

CANADA / JUDGMENT

R. v. Wormell

2003 BCCA 585

COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Wormell,

2003 BCCA 585

Date: 20031104

Docket: CA028819

Between:

Regina

Respondent

And

William John Wormell

Appellant

AN ORDER HAS BEEN MADE IN THIS CASE PROHIBITING PUBLICATION OF ANY INFORMATION THAT COULD DISCLOSE THE IDENTITY OF THE COMPLAINANTS OR WITNESSES PURSUANT TO SECTION 486(3) OF THE CRIMINAL CODE.

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Mackenzie

J. J. Blazina

Counsel for the Appellant

A. Budlovsky

Counsel for the Respondent (Crown)

Place and Date of Hearing:

Vancouver, British Columbia

December 4, 2002

Written submissions received:

December 19, 2002 and January 8, 2003

Place and Date of Judgment:

Vancouver, British Columbia

November 4, 2003

Written Reasons by:

The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Mackenzie

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

- [1] The appellant was convicted by a jury on 21 January 2000 of two counts of sexual assault charged under s. 271 of the Criminal Code, two counts of sexual touching under s. 151, and two counts of sexual invitation under s. 152. The offences with which the appellant was charged were alleged to have taken place between 1 August 1998 and 10 October 1998. The complainants were two young boys. At the time the offences alleged took place, D.L. was between seven and eight and B.L. was ten.
- [2] The complainants, their mother, and three witnesses who gave similar fact evidence were called by the Crown. Police interviews of the two complainants were videotaped and admitted into evidence under s. 715.1 of the Criminal Code.

- [3] The complainants described various incidents of a sexual nature including a "game" in which the appellant would put money in his underwear and, in order to get the money out, the complainants had to touch the appellant's penis. Two of the three witnesses called to give similar fact evidence described very similar incidents having taken place with the appellant when they were youngsters.
- [4] The appellant testified and denied the allegations. The theory of the defence was that the boys had made up the allegations at the urging of their mother and that the mother had done so in order to pre-empt the appellant making a complaint to the Ministry of Social Services about the manner in which she was raising the boys.
- [5] Three grounds of appeal were set out in the appellant's factum but the third ground, that the trial judge erred by failing to warn the jury that the videotaped statements could not be used as prior consistent statements, was abandoned during oral argument.
- [6] At the conclusion of the hearing of the appeal, counsel were asked to provide supplemental factums on a ground of appeal raised during oral argument in which the appellant asserted non-direction amounting to misdirection in the charge on how the jury should assess the evidence of the two complainants as recorded in their videotaped statements. Counsel provided helpful written submissions and we thank them for their assistance.
- [7] On the grounds of appeal that focus on the videotaped interviews with the complainants, the appellant argues the trial judge erred:
- (1) by failing to edit a videotape of one of the complainants to exclude his prejudicial remarks about the appellant's character, and
 - (2) by failing to caution the jury that in assessing the evidence of the complainants on the videotapes, they must ignore the police officers' opinions, express or implied, as to the credibility of the two complainants.
- [8] In the third ground of appeal, the appellant argues that the trial judge erred by failing to properly caution the jury that a prior statement of a witness, adduced by the Crown in redirect, was not evidence that could corroborate her testimony.
- [9] For reasons I will endeavour to explain, I am of the view that none of the grounds of appeal the appellant has put forward amounts to reversible error and I would therefore dismiss the appeal.

II. The trial court proceedings

- [10] The complainant's mother, Ms. S.M., and the two complainants, D.L. and B.L., testified that they met the appellant when he was preaching at a Pentecostal church in a small community in the interior of British Columbia. Ms. S.M. said they first met the appellant in November 1997 and, in the summer of 1998, the appellant came and took the two boys swimming and to various other things. At the time, the family was on social assistance.

- [11] When the children's mother, her companion Greg, and the younger of the two complainants travelled to Alberta, the appellant looked after the older boy for a few days.
- [12] In October 1998, the children's mother found the boys had some cash on them. The following day the boys told their mother that the appellant had touched them sexually and the mother promptly called the police.
- [13] D.L., who was nine years of age when he testified, gave evidence after promising to tell the truth. D.L. said the appellant took him and his brother swimming and they also went to the appellant's house "in the forest". He used to call the appellant "grandpa". D.L. said they would all ride in the appellant's pickup, sitting on the bench seat. D.L. said the appellant would put money down his pants and then have the boys reach into his underwear under his "dink" to get it out. D.L. also testified that the appellant would give them money to dress and undress in front of him. Once the appellant had D.L. undo his pants and take out his penis and the appellant then kissed it. On another occasion, the appellant came into his bedroom and had D.L. pull down his pants. The appellant then took out his own penis and demonstrated "humping" to D.L. by rubbing against him. D.L. also described how the appellant, while driving, would take D.L.'s hand and would touch his "privates".
- [14] After D.L. had given his evidence in chief, a voir dire was held to determine the admissibility of a videotape in which D.L. described to two police officers, Constables Campbell and Harvey, what had happened between himself and the appellant. Defence counsel argued that the videotape should not be admitted because it would add nothing to D.L.'s court testimony. In the alternative, defence counsel submitted that the trial judge ought to give a strong warning to the jury, prior to the playing of the tape, that the police officers' opinions as to D.L.'s veracity were not to be used to corroborate the complainants' testimony. The trial judge admitted the videotape after editing out some parts at the beginning of the tape at the joint request of counsel.
- [15] On the videotape, as it was played for the jury, D.L. was first asked the following questions:
- CAMPBELL: Do you know why you're here today, [D.L.], why, why are you coming to talk to us today?
- A: Because of my Grandpa.
- CAMPBELL: Okay. Who's your, who's your Grandpa?
- A: Grandpa Bill.
- CAMPBELL: Okay. Tell me about your Grandpa Bill.
- A: Well he's sick, and he's gross, and he got (inaudible).
- HARVEY: We can't hear you bud.

A: He's sick and he's gross and he got a new truck and (inaudible), and there's like, here's the door and then you turn up there are five stairs, and there's a king size bed there. And that stuff.

- [16] At several points in the course of the videotaped interview, the police officers assured D.L. that he was not in any trouble, that they were there to help him, that he was "doing good" or "doing very good" and that he was "a nice boy" or a "nice young fella".
- [17] In cross-examination, D.L. denied that his mother had told him what to say and he disagreed with suggestions that the incidents he described had never happened. D.L. agreed that he was now living in foster care, apart from his mother and older brother. He agreed that he wanted to go back to live with his mother, that he would "probably" lie for his older brother B.L. and that he "didn't know" if he would lie in order to be able to live with his mother again.
- [18] B.L. was 11 when he testified at trial. He said the appellant had taken both he and his brother swimming on several occasions. He said they would play a game where the appellant put money in his underwear and to get it out he and D.L. would have to touch the appellant's penis. B.L. said the appellant would also reach out and touch both his and his brother's clothes in the crotch area and that he would sometimes grab one of their hands and put it on top of his own clothing, over his penis. On one occasion, when B.L. was staying alone at the appellant's house, the appellant had him pull down his pants. The appellant then kissed B.L.'s penis and rubbed his penis against B.L.'s penis.
- [19] A videotape was also made of the police interview with B.L. In the voir dire held to determine its admissibility, B.L. viewed the video and adopted its contents. Defence counsel said that he had virtually the same arguments to make with respect to the videotape of B.L. as he had with the videotaped interview with D.L. Counsel argued that the officers' "feel good" opinions with respect to B.L.'s credibility had no probative value and urged the trial judge to edit the tape so that it would end at a particular point. The trial judge ruled that the tape was admissible and directed that the tape be edited so that it would end at the point defence counsel had requested. The edited tape was played for the jury and B.L. adopted its contents.
- [20] B.L. was cross-examined about his evidence at the preliminary hearing at which he had testified that he was "not sure" when he had seen the appellant touch D.L.'s privates and he agreed that he had not pictured it happening. B.L. explained that he was "probably confused" by the questioning, and maintained that he had seen the appellant touch D.L. When asked why he waited several months before telling his mother what had happened, he said "Probably 'cause I was scared, confused at the same time." B.L. agreed that he wanted the family to be back together again. He agreed that he would lie for his "mom" and had done so in the past but said no one had told him what to say.

- [21] Ms. S.M., the complainants' mother, gave evidence about meeting the appellant in November 1997 at the church where he was preaching. She said that the following August the appellant called and offered to take her and the boys swimming. Over the next few months, the appellant took the boys swimming about six times.
- [22] In late September, Ms. S.M. and her companion Greg went to look for work in Alberta and D.L. went with them. She left B.L. with a girlfriend but when their trip was extended, she arranged for B.L. to stay with the appellant. When Ms. S.M. returned from Alberta, the appellant brought B.L. home in his pickup truck. Ms. S.M. said she noticed that B.L. was sitting very close to the appellant in the front seat. The appellant told her that he let B.L. and D.L. sit beside him so they could steer or change gears.
- [23] Ms. S.M. said the appellant offered to have her and the boys over for Thanksgiving dinner the following Monday and that, since Greg was still out of town, she gratefully accepted. On Saturday morning she went to do some shopping and left the boys at home. When she returned, the appellant was at her house with the boys. They talked and the appellant invited them all to go to Disneyland with him.
- [24] After the appellant had left, Ms. S.M. noticed that the boys had some money, about \$5.00 each. She said this was not the first time the boys had received money from the appellant. She was on welfare at the time and did not agree with the appellant giving money to the children. She said she had spoken to the appellant about it. On Sunday, the boys told her what was taking place with the appellant and she spoke to the police that day.
- [25] In cross-examination, Ms. S.M. agreed that she had not said anything about the offer of the trip to Disneyland in her statement to the police or in her testimony at the preliminary inquiry. She agreed that her relationship with Greg, whom she subsequently married, was "pretty rocky" at the time the incidents with the appellant and the children were alleged to have occurred. She agreed that Greg was an alcoholic at the time and that the two of them were occasionally using drugs. Ms. S.M. agreed that it might not have been a good plan to get married in the circumstances. She acknowledged that she had called Family and Child Services on 12 or 13 October, but denied that she had done so in order to pre-empt any threat by the appellant to call them about the boys' home environment. Ms. S.M. said the appellant never made such a threat and had never expressed dissatisfaction with the way she was raising the boys.
- [26] The Crown called three witnesses to give similar fact evidence. P.K. testified that he had met the appellant when he was 12 years of age. He said that the appellant would let him sit next to him in his van so he could steer or push the brake. The appellant would then touch his genitals on top of his clothes, or take P.K.'s hand and guide it to his own genitals. P.K. said that the appellant had given him numerous gifts, including a small motorbike, and had taken him on trips with other children, including a trip to Disneyland. On one occasion, the appellant attempted to have oral sex with him, kissing his penis and getting it into his mouth before P.K. could push him away.

- [27] L.A., another witness who was permitted to give similar fact evidence, testified that she had met "Uncle Bill" when she was about six years old. She said he would take her and other children swimming, hiking and on overnight trips. He said that he loved her and bought her gifts. L.A. said that on one occasion when she was sitting next to the appellant on the front bench seat of his car, he told her there was money in his pocket, and that she should reach in and get it out. She did and there was a rip in his pocket and her hand contacted his penis. He was not wearing any underwear. The appellant then held her wrist for several seconds so she could not move her hand.
- [28] T.M., the third similar fact witness, testified that she knew "Uncle Bill" when she was six or seven years old and that he had lived in their house for some time. He took her swimming with him, and would touch her vagina on top of her swimsuit while in the pool. She also said it was "common" for them to play the game where he would put money in his under-wear, under his penis, and she would reach in through a hole in his pocket in order to get the money out.
- [29] In cross-examination, T.M. agreed that sometimes her mother or father would go swimming with her and the appellant but she maintained that most of the time it was just her and "Uncle Bill". T.M. said she had a good relationship with her parents at the time but acknowledged that she never told them about any of the incidents which she described in court.
- [30] The third ground of appeal concerns a portion of the cross-examination of T.M. and Crown counsel's brief redirect examination of her. I will refer to that testimony and the appellant's complaint with respect to a question and answer on redirect later in these reasons.
- [31] The appellant, who was 66 years old at the time of trial, testified that he had met Ms. S.M. and the two complainants at the church where he was preaching. He said that some time later Ms. S.M. had approached him and asked if he could spend some time with the boys because they were having behavioural problems and she wanted his help. He agreed and on half a dozen occasions took them with him on various outings including going to go-karts, swimming and water slides. He said that on each occasion, he asked if either Ms. S.M. or her companion Greg would come along but they never did. He denied touching the boys or having them touch him in the manner they had described.
- [32] The appellant said he had given the boys money on occasion but did so as a reward in order to get them to stop their aggressive and jealous behaviour. He said that the boy's behaviour did not get any better as a result but rather got worse. The appellant testified that at the same time, the complainant's mother was continuing to tell him about the problems she and Greg were having with drugs and alcohol and he believed that this was causing the behavioural problems he was seeing in the boys.

- [33] The appellant testified that as a result of his concerns, he met with Ms. S.M. and told her that if she did not take steps to deal seriously with the problems of drugs and alcohol, he would be forced to report the matter to Social Services. He said Ms. S.M. became very agitated and obviously did not appreciate his comments. He also said that Ms. S.M. had asked him to lend her money and he had refused, since he thought it would be spent on alcohol or drugs.
- [34] In cross-examination, the appellant said that on one occasion, after he had given Ms. S.M. some groceries and money, he noticed alcohol of all different kinds at the house. He said he expressed his concern that the money he had given her was spent on alcohol and Ms. S.M. did not deny it. He said that after their last conversation, where Ms. S.M. had asked to borrow \$3,000.00, he had nevertheless invited her and the boys over for Thanksgiving dinner because Greg was still out of town. He said that Ms. S.M. had called shortly before they were due for dinner and told him that a friend had come over and they could no longer come for dinner. The appellant said that was the last he ever heard from Ms. S.M.
- [35] The jury retired to deliberate about 11:00 a.m. The Court reconvened at 8:15 p.m. that evening in response to two questions posed by the jury. The first question was this:

My lady, the jury requests that we might re-exam the videotaped testimony of both [the two complainants]. There are some aspects of this testimony on which we have conflicting interpretations.

- [36] After hearing the submissions of counsel, the trial judge told the jury that the response to the first question would take some time and that the question would be dealt with in the morning. The other question was answered and the jury retired for the night. The following morning, the members of the jury were told that the evidence of both complainants as well as the videotapes would be played for them. The replay of the evidence and the videotapes went on until approximately 3:00 p.m., with a break of about two hours for the jury to have lunch. The trial judge then reinstructed the jury as to how the rule of reasonable doubt applied to the issue of credibility. She made reference to the appellant's denial of any sexual misconduct with the complainants and instructed the jury in accordance with *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397.
- [37] The jury returned to their deliberations at 3:05 p.m. At 9:10 that evening, the jury asked to retire for the evening and to begin again in the morning "as early as convenient". At about 9:30 a.m. the following morning, the jury returned a verdict of guilty on all counts.

III. Grounds of appeal

- (i) Ground one: Did the trial judge err in failing to excise a portion of D.L.'s videotaped statement?

- [38] On the first ground of appeal, the appellant argues that the trial judge erred in law by failing to edit the videotape of D.L. so as to exclude the prejudicial comment or remark he made about the appellant's character.
- [39] The trial judge acceded to the joint request of counsel to delete the first portion of the D.L. videotape although she did so reluctantly. The trial judge's reluctance to delete the first part of the videotape is understandable because seeing the first portion of the tape would have allowed the jury to observe more fully how the interview was conducted by the police and how D.L. responded to general questions about his activities and various other matters.
- [40] Whether the videotape required the further editing defence counsel sought was a matter within the discretion of the trial judge.
- [41] The edited videotape the jury saw begins with Constable Campbell's question about what happened with "Grandpa Bill". The question was a logical place for the videotaped statement to begin. Had Constable Campbell's question and D.L.'s answer been deleted, much of what follows in that stage of the interview would be largely meaningless. Nevertheless, it is the appellant's contention that D.L.'s response to Constable Campbell's question: "Well he's sick, and he's gross, and he got (inaudible)" along with the repetition of the question and the response ought to have been edited out as well.
- [42] To support that contention, the appellant argues that s. 715.1 of the Criminal Code does not make admissible evidence that would otherwise be inadmissible and that the trial judge erred in not excluding, through editing, the inadmissible reference to the appellant's character. The appellant argues that the evidence was, on its face, patently inadmissible, being a crude expression of the young witness's personal revulsion towards the appellant and an equally crude expression of his opinion of the appellant's character.
- [43] The appellant further argues that once the evidence was admitted, the prejudice to the appellant could not be remedied. He submits that any attempt to instruct the jury to ignore the evidence or to warn the jury that the appellant's character was not in issue would only have drawn further attention to the prejudicial and inflammatory comments.
- [44] There is no doubt that a trial judge may excise portions of a videotaped statement where the potential for prejudice through the introduction of the evidence exceeds the probative value of the evidence. Indeed, recognition of the discretion to edit is crucial to the constitutionality of the legislation permitting videotapes to be entered into evidence. There is also no question that, generally speaking, the Crown cannot lead evidence of an accused's bad character unless the accused puts his character in issue or the evidence of the accused's character is also relevant to some other issue.

- [45] The concept of bad character evidence is not generally associated with the offences with which an accused is charged but with some other disreputable conduct in which the accused is alleged to have engaged on other occasions. The danger of evidence of bad character is that it may be misused by the trier of fact as part of the reasoning process, that is, to conclude that because the accused has engaged in other disreputable conduct he is more likely to have committed the offences with which he is charged.
- [46] In this case, D.L.'s response to the police officer's question, when taken in the context in which it was said, cannot reasonably be regarded as evidence of bad character. D.L.'s response to the questions appears to be no more than a preliminary or "wind up" to what he had been asked to relate, that is, what occurred with "Grandpa Bill".
- [47] Although D.L.'s comment appears to lack probative value, it may have been useful to the jury when assessing D.L.'s credibility or the reliability of his evidence. The defence raised in this case was one of concoction and the triers of fact had to consider whether the complainants might have been prompted by their mother to make up a story about the sexual misconduct of the appellant. How D.L. expressed himself when he was interviewed and how he related what had happened with the appellant was of potential importance to the triers of fact in assessing his credibility and the reliability of his evidence.
- [48] In my view, the trial judge did not error in principle when she refused to excise D.L.'s comment. I would not accede to this ground of appeal.
- (ii) Ground two: Did the trial judge err by failing to caution the jury to ignore the express or implied opinions of the police officers as to the credibility of the complainants?
- [49] At trial, defence counsel argued that the videotape of the interview with D.L. ought to be excluded since the tape added nothing to his testimony. Defence counsel went on to argue that if the videotape were to be admitted, the trial judge ought to give a strong warning to the jury, prior to playing the tape, that the police officers' opinions as to D.L.'s credibility or veracity were not to be used to corroborate his testimony. Defence counsel's submission was that the tape gave the clear impression that both police officers and the child's mother believed D.L. and that the jury would use this as evidence of the truth of D.L.'s allegations.
- [50] Defence counsel also objected to the admissibility of the B.L. videotape. Counsel indicated to the trial judge that he had virtually the same arguments with respect to the B.L. videotape as he had to the D.L. tape. The trial judge responded that she did not require the submissions to be made again "if it's along the same lines". The B.L. videotape was ruled admissible with some editing at the end and was shown to the jury.

- [51] On appeal, the appellant does not argue that the video-tapes were inadmissible or that the manner of questioning used by the police officers was inappropriate. The appellant accepts that, given the goals of s. 715.1 of the Criminal Code as enunciated by the Supreme Court of Canada in *R. v. F.(C.C)*, [1997] 3 S.C.R. 1183, 120 C.C.C. (3d) 225, and *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419, 85 C.C.C. (3d) 289, the police conduct of the videotaped interviews of the complainants cannot be faulted.
- [52] The appellant's argument on appeal is that even though the evidence was properly admitted, that did not relieve the trial judge from giving a clear instruction to the jury that, in assessing the videotaped evidence, they must disregard the police officers' statements to the complainants which suggest that they believed the boys. The appellant submits that that is the kind of instruction he asked for but did not get at trial.
- [53] The appellant's argument proceeds from the proposition that a party is not allowed to bolster the complainant's credibility by having another witness comment as to his believability or truthfulness and that where such inadmissible evidence finds its way in front of a jury, the trial judge is required to give a strong instruction that no opinion as to the credibility of the complainant is of any consequence except where they themselves form that opinion after an examination of the evidence as a whole. To support his argument, the appellant referred us to *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.), in which Wood J.A. said at 466:

Finally, it is argued that Constable Logan's statement that he had no problem with the credibility of the complainant, was inadmissible as a form of "oath-helping".

Constable Logan's opinion as to the credibility of the complainant was clearly inadmissible and should never have been offered in evidence. It was, in fact, a gratuitous remark and unresponsive to the question asked, although there can be no doubt that the question invited at least the risk that such an answer would be given.

What was required by way of a remedial response was an immediate instruction to the jury to dis-regard the answer altogether with an explanation to the effect that no opinion on the credibility of the complainant was of any consequence to their deliberations except that which they themselves formed after a consideration of the evidence as a whole.

- [54] The appellant submits that in a jury trial, comments by police officers which suggest they believe the complainant have the potential to be damaging to trial fairness, since the jury is not schooled in the law and is not trained to ignore inadmissible evidence.
- [55] In his supplemental factum, the appellant has referred us to comments or observations of the police officers, particularly in the B.L. videotape, which he contends would have had the effect of bolstering the complainants' credibility. It is the appellant's submission that the trial judge erred in law in failing to warn the jury, either after their initial viewing of the videotapes or as part of her instructions to the jury following their request to see the videotapes again, that they should ignore any comments, remarks, or attitudes expressed by

the police officers which indicated that they believed the complainants. He contends that the trial judge ought to have made it clear to the jury that it was up to them to assess the credibility of the two complainants and that they must ignore the police officers' opinions, express or implied, as to their credibility.

- [56] In the appellant's submission, the lack of direction on a matter going directly to the central issue of the credibility of the complainants resulted in an unfair trial and the only remedy for such an error must be an order for a new trial.
- [57] The respondent's position is that the trial judge was right to refuse to give the warning defence counsel had asked for at trial, for there was nothing said by the police officers in the videotapes which could be considered as improperly bolstering the complainants' credibility.
- [58] I agree with the respondent's submissions on this ground.
- [59] What is at issue in this case is quite unlike the issue that arose in *R. v. Ay*, supra, where a police officer, in response to a question having to do with arranging a second interview with the complainant to gauge her credibility, gratuitously responded that he had no problems with her credibility. Further, the response came after the officer had testified about his impressions of the interview he had had with the complainant, designed to show she was a credible witness. In this case, there was no testimony from the police officers expressing the opinion that the two complainants were telling the truth.
- [60] This case is also unlike *R. v. Llorenz* (2000), 145 C.C.C (3d) 535, 35 C.R. (5th) 70 (Ont. C.A.), to which the appellant also referred us in support of his argument that the jury could be unduly influenced by the belief of police officers as to a complainant's veracity. In *Llorenz*, a psychiatrist offered an opinion, based on a diagnostic tool he had used, that the complainant had been sexually abused, and he conveyed, by his reference to what the complainant had told him over a lengthy physician and patient relationship, that he believed her.
- [61] In the case before us, the police officers did not give opinion evidence concerning the credibility of the complainants. Their participation in the videotaped interviews was limited to eliciting information from the complainants in a sympathetic way while avoiding questions that would suggest answers.
- [62] It is clear from the transcript that the trial judge, after having viewed the videotapes prior to their admission into evidence, considered the question of editing and also the question of whether the type of instruction the appellant requested ought to be given to the jury. Whether a warning or limiting instruction is to be given is a matter of discretion for the trial judge to determine.

[63] I agree with respondent's counsel that sympathetic treatment by an interviewer, designed to encourage a child to speak freely, cannot be a criterion that automatically triggers a duty to give a warning such as the one requested by the appellant in this case. While no automatic rule requiring a caution is appropriate, there may be cases in which such a warning is necessary. With that in mind, I have examined the officers' comments put forward by the appellant as illustrating the need for a caution.

[64] Near the beginning of the interview with D.L., after Constable Campbell has explained that he knows "some of these things are a little embarrassing to talk about", he then goes on to assure D.L. in the following way:

CAMPBELL: ... we're here to help you [D.L.], and we want to make sure that uh, that you can talk to us about things and stuff and uh, we're policemen, and policemen, like we've talked about before, to help people....you don't need to be ashamed or embarrassed. You know why?

A: Why?

CAMPBELL: Cause you're just a nice, young fella, and you've done nothing wrong. Do you know that? You're a nice boy. And we want to just make sure that we can help you, okay?

A: Um hum.

[65] However, the very next thing Constable Campbell said to D.L. was this:

CAMPBELL: So you be just as honest as you can with us okay, we don't want you to make up anything or, or do any, say anything that's not true. We just want you to be honest with us, and tell you what happened okay? Cause we're gonna help you ya. Is that okay?

A: Ya.

[66] The police officers continued to try to elicit from D.L. what had happened and when D.L. answered one of their questions, one or both of the officers would respond by saying "okay" and would then ask for more detail. Further into the interview, D.L. recounted how the appellant had the boys put their hands down his pants to retrieve money or candy. The following appears in the transcript:

A: Like, we both had a turn to put our hands down, it kind of like made us do it cause we like money, and we like candy and we like money and (inaudible) candy. (inaudible) just do that

HARVEY: It's okay.

CAMPBELL: Everybody likes candy, sure.

HARVEY: You're not in any trouble. I just want you to tell me the story as you remember it. Like Cst. Campbell said, we don't want you to make anything up, and you're definitely not in any trouble, we just want you to tell us your story. That's all.

A: Okay.

CAMPBELL: Just show us how you got the money....

[67] Later in the interview, D.L. told the officers how the appellant undid his pants, pulled out his penis, held it and then kissed it. The police officers then asked D.L. how long the appellant held his penis and asked him to demonstrate, using his finger in place of a penis, how the appellant kissed his penis. The officers continued to ask for details of what was said while this was happening, and D.L.'s voice became inaudible. The officers responded to the problem as follows:

HARVEY: We need you to keep your hand away from your mouth so we can hear what you're saying, okay bud?

A: Okay.

CAMPBELL: You're doing good.

HARVEY: Oh, you're doing very good.

[68] The appellant submits that the interview with B.L. was carried out in a similar fashion but the officers did not provide the high level of reassurance and encouragement they did with D.L., probably because he was older and did not require it. According to the appellant, however, there are passages in the transcript which convey the impression that the officers were accepting B.L.'s statements as truthful.

[69] When the passages to which the appellant referred, which I have set out above, are considered in the context of the interview as it progressed, I am unable to agree that what the officers said would convey the impression that they believed D.L. It seems to me that the jury would have understood perfectly well, without the necessity of being told, that all the police officers were doing was attempting to put D.L. at ease so he would be free to tell them what he had to say. Although the police did not challenge D.L. directly, they did probe by asking for details and for demonstrations of how some of the events were said to have occurred. At no point did either of the officers say they were satisfied about the truth of the allegations. With respect, it appears to me that the passages the appellant contends would have the effect of bolstering D.L.'s credibility simply do not carry the weight he suggests.

[70] The trial judge did give specific instructions to the jury on certain evidence, including the evidence in the videotaped statements. With respect to the videotaped statements, this instruction was given:

Section 715.2 [sic] of the Criminal Code makes this video tape evidence admissible. You must decide as the triers of fact whether to accept the evidence and how much weight to give it. Any concerns you may have about the circumstances surrounding the making of the video tape, the truthfulness of the statements made by [D.L.] or [B.L.] in the video tapes, or the overall reliability of the evidence, are matters for you to consider in determining the weight you should give to the videotaped statements.

[71] When that instruction is coupled with the general instructions the trial judge gave about the jury's function as the triers of fact and her instructions on assessing credibility, I think the jury would have understood that it was they, and no one else, who had to determine the credibility of the complainants.

(iii) Ground three: Did the trial judge err by failing to properly caution the jury that a prior statement of a witness, adduced by the Crown in redirect, was not evidence that could corroborate her court testimony?

[72] In the third ground of appeal, the appellant argues that the trial judge erred by failing to properly caution the jury that a prior statement of a witness, adduced by the Crown in redirect, was not evidence that could corroborate her court testimony.

[73] What prompts this ground of appeal are several questions asked in cross-examination of one of the similar fact witnesses, T.M. T.M. confirmed in cross-examination that the incidents she described had occurred on more than one occasion. She was then referred to a statement she had given to the police in which she had been asked:

Question: "How old were you when this was going on?"

Answer: "Around six or seven years old. I just remember once at our house on ..."

[74] T.M. agreed she said that to the police but she was not asked to explain the inconsistency between her prior statement and her testimony in court. Defence counsel suggested to her that "it didn't happen at all" but T.M. did not agree.

[75] Crown counsel then applied to re-examine T.M. in order to put to her that part of her statement to the police that preceded the question and answer which had been read to her by defence counsel. Defence counsel did not object to the re-examination.

[76] In re-examination, Crown counsel read from T.M.'s statement to the police the following questions and answers:

Question: "Is there anything else you'd like to add to this statement?"

Answer: "Just that when I'd reach into his pocket, the money would always be in his shorts. I'd just take it and walk away."

Question: "Where was the money in his shorts?"

Answer: "At the bottom."

Question: "Would you have to touch his penis to get the money?"

Answer: "Yes."

Question: "How old were you when this was going on?"

Answer: "Around six or seven years old. I just remember once at our house on ..."

[77] Crown counsel then asked T.M. the following questions:

[Q] Now, do you remember giving those answers to those questions?

A Yes.

Q And were they true?

[Defence counsel]: Well --

A Yes.

[78] That ended the Crown's re-examination. Defence counsel, who is not counsel on appeal, immediately objected that Crown counsel had deliberately and inappropriately elicited self-serving evidence in the nature of a prior consistent statement. Defence counsel said that while he had no objection to the questions and answers being put to the witness per se, it was quite inappropriate for the Crown to go beyond that and have the witness adopt the statement as truthful. The trial judge responded to this objection by telling the jury:

THE COURT: Well, members of the jury, your decision will have to depend on the evidence you've heard in this court as opposed to any previous statements that may have been given and we will talk more about that when I give you my final instructions.

[79] After the jury was excused, defence counsel again expressed his strong objection to the way Crown counsel had handled the redirect and urged the trial judge to give a clear warning to the jury with respect to the limited use they could make of T.M.'s prior statement.

[80] In my respectful view, this ground is without merit. The Crown did not lead the statement T.M. made to the police. In cross-examination, the defence referred to the statement and, in doing so, created the impression that T.M.'s evidence about the many but unspecified times on which the money "game" was played was a recent fabrication. The law as it relates to this issue is straightforward. Generally, evidence of prior inconsistent statements cannot be led for, until challenged, the assertions of a witness are to be regarded as true. But when the veracity of the witness is impugned, the evidence of a prior consistent statement may be led to support the witness's credibility.

[81] The appellant's complaint is that Crown counsel improperly asked whether the answers in the statement were true. Even if that question were an improper one to ask, I am of the view that the answer was of no practical importance because of the close correspondence between the statement and the witness's testimony.

[82] I would add that had the trial judge instructed the jury as the appellant contends she ought to have, the instruction would likely have served to remind the jury not just that T.M.'s evidence in chief was consistent with her statement but also that her credibility had been attacked by parsing her statement in such a way as to distort it. As that would likely have done more harm than good to the appellant's case, the trial judge's decision to say nothing about the matter in her charge is unobjectionable.

IV. Conclusion

[83] I would dismiss the appeal.

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Mackenzie"

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