

CANADA / JUDGMENT

R. v. J.W.

2025 ONCA 677

COURT

Court of Appeal for Ontario

DECIDED

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R. v. J.W. Collection Decisions of the Court of Appeal Date 2025-10-02 Neutral citation 2025 ONCA 677 Docket numbers COA-23-CR-0014 Judges Hourigan, C. William; Monahan, Patrick J.; Dawe, Jonathan Subject Criminal Decision Content COURT OF APPEAL FOR ONTARIO CITATION: R. v. J.W., 2025 ONCA 677[1] DATE: 20251002 DOCKET: COA-23-CR-0014 Hourigan, Monahan and Dawe JJ.A. BETWEEN His Majesty the King Respondent and J.W. Appellant Myles Anevich and Ana Mihajlovic, for the appellant Maria Anghelidis, for the respondent Heard: September 22, 2025 On appeal from the convictions entered by Justice R. John Harper of the Superior Court of Justice, on November 7, 2022, and from the sentence imposed on January 24, 2023, with reasons reported at 2022 ONSC 6196 and 2022 ONSC 6491. Hourigan J.A.: A. Introduction [1] The appellant was found guilty of seven counts of sexual offences against two children under the age of 16 years—his stepdaughter, M.D. (aged 11-13 at the time of the alleged offences), and her friend, M.L. (aged 15 at the time of the alleged offences). Convictions were entered on two counts of sexual interference, one relating to M.L. and the other to M.D., and the remaining counts were conditionally stayed. The trial judge found that the appellant had committed sexual offences against both complainants in a park in Brantford on a single occasion in August 2019, and that he had also sexually abused M.D. over an extended period in the family home prior to the incident in the park. The appellant was sentenced to ten years' imprisonment, with six years allocated to the offences against M.D. and four years allocated to the offences against M.L.

[2] The appellant submits that the trial judge erred in his W.(D.) analysis, subjected the defence evidence to more rigorous scrutiny than the Crown evidence, and misapprehended the evidence regarding DNA results. For the reasons that follow, I would dismiss the conviction appeal. The sentence appeal is dismissed as abandoned. B. Background [3] As noted, there were two sets of allegations. First, M.D. testified that she was sexually assaulted by the appellant, her stepfather, in the family home over the course of many months since she was 11 years old. Second, M.D. and M.L. testified that on the night of August 14-15, 2019, the appellant had vaginal intercourse with M.L. and forced M.D. to perform oral sex on him when the three of them attended a park in Brantford.

- [4] The appellant testified and denied the alleged sexual assaults that occurred in the family home. He further testified that he only went to the park because M.D. had threatened to make an allegation against him to her mother that he had “assaulted her or worse.” According to him, he was fearful that M.D. might make a false allegation against him because she had done so in the past. He was so concerned that he felt he had no alternative but to attend the park. At trial, the appellant took the position that M.L. administered a drug to his drink at the park. He does not remember anything after consuming the drink, yet he also maintains that he was sexually assaulted by the complainants as part of a scheme to remove him from M.D.’s life.
- [5] The trial judge disbelieved the appellant and found that he was not credible. Specifically, he rejected the appellant’s claim that he was so frightened by M.D.’s threat to make a false allegation against him that he would “put himself in a position to be in a dark park at around midnight with a 13 and 15-year-old girl with alcohol.” The trial judge also rejected the testimony that M.L. drugged the appellant’s drink as “equally unbelievable.”
- [6] The trial judge believed the evidence of M.D. and M.L. He found that much of M.D.’s testimony was corroborated by M.L. The trial judge also found that M.L. was credible and consistent on all the material facts related to the sexual touching, oral sex, and vaginal intercourse on cross-examination. Further, the trial judge found that both M.D.’s and M.L.’s evidence was corroborated in material ways by the crime scene photos, DNA evidence, toxicology evidence, the internal and external consistency of the evidence of the events at the park, and M.D.’s realistic fear of her mother and grandmother’s efforts, supported, and at times directed, by the appellant, to coerce and direct M.D. to recant.
- [7] Ms. Johnston, an expert qualified in the interpretation of DNA results, testified that there was substantial DNA of the appellant from M.L.’s vaginal swab. Further, M.L.’s DNA was found on the appellant’s penile swab. The trial judge found that this DNA evidence was consistent with and corroborative of M.L.’s testimony that the appellant had vaginal intercourse with her the night of the park incident. One oral swab taken from M.D. showed no DNA of the appellant, which defence counsel argued proved that M.D. did not perform oral sex on the appellant that night, contrary to her testimony. The trial judge rejected that argument. Instead, he accepted Ms. Johnston’s evidence that the absence of DNA “could mean that it was never there, or it could also mean that it was there, and it was eliminated over time.” C. Analysis i. W.(D.)
- [8] The submission on this ground of appeal is that the trial judge made a material misapprehension of the evidence in his W.(D.) analysis regarding M.D.’s previous false allegation about physical abuse by the appellant. Specifically, the appellant points to the trial judge’s understanding of the evidence expressed at paragraph 128 of his reasons: [M.D.] stated that she did not remember telling her biological father that J.W. assaulted her nor that he hit her with a belt and punched her in the face as hard as he could. M.D. stated that she could not remember that. The appellant also takes issue with the finding at paragraph 131 of the trial judge’s reasons: Other than counsel suggesting that this happened in his

questioning, there was no other evidence presented with respect to these alleged previous complaints made by M.D. about J.W.. Suggestions of counsel in their questions are not evidence.

- [9] The appellant submits that these passages show a material misapprehension of the evidence because the trial judge found there was no evidence of the previous false allegations notwithstanding that M.D. admitted she had falsely accused the appellant of physical violence. The appellant asserts that this error adversely affected the trial judge's assessment of M.D.'s credibility. He also submits that it adversely affected the trial judge's evaluation of the credibility of the appellant's evidence that the previous false allegations were an important part of why he was cowed into attending the park.
- [10] The appellant is correct that the trial judge misstated some of the evidence in paragraph 128. The trial judge wrote that M.D. testified she did not remember telling her biological father that the appellant had assaulted her. However, on cross-examination, M.D. admitted to telling her father that the appellant was physically abusing her, and she admitted this accusation was a lie, as follows: Q. No, no, no, no, no, I mean, prior to this incident, did you not tell a very big lie about [J.W.] that you ultimately confessed was a lie? A. I have. Q. Why don't you tell us about that if you can remember, please? A. Uh, I had told my father that [J.W.] was physically abusing me.
- [11] Despite this misunderstanding, I am not persuaded the trial judge's reasons disclose a material misapprehension of the evidence.
- [12] First, I do not accept the appellant's argument that paragraph 131 contains a finding that there was no evidence of a previous false allegation. The issue that the trial judge was referencing in paragraph 131 was the lack of particulars of the past allegation. This was also noted in paragraph 128, where the trial judge correctly recalled that M.D. did not remember saying she had been hit with a belt and punched in the face. To place the trial judge's comments in the necessary context, it is essential to consider M.D.'s evidence in cross-examination, as follows: Q. So, if I told you that in the investigation that you said that he had been whipping you with a belt, would that, does that tweak your memory, do you remember that? A. No. Q. And what if, uh, in your, um, false allegation to the CAS, what if, uh, I told you that you said that [J.W.] punched you in the face as hard as he could, do you remember that? A. No. Q. You don't remember that. So, you said that your stepdad, [J.W.], assaulted you in some way, some serious way, uh, you told [your father]. I realize your memory is, is a little hazy on this, but you do know that the CAS, the Children's Aid Society, became involved and made an investigation? A. Yes.
- [13] When the trial judge referenced the appellant's counsel's questions not being evidence, he was referring to these questions. That was a correct statement of the law. He was also correct that there was no evidence regarding the details of the false accusations. I note that there was no evidence adduced from the appellant, his common law spouse, or the CAS investigator regarding the details of the allegations. The trial judge did not find that the false

accusations were not made, and noted that M.D. remembered her father taking her the police station, and there being a CAS investigation. He found only that that there was no evidence regarding the details of the accusations.

- [14] Second, it was the lack of details about the previous false allegation that was material to the trial judge's credibility analysis. At paragraph 245 of his reasons, the trial judge wrote "not only was there no evidence about the nature of the previous complaint(s), nor the nature of any investigation or the outcome of any investigation, J.W.'s own testimony raises concerns about the nature of the previous complaints." Therefore, the trial judge's misunderstanding at paragraph 128 did not form part of his analysis. Instead, the analysis referred to the lack of details about the nature of the complaint, which is an accurate understanding of the evidence presented at trial. There was, therefore, no material misapprehension of evidence. Accordingly, I would reject this ground of appeal. ii. Uneven Scrutiny
- [15] As this court and the Supreme Court have repeatedly observed, an uneven scrutiny ground of appeal is notoriously difficult to establish. The appellant must identify something in the reasons or the record that makes it clear that different standards were applied in assessing the evidence. It is not sufficient to show that a different trial judge could have reached a different credibility assessment or that a trial judge failed to say something when assessing respective credibility: *R. v. Ramdeo*, 2025 ONCA 492, at para. 40.
- [16] An examination of the particulars of this ground of appeal reveals a series of complaints that the trial judge should have assessed the evidence of the complainants differently. The trial judge is faulted for failing to find inconsistencies where the appellant submits such findings should be made. I disagree. For example, I am not persuaded that there were any inconsistencies in M.D.'s description of the oral sexual assault. I am also satisfied that the trial judge was entitled to find that M.L. was consistent on all material facts and was not shaken in cross-examination. Further, the trial judge reasonably concluded that M.D.'s lack of clarity with respect to when the last sexual contact occurred did not seriously undermine her credibility. Finally, the trial judge was not required to treat M.D.'s evidence about whether M.L. left after the sexual assault in the park as an inconsistency. M.D.'s evidence was ambiguous on this point.
- [17] In summary, this ground of appeal is an invitation for this court to second guess the trial judge's assessment of the evidence. That is not this court's function, and I would dismiss this ground of appeal. iii. DNA Evidence
- [18] The DNA ground of appeal, like other grounds asserted, morphed between the filing of the factum and the oral submissions. The appellant does not raise any issue with respect to the DNA evidence from the vaginal swab from M.L. He also does not take issue with the lack of a finding that his DNA was present in the oral swab of M.D., despite this argument being advanced in his factum. During oral submissions, counsel for the appellant raised a new DNA argument. He submitted that the lack of DNA traceable to M.D. on the appellant's penile swab raises a reasonable doubt about the oral sex allegation, especially given the lack

of a finding that the appellant's DNA was present in the oral swab of M.D.

- [19] I would not give effect to this argument. Ms. Johnston, the DNA expert, testified that M.L.'s DNA was present on the penile swab. However, she could not rule out that other female DNA was present: Q. So, you can't say whether - would you say it's possible, then, that there is a second female's DNA on there, is that possible? A. It's possible, I can't include or exclude that, because the additional DNA is not suitable for comparison. It's at such a low amount, that I can't, um, I can't be specific about the features, about whether it's from a male, or a female, or who it could, or could not be from. Q. But to more clearly answer my question, that is possible, correct? A. Sorry, can you repeat the original question? Q. It is possible that another female's DNA was on there. A. It is possible, yes.
- [20] Based on this evidence, it was open to the trial judge to find that the lack of DNA traceable to M.D. on the appellant's penile swab did not raise a reasonable doubt. Therefore, I would dismiss this ground of appeal. D. Disposition [21] For these reasons, I would dismiss the conviction appeal. The sentence appeal is dismissed as abandoned. Released: October 2, 2025 "C.W.H." "C.W. Hourigan J.A." "I agree. P.J. Monahan J.A." "I agree. J. Dawe 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. This appeal is also subject to a publication ban pursuant to s. 87(8) of the Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1.

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