

CANADA / JUDGMENT

R. v. Milne

2020 BCSC 2101

COURT

Supreme Court of British Columbia

DECIDED

3 December 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 2101 R. v. Milne

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Milne,

2020 BCSC 2101

Date: 20201203

Docket: 27834-1

Registry: Vancouver

Regina

v.

Joshua Evan Milne

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials A.D. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Ker

Oral Reasons for Sentence

Counsel for the Crown:

J. Machek

Counsel for the Accused:

G. Ng

Place and Date of Trial:

Vancouver, B.C.

December 12, 2019

October 2, 2020

November 13, 2020

Place and Date of Sentencing:

Vancouver, B.C.

December 3, 2020

- [1] These Reasons for Sentence were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] The accused, Joshua Milne, is before the court for sentencing on two offences: sexual assault, contrary to s. 271, and transmitting child pornography contrary to s. 163.1(3) of the Criminal Code, R.S.C. 1985, c. C-46 [the Code].
- [3] The offences occurred on November 15, 2017, and January 26, 2018. The guilty pleas were entered on December 12, 2019. The extended time frame between the guilty plea and the sentence hearing stems from the difficulty in having a pre-sentence report ("PSR") and a forensic psychological assessment completed, as well as the complications wrought by the public health crisis related to the novel Coronavirus pandemic.
- [4] The victim of the offences is A.D., the accused's former girlfriend. I will not refer to the victim by name. In doing so I intend no disrespect to her; rather, I intend only to preserve her dignity and privacy to the greatest extent possible.
- [5] A.D. was 17 years old at the time of the offence. The accused was 24 years old.
- [6] The offence of sexual assault carries a maximum penalty of 10 years' imprisonment. Although sexual assault does not have a mandatory minimum sentence, a conditional sentence order is nevertheless precluded by virtue of s. 742.1(f)(iii) of the Code.
- [7] The offence of transmitting child pornography carries a maximum penalty of 14 years' imprisonment. The statutory minimum sentence of one-year imprisonment as provided by s. 163.1(3) of the Code was found to violate s. 12 of the Charter and has been declared unconstitutional and of no force in effect: *R. v. Mollon*, 2019 BCSC 423 at paras. 112-113. However, the maximum sentence for transmitting child pornography precludes the imposition of a conditional sentence order by virtue of s. 742.1(c) of the Code.

- [8] The Crown seeks a global sentence of three and a half years' imprisonment, apportioned as two and a half years' imprisonment for the sexual assault and one year consecutive for transmitting child pornography, plus a number of ancillary orders. The defence seeks a suspended sentence and three years' probation in the unique circumstances of this case.
- [9] My task is to determine the appropriate sentence for these two offences. Crafting a proportionate sentence in accordance with the purpose, principles and objectives the law requires in each unique case is one of the most challenging and difficult stages of the criminal justice process in Canada. This task is governed by ss. 718 through 718.2 of the Code and informed by relevant case authorities. Although the objectives set out in the statutory provisions guide the court and are clearly defined, the task of crafting a sentence nonetheless involves the sentencing judge exercising a broad discretion in balancing all of the relevant factors in order to meet the objectives of sentencing: *R. v. Lacasse*, 2015 SCC 64 at para. 1.
- [10] Fundamental to this task is the need to ensure that the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender (the proportionality principle).

Circumstances of the Offence

- [11] An agreed statement of fact ("ASF") was filed and provides the context of the offence, outlining the troubled relationship that A.D. and the accused had, and the difficulty that A.D. had in trying to extricate herself from it. The ASF outlines in stark detail the horrendous circumstances of the sexual assault upon A.D. I will not recite it in its entirety, but the summary of the circumstances of the offence is drawn from it.
- [12] The offence occurred on the night of November 14, 2017, and into the morning of November 15, 2017. Not included in the ASF, but covered in detail in the PSR and the forensic psychological assessment of Dr. Kimberley Kreklewetz, is the other significant contextual factor: Mr. Milne's emotional and psychological state at the time of the offences. I will address the accused's compromised state of mental health in more detail when I review the circumstances of the offender. Suffice to say, the accused was experiencing acute psychological distress at the time of the offence.
- [13] A.D. and the accused were in a brief intimate relationship from August 2017 through part of October 2017. They met in Kelowna when the accused was there visiting family and on a break from his schooling at BCIT. They lived together for about one week, until the accused returned to Burnaby in September 2017 to continue with his schooling. A.D. stayed in Kelowna until October 1, 2017.

- [14] A.D. found the accused to be very needy and demanding during the time that he was in Burnaby and she was in Kelowna, wanting to talk on the phone for hours every day. A.D. tried to end the relationship then, but the accused convinced her to prolong it. She described the accused as displaying obsessive or controlling behaviour, calling her up to 30 times a day, and when he was in Kelowna, showing up at her home uninvited if she did not return his calls.
- [15] In early October, while the accused was in Burnaby, A.D. became involved with another man and moved to Burnaby, B.C. to live with that other man.
- [16] On or about October 22, 2017, A.D. told the accused that they needed to have a break in their relationship. The accused told A.D. he would kill himself if she broke up with him.
- [17] The accused was hospitalized on at least four occasions between October 19, 2017, and November 14, 2017, for suicidal ideation and intoxication, all related to the breakup with A.D. His fourth hospitalization occurred on November 13, 2017, at Burnaby General Hospital. He was certified under the Mental Health Act, R.S.B.C. 1996, c. 228, and was discharged on November 14, 2017. The author of the PSR noted the discharge summary described him as stable, and that he was prescribed Pristiq.
- [18] Later on that same day, following his discharge from the hospital, the accused contacted A.D. and told her he was feeling suicidal. A.D. was concerned and went over to the accused's apartment in Burnaby to stay with him, to make sure he did not harm himself.
- [19] The accused could not accept that A.D. wanted to end the relationship. They talked for some time, and then A.D. indicated she needed to sleep because she had to work the next day. The discussion about their relationship caused A.D. to be wound up. The accused gave her a sleeping pill in order to assist A.D. in getting to sleep. Rather than falling asleep, the two continued to discuss their relationship for another two to three hours. The accused continued to try and convince A.D. not to end the relationship.
- [20] A.D. described the accused as being very emotional, as was she. She described the accused's behaviour during the evening as erratic and moody; laughing at one moment and crying at the next. A.D. said that this pattern of abnormal behaviour had been going on for two to three weeks before the offence.
- [21] After the further two to three-hour discussion, A.D. told the accused she was exhausted and had to sleep. She expressed concern about being able to fall asleep. The accused asked her if she trusted him and she said she did. He put an Ativan pill in her mouth and it dissolved immediately. A.D. knew the accused was prescribed Ativan for anxiety.
- [22] A.D. was fully clothed and not bound or blindfolded when she took the Ativan. Within minutes of taking the Ativan, A.D. became overwhelmingly drowsy and lost consciousness approximately five to 10 minutes after taking the pill. She did, however, have periods of various levels of consciousness throughout the ensuing events.

- [23] The accused bound A.D.'s hands and feet, blindfolded her and removed her clothes. She did not consent to any of this. Over the course of a number of hours, the accused sexually assaulted A.D. The assault included acts of anal and vaginal penetration and fellatio.
- [24] A.D. recalled regaining consciousness at one point during the offence and wanting to leave but was unable to move. A.D. did not consent to any of these activities.
- [25] The accused used his cellphone to document the assault by taking videos and/or photographs of his assault. Evidence from a forensic expert who examined the accused's cellphone established that nine deleted videos were taken between 4:12 a.m. and 9:09 a.m. on November 15, 2017. Eight photographs that A.D. obtained from the accused's cellphone and sent to herself were taken between 7:50 and 8:57 a.m. on that same date.
- [26] When A.D. awoke the next morning, she thought something had happened but could not recall much. She was naked. She noticed bruising on her wrists and experienced severe pain in her anus and vagina. A.D. wanted to leave but the accused tried to convince her to stay. She eventually stood up, tripped, fell and struck her head. A.D. managed to convince the accused that she needed to go home. She was helped to her vehicle by him and they drove off together.
- [27] The accused called the police as A.D. was having difficulty driving. He told the police that A.D. had tried to overdose by ingesting pills. A.D. was taken to the hospital and temporarily detained under the Mental Health Act. She was eventually released from the hospital on the evening of November 15, 2017. A.D. never had any intention of harming herself. She only took the Ativan to try and sleep on the night of November 14.
- [28] While dealing with the police on November 15, 2017, A.D. made no report of having been sexually assaulted, as at that time she did not recall much of the events from the night before.
- [29] The accused was admitted to hospital on the evening of November 15, 2017, after trying to harm himself. He was certified under the Mental Health Act and remained certified until his discharge from hospital on November 23, 2017.
- [30] On November 16, 2017, the accused asked A.D. to come and visit him at the hospital. She visited him on that date and again several days later. Between staying at the accused's place on November 14 and visiting him in hospital on November 16, A.D. recalled some of the events of the night of November 14-15, 2017. She vaguely recalled being filmed. During one of her visits to the accused while he was still hospitalized, A.D. confronted him and asked to see his phone. The accused resisted but eventually gave A.D. his phone and told her to keep the phone for as long as she needed.

- [31] On the accused's cellphone, A.D. found both still images and video of herself naked, blindfolded, her legs bound, and her arms bound behind her back, in various positions and subjected to various sexual acts. All of the images were date-stamped November 15, 2017. A.D. did not consent to being filmed and did not consent to any of the sexual activities depicted in the images and videos.
- [32] In some of the still images, A.D. appeared unconscious. In some of the videos, A.D. sometimes appeared conscious but was unable to speak properly. Her words made no sense and she physically stumbled.
- [33] The videos captured a number of degrading sexual acts, each about three minutes in length, including one video where the accused ejaculated in her mouth and told her that if she spat the ejaculate out, he would punish her.
- [34] A.D. sent the images and videos to her email account. Days later, A.D. confronted the accused about what he had done. He apologized, was tearful, said he would never hurt her, and explained that he had been overdosing on pills for two to three days and could not remember doing the things depicted in the imagery on his phone.
- [35] A few days later when A.D. again confronted the accused about what he had done, he was angry and emotional. A.D. recalls the accused told her at the time that she deserved what he had done to her. The accused has no recollection of this conversation. On another occasion the accused told A.D. he did not recall what he had done to her on November 15.
- [36] A.D. went to the police on December 1, 2017, to report the events of November 15, 2017 and to provide them with the images she had transferred from the accused's phone to her email account. She provided a statement to the police on December 2, 2017.
- [37] Four of the eight still images that A.D. emailed to herself constitute child pornography, given her age and the primary focus of the images being on either her breasts or genital and anal region. The videos of the sexual assault upon A.D. that she had emailed to herself from the accused's cellphone were not found in her email account.
- [38] Charges were approved on December 27, 2017, and an arrest warrant was issued. The accused was arrested at school on March 19, 2018. His cellphone was seized and later searched pursuant to a warrant.
- [39] Forensic examination of the accused's cellphone revealed data for eight deleted images identical to the images A.D. provided to the police. In addition to locating another cached image that met the definition of child pornography and depicted A.D., the expert also located nine deleted videos created between 4:12 a.m. and 9:09 a.m. on November 15, 2017. The files could not be recovered and it is unknown when the videos were deleted.

- [40] The expert also located three images that had been created as snapshots derived from the deleted video. Two were images described as "fellatio image #1" and "fellatio image #2". These images depict A.D. with the accused's penis in her mouth. These two images meet the definition of child pornography. A third image was of vaginal penetration.
- [41] On January 26, 2018, a little over two months after the sexual assault, the accused sent these three images to a woman named Savannah, as they engaged in a Whisper Chat conversation. Whisper Chat is an anonymous platform that permits users to communicate with one another. The Whisper Chat conversation was marked as an exhibit and shows a conversation between the accused and Savannah that commenced at 11:49 p.m. on January 25, 2018, and continued until at least 2:21 a.m. on January 26, 2018.
- [42] During the Whisper Chat conversation, the accused sent six images to Savannah and she sent him three images. Included in the images that the accused sent to Savannah were the two fellatio images and the image of vaginal penetration that the accused took of A.D. during the morning of November 15, 2017.
- [43] The two fellatio images that the accused sent to Savannah on January 26, 2018, are what constitute the transmission of child pornography offence contained in Count 4 of the Indictment.

Impact of the Offence on the Victim

- [44] A.D. completed a victim impact statement that was read into the record by Crown counsel. I have read it again while this decision has been on reserve. The impact of this offence on A.D. has been profoundly negative, and the statement establishes that:
1. She is unable to trust people.
 2. She is no longer able to help people.
 3. She wanted to kill herself when she first discovered the images.
 4. Her physical relationship with her husband has been negatively impacted.
 5. She fears for her daughters and does not feel she can leave them alone with male friends or male relatives.
 6. She was horrified by the images she saw of herself on the accused's phone and is still haunted over what she saw.
 7. She was horrified that the accused shared some images of her with someone he barely knew, worries that the images of her have travelled further, and is concerned the images may still be out there.
- [45] A.D. has experienced sleeplessness, anxiety, embarrassment, and shame over the offences. Despite a close relationship, she has been unable to confide in her mother.

- [46] A.D. suffered physical harm as a result of the forced sexual acts, but as she noted, the physical effects pale in comparison to the negative emotional effects she continues to feel. The events negatively affected her ability to breastfeed her children and even caused her to worry that her first child was actually the accused's child from this offence and not her husband's. That fear was alleviated upon the birth of her first child when the resemblance to her husband was apparent.
- [47] The offences also negatively impacted her sense of security and caused her to be fearful at unexpected sounds and lights. I have no doubt that the realization that her former boyfriend had sexually assaulted her and filmed his exploits was deeply traumatizing for A.D. I accept that her trust and sense of security has been deeply betrayed and that her feelings of shame and embarrassment have significantly negatively impacted her, as well as her relationship with her husband and her two young daughters.

Circumstances of the Offender

- [48] In considering Mr. Milne's circumstances, I have had the benefit of two detailed and thoughtfully prepared reports, the PSR prepared by a community corrections officer and a forensic psychological assessment prepared by Dr. Kreklewetz. I have also had the benefit of six letters of support from Mr. Milne's family and friends, and a letter from a mental health and substance abuse clinician.
- [49] Mr. Milne is now 27 years old. He was 24 years old at the time of the offence. He has no criminal record.
- [50] The accused was born in Kelowna. His parents divorced when he was two years old. He is an only child. He was raised by his father. He had contact and visits with his mother but there were frequent gaps. He has not had contact with her since he was 15 years of age. The accused advised the author of the PSR that his mother was diagnosed with bipolar disorder. His father advised the PSR writer that the accused was negatively impacted by his mother when he was growing up and that she walked away when the accused was two years old.
- [51] The accused's father did his best in trying to raise his son, but had to work two jobs, one as a chef, for many years. As a consequence, the accused was frequently in the care of babysitters, one of whom physically abused him when he was about eight or nine years old. His father dismissed her.
- [52] The accused has a close relationship with both his father and his grandmother. During the period when the accused was involved with A.D., he was living in Burnaby attending BCIT, in the second year of a four-year apprenticeship program to become a journeyman electrician.

- [53] Since the summer of 2019, the accused has lived in Kelowna with his father and grandmother. When he attended BCIT for the 10-week classroom portion of his apprenticeship, he resided with Sharon Sanderson who also acted as his surety for his bail. Indeed, the accused lived with Ms. Sanderson and her family for about a year after this offence.
- [54] The accused's father described his son as a really smart child, who skipped Grade 3. The accused did well at school until Grade 10, when he started to skip classes and became antisocial. His mental health difficulties were diagnosed in Grade 11. The accused continued in school and started Grade 12 but did not complete it, opting instead to work.
- [55] In 2015, the accused started a four-year apprenticeship course, first at Vancouver Career College, and then transferred to BCIT's electrical apprenticeship program in 2018. The program consists of four 10-week classroom segments over four years and apprenticing with an electrician in between.
- [56] In July 2019, the accused moved back to Kelowna after receiving a job offer from a company there. In August 2020, he returned to BCIT to complete his fourth and final year of schooling at BCIT. On October 9, 2020, he received his interprovincial Red Seal certification as a journeyman electrician. He continues to be employed by the same company that hired him in July 2019.
- [57] The foreman the accused works with, Matthew Demers, has supplied a letter of support. He is aware of the charges and that the accused has pled guilty. He remains supportive of the accused and wants him back on his work team. Mr. Demers urges leniency in light of the positive changes he has observed in the accused and in the overall positive work attitude and abilities the accused has displayed when working with him.
- [58] The PSR and Dr. Kreklewetz's report documented that the accused has had a longstanding substance abuse issue that started when he was about 15 years old. Between the ages of 15 and 19 years, he was a heavy marihuana user, but stopped consuming it as it caused him to feel paranoid. Between the ages of 15 and 24, Mr. Milne considered himself to be an alcoholic, frequently consuming up to 26 ounces of liquor a day. Although he says he quit "cold turkey" in August 2017, it appears that was short lived in light of the amount of alcohol he had consumed around the time of his hospitalizations in October and November 2017.
- [59] Following his discharge from hospital on November 23, 2017, the accused attended the Creekside Withdrawal Management Detox Service in Surrey and then attended AA in Kelowna for a period of time after his arrest. However, he is not currently attending AA. Indeed, the PSR notes that at the time he was interviewed for the PSR, April 2020, he was consuming on average six to 10 drinks a day, save for when he participates in line dancing once a week. Thus, Mr. Milne's report to the author of the PSR suggests he is still consuming alcohol, anywhere between 42 and 70 drinks a week.

- [60] One of the medications that the accused is currently taking is Naltrexone, a medication that is supposed to suppress the urge to consume alcohol.
- [61] The accused clearly has a substance abuse issue, both in terms of alcohol and abuse of prescription medications. The lead-up to the circumstances of this offence and in the immediate aftermath of the offence clearly support that finding.
- [62] The accused's continued consumption of alcohol is outlined in the PSR as worrying. Nevertheless, to his credit, he does not appear to have had any sort of relapse into mixing alcohol and prescription medications in the manner he did in the fall of 2017.
- [63] Also to his credit is the fact that he engaged in counselling with the Creekside Withdrawal Management Detox Service after he was discharged from hospital after this offence, and did attend AA for a period of time when he returned to Kelowna. He has also been attending the Interior Mental Health and Substance Abuse Clinic in Kelowna since June 2020. His current clinician, Stephen Lance, has been working with him since October 1, 2020, and has had seven phone-based appointments with him. Mr. Lance provided a letter of support for the accused, noting that he has "demonstrated strong engagement and willingness to reflect upon his internal and external experience."
- [64] The accused is prepared to consent to participating in further substance abuse counselling should I order him to do so.
- [65] I have alluded to the state of the accused's mental health at the time of the offence already as it informs the circumstances of the offence. I will address features of it again here.
- [66] The PSR and the report of Dr. Kreklewetz provide greater details on the accused's history, but also create some confusion about it. For instance, Dr. Kreklewetz indicates there is no information to confirm the accused's claim that he was diagnosed as suffering from bipolar disorder and obsessive compulsive disorder when hospitalized in Kelowna at the age of 15, yet the PSR suggests that records from Burnaby General Hospital confirm he received such a diagnosis when he was 15 years old and at Kelowna General Hospital. Moreover, his father confirmed the diagnosis from that time when interviewed for the PSR.
- [67] The accused was also hospitalized in Kelowna between December 6 and 10, 2010, when he was 17 years old. This was precipitated by his response to a breakup with a girlfriend. The accused stabbed holes in his bedroom wall and threatened his father.
- [68] Initially the hospital would not admit the accused when his father took him there on December 4. However, on December 6, 2010, the accused was admitted to hospital when transported there by the RCMP after he drew a knife on his father and threatened him. The attending psychiatrist diagnosed the accused with marihuana abuse and Cluster B personality disorder at that time. He was not diagnosed with bipolar disorder in December 2010.

- [69] Other records were alluded to by Dr. Kreklewetz that indicate a history of behavioural problems and intermittent suicidal ideation over several years, but no further details were provided.
- [70] The accused's history of mental health issues and suicidal ideation, both when he was a teen and more particularly at the time of this offence are important considerations in assessing his moral blameworthiness for this offence. Significantly, he was experiencing acute mental distress, depression, and suicidal ideation at the time of his breakup with A.D. This is confirmed in his medical records as outlined in the PSR and Dr. Kreklewetz's report, which delineate at least four hospitalizations before this offence. Those hospitalizations occurred on the following dates:
1. On October 19, 2017, he was admitted to Burnaby General Hospital and discharged the next day. No details of the prescribed medication were provided for this admission.
 2. On October 21, 2017, he was admitted to Kelowna General Hospital and prescribed Clonazepam for anxiety.
 3. On October 30, 2017, he was transported to hospital (unspecified) by the RCMP. The accused had been drinking and was described as suicidal. He was held overnight. On discharge, he was diagnosed as suffering from chronic dysthymia with recurrent depression complicated by chronic substance abuse of 10 years. He was prescribed Pristiq and Zopiclone.
 4. On November 13, 2017, he was admitted to Burnaby General Hospital, certified under the Mental Health Act, held overnight, and discharged the next day. The discharge report described the accused as having a stable mood and was prescribed Pristiq.
- [71] By the time of his discharge on November 14, 2017, it appears the accused had been prescribed a variety of different medications as outlined above, confirming his claim to the author of the PSR that the "doctors were 'switching and swapping out' different medications". Later in the day of November 15, 2017, after A.D.'s hospitalization, the accused was re-hospitalized at Burnaby General Hospital for an attempted suicide. He was certified under the Mental Health Act and remained in hospital until November 23, 2017.
- [72] The circumstances around this last hospitalization indicate the accused was admitted to Burnaby General Hospital as a result of a polysubstance overdose. EMS attended at his suite based on calls from concerned friends. They found him by three empty bottles of wine and he appeared to have access to a variety of medications, including Ativan; Desvenlafaxine, also known as Pristiq; Diclofenac, an anti-inflammatory; Zopiclone, Tylenol, and Cymbalta.
- [73] The discharge summary notes that upon his admission on November 15, 2017, the accused was placed in ICU, required medical resuscitation and was intubated.
- [74] The PSR includes excerpts from the Burnaby Hospital records that note both the bipolar disorder diagnosis from the November 13 admission, and an underlying personality disorder from the November 23 discharge.

- [75] Dr. Kreklewetz notes that the records for the accused's extended stay at Burnaby General Hospital indicate a diagnosis of adjustment reaction and borderline personality disorder in crisis. On discharge, he was prescribed 200 milligrams of Gabapentin for anxiety.
- [76] Once the accused was discharged from Burnaby General Hospital on November 23, 2017, he was followed by the Burnaby Adult Short Term Assessment and Treatment ("ASTAT") team between November 2017 and April 2018. He attended numerous appointments with his case manager and also with a psychiatrist. It was through his involvement with ASTAT that he attended an orientation and four subsequent group meetings with Creekside Withdrawal Management Detox Service in Surrey.
- [77] As noted previously, the accused currently attends at the Interior Mental Health and Substance Use Clinic in Kelowna and speaks with a clinician, Mr. Lance, on a weekly basis.
- [78] Insofar as medication is concerned, the accused's difficulties with medication in the fall of 2017 appear to have been sorted out. He is currently taking four different prescription medications: Escitalopram, Gabapentin, Remeron, and Naltrexone. There have been no relapses, suicidal ideation or major depressive episodes since the offence.
- [79] Dr. Kreklewetz offered the following diagnostic formulation based on a review of the records she received, the behavioural observations she recorded, and the accused's statements during her clinical interview of him on April 6, 2020:

Query Persistent Depressive Disorder and Major Depressive Disorder, recurrent

Rule Out Bipolar Disorder

Borderline Personality Disorder

Alcohol Use Disorder, current severity mild

Cannabis Use Disorder in sustained remission

- [80] Dr. Kreklewetz conducted a risk assessment using the Risk for Sexual Violence Protocol (RSVP). Her findings are detailed in her report. In essence, she concludes that the accused presents as:
- i. being at a moderate risk for suicide/self-harm;
 - ii. having a well-documented history of major mental illness;
 - iii. having problems with intimate relationships, including violent and erratic behaviour when distressed over the loss of a relationship;
 - iv. having a history of impulsivity and longstanding patterns of unstable mood behaviour; and
 - v. presenting a moderate risk for sexual re-offending.

[81] She further opined that the accused has yet to develop appropriate coping skills to manage relationship conflict and distress. Dr. Kreklewetz did rule out a diagnosis of psychopathic personality and pedophilic disorder.

[82] The accused has expressed remorse for committing this offence to the PSR author, to Dr. Kreklewetz, and to his family members and friends. Significantly, he demonstrates a measure of insight into this offence. The PSR states that he "feels awful about [the offence]" and that it "never should have happened". He recognizes the impact of the offence on A.D., stating she would have been "terrified that I did this".

[83] Dr. Kreklewetz asked the accused about the impact of the offence on the victim and wrote:

When asked to comment on victim impact, Mr. Milne stated "I think about it all the time. I hope she's recovered and leading a normal life still. I don't know how to apologize to her (i.e., due to the no-contact order). I don't know how to correct any of it. I joined the Jehovah Witnesses so I could try to be better. I don't even know if she is alright. I hope she's been able to move past it. I just keep busy and keep working to better myself to make sure I don't hit that point again and be that person. I should have gone home (for support) when things got really bad. I didn't know what to do.

[84] Dr. Kreklewetz also described the accused's acknowledgement of responsibility in the following manner:

While he acknowledged responsibility for his behaviour on a surface level, Mr. Milne repeatedly described the offence as stemming from the deterioration in mental health at the time, rather [than] acknowledging a series of poor decisions (e.g., taking more of his (Zopiclone and Ativan) medication than prescribed, failing to respect the victim's wishes to end the relationship, not seeking mental health support unless/until he was suicidal and in acute crisis).

[85] While Dr. Kreklewetz's observations on responsibility may be a fair comment, respectfully, the accused is seemingly caught in the classic Catch-22 situation. He acknowledges what he did was wrong, is remorseful, and offers his mental deterioration as an explanation but not an excuse. However, in my view, his failure to have a fuller understanding of the genesis of his offending behaviour is no doubt limited by both his level of mental distress at the time of the offence, exacerbated as it was by his abuse of his prescription medication and other substances, and his lack of involvement in any sort of psychotherapy for his mental disorder or any sort of intense sex offender therapy thus far.

[86] I accept that the accused is genuinely remorseful and that with some intensive therapy he will likely develop a deeper understanding of his mental health issues, his substance abuse issues, and his offending.

- [87] Both the author of the PSR and Dr. Kreklewetz include a number of recommendations for the management and treatment of the accused, whether he is sentenced to a non-custodial sentence or a term of imprisonment. Sex offender programming is available out of custody through Forensic Psychiatric Services and is also available in both the provincial and federal correctional systems. A sentence of at least 12 months' imprisonment is necessary for the accused to access the provincial in-custody program.
- [88] In addition to recommending a referral for sex offender treatment programming, Dr. Kreklewetz also recommends that the accused participate in individual or group psychotherapy from a dialectical behaviour therapy perspective to address his difficulties with emotional regulation. As well, in order to manage his level of risk both from a future offending perspective and considering the stability of his mental health, it is recommended that the accused should take further substance abuse counselling or programming. The accused has indicated to the court that he consents to undergo all recommended forms of assessment counselling and treatment.
- [89] As I noted earlier, six letters of support from family, friends and a co-worker were provided and marked as exhibits. I have read all of them. All of the authors are aware of the accused's charges and that he has pled guilty to the offences. All express shock at the nature of the allegations and state that the offence is out of character for the accused. All urge the court to be lenient with the accused to let him continue on this positive path of change and improvement in his mental health and overall circumstances. All express confidence that he will continue to improve and be a productive member of society. His father and grandmother emphasize the significant amount of remorse that the accused feels for this offence.
- [90] I will say this: the work Mr. Milne has done to improve and stabilize himself while on bail is a testament to his strength of character and desire to ensure he does not find himself in this situation again.

Positions of the Parties

- [91] As I mentioned at the outset of these reasons, the Crown seeks a global sentence of imprisonment for three and a half years, apportioned as two and a half years for the sexual assault and one year consecutive for the transmitting child pornography offence.
- [92] The Crown relied on the following cases to support its position that the range of sentence for sexual assault in cases similar to this one is two to six years imprisonment: *R. v. B.S.B.*, 2010 BCCA 40; *R. v. Berry*, 2015 BCCA 210; *R. v. Boya*, 2006 YKCA 15; *R. v. G.M.*, 2015 BCCA 165; *R. v. Goodliffe*, 2005 BCCA 426; *R. v. Law*, 2018 BCSC 1683; *R. v. Pouce Coupe*, 2014 BCCA 255; *R. v. Rosenthal*, 2015 YKCA 1; *R. v. Shalley*, 2005 MBCA 150; *R. v. Yamelst*, 2013 BCSC 1689. Collectively these cases establish that two to six years is the effective range for an offence like the one before the court, where the victim was unconscious at the time of the offence either because they were asleep or incapacitated through the consumption of drugs

or alcohol.

- [93] Three of the decisions, including G.M., establish that a suspended sentence or an intermittent sentence of 90 days' imprisonment is generally a demonstrably unfit sentence for a sexual assault perpetrated on an unconscious or incapacitated victim.
- [94] The Crown relied on the following cases to support its position that a one-year consecutive sentence of imprisonment for transmitting child pornography is a fit sentence, but conceded that the circumstances in this case are markedly unlike any of the cases provided or found: R. v. Benson, 2012 SKCA 4; R. v. D.G.F., 2010 ONCA 27; R. v. Watts, 2016 ABPC 57.
- [95] Counsel for the accused acknowledged the range of sentence for sexual assaults involving penetration as set out by the Court of Appeal in the cases relied upon by the Crown, but urged that the constellation of unique factors evident in this case amount to exceptional circumstances such that I should depart from the range as permitted by R. v. Nasogaluak, 2010 SCC 6 at para. 44; R. v. Voong, 2015 BCCA 285; and R. v. Dragani, 2018 BCCA 225 at paras. 71-74.
- [96] Alternatively, if the circumstances do not amount to exceptional circumstances, then counsel asserts that the constellation of mitigating circumstances that exist in this case supports the imposition of a sentence well below the range of two to six years' imprisonment, citing R. v. Davies, 2019 BCCA 359 at paras. 37-40.
- [97] Counsel for the accused relies upon the decisions in R. v. Aftergood (January 26, 2012), Victoria 145042 (B.C.S.C.), and R. v. K.S. 2014 ABPC 224, to support the imposition of a suspended sentence in the circumstances of this case.

Principles of Sentencing

- [98] The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond any mathematical calculation. Many courts have recognized that imposing a just and proportionate sentence in serious cases like this is one of the most challenging responsibilities that judges must exercise. It involves the careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a particular offender. This balancing process occurs within a legislative framework that is informed by common law principles. The legislative framework is set out in ss. 718 through 718.2 of the Code, which enumerates the purpose and the principles of sentencing.

General Principles

- [99] Under s. 718 of the Code, the fundamental purpose of sentencing is to protect society and promote respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions. The objectives of such sanctions include denouncing unlawful conduct, deterring offenders and others from committing crimes, separating offenders from society where necessary, rehabilitating offenders, providing reparations for harm done to victims or to the community, and promoting a sense of responsibility in offenders.
- [100] Section 718.1 of the Code further focuses the objectives of sentencing by directing that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the offender. The proportionality principle is fundamental in Canadian law. Thus, whatever weight a judge may wish to accord to the objectives listed in s. 718, the resulting sentence must respect the fundamental principle of proportionality: *Nasogaluak* at para. 40.
- [101] Section 718.2 of the Code enumerates a number of other sentencing principles. It is a non-exhaustive list. Pursuant to s. 718.2(a), sentences are to be increased or reduced to account for any aggravating or mitigating circumstances. Section 718.2(b) contains the parity principle, which requires that sentences should be similar for similar offences committed by similar offenders in similar circumstances.
- [102] Finally, s. 718.2(c) through (e) of the Code promote restraint in sentencing. Section 718.2(c) outlines what is referred to as the totality principle, which requires that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. Subsections 718.2(d) and (e) emphasize the need for restraint in the use of imprisonment. These provisions require that an offender not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances, and that all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders.

Specific Considerations for Sexual Assault

- [103] In *Law*, Madam Justice Duncan succinctly summarized the principles germane to sentencing in cases of serious sexual assault that include acts of penetration:
- [95] In *R. v. G.M., Goepel J.A.* said:
- [17] In serious sexual assault cases, the paramount sentencing objectives are denunciation and deterrence; it is not an error in principle to give them primacy over other sentencing principles such as rehabilitation: see e.g. *R. v. Wells*, 2000 SCC 10 at para. 44; *R. v. B.S.B.*, 2010 BCCA 40 at para. 39; *R. v. Thurairajah*, 2008 ONCA 91 at para. 41.

- [18] Absent exceptional or unique circumstances, it is incumbent on the sentencing judge to give primacy to the deterrence and denunciation when imposing a sentence for a serious sexual assault: *R. v. Garrett*, 2014 ONCA 734. At para. 19 of *Garrett*, the Ontario Court of Appeal stressed that ignoring pleas by a complainant to stop "in itself" constituted "demeaning behaviour and contemptuous disregard for the personal integrity of the complainant" that engaged "the predominant sentencing principles of denunciation and deterrence."
- [19] The comments of the Ontario Court of Appeal resonate in this case, and I would adopt them. The respondent perpetrated a serious sexual assault, disregarding clear and repeated requests to stop. In doing so, he demonstrated the kind of demeaning behaviour and contemptuous disregard for the personal integrity of others that the Court in *Garrett* stressed required a clear denunciatory and deterrent sentence. It was, therefore, incumbent on the judge to impose a sentence focusing primarily on the principles of deterrence and denunciation.
- [96] Later in the reasons, Goepel J.A. said:
- [22] The range of sentences for sexual assault involving intercourse is two to six years: *R. v. B.S.B.*, 2010 BCCA 40 at para. 6 and *R. v. Pouce Coupe*, 2014 BCCA 255 at para. 31. While the range of sentences is an important consideration, ranges constitute guidelines rather than hard and fast rules.
- [23] The importance of sentencing ranges was explained in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44. In *Nasogaluak* the Court emphasized that the discretion on sentencing is not unlimited, with the overarching requirement being that the sentence imposed is consistent with the principles and objectives of sentencing:
- [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
- [97] In *R. v. Goodliffe*, 2005 BCCA 426, the accused had sexual intercourse with a complainant who was unable to stay awake due to the effects of G.H.B., which she had voluntarily ingested. The Court of Appeal dismissed the accused's appeal against a sentence of 27 months imprisonment.
- [104] The primacy of the objectives of deterrence and denunciation have now been codified in s. 718.04 of the Code which came into effect on September 2019, and provide as follows:

When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances -- including because the person is Aboriginal and female -- the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[105] I acknowledge that this statutory provision did not exist at the time of this offence. However, it is not a penalty provision. Rather, it represents a codification of the jurisprudence on the primacy of deterrence and denunciation in cases like this.

[106] To similar effect is s. 718.201, also introduced through Bill C-75 and in effect in September 2019, which states:

A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

Specific Considerations for the Offence of Transmitting Child Pornography

[107] The jurisprudence is replete with admonitions as to the repugnant nature of offences relating to child pornography, be it simple possession or the more serious offences of making, transmitting or distributing such material. It is clear that the predominant emphasis must be on the objectives of deterrence and denunciation as mandated by s. 718.01 of the Code: *R. v. Athey*, 2017 BCCA 350 at para. 37 and *R. v. Prince*, 2018 BCSC 987 at para. 85.

[108] Most of the sentencing authorities for transmitting child pornography involve the imposition of a not insignificant term of imprisonment. All of the authorities provided at this sentencing hearing involve substantially larger amounts of imagery, frequently described as "collections", as well as the behaviour of sharing images on websites that cater to this predilection. In that respect, the cases are distinguishable and of no assistance in providing a range for the unique circumstances currently before the court. The accused in this case transmitted two images of child pornography on one occasion, to one person, not to a platform that is involved in the exchange and distribution of such vile materials.

Exceptional Circumstances Justifying Departure from the Range of Sentence

[109] I have noted that the range of sentence for the offence of sexual assault committed in circumstances where the victim is rendered incapacitated and subjected to vaginal and anal penetration is between two and six years' imprisonment. Of course, sentencing ranges guide but do not bind the sentencing judge: *Lacasse* at paras. 56-58.

[110] In *R. v. Williams*, 2019 BCCA 295, Madam Justice D. Smith, writing for the court, explained:

[57] This Court has adopted the approach of sentencing ranges because, in our view, they provide an optimal balance between furthering parity and individualization in a sentence. Sentencing ranges are not more rigid than starting points but simply reflect an overview of

sentences that have previously been imposed for a particular offence. They are intended to assist judges in arriving at a sentence that is consistent with sentences for similarly situated offenders, in similar circumstances--furthering the principle of parity--without constraining the judge's discretion to go outside of the range to properly reflect the unique circumstances of the offence or the offender. They do not set out "practical minimum and maximum sentences." For example, in *Voong*, Justice Bennett, for the Court, upheld three sentences that fell below the sentencing range she identified.

- [58] Individual circumstances of the offence or the offender may require an increase or reduction from the range of sentence in order to ensure that the sentence is a proportionate one that properly reflects the offender's moral blameworthiness.
- [111] While sentencing judges enjoy significant discretion in imposing what they consider to be fit sentences, in *G.M.* at para. 23, the court cited *Nasogaluak* at para. 44 for the proposition that the discretion on sentencing is not unlimited and that the overarching requirement remains to impose a sentence consistent with the principles and objectives of sentencing. To similar effects are the comments of Mr. Justice Moldaver in *R. v. Suter*, 2018 SCC 34 at para. 4:

Sentencing is a highly individualized process. A delicate balancing of the various sentencing principles and objectives is called for, in line with the overriding principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the Criminal Code). Accordingly, there will be cases where the particular circumstances of the offence and/or the offender call for a sentence that falls outside of the normal sentencing range. This is one such case.

- [112] In *Voong*, the concept of exceptional circumstances was addressed in the context of a drug trafficking offence that ordinarily had a range of sentence between six and 18 months' imprisonment for a first offence in a dial-a-dope trafficking situation. Madam Justice Bennett noted at para. 45 that, in order to take a sentence outside the usual range:

... exceptional circumstances must engage principles of sentencing to a sufficient degree to overcome the application of the main principles of deterrence and denunciation ...

- [113] Justice Bennett provided guidance with respect to what might constitute exceptional circumstances in *Voong*:

- [59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a

non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.

- [114] Similar observations were made by Madam Justice Fenlon in *Dragani* at paras. 71-72. At paras. 73-74, Fenlon, J.A. alluded to the two routes available to sentencing judges that might permit departing from the customary range of sentence:
- [73] The Crown relies on *R. v. Burnett*, 2017 MBCA 122. There, the Court noted that the principle of exceptional circumstances is separate and apart from a sentencing judge's general discretion to depart downward or upward from a starting point or sentencing range (para. 24). Findings of exceptional circumstances occur in only the "clearest of cases", when there are "multiple mitigating factors" of significance (para. 29). Sentencing judges should not conflate "sympathetic circumstances" with "exceptional circumstances" (para. 33).
- [74] That said, a judge can order a sentence outside the range as long as it is in accordance with the principles and objectives of sentencing: a sentence outside the range is not necessarily unfit: *R. v. Nasogaluak*, 2010 SCC 6 at para. 44; *Lacasse* at paras. 57-61. Where there is an arguable case of exceptional circumstances, two inquiries are commonly emphasized: (1) has the offender concretely demonstrated that he or she has turned his or her life around since his or her arrest, and (2) would the fundamental purpose of sentencing as set out in s. 718 of the Criminal Code be better served by a custodial or non-custodial sentence: *Burnett* at para. 30.
- [115] Accordingly, the ordinary range of sentence can be departed from so long as the sentence imposed is in accordance with the principles and objectives of sentencing, or if there are exceptional circumstances that justify departure from the ordinary range. When considering if there are exceptional circumstances, the court often focuses on whether the offender has concretely demonstrated that they have turned their life around since their arrest, and whether the fundamental purpose of sentencing as contained in s. 718 of the Code would be better served by a custodial or non-custodial sentence: *Dragani* at para. 74.
- [116] I will conclude this review of the general principles of sentencing by returning to the fundamental principle of proportionality. In *R. v. Pham*, 2013 SCC 15, the Supreme Court of Canada again discussed proportionality and its interplay with the sentencing objectives and other principles at paras. 7-8:
- [7] LeBel J. explained proportionality as follows in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37:

Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

- [8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the Criminal Code), as well as objective and subjective factors related to the offender's personal circumstances.
- [117] The Court emphasized this again in *Lacasse* at para. 53, instructing sentencing judges that proportionality is to be determined both on an individual basis, that is, in relation to the offender themselves and to the offence committed by that person, and by comparison with sentences imposed for similar offences committed in similar circumstances. The concepts of individualization and parity of sentence must be reconciled for a sentence to be proportionate.

Analysis

- [118] With all of these principles firmly in mind, I turn to my task in this case: determination of an appropriate sentence for these two offences committed by the accused.
- [119] Counsel provided several authorities for the court to consider. Both counsel recognize that no two cases are alike and have not, unsurprisingly, been able to find a case that is factually similar to the case at bar. Counsel did provide several cases for their guidance and some of the principles of sentencing in these types of cases, and examples of how the principles were applied in those cases. I have listed the authorities earlier in these reasons. Both counsel thoroughly reviewed these authorities in their submissions. I do not intend to review them further here, but I have read and considered them.
- [120] The accused's personal circumstances and the circumstances of these offences pose several unique challenges to determining a fit sentence. I will begin by outlining the aggravating and mitigating circumstances that I find to be engaged in this case.

Aggravating Circumstances

[121] As mentioned earlier, a sentence should be increased to account for any relevant aggravating circumstances relating to the offence or the offender. The aggravating factors are manifest in my recitation of the circumstances of the offence, and they include the following:

- i. A.D. was the accused's former intimate partner and under the age of 18 at the time of the offence, and so the statutory aggravating factors in s. 718.2(a)(2) and 718.2(a)(2.1) of the Code are engaged collectively, but not cumulatively, by which I mean they are not double counted as two different statutory aggravating factors.
- ii. The offence occurred in the context of the accused being unable to accept A.D.'s desire to end the relationship.
- iii. The offence was committed while A.D. was either unconscious or incapacitated from the drugs, Ativan, that the accused provided to her to help her sleep. (See *R. v. Arcand*, 2010 ABCA 363 at paras. 282-283 and *Yamelst* at para. 20).
- iv. The variety of invasive sexual acts that involved anal and vaginal penetration occurred over at least five hours, at a time when A.D. had been bound and blindfolded by the accused.
- v. The accused filmed the sexual assaults of A.D. Such conduct is degrading and represents a gross invasion of A.D.'s privacy and sexual autonomy: *Law* at para. 116.
- vi. A.D. was profoundly negatively impacted by and continues to be negatively affected by both offences. Her victim impact statement and the dramatic psychological trauma she has experienced and continues to experience are a stark and concrete example of the grave psychological harm that victims of sexual assault experience, observed by the Supreme Court of Canada in *R. v. McCraw*, [1991] 3 SCR 72 (see also: *Yamelst* at para. 22). The evidence supports the finding that the statutory aggravating factor in s. 718.2(a)(iii.1) of the Code is made out in circumstances of this case. The offences had a significant impact on the victim, particularly considering her age and other personal circumstances, including her health and financial situation.

Mitigating Circumstances

[122] There are also a number of mitigating circumstances in this case. They include the following:

- i. The accused has no criminal record.
- ii. The accused has expressed remorse for these offences to the author of the PSR and Dr. Kreklewetz, as well as his family and friends.
- iii. The accused entered a guilty plea, a further indicator of remorse, and spared A.D. from having to testify.

- iv. The accused has broad and strong support from his family, friends and co-worker, who are fully aware of the nature of the offences and describe them as out of character for the person they know.
- v. The accused continued with his educational and career plans, obtaining his Red Seal certification as a journeyman electrician in October 2020.
- vi. The accused has been employed with the same electrical company since July 2019.
- vii. The accused was suffering from a mental illness at the time of the offence.
- viii. The accused has had no relapses or negative performance reports while on bail over the last three years.
- ix. Since the offence, the accused has worked on stabilizing his mental health and is currently taking a course of prescription medication that appears to be assisting him with his anxiety and depression in a more beneficial fashion than at the time of the offence.
- x. The accused has undertaken some counselling to address the substance abuse disorder and is engaged in counselling with a mental health and substance abuse clinician with the Interior Health Authority.

[123] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated: *R. v. Badhesa*, 2019 BCCA 70 at paras. 39-46; and *Williams*, at paras. 74-83.

[124] In this case, I can reach no other conclusion on the evidence than that the state of the accused's mental health at the time of the offence was a significant contributing factor to the commission of the offence. He suffers from a major depressive disorder which is recurrent and was acute in the weeks preceding the offence. He was previously diagnosed with suffering from bipolar disorder in his teens and in the weeks prior to the offence, although I acknowledge that Dr. Kreklewetz has ruled out a diagnosis of bipolar disorder.

[125] Significantly, the accused was discharged from Burnaby General Hospital on November 14, 2017, where he had been certified under the Mental Health Act the day before. This was his fourth hospitalization over a four-week period. It appears from the PSR and Dr. Kreklewetz's report that he had been prescribed a variety of different prescriptions to assist him in dealing with his anxiety and depression, and that he misused his prescription medication at the time of the offence. He also suffers from a mild form of alcohol use disorder.

[126] In my view, considering the totality of the circumstances, the defence has demonstrated that the accused's compromised state of mental health at the time of the offence in November 2017 contributed to the commission of this offence. It is a mitigating factor that reduces the accused's moral blameworthiness, and as such must be considered in the balancing required to arrive at a proportionate sentence: *Williams*.

[127] I note that when mental health is a contributing factor to the commission of the offence, the usual primary focus on the objectives of deterrence and denunciation are attenuated to some degree: *Badhesa* at para. 44 and *Williams* at para. 76.

The Impact of COVID-19

[128] One final point to consider is the impact of the coronavirus pandemic on sentencing. Counsel for the accused acknowledged that the existence of COVID-19 is not a "get out of jail free card" but argued that it is a factor to consider when fashioning a sentence, as it is common knowledge that the ability to physically distance in a custodial setting is close to impossible.

[129] Crown counsel relied upon the decisions in *R. v. Lariviere*, 2020 ONCA 324 at paras. 12 and 16-17, and *R. v. Stevens*, 2020 BCPC 104 at paras. 44-66, to support its position that the existence of COVID-19 is not an exceptional circumstance. In *Stevens*, Judge Malfair engaged in a detailed analysis of this point and concluded that COVID-19 is more properly characterized as a collateral consequence, but noted that collateral consequences cannot reduce a sentence to a point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender.

[130] Four other decisions inform the impact of COVID-19 on sentencing and determining an appropriate sentence: *R. v. Greer*, 2020 BCSC 1311; *R. v. Hearn*, 2020 ONSC 2365; *R. v. Zhao*, 2020 BCSC 1552; and *R. v. McKibbin*, 2020 BCCA 337. I acknowledge that these cases were not cited during submissions, but given the importance of the point, I am of the view that they are the controlling decisions for this court.

[131] In *Greer*, Mr. Justice Crabtree addressed the decision by Madam Justice Pomerance in *Hearn*. Justice Crabtree ultimately concluded that in the absence of any specific evidence of health risk to the accused, the impact of COVID-19 on the sentence of an accused is best left to the parole authorities in the province.

[132] Mr. Justice Schultes reached a similar conclusion in *Zhao*, stating:

[134] On the effects of COVID, Mr. Zhao's counsel cited the thoughtful reasons of Justice Pomerance, a well-known criminal law authority, in *R. v. Hearn*, 2020 ONSC 2365. In that decision, Pomerance J. concluded that the current pandemic and the conditions that it will create in prisons, whether through the risk of infection or the kind of restrictive lockdown that Mr. Zhao has experienced, may justify a departure from the usual range of sentence in appropriate circumstances. In her analysis, Pomerance J. drew an analogy to the principles that can lead to the reduction of sentences for state misconduct, or for collateral consequences that would make a sentence harsher for the offender than it might otherwise have been.

[135] In determining whether to apply that analysis here, I find the decision of Justice Crabtree in the recent decision of *R. v. Greer*, 2020 BCSC 1131, very helpful:

- [51] In my consideration of this matter, I have reflected upon the comments set out in Hearn. Here, I note that there was no evidence introduced to show the current impact of COVID-19 upon the federal or provincial institutions; and, more importantly, with respect to Mr. Greer himself, in terms of whether or not he suffers a suppressed or compromised immune system. Mr. Greer, in his comments to the court, did provide some insight into his personal situation and the restrictions in movement, programming, and visitation that he has experienced while at the Pretrial Centre; and I accept the fact that there are certainly some restrictions imposed, as a result of the current circumstances.
- [52] Any sentence imposed must be guided by the statutory and common law principles of sentencing. That said, it was suggested that COVID-19 may reduce the requirement of parity with previously established ranges, or may justify a departure from the usual range of sentence in certain circumstances; and here, I refer to *R. v. Lacasse* [citation omitted]. The defendant requests the court grant a reduction in what would otherwise be an appropriate sentence, based on the potential prospect of difficulties posed by the current pandemic that the defendant may be subject to.
- [53] While I have considered this, I am not inclined to do so in these circumstances for the following reasons. I do not know for how long such restrictive conditions may continue and in what form. Not enough is known at this point, as to whether conditions may improve, worsen, or remain the same. As a result, it appears to me to be speculative to assess the impact. Again, as I noted previously, there is no specific evidence concerning the particular health issues or risks, if any, that are faced by Mr. Greer; and finally, I would draw upon the comments in the Ontario Court of Appeal case of *R. v. Morgan*, 2020 ONCA 279, discussing the impact of COVID-19 at para. 12, where the Court states:
- [12] That result does not mean that there is no potential remedy for the appellant respecting the impacts arising from the COVID-19 pandemic. We expect that the Ontario Parole Board will take into account those impacts in deciding whether the appellant should be granted parole. If the Parole Board fails to do so, the appellant has other remedies available to him to redress that failure.
- [54] Based on the circumstances and information that I have before me at this juncture, it strikes me that any impact that COVID-19 may have upon Mr. Greer and the sentence received is best left in the hands of the parole authority in this province.
- [136] I adopt that approach here and would not give specific effect to the impact of COVID on Mr. Zhao's correctional experience, either thus far or prospectively. I note that in a subsequent decision - *R. v. Costello*, 2020 BCSC 1206, at para. 76 - Justice G.P. Weatherill appeared to endorse Hearn, but he did so only generally and in passing, and so if a conflict between these two authorities actually exists, I would adopt the more extensive reasoning in Greer.
- [133] More recently, in *R. v. McKibbin*, 2020 BCCA 337, Madam Justice Bennett, speaking for the court, admitted fresh evidence tendered on a sentence appeal that established that the appellant, an individual who suffered from a serious respiratory disease, COPD, would be at

serious risk of significant health consequences or even death if he contracted COVID-19 while serving a custodial sentence. The appellant had been sentenced to six months' imprisonment for trafficking cocaine. He had been released on bail pending appeal on March 19, 2020. The combination of the evidence of the significant risk to the appellant's already compromised state of health, coupled with the short amount of time left for him to serve his sentence, resulted in the Court of Appeal suspending the remainder of the sentence and placing the appellant on probation.

- [134] The import of McKibbin is that, in the absence of concrete evidence of significant risk to an offender's physical health, the fact of COVID-19 on its own does not result in a reduction of the length of a custodial sentence to be imposed, or count as a factor in reducing a sentence below the range otherwise supported by the case authorities. Rather, the matter is best left to the parole authorities to assess as outlined in Greer and Zhao.

The Sentences to be Imposed

- [135] Taking into account the aggravating and mitigating circumstances in this case, the sentence I impose must include an emphasis on deterrence and denunciation. However, in my view, notwithstanding the brutal nature of the sexual assault in this case, including actions that degraded and objectified the victim and grossly invaded her privacy and sexual autonomy, there are sufficiently compelling mitigating circumstances, including the fact that the accused's compromised mental health contributed to the commission of this offence and thereby reduces his moral blameworthiness, to reduce the sentence to below the usual range.
- [136] While the mitigating circumstances are significant and arguably exceptional circumstances, they do not, in my view, reduce the sentence to a non-custodial sentence.
- [137] Insofar as the transmitting child pornography offence is concerned, the circumstances of this case are decidedly dissimilar to any of the child pornography sentencing cases provided or generally contained in the jurisprudence. The accused in this case did not have a collection. He was not disseminating it in the usual manner of uploading and sharing with like-minded individuals in private chat rooms. Nevertheless, he took pictures and video of his sexual assault of a person under the age of 18 years, and shared three images with another person he was seemingly flirting with and trying to impress.
- [138] While the main objectives of sentencing in a case like this are, of course, denunciation and deterrence, rehabilitation is another factor that must be considered. As I noted earlier, the importance of rehabilitation varies from case to case, depending on the proven willingness of the offender to turn things around and the degree of confidence that the court has in the durability of the offender's recovery.

[139] The strong and compelling evidence of the accused's efforts to stabilize his mental health and to effect his rehabilitation satisfies me that the principle of rehabilitation has enhanced importance in this case. In terms of rehabilitation, I accept that the accused has concretely demonstrated that he has turned his life around since his arrest. His significant and objectively identifiable steps towards rehabilitation include:

- i. his completion of his education and certification as a journeyman electrician;
- ii. his employment as an apprentice and now as a certified journeyman electrician;
- iii. his stabilization of his mental health issues;
- iv. his efforts to address his substance abuse issues, which still require further work and a lifelong commitment to achieving and sustaining sobriety;
- v. his engagement in counselling initially when released and again starting in June 2020;
- vi. his consent and willingness to take whatever further counselling is viewed to be necessary;
- vii. his genuine remorse;
- viii. his acknowledgment of the harm done to A.D. as a result of these offences; and
- ix. the strong support that he has from his family, friends and co-worker.

[140] Accordingly, the first facet of the consideration for findings of exceptional circumstances as outlined in Dragani is satisfied.

[141] Nevertheless, in my view the fundamental purpose of sentencing as set out in s. 718 of the Code and the importance of the principles of deterrence and denunciation are better served by a custodial sentence for the sexual assault, albeit one well below the range sought by the Crown and espoused in G.M. and Pouce Coupe: Dragani at para. 74 and Nasogaluak at para. 44.

[142] Notwithstanding the serious nature of the sexual assault in this case, the reduced moral blameworthiness of Mr. Milne at the time of the sexual assault in light of his established acute mental health crisis, coupled with the exceptional and mitigating circumstances that I have found exist in this case, make a sentence below the general range established in the jurisprudence appropriate. However, I am of the view that the objectives of deterrence and denunciation can only be satisfied by the imposition of a custodial sentence. It will be followed by a lengthy period of probation.

[143] I would say this, Mr. Milne. You are to be commended for the concrete steps you have taken to turn your life around. You appear to have a better grasp of your mental health and related medication issues than you did at the time of the offence. But make no mistake. The message from the Court of Appeal in G.M. is clear: but for the mitigating and exceptional circumstances that I conclude exist in your case, I would not hesitate to impose a sentence of imprisonment in the range that the Crown seeks and the case law supports.

[144] My purpose in imposing a sentence below the range set out in the jurisprudence is to configure an adequately denunciatory and deterrent penalty without compromising the demonstrated steps towards rehabilitation and recovery you have achieved since your arrest in March 2018.

[145] The appropriate balance between denunciation and deterrence to instill responsibility for the wrongs committed against A.D. while also recognizing and encouraging a continued commitment to recovery and rehabilitation, can be achieved through the following sentence.

[146] Mr. Milne, please stand up.

Count 2: Sexual Assault

[147] A.D. was your former girlfriend. She came to your apartment to help you when you said you were suicidal. The agreed statement of facts supports the conclusion that you were experiencing acute mental distress at the time. The four hospitalizations in the four weeks before this offence confirm this as well. After a number of hours of discussion with her, you gave her an Ativan. You took advantage of her incapacitated state, bound her arms and legs, and blindfolded her. Over the course of approximately five hours, you had unprotected vaginal and anal intercourse with her and forced her to fellate you. You used your cellphone to take video and still photographs of your assault upon her.

[148] Bearing in mind the range of sentences set out in G.M. and the other authorities, the importance of the objectives of denunciation, deterrence and rehabilitation, as well as the exceptional and mitigating circumstances I have found to exist in this case, I impose a sentence of 12 months' imprisonment on Count 2.

Count 4: Transmitting Child Pornography

[149] You shared two images of your sexual assault of A.D. with another woman you were endeavouring to impress on Whisper Chat. A.D. was 17 years old at the time of the offences when the images were taken. As such, the images constitute child pornography.

[150] Bearing in mind the range of sentence set out in the authorities provided, the dissimilarity of this case to the usual cases of transmitting or distributing child pornography, the importance of the objectives of denunciation, deterrence and rehabilitation, as well as the exceptional and mitigating circumstances I have found to exist in this case, I impose a sentence of two months' imprisonment to be served consecutive to the sentence on Count 2.

[151] You spent three days in custody following your arrest, therefore, pursuant to s. 719(3.1) of the Code you are entitled to have 4.5 days deducted from the overall sentence as presentence custody. The credit for this presentence custody will be deducted from the sentence imposed on Count 4, the transmitting child pornography charge. Thus, the net sentence on Count 4 after the 4.5 days' presentence custody are deducted, is 55.5 days of imprisonment.

[152] So, the overall combined net sentence for both offences is 13 months and 25.5 days' imprisonment.

[153] I will now go through the terms of the probation order.

[154] Once you have completed your sentence of imprisonment, you will be bound by a probation order for a period of three years. The conditions of your probation order are:

- (1) You must keep the peace and be of good behaviour.
- (2) You must appear before the court when required to do so by the court.
- (3) You must report in person to the probation officer at 1355 Water Street, Kelowna, British Columbia, by 3 p.m. within 48 hours of your release from a Correctional facility. If the office is closed, you must telephone daily during regular business hours until you have spoken to a probation officer and received further direction on how and when to report. After that, you must report as and when directed by your probation officer.
- (4) When first reporting to your probation officer, you must provide them with the address where you will live and your phone number. You must not change your address or phone number without prior written permission from your probation officer.
- (5) You must notify the court or the probation officer two days in advance of any change of name or address and promptly notify the court or the probation officer of any change of employment or occupation.
- (6) If at any time prior to the expiration of this order you are arrested, detained, or have served a sentence for another offence, you shall report to the probation officer within two business days of your release from custody.
- (7) You must have no contact or communication directly or indirectly with A.D.
- (8) You must not be within 100 metres of any place where you know A.D. to live, work, attend school, worship, or happens to be. If you see her, you must leave her presence immediately without any words or gestures.
- (9) You must not possess or consume alcohol, drugs or any other intoxicating substance except in accordance with a medical prescription.
- (10) You must not enter any liquor store, beer and wine store, or beer garden.

- (11) Having advised that you consent, you must attend, participate in, and complete any intake assessments, counselling, and/or programming that may be directed by your probation officer, including but not limited to sex offender programming, mental health and substance use, assessment, and counselling. This may include programming or treatment for alcohol or drug addiction or psychiatric and psychological counselling.
- (12) Having advised that you consent, you must do the following: (a) report to Forensic Psychiatric Services or elsewhere for any intake assessment, counselling or treatment as directed by your probation officer; (b) attend all scheduled appointments with the professionals in charge of your mental health care; (c) take all medications and medical treatment prescribed for you by those professionals; (d) give those professionals a copy of this order; and (e) if you decide not to follow these directions, you must immediately report that back to your probation officer.
- (13) You must not possess directly or indirectly any weapon as defined by the Code, including: (a) firearms and ammunition; (b) crossbows, prohibited or restricted weapons or devices, or explosive substances; (c) anything used, designed to be used, or intended for use in causing death or injury to any person or to threaten or to intimidate any person; (d) any imitation of all of the above, including any compressed air guns or BB pellet guns; or (e) any related authorizations, licences and registration certificates, and you must not apply for any of these.

The Ancillary Orders

- [155] Pursuant to s. 109(1)(a) and 109(2) of the Code, Mr. Milne is prohibited from possessing any firearm, crossbow, restricted weapon, ammunition, or explosive substance for 10 years from the date of his release from prison, and he is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, or prohibited ammunition for life.
- [156] Pursuant to s. 487.05(1) of the Code, Mr. Milne is required to provide a sample of bodily substances that is reasonably required for the purposes of forensic analysis of DNA, as the offences of sexual assault and transmission of child pornography are both primary designated offences under s. 487.04 of the Code.
- [157] Pursuant to s. 490.012(1) and 490.13(2.1) of the Code, Mr. Milne must comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10, for life, as sexual assault and transmitting child pornography are both designated offences under s. 490.011 of the Code.
- [158] Pursuant to s. 743.21 of the Code, Mr. Milne is prohibited from communicating directly or indirectly with A.D. while in custody.
- [159] That concludes the ancillary orders and the terms of probation.

[160] I note that the Crown asked for a victim fine surcharge to be imposed, but in my view, it is not available because the victim fine surcharge provisions in effect now came into effect in July 2019, after this offence was committed. The victim fine surcharge provisions in existence at the time the offence was committed were found unconstitutional pursuant to *R. v. Boudreault*, 2018 SCC 58.

[161] To conclude, I will say that counsel for both the Crown and defence provided extremely thoughtful, detailed and principled submissions supporting the positions they advanced as to the appropriate and fit sentence for this case. Their submissions were clearly focused on the issues, and provided reasoned and relevant support for their positions. They have both approached this case with the utmost sensitivity and professionalism, and the court is indebted to both counsel for their thorough analysis and presentation of this case. I thank you both very much, counsel.

[162] Mr. Milne, good luck to you.

"Ker J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/21/2020BCSC2101.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-milne-2020>

Prepared on 25 October 2026 · Esheria