

CANADA / JUDGMENT

R. v. R.N.

2026 ONCA 315

COURT

Court of Appeal for Ontario

DECIDED

5 May 2026

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COA-23-CR-0180

Judges

Simmons, Janet M.; Thorburn, Julie; George, Jonathon C.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. R.N., 2026 ONCA 315[1]

DATE: 20260505

DOCKET: COA-23-CR-0180

Simmons, Thorburn and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

R.N.

Appellant

Brian Snell, for the appellant

Julia Cappellacci, for the respondent

Heard: December 18, 2025

On appeal from the conviction entered by Justice Allan G. Letourneau of the Ontario Court of Justice on June 21, 2022.

George J.A.:

- [1] The appellant, who testified in his own defence, was found guilty of one count of sexual assault. He appeals against conviction.[2]
- [2] The appellant argues that the trial judge misapplied the third branch of the test in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 by treating his disbelief of the appellant's testimony as a basis for finding him guilty, and by failing to grapple with weaknesses in the complainant's evidence. [3]
- [3] The appellant also submits that the trial judge failed to turn his mind to the possibility of collusion. Since I would allow the appeal and order a new trial on the first ground of appeal, there is no need to address this remaining issue.

A. Background [4] The appellant was in a relationship with the complainant's aunt, which is how he came to know the complainant. At the time of the incident, the complainant was 16 years old and was described in the evidence as a vulnerable teen with autism, oppositional defiant disorder, attention deficit hyperactivity disorder, and who had struggled with anxiety and depression. The complainant's aunt was close with her sister, the complainant's mother. The aunt described herself as like a second mother to the complainant.

- [5] In 2017, when the sexual assault is said to have occurred, the complainant was spending every other weekend with his aunt as well as extra time during the holidays and in the summer. The appellant and the complainant became quite close. According to the complainant's aunt, the complainant loved the appellant and viewed him as a big brother whom he could talk to about anything. In his police statement, the appellant acknowledged that the complainant looked up to him and considered him a father figure.

- [6] The complainant and the appellant both enjoyed playing video games, and frequently did so together online. They also communicated on Facebook Messenger. The complainant's aunt was aware that the appellant's relationship with the complainant continued, even after she and the appellant had broken up. She did not have a problem with the two spending time together as she "had no reason to not trust [the appellant]. He – he's always been great with [the complainant], [the complainant] loved him".
1. The Sexual Assault Allegation [7] In August 2017 the appellant, who was 35 years old, hosted the complainant at his home. The complainant understood that they would play video games together, and the two spent the evening in the appellant's bedroom which is where the appellant kept his video game console. According to the complainant, while he was lying on the appellant's bed the appellant got under the blanket, placed his mouth over the complainant's penis, and bit it for approximately 30-50 seconds in an attempt to get it "hard". During cross-examination, the complainant acknowledged that he described the appellant "biting" his penis for the first time when testifying at trial.[4]
- [8] At some later point, before the complainant told anyone about the sexual assault, the complainant's aunt began to wonder about his sexual orientation. As it was not something she believed the complainant would talk to her about, she asked the appellant to speak with the complainant and learn what he could.
- [9] The complainant visited the appellant's apartment in December 2019 for what was expected to be a brief visit. The aunt said the appellant told her that during this visit he "flirted" with the complainant. The appellant testified that he asked the complainant if he would "ever have fun with [him]" to see how he would react.
- [10] According to the complainant, the appellant also asked him if he wanted to do it again, which he believed to be a reference to the night he slept over at the appellant's home. The appellant, who denied saying this or anything sexually explicit, reported to the complainant's aunt that the complainant was not interested in having a relationship with anyone.
- [11] Not long after this visit, the complainant told his aunt about what he says happened in August 2017. According to his aunt, this happened during a conversation in which she warned the complainant about internet predators after she noticed an email soliciting the complainant to provide nude photos of himself in exchange for toy cars he collected. The complainant initially testified that he disclosed the allegation because he believed his aunt wanted to have a baby with the appellant and he wanted to protect her. In cross-examination, however, he said that he learned about the baby after he disclosed the allegation to his aunt and then subsequently agreed with defence counsel's suggestion that the disclosure was related to his aunt's warning about internet predators.
- [12] Following the complainant's disclosure, his aunt told his mother, leading to the police report and the appellant being arrested and charged.

2. The Appellant's Police Interview [13] The appellant was interviewed by the police after his arrest. He said several things that he later resiled from. For instance, near the beginning of the interview he claimed that he had never been left alone with the complainant because he had been accused of sexual misconduct before, including with a minor, and had a self-imposed rule to never be alone with a minor. He initially said that the complainant had never slept over at his apartment but later, in this same interview, acknowledged that the complainant had in fact stayed with him on the night in question. The appellant then admitted that the complainant had "passed out" right next to him on his bed and that when he tried to wake him up and send him to the living room, the complainant said he was too tired, fell back asleep, and remained in his room through the night.
3. Decision Below [14] I will begin by noting that during his closing submissions defence counsel at trial (not Mr. Snell) acknowledged that the appellant had weaknesses and inconsistencies in his evidence and focused on deficiencies in the complainant's evidence. Then, in his reply submissions, defence counsel said this:

[A]s I stated earlier that obviously this – this case on Mister – [the appellant] isn't turning on prong 3 [of W.(D.)], because it's conceded. I mean, it's – he wasn't a great witness for himself, or in his own defence.

...

I guess what I'm ultimately saying is that you can find that [the appellant] is – is – I mean akin to somewhat of a pathological liar, and still not be convinced of his guilt beyond a reasonable doubt, Your Honour. That's – that's ultimately what I was saying, because the Crown still needs to convince you that the testimony of [the complainant] is sufficient. [Emphasis added.]

- [15] The trial judge did "not believe [the appellant's] testimony that he did not put his mouth on [the complainant's] penis and bite [the complainant's] penis trying to make him hard" in August 2017, finding that he consistently contradicted himself throughout both his police statement and testimony. He accepted the complainant's evidence and that of the two other Crown witnesses – the complainant's aunt and mother – as they "tended to stick to the basic factual circumstances surrounding [the complainant's] connection and interactions with [the appellant], before and after [the complainant's] disclosure of the alleged sexual assault". Accordingly, the trial judge found the appellant guilty of sexual assault.

B. Analysis [16] In my view, the trial judge erred in his treatment of the appellant's evidence and in his application of W.(D.). A new trial is therefore required.

- [17] First of all, it is clear that when defence counsel said this case did not turn on "prong 3" of W.(D.) he misspoke.[5] Given the context and the balance of defence counsel's remarks, what he meant to say was that this case turned entirely on the third prong, which directs a trial judge to acquit if they are not, on the evidence they do accept, convinced beyond a reasonable doubt that an accused is guilty. In other words, defence counsel did not concede the third prong; he instead focused his submissions on the third prong and conceded the

first and second prongs, which direct an acquittal if the accused's evidence is believed or, if it is not believed, it raises a reasonable doubt.

[18] This is the only reasonable interpretation of defence counsel's submissions, in which he disparages his own client's credibility and focuses on problems with the Crown's evidence. Although defence counsel stated at the outset of his reply submissions that the third prong was conceded, it is clear from the quotation set out above at para. 14 that within a transcript page of doing so he had clarified that he was not conceding the third step of W.(D.).

[19] It appears that the trial judge recognized this when he stated the following at para. 58 of his reasons:

[Defence counsel] started his submissions by conceding that [the Crown] made "some headway" in her cross-examination of [the appellant]. He then indicated that his strongest argument for the court to not convict [the appellant] was on prong 3 of W.(D.). [Emphasis added.]

[20] However, the trial judge almost immediately makes it plain at paras. 60 and 61 that he did not appreciate that defence counsel simply misspoke when he said that the third prong was conceded:

Later in his submissions, [defence counsel] conceded prong 3 of W.(D.).

...

Given [defence counsel's] initial submission that his strongest argument for not convicting [the appellant] of the sexual assault offence was on count 3 [sic]—and given his later submission that "[the appellant] isn't turning on prong 3, because it's conceded"—the defence has exhausted all of R. v. W.(D.)'s 3 step credibility prongs. Consequently, on the basis of the defence submissions, [the appellant] should be convicted of sexually assaulting [the complainant]. Nevertheless, I will move on with my further analysis of the evidence in this matter. [Italics in original; underlining added.]

[21] The trial judge later in his reasons reinforces this misapprehension of the defence position by once again erroneously referring to counsel's concession on the third prong of W.(D.).

[22] This misapprehension led the trial judge to conclude that the appellant "should be convicted of sexually assaulting [the complainant]" (emphasis removed) because he has, through his concession, "exhausted all of R. v. W.(D.)'s 3 step credibility prongs." It appears that the trial judge believed the appellant had effectively conceded his guilt. Although the trial judge went on to conduct a step three analysis, his misapprehension of the defence position raises concerns about the objectivity and rigour with which he conducted that analysis.

[23] These concerns are borne out by the trial judge's conflation of the first two prongs of the W.(D.) analysis with the third prong at para. 125 of his reasons:

On step 3 of W.(D.), I accept the evidence of [the complainant], [his aunt] and [his mother] and I reject [the appellant's] testimony that he did not place his mouth on [the complainant's] penis and bite his penis trying to make [him] "hard". [The appellant's] denial of guilt on the sexual assault charge does not give me reasonable doubt regarding his guilt. [Emphasis added.]

[24] At the beginning of these reasons, I characterized the alleged errors as the misapplication of W.(D.) and, relatedly, the trial judge using his disbelief of the appellant's evidence to draw an inference of guilt. In my view, the trial judge committed this error. Which is to say, he used his disbelief of the appellant's evidence, not just to assess his credibility and reliability, but as a makeweight for guilt.

[25] It is important to note that throughout his reasons the trial judge uses very strong language to describe the appellant's evidence, such as when he writes, "[t]his Judgment lays bare all of [the appellant's] contradictions, inconsistencies, outright lies, and subterfuge. Previously in this Judgment I found [the appellant] to be a devious and deceitful witness. I cannot remember the last case that I presided on that I used such language." This is but an example; the reasons are replete with similar harsh comments about the appellant and his credibility. Such comments relate not only to the appellant's police statement but also to his trial evidence. For example, at paras. 109 and 110, which are in a section of his reasons that follow a discussion of the Crown's submissions on the appellant's police statement, and while addressing the Crown's submissions on the appellant's trial evidence, the trial judge says:

On the basis of my review, herein, I find that [the appellant] did engage in outright deceit during the course of his testimony in this trial.

The extent of the deceit is considerable.

[26] The trial judge's reasons raise an obvious concern, and that is, if he truly understood defence counsel's concession, why did he devote so much time to criticizing the appellant? Properly understood, the concession would have narrowed the trial judge's task to a single question – whether the evidence he did accept proved guilt beyond a reasonable doubt.

[27] It is also unclear why, in para. 126, – after conflating the first two steps of the W.(D.) analysis with the third step, and while under the heading "Step 3 (R. v. W.(D.)): Is the Court convinced, on the Evidence it accepts, that the Accused is guilty of the offences beyond a Reasonable Doubt?" – the trial judge continued treating the appellant's credibility as if it remained a live issue:

In my humble opinion, [the appellant] is a prevaricator. In his tool shed in this trial he used subterfuge, inconsistencies, contradictions, memory loss from being booted in the head, etc., to attempt to belie the real facts in this matter.

- [28] After reading the reasons as a whole – having regard to the lengthy discussion about the appellant’s evidence, and given their general tone and tenor – it is apparent that the trial judge used his disbelief of the appellant’s evidence to find him guilty.
- [29] During oral argument on appeal, the Crown submitted that the trial judge was entitled to find that the appellant was deliberately lying as part of his assessment of the appellant’s reliability and credibility and that such findings are only problematic if the trial judge uses them improperly as a makeweight in finding guilt. The Crown says that the trial judge did not do so, but even if he did, the only occasion on which he used terminology suggestive of a makeweight was in relation to the contradictions in the appellant’s police statement, when he agreed with a submission by the trial Crown (not Ms. Cappellacci) that the appellant’s “evidence in relation to his police statement demonstrates that [his] police statement is inculpatory in nature.”
- [30] Although the point was not argued at trial, on appeal, the Crown submits that the trial judge would have been entitled to rely on the contradictions in the appellant’s police statement as independent evidence supporting a finding of deliberate fabrication capable of supporting guilt: *R. v. Ahmadi*, 2025 ONCA 219, 446 C.C.C. (3d) 497, leave to appeal to S.C.C. refused, 41898 (December 11, 2025). Further, the Crown says it is open to this court to conclude that “the record reveals sufficient such evidence to show that the trial judge’s omission did not prejudice the appellant” (citations omitted): *R. v. Iqbal*, 2021 ONCA 416, 406 C.C.C. (3d) 208, at para. 69.
- [31] I reject these submissions. Even assuming the contradictions in the appellant’s police statement were capable of supporting a finding of deliberate fabrication, I am satisfied that the trial judge also used his disbelief of the appellant’s trial testimony as a makeweight supporting guilt.
- [32] It is noteworthy in my view that, although the trial judge accepted the Crown’s explicit invitation to find the appellant’s police statement inculpatory because of inconsistencies, he did not advert to the principles and caselaw relating to deliberate fabrication and the type of independent evidence that would be capable of supporting a finding that a police statement or trial evidence was concocted to avoid liability.
- [33] Further, as explained in *R. v. U.K.*, 2023 ONCA 587, 168 O.R. (3d) 321, at paras. 75-78, the type of evidence that may be considered as independent evidence of fabrication in relation to trial evidence is more restricted than it is for out-of-court statements. For example, “the circumstances surrounding the testimony, such as logical implausibility or internal inconsistencies, cannot constitute independent evidence of fabrication” in relation to trial evidence: *U.K.*, at para. 78. Here, the record does not reveal the type of evidence that could constitute independent evidence that trial evidence was fabricated – nor did the Crown point to any such evidence.

[34] The concerns about the objectivity and rigour of the trial judge's analysis on the third step of W.(D.) are borne out as well by the trial judge's failure to address any of the weaknesses in the complainant's evidence. For example, while the trial judge referred to the complainant's evidence that he disclosed the allegation to his aunt because he believed she wanted to have a baby with the appellant in his review of the evidence, when it came to his analysis on the third prong of W.(D.) he did not note this as a potential inconsistency in the complainant's evidence. Nor did he refer to the fact that the complainant spoke of the appellant "biting" his penis for the first time at trial.

C. DISPOSITION [35] For these reasons, I would allow the appeal and order a new trial.

Released: May 5, 2026 "J.S"

"J. George J.A."

"I agree. Janet Simmons J.A."

"I agree. Thorburn J.A."

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The appellant initially appealed both conviction and sentence, but he subsequently abandoned his sentence appeal.
- [3] The appellant raised these issues as separate grounds of appeal in his factum but addressed them together in oral argument.
- [4] The complainant's videotaped police statement was also played at trial under s. 715.1 of the Criminal Code.
- [5] In oral argument, the Crown did not dispute that defence counsel misspoke.

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