

CANADA / JUDGMENT

R. v. M.L.M.

2025 BCSC 870

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 870 R. v. M.L.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. M.L.M.,

2025 BCSC 870

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Registry: Kamloops

Rex

v.

M.L.M.

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Before: The Honourable Justice Thomas

Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

Kamloops, B.C.

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March 4, 2025

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[1] THE COURT: The accused M.L.M. is charged with sexually assaulting R.G. on or about the 25th day of March 2023. The sole issue in dispute is consent.

Overview of Evidence

Camera Evidence

- [2] R.G. had a camera outside her house which was set to a motion detector that would record people coming down the stairway to her front door. She also had a camera inside her house in the kitchen that would record her kitchen and into the living room.
- [3] The video view also extended into the living room. It is unknown whether the camera had audio or was only video. She installed the cameras because, in a previous residence, someone had broken into her house and smelled and stolen some of her underwear. She said it was her practice to leave the outside camera on all the time, but she only turned the inside camera on when she was away for a weekend or away on vacation. The inside camera was in plain view. When people first visited her house, she would explain to them why she had the camera and that the inside camera was only on when she was away.
- [4] M.L.M. had known R.G. for a long time. He had been to her house a number of times before the incident in question. R.G. had told him why she had the cameras. M.L.M. said he did not recall R.G. telling him that she only turned the inside camera on when she was away for the weekend or on vacation.

M.L.M.'s Evidence

- [5] On March 24, 2023, M.L.M. went to the liquor store with his girlfriend and a friend, D., where he purchased a bottle of Cîroc. They then went to the casino, where they drank, and M.L.M. and D. inhaled several bumps of cocaine. Later that night, they all returned to M.L.M.'s girlfriend's house. They all drank directly from the Cîroc bottle. M.L.M. and D. also inhaled more cocaine.
- [6] D. left, and M.L.M.'s girlfriend went to bed. M.L.M. called R.G. because he missed her and wanted to see her. He had known R.G. for many years and had been to her place on a number of occasions. He called her more than once. He asked her to inject him with steroids as a ploy to getting her to allow him to come over to her house. M.L.M. stated that R.G. was clear that there would be no sexual intercourse but that he could come over to talk. She specifically told him that "he would not be getting his dick wet." He put his steroids and a bottle of Cîroc in his knapsack and went to R.G.'s house. He estimates that he was about a six out of 10 on the intoxication scale. He could walk and think, but it would not be safe to drive.
- [7] When he arrived, he sat down on the couch with R.G., and they began talking about things he had said to her previously when they were in a relationship that were toxic. She slapped him a number of times. He held onto her wrists to stop her, as she had never done anything like that before. He asked her what was wrong and the conversation moved to other topics.
- [8] He pulled out his steroids. She refused to inject him with the steroids. He took out the bottle of Cîroc and took a drink from the bottle. It was about a quarter full. R.G. grabbed the bottle from him and downed it. I note the picture of the bottle of Cîroc indicates that R.G. did not drink all of the remaining contents of the Cîroc.

- [9] He did not place any drugs in the Cîroc bottle at any time, though he had inhaled cocaine through his nose along with D. while drinking directly from the bottle. They went into R.G.'s kitchen, where she has a small bar. They both had a shot of tequila, then he grabbed a bottle of Smirnoff Ice since she had drunk his Cîroc. She did not seem to mind.
- [10] He had two to three shots of tequila in the kitchen. R.G. had one to two shots. When they returned to the living room couch, they had a normal conversation. They talked about getting back together. She brought up another ex-girlfriend of his and asked why, if he had cheated on her before, should she trust him again. The discussion got friendlier.
- [11] R.G. asked M.L.M. to come closer to her. M.L.M. got up and walked over to the end of the couch. R.G. scooted forward and pulled his pants and underwear down to above his knees and began to give him oral sex. He was surprised because on the phone, she was clear that he would not "get anything" that night. The oral sex continued for a maximum of two minutes, then she grabbed his shirt by the neckline and pulled him into her bedroom. They started kissing and each of them took off their own clothes.
- [12] After that, they ended up on the bed kissing. She gave him some hickies on his neck. He then went between her legs and started to digitally penetrate R.G. with two fingers. He then moved to oral sex, using his mouth on her vagina. M.L.M. then moved on top of her and penetrated her with his penis. He slapped her on the buttocks a few times. She did not ask him to do so but did not tell him to stop.
- [13] While penetrating her, he placed his hands on the side of her throat. He was careful not to push down on her windpipe, but did grab her or place his hands in the throat area. She did not ask him to do this. After that, she got on top of him and went up and down on him. After that, she turned onto her stomach and he penetrated her vagina from behind and they continued to have sex.
- [14] After the sexual activity ended, he fell asleep right away next to her on the bed. The next thing he remembered was her phone alarm going off. R.G. told M.L.M. the alarm was to get her up for work and R.G. told him to turn it off. M.L.M. asked if she was sure, then R.G. said that she was and gave him her password. M.L.M. said he did not need her password to turn the alarm off but used the password R.G. gave him to unlock her phone and look at some of her messages and her contacts. There was no discussion about R.G. looking at M.L.M.'s phone.
- [15] M.L.M. then got up. He sent a text to R.G., while at her apartment, saying that he did not think things would work out between them. He was trying to think of an excuse to tell his girlfriend about the hickies on his neck. He then left. R.G. was still asleep when he left.

- [16] M.L.M. gave a warned statement to the police about the incident. At the start of the statement, he asked the police if the inside camera had audio turned on and brought up the camera several more times. He asked that the police investigate the camera because he believed that it was on and he would have evidence on it which would establish that the sexual relations were consensual.
- [17] M.L.M. suffered from an overdose approximately a year ago, and his memory for current events is impaired. My impression was that he had difficulty answering some questions because it appeared he forgot what he was being asked or what he initially intended to say.

R.G.'s Evidence

- [18] R.G. got off work at around 9:30 p.m. on March 24th and went home. Her friend G. came over. R.G. had a margarita and a shot of tequila. The two of them then walked over to a bar. R.G. was at the bar for about three hours. She had a vodka with cranberry juice and three shots of tequila.
- [19] R.G. and G. left the bar and they went back to R.G.'s house together. M.L.M. called R.G. He said that he had won big at the casino and wanted to see her. He wanted her to give him an injection of steroids. R.G. said that she was drunk, did not want to stay up, and did not want to talk. Eventually, he convinced R.G. to let him come over, but R.G. was clear that she was only open to a conversation with him and nothing further.
- [20] G. arranged a ride home and a friend came to pick up G. and take her home. R.G. walked G. to her car and then left the door unlocked for M.L.M. to enter the house. R.G. changed into sweatpants and a t-shirt and laid down on the couch. M.L.M. phoned again to say he was on his way and not to fall asleep. R.G. was intoxicated at this time, but was in control and coherent. However, she would not have been comfortable operating a motor vehicle.
- [21] M.L.M. came into her apartment through the unlocked door. R.G. was still lying on the couch. She did not get up to greet M.L.M. He offered to get her a cup of water. R.G. said she was trying to sleep but accepted the water. They were talking and the conversation got heated. She expressed frustrations about previous things that she wanted to discuss with M.L.M. She wanted to say her piece and then hear his side of the story. M.L.M. brought up something that she found offensive so R.G. slapped him across the face. The issue did not get resolved but they moved past that topic.
- [22] They then discussed injecting steroids and R.G. examined the syringe. She did not agree to inject him with the steroids. He then pulled out the bottle of Cîroc. The bottle was about a quarter full. She thought that he was no longer drinking, so she took the bottle from him and had a sip of it. M.L.M. then walked into the kitchen. He found a bottle of Smirnoff Ice, opened it, and drank from it.

- [23] R.G. is not sure whether she drank more after that. After R.G. drank from the bottle of Cîroc, she felt very different. She felt out of control and no longer aware of her surroundings. After taking the drink, she only remembers small bits and pieces of the rest of the morning.
- [24] Her first memory is of her lying on the couch, very confused. M.L.M. had his penis inside her mouth. She tried to push him off and say no, that she was not interested. She was confused about what was happening and why. She told M.L.M. she did not want it and that she wanted to go to sleep. That is all she can remember about that moment.
- [25] The next clear memory she has is that she is on her bed with her pants off. M.L.M. was inserting his fingers into her vagina and then began using his mouth. She told him that she was not interested and did not want to do this. What he was doing would not do anything for her as she just wanted to go to sleep. She did not yell. She said it in a normal speaking volume. She knows that that is not what she wanted that evening. She was not attracted to M.L.M. at the time. She had been doing a lot of growth in terms of moving past their relationship and did not want to get back into that loop. She wanted to speak with him and stay within her boundaries and go to bed.
- [26] The next thing she remembers was that he was on top of her, putting his penis inside of her vagina. She heard a slapping noise and felt pain all over. The slapping hurt her skin. She was very confused. She said something along the lines of "stop". M.L.M. then put his hands on her throat and pressed hard, and that was the last thing she remembers. Her memory lasts for about 30 to 45 seconds. R.G. said it hurt when M.L.M. slapped her, and that it felt awful when he put his hands on her throat. She had bruises on her buttock and throat. She did not enjoy the slapping or the hands on her throat and would never have consented to that with anyone in any situation. R.G. does not know if M.L.M. used a condom but it did not feel like he did.
- [27] The next thing she remembers is him waking up or gaining consciousness. She saw a light coming in below her blackout curtain in her room. She was confused why it was bright as it did not make sense. M.L.M. said not to worry, it was morning, and asked for a pillow. R.G. said, "you're trying to sleep with me when I am unconscious, trying to have sex with a girl who's not awake." She was angry and told him to get out.
- [28] She said he looked at her messages on her phone from other people, but continued to speak, and he told her to go fuck herself and he left. M.L.M. left, slamming the front door behind him.
- [29] When the police gathered evidence from R.G.'s apartment on March 26th. R.G. told the police officer that the indoor camera had been unplugged and was not on during the incident. The police officer took no further steps to ascertain the existence of the video evidence.

The Video Evidence

- [30] The door video shows that M.L.M. arrived at 3:06 a.m. on March 25th. R.G. and G. returned from the bar at 2:23 a.m. R.G. and G. left to go to the bar at 11:26 p.m. on March 24th, and G. arrived at 10:52 p.m. and R.G. got home from work at 10:13 p.m.

Forensic Evidence

- [31] Cocaine was detected in the liquid in the Cîroc bottle. The cocaine could have been transferred inadvertently by a cocaine user drinking from the bottle. There were no other drugs, including GHB, in the liquid in the Cîroc bottle.

Legal Principles

Elements of the Defence

- [32] The Supreme Court of Canada in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 1999 CanLII 711 [Ewanchuk] explained the components of sexual assault. The court held at para. 23:

23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea. The actus reus of assault is unwanted sexual touching. The mens rea is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

The actus reus of Sexual Assault

- [33] The court in *Ewanchuk* went on to explain that the actus reus of sexual assault is established by proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two elements are determined objectively. All the Crown needs to prove is that the accused's actions were voluntary. The sexual nature of the assault is determined objectively, and the Crown need not prove that the accused had any mens rea with respect to the sexual aspect: *Ewanchuk* at para. 25.
- [34] The absence of consent is determined with reference to the complainant's subjective state of mind towards the touching when it occurred: *Ewanchuk* at para. 26.

The mens rea of Sexual Assault

- [35] The mens rea of the offence of sexual assault contains two elements: (i) intention to touch; and (ii) knowing of, or being reckless or wilfully blind to, a lack of consent on the part of the person touched: *Ewanchuk* at para. 42.

Credibility and Burden of Proof

- [36] I begin with the fundamental proposition that M.L.M. is entitled to the presumption of innocence. That means the Crown must prove its case beyond a reasonable doubt. The burden rests squarely on the Crown and never shifts. M.L.M. bears no onus of proof. To meet its burden, the Crown must prove that the evidence as a whole establishes M.L.M.'s guilt beyond a reasonable doubt. A reasonable doubt is not one based on sympathy or prejudice, but on reason and common sense. The issue before me is not a question of whose evidence I prefer as among the two witnesses who testified. This is not a credibility contest, because the burden of proof is on the Crown to prove every element of the offence beyond a reasonable doubt: *R. v. Thiara*, 2010 BCCA 415 at para. 28.
- [37] The classic formulation of the instruction to be given to juries in a criminal case such as this one, where the accused has testified and the results turn on the assessment of credibility, is found in the majority judgment in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 758, 1991 CanLII 93 [W. (D.)]:
- First, if you believe the evidence of the accused, obviously you must acquit.
- Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
- [38] It follows that if the trier of fact is left, after considering all the evidence, unable to decide whom to believe, then an acquittal must follow.
- [39] As a judge hearing the case without a jury, I must of course instruct myself in the same way. However, because I am sitting as a judge without a jury, the W.(D.) formula can be applied with greater flexibility, as Justice Charron writing for the court in *R. v. Dinardo*, 2008 SCC 24 wrote:
- [23] What matters is that the substance of the W. (D.) instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.
- [40] When assessing M.L.M.'s evidence, I must consider it not in isolation, but in light of the evidence as a whole, including the evidence of R.G. Likewise, I must not decide the case on the basis of the Crown's witness in isolation without considering the evidence of M.L.M. together with it. As Justice Lambert stated in *R. v. P.W.*, 2003 BCCA 542:

- [19] It is not the function of the trial judge to decide whether she believes the complainant and, having reached a conclusion in that, to go on and only then consider what the evidence of the appellant was on his own behalf. The consideration of both must be deferred until they can be looked at together and an overall conclusion reached on the basis of the whole of the evidence.
- [41] In assessing the credibility and reliability of M.L.M. and R.G., I am cognizant of, and have relied upon, the principles set out by our Court of Appeal in the recent case of *R. v. S.S.M.*, 2024 BCCA 417 [S.S.M.]:
- [65] The credibility of a witness refers to their honesty or truthfulness. Reliability refers to their accuracy. While related, these are distinct concepts. For example, a truthful witness may be mistaken about what they believe they saw or heard.
- [66] The fundamental approach to assessing the credibility of a witness and the reliability of their evidence was articulated in *Faryna v. Chorny* [citation omitted]:

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [67] The assessment of both credibility and reliability is context-specific and multi-factorial. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness's evidence at trial or between prior accounts; whether the witness's evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying [citation omitted.]
- [68] Regarding the last of these, demeanour, it is well-recognized that grounding credibility or reliability determinations solely, or primarily, on this factor carries significant risks.
- [70] How a witness answers questions and some of the factors detailed in *Stenner* are captured by the notion of balance [citation omitted.] Balance exists when a witness shies away from exaggeration or minimization, acknowledges memory frailties, admits personally difficult facts, or credibly acknowledges weaknesses in their evidence. A balanced witness does not answer questions strategically, in the sense that they answer the questions asked and without attempt to unreasonably control the narrative. They do not appear to have an agenda [citation omitted.]

- [71] Credibility and reliability assessments can be the most important, and often the most difficult, determinations in a criminal trial, particularly in sexual assault cases which frequently involve the contradictory testimony of two witnesses about events that occurred in private. The difficulty lies not only in the challenge of the assessment itself, but in articulating the reasons.
- [72] The assessment itself is challenging because it requires the trial judge to simultaneously ground the assessment in the totality of the evidence, while also evaluating the testimony of each witness and making determinations that are entirely personal and individual to that witness. The task is further complicated by the ability of the trial judge to accept some, all, or none of a witness's testimony, and to ascribe different weight to different aspects of their evidence: *R. v. Kruk*, 2024 SCC 7 at para. 81.
- [73] Described as "more of an art than a science" (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 1997 CanLII 324 at para. 128), the assessment is also challenging to articulate because the exercise "may not be purely intellectual and may involve factors that are difficult to verbalize": *R. v. R.E.M.*, 2008 SCC 51 at para. 49. It involves a "complex intermingling of impressions that emerge" from the experience of observing and listening to the witness in the courtroom: *R. v. Gagnon*, 2006 SCC 17 at para. 20.

The Parties' Arguments

The Defence

- [42] The defence says that although M.L.M. answered questions in a somewhat convoluted manner, he was consistent in his evidence about his physical actions. If one accepts his account of what occurred, he would have to be found not guilty. R.G. initiated the first sexual encounter and performed a sexual act on M.L.M. She pulled M.L.M. into her room, took off her clothes, and then participated in ongoing sex, including having sex on top of the accused and from behind after the alleged assault. The defence argues that R.G.'s actions before and after the alleged sexual assault, specifically the change in positions after the alleged assault, provide circumstances upon which the court should infer consent of R.G. to the acts.
- [43] M.L.M. admitted a number of things that were not in his interest to admit. He admitted to taking cocaine, he admitted to steroid use, he admitted he had gone back to drinking after being abstinent, and he admitted that on the telephone, R.G. told him that she did not want to have sex with him. The fact that he told the police of his belief that the indoor camera was on and would exonerate him is a significant factor bolstering his credibility, as one would not direct the police to possible video and/or audio evidence if he committed the assault.
- [44] R.G.'s testimony raised a few issues that might cause one to question her credibility and reliability:
- 1) she understated her drinking;

- 2) the loss of memory and cognition issues were not consistent with the amount of alcohol she consumed;
- 3) she testified that a small drink from the Cîroc bottle caused a significant change in her cognition and memory, this suggests an implication that she may have been drugged with GBH or something similar; and
- 4) her memory was very poor and absent for much of the time and she admitted to it being blotchy.

The Crown

[45] The Crown says that even if M.L.M.'s evidence is accepted, he should be found guilty of sexual assault with respect to the sexual assaults in the bedroom, specifically for slapping and putting his hands on R.G.'s throat. The Crown notes that M.L.M. agreed to the following facts:

- 1) R.G. told him before he went to her house that she did not want to have sex;
- 2) the last conversation that M.L.M. had with R.G. about sexual activity was on the phone when she said he should not expect to get his "dick wet";
- 3) M.L.M. did not ask R.G. if she changed her mind;
- 4) M.L.M. did not use a condom;
- 5) M.L.M. did not ask R.G. if he could put his fingers, mouth, or penis in her vagina;
- 6) R.G. did not ask M.L.M. to put his fingers, mouth, or penis in her vagina;
- 7) there was no conversation about him putting his fingers, mouth, or penis in her vagina;
- 8) M.L.M. did not ask R.G. if he could slap or put his fingers or hand on her neck;
- 9) R.G. did not ask R.R. to slap her or put his fingers or hand on her neck; and
- 10) there was no conversation about M.L.M. slapping R.G. or putting his fingers on her neck.

[46] M.L.M. admitted that R.G. did not communicate consent to him for any of the sexual activity, including the slapping and choking. One cannot retroactively consent to conduct. Therefore, he should be convicted on his own evidence.

[47] The Crown says that R.G. was a credible witness whose evidence, although limited and fraught with significant gaps in her memory, was consistent and reliable, despite these gaps. The Crown says the court should infer that R.G.'s cognition and memory issues were caused by the cocaine ingested by her when she drank the Cîroc bottle. The Crown later resiled from this position and agreed with defence counsel that such an inference would require expert evidence. The Crown says M.L.M. was neither credible nor reliable:

- 1) M.L.M. lied to the police in his statement about his use of drugs. He explained that even though the police had told him that he would not get into trouble if he answered them truthfully, he did not believe them and knew he could still get into trouble, despite their assurances. The Crown says this establishes M.L.M. will lie if he believes the truth will get him in trouble and is reason enough to disregard his testimony.
 - 2) The Crown notes that M.L.M. also explained in cross-examination that he was worried that his girlfriend would find out he was using drugs. M.L.M. agreed that this explanation was internally inconsistent because his girlfriend was aware that he was doing drugs.
 - 3) In direct examination, M.L.M. testified that he did not take a drink from the Cîroc bottle at R.G.'s house, but in his statement to police, he said, on two different occasions, that he had a drink before the bottle was taken away. M.L.M. then accepted that his statement to the police was likely more accurate and that he was mistaken when he testified.
 - 4) M.L.M. said his memory was better on the stand than when he gave his statement to the police. Crown says this statement is not credible. The Crown said M.L.M.'s evidence about the camera is simply a red herring. She says so for two reasons:
 - i. M.L.M. should be disbelieved that he thought the camera was not on during the incident. R.G.'s evidence that she tells everyone when they first come into her apartment that she only turns on the internal camera when she is on vacation or away on the weekend should be decisive on this matter; and
 - ii. M.L.M. knew the camera would not capture activity in the bedroom.
- [48] The Crown says that R.G. in her testimony was very careful not to speculate on things she did not have memory of, and was very consistent in her description of the three memories she had and why she would not have consented to sexual intercourse with M.L.M. Therefore, R.G.'s evidence should satisfy the court beyond a reasonable doubt of the offence.

Discussion

Evidence of M.L.M.

- [49] I will go through the significant issues raised by the Crown. My comments are made upon reflection of the evidence as a whole and my considerations of the factors I have referred to earlier in S.S.M. In my view, M.L.M. was generally a credible witness, but I had concerns with his reliability. Overall, I found his testimony to be balanced, as noted in S.S.M. He did not hesitate in agreeing with significant evidence, which was not in his interest to do so on a number of occasions, such as the lengthy list of things on which he agreed with the Crown that I went through earlier in my reasons.
- [50] It is true that he lied to the police about his cocaine use, but in the circumstances, I do not find that this fact would necessarily mean that M.L.M. would not be honest in court under oath. It is also true that M.L.M. stated that he was worried that his girlfriend would find out about the cocaine, but in my view, this was an example of M.L.M. losing track of what

question he was answering or becoming confused. I can understand that he might be worried about explaining to his girlfriend why he was charged with sexual assault, but he readily agreed that his girlfriend knew that he was using cocaine. I do not see this as much as a credibility issue as I do as a cognitive issue, likely arising from his overdose.

- [51] I find that his acknowledgment that he must have taken a drink from the Cîroc bottle when his statements to the police were put to him was a reasonable concession and reflected well on his credibility. However, it does raise some concerns about his reliability for these types of details.
- [52] When M.L.M. said his memory was better on the stand than when he gave the police statement, in my view, he was referring to his state of mind at the time when he gave the statement, which he characterized as "being out of his mind". M.L.M. candidly admitted that he did not have an exact memory of the whole evening in question, but yet he remembered significant events, and had a lot of time to reflect on them. In my view, this does not raise significant credibility issues.

Evidence of R.G.

- [53] I have taken the same approach to my assessment of R.G.'s evidence that I used for M.L.M. I agree that R.G. was very detailed and consistent in her description of her key memories and that she would not have consented to sexual intercourse with M.L.M. I do have some concerns with her reliability, given the poor and blotchy state of her memory. I also had some concerns with her credibility, in particular with her evidence about why she only turned on the inside camera when she was on vacation or away for the weekend. I will detail this concern later.
- [54] In addition, I do not accept that M.L.M. slammed the door when he left her house. The video shows that the door was not slammed. R.G. retreated from this statement when confronted with the video evidence by saying that her door makes a lot of noise when it is closed. However, in my view, this is different than saying someone slammed the door which, in my view, was an exaggeration, though perhaps not a great one.
- [55] I have some concerns about the amount of R.G.'s loss of memory. Crown has agreed that there is no expert evidence which would support a connection to R.G.'s dramatic change in cognition shortly after drinking from the Cîroc bottle and that such evidence would be required to draw such an inference.
- [56] Despite these concerns, it would be unrealistic to hold R.G. to the standard of perfection and a certain amount of unreliability is expected in these circumstances.

The Camera Evidence

- [57] R.G. did not have a memory of telling M.L.M. when she turned the inside camera off. She said that she usually tells everyone that when they first come into her house after she explains why the camera is there. She said it was her practice to do so.
- [58] R.G. said that one of the reasons she did not use the inside camera all the time when she went out was because she did not want to use up her camera's battery. The camera was a plug-in and did not have a battery. She then said she must have been referring to her phone's battery, as the app would give her notifications when the camera was activated by motion. That answer does not make logical sense to me, as it is not apparent to me that simple notifications on the phone would have caused a dramatic drain on the battery.
- [59] M.L.M. stated that he thought the camera was on when R.G. left her house. I note her apartment had windows in addition to a door. Given her legitimate concerns, it seemed natural to him that she would want the camera on when she was not home. M.L.M. knew the camera had a video and thought the camera might also have audio. When M.L.M. was questioned about R.G.'s evidence during the trial that the inside camera was off, he accepted R.G.'s answer and said maybe the camera was not on. He did not accuse her of deleting the video or some other concern. In my view, this enhances his credibility.
- [60] Before coming to R.G.'s house, M.L.M. knew that R.G. was both intoxicated and tired. In my view, M.L.M. honestly believed that the inside camera was on or that it might have been on.
- [61] Crown's position is that a sexual assault was committed if one accepts M.L.M.'s version of events. M.L.M. testified that R.G. was clear on the phone that she would not participate in any sexual activity that morning. However, that statement must be assessed within the context of subsequent events. On M.L.M.'s evidence, R.G. initiated and was an active participant in sexual activity before going into the bedroom, pulled M.L.M. into the bedroom, took off her clothes, kissed him on the bed, and gave him hickeys. M.L.M. then digitally and orally penetrated her. He then penetrated her with his penis, slapped her on the buttock, and placed his hands on her neck. R.G. then switched positions to continue intercourse on top of M.L.M. and then switched positions again to continue intercourse with M.L.M. behind her. M.L.M. and R.G. were familiar with each other and R.G. was not excessively impaired.
- [62] M.L.M. admitted that he did not ask R.G. if she consented to any of the sexual activity, and in particular, he did not inquire as to whether R.G. consented to him slapping her buttock and putting his hands on her throat. R.G. testified that she did not wish to engage in sexual activity, specifically the oral sex, digital and penile penetration with M.L.M. that night. R.G. testified that she would not have consented to anyone slapping her buttock or having a hand on her throat in any circumstances, let alone that night. The Crown says that this establishes that R.G. did not consent to, at a minimum, M.L.M. slapping R.G.'s buttock and putting his hands on R.G.'s throat. In these circumstances, the slapping and hands on R.G.'s throat constitute sexual acts and that on M.L.M.'s evidence, he was either reckless or wilfully blind

to R.G.'s active consent to this activity.

- [63] I agree that in these circumstances, the slapping and placing of hands on R.G.'s throat constitute sexual acts. I also agree that if R.G. did not subjectively consent to these acts, that M.L.M.'s evidence establishes beyond a reasonable doubt that he was reckless or wilfully blind to R.G.'s lack of consent to engage in this activity; that is, the slapping and placing of hands on her throat.
- [64] However, this does not end the matter. The defence says that despite R.G.'s testimony, the court should reject her evidence on this issue and find that R.G. subjectively consented to all of the sexual activity, with the result that M.L.M. must be acquitted because the Crown failed to establish the actus reus element of the offence.
- [65] When I consider M.L.M.'s evidence, despite my concerns with his reliability and the credibility concerns raised by the Crown, and with reference to all of the evidence, in my view, I accept M.L.M.'s evidence with respect to the events that occurred in the living room and his testimony raises a reasonable doubt as to whether his version of events occurred in the bedroom.
- [66] A critical part of this finding is my credibility assessment, based on S.S.M., set out previously, and my conclusion that M.L.M. believed that the inside camera was, or could have been, on during the time of the incident, and his insistence to the police that they investigate the camera for video and perhaps audio. Although M.L.M. knew the camera would not have filmed the events that occurred in R.G.'s bedroom, M.L.M. believed the camera would have picked up enough of the activity in the kitchen and living room to establish his version of events.
- [67] In my view, M.L.M.'s insistence that the police investigate the existence and contents of the interior camera -- in conjunction with all of the evidence -- is a critical piece in my acceptance of his evidence in the living room and a reasonable doubt in my mind as to whether his version of events occurred in the bedroom.
- [68] However, even if reasonable doubt exists with respect to M.L.M.'s version of events in the bedroom, the question remains as to whether R.G. subjectively consented to the sexual activity, that is the actus reus of the offence. R.G.'s evidence with respect to the oral sex in the living room and the digital, oral, and penile penetration in her bedroom was that she did not want to participate in these sexual acts with M.L.M. on the morning in question.
- [69] R.G.'s evidence about slapping and placing of hands on her throat was that she did not want to engage in these sexual acts with M.L.M. on the morning in question, and would not have consented to this activity with anyone in the circumstances.
- [70] Considering all the circumstances, including my assessment of M.L.M.'s testimony and R.G.'s credibility set out earlier, I do have reasonable doubt about R.G.'s evidence on this issue. In my view, the most important issues supporting this doubt are:

- 1) my assessment of R.G.'s credibility, combined with;
 - 2) my finding with respect to M.L.M.'s version of events, specifically with respect to R.G.'s initiation of oral sex on M.L.M. in the living room, which directly contradicts R.G.'s testimony of her subjective views on this activity.
- [71] If I had accepted R.G.'s evidence that she would not have consented to anyone slapping her buttock and putting their hands on her neck in any circumstances, I agree with the Crown that the sexual assault would have been made out with respect to M.L.M. slapping her buttock and placing his hands on her neck, because, in my view, these acts would constitute unwanted touching of a sexual nature and, in that situation, M.L.M.'s evidence would satisfy the mens rea component of being reckless or wilfully blind to lack of consent for slapping and putting his hands on R.G.'s neck.
- [72] M.L.M., could you please stand. You have been charged with the sexual assault of R.G. on or about March 25, 2023. I find you not guilty. You are free to go or stay as you see fit. You may be seated if you choose to stay.
- [73] Are there any other issues that need to be addressed today?
- [74] CNSL N. WIBERG: Not from the defence perspective, Justice.
- [75] CNSL L. DRAKE: Not from the Crown.
- [76] THE COURT: Okay. Well, thank you both for your professional conduct throughout the trial.
- [77] CNSL N. WIBERG: Thank you, Justice.
- "Thomas J."

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