
CANADA / JUDGMENT

R. v. D.M.D.

2019 BCSC 1027

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D.M.D.,

2019 BCSC 1027

Date: 20190607

Docket: 66419-1

Registry: Chilliwack

Regina

v.

D.M.D.

Restriction on Publication: Pursuant to Criminal Code s. 486.4(1)

Before: The Honourable Mr. Justice Riley

Oral Ruling on Voir Dire

Counsel for the Crown:

V.C. Toselli

Counsel for the Accused:

R.J.K. Gill

Place and Date of Trial/Hearing:

Chilliwack, B.C.

May 28-31, 2019

June 3-6, 2019

Place and Date of Judgment:

Chilliwack, B.C.

June 7, 2019

Introduction

- [1] The accused, Mr. D, is charged with a single count of touching a person under the age of 16 for a sexual purpose, contrary to s. 151 of the Criminal Code, R.S.C., 1985, c. C-46. This is a ruling on the Crown's application to tender a video-recorded statement of the complainant, EJM, under s. 715.1 of the Criminal Code.

Background

- [2] A voir dire was held to address the admissibility of EJM's video-recorded statement. In the course of that voir dire, I heard from five witnesses, namely (i) EJM's grandmother and current legal guardian Ms. D, (ii) EJM's father Mr. M, (iii) Constable Inkman, the initial investigator of the allegation who took the first video-recorded statement from EJM, (iv) Corporal Remple, who was later assigned to take a second video-recorded statement from EJM, and (v) the complainant EJM.
- [3] The offence is alleged to have been committed between 1 June 2016 and 31 October 2016 at the residence of the accused, Mr. D. At the time, the complainant EJM was eight years old. She was at Mr. D's house, a place she frequently visited to play with Mr. D's daughter, CD, when the sexual touching is alleged to have occurred.
- [4] The allegation first came to light sometime between late December 2016 and early January 2017. EJM made an initial disclosure to one or more adult family members who then reported the allegation to the police within a matter of days. In their subsequent investigation, the police took two video-recorded witness statements from EJM. The Crown now seeks to tender the second of these statements at trial pursuant to s. 715.1 of the Criminal Code.
- [5] The first video-recorded statement was taken from EJM on 4 January 2017 by Constable Inkman. That statement was later considered by the police to be problematic for a number of reasons. Constable Inkman had no specific training in the interview of child witnesses. Constable Inkman allowed EJM's grandmother, Ms. D, to be present for a significant part of the interview. Despite Constable Inkman's efforts to limit Ms. D's involvement, she actually interjected at certain key points in the interview to either ask questions or to add factual details to EJM's accounting or recounting of the narrative.

- [6] There are also concerns with respect to Constable Inkman's interview technique and his manner of asking questions. Some of Constable Inkman's questions were leading on key points. Further, Constable Inkman gave EJM a doll and asked her to demonstrate the manner in which she was touched. Constable Inkman pointed to certain parts of the doll and also folded up the doll's skirt to better reflect his understanding of how EJM was dressed on the date of the incident. It is suggested that in doing so, Constable Inkman influenced the substance of what EJM had said about the alleged touching.
- [7] Finally, the ability to assess EJM's description of the event is further undermined by the poor quality of the audio in which a number of EJM's assertions are not audible or discernible.
- [8] The second video-recorded statement was taken from EJM on 12 January 2017 by Constable Remple, now Corporal Remple. Corporal Remple had received training in taking statements from child witnesses and tried to employ the techniques she learned when she took EJM's statement. Corporal Remple conducted her video interview of EJM alone, although at one point she did allow EJM to see her grandmother, Ms. D, standing in the doorway of the interview room during a break in the statement.
- [9] Corporal Remple generally used open-ended questions except when repeating back EJM's statements to ensure that they were accurately recorded. Corporal Remple used a diagram of a gingerbread doll figure as a visual aid during the interview. She had EJM label parts of the doll's body before asking EJM to describe the manner in which she was touched using the diagram and the terms chosen by EJM to describe the doll's body parts. The quality of the audio is better than the audio for the statement taken by Constable Inkman. Also, as noted, Corporal Remple tried to get EJM to speak up and, to ensure the entirety of EJM's words were captured, the officer sometimes parroted back EJM's answers.

Analysis

- [10] The application is brought under s. 715.1 of the Criminal Code, which reads as follows:

715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

- [11] The case law interpreting and applying s. 715.1 of the Criminal Code indicates that the provision has two key objectives. The first is to enhance the fundamental truth-seeking role of the courts. The second is to reduce the likelihood of inflicting further injury on a child witness or complainant as a result of involvement in the criminal justice system: *R. v. C.C.F.*, [1997] 3 S.C.R. 1183 at para. 29.

- [12] With regard to the truth-seeking objective, s. 715.1 allows for the creation and admissibility of a record of what is likely to be the best recollection of the event in issue to aid in ascertaining the truth: C.C.F. at para. 21. In other words, s. 715.1 is a mechanism for preserving and admitting at trial an "early account" of the incident: C.C.F. at para. 41.
- [13] With regard to the objective of reducing trauma, s. 715.1 prevents or materially reduces the stress or trauma that can be visited upon a child as a result of being required to participate in court proceedings dealing with matters that would be distressing or disturbing to the child. The provision does this by allowing for the taking of a videotaped statement in circumstances that are less formal and less overwhelming to the child witness: C.C.F. at para. 22.
- [14] Section 715.1 is basically a statutory exception to the hearsay rule. It permits an out-of-court statement to be admitted for the truth of its contents, provided that certain statutory preconditions are met: C.C.F. at para. 17. The statute uses the phrase "victim or witness", but I will use the term "complainant" for ease of reference.
- [15] The five statutory preconditions that must be met under s. 715.1 are: (1) the complainant must have been under the age of 18 at the time of the alleged offence; (2) the video recording must have been made within a reasonable time after the alleged offence; (3) the complainant must describe the acts complained of in the video recording; (4) the complainant must, while testifying, adopt the contents of the video recording; and (5) the video recording shall not be admitted if the presiding judge is of the opinion that its admission would interfere with the proper administration of justice: *R. v. T.R.J.*, 2014 BCSC 1611.
- [16] In the case at bar, there is no issue with respect to conditions 1, 3, or 4. The key issues before me are whether the video recording was made within a reasonable time of the alleged offence (condition 2 above), and whether the admission of the recording would interfere with the proper administration of justice (condition 5 above). I will deal with each of these issues in turn.
- (a) Whether Video-Recorded Statement Made in a Reasonable Time
- [17] As noted, one of the objectives of s. 715.1 is to preserve an early account of the incident giving rise to the criminal charge against the accused. To this end, s. 715.1 requires the video-recorded statement must have been made within a reasonable time of the alleged offence. The time in question runs from the time of the alleged offence to the time that the video recording is made. The determination of what is reasonable is not a mathematical calculation, but rather an exercise of judicial discretion based on the totality of the circumstances. Relevant circumstances include the age of the child, the length of the time in issue, the reason for any delay between the date of the alleged offence and the taking of the video-recorded statement, the nature of the relationship between the child complainant and the accused, any significant intervening events that might impact upon the statement, and the potential impact of the passage of time may have had on the complainant's ability to

recollect the events: T.R.J. at paras. 71, 73, 76, 80.

- [18] The focus of the analysis should be on the extent to which the passage of time can be said to have impacted on the complainant's ability to recollect and describe the events. The factors I have just listed should be considered through that lens. In considering the reasons for any delay, the court must be mindful of the fact that children sometimes delay disclosure of sexual abuse allegations for a number of reasons: T.R.J. at para. 74.
- [19] It is also important to bear in mind that children's memories fade faster than the memories of adults. To paraphrase from Justice Fitch as he then was in T.R.J. at para. 79, the younger the child, the more acute the concern about the passage of time. However, the passage of time cannot be viewed in isolation, nor should it overwhelm the analysis.
- [20] In this particular case, the video recording was created some three and a half to seven months after the alleged sexual touching. The question is whether that is a reasonable time in all the circumstances.
- [21] EJM was eight years old when the event in question is alleged to have occurred and nine when the video-recorded statement was taken. Thus, EJM was quite young and the amount of time that passed, some three-and-one half to seven months, is not insignificant and certainly more than trivial in terms of its potential impact on her memory.
- [22] Crown counsel concedes that the alleged sexual touching involves a single incident that appears to have been of a relatively brief duration, a factor which might have some bearing on the complainant's ability to remember it. However, it is clear from the statement itself that EJM considered the event to be upsetting. She says she kept it inside her and it made her feel bad and caused her to be fearful. Although EJM expressed some difficulty remembering certain aspects of the event, including how she ended up on the bed and what she was wearing, the statement itself, if believed and considered reliable, does suggest that at the time EJM gave the statement she had an independent recollection of the event sufficient to articulate the nature of the act complained of.
- [23] I note further that EJM was able to describe some aspects of the event in the video in some detail. She was able to describe the timeframe within which the event occurred, the nature of the relationship with C, and the games she played and other things she did at C's house.
- [24] Turning to the reasons for the delay, the lion's share of the three-and-one-half to seven months that elapsed between the date of the alleged incident and the taking of the statement is attributable to delayed disclosure of the allegation by the complainant EJM. As noted, the case law recognizes that it is not uncommon for children to delay disclosure of such allegations. In this case, in the video-recorded statement, EJM repeatedly expressed a reluctance to discuss the allegations, explaining that she was reluctant to tell her family about it. She did not want to discuss it because she was scared, and she kept it inside and felt bad about it. She said she did not want to discuss it because big stuff would happen. She was fearful about what would happen to her friend C, who is the accused's daughter. There was

also evidence that EJM expressed a fear that if she told what happened to her, she might be put back into foster care. That evidence comes from the video-recorded statement itself in which EJM says Mr. D told her that if she did not do what he said, he knew people that would put her back into foster care. There is witness testimony to the same effect from Ms. D and Constable Inkman, which is admissible evidence of EJM's state of mind under the state of mind exception to the hearsay rule.

- [25] The balance of the delay, a period of perhaps two weeks, is attributable first to a very short delay by family members in reporting the matter to the police, and second, to the delay between the taking of the first statement on 4 January 2017 and the taking of the second statement on 12 January 2017. These time periods are relatively brief and add only a few weeks to the overall time period of some three-and-one-half to seven months.
- [26] There were, of course, intervening events between the initial disclosure and the taking of the statement which the Crown now seeks to tender, namely the statement dated 12 January 2017. I would put the intervening events into two categories. First, there were the discussions between EJM and her family members, those being Ms. D, Mr. M, and his partner Ms. B. Second, there was the statement taken by Constable Inkman on 4 June 2017. In terms of the significance of these intervening events, both counsel agree that they are relevant to both the reasonable time criterion and the administration of justice criterion.
- [27] As explained above, the focus of the reasonable time criterion is on the effect of the delay, on the ability of the complainant to recall and recount the allegation. Considered from this perspective, in my view, the key concern is the extent to which the intervening events might be said to have affected the complainant's recollection over the time from the date of the offence or the alleged touching to the date of the video-recorded statement.
- [28] The first intervening event is the discussions between EJM and her family members. The evidence indicates that these were relatively basic discussions with little substantive content. I will discuss the evidence on this point in greater detail below. For present purposes, what is most important is that these discussions took place at or around the time of EJM's initial disclosure. What is more, the period of time from EJM's initial disclosure of the allegation to her family members to the reporting of the allegation to the police was relatively brief, 10 days at most. The time from EJM's initial disclosure to the taking of the subject statement on 12 January 2017 was no more than three weeks in total.
- [29] With regard to the first interview conducted by Constable Inkman on 4 January 2017, defence counsel suggests that this statement had a significant bearing on EJM's subsequent statement. I will discuss the manner in which Constable Inkman took the statement and its potential effect on the second statement in greater detail under the administration of justice criterion. For present purposes, that is in considering whether the second statement was taken within a reasonable time, the most salient considerations are that the first statement was taken a mere eight days before the taking of the second statement, and that there is a relatively complete contemporaneous record of the first statement.

- [30] This is not a situation where an initial statement was taken at or near the time of first disclosure and a second statement was taken months or years later. Nor is it a situation where the initial statement was lost or destroyed, such that one cannot ascertain its effect on the subsequent statement.
- [31] Taking all of these circumstances into account, I conclude that the video-recorded statement taken by Corporal Remple on 12 January 2017 was created within a reasonable time after the alleged offence. As noted, the bulk of the time in issue is attributable to the delayed disclosure by EJM in circumstances where she expressed a specific fear or concern about possible negative consequences that telling about the incident could have on her. In the video, EJM, who was nine at the time, appeared to have an independent recollection of a number of rather specific aspects of her relationship with Mr. D and with CD, and she was able to describe the allegation itself in a manner that suggested an independent recollection of it. Although there were intervening events, they came near the end of the time period in issue. The delay between the initial disclosure and the taking of the statement the Crown now seeks to tender was relatively minimal and the intervening events do not materially undermine the ability to properly assess EJM's recollection and recounting of the allegation in the particular statement that the Crown seeks to lead under s. 715.1.
- (b) Whether Admission would Interfere with Administration of Justice
- [32] There are a variety of considerations or factors commonly taken into account in deciding whether admission of a video-recorded statement would interfere with the proper administration of justice within the meaning of s. 715.1, although not all of them are apposite in every case. In the case at bar, the parties focused their submissions on the following considerations: (1) the manner of questioning in the statement; (2) the quality of the video and audio record; (3) the presence of or involvement of third parties in the taking of a statement; and (4) the effect of any prior discussions with the complainant on the statement. I will review each of these considerations in turn.
- 1) The Manner of Questioning
- [33] Corporal Remple explained that she had training in the use of the step-wise interview technique. One of Corporal Remple's concerns was to avoid use of leading questions. In the video, Corporal Remple's manner of examining EJM was largely open-ended. It is clear that Corporal Remple had certain topics that she wished to raise with EJM in order to get EJM to say what she knew or what she could say about these topics, but Corporal Remple did not direct EJM by giving her leading questions or telling her what to say. For the most part, EJM was allowed to use her own words to describe the events.

- [34] There were a number of occasions when EJM made gestures or gave non-verbal responses to questions. On some occasions, Corporal Remple prompted EJM to respond verbally, but on some occasions she did not. There were also multiple instances where, in addition to giving a verbal response to a question, EJM made a simultaneous gesture or non-verbal reaction to a question.
- [35] For the most part, EJM's gestures and non-verbal responses are visible on the video and appear to be self-explanatory. On multiple occasions, EJM shakes her head back and forth indicating no, or nods her head up and down indicating yes.
- [36] There are also occasions when EJM shrugs her shoulders or moves her arms in a waving motion in an apparent indication that she is uncertain or does not know the answer to a particular question. Sometimes these gestures were clarified with EJM during the interview and other times they were not.
- [37] There are some hearsay dangers associated with EJM's unexplained gestures or movements. These hearsay dangers have been or could be addressed and minimized in several ways. For one thing, the hearsay dangers could have been and were, in fact, reduced by the testimony of Corporal Remple who was able to articulate or describe some of the gestures during her voir dire testimony. Perhaps more importantly, defence counsel had the opportunity to cross-examine EJM on her non-verbal responses or gestures in the video during the voir dire.
- [38] Defence counsel chose to cross-examine EJM on at least one of her non-verbal responses or gestures in the prior 4 January 2017 video statement taken by Constable Inkman, and EJM was able to give a meaningful response to counsel's question. Counsel evidently chose not to question EJM on her non-verbal responses or gestures in the 12 January 2017 statement, although she had the opportunity to do so. Of course, if the video were ruled admissible, counsel would still have the opportunity to cross-examine EJM on her non-verbal responses or gestures in the trial proper.
- [39] All of this tends to weigh in favour of a conclusion that any concerns about non-verbal responses or gestures would be matters of weight and ultimate reliability of the video-recorded statement, rather than admissibility.

2) Quality of Video and Audio Record

- [40] Crown counsel acknowledges that the quality of the video is far from perfect. I agree with that observation. The relatively low resolution of the video and the elevated angle of the camera make it difficult to discern details of EJM's facial features. However, I agree with Crown counsel that EJM's body language and manner of gesturing are pronounced and easily discernible on the video.

- [41] Defence counsel takes issue with the fact that, due to the lighting and the distance of the camera from the participants, it is not possible to see the markings in the diagram presented to EJM during the statement. The diagram is significant because there are instances where EJM pointed to the diagram to describe the manner in which she says she was touched by Mr. D.
- [42] Counsel says because of the quality of the video and the absence of any indication on the diagram itself, one cannot tell what specific part or parts of the diagram EJM pointed to when describing the touching. I accept that this is a failing or limitation based on the quality of the video. However, the various parts of the doll shown in the diagram were labelled using words selected by EJM. What is more, Corporal Remple's general practice was to articulate or put into words EJM's actions when she pointed to the parts of the diagram.
- [43] Finally, Corporal Remple was cross-examined in the voir dire and was able to answer questions about the particular parts or labels that EJM pointed to in the video, although she was not able to say precisely what part of the diagram, for example, what part of the line or part of the picture itself, EJM pointed to.
- [44] I conclude that the inability to see the contents of the diagram on the video is a matter that goes to weight or ultimate reliability of the evidence. This factor, considered on its own or cumulatively with the other factors, does not lead me to conclude that the admission of the video-recorded evidence would interfere with the proper administration of justice.
- 3) Presence of or Involvement of Third Parties in Taking of Statement
- [45] Corporal Remple made a concerted effort to interview EJM alone. EJM asked a number of times to see or speak with her grandmother, but Corporal Remple explained that she wanted to speak to EJM alone. There was a single instance when Corporal Remple allowed EJM to see Ms. D in the doorway of the interview room during a break in the interview. No questioning occurred at this point and Ms. D did not say anything or ask any questions. In my view, one cannot say that Ms. D was present or involved in the taking of the statement in any meaningful way.
- 4) Impact of Prior Events
- [46] Defence counsel asserts that the 12 January 2017 statement was tainted by prior events falling into two categories, the first being the involvement of EJM's family members and the second being the effect of the statement taken by Constable Inkman on 4 January 2017. As indicated above, the discussions between EJM and her family members concerning the substance of the allegations appear to have taken place at or near the time of EJM's initial disclosure, and the contents appear to have been relatively limited.

- [47] Ms. D testified that EJM told her little or nothing about the allegation, other than stating that she had something she wanted to say but was fearful about going back to foster care. Mr. M testified that he really only heard the name David and then made his own assumption that something untoward happened. He clearly got upset in EJM's presence, but there is no indication that he made any specific suggestion to EJM about what happened.
- [48] The narrative evidence suggests that the most detailed disclosure was to Ms. B, Mr. M's partner who in some respects stood in the position of a step-mother to EJM. It appears that EJM told Ms. B of the alleged sexual touching by Mr. D. Ms. B was not called as a witness on the voir dire and there is certainly no direct evidence that Ms. B made any improper suggestions or efforts to influence the substance of EJM's allegations before the matter was reported to the police.
- [49] Defence counsel argues that it is unclear, based on all the evidence, exactly when EJM made her initial disclosure. Counsel also submits that the evidence of Ms. D and Mr. M about what was discussed was vague and, counsel says, evasive. Counsel submits that there is a risk that EJM's family members may have influenced the content of her allegation as reflected in the 12 January 2017 video. In my view, that submission is speculative and not grounded in the evidence. I would not consider the manner in which this allegation came to light and was ultimately brought to the attention of the police to be particularly unusual or extraordinary. There is no evidence that any of EJM's family members did anything to influence or alter EJM's account of the allegation.
- [50] The more significant concern in this case is the effect of the video-recorded statement taken by Constable Inkman on 4 January 2017, just eight days before Corporal Remple took the statement the Crown now seeks to tender into evidence. As noted, there were a number of serious concerns about the manner in which the statement was taken.
- [51] One concern about the 4 January 2017 statement is that Constable Inkman allowed EJM's grandmother to be present for the bulk of the interview, and despite Constable Inkman's efforts to limit her involvement, she actively participated in the interview, both by asking questions and by adding facts to EJM's narrative. Defence counsel says the involvement of Ms. D in the interview process was significant and problematic for a number of reasons. Her mere presence in the room may have caused EJM to feel pressured to give details or to provide an account that justified their going to the police station. Furthermore, Ms. D's active participation may have influenced the content of EJM's statement. Counsel says it is not just the words Ms. D spoke but her tone.
- [52] Another concern about the 4 January 2017 statement has to do with the manner in which Constable Inkman posed his questions. Many of his questions were leading, sometimes on key points. This is significant because child witnesses can be highly suggestible.
- [53] Another concern was Constable Inkman's effort to have EJM describe what happened to her by use of a doll. Constable Inkman gave EJM a doll and asked her to demonstrate the manner in which she was touched. In the course of the interview, Constable Inkman pointed

to certain parts of the doll and also folded the doll's skirt to better reflect his understanding of how EJM was dressed on the date of the incident. It is suggested that in doing these things, Constable Inkman influenced the substance of what EJM had to say about the alleged touching.

- [54] Finally, the ability to assess EJM's description of the event is undermined by the poor quality of the audio in which a number of EJM's assertions are not discernible. In his *voir dire* testimony, Constable Inkman was able to clarify some of these references, but not others. In the end, there are a significant number of inaudible statements made by EJM in the 4 January 2017 statement.
- [55] Crown counsel accepts that the 4 January 2017 statement was flawed in a number of aspects, but says that the key issue is the effect of the statement on the subsequent statement taken by Corporal Remple on 12 January 2017. Counsel says that although Constable Inkman's statement was not completely wiped from EJM's mind when she gave the second statement on 12 January 2017, Corporal Remple was able to do a "reset". Crown counsel says Corporal Remple effectively started again from square one using proper ground rules and interview techniques, resulting in a statement that was not materially influenced or tainted by the prior statement.
- [56] For her part, counsel for Mr. D says the two statements are part and parcel of the same investigation. The second statement is closely linked in time to the first. It is evident from the content of the second statement that EJM remembers the first. In these circumstances, counsel says there is a compelling basis on which to conclude that the second statement was tainted by the first and that EJM was influenced in what she said in the second statement by what was said in the first.
- [57] I have been provided with two prior decisions considering the effect of prior statements upon the admissibility of a subsequent statement sought to be admitted under s. 715.1. Those two cases are *R. v. Rohrich*, 2009 CanLII 5150 (ONSC) [Rohrich], and *R. v. Wiebe*, 2016 MBPC 55 [Wiebe].
- [58] In *Rohrich*, the complainant was 17 years old at the time of the alleged sexual assault. A first video statement was taken within five months of the alleged offence. That statement was lost and not available for consideration at trial. A second video statement was taken some 14 months after the alleged offence. It appears that the complainant's mother was present for the taking of the second statement. The court ultimately ruled that the second statement was not admissible, reasoning that too much time had passed between the date of the offence and the taking of the second statement. The court also took into account that a number of people had spoken to the complainant in the intervening period and this might have influenced the content of the second statement. I am not sure that that concept, "might have influenced the content of the statement", is a fair description of the standard that would have to be met, but in any event the case is a useful example of a situation in which the taking of a first statement was found to have affected the admissibility of the second.

- [59] In Wiebe, the complainant was 15 years old at the time of the alleged sexual assault. A first videotaped statement was taken four days after the alleged offence and a second videotaped statement was taken nine days later. The first statement was not placed before the court in the voir dire since the investigating officer was not available to testify. However, there was evidence that the first statement was taken in the presence of the complainant's 25-year-old boyfriend. In ruling the second statement inadmissible, the court reasoned at follows at para. 29 of the decision, and here I am quoting from Wiebe:
- [29] No case law has been provided to this Court where two statements were taken about the same set of allegations, but only one was being sought to be introduced into evidence. The case law only deals with pre-interviews to statements. That case law, as noted, indicates that pre-interviews go to weight unless they are of such a nature as to hinder the truth seeking function of the court or to be so prejudicial to the accused that their admission in evidence would result in an injustice. In *R. v. B.B.*, the court was able to view the pre-interview, note the changes in demeanour as well as in the nature and quality of questions posed to the witness. In this case, the Court is deprived of that ability to see that earlier July 6 statement.
- [60] The difference between those decided cases, Rohrich and Wiebe, and the case at bar is that in both of those cases, the first statement was not before the court. In Rohrich, the first statement had been lost. In Wiebe, the first statement was not placed before the court because the officer who took it was not available. However, there was evidence of the presence of a third party who might be expected to have had some influence on the statement. In neither case was the court in a position to assess the impact of the first statement on the content of the second statement, a point that is stressed by the court in Wiebe at para. 29. The Crown says both decisions are distinguishable from the present matter on that basis alone.
- [61] Counsel for Mr. D says the basis for exclusion of the second statement is in fact stronger in the case at bar because there is evidence before the court about the serious flaws in the taking of the first statement. Thus there is a real, non-speculative basis for the defence assertion that the first statement was flawed so as to make the second statement tainted.
- [62] I agree with counsel for Mr. D that there is a real, non-speculative basis in the evidence to conclude that the taking of the first statement was flawed. The real question is the impact of that flawed statement on the content of the second statement. On this point, I am not satisfied, on a balance of probabilities, that the second statement was tainted by flaws in the first. Although Corporal Remple referred to Constable Inkman and his earlier interview of EJM, Corporal Remple did not ask EJM to repeat what she had told Constable Inkman. Rather, Corporal Remple asked EJM to tell her about the incident itself in open-ended terms and, after carefully reviewing both statements, I am not satisfied, on a balance of probabilities, that the content of the second statement was the product, either direct or indirect, of suggestive questions or other improper influences arising out of the first statement.

- [63] The language used by EJM in the second statement was her own. EJM did not adopt the language or terms used by Constable Inkman in his questioning of her, nor did EJM in her second statement appear to adjust the content of her allegation in response to comments made by either Constable Inkman or Ms. D during the first statement.
- [64] In Wiebe, Martin P.C.J. reasoned that the effect of prior statements is a matter that generally goes to weight and not admissibility, "unless they are of such a nature as to hinder the truth seeking function of the court or to be so prejudicial to the accused that [the admission of any subsequent statement] would result in an injustice." Applying that reasoning in the case at bar, I find that concerns about the impact of the first statement are not of such a nature as to impair the truth-seeking function of the court through admission of the second statement. Rather, the concerns about the impact of the first statement are matters of weight to be taken into account in assessing the reliability and trustworthiness of the assertions made in the second statement.
- [65] Taking into account all of the factors and considerations I have reviewed above, both individually and cumulatively, I conclude that admission of the video-recorded statement given by EJM on 12 January 2017 would not interfere with the proper administration of justice as contemplated by s. 715.1 of the Criminal Code. The statement is therefore admissible.
- (c) Admissibility of Aids Used in 12 January 2017 Statement
- [66] Corporal Remple made use of a number of aids when taking EJM's statement on 12 January 2017. In particular, Corporal Remple made use of: (1) a list of rules; (2) a diagram of a gingerbread doll which was labelled using the names of body parts given by EJM in the course of the statement; and (3) handwritten notes made by both EJM and Corporal Remple in the course of the statement.
- [67] Section 715.1 allows for the admission of "a video recording" which, based on common sense, would include both images or video and sound or audio. However, on its face, s. 715.1 does not allow for the admission of other materials that may be referred to or relied upon in the course of a video-recorded interview. At first blush, one might be tempted to say that the admissibility of such materials is by necessary implication governed by s. 715.1. On this reasoning, where a video-recorded statement is held to be admissible under 715.1, any materials referred to or relied upon in the course of the statement would be admissible as part and parcel of the video recording. That was the approach taken in *R. v. Kalmakoff*, 2017 ABCA 330 at para. 2.
- [68] However, in my view, such a categorical approach risks admission of material that may be rife with hearsay. For example, if a witness is asked to write out a statement during a video-recorded interview, the witness may write out a lengthy written account that may have hearsay dangers, most notably an absence of opportunity to study the demeanour of the witness in the same way as if the witness had made the statement orally. Or where a witness is referred to a document, the document itself may contain hearsay assertions that the

witness is not asked to comment upon or is not in a position to adopt as true.

[69] As an alternative, a more cautious albeit more technical approach would be to conduct a hearsay analysis of each item or aid referred to in the video-recorded statement to determine who created it, the purpose for which it was being tendered and, if it is hearsay, whether it is admissible under any appropriate hearsay exception.

[70] In the case at bar:

- 1) The interview rules are a typewritten set of rules prepared by a third party. The rules were not read verbatim to EJM, so the written document contains text that was never put to the witness. To the extent that the rules were read to EJM during the statement and acknowledged by EJM, the audio records exactly what was said to EJM and what she said in response. As a result, the rules document is hearsay and admissible only as an aid to assist in following what was actually said in the video, not for the truth of its contents.
- 2) The diagram of the gingerbread doll is a visual aid. Its admission is necessary to understand the portions of the video where EJM points to it. The labels on the diagram were filled in by Corporal Remple while EJM watched, based on statements made on the video by EJM. The labels are therefore not hearsay. Rather, they are a record of what the witness said aloud, written in the presence of the witness, as the witness watched it being written.
- 3) The notes on the back of the diagram are written by EJM. They were read aloud by Corporal Remple, who then asked follow-up questions. To the extent that EJM's oral answers involve an acknowledgment of the words spoken, EJM has adopted the contents of the handwriting and it is not hearsay, or it is subject to an exception that makes it admissible.
- 4) With respect to the notes on the separate piece of paper, some were written by Corporal Remple and based on statements made by EJM, and some were written by EJM herself. With respect to the notes written by Corporal Remple, these are notes of what EJM purportedly said during the interview. They are redundant since EJM spoke the words in the video. What is more, the handwriting itself was never reviewed and confirmed by EJM, so it is inadmissible. I note that in the course of her testimony on this voir dire, EJM was asked about this handwriting and was unable to identify it. With respect to the notes written by EJM, again these notes were subsequently read aloud by Corporal Remple. To the extent that EJM's subsequent oral statements involve an acknowledgment of the words written on the page, EJM has adopted the contents and they are not hearsay.

[71] The last point I should make is that in the context of my analysis of the admissibility of the second statement, I have taken into account the fact that the parties have agreed that if the statement were ruled admissible, the first statement would be available for use by the defence in challenging or impeaching the statements made by EJM in the second statement. That is something to take into account in terms of the ability to use that first statement in assessing the reliability and accuracy of assertions in the second statement in the trial proper.

"Riley J."

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