

CANADA / JUDGMENT

R. v. Lussow

2025 BCSC 2037

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 2037 R v. Lussow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R v. Lussow,

2025 BCSC 2037

Date: 20251014

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Registry: Nanaimo

Rex

v.

Rourke Lussow

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Before: The Honourable Justice Majawa

Oral Reasons for Judgment

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J. Simpson

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Place and Date of Trial:

Nanaimo, B.C.

September 15-19, 2025

Place and Date of Judgment:

Nanaimo, B.C.

October 14, 2025

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INTRODUCTION

- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.
- [2] Rourke Lussow is charged with two counts of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. He is also charged with one count of assault by choking, contrary to s. 267(c) of the Code, and one count of uttering threats to cause bodily harm, contrary to s. 264.1(1) of the Code. The incidents are alleged to have occurred on May 14 and 15, 2022, in or around Nanaimo, British Columbia.
- [3] The Crown alleges that the sexual assaults took place on a number of occasions in two parks and at the accused's residence. The assault by choking charge is in respect of events that allegedly occurred at a park. The threats were allegedly uttered at a park, at a Walmart store, and in the complainant's car.
- [4] At trial, I heard evidence from the complainant, V.K., and the RCMP officer who took the complainant's report. I also heard from the accused and his mother.
- [5] In these Reasons for Judgment, I will first set out some of the background facts for context. I will then address the applicable legal principles. I will then discuss the Crown's and the defence's evidence in more detail before turning to my analysis and determination, where I will discuss my findings and conclusions. Before doing so, I note that the elements of identity and jurisdiction are not in issue in this case.

BACKGROUND FACTS AND POSITION OF THE PARTIES

- [6] The complainant was 23 years old at the time of the trial and 21 years old at the time the events of May 14 and 15, 2022, took place. The accused is of a similar age, although no direct evidence was led as to his date of birth.

- [7] The accused and the complainant met on a dating app and interacted on that app and on social media in the days immediately preceding May 14, 2022. They decided to meet in person on May 14, 2022. They met at approximately 8:00 p.m. in a Tim Horton's parking lot. Each of them drove their own vehicles to the meeting place.
- [8] At the parking lot, the complainant got into the accused's car and they drove to a park where they engaged in some consensual kissing. It is at this park that the complainant alleges that the accused first sexually assaulted her by attempting to force her to perform oral sex on him. The two then returned to the parking lot to retrieve cigarettes from the complainant's vehicle. The accused then drove them to another park where they proceeded to engage in more consensual kissing and what was described as consensual "making out".
- [9] After a short time, the accused invited the complainant back to his apartment to watch a movie and she accepted. The two engaged in more consensual kissing and more making out while in a state of semi-undress in the accused's bed. As will be discussed later, the complainant alleges that while in the bed, the accused attempted to penetrate her vagina without her consent and that while doing so, he placed his hand around her throat to choke her. Afterwards, the accused drove the complainant back to her vehicle and the two made plans to see each other again the next day.
- [10] On May 15, 2022, the complainant picked up the accused from his residence and drove the two of them to Yellow Point Park. Once at the park, the accused led the complainant to a clearing off the trail. It is at this location that the complainant alleges that the accused sexually assaulted her by again attempting to force her to perform oral sex.
- [11] On the way back to the main trail from the clearing, the accused allegedly came up behind the complainant and applied what the complainant described as an MMA style chokehold. The complainant says the accused stopped after she tapped his arm with some force to indicate that she could not breathe. Shortly thereafter, on the way back to the trail or the car, the complainant purposefully tripped and fell in an attempt to get a passerby's attention, dirtying her pants.
- [12] The two returned to the complainant's car in the parking lot. The complainant got in the back seat of the car to change her pants, and the accused joined her. The complainant did not object to him joining her in the backseat while she changed because he had already seen her in her underwear the night before at his apartment. The complainant alleges that the accused again sexually assaulted her in the backseat of the car by again attempting to force her to perform oral sex. The two got into the front seat after noticing that there were several people in the vicinity of the parking lot.

- [13] The complainant then drove the accused to Walmart to do some grocery shopping, a plan which had been made earlier. At the Walmart, the complainant says that the accused threatened to punch her in the face. The complainant drove the accused home and shortly before they arrived at his residence, the complainant says that the accused threatened to force sexual acts on her on the next date if she did not consent.
- [14] After dropping the accused at his residence, the complainant texted him to say that they should not see each other again. She eventually drove to a parking lot where she wrote a handwritten statement in her notebook about what occurred on May 14 and 15. The complainant went to the police the following day to make a report. The accused was arrested shortly thereafter.

THE APPLICABLE LEGAL PRINCIPLES

The Fundamental Principles

- [15] The fundamental principle of law applicable to every criminal case is the presumption of innocence. The accused is presumed innocent until the Crown has proven every element of the offence beyond a reasonable doubt. The Crown bears the burden of proving the accused's guilt. That burden never shifts to the accused.
- [16] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, 150 D.L.R. (4th) 733 at 333, the Court explained that a reasonable doubt is "based on reason and common sense" and that it must be logically connected to the evidence or absence of evidence.
- [17] Proving a case beyond a reasonable doubt does not require proof to an absolute certainty. However, proof beyond a reasonable doubt is "much closer to absolute certainty than to a balance of probabilities": *R. v. Starr*, 2000 SCC 40 at para. 242, citing *R. v. Starr*, 123 C.C.C. (3d) 145, [1998] 6 W.W.R. 710 at para. 119.

The Offences and their Elements

Sexual Assault

- [18] Counts 1 and 4 of the indictment charge Mr. Lussow with sexual assault of the complainant. The offence of sexual assault is provided for in ss. 265 and 271 of the Code. Sexual assault is an assault within the definition set out at s. 265(1) of the Code. Sexual assault is an assault "committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated": *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 24.
- [19] The Crown must prove, beyond a reasonable doubt, both the *actus reus* and *mens rea* elements of the offence. In this case, given that identity is not an issue, the elements of the offence the Crown must satisfy beyond a reasonable doubt with respect to the *actus reus* are:
- a) the accused applied force to or touched the complainant directly or indirectly;
 - b) the touching by the accused was of a sexual nature; and

- c) the complainant did not consent to the sexual activity in question.
- [20] The elements of the offence the Crown must satisfy beyond a reasonable doubt with respect to the mens rea are:
- a) the touching by the accused was intentional; and
 - b) the accused knew or was recklessly or wilfully blind that the complainant did not consent to the sexual activity in question.
- [21] Some more needs to be said about both the actus reus and mens rea of the offence of sexual assault. The first two of the three elements of the actus reus identified above are determined objectively: To prove that there was touching, it is sufficient for the Crown to prove that the accused's actions were voluntary. The Court determines objectively if the touching was of a sexual nature; the Crown need not prove that the accused had any subjective mental intent with respect to the sexual aspect.
- [22] Unlike the first two elements of the actus reus, the absence of consent is determined subjectively with reference to the complainant's internal state of mind towards the touching when it occurred. At the actus reus stage, consent means that the complainant in their mind agreed to the sexual touching taking place. To prove its case, the Crown must prove, beyond a reasonable doubt, that the complainant did not consent. At the actus reus stage, the accused's subjective perspective of the complainant's consent is not examined: *R. v. Barton*, 2019 SCC 33 at para. 90.
- [23] "Consent" is defined in s. 273.1 of the Code as being "the voluntary agreement of the complainant to engage in the sexual activity in question." As summarized by Justice Gibb-Carsley in *R v. A.R.*, 2025 BCSC 1594 at para. 33, consent is linked to the sexual activity in question - it is not considered in the abstract. For a person to consent, it must be freely given, it must exist at the time the sexual activity in question occurs, it can be revoked at any time, and it must relate to the specific sexual act, its sexual nature, and the partner's identity: *Barton* at para. 88. Consent must be affirmatively communicated through some positive signal or words for each sexual act: *R. v. Goldfinch*, 2019 SCC 38 at para. 44; *R. v. Schank*, 2023 BCSC 931 at para. 106.
- [24] Moreover, a complainant need not express her lack of consent or revocation of consent for the actus reus to be established: *R. v. J.A.*, 2011 SCC 28 at para. 37. In another words, a complainant need not say "no" for the Crown to prove that the complainant did not consent.
- [25] Mens rea, or the mental component, of sexual assault is established by proof, beyond a reasonable doubt, of the accused's intention and knowledge. The focus at this stage is the accused's mental state and the question to be answered is whether the accused honestly believed that the complainant communicated consent to the sexual activity in question: *Barton* at para. 90; *Schank* at para. 114.

Particular Considerations in Sexual Assault Cases

[26] There are particular principles that are applicable to cases involving sexual offences. The use of rape myths and stereotypes about sexual assault complainants have been unequivocally rejected as a means of assessing a complainant's credibility. In *R v. Kruk*, 2024 SCC 7, the Court provided a partial list of such myths and stereotypes:

[36] This Court has repeatedly recognized the prevalence of myths and stereotypes about sexual assault complainants, some of which include the following:

- Genuine sexual assaults are perpetrated by strangers to the victim;
- False allegations of sexual assault based on ulterior motives are more common than false allegations of other offences.
- Real victims of sexual assault should have visible physical injuries.
- A complainant who said "no" did not necessarily mean "no", and may have meant "yes".
- If a complainant remained passive or failed to resist the accused's advances, either physically or verbally by saying "no", she must have consented -- a myth that has historically distorted the definition of consent and rendered rape "the only crime that has required the victim to resist physically in order to establish nonconsent".
- A sexually active woman (1) is more likely to have consented to the sexual activity that formed the subject matter of the charge, and (2) is less worthy of belief -- otherwise known as the "twin myths", which allowed for regular canvassing of the complainant's prior sexual history at trial, regardless of relevance, thereby shifting the inquiry away from the alleged conduct of the accused and towards the perceived moral worth of the complainant [Citations omitted.]

[27] In *R v. Leary*, 2024 BCSC 2103, Justice B. Smith provided some other common myths and stereotypes which also must be avoided in assessing a complainant's credibility:

[76] Other common myths and stereotypes, include:

1. individuals who consult with mental health professionals are not credible and reliable;
2. failure to immediately report a sexual offence means that it did not occur;
3. drug and alcohol use demonstrates bad character; and
4. a "real victim" will avoid all contact with the perpetrator: *R. v. J.J.*, 2022 SCC 28 at para. 132.

[28] In this case, I must avoid stereotypical reasoning such as that the complainant would likely not choose to be alone with the accused after the first alleged assault, or would take the first opportunity to flee, or that she would have reported the incident at the earliest opportunity. It would be an error of law to judge a complainant's credibility based on the correspondence between their behaviour and the expected behaviour of the stereotypical victim of sexual assault: *R. v. A.R.J.D.*, 2018 SCC 6 at para. 2.

[29] At the same time, I must be cautious not to apply problematic stereotypical thinking in the other direction. As stated by Justice Marchand in *R. v. Snell*, 2021 BCSC 673 at para. 44:

For example, I must not start with the assumption that complainants in sexual assault cases are believable, tell the truth and/or would not expose themselves to the rigours of trial unless what they were saying was true. Such assumptions would reverse the presumption of innocence and impermissibly shift the burden to Mr. Snell to prove his innocence: *K.(V.)* at paras. 55-56; *R. v. J.C.*, 2021 ONCA 131 at para. 88; *Nyznik* at para. 15-17.

[30] I have approached the assessment of credibility and my findings of fact with all of these legal and evidentiary principles in mind.

Assault by Choking

[31] Count 2 of the indictment charges the accused under s. 267(c) of the Code which provides that it is an offence to choke, suffocate, or strangle a person in committing an assault. Like with sexual assault, the elements of the offence of assault under s. 265(1) are incorporated. Thus, the actus reus of the offence under s. 267(c) requires proof that the accused applied force intentionally to the complainant and that the complainant did not consent. Unlike with assault simpliciter, s. 267(c) provides for the type of force that is prescribed: "chokes, suffocates or strangles".

[32] However, the words choke, suffocates, and strangles are not defined in the Code. In a recent decision of this Court, *B. Smith J.* considered the essential elements of the offence under s. 267(c): *Leary* at paras. 79-84 and what those words mean. *R v. Laite*, [2023] N.J. No. 5, one of the decisions referenced by *B. Smith J.*, provides, a particularly helpful discussion of the provision at paras. 137 and 138:

[137] It has been held that these [s 267(c)] words "must be construed in the context of the provision in which they appear...they generally refer to conduct designed to prevent or seriously impair a person's ability to breathe. In this sense, there is overlap between the concepts of 'choking,' 'suffocating' and 'strangling'. They include actions designed to block or constrict a person's airway, such as by squeezing the neck or throat, or covering the nose and mouth" [.] However, section 267(c) does not require that the accused intended to constrict a complainant's airway or ability to breathe. Section 267(c) incorporates the mens rea for an assault. Thus it requires proof of an intentional application of force without consent. In contrast to section 265(1)(a), section 267(c) specifies the type of force that must be proven: choking, suffocating or strangling. This is proven if the accused places their

hand or hands around a person's neck and applies any force, no matter how minimal.

- [138] In *R. v. C.M.*, 2022 ONCJ 505, it was held that "the Crown can prove the Assault by Choking offence even though bodily harm is not present. 'Chokes', 'suffocates' or 'strangles' are not defined in the Criminal Code. Generally speaking, these elements are made out where the Crown proves beyond a reasonable doubt that the accused took some action 'designed to block or constrict a person's airway, such as by squeezing the neck or throat, or covering the nose and mouth'. To these elements, I would add the alternative that the offence can also be proven where there is evidence beyond a reasonable doubt that the accused took some action which applies pressure to the respiratory system of the complainant such that her ability to breathe is interfered with in meaningful way" .
- [133] I find B. Smith J.'s decision and the decisions cited therein to be persuasive and I conclude that to prove an assault by choking or strangling, the Crown must prove that the accused placed his hand or hands around the complainant's neck and applied force, or took some other action designed to block or constrict the complainant's airway by applying pressure to the complainant's respiratory system such that it is interfered with. The force applied may be minimal and need not cause an injury.
- [134] Given that s. 267(c) incorporates the mens rea for assault, it requires proof beyond a reasonable doubt of the intentional application of force of the type described above. It also requires that the accused knew or was recklessly or wilfully blind that the complainant did not consent to the application of that force. In *Leary* at paras. 83-84, the Court determined that s. 267(c) does not require any additional mens rea components, and therefore, the Crown need not prove that the accused intended to constrict the complainant's airway or interfere with her ability to breathe.

Uttering Threats to Cause Bodily Harm

- [135] The accused is charged on Count 3 of the indictment with uttering threats to cause the complainant bodily harm under s. 264.1(1) of the Code. To be found guilty of this offence, the Crown must prove the actus reus, that the accused made a threat to cause bodily harm to the complainant, and the mens rea, that he made that threat knowingly.
- [136] For a statement to amount to a threat to cause bodily harm, the threat must be to cause that person something more than just a slight injury or a brief pain. "Bodily harm" is defined in s. 2 of the Code and is any hurt, or injury, that interferes with a person's health or comfort and is more than brief or fleeting, or minor in nature. Determining whether the words conveyed amount to a threat requires that they be objectively viewed in the circumstances in which they were spoken. The issue is whether the words spoken would convey a threat of serious bodily harm to a reasonable person: *R v. Clemente*, [1994] 2 S.C.R. 758; *R v. McRae*, [2013] 3 S.C.R. 931.

- [37] Regarding the mens rea, the Crown must prove that the accused by his threatening statement meant to intimidate or to be taken seriously by the complainant. The Crown need not prove that the accused meant to carry out the threat: Mcrae at para. 18.

THE APPLICABLE EVIDENTIARY PRINCIPLES

- [38] The trier of fact is not to assess the evidence in a piecemeal fashion. As discussed by the Supreme Court of Canada in *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193, not every individual piece of evidence requires proof beyond a reasonable doubt; it is only the elements of an offence that are subject to a criminal standard of proof. A trier of fact must consider the collective effect of the evidence.
- [39] Where the accused and the complainant provide competing versions of events, the Supreme Court has set out a framework for the application of the reasonable doubt standard of proof in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 757-758, 63 C.C.C. (3d) 397 and further developed in *R. v. J.H.S.*, 2008 SCC 30, and many cases since. Applied to this case, the framework is as follows:
- if I believe the accused's evidence, I must acquit him;
 - if I do not believe the accused's evidence, but I am left in a reasonable doubt by it, I must acquit him;
 - even if I am not left in a reasonable doubt by the accused's evidence, I must consider whether, on the basis of the evidence I do accept, I am convinced, beyond a reasonable doubt, by the evidence of the accused's guilt; and
 - if after careful consideration of all the evidence, I am unable to decide who to believe, I must acquit.
- [40] This framework should not be applied in a formulaic manner. It is the principles underlying the framework that are important.
- [41] In *J.H.S.*, at para. 13, the Court reminded trial judges that an accused's lack of credibility does not equate to proof beyond a reasonable doubt.
- [42] Improvements to the formulation of the *W.(D.)* framework have been proposed in a number of cases (i.e. *R. v. Ryon*, 2019 ABCA 36 at para. 51) but the fundamental nature of the framework remains the same. I have applied these principles in the assessment of the evidence in this case.
- [43] Only the complainant and the accused can testify about what is alleged to have occurred in the absence of anyone else. This is not unusual in these types of cases. However, it is important that I do not decide whether the accused is guilty simply by concluding that the complainant's version of events is more likely to be true. As stated in *Ryon*, this trial is not a credibility contest that requires the accused put forward a more credible version. To approach the assessment of the evidence in that manner would be a misapplication of the burden of proof. Even if I was to find that the complainant's version of events is more

believable, I must assess the evidence as a whole to determine whether it raises a reasonable doubt about guilt. The benefit of that doubt must go to the accused.

[44] Evidence must be both credible and reliable to support a finding of guilt beyond a reasonable doubt. Credibility speaks to the truthfulness of a witness and reliability speaks to the witness' accuracy. Factors relevant to the assessment of both are summarized in the often-cited decision of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time

[Citations omitted.]

[45] Reliability and credibility are often considered together, although they are different concepts. The Ontario Court of Appeal described the difference between the two in *R. v. H.C.*, 2009 ONCA 56 at para. 41:

[41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence

[46] Credibility assessments "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. R.E.M.*, 2008 SCC 51 at para. 49. In determining credibility, I must consider a number of factors including internal and external consistency of the witness' evidence, motive to fabricate, the inherent plausibility of the evidence in the context of the case as a whole, and demeanour.

- [47] In assessing the credibility of a witness, I am entitled to consider the absence of evidence suggesting a reason to fabricate. However, I must be cautious in how much weight to give to this consideration. I must not equate an absence of evidence of a motive to lie with evidence disproving a motive to lie. Most importantly, I must not reverse the burden of proof by requiring the accused to demonstrate why the complainant (or other Crown witnesses) would lie: *R. v. Gerrard*, 2022 SCC 13 at para. 4.
- [48] While common sense may be applied, I must be cautious in approaching credibility in this manner because it can obscure reliance on stereotypical assumptions. The trier of fact must guard against making credibility findings grounded in emotional evaluation, stereotypes, guesswork, or other kinds of impermissible reasoning: *R. v. D.F.*, 2020 BCSC 2215 at para. 32.
- [49] I must also be cautious not to place too much reliance on the witness's demeanour. The manner in which a witness testifies is not a reliable measure of their credibility. There are many factors that can affect a witness's demeanour that are unrelated to whether they are truthfully and accurately recounting the events. Furthermore, I am not familiar with the witnesses outside of this trial, and therefore, I have no baseline against which to assess their demeanour at trial.

THE CROWN'S EVIDENCE

The Complainant

- [50] The complainant testified that she and the accused met in person for the first time on May 14, 2022, after communicating with each other on social media or via text message in the few days before. They met at a Tim Horton's parking lot and then left in his car and went to Blue Heron Park. The complainant testified that when they arrived at the park, they got out of the car and walked over to a tree where they began to kiss consensually.
- [51] The complainant testified that the accused then took her over to an opening in the bushes behind a bench, grabbed her by the hair on the back of her head and forced her to her knees in an attempt to force her to perform oral sex on him. She testified that he did not say anything at this time but that she said that was not interested in having sex and told him to stop. She said that after this he seemed apologetic and the date continued.
- [52] The complainant testified that the two of them returned to the accused's vehicle and drove to the Tim Horton's parking lot to get her cigarettes because they both wanted to smoke. The two then went to a different park, Roberts Memorial Park, which was a few kilometres away from the Blue Heron Park. The two smoked a cigarette and made out a little more at the park, which the complainant explained meant kissing with tongue.
- [53] The accused invited the complainant back to his residence to watch a movie and the complainant accepted the invitation. The complainant understood that the accused had a female roommate but does not believe that she ever saw his roommate.

- [54] At the accused's apartment, the two began to watch a movie and continued to make out. They took off some articles of each others clothing such that the complainant was only in her underwear, she said she had not been wearing a bra. The accused was also in his underwear.
- [55] The complainant says that the accused then put his hand around her throat and she started to hit his arm and hyperventilate. She testified that he tried to move her underwear aside and tried to insert his penis into her vagina while she tried to block him. He stopped, laid on top of her and let out a sigh. She testified that he tried to insert his penis again and she resisted. She testified that she flipped over and he may have again tried to penetrate her. She did not see the accused's penis and does not know if it was exposed. She was not sure if what she felt trying to penetrate her was his penis or some other object. They lay in bed together for 10 minutes and then he drove her back to her car at the Tim Horton's parking lot. The complainant said that the accused apologized and that he seemed to be upset for the rest of the evening.
- [56] The complainant and the accused made plans for another date the next day. The plan was to go for a walk in the park and then she would accompany him grocery shopping. On May 15, 2022, the complainant drove to the accused's home at around 1:00 p.m. and picked him up. She then drove them to Yellow Point Park.
- [57] At Yellow Point Park, they walked down a trail and the accused pulled out a yellow handled box-cutter type knife and started to make slices into a tree as they walked. He explained that he had forgot that the knife was in his pocket from work. They continued to walk for about 20 minutes at which time he led her off the trail to a place she described as having a stump and a partial clearing. Once there, the complainant testified that the accused grabbed her by the hair at the back of her head and tried to force her to her knees. The complainant testified that the accused told her that if she did not perform oral sex on him that she would be lost in the forest forever because she did not know her way back. The complainant told him to stop and that she was not going to perform oral sex. He let go of her and she began to walk away.
- [58] The complainant testified that the accused came up behind her and put his right arm over her neck and used his other arm to press his right arm against her throat with in what she described as an "MMA style" chokehold. She says she was terrified, could not breathe, began "seeing spots" and began tapping on his arm like she was "tapping out". In response, the accused said that if she made him mad enough, he would proceed until she was unconscious. She tapped his arm harder, and he let go.
- [59] The complainant testified that she was terrified and checked her cell phone because she wanted to text someone for help. However, she said there was no service in that location. She and the accused walked down the path and she saw a woman approaching with her dog. The complainant testified that she purposefully tripped in front of this woman in an effort to get the woman's attention but it did not work. The two went back to the complainant's car

and she changed her clothes in the backseat because they had become muddy from her fall. The accused joined her in the backseat and the complainant testified that she was alright with this because he had already seen her in her underwear the evening before.

- [60] At this point, the complainant says that the accused tried again to force oral sex by grabbing the hair at the back of her head and forcing her head into his crotch area. She told him that she was not comfortable performing oral sex because she did not know him well enough. He stopped and she suggested that they continue with the original plan and go grocery shopping at Walmart.
- [61] The complainant drove the two to Walmart. On the way, the accused unsuccessfully attempted to get into the complainant's mobile phone. He answered a video call from the complainant's friend and had a brief conversation with her. The complainant was not alright with the accused using her mobile phone in this manner.
- [62] They arrived at Walmart and as they walked inside, she says that the accused grabbed her arm and pulled her back and said that she had to walk beside him, and not in front of him. The complainant testified that she was terrified because she knew he still had the knife on him. While in the Walmart, the complainant testified that she tried to engage the accused in conversation but he told her that if she would not be quiet he would punch her in the face. She testified that she was terrified of him and that she went to the bathroom and tried to text someone for help but had no service.
- [63] Eventually, they left the Walmart and at the accused's request, they drove to a chicken restaurant at Southgate Mall where he purchased a chicken sandwich. She then drove him home. As they arrived at his home, the complainant testified that the accused told her that if she does not give him what he wants by the third date he would force it upon her, which she took to mean that he would force her to have oral sex or sexual intercourse with him. At some point relatively shortly after dropping him off at his residence, the complainant texted the accused "Hey so I don't think we should see each other anymore. I'm sorry."
- [64] The complainant testified that shortly after she dropped the accused off at his house on May 15, she called her then best friend. The complainant said she was hyperventilating and crying while she told her everything that happened. Her friend told her to write everything down.
- [65] After the phone call with her friend, the complainant drove to her mother's house. At the time, the complainant was living with her grandparents at their house because her mother and step-father had possibly been exposed to Covid 19. The complainant says that she spoke with her mother through the window and that her mother noticed bruising on her and that she was crying. Her mother asked her if she was alright to which the complainant replied she was not. Her mother told her to write down what happened and to go to the police. The complainant's stepfather was also on the other side of the window during this conversation. The complainant did not tell her mother or her stepfather any details of what allegedly occurred earlier that evening.

- [66] The complainant testified that she went to her cousin's house but provided no further details about what occurred there, if anything, other than to say that it was around this time that she blocked the accused from her social media accounts and blocked his phone number from her phone.
- [67] After seeing her cousin, the complainant went to the Rutherford Mall parking lot where she testified that she spent approximately three hours crying and writing down everything she could remember at the time about what occurred on May 14 and 15 in a notebook she had with her.
- [68] The next morning, May 16, 2022, the complainant went to the police to make a report. Her mother, stepfather, grandparents and her boss all knew she was going to the police but none of them knew the details of what allegedly occurred on May 14 and May 15.
- [69] On May 16, 2022, at around 10:30 a.m., the complainant provided a videotaped statement to the police. While providing her statement, the complainant referenced the handwritten notes that she made in her notebook the evening before. The RCMP constable made a photocopy of those notes. I will refer to these notes as Handwritten Statement #1.
- [70] The complainant wrote two other handwritten statements in addition to Handwritten Statement #1. The complainant says that Handwritten Statement #2 was made a few days after Handwritten Statement #1 and it was made in the same notebook. She took photographs of the pages of her notebook that contained Handwritten Statement #2 and emailed it to the RCMP officer.
- [71] The complainant testified that at the same time she sent Handwritten Statement #2 to the police officer, she also sent photographs that depict bruises she says she sustained during the May 14 and/or May 15 incidents. The photographs are said to depict various parts of her body including her neck, legs, stomach and wrist. It is not entirely clear to me when these photographs were taken. The complainant said that she took the photograph of her neck on the same day that she gave her statement to the police on May 16, 2022; however, the date typed on the photograph says May 15, 2022. She says that she took the rest of the photographs "a few days afterwards". However, she testified that the photographs were sent to the RCMP officer on May 18, 2022.
- [72] The complainant says that the photograph of her neck depicts a bruise that she sustained when the accused put his hand around her throat to choke her while at the accused's residence. She says that a photograph of her wrist depicts the fingerprint bruise arising from when the accused grabbed her by the wrist while they walked into the Walmart parking lot. The complainant says that one of the photographs depicts a bruise on her stomach that she sustained when the accused put her in a choke hold from behind. The photographs that she says depict bruises on her legs she believes are from the incident on May 14 when he tried to penetrate her vaginally and she blocked him with her legs. In cross-examination, the complainant admitted that she took photographs of anything on her body that could have possibly been a bruise from the incidents.

- [73] The complainant wrote Handwritten Statement #3 in the same notebook, approximately one year or more after the date the alleged offences occurred. She ripped these pages out of her notebook and provided them to the police in September 2023. The police officer took photocopies of these notes. The notebook itself no longer exists; the complainant testified that she threw it away when she was decluttering in or around April 2025.
- [74] The complainant agreed that the allegations of what occurred on May 14 and 15 and was recorded in Handwritten Statement #1 was elaborated and expanded upon in each of Handwritten Statements #2 and #3.

Constable Smith

- [75] RCMP Constable Jason Smith obtained a verbal statement from the complainant on May 16, 2022. He recalls that the complainant brought a notebook with her and referred to it during her verbal statement. He took photocopies of the pages that she referred to (Handwritten Statement #1). Constable Smith asked the complainant questions about the choking allegations and noted her responses and noted that she had bruises on her stomach. He did not observe any other injuries on the complainant.
- [76] On May 18, 2022, Constable Smith received an email from the complainant that contained photographs of Handwritten Statement #2 and also photographs of what the complainant says is bruising she suffered as a result of the alleged assaults.
- [77] On September 1, 2023, Constable Smith took a second verbal statement from the complainant and made photocopies of Handwritten Statement #3 which she had brought to the detachment with her.

THE DEFENCE EVIDENCE

The Accused

- [78] The accused had very little specific memories of his interactions with the complainant. He testified that he was smoking a lot of cannabis at the time he met the complainant in 2022, although he could not provide an estimate of how much or frequent his usage was. He testified that he thought that his cannabis use affected his memory. There was no evidence led about whether he had consumed cannabis, or any other intoxicants, on the dates in question.
- [79] The accused does not recall communicating with the complainant before they met but accepted that they would have met on the social media dating site, Bumble. The first recollection he has about meeting the complainant is meeting her at the Tim Horton's parking lot. This was presumably on May 14, 2022, although he was never asked about specific dates.

- [80] The accused testified that they were not at the Tim Horton's for very long, just long enough for him to pick her up. He recalls that they went to Robert's Memorial Park although he has no recollection of anything that occurred on the drive to the park. The accused recalls that they parked at Robert's Memorial Park, kissed each other and made out. He explained that making out involves tongue kissing and longer kisses. He does not recall anything else about the time they spent at Robert's Memorial Park, including where his hands were at the time.
- [81] He does not recall going to another park before Robert's Memorial Park. Although it was not put to him directly, I take this to mean that he has no recollection of going to Blue Heron Park before returning to the Tim Horton's parking lot to get cigarettes as the complainant testified. In cross-examination, he acknowledged that it was possible that he and the complainant went somewhere else before going to Robert's Memorial Park.
- [82] The accused testified that he and the complainant could not have been at Robert's Memorial Park for more than 10 minutes. He said they next drove to his residence that he shared with his roommate. He does not recall any details of what happened on the drive there. He recalls walking down the driveway, opening the door to his basement suite and entering it. The complainant was behind him.
- [83] The accused's next recollection is that the complainant took her clothes off and got into his bed wearing her pink bra and panties. He recalls taking his shirt off and lying down next to her and that the two started kissing. The accused testified that other than kissing, "nothing else happened". By this, I take him to mean that nothing else sexual happened between the two of them. He testified that he "probably" asked her to have sex with him, although he has no specific recollection of the words they spoke to each other. He believes she likely said no because they did not have sex that night. The accused explained that he has a specific memory of what physically happened in his bed because it was a "physical romantic interaction."
- [84] The accused testified that he next recalls the complainant slowly getting up and slowly putting her clothes on and looking disappointed. He testified that this was striking to him. He assumes that she was disappointed because he did not want to make out with her anymore or cuddle with her. However, he acknowledged that he has no recollection of the complainant making any such request.
- [85] The accused does not specifically recall driving the complainant back to her car at the Tim Horton's parking lot but thinks he would have done that because he would not take someone back to his residence and then not drive them back from where they came afterwards.

- [86] The accused recalls going to Yellow Point Park with the complainant the following day; however, he does not recall who suggested that they go there or how that date was arranged. Once again, he does not recall any details from the drive to the park or from any of the other times the two were driving between locations. the accused recalls being at spot off the trail with the complainant which he described as being a clearing. This is his first memory of being at Yellow Point Park that night.
- [87] The accused testified that the clearing is approximately a 25-minute walk from the parking lot. He knows this because he said he recently went back to that same spot and timed himself. On this occasion, he testified that there is cellular service throughout the park and at the clearing.
- [88] The accused does not recall much, if anything, about what occurred between him and the complainant at the clearing in Yellow Point Park. Although he does not specifically recall why he went to that particular spot that night, he testified that he "probably" took her to the clearing to "get some action" because he would not have brought her there for any other reason.
- [89] The accused does not recall how long they were at the clearing for. He does recall the complainant falling down on some rocks on the way back to the car. He said she fell backward and described it as being "quite a fall". When asked why he remembered her falling, he said it was a striking image in his head and it seemed like she did it on purpose and he was confused as to why. He was not asked if he recalls seeing a woman with a dog on the trail at around the time that the complainant fell.
- [90] It was established during cross-examination that, at the time of the incidents, the accused worked as a framer and one of his tools was a yellow handled box cutter. He did not recall if he had the yellow box cutter with him while at Yellow Point Park.
- [91] The accused's next recollection is being in the backseat of the car with the complainant in the parking lot at Yellow Point Park. He remembers that she took off her pants and changed. He remembers that they started kissing while in the back of the car but they did not do anything else sexually that he can recall. He remembers that the two of them noticed that there was a family nearby while they were in the backseat of the car and this embarrassed them, so they stopped and got into the front of the car.
- [92] The accused then remembers being at Walmart next but does not remember anything about the car ride. He has no recollection of answering the complainant's mobile phone and having a conversation with anyone. He does not recall whose idea it was to go get the groceries. The accused does not recall anything out of the ordinary about the time at Walmart. He testified that he shopped for groceries and paid for them at the self-checkout.
- [93] The accused's next recollection is of the complainant driving away from his place after dropping him off. He does not recall going to the chicken restaurant after the Walmart but said he does not like the chicken sandwiches at that restaurant. He has no recollection of

texting with the complainant later and does not recall her text message that stated that she did not want to see him anymore. The next day, he was arrested by RCMP officers at his house and released on an undertaking to appear. He remembers this clearly and said he was very surprised to be arrested and had no idea what was going on.

- [94] The accused was not directly asked about the various allegations made by the complainant i.e. that he pulled her hair, forced her head down or forced her to her knees and tried to force oral sex, tried to force vaginal intercourse or that he choked her in his apartment or put her in an MMA style chokehold on the trail, or that he threatened her. At the conclusion of his evidence in chief, he made a broad denial and said that he did not do any of the things that he has been accused of.

The Accused's Mother

- [95] The accused's mother testified. Her evidence was brief and consisted of her view of her son's character. At the time of the incidents in May 2022, the accused's mother would speak with him approximately once a week for an hour or more and sometimes more frequently. She described him as a kind and gentle soul and that he would never hurt anyone. She has never observed him get in a fight. His mother says that he is the gentlest and kindest of all three of her children.

DISCUSSION

- [96] Credibility is a key factor in my consideration of this matter: The credibility of the complainant and the accused is particularly important given that they were the only two present when the alleged offences occurred.

Assessment of the Defence Evidence

The Accused

- [97] The accused's evidence did not raise a reasonable doubt. As discussed, the accused could recall very little in respect of the time he spent with the complainant. Essentially, he was unable to recall any details at the relevant times that are related to any of the offences for which he is charged.
- [98] On the evidence before me, there is little to explain the accused's striking lack of memory in respect of the events on those two dates. While he testified that he was consuming a large amount of cannabis at that time in his life and that this consumption may have had an affect on his memory, he did not explain what his level of consumption was at that time in his life, nor did he explain how that might have affected his memory. Moreover, he did not provide any evidence about consumption of any intoxicants on the dates in question.

- [99] The accused explained that he did not remember many details because the interactions with the complainant were uneventful and therefore did not stick out in his memory. It is difficult to accept this explanation given that the accused was arrested the day after the second date with the complainant. He recalls the arrest clearly. It is common sense that his arrest would cause him to think back about the events of the previous two days; even if they were previously uneventful in the accused's mind, they certainly would not be after he was arrested. Moreover, unlike a victim of sexual assault, the alleged perpetrator's memory is less likely to be affected by trauma related to the incident: *R v. Thomas*, 2024 BCCA 150 at paras. 66-67.
- [100] The only details that the accused could remember while testifying corroborated parts of the complainant's evidence. In particular, that he possessed a yellow handled box-cutter type knife with thin blades and that the complainant fell on the trail on the way back from the spot at Yellow Point Park and it seemed like she fell on purpose.
- [101] If the accused's memory is as poor as he says it is, then his reliability as a historian of the events on May 14 and 15, 2022, is very low. If his memory is not as poor as he says it is, then he is lying and is not a credible witness. In either scenario, the accused's evidence does not raise a reasonable doubt about his guilt.

The Accused's Mother

- [102] The accused's mother had no direct evidence of the incidents in question. Indeed, in May 2022, the accused and his mother did not live in the same community. The accused's mother's evidence essentially amounted to a testament to his good character. Her evidence was not objected to although it likely did not meet the requirements of reputational evidence. Nonetheless, I have considered her testimony. I have decided to give it no weight.
- [103] First, while evidence of an accused's morality may be relevant to a sexual offence, such evidence has diminished probative value in cases such as this one. As a matter of common sense, sexual misconduct often occurs in private and will not often be reflected in the accused's reputation in the community: *R. v. R.(B.S.)*, (2006), 212 CCC (3d) 65 (ONCA).
- [104] Second, the good character evidence provided by an accused's parent has little probative value in this type of case. The fact that a parent does not think that their child would commit a crime, particularly the type of crime that the accused is charged with, tells me little to nothing about the accused's morality.

Assessment of the Crown's Evidence

The Complainant

- [105] I found that the complainant generally presented her evidence in a forthright manner. She appeared to take her testimony seriously. At times, she became emotional when recalling the events. However, as discussed above, I will not place too much emphasis on her demeanour, even though her presentation was believable.
- [106] The complainant had no apparent reason to lie or fabricate evidence. She denied being jealous about the accused's roommate or by the accused's conversation with her friend on the phone while on the way to Walmart, and I accept that evidence. Even if I had not accepted that evidence, it is difficult to see how such minor jealousy would lead to a fabrication of the events alleged here. Nonetheless, I will also not place too much emphasis on this factor given that there is no burden on the accused to demonstrate that the complainant had a motive to fabricate. Furthermore, one cannot conclude that someone is telling the truth just because there is no apparent reason for that person to lie; people can and do lie for reasons that are not apparent at the trial of a matter.
- [107] Defence counsel pointed to a number of inconsistencies between the three Handwritten Statements, the complainant's verbal statements to the police, and her testimony at trial. I find some of these inconsistencies to be minor and to have no negative effect on the complainant's credibility. For example, I take nothing from the complainant's use of the expression "had a first kiss" and "shared a first kiss". I accept that she used these expressions interchangeably.
- [108] However, there are some inconsistencies about the incidents themselves that cause me considerable concern. There is significant inconsistency between her Handwritten Statements and the testimony she gave at trial with respect to what occurred at Blue Heron Park. In her Handwritten Statements, the complainant said that the accused asked her to perform oral sex and to have sexual intercourse and she said no to both. She wrote that he was disappointed but told her that he respected women. At trial, she testified that at Blue Heron Park he took her into the woods, pulled her hair by the back of her head, forced her head to his waist and attempted to force her to perform oral sex, and that he said nothing during this incident. She said something similar to the police in her verbal statement on May 16, 2022.
- [109] The complainant did not provide an explanation for this significant inconsistency except to say that her memory has gotten better over time because of the way in which she processes traumatic events. The Crown refers to the Court of Appeal's recent decision in *Thomas and* submits that a sexual assault victim's memory is molded by trauma, meaning that peripheral details may be less clear than central ones due to trauma and shame and lack of understanding of the criminal justice system process. The Crown submits that a complainant's descriptions of the sexual assault may unfold gradually, and incremental disclosure should not automatically be troubling to the trier of fact. The Crown also relies on *R. v. P.A.*, 2024 BCSC 282 paras. 42-44 in support of its submission that like delayed

disclosure, piecemeal disclosure alone should not lead to a negative credibility inference.

- [110] I accept the principles relied upon by the Crown in the cases it has cited. However, my concerns with respect to the complainant's reliability and credibility as a result of this particular inconsistency, does not arise automatically because her recitation of the events have changed. Rather, it arises on the specific facts of this case and in part on the actions the complainant herself took. The complainant testified that she spent approximately three hours carefully writing everything she could remember about the events of May 14 and 15 almost immediately after the events occurred. She also had the opportunity to revisit her written statements on several occasions and did in fact revise and supplement them in respect of some matters, but not this one. The complainant wrote Handwritten Statement #2 within days after providing her first verbal statement to the police. When she prepared that second handwritten statement, her interview with the police must have been fresh in her mind. She reviewed Handwritten Statement #1 and copied it word for word in respect of the incident at Blue Heron Park, despite having told the police something significantly different a short time before. This is a different situation than the piecemeal disclosure described in the cases relied upon by the Crown. There is no explanation for this inconsistency other than the professed improvement of her memory over time.
- [111] However, it is not the inconsistency between her testimony and what was in the Handwritten Statements that is the most troubling. What is most troubling is the complainant's understanding of the difference between what she wrote in her handwritten statements - i.e. that the accused asked her to perform oral sex and to have sexual intercourse and she said no to both and that he was disappointed but said that he respected women and did not proceed - and what she said at trial - i.e. that he took her into the woods, pulled her hair by the back of her head, forced her head to his waist and attempted to force her to perform oral sex, and that he said nothing during this incident. When confronted with this inconsistency on cross-examination, the complainant testified that "to her there is no difference" between the two descriptions of events, although she could see that there is a difference in a "court of law". This causes me considerable concern with respect to the complainant's reliability as an accurate historian of the events that occurred on May 14 and 15 that are said to amount to sexual assault.
- [112] The complainant testified to having suffered bruises from the alleged choking incident on May 14 at the accused's apartment, and other bruises from the alleged sexual assaults. In support of this testimony, the Crown tendered photographs taken by the complainant of various parts of her body. Unfortunately, I am not able to discern much from these photographs. They are of very poor quality, and other than on one photograph, the complainant did not identify where in the photograph the injury was depicted. I am unable to tell where the injury is supposed to have occurred by reference to these photos. Moreover, on cross examination, the complainant resiled from her testimony that a bruise on her stomach was caused by the accused.

- [113] There is one photograph that is of better quality - that is on page 2 of the Exhibit and depicts the complainant's neck. She has circled what she says is a bruise she suffered from the accused placing his hand around her throat while trying to force intercourse when the two were at his apartment. She has indicated that the photograph was taken on May 15, 2022, by typing that date on the photograph. Part of the difficulty with this evidence is that the complainant testified that the bruise she suffered was on the right side of her neck. She was certain of this. However, the photograph depicts what appears to be the left side of her neck. No evidence was tendered as to how the photograph was taken and whether the photograph depicted a mirror or direct image of the complainant's neck.
- [114] As mentioned earlier, the complainant testified that she went to her mother's house after the alleged assaults and her mother observed her upset emotional state and also observed bruises on her which prompted her mother to tell her to call the police. However, the complainant's mother was not called to testify about her observations of the complainant on that evening. While s. 274 of the Code provides that corroboration is not required for a conviction of sexual assault, there is certainly no prohibition against tendering such evidence. Moreover, a different issue arises where a complainant testifies to corroborating evidence but that corroborating evidence is not tendered. This can affect a complainant's credibility or reliability and does not, in my view, offend the prohibition against requiring corroborating evidence: *R. v. Grief*, 2021 BCCA 187 at para. 51. It is also relevant that Constable Smith did not observe any bruising on the complainant's neck when he interviewed her on May 16, 2022, in circumstances where he had turned his mind to the allegation of choking. In light of all the evidence, I am unable to conclude that the complainant suffered physical injuries such as bruises from her interactions with the accused on May 14 or 15.
- [115] The defence also points to inconsistencies between the complainant's statements and her testimony with respect to the interaction with the woman and her dog at Yellow Point Park. At trial, she testified that she purposefully fell in front of the woman and her dog in an effort to get help but the woman just kept walking. In cross examination, she agreed she told the police on May 16, 2022, that the woman asked her if she was alright and she responded yes - the suggestion being that the woman asked her if she was ok because she had observed dirt on her knees from falling. While there is a difference between these two recitations of the interaction with the woman on the trail, the complainant's sworn testimony at trial that she purposefully fell in an effort to get the woman's attention was partially corroborated by the accused's testimony and I accept that this occurred. Whether or how the woman interacted with the complainant is the type of peripheral detail about which one might expect inconsistencies.
- [116] The defence suggests that the complainant's later recollection of the accused's possession of a box cutter style knife on May 15, 2022, should cause considerable concern with her credibility. I disagree. In my view, this is the type of piecemeal disclosure that, standing alone, should not cause concern with a sexual assault complainant's credibility. While this

detail was not mentioned in the complainant's earlier statements, it was mentioned in Handwritten Statement #3 and is the type of piecemeal disclosure that one might expect. Furthermore, the accused admitted he had a yellow-handled box cutter style knife. There is no other plausible explanation that the complainant knew that he had such a knife unless he showed it to her or had it in his hand while in her presence. On the evidence before me, I find that the accused did have a box cutter style knife in his possession on May 15 and that the accused saw him handling this knife while on the trail that day.

- [117] Although I have some significant concerns with the complainant's reliability as described above, I agree with the Crown that the complainant generally provided her evidence in a forthright, detailed and mainly consistent manner. The evidence she provided with respect to the MMA style chokehold and the incidents in Walmart were not successfully challenged. I accept her testimony that she was scared, particularly in light of her observation of the accused's box-cutter style knife. Her description of the threats the accused made were detailed and uncontradicted. She resiled from little during a lengthy and, and at times aggressive, cross-examination.

Analysis of the Charged Offences

- [118] Given that I am not left in a reasonable doubt by the accused's evidence, I must consider whether I am convinced of the accused's guilt beyond a reasonable doubt on the basis of the evidence I do accept. In coming to my conclusions, I am guided by our Court of Appeal which held that it is open to the court to reject all, none, or some of a witness's evidence: see *R. v. Fay*, 2023 BCCA 151 at para. 47. With this in mind, I turn to the consideration of each of the charged offences.

Sexual Assault Charges

- [119] Counts 1 and 4 of the indictment charge the accused with sexual assault. The Crown alleges that Count 1 encompasses the accused's attempt to force oral sex while they were at Blue Heron Park and his attempt to penetrate the complainant while at his apartment later that night. Count 4 is in respect of the alleged incidents of attempting to force oral sex upon the complainant at the clearing in Yellow Point Park and in her car in the parking lot afterwards.
- [120] As discussed earlier, to be guilty of sexual assault, the Crown must prove that the accused touched the complainant in a sexual nature and the complainant did not consent to the sexual activity in question.
- [121] I accept that parties went to Blue Heron Park on the evening of May 14, 2022.

- [122] I agree with the Crown that piecemeal disclosure of the details of a sexual assault, particularly peripheral details, should not automatically lead to a negative credibility finding. However, the inconsistency with respect to what occurred at Blue Heron Park is not a peripheral matter. It goes to the core of the allegation of sexual assault.
- [123] The version described by the complainant in her Handwritten Statements does not depict a sexual assault - it recounts the accused asking for oral sex and sexual intercourse, albeit in a rather crude manner, and the complainant rejecting that request by saying no, followed by the accused's perhaps disappointed acceptance, but acceptance nonetheless, of that rejection. The fact that the complainant testified on cross-examination that there is no difference to her between what I have just described above and the accused pulling her by the hair to her knees and to his waist and attempting to force oral sex on her is very troubling. The complainant's testimony about her inability to distinguish between these two scenarios was not further explained. I am left with a complainant who has testified to seeing no difference between a factual scenario that could amount to a sexual assault and a factual scenario that does not and cannot. Moreover, the scenario which she recorded in writing shortly after the alleged incident is the scenario that does not amount to a sexual assault. This is the time when the events were most fresh in her mind.
- [124] As stated earlier, I have significant concerns about the accused's lack of memory of the events on those dates and his testimony in and of itself does not raise a reasonable doubt. However, the complainant's inability to distinguish between the events I have described above leave me with a reasonable doubt about whether the accused touched the complainant in a sexual nature without her consent on any of the incidents in question.
- [125] The Crown did not charge the alleged choking while at the accused's apartment on the evening of May 14 as a separate count on the indictment. Rather, the Crown argued that if I found that the choking occurred on that first night, it would be an aggravating factor in respect of the alleged sexual assault. I have already described the reasonable doubt that I have in respect of the sexual assault allegations, thus, even if I was to accept that the accused choked the complainant at his apartment, no conviction could arise as he is not charged with a separate offence in respect of that allegation.
- [126] In any event, I note that the evidence in respect of the bruises that the complainant says she suffered that evening also raise a reasonable doubt. I have already explained the concerns I have with the photographs that are said to depict bruises caused by the accused. It is also noteworthy that the RCMP officer did not notice a bruise on the complainant's neck even though he was attuned to allegations of choking. Moreover, corroborative evidence that was said to exist, i.e. the complainant's mother's observations that evening, was not tendered and no explanation was provided as to why not. This combined with my concerns about the complainant's reliability to accurately recount what is alleged to be a sexual assault, leads to a reasonable doubt as to whether the accused choked the complainant at his residence.

Assault by Choking

- [127] Count 2 on the indictment charges the accused with assault by choking. This count is in respect of the MMA style chokehold that the complainant says the accused applied to her after they left the clearing at Yellow Point Park on May 15, 2022, and before they encountered the woman on the trail.
- [128] The complainant's evidence in respect of the allegation that the accused put her in an MMA style chokehold was largely unshaken and did not suffer from the same issues as the sexual assault allegations that I have described above. The only inconsistency was in respect of the bruise on her stomach which she said she suffered when he grabbed her in this manner. During cross examination, she resiled from her earlier testimony that the bruise on her stomach was from this incident.
- [129] Nonetheless, I am satisfied, beyond a reasonable doubt, that the Crown has proven the accused's guilt on this count of the indictment. The complainant's testimony establishes that the accused took some action designed to block or constrict her airway by applying pressure to the complainant's respiratory system such that it was interfered with. He did this by coming up behind the complainant and putting his forearm around her neck and grabbing that arm with his other. She saw "spots" and tapped on his arm like she was tapping out. The force can be minimal and need not cause an injury. I accept the complainant's testimony that she did not consent to being choked in this manner.
- [130] Other evidence that I accept about what occurred on May 15, 2022, also supports this conclusion. I accept that the accused had a yellow handled box cutter style knife with him on May 15, 2022, when the two went to Yellow Point Park, and that although he did not directly threaten the complainant with the knife, she was aware that he had it and that this scared her. I also accept that this is the type of detail that should not automatically call a complainant's testimony into question, particularly in circumstances where the complainant has never testified that the accused used the knife in a threatening manner. Moreover, the accused's own testimony partially confirms that he had a knife with him that day, and on the evidence before me, there is no other explanation as to how the complainant would have known that he had such a knife if she had not seen it.
- [131] I also accept that the parties encountered a woman on the trail on the way back from the clearing at Yellow Point Park and that the complainant purposefully fell in her vicinity. While it is not clear to me whether the woman inquired into the complainant's well-being, the essential elements of what occurred were consistent, and as described earlier, partially corroborated by the accused's own testimony. The complainant's attempts to get help by purposefully falling in front of the woman on the trail is consistent with the fear she testified to experiencing at that time as a result of the accused putting her in an MMA style chokehold and the knowledge that he had a knife on his person.

[132] I find that the Crown has proven the mens rea of assault by choking beyond a reasonable doubt. Given that I accept the complainant's testimony with respect to the MMA style chokehold, and given that the accused had no recollection of this incident, I find that the application of the MMA style chokehold was intentional and that the accused knew or was recklessly or wilfully blind that the complainant did not consent to being put in such a chokehold. There is no other rational explanation on the evidence before me.

Uttering Threats to Cause Bodily Harm

[133] Count 3 on the indictment charges the accused with uttering threats to cause bodily harm. In closing submissions, the Crown clarified that this count is in respect of several threats the accused allegedly made to the complainant on May 15, 2022.

[134] The first threat is in respect of statements the accused was said to have made during the alleged incident of sexual assault at the clearing at Yellow Point Park. The complainant says that the accused told her that if she did not perform oral sex, he would leave her in the woods, and she would be lost forever. I have already explained why I have a reasonable doubt about the allegations of incidents of sexual assault themselves. The complainant's inability to distinguish between the very different factual scenarios that I have discussed earlier leads me to have a reasonable doubt about what exactly occurred on those particular incidents. For that reason, I do not find that the Crown has proved beyond a reasonable doubt that this threat occurred.

[135] The second threat encompassed by Count 3 on the indictment is in respect of words said by the accused to the complainant while the two were in the Walmart after leaving Yellow Point Park on May 15. While in the Walmart, the complainant testified that in response to her attempts to engage him in conversation, he told her that if she did not "shut the fuck up", he would punch her in the face.

[136] The third threat encompassed by Count 3 on the indictment is in respect of words said by the accused to the complainant as the complainant was about to drop the accused off at his residence after visiting Walmart. Here, the complainant testified that the accused said if she did not give her what he wants by the third date, he would force it upon her - the implication being that he would force her to have oral sex or sexual intercourse with him on the third date if she did not agree to it.

[137] The complainant was not shaken on cross examination with respect to her testimony about the words the accused used and her testimony was generally consistent on these points. It makes sense that the complainant was nervously trying to engage the accused in conversation at the Walmart following the MMA style chokehold at the park and after being grabbed forcefully on the way into the Walmart. She was likely terrified given these events and the knowledge she had that the accused possessed the box cutter style knife.

- [138] The accused testified that he had no recollection of anything out of the ordinary occurring at the Walmart and made a blanket denial of the allegations. As I have said before, the accused's inability to remember almost any of the details of those two days remains largely unexplained.
- [139] I find that the accused threatened to punch the complainant in the face while they were at the Walmart on May 15, 2022. Threatening to punch her in the face amounts to a threat to cause bodily harm because such an action would likely interfere with the complainant's health and well being in a more than brief or fleeting manner. In circumstances where the complainant and the accused met each other for the first time the day before, the accused had put the complainant in an MMA style chokehold earlier that day and had grabbed her forcefully by the arm on the way into the store, a reasonable person would consider that those words conveyed a threat of serious bodily harm. There is no indication that the accused was joking when he said these words. On the evidence before me, I conclude that he meant to intimidate the complainant.
- [140] I come to the same conclusion with respect to the third threatening statement which occurred in the car shortly before the complainant dropped him off at his residence. Once again, the complainant's testimony that the accused said that if he did not get what he wanted by the third date, he would force it upon her, was not successfully challenged on cross-examination. Once again, the accused has no recollection of anything that occurred in the car rides on either of those days. I find, beyond a reasonable doubt, that the statement was made.
- [141] In my view, the implications of this statement, when viewed in the context of the circumstances, amount to a threat to cause bodily harm. When the statement was made, the accused and the complainant were on their second date. While it is possible that the alleged sexual assaults occurred, I do not find that they did beyond a reasonable doubt. However, I do find that during the course of those dates, the accused asked the complainant to perform oral sex and engage in sexual intercourse and the complainant declined. In those circumstances, a reasonable person would objectively conclude that by saying that if the accused did not get what he wanted by the third date, he would force it upon her, that the accused meant to threaten to force oral sex or sexual intercourse upon the complainant if she did not consent to it by the third date. Such a threat clearly amounts to bodily harm. There is no indication that the accused did not mean to intimate or be taken seriously by the complainant in making these statements.
- [142] For the foregoing reasons, I find that the elements of uttering threats have been proven beyond a reasonable doubt in respect of the threat made to punch the complainant in the face and to force oral sex or sexual intercourse upon the complainant if she did not consent during their next date.

[143] Before concluding on this point, I wish to address the accused's submission that the complainant's failure to obtain assistance in the Walmart detracts from her credibility and the likelihood that the events occurred. The complainant testified that she was terrified at this point and that she went to the washroom with the intent of texting someone for assistance but found she had no service. I have already referenced the unfounded stereotype that sexual assault victims will take the first opportunity to flee their attacker. While I have not found that the sexual assaults occurred beyond a reasonable doubt, I acknowledge that the complainant's perception may have been that she was sexually assaulted earlier that day and the day before. In any event, it is reasonable that she continued to shop at Walmart and acceded to his request to pick up some food from a restaurant on the way home given her fear following the MMA style chokehold and the threat he made to punch her in the face. It is not unreasonable that the complainant went along with the rest of the date in the hopes that she could drop him off at his residence and then never see him again, as she informed him by text shortly afterwards.

DETERMINATION

- [144] It is possible that the accused sexually assaulted the complainant as she has alleged. Certainly, the accused's testimony did not raise a reasonable doubt in and of itself. However, these proceedings are not a credibility contest between the complainant and the accused. The burden is on the Crown to prove the accused's guilt beyond a reasonable doubt and that burden never shifts. The burden is a rigorous one.
- [145] The complainant's inability to distinguish between the factual difference of her two accounts of what occurred at Blue Heron Park raises a reasonable doubt about all of her allegations of sexual assault in this case. While it is possible that he did commit the sexual assaults as alleged, a possibility, and even a probability, is not enough to ground a conviction. While 100% certainty is not the test, the burden of proof beyond a reasonable doubt falls much closer to absolute certainty than proof on a balance of probabilities. To convict, the court must be sure that the events occurred as alleged by the Crown. After a careful consideration of all of the evidence, and applying the W.(D.) framework, I am left with a reasonable doubt as to whether the accused committed sexual assault on May 14 or May 15 as alleged by the Crown. Therefore, I must acquit the accused on those counts.
- [146] As discussed, I can accept all, some, or none of a witnesses' evidence. I have carefully considered the complainant's evidence in respect of the remaining charges and for the reasons I have given, I find that the Crown has met its burden of proving that the accused assaulted the complainant by choking when he applied the MMA style chokehold on the complainant. I also find that the Crown has met its burden of proving that the accused uttered threats to cause the complainant bodily harm while in the Walmart and while in her car shortly before she dropped him off at his residence; both of these occurring on May 15, 2022, at or near Nanaimo, BC.

[147] Mr. Lussow, would you please stand?

[148] On Count 1 - regarding the allegation of sexual assault, I find you not guilty.

[149] On Count 2 - regarding the allegation of assault by choking, I find you guilty.

[150] On Count 3, - regarding the allegation of uttering threats, I find you guilty.

[151] On Count 4, - regarding the allegation of sexual assault, I find you not guilty.

[152] You may be seated.

CONCLUSION

[153] I accept that it was likely difficult for the complainant to testify. I also accept that the complainant has participated in a very difficult process. She was subjected to a lengthy cross-examination. She was prepared to go to trial on occasions before this. She was clearly upset at times and expressed the difficulty she has had sleeping while recalling what occurred. However, I cannot reason that a complainant's evidence is sufficiently reliable merely because she has pursued a complaint and showed a willingness to undergo the "unpleasant rigours of a criminal trial": see *R. v. J.C.*, 2021 ONCA 131, at paras. 88-89.

[154] The complainant's character and her motives should not be impugned simply because she decided to write down the events as she recalled them and because her telling of those events evolved somewhat over time. My determination of these matters should not be taken as a finding that the complainant lied about what she perceived happened on May 14 and 15, 2022, nor should it be taken as a personal reflection upon the complainant. Rather, as I have explained, my determination is the outcome of the stringent standard of proof required in a criminal trial. Nothing more, nothing less.

"Majawa J."

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