

CANADA / JUDGMENT

R. v. J.X.A.R.

2023 BCSC 292

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 292 R. v. J.X.A.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.X.A.R.,

2023 BCSC 292

Date: 20230301

Docket: 32927

Registry: Vancouver

Between:

Rex

Respondent

And

J.X.A.R.

Appellant

These Reasons have been anonymized for publication purposes

Before: The Honourable Justice Chan

On appeal from: the decision of the Provincial Court dated October 26, 2021

(R. v. J.X.A.R., Provincial Court File No. 64205-2C).

Oral Reasons for Judgment

Counsel for the Appellant:

T. Paisana

Counsel for the Respondent:

S. Bains

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 27, 2023

Please and Date of Judgment:

Vancouver, BC

March 1, 2023

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Overview

- [1] The appellant J.X.A.R. ("Mr. R.") was convicted on October 26, 2021, of one count of assault contrary to s. 266 of the Criminal Code, R.S.C. 1985 c. C-46, against his son, A.R. ("Allan"), after a trial in Provincial Court. The assault occurred on December 14, 2019 at the appellant's home in Richmond, when Allan was 12 years old. Mr. R. and Allan both testified at trial and provided different accounts of the altercation. A second count of assault in relation to an earlier time period was dismissed by the trial judge.
- [2] Mr. R. appeals his conviction, arguing that the trial judge erred by using Allan's prior recorded statements improperly and by allowing a medical doctor to provide opinion evidence in an area where she was not qualified. The appellant seeks a new trial.
- [3] For the following reasons, I dismiss the appeal.

Background

- [4] The trial took place over 11 days from November 2020 to September 2021. The Crown called Allan, his mother C.Y. and Dr. Nita Jain, a paediatrician who was qualified to provide opinion evidence in the area of mechanisms of injury. The appellant was the only defence witness.
- [5] At the outset of the trial, the Crown sought to tender Allan's two videotaped statements, made to police on December 14, 2019 and January 13, 2020, relying on s. 715.1 of the Criminal Code:

Evidence of victim or witness under 18

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

- [6] The defence did not object to the admissibility of the two statements, and the trial judge found the statements admissible. Allan also testified at trial, via video from a remote location at the courthouse with the presence of a support worker, and adopted the contents of the statements. Allan, over the course of four days of testimony, provided further direct evidence and was cross-examined.
- [7] I take the following summary of the evidence from the reasons of the trial judge. Allan's evidence, as elicited through the two videotaped statements and at trial, was briefly as follows. His parents are divorced and he was usually in his father's care from Wednesdays after school to Saturdays at 7 pm. On Saturday December 14, 2019, Allan wrote an entrance examination for St. George's School in Vancouver. The appellant picked him up after the examination and on the car ride home, asked Allan to peel an orange for him. Instead of a slice of the orange, Allan gave his father a piece of orange peel. This irritated his father. His father told him to finish his Chinese homework when they returned home. Allan asked for his cell phone back, as his father had taken it away a few days earlier. His father would not return the phone. Allan was frustrated and angry, and he went into his playroom and flipped over a chair.
- [8] Allan came out to the living room where his father was on the couch, and asked to play fight. Play fighting was an activity Allan and his father sometimes engaged in, where they tried to knock the other person off the couch. During this play fight, Allan accidentally damaged his father's eyeglasses. Allan testified his father became very angry, and started yelling at him. His father chased him into the playroom. His father grabbed him, twisted his arm behind his back, and threw him repeatedly on a chair, then on the floor. Allan testified he was rolling on the floor and against the side of an art project he had been building, which had a

wooden frame. His father pinned one side of Allan's head against the wooden frame and punched him on the other side of his head. Allan testified both his ears were injured.

- [9] Allan testified an older cousin was at the residence at the time, visiting during the winter break from university. She came downstairs and told his father to stop. Allan went upstairs to his room. Sometime later his father left the residence, and Allan believed it was to have his glasses repaired. His father returned to the house, and Allan's cousin told Allan to apologize to his father. His father prepared dinner and he was driven by his father to meet his mother at about 7 pm.
- [10] Allan's mother testified that they went to T & T Supermarket, and while there, she noticed the injury to Allan's ears. His mother took some photos of the injuries and took Allan to the police station that night. Allan gave his first videotaped statement to police that night. In the statement, Allan referenced some earlier violent incidents involving his father. He returned on January 13, 2020 to the police station to give a second statement; however, Allan's details about the earlier incidents are vague, both in the statements and in his court testimony, and the trial judge dismissed the count of assault in relation to these earlier incidents.
- [11] The appellant testified. He provided a different account of his relationship with Allan. The appellant testified to a history of assaults by Allan on him. In relation to the incident on December 14, 2019, the appellant testified Allan was upset about not getting his phone back, and went into the appellant's room to try to find it. Allan then came downstairs and placed bars of soap and magazines on the appellant's head. The appellant testified he started play fighting with Allan on the couch, but Allan kicked and punched him, then tried to choke him by wrapping a jacket around the father's head. Allan then went into the playroom and threw a chair. The appellant went to the playroom and saw an overturned chair and toys scattered on the floor.
- [12] The appellant testified Allan kicked him repeatedly in the groin and punched him in the face, damaging his eyeglasses. He tried to control Allan by putting him on a chair and later, putting him down on a mattress on the floor. The appellant testified Allan was rolling from side to side, and came into contact with the wood on the art project. The appellant tried to hold Allan's head still, as Allan was head-butting him repeatedly. Allan's cousin came into the room and told Allan to stop assaulting his father. The appellant left the house later to try to get his eyeglasses repaired. He testified he suffered injuries to his eyes and his mouth was sore. The appellant never saw any injuries on Allan before he dropped Allan off with his mother.
- [13] Dr. Nita Jain was called by the Crown as an expert witness. She is a paediatrician at B.C. Children's Hospital, and works at the Child Protection Service Unit. After a lengthy voir dire, counsel for the appellant abandoned his challenge to Dr. Jain's qualifications. Dr. Jain was qualified by the trial judge to provide opinion evidence about the mechanism of injury in children and the diagnoses of child maltreatment.

[14] Dr. Jain examined Allan on December 17, 2019. She provided her opinion that the bruising of Allan's ears were consistent with an altercation, and not an accident. Her evidence is injuries to the ears are not easily explained as caused by an accident, especially injuries to both ears. Dr. Jain testified that bruises in children from accidents are usually in the extremities, such as elbows, knees and shins. She testified that Allan's bruising on the hip, the back, the upper left thigh and the waist were concerning, as those are not areas where children typically get injuries from accidents.

Issues on Appeal

[15] The appellant argues the trial judge erred in law by:

- 1) relying on Allan's prior consistent statements in his videotaped interviews with police to enhance Allan's credibility; and
- 2) qualifying and relying on the opinion evidence of Dr. Jain.

[16] The appellant argues as these are errors of law, the standard of review is correctness.

Did the Trial Judge Make Improper Use of Allan's videotaped statements?

[17] The appellant argues the trial judge improperly used Allan's videotaped statements, which the appellant characterizes as prior consistent statements, to bolster Allan's credibility. The appellant argues using an out-of-court consistent statement to enhance Allan's credibility is an error in law, as mere repetition of a statement cannot bolster its credibility. The appellant relies on *R. v. Moir*, 2020 BCCA 116 at para. 110; *R. v. Untinen*, 2017 BCCA 320 at paras. 53-56; *R. v. O'Reilly*, 2014 ONSC 6188 at paras. 17-20 and 22; and *R. v. Czechowski*, 2020 BCCA 277 at para. 30.

[18] The appellant argues the trial judge in the following paragraphs of her ruling improperly used Allan's prior consistent statements:

[63] Count 2 is quite different. Allan gave a statement about the event that same evening. He gave a further statement about a month later. He was an articulate boy when he spoke to the police. When he testified a year later, he also articulate and more mature. His evidence was consistent across two police video statements, a lengthy direct examination and an even lengthier cross-examination

[66] While I have considered all the arguments advanced by the defence who says that the child's evidence is fraught with ambiguities, I have come to quite the opposite conclusion. As I said, Allan's evidence was generally consistent

[85] I do not rely on the child's demeanour in saying that I accept the entirety of his evidence about the events of December 14. I rely on it because, to me, it had the ring of truth. His feelings appeared genuine. His evidence was consistent across direct and cross examination, and through two recorded video statements. As well some of the injuries, as Dr. Jain testified, were more likely intentional than accidental, especially the injuries to both ears.

[Emphasis added.]

[19] The Crown agrees that a prior consistent statement cannot be used to bolster the credibility of a witness. However, the Crown's position is the trial judge did not do that in the above passages. The Crown argues the trial judge was responding to the defence challenge at trial that Allan lacked credibility as there were inconsistencies in Allan's evidence. The Crown argues the ruling must be read as a whole, in combination with the submissions of counsel. Read together, it is clear the trial judge was simply addressing the defence argument that there were inconsistencies in Allan's evidence, and pointing out that in fact Allan was not inconsistent in his evidence. The trial judge was not using the prior consistent statements to enhance or bolster Allan's credibility.

[20] In my view, the trial judge did not make improper use of the videotaped statements. A central part of the appellant's submission at trial was that Allan was inconsistent in his evidence, and he should not be believed. In his submission, counsel for the appellant directly called into question Allan's credibility, calling him a "Dr. Jekyll and Mr. Hyde" type of person. The appellant's counsel pointed to inconsistencies in his videotaped statements and his in-court testimony, arguing that Allan did not disclose that he placed bars of soap and magazines on his father's head in his police interview; Allan did not mention asking for his cell phone on the car ride back from St. George's School; Allan's explanation of how his father's eyeglasses were damaged was internally inconsistent; Allan gave inconsistent accounts of when he flipped the chair over in the playroom; and other examples. The appellant's counsel argued Allan kept changing his story, and as such, he ought not to be believed.

[21] In response to this argument from the appellant's counsel, the trial judge was obliged to look at Allan's evidence in its entirety to see if there were inconsistencies. That is what the trial judge did, and she came to "quite the opposite conclusion": para. 66 of ruling. There is nothing improper about reviewing a prior statement in the form of a videotape admitted pursuant to s. 715.1 of the Criminal Code to assess the witness's credibility. This is a permissible use of a prior statement. What is not permitted is using a prior consistent statement to bolster, enhance or corroborate the witness's credibility. This was made clear in Untinen:

- [70] In my view, there is a subtle but important distinction to be drawn in this context between using a video-recorded statement introduced under the Code for the limited purposes of assisting in the assessment of a witness's credibility and reliability and using it for the impermissible purpose of corroborating the truthfulness of the witness's trial testimony.
- [22] That it is permissible to use a videotaped statement admitted pursuant to s. 715.1 of the Criminal Code, which may contain prior consistent statements, to assess credibility of a witness, was affirmed recently in *R. v. M.D.*, 2021 BCCA 339:
- [69] In *Untinen*, this Court rejected the Crown's submission that mere consistency between a videotaped statement admitted under s.715.1 and a complainant's testimony at trial can add weight to, bolster or corroborate the complainant's account when testifying: at paras. 53, 56. However, speaking for the Court, Justice Fitch also affirmed that both consistencies and inconsistencies between a complainant's videotaped statement and trial testimony may be relevant for the purposes of credibility assessment, depending on the context and the use to which they are put
- [76] Where inconsistencies are raised to challenge the credibility of the complainant when a video statement is tendered, the truth-seeking function of the trial demands that the entirety of the complainant's account be scrutinized, including internal consistencies as between her video statement and trial testimony, in deciding whether the inconsistencies relied on by the defence so impact on the credibility or reliability of the complainant as to give rise to a reasonable doubt.
- [23] In my view, that is how the trial judge used the videotaped statements. She was reviewing the videotaped statements, together with Allan's in court testimony, to assess his credibility. There is no basis to argue the trial judge was using the out-of-court prior consistent statements to bolster, corroborate or add weight to Allan's credibility. The cases cited by the appellant are distinguishable, as in those cases the trial judge found the prior consistent statements "enhanced" the complainant's credibility (*O'Reilly*) and the prior consistent statement "confirmed" the complainant's in court testimony (*Czechowski*). The plain language used by the trial judge in this case, together with the submissions of counsel, make it clear the trial judge was not using consistencies between the videotaped statements and Allan's viva voce evidence to add to his credibility.
- [24] I would not give effect to this ground of appeal.

Did the Trial Judge Err by Qualifying and Relying on the Opinion Evidence of Dr. Jain?

- [25] The appellant argues Dr. Jain was not qualified to provide opinion evidence on the mechanism of injuries. He argues the trial judge erred in finding her so qualified. Further, he argues the trial judge erred in relying on Dr. Jain's evidence as it was anecdotal evidence that was not reliable.

[26] As I understand it, Dr. Jain's evidence was mainly to provide an opinion as to whether the injuries on Allan's body was from an accidental or non-accidental cause. For some injuries, her opinion was the cause was more likely non-accidental; in some cases, her opinion was it could be accidental or non-accidental; and in some cases, her opinion was it was more likely accidental. She explained the factors she considered in coming to those opinions, including the location of the injury on the body, any known medical conditions which could account for the injury, the child's explanation of what happened and her knowledge of where children usually injure themselves by accident.

[27] The appellant argues Dr. Jain was not qualified to provide an opinion on the mechanism of injury - i.e. was the injury more likely the result of an accident or was it inflicted? The appellant argues she was not qualified as she was not trained in forensic examinations, and had only attended some "talks" by experts in the field. He further argues Dr. Jain has no objective basis for her opinions, other than looking at the location of the injury on the body.

[28] Dr. Jain testified in a voir dire to determine her qualifications. Dr. Jain is a paediatrician, a member of the Child Protection Service Unit (CPSU) at B.C. Children's Hospital. She is one of four paediatricians on the CPSU, along with social workers, nurses and psychologists, and their role is to assess children referred to them for suspected child abuse. Dr. Jain is the medical director of CPSU, and she has been working with the unit since 2000. She testified as there is no formal child abuse medical training program in Canada, she regularly attends rigorous training sessions directed towards advanced providers of child maltreatment medicine in Canada and internationally. Dr. Jain has assessed thousands of children since 1994, when she began working as a medical resident. She has been previously qualified in court as an expert approximately 20 times. She described her expertise this way:

.I believe through all the training that I have done over the past 20 years, plus the educational seminars and workshops that I've attended in this regard, that I have a certain expertise in the area of assessing children for injuries and determining whether those injuries were a result of an accident versus a medical problem versus a non-accidental cause and for that expertise I have been consulted by colleagues in my hospital and community for the last 20 years.

[29] In my view, Dr. Jain does not need to be trained in forensic examinations to provide her opinion on whether the child's injury was likely due to an accidental or non-accidental cause. Dr. Jain has assessed thousands of children in her career, and she works in the specialized unit which examines children for suspected child abuse. She has worked in that unit for 20 years, and was the medical director at the time of trial. She not only attended conferences for child abuse medical experts, she presented at these conferences. Based on her education, experience with treating children generally and experience working at CPSU for 20 years, she is qualified to provide the court with an opinion on whether the injuries on Allan were more consistent with an accidental or non-accidental cause.

- [30] In the recent decision of *R. v. Laberge*, 2022 ABCA 385, the issue was whether the trial judge correctly dealt with expert evidence concerning whether the child's injuries were accidental or non-accidental. The court stated the following as to the role of an expert witness:
- [38] It must be remembered that an expert witness' function is "to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate" *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 at para 23, citing *R v Abbey*, 1982 CanLII 25 (SCC), [1982] 2 SCR 24 at 42. There is no requirement that every piece of evidence or factor that informs an experts' analysis and opinion be proved beyond a reasonable doubt. An expert's training, experience, and specialized knowledge enables the expert to draw inferences from facts available or put to them. The inferences drawn by the expert are put forward for the court to consider along with all of the other evidence in determining the ultimate issue on the standard of beyond a reasonable doubt: *R v Blanchard*, 2022 NLCA 15 at para 34, [2022] NJ No 56 (QL)
- [45] Contrary to the trial judge's conclusion, the experts were not speculating, and their opinions were not that there was or was not a simple fall. The child's condition at the time she was left with the respondent and later, unattended in the bathtub, was critical to the experts' opinions relative to the mechanics and cause of those injuries. Accounting for her condition and relying on their specialized knowledge about the mechanics of injury, the experts provided opinion evidence about the inferences the trier of fact could, not must, draw in determining whether the Crown had met its burden to prove the respondent's guilt beyond a reasonable doubt.
- [31] The appellant relies on *R. v. France*, 2017 ONSC 2040, and argues Dr. Jain's expert evidence suffers from the same frailties as the expert evidence considered in *France*. However, in my view, the *France* decision is distinguishable on the facts. In *France*, the area of injury to the child was the abdomen. The Crown's expert agreed, based on medical literature, an injury to the abdomen could have been the result of accidental or non-accidental cause. Despite this, the Crown sought to lead evidence from the expert that the injury to the child's stomach was caused by an assault. It was in that context that the court in *France* ruled that the expert could not testify that it was an assault that caused the injury to the abdomen. Dr. Jain's evidence in this case was more limited in scope.
- [32] The appellant's complaint that Dr. Jain's evidence is not based on objective facts is also not persuasive. Dr. Jain bases her opinion on the location of the injury on the child's body, her knowledge and experience of the types of injuries common to children that occur by accident, her knowledge of any medical conditions in the child, and the self-report by the child or caregiver of what happened. In the case of *Allan*, Dr. Jain also had access to a medical test result which ruled out any underlying bleeding disorder that made him more susceptible to bruising. In my view, her evidence was based on objective medical information and was not anecdotal in nature.

- [33] The appellant argues as Dr. Jain relied on Allan's self-report of what happened, Dr. Jain's evidence was in effect a form of "oath-helping" or self-corroboration. He argues this is so, because Allan advised Dr. Jain that his father assaulted him, and that allowed Dr. Jain to conclude Allan's injuries were not accidental. However, as stated above, Allan's account is only one of the factors Dr. Jain considered. From my review of the evidence, the most relevant injury was the injury found on both of Allan's ears. It is the ear bruising which most concerned Dr. Jain, and in turn, the trial judge. Dr. Jain explained that bruising on both ears, based on the location of the ears on the body, is not a common accident. Allan's self-report was simply an additional factor she considered.
- [34] In my view, the trial judge did not err in finding Dr. Jain was qualified to provide an opinion on whether the injuries were accidental or non-accidental. Dr. Jain's evidence stayed within that narrow focus and did not overreach. Further, the trial judge did not put undue weight on Dr. Jain's evidence. The trial judge rejected the appellant's evidence and accepted Allan's evidence. She relied on the photos showing the injuries, stating "the photos do not lie". She found the photos corroborated Allan's testimony, and "bear witness" to the assault, together with the evidence of Dr. Jain.
- [35] Accordingly, I would not give effect to this ground of appeal.

Conclusion

- [36] The appeal is dismissed.

"Chan J."

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