CANADA / JUDGMENT

R. v. Smith

2018 BCSC 1376

COURT	DECIDED
Supreme Court of British Columbia	19 June 2018

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2018 BCSC 1376 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2018 BCSC 1376

Date: 20180619

Docket: 27207

Registry: Vancouver

Regina

v.

Mark Anthony Smith

Restriction on Publication: Pursuant to 486.4(2) C.C.C.

Further Corrected Judgment: The judgment was further corrected on

November 9, 2018 at paras. [49] - [50].

Corrected Judgment: The text of the judgment was corrected on

August 23, 2018 at para. [36].

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

Counsel for the Crown:

M. Myhre

Counsel for the Accused:

R. Johnson

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 9-12, 16-20, 24, 26,

& 27, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 8 & 19, 2018

Introduction

[1] Mark Anthony Smith is charged on a two-count indictment. The charge reads:

Count 1:

From the 1st day of May, 2010 to the 30th day of June, 2010, inclusive, at or near Vancouver, in the Province of British Columbia, did sexually assault K.S., contrary to Section 271 of the Criminal Code.

Count 2:

On or about the 21st day of August, 2015, at or near Vancouver, in the Province of British Columbia, did sexually assault S.K., contrary to Section 271 of the Criminal Code.

[2] In order to find Mr. Smith guilty of sexual assault, the Crown must prove beyond a reasonable doubt that Mr. Smith is the person who committed the offence on the date and in the place described in the indictment. Those matters are not in issue.

[3] In this case, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:

1) that Mr. Smith applied force to each complainant;

2) that Mr. Smith intentionally applied the force;

3) that neither complainant consented to the force that Mr. Smith applied;

4) that Mr. Smith knew that neither complainant consented to the force that Mr. Smith applied; and

5) that the force that Mr. Smith applied took place in the circumstances of a sexual nature.

[4] In R. v. Ewanchuk, [1999] 1 S.C.R. 330, the Supreme Court of Canada defined the actus reus and the mens rea of the offence at para. 25:

The actus reus of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective ... the Crown [must] prove that the accused's actions were voluntary. The sexual nature of the assault is [also] determined objectively; the Crown [does not] need [to] prove that the accused had any mens rea [that is mental state] with respect to the sexual nature of his ... behaviour ...

The absence of consent ... is subjective and [is] determined by [referring] to the complainant's subjective internal state of mind towards the touching, at the time it occurred ...

[5] For the purpose of the actus reus, consent means that the complainant in her mind wanted the sexual touching to take place.

[6] The mens rea of the offence requires the Crown to prove that the accused intended to touch the complainant in order to satisfy the basic mens rea requirement, knowing or being reckless or wilfully blind to a lack of consent on the part of the person touched.

Chronology

[7] K.S. alleges that in May or June 2010 she was sexually assaulted by Mr. Smith. She reported to police on February 17, 2015. Mr. Smith was charged with sexual assault of K.S. on April 15, 2015.

[8] S.K. alleges that she was sexually assaulted by Mr. Smith on August 21, 2015. Mr. Smith was arrested on August 31, 2015. The charging documents were sworn on December 23, 2015, and Mr. Smith was ordered to stand trial on February 7, 2017.

Similar Fact Evidence

[9] During the trial, the Crown sought a ruling to have the evidence of each count considered as similar fact evidence in respect of the other count of the indictment. I determined that while Mr. Smith's actions, as described by the complainants, were sufficiently similar to be probative, I dismissed the application on the basis that the prejudicial effect of the evidence was significant and potentially tainted by the transfer of evidence or unconscious collusion, and that this outweighed the probative value.

[10] I commented that the transfer of evidence or unconscious collusion may have occurred through a mutual friend of Mr. Smith and S.K., Matthew Butcher. Matt knew the details of K.S.'s allegation from Mr. Smith and spoke to S.K. about them and other matters before S.K. spoke to police.

[11] I considered that the safest route in the circumstances was to evaluate the allegations of each complainant separately without allowing one to bolster the other.

Evidence

[12] When I refer to the witnesses, other than the complainants and Mr. Smith, I will identify them and then use their first names. I consider that that is a clearer approach and I do not mean any disrespect to any of the witnesses by doing so.

Count 1

[13] In June 2010, K.S. was 20 years old. She was five foot seven and a half inches and weighed 130 pounds. At the time, she described herself as partying a lot. She had a high tolerance for alcohol, although eight or nine drinks was her limit. After that, she would be drunk. It would affect her speech and she would feel sleepy. She says that alcohol did not affect her memory.

[14] On the evening of June 12, 2010, she was at the Biltmore Cabaret in Vancouver. She was there with a friend, Kaylee Johnston. K.S. was wearing tights, jean shorts, white Ked running shoes, a tank top, and a cardigan. While at the Biltmore, K.S. danced, drank, and hung out with friends. She says she remembers that Mr. Smith was at the Biltmore with a group of friends, but she does not recall having a conversation with him there.

[15] When the Biltmore was closing, someone, who K.S. believed was Mr. Smith, invited them back to his apartment for an after-party. She left with Kaylee, Mr. Smith, and his flatmate, Nick Ismirnioglou, and others to an apartment on Quebec Street. K.S. thinks that she walked to Mr. Smith's apartment, but she cannot recall whether she walked all the way or whether she and her friends took a cab. Kaylee recalls they took a cab.

[16] Nick recalls being at the Biltmore. He recalls the date because it was the night before his birthday. He recalls being drunk by the end of the night and that he, K.S., Kaylee, and Mr. Smith decided to have an after-party at Nick and Mr. Smith's apartment. Nick cannot recall whether they walked or took a cab to the apartment. He remembers a group of approximately eight or ten people returning to the apartment.

[17] K.S. recalls that Mr. Smith's apartment was in Vancouver on Quebec Street facing Science World. It was north of Terminal. Her recollection is correct according to Nick and Mr. Smith. The apartment building was the third building to the north of the Vancity, at the northeast corner of Terminal and Quebec. K.S. says she recalls the apartment being on the third or fourth floor.

[18] K.S. prepared a diagram of her recollection of Mr. Smith's apartment that she provided to police. Each of Kaylee, Nick, and Mr. Smith provided a description and a layout of the apartment. While K.S. was not certain of the whole of the layout of the apartment, she knew where Mr. Smith's bedroom was in relation to another bedroom and the living room, and identified the furniture layout in the living room and Mr. Smith's bedroom.

[19] K.S. was asked in cross-examination to describe the apartment and she did. There are aspects of her recollection which were unclear, including whether the door to the bedroom was closed or could close, whether there was a sheet over the window, and whether there was glass on three walls or not. K.S. describes Mr. Smith's bedroom as having glass on the whole front facing the water and glass on the southern wall. She thinks it could have been a solarium, which was confirmed by Nick and Mr. Smith.

[20] K.S. says that she probably had a drink at Mr. Smith's but cannot specifically recall. In all, K.S. estimates that she had about five drinks over the whole night, including one at the after-party. She agrees that that was a judgment based on what she usually drank and what she recalled drinking that night. She says at the end of the night she was intoxicated, but not drunk or falling over, and she recalls most of the night. She says, "I had not reached my limit, that's for sure."

[21] While K.S. does not remember any drugs, she says it was common at after-parties. She thinks people were smoking weed. She believes there was some cocaine, but she did not consume any.

[22] Kaylee recalls there being cocaine at the party and says that she did one line. She did not see Mr. Smith, Nick, or K.S. do any cocaine. Nick does not recall there being any drugs at the apartment, although he acknowledges that he would not have been surprised if people did drugs. Nick, however, says he does not do drugs.

[23] K.S. says that in addition to Kaylee, Nick, and Mr. Smith, there were maybe three others at the apartment. There was music and dancing and someone put on a Planet Earth DVD later in the night. Kaylee recalls Nick, Mr. Smith, K.S., and herself watching a DVD of a nature show. Kaylee says that she and Nick then went into Nick's bedroom and left Mr. Smith and K.S. She did not see K.S. until the morning.

[24] K.S. remembers the DVD playing in the living room. She was sitting beside Mr. Smith. She says, "He was not flirting with me and he did not have his arm around me on the couch. We didn't kiss on the couch before we went into the bedroom."

[25] Kaylee says that maybe Mr. Smith might have been casually sitting with his arm around K.S., but her memory is unclear. She adds, "I don't remember him trying to kiss her. He was leaning in a bit more and maybe thinking that this would happen. When I thought about it that night, I may have had a memory of his leaning into her, like he was into her. At the time, I thought that that might be happening."

[26] People started to leave the apartment. K.S. knew that Kaylee wanted to stay with Nick at the apartment that night. K.S. wanted to stay with Kaylee. She asked Mr. Smith if she could crash on the couch. She says Mr. Smith said she could not because his friend was sleeping on the couch, but she could sleep in his bed. K.S. thought that was weird, but she was tired and wanted to stay with her friend Kaylee in the apartment.

[27] K.S. agrees that because she was intoxicated, she made the decision to go into bed with Mr. Smith. She agrees that she would not have done so if she had not been intoxicated. K.S. says that she fell asleep, but she did not pass out from the effects of alcohol. She reiterates that she did not use cocaine that night.

[28] Nick remembers going to bed and saying good night to Mr. Smith and K.S. He recalls that K.S. was in Mr. Smith's room, sitting on the bed with a comforter around her. He and Kaylee then went to his room and spent the night there.

[29] K.S. says that she thought there was a guy sleeping on the couch outside the door, perhaps five feet away from the door to the bedroom or eight feet away from the bed. She could not be certain. K.S. agrees that there were two couches in the living room and a guy was sleeping on one of them. K.S. says when she got into Mr. Smith's bed, he was facing away from her. She got on top of the covers with her clothes and shoes on. She says Mr. Smith said, "Take your shoes off, get the fuck out of my bed." K.S. says she was taken aback by his comment, but took off her shoes and leaned back on top of the covers still wearing her clothes. She thought Mr. Smith was wearing his clothes.

[30] K.S. says that she either fell asleep for a while or just lay there. Mr. Smith kissed her. K.S. says she was not into it, but thought she would let it happen and then she could go to sleep. She describes the kissing as going on for a minute or two. She describes herself as kissing back, but not enthusiastically. In her recorded statement to the police, K.S. denied saying that they were having fun during this kissing stage, although that appears in the transcript and in the recording. K.S. agrees that the kissing was consensual. While the kissing went on, K.S. says she was lying on one side of the bed on her back, and Mr. Smith was lying on the other side.

[31] When Mr. Smith kissed her, he leaned over top of her. K.S. does not remember embracing him. She says she did not end up underneath the covers while they were kissing. After the kissing that lasted for a few minutes, K.S. says Mr. Smith turned over, she went to sleep, and she thought Mr. Smith did as well. K.S. woke up to Mr. Smith trying to pull off her shorts and tights. It was early in the morning and the light was coming in the windows. She says that as Mr. Smith was trying to pull off her shorts and tights, she was trying to pull them up. She was on her back and Mr. Smith was above her. K.S. says that she said "no" in an audible voice, but she was not yelling. She grabbed her shorts, as Mr. Smith continued to try to pull them down, along with her tights. K.S. says she did not know how he got them down or how he turned her over on her stomach, but he did. She was flat on the bed on her stomach. Her shorts and tights were down around her knees and she says Mr. Smith then raped her from behind.

[32] He held her arms above her head, so that she could not move her arms or struggle more. K.S. says her elbows were out and her hands were above her head, and he held her by her forearms. She says that she said "no" three times once she was on her stomach, again in an audible voice, but she was not yelling. Once Mr. Smith held her by her arms, she just lay there and stopped struggling.

[33] K.S. describes Mr. Smith as having his body weight on her when he was behind her. She does not know exactly how Mr. Smith got access to her vagina from the angle of their bodies, but disagreed that it was physically impossible because it happened. She also disagreed with the suggestion that Mr. Smith could only achieve intercourse if she raised her buttocks. She agreed that it needs a hand to guide the penis into the vagina when it is from behind. K.S. says that when Mr. Smith was holding her arms over her head, he had both hands over her arms at one time, and that he did not let go until he stopped. K.S. denies that she was pushing back against Mr. Smith to help him continue to have his penis inside her vagina. K.S. says Mr. Smith did insert his penis in her vagina, but not for long. It was less than five minutes. K.S. says it was hard to judge the time while it was going on. K.S. says she felt no power, she was embarrassed and ashamed.

[34] K.S. was asked in cross-examination whether Mr. Smith's inability to finish intercourse made her feel rejected. She agrees that her confidence was low at the time. She did not have a long-term boyfriend. She disagrees that she felt rejected because Mr. Smith did not finish. She says she does not know whether he just stopped or he stopped because he ejaculated. Mr. Smith made no effort to try and keep her there. He did not tell her not to talk to anyone about what happened. He just rolled over and seemingly ignored her. K.S. says that that did not upset her.

[35] K.S. says that from the time she woke up to when it ended, she does not remember Mr. Smith saying anything.

[36] K.S. does not believe that Mr. Smith had a condom. She says he stopped after and turned over. She assumed that he had ejaculated, but she did not know. Once Mr. Smith turned over, K.S. describes herself as freed. She says she pulled up her shorts and tights and waited until Mr. Smith went to sleep, she thinks it was 20 or 30 minutes. She describes herself as kind of in shock and her heart was racing. After Mr. Smith was still, K.S. says she grabbed her shoes and her bag and left the bedroom.

[37] She knew that Kaylee and Nick were in another bedroom. She went to that room. She says she knocked and said, "We have to go now." K.S. could not say whether the guy on the couch was there when she left, as she was in a hurry to get out.

[38] Kaylee remembers waking up and hearing K.S. in the hallway. It sounded like K.S. was looking persistently for her purse and sweater. K.S. said, "I have to get the fuck out of here." Kaylee recalls K.S.'s body language as demonstrating that she was urgent to leave and find her things so they could get out. Kaylee described K.S.'s demeanour being one of shock, that K.S. wanted to leave, and there was a franticness or urgency about it. K.S. left along with Kaylee and Nick and they got in the elevator.

[39] In her videotaped statement to police on February 26, 2015, Kaylee described K.S. as sleeping and not totally awake when she saw her in the morning. At trial, Kaylee says that was not necessarily the right description. She thinks K.S. got the worst awakening that one could ask for, and in reaction to that, K.S. was only focused on leaving. She says K.S. was very intentional. Kaylee considered that K.S. was just in shock and having a reaction. She says that K.S. was altogether in kind of a survival mode and just wanted to leave. Kaylee says K.S. did not seem hungover, she was walking and speaking clearly, and was fully functioning.

[40] Nick recalls that he was awake for between 20 or 40 minutes before K.S. came to the room. Shortly after, he left with K.S. and Kaylee. Nick thinks they were going for brunch. Nick recalls Mr. Smith in his robe at the doorway of the apartment when he left. He also recalls K.S. yelling back at Mr. Smith, saying, "Thanks for the coke."

[41] When the three of them got in the elevator, Nick says that K.S. seemed really upset and sad. He recalls her saying something. She may have said "rape". Nick thought it was super weird. They got off the elevator and went out the door of the apartment. K.S. went north and Nick went south.

[42] Kaylee has a faint memory of Mr. Smith lying in bed, not getting out of bed or coming to the door. She does not remember K.S. saying anything to Mr. Smith that morning.

[43] Nick describes K.S. as seemingly mad. He says when she yelled at Mr. Smith, it was with an angry look on her face. He says her body language also disclosed that she was angry.

[44] K.S. says that when she was in the elevator with Nick and Kaylee, she made a remark. She does not remember describing the details. When the three of them got out of the building, Nick went in one direction and Kaylee and K.S. went together in another direction. K.S. and Kaylee went for coffee at JJ Bean at the CBC building. K.S. called in sick for work. Her reason for calling in sick was, as she describes it, because she felt like shit because she had been raped. She may have felt like shit because of a hangover, but the rape was the main reason that she felt like shit the next day.

[45] Kaylee asked K.S. what she wanted to do. K.S. says she was not going to go to the police, that she was ashamed. K.S. says she did not tell Kaylee many of the details of what happened. She told Kaylee that an assault happened and that she did not want to go to the police. K.S. describes herself as feeing very shut down.

[46] In the trial proper, Kaylee describes the conversation with K.S. at JJ Bean in her recorded statement to the police. After K.S. spoke about what happened in Mr. Smith's apartment, Kaylee said, "He raped you". She said, "you were raped," using K.S.'s first name. K.S. said she did not know, it was only for a few minutes.

[47] Because K.S. was not on birth control, she got a preventative birth control Plan B, which is the morning-after contraceptive.

[48] Approximately a week after June 12, 2010, Nick raised the incident with Mr. Smith. He asked Mr. Smith if he and K.S. had hooked up, which is a colloquial term for having sex, although Nick can not recall whether Mr. Smith used that word exactly. Nick recalls Mr. Smith saying that they had a sexual romantic encounter and it was consensual. Mr. Smith told Nick that K.S. got too drunk and was likely saving face when she suggested the sexual encounter was not consensual. Nick says that Mr. Smith said something to the effect that she was not too proud to have hooked up with him for whatever reason.

[49] Mr. Smith's recollection of the conversation with Nick about non-consensual sex was it occurred sometime after June 12, 2015. He says it was a serious allegation to be confronted with. Mr. Smith says that Nick told him that K.S. was mad because Mr. Smith ignored her in the morning. Mr. Smith says he did not feel sick when Nick told him of the allegation.

[50] Mr. Smith first says he told Nick that K.S. was just pissed off because he was ignoring her in the morning and that her face as she left made him laugh a little. Later in his evidence, Mr. Smith says he was truthful with Nick and told Nick that after he stopped in the middle of having sex with K.S., he thought that she was pissed off with him the following morning. Even later in his evidence, Mr. Smith says that when Nick told him or raised the allegation with him, he was shocked at the allegation.

[51] K.S. says that she has seen Mr. Smith twice since then, in 2010 and 2011. Mr. Smith did not acknowledge her at either time and seemed to look right through her. K.S. describes her seeing Mr. Smith as causing her to be overwhelmed and panicked.

[52] In January 2015, K.S. was working at a rape crisis centre in Vancouver. She saw the name Mark Anthony Smith written on a board there. She panicked, believing that Mr. Smith had done to someone else what he did to her. She decided to go forward to police on February 17, 2015, and provided a recorded statement to police on February 24, 2015. K.S. does not explicitly recall if she had spoken to Kaylee before or after she prepared her first statement to police, but acknowledges that she probably talked to Kaylee before she prepared the statement.

[53] K.S. was asked for clarification, whether her memory might have been coloured by her work at the rape crisis centre. K.S. says she did not think so. Her memories had not changed, despite her working there and despite her reading and analyzing feminist writings. She says her perception in 2015 was the same as 2010. She says she did not have to think about whether rape had occurred or not, nor was she unsure about whether it was rape. She did

not determine it was rape only after working at the rape crisis centre. K.S. says she knew that it was rape right away when it happened. She says she hardly told anyone about it when it happened, but she did talk to two people and she called it rape at the time. The posting of Mark Anthony Smith's name at the rape crisis centre did not make her suddenly conclude that it was rape.

[54] K.S. says the reason she phoned Kaylee before speaking to police was to let her know as a friend that she was providing Kaylee's name to the police and she would likely get a call. K.S. says she was not trying to get Kaylee to go along with her story.

[55] K.S. says that in the five years which passed between the event and her reporting, there was likely some deterioration in her memory, but she denies there had been any further deterioration because since reporting it she had been asked about it so many times. Her repeating what occurred reinforced what she remembers.

[56] There was evidence in Voir Dire #1 of what K.S. said specifically to Kaylee. It was tendered by the Crown to rebut a notion of recent fabrication. I am not going to refer to that evidence in this portion of my reasons.

[57] In his evidence, Mr. Smith describes being at the Biltmore with Nick and some others. He remembers leaving by taxi from the Biltmore to his apartment. Mr. Smith does not remember K.S. at the Biltmore. He says he met her when they took the cab to his place. At the apartment, Mr. Smith describes that people were drinking and having fun and being social. There were 8 to 10 people there. He says there was some drinking. Some people were smoking marihuana and doing cocaine, as was Mr. Smith. Mr. Smith says that he and K.S. were flirting and that he had his arm around her as they were watching the Planet Earth DVD. He says he and K.S. were laughing about it.

[58] Mr. Smith recalls kissing K.S. on the couch briefly, but says she was shy or whatnot. Mr. Smith perceived that K.S. was okay with him having his arm around her, and he says everything was going really well. He says that they were cuddled up close on the couch and they had kissed for a second, but there were people around and so they left it low key.

[59] When people left, Nick and Kaylee went to Nick's bedroom and Mr. Smith says that he said to K.S., "I'm going to bed now. You're welcome to stay in my bed if you like." He says that he invited her into his bed because it was comfortable and they were flirting and he was trying to be nice. In his evidence, Mr. Smith denied telling K.S. that she could not stay on the couch. He says there were two couches there and anyone was welcome to stay on the couch. He could not say whether he said that to K.S.

[60] Mr. Smith says that he went to his bedroom and got into bed. He was wearing a T-shirt and boxer shorts. He fell asleep. Mr. Smith remembers K.S. coming into the room and getting into bed. She had her boots on and Mr. Smith asked her to take them off. He describes his tone as just, "Can you take your boots off because you are in my bed." K.S. did take her boots and put them by the door. Mr. Smith rolled over and went to sleep.

[61] Mr. Smith recalled waking up to K.S. facing him. She was fidgeting in bed and they began to make out again; that is, kissing. He says K.S. was in the bed under the covers and she was awake. When they started kissing again, they got very close with their bodies. He says his chest was on her chest. It was tongue-in-mouth kissing. Mr. Smith says he unbuttoned K.S.'s shorts and grabbed her tights and shorts all at once and got them down to her calves. He says K.S. then kicked them off her feet. Mr. Smith says K.S. was lying on her back. He denied that he pulled her tights and shorts off. Mr. Smith says that they continued to make out for a while. K.S. was wearing her top at that point and he was wearing his T-shirt.

[62] Mr. Smith says that he then went behind her. K.S. leaned into him and he put his penis into her vagina and they were having sex. He says that her buttocks were pressing into him and her knees were bent forward on an all-fours type position. Mr. Smith says that K.S. was not flat on her stomach. Mr. Smith says he did not force her into the position, that he never held her hands or arms, nor tried to restrict her movement. Mr. Smith remembers holding onto her hips. Mr. Smith says that from his experience, "my partner would have to be cooperative and lean into me." He would have to guide his penis into her and find the right angle. Mr. Smith says he tended to slip out now and again as he does not have, as he described it, "the biggest penis in the world". He says the erect size of his penis is about five inches.

[63] Mr. Smith says that a woman would have to be cooperating, leaning back into him and having her buttocks up and her legs apart. He says that if a woman is not doing that, his penis would not stay in and he would not maintain penetration into the vagina. He says that K.S. was leaning into him, cooperating, and pushing him into her. Mr. Smith says he used his hand to guide his penis into her vagina.

[64] Mr. Smith says that K.S.'s description of what occurred was not accurate. He says, "In my experience, it would not have been possible for me to penetrate her. Her legs would have been together if her shorts and tights were lowered to her knees or calves," and that his penis would have to go down between her legs and then make a right angle to her vagina. Mr. Smith says, "I don't know how that is even possible." Mr. Smith says that in his experience, if K.S. was lying flat on her stomach, he could not have entered her vagina with his penis from behind her.

[65] Mr. Smith says that K.S. never told him to stop or said no. She did not resist her clothes coming off or resist at any other time. Mr. Smith says that while they did not say anything to each other during intercourse, he could tell that K.S. was consenting by her body language when they were making out. He says that K.S. did not push him away and he was sure that K.S. knew that he was also consenting.

[66] Mr. Smith described sex stopping after three or four minutes when he lost his erection. He says that that was because he had a lot to drink and he used cocaine that night. He says he just rolled over and lay down because he was pretty exhausted. He says he did not ejaculate; his erection was going away. He says that after the sex stopped and he lay down, K.S. said, "What is happening?" Mr. Smith says he was not the nicest about it, but he said, "I cannot. I

do not have it in me." Mr. Smith described himself as being a little bit embarrassed and really tired. He just wanted to go to sleep at that point. He says that he rolled over and that K.S. was in bed with him for another 30 or 45 minutes. He recalls her huffing and puffing a few times.

[67] In cross-examination, Mr. Smith says that he recalled only asking K.S. to take her boots off. That was the extent of the conversation. He says he said nothing else to her, except, "I can't" when he pulled out. Those were the only words that he used and he says he could not remember K.S. uttering a single word to him. He agrees that he did not ask if he could unbutton her shorts. He did not ask if she wanted more. He did not ask if she wanted to have sex. He just moved around behind her. Mr. Smith says it all seemed very consensual. He assumed that she was agreeing to have unprotected sex. He says that he has unprotected sex with other girls and, in his experience, if a woman wishes to use a condom, she will tell you. Mr. Smith does not like to use protection as it gives him a rash.

[68] He says his impression was that K.S. was okay to have unprotected sex with him, although they had just met. Mr. Smith says that K.S. was apparently enjoying the sex and he was too. Mr. Smith says he did not apologize or ask K.S. whether she wanted some sort of stimulation. Mr. Smith says that they lay there in dead silence for 35 to 40 minutes.

[69] Mr. Smith says he did not initiate any sexual activity with K.S. when she was sleeping, but he does not know if she ever fell asleep.

[70] Later in his evidence, Mr. Smith says that K.S. said nothing to him when he pulled out. She did not ask what was wrong. She just lay there and made the huffing and puffing noises.

[71] After the 30 or 45 minutes elapsed, Mr. Smith recalled K.S. sitting on the edge of the bed putting on her tights, shorts, and boots. He recalls that she made a scrunched up face toward him and then left. K.S. did not say anything to him. He says he heard her outside walking around the apartment for about five minutes. He recalls hearing Nick and Kaylee getting up. He recalls K.S. shouting something at him, but he does not recall what she said. He says her tone of voice was not happy and it was loud. Mr. Smith considered that K.S. was hungover.

[72] In spite of Mr. Smith being intoxicated with alcohol and cocaine and being quite exhausted, he says that this did not affect his memory to recall what happened with K.S. in the bedroom. Mr. Smith says he was not aware of K.S. using any cocaine that night, but recalls a dish and straw were placed on his bedside table with cocaine residue on it, which he did not notice when he went to bed, but he noticed when he woke up.

[73] Mr. Smith was arrested on April 15, 2015, for sexually assaulting K.S. He gave a recorded statement to police on that date. Before he made the statement, he received legal advice. He understood that he should stay silent and that was his intention throughout. During the police interview, Mr. Smith was told of the allegations of K.S. At first, he said he did not know who K.S. was, although he says it came to him later in the interview after they showed

him a video of K.S. and he recognized her. During the interview, Mr. Smith said he did not know the name K.S. Throughout the interview, he denied having sex with her. He said he did not know her and that he did not know if she had met him.

[74] Mr. Smith describes this as his trying to stay silent. He says the police officer kept asking him questions and he was trying to follow his lawyer's advice and remain silent. Mr. Smith says that one of the police officers threw a chair during the interview and he found this very intimidating. He says he resorted to saying, "I don't know" because not saying anything did not make the police officer stop asking. Mr. Smith describes it as his way of staying silent.

[75] In regard to his demeanour during the interview, Mr. Smith was asked why he chuckled in the interview on several occasions. Mr. Smith says his chuckles were because he was intimidated. The police officer was not very nice to him. He was also tired and hungover and he did not want to be there. He says he was grouchy and he was talking back to the officer.

[76] He says that another reason why he chuckled was because he considered that the allegations were ridiculous.

[77] Mr. Smith acknowledges that he knows the difference between remaining silent and saying, "I don't remember." His saying, "I don't remember" to the police officer were lies. Mr. Smith says he lied about saying that he had no idea what the officer was talking about and he lied when he said he had nothing to tell.

[78] In the interview, Mr. Smith referred to having a girlfriend throughout the whole year of 2010 that was on and off. He gave her name. He described the girlfriend as staying at his house pretty much every day. Mr. Smith says he did not refer to the girlfriend to imply that he would not have done the thing that he was accused of; he was just trying to remain silent.

[79] Mr. Smith says that he actually had an accurate recall of the event with K.S. when he told this Court that whatever happened with her was consensual. He had no reason to lie, despite having lied to the police on at least a dozen times about what he remembered. He says he lied because he was implementing his right to silence and he was intimidated the whole time he was in the police interview. He did not tell the police what he knew, because he had been instructed by his lawyer to remain silent.

[80] Sometime after he was charged with sexual assault of K.S., Mr. Smith says that Nick came to see him about what Nick had said to police when he spoke to them in 2015. Mr. Smith acknowledges that he was not to speak with Nick and understood that he was violating his undertaking by speaking to him. Mr. Smith says the conversation lasted for only about three minutes and it was Nick that came and spoke to him. Mr. Smith says it just happened, he was not intending to commit a potential criminal offence. He opened the door to Nick, who started speaking. Mr. Smith says, "Should I have put my hand over his mouth?"

[81] After Mr. Smith was interviewed by police in April 2015, he told his friend Matt Butcher of the allegation and what had occurred between him and K.S., including that it would have been impossible for him to have done what K.S. accused him of. Mr. Smith says he told Matt that he would have had to have been an octopus to do what he was alleged to have done with K.S.

[82] Matt says that he had heard rumours about Mr. Smith, as well as the information that Mr. Smith had confided in him personally about the K.S. allegations. Matt was not asked the details of that conversation with Mr. Smith and was not asked about the comment of being like an octopus.

Count 2

[83] S.K. was 25 when she moved to Burnaby in July 2015. She was looking for work in the art field in Vancouver. At the time, she weighed 130 pounds. She is about five foot six or five foot seven. She says she had not spent much time in Vancouver before she moved here.

[84] On August 15, 2015, she moved to an apartment at Union and Jackson, located in the Downtown Eastside of Vancouver near Gastown. S.K. says that she was drinking alcohol regularly at the time, at least four times a week, and as much as 10 drinks a night. With that consumption, she would describe herself as buzzed but still completely coherent. On the evening of August 19, 2015, to the morning of August 20, 2015, S.K. met up with her friend Kate Barlett in Gastown. They were at the Portside Pub and after it closed, her friends, including Kate and another friend and his girlfriend, were in front of the Portside joking around. Mr. Smith came by and said that he and his friends were not done drinking either, and he invited the group over to his apartment. S.K. can not remember if Mr. Smith was with others.

[85] The group moved to Mr. Smith's apartment, which was close to the Portside. Kate says that she did not join the group at Mr. Smith's apartment. S.K. says that she and Mr. Smith were getting to know each other and having a couple of drinks. They were looking at each other's cellphones and adding each other on Instagram and Facebook. Mr. Smith told her that he had painted the silos on Granville Island. S.K. says, "I was really stoked to get to know him. He seemed like a funny, really nice, guy."

[86] S.K. says they were playing Nintendo when Mr. Smith leaned over and tried to kiss her. S.K. says she backed away and told Mr. Smith she was not looking for a relationship. S.K. says they were hanging out at Mr. Smith's apartment and his neighbour's place as well. S.K. estimates that she probably had about 20 drinks over that evening and the following morning. She says that she was very intoxicated, on a scale of 1 to 10, 10 being drunk, she described herself as a nine. S.K. acknowledges that her memory was drastically affected by alcohol. She could not remember being in the neighbour's apartment. She does not know what the neighbour looked like. S.K. says she had 20 drinks that night and ascribes her loss of memory of what occurred that night to her level of intoxication.

[87] The next day, August 20, 2015, S.K. and Kate went to Granville Island to look at the silos that Mr. Smith said he had painted. Although S.K. did not mention it, Kate describes that they were patio hopping while there. Kate estimates that they each had two drinks and something to eat while on the island. They then left and went to the Portside. S.K. sent Mr. Smith a text at 2:27 p.m. She suggested that they get together soon and asked about that night. Mr. Smith responded, "Not sure, yeah, you want to hang out."

[88] Their messages continued. At 6:49 p.m. on August 20, 2015, S.K. messaged Mr. Smith that she was at the Portside having a beer and asked if he wanted to join. Mr. Smith responded, "Okay, give me 20," to which S.K. responded, "Sweet." He then went and met S.K. at the Portside.

[89] Matt is a mutual friend of S.K.'s and Mr. Smith's. He worked with Mr. Smith at a car dealership in Vancouver for about six to nine months before the events of August 2015. They were acquaintances before that. Mr. Smith says that he had been texting Matt throughout the day, as Matt was his cocaine supplier and had been for some time. On August 20, 2015, Matt received a text message from Mr. Smith indicating that he had met someone that Matt knew and her name was S.K. S.K. sent a picture of the two of them from her cellphone. They invited him to join them for a drink at the Portside. Matt met them outside the Portside at between 7:30 and 8:00 p.m. on August 20, 2015. They were together for roughly 20 minutes.

[90] In cross-examination, Matt first denies and then agrees that he met Mr. Smith in order to sell him cocaine. He had been Mr. Smith's cocaine provider for several months. Matt admits that he had lied in his evidence about why he was at the Portside until he was confronted with a series of text messages between him and Mr. Smith spanning several months from May 2015, which were exchanges about the purchase and sale of cocaine.

[91] S.K. was asked questions about her friend Matt. S.K. says she did not know whether Matt was selling Mr. Smith cocaine that night. She says she did not see Matt sell cocaine. She says she knew that Mr. Smith and Matt were texting each other, but did not know if it was about buying cocaine.

[92] S.K. describes her clothing that night. She was wearing a black tank top and a denim skirt with Lululemon shorts underneath. She had underwear on under her shorts.

[93] S.K. and Mr. Smith stayed at the Portside until about 10:30 p.m. S.K. says she had a shot and four beers by the time they left the bar. She and Mr. Smith then went to a liquor store at Steamworks, where Mr. Smith purchased some gin. S.K. says it was possibly two bottles. She says they then went to a convenience store and picked up soda, water, and limes, and they went back to his apartment.

[94] S.K. describes that while at Mr. Smith's apartment, they made some drinks and they were just chilling, chatting, listening to music, and scrolling through pictures on their phones. When asked how much he had to drink on the night and morning of August 20 and 21, S.K. says that she had a shot and four beers at the bar, and three or four gin drinks at Mr. Smith's

house. She agreed that Mr. Smith was generally pouring the drinks. She says that her drinks contained one ounce of liquor. She says she can taste if it is a double or stiff drink; that is more than one ounce. She describes her background as a bartender and says that that was the basis of her knowledge of the strength of a drink, by tasting it.

[95] S.K. denies having eight ounces of gin that evening while at Mr. Smith's. She can not recall how much gin Mr. Smith bought at the liquor store. She insists that she did not finish two bottles of gin; that she knew how much she had to drink. Even if two bottles were finished off, she did not have more to drink than she said. She disagreed that they moved on to other drinks, including beer and vodka.

[96] S.K. was asked whether her memories from August 20-21, 2015, might be hazy due to the amount of alcohol she consumed. She says that she felt pretty confident that she was not drunk. Her memory was not hazy, although there could be some things that she may not remember, but could not say that that was due to alcohol consumption. She considered the passage of time may have affected her memory, but not alcohol.

[97] S.K. says that there were no drugs used throughout the evening of August 20-21 by her or by Mr. Smith.

[98] Shortly before the trial, S.K. told the prosecutor that she had seen Mr. Smith snorting cocaine. She said she believed both she and Mr. Smith were doing cocaine on the first night (August 19-20). She told the prosecutor that she could not remember which night, but thought about it some more and was sure that they did not do cocaine on the second night (August 20-21, 2015).

[99] S.K. agrees that she never told the police or gave evidence at the preliminary hearing about the cocaine. She told the prosecutor that it was Mr. Smith who was doing it and not her, and that it was on the first or second night. She acknowledges that she might have done cocaine on the first night. She says she was drunk and could have been doing it and did not remember. She says that she could not remember if Mr. Smith had done cocaine on the second night.

[100] At 1:15 a.m. on August 21, 2015, Mr. Smith and S.K. took a picture of themselves on S.K.'s phone. S.K. is pictured in that photograph as having Mr. Smith with his arm around her. She describes his hand as hovering over her chest. The picture shows that they are both smiling.

[101] Mr. Smith then messaged his friend Donovan to come over, and Donovan came over at about 2:30 a.m. S.K. had never met Donovan before and she has not seen him since. S.K. observed that whenever she was talking to Donovan, Mr. Smith would look over with a jealous look almost. She says that Mr. Smith looked sort of irritated when she was talking to Donovan. She says Donovan asked if everything was okay and whether he should leave, to which Mr. Smith responded, "No, man, everything is cool."

[102] At one point, Donovan decided to leave. S.K. asked if she could go with him. S.K. says that Mr. Smith said, "Really? You're going to leave with my friend?" S.K. said that she was not going home with Donovan, she was just leaving. S.K. then said that she did not want to piss Mr. Smith off or make him mad, so she agreed to stay longer and hang out with him. Donovan left about 4:30 or 5:00. S.K. says she and Mr. Smith continued goofing around and dancing. S.K. says that she was having a fun time in his apartment.

[103] S.K. denies that Mr. Smith said to her when she was about to leave with Donovan, "You are not going to leave me high as fuck on my own. We've been doing drugs and I won't be able to sleep." S.K. says that Mr. Smith said, "You're really going to go with my friend? You're just going to go with Donovan?"

[104] S.K. acknowledges that she could have gone, but she did not want to make Mr. Smith mad. He was not bullying her, but after she left with Donovan, she went back to Mr. Smith's apartment. Before he left, Donovan went back to Mr. Smith's apartment and asked S.K. if she wanted to come with him and she said no.

[105] When confronted by her recorded taped statement that suggests she had a few more drinks between 4:30 and 5:00 a.m. after Donovan left, S.K. says she did not say they were necessarily alcoholic. She says she was drinking water, but did not point out that the drinks that she was drinking were water to the police.

[106] S.K. denies doing a striptease or doing a seductive dance while removing her skirt. S.K. acknowledges that she did not tell police that she had taken her skirt off, because she did not think it was a big deal. S.K. removed her skirt on her own. It was not taken off by Mr. Smith. S.K. says she removed it while she was dancing. She was still wearing her Lululemon shorts and her tank top while she was dancing around.

[107] Mr. Smith was taking pictures of S.K. dancing. When S.K. was shown a series of photographs taken by Mr. Smith on August 21, S.K. agreed that in one photograph she is holding a beer. She says she was not dancing provocatively or removing her clothing. She does not know whether she was drinking the beer, because she and Mr. Smith had finished two bottles of gin. S.K. denies drinking vodka drinks, because she does not like vodka.

[108] One photo showed S.K. standing in a planter. S.K. forgot that she had been standing in a planter. She could not recall dancing in the planter in the preliminary hearing. S.K. agrees that she and Mr. Smith had made out on the couch, during which he put his hand up her skirt and inserted his fingers in her vagina. S.K. says that she asked Mr. Smith to stop and that Mr. Smith told her he was sorry, said he was going to stop, and suggested they cuddle in the bed where it was more comfortable. S.K. says she had believed him when he said he would stop and that they would just cuddle. S.K. acknowledges that despite some of the non-consensual activity on the couch, she agreed to go to Mr. Smith's bed when she could have remained on the couch. She agrees that she should not have gotten into bed with him, but says what happened there was not consensual. She just wanted to go to sleep.

[109] S.K. went into his bed and says it was fine at first. She was lying on her back and he was on his side towards her. S.K. says Mr. Smith then grabbed her hands and made her touch his penis. S.K. was trying to take her hand back because she did not want to do that, but Mr. Smith was forceful. Mr. Smith then grabbed her head and tried to kiss her. S.K. describes it as a sloppy kiss, where Mr. Smith shoved his tongue down her throat.

[110] S.K. says she was moving her head away, because she did not want to kiss him, and if her mouth was open it was only because she was screaming "stop".

[111] S.K. says it was not a consensual kiss and the kiss grossed her out. She says she was turned off. She says she had decided she did not want to have sexual activity with Mr. Smith. She acknowledged that, in spite of what Mr. Smith was doing in bed, she did not get up and get out of bed. She did not put more clothes on because she was exhausted. She did not go back to the couch.

[112] S.K. says that she did not know how Mr. Smith achieved penetration from behind while she was on her stomach down on the mattress. She says it was not accidental. It is possible that Mr. Smith took his hand off her wrist to guide his penis in. S.K. says her shorts were pulled down around her knees, her legs were not spread apart very much, but Mr. Smith still managed to get in. S.K. says she said "no" to Mr. Smith during intercourse and was screaming "no" and it was loud. Later she refined that evidence to say she was yelling loud, but not screaming at the top of her lungs.

[113] S.K. says she really wanted to leave, but she was brand new in Vancouver and she did not have cab numbers. She knew that Gastown and the area where she lived was not the best area to be around at night, and she did not want to try and find her way home in the middle of the night. She says that she thought that Mr. Smith felt bad and embarrassed. He walked over and apologized to her.

[114] S.K. says she knew she had to leave. She ran and grabbed her skirt and put it on and took her bag and left. As she was trying to leave, Mr. Smith stopped in the doorway and put his hand on her shoulder and said, "I am so sorry, I should not have done that. Do not leave." S.K. left.

[115] When she got to her apartment, S.K. called her friend, Kate Bartlett, who said that she would be over on the next bus. When she got home, S.K. took a shower and threw her clothes in the wash. She does not recall whether that was before or after Kate arrived.

[116] Kate describes that she has been a friend of S.K.'s since 2010. They rekindled their friendship in 2015 and have been very close since then. Kate says that S.K. is her absolute best friend now and they have been roommates for going on four years. In cross-examination, Kate agrees that she had spoken to S.K. about the events numerous times over the years and within the last month before trial. The events I am referring to are August 20 and 21.

[117] The next morning, that is August 21, 2015, at about 9:30, Kate received a call from S.K. Kate describes S.K.'s demeanour as extremely distressed, wailing and hyperventilating, and struggling to get her words out. In Kate's words, a state of borderline panic.

[118] Kate says they were on the phone for one and a half to two minutes. Kate says she has spoken to S.K. on the phone many times and can assess whether S.K. is intoxicated based on the volume and intonation of her voice. When S.K. is intoxicated, it is louder and there is not the same level of sincerity. When S.K. is sober, she is more relaxed and sincere.

[119] Kate says that in the telephone conversation on August 21, 2015, that there was a calm sincerity in S.K.'s voice that you could hear from a person where there are no substances in her system. S.K. was able to understand what Kate said and Kate could understand what S.K. was telling her.

[120] As a result of what S.K. said, Kate decided to head to S.K.'s place and arrived within an hour of the phone call. She woke up S.K. with breakfast.

[121] Kate describes S.K.'s demeanour as extremely distressed. Kate and S.K. sat on S.K.'s bed together and S.K. provided more details on what happened on the night and morning of August 20 and 21. Kate described S.K.'s demeanour as exhausted and distressed. S.K. did not have any difficulty explaining what happened. Kate suggested to S.K. that she go to the police, but S.K. apparently did not want to deal with the drama of the police and the justice system. Kate then returned to her own apartment and met S.K. later.

[122] S.K. had a nap, but knew that she needed to get checked for a potential sexually transmitted infection or STI. S.K. described that during her conversation with Kate on the bed, she was at a level of intoxication of 5 out of 10; 10 being more intoxicated. She was also ready to go to sleep. S.K. says that the alcohol did not affect her perception of her memory of what happened that night and that she did not consume any other substance.

[123] S.K. and Kate looked Mr. Smith up on social media that morning. Kate says that there was no Facebook profile, and his Instagram profile had not been updated.

[124] Matt Butcher describes receiving a call from S.K. between 3:30 and 4:00 p.m. while he was at work. Matt understood that he was the first person that S.K. had talked to after her night at Mr. Smith's house. S.K. was crying. S.K. told him something happened. Matt suggested that she go to a clinic. S.K. says she would go to a clinic, but did not intend to go to the police.

[125] After the conversation, Matt left work and picked S.K. up on his motorcycle and took her to a clinic. The first one they went to was closed, so they went to another one that was about to close. The clinic referred S.K. to Life Labs, but Life Labs was also closed. At that time, they were with Kate. Kate then left. S.K. and Matt went for ice cream.

[126] S.K. says that several friends encouraged her to go to the police. She was told rumours that Mr. Smith was doing this to other girls. She heard from Matt about Mr. Smith's reputation. S.K. says she trusted the people who told her the rumours and she believed what they told her. S.K. disagrees that the things that others told her about Mr. Smith solidified her feeling that it was not consensual. S.K. says she knew it was not consensual and that her friends telling her about the rumours caused her to go to the police so it did not happen to other girls.

[127] After Matt dropped her off, S.K. texted him and said she was going to go to the police. S.K. asked for more information from Matt on Mr. Smith, and Matt provided it to her. As noted, Matt knew about the K.S. allegations, because Mr. Smith told him about them when he was arrested for sexual assault of K.S. In his evidence, Matt did not specify details of what Mr. Smith told him and, as I have noted, he was not asked about the octopus comment.

[128] Before S.K. gave police her statement, she was not familiar with the rape crisis centre in Vancouver and she had never spoken to anyone in that organization. She had never spoken and did not know K.S.

[129] S.K. called the police and told them what happened. She asked that a female officer attend and take her statement. A male officer, Cst. Doug Higginson, came to her apartment. S.K. refused to speak with him and asked for a female officer. Cst. Jennifer Cousineau attended and took a statement from S.K. S.K. says that she remembered everything when she gave her first police statement.

[130] Constable Cousineau got to S.K.'s apartment about 20:45. She spoke to S.K. alone. She took a written statement that S.K. prepared. Cst. Cousineau read through it and then asked S.K. 12 other questions and recorded her answers on that statement.

[131] Constable Cousineau describes S.K. as quite upset. She says S.K.'s eyes were red and she was crying. She had her arms around her knees in a chair, and she had a hard time speaking about what took place. Cst. Cousineau recommended that S.K. go to the hospital and have a sexual assault kit done. S.K. said she would like to do that.

[132] Constable Cousineau and another officer took her to the hospital and they arrived there about 10:30 p.m. Cst. Cousineau asked S.K. more questions while they were at the hospital and recorded her answers.

[133] S.K. was examined at the hospital by Dr. Laurie Logan. Dr. Logan was qualified as an expert in the practice of medicine, including forensic examination, assessment and treatment of sexual patients, including the mechanism of injury. Dr. Logan described her usual procedure with a patient complaining of sexual assault. She describes to the patient what she has to offer. If the person is not sure what she wants to do, the doctor gets forensic evidence and only gives it to the police if the patient says she wishes to go to the police.

[134] Dr. Logan also gets written consent of that person and says that the patient can change her mind at any time.

[135] Dr. Logan took a history from S.K. She also did a full head-to-toe examination for tenderness, bruises, foreign material, laceration, and tears. Based on what S.K. told her, Dr. Logan took a sample from her mouth to establish S.K.'s DNA. As S.K. had told her that Mr. Smith had his penis in her vagina, Dr. Logan took two swabs, one from her vagina and one from her cervix.

[136] Before Dr. Logan takes the swabs, she checks the vaginal area for tenderness. If nothing is apparent to her naked eye, she uses a dye that she paints on and wipes off. It will show tiny tears and abrasions. In S.K.'s case, there was a faint blue smudge at the opening of the vagina on the bottom, which Dr. Logan describes by referring to a clock face. She says the faint blue smudge was between 4:30 and 6:30, if the patient is lying on her back and the top of the vagina is 12 o'clock.

[137] Dr. Logan says the smudge indicated there was some trauma to the area and a little laceration. Dr. Logan says that this is the most common location if one sees trauma. It is the most easily traumatized area, because it is not flexible and is susceptible to shearing. The injury or the trauma is consistent with vaginal intercourse with a penis penetrating a vagina from behind.

[138] Dr. Logan described it as a minor amount of trauma, but the presence of it is interesting because, in a large proportion of people that Dr. Logan examines, she sees nothing.

[139] Dr. Logan acknowledged that she does not often examine people after consensual sex, but referred to the literature that said that trauma is apparent in 40 percent of cases after sexual assault, and 11 cases of consensual sex. Dr. Logan agrees that it is also consistent with digital penetration with a finger for ten seconds, that it is possible depending on whether there was a large knuckle or friction.

[140] Dr. Logan says the timing of the injury is consistent with having been inflicted 17 hours before the examination, as injury usually resolves within 72 hours.

[141] Dr. Logan described that the tear was an abrasion, not that deep, but deep enough to take up the dye. Dr. Logan says that if the patient is intoxicated when she has sex, the woman tends to be more relaxed and so are her tissues. It is less likely that a tear will be present.

[142] Dr. Logan also noticed bruising on S.K.'s left leg, which was not tender and was light blue. She noted the bruises on her diagram. Dr. Logan has no note of anything happening with S.K.'s legs. She did not write it down as pre-existing, because she did not know whether they were. Dr. Logan documents everything that she sees. She says she assumed that S.K. was not aware of them as pre-existing. Dr. Logan says she is careful about what she asks, because she does not want to lead a patient. She does not say anything to the patient generally, except to ask if the patient was aware of them and explain them.

[143] Dr. Logan says that if S.K. said they had nothing to do with the assault, she would generally make a note of that. Dr. Logan noted them because Dr. Logan assumed that they were not bruises that S.K. was aware of in advance. Dr. Logan used them as corroboration of the assault.

[144] S.K. says she noticed the doctor looking at the bruises on her legs. She does not remember what she said to the doctor about the bruising. She says she did not say that they were from her night and morning with Mr. Smith or that they were.

[145] Dr. Logan explains that there is always a chance that where a man has unprotected intercourse with another woman on the same day, and then had intercourse with S.K., and there is ejaculation, she would expect to see DNA of either the other woman or Mr. Smith on the swabs taken from S.K. Analysis of the swabs taken from S.K. showed no presence of semen or the DNA of Mr. Smith.

[146] Dr. Logan prepared two reports. The first one was in error. In it, she noted no genital injuries after the application of the blue dye. Dr. Logan prepared another report where she fixed the error. It is dated the same day as the first report, but Dr. Logan submitted it sometime later August 5, 2015. Dr. Logan says she possibly changed the report, because she went back to the final and looked at her notes and determined that the report was incorrect. Dr. Logan says she fixed the second report based on her notes that were done at the time of the examination.

[147] After S.K. saw Dr. Logan, she provided Cst. Cousineau with a photograph of herself and Mr. Smith that was taken on her cellphone on August 21 at about 1:15 a.m. Cst. Cousineau offered S.K. victim services as they were leaving the hospital and gave S.K. the card. S.K. says that she did not want to talk to victim services or anyone else about what occurred and that she was upset. Cst. Cousineau took S.K. back to her friend's place.

[148] S.K. says she tried to look up Mr. Smith on Instagram and Facebook to delete him, but she was not able to find him.

[149] Kate Bartlett was interviewed by police on August 22, 2015. She told the police that she was involved in the process; that is, the process of S.K. reporting to police with other friends. She told police that she and her friends had been talking about different options, and that Kate had received information from her friends about Mark Smith. Kate said that her friend group was in favour of filing a police report, even though S.K. did not want to go.

[150] Kate said that she was aware of numerous bad rumours about Mr. Smith's reputation. She said that Matt was relaying rumours about Mr. Smith to S.K. Kate described herself as being in the circle of that communication. Later on August 22, 2015, Kate, S.K., and Matt went out for drinks and hung out during the day. They generally discussed what happened and the rumours of the event.

[151] In August 2015, Mr. Smith was 30. He weighed about 190 pounds. He was out of work, having been fired as a project manager for a painting company. It was in that capacity that he was involved in the painting of the Granville Island silos. He was involved in staging for the artist. Mr. Smith lived in Gastown in a one-bedroom apartment near the Portside Pub. He did not have a roommate.

[152] Mr. Smith says he was drinking every day for the weeks leading up to the incident. He would begin the day by drinking with breakfast and drink throughout the day. He was drinking six to 10 drinks a day. He described himself as heavily into cocaine at this point, using it four or five times a week. He used half a gram to a gram. Mr. Smith also described himself as doing whatever drugs came along, including MDMA, acid and, as I have stated, cocaine.

[153] Mr. Smith says that on August 19, 2015, he woke up at noon and went for drinks and an Irish breakfast at a pub in Gastown. He was alone. As he was going back to his apartment, he ran into his friend Nate who lived in the apartment upstairs from Mr. Smith. Nate was the manager of a bar. Mr. Smith went to the bar with Nate and drank there until 2:00 a.m. when the bar closed. On his way home past the Portside, he and Nate stopped. The Portside was closed. Mr. Smith says he banged on the door and said, "Let us in, we're not done drinking."

[154] Mr. Smith says others on the street heard him and Nate and said they were not done drinking either. Nate suggested that they all go back to the apartment and order beer. There were six or seven people that came with them. Mr. Smith did not know those people. They went back to Nate's apartment. Mr. Smith says that Nate's apartment was similar, but he had bare brick walls while Mr. Smith's apartment's walls were Gyproc that he painted red. The furniture was set up differently in each apartment.

[155] While at Nate's, Mr. Smith says the group ordered beer and played Nintendo. He met S.K. over the course of the interactions. They were playing Nintendo and they started talking and were getting along pretty good. S.K. gave him her number and he sent her a text. They talked about music festivals and what they had in common. They talked about the silos on Granville Island and Mr. Smith showed her pictures of them. Mr. Smith describes that he and S.K. were pretty friendly and S.K. seemed to like him and he liked her.

[156] Mr. Smith, S.K., and the others hung out until about five in the morning. Mr. Smith says he did some cocaine and drank some beers. He does not know how many drinks he had that day. He says that S.K. seemed like she was having fun. Mr. Smith can not say anything about her alcohol consumption that night or whether she did drugs.

[157] Mr. Smith says he left Nate's apartment and went to his own apartment and passed out. He does not recall whether S.K. had left or remained in Nate's apartment when Mr. Smith left.

[158] The next day, on August 20, 2015, Mr. Smith says he woke up at about 12:30 p.m. He was hungover. He says he needed to rest that day because he was going on a camping trip that weekend. He was at his apartment and his friend Robin came over between 2:00 and 4:00

p.m. He says she had been drinking. He described Robin as a woman that Mr. Smith had sex with quite often. She was married at the time to someone else. Mr. Smith had been friends with the people in her husband's group, but was not at the time, that is August 20, 2015, because they had had a falling out, possibly over Mr. Smith's having sex with Robin.

[159] Mr. Smith says that he and Robin had sex on the couch. He did not use a condom. He ejaculated. After the sex, Robin asked him if he had any cocaine. Mr. Smith called Matt. Robin texted someone else and then she left. Mr. Smith lay on the couch. He says he was pretty exhausted. He acknowledges that S.K. had been texting him throughout the day and he texted back.

[160] When S.K. texted him that she was at the Portside, Mr. Smith responded that he would join her in 20 minutes. Mr. Smith says he laid on his couch for another 25 minutes, and then walked down the street to Portside. Mr. Smith also texted Matt, saying that he needed camping stuff, five or six, meaning five or six half-gram bags of cocaine. Matt responded that he was at work but would meet him after.

[161] Mr. Smith joined S.K. and her friends at the Portside. He says that S.K. and her friends were doing rounds of shots and he joined in. He says S.K. also had some beers, as he did.

[162] Mr. Smith says that when he sent a photo of himself and S.K. to Matt, Mr. Smith was setting up a cocaine buy. Mr. Smith says that he told S.K. that he was trying to get some cocaine from his friend Matt in Gastown and she asked whether it was Matt Butcher. Mr. Smith said, "Yeah." S.K. said she knew Matt and sent him the picture of them together. Mr. Smith says that he was sure that S.K. knew that Matt sold him cocaine and she was not surprised when he told her.

[163] Matt met Mr. Smith and S.K. outside of the Portside about 7:30 or 8:00 p.m. Mr. Smith told S.K. that he was meeting with Matt to buy cocaine and that Mr. Smith told S.K. that he had to go to the bank machine first. He says S.K. said, "I will go with you." Mr. Smith met up with Matt and brought about three grams of cocaine. Mr. Smith says Matt pulled it out of his pocket and gave it to him in Gastown.

[164] Mr. Smith says that he and S.K. then went back to the Portside and had more drinks. Mr. Smith asked S.K. what she was planning to do that night. S.K. said she did not have any plans. Mr. Smith says he suggested that they go to the liquor store and then go party at his apartment. He says S.K. said, "Sure, whatever you want to do." He and S.K. went together to the Steamworks liquor store where Mr. Smith bought two bottles of Tanqueray gin. He says they walked to get back to Gastown and got limes and a mix for the drinks at a convenience store and it was about 10:30 or 11:00 p.m.

[165] They went back to his apartment. Mr. Smith says he introduced his cat to S.K. He put on some music and started pouring drinks. Mr. Smith described that he and S.K. were having a good time. He was pretty stoked about the fact that S.K. had left all her friends to hang out with him.

[166] Mr. Smith produced a series of photographs that he had taken on August 21 in the morning hours, of himself and S.K. He described the photograph of him and S.K. on the couch that was taken with S.K.'s phone. Mr. Smith says he was drinking gin and tonic with lime. He says he had his hand on S.K.'s breast while she took the photograph. Mr. Smith says he does not recall that S.K. had a bad reaction to his putting his hand on her breast.

[167] Mr. Smith says he was free pouring drinks and each drink was one and a half to two ounces of gin, filled up with tonic, soda, or orange juice and lime. Mr. Smith describes that he and S.K. were dancing around to music, sharing stories, talking about festivals that they had been to. Mr. Smith says, "We busted out some cocaine and did some lines of cocaine." Mr. Smith says there was not much discussion about it and he just put it out, and he and S.K. were doing it line for line. He says they were snorting it nasally. Mr. Smith says he took other photos of S.K. with her cellphone.

[168] About 2:30 a.m., Mr. Smith's friend Donovan called and asked if he could come over. Donovan said he had a couple of bags of cocaine that he wanted to share. Mr. Smith asked S.K. whether she minded and she said, "Yeah, sure, invite your friend over." Mr. Smith estimates by the time Donovan showed up, each of he and S.K. had gone through a couple of grams of cocaine.

[169] Mr. Smith says that Donovan came over in about 20 minutes. He had some beers and he made Mr. Smith and S.K. more lines of cocaine. Mr. Smith says that Donovan was grabbing some cocaine from Mr. Smith's bag and mixing it with him. Mr. Smith says the three of them were doing lines of cocaine. Mr. Smith says he was getting bitter, as Donovan was using his cocaine that Mr. Smith needed for camping. Mr. Smith was trying to get looks to try and communicate that to Donovan. Donovan was there for about an hour and a half and asked Mr. Smith whether he wanted him to leave. Mr. Smith said it was fine if Donovan wanted to stay.

[170] Donovan called a cab. S.K. asked where he was going and he said to Main Street. Donovan asked S.K. if she needed a ride and she was going to leave. Mr. Smith said to her, "You are not going to leave me here high as fuck, are you?" S.K. said she did not know and left the apartment with Donovan. Mr. Smith describes himself as tired but not upset. He says he was really high and expected that she would sit there and wait for a couple of hours, although he is not sure if he said that to S.K.

[171] Mr. Smith says that after a while, the door opened and S.K. came back into the apartment and said she was not going to go. After that, Donovan came back in and said that the cab was here and asked S.K. if she wanted a ride. S.K. responded no, she was going to stay. Mr. Smith says they had gone through another half a gram from his bag and there was some cocaine that Donovan had contributed.

[172] After Donovan left, Mr. Smith got out his bag of cocaine and he says he did a couple of more lines with S.K. By that time, Mr. Smith says they were out of gin, that is the two bottles, and that Mr. Smith got a bottle of vodka out that he had that was not full, but was half or three-quarters full with vodka. Mr. Smith also described himself and S.K. drinking beers.

[173] Mr. Smith says he asked S.K. if she liked pillow forts. She said yes and he decided to build one by pushing the ottoman toward the couches and getting the pillows and duvet cover off his bed. He describes that S.K. was dancing around a bit with her skirt off and with his cat around her neck. Mr. Smith says he took off his pants and got into the pillow fort. He says he invited S.K. in and she did get on the couch with him. Mr. Smith says he was wearing a T-shirt and boxer shorts and socks, and that S.K. was wearing her tank top and Lululemon shorts.

[174] Mr. Smith says they were searching on his laptop for songs that they liked. Mr. Smith says that they were making out on the couch. He put his hand up her skirt and he had his fingers in her vagina, while they were making out.

[175] He says S.K. was rubbing his penis on the outside of his boxer shorts. Mr. Smith says they were making out body to body and feeling each other up. Mr. Smith says that at some point after they started making out, and then S.K. got up to dance. She was dancing in his apartment in front of him to some music. She was moving her hair around and showing him her buttocks. He says that they had a couple of more lines and they were still drinking. S.K. took off her skirt and was dancing a seductive dance. He describes her as doing a sexy dance and then taking her dress (apparently referring to her skirt) off at the same time. He took pictures of her dancing, and S.K. was aware that he was taking pictures.

[176] The first photo that Mr. Smith took was from the couch. S.K. was in the planter doing something with her eyes. Mr. Smith notes there were two bottles of gin and two cans of beer and tonic or soda mix apparent in the photograph. Mr. Smith says he took the picture at about 7:00 a.m. or 8:00 a.m., and it appears to be broad daylight outside. He describes S.K. as acting a little crazy, getting a little loony, and that she was free spirited.

[177] In one of the photos, Mr. Smith describes himself on the couch and the photograph has a picture of him and his shoes. He refers to the vodka bottle apparent in the picture. In another photo, Mr. Smith says that it is S.K. in her shorts. There is a sombrero visible on the wall. Mr. Smith does not remember S.K. dancing with it. He notes that the vodka bottle was empty. In that photograph, S.K. has a can of beer. In the remaining photos, he describes S.K. as turning her butt to him and smiling and looking over her shoulder. He says this is right before they went into the bedroom. When S.K. started dancing, she said, "Just so you know, I'm not looking for a relationship right now." Mr. Smith thought that was fine, but he is not sure if he said that.

[178] Mr. Smith says that while they were on the couch, he did not force S.K.'s hand on his penis. He says he had his finger in her vagina and he guided her hand to his penis. S.K. did not pull her hand away and she did not try and pull his hand away from her vagina when he

touched it. Mr. Smith does not think S.K. went to sleep and he did not grope her while she was asleep. He says that he and S.K. did not have intercourse at any time in the evening, and certainly not from the position that S.K. described. Mr. Smith describes how it would be physically impossible to achieve penetration the way S.K. described it. He referred to the same evidence that he referred to in describing his intercourse with K.S.

[179] S.K. left Mr. Smith's apartment about 8:00 or 8:30. Mr. Smith was intoxicated and felt really high. He says he felt fuzzy and empty and a little surreal. He says he knew he had to go away that morning and considered that it would be a long trip with no sleep. After S.K. left, Mr. Smith started putting his camping gear together and put out some food and water for his cat. He then went down to the street and met his friend Matty White, who picked him up in his camping truck. They stopped at the liquor store on their way to the party at Hope.

[180] In cross-examination, Mr. Smith was asked about a promise to appear at the court at 222 Main Street on August 20, 2015. Mr. Smith appeared to be confused by the questions. He did not attend court that day and is confused about whether his lawyer did. He agrees it would be a significant day because of the promise to appear and despite that, the events with S.K. took place on August 20 and 21. Mr. Smith learned later that he had not (at that time) been charged with the sexual assault of K.S. He says perhaps it was after the camping trip.

[181] Mr. Smith says he was attracted to S.K. but he did not feel lucky. He was stoked that she was interested in him, but he says that lots of girls were interested in him at the time. He was happy to see her and hang out with her.

[182] Mr. Smith says that he understood the significance of his having sex with Robin earlier in the day. He also understands it would be significant that he did not shower, as there may have been some ejaculate on his penis that would rub off. He says that although he had three hours to get ready to meet S.K., he did not have time to shower. He may have thrown some water and some pomade in his hair.

[183] Mr. Smith did not try to reach S.K. from his camping trip. He says he did not have internet or phone access.

[184] Mr. Smith adds up the amount of alcohol that he drank on August 20 and 21 as 36 ounces. Mr. Smith says it affected him: his judgment was off and he forgets some things. He does recall S.K. dancing and that she was not falling over. He did not notice if her speech was slurred. He could not say how many drinks she had, but that it was definitely more than three or four.

[185] Mr. Smith says he was shocked when he got back from his camping trip. He did not think about his experience with S.K. over the weekend; he was thinking about camping, not about the girl in the apartment dancing in her "booty shorts", who he tried to have sex with.

[186] Mr. Smith knew that S.K. was new in town. When she left, he agreed with the Crown that he did not offer to walk her home. He did not think that he should have, because they were partying all night. He did not think to call a cab for S.K., even after the alcohol or drugs. He

was not concerned with how much S.K. had to drink or the drugs she had taken when she left. Mr. Smith says he was not concerned with her well-being. He did not text her after that night. He did not think about S.K. on the way to Hope, as he was hoping to see more beautiful girls in the river camping.

[187] Mr. Smith says his mind had already gone onto the next thing. Mr. Smith says he tried to phone S.K. when he got back. He was coming down from an acid trip. He did ask her, he says, why she was accusing him of sexual assault.

Legal Framework

[188] I have referred to the elements of the offence of sexual assault. There are other relevant legal principles to which I wish to refer.

[189] In R. v. W.(D.), [1991] 1 S.C.R. 742 at 758, the Supreme Court of Canada set out the framework that a trial judge must apply in the case where the accused gives evidence. It is:

1. First, if you believe the evidence of the accused, obviously you must acquit.
2. Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
3. Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[190] In R. v. H.(C.W.) (1991), 68 C.C.C. (3d) 146, 3 B.C.A.C. 205 Wood J.A. recommended a fourth instruction. He said, at para. 24:

I would add one more instruction in such cases, which logically ought to be second in the order, namely:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[191] Over the years, the Supreme Court of Canada and Canadian appellate jurisprudence has dispelled certain myths and stereotypes in the law of sexual assault in Canada. I will refer to some of those.

[192] It is a myth that a complainant may be responsible for sexual assault or be deemed to have consented to sex by reason of her appearance: Ewanchuk, at para. 103.

[193] It is a myth that if the complainant failed to resist the accused's advances physically or by saying no, she must have been consenting; or, if the complainant is being passive, she must have been consenting: Ewanchuk, at para. 103.

[194] It is a myth that the complainant's behaviour may imply her consent: Ewanchuk, at paras. 1, 31, 87, and 103.

[195] It is a myth that genuine victims of sexual assault report the incident at the earliest opportunity or a complainant's credibility is affected by her delay in disclosure: R. v. R.W., [1992] 2 S.C.R. 122 at para. 30.

[196] It is a myth that women make up stories of rape out of spite and revenge: R. v. Seaboyer, [1991] 2 S.C.R. 577 at 653.

[197] There are other aspects to the consideration of the complainant's evidence in sexual assault cases; evidence of the demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events: R. v. J.A.A., 2011 SCC 17 at para. 40.

[198] A complainant's post-event conduct can be corroborative; for example, telling a friend, leaving her work earlier, going to the hospital, can support the credibility of the complainant: R. v. Greer, 2009 ONCA 505 at para. 5.

[199] A lack of motive to lie supports the complainant's credibility in appropriate circumstances: R. v. Hughes, 2017 ONCA 814 at paras. 7 to 9.

[200] The court may consider the demeanour of the witness in court as a relevant factor, but placing too much emphasis on demeanour is a reversible error: K.(I. F.) v. College of Physicians and Surgeons of British Columbia (1998), 55 B.C.L.R (3d) 349, 105 B.C.A.C. 106, at paras. 38 to 40.

[201] Where there is evidence that the complainant had been drinking and was intoxicated, but not to the level of incapacity, she may have had the ability to freely determine to engage in sexual relations with the accused. Imprudent decision-making, memory loss, loss of inhibitions, and self-control on account of self-induced intoxication, including drunkenness, does not automatically equate to an abuse of capacity to consent. A drunken consent is still valid consent: R. v. Cedeno, 2005 ONCJ 91 at para. 18.

Mr. Smith's Evidence

[202] Mr. Smith gave his evidence in chief in a direct manner, referring to many details of June 12, 2010, and August 19, 20, and 21, 2015. I accept that he was forthcoming about his use of alcohol and cocaine; in some cases, I find to the point of exaggeration. On August 20 and 21, 2015, the night with S.K., Mr. Smith says he consumed 36 ounces of alcohol and at least one and a half grams of cocaine. Even with that level of consumption, he says that he was able to remember every significant aspect of both evenings; one that occurred eight years ago and the other that occurred almost three years ago.

[203] His manner changed in cross-examination, where his evidence was inconsistent and evasive. He resorts to describing himself as being intimidated, and suggested that the prosecutor was being sneaky.

[204] I will give some examples. Mr. Smith refers to the guy on the couch in June 2010 as Tony Dallas or Patrick, but he is not sure. He is unclear about how to get in touch with Patrick, and he then says, "Sometimes I meet people I don't know to party."

[205] In regard to Mr. Dallas, Mr. Smith says he had not had any contact with him for three years. Then he says he was calling Tony Dallas as a witness. He then says Tony Dallas was on tour. Mr. Smith was inconsistent in what he told Nick after the K.S. Incident. At first, he says she was pissed off because he was ignoring her in the morning. In cross-examination, Mr. Smith says he told Nick that K.S. was pissed off at him because he did not finish and was ignoring her in the morning.

[206] He also changed his evidence about being shocked. First he says he was not shocked and then he says he was.

[207] I have discussed the evidence that Mr. Smith gave about his interview with the police in April 2015, and his demeanour during the interview. Mr. Smith admitted that he lied to the police, but claimed that he was badgered by them and he was intimidated, particularly when the officer threw a chair. There is no indication from the portions of the transcript or the recording that Mr. Smith was intimidated. He was chuckling and being sarcastic throughout. I find that the police officer did not throw a chair; rather, he moved a chair that Mr. Smith was using as a foot stool. Mr. Smith described himself as grouchy and talking back, and that he considered the allegations ridiculous. That, I find, is a more accurate description of his demeanour during the police interview, rather than one of intimidation.

[208] Mr. Smith referred to his on-and-off girlfriend during the interview. He said that he had an on-and-off girlfriend during 2010, when he was asked by police if he remembered bringing a girl home from the Biltmore. In cross-examination, he denies that he was trying to imply that that is why he would not have brought a girl home from the Biltmore and it was just his way of remaining silent. I find this to be incapable of belief.

[209] I do not accept Mr. Smith's evidence that saying "I don't know" was his way of remaining silent. He agrees that he knew the difference between them, but only after he claims the statement "I don't know" was just words.

[210] In respect of his meeting with S.K. at the Portside on August 20, 2015, Mr. Smith had first said he was not excited to meet up with her. When shown his texts that he exchanged with S.K., Mr. Smith agrees he was interested in hanging out with her and he was attracted to her.

[211] Mr. Smith did not attempt to contact S.K. over the weekend after the events of August 20 and 21, when he went camping. His explanation evolved from, "I was thinking about where I could get acid" to "I was going to see more beautiful girls dancing in the river."

[212] When asked why he texted S.K. after the first night, that is August 19, saying "Nice to meet you", but not after the second night of what Mr. Smith described as ongoing fun and sexual engagement, Mr. Smith says, "I didn't have access to Wi-Fi." He then says his phone did not work, and then he really did not think about it. His dissembling discloses that he was being untruthful about that.

Count 1: K.S.

[213] The defence suggested to K.S. that she drank more than she said she drank. She says four or five drinks, one at Mr. Smith's, and denies that she also ingested cocaine. I am satisfied by K.S.'s evidence that her estimate of drinking is accurate, and I accept her denial of ingesting cocaine after the party. No one observed K.S. ingesting cocaine.

[214] K.S. agreed that alcohol affected her judgment and her level of intoxication allowed her to make a compromised decision to go into Mr. Smith's bed with him. When pressed on whether she had blacked out or passed out, K.S. was clear that she had not. In her evidence, she was able to describe the events of the after-party without interruption.

[215] Regarding the cocaine, as I have said, no one gave evidence that they observed K.S. ingesting cocaine. Nick suggests that as they left the apartment, he heard K.S. say, "Thanks for the coke, Mark," when leaving. Nick understood that as referring to cocaine. K.S. disagrees that she made that remark. She says it never happened. Mr. Smith did not hear such a thing, although he heard K.S. say something. Kaylee does not support the statement.

[216] In the circumstances, I find that Nick is mistaken about that. In any event, that recollection does not support the inference that K.S. ingested cocaine at the after-party.

Kissing on the couch

[217] Mr. Smith says that he and K.S. were making out on the couch. K.S. says that this did not happen. While Kaylee thought something might be happening between Mr. Smith and K.S., she did not have a clear memory of Mr. Smith kissing K.S. on the couch. At best, she says, he might have had his arm casually around her. K.S. denies that that occurred as well.

[218] I deduce from the evidence that Mr. Smith may well have considered that there was a prospect of hooking up with K.S., but I cannot find that K.S. considered that to be a prospect while she was sitting on the couch watching the DVD.

The invitation to bed

[219] Both Mr. Smith and K.S. describe that he invited her to sleep in his bed. I have referred to what K.S. says she would have done had she not been drinking, or perhaps would not have done had she not been drinking. K.S. says that there was somebody sleeping on the couch and that Mr. Smith said that she could not sleep on the couch, but could stay in his bed. K.S. and Mr. Smith agree that there was someone sleeping on the couch.

[220] Even if there was another couch available, Mr. Smith offered that his bed was more comfortable. K.S. allowed that going into Mr. Smith's bedroom showed interest in him.

Kissing in bed

[221] K.S. admits that she was kissing Mr. Smith on his bed when she was there and it was consensual; she kissed him back. When he kissed her, she did not get up to leave or go to sleep on the empty couch. K.S. says in her evidence that she was not enthusiastically kissing him back.

[222] There is some inconsistency in her police report where the transcript describes K.S. as saying, "It was not enthusiastic. We were having fun." K.S. denies that that is what she said. This statement to police is internally inconsistent but, in any event, K.S. consented to the kissing, whether she was having fun or not.

Flipping K.S. onto her stomach

[223] Mr. Smith denies that he put K.S. on her stomach or held her down by her arms. K.S. is certain that that happened. The complainant says she said no. Mr. Smith says that she said nothing. Mr. Smith did go behind her and penetrate her vagina with his penis. This is consistent with what K.S. says. She says that Mr. Smith held her down by her forearms. Mr. Smith denies this. However, even if he was not holding her by her forearms for the entire time that she was on her stomach and he was penetrating her vagina with his penis, Mr. Smith weighed 180 pounds at the time and K.S. weighed 130. As Mr. Smith weighed 50 more pounds than K.S., if he was behind her and on her, she would not be able to move.

Intercourse

[224] Mr. Smith maintains that he could not have had intercourse with K.S. if she was not leaning back against him. He describes the impossibility of that position and why he could not have penetrated her with his small penis from behind, unless she had her buttocks raised and was on all fours.

[225] It could not occur, he says, with her shorts and her tights at her knees if she was lying directly on the bed. Mr. Smith suggests that the impossibility of the position is a matter of common sense. I disagree that it is a matter of common sense, nor can I take judicial notice of it. The purpose and effect of taking judicial notice is that the court may accept the truth of a particular fact without the requirement of proof by taking judicial notice of that fact. It does not need to be proven formally by one of the parties.

[226] In R. v. Spence, 2005 SCC 71, at paras. 49 to 61, the Supreme Court of Canada engaged in a thorough analysis of the history and development of the law pertaining to judicial notice. The court held, at para. 61, that the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with stricter criteria.

[227] Judicial notice has two branches: the notoriety branch and the demonstrability branch. The notoriety branch allows judges to take notice of facts that are so notorious as not to be the subject of dispute among reasonable people. The demonstrative branch applies to facts that may not be immediately within the judge's knowledge, are indisputable, and can be ascertained from sources to which it is proper for the judge to refer.

[228] The impossibility of the position theory espoused by Mr. Smith meets neither branch.

[229] I consider that this type of evidence requires an expert on women's physiology to explain. Mr. Smith says that he is not a gynecologist but asserts that he has a lot of experience. I cannot rely on his opinion as an expert opinion on the ability of a man with his penis size to penetrate a woman's vagina from behind when she is lying flat on her stomach on the bed.

[230] I therefore reject this evidence entirely. I do not accept, as it stands, the impossibility of the position as described by Mr. Smith as a defence.

Length of intercourse

[231] Both K.S. and Mr. Smith describe the period of intercourse to be less than five minutes. Mr. Smith says that after that, he could not continue and he turned over and said nothing. There is no disagreement between K.S. and Mr. Smith about this.

Use of a hand

[232] K.S. says she does not know how Mr. Smith achieved penetration, but that it was not accidental. As she says, he shoved his penis in. She agrees penetration from behind requires a hand to guide the man's penis in and that Mr. Smith did not let go of her arms until he stopped and rolled over. She does not say she used her hand.

[233] That Mr. Smith let go of one hand for the moment that he used his hand to guide his penis into her vagina does not mean that she was consenting to intercourse.

The complainant said no

[234] K.S. says that she said no three times while she was on her stomach. Mr. Smith says she said nothing. He is clear that she did not say yes. The basis of Mr. Smith's understanding that K.S. consented was that she leaned back into him and positioned her body in such a way to achieve intercourse. He also relies on his impossibility of the position theory which I have rejected.

No conversation

[235] Both K.S. and Mr. Smith say there was no conversation between K.S. and Mr. Smith before or during intercourse. Mr. Smith changed his evidence about what was said after intercourse. He says that he said to K.S., "I can't." He says that K.S. asked what was wrong. Mr. Smith says that K.S. did not utter a word to him.

[236] I must find that, either way, the fact that neither of them said anything supports K.S.'s evidence that she did not consent to have sexual intercourse with Mr. Smith.

K.S. fumed and then left

[237] Both Mr. Smith and K.S. agree that this occurred.

Nick and Kaylee in the elevator

[238] Both Nick and Kaylee described K.S. as angry, mad, upset, and sad.

Post-event demeanour

[239] In addition to what Nick and Kaylee described in the elevator, Kaylee describes K.S.'s body language and demeanour as that she was in shock. Kaylee agrees that she described K.S. as sleepy and not totally aware, but hungover. She says K.S. was fully functioning. Mr. Smith is not in a position to disagree with that assessment. He observed K.S. scrunch up her face, but beyond that he did not see her once he left the bedroom.

[240] I find that K.S.'s demeanour post-event supports her version of what occurred between her and Mr. Smith in bed, and that she did not consent to it.

Not reporting

[241] K.S. did not wish to report the incident to police and did not in 2010. She did so after she saw Mr. Smith's name on a board at the rape crisis centre where she worked in 2015. She says that her perception in 2015 was the same as 2010. She did not have to think about whether rape had occurred, nor was she unsure about whether it was rape. She did not determine it was rape after working at the rape crisis centre.

[242] The defence suggests that it was K.S.'s working at the rape crisis centre that caused her to consider that she had been raped by Mr. Smith in 2010. Mr. Smith asserts that K.S. was prompted to report him by seeing his name, by her study of feminist analyses in literature, and by working with rape victims. This, the defence argues, caused her to re-evaluate what happened between her and Mr. Smith in 2010.

[243] I reject that position. Her not reporting in 2010 is not to be considered as an adverse inference. She is clear on what happened when she spoke to her friend right after the event. There is no real dispute about what happened with Mr. Smith. The dispute is whether she consented to it or willingly participated in it.

[244] I have already found that K.S. did neither.

Inconsistencies

[245] The defence points out that there are inconsistencies in K.S.'s evidence about what clothing she wore. K.S. never changed the description of what she wore, although she qualified it in her police statement by saying, "I think". I do not consider this to be a significant inconsistency. Using the expression "I think" does not necessarily demonstrate that one cannot remember. Furthermore, whether she was wearing a tank top or cardigan was not as significant as her consistently recalling that she was wearing black tights, jean shorts, and white Ked shoes. It was what she was wearing on the bottom that was important, as she describes these items being removed by Mr. Smith when she was in bed with him.

Recent fabrication

[246] Generally, prior consistent statements of a witness are not admissible, but they can be used to rebut an allegation of recent fabrication: R. v. Ellard, 2009 SCC 27 at paras. 31-33 and 42.

[247] I find that K.S.'s direct examination and cross-examination was clear. In fact, there is no dispute about what occurred between her and Mr. Smith. The difference is his theory about the impossibility of the position and whether she demonstrated consent. She says she said no three or four times. Mr. Smith did not hear her say anything. He certainly did not hear her say yes.

[248] Mr. Smith's defence is that she must have consented because she was leaning back into him as he penetrated her vagina with his penis and that he could not have done so otherwise, due to the impossibility of the position theory that I have already rejected.

Revenge theory

[249] While it is a rape myth that a woman claims that she is raped as a matter of revenge, I must consider Mr. Smith's suggestion in this regard. He says that because K.S. had issues of self-confidence at the time in June of 2010, and because she was mad that he was unable to finish, she acted out of revenge, reporting that he had raped her. This theory of revenge does not make any sense.

[250] Why would K.S. be mad that Mr. Smith was unable to complete sexual intercourse, even if she did lack self-confidence at the time? Mr. Smith's assertion in this regard is illogical and I reject it.

[251] I do not believe Mr. Smith's evidence that he and K.S. engaged in consensual sexual intercourse in June 2010 when she was in his bed. I am not left in doubt by the evidence of the accused. I am convinced, beyond a reasonable doubt, of Mr. Smith's guilt on Count 1. The Crown has established all the elements of the offence, including the actus reus. There was touching of a sexual nature. K.S. did not consent to it, based on her evidence of what occurred and by her internal state of mind towards the touching at the time it occurred. I

find that Mr. Smith had the intention to touch K.S. and that he knew or was reckless or wilfully blind to K.S.'s lack of consent.

Conclusion

[252] I therefore convict Mr. Smith of Count Number 1.

Count 2: S.K.

[253] In regard to the ingestion of alcohol and cocaine on August 20 and 21, 2015, it is clear that both Mr. Smith and S.K. were drinking in quantity. Whether they were keeping up with one another is uncertain. It is clear that they drank significant amounts of alcohol.

[254] With regard to how much she had to drink, I find that S.K. was not forthright in her evidence. The amount that she had to drink changed from her police statement, to her statement in the preliminary hearing, to the statement she made at trial. While S.K. insisted that she did not forget any of the things that occurred during that night, she did forget standing in the planter and having a beer while dancing.

[255] In her police statement, she says she drank three or four gin drinks and perhaps a beer at the Portside, but she was certain as to how much she had to drink. She agrees with the suggestion that as a person drinks more alcohol, it is harder to ascertain how strong the drinks are. Despite that, S.K. insists that while she was not necessarily pouring the drinks, she was sure that there was not more than one ounce of liquor in each.

[256] I find this to be unlikely. The drinks were likely stronger than one ounce. They were free poured, mostly by Mr. Smith.

[257] S.K. agrees in her evidence that she had been drinking at the Portside and Mr. Smith's until the early morning hours of August 21, 2015. S.K. does not say that she had a drink or two with her friend Kate at Granville Island in the afternoon of August 20, 2015, which Kate gave evidence that she did. S.K. continues to insist that there were only three or four drinks over the entire time.

[258] In her recorded statement to the police, S.K. said that she was also drinking while Donovan was present. She then said she had a few more drinks between Donovan leaving and going to bed on the couch. At trial, she says she did not necessarily mean that those drinks were alcoholic. She was drinking water as well. I do not accept that evidence.

[259] It would be clear to S.K. that the police were interested in knowing how much alcohol she had to drink and that she knew that. Her suggestion that she was referring to drinking water in the police statement is not believable.

[260] I conclude that S.K. was drinking more than she admits.

[261] In respect of cocaine, S.K.'s evidence was also inconsistent. She did not mention cocaine to the police. She only mentioned the presence of cocaine to the prosecutor a week before the trial. S.K. was uncertain whether there was cocaine on the first night or the second night or both. She then insisted that cocaine was only available on the first night, and then that she may have ingested it. In cross-examination, S.K. could not remember if Mr. Smith was using cocaine on the first or second night. Clearly, S.K. was not willing to admit that she used cocaine on either night. Once she did, her evidence about her use was not straightforward. The reliability of her evidence regarding the use of cocaine at all and whether it occurred on the second night is unreliable.

[262] There are other evidentiary issues where S.K. was inconsistent. She told the police she only removed her skirt when she went into the couch bed. That was not the case. She apparently had taken her skirt off while dancing, as shown in the photographs that Mr. Smith took on the evening in question. S.K.'s evidence in this regard, therefore, is unreliable.

[263] The photograph that was taken of Mr. Smith and S.K. on S.K.'s phone at 1:51 a.m. shows Mr. Smith and S.K. closely together. S.K. says that Mr. Smith's hand was hovering above her chest. Mr. Smith says that he was touching one of her breasts. The photograph shows that both she and Mr. Smith looked very happy. S.K. does not suggest that she did not consent to this.

[264] S.K. agrees that she got into the couch bed with Mr. Smith while he was in his underwear and a T-shirt and she was in her Lululemon shorts and a tank top. She says that Mr. Smith pulled her top down and tried to touch her breasts without her consent. She says that Mr. Smith put his fingers in her vagina without her consent while she was physically trying to remove his hand and he was caressing her buttocks.

[265] She also says she wanted to leave but she was new in the area and did not know any cab numbers.

[266] S.K.'s evidence regarding not knowing any cab numbers is not credible. She had a cellphone and she could have looked up a cab number on that phone. Eventually S.K. did leave and found her way home without difficulty.

[267] In cross-examination, S.K. was referred to a recorded statement where she said that she joined Mr. Smith in bed because he promised that they would just cuddle. S.K. says that was a true statement. Later in her cross-examination, S.K. says that she was not cuddling with Mr. Smith, and the only reason that she said that to police was that she was bawling her eyes out while she was giving that statement and hyperventilating, and it was hard to talk.

[268] The recorded statement was played and shows that S.K. was speaking clearly and coherently and was not crying, hyperventilating, or having difficulty speaking.

[269] S.K.'s evidence on this point is unreliable.

[270] S.K. says that Mr. Smith penetrated her vagina from behind while he held her hands on the bed. I have already discussed Mr. Smith's impossibility of position theory, and I do not accept that evidence of Mr. Smith.

[271] Dr. Logan says that there was a faint blue smudge that appeared when dye was applied to S.K.'s vaginal area. She says it was consistent with non-consensual sex, where a man penetrated a woman from behind. Dr. Logan agrees it also could be caused by a finger.

[272] Dr. Logan also suggests that if Mr. Smith had sexual intercourse to ejaculation with another person before penetrating S.K. with his penis, that some of the biological material from either him or his earlier sex partner could appear on the swab taken from S.K.'s vagina. There was none.

[273] I have no reason to disbelieve Mr. Smith's evidence that he had had unprotected sexual intercourse to ejaculation with Robin between 2:00 and 4:00 p.m. on August 20, 2015. While I find that Mr. Smith's explanation that he did not have time to shower and did not shower before he went to meet S.K. at the Portside unlikely, it is possible; it is not beyond a reasonable doubt.

[274] That being the case, if Mr. Smith had sex with Robin as he described and sex with S.K. later, as she described, Dr. Logan says she would expect to see some biological material from one of them present on the swabs taken from S.K.

[275] As I said, there was no DNA from anyone other than S.K. on the swabs. This leaves me with reasonable doubt about the reliability of S.K.'s evidence about the sexual intercourse that she says took place in the bed.

[276] I have described the evidence of Dr. Logan and I note that the bruises that she observed on S.K.'s legs were corroborative of sexual assault. I accept Dr. Logan's evidence that if S.K. said they had nothing to do with the assault, Dr. Logan would generally have made a note of that. Dr. Logan says she noted them because she assumed that they were not bruises that S.K. was aware of in advance. S.K. says she did not remember whether she told the doctor about the bruising.

[277] I find that this causes me to have some concern about the reliability of S.K.'s evidence and her forthrightness with Dr. Logan.

[278] S.K. says that she was screaming "no" during the sex in the bedroom. That is consistent with her recorded statement to police at page 15 that she was screaming. However, at page 19 of the recorded statement, she said she was not screaming. These statements are directly contradictory and I must find that S.K.'s evidence regarding the screaming is unreliable.

[279] S.K. says that she and Kate discussed what occurred the night before between her and Mr. Smith. I note that Kate and S.K. were, in Kate's words, absolutely best friends, and they have discussed the incident concerning Mr. Smith on several occasions, including within the month leading up to trial.

[280] Kate's evidence that S.K. was not intoxicated during her phone call is contradictory. She says that at first, S.K. was extremely distressed, sobbing, and hyperventilating, and struggling to get her words out. Kate then describes S.K. as sober because of the calm sincerity in her voice that she could pick up from a person when they have no substances in their system. These are inconsistent, in my view.

[281] Further, S.K. did not say that she had no substances in her system. She says that she was intoxicated on a level of 5 out of 10. The evidence of S.K. and Kate conflict and Kate's evidence is therefore unreliable.

[282] Kate also agrees that it had been two and a half years since the conversation with S.K. occurred on August 21, 2015, but she adds that no one had asked her to comment on whether she thought S.K. was drunk at that time, until she met the prosecutor before trial. Kate agrees that she had not thought about whether S.K. was sober or not, but Kate insists in her evidence that S.K. was not intoxicated. This casts further doubt on the reliability of Kate's evidence.

[283] I reject the evidence of Matt Butcher. He was an untruthful witness and only admitted to lying when confronted by text messages between him and Mr. Smith discussing cocaine.

[284] S.K. says that she heard rumours from Matt about Mr. Smith before she gave her first police statement. Matt agreed that he relayed rumours and information that he got directly from Mr. Smith about Mr. Smith sexually assaulting another woman or other women, including K.S. While Matt was not asked about the details of his knowledge of what occurred between Mr. Smith and K.S., I accept there may have been a transfer of evidence or unconscious collusion. It means I must exercise extreme caution regarding the statement that S.K. gave to the police.

[285] Kate also agrees that she provided information to S.K. about Mr. Smith's past and that she and other friends of S.K. were active proponents of S.K. reporting the matter to police.

[286] There is a possibility that what S.K. does recall could be tainted. When she reported the incident to the police, she had information about Mr. Smith from Matt that could have affected her memory and how she felt and what she told the police.

[287] I have already referred to Mr. Smith's evidence and its lack of reliability. I do not believe his evidence.

[288] I have referred to the areas where I find S.K.'s evidence to be unreliable. I am not saying that because she was drinking or using cocaine, or because she took her skirt off, or because she stayed at Mr. Smith's apartment after he made sexual overtures to her, or

whether she contradicted herself in her statement to police, or in any specific area where I have found her evidence to be unreliable, means that she must have consented to sexual activity with Mr. Smith. But I do find that S.K.'s consumption of intoxicants on the evening and the morning of August 20 and 21, 2015, could have resulted in greater disinhibitions and affected her conduct over that period.

[289] The Crown must prove Mr. Smith is guilty of every element of the offence of sexual assault beyond a reasonable doubt. If there are significant and numerous areas where the evidence of the complainant is unreliable, it raises a reasonable doubt about the complainant's evidence as a whole.

[290] If I cannot rely on it, I cannot use it as a basis to convict Mr. Smith of a criminal act.

[291] Based on the evidence as a whole, and because I have found S.K. and another witness for the Crown to have given evidence that is not credible and reliable in many respects, I cannot be satisfied beyond a reasonable doubt the Crown has proven all the elements of the offence of sexual assault in Count 2.

[292] Mr. Smith and S.K. have very different accounts of what occurred between them on August 20 and 21, 2015. I have carefully considered all the evidence on Count 2, and I am unable to decide whom to believe.

Conclusion

[293] Based on all the evidence that I accept, I am not convinced beyond a reasonable doubt that Mr. Smith is guilty of Count 2.

Summary

[294] In summary then, I find that Mr. Smith is guilty of Count 1 and not guilty of Count 2.

"Gropper J."

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