

CANADA / JUDGMENT

R. v. Densmore

2026 ONCA 207

COURT

Court of Appeal for Ontario

DECIDED

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COA-24-CR-1164

Judges

Tulloch, Michael H.; Roberts, Lois B.; Rahman, Moiz

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Densmore, 2026 ONCA 207[1]

DATE: 20260323

DOCKET: COA-24-CR-1164

Tulloch C.J.O., Roberts and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Jack Densmore

Appellant

Peter Sankoff and Mark Fahmy, for the appellant

Ken Lockhart, for the respondent

Heard: February 5, 2026

On appeal from the conviction entered by Justice John Krawchenko of the Superior Court of Justice, on July 26, 2024.

Tulloch C.J.O.:

A. overview [1] The appellant appeals his conviction for sexual assault following a judge-alone trial. The charge arose from a date with the complainant. The trial judge found that, although sexual activity began consensually, the complainant ceased to consent during the interaction and that the appellant nevertheless proceeded to force vaginal intercourse on her without taking reasonable steps to ascertain her consent. The trial judge rejected the defence of honest but mistaken belief in communicated consent and entered a conviction, finding that the appellant was, at a minimum, reckless or wilfully blind.

[2] The appellant submits that the trial judge erred in his application of the burden of proof and the framework set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, by improperly fragmenting the evidence and failing to assess it holistically. He also maintains that the reasons for judgment are legally insufficient because they do not address central credibility concerns raised by the defence, thereby preventing meaningful appellate review.

[3] I would dismiss the appeal. This case turned on credibility. The trial judge carefully assessed the totality of the evidence, accepted some portions, rejected others, and explained why. His phase-by-phase analysis of the sexual activity was consistent with the legal framework governing consent. The appellant has not demonstrated an error in principle, a misapplication of the burden of proof, a misapprehension of evidence rising to palpable and overriding error, or a deficiency in reasons warranting intervention.

B. Background [4] At the time of the events, the appellant was a YouTube content creator, and the complainant was a university student. They matched on a dating application website and arranged to meet on August 5, 2020. She arrived at his home at approximately 8:35 p.m. They toured the house, attempted a hike, but returned to the house due to darkness, and then went upstairs to watch television in his bedroom.

[5] The trial judge divided the subsequent sexual activity into four phases:

- Phase One – Initial kissing;
- Phase Two – Breast contact and digital touching;
- Phase Three – Oral sex and attempted video recording; and,
- Phase Four – Unprotected vaginal intercourse.

1. Phase One [6] The trial judge accepted both parties' testimony that this phase was consensual.

2. Phase Two [7] The complainant testified that the appellant bit her breasts painfully and digitally penetrated her without consent despite her objections and attempt to push him away. In cross-examination, she acknowledged active participation during parts of this phase.

[8] The appellant testified that this phase was mutually consensual throughout, citing the complainant's active participation. He denied breast biting, hearing the complainant object, or being pushed away by her.

[9] The trial judge accepted the appellant's account of consensual activity during this phase, which he found was supported by the absence of physical marks on the complainant's breasts. While he also accepted the complainant's evidence that she developed misgivings, he found that she did not communicate disapproval or lack of consent in the manner she described.

3. Phase Three [10] Both parties agreed that oral sex occurred, and that the appellant briefly attempted to record a video of that activity on his phone.

[11] The appellant testified that he recorded a short "consent video," motivated by his public profile, deleted it when the complainant objected, showed her the deletion, and that she resumed oral sex voluntarily. He admitted that he did not ask the complainant's consent to record the sexual activity before he began filming.

[12] The complainant testified that she objected and withdrew her consent as soon as she saw that he was attempting to record her. She maintained that, while she observed the appellant put the phone down following her objection, she never saw him delete any video. While she testified in chief that the oral sex ended when she realized that he was attempting to record her, she acknowledged in cross-examination that they may have continued that activity after he placed the phone aside.

[13] The trial judge rejected the appellant's explanation as contrived and unworthy of belief, finding that it would be nonsensical to videorecord sexual activity for the purpose of confirming consent without first obtaining agreement to the filming. He preferred the complainant's evidence that she never witnessed the appellant delete the video. He found that the complainant, who had already developed misgivings during the prior phase,

withdrew her consent when the appellant attempted to film her. Because she verbally and clearly communicated her objection to the filming, the trial judge concluded that the appellant knew that he had overstepped.

- [14] The trial judge also found that any continued oral sex post-filming did not undermine the complainant's testimony that she withdrew her consent due to that videorecording. Instead, it merely showed that she was not sure how long the sexual activity lasted. As the trial judge explained, the unauthorized filming solidified the complainant's misgivings into a withdrawal of consent that culminated in her getting dressed to leave immediately after the oral sex had concluded.
4. Phase Four [15] The complainant testified that the appellant had unprotected vaginal intercourse with her without her consent after she had begun dressing to leave. She stated that he came up behind her, kissed her, pushed her face down on the bed, and pulled her clothes away before penetrating her.
- [16] The appellant testified that intercourse was consensual and that the complainant expressed consent physically and, after that activity began, verbally.
- [17] The trial judge accepted the complainant's account of non-consensual intercourse, finding it logical in light of her serious misgivings following the attempted non-consensual filming. He rejected the appellant's evidence, concluding that his testimony concerning the complainant's alleged verbal expressions of consent – statements which were never put to the complainant in cross-examination – was flippant and appeared to be made up on the spot. He determined that the appellant's testimony "painted a confusing picture" because, despite asserting that the complainant verbally expressed consent, the appellant stated that he took his cues from the complainant's body language. The trial judge found that the appellant, at a minimum, was reckless or willfully blind and took no reasonable steps to ascertain consent before proceeding.

C. analysis 1. Alleged W.(D.) Error a. The Appellant's Position [18] The appellant argues that the trial judge erred by fragmenting the encounter into phases and assessing credibility in isolation rather than holistically. He submits that, having found the complainant's account of Phase Two to be unreliable, the trial judge was required to articulate a clear and logical basis for accepting her evidence about the later phases. The appellant asserts that this failure contravenes the principles in W.(D.), R. v. Reid (2003), 167 O.A.C. 336 (C.A.), and more recent appellate authority, including R. v. Bristol, 2011 ONCA 232, 280 O.A.C. 334, at para. 14, R. v. A.P., 2013 ONCA 344, 297 C.C.C. (3d) 560, at para. 55, R. v. P.A., 2024 BCCA 93, at paras. 33, 41, and R. v. Stewart, 2025 NSCA 57, 451 C.C.C. (3d) 175, at para. 64, leave to appeal requested, [2025] S.C.C.A. No. 391.

- [19] The appellant further contends that the trial judge failed to perform the third step of the W. (D.) analysis – namely, assessing whether the Crown's evidence, even if the defence evidence is rejected, leaves a reasonable doubt when considered against the totality of the evidence.

- [20] Finally, the appellant submits that the trial judge mischaracterized his testimony regarding consent in Phase Four, describing it as “confusing” when, in his submission, it was consistent throughout.
- b. The Trial Judge Properly Applied W.(D.) [21] W.(D.)’s three steps guard against a simple choice between whether the accused or the complainant is more believable by focusing on whether a reasonable doubt arises on the whole of the evidence. This guidance, however, is not a mechanistic straitjacket. Judges are presumed to know the law, they need not recite their reasoning process in detail, and their reasons should not be microscopically parsed for error. Instead, the test for appellate intervention is contextual – whether the reasons, read as a whole and in the context of the record, show that the trial judge incorrectly applied the burden of proof: *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at paras. 21, 26; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 6-12.
- [22] In this case, I do not accept that the trial judge’s phase-by-phase analysis constitutes legal error. Consent must be assessed in relation to each sexual act. Where an encounter evolves, a trier of fact must thus determine whether subjective consent existed at each phase and whether it was communicated. Further, as the appellant accepts, the order in which the trial judge made his findings is inconsequential as long as he properly applied the principle of reasonable doubt: *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 66; *Vuradin*, at para. 21.
- [23] The trial judge did not treat the case as a binary credibility contest. Indeed, he did not accept significant portions of the complainant’s evidence concerning Phase Two and instead preferred the appellant’s evidence on that issue. These findings undermine the suggestion that he approached the case as a simple choice between witnesses.
- [24] The judge explained why, notwithstanding those findings, he accepted the complainant’s evidence regarding Phases Three and Four: it was logically consistent with her contemporaneous communications expressing distress and concern about the video, it remained stable under cross-examination, it was logical in light of the misgivings he found that the complainant had developed during Phase Two and which intensified following the attempted videorecording, and the appellant’s explanation for filming was incredible.
- [25] The appellant’s reliance on Reid and Bristol is misplaced. Those authorities address circumstances where a witness deliberately fabricated a criminal allegation, or the trial judge made grave adverse credibility findings concerning major parts of the witness’s evidence. The trial judge made no such findings here. While he determined that portions of the complainant’s evidence concerning Phase Two were unreliable, he did not conclude that she intentionally misled the court.
- [26] Nor did the trial judge fail to perform the third step of W.(D.). The reasons demonstrate that he considered the entirety of the evidence, including his findings concerning the earlier phases. For instance, he grappled with his finding that portions of the complainant’s Phase Two evidence were unreliable when deciding to accept that she nonetheless developed misgivings during that phase. Similarly, he determined that the complainant’s non-consent

during later phases was logical in light of those earlier misgivings, which intensified following the attempted non-consensual filming during Phase Three. He was not left in reasonable doubt after assessing the defence evidence against the Crown's case.

- [27] As for the alleged mischaracterization of the appellant's evidence regarding consent in Phase Four, the trial judge found that it was illogical for the appellant to base his alleged belief in consent on body language if the complainant had, as he claimed, verbally expressed consent during the intercourse. That finding was open to him on the record and does not disclose palpable and overriding error.
- [28] I am satisfied that the trial judge understood and applied the burden of proof correctly.
2. Sufficiency of Reasons a. The Appellant's Position [29] The appellant submits that the reasons are insufficient because the trial judge failed to address material concerns regarding the complainant's credibility raised by the defence, including:
- (1) A possible motive to fabricate linked to anxiety about videos or images;
 - (2) External pressure from friends, family, and a therapist to report him, coupled with her initial perceptions that she may have been overreacting;
 - (3) Her alleged minimization of her active participation; and,
 - (4) Alleged inconsistencies regarding whether oral sex resumed after filming.

He argues that these omissions prevent meaningful appellate review.

- b. The Trial Judge's Reasons Were Adequate [30] Reasons must explain the result and permit meaningful review; they need not catalogue every argument or reconcile every inconsistency. Credibility findings are owed particular deference and the reasons for those findings should not be finely parsed in a search for error: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 24, 50; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 30; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 69, 76, 81.
- [31] When read functionally and contextually, the reasons explain why the appellant was convicted: the trial judge accepted the complainant's account of non-consensual intercourse beyond a reasonable doubt, rejected the defence of honest but mistaken belief in communicated consent, and found that the appellant was, at the very least, reckless or wilfully blind. His reasoning path is discernible, and the requirements of *Sheppard* are met.
- [32] First, the trial judge addressed the alleged motive to fabricate arising from anxiety about the video. He found that the complainant's continued concern about that recording confirmed her account that she did not see him delete it. This concern, he found, intensified her earlier misgivings and supported her testimony that she did not consent to vaginal intercourse during the next phase. The appellant's argument that the trial judge should have drawn a different conclusion from this evidence – that the complainant fabricated sexual assault allegations so that the police could search the appellant's phone for the recording – does not

establish palpable and overriding error.

- [33] Second, the trial judge addressed the complainant's communications with friends, family, and her therapist. As he recognized, the appellant's trial counsel submitted that these communications tainted the reliability of the complainant's evidence by colouring her perceptions but disavowed any scheme to concoct evidence. The trial judge rejected the argument advanced before him, characterizing the communications as evidence of a supportive network rather than improper pressure. That conclusion was open to him. The trial judge was not required to also address the argument now made on appeal – that the communications show that the complainant intentionally fabricated the allegation in an attempt to protect other women from the appellant – because it was never properly put to him.
- [34] The complainant's initial perceptions that she may have been overreacting were linked to these communications, which the trial judge addressed. It was open to him to accept her evidence concerning Phases Three and Four – testimony which he found was emphatic, logical, and unshaken – notwithstanding any initial uncertainties she might have had.
- [35] Third, the trial judge did not fail to address alleged inconsistencies in the complainant's testimony concerning earlier phases. Instead, he expressly acknowledged them – for instance, by noting that the complainant acknowledged active participation in cross-examination – and did not accept portions of her evidence on that basis. He was nonetheless entitled to conclude that initial consent does not preclude the development of misgivings or subsequent withdrawal.
- [36] Fourth, the trial judge addressed the alleged inconsistency regarding whether oral sex continued after the attempted filming. He found that this suggested discrepancy did not undermine the complainant's credibility, but merely affected the reliability of her time estimates, an immaterial issue. This finding was open to him because the complainant's evidence on this point arose in the context of cross-examination concerning how long the oral sex lasted. Whether that activity continued does not undercut the trial judge's finding that the appellant knew that he had overstepped by attempting nonconsensual filming during it and should have taken greater care to confirm communicated consent before engaging in a new activity – unprotected vaginal intercourse. Nor does it undermine his finding that the videorecording intensified the complainant's earlier misgivings and prompted her to attempt to leave after the oral sex concluded.

D. Disposition [37] I would dismiss the appeal.

Released: March 23, 2026 “M.T.”

“M. Tulloch C.J.O.”

“I agree. Roberts J.A.”

“I agree. M. Rahman J.A.”

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
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