

CANADA / JUDGMENT

R. v. T.B.

2026 ONCA 327

COURT

Court of Appeal for Ontario

DECIDED

8 May 2026

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Collection

Decisions of the Court of Appeal

Date

2026-05-08

Neutral citation

2026 ONCA 327

Docket numbers

COA-25-CR-0858

Judges

Gillese, Eileen E.; Dawe, Jonathan; Madsen, Lene

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. T.B., 2026 ONCA 327[1]

DATE: 20260508

DOCKET: COA-25-CR-0858

Gillese, Dawe and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

T.B.

Appellant

Michelle Psutka, for the appellant

Ryan Mullins, for the respondent

Heard: March 6, 2026

On appeal from the convictions entered by Justice Jonathan Brunet of the Ontario Court of Justice on May 17, 2024.

Madsen J.A.:

- [1] The appellant was charged with eleven assault-related offences alleged to have taken place during a domestic relationship with the complainant, E.N.
- [2] The charges against the appellant relate to three time periods and can be grouped as follows:
 - (1) November 1 – 30, 2022: Assault (count 1) (the “November 2022 assault”) and forcible confinement (count 2).
 - (2) December 1 – 15, 2022: Assault by choking (count 3) (the “December 2022 choking assault”) and sexual assault (count 11) (the “December 2022 sexual assault”).
 - (3) May 1 – 15, 2023: Sexual assault (count 4) (the “May 2023 sexual assault”), assault with a weapon (count 5), uttering death threats (count 6), assault by choking (count 7), assault (count 8), assault causing bodily harm (count 9), and assault (count 10).
- [3] Following a three-day trial in the Ontario Court of Justice, the trial judge delivered extensive oral reasons in which he acquitted the appellant of count 11, the December 2022 sexual assault, and count 5, assault with a weapon. He convicted the appellant of the other nine charges.
- [4] The appellant appeals only his conviction for the May 2023 sexual assault, the offence for which he received the longest sentence. He submits that the trial judge: (1) failed to resolve material credibility and reliability concerns in relation to E.N.’s testimony with respect to this charge, and (2) misapprehended material evidence. The appellant seeks a new trial on the May 2023 sexual assault charge.
- [5] I do not accept these arguments and accordingly, would dismiss the appeal.

I. Brief Background [6] E.N. and the appellant dated for several years and lived together from the summer of 2021. Their relationship was rife with violence by the appellant against E.N. She testified that the appellant became physically abusive to her shortly after they moved in together.

- [7] E.N. and the appellant were addicted to drugs, using substances including gamma-hydroxybutyrate (GHB), crack cocaine, and methamphetamine. At times, they performed sex work in exchange for money or drugs. E.N.'s testimony was that the appellant was more violent towards her when he was using drugs.
- [8] On May 15, 2023, E.N. took her debit card, fled the apartment she shared with the appellant, and ran about three blocks to a bus stop, breaking her foot in the process. She took the bus to Hurdman Station, where she received medical attention and then came to the attention of the police.
- [9] On May 17, 2023, two days after E.N. fled the apartment and while in the hospital being treated for her broken foot, E.N. gave a police statement (the "Police Statement"). The officers described E.N. as initially reluctant to provide information about the appellant, but she ultimately told them about the November 2022 assault, some details about the December 2022 choking assault, and some information about the May 2023 sexual assault. She did not say anything about the December 2022 sexual assault. She said that the May 2023 sexual assault was precipitated by her giving oral sex to a third party in exchange for money, which became too rough and caused her to vomit. As a result, the third party paid less than agreed (the "2023 precursor event").
- [10] On February 28, 2024, at a trial preparation meeting with the Crown[2] (the "trial preparation meeting"), E.N. provided the following further information. She said that after becoming sober in or around January 2024, she remembered additional details. She disclosed that the May 2023 sexual assault incident involved anal intercourse. She also disclosed, for the first time, that she was sexually assaulted in December 2022. She said that in relation to the latter, she told the appellant that she did not want to have sex with him, but he put his hand to her jaw and threatened to break it, so she complied while crying.
- [11] At trial in May 2024, E.N. provided further details about the December 2022 sexual assault. She said it was precipitated by an argument and that she was angry at the appellant because he did not intervene when oral sex with a third party was too rough and caused her to vomit (the "2022 precursor event").
- [12] E.N. also testified at trial about why her disclosures had become more detailed since her Police Statement. She explained that she initially did not want to get the appellant into trouble because she loved him; she was embarrassed and did not want to talk about it; and she had subconsciously blocked some memories, which only resurfaced later when she became sober.

- [13] During cross examination about the May 2023 sexual assault, E.N. agreed that she told the Crown and police in April 2024 that she did not disclose the anal intercourse element of the May 2023 sexual assault during her Police Statement because she was embarrassed, but it was really because she had forgotten some aspects of the incident. She said that she thought saying she was embarrassed would make her seem more “believable” than if she said she had not fully remembered the May 2023 sexual assault.

II. Decision below The Convictions

- [14] The trial judge convicted the appellant of the November 2022 assault (count 1) and forcible confinement (count 2). He found that the appellant assaulted E.N. by grabbing a chunk of her hair and pushing her into a doorknob or lock, resulting in a scar above her eye; and that she was physically confined in the apartment by the appellant between November 1 and 30, 2022.
- [15] The trial judge convicted the appellant of the December 2022 assault by choking (count 3). He found that the appellant choked E.N. approximately 20 times, that she could not lift her head and had difficulty swallowing, and that she was in bed for a long period of time because of her injuries.
- [16] In relation to the May 2023 charges, the trial judge convicted the appellant of counts 4, 6, 7, 8, 9, and 10. He accepted E.N.’s testimony about the May 2023 sexual assault (count 4). Specifically, he accepted that the appellant told her that he wanted sex, was “scary”, said he would kill her so she tried to calm him down with oral sex, and that she agreed to anal intercourse so she would not “get beaten” and because she was afraid. He also accepted E.N.’s testimony that the appellant threatened to chop her up and leave her in the woods, and that she believed she would be killed if she did not escape (count 6). Further, the trial judge accepted that the appellant punched E.N. in the ribs, hit her legs causing more than trivial bruising, and smacked and cupped her ears causing ringing (counts 8, 9, and 10).

The Acquittals

- [17] The trial judge acquitted the appellant of count 5, assault with a weapon, which was part of the May 2023 group of charges. He found that E.N. was not sure of when or how many times the appellant had put a knife to her throat. Accordingly, her testimony on this count lacked “clarity and certitude” and, therefore, did not satisfy the proof beyond a reasonable doubt standard.
- [18] The trial judge was also not satisfied that the Crown had proven the December 2022 sexual assault charge (count 11) beyond a reasonable doubt. Specifically, the trial judge found that E.N.’s testimony in relation to the December 2022 sexual assault was “sourced from a recovered memory”; not mentioned in E.N.’s Police Statement; remembered in or around January 2024 but not disclosed by E.N. until the trial preparation meeting; and that it was unlikely that the 2022 precursor event was the same as the precursor event for the May 2023

sexual assault. The appellant takes no issue with respect to these findings.

- [19] The trial judge then made the following statements, which are the focus of this appeal. While discussing the acquittal of the December 2022 sexual assault charge, he referred to E.N.'s acknowledgment that she told the police and the Crown that she did not initially disclose the anal intercourse component of the sexual assault because she was embarrassed, when in fact she had not remembered it at the time of her Police Statement and wanted to seem more believable. However, the trial judge erred in attributing that admission to the December 2022 sexual assault. E.N. made the acknowledgment in her testimony about the May 2023 sexual assault.
- [20] The trial judge then stated, while still discussing the December 2022 sexual assault: "[t]hat highly problematic statement is compounded by the fact that the very particular background leading up to each of the two sexual assaults, months apart, was precisely the same, which would seem somewhat unlikely – or to put it another way, it doesn't seem very plausible." The trial judge concluded that based on the "combination of all those factors", the Crown had failed to satisfy him that "the possibility that [E.N.'s] recovered memory being false is something that can safely be dismissed as having been disproved beyond a reasonable doubt". He then acquitted the appellant of the December 2022 sexual assault charge.

III. Analysis [21] As stated above, the appellant appeals only his conviction for the May 2023 sexual assault. His submission centres on the trial judge's reasoning in acquitting him of the December 2022 sexual assault charge while convicting him of the May 2023 sexual assault.

- [22] The appellant's submission is twofold. First, he submits there is no logical basis to treat the reliability concerns regarding the two sexual assaults differently and that the verdict in respect of the May 2023 sexual assault charge is therefore illogical and unreasonable. At the very least, the appellant asserts, "the trial judge failed to resolve reliability concerns relating to the May 2023 sexual assault." Second, the appellant submits that the trial judge mistakenly attributed the "highly problematic" aspect of E.N.'s testimony on the May 2023 sexual assault count to the December 2022 sexual assault count, and, in so doing, misapprehended the evidence on a material issue.
- [23] In short, the appellant submits that in convicting him of the May 2023 sexual assault, the trial judge erred by misapprehending material evidence and providing insufficient reasons.
- [24] The threshold for appellate intervention based on a misapprehension of evidence is stringent: *R. v. N.P.*, 2025 ONCA 110, at para. 16; *R. v. B.W.*, 2024 ONCA 412, 438 C.C.C. (3d) 241, at para. 56; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.), at pp. 538-41. Where ambiguities in a trial judge's decision are open to two interpretations, the one consistent with the presumption of correct application must be preferred over one that suggests error: *Morrissey*, at pp. 523-25. Appellate courts must be rigorous in looking at problematic reasons in the context of the record as a whole: *R. v. G.F.*, 2021 SCC, [2021] 1 S.C.R. 801, at para. 20. To succeed on appeal, a misapprehension must relate to the substance of the evidence material

to the judge's reasoning process: *Morrissey*, at pp. 540-41.

- [25] The threshold for appellate intervention based on an allegation of insufficient reasons is high: *R. v. Kirkham*, 2013 ONCA 437, at para. 3. Reasons are not to be parsed line by line in search of error, but read as a whole, in the context of the evidence, the issues, and the arguments at trial: *G.F.*, at para. 20; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at para. 13; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16. Not every finding or conclusion need be set out. When reviewing oral judgments, appellate judges must “read between the lines, not ignore the implicit, strive to recognize the underlying meaning of first instance judgments” while refraining from speculation: *R. v. Ouellet*, 2025 QCCA 347, 452 C.C.C. (3d) 497, at paras. 16-22, *aff'd* 2025 SCC 40, 509 D.L.R. (4th) 50.
- [26] In my view, when the trial judge's reasons are read as a whole and in the context of the record, the appellant's submission is not made out.
- [27] The appellant acknowledges that the trial judge accurately summarized the evidence in this case, including the evidence relating to both the December 2022 sexual assault and the May 2023 sexual assault. Indeed, for some 40 pages, the trial judge carefully set out the evidence relating to each count, demonstrating a clear understanding of E.N.'s testimony and the context of each alleged sexual assault. The reasons reflect that the trial judge was alive to the multifaceted reasons E.N. gave for the timing of her disclosures.
- [28] The trial judge also carefully and accurately set out the law bearing on the live issues in the trial. He self-instructed on the burden of proof before appropriately considering caselaw regarding the importance of scrutinizing recovered memories. He highlighted that where there are concerns about the reliability of a complainant's testimony, corroboration can provide a basis for resolving concerns. He emphasized, before addressing any specific allegation, that E.N.'s evidence had to be “funneled through” *R. v. Lifchus*, [1997] 3 S.C.R. 320 and *R. v. Tan*, 2023 ONSC 3750 as well as through common sense and “credibility and reliability issues”. In short, the trial judge was acutely aware of the need to thoroughly scrutinize E.N.'s evidence, and he did so.
- [29] The trial judge then found E.N. to generally be a credible and reliable witness. He described her as “responsive and sincere”, finding that she was “doing her best to recount the events.” He relied on photographs of marks and bruising on E.N.'s body that corroborated her testimony on the assault counts in May 2023 and the scar above her eye that was consistent with the November 2022 assault.
- [30] The trial judge set out the evidence he accepted in respect of the May 2023 sexual assault. He reiterated that he found E.N. to be a credible witness and noted that reliability was a concern on “a couple of the counts”, but that this “did not affect the entirety of the charges in all of the circumstances.” He stated, “[t]hose circumstances, including not only my assessment of her general credibility and reliability, but also the simple principle that a court can believe some, all, or none of a witness' evidence.” Further, the trial judge was clearly aware that some of E.N.'s testimony in relation to both sexual assault counts derived

from recovered memories. His statement at the outset, before considering any count, that E.N.'s evidence had to be "funneled through" Tan was an explicit recognition of the need to scrutinize all of her evidence closely.

A. No reliability concerns about the May 2023 sexual assault

- [31] I do not accept the appellant's submission that the trial judge's reliability concerns about the December 2022 sexual assault count are indistinguishable from the May 2023 sexual assault count or that the trial judge was required to reach the same conclusion for both counts, for two reasons.
- [32] First, unlike the December 2022 sexual assault count, a majority of E.N.'s testimony on the May 2023 sexual assault was not derived from recovered memories. When she made her Police Statement in May 2023, E.N. specifically disclosed that she had been sexually assaulted during the May 2023 incident, a few days earlier. She also described the 2023 precursor event that precipitated the May 2023 sexual assault. The only part of E.N.'s account at trial regarding the May 2023 sexual assault that was sourced from what she said was a "recovered memory" was a clarification that the incident involved non-consensual anal intercourse. Since the associated charge (count 4) was not particularized to specify anal intercourse, this specific detail was not something the Crown had to prove to obtain a conviction. In contrast, as the trial judge found, the alleged December 2022 sexual assault was fully "sourced" from a recovered memory and was not disclosed by E.N. until the trial preparation meeting in February 2024. It was within that context that the trial judge stated that E.N.'s evidence on the December 2022 sexual assault charge required "particularly" close examination.
- [33] Second, while the precursor events for the December 2022 and May 2023 sexual assault incidents were similar, E.N.'s testimony about what occurred during the December 2022 sexual assault was very different from her testimony about what occurred during the May 2023 sexual assault. In relation to the latter, the trial judge accepted E.N.'s testimony that the appellant was threatening to kill her, chop her up and leave her in the woods, and that she agreed to anal intercourse so she would not "get beaten". Indeed, when sentencing the appellant, the trial judge described the events of the May 2023 sexual assault as "nightmarish". The trial judge accepted E.N.'s testimony in relation to the May 2023 counts, except for her testimony about the assault with a weapon count which lacked sufficient clarity. The trial judge found that the May 2023 sexual assault occurred within a chain of violent acts, a context that differs significantly from that of the December 2022 sexual assault.
- [34] While it would have been preferable had the trial judge explained why he was not left with a reasonable doubt with respect to the May 2023 sexual assault even though E.N. described part of her present memory of this incident as a recovered memory at trial, when read as a whole and in context, the reasons adequately address why he convicted the appellant on that charge but acquitted him of the December 2022 sexual assault charge. To reiterate, the trial

judge did not have to be satisfied beyond a reasonable doubt that the May 2023 sexual assault had involved anal intercourse in order to accept E.N.'s evidence that she had been forced to engage in some form of non-consensual sexual activity on that occasion.

B. The trial judge did not misapprehend the evidence

- [35] Turning to the alleged misapprehension of evidence, the Crown concedes that the trial judge inaccurately attributed E.N.'s admission (that she did not remember the anal intercourse but said she did not disclose it because she was embarrassed), to the December 2022 sexual assault count when in fact that admission pertained to the May 2023 sexual assault count.
- [36] A trial judge's mistakes regarding the substance of material evidence will only give rise to a miscarriage of justice when the "errors play an essential part in the reasoning process resulting in a conviction": *Morrissey*, at p. 541. As set out above, the trial judge accepted E.N.'s testimony about the May 2023 sexual assault. He stated this on three separate occasions in his reasons, including an express and correct reference to the anal intercourse component of the May 2023 sexual assault. His concern about the reliability of E.N.'s evidence concerning the December 2022 sexual assault was based primarily on her explanation that she did not report it until April 2024 because it was a recovered memory. The trial judge would not have had the same concerns about E.N.'s May 2023 sexual assault allegations, which she had reported to the police within a few days. Moreover, even if the trial judge had been left with a reasonable doubt about the reliability of E.N.'s testimony that the May 2023 sexual assault had included non-consensual anal intercourse, this was not an essential element of the charged offence that had to be proved beyond a reasonable doubt.
- [37] In summary, the trial judge gave an oral judgment in which he demonstrated a grasp of the complicated evidence and made unequivocal credibility and reliability findings that provided a grounded basis for convicting the appellant of the May 2023 sexual assault charge, while acquitting him on the December 2022 sexual assault charge. To the extent that he may have become confused about which incident involved the allegation of anal intercourse, this error did not play an essential part in the reasoning process that led him to find the appellant guilty of the May 2023 sexual assault charge.

IV. Disposition [38] Accordingly, I would dismiss the appeal.

Released: May 8, 2026 "E.E.G."

"L. Madsen J.A."

"I agree. E.E. Gillese J.A."

"I agree. J. Dawe J.A."

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C., 1985, c. C-46.

[2] This was for trial dates that did not go ahead.

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Prepared on 29 October 2026 · Esheria