

CANADA / JUDGMENT

R. v. J.J.K.G.**2025 BCCA 234**

COURT

British Columbia Court of Appeal

DECIDED

10 July 2025

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2025 BCCA 234 R. v. J.J.K.G.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. J.J.K.G.,

2025 BCCA 234

Date: 20250710

Docket: CA49289

Between:

Rex

Respondent

And

J.J.K.G.

Appellant

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FILE SEALED IN PART

Before:

The Honourable Mr. Justice Butler

The Honourable Madam Justice Horsman

The Honourable Justice Warren

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

October 7, 2022 (R. v. [J.J.K.G.], Port Coquitlam Docket 106422-1K).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

April 8, 2025

Place and Date of Judgment:

Vancouver, British Columbia

July 10, 2025

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Horsman

The Honourable Justice Warren

Summary:

The appellant was convicted of making and possessing child pornography, as well as two counts of voyeurism. The charges arose from images discovered on an app on the appellant's phone, which were captured by a camera hidden in a USB charging device placed in a family bathroom. One count in the indictment specified that the appellant made "a video recording" of one of the complainants. In his sentencing reasons, the judge held that the Crown failed to prove that the thumbnail images which constituted child pornography were linked to videos, which reduced the seriousness of the offending.

On appeal, the appellant argues that the particular "a video recording" was an essential element of the charge, and that the judge's finding at sentencing that the Crown failed to prove it undermined his decision to convict on all counts. The appellant also alleges the judge made palpable and overriding errors in assessing his credibility.

Held: Appeal dismissed. In the context of this case, the specification "a video recording" is a non-essential element of the offence and falls under the surplusage rule. Applying the surplusage rule in this context does not result in any prejudice to the appellant, and therefore the Crown's failure to prove the particular does not undermine the judge's verdict. In addition, the judge did not make any palpable and overriding errors in assessing the appellant's credibility.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Following a trial in the Provincial Court of British Columbia, the appellant J.J.K.G. ("J.G.") was convicted of making and possessing child pornography, as well as two counts of voyeurism, contrary to ss. 162(1)(a), 163.1(2), and 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46. The charges arose from images of A.B. and C.D. (the daughters of J.G.'s then-common law spouse, E.F.) which were discovered on an app on J.G.'s phone. The images had been captured by a camera--advertised as a "spy cam"--hidden in a USB charging device that was placed in the family's bathroom.
- [2] J.G. was ultimately acquitted of a voyeurism count involving E.F., but convicted of the other four counts in the indictment. This included Count 4, which was particularized in the indictment as: "mak[ing] child pornography, a video recording of [A.B.]". In his reasons for sentence, the judge stated he was "unable to conclude beyond a reasonable doubt that J.G. made or possessed videos": R. v. J.J.K.G. (2 August 2023), Port Coquitlam Docket 106422-1K at para. 73 ("Sentence Reasons"). On appeal, J.G. argues that making a video recording of A.B. was an essential element of the charge, and that the judge's finding in his Sentence Reasons that the Crown failed to prove that element renders his verdict on Count 4 unreasonable. J.G. further submits that the lack of proof he made videos as opposed to images undermines the judge's decision to convict on the other three counts.
- [3] In addition, J.G. argues the judge made two palpable errors in assessing his credibility and rejecting his evidence. He argues that when they are considered cumulatively, these errors are overriding because they were material to the judge's overall assessment of his credibility, which was a central issue at trial. He asks that the convictions be set aside and seeks a new trial on all counts.
- [4] For the reasons that follow, I would dismiss the appeal. The specification in Count 4 of a "video recording of [A.B.]" is surplusage, and not requiring the Crown to prove that specification does not result in prejudice to J.G. In addition, I am not persuaded the judge made any palpable and overriding errors in assessing J.G.'s credibility.

Background

- [5] The arguments advanced by J.G. arise from the unusual circumstances giving rise to the charges, as well as the evidence--and absence of evidence--at trial. I will, accordingly, set out the background in some detail.
- [6] J.G. lived in a house with E.F. and her three children. His two children from a previous relationship frequently spent weekends at the house. Several months before the events that gave rise to the charges, J.G. purchased a USB charging device which contained a hidden camera (the "Camera"). The Camera cost \$30 on Amazon and was manufactured by Luohe, a Chinese company. It was described as a "spy camera".
- [7] J.G.'s explanation for purchasing the Camera was that he wanted a camera that could display real time video on his phone and had a motion detection mode, and that he intended to use it in the garage for animal protection and home security purposes. He testified that he searched for a camera with those features on Amazon and eventually purchased the Camera. However, in cross-examination, J.G. also admitted that after E.F. confronted him about the device, he told her that one of the reasons he bought the Camera was for recording and livestreaming videos of jam sessions (playing instruments with friends).
- [8] J.G. was clear that he first placed the Camera in the garage, and downloaded the Luohe app to link the Camera to his phone. He testified he was able to download the app but that he could not get the app to recognize the Camera and link it to his phone. He said the English instructions available online were difficult to understand and unhelpful. From discussions with others, he believed the Camera did not work properly because of the limited Wi-Fi connectivity in the garage. He testified that after his initial attempts, he never looked at or used the Luohe app on his phone.
- [9] J.G. stated he did not return the Camera for a refund because he did not "care that much", as he had only paid \$30 to purchase it: R. v. [J.J.K.G.] (7 October 2022), Port Coquitlam Docket 106422-1K at para. 50 ("Conviction Reasons"). J.G.'s evidence regarding what happened to the device next was not always consistent. It is clear that at some point J.G. moved the Camera into the house, and eventually ended up plugging it into a socket in the bathroom to use as a charger for his razor.
- [10] In June 2021, A.B. discovered the images which led to the charges against J.G. At that time, the family was away from their home, and J.G. had left his phone in the trailer where they were sleeping. A.B. picked up his phone, and decided to unlock it. She knew the passcode, as did everyone in her family. She opened the camera roll and, for no particular reason, opened the "recently deleted" folder. She was surprised to find a video of herself in the bathroom of their home. The video was of poor quality and had time stamps on it which led her to believe it was not taken with J.G.'s phone. She knew it had been taken recently because of the pajamas she was wearing. She deleted the video and replaced the phone.

- [11] On further reflection, A.B. wondered if the charger in their bathroom at home might function as a camera, and whether the video had been recorded by that device. When she returned home, she and C.D. looked at the Camera and saw it was made by Luohe. They looked up the brand online and found a device with two USB inlets and a spy cam that appeared similar to the one in their bathroom.
- [12] The next day, A.B. took J.G.'s phone, unlocked it, and found the Luohe app. She opened the app and saw an image of their bathroom door. A.B. took a photo of that image. She then found a screen with two "saved album" icons. She clicked on one of the icons which opened a page titled "Video" that displayed 18 thumbnail images. About half of the thumbnails were images of A.B. and C.D. in states of undress, including full nudity. Eight of the images appeared to be random shots that did not depict a naked body. None of the thumbnails contained images that could be identified as J.G., his children, or E.F.'s son, all of whom also used that bathroom. The thumbnails had date stamps indicating dates between March 31 and June 7, 2021. A.B. believed that pressing on the thumbnails would open a video recording, but she did not press any of the thumbnails. She took a photo of the screen with the 18 thumbnail images.
- [13] A.B. locked the phone and returned it to where she had found it without deleting anything. She then told her sister, C.D., and her mother, E.F., about what she had found on J.G.'s phone. She also showed them the photograph of the screen with the thumbnail images. Shortly after A.B. found the images, E.F. confronted J.G. and asked him why he had naked images of her daughters on his phone. J.G. denied knowing there were naked images of A.B. and C.D. on his phone. He denied any knowledge of how the Camera worked, or that it had saved images to the app. E.F. and J.G. then looked at his phone and found the Luohe app, but it did not show any images or files containing images. E.F. took a photo of the phone. Based on the time stamps of the photographs, only an hour and 15 minutes had passed between the time A.B. took the photograph of the thumbnails and the time when E.F. was unable to find any images in the app.
- [14] J.G.'s phone was not seized by the police. A.B.'s phone was seized and the photos she took of the app, including of the 18 thumbnails, were entered as exhibits at trial. Neither the Crown nor the defence presented expert or technical evidence at trial about how the Camera and the app worked together to save images or videos, and whether that could have occurred without active user involvement with the device. The judge was left to find facts and draw inferences from the testimony of the witnesses and the photograph of the screen with the thumbnail images.

Reasons for conviction and sentence

- [15] It was not disputed at trial that the images of A.B. and C.D. were captured without their consent in a location where they had a reasonable expectation of privacy. As A.B. was 12 years old at the time, it was also not disputed that the naked images of her constituted child pornography, as defined in the Criminal Code: Conviction Reasons at para. 67. I pause here

to note that, while the Criminal Code uses the term "child pornography", I will use the term "child sexual exploitation material" or "CSEM" as a synonym throughout these reasons whenever possible: see *R. v. S.J.H.*, 2024 BCCA 134 at para. 8, footnote 1.

- [16] The judge identified two outstanding issues:
- a) Did J.G. intentionally observe or record the images of the complainants?
 - b) Did J.G. have knowledge and control of the images?
- [17] The judge recognized the evidence was largely circumstantial. He referred to appellate authority for the principles applicable to fact-finding in cases dependent on circumstantial evidence, including the principle that he must be satisfied that the only rational inference that he could draw from the evidence was of guilt: *R. v. Griffin*, 2009 SCC 28 at para. 33. As J.G. testified in his own defence, and denied knowing that the Camera had taken photos (or videos) and transferred them to the app on his phone, the judge acknowledged he had to apply the three-step analysis in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 when considering J.G.'s evidence: Conviction Reasons at paras. 69-79.
- [18] The judge first considered the uncontroversial evidence, including the fact that J.G. purchased a device with an "effectively hidden" spy camera without telling anyone about it: Conviction Reasons at para. 81. He also found as a fact that A.B. discovered a video of herself in the bathroom on J.G.'s phone that had been recently deleted: at para. 82.
- [19] The judge then considered J.G.'s testimony regarding his intentions and use of the Camera. The judge reviewed the evidence and concluded:
- [97] Given the several discrepancies in [J.G.]'s evidence as described above, I find it difficult to accept his evidence in a number of crucial areas. His explanations for purchasing the device are contradictory and do not make sense. He did not mention purchasing the device to anyone else in the home. When the device did not work for the purpose that he bought it for, he took no steps to return it or to explore further how to make it work. Similarly, there were discrepancies as to where and when he located the device.
- [98] Furthermore, his explanation for not taking any steps to explore what might have happened for these images to be accidentally transmitted from the device and captured on his phone does not make sense. Surely he would have wanted an answer from Luohe as to how and why that happened without his knowledge.
- [99] In view of the above, I find that I am unable to accept the evidence of [J.G.] with respect to his explanations regarding his intentions and use of the device.
- [20] After rejecting J.G.'s evidence, the judge turned to consider whether, on the basis of the evidence he accepted, there were reasonable inferences other than guilt. In doing so, he acknowledged the considerable gaps in the evidence, including the absence of technical evidence about the operation of the Camera and any direct evidence about the contents of the app, as well as the lack of direct evidence that J.G. had knowledge of, or had accessed,

the thumbnails. The judge also noted several pieces of exculpatory evidence, including the fact that for several months the Camera had been placed in locations where there was no expectation of privacy, and the fact that J.G. permitted everyone in the family to have access to his phone by sharing his password.

- [21] The judge then considered whether, based on the evidence he accepted, there were reasonable inferences other than guilt. He concluded:
- [110] That evidence supports the inference that [J.G.] intentionally placed the device in the bathroom and that he had knowledge of and possessed the thumbnail images that were stored on his phone by way of the Luohe app. I am unable to contemplate or imagine any reasonable alternative inference based on the proven facts, despite gaps in the evidence and exculpatory evidence.
- [22] Accordingly, the judge was satisfied beyond a reasonable doubt that J.G. was guilty of unlawfully observing or recording A.B. and C.D. in a place where they could reasonably have been expected to be nude, contrary to s. 162(1)(a) of the Criminal Code. He acquitted J.G. on the count involving E.F., as there was some uncertainty as to whether she was in any of the thumbnails. As some of the nude images were of A.B., who was 12 at the time they were taken, he also convicted J.G. of one count of making child pornography contrary to s. 163.1(2) of the Criminal Code, and one count of possession of child pornography contrary to s. 163.1(4).
- [23] On August 2, 2023, the judge sentenced J.G. to 18 months' jail time, followed by two years of probation. At the sentencing hearing, J.G. argued that the Crown's failure to establish that J.G. had made and possessed video recordings of A.B. and C.D. meant the circumstances of the offence were less serious. In his Sentence Reasons, the judge dealt with this issue as follows:
- [73] although the screen shot of the camera displaying the thumbnail images suggests that they connect to videos, there was no evidence that they actually were so connected. As such, I am unable to conclude beyond a reasonable doubt that J.G. made or possessed videos. The creation and possession of these two to three thumbnails [showing full frontal nudity of A.B.] reduces the seriousness of the offending below what it would be if the Crown had proven the existence of videos.

On appeal

- [24] J.G. raises two issues on appeal. First, he argues the judge's finding that the Crown had failed to establish that J.G. made or possessed videos in his reasons for sentence is inconsistent with the judge's reasons for conviction. His argument is premised on the proposition that, having particularized Count 4 by alleging J.G. made CSEM by making "a video recording of [A.B.]", the Crown was required to prove that particular. Having failed to do so, J.G. submits the verdict was unreasonable. He further submits the judge implicitly accepted that the thumbnails were linked to videos even though that particular had not been proven, which

affected the judge's verdicts of guilt on the other charges.

- [25] Second, J.G. argues the judge made two palpable errors in rejecting his evidence. He submits the judge erred in finding that J.G. "took no steps to return [the Camera] or to explore further how to make it work": Conviction Reasons at para. 97. In addition, he says the judge erred in rejecting J.G.'s explanation for why he did not "explore what might have happened for these images to be accidentally transmitted from the device and captured on his phone": Conviction Reasons at para. 98. J.G. argues these errors were overriding because they were critical to the judge's assessment of his credibility.

Analysis

Was the Crown required to prove J.G. made a video recording of A.B.?

- [26] While J.G. has framed the first ground of appeal in terms of inconsistency between the judge's Conviction Reasons and Sentence Reasons, this ground of appeal turns on whether the Crown was required to prove the allegation in Count 4 that J.G. made a "video recording of [A.B.]". If the allegation was more than mere surplusage (in other words, if it was a particular that was essential to constitute the offence) or if J.G. was prejudiced by relying on the particular in his defence to the charge, the Crown needed to prove it. As I will explain, I am of the view the particular specifying that the CSEM was a video recording of A.B. is surplusage, and further, that J.G. was not prejudiced by the inclusion of that particular in Count 4.

Legal framework

- [27] Generally, the Crown must prove the details or particulars of the alleged offence as set out in the count. As the Supreme Court of Canada (the "SCC") held in *R. v. Saunders*, [1990] 1 S.C.R. 1020, 1990 CanLII 1131 at 1023, "[i]t is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved".
- [28] The requirement to prove particulars is subject to the 'surplusage rule': if a particular "is not essential to constitute the offence, it will be treated as surplusage, i.e., a non-necessary which need not be proved": *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2, 1986 CanLII 93 at 24, citing *Ewaschuk, Criminal Pleadings and Practice in Canada* (1983), at 222-23. The surplusage rule is, in effect, the converse of s. 581(3) of the Criminal Code, which states that:

Details of circumstances

- (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

- [29] Importantly, the surplusage rule is "subject to the proviso that the accused not be prejudiced in his or her defence": Vézina at 25. Thus, even if a particular is non-essential, the Crown must still prove it if failing to do so would cause prejudice to the accused.
- [30] As the Yukon Court of Appeal put it in *R. v. McMillan*, 2016 YKCA 10, "[t]he Crown must prove the details it specifies in an information if they are either (a) an essential element of the offence, or (b) critical to the defence. Any other details specified are mere surplusage": at para. 22.

Was the particular an essential element of the offence?

- [31] J.G. argues the manner in which an offence is committed cannot be said to be an unnecessary particular in this case, relying on *R. v. Katsiris*, 2008 BCCA 351. He says the particularization of the CSEM as a video depiction of A.B. was an essential element of the offence charged in Count 4 and therefore must be proved. I would not accept that submission.
- [32] In *Katsiris*, the accused was charged with committing an assault with a weapon, contrary to s. 267 of the Criminal Code. Section 267 requires that the accused "carries, uses or threatens to use a weapon or an imitation thereof". In *Katsiris*, the count specified the weapon used was "broken glass". The Crown presented video evidence which showed the accused striking the victim, but the trial judge was unable to determine what the accused held in her hand, and acquitted the accused. The circumstances were complicated because the video also depicted the victim being struck by another participant in the fight before she was struck by the accused, and the judge was unable to discern whether the other participant was carrying an object when she hit the victim. At trial, the defence relied on the lack of clarity as to whether the accused had a glass object in her hand, as well as the lack of evidence of an actual weapon. On appeal, the Crown argued that the description of the weapon was surplusage and the judge, having found the accused held an object in her hand while striking the victim, was obligated to convict her. This Court, relying on *Saunders*, dismissed this ground of appeal:
- [15] the Crown faces an insurmountable barrier in having failed to prove a material particular beyond a reasonable doubt. As mentioned, the judge could not determine what the respondent held in her hand while striking the victim. Count 1 particularized the weapon as broken glass. The Crown did not move at trial to amend the indictment to conform with the evidence.
- [16] The Crown is bound by the particulars in the indictment. In *R. v. Saunders*, [1990] 1 S.C.R. 1020 at 1023, 56 C.C.C. (3d) 220, McLachlin J. (as she then was), for the Court, wrote:

I am of the view that the appeal must be dismissed. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved [] To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial": *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.

[33] I do not read *Katsiris* as standing for the proposition that the manner in which an offence is committed can never be surplusage and will always be a material particular. This reading does not accord with s. 583(f) of the Criminal Code, which states that an indictment will not be insufficient solely for the reason that "it does not specify the means by which the alleged offence is committed".

[34] This reading of *Katsiris* is also contrary to other authorities. In *R. v. Herntier*, 2020 MBCA 95, the Manitoba Court of Appeal held that: "[w]here the Crown particularizes matters not essential to the charge, e.g., the means by which the offence was committed, the Crown is not required to prove such particulars if the offence is otherwise proved": at para. 84 (emphasis added); see also E.G. Ewaschuk, K.C., *Criminal Pleadings and Practice in Canada*, 3rd ed. at § 9:180. In my view, whether the manner in which an offence was committed is or is not an "essential particular" depends on the specific context, in the same way details such as the time or date of an alleged offence may or may not be essential. As the SCC held in *R. v. B.(G.)*, [1990] 2 S.C.R. 30, 1990 CanLII 7308 at 49:

it is clear that it is of no consequence if the date specified in the information differs from that arising from the evidence unless the time of the offence is critical and the accused may be misled by the variance and therefore prejudiced in his or her defence [] the date of the offence need not be proven in order for a conviction to result unless time is an essential element of the offence. Accordingly, while it is trite to say that the Crown must prove every element of the offence in order to obtain a conviction, it is, I believe, more accurate to say that the Crown must prove all the essential elements. The Crown need not prove elements which are, at most, incidental to the offence. What the Crown must prove will, however, of necessity vary with the nature of the offence charged and the surrounding circumstances.

[Emphasis added.]

[35] The finding in *Katsiris* that the Crown was bound to prove the assault was committed with "broken glass" as specified in the indictment was an application of the surplusage rule that was specific to the circumstances of that case, including the specific provision of the Criminal Code at issue and the arguments made at trial surrounding that particular. It does not dictate the outcome of this case.

- [36] In this case, Count 4 charges J.G. with "mak[ing] child pornography, a video recording of [A.B.], contrary to s. 163.1(2) of the Criminal Code". Section 163.1(2) of the Criminal Code reads, in relevant part, "[e]very person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable offence". The definition of child pornography in s. 163.1(1)(a) includes "a photographic, film, video or other visual representation".
- [37] The offence created by s. 163.1(2) of the Criminal Code can therefore be committed in four ways: by making, printing, publishing, or possessing for the purpose of publication, child pornography. Count 4 clearly specified the manner in which the alleged offence was committed: the making of CSEM. The "particular" that J.G. focuses on was not the specific act constituting the offence, but the form of the CSEM made during that act. Having specified the act constituting the offence, the Crown was required to prove that J.G. had made CSEM. That could be established by proving he made a photographic, film, video, or any other type of visual representation depicting A.B.'s naked body. Proof of any of these would suffice to establish the offence because each is clearly child pornography as defined in s. 163.1(1)(a).
- [38] Looking at the nature of the offence and the surrounding circumstances in context, I would conclude that the essential elements of the offence alleged in Count 4 of the indictment are that J.G. made (rather than printed, published, or possessed for publication) child pornography. The specific form that child pornography took--whether video or still image--is not essential to constitute the offence under s. 163.1(2) of the Criminal Code. In other words, the allegation that the CSEM made was "a video recording of [A.B.]" is surplusage.
- Was J.G. prejudiced in his defence by the inclusion of the particular?
- [39] The finding that the particular of "a video recording" is non-essential does not end the inquiry. The remaining question is whether J.G. was prejudiced in his defence by the inclusion of that particular in the charge.
- [40] It is clear from Vézina that two types of prejudice can arise in these circumstances: first, the accused could be unaware of, or misled as to, the specific transaction alleged to constitute the offence. Second, the accused may have conducted their case in a different manner than they would have had the particular not been included.
- [41] In Vézina, the accused were alleged to have, among other things, committed a conspiracy to defraud using stolen Government of Canada bonds. The indictment specified that the conspiracy was to defraud the Bank of Montréal. The accused made a motion for a directed verdict on the basis that the evidence did not support a conspiracy to defraud the Bank of Montréal in particular. Crown sought leave to amend the indictment to remove the reference to the Bank of Montréal. The trial judge denied the amendment in part because it would "cause serious hardship to the accused": at 17.

- [42] The SCC disagreed, finding that the inclusion of the Bank of Montréal in the indictment was surplusage and that there was no prejudice to the accused. Justice Lamer, writing for the Court, found that in the circumstances "the accused knew what transaction was being complained of, which bonds were involved, who the owner was and who the possible victims could be": Vézina at 28. Justice Lamer acknowledged that the specification of Bank of Montréal could still prejudice the accused if they conducted their case based on this particular, as "decisions whether or not to object to evidence, whether or not to cross-examine and how and to what extent to cross-examine, might have been made in the light of that undertaking by the Crown": at 29. However, the trial judge did not give any reasons for his finding of prejudice and none were evident on the record. The SCC allowed the Crown's amendment and remitted the matter for a new trial.
- [43] J.G.'s submissions place considerable reliance on the principle stated in Saunders that "the offence, as particularized in the charge, must be proved": at 1023. However, this principle is still subject to the surplusage rule. Moreover, Saunders is a "transaction" case--where the charge identified a transaction that was not proved. In other words, it turned on the first type of prejudice that can arise when a charge includes an unproven non-essential particular.
- [44] In Saunders, the indictment stated the accused were charged with a conspiracy to "Import a Narcotic, to wit: diacetylmorphine (heroin)": at 1022. One of the accused admitted he had been involved in conspiracies to import other drugs, but not heroin. During trial, Crown led evidence of the importation of cocaine, not just heroin, in order to prove an element of the alleged conspiracy. The trial judge charged the jury that they could convict the accused if they were satisfied the accused conspired to import a narcotic of any kind, even without proof of conspiracy to import heroin. The accused were convicted.
- [45] On appeal in Saunders, this Court set aside the convictions and directed a new trial on the basis that the Crown had to prove the conspiracy related to heroin, as specified in the indictment, and no other drug. The SCC dismissed the Crown's further appeal, reasoning as follows (at 1023-1024):

I agree with Crown counsel that the gravamen of the offence is conspiracy to import a narcotic, rather than a particular kind of narcotic. The purpose of specifying the narcotic in a case such as this is to identify the transaction which is the basis of the alleged conspiracy. The fundamental requirement that the charge must provide sufficient particulars to reasonably permit the accused to identify the specific transaction may be met in a variety of ways. There must be a new trial in this case, not because a conviction for conspiracy to import a narcotic cannot be supported without proof of the type of narcotic involved, but rather because the Crown chose in this case to particularize the drug involved and failed to prove the conspiracy thus particularized.

[Emphasis added.]

[46] In *R. v. Rai*, 2011 BCCA 341, leave to appeal to SCC ref'd, 34489 (2 February 2012), this Court explained the import of the decision in *Saunders*:

[16] *Saunders*, as I see it, is simply an exemplification of the need (codified in the Criminal Code, s. 581) to properly inform an accused person of what transaction constitutes the charge. For instance, if the Crown charges an accused with robbery, it cannot then lead evidence of sexual assault and seek to convict the accused of the latter offence. That, in effect, was what was occurring in *Saunders* as the Crown had charged a conspiracy to import heroin and then sought to establish guilt of a conspiracy to import cocaine. I consider *Saunders* could be characterized as a "transaction" case: the Crown charged one transaction and then sought to convict on a different transaction. That is not legally permissible.

[Emphasis added.]

[47] In *R. v. Jamo*, 2022 BCCA 73, this Court interpreted the principle from *Saunders* in a similar manner. In *Jamo*, the accused was charged with defrauding the Insurance Corporation of British Columbia ("ICBC") of driver's licences "of a value not exceeding five thousand dollars": at para. 5. He was convicted, but argued on appeal, relying on *Saunders*, that the Crown failed to prove that he defrauded ICBC of property in the form of driver's licences of a value under \$5,000. The Court rejected that argument, finding that the charge complied with the requirements discussed in *Saunders*:

[31] What required particularization was the transaction--here, deceitfully depriving ICBC of property in the form of driver's licences--not the result or potential consequences of that transaction

[32] It would be different if the Information got the transaction wrong as it did in *Saunders*, alleging that the appellant defrauded ICBC of property in the form of driver's licences when what the Crown proved at trial was that the appellant had defrauded ICBC of some other kind of property, such as a damage payout, vehicle licence plates or a salvaged vehicle.

[48] In this case, there was no issue of multiple transactions. The offence alleged in Count 4 always related to a single transaction involving the making of CSEM of A.B. There was no doubt the CSEM that J.G. was alleged to have made was the thumbnail images found on his phone on June 13, 2021. The only doubt related to whether those thumbnails images connected to videos. Therefore, unlike in *Saunders*, the conclusion that the particularization of the CSEM as "a video recording" is surplusage does not cause J.G. to be convicted of a different transaction from the one he was charged with. To use the language in s. 581(3) of the Criminal Code, Count 4 contained sufficient detail of the circumstances of the alleged offence to give J.G. reasonable information with respect to the act to be proved against him and to identify the transaction referred to.

- [49] The remaining question is whether the specific allegation that J.G. made a "video recording of [A.B.]" was somehow critical to the defence. In other words, was the defence prejudiced in some way by reliance on that particular at trial such that the surplusage rule should not be applied: *Vézina* at 27-29. In my view, J.G. cannot show his defence was prejudiced in any way by application of the surplusage rule.
- [50] While the Crown took the position at trial that the thumbnail images were likely connected to videos, J.G.'s defence was that he had no idea the Camera made recordings of any kind that were saved to the app on his phone. He has not directed us to any strategy or position taken at trial that relied on the Crown proving he had made a video recording.
- [51] As the Crown submits, the lack of prejudice to J.G.'s defence arising from the particularization of the form of CSEM in Court 4 is highlighted by the fact J.G. took the same position at trial on Counts 4 and 5. While Count 4--making child pornography--specified that the CSEM was a video recording, Count 5--possession of child pornography--did not particularize the form of CSEM possessed. If the particularization in Count 4 was relevant to J.G.'s defence, he would have taken distinct approaches to the two charges. He did not do so. The reason is evident: based on the disclosure provided there was no question the CSEM he was alleged to have both made and possessed were the images on the Luohe app found on his phone. J.G.'s defence to both counts was the same: he did not intentionally make the CSEM and did not knowingly possess it.
- [52] It is also instructive that J.G. did not argue at trial that proof of video recordings was an essential element of Count 4. In reply submissions at trial, J.G. submitted there was "no evidence tendered as to whether [the thumbnail images] are videos or not", but he did not argue the trial judge could not convict without a finding that the thumbnails were videos.
- [53] Further, at the time of sentencing, his new counsel did not apply to reopen the case because of a failure to prove that J.G. had made (or possessed) video recordings of A.B. Instead, counsel explicitly took "absolutely no issue" with the trial judge's finding that J.G. "had knowledge and possessed the thumbnail images that were stored on his phone". He argued the Crown had not proved beyond a reasonable doubt the thumbnails were videos, citing the trial judge's statement in his Conviction Reasons at para. 109 that the thumbnails "appear[ed] to be videos" to support this argument. On this basis, J.G.'s counsel submitted "that the scope of this offence is less, and significantly less, than what is found in other cases". The trial judge accepted this argument, finding that he was "unable to conclude beyond a reasonable doubt that J.G. made or possessed videos" and that this "reduces the seriousness of the offending below what it would be if the Crown had proven the existence of the videos": Sentence Reasons at para. 73.

- [54] Finally, I note that much of J.G.'s argument on appeal was directed at the proposition that the Crown's mens rea argument at trial depended on the fact that the thumbnail images were connected to videos. Specifically, J.G. argues that in the judge's Conviction Reasons, he implicitly accepted that the saved thumbnails were videos, and that this acceptance was crucial to his conclusion that J.G. had the requisite mens rea for all the offences.
- [55] The core of this argument, as I understand it, is that the judge accepted the Crown's argument that the thumbnails which depicted non-nude images were linked to videos which, if played, would eventually depict nude imagery. This in turn supported the inference that J.G. had the requisite knowledge of the thumbnails required for all the counts because he purposefully curated them. On this basis, J.G. says that all the convictions should be set aside.
- [56] I would reject this argument. Even though the Crown's position at trial was that the thumbnails were videos, its argument that J.G. had the requisite mens rea for the offences did not hinge on whether they were connected to videos. The Crown submitted there were multiple reasons why J.G. must have had knowledge of the thumbnails on his phone and the judge ultimately accepted those arguments.
- [57] Most importantly, there is nothing in the judge's reasons to suggest he engaged in improper speculation, in the absence of evidence, about whether the thumbnail images that did not depict nudity were linked to videos that did contain nudity. His reasoning on the issue of mens rea was as follows:
- [109] The evidence that I accept is as follows. [J.G.] purchased the device knowing that it was a spy camera. He did not tell anyone else in the home about this purchase. The device was used as a charger in the garage for several months and was eventually moved into the bathroom by [J.G.]. A video of [A.B.] in the bathroom, taken without her consent or knowledge, was found on [J.G.'s] phone in the recently deleted file. A page with 18 thumbnails appearing to be videos of [A.B.] and [C.D.] in various states of dress, including full nudity, was found within a folder of the Luohe app on [J.G.'s] phone. The device was plugged into an outlet in the bathroom that was consistent with the images being captured by the device. No other individuals other than [A.B.], [C.D.] and possibly [E.F.] were captured in the thumbnail images, despite several other individuals regularly using the bathroom. The thumbnail images were present on [J.G.'s] phone at 8:09 p.m. and were no longer present at 9:24 p.m.
- [110] That evidence supports the inference that [J.G.] intentionally placed the device in the bathroom and that he had knowledge of and possessed the thumbnail images that were stored on his phone by way of the Luohe app. I am unable to contemplate or imagine any reasonable alternative inference based on the proven facts, despite the gaps in the evidence and exculpatory evidence.

[58] Although the judge stated the thumbnails "appear[ed] to be videos", it is clear that his conclusions on J.G.'s knowledge and possession of the thumbnails did not depend on any apparent connection to a video.

[59] In summary, J.G. cannot be said to have been prejudiced in his defence because of the Crown's inclusion of the words "a video recording of [A.B.]", which were in this context surplusage. Having arrived at this conclusion, I need not consider J.G.'s argument that the verdict was unreasonable because the Crown failed to prove the particular.

[60] It follows that I would not give effect to the first ground of appeal.

Did the judge err in assessing J.G.'s credibility?

[61] J.G. argues the judge made two errors in assessing his credibility. He submits that both errors are palpable and, when considered "cumulatively", are also overriding because they were material to the judge's overall assessment of his credibility.

[62] The standard of review applicable to a finding of credibility is not contentious. A trial judge is in the best position to assess credibility. A finding on credibility is a finding of fact to which a high degree of deference is owed on appeal: *R. v. Li*, 2023 BCCA 47 at para. 81. An appellate court may intervene where the judge erred in principle: *R. v. S.S.S.*, 2020 BCCA 180 at para. 26. It may also intervene where "the finding of credibility rests on a misapprehension of evidence, or is made in the absence of any objectively discernible evidence to support it, and the finding goes to the heart of the judge's analysis": *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 346, leave to appeal to SCC ref'd, 37817 (8 March 2018).

[63] In addition, reasons for credibility findings must not be parsed for error but reviewed functionally and in context. Where it is alleged that a finding reflects an unfounded generalization about human behaviour, a contextual reading of reasons may indicate that the judge's reasons are grounded in the evidence and respond to the arguments advanced at trial: *R. v. Kruk*, 2024 SCC 7 at paras. 102-106.

[64] For the reasons that follow, I would not accede to this ground of appeal. In my view, J.G. is unable to demonstrate that the judge's findings of fact or credibility assessment are palpably wrong, nor can he point to any error in principle. As the Crown argues, the impugned aspects of the judge's reasoning were his assessment of the contrast between J.G.'s evidence about his stated intentions (and lack of knowledge) and the evidence about his actions. When read in context, as required by *Kruk*, the judge's reasons for rejecting J.G.'s explanations are grounded in the evidence and responsive to the arguments advanced at trial.

First error--"no steps" taken to make the Camera work

- [65] The first alleged error relates to J.G.'s explanation about what he did when he was unable to get the Camera to work as intended. The judge found J.G.'s explanation "puzzling" because "he took no steps to return it or to explore further how to make it work": Conviction Reasons at paras. 93, 97. J.G. argues the judge's finding he took "no steps" is clearly wrong because he made some inquiries and determined the Camera likely did not work because of poor Wi-Fi in the garage: Conviction Reasons at para. 50. Further, J.G. says that his "failure to return the device, as a matter of logic and common sense, was not 'puzzling' at all in the circumstances and should not have weighed against his credibility." He notes that he only paid \$30 for the Camera, and says his decision not to return it to the online retailer was not unreasonable given he could still use it as a charger.
- [66] First, J.G.'s suggestion the judge found that he took "no steps" to make the Camera work is incorrect. The judge's full statement is that "[w]hen the device did not work for the purpose that he bought it for, he took no steps to return it or to explore further how to make it work": Conviction Reasons at para. 97. What the judge found puzzling was that J.G. did so little given that he had purchased the Camera for two stated reasons: to livestream jam sessions, and for security against break-ins and animals in the garage. J.G. admitted he never used it for either of those purposes, and took no other steps to address the security issues in the garage. Even though Luohe advertised 24/7 technical support, J.G. never contacted the company in the many months before he was charged.
- [67] J.G. submits, as he did at trial, that it was reasonable for him to take no steps to return the Camera or seek a replacement device as he had only spent \$30 on the purchase. However, the evidence also established that J.G. was budget conscious, knew that Amazon had an easy return policy, had purchased the Camera on sale, and could not afford a proper surveillance system. In other words, the evidence about the cost of the Camera did not clearly support the position that his inaction was reasonable.
- [68] In my view, seen in context, there was evidence to support the judge's finding that J.G.'s inaction was puzzling because it was at odds with his stated reasons for purchasing the Camera. In turn, that finding provides some basis for questioning J.G.'s credibility. In other words, the finding that his inaction was "puzzling" does not amount to a palpable error and the judge could properly consider his failure to take further steps when assessing J.G.'s credibility.

Second error--failure to complain to or make inquiries of Luohe

- [69] The second alleged error is the judge's finding that J.G.'s failure to complain or make inquiries of Luohe after he learned of the naked images on his phone "[did] not make sense": Conviction Reasons at para. 98. The judge reasoned that "[s]urely [J.G.] would have wanted an answer from Luohe as how and why that happened without his knowledge": at para. 98. J.G. submits that it is unclear as a matter of common sense why anyone would contact a

manufacturer about a malfunctioning product unless they wanted a replacement. He also notes that his failure to contact Luohe must be situated in the context of J.G. facing serious criminal accusations and having to move houses. He argues that in these circumstances, it was not logical or realistic to expect him to have made efforts to contact Luohe to get answers about how this could have happened.

[70] In my view, there is no merit to this submission. This issue arose because the Crown asked him in cross-examination why he did not follow up with Luohe. While he professed to want to know how the images ended up on his phone, he ultimately stated that "[i]t doesn't really matter to contact [Luohe] to me". I agree with the Crown's submission that it is logical that an innocent person faced with serious criminal wrongdoing and the dissolution of their longstanding relationship would be motivated to learn how naked images of E.F.'s daughters could have been transmitted to and saved on his phone. The most obvious starting point for that inquiry would be to contact the manufacturer. I see no error, let alone a palpable error, in the judge finding that J.G.'s explanation did not make sense and taking that into account in assessing credibility.

[71] My rejection of J.G.'s submission that the judge made two palpable errors is sufficient to dispose of this ground of appeal. However, I would also agree with the Crown's submission that the judge's findings on these two issues were not overriding, in the sense of being crucial to his ultimate conclusion. Because it was accepted that the images were recorded and stored on his phone, the crucial areas of J.G.'s evidence were his explanations about his intentions and use of the Camera, and his knowledge (or lack thereof) of the recorded images. The two impugned findings merely added to the erosion of J.G.'s credibility, along with the other discrepancies in his evidence that the judge noted. When the reasons are read functionally and contextually, it is clear the judge's assessment of credibility was based on his much broader assessment of the evidence.

Disposition

[72] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Warren"

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Prepared on 26 October 2026 · Esheria