

CANADA / JUDGMENT

R. v. Field

2022 BCCA 197

COURT

British Columbia Court of Appeal

DECIDED

31 May 2022

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2022 BCCA 197 R. v. Field

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Field,

2022 BCCA 197

Date: 20220531

Docket: CA47076

Between:

Regina

Respondent

And

John Frederick Field

Appellant

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Before:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Voith

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia,

dated October 24, 2019 (conviction) (R. v. Field, 2019 BCSC 2341,

Chilliwack Dockets 66940-2; 66940-4).

Oral Reasons for Judgment

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent

(via videoconference):

M. Richards

(appeared May 31, 2021 only)

L.A. Chu

Place and Date of Hearing:

Vancouver, British Columbia

May 26, 2022

Place and Date of Judgment:

Vancouver, British Columbia

May 31, 2022

Summary:

The appellant was convicted of attempted robbery and sexual assault against two different complainants. On appeal, he submits that the judge misapprehended the evidence in relation to the attempted robbery conviction and erroneously concluded that he had formed the requisite intent to steal the complainant's vehicle. In relation to the sexual assault conviction he says that, in the absence of both direct sexualized contact and the exercise of power and control, the interaction could not have amounted to a sexual assault. Held: Appeal dismissed. Read functionally and contextually, it is clear from the reasons that the trial judge properly considered the evidence in inferring the appellant's intent to steal the complainant's vehicle. The trial judge also did not err in his consideration of the sexual assault conviction. Though a relevant factor, there is no requirement that there be a clear exercise of power and control where there is no direct sexualized contact. Nonetheless, the judge found that the appellant had applied force to and threatened the complainant and that her sexual integrity was violated. In light of the findings of fact, there is no basis to challenge this conclusion.

- [1] BUTLER J.A.: John Field appeals convictions for attempted robbery and sexual assault arising from a series of events involving different complainants that occurred on the same day. He says the judge misapprehended the evidence regarding his encounter with the driver of a parked vehicle and argues that this misapprehension led the judge to err in finding that the Crown had proved mens rea for the offence of attempted robbery of her car. The appellant also argues the judge erred in law in concluding that the Crown had proved that he sexually assaulted another woman. The appellant does not challenge the judge's factual findings as to what occurred during that encounter. Instead, he says the judge misapplied the legal standard set out in *R. v. Chase*, [1987] 2 S.C.R. 293 to the facts and erroneously concluded that the appellant's conduct amounted to a sexual assault.
- [2] For the reasons that follow, I would dismiss the appeal.

Background

- [3] The appellant was charged with four counts arising out of events that occurred on February 22, 2018. The trial proceeded by judge alone before Justice Crabtree. The appellant and the two complainants in the convictions under appeal, C.G. and J.G., gave evidence. Their evidence and the circumstances leading to the charges are set out in detail in the reasons for judgment. The appellant does not challenge the findings of fact and so, for the purpose of describing the issues on appeal, I can briefly summarize the relevant circumstances.
- [4] At the time of the offences, the appellant was high on methamphetamine. After breaking into an apartment where he stole a number of items, including car keys with an electronic fob, the appellant went into the secure parking lot of the apartment building to look for the car associated with the keys and fob. His intention was to steal a car to drive to Abbotsford. In an attempt to locate the vehicle, he made three approaches to a car that C.G. had just parked in one of the stalls. The evidence of the appellant and C.G. about what took place during those encounters is relevant to the first ground of appeal and I will return to it below. In brief, on the second approach to her vehicle, C.G. stated that it was her impression the appellant wanted to get into her car, but agreed that he may have just wanted to know where the vehicle associated with the keys he had taken was located. On the third encounter with C.G., the appellant banged his fist on the driver's window and told her to get out of the car. She refused and told him she had called the police. After the third encounter, the appellant left the parking lot and proceeded to visit nearby establishments.
- [5] The appellant eventually entered an office building and approached the office where J.G., a healthcare worker, was working. After entering the office, the appellant closed the door and proceeded to empty a powdered drug from a plastic bag on a counter where he snorted it. The evidence of J.G. and the appellant about what happened after he consumed the drug differed, but the judge accepted J.G.'s testimony. According to J.G., the appellant said he was going to masturbate while watching her, and also told her to remove her clothes. She asked him to leave, but he lunged at her. She yelled, "Get out. Get out" and kicked him twice in the crotch. He told her to "Shut the fuck up" and pushed her into a chair. The appellant then

turned around and she kicked him in the buttocks as he left the office.

- [6] At the start of the trial, the appellant pleaded guilty to the breaking and entering count. He pleaded not guilty to the other charges: sexual assault of J.G.; unlawful confinement of J.G.; and attempted robbery of C.G. The judge acquitted the appellant of unlawful confinement but found him guilty of the two offences that we are concerned with on this appeal.

Trial Reasons

Attempted Robbery

- [7] After setting out relevant legal principles, which are not challenged on appeal, the judge set out the evidence of both parties concerning the attempted robbery charge and the appellant's three approaches to C.G.'s vehicle. He found that the appellant's testimony was self-serving and that it contained internal and external inconsistencies. He concluded that the reliability of the appellant's testimony was affected by a lack of sleep and by the drugs he had consumed leading up to the events. He found C.G. to be a reliable and credible witness whose testimony was detailed, logical and made sense. He also found that she presented a fair and balanced outline of the events, having conceded those points in her evidence where she was unsure about what she heard or observed.
- [8] The judge concluded that, while C.G. was not certain about what the appellant said or did on his second approach to her vehicle, there was no doubt about what occurred on the third approach. The judge's key findings relevant to the issues on appeal include:
- [34] Dealing with the second occasion where Mr. Field approached Ms. C.G.'s vehicle, she was unclear what Mr. Field specifically said. It was unclear on that occasion whether he was attempting to gain access to the vehicle. Ms. C.G. opened the door briefly, but then closed it; and there appeared to be no attempt to keep it open or attempt to gain access to the vehicle on that particular occasion.
- [36] The Crown submits, based upon the context in which Mr. Field was in the parking lot, coupled with his actions of punching the window and uttering those words, makes out the necessary elements to establish the offence of attempted robbery. The defence submits that Mr. Field's actions do not rise to the level or constitute an attempt to commit that offence.
- [39] With respect to the intent to commit the offence of robbery, I am satisfied that Mr. Field had the intent to steal Ms. [C.G.'s] vehicle. Immediately prior to this event, he had formed the intent to enter Mr. S.J.'s apartment and took his wallet and keys. He went to the underground parking lot with a plan to steal a vehicle.

- [49] Mr. Field was in the parking lot to take a vehicle. Ms. C.G. testified that during the second occasion, when Mr. Field approached her vehicle, it was her impression that Mr. Field wanted her car and to get into it. However, despite her saying that Mr. Field's hand was in a position to block or even pull open the driver's side door, no effort was made to do so. On that occasion, I am not satisfied that the words: "Move over" were spoken by Mr. Field during the exchange.
- [50] In sum, Mr. Field came to the vehicle, his hand was near the passenger side door in position to block or possibly pull the door open, but he did not do so. Ms. C.G. then closed the driver's side door and Mr. Field left. Mr. Field returned for a third time and, on that occasion, he punched the driver's side window and told Ms. C.G. to get out. I accept that this occurred.
- [52] Mr. Field made several attempts to locate a vehicle in the parking lot but was unsuccessful. He sought the assistance of Ms. C.G., initially, in an attempt to locate the vehicle and, again, was unsuccessful. He returned to the driver's side of the vehicle and, at that point, on the third occasion, punched the window and said the words, "Get out." Ms. C.G. had the wherewithal to say to him that she had called the police, at which point Mr. Field left the building.
- [53] Mr. Field's explanation and denial of the attempt to take the vehicle, makes no sense in the circumstances. He said that he returned to the vehicle to express his frustration and then to leave. There was no need for him to do so. In my view, he returned to the side of the vehicle, approached the driver's side door, took the action and said the words he did, in his attempt to obtain the vehicle.

[Emphasis added.]

Sexual Assault

- [9] The evidence on the sexual assault count was more contentious. The appellant denied telling J.G. that he was going to masturbate in front of her, or that he told her to take her clothes off. However, the judge rejected his evidence and was left in no doubt by it. He found J.G. to be a reliable and credible witness even though she was traumatized by the events. The judge found the following facts:
- [64] After consuming drugs on the side table in the reception area, Mr. Field leaned against the entrance door. He told Ms. J.G. he was going to masturbate, and she observed his hand moving in his pocket through her peripheral vision. Mr. Field told her to take her clothes off. Mr. Field moved towards her, his arm outstretched, and pushed her into a chair located behind her. She kicked him twice, as he approached. He turned to leave and Ms. J.G. kicked him in the buttocks, after which he left.
- [10] Having concluded that the appellant applied force to J.G. by contacting her neck and chest area and that he directed her to remove her clothes as he walked towards her, the judge concluded that the appellant had committed the offence of assault. The only question was

whether it was a sexual assault. He referred to Chase for the test to be applied in determining whether the assault had the requisite sexual nature and considered relevant factors set out in that decision. He also referred to *R. v. Edgar*, 2016 ONCA 120 for the proposition that sexual assault is not limited to those instances where there is physical contact. The judge concluded:

- [70] Here, Mr. Field was a trespasser as Ms. J.G. demanded that he leave the premises and he did not. He advised he would masturbate and inserted his hand in his pocket, followed by movements consistent with someone engaged in the act of masturbation. He instructed Ms. J.G. to remove her clothes and moved toward her.
- [71] In these circumstances, I find the actions of Mr. Field constitute sexual assault.
- [11] While the judge acquitted the appellant of the unlawful confinement count, in doing so he made findings about the nature of the force applied by the appellant to J.G. that are relevant to the sexual assault charge:
- [76] Here, Mr. Field was invited into the reception area of Ms. J.G.'s workplace. She, too, demanded that he leave, and he did not do so. Mr. Field made comments about masturbation, demanded the removal of clothing, and moved towards her. In the course of the action, Ms. J.G. was pushed to the chair. He then turned and left. The events occurred very quickly. The directions made of her centred on the sexual assault and, in that context, restrained her movement. Even if one views the push as a form of restraint, once this occurs Mr. Field turns and leaves the premises.
- [77] In my view, it cannot be said that this particular act restrained Ms. J.G.; it is part of the application of force applied toward her.

[Emphasis added.]

On Appeal

- [12] The appellant raises two grounds of appeal. On the attempted robbery charge, he argues that the judge erred in law by failing to consider relevant evidence on the question of whether he had formed the requisite intent to steal C.G.'s vehicle. Specifically, he says the judge failed to consider C.G.'s evidence that it was "quite possible" that the appellant approached her vehicle to ask her to help him locate the car associated with the key and fob he had taken from the apartment, rather than to steal her car. Relying on *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), and *R. v. Lohrer*, 2004 SCC 80, he argues that a failure to consider or give proper effect to relevant evidence constitutes a misapprehension of evidence. He submits that the judge's failure to grapple with C.G.'s equivocal evidence renders the verdict unsafe. He submits that the appeal should be allowed and a new trial ordered.
- [13] On the sexual assault charge, the appellant says that whether the facts as found by the judge violated J.G.'s sexual integrity and amounted to a sexual assault is a question of law, reviewable on a standard of correctness. The appellant submits that the judge failed to

consider whether the accused's acts were performed in the context of exercising power and control over the complainant, an important contextual factor. As there was no evidence of direct sexual touching, the absence of any demonstration by the appellant of power and control over J.G. must lead to an acquittal. Quite simply, he says that the surrounding circumstances were not indicative of sexualized violence, control or confinement, and that the circumstances as found by the judge, objectively construed, could not amount to a violation of J.G.'s sexual integrity.

- [14] The Crown agrees that the two grounds advanced by the appellant raise issues of law and that the standard of review to be applied is correctness. On the attempted robbery appeal, the Crown says the appellant's arguments are misguided as they are based solely on what occurred during the appellant's second approach to C.G.'s car, while the conviction was based on the judge's findings about the third approach to her vehicle. Further, the Crown argues that it is clear that the judge did not fail to consider any relevant evidence.
- [15] On the second ground of appeal, the Crown argues that the judge correctly considered the relevant factors from Chase in concluding that J.G.'s sexual integrity was violated by the appellant's actions. However, if this Court finds that the judge erred in finding that her sexual integrity was violated, the Crown submits that the appropriate remedy is to substitute a conviction of assault simpliciter for the sexual assault conviction.

Analysis

Attempted Robbery

- [16] This ground of appeal is premised on the appellant's assertion that the judge misapprehended or failed to grapple with C.G.'s evidence about the second encounter she had with the appellant. At trial, the appellant argued that the judge had to be satisfied that the appellant had the requisite intention to rob C.G. of her vehicle (the mens rea). His submissions on that issue focused, as they do on appeal, on his second approach to C.G.'s vehicle. He also argued, focusing on the third approach to C.G.'s vehicle, that his actions were merely preparatory such that the Crown had failed to prove the actus reus. The judge rejected his submissions and his reasons address the arguments advanced at trial.
- [17] On appeal, the appellant argues that the judge's conclusion on mens rea was based on the fact that the appellant had stolen car keys and had formed the intention to steal "a car": at para. 39. The appellant does not contest that it was possible for the judge to come to that conclusion, but says that it is not sufficient to establish mens rea because the Crown was required to prove that the appellant had formed the intention to steal not just any car, but C.G.'s car. The appellant argues, focusing on para. 39, that it is evident from the reasons that the judge wrongly reached his conclusion on mens rea based only on the finding that the appellant had formed the general intent to steal a car when he stole the keys and fob from the apartment.

[18] In Lohrer, Binnie J. emphasized that the standard for demonstrating a misapprehension of evidence is stringent:

2 Morrissey, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[19] In order to succeed on this ground of appeal, the appellant must show both a misapprehension of evidence of substance and that the misapprehension was material to the judge's reasoning process. In my view, the appellant is unable to meet either requirement.

[20] The appellant's argument ignores an important principle of appellate review: a trial judge's reasons must be read functionally and contextually. In *R. v. G.F.*, 2021 SCC 20, the Court described the task of an appellate court this way:

[69] Appellate courts must not finely parse the trial judge's reasons in a search for error: Chung, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17.

[21] As the Crown submits, the appellant's argument is based on C.G.'s evidence about the second approach to her vehicle and ignores her evidence about what occurred on the third encounter. When the judge's reasons are considered as a whole, it is clear that he was properly aware of C.G.'s equivocation about what happened during the appellant's second approach to her car. Further, it is abundantly clear that his decision on both *actus reus* and *mens rea* was based on his acceptance of the appellant's evidence that he went to the parking lot to steal a car, and C.G.'s evidence about the third encounter at her car. Although the appellant stated that he went to the parking lot to steal the car associated with the stolen keys, the judge concluded, based on what occurred during the appellant's third encounter with C.G., that when he could not locate that car he formed the intent and took steps, beyond the mere preparatory, to take C.G.'s car.

[22] The reasons were responsive to the defence submissions at trial. Notably, the appellant never took the position at trial that *mens rea* could not be inferred if the judge was satisfied that the appellant's actions on the third encounter (banging the window and telling C.G. to get out of the car) were sufficient to prove the *actus reus* of the offence.

[23] On appeal, the appellant continues to focus on the evidence regarding the second encounter between the appellant and C.G. In chief, C.G. said she heard the appellant mumbling something about a car. She stated that it was her "impression" that he was trying to steal her car, but admitted that she did not clearly understand what the appellant was saying. In cross examination, C.G. agreed with the suggestion put to her by defence counsel that during the first and second approaches to her vehicle, the appellant may have been seeking her assistance in finding the car associated with the keys he held in his hands. This was further clarified in re-examination where C.G. gave the following evidence:

Q: Okay. I'm quite sure I understand the answer again. But the second interaction, it's possible he was wanting to know where the car - this other car was?

A: Correct. It's - it's possible. My interpretation is I felt that he was kind of going for mine but it could be - that's just my interpretation. It's possible he was trying for something different.

[24] Contrary to the appellant's assertion, it is clear that the judge considered C.G.'s evidence about the second encounter and gave effect to it. The judge readily accepted the appellant's uncontradicted evidence that he had formed the intent to steal a vehicle, which is why he took the keys from the apartment: at para. 39. However, regarding the second encounter, he accepted C.G.'s evidence was equivocal and that it was not possible to infer that the appellant had the intent to steal C.G.'s vehicle based on what had occurred up to that point.

[25] The judge then proceeded to set out the Crown's position that the necessary elements to establish the offence of attempted robbery were made out "based upon the context in which Mr. Field was in the parking lot, coupled with his actions of punching the window and uttering those words": at para. 36. Turning to consider the third approach, he accepted C.G.'s evidence that the appellant punched the driver's side window and told her to get out of the vehicle. The judge rejected the appellant's submissions that he had simply returned to the car to express his frustration before leaving, finding instead that "he returned to the side of the vehicle, approached the driver's side door, took the action and said the words he did, in his attempt to obtain the vehicle": at para. 53.

[26] In summary, it is evident from the reasons that the judge's conclusion about the mens rea of the offence of attempted robbery of C.G.'s vehicle was not based on a misapprehension of C.G.'s evidence about the first two encounters with the appellant, nor a failure to consider it. The judge rejected the appellant's denial of any attempt to steal C.G.'s vehicle and that finding is not challenged. The judge properly considered C.G.'s evidence about all three encounters with the appellant and he drew an inference about the appellant's intent based on the appellant's stated intention to steal a car and, more particularly, on what occurred during the third encounter. That being the case, there could be no error in the judge's reasoning process. I would not give effect to this ground of appeal.

Sexual Assault

- [27] Whether an accused's conduct violates the sexual integrity of a victim is a question of law as it involves the application of a legal standard to a set of facts: *R. v. Shepherd*, 2009 SCC 35 at para. 20.
- [28] As explained in *Chase*, the test to be applied in determining whether an assault has the requisite sexual nature is objective:
11. Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the Criminal Code which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (Taylor, *supra*, per Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S.J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L. Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.
- [29] The appellant acknowledges that the judge appropriately referred to the test in *Chase* and that he purported to consider the enumerated factors. However, he says that where an assault does not involve direct sexualized contact, a judge must consider the extent of power and control exercised by an accused over the complainant. He argues that the degree of power, control and domination exercised is the overarching contextual factor to be considered for the purpose of determining whether a complainant's sexual integrity has been violated in the absence of any evidence of direct sexual touching. While he does not directly submit that the test in *Chase* must be modified in such circumstances, that is what the appellant is inviting us to find. The appellant says the judge failed to turn his mind to this important factor. Further, he says it was not possible for the judge to conclude on the facts found that the appellant's conduct, objectively construed, violated J.G.'s sexual integrity.
- [30] I will first address the question of whether power and control are necessary for a finding of sexual assault in the absence of direct sexualized contact. I will then consider whether, in the circumstances of this case, the appellant did exercise power and control over J.G. and whether her sexual integrity was violated by the assault.

- [31] As he did in the court below, the appellant relies on Edgar. The facts in that case have some similarity to what occurred here. Mr. Edgar, who appeared to be high on drugs, broke into the complainant's apartment and would not let her leave. He was in the apartment for about an hour, during which time the complainant was not restrained. At some point he told her that she had to watch him masturbate. While he did not expose his penis, he put his hands down his pants and proceeded to masturbate. He was convicted of sexual assault. His argument on appeal has some similarity to the appellant's argument, but also has an important distinction:
- [8] The defence submits that the appellant's act of masturbation does not amount to a threat of sexual assault because the appellant did not touch or move towards the complainant, nor was his act accompanied by any threatening words. The defence concedes that the appellant's actions in the complainant's apartment created a terrifying and sexualized atmosphere that understandably terrorized the complainant. However, his isolated act of masturbation cannot amount to a sexual assault because it did not overtly threaten the complainant's sexual or bodily integrity.
- [32] The Court rejected that argument, holding that a sexual assault can be committed by acts or gestures without words, physical contact, touching or verbal threats so long as the actions "intentionally [create] in another person an apprehension of imminent harm or offensive contact that affronts the person's sexual integrity": at para. 10. The Court explained that the act of masturbation was elevated from an indecent act to a sexual assault because of "the surrounding circumstances of sexualized violence, control, and confinement" created by the appellant: at para. 13.
- [33] The appellant says that in this case, the "surrounding circumstances" were not indicative of sexualized violence, control and confinement. He notes that the judge actually acquitted the appellant of unlawful confinement and that the events took place "very quickly". He also notes that J.G. repeatedly kicked the appellant which cannot be indicative of the appellant exercising power and domination.
- [34] I would reject this argument for a number of reasons. First, and contrary to the appellant's submission, I do not accept that the Chase test must be modified in any way where there is an absence of evidence of actual sexual touching. Indeed, as explained in Chase and applied in Edgar, the test is contextual as it requires "all the circumstances" to be examined to determine if "the impugned conduct has the requisite sexual nature".
- [35] Further, the reason that the Court in Edgar focused on the question of power and control was because Mr. Edgar took the position on appeal that his actions (which involved no touching or threatening words) did not amount to a "threat", and so no assault was committed. That argument is not available to the appellant in this case as the judge found that he physically assaulted J.G. when he pushed her and that he threatened her when he told her to remove her clothes.

- [36] The appellant also relies on the cases of *R. v. V.(K.B.)*, [1993] 2 S.C.R. 857 and *R. v. Nicolaou*, 2008 BCCA 300 in support of his position that the exercise of power and control is a significant consideration in determining whether an act constitutes sexual assault where there is no direct sexual touching. These cases involve very different factual circumstances and are of no assistance to the appellant. The issue in both was whether the assaults, which involved direct sexual touching, could be properly found to be sexual assaults when the motive was not sexual gratification.
- [37] In *V.(K.B.)*, the Supreme Court of Canada endorsed the Ontario Court of Appeal's conclusion that a father who had violently clutched his son's scrotum for disciplinary reasons had committed sexual assault. Osborne J.A., writing for the majority, held that "sexual assault does not require sexuality and, indeed, may not even involve sexuality. It is an act of power, aggression and control": at 70.
- [38] In *Nicolaou*, this Court found that the public examination of the complainant's vagina by a drug dealer and pimp in order to determine if she had stolen drugs from him constituted sexual assault. The motive was found to include a demonstration of the appellant's power and control over the complainant: at para. 44.
- [39] The courts in the three cases above all considered sexual assault to be inherently an act of power, aggression and control, and the fact that this was the motive behind the sexual touching in *V.(K.B.)* and *Nicolaou* permitted a finding that these were indeed sexual assaults. The fact that a person exercises power and control over another may well be relevant to the determination of whether an act constitutes sexual assault. However, neither case stands for the proposition that the exercise of power and control is necessary for a finding of sexual assault, whether there has been direct sexual contact or not. As stated in *Edgar*, "a threat to invade the bodily or sexual integrity of another person or to otherwise apply force is itself a hostile act": at para. 16. These cases certainly do not stand for the proposition that where there is no physical sexual contact, there must instead be some physical manifestation of the power, aggression and control (which is already inherent in an act of sexual assault), regardless of the other circumstances of the interaction.
- [40] Second, I would in any case reject the argument that the appellant did not, on the judge's findings, exercise power and control over J.G. The thrust of the appellant's submission seems to be that the circumstances are inconsistent with a finding that he exercised power and control, and so could not have violated J.G.'s sexual integrity, because the duration of his assaultive actions was brief and because J.G. physically resisted his actions.
- [41] The latter point is without merit. While the appellant conceded that the fact a person physically resists an assault does not necessarily mean that their sexual integrity is not violated, he nonetheless submitted that, because J.G. repeatedly kicked the appellant in an attempt to get him to stop the assault, the judge could not have found a situation of power and control. As a result, he says, this could not have been a sexual assault. To be clear, the fact that a person physically resists an assault does not mean that the offender is not

exercising power and control, and cannot be a reason to find that their sexual integrity was not violated. In this case, the fact that J.G. resisted the appellant does not prevent a finding that the acts in question constituted sexual assault.

- [42] The fact that the encounter was not prolonged is a factor to be considered, but the relative brevity of the appellant's behaviour cannot, on its own, preclude a finding that J.G.'s sexual integrity was violated. It is apparent from the evidence that after telling J.G. that he was going to masturbate and beginning to do so, she remained seated and frightened for several minutes, following which the appellant asked her to remove her clothes and lunged at her. The judge noted that assault can be committed in a variety of ways and found that the appellant had both applied force to J.G. and threatened her. He found that the appellant pushed her, contacting her neck and chest, and directed her to remove her clothes: at para. 66.
- [43] After finding that the assault was committed through the application of force and a threat, the judge set out the relevant factors from *Chase*: the part of the body touched; the nature of the contact; the situation in which it occurred; the words or gestures accompanying the contact, including any threats; and the accused person's intent or purpose, including the presence or absence of elements of sexual gratification: at para. 68. While he did not indicate how he weighed the various factors, having set out the evidence in detail, it is clear that the judge considered all of the surrounding circumstances and properly applied the test from *Chase*.
- [44] I am of the view, in light of the findings of fact, there is no basis to challenge the judge's conclusion that, on an objective basis, the assault was committed in circumstances of a sexual nature such that the sexual integrity of J.G. was violated. I am satisfied, viewed in the light of all the circumstances, the sexual context of the assault would be visible to a reasonable observer. I would not give effect to this ground of appeal.

Disposition

- [45] I would dismiss the appeal.
- [46] VOITH J.A.: I agree.
- [47] HORSMAN J.A.: I agree.
- [48] BUTLER J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Butler"

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