

CANADA / JUDGMENT

R. v. M.A.

2022 BCSC 1973

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1973 R. v. M.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. M.A.,

2022 BCSC 1973

Date: 20220802

Docket: 31125-2

Registry: Cranbrook

Regina

v.

M.A.

Restriction on publication: Pursuant to ss. 486.4(1) of the Criminal Code, information that could identify the complainant , or the witness J.A. shall not be published in any document or broadcast or transmitted in any way

Before: The Honourable Justice Schultes (Appearance via videoconference)

Oral Reasons for Judgment

Counsel for the Crown appearing by videoconference:

D.A. Jardine, K.C.

Counsel for the Accused appearing by videoconference:

B.R. Anderson

Place and Date of Trial:

Cranbrook, B.C.

January 18- 21, 24-28 & February 22-25, 2022

Place and Date of Judgment:

Cranbrook, B.C.

August 2, 2022

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Introduction

- [1] The accused is charged with assaulting the complainant, his former spouse, between January 1, 2006, and September 16, 2015; sexually assaulting and causing bodily harm to her between January 1, 2010, and August 30, 2015; and sexually assaulting her with a knife between August 1, 2014, and August 30, 2015. The offences are alleged to have taken place over virtually the entire married life of the couple, with the final incident on August 28, 2015, the last night that they lived together.
- [2] This is the second trial in this matter. The first one resulted in an order for a new trial by the Court of Appeal (2021 BCCA 215).
- [3] The complainant's credibility was extensively challenged in this trial, based on inconsistencies between her current testimony and the versions of events that she provided in previous proceedings, as well as to her family doctor and another doctor in the same clinic. The Crown called evidence from other witnesses that was intended to support her testimony.
- [4] In his own testimony, the accused denied having committed any of the offences. In general, the theory of the defence is that the complainant made false allegations to deflect attention from her substance use problems, as they affected her parenting and the potential involvement of the Ministry of Children and Family Development (the "MCFD") in apprehending her children.
- [5] The basic chronology of events is not in dispute. The accused and the complainant began a romantic relationship in the fall of 2003 and married in 2006. They lived in several different homes in Cranbrook during their time together. They have three children, whose months and years of birth anchor some of the incidents that the complainant described: J. in July 2004, K. in December 2007, and L. in September 2011.

The Complainant's Evidence

The Assaults

- [6] According to her, the accused's assaultive behaviour began in 2006, when J. was two years old.
- [7] The first incident occurred during an argument about the fact that the accused had not done any packing for their upcoming move while the complainant was out, even though her mother had been looking after J. She said that he became angry, started throwing things in boxes, and then threw a glass candleholder (which she described as a square platform, with

a hole in it for a candle) at her, striking her above the left eye. It caused a welt, which eventually turned into a bruise. Describing the amount of force involved, she said that he had "whipped it" at her, but that it did not knock her over. The candleholder was very solid, and did not break after striking her and falling to the floor. She put ice on the injury, but did not seek any other medical treatment.

- [8] The accused had definitely been drinking before this incident, she recalled, because she found empty beer bottles in the kitchen. He apologized to her after it occurred.
- [9] She told her mother and her co-workers, all of whom asked her about the injury, that she had sustained it by running into a cupboard. In cross-examination, she agreed that she had told everyone that the injury had been caused in that manner, and confirmed that the injury she had suffered had been a bruise rather than a cut. In particular, she was able to remember what she had told other people because it was the first time that she had to give an explanation to cover up an injury from an assault. She also confirmed that J. was not in the room at the time it occurred.
- [10] In cross-examination, she agreed that in her second statement to the police in 2015, she had said she did not know what she had said to other people about how she had received the injury, and that J. was "right there" when the incident occurred. She also agreed that in 2007 she had told an MCFD official the candleholder had grazed her cheek and cut it.
- [11] The next incident did not amount to an actual assault, but is relevant as part of her narrative of the accused's behaviour. The complainant said that it occurred while they were still living in the same house where the first assault occurred. They were in the spare room of the house with J., when the accused began yelling at her. She crouched down, holding J., and the accused punched the wall above her head several times, ultimately putting a hole in the drywall that later needed to be repaired. He then left the house on foot, as they did not own a vehicle at that point. She did not believe he had been drinking before that incident.
- [12] The complainant described having received black eyes "lots of times" in these early years of their marriage.
- [13] The first one was inflicted shortly after the wall-punching incident, but before they had moved from that house, which they did at the end of the summer of 2006. In that incident, the accused hit her in the face once with his fist. She "sort of" fell to the ground, and ducked. She was scared, but he stopped at that point and said he was sorry. She was unable to recall what had precipitated this incident, or where in the house they were when he struck her. She also could not recall which eye was injured, but remembered being concerned about what other people would think when they saw her injury. She had to work the next day and she told her co-workers and her mother that J. had hit her in the face with a hard-cover book. By that next day, her eye was "pretty puffy" and starting to bruise. On the second day after the assault, she put some makeup on the bruise in an attempt to cover it up. It turned yellow eventually, and took about a week to disappear completely.

- [14] The next incident that she was able to describe specifically occurred after they had moved to a house on 4A Street, which was early in the fall of 2006, but before she found out that she was pregnant with their daughter K., in March of 2007. This house had stairs leading from the main floor down to the laundry room, with 12 to 15 steps.
- [15] She was in the process of taking the laundry downstairs and had gone about halfway down. The accused was yelling at her from the main floor. He came down to her, took hold of her shoulders, and was shaking her. She told him to leave her alone. He then pushed her with "a really strong force". She fell six to eight stairs to the bottom, onto a concrete floor, while still holding the laundry basket. She landed on her right side, and injured her right wrist and had bruising on the right side of her body. The accused came down and helped her, and told her he was sorry. He then went back upstairs, to the room where he usually played videogames. She went to the washing machine and cried for a while, before pulling herself together and going back upstairs.
- [16] Her wrist was puffy and bruised and a couple of days later she went to the doctor and found that it was sprained. She also had bruising in her right hip area. On the advice of the doctor, she and her mother found a wrist brace to help her wrist heal. She told the doctor that she had slipped on a toy on the stairs. She was afraid if she told the truth, the doctor would report it and she could "lose [her] son" (by him being apprehended by the MCFD). She gave her mother the same explanation.
- [17] There were some differences between her trial testimony about that matter, and the description that she provided at the preliminary inquiry in 2017, that emerged in cross-examination. In that earlier description, she said that she had been pushed "from [her] back" (that is, from behind), rather than the accused shaking her and yelling at her after she had turned around to face him, as she testified in this trial.
- [18] More generally, she disagreed that she had been given her statements to the police by Crown counsel to review before the preliminary inquiry. There was an admission of fact in this trial that she had been given them.
- [19] It was also put to her that at the preliminary inquiry she had testified that she had injured both of her wrists, rather than only the right one as she currently recalled. She was adamant that she had only referred to one wrist being injured in that previous testimony. Although she was initially contradicted by the transcript of the preliminary inquiry, there was an admission of fact in the trial, after both counsel listened to the DARS recording of it, that she had indeed referred to only one wrist in her testimony during it.
- [20] The complainant agreed that she had provided an additional version of this incident to an MCFD official, which was that she had slipped on a child's toy (she clarified she had been describing a ball) and fallen, that the accused had been sleeping at the time, and that she had woken him up so that he could drive her to see a doctor.

- [21] When she was asked in cross-examination to clarify the timeline of the assaults, she confirmed that the incident in which the accused had punched her in the face took place between the candleholder incident and the one in which she was pushed down the stairs. She then agreed that in her November 2015 police statement, she had not described any significant assault taking place between those two incidents, only that the accused would get angry and "push or grab" her. She explained that she had remembered a lot of things subsequently, and the statement had been given during a very chaotic time, during which she had been "trying to remember everything". In particular, she had received a lot of forceful punches to the face from the accused. She also said that she had not seen that statement to the police until the accused's counsel had cross-examined her on it.
- [22] During the period when J. was two years old and she was not yet pregnant with K., the MCFD became involved with the complainant and her family. The background to this involvement was that she had struggled with substance use earlier in her life, but had gone through rehabilitation when she was 20 and "cleaned up". She described having had her first slip from abstinence after the physical abuse from the accused began. She used drugs to cope with it, she explained, and as a result, was seeing a drug and alcohol counsellor. At that point, the abuse was "still happening" and she and the accused were trying to have a baby.
- [23] She disclosed to her counsellor that she abused drugs because of what she was experiencing in the home. The counsellor contacted the MCFD, and an MCFD official then contacted her. Her counsellor provided further information to that MCFD official that she was doing well and not using anymore, but expressed continuing concerns about what was going on in the home. She went in to see the MCFD official with J., and denied that any abuse was occurring. She testified that she did so because she was scared. Her understanding was that the MCFD file was then closed.
- [24] With respect to her struggles with substance abuse after that, she testified that her abuse was very rare. She wanted to use drugs, but continued to see her counsellor. She had "slip-ups", but not very often - "maybe one time," she initially testified.
- [25] She said that during her pregnancy with K., the accused engaged in an increased amount of controlling behaviour towards her, but did not physically assault her. Once K. was born, in December 2007, he resumed with "little things", such as hitting her, grabbing her, forcefully holding her down, and pushing her. She sustained a few more black eyes during this time.
- [26] After K.'s birth, the complainant no longer worked outside of the home, because it was more economical to care for the children than send them to daycare. She later began doing some childcare for others, as well for which she was paid in cash. She did not claim those amounts as income on her tax returns. She explained that she was not paid a lot for this service, describing it as "just a little bit to help with groceries" and that she had "no clue" of the amount that she earned per month.

- [27] In re-examination, she estimated that in 2015 it was about \$3,000. The accused would take this cash and sometimes put it in their joint bank account. Later in the relationship, when she was planning on leaving, she had a separate account and would put some of the money she earned into it.
- [28] The main account they used during their relationship was a joint one, for which they both held debit cards. The accused would sometimes take her debit card away from her when he was away from home at his job at the mine - he did not want her buying anything while he was gone.
- [29] She did the grocery shopping with her mother when he was at home from work. If they needed other things, her mother would take her out and would pay for them. Her mother contributed financially to the family on an ongoing basis. According to the complainant, these contributions were "not a gift, but I did not pay her back." She and the accused had money, but she was unable to access it. He would get angry when she bought things like clothes for the children, and her mother would end up paying for them so that it did not cause a fight.
- [30] Her mother also helped her by taking the children to school and their activities, and by taking her to various appointments.
- [31] More generally, she said she probably saw her mother every day.
- [32] Once J. started school, she was referred to a social worker at his school who, despite the complainant's denial that there was any abuse going on in the home, expressed concerns about it and referred the matter to MCFD again. Another official visited their home. As a result of this intervention, she took the children and went to stay with a friend for a few days. The accused contacted her there and asked her to come home, promising that things would be different in the future. She believed him and agreed to return home.
- [33] At this point, the nature of his assaultive behaviour changed to sexual acts, the complainant testified.
- [34] The first such incident occurred a few days after she had returned home, in the evening after she had put the children to bed. She had turned on the TV in their bedroom and gotten into bed, when the accused came into the room. He shut the door, and started yelling at her. He then got on top of her. She told him to get away from her. She pushed him off and went towards the door. He grabbed her from behind, threw her on the bed, and held her down with the weight of his body. He then held both of her wrists over her head with one hand, removed each of their pajama bottoms with the other, and had sexual intercourse with her. After it was over, he went to his side of the bed. She put her pajama pants on, got under the covers, and waited for him to go to sleep, after which she took the baby monitor with her and went to sleep in J.'s room.

- [35] The complainant suffered bruising to her wrists where he had held her forcibly, but did not seek any medical attention. The accused made no comment to her about what he had done, either the next day or subsequently. She believed that this incident had occurred between September 2009 and March 2010. She recalled there being snow on the ground at the time, so it was probably later than September, she said.
- [36] Her ability to describe this first sexual assault by the accused in her testimony differed from the preliminary inquiry, at which she had said there had been so many such incidents she could not say which one had been the first. In response to the suggestion in cross-examination that her memory had not improved over time, she said that there was actually "more stuff," (by which I took her to mean more details of the alleged offences) that has come back to her over the years.
- [37] The complainant testified that after this first incident, forced sexual intercourse by the accused became common - "weekly or more." In the beginning, she would resist his attempts, but ultimately gave up that approach because it would "hurt worse" if she fought back. In general, when the accused came into the bedroom and closed the door, that signified to her that some type of forced sexual activity would be happening, because, they normally slept with the door open.
- [38] She saw her family doctor in relation to severe vaginal pain and abnormal bleeding (which she attributed to the forced intercourse, I infer). She did not tell the doctor what was happening, once again because of her fears that she would lose her "children and family". Her doctor then asked her if she would like to speak to a female doctor and have her do the examination. That was how she came to have her current family doctor, Dr. Shilhan.
- [39] The complainant testified that she found out that she was pregnant with L., their third child, in December 2010. She did not want to have the child because he had been conceived as a result of one of the sexual assaults. She was planning on terminating the pregnancy, she said, but somehow the accused found out that she was pregnant and insisted that she keep the child. She did not feel that she had a choice in the matter, because he said that if she did not continue with the pregnancy, he would kill her.
- [40] The complainant's attention was directed to a conflict between this testimony and Dr. Shilhan's notes about her reaction to finding out that she was pregnant with L. The thrust of her testimony was that she found out about the pregnancy from the doctor in late December during a visit in which she was seeking a particular form of birth control, that she was devastated by learning this news, and did not want to keep the baby. As I have described, she referred to the accused threatening her so that she would not terminate the pregnancy. In contrast, it was put to her that Dr. Shilhan had noted that she was aware of the pregnancy from having done three home pregnancy tests herself, and that she told Dr. Shilhan that her partner was aware of the pregnancy and that she wanted to continue with it. There was no reference in Dr. Shilhan's notes to the context being a request by the complainant for birth control. When these notes were put to the complainant, she said she did not recall any home

pregnancy tests.

- [41] In re-examination, she was shown notes from her visit to Dr. Shilhan on January 7, a bit more than a week later. She agreed that, as indicated in the notes, she had expressed mixed feelings about the pregnancy at that time, because of the non-consensual intercourse that led to it. She did not wish to terminate the pregnancy, she told Dr. Shilhan, but felt trapped.
- [42] The complainant testified that once the accused found out she was pregnant, he began to force anal sex on her instead of vaginal sex. This happened "a lot", she said, from early 2011 onwards.
- [43] She became very depressed during this pregnancy and was placed on an antidepressant medication by Dr. Shilhan. By this point, she was able to disclose the abuse that was occurring to the doctor.
- [44] As part of her depression, she engaged in cutting herself multiple times. This involved using a safety pin or push pin to scratch her arms. Dr. Shilhan asked her why she was doing it. She usually kept the scratches covered so her family and friends did not comment on them, but a few friends did notice.
- [45] The complainant described an additional non-sexual assault occurring when she was in the second trimester of that pregnancy. Her mother and stepfather had brought the accused's mother, with whom he had a troubled relationship, over to their house for a visit. The complainant was aware that his mother was coming over, but could not recall whether he was aware of it.
- [46] When the accused's mother arrived, he became very angry, and was yelling. He rushed towards his mother. The complainant was standing beside the fridge in their kitchen area. As the accused passed her on the way to his mother, he pushed her in the shoulders very forcefully, with one hand. This caused her to fall into the fridge and end up on the ground. The accused continued on towards his mother, but the complainant's stepfather grabbed him before he could reach her. The accused's mother left as a result of his hostile reaction and the complainant's mother left to find her.
- [47] The complainant was "alright" physically, but felt like she was having contractions, as well as an anxiety attack. She was not feeling any better by the time her mother returned to the house, so they went to the hospital. She was given Ativan, subjected to some tests, and allowed to go home once they had checked on the wellbeing of the baby. When she returned home, the accused did not say anything about having pushed her, such as providing an apology for having done it.

- [48] When L. was nine months old, the complainant ended up in a psychiatric unit, because she wanted to kill herself. She had a hard time forming an attachment to the child - because she wanted to be dead, she did not want him to rely on her to feed him. She stopped breastfeeding him at that point. This differed from her first two children, whom she breastfed until they were toddlers.
- [49] She was permitted to go home from the psychiatric unit, rather than being hospitalized, because she had a safety plan that involved seeing her doctor every day. She also usually saw her counsellor every day. The accused was angry with her for going to the psychiatric unit, and was concerned whether she had told them what he was doing (by which I infer she meant the assaults). In addition to this specific incident, he would mention constantly that if she told anyone about the assaults, he would kill her. She said that she believed him.
- [50] The accused continued having forced vaginal and anal intercourse with her after L. was born. When she was asked if they were having any consensual sexual contact as well, she said that she did not think so.
- [51] These sexual assaults continued into 2013. By then, the accused had gotten a job at the mine in Sparwood, at which he worked a shift schedule of four days on and four days off. The complainant said that the sexual assaults would occur whenever he was home on his days off, from once to three times during such a period.
- [52] At times, she contemplated leaving the relationship, and discussed that issue with Dr. Shilhan.
- [53] August 2014 was the first time the accused used a knife in the actual sexual aspect of an assault on her, the complainant testified. There ended up being two such assaults. These occurred after L. was born, and they had moved to a house they had purchased. Until that point, they had rented their previous homes.
- [54] Before then, the accused had held knives to her throat when he was threatening her or, as she later added, in the course of committing a sexual assault of the kind she had previously described. In the latter situation, there were marks on her neck as a result of him holding the knife there, although they did not require medical attention. There were too many assaults that generally involved a knife for her to remember them all, she testified.
- [55] The knife in question was a Gerber brand flip-knife, with a silver blade and a black handle. The blade was three to four inches long, and the handle was probably the same length. She had been with the accused when he bought it from Canadian Tire. When he was dressed, he typically kept it in his pocket. When he was wearing his pajamas, it was kept in his bedside table. She identified a photo of a knife that she said was similar in appearance. In cross-examination, she added that it only had a blade on one side.

- [56] She was able to situate the first incident involving a knife as having happened before a family wedding in Ontario in September 2014, which she and her entire family from Cranbrook attended together.
- [57] Like the previous sexual assaults, it occurred when she was in their bedroom at night. She was clothed at the time. The accused was sitting on his side of the bed. She heard his bedside table drawer open and saw the knife in his hand. He pointed it at her. She could not recall whether he said anything. He started to take off her pants, and had already taken his own pajama pants off.
- [58] After her pants were off, he spread her legs and she saw him putting the knife towards her vagina. She looked away. At that point, she felt something inside her. It really hurt, and felt "kind of" cold. It was not inside her for long. He stopped, put the knife on his table, and told her to roll over. He then had anal sex with her. After the anal sex ended, she waited for him to fall asleep and then went to the bathroom. She noticed that some blood was on her leg. When she wiped it, she saw that it was coming from her vagina.
- [59] When she was describing this incident, the complainant explained that, whenever these sexual assaults were being committed, she tried to go "somewhere else" in her mind and "let it happen, stay still, don't move, do whatever he wants."
- [60] In cross-examination, she said she did not know whether it was the blade or the handle that had been inserted. She resisted the suggestion that it must have been the blade, because otherwise the accused would have to have held the knife by the blade. She pointed out that it had not been inserted very far, so he could have been holding a portion of the handle (the part near the blade, I took it). She ultimately expressed her recollection as being that he had a knife and "did something with it." She assumed that it had cut her vagina because she had an infection there afterwards. She was hesitant to offer an estimate of how long the knife had been inserted, but eventually said "a few minutes". She was not watching while he used it, but instead looked away towards the closet and, as she had mentioned, "thought of other things". She clarified that it was not as though he was "sticking it in and out, ramming it in or anything like that." He was whispering "not nice things" as he used the knife, she elaborated.
- [61] She waited until the accused had returned to work before she sought medical attention in relation to this incident. Before that, when she told him that it really hurt and that she needed to go to the doctor, he told her she was not allowed to do so. His next work shift was not for a couple of days. By then, she had a fever and could hardly sit or walk. Her friend Devon Rae, drove her to the doctor. She was fairly sure she saw Dr. Shilhan in relation to this incident, although she also had some recollection of Dr. Van Rensburg, another doctor at the clinic, and indicated that she had seen him at some point, as well.

- [62] In fact, the accused's counsel presented the complainant with records showing that she was seen by Dr. Van Rensburg on August 19, and that he had recorded she was having trouble with pain in the anal area. She agreed that she had told him that, and that it was from what she described as the "constant rapes". She added that she was "not completely comfortable" with Dr. Van Rensburg, "did not even really know him", and that he was not someone with whom she discussed what was going on in her life. She really wanted to see her own doctor.
- [63] She agreed that she had not reported any pain in her vagina, or any of the severe associated symptoms that she had described in her testimony, to Dr. Van Rensburg. She explained that this was because she was scared to do so. However, she agreed that she had advised Dr. Van Rensburg, as recorded in his notes, that she was "forced to do sexual acts with her husband which she does not want to do."
- [64] In her subsequent visits, she did not tell Dr. Shilhan about the use of the knife right away (once again, because she was too scared to do so), although she did tell her about the sexual assault. Dr. Shilhan referred her to the hospital to be examined by a surgeon there, who by coincidence happened to be Dr. Shilhan's husband.
- [65] By the time she saw the surgeon, she was in excruciating pain. He examined her vagina and anal area and prescribed her antibiotics and Tylenol 3s. Either Dr. Shilhan or the surgeon also advised her to take baths with Epsom salts, which she found very painful. According to her testimony, she ended up on bed rest, with her mother and sister looking after the children. When the accused returned home from his shift, he was concerned about whether she had told anyone about what he had done, and she assured him that she had not.
- [66] When she was referred to Dr. Shilhan's records for that period, she confirmed that in her visit on August 21, she did not tell Dr. Shilhan about a sexual assault with a knife by the accused. There was also no reference in the notes to any complaints relating to her vaginal area, only to her anal area. There was no reference to vaginal pain in her visit to Dr. Shilhan the following day either, although she responded that most of her visits related to vaginal or anal pain, so the doctor probably had not written what she said down. She had told Dr. Shilhan there was some bleeding from her vagina, but she was not sure if it was her menstrual period. In keeping with that Dr. Shilhan had recorded "? bleeding/menses."
- [67] In re-examination, it was brought out that she had attended for a visit on August 25 and described to a Dr. Quinn that she had had "anal/vaginal pain" for the past week and difficulty sitting, as well as fevers on and off. She also described something bursting in her vagina three days before, with a smelly discharge, after which she felt better.
- [68] The complainant also agreed that during the visit to Dr. Shilhan on November 13, 2014, she had told the doctor that her husband "used a knife in her anus in late August." She said that it could have been the first time she told Dr. Shilhan about the incident and that she "finally felt safe" doing so.

- [69] It was about three weeks after this first incident involving an insertion of the knife that the family trip to Ontario for the wedding took place. The complainant said that she was uncomfortable during the travel (due to the injury caused by the knife, I took her to mean) but that it was manageable. No assaults occurred in Ontario, because they were all staying at her grandmother's house, which was full of people.
- [70] She testified that when they returned, the state of her relationship with the accused was "not good". In the last few months of 2014 and into 2015, the sexual assaults were still happening "constantly". She did not think that she had consented to any sexual activity with the accused during that period, but could not recall for certain.
- [71] In February 2015, she decided that she needed to get out of the relationship somehow. Through Victims Services at the RCMP, she was put in contact with an organization that offered safe housing. Because she needed a three-bedroom unit, she had to go on a waiting list and she was told that it could be a while before such a unit came up. She also did safety planning with Victims Services in the mean time.
- [72] At the beginning of August, she received a call from the safe housing organization that a place was available. However, she was scared to make the move, and as a result turned it down. Despite this, around August 7 she and the accused effectively separated.
- [73] In her description, the catalyst for this development was the incorrect accusation by him that she had taken \$10 from his wallet. After he left for his shift at the mine, he started sending her text messages to the effect that he did not want to be together anymore. He also told her that when he got back from his shift, he would be moving down to the basement. She told him that she did not want things to be over, but explained in her testimony that she was "scared financially" (of ending the relationship, I infer) because she had no money.
- [74] When he returned on August 9, he reiterated that she and the children would live upstairs and he would live downstairs. He did not address how the money would be managed between them.
- [75] That same week, she received a call that another three-bedroom unit in the safe housing facility had become available. She decided that she needed to get out of the relationship. She told her family and close friends about this, but not the accused. She was scared of him knowing when she was leaving, because he might "do something" to her. She settled on a moving date of August 29, and informed those people who were going to help her move.
- [76] In advance of that date, she started boxing up things that she would not be able to take to the new house, so that they could be stored at her mother's house. At this point, the accused was aware that she was moving out, just not the specific date. She said that he was out partying all the time and did not seem to care.

- [77] On the morning of August 28, she asked him to stay away from the home because she had things to do there and did not want him around. He agreed, but asked if he could come by at 4:00 p.m. to get his work things ready, because he had to leave for his shift the next day at 4:00 a.m. She agreed to his request. She left with the children before he arrived, and returned home at 6:00 p.m. He was not there, and she understood he had other plans for the evening.
- [78] After she went to bed, she heard the accused come home. She knew this because the garage door made a loud noise when it opened and closed. She heard him coming up the stairs and thought perhaps he was going to the kitchen. She then heard him say something to J., whose bedroom was near hers on the upper floor and who was still awake. She could not make his words out, but they might have been him telling J. to go to sleep.
- [79] He came into her bedroom and shut the door. He went into the bathroom, turned on the bathroom light, and then came back and sat on the bed. He then came over to her side and she could see that he had the knife. She could also smell beer on him. He told her that "if I just do it, he'll be quick."
- [80] She was frightened and thought of grabbing her phone, but was worried about something else (something even more serious, I took her to mean) happening. She was under the covers, and he was rubbing her leg with his hand. He told her to take her pants off (which I infer were pajama pants), took the covers off and removed her pants, then removed his own.
- [81] She was on her back. He stuck the knife in her vagina again as he had the previous time. She could feel it inside, and said it was not there for long. He then reached over and placed the knife next to her phone. He told her to roll over and he performed anal sex on her. After he was finished, he put on his pants and left the room. She heard him go downstairs.
- [82] She agreed that in her 2015 police statement, she had described him using the knife on her before removing his own pants and having anal intercourse. When she was asked if that actually happened, she initially responded that she did not know, but that she was "pretty sure now" that he had removed his pants between taking the knife out and pointing it at her and placing it in her vagina.
- [83] Her description of this event at the preliminary inquiry also differed from her trial testimony in some details. In that version, the accused said nothing to her once he entered the room - he was "really quiet". She told him to "just leave me alone." In that version, at one stage he placed the knife on the seat of an exercise bike that was in the bedroom. She testified about wondering whether she could "just grab it and hurt him with it."
- [84] Returning to her narrative in this trial, she testified that after the assault, she went to the bathroom and saw some blood, as she had the previous time. She had a shower, and noticed more blood coming down the side of her leg, from her vagina. After the shower, she lay in bed, waiting until she heard him leave for work. She was in a lot of pain so she took Advil or Tylenol, and continued to take them throughout the day which, as I have mentioned, was

her moving day. In keeping with her previous testimony, she said that she did not think that the accused was aware of the fact that she was going to be moving on that particular day.

- [85] In cross-examination, she confirmed that J. and L.'s bedroom was right across the hall from hers. She explained that in the summer months the children did not have set bedtimes, and generally went to bed between 9:00 and 11:00 p.m., unless they were tired and wanted to go earlier. J. had a routine of reading in bed on his own. She agreed that according to her version of events, the accused had sexually assaulted her with a knife shortly after telling J. to go to sleep across the hall, although she pointed out in response that there was a closed and locked door between them and J. at that point.
- [86] As she had for several other details in her evidence, she conceded that she had not mentioned hearing the accused speak to J. before this assault until her testimony in this trial. She explained she was able to "remember more about that night now than [she] did then" and that "more things come up" every time she has to come to court and testify. In particular, she referred to "how counselling works, how domestic violence works and how suppressed you are at the very beginning." After she initially left the relationship, she did not want to think or talk about anything relating to it.
- [87] The accused's counsel pursued the absence of any previous mention of this detail by having the complainant confirm that at the first trial, J. had testified after her, and she been present in court for his testimony. She explained spontaneously that after hearing J. testify that the accused would come into his room, she remembered the accused saying something to J. on that night. She did not accept the suggestion that she had added that part of her testimony to fit with J.'s, and maintained that she was saying it only because it was the truth.
- [88] She was also confronted with a text message exchange with the accused that had taken place on the date of this last alleged sexual assault. In the messages, the accused told her that he was going to stop by the house to pick up his "work stuff" and asked her what time would be good for him to do that. After receiving no reply, he said he would be there around four o'clock, and she eventually replied, "Okay." As I have mentioned, the complainant had testified in direct examination that she had spoken to him that morning and asked him to stay away from the home. She agreed in cross-examination that she had not mentioned asking him to do that in the first trial. She did not accept the further suggestion that she had made that evidence up to explain the accused's text asking to stop by the house, which would have contradicted her claim that he was still living at the house by then, and sexually assaulting her on an ongoing basis. She also accepted that she had said in the first trial that she could not remember whether she had been home when he came by, in contrast to her evidence in this trial that she had not been. She agreed this was an instance of her memory improving since the first trial.
- [89] Another potential contradiction of the complainant's testimony that the accused was still living in the home as of the last sexual assault was provided in an entry in Dr. Shilhan's notes from August 27. The doctor recorded her as stating that she had asked him to leave "a few

days ago" because he had threatened her, and that he had left and "not returned home since." In response, the complainant clarified that he had returned home on the night of the 27th and had not been gone for more than two days by that point. She agreed that she had not provided this evidence previously, but added that she had not been asked, although in the first trial, she had rejected the suggestion that he had moved out on the 20th. Later in her testimony, she added that he was "always coming and going" during this period, because he was out partying all the time.

- [90] As I have previously summarized, the accused was to start his four-day work shifts the next morning. She texted him (after the sexual assault, I infer) and asked him not to come home between the end of his two days of day shifts and the start of his two days of night shifts.
- [91] During the move the next day, she was in too much pain to take part physically in it, so she was just telling the people who were helping her what to move, and minding the kids.
- [92] She did not seek medical attention for her vaginal injury right away. She saw Dr. Shilhan a couple of days after the move, but did not tell her what happened at that point, although she did eventually.
- [93] After about a week, she had to go to the hospital, and was given intravenous antibiotics over two days and Tylenol 3s. She then spent several days in bed recuperating. It was much worse than the first time the knife was inserted, she testified, because she waited longer for medical assistance.
- [94] In cross-examination, the complainant agreed that when she saw Dr. Shilhan on September 1, she did not mention any vaginal pain, or any problems with her anal area for that matter. Nor, as I have summarized previously, did she refer to any sexual assault. She explained that she was embarrassed about what had happened. In addition, the pain from the injury was getting better and she "didn't see the need." However, as she continued to unpack in her new home, the pain began to get worse.
- [95] She was not prepared to accept that she had told an emergency physician on September 5, and Dr. Shilhan on September 10, that her husband had used a knife in her rectum and her vagina. She maintained that she had told them that the knife had been used in her vagina, and that she had then been subjected to forced anal sex, as she had described in her testimony.
- [96] With respect to medical assistance in relation to the forced anal sex in general, the complainant said that she was not always able to submit to an examination of that part of her body, either because it was too painful when her doctor attempted to conduct it, or she was in a state of mind where she did not want to be touched.

- [97] The accused texted her on September 1 to ask if she had moved out. He also told her that he would not be able to continue living at the house and pay her child support. He phoned her as well, and she described him as being quite angry that she had moved out. He told her that he knew that she had left and that "he saw it in my book" - a notebook in which she had begun writing down her plans to leave earlier in the year, which she stored under high school art supplies in her bedside table.
- [98] She did not communicate with him further once she had moved to the safe accommodation.
- [99] Shortly after moving out, she began family law proceedings. There was an appearance date in those proceedings scheduled in Provincial Court for October 28, 2015.

Other Credibility Issues

Substance Use

- [100] In support of the defence theory that her allegations were made to deflect attention from child protection investigations into her substance use problem, the accused's counsel explored the origins of that problem in more detail.
- [101] She testified she began using marihuana as a 12-year-old and cocaine as an older teenager. She described herself as having a significant problem with substance use. She was required to leave her father's home because of it and was convicted as a youth for her participation in a group assault, albeit to a lesser degree than the two other offenders. She said she had been too "drunk and high" to remember the details of the assault.
- [102] After coming to B.C., she participated in a drug treatment program in Vancouver for several months in early 2003, before she and the accused began their intimate relationship. She had what she described as her first relapse from sobriety in the fall or winter of 2006. She described herself as being very high and was sufficiently concerned about her condition that she placed J., who was about two years old, in his bedroom. She denied the suggestion that she had locked him in, but later agreed that she had told the police in her second statement in November 2015 that she was "so messed up one night [she] had to lock J. in the bedroom."
- [103] The MCFD investigated the incident and she was required to come in to speak with a social worker. In response to the suggestion that the MCFD would be concerned about any future substance use, she said that the social worker had closed the file without saying anything of that nature, but the possibility of MCFD being concerned did cross her mind.

[104] She said that, after that, her relapses consisted of smoking marihuana "here and there", as she put it, and not taking prescription medicine in the manner prescribed, including a deliberate overdose in 2016. She rejected the suggestion that she had a drug dealer as such, but rather obtained the marihuana from a friend. She maintained that she did not return to using cocaine. When she was asked if she had engaged in any binge drinking in the post-2006 period, she responded that she "might have had social drinks here and there."

[105] Later in cross-examination, she qualified this assertion somewhat with respect to cocaine use, explaining that she did not use drugs or alcohol while she was pregnant or breastfeeding which occupied seven or eight years of the period in question, but acknowledging that she may have had some "slips in there", and that she did not always cope well with what was happening to her.

[106] When the accused's counsel put her previous unequivocal response about any cocaine use after the 2006 relapse to her, she said that she did not remember, and if she had used it again, it was "like one time." She explained her initial response by reference to the fact that she was exhausted on the first day that she testified in this trial.

[107] Her subsequent response with respect to the binge drinking in that period was that she did not remember engaging in it, "but if it happened, I guess it happened." She gave a similar response with respect to the suggestion about blacking out from drinking. She was unable to recall any incidents in which she had drunk so much that she was unable to remember having injured herself afterwards.

[108] The accused's counsel then confronted her with statements to Dr. Shilhan, as well as to doctors filling in for her, in which she admitted:

- cocaine use, once on each occasion, on March 7, May 28, and August 2, 2012;
- using benzodiazepines and Tylenol 3s inappropriately, on October 5, 2012, (she explained that this had been for a short period of time, or perhaps only once, in conjunction with alcohol, leading her to ask Dr. Shilhan not to prescribe these medications to her anymore);
- cocaine use two or three times during the two months preceding April 5, 2013;
- being unable to remember the source of a knee injury sustained about two weeks previously because she had been drinking at the time, on July 11, 2013;
- cocaine use once in the last month, on February 11, 2014;
- drinking 12 to 14 drinks and blacking out during the weekend of June 26, 2014;
- snorting a Tylenol 3 tablet, on September 10, 2014;
- a return to using drugs (which she explained meant marihuana, nightly before bed to relax) and alcohol, on March 17, 2015;

- drinking too much alcohol, smoking marihuana, and using a small amount of cocaine the preceding weekend, on June 4, 2015;
- being out drinking and using marihuana on four days; and using cocaine once, on July 30, 2015; and
- snorting Tylenol 3s "which she got from her dealer" on the weekend on September 14, 2015, in response to which she reiterated that this so-called dealer was no more than a friend of hers.

[109] More directly related to the alleged motive for her allegations of assault that the defence imputes to her, the complainant agreed that during an appointment on March 19, 2012, she had become angry when Dr. Shilhan responded to her disclosures about drinking by saying that the MCFD would need to be contacted, although the doctor ultimately advised her that she would only do that if there was a concern about the children's safety. While she agreed with the suggestion by the accused's counsel that she knew that MCFD might get involved in relation to the specific matter of her drinking and drug use, she stressed that Dr. Shilhan had also discussed the MCFD being involved because of the abuse she had suffered from the accused, which the MCFD were also aware of.

[110] With a qualification about the periods in which she was pregnant or breastfeeding, she accepted the accused's counsel's suggestion that, in fact, she was using drugs on and off for years during her relationship with him. She denied the suggestion that she considered herself to be "an addict" as of the following winter of 2015. She was then directed to a passage in her November 2015 police statement in which she had described herself using that term, and had told the police officer that as a result, "I want to use so bad right now", although she was clean at the time and was not going to "mess that up" by doing so.

Communications Relating to the Sexual Relationship

[111] A further issue that was pursued in cross-examination, solely on the issue of credibility, was the extent to which there had been any consensual sexual contact with the accused during the time periods in the indictment. Several passages from her testimony from the first trial in which she had testified that there had not been any such contact were brought to her attention. When the accused's counsel suggested that there had been none from 2010 onwards, she answered, "Not that I'm aware of, no". Later in her cross-examination, she said she believed that her previous testimony that there had been no consensual sex after 2010 was true, but, "there may have been the occasional time, but I honestly don't know. There was so much times that he raped me that I don't even remember when there would have been consensual sex." She added that there were times when she tried to keep things "safe and good for herself" that could have been considered consensual. She referred to "a lot more stuff" having come up since the first trial as a result of her involvement in counselling, but ultimately agreed that her statements in the first trial had been true.

- [112] She also confirmed that her position with respect to the crucial period of August 2015 was that she wanted to escape the family home and that, when the accused was at home, he was constantly sexually assaulting her.
- [113] Against that background, the complainant was shown a series of text messages that she exchanged with the accused on August 20, 2015. This evidence of communications between the couple about their sexual activity and the complainant's statements on that issue to care providers, which were admitted following a s. 278 application, do not engage the twin myths that she is somehow less worthy of belief or more likely to have consented to the alleged sexual assaults because of the sexual activities that she described. The sole purpose of tendering these communications was to contradict her evidence on the nature of her relationship with the accused around the time of the alleged sexual assault, including her wish to leave the relationship.
- [114] These communications began with a discussion about the accused having accused her of taking \$10 from his wallet and segued into a declaration by him that he wanted to separate, to the extent of moving down to the basement (I referred to this exchange in my summary of the complainant's basic narrative).
- [115] Then, in response to his statement that she hated him, she denied it and said, "I thought we worked through all this last weekend and we're doing better. I was feeling really good about us[.] Was looking forward to you being off." She also referred to having asked her mother to look after the children so that while he was on holidays they could go to a restaurant in Fernie that he had mentioned.
- [116] In cross-examination she characterized these communications as "trying to keep the peace as best [she] could." She elaborated that he had been angry with her about something after her sister's wedding, which had taken place on the first Saturday in August. Her comment about working on their relationship arose from the fact that after that disagreement, she had received the call that a spot in the safe housing facility was available for her and the children to move into. She got scared and turned it down, as I have mentioned, at which point she "tried to fix things" (in the relationship, I infer).
- [117] Returning to the text messages, she went on to deny that she had previously said she was not attracted to him, and emphasized that she loved and was attracted to him. She also denied that sex with him was a "chore" and reminded him that she had told him previously that she would work on it with him. At the response to counsel's suggestion that they were indeed "working on their sex life", the complainant responded, "Of course, yes."
- [118] Further messages from her in this chain in the same vein include telling him that he was hurting her and the children by separating; "I don't want us to be over I thought I made that clear a week ago"; that they were doing better after "that huge fight"; "I thought we got a lot out and were working on everything"; "So you just don't love me anymore[.] I can't believe you are doing this to me"; and, " [W]e are working on our sex life." The complainant agreed that she had sent these various messages, but expressed the belief that the accused had sent

responses to them that were missing from the printed version that was presented to her, and later said she was sure that he had replied. These messages had not been taken from her phone, she said, as she had deleted everything involving him from it, although the prosecutor in the first trial had been able to find her messages and had photographed "a couple of pages" of them.

- [119] Later in the cross-examination she said she did not want to leave the relationship, explaining that, "I was scared to leave I was financially dependent on him."
- [120] Along the same lines, she was shown a report of a psychiatrist whom she had seen in 2012. She confirmed that she had told the psychiatrist that, at times, her husband forced sexual intercourse on her and was physically violent with her, but that at other times she was in a more "accepting mood", "willingly engage[d] in sexual encounter" and derives enjoyment from it. She agreed that this meant that at least as of 2012, she was still having consensual sexual relations with the accused. However, later in her cross-examination, she took the position that she was "probably just saying that" when she spoke to the psychiatrist about her sexual relationship with the accused. She had not wanted to be at that session with the psychiatrist, and was terrified both of the accused and the "system".
- [121] Next, the complainant confirmed that on July 27, 2015, during a text message exchange with the accused as he was on his way home from work, she had written that, after making homemade pizzas for dinner, she was going to "sex you up tonight." After he responded with a smiling face emoji, the next message from her was, "I was just way too tired last night. Honestly." She maintained once again that there were missing pages in this exchange from him, in which he had raised a concern that they had not had sexual intercourse the previous evening, despite his wish to do so. She later explained that she was basing her belief that there had been intervening texts from him on the unlikelihood of her offering an explanation about the previous evening immediately after he sent the smiling face emoji.
- [122] She also pointed out that if the accused was returning from a work shift when he texted her (which is indicated by his reference to being in Hosmer, an area along his route home), then he would not have been home the night before for the issue of sexual intercourse between them to have arisen - he stayed over in Sparwood during his shifts at the mine. She initially maintained this was true even if, as suggested by the accused's counsel, he had been doing an eight-hour mining rescue training shift before the start of his usual four days of work, but she eventually conceded that it "could be possible" that he had been driving home from such a shift. To solidify this point, she agreed that a text message at 6:38 the following morning, during which he had indicated he had arrived in Sparwood, would have been just before he started his shift. More generally, she stressed that her reference to forthcoming sexual activity with him in these texts was just a further example of how she "stayed safe" in the relationship, and that other text messages from her to the same effect could probably also be found.

[123] In addition, her family members were visiting from Ontario for her sister's wedding at the time of these messages, and so she was "just trying to keep things calm and good" and "keep the peace in my home so my family didn't see how insane it was." However, she also said that the accused would "be nice to me when we have company" and would not "rape me while my dad's sleeping in the next room", which could be understood as indicating that the presence of her family, rather than unwillingly engaging in sexual activity, was the means by which her safety was being preserved at that time. Ultimately she asserted, as a more general proposition, that her sexual relationship with the accused in the summer of 2015 was not consensual, but rather a matter of safety.

Financial Control

[124] The complainant accepted the proposition that she was the one who was responsible for paying the family's bills out of their joint account, which she did online because the accused did not know how. He also put her in charge of budgeting, although he frequently refused to follow her advice about how much money he could spend while he was away at work, which resulted in them running short of money. She agreed that she had never included the detail of the accused taking her debit card with him on his work shifts so that she could not use it until her testimony in this trial, although she said it had not been brought up before, and maintained that this was why her mother had to make purchases for her. If she had gone to the bank for a replacement card, there would have been "repercussions", (from he accused, I took her to mean).

[125] She denied the suggestions by his counsel she had ever had her own separate credit card (as opposed to a secondary credit card under an account held by the accused), or that she had accumulated enough debt on her own card that they had to get a consolidation loan. In re-examination, she explained that, in 2015, before the end of their relationship, they had obtained such a loan for various joint family debts, such as a truck loan and their line of credit.

Motive to Obtain Custody

[126] She rejected the general suggestion that, once the relationship was over, she made these allegations of assault to the police to ensure that she obtained custody of the children. She pointed out that she already had full custody, through the application in the family proceedings, before she spoke to the police. She explained in re-examination that she continues to have full custody and full exercise of parenting rights, although the accused has been provided with opportunities for supervised parenting and contact with the children by letter in the ensuing years.

[127] She agreed that at the start of her first statement to the police she had referred to wanting to obtain a protection order, including the ability to restrict the accused's contact with the children. She explained that she was terrified about the conduct by him that she was about to report (with respect to the possibility of retribution from him, as she described in re-examination) and that the children were also scared, and also wanted such an order.

Potential Supporting Evidence

Photographs

[128] In her direct examination the complainant was shown three pages containing copies of photos of injuries to her face, which were kept by Dr. Shilhan. The first one showed an injury to her cheek below her right eye. It was taken by Dr. Shilhan on a date that she could not recall. She also could not recall how, in particular, she had received that injury. The second page contained four closeup shots of an injury to a similar area, which she had taken herself in April 2014 and then provided to Dr. Shilhan. This injury had occurred when the accused pushed her into the sharp corner of the bed, she said. The third page showed a closeup of bruising below her right eye. This photo was printed on Dr. Shilhan's letterhead. It was caused when the accused punched her in the face. She was unable to advise when it was taken.

[129] These photographs were authenticated as part of Dr. Shilhan's records in her testimony.

Medical Evidence

Dr. Shilhan

[130] She has been practicing family medicine since 2008. Between August 2010 and September 2015, she had about 177 visits with the complainant. In addition to this large number of visits, she allocated 20 to 30 minutes for the complainant's appointments, in contrast to the usual 10 minutes that is allocated, and instructed her staff to book appointments of that length with her. The number and duration of the appointments reflected the complex nature of the complainant's issues, and the need that Dr. Shilhan felt to "check in" with her regularly about her situation.

[131] Not surprisingly, Dr. Shilhan had no present memory of the details of each appointment about which she was questioned in this trial. They were treated as past recollection recorded, based on her consistent practice of recording them electronically, and the importance to her practice of taking detailed accurate notes, both for the present appointment being recorded and ongoing care of the patient.

- [132] I denied a pretrial application by the Crown to admit Dr. Shilhan's records as part of the "narrative as circumstantial evidence" exception to the hearsay rule, to give context to the assessment of the complainant's evidence. As a result, any statements to her by the complainant that were contained in the records were elicited by the Crown only to explain the actions that she took in providing care for the complainant.
- [133] She was also not qualified as an expert witness to give opinion evidence, but it was common ground between counsel that her factual observations were properly informed by her medical experience and training as to the significance of what she observed, and could be provided on that basis without straying into the giving of opinions.
- [134] The Crown relied on the evidence of the following visits to provide confirmatory evidence of the complainant's injuries from the assaults she described, or of other significant aspects of her testimony:
- December 13, 2010: Dr. Shilhan noted bruises that were apparent around the complainant's neck.
 - February 8, 2011: she noted abrasions to the complainant's right forehead area. She defined an "abrasion" as what occurs when there has been some opening up of the superficial layers of the skin. There was no bruising in this area, but it was tender to mild "palpation", which means touch.
 - May 12, 2011: she prescribed an antidepressant to the complainant which she had to do frequently during her care of her. She noted that the complainant had a flat affect which meant that she was not showing much range of emotion.
 - May 30, 2011: she recorded that the complainant had been seen in the emergency ward the previous weekend for abdominal cramping in relation to her pregnancy. The reasons for her attendance at the emergency ward are not admissible for their truth through Dr. Shilhan, but the timing of the incident corresponds to the incident described by the complainant in which she was pushed into the refrigerator. This examination was triggered by the complainant's report of having been struck in the abdomen which, of course, is not evidence in itself that such an assault occurred.
 - October 30, 2011: Dr. Shilhan observed a two-centimetre linear red marking, approximately 1.5 centimetres below the complainant's right collarbone. She noted that because it was unusual for someone to have markings there. The complainant also had a sore throat.
 - November 16, 2011: the significant observation was an excoriated area on the inner aspect of the right labia minora (the small lips of the vagina). "Excoriation" meant there had been a removal of the superficial layer of the skin in that area.

- January 25, 2012: Dr. Shilhan noted markings on the front part of the complainant's neck. Her use of the term "markings" to describe what she saw indicates to her that there must have been something on the skin which was unusual. She said that there are certain marks which are "unusual if they are seen", by which I took her to mean, in that particular location. Based on her records, she could not say what colour these marks would have been.
- February 1, 2012: The complainant was suffering from painful and frequent urination. Dr. Shilhan performed a pelvic exam because of the complainant's concern that her partner was having intercourse with other people. The pelvic exam was normal, but Dr. Shilhan could not say, based on that result, that the complainant had not suffered any trauma to her vagina. Such exams are usually normal.
- March 22, 2012: The complainant had pain with palpation to the sub mandible (the area of one's upper neck and lower jaw where the jaw gets closer to the ear). There was also mild redness in the back of her throat.
- April 2, 2012: The complainant reported signs and symptoms that would have indicated a requirement for an examination with respect to an anal fissure. She did not wish to have such an examination on this visit, however. Dr. Shilhan defined an "anal fissure" as a cut to the superficial layers of the skin in the anus, sometimes down to the anal mucosa. A physical examination to identify it is very difficult in a conscious, overweight patient like the complainant, she explained. In fact, such an examination is almost impossible. The patient would need to be in what was described as a "prone jackknife position", which means lying on their abdomen in a V shape, with a spreading of the patient's buttocks, the latter of which Dr. Shilhan would not do in an office examination.
- April 11, 2012: The complainant reported that she was experiencing pain to her left wrist. Dr. Shilhan did not order an X-ray because the history that the complainant provided was of a forceful grabbing of it by her husband. If she had reported falling on her wrist with her full body weight, X-rays would have been appropriate.
- May 25, 2012: she saw the complainant at the offices of East Kootenay Addictions which limited the scope of any physical examination that she was able to perform. She found tenderness with palpation to the outer aspect of the complainant's left hip. There was also a small bruise towards the buttock. Subjective history leading to this examination was of the complainant being slammed against a wall.
- June 15, 2012: she examined the complainant and was able to see two small anal fissures at the six o'clock and nine o'clock positions. It is medical practice to describe the area as corresponding to a clockface with the part nearest to the patient's vagina described as twelve o'clock. Dr. Shilhan said that while it is common to have anal fissures of the so-called midline at the twelve and six o'clock positions, it is uncommon to have a fissure in the nine o'clock position. The twelve and six o'clock positions are usually only seen in the case of fissures caused by constipation. Dr. Shilhan said she could only have performed this examination if she had a clinical reason to do so, which in this case was a report of non-consensual anal intercourse. She prescribed a medication that

has the effect of relaxing the anus and increasing blood flow to it. She emphasized the importance of soft and regular bowel movements to the complainant, so the tissue in the area would not be retraumatized. (There were actually two appointments with the complainant on this day. The second one, in the afternoon, was at the Addictions Centre, with respect to ongoing issues with the complainant's mental state.)

- June 28, 2012: Dr. Shilhan noted evidence of bruising on the front surface of the complainant's neck. She described these marks as two lesions. Their size was 1.5 centimetres and two centimetres respectively. She explained that a lesion is anything on the skin surface that is different from what normal skin would look like. A bruise can be a lesion, as in this example.

- September 12, 2012: she noted a bruise on the right front surface of the complainant's neck which she described as being in the shape of a thumb.

- November 7, 2012: she noted four linear marks on the complainant's right inner thigh, which she described as being consistent with abrasions from a small sharp object. In her testimony the marks must not have been very wide for her to have believed that a small sharp object had been involved. She also performed a pelvic examination of the complainant as a result of bleeding from the vagina outside of the menstrual period. She performed this examination because of the history provided by the complainant of her husband using a small sharp object while having intercourse with her, she mentioned.

- November 23, 2012: the complainant described suffering abrasions to her right upper cheek, which were healing. Dr. Shilhan explained that the absence of a corresponding injury under the "Examination" section of her notes means that what she observed would have been consistent with what the complainant had described.

- April 10, 2013: Dr. Shilhan performed an anal examination. She did not note any fissure or hemorrhoids, but emphasized that the absence of such a finding does not mean there was not a fissure there. A digital rectal exam did not note any abnormality, but the complainant had pain with palpation at the twelve o'clock position (as I have described, that position is the one closest to the vagina). The pelvic examination noted pain with palpation in the area within the vagina that is the closest to the rectum. The complainant was also referred to a general surgeon with respect to anal pain and chronic fissures.

- April 19, 2013: Dr. Shilhan observed three linear lesions on the left side of the complainant's neck, just above the collarbone.

- September 19, 2013: she performed an anal examination, but no abnormalities were noted. However, the complainant had pain with palpation to her anus.

- November 6, 2013: an examination revealed that she had pain with palpation to the left labia minora, at the mouth of her vagina. There were no lesions there, however. Dr. Shilhan found it surprising to find an abnormality of the labia in a pre-menopausal woman.

- December 2, 2013: Dr. Shilhan noted two red areas on the complainant's neck, with what appeared to be "friction burns" (an area of skin that is removed at some level) superimposed on the red areas. These red areas were elliptical lesions, one and two centimetres in diameter, halfway between her chin and her collarbone.
- February 24, 2014: Dr. Shilhan observed bruising around both of the complainant's wrists. She could not say based on the notes whether it was on the top or the underside of the wrists, only that it was in the area of the wrist joint between the hand and the arm. She took photos of these injuries, but was unable to locate the photos by the time of trial. She believed that the distribution of the bruising resulted from the wrists being compressed by another person, because it would have been difficult for the complainant to hold her wrists together in that manner herself.
- April 20, 2014: she observed "resolving" bruising to the right of the complainant's eye. She inferred from those notes that there must have been some colouring that is associated with the later stages of bruises. There were also marks around the complainant's neck, which were "consistent" with a thumbprint and a fingerprint. She used this language instead of her previous references in her notes to elliptical prints or marks with sizes of 1.5 and 2 centimetres respectively. She identified the four photos on the second page of the photographs in evidence as relating to the injuries she saw on this visit (these were photos that the complainant took herself).
- May 26, 2014, she noted pain with palpation of the post-vaginal wall, which is where the vagina starts towards the anus.
- June 4, 2014, she noted bruising and swelling to the back of the complainant's right wrist, which indicated some trauma to that area.
- August 21, 2014: following up on the observations of Dr. Van Rensburg on the previous visit, which I will discuss, Dr. Shilhan noted a cyst-like lesion at the twelve o'clock position of the complainant's anus. She described it as soft, pink, and very tender to the touch. She was concerned about infection so she performed a digital rectal exam. She did not note any hemorrhoids and did not see an anal fissure. She was also very concerned about an abscess because the complainant had a fever, albeit a low grade one. She does not drain anal abscesses herself so she contacted the surgeon on call.
- August 22, 2014: Dr. Shilhan believed that this examination had been conducted by Dr. Wentworth, who signed the electronic medical record. At the request of the defence, this entry was admitted as a record kept in the usual and ordinary course of business. During the examination, that doctor noted "PV blood", which Dr. Shilhan said means that she could see blood coming from the vagina. There was also a note, in relation to an examination of the anus, of "scar tissue from the tear," but nothing further was made of this in the trial.
- January 13, 2015: Dr. Shilhan observed bruising under the complainant's right eye, which she photographed. She identified the first photo in the exhibits as the one that she took of the complainant on that date.

- May 6, 2015: she observed a superficial cut near the complainant's right eye, as well faint discolouration under the right eye, which seemed to her to be consistent with an old bruise. She explained that there was discolouration of the skin underneath the superficial cut. There is a photograph in the evidence of this injury, which was taken by the complainant but uploaded by Dr. Shilhan into the electronic records.

- September 14, 2015: Dr. Shilhan recorded that her vaginal examination of the complainant was "within normal limits", but when she put her fingers into the vaginal cavity, there was some mild discomfort. This was a follow-up on the pelvic pain that the complainant had previously reported.

[135] In addition, some relevant matters were raised in cross-examination:

- While she said there is an objective component to the observation of a patient's reaction to palpation, Dr. Shilhan agreed that the patient's response to whether a particular form of touch hurts is a significant component of her findings. Because she had no independent memory of the examinations recorded in the records, she has no way to say of whether she made objective observations in a particular instance, or was relaying on the complainant's responses. She pointed out that if the complainant's reaction had been out of proportion to what she expected would be reasonable in that situation, she would have made a note of that. Nonetheless, she accepted the proposition that her notes of pain on palpation may have been completely dependent on the complainant's response.

- The complainant had a history of self-harm. On April 16, 2012, she showed Dr. Shilhan superficial cuts to her left forearm, which she had made with a safety pin. She also disclosed she had been "cutting more" during the visit on May 28, 2012, and made similar comments on November 13, 2014, and May 22, 2015. She definitely examined the further instances of cutting on May 28, and the complainant probably showed her the injuries on the later occasions.

- She would have routinely questioned the complainant about drug use, along with questions about her mood and any concerns about her children. On April 5, 2013, the complainant told her that she never uses cocaine when she is caring for the children. On the same visit, she expressed concern about prescribing sleeping aids, because of the complainant's history of taking more of them than prescribed. Along the same lines, she was careful not to prescribe too much medication on any given occasion, because of the complainant's previous misuse of Tylenol 3s and benzodiazepines. Her admissions to Dr. Shilhan also included drinking to excess on occasion, as I have previously described, and the doctor confirmed her preliminary inquiry testimony that the complainant had been using marihuana intermittently throughout the years.

- Of relevance to the theory of the defence on the complainant's motive, Dr. Shilhan recorded a comment by the complainant that she could not talk to counsellors at a certain organization with respect to substance abuse or spousal abuse because they had told her that they would need to call MCFD[1]. She agreed that on that occasion the complainant was quite concerned about the involvement of Children's Aid and the possibility that her children could be taken away from her. One component of her concern was her history of drug use.
- Similarly, on February 11, 2014, Dr. Shilhan warned her that she would have to contact MCFD if the complainant was using drugs.
- During the visit of March 19, 2012, the complainant became visibly angry with when she said she would need to contact MCFD if the complainant had been "drinking more than she should." She ultimately advised the complainant that she did not need to report her at that point, because the complainant was aware of her duty to do so.
- She confirmed the contradictory evidence with respect to the complainant's pregnancy with L. that the complainant had told her on December 30, 2010, that she had done three home pregnancy tests, all positive, that her partner was aware of the pregnancy, and that the complainant wanted to continue with it even though it was not planned. In other words, she told Dr. Shilhan that she was pregnant, rather than the other way around. There was also no discussion of contraception on that occasion. (As I have previously mentioned, she confirmed the discussion on January 7, 2011, in which the complainant expressed mixed feelings about the pregnancy, feeling trapped in her relationship, and being concerned about the non-consensual basis of the child's conception.)
- On February 1, 2012, her pelvic examination of the complainant revealed no abnormalities, even though she had received an allegation of non-consensual forced intercourse by the complainant's husband. The pelvic exam was also normal on October 27, 2014. On April 14, 2015, again following an allegation of non-consensual intercourse, the pelvic examination was normal, except for a minor abnormality that was not related to trauma.
- Dealing with the time of the first alleged use of the knife during sexual intercourse, Dr. Shilhan confirmed there were no signs of injuries to the complainant observed during her visits on August 7 and 14, 2014. On August 21, no cuts or lacerations were observed to the anal area in the examination, in addition to the cyst-like lesion in the anus that I have previously described. There was also no complaint about vaginal pain and neither a complaint nor an observation of any vaginal bleeding or discharge. Also of potential relevance on this point, Dr. Shilhan confirmed that a patient who was in so much pain that they had difficulty walking or sitting would not be described as being "in no apparent distress", as Dr. Shilhan had noted of the complainant for that visit. She did not record any comments to that effect by the complainant, nor did she make any such observations of the complainant's movements. She agreed that those would be significant observations and she would hope to have made them if they had been present. She then qualified this response somewhat by noting that her referral of the complainant to a general surgeon in the emergency room indicates that she had observed

something of significance. In other words, her actions imply that the patient was unwell.

- She confirmed she did not prescribe "bed rest" for the complainant in any of the visits in which she saw her in August 2014. In fact, that is not something that she ever prescribes for a patient, as such.
- The complainant's disclosure during the November 13, 2014 visit that her husband had used a knife in her anus was the first time she had ever provided such information to Dr. Shilhan.
- The note for the visit on August 27, 2015, appeared to have been signed by the resident doctor whom Dr. Shilhan was supervising, but she would have reviewed it herself, she confirmed. The note indicated that the complainant advised her that her husband had left a few days ago at her request (because he had threatened her) and had not returned since. There were no complaints by the complainant of any physical pain, and Dr. Shilhan did not record any such observations. The complainant also did not report any pain to Dr. Shilhan during the visit on September 2, 2015, which is after the second alleged knife assault. The only observation she made on that date was that the complainant appeared fatigued.
- The physician's notes from the complainant's visit to the emergency ward on September 5, 2015, were entered as a business record. The significance from the defence point of view being the absence during the examination of any visible lacerations to her vagina. The emergency physician did note that the complainant was very tender to palpation during the digital vaginal exam, and it appeared that a CT scan of her abdomen was recommended by the gynecologist on call.
- For the visit on September 10, 2015, Dr. Shilhan confirmed the complainant's statements that her husband had raped her using a knife in her rectum and her vagina. On that day, she reviewed the CT scan of the complainant's abdomen. It was negative - that is, not revealing anything of significance.
- When reviewing the CT scan results with counsel, Dr. Shilhan cautioned against inferring that the absence of any abscess or swelling means that none were present. A CT scan can only determine the presence of large abscesses and inflammation. This result also does not mean that there is no sign of infection, she explained. All she can say based on it is that there was no abscess and no significant infection. It would have picked up really serious inflammation, however.
- Although she noted that the complainant had mild discomfort on the "bimanual" vaginal exam, no injury to the vagina was observed in that examination. There was also no abnormal vaginal discharge on that day, she noted. [In re-examination, she elaborated that physical evidence of trauma to the vagina is often not found during examinations. Frequently, the exam will be normal. In particular, if there is not significant friction, there will likely not be any visible trauma to the labia itself. The labia are very "estrogenized" in a young woman so there will be significant lubrication - tending to prevent trauma, I took her to mean.]

- During the same visit, the complainant also told her she would like to "limit her kids' access to their dad". Dr. Shilhan attempted to mitigate her concerns that her children would be removed from her. [In re-examination, Crown counsel canvassed further entries in the notes of this visit, including the complainant's awareness that the accused might take the children away; that he had asked to see them; that J. and K. did not want to do so, but L. did, so they went with L. to see their father; and that her mother was present when he saw the children, because of the complainant's concern.
- Dr. Shilhan confirmed the conversation that was previously put to the complainant from the visit on June 15, 2012, in which she had explained that the complainant could either voluntarily go to the hospital for a psychiatric assessment or Dr. Shilhan would be obliged to "go through a form," - that is, to commit her involuntarily.
- A further mental health-related concern that Dr. Shilhan had recorded at one point was that the complainant was exhibiting symptomology of borderline personality disorder. In her experience with people with that disorder, they like to "create a lot of drama", especially in their relationships.
- Lastly, she agreed that over the course of their visits, the complainant had described her vagina being penetrated by her husband using a hammer, as well as a glass bottle.

Dr. Van Rensburg

- [136] He qualified as a doctor in Canada in 2005 and has been practicing in Cranbrook since 2009, exclusively in family medicine.
- [137] He saw the complainant on August 19, 2014, because Dr. Shilhan was not available. He had an independent recollection of seeing her that day, but it assisted him to recall the details of the examination to look at the electronic record that he had created for the visit.
- [138] He performed an anal examination as a result of the complainant's reports of anal pain. He did not see any hemorrhoids or swelling, cellulitis, or inflamed surrounding tissue. He did notice tenderness in the six o'clock position (as previously mentioned, the part of the anus farthest away from the vagina).
- [139] He explained that an anal fissure can be caused by a large bowel movement, a foreign body, or some kind of injury to the anal sphincter.
- [140] He described anal examinations as being difficult to perform. The patient lies on the bed with their underwear removed either prone and with their legs apart, or lies on their side with their legs towards their chest. The latter position is known as the jackknife position (as described by Dr. Shilhan as well). He could not recall which position he used to examine the complainant in this case. In cross-examination, he elaborated that when the complaint is anal pain or hemorrhoids, the examination is generally performed with the patient on their side (that is, the jackknife) to allow the examiner focus on the anal area.

- [141] He diagnosed an anal fissure. The laceration was not visible to him, but the diagnosis was based on the complainant's tenderness on palpation. He later elaborated that it was also based on other fissures he has examined in the past. He does not see the laceration, he said, by which I took him to mean one does not usually see lacerations. The sign exhibited by the patient leading to the diagnosis is quite distinctive - the patient expresses pain or withdraws in pain.
- [142] Contrary to Dr. Shilhan's evidence, in Dr. Van Rensburg's experience, there is no exact position around the anus at which a fissure usually occurs. Most significantly for our purposes, he said that the position of a fissure on the clock does not tell him anything about how it was created.
- [143] The complainant had a temperature of 37.9 degrees when he examined her, which was slightly elevated. He agreed with the characterization of it as a low-grade fever. This was an indication of a possible infection. He recommended to the complainant the use of Anusol, an over the counter product that is also used for hemorrhoids, and her previous prescription of a topical nitroglycerin ointment. An additional recommendation was that she take salt water baths to eliminate any infection. Because of her fever and tenderness, he prescribed a course of antibiotics.
- [144] On cross-examination, it emerged that he is a member of the Sexual Assault Team, whose members conduct medical examinations for police investigations of complainants in alleged sexual assaults. He believed he had performed approximately 50 such examinations, an average of five per year, for the last 10 years. While performing pelvic examinations for the Sexual Assault Team, he has observed vaginal injuries "on some occasions" [this appeared to differ from Dr. Shilhan's view that they are rarely seen].
- [145] He agreed that when an anal exam is performed with the patient on their back, the vagina can also be visualized. In the jackknife position, the view of the vagina is more minimal. The physician has to separate buttocks and thighs, so it will not be visualized as well. A physician would be able to see it to a certain extent in that position, however, and the lighting in the examination room is of sufficient strength that, if he had a clear field of view, no visual aids would be required to assist him. I took this to be support for the notion that any abnormalities to the vagina would have been observed during his examination as well.
- [146] In the digital component of the examination, he would be more likely to feel lumps and growths, rather than injuries. The response to an injury to the anus would likely be tenderness, which makes the examiner suspicious that an injury is present. He did not observe any injuries, but the tenderness told him there might be one. When he was asked whether a finding of tenderness depends on what the patient tells the physician on palpation, he responded, "Ideally, yes." He did not note any swelling and did not feel any abnormality.

[147] In addition, Dr. Van Rensburg agreed that there were no complaints noted of vaginal pain, blood, or discharge from the vagina. He saw no lacerations or cuts in the anal or vaginal areas. He certainly did not observe that the complainant was in such pain that she had difficulty moving or sitting.

Mother, Friend and Son

K.B.

[148] She is the complainant's mother. She lived in Cranbrook for the couple's entire relationship.

[149] She said that after their children were born, she would see the complainant almost every day, sometimes twice a day during the week, and frequently on weekends as well. She described extensive involvement in the lives of the complainant and grandchildren, including taking them shopping and to appointments, and taking the children to school.

[150] When she and the complainant were together she frequently purchased groceries and other essential items for the family, without requiring any of the costs involved to be repaid. It was pointed out to her, and she accepted, that she had not previously mentioned purchasing such items in her statement to the police or her testimony at the first trial, although she noted that she was not questioned on that particular topic at the first trial.

[151] From her vantage point, she was able to observe some injuries to the complainant over the years, as well as a specific incident of assault that corresponds to the kitchen pushing incident that the complainant testified about.

[152] She did not remember seeing any injuries when the couple first got married, although she was aware that they argued. In the period of 2008 to 2009, she started noticing some, however. These consisted of a sprained wrist, a sprained ankle, a bruise on her arm, and black eyes "once in a while." She agreed that she had not mentioned any bruising on the complainant's arm in her testimony in the first trial.

[153] She described these injuries as sporadic - "not every week, but I would notice them." She did not make inquiries in relation to every injury she observed. In some cases, she would wait for the complainant to tell her about it.

[154] The wrist injury came to her attention because she saw the complainant wearing a tensor bandage on it and also saw a "hefty" bruise on it. The complainant told her that she had fallen down.

[155] The complainant showed her the ankle injury which was said to have occurred when she slipped down the basement stairs. She had a bruise from her ankle to her shin, which was a bright purple and black colour. Ms. B. agreed that, at the first trial, she had described the wrist injury as having resulted from the complainant falling down the stairs. She clarified that she knew for sure that the complainant had said she had fallen, but did not know which of the injuries was in reference to it. In response to a follow-up question about whether she had been confused when she attributed the ankle injury to falling earlier in

her testimony, she agreed she had been, but that both injuries had involved falling in some manner.

- [156] As to slipping on the stairs generally, she agreed that "at the time" her immediate thought was that the steps of the stairs at the 4A Avenue home, which were described as stair treads, were small and therefore easy to slip on. As a result, she did not press the complainant about her explanation of the incident.
- [157] She was able to say "for sure" that she had seen the complainant with two black eyes. For one of them, the complainant told her that she had bent down to pick something up and then banged herself on her nightstand. Ms. B. knew that she had also asked about the cause of the other one, but could not remember what answer her daughter had given her.
- [158] The complainant would frequently wear sunglasses even when the outside lighting conditions did not call for it, which Ms. B. "wonder[ed]" about. The complainant would sometimes take them off when she was inside her vehicle, she added.
- [159] Ms. B. was confronted with testimony from the first trial in which she explained that she has dark-ringed eyes herself when she is suffering from a lack of sleep. When it was suggested that her immediate impression of the complainant's eyes was that the complainant was tired and lacking sleep, she agreed that that had occurred a few times, but that "a few times there were more". I took her to mean that there were additional indications that they were actually black eyes from an injury.
- [160] Ms. B. had a close relationship with her grandson, J. She described receiving concerning calls from him about what was happening in his home. She would go over to his family home in response to these calls and would try to defuse the situation, calm people down, and "see what's going on." I infer that she was describing domestic disputes between the accused and the complainant.
- [161] Her recollection of the pushing incident was that it had occurred in 2011, before L. was born, probably in the summertime. As the complainant described, Ms. B. and her husband were bringing the accused's mother over to his and the complainant's home for a visit. His mother lived in Golden and was staying with Ms. B. and her husband during the visit.
- [162] After she entered the house, she saw the accused come running, with his fist up, in the direction of his mother. The complainant was standing in the hallway by the fridge. He pushed the complainant from the back with sufficient force that she stumbled into the fridge stomach first.
- [163] In her direct evidence Ms. B. described standing in the doorway of the bedroom, and therefore being unable to see whether the complainant fell to the floor. In cross-examination, she clarified her observation point as being just before the bedroom (which is across the hallway from the bathroom once one enters the house). She then took the children with her into the bedroom. She accepted the suggestion that all of these events "happened very quickly, almost simultaneously," and that she was somewhat distracted by

the task at hand. However, she rejected the proposition that the accused had made contact with the complainant only incidentally in the course of "making a beeline" for his mother. He had one fist in the air and pushed her with his other hand. She conceded, however, that she had not mentioned the push at the first trial, although she added once again that she was not asked about it.

- [164] She said that her husband intercepted the accused before he could reach his mother. His mother was upset and walked away from the house.
- [165] The complainant was having stomach pains and was worried about the baby, so Ms. B. took her to the hospital, where she was sent up to the maternity unit to be checked out. When confronted with her comment in her statement to the police that "it might have been that time," that she took the complainant to the hospital, and that she had taken her to the hospital "quite a few times", Ms. B. emphasized that she was sure that it was that time, and that she had become certain on that point over the last seven years.
- [166] Dealing with her observations of the complainant on August 29, 2015, the day that she moved out of her former family home, Ms. B. described her as being very anxious, wanting to get over to her new place, and not wanting to be in the house. As to her physical condition, Ms. B. said that none of her friends would allow her to lift anything. She agreed that, in the first trial, she had not made any comments about the complainant's physical condition - only describing that she was very emotional and that she was not acting "any much different" than she had been in the last while. Her response was that she had not been asked about the complainant's physical state and had been referring only to her behaviour (she confirmed in re-examination that that was the question she was intending to answer at the first trial). She accepted, however, that this trial was the first time she had made any reference to the complainant's physical condition during the move.
- [167] She initially took the position that before she spoke to the police in their investigation of the accused's assaults, she had not heard anything about the allegations from the complainant, who had simply told her on August 7, 2015, that she would be moving out. However, in that police statement she described some of the details of the sexual assaults that the complainant said the accused had committed, and the injuries that had resulted. Ms. B. then conceded that the complainant had told her "some of these things" beforehand. Addressing the contradiction with her initial denial of having been told anything about the allegations, she explained that the complainant "didn't go into a lot of details." She later agreed the complainant had also told her in advance of her police statement that she had received "a bruised eye from fighting." Finally, in re-examination, after a portion of her police statement had been read to her, she clarified that the complainant had told her the circumstances under which she had left the relationship, but did not tell her the circumstances of what had happened in the so-called "fights"; only what had happened after them.

[168] Ms. B.'s credibility was assailed more generally in cross-examination by reference to her past guilty plea to defrauding her employer of over \$100,000, by making false product return claims over a period of four or five years. She agreed that although the amounts involved in each return were not that great, that she had engaged in hundreds or thousands of them, and that she had made a conscious effort to engage in this dishonest activity over many years.

Devon Rae

[169] She became friends with the complainant in 2009, when their oldest children both started kindergarten at the same school. A casual relationship in connection with their children turned into an actual friendship between them. She was aware of the duration of the complainant's marriage because she also helped her move out of her family home on August 29, 2015. They saw each other more frequently when their children were younger, but less so as the years went by. Ms. Rae was away from Cranbrook attending to her own family's needs for most of 2013. Later in their relationship, they tried to stay in contact by texting each other and having the occasional dinner together.

[170] Ms. Rae testified that, during those years, she frequently saw bruises or marks on the complainant, usually black eyes. She found it difficult to say how frequently she observed them, because sometimes she saw healing bruises with fresh bruises on top, but she estimated that she saw them monthly. She recalled seeing bruising and a small abrasion on the complainant's arm once, but emphasized that it was "mostly black eyes." She would notice them when they were picking up their children from school. As Ms. B. had also noted, Ms. Rae found it strange that the complainant wore sunglasses when the weather did not require it or sometimes indoors. There were times when she would not look Ms. Rae in the eye. When she looked closely, Ms. Rae would then see that the complainant's eye was black.

[171] In cross-examination, she said that the complainant would sometimes wear makeup to cover her black eyes, but then modified her response to say she could remember one specific time when that had happened and that she "didn't really notice that." She was then referred to her testimony from the first trial in which she had said that the complainant had done so "more often than not." She agreed that testimony was true at the time, although she currently only remembered one incident. She added that such attempts to cover up bruising by makeup would not necessarily be successful, that black eyes can be seen under makeup if the bruising is bad enough, and that "if you are looking for it, you can see it." The complainant's black eyes were obvious, she said.

- [172] She provided an initial estimate of seeing the complainant with black eyes 10 times per year, but then added that it was "every time I saw her, pretty much." When it was pointed out that she testified to seeing the complainant on a daily basis for a significant period, which would have resulted in hundreds of such observations, she said that was in the beginning, and then that "when things are overlapping, how do you count them?" She then agreed that she did not have a clear recollection of the actual numbers.
- [173] She was shown her statement to the police from 2015 in which she described seeing three black eyes in eight months. In response to the suggestion that her version of the frequency had changed since then, she described this as a complicated case in which it was "difficult to prove" how often she had seen them. She explained the general feeling she had was that, every time she saw the complainant, she had a black eye and that in the beginning of their relationship she saw her daily, but less as time went by. In response to further questions, she qualified that this would not include days when she only saw the complainant from behind or that she would not have been in a position to tell whether she was seeing a fresh black eye or the same one that had been inflicted the previous week. She then agreed that "pretty much every time" she saw her in that period, she had a black eye that was either healing or fresh, but then when the proposition that she saw a black eye pretty much every time was restated to her, she responded, "I can't say every time."
- [174] Despite this, she agreed she had told the police that after about a year of knowing the complainant, she had confronted her with the proposition that "nobody has three black eyes in eight months." In re-examination, she explained that she had actually been summarizing a number of conversations with the complainant to the police and that the reference to three black eyes was something she had said in a particular conversation.
- [175] She also confirmed that she observed injuries to the complainant before the winter of 2009. She was shown her testimony from the previous trial in which she said that she first noticed things of concern at the beginning of winter and had made reference to first noticing a black eye during an incident in which the complainant had been pulling her daughter with her on a sled. She clarified that they would pass in the hallway before that and she would notice (by which I infer she meant notice black eyes), but the first time that she "stood face to face" with the complainant was in relation to the sled incident. It was then that she began thinking that the black eyes were too frequent to be coincidental. She also explained that she had been referring to incidents in which the complainant's eyes had been totally black.
- [176] More generally, she agreed that the complainant would sometimes refer to herself as being a "klutz".
- [177] During their friendship Ms. Rae became aware that the complainant did not have ready access to money, so she offered to hold any cash, valuables, or things for the children that the complainant did not want to have at her own house. In particular, she offered multiple times to hold cash for her. The complainant did not take her up on any of these offers.

- [178] With respect to her assistance with the move on August 29, 2015, she said that she had previously offered the complainant the opportunity to move into her basement, but then a place (which I took to mean the safe housing) became available for the complainant and the children. She recalled that Ms. B. also came to help with the move.
- [179] She made observations of the complainant's physical condition during the move, describing her as being in pain and "not lifting anything heavier than a hula hoop." The complainant was bracing herself to move, did not sit to eat lunch "or ever" during the move, and was wincing. In addition, she was quiet, and would not talk to Ms. Rae that day. Ms. Rae agreed that these details about the complainant's physical condition were not included in her statement to the police, even though she had been invited by the interviewing officer to provide as much detail as possible. Her only observations in the statement on this issue had been that the complainant had looked tired, sad, and odd - "just like not right" - on that day. She agreed that at the time she thought it was possible that the complainant was just physically exhausted and was hopeful that is what it was.
- [180] In addressing the information she had when she gave her statement to the police, she confirmed that she had been involved in conversations with the complainant about some of the allegations before giving it. Although she had heard about a sexual assault involving a knife that had occurred before the complainant moved out, she said she did not hear about "the one that put her in the emergency" until after the moving date. All she knew as of the moving date was that something had happened and that it was not appropriate to talk about it at that time. The complainant later briefly told her what had happened in relation to that incident, and said that she was going to talk to her doctor about it. She also asked Ms. Rae to drive her to the appointment. Ultimately, Ms. Rae agreed that by the time she gave the statement, she knew "in broad strokes" the allegations that the complainant was making, and that it was important to disclose anything relevant about them to the police.
- [181] Beyond the date of that statement, she said she had continued to have discussions with the complainant about her allegations, up to the time she gave her evidence in this trial.

J.A.

- [182] He was 17 years old and in grade 12 when he testified. He also testified in the first trial, when he was 14.
- [183] He recalled many arguments between his parents. He said that most of the time his father was working, but when he was at home, his parents did not seem very happy with each other and his father was angry.
- [184] He described an incident of assault when he was four years old and the family was living on Little Van Horne Street. He described his father yelling at his mother, then walking into her room and hitting her very hard across the face with the back of his hand. She screamed and went to the floor. J. said that he then ran back to his room. He did not recall any injuries to his mother.

- [185] He also testified an additional incident that occurred when he was seven years old and his family lived on 11th Avenue. He was very thirsty and so went to get some water. It was twelve o'clock at night and his parents were fighting. They were in the kitchen. J. described that his father screamed right in his mother's face and then hit her across the face with the front of his hand, "very hard". His hand was open. She remained standing after the hit. When he went back to his room he heard more arguing, yelling, and screaming. He recalled that the next day she wore a lot of makeup. His father was angry, as always, while his mother was quiet and "kind of sad."
- [186] The last incident occurred on what he described as the very last night he lived in the house on 11th Avenue. He was 11 years old at the time. It was in the summertime, when he usually went to bed around 8:00 p.m. His father came up from downstairs (where he was sleeping at the time, as opposed to his parents' bedroom) and said good night to him. The door to his bedroom was right across the hall from his parents' bedroom. He heard yelling and screaming and then, judging by the sound his mother made, "something like a hit". When he was asked whether he had gotten up, he responded, "Maybe just to listen at their door." He added that that night his father "went to go to work". After that "we got up and moved boxes to go to our new place."
- [187] In a related incident, which he said occurred when he was 11, "before they got in a big fight and he starts living downstairs," he heard yelling and screaming. As in the incident on the night before they moved out, they shut the door. He got scared and Facetimed his grandmother because it sounded "really, really bad." His grandmother calmed him down. He could not recall if she came over to the house or not. He clarified that this was the night of or the night after "the family wedding".
- [188] When he was four, he told his mother's counsellor, Allison, about the assault he had witnessed. This was the backhand incident that I have previously summarized. His father asked him if he had told anyone about it and, when he said yes, his father said that if he told anyone he (that is, J.) would be taken away. After that, J. did not tell anyone about such incidents except his grandmother.
- [189] Over time, he saw bruises on his mother - some on her arms, back, and one in the eye. She told him that the one on her eye occurred when she hit it on the closet while getting cleaning stuff.
- [190] He believed he last saw his father at his grandmother's house at the end of 2015, around Christmas time. No one has ever tried to stop him from seeing his father, he advised. It was his "own will" not to do so.

- [191] He gave a statement to the police on November 26, 2015, when he was 11. This was three months after they had moved out of the former family residence. Beforehand, his mother told him why he was being brought to see the police - that he was going to talk about allegations of abuse. She also talked to him a little bit about "them" (by which I infer meant allegations), and said that he would likely be testifying in court.
- [192] J. agreed that his mother is his favourite person, but did not agree that she had some influence on how he viewed other people. He agreed however, that he had expressed the view in his police statement that a person who had assumed care of their family dog after they moved, but then would not allow him to visit the dog, was a "dirty, dirty liar" - a characterization of that person that his mother had provided to him. (The point, as I took it, was to illustrate the complainant's degree of influence on how J. viewed people including, potentially, the accused.)
- [193] He also agreed that he was aware that his father was looking to get joint custody of the children, a legal term that he said he had learned about from friends who had divorced parents. He had several conversations with his mother about that possibility before he spoke to the police.
- [194] In addressing the assault he described seeing when he was four years old, he said that he ran back to his room after he saw his mother fall to the floor. He did that because he was upset about what he had seen. The only thing he heard either of them say when he was watching them was his mother telling his father that she was going to call her mom. He agreed that during the first trial, he had testified that after he saw the hit, he was told to leave and went to his room, and that in his 2015 statement to the police and his testimony in the first trial, he had not described his mother falling to the floor after she had been struck.
- [195] J. maintained that he remembered "lots of things" from when he was four years old and the family was living at the Little Van Horne Street house, such as that his sister had just been born and he had two friends who came over to play almost every day. He added that he remembers everything from when he was four and that that is where most of his memories come from. In contrast, in his 2015 statement to the police, he had said that the incident was the only thing that he remembered from that period.
- [196] The incident that he described occurring when he was seven years old was not described in his 2015 police statement. He told the interviewing officer that he could not remember any other specific incidents of violence. He had responded to the officer's question of whether he had anything else he wanted to say with "I've pretty much given you everything." This same type of response was repeated by him twice later in his statement. He explained that this memory came back to him about a year after he gave the police statement. He did a lot of thinking and remembering over the years, because he knew he would eventually have to come to court and testify. When he was asked whether this memory had come back to him intact or he had recalled additional details over time, he said that he thought about things he saw that were "not okay" and, as he got older, "more came back" to him.

- [197] The incident in which he called his grandmother must have been after his birthday on July 28, 2015, he agreed, because he was born in 2004 and had said that it occurred when he was 11. Although it was around the time of the family wedding, there were no extended family members staying there who he could turn to for assistance (contrary to the complainant's reference to relatives staying in their home at that time).
- [198] He also omitted any reference in his police statement to seeing his father the night before they moved from the 11th Avenue house (the night of the second alleged knife assault). Although his bedtime was around 8:00 p.m., he explained that he would not necessarily be asleep by 11:00 p.m. as he had difficulties getting to sleep. He clarified that sound he heard indicating that his mother had been hit was "like a yelp," from her, despite his earlier description of it being a sound like "a hit".
- [199] In his testimony from the first trial, he had testified that "one time" he had heard a slap - "more like a hitting noise, like something hitting something with force" - during an incident between his parents. He had testified that he was 10 years old when he heard that. He denied the suggestion that he had confused the incident on the night before they moved in 2015 with this other incident that that had occurred when he was 10. He maintained that was a separate "whole other incident."
- [200] With respect to the incident the night before they moved, J. said that when his father came upstairs to his room, he told him, "I love you very much [which was the same thing he told him every night], hope you sleep well." The only other thing J. noticed about the accused at that point was his bad breath. He was not able to clarify what kind of bad breath he meant, such as from needing to brush one's teeth more frequently. It was a minute or two after that goodnight that he heard the yelling and screaming. He did not hear anything coming from the room before that, such as a toilet flushing. He agreed that this was the only thing he remembered from that day, but he explained that he remembered traumatic experiences. Despite this being such a highly traumatic experience however, he also agreed that he had not described it three months later when he spoke to the police.
- [201] His testimony about this incident at the first trial was that it occurred "around" the last night they were at the house, although later in that testimony he had specifically said that it had occurred "the last night I was in my house with my dad." Crucially from the defence point of view, he made no reference to hearing yelling and screaming or something that sounded like a hit in that testimony. In response to the suggestion that he was mistaken about this observation, he said that after years of thinking about what he saw, it was "more clear" to him than when he was younger. In response to the suggestion that he had never seen his father hit his mother, he said he had seen it many times.
- [202] Potentially contradicting the complainant's position about the accused's control of the family finances, J. agreed that his mother had bought him a new iPod Touch, which was to replace one that she had broken.

[203] In re-examination, to provide some context to the omissions from his 2015 police statement, Crown counsel referred him to the points in that statement which he told the interviewing officer that he was tired and that his "brain" was tired. He also confirmed that he had never been asked in that statement about the last night that he spent at the family home.

The Accused's Evidence

Main Narrative

- [204] His timeline of the relationship with the complainant was that it became a romantic one between them three or four weeks after they had moved into together as friends, which was in 2003. The complainant became pregnant with J. in October or November of that year.
- [205] He described their relationship as still being good after J. was born, although they were tired parents and arguments arose when he slept through the baby crying and did not get up at night.
- [206] In 2005, he got a job at a water bottling plant. It was a better position than his previous one as a dishwasher. The complainant was not working at this point, but about a year later she got a job at a greeting card store.
- [207] In July 2006, they were married. In his view, the relationship was still good at that time. They moved from their previous residence on 2nd Street to a house on 4A Street in the fall or winter of 2006. They divided the tasks for that move so that she did all the packing and he lifted the heavy items to the downstairs storage area. It was at her own request that she did the packing, because she is very organized and "wanted things the way she wanted them". He never threw a candleholder at her, nor did she ever throw one at him, in the course of that packing process. He also did not physically assault her in any way.
- [208] He denied, as well, ever punching a hole in the wall in the spare bedroom, which was the complainant's description of the next assault-related activity by him.
- [209] The complainant's mother usually came over every day during that period, and the accused said he got along well with her.
- [210] With respect to the incident on the stairs, he recalled that in the 4A house there were 12 to 14 steps from top to bottom leading to the basement. The steps were "skinnier" than the average step. There was also a handrail. He denied pushing the complainant down these stairs, as she had described. Instead, when she got home, she showed him some bruises and told him that she had fallen on one of J.'s toys as she was descending the stairs. The bruises were on the inside of her wrists and on her palms. He did not take her to the hospital because she said she had already been to the doctor. The next day she was wearing braces on her left and right wrists.

- [211] He described the relationship at that stage as involving "a little more fighting". Their leisure activities were separate from each other - he would play video games and she would watch TV. Although he initially could not recall any specific arguments, he then recalled that he was a smoker at that time and she wanted him to quit. She would smell smoke on him when he got home from work, which would lead to an argument.
- [212] In 2011, the complainant became pregnant with K. The accused described himself as being really happy, and said that they had been trying to get pregnant.
- [213] In December 2007, they moved to the house on Little Van Horne Street. The complainant was a stay-at-home mother from the time they moved in, he said.
- [214] When addressing the allegation that he had pushed the complainant in their kitchen while he was running towards his mother, he was referred to the diagram of the kitchen and surrounding rooms that had been drawn by Ms. B. The additional detail that he initially provided was that a wall continued along past the bathroom, the effect of which would be that a person standing in the mudroom would not be able to see the area immediately in front of the fridge (that is, where the complainant was standing when he was supposed to have pushed her). That might arguably have prevented Ms. B. from seeing the push, as she testified. However, later in his direct testimony the accused indicated he had been mistaken about the presence of a wall there. He realized this after being sent photos of the kitchen area that had been provided by the Crown. He explained his mistake by reference to the fact that he had last lived in that house in 2013, and that he and the complainant lived in a total of five different houses together.
- [215] His version of this incident was that he was upset that his mother was coming over because they do not have a great relationship and he did not want to be around her. He was in the kitchen of the house when he saw her walking past the window outside, heading up to the mudroom. The complainant was in the hallway beside the kitchen. He then saw his mother, the complainant's mother, and the complainant's stepfather in the mudroom. He ran past everyone to get his shoes, and then left the house. When asked if he came into contact with the complainant, he said that he "rushed past everyone because it's a tighter space." He denied pushing her with one hand.
- [216] At one point, while they were living on Little Van Horne Street, he was notified that someone from the MCFD wished to speak to him. He was contacted by an official from that agency about what was described as a spanking incident with J. He was asked if he would participate in an anger management program. He completed a session on that topic, with a person named Richard Thiessen, and the MCFD were content with that. He had no other contact with that agency during his relationship with the complainant, he said.

- [217] As to the state of their relationship at Little Van Horne Street, he said that there were some difficult times. They were not as close, and physical affection and terms of endearment were not exchanged very often between them. Most of their conversations were to do with groceries and what to do with the kids. Their sexual contact was also rare, three to four times per year. During the times that he was home, he played videogames or played with J.
- [218] In 2009, he got a job with a general industrial supply store and then in "2010 to 2011", he was hired by the mine in Sparwood, initially as a warehouseman. The mine is an hour and 45 minutes' drive from Cranbrook. The days and durations of his shifts at the mine became important to his narrative.
- [219] In 2011, he obtained a full-time position as a haul truck operator at the mine, which he did for two to three years before taking a position in pit utility. As I have said previously, it was a four-day-on/four-day-off process with two days of dayshifts and two days of nights.
- [220] Once he had the pit job, he made \$38 an hour leading to a base salary of \$86,000 a year. With overtime, that could be as much as \$110,000 a year. That was the most money he had ever made.
- [221] In order to respond to the notion that he had smelled like beer during the incident on the 28th of August, he referred to the screening routine that took place at the intake area of his work. Before being taken to the work area, he would go to a "wicket", consisting of a long counter with different sections. There he would have a conversation with the foreman, while they were two feet apart across the counter, during which he received information about what was going on at the pit. There was zero tolerance of alcohol during the shift. He had seen employees pulled aside because they reeked of alcohol and placed on a breathalyzer. He has also been randomly chosen multiple times for drug and alcohol screening.
- [222] In addition to the regular four-day shifts, he had special shifts as part of the mining rescue team. The team had practice days twice a month. They met at 7:30 in the morning and were done by 4:00 p.m. These practices would be held on the day before his first dayshift - in other words, on the last of his four days off.
- [223] Returning to the chronology of the relationship, it was in September 2009 that J. started kindergarten. His relationship with the complainant at that time was about the same as he has previously described. They would pick up the children and go grocery shopping together. When they got home, he would involve himself playing video games and using the computer. They were still sleeping in the same bed, but it was "not the best relationship".
- [224] With respect to financial issues, he denied that he ever took the complainant's debit card away to prevent her from having access to funds. In fact, she had her own bank card, which he never took from her. She was actually in charge of the banking, grocery purchases, paying their bills, and budgeting.

- [225] The budget imposed on him was that he was allowed \$20 for a four-day period of work at the mine "for coffees and such." Sometimes he would spend over that amount on things like a breakfast sandwich on the way home.
- [226] He alleged that the complainant also had a credit card in her own name which was not shared with him. It had a \$10,000 limit which was "maxed out". He found out about it only when they went for the debt consolidation loan in 2010 or 2011 and she brought it up. Their own \$10,000 limit credit card was also at its limit by then. She also had a couple of grocery store credit cards including President's Choice or something similar, with a small limit. For the same consolidation loan, they paid out an outstanding loan from City Financial. They took out a second consolidation loan in June 2015.
- [227] He was aware of a major purchase by the complainant, in the form of replacing J.'s broken iPod Touch, as J. also testified which cost \$400 to \$500.
- [228] During the years that he did not have a well-paying job, he was aware that the complainant's mother was helping them out financially. If she was still helping the complainant out once he was at the mine and earning a good income, he had no idea about it, he said.
- [229] Addressing the pregnancy with L. and the complainant's reaction to it, the accused testified that he had "an epiphany" that he wanted to have a vasectomy and that he was "done" trying to have kids. The complainant was "pretty quiet" when he told her that. Later, when he was getting ready for work, he wondered if she was pregnant. When he asked her, she responded that she was. He told her that he was happy and not upset, which she was happy to hear, he said. Although they were not planning on getting pregnant, he did not threaten her in relation to the pregnancy in "any way, shape, or form", he maintained. They also did not discuss the possibility of an abortion after they found out. A few weeks later, the complainant told him that an abortion had crossed her mind when he first said he did not want more kids. He was not happy at the thought of an abortion and told her that he was glad that she had told him about that.
- [230] He believed that he and the complainant had become "a little bit closer" during the pregnancy as a result of "buying baby stuff and planning names". The relationship was also good after L. was born. They were tired and not sleeping as much, but were not fighting. However, they eventually went back to their former routine of hanging out in separate areas of the home and not "sitting together." He was engaged in practicing his bass guitar and playing with the kids

- [231] In 2013, they moved to the house on 11th Avenue. Initially, the relationship between them was good, he said. They were excited to own their own home, and were doing a lot of garden work together. Despite this, however, they were having sexual intercourse only about three or four times a year. Once again, they started spending time away from each other a lot more. He had a "man cave" that he would retreat to in the basement, which had a sofa, video games, and a large-screen television.
- [232] He denied that any sexual assault with a knife was committed by him on the complainant around the time of the family wedding in Ontario in August 2014.
- [233] Turning to 2015, the last year of their marriage, the accused said that generally speaking on his days off he was in the basement. The children were hanging out with him there quite often. The communication between him and the complainant was very minimal - relating to the children, groceries, and paying bills. He could remember them having sex "maybe three times" during that period.
- [234] He referred to a chart prepared by the human resources department of this former employer, which contained a complete record of shifts that he worked at the mine from July 15 to September 30, 2015. For example, he explained that the lack of entries from July 24 to 26 indicates that he was on his days off then. As another example, an entry of eight hours' work July 27 would be a mine rescue practice shift, before the start of his four days on.
- [235] The complainant's sister's wedding occurred in the first weekend of August just outside of Cranbrook. None of her family stayed with them, he maintained. Her father, stepmother, and half-sister stayed at the home of the sister whose wedding it was.
- [236] The accused addressed the text messages, which the complainant had been cross-examined on, relating to the state of his relationship with her before the alleged assaults. As indicated previously, July 27 was a mine rescue shift. He texted her saying he was in Hosmer which is 10 to 15 minutes away from Sparwood on the way back to Cranbrook, because he was on his way home from that shift. Her reference to having been "way too tired last night" related to his attempts on the previous night to arouse her to engage in sexual intercourse, he said. She did not want to do so, and said she was too tired again. His text message at 6:30 a.m. the next morning saying he was "alive and well in Sparwood" was pursuant to his habit of always sending a message when he reached the parking lot of the mine. That was his first dayshift.
- [237] He testified there are no text messages missing from those conversations, as the complainant suspected. He obtained the messages from his phone by doing screenshots of them, and then sent them to his family lawyer at the time.
- [238] He then addressed the series of messages dealing with their relationship that began on August 8. Starting with the reference to the missing ten dollars, he explained they had gotten into an argument about it, and he confronted her through the message with the

accusation she had taken it. He discovered it missing on August 7, when he went to pay for coffee before picking up the members of his carpool. It was half of the twenty dollars he was allowed to spend during his four-day work shifts. It upset him because she had said she did not take it, but he knew that besides himself and the kids (who would not go into his work stuff), there was only her left. Therefore, he knew she was lying.

- [239] He described himself already being at the breaking point and with the lying he was "done" (with the relationship I infer). He communicated that to her. He advised her that he would be staying in the basement when he got home. He elaborated in his testimony that that arrangement was to be until he could find a place to stay. Later in the texts, as I have summarized previously, he told her that he just wanted to be separated and, subsequently, that he would find a place as quickly as he could.
- [240] Her reference to the previous weekend in the texts referred to another argument they had had about money and sexual matters. He was going to leave her at that point, and had communicated that to her. They had argued at the house.
- [241] Her reference to the restaurant in the messages had to do with a nice restaurant in Fernie. However, he did not have any plans to go there. She had apparently arranged it to surprise him. He had received gift cards from work and had previously suggested that they should go.
- [242] The reference to having said she was not attracted to him was to a comment that she had made that previous weekend, when they had their fight. His references to sex being a chore and that it should be more natural had to do with his desire for more frequent sexual contact, and for them to be passionate with each other and to have a sex life together.
- [243] Her request on August 12 to turn the lights off downstairs reflects the fact that he was staying downstairs full time by then, sleeping on the futon bed. He moved his nightstand and some clothes down there, as well.
- [244] Messages on August 20 revealed discussions between them about paying household bills.
- [245] He took photos of this sequence of messages on his former phone by scrolling through them. When he was asked if it was possible that he had missed any, he responded that he would say that he "got most of them."
- [246] More generally, the accused testified that he had never forced the complainant to remain in the family residence.
- [247] He would have been off from work August 25 to 28. His text message to her about stopping by on August 28 was sent because he had left his work bag and clothes at the house on his first day off. He had previously been off work from the 17th to the 20th. He spent a couple of those nights at home and then a couple, the 18th and 19th, at his friend's house. The friend's name was Jeff Zaychuk. Mr. Zaychuk lived seven blocks from their house. The accused's evidence was that for the rest of August when he was in Cranbrook he stayed with

Mr. Zaychuk, and did not return to the family home to stay the night.

- [248] He denied that he had a conversation with the complainant on the morning of the 28th in which she asked him to stay away. He sent her a message asking to come over and get his stuff because he was not staying there anymore and figured he should ask her permission to go there. He did, in fact, go to the house and collect his work stuff that day. The complainant was not there at the time.
- [249] August 29 was his first dayshift. The bus up to the hill to the mine was at 6:50 a.m. He was in a carpool with three other people and was the driver that morning. The other carpool members consisted of a person who lived a few blocks from his house and two others who lived on the other side of Cranbrook. He stayed at Mr. Zaychuk's house the night before and would have left Mr. Zaychuk's house at around 4:30 am, his usual time for dayshift.
- [250] He had "a couple of beers" with Mr. Zaychuk on his deck the night before, that is, the night of the 28th. He kept his alcohol consumption minimal that night because of the consequences to him if he failed a breathalyzer at work, as I have previously summarized in his evidence. He later added that the dangers of his job meant that he would not want to be working with anyone who was drunk or hungover. Overall, his alcohol consumption between 2010 and 2015 was only once every couple of weeks.
- [251] He did not go to the family residence that night, as described by the complainant. He explained that the garage of their house on 11th Avenue was in the front of the house on the left-hand side, with J.'s bedroom directly above it. If one were in that bedroom, one would be able to hear the garage door open and close. I took this to be a reference to the lack of any description in J.'s evidence of hearing the sound of the garage door, although it was part of the complainant's testimony.
- [252] He did have a knife similar to the one depicted in the exhibit, but his had a blade on both sides, instead of only one as the photo shows. He kept it sharp. He did not habitually carry it on his person and never used it against the complainant in any way.
- [253] In addition to the bruising on her wrists that he described in connection with her fall down the stairs, he recalled seeing bruising around her eye once in "2012, 2013-ish". When he asked her what happened on that day, she said that L. had hit her in the face with a book. There were no other specific instances in which he observed bruising on her body.
- [254] He also maintained that the sexual intercourse they were having three or four times a year by that point was always consensual. He denied ever forcing her to have sex, physically assaulting her, or threatening to kill her or cause her bodily harm.
- [255] He knew that the complainant was going to move out because she phoned two weeks earlier and said she would be doing so on August 29. He sent a message on September 1, asking whether she had moved out from Sparwood where he was at work. He tried moving back into the house on September 2.

[256] He last saw the children on a scheduled visit about four years ago in December 2017.

[257] With respect to any drug use by the complainant during the relationship, he saw her using Tylenol 3s by crushing them up and snorting them, as well as smoking marihuana.

He also explained the situation with the phone from which she had obtained the 2015 text messages. It was an old iPhone 6 which he had last used as his phone in 2016. He was in custody following his first trial in 2019 and was released in January of this year, during the present trial. He found the phone, but was not able to access it. He could not recall the password. He called Telus, Apple, and searched the Internet for a solution, but his efforts were unsuccessful.

Cross-examination

[258] He denied that he had originally been lying about the presence of the wall in the kitchen in the home on Little Van Horne Street. He maintained that he had simply been mistaken. He agreed that he was upset that his mother was coming over on the day that he is alleged to have pushed the complainant and that he had not been told about it in advance. He was angry to see her because it brought back memories of abuse he had endured. He was dealing with "a lot of stuff" from his childhood, he said. He explained that he was trying to get over it and build a relationship with her, although he conceded that he was not taking any steps towards that other than keeping away from her. He then agreed with the suggestion that "dealing with it" was an overstatement.

[259] He accepted the suggestion that he had panicked, but denied that it had been a temper tantrum. He also denied that he had pushed the complainant, maintaining that he had only brushed past her. He was not sure what part of his body came into contact with her. He had walked through everyone who was there. He later described that he was going at a quick pace when he left the house, but not running.

[260] One part of his body did hit people, he conceded, but when it was suggested that it could have been the complainant, he disagreed and said that it was in the hallway.

[261] He could not recall if he had put his shoes on in the mudroom or just run out the door with them. He drove around for half an hour at least, and agreed with the suggestion that he had done so to calm down. He would have kept away until his mother was not there anymore. He could not "quite remember" who was there when he got back to the house and did not recall the complainant being taken to the hospital.

[262] He confirmed that the complainant was pregnant from January to September of 2011, but did not know if this particular incident had occurred in the spring, summer, or late winter.

- [263] He also confirmed that he had testified in the first trial that he did not have an anger issue. He did not agree with the decision of MCFD that he should take anger management counselling, but despite being unhappy about having to do such a session, he was "willing to work with them". He ended up seeing the same counsellor that they had gone to for premarital counselling. He denied that the complaint that MCFD had received involved him hitting the complainant in addition to spanking J.
- [264] He asserted that he does not swear, yell, or hit. When he was asked if he was suggesting that he had not lost his temper many times in his relationship with the complainant, he said that he had never lost his temper. However, he denied that he was thereby claiming that he and the complainant had a happy, non-confrontational marriage. He conceded that they had arguments that J. probably saw and "was not happy about". There were a few previous times in which he would have broken up the marriage (which he clarified meant he had tried leaving the complainant a few times). J. would have been upset if he was leaving the complainant, and called his grandmother as a result.
- [265] He explained that he had tried to break up the marriage the week before they actually broke up, the year before, and "maybe another time". He could not recall the time in 2014. He thought they had worked it out, could not quite remember, including what it had been about. He was fairly certain however, that it was sometime in 2014. He told the complainant that they were done and he began sleeping in the basement for a few days. He then said the dispute might have been about money issues, and that J. might have heard them discussing it. He denied that there was any loud or angry yelling. The argument was "out in the open", and they were not arguing. In particular, he was not yelling.
- [266] When he was asked about the other attempt to end the relationship, he said he recalled a few times in which they were splitting up. This incident was long before that, that is, the 2014 incident, which he elaborated then to "a couple of years". He could not recall exactly when. He believed it was before L. was born in 2011. He could not recall the cause. There were no raised voices, however. In response to the suggestion that it was a calm decision about leaving the marriage, he said he believed so, but did not recall.
- [267] He accepted that he had not mentioned these two other occasions that he was going to leave the complainant before 2015 in his testimony in the first trial in this matter. However, he was re-examined to confirm his statement to the police from 2015 in which he had said that both he and the complainant had attempted to leave each other at various times throughout the relationship, but had "hung in there".
- [268] His text about the missing ten dollars was sent to her because he was done with the marriage. The significance of that amount, despite how much he was earning at the time, was that they had budgeted twenty dollars for him to spend for a four-day work period.
- [269] He also denied the suggestion that the complainant would have been unable to get a credit card with a \$10,000 limit in her own name, when she had no job outside the home. In his view, because she was married to someone who earned an income, she could have. He also

disagreed that he would have had to sign in order for her to receive a card. Some how she got it, he insisted. He believed that it was a CIBC card like their joint one. He was not prepared to accept that a credit report showing CIBC credit card accounts that were closed on July 31, 2015 represented the joint cards they had as a couple. He said the debt consolidation loan was actually in September of that year. He initially agreed that the listed card could not be the complainant's sole card because its limit was more than \$10,000, but then said he was just guessing and did not know. He added that he did not remember their joint card having a higher balance than \$10,000, as indicated in the report. He also did not recall her having any of the low-limit cards that were listed in that report.

- [270] As for the epiphany that he had described about not wanting to have any more children, he was challenged on his testimony that he was in the baby section of Walmart with the complainant when it occurred, buying snacks for K., who was in diapers. When it was put to him that, at that point, K. would have been three years old by then, had been toilet trained since she was two, and was eating regular meals, he said that she was eating "toddler snacks" as well as regular meals.
- [271] He explained his direct testimony that the complainant was happy that he was not upset on learning about the pregnancy. He explained that they were both happy because he had been on a "rant" previously about not having kids. He denied that a rant is an expression of anger. He was just saying that he was done.
- [272] He agreed that after getting pregnant this time, the complainant was exhibiting signs of depression, although he said that they were not very strong ones. He thought they might have talked about her depression. She did not tell him that she was depressed because the child was unwanted. They also did not discuss an abortion together - she told him she had been thinking about it.
- [273] He explained that he had forgotten his password to the phone over the two-and-a-half years since the first trial. He paused for quite a lengthy period before responding that he had not written the password down anywhere.
- [274] During their fight on the weekend of the complainant's sister's wedding, which was referred to in the August 8 text message, the complainant's voice may have been raised, but his was not. The complainant was not crying after the fight. He originally said that the visiting relatives had "stayed at my house the whole time" before immediately correcting himself to say they stayed at the sister's house. He said he had been confused when he initially answered.
- [275] Other than the location of that wedding, he could not recall a number of other details about it. He believed there was a reception, but could not recall where it happened, whether there was a toast to the bride and groom, or who wore what. He assumed that his and the complainant's children had gone to the wedding, then said he was sure that they were there, and that he and the complainant "would have" brought them. He also could not recall if there had been a party the following day, or whether they had said goodbye to the visiting

family members.

- [276] He returned home on August 25 after his last night shift on the 24th. He went to the house and dropped off his laundry, even though his friend Mr. Zaychuk also had laundry facilities. Mr. Zaychuk's house would have been a two-minute or a five to 10-minute walk from the family home.
- [277] The accused agreed that, at the last trial, he had said he was fully moved in by August 25, but explained that by "moved in" he had meant his clothing, his guitar, and some movies. When that was put to him again in cross-examination, he said he was "staying there with those items". He confirmed that although he was staying there full-time, he was not doing his laundry there.
- [278] He testified that he went to the house on August 28 at about 4:00 p.m. Mr. Zaychuk went with him. He initially said Mr. Zaychuk had seen everything he did there, although he later clarified that he went up on his own. He retrieved his body washes and shampoos from the bathroom. When Crown counsel suggested that that is where people leave things when they are living somewhere, he simply responded that he had left them there. He had put his clothes in the dryer before he left. When he returned on August 28, they had been taken out of the dryer.
- [279] He had to come back on the 28th to retrieve his key card for work, without which he would not have been able to scan in. It was kept in his work bag which he had left in the family home.
- [280] He denied that the final text message to the complainant, to the effect that he could not afford to live in the house by himself, reflected a missing message in addition to the ones he had provided. He had discussed bringing people in in order to be able to afford child support in a previous phone call with the complainant. He could not recall when that call was. Rather than there being a missing message to which he was responding, he was simply making a statement. He agreed that he had never testified about such a phone conversation in the first trial.
- [281] Although he testified that he moved back in the house on September 2, he agreed that, in the first trial, he said he had stayed with Mr. Zaychuk until October 1. He clarified that he went to the house [to stay, I took him to mean], but then moved back with his friend because he found it too hard to stay there without the children. At certain points in September, however, he stopped by the house, had a couple of people over, and had "a girl" over.
- [282] His last connection with Mr. Zaychuk was in September 2019. Had had not been able to get a hold of him before the current trial. He denied the suggestion that by not describing in his direct evidence that Mr. Zaychuk had accompanied him to his house during the day on August 28 or that he was staying with Mr. Zaychuk most of the time in September, he was trying to avoid mentioning him in his evidence.

- [283] It was also brought to his attention, and he confirmed, that Mr. Zaychuk worked at the same place and also went to work on the morning of August 29, although not in the same carpool.
- [284] He knew that the complainant had moved to a safehouse because he had looked in her "material" to see the details. This may have been the book in her drawer that she described.
- [285] He was shown the photos of bruising to her eye area, but did not recall ever seeing those marks on her. The only incident he had seen was the one he described in 2012 when she said she had been struck with the book by L. What he saw then was a bruise on her cheek and a scrape and he asked her about it. When it was pointed out that, for nine months of 2012, L. was under one-year-old, he said he could not recall exactly when it happened, but L. was around one. It was a "kid's book" with a hard cover and bigger pages, he said. L. was looking at books at the time and "he read them." When it was put to him that it was surprising that a child of less than one year could grab a book and strike with such force, he said it was a small bruise. It was "kind of surprising" that it occurred, but he was going by what the complainant told him.
- [286] From 2010 onwards, he never heard the complainant complain of vaginal or anal pain or discomfort. He never saw her take any soothing baths for anal pain. He confirmed his testimony from the first trial that the only cream he ever saw in their shared medicine cabinet was for a yeast infection that she was suffering. He added that he never saw her in discomfort of any nature.
- [287] He agreed that he kept his knife in the bedside drawer regularly.
- [288] He also agreed that the complainant obtained an order for the custody of the children in October of 2015 and that he has not applied for custody himself or challenged her custody. He testified at the last trial that his lawyer applied for unsupervised visits with the children in 2016.

Positions

Defence

- [289] The accused's counsel submits that while there is some confirmatory evidence available in relation to the physical assaults in Count 1, the sufficiency of which he goes on to analyze further, all of the objective evidence on the sexual assaults in Counts 2 and 3 actually contradicts the complainant's allegations, and the degree to which she has been inconsistent about them in her past testimony and statements to the police further undermines her credibility with respect to them.

- [290] These contradictions and inconsistencies fall into several subject areas:

- her evolving and inconsistent descriptions of the various assaults and sexual assaults, as well as her assertion of new recollections of specific incidents at various points in her chronology;

- her willingness to fabricate details to avoid inconvenient facts, such as the alleged phone call to the accused asking him to stay away from the home on August 28 to preserve her contention that he was still living there despite his text message asking permission to come over; or, her contention that they had family staying with them during her sister's wedding;
- in particular, the contradiction of her descriptions of the two sexual assaults using a knife that is provided by the medical evidence, which shows no sign of related vaginal injuries during the related period, inconclusive indications of anal injuries, and inconsistent reports by her of the part of the body into which the knife was inserted;
- the contradiction of other key aspects of her narrative, such as the manner in which she learned of the third pregnancy and her response to it, the state of her sexual relationship with the accused, her attitude to remaining in the marriage, and the extent to which he maintained financial control over her.
- The extent of her substance use, which was contradicted by her various admissions to Dr. Shilhan, and further contradicted on her claim never to have used drugs in the presence of the children by her admission to the MCFD. This lack of straightforwardness, in the submission of the defence, was clearly connected to her concerns about the MCFD's involvement with her children, as shown in her interactions with Dr. Shilhan. Along with her efforts to ensure that she retained custody of them after separation, this behaviour supports the defence theory about the motive for her false allegations against the accused.

[291] Taken as a whole, counsel submits that the complainant's evidence is so completely lacking in credibility that it would be very unsafe to base any convictions on it.

[292] The defence concedes that Dr. Shilhan was a careful witness and that her evidence should be accepted, with the exception that she cannot say how the injuries she saw were inflicted. Without an acceptance of the complainant's evidence about that, Dr. Shilhan's evidence cannot prove that they resulted from assaults.

[293] In addition, the very high number of visits tends to diminish the probative force of the injuries that Dr. Shilhan did identify, for example - three black eyes observed in 177 appointments. The other injuries she saw, such as marks on the complainant's neck, were not related to any specific injuries described by the complainant, and the complainant's own capacity for self-harm by cutting herself means that the possibility of some of the injuries that she saw were self-inflicted cannot be dismissed.

[294] As to any potentially confirmatory evidence of sexual assaults from the medical evidence, Dr. Van Rensburg's evidence, given from his vantage point of experience as a sexual assault examiner, that some vaginal examinations do yield evidence of injuries, that an anal exam may give an opportunity to observe a vagina, and that the position of anal fissures does not bear any particular relationship to their cause must be given meaningful weight.

- [295] The accused's counsel also reviewed the potentially confirmatory evidence from the non-medical witnesses.
- [296] Ms. B.'s close relationship with the complainant, previous discussions about the allegations before she spoke to the police, and very significant dishonesty-based criminal conviction, all require caution before accepting any of her evidence as confirmatory. Counsel says that it was noteworthy, given her close relationship with her daughter, that she apparently did not attach much significance to the injuries that she saw at the time she was observing them. On the incident in which she described the complainant being pushed into the fridge, it is questionable how she could have made her observations from the entrance area, given the position she was in physically and her immediate need to attend to the grandchildren, as she described. It is also questionable how she could have seen the complainant being pushed from that position, but not see her falling.
- [297] Devon Rae's description of the complainant's black eyes are said to be so imprecise and variable over the course of her testimony, including the frequency with which she saw them, that it suggested a degree of carelessness on her part in giving testimony. The adjustment she sought to make in her evidence from previous versions (for example, the frequency with which the complainant wore makeup) and her resistance to obvious propositions on cross-examination suggested some bias in favour of the complainant on her part. A particular concern raised by the defence was her purported observation of the complainant's injured condition on her moving day after the alleged August 28 sexual assault, which was substantially enhanced from the description she provided to the police.
- [298] Finally in the defence analysis, J.'s evidence raises significant concerns about his credibility and reliability. His strong connection with his mother and her evident influence on his perspective, his unrealistically detailed and evolving evidence of his memories as a very young child, and the insertion of a new specific incident that he remembered after his police statement, and his apparent conflation of the events of August 28 with another incident he described the year before are meaningful examples of his difficulty as a witness. Even if one were to accept the encounter he describes with his father on the evening of August 28, what he said he heard happen when his father went into the bedroom is inconsistent with the complainant's testimony of how the assault in that room unfolded.
- [299] On the other hand, defence submits that the accused's evidence should be accepted, or at least raise a reasonable doubt. It was conceded at the outset that he is not a sophisticated or educated person and that he was "not the most articulate" when describing events. Nonetheless, his categorical denial of assaultive behaviour during the relationship had various convincing attributes. Counsel reviewed his testimony about the history of the relationship, including its up-and-down nature and his evolution towards wanting to end it. His version of those events is consistent with the text messages with the complainant in 2015. His work schedule, the extreme importance of maintaining sobriety when on shift, and his responsibility to his carpool partners tend to support his denial of going to the family home on the night of August 28.

- [300] His counsel resists the suggestion that any adverse inference should flow from Mr. Zaychuk's absence as a witness on that last issue. Given the time of night that the sexual assault is alleged to have occurred and the proximity of their two residences, Mr. Zaychuk's evidence might not necessarily have ruled out the complainant's version of events conclusively. in any event.
- [301] Nor is his professed failure to observe any injuries to the complainant over the years as damaging to his credibility as it might initially seem. One must keep in mind how few injuries her confirmatory witnesses and Dr. Shilhan actually saw over that same lengthy period before concluding that he must inevitably have seen them if they arose innocently.
- [302] More generally, even if the accused's memory leaves something to be desired on certain points, I am asked to keep in mind the likely effect of his lengthy incarceration following his first conviction, despite his claims of innocence, and the effect of the allegations on his ability to see his children, which would in turn have impaired his memories of the family's time together.

Crown

- [303] Crown counsel begins with the proposition that the motive for these allegations that is being ascribed to the complainant is absurd. She already had an order for custody of the children before she spoke to the police in 2015. A protection order was a very valid concern in light of the abuse she was going on to describe, and the supposed fabrications that she engaged in from 2006 onwards to protect herself from having the children taken away were documented in her ongoing visits with Dr. Shilhan. In particular, Crown counsel submits that it defies belief that she was able to fool Dr. Shilhan into providing her with the dedicated care and support for an abusive situation. The defence theory also requires an acceptance that her various documented physical injuries were part of a master plan to amass evidence to protect herself against the MCFD, and that her supporting witnesses were somehow part of that plan.
- [304] Rather than being a fabricated set of allegations to obtain and preserve custody of the children, Crown counsel submits that this was the familiar situation of an abused spouse struggling to keep her marriage together, because she and her children nonetheless required the support of her abuser. That was the complainant's real motivation throughout this period, and her actions can be understood in that context. Her struggles with addiction and the ongoing fear instilled by the accused added to the difficulty of her situation. Despite these struggles, it is submitted that there are actually few problems with her credibility.
- [305] In contrast, the accused's evidence is said to be contrived and incapable of raising any doubt. Its shortcomings are said to include:

- the addition of new details to explain unfavourable evidence, like the suggestion that J. had heard him threatening to leave the relationship, to counteract J.'s phone calls to the grandmother, or the phone call before his text message in September telling the complainant that he could not afford to live in the house alone.
- the unrealistically calm temperament that he claimed, when contrasted to his sudden outburst of temper upon the unexpected arrival of his mother; and the unlikelihood of the scenario surrounding his involvement in anger management counselling.
- his implausible lapses of memory such as surrounding the wedding of the complainant's sister; the details of the supposed near break-up with the complainant in 2014, and the password on his iPhone, the last of which coincided conveniently with Crown counsel's requirement to see the phone.
- his attempts to distance himself from the evidence of Mr. Zaychuk, who was the last person to see him on the evening of the 28th and whose evidence could indeed have supported his denial if he really did not go back to the family home;
- the extreme unlikelihood, however much time he spent in his man cave, that in the course of interacting with his family, he would not have seen the complainant's black eyes, except the one he implausibly claimed having been inflicted by L. with a children's book, or her enduring vaginal and anal discomfort.
- His counsel's failure to confront the complainant with various aspects of the defence theory, including her alleged manipulation of J. before he gave his police statement, the several previous near breakups in their relationship, or the notion that she had injured herself, or had someone injure her in furtherance of her allegation.

[306] In the Crown's submission, the accused's actions in relation to the complainant on the night of August 28 are consistent with his knowledge that it was going to be her last night in the house, causing him to return from Mr. Zaychuk's house to spend the last night there inflicting non-consensual sex on her.

[307] The Crown disputed the arguments that the witnesses supporting the complainant's evidence were not credible or reliable.

[308] Ms. Rae's overall description of the black eyes she saw is not contradicted by having at one point confronted the complainant about observing three in eight months. She offered important support for the financial restrictions that were imposed on the complainant by the accused, and the lack of focused questioning by the police on her observations of the complainant on her moving day diminishes the weight that should be attached to the absence of any references to the complainant's apparent physical pain.

[309] Ms. B.' evidence was also generally supportive of the complainant's on details like bruising to her face and the black eye she received. The photos of the kitchen show that her evidence of the push into the fridge incident was quite plausible, given the configuration of

the hallway relative to the kitchen. It was not inherently inconsistent for her to have seen the accused push the complainant, but not the complainant falling. There is also support in the medical records for her testimony about taking the complainant to the hospital afterwards. Like Ms. Rae's evidence, there was also no particular reason that Ms. B. would have mentioned the particular observations that she made of the complainant on moving day in her statement to the police if she had not seen them, and more generally, no real indication of tainting between her evidence and the complainant's given the kinds of mother-daughter conversations that one would expect them to have had.

- [310] In the Crown's submission, J.'s evidence is entitled to significant weight. It undermines the accused's self-portrayal as a calm non-violent partner over the years, as well as his alibi for August 28. On the former point, Crown counsel notes that J.'s evidence that his father told him not to tell anyone about the early assault or he would be taken away was not actually challenged. The only reason to give such a warning would be to cover up the accused's violent behaviour. On the latter point, the Crown says that a father moving out is something that a child is likely to remember clearly.
- [311] Dr. Shilhan's records provide a wealth of confirmatory detail, the Crown argues. This includes not only her actual observations of injuries (for example, bruising consistent with hands being placed on the complainant's neck or the excoriated area of the labia), but the complaints of vaginal and anal pain - both the objective tenderness on palpation and the reports of pain that a doctor is entitled to take into account as part of their diagnosis. Important in this regard were Dr. Shilhan's points about the frequency of normal findings from vaginal examinations and the difficulty of carrying out effective anal examinations for obese patients like the complainant.
- [312] The findings of pain and apparent infection in the anal area in August 2015 are especially important to the description of the assaults with the knife that preceded it. On this point, Crown counsel disagrees with the defence's characterization of the possibility of the knife handle being inserted instead of the blade as implausible. There is no evidence that the entire handle or blade was inserted and using the handle in that manner was more consistent with using the knife to intimidate the complainant, as opposed to stabbing her with it. In that scenario, the fissure followed by infection and discomfort would have resulted from the subsequent anal intercourse, which would also meet the definition of "bodily harm."
- [313] Finally, Crown counsel turned to the apparent inconsistencies in the complainant's testimony. He argued that, properly understood, they are not as significant as the defence argues. The situations in which she provides innocent explanations of her injuries are most consistent with trying to cover up for the accused's assault. As in the case of J.'s evidence the apparently new incidents arising in her testimony in this trial, such as the first time she was struck in the face, or her description, being subjected to forced intercourse, which she seems to have described in a different context in the first trial, do not necessarily undermine her credibility.

- [314] The same is true about her initial response to her pregnancy, which was more consistent with her present testimony in her later visit with Dr. Shilhan, and her resulting depression and her denial of her ongoing drug use. The latter issue was certainly a shortcoming in her evidence, but it is ultimately most consistent with a person with an ongoing problem, who does not regard that issue as having much to do with the assaults and sexual assaults that she came to court to testify about.
- [315] The issue of consensual sex during the relationship, a particularly significant issue in cross-examination, should not be analyzed in the black and white manner proposed by the defence, Crown counsel submits. While there is some evidence of injury to the complainant's vagina, the absence of further injuries is not determinative, and her evidence about attempting to keep herself safe makes it likely, as she said, that she submitted at times to avoid injury. More generally, one can conclude that there was at least some consensual sex in the relationship, as described in the psychiatrist's report, but that line was blurred in circumstances in which her actual motivation was self-preservation.
- [316] A particularly strong point in the complainant's favour, Crown points out, is the way she stood her ground in the face of an erroneous preliminary inquiry transcript that quoted her as saying that both of her wrists had been injured in the fall down the basement stairs. The court can have confidence, that she was at least attempting to describe matters as she actually remembers them, even if there are imperfections in that process.

Discussion

- [317] Beginning with the accused's evidence, obviously if I believe it or it raises a reasonable doubt, he must be found not guilty.
- [318] Having considered his evidence, and having made due allowance for his degree of sophistication and the circumstances he finds himself in, I find that neither of those situations arises here.
- [319] I am satisfied that his evidence represented a concerted effort to distance himself from the acts he is alleged to have committed which resulted in a series of implausible assertions.
- [320] The first of these is the uniformly calm demeanour that he attributed to himself during all of his disagreements with the complainant, including situations in which he was attempting to break up the relationship, the complainant was crying, and those that he said J. would have found sufficiently upsetting to need to call his grandmother for support. Aside from being unrealistic in itself, especially in light of the surrounding evidence that this was on any version of events a tumultuous marriage, his position also clashed with his immediate volatile emotional response, even on his own evidence, to seeing his mother unexpectedly, and his being so "done" with the relationship that he was prepared to end it over the taking of \$10 from his wallet.

- [321] The next problem was his claim never to have witnessed any injuries to the complainant except for the bruises on her wrist from falling down the stairs, and the black eye when L. hit her with a book. He never saw the complainant in any vaginal or anal pain, observed any medications for those problems in their joint medicine cabinet, and going farther, maintaining he never saw her in discomfort of any nature. Even without considering the observations of Ms. B., Ms. Rae, and J., or on what was observed by Dr. Shilhan alone, it is unrealistic that even the least attentive husband would not have noticed these fairly distinctive injuries and other markings on her body over several years, or her discomfort for what were clearly troubling problems in her intimate areas, whatever may have caused them.
- [322] I found his various gaps in memory inexplicable and troubling. The most notable was his inability to answer even the most basic questions about the previous instances in which he had attempted to end the relationship. As another example, his failure to recall even the most basic details about the complainant's sister's wedding was so pronounced, one might doubt that he was actually present. He also seemed to recall less about the family finances when he was being cross-examined on the credit report than one would expect, especially in view of the serious situation that the family was facing, requiring a consolidation loan.
- [323] More broadly, he tended to make assertions that he then struggled to support plausibly. His attempt to retreat from K.'s age and snack requirements at the time that he had his epiphany about not having any more children, once her actual age was pointed out, or how the infant L. was able to enjoy books and wield them with sufficient force to give his mother a black eye, raised real concerns. He represented himself as attempting to deal with his fraught relationship with his mother, before retreating into the acknowledgment that he was simply avoiding contact with her, which did not really amount to any steps in that direction.
- [324] A credible explanation of how he was fully moved in at his friend's house with clothes, a guitar, and some movies while his shampoos and body washes remained at the family home and continued to do laundry there and left his work pass there also eluded him. A lack of confidence about exactly where he was living in September on my part arose from his explanation that he had moved to Mr. Zaychuk's, but at times visited the family and had friends and, at one point, a woman over. I was left with the impression that this was quite a malleable part of his narrative.
- [325] Having rejected the accused's evidence and not being left in any doubt about it, I turn to the question of whether the Crown has met its burden of proving his guilt on any of the counts beyond a reasonable doubt.

- [326] As a necessary first step, I conclude that it would be unsafe to base a conviction on the complainant's evidence except where it is confirmed by other reliable evidence. The objective evidence that contradicts much of her version of events and the degree, materiality, and number of her past inconsistencies compels that conclusion, as the accused's counsel argues.
- [327] Before reviewing those difficulties, I should say that I did not find the motive for making these allegations that was attributed to her by the defence, persuasive. There is no question that she expressed concerns about MCFD involvement with the children, in light of her substance use, throughout the period covered by the medical records, and concerns about their custody in the post-separation period. What is lacking to support this theory however, is any convincing connection between those concerns and the longstanding contemporaneous allegations of physical and sexual abuse in the records. In other words, I was left unclear how repeatedly describing that abuse to her doctor would prevent the doctor from reporting her relapses, when such warnings from the doctor about relapses and the consequences were interspersed with the recording of those very complaints of abuse. The custody aspect of the defence theory fails to account for the fact that the complainant had already obtained a family court order to that effect before she spoke to the police, and that a protection order was obviously appropriate based on the assaults that she would go on to describe.
- [328] Of course, the absence of a particular motive to fabricate, which is at best one of the many factors in a credibility analysis, cannot overcome the significant weight of contradictory evidence and inconsistency in the complainant's evidence.
- [329] To be fair to her, nothing approaching perfect consistency could be expected in a description of numerous assaults spanning a wide time period. For example, recalling incidents with basic accuracy but out of sequence, or omitting or adding details that do not change the essential nature of an event, are consistent with the frailties of human memory, and may be less of a concern. On the other hand, the omission of significant details at a time much closer to the events being described can be meaningful. In this case, the complainant's difficulties were in many situations fundamental to her credibility. Most notably:
- a review of the medical records showed convincingly that she was not truthful in her testimony about the extent of her substance abuse during the period in the indictment.
 - Her text communications with the accused in 2015 about their sexual activity and his wish to separate undermine her near-categorical denials of any consensual sex that the accused's counsel elicited from her, as well as her evidence about how she viewed the relationship at that time. To be clear, I am not imposing any stereotypical assumptions about the extent to which consensual or non-consensual sex might coexist in an abusive relationship, or the ambivalence that an abused spouse might well feel towards leaving it. The point is that the text messages contradict the complainant's own account of those matters within the four corners of her evidence, and the

concept of staying safe in that manner was mainly raised in response to the contradictions.

- She could not explain why she had described the 2014 sexual assault involving the insertion of a knife to her doctors as relating to her anal area, rather than her vagina as she testified, or why she described the 2015 one as involving both her rectum and her vagina, also contrary to her testimony. Taking care once again to stay solely within the four corners of her evidence, I am at a loss to understand how she could have been mistaken or confused about that, if the testimony is true. (I should say that although I allowed Crown counsel to re-examine on her ability to distinguish those areas in her November 2015 statement to the police, in retrospect, I have concluded that that statement is too remote from the disclosures and non-disclosures to her doctors to shed light on, or remedy, the concerns that arise from it).
- Of equal importance, the records of her dealings with her doctors during those periods do not support the vaginal pain she described, only anal pain. Nor was she observed to be in the level of distress that she described in her testimony when she attended the doctors. It is also inexplicable to me why her obvious relationship of deep confidence with Dr. Shilhan, which had included multiple ongoing disclosures of abuse, did not extend to the immediate aftermath of these incidents. (In making these observations, I am keeping in mind Dr. Shilhan's record of non-menstrual bleeding in August 2014 and Dr. Wentworth's record of vaginal blood in August 2015, but neither of these observations were related to complaints that bear any resemblance to the complainant's testimony.) I do not think the Crown's resourceful alternative argument that her difficulties resulted from the anal sex, whereas perhaps only the handle had been inserted in her vagina, can get around the clear implication of her testimony that she was suffering from vaginal pain, and that it had related to the insertion of a knife into her vagina.
- Another confident aspect of her testimony that the records show was, at best, completely mistaken was her testimony about how she learned of her pregnancy and how the accused reacted to it. I acknowledge that she subsequently expressed a greater degree of ambivalence about the pregnancy to Dr. Shilhan within a relatively short period, but her testimony was about how she found out, and her two different versions of that cannot coexist credibly.
- While I take the Crown's point that responsibility for budgeting does not necessarily connote ultimate control of the family finances, the contradictory force of this aspect of the cross-examination was the expansion of her role from the impression of financial restrictions as another facet of her abuse that she conveyed in direct examination. In reaching this conclusion, I have kept in mind Ms. Rae's evidence that she offered to hold money for the complainant which certainly supports the accused's ultimate financial control and Ms. B.' evidence that she paid for a large number of items for the family. My point, for credibility assessment purposes, is that the complainant had a role in managing the family's finances beyond what she initially portrayed.
- I was less concerned about the complainant's interpolation of a new physical assault between the candleholder and stairs incidents in itself, given the frequency of the punches to the face that she described receiving over the years. The concerning aspects of that testimony were her explanation that it was the product of further thinking about the circumstances over the years

and her claim, subsequently proven to be incorrect, that she had not seen her police statements until her initial trial testimony. The same enhancement of detail over time arose in connection with her ability to describe the first sexual assault specifically, after previously testifying that they were too frequent to be distinguished and the jog to her memory provided by watching J.'s evidence in the first trial.

· Lastly, standing alone, I would not have been as troubled by the false explanations for her injuries that the complainant gave to her friends and family as well as the MCFD over the years, if the underlying assaults had been otherwise credibly proven. It would not be inconsistent, again within the four corners of her evidence, for her to have attempted to keep ongoing secret.

[330] The question, then, becomes what, if any, of the described assaults and sexual assaults have been reliably confirmed.

[331] Given the fundamental contradictions in the incidents alleging the insertion of a knife into the vagina, the absence of expert opinion linking the ongoing vaginal or anal complaints to non-consensual intercourse, and the availability of alternative explanations for any anal fissures that may have existed, I do not think it would be safe to treat the medical records as confirmatory of any of the sexual assaults.

[332] Given the complainant's evidence about being punched in the face multiple times and the obvious availability of judicial notice that such blows are capable of producing black eyes, bruising, abrasions, and swelling to the face, as an aspect of universal human experience, it is clear that the injuries of that nature observed by Dr. Shilhan serve to confirm punches in relatively close proximity to those appointments. They are February 8, 2011, November 23, 2012, April 30, 2014, January 13, 2015, and May 6, 2015. The last three were the subject of the photos in the exhibits.

[333] Once one strays away from that obvious type of injury however, the question becomes one of interpretation and, more importantly, whether there was any evidence from the complainant of a particular assault, for which the medical records can then offer confirmation. Besides the sexual assaults and punches, she described having a knife held to her throat and the "little things" such as hitting her, grabbing her, forcefully holding her down, and pushing her. Notably, choking was absent from that litany. I think it would amount to confirming evidence that was not provided to rely on any of Dr. Shilhan's observations to find that such additional types of assaults occurred. This problem is compounded by my inability to relate any specific observation, such as the position of apparent finger marks, to specific alleged conduct, in order to assess its confirmatory weight.

[334] I turn, then, to the potential confirmatory evidence provided by the non-medical witnesses.

- [335] Ms. B.'s conviction for a fraud that involved deception of an employer over a lengthy period of time certainly requires a degree of caution in approaching her evidence. I do not regard it as determinative of her credibility, however. The core of her evidence was quite convincing. She described sporadic observations of various idiosyncratic injuries to her daughter, and of asking about them only on some occasions. This struck me as a realistic depiction of actual observations and communications in the course of a mother-daughter relationship, which I would not expect to find if she were seeking to blindly corroborate the complainant or present the accused in the worst possible light.
- [336] I thought she also drew a believable distinction between the dark circles that she sometimes associated with the complainant being tired, and her more specific observations of black eyes. Her core recollection of two specific incidents of black eyes and the complainant's habit of wearing sunglasses in incongruous situations remained unshaken. I am satisfied that those black eyes are also confirmatory of assaults by the accused. While there was nothing deficient in her description of observing a sprained wrist or a sprained ankle (she failed to mention the arm bruise in the first trial), as in the case of Dr. Shilhan, the lack of a reference point for them in the complainant's own testimony prevents them from confirming further assaults.
- [337] She was less reliable on what injury the complainant received from falling downstairs, and how much she was told by the complainant about the assaults before she spoke to the police, although the extent of her advance knowledge was moderated by the reference to her police statement in re-examination.
- [338] I also did not find it believable that she would have failed to include the fairly marked physical symptoms that the complainant described having on her moving day if she had actually observed them. Further, although the photos of the physical configuration of the Little Van Horne house satisfy me she could have seen the accused push the complainant into the fridge from her vantage point, her failure to describe such a significant action on his part in the first trial, coupled with the subsequent certainty that she developed about that being the incident in which she took the complainant to the hospital, leaves me unable to be satisfied that the push occurred.
- [339] As my summary of Ms. Rae's testimony revealed, she experienced significant difficulty in providing a consistent estimate of the number of times she saw the complainant with black eyes. Her eventual concession that she did not have a clear recollection of the actual numbers was quite appropriate. I did not have any impression of deceptiveness from her however, and it seemed quite clear that she had made at least some observations of this nature. I think the only reliable quantification of those observations was her description in her police statement, which she accepted, that she had confronted the complainant on the basis that three black eyes in eight months could not be an accident. I appreciate that she summarized multiple such conversations in her statement, which could potentially support a greater number of observations, but I do not feel comfortable exceeding the three that she unquestionably described. I am satisfied those three observations occurred and that

they confirm blows to the complainant by the accused.

- [340] Like Ms. B.'s evidence on this point, I do not find it plausible that Ms. Rae would have failed to relate the degree of physical impairment on August 29 that the complainant described to the police if she had observed it, even if her attention was not specifically drawn by her interviewer to the issue of physical condition. In particular, I find it hard to accept that she would have described the complainant as "tired, sad, odd, and just not right" while nonetheless still withholding physically descriptive details merely because she was not specifically asked about them.
- [341] Finally, I can empathize with the very difficult position in which J. found himself when testifying in this trial. Understandably, he seemed to be under significant emotional stress. His strong connection with his mother and evident hostility towards his father require a degree of caution when assessing his evidence and some aspects of that evidence suggest, at the very least, concerns about its reliability.
- [342] Though common sense and ordinary human experience might suggest that four years old is likely the lower margin of a person's ability to generate reliable memories, he described quite an array of accompanying ones at that age, going so far as to say that most of his memories are from that period. This contrasted sharply with his statement to the police in 2015 that the assault was the only thing he can remember which, again as a matter of ordinary human experience, makes more sense. His addition of the detail of his mother falling to the ground is also troubling, because it suggests a degree of force accompanying the blow that was not previously included.
- [343] With respect to the assault he described occurring when he was seven, it is not inconceivable that he could have remembered another incident after speaking to the police, even if he confirmed to them that he had provided everything. As in the case of his testimony about the incident when he was four, it is the surrounding comments in his testimony - that he thought about things that were not okay and that, as he was older, more came back to him - that raised concerns about reliability.
- [344] I also think the omission of any reference to seeing his father the night before they moved in his police statement undermines the reliability of that professed memory. His description in the first trial of an incident the year before in which his father went to his parents' bedroom and heard a sound like a slap, which he did not testify about in this trial, may be the source of that memory, but it is not necessary to decide that question.
- [345] J. was not challenged on his observations of seeing injuries to his mother, including one to her eye that she gave an innocent explanation for, and I find his observation of that specific injury sufficiently reliable to form the basis of a conclusion that it resulted from a blow by the accused.

[346] Although I have already rejected the accused's testimony entirely and do not have a reasonable doubt arising from it, based on its own internal shortcomings, J.'s testimony about the screaming argument that caused him to call his grandmother around the time of the family wedding, which his grandmother supported in a more general sense, and his evidence that his parents fought frequently when his father got angry, would have further undermined the accused's unbelievable story that J. became upset solely from hearing him calmly discuss leaving the relationship.

Conclusion

[347] In summary, I am satisfied beyond a reasonable doubt that the accused physically assaulted the complainant within the dates captured in Count 1, on the occasions preceding the observations of black eyes and facial abrasions and swelling that I have found were confirmed by Dr. Shilhan and the non-family witnesses. Accordingly, I find him guilty of Count 1.

[348] As I have been unable to find the complainant's evidence to be sufficiently reliably confirmed to find beyond a reasonable doubt that any of the sexual assaults were committed, I find the accused not guilty of Counts 2 and 3.

"Schultes J."

[1] Dr. Shilhan sometimes referred to the MCFD as "Children's Aid" or "Family Services" in her notes, but given that she was always referring to the same agency, I have used MCFD for the sake of clarity throughout.

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