was not engaged in the game for time periods of up to three hours was never mentioned by M.A.W., who was a part of the team. Common sense suggests that M.A.W. would have noticed, and mentioned, gaps in D.F.'s involvement in the game. Presumably, M.A.W. would also have noticed D.F. grunting and huffing.
- [157] Finally, M.W.'s evidence lacked detail in an area I would have expected him to recall. He did not describe how D.F. reached under his shirt. He did not explain whether D.F. put his hand down his shirt from the neck, or through the sleeve, or up from the bottom. How D.F. was able to touch M.W. in the way M.W. recalled is not the sort of peripheral detail which a child might not recollect.
- [158] Assessing the evidence as a whole, including the evidence that I accept and the evidence that I do not, I am left with a reasonable doubt with respect to D.F.'s guilt. As a result, I find D.F. not guilty of the offence charged.

"MacNaughton J."

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