

CANADA / JUDGMENT

R. v. Smith

2025 BCSC 1958

COURT

Supreme Court of British Columbia

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2025 BCSC 1958 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2025 BCSC 1958

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Gene Kenneth Kacy Smith

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Before: The Honourable Madam Justice Sukstorf

Oral Reasons for Judgment - Voir Dire Re: Admissibility of the Statement of Mr. Smith

Counsel for the Crown:

P.A. Weir

Counsel for the Accused:

J.D.A. Watt

Place and Dates of Voir Dire:

Victoria, B.C.

August 6, 8, 11, 12, 2025

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Victoria, B.C.

August 13, 2025

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- [1] THE COURT: These are my reasons on the admissibility of Mr. Smith's recorded statement. If a transcript is ordered or this decision is published, I reserve the right to edit these reasons to insert the relevant citations and make minor editorial changes. Neither the result nor the reasoning will change.

I. Introduction

- [2] On August 6, 2024, the accused, Gene Kenneth Kacy Smith, was arrested and charged with sexually assaulting the complainant, C.T., on or about August 4, 2024, in Central Saanich, British Columbia.
- [3] This voir dire concerns the voluntariness of a recorded interview conducted by Constable Bonneau following Mr. Smith's arrest by Constable Udahl and transport by Constable Glasgow. The interview was approximately 90 minutes in length.

II. Issue

- [4] The issue on this voir dire is whether the Crown has proven beyond a reasonable doubt that Mr. Smith's statement to Constable Bonneau was voluntary under the common law confessions rule.

III. Legal Framework

- [5] The admissibility of a statement made by an accused to a person in authority is governed by the common law confessions rule, which renders such statements presumptively inadmissible unless the Crown proves beyond a reasonable doubt that they were made voluntarily: *R. v. Oickle*, 2000 SCC 38 at paras. 30, 68; *R. v. Tessier*, 2022 SCC 35 at paras. 68 and 89; *R. v. Beaver*, 2022 SCC 54 at para. 45; *R. v. Correia*, 2024 BCCA 361 at para. 31.
- [6] This analysis is contextual and fact-specific. The court must consider whether the accused made a free and meaningful choice to speak or whether that choice was undermined by state conduct. This inquiry balances individual rights against society's interest in effective law enforcement while ensuring that statements are both reliable and obtained in a manner that maintains the integrity of the justice system: *Tessier* at paras. 12, 74, 68, 88; *Beaver* at paras. 46-48.
- [7] In assessing voluntariness, the court must examine whether the statement was affected by:

- a) Inducements (promises or threats);
- b) Oppressive conditions;
- c) Lack of an operating mind; or
- d) Police trickery that would shock the community.

(See Oickle at para. 69; Tessier at para. 68; Correia at para. 32.)

- [8] These factors are not a checklist. At the heart of the confessions rule is the delicate balance between individual rights and collective interests in the criminal justice system. The court must consider the entire context of the case, including the accused's characteristics (e.g., age, education, mental health, intoxication), the conditions of detention, and the nature of the police conduct: Tessier at paras. 68-69, Beaver at paras. 46, 48.
- [9] The presence or absence of a police caution is a significant but non-determinative factor. The absence of a caution may raise a prima facie concern. Still, if the Crown can show that the accused had sufficient awareness of their rights and the consequences of speaking, voluntariness may be established: Tessier at paras. 11-12, 74, 89.
- [10] The concept of an operating mind requires that the accused possess a limited degree of cognitive capacity to understand what they are saying, to whom, and that it may be used in evidence: R. v. Whittle, [1994] 2 S.C.R. 914 at 939-941, 1994 CanLII 55.
- [11] A diminished ability to think clearly will not, on its own, render a statement involuntary: Correia at para 43. The test is not whether the accused made a sound or wise choice, but whether they could choose: Whittle at 939.
- [12] An accused's right to silence and the common law confessions rule allow for some degree of police persistence and persuasion when seeking a statement: R. v. Hebert, [1990] 2 S.C.R. 151 at 176-177, 184, 1990 CanLII 118. While an accused may choose to remain silent, they do not have the right to prevent police from speaking to them: R. v. Singh, 2007 SCC 48 at para 28.
- [13] As the British Columbia Court of Appeal ("BCCA") explained in Correia, police trickery is a distinct branch of the confessions rule to be assessed separately from inducements, oppression, and the operating mind: at para. 40, citing Oickle at para. 65. Police trickery can render a statement inadmissible where the conduct would shock the community or undermine trial fairness, even if the statement is otherwise voluntary: Correia at paras. 40, 48, citing Rothman v. The Queen, [1981] 1 S.C.R. 640 at 697. In assessing trickery, consistent with Justice Lamer concurring reasons in Rothman, the court must consider all of the circumstances: how the statement was obtained, the degree to which social values were breached, the seriousness of the charge, and the effect exclusion would have on the result. Some deception is permissible--the investigation of crime is not a game of formalities--but conduct that would shock the community must be vigorously repressed. Examples of shocking conduct include impersonating a lock-up chaplain to elicit a confession, pretending to be duty counsel to obtain admissions, or injecting a drug under false

pretences. By contrast, ordinary undercover ruses, such as posing as a person who uses drugs or (as in Rothman) a truck driver, will not generally shock the community: Rothman at 697.

- [14] The BCCA has also clarified that neither trickery nor diminished clarity of mind, standing alone, will justify exclusion: Correia at paras. 43, 49. A trial judge must identify a core concern under the confessions rule that has been violated, whether it be the reliability of the statement, respect for the accused's free will, or protection against self-incrimination: Correia at paras. 44-45.
- [15] Similarly, persistent questioning or police commentary that appears to undermine legal advice must be scrutinized. While not automatically fatal, such conduct may erode voluntariness if it causes the accused to lose the ability to exercise their right to silence meaningfully: Singh at paras. 31, 39, 53.
- [16] In summary, the Crown must satisfy the court beyond a reasonable doubt that the accused's statement was not the product of threats, promises, oppressive conditions, deception that shocks the conscience, or a lack of cognitive capacity. If that burden is met, the statement is admissible.

IV. Summary of Evidence

A. Constable Udahl - Arresting Officer

- [17] On August 6, 2024, at about 17:22 hrs, Constable Udahl arrested Mr. Smith at his residence for sexual assault. He advised Mr. Smith of his s. 10(b) rights and provided him with the standard caution, first from memory and again from his Charter card. Mr. Smith indicated he wished to contact counsel and provided a name and phone number. The call was facilitated on an RCMP phone on speaker. Constable Udahl then stepped away, out of earshot. After the call, Mr. Smith confirmed he had completed the conversation and understood the advice. There is no evidence of threats, promises, trickery, or coercion at this point in Mr. Smith's detention. Constable Udahl could not recall whether Mr. Smith was wearing shoes at the time of the arrest or whether shoes were later provided.

B. Constable Glasgow - Transporting Officer

- [18] Constable Glasgow activated the in-car audio-video system ("WatchGuard") and transported Mr. Smith to the detachment. Mr. Smith was quiet and compliant: the only comment noted was about the driving route. There was no eliciting of statements and no questioning during transport. I am unsure whether the WatchGuard system was turned on before Mr. Smith entered the vehicle or just before transport, but there is no evidence that any solicitor-client communication was intercepted or discussed during transport.

C. Constable Bonneau - Interviewing Officer

- [19] The recorded interview began at approximately 03:10 hrs and lasted about 90 minutes. Mr. Smith had already consulted counsel and did not request a reconsultation.
- [20] Below is a summary of the factual concerns raised by defence counsel on behalf of Mr. Smith that arise from the statement he provided to Constable Bonneau:
- a) Continuity from Booking to Interview: Mr. Smith was arrested at 17:22 hrs and arrived at the detachment at approximately 18:00 hrs. The recorded interview did not begin until 03:10 hrs. No booking officers, guards, or logbooks were called or tendered, and there is no evidence regarding Mr. Smith's interactions, checks, or cell conditions during this period. The defence highlights this gap as part of the context of oppression.
 - b) Sleep, Fatigue, and Interview Progression: Before the interview began, Mr. Smith had been asleep in his cell, a fact noted by Constable Bonneau. Early in the interview, Mr. Smith stated that he was "pretty tired" and asked to lie down. Constable Bonneau responded by asking for "two more seconds," after which the interview continued for approximately another hour. The defence frames this as persistence despite obvious fatigue.
 - c) Cautions and Pre-Admission "No Deals" Language: Mr. Smith consulted counsel in the police vehicle before arriving at the detachment. At the outset of the interview, Constable Bonneau confirmed that Mr. Smith did not have to speak, stated there were "no deals or advantages" available to him, and emphasized that the Crown, not the police, decides whether to lay charges. The Crown relies on these cautions. The defence argues that later messaging undercut them.
 - d) Denials and First Mention of the Complainant: The interview transcript shows that the first mention of the complainant occurred around p. 10. This was followed by questions such as "Did you have sex with anyone?" (p. 14). Mr. Smith denied drinking and having sexual contact with the complainant at various points between pp. 18-23 and 31-39. The admission came later, after this sequence of denials.
 - e) Break in the Interview and Escalation on Return: At one stage, Constable Bonneau left the room. The defence points to an off-camera exchange in which Constable Bonneau consulted with a monitoring colleague about "whether we're just going to leave it." On his return, Constable Bonneau escalated his tone, saying, "you gotta give me something something believable/there's nothing believable here" before moving to the theme of corroboration by Mr. Smith's wife and sister and the credibility passage at p. 44. The defence relies on this sequencing in its causation theory.

- f) **References to the Crown:** Throughout the interview, Constable Bonneau referred to explaining or presenting Mr. Smith's account to the Crown on several occasions--the defence estimates four distinct references between pp. 37-42--and reiterated that the Crown decides whether to lay charges. The defence says these references framed cooperation as potentially helpful with respect to the Crown's charging decision. The Crown says they accurately described the process.
- g) **DNA Remarks:** Constable Bonneau did not know whether a Sexual Assault Nurse Examiner ("SANE") exam had been completed, although the defence says he assumed it had been from policy. Nonetheless, he told Mr. Smith variations of: "they're gonna know," "we'll know in a day or two," "up to seven days," and "if DNA pops up," sometimes framing DNA as a future possibility, other times implying inevitability. The defence says this conveyed a false sense of certain detection. The Crown says these were hypothetical.
- h) **Credibility-Consequence Language and Timing:** At p. 44, Constable Bonneau warned Mr. Smith that if DNA evidence later contradicted a denial, Mr. Smith's "credibility [would be] out the window," that the "Crown will think you're a liar," and "we lose those witnesses that would give [the] Crown the doubt." He linked this to the potential corroboration from Mr. Smith's wife and sister if he admitted sexual contact. Within that same exchange, Mr. Smith made his first admission--stating, "we did have sex"--while explaining that his main concern was being in breach of his no-alcohol condition. The defence characterizes this as the "final push," crystallizing prior inducements and threats.
- i) **Minimization and Normalization:** Constable Bonneau also used language that downplayed the moral seriousness of the alleged conduct, referring to it as a "quick shag" and as "understandable," saying it was "not biologically wrong," and framing it as occurring between "two consenting adults." At one point, he added "that's not a crime," a phrase the defence says pointed Mr. Smith toward a non-criminal narrative.
- j) **Asserted Belief in the Complainant:** Constable Bonneau stated he "knows when someone is telling the truth" and that the complainant had given "explicit" or "compelling details." The defence says this conveyed a prior belief in the complainant's account, further pressuring Mr. Smith.
- k) **Corroboration via Family:** Constable Bonneau proposed interviewing Mr. Smith's wife and sister as "good witnesses" and "evidence" that would "corroborate your story" as "believable." The defence treats this as a benefit tied directly to speaking.
- l) **Mr. Smith's Internal Motivation:** When making his first admission, Mr. Smith said his primary concern was being in breach of his no-alcohol condition for drinking, which the Crown says indicates an internal, self-generated reason for speaking rather than the overbearance of police conduct.

- m) Demeanour and Conditions on Video: On video, the interview was conducted in a conversational tone; food and drink were offered; there were no restraints or raised voices; and Mr. Smith appeared engaged and coherent. The Crown says these conditions support voluntariness. The defence contests their significance given the inducement, fatigue, and credibility-pressure factors listed above.

V. Positions of the Parties

- [21] Both parties accept the legal governing framework outlined above by Oickle, Tessier, Beaver, and Correia and that voluntariness is assessed contextually. They diverge on how the totality of the circumstances applies to the interview in this case.

A. Defence

- [22] The defence's overall position is that the Crown has not discharged its burden to prove the voluntariness of Mr. Smith's statement to Constable Bonneau. He argues that the cumulative effect of waking Mr. Smith for a 03:10 hrs interview, unexplained off-camera handling from approximately 18:00 hrs to 03:10 hrs, and the interview tactics employed (including credibility/loss-of-witnesses messaging, minimization, and repeated DNA assertions) overbore his will.
- [23] On the issue of inducements/undermining Mr. Smith's will, the defence refers to Mr. Smith's consultation with legal counsel being characterized as "good advice, but it makes it tough for us" by Constable Bonneau. The defence argues that this comment implicitly denigrated legal advice and framed speaking to police as Mr. Smith's "best opportunity." Repeated references to presenting "both sides" to the Crown, warnings that his credibility would be "out the window" if DNA evidence appeared, and suggestions that Mr. Smith's wife and sister could "give [the] Crown doubt" if he admitted sex (but would be "lost" if he maintained a denial) created an implicit quid pro quo involving a benefit for talking and prejudice for not talking.
- [24] On the issue of trickery and oppression, the defence contends that Constable Bonneau implied that a SANE exam had been completed and asserted a "seven-day" DNA persistence window without foundation, repeatedly stating "they're gonna know," thereby cultivating an impression of inevitable detection to erode Mr. Smith's resolve. Coupled with the late hour, his expressed wish to lie down, and comments that the complainant's account had "compelling details" (suggesting that Constable Bonneau believed her), the defence says the tactics mirror the eventual admission and demonstrate pressure rather than free choice. The defence seeks the exclusion of Mr. Smith's statement.

B. Crown

- [25] The Crown's overall position is that the statement was the product of a free and informed choice. The operating mind is not truly in issue as the video shows Mr. Smith lucid, coherent, and aware that he does not need to speak, having recently consulted counsel. The interview conditions were measured (recorded, moderate in length, food and drink offered, no raised voices or restraints) and the early-morning timing does not compromise these conditions.
- [26] On the issue of inducements, the Crown says there was no quid pro quo. Statements inviting Mr. Smith's "side" or noting it could be "better" to explain oneself are permissible encouragements. References to interviewing Mr. Smith's wife and sister, and to "adding it to the package," accurately describe investigative steps. Repeated reminders that the Crown--not the police--decides whether to lay charges negate any suggestion of bargaining. The "two consenting adults" phrasing correctly distinguished consensual sex from sexual assault and did not promise leniency.
- [27] On the issues of trickery and credibility, the Crown argues that Constable Bonneau did not claim to possess forensic results. Instead, DNA comments were expressly conditional ("if DNA shows up") and forecast potential evidentiary conflict, not legal prejudice for silence. Further, credibility remarks were explanatory rather than coercive. Constable Bonneau affirmed counsel's advice, made no "deal," and there was no request to re-consult or Sinclair-type trigger. Gaps in booking/guard evidence are immaterial because the recorded interview itself demonstrates voluntariness and the Crown is not required to call every person with incidental contact to Mr. Smith.
- [28] I turn now to the application of these principles to the facts before the Court.

VI. Analysis

- [29] Although the circumstances of Mr. Smith's arrest and transport to the police detachment form part of the broader context, the only statement at issue in this voir dire is his video and audio-recorded interview with Constable Bonneau, during which he made an inculpatory admission. The detailed factual concerns advanced by the defence, and the Crown's responses to those concerns, provide important context for assessing the environment in which that statement was made.
- [30] My task is to determine, on the totality of the evidence, whether the Crown has proved beyond a reasonable doubt that Mr. Smith's statement was the product of a free and informed choice rather than the result of overbearing state conduct. This requires applying the confessions rule to the specific facts of this case in a contextual manner, having weighed both parties' submissions in light of the governing authorities.

A. Operating Mind

- [31] The operating-mind threshold is modest: the accused must understand what is being said, to whom, and that what he says could be used in evidence. The transcript and video, together with Mr. Smith's prior legal consultation, satisfy me that he possessed the requisite cognitive capacity. Nothing in the record suggests impairment undermining meaningful choice.
- [32] Mr. Smith was alert, oriented, and engaged in coherent communication with the police. He had already exercised his right to counsel, understood the legal advice provided, and gave no indication of confusion or cognitive impairment. His responses to questions were logical and responsive. He did not appear impaired by intoxication, sleep deprivation, emotional distress, or mental health concerns that could affect his decision-making.
- [33] As confirmed in Whittle, the test for an operating mind does not require wisdom or sound judgment, but rather the cognitive capacity to understand what is being said, to whom, and the implications of that conversation. Mr. Smith clearly met that threshold.

B. Oppression

- [34] There is no evidence of oppressive circumstances in this case. Mr. Smith was arrested without incident at 17:22 hrs and exercised his right to counsel while in the police car before being taken to the detachment at approximately 18:00 hrs. He was treated respectfully throughout, promptly advised of his rights under s. 10(b) of the Charter, and allowed to speak privately with counsel.
- [35] The interview began at approximately 03:10 hrs, after Mr. Smith had been roused from sleep. Although he was not wearing shoes during the interview, the evidence does not establish whether he had been arrested without them or made to stand outside in the cold and rain without footwear. When asked whether he was wearing shoes when he was arrested, Constable Udahl could not remember.
- [36] The defence argues that waking Mr. Smith so early in the morning for questioning contributed to oppressive conditions. While timing and the fact that he had been asleep are relevant considerations, they do not, on this record, cross the line into oppression. Constable Bonneau testified that it is not unusual in policing to conduct interviews at that hour and that his shift ended at 07:00 hrs, so he sought to interview and release Mr. Smith before that time.
- [37] The video recording shows a measured, conversational tone. Mr. Smith was seated comfortably, offered juice and a breakfast sandwich, and was not subjected to raised voices, threats, or mistreatment. The exchange was of moderate duration and free from intimidation. It is also notable that Mr. Smith appeared sufficiently at ease to discuss personal matters unrelated to the investigation, including the tragic loss of his brother (whom he had lived with for many years into their 30s), the cancer treatment his brother's wife was undergoing, and the loss of his mother, all within a short period. He also spoke

about his upbringing and attendance at various schools. These personal disclosures suggest a level of comfort inconsistent with the presence of oppressive conditions.

[38] Based on the totality of the evidence, Mr. Smith was not subjected to prolonged detention, sleep deprivation, isolation, a denial of basic needs, or other psychologically coercive measures that would support a finding of oppression (see, for example, Oickle at paras. 60-61; Beaver at para. 49). These circumstances fall well short of the oppression threshold identified in Oickle (at paras. 60-61) and Tessier (at para. 99) and align with the tenets of voluntariness summarized in Correia (at paras. 32-34). I have taken into account the absence of booking or guard evidence covering the period from Mr. Smith's arrival at the detachment (around 18:00 hrs) until the start of the interview (03:10 hrs). In these circumstances, I am not left with a reasonable doubt that oppressive conditions existed during that interval. Moreover, the Crown was not required to call every incidental witness given the adequacy of the video record.

[39] For clarity, I do not draw any adverse inference from the absence of continuity evidence. My findings rest on the recorded interview and the totality of circumstances.

1. Nature of Questioning

[40] The defence argues that the interview was influenced by Constable Bonneau's prior belief in the complainant, citing his admission on cross-examination that her account had "compelling details" and the suggestion that he told Mr. Smith he believed her. Constable Bonneau maintained he was referring to the level of detail and that his purpose was to "get to the truth," noting he had only one side of the story before speaking with Mr. Smith.

[41] The confessions rule does not require interviewer neutrality. Instead, voluntariness depends on whether government conduct overbore the accused's will, assessed in the context of the case. Police can challenge a suspect's account and even be confrontational without crossing into oppression or unfair trickery: Tessier at paras. 99-100; Beaver at para. 67.

[42] Here, the interview, though persistent, was conversational and respectful. Mr. Smith had spoken with counsel, was cautioned, told the interview was recorded, offered food and drink, and was not subjected to threats, promises, or legal misinformation. These features weigh against a finding that any expressed belief in the complainant overbore his will.

[43] Had Constable Bonneau told Mr. Smith the complainant would be believed regardless, or that only a confession would avoid adverse consequences, the analysis could differ. On this record, however, Constable Bonneau's references to detail and the acknowledgment that he had "one side" and wanted Mr. Smith's version are insufficient, alone or cumulatively, to raise a reasonable doubt about voluntariness.

C. Police Conduct

- [44] As noted above, the defence argues that there were several significant and improper inducements which, whether considered individually or together, undermine voluntariness. While I consider each separately, I must also evaluate their combined effect within the context of the interview as a whole, including the calm tone, prior consultation with counsel, absence of restraints or deprivation, and the lack of legal misinformation.
1. Improper Inducements
 - a) "Opportunity" Framing
- [45] The starting point is that statements such as "it would be better if you told us" are not improper per se. Voluntariness turns on the totality of the circumstances, not on a single phrase: *Oickle* at paras. 54, 57; *R. v. Spencer*, 2007 SCC 11 at paras. 13-15, 19.
- [46] The confessions rule permits persuasion but not threats or promises "strong enough to raise a reasonable doubt about whether the will of the subject has been overborne": *R. v. Gauthier*, 2025 ABKB 133 at para. 59, citing *Oickle* at para. 57. A classic marker of impermissible inducement is a quid pro quo: a benefit for speaking or prejudice for silence. By contrast, appeals to conscience or morality, where any advantage lies outside police control, are generally admissible: *R. v. Davis*, 2011 ONSC 5564 at paras. 6-7, citing *Oickle* at paras. 56-57.
- [47] Two case comparators relied upon by the defence illustrate the line between permissible and impermissible police conduct. In *R. v. Khill*, 2018 ONSC 4148, the interviewing officer suggested that explaining himself could frame the events as self-defence, contrasting that with an "American vigilante" narrative, and implied that the type of charge might turn on the accused's account. The Court held that this created an implied legal advantage and excluded the statement. In *R. v. Hamelin*, 2021 ABQB 443, the accused asserted their right to silence 31 times, while the police repeatedly employed "only opportunity" and "credibility now vs. later" themes, and even discussed aggravating and mitigating sentencing factors. Those cumulative inducements overbore the accused's will, notwithstanding a polite tone.
- [48] This case is materially different. Constable Bonneau did not suggest that the nature of any charge depended on Mr. Smith's cooperation, and he repeatedly emphasized that the Crown, not the police, makes charging decisions. There was no "only opportunity" or "now-or-never" framing, no discussion of sentencing, and no suggestion that silence would produce an adverse inference at trial. The level of urgency was modest by comparison to *Hamelin*.
- [49] The defence stresses that phrases inviting Mr. Smith to give his "side" implied an advantage for speaking. That concern is real in the abstract. However, here the messaging remained at the level of process accuracy (the Crown decides; the police will gather evidence from both sides) rather than bargaining over legal jeopardy, as in *Khill*. Further, in this case, there was no urgency/credibility-now drumbeat such as that seen in *Hamelin*.

[50] Ultimately, whether a line is crossed depends on the strength and effect of the inducement on Mr. Smith in the circumstances. Police are not required to remain passive. They may encourage, be accusatorial, and persist, provided they do not overbear the will of an accused: Oickle at para. 57.

[51] On this record, I find no quid pro quo, no legal misinformation, and no "opportunity" or "better if you talk" theme strong enough, alone or cumulatively, to raise a reasonable doubt that Mr. Smith's will was overborne.

b) Third-Party Interviews

[52] The defence challenges Constable Bonneau's references to speaking with Mr. Smith's wife and sister, "adding it to the package," and presenting the information to the Crown. Constable Bonneau also emphasized that it is the Crown, not the police, that decides whether charges are approved. While the defence argues that such comments implied these witnesses could "give [the] Crown doubt" or "help make this all go away," the record shows that Constable Bonneau walked a tight line, describing possible investigative steps and the charge-approval process rather than bargaining over outcomes. When pressed in cross-examination, Constable Bonneau denied promising that these steps would "make this go away."

[53] The confessions rule considers promises or threats--a quid pro quo capable of dominating the will--to be improper inducements. In contrast, accurately explaining investigative procedures (including interviewing potential witnesses and passing information to the Crown) does not, in itself, constitute an inducement. Here, Constable Bonneau clearly stated that the police only recommend charges and that the Crown makes the final decision, which undermines any claim of bargaining for a confession. On this point, I find no quid pro quo and no legal misinformation.

[54] The defence also points to remarks that these witnesses could "give [the] Crown doubt" and that Mr. Smith might "have no credibility" if later evidence contradicted a denial. Read fairly and in context, these statements forecast potential evidentiary conflict and the consequences of inconsistency, rather than offering a benefit for confessing or threatening prejudice for remaining silent. They were made alongside repeated statements that Constable Bonneau's role was to gather facts and present them to the Crown.

[55] To the extent the language approached "[the] Crown will think you're a liar if DNA shows up," that issue is addressed under the trickery analysis below. The transcript indicates that Constable Bonneau framed this as a hypothetical credibility problem if later forensic evidence contradicted a denial, not as a false claim of existing proof. This type of (imperfect) prediction is assessed contextually and, on this record, does not cross into community-shocking deception.

[56] In sum, the "we'll interview your wife and sister and tell [the] Crown" messaging amounted to an accurate description of investigative steps and case routing, not a promise of leniency or a threat of prejudice. Considered within the totality of the circumstances, it does not raise a reasonable doubt that Mr. Smith's will was overborne.

c) Minimization of the Offence

[57] The defence says Constable Bonneau repeatedly downplayed the seriousness of the allegation by suggesting that "if you just had sex, that's okay--between two consenting adults," notwithstanding the complainant's assertion of non-consent. They argue that this encouraged Mr. Smith to adopt a less culpable account, and in doing so, overrode his will.

[58] Minimization becomes problematic when it conveys a legal benefit (i.e., that confessing or tailoring an account will reduce jeopardy). The voluntariness inquiry is holistic and contextual, but courts have treated themes such as "it would be better to talk now," "this is your opportunity," or "consensual sex could clear this up" as potential inducements when they imply an advantage for speaking or prejudice for silence. Examples include *R. v. Othman*, 2018 ONCA 1073, (where "you may never get another opportunity" and credibility warnings were treated as threats/inducements) and *Khill* (where the officer used the enticement of self-defence as a way to persuade the accused to speak, suggesting it could influence the type of charge laid).

[59] The circumstances in *R. v. Den Ouden*, 2023 ABKB 85, are materially different. There, the accused--a young man with no prior experience in the criminal justice system--repeatedly and emphatically told the interviewing officer that his lawyer had advised him not to speak. Despite these clear assertions, the officer persisted, stating that she needed "two sides" of the story or she would have to believe the complainant. The manner in which this was presented led the accused to believe that if he admitted to consensual sex, it would exonerate him and "fill in the gaps" in the information in a way that could change the direction of the investigation. He was also left with the impression that if he said nothing, the police's hands were tied and they would have to accept the complainant's version. The Court found he was led to believe he would remain at the station until he spoke. On the totality of the circumstances, the Court was satisfied that the police provided a subtle but real implied inducement which undermined his right to silence and contributed to a finding of involuntariness.

[60] By contrast, Mr. Smith is a mature individual with some prior experience in the criminal justice system. He had already consulted counsel before the interview, did not repeat or persist in asserting a wish to remain silent, and did not request to re-consult counsel. While Constable Bonneau also noted that he had only one side of the story and invited Mr. Smith to give his version, the exchanges were framed in accurate process terms, emphasizing that the Crown decides charges. They were not accompanied by legal misinformation or the erosion of repeated, explicit assertions of the right to silence as seen in *Den Ouden*.

- [61] The defence also relies on *R. v. G.F.*, 2016 ONSC 2510, where the interviewing officer repeatedly told the accused that consensual sex was "not a crime" and there was "nothing wrong" with it, even with a younger partner. The officer also misrepresented the complainant's allegations, suggested that admitting to consensual sex would "clear things up," warned of a "spiral out of control" if he did not, and disparaged duty counsel's advice. The Court excluded the statement, finding that these misrepresentations of both fact and law created a false legal framework that led the accused to believe an inculpatory admission was exculpatory, depriving him of a meaningful choice and undermining his right to silence.
- [62] Read in light of the authorities, G.F. draws a clear line between permissible moral minimization--downplaying moral blameworthiness where any advantage lies outside police control--and impermissible legal minimization, which involves misstating the law or implying outcome bargaining. Only the latter raises voluntariness concerns.
- [63] In the present case, Constable Bonneau's "two consenting adults" remark identified consent as the legal fulcrum, but did not misstate the law or imply that adopting a consensual account would avoid charges or reduce jeopardy. There was no "one line clears it up" assurance, no suggestion of a particular legal defence, and no misrepresentation of the complainant's account.
- [64] Stepping back, the absence of any quid pro quo, the accuracy of the law conveyed, and the totality of the circumstances (i.e., recorded interview, measured tone, offers of food and drink, no raised voices or threats) leave me satisfied that this was permissible moral minimization. Unlike G.F. or Khill, the remarks here did not overbear Mr. Smith's will.
- d) Undermining Counsel
- [65] The remark, "that's good advice [from your lawyer], but it makes it tough for us," was ill-advised. Read fairly, and in context, however, it did not disparage counsel or urge Mr. Smith to ignore legal advice. Mr. Smith had already consulted counsel and did not ask to re-consult. There was no change in jeopardy or investigative procedure that would trigger further facilitation. Constable Bonneau repeatedly acknowledged that it was the Crown, not the police, that decides whether to lay charges. This record is materially different from the persistence and messaging that led to exclusion in Hamelin.
- [66] The defence also points to repeated framing of the interview as Mr. Smith's "opportunity to provide his side," arguing that this implied a benefit for speaking. A close review of the transcript confirms that there were several references to Mr. Smith having an "opportunity" and to Constable Bonneau "explaining to [the] Crown," but these remarks were not accompanied by any misstatement of the law or denigration of counsel's advice. There was no suggestion that silence would be used against Mr. Smith at trial, that third-party statements would be admissible against him, or that a judge would draw an adverse inference from his silence. In the context of this case, the comments here remain within the bounds of a permissible invitation to provide Mr. Smith's version rather than an improper inducement.

- [67] While the defence argues that persistent questioning and remarks about "explaining to [the] Crown" eroded the right to silence, the evidence does not establish belittling of counsel, refusal to re-facilitate consultation after a request, or any material change in circumstances. Mr. Smith confirmed that he had spoken with his lawyer and gave no indication that he wished to re-consult before or during the interview. The concern in Singh--that repeated questioning may undermine the right to silence--does not arise on these facts.
- [68] I make four express findings on this point. First, Mr. Smith had already consulted counsel shortly after his arrest. Second, he did not request to re-consult with his legal counsel before or during the interview. Third, there was no change in jeopardy or investigative procedure that would have triggered a renewed duty to facilitate consultation. Fourth, I treat the "good advice but it makes it tough for us" line as clumsy process commentary, not denigration of counsel or an exhortation to ignore legal advice. In the context of this case, the remark did not vitiate the earlier cautions or meaningfully erode Mr. Smith's ability to choose not to speak.

2. Trickery

- [69] The nub of the defence submission is that during the interview Constable Bonneau: (i) asserted (or strongly implied) that a SANE examination was being done; (ii) described DNA science and persistence windows; and (iii) warned that if DNA "pops up," Mr. Smith's credibility would be "out the window." Taken together, the defence says that these tactics were deployed to extract admissions by false evidence and implied adverse-inference threats. The transcript fairly captures those lines of questioning.
- a) DNA References
- [70] The concern about police trickery in this case stems from Constable Bonneau's references to DNA evidence during his interview with Mr. Smith. While Constable Bonneau reasonably believed the complainant might undergo a SANE examination, the evidence suggests he was uncertain whether she had undergone a test and, if so, whether it had been completed. Parts of the interview give the impression that DNA evidence linking Mr. Smith to the complainant could be obtained. However, the record also shows that Constable Bonneau acknowledged he did not have SANE exam results and, at times, presented his comments as possibilities rather than certainties.
- [71] The use of non-existent evidence is recognized as a "dangerous ploy" and must be assessed in the totality of the circumstances: Oickle at para. 61. Courts distinguish between falsely claiming to possess conclusive evidence and hypothesis-testing about what future evidence might show. However, references to possible DNA results or to how conflicting accounts might be reconciled will not necessarily create oppressive conditions.

- [72] Constable Bonneau's remarks about DNA evidence (i.e., persistent "up to seven days" later, "we'll know in a day or two," and "they're gonna know") were framed as possibilities about what testing might later show. There is no sustained claim of existing forensic proof. On this record, it does not amount to deception that would shock the community or undermine fairness: see Oickle.
- [73] I find that Constable Bonneau acknowledged having no results in hand and spoke hypothetically about what testing might later reveal (including persistence windows). The rhetoric, while better avoided, did not purport to present non-existent proof.
- b) Credibility Out the Window
- [74] The defence argues that, at p. 44 of the transcript, Constable Bonneau's extended statement warning that Mr. Smith's "credibility [would be] out the window" if DNA evidence later contradicted his denial operated as an implicit threat that his credibility would be irreparably damaged if he maintained his position. They submit that this remark, delivered immediately before the first admission, was the "final push" that overbore Mr. Smith's will. The defence emphasizes the temporal link between this exchange and Mr. Smith's subsequent admission, arguing that the sequencing demonstrates a direct causal connection between the credibility warning and his decision to speak.
- [75] The defence relies upon Othman. In Othman, the accused repeatedly asserted his right to silence throughout a four-hour interview. The interviewing officer told him that he might never get another chance to tell his story, explaining that a jury or judge would likely see the video of him refusing to speak and not believe him, and that his credibility was at its highest at that moment. After being shown his girlfriend's statement, the accused confessed. The Ontario Court of Appeal held these were both threats and inducements: they conveyed legally incorrect information by suggesting negative legal consequences for silence and positive ones for speaking, thereby undermining legal advice. The statement was excluded even though the comments were not the sole cause of the confession.
- [76] In the present case, there were no explicit statements that a jury, judge, or the Crown would see Mr. Smith's silence or draw an adverse inference from it, nor was there any assertion that his credibility was "highest now." While some comments invited him to give his side of the story, they did not expressly link silence to adverse legal consequences at trial. Read fairly and in context, the "credibility" remarks were confined to the risk of inconsistency if a continued denial was later contradicted by future forensic evidence. I reject the submission that Constable Bonneau conveyed legal misinformation about adverse inferences from silence.
- [77] This stands in contrast to the cases set out at para. 41 of Den Ouden, where various courts found that telling an accused that their credibility would be "enhanced" if they spoke to police immediately and would be less credible if they told their story later undermines the right to silence. That type of framing creates a direct, time-sensitive inducement tied to perceived credibility at trial. Similarly, in Othman, the interviewing officer improperly

suggested that silence would be perceived as a lack of candour and would diminish the accused's credibility, while speaking would improve it. Those cases involved legally incorrect assurances or threats that trial credibility would turn on whether and when the accused spoke.

- [78] By contrast, in the present case, there is no suggestion that delaying or declining to speak would reduce Mr. Smith's credibility before a judge or jury. The discussion was limited to evidentiary consistency in the event of future forensic results. This distinction avoids the core mischief addressed in *Othman and Den Ouden*. However, similar caution applies to ensure that language related to credibility is not framed in terms of legal prejudice for remaining silent.
- [79] I reiterate again that Constable Bonneau did not claim to possess existing DNA results. His references were framed conditionally ("if DNA pops up") and were tied to hypothetical future testing rather than proof already in hand. I make this finding notwithstanding the temporal proximity of the credibility remarks to the admission.
- [80] On causation, while the temporal proximity between the credibility comments at p. 44 of the transcript and the admission is apparent, the surrounding context suggests otherwise.
- [81] The interview video and transcript show that, immediately upon acknowledging sexual contact, Mr. Smith volunteered, without prompting, that his "main concern" was the breach of his no-alcohol condition, expressly linking the drinking and sexual contact in his reasoning. I paid close attention to how this unfolded. I find that his tone, sequencing, and choice of words indicate that he was explaining a pre-existing personal concern, not acquiescing to avoid the evidentiary consequence outlined by Constable Bonneau. Given the context in which the "credibility" comment was made (framed as a hypothetical evidentiary issue rather than a threat of trial prejudice), I am not satisfied that it overbore Mr. Smith's will or materially contributed to his decision to speak.

c) Overall Police Trickery

- [82] Police trickery, as a separate branch of the confessions rule, renders a statement inadmissible only where the conduct would shock the community or undermine trial fairness. While some deception is permissible, what is prohibited are tactics such as impersonating counsel or fabricating decisive evidence.
- [83] Viewed cumulatively, Constable Bonneau's conduct does not meet that threshold. His DNA remarks were framed conditionally, did not claim proof in hand, and referred only to possible future testing. The "credibility out the window" comment predicted potential evidentiary conflict, not trial prejudice stemming from silence. Similarly, the "two consenting adults" remark amounted to moral minimization--identifying consent as the legal fulcrum--rather than a misstatement of law or promise that an admission would avoid charges. Taken together, these statements, made in a measured interview following prior legal consultation, did not amount to a quid pro quo or threat. On the totality of the

circumstances, they formed part of permissible persuasion and did not overbear Mr. Smith's will.

D. Cumulative Assessment and Conclusion

- [84] The voluntariness analysis is holistic. Weighing the operating mind, the absence of oppressive conditions, the lack of quid pro quo or legal misinformation, the process-accurate references to interviewing third parties and to the Crown charge approval, and the hypothetical (not existing-proof) framing of DNA evidence, I am not left with a reasonable doubt that Mr. Smith's admissions were the product of a free and meaningful choice.
- [85] Ill-advised phrasing, including "good advice makes it tough for us," "credibility out the window," and (with reference to the presence of DNA evidence) "they're gonna know," should be avoided. But unlike the patterns that led to exclusion in Hamelin and the implied benefit/harm concerns in Den Ouden, the tone here was measured, the persistence was moderate, there was no suggestion that silence itself would cause adverse consequences at trial, and Constable Bonneau repeatedly acknowledged that the Crown decides whether to lay charges. In totality, the Crown has discharged its burden.

VII. Disposition

- [86] Based on the evidence, notwithstanding defence counsel's able submissions, I am satisfied that the Crown has proved beyond a reasonable doubt that Mr. Smith's statement was voluntary. While certain aspects of Constable Bonneau's interview were ill-advised and could be improved upon in future, they did not amount to inducements or trickery strong enough to overbear Mr. Smith's will.

- [87] In the result, I find the statement admissible in evidence.

"Sukstorf J."

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