

CANADA / JUDGMENT

R. v. Fidgen

2026 NSPC 2

COURT

Nova Scotia Provincial Court

DECIDED

16 January 2026

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R. v. Fidgen

Court

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Docket

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PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Fidgen, 2026 NSPC 2

Date: 20260116

Docket: 8916312

8916313

Registry: Dartmouth

Between:

His Majesty the King

v.

Cole Fidgen

Restriction on Publication: Restriction on Publication: Criminal Code s. 486.4

Any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Judge:

The Honourable Judge Timothy G. Daley

Heard:

December 12, 2025, in Dartmouth, Nova Scotia

Decision:

January 16, 2026

Charge:

Sections 151, 271, 129 and 733.1(1) of the Criminal Code, RSC 1985, c C-46

Counsel:

Michael Blanchard, for the Crown

Drew Rogers, for the Accused

By the Court:

Introduction

[1] This is the trial decision respecting Cole Fidgen who was alleged, on or about the 16th day of April 2025, in Dartmouth, Nova Scotia, to have committed the following offences under the Criminal Code, RSC 1985, c C-46 [Code]:

1. For a sexual purpose touch I.G., a person under the age of 16 years directly with the part of his body, to wit, his hand, contrary to section 151; and
2. That he at the same time and place aforesaid, did unlawfully commit a sexual assault on I. G., contrary to section 271; and
3. That he at the same time and place aforesaid, did unlawfully and willfully resist Constable James Anderson, a peace officer, while engaged in the lawful execution of his duty, contrary to section 129 (a); and

4. That he at the same time and place aforesaid, while bound by a Probation Order issued on the 24th day of January 2025, did wilfully fail without reasonable excuse to comply with such order, to wit, "keep the peace and be of good behaviour", contrary to section 733.1 (1).

The Evidence

- [2] On the day of trial, Mr. Fidgen entered guilty pleas on the third and fourth charges, specifically resisting arrest and breach of probation. As a result, the only matters for trial are the first two charges of sexual interference and sexual assault.
- [3] There is also agreement that the essential elements of date, time, jurisdiction, identity of the accused, identity of the complainant and that the complainant, at the time, was under the age of 16 years are proven beyond a reasonable doubt.
- [4] Also admitted into evidence by consent were video recordings made at the location of the alleged offences and a series of photographs from those recordings.
- [5] There was one witness in the matter, Scott Mallon, a loss prevention employee with the Winners store in the Mic Mac Mall in Dartmouth. He testified that on the date of the alleged offences he was working in that capacity and had done so for 13 years.
- [6] He testified that he was familiar with the placement and operation of all the cameras in the store on that day. Specifically, there were six "feeds" of videos, all coordinated as to time and date, which he could observe from his office.
- [7] The videos were played and Mr. Mallon confirmed that the first video was of the entrance to the store and showed Mr. Fidgen entering the store wearing an orange hoodie, blue jeans, and a backpack.
- [8] Mr. Mallon testified that the next video was taken from a camera located approximately 40 feet to the left of the entrance and shows the complainant entering the frame with her mother and brother. On the same video, Mr. Fidgen is seen observing the complainant and looks back at her. She walks down the clothing aisled with her mother and brother.
- [9] On the same video, the complainant can be seen a few seconds later leaving her mother who remains in the clothing aisle and the complainant appears to head to the toy area with her brother.
- [10] On the same video, and approximately one minute later, Mr. Fidgen can be seen walking down the opposite side of the clothing aisle where the children's mother was still standing.
- [11] Mr. Mallon testified that the next video was taken from a camera positioned to observe an area which included a toy section of the store. During this time, Mr. Mallon was operating the camera, changing its field of view, and he confirmed that by then a police officer was in his office with him to observe Mr. Fidgen.

- [12] In this video, the complainant and her brother can be seen entering the toy aisle and looking at toys. Approximately 30 seconds later, Mr. Fidgen is seen entering the same toy area of the store and looks towards the complainant. He walks past the complainant a few seconds later, stops, removes his phone and appears to look at the phone. It is not clear that he directed the phone's camera at the complainant.
- [13] Mr. Fidgen then walks past the complainant who had her back to him and was looking at toys. The aisle in which they were observed was wide enough for him to pass by her without touching her. Mr. Fidgen looks back at the complainant and her brother from the end of the aisle.
- [14] Mr. Fidgen then returns to the same area a few seconds later and walks by the complainant. It is in this moment, as he walked by the complainant, that he touches the complainant's buttocks with the backside of his right hand. After he passes her, the complainant looks at him.
- [15] Mr. Fidgen then leaves the area and in further videos from cameras located through the store Mr. Fidgen is seen running from the store with the police officer pursuing him. Shortly thereafter, Mr. Fidgen is seen re-entering the store in handcuffs in the custody of the police officer and in the company of Mr. Mallon.
- [16] In cross-examination, Mr. Mallon confirmed there were other customers in the store throughout this time, and that the aisle occupied by the complainant and Mr. Fidgen when the touching occurred was visible from other areas of the store.
- [17] He further confirmed that Mr. Fidgen walked by the complainant once and made no contact. It was the second time he passed her that Mr. Fidgen moved his hand in a deliberate motion to touch her buttocks.
- [18] Mr. Mallon agreed that Mr. Fidgen was not looking at the complainant. The touch was extremely brief, it was with the back of his hand and there was no grabbing, squeezing, or any other activity by Mr. Fidgen. He also agreed that Mr. Fidgen had a neutral facial expression and did not slow down. He agreed that there appeared to be nothing said by Mr. Fidgen to the complainant.
- [19] It was Mr. Mallon's evidence in cross-examination that the width of the aisle is 4 to 4 1/2 feet and there was no shortage of space for Mr. Fidgen to walk by the complainant without touching her.
- [20] Respecting any state of arousal of Mr. Fidgen, Mr. Mallon could not say.
- [21] He did confirm that Mr. Fidgen's backpack contained a collapsible knife.

Summary of the Law

[22] In this criminal trial the Crown bears the burden of establishing proof of every element of the offence beyond a reasonable doubt. The Supreme Court of Canada decision of *R. v. Lifchis*, [1997] 3 SCR 320 provides direction on this issue as follows:

[36] Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[23] In *R. v. Starr*, (2000) 2 SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities. Mere probability of guilt is never enough in a criminal matter.

[24] Mr. Fidgen is charged with two offences, the first of which is sexual interference as follows:

151. Sexual interference Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
 - (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[25] He is also charged with sexual assault. Sections 265 and 266 of the Criminal Code describe the offence of assault:

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly...

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[26] The offence of sexual assault is created by s. 271, as follows:

271. Sexual assault Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[27] The essential elements of the offence of sexual interference and sexual assault are summarized in the decision of *R. v. T.K.B.*, 2021 NSSC 221 when Justice Norton of the Nova Scotia Supreme Court wrote as follows:

[48] The elements of a charge under s. 151 were summarized by the Nova Scotia Court of Appeal in *R. v. J.D.C.*, 2018 NSCA 5: “that the complainant was less than 16 years old at the time; that the appellant intentionally touched the complainant either directly or indirectly...; and that the touching was for a sexual purpose” (para. 32).

[49] Touching involves intentional physical contact with any part of the complainant’s body and may be direct, for example by the accused’s hand, or indirect, for example by touching with an object. Force is not required but accidental touching is not enough. It does not matter if the complainant agreed to the touching.

[50] In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, reviewed the essential elements of sexual assault:

A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the actus reus and had the necessary mens rea. A person commits the actus reus of sexual assault “if he touches another person in a sexual way without her consent” (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The mens rea consists of the “intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched” (*R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, at para. 42).

[51] Because the complainant was under the age of 16 years at the time of the alleged incidents, consent is not an issue: Section 150.1 of the Criminal Code.

[52] The Crown must prove beyond a reasonable doubt that the touching was done for a sexual purpose or in a sexual manner. This was described in *Ewanchuk* as being done “in the circumstances of a sexual nature, such that the sexual integrity of the victim is violated” (para 24).

[53] In *R. v. Chase*, 1987 CanLII 23 (SCC), [1987] 2 S.C.R. 293 the Court provided further instruction on this question of sexual or carnal context:

11 Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault... which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?"... The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant... The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

[54] The interaction of charges of sexual interference and sexual assault was recently considered by the Supreme Court of Canada in *R. v. R.V.*, 2021 SCC 10. Justice Moldaver, writing for the majority, was addressing this issue in the context of inconsistent jury verdicts. At paras 51 to 53 he said:

[51] Sections 151, 152 and 271 of the Criminal Code use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force intentionally to another person, directly or indirectly, in circumstances of a sexual nature (Criminal Code, s. 265(1) (a); *R. v. Chase*, 1987 CanLII 23 (SCC), [1987] 2 S.C.R. 293, at p. 302; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, at para. 24).

[52] The word “force” is commonly understood to mean physical strength, “violence, compulsion, or constraint exerted upon or against a person” (*R. v. Barton*, 2017 ABCA 216, 55 Alta. L.R. (6th) 1, at para. 202, aff’d 2019 SCC 33, citing Merriam-Webster Dictionary (online)). However, as a legal term of art, the element of force has been interpreted to include any form of touching (*R. v. Cuerrier*, 1998 CanLII 796 (SCC), [1998] 2 S.C.R. 371, at para. 10; *Ewanchuk*, at paras. 23-25; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23).

Put simply, although the words “touch” or “touching” and “force” are distinct, in some circumstances, including those that apply here, they mean the same thing in law.

Analysis and Decision

[28] With respect to the charge of sexual interference, there is agreement that the Crown has proven the age of the complainant being under 16 years of age and thus consent is not an available defence.

Noting the comments of Justice Norton in *R. v. T.K.B.*, supra, I must next be satisfied that the touching involved physical contact with any part of the complainant's body. Force is not required and accidental touching is not enough.

[29] In this case, I have carefully and repeatedly reviewed the video in evidence. I first find that the aisle in which the complainant and Mr. Fidgen were located when the touching took place was wide enough by significant margin to allow him to pass by her without any contact between them.

[30] When he did walk past her and touched her, I find that he intentionally reached out to touch her buttocks with the back of his right hand. There is no indication prior to that motion that he was moving his hand in that way. There is no indication that he stumbled or was in any other way attempting to steady himself or otherwise had a reason to move his hand as he did. Put simply, I find that the Crown has proven beyond a reasonable doubt that Mr. Fidgen did reach out with intent to touch her buttocks and succeeded.

[31] I must also be satisfied beyond a reasonable doubt that the touch was made for a sexual purpose. As noted in *Ewanchuk*, supra the touch must be "in the circumstances of a sexual nature, such that the sexual integrity of the victim is violated."

[32] This test is to be applied on an objective standard. In doing so, I find that the touch was made by the back of Mr. Fidgen's hand to the buttocks of the complainant in a deliberate fashion. His arm was not bent such that he could touch her back or any other part of her body. I find that a reasonable person would conclude that he touched the complainant with deliberate intent.

[33] I further find that a reasonable person would conclude that the touch to the buttocks of the complainant was of a sexual nature. I arrived at this finding based upon the pattern of behaviour of Mr. Fidgen as he walked through the store, observing the complainant, following her and her brother into the toy area, stopping and turning around to remove his phone for no apparent purpose, walking past her once and then a second time when the touch occurred.

[34] While I accept that there is no evidence of sexual gratification or arousal on the part of Mr. Fidgen, I find that there is simply no other explanation for his action, and the Crown has proved the sexual intent of the touch beyond a reasonable doubt.

- [35] With respect to the essential elements of the offence sexual assault, I find that the actus reus has been proven beyond reasonable doubt. The intentional touching of the buttocks of the complainant by Mr. Fidgen was done so in a sexual manner.
- [36] As to the mens rea of the offence, I find that the Crown has proved this as well beyond a reasonable doubt. I have already found that there was a clear intention to touch the complainant based on the intentional motion of Mr. Fidgen's right hand and contact with the complainant's buttocks. As a complainant was under the age of 16 years at the time, consent is not an issue in the matter.
- [37] I arrive at the conclusion that the mens rea has been proven beyond reasonable doubt, considering all the circumstances of the events of that day. I find that the intention of Mr. Fidgen was to touch the complainant on the buttocks in the context of a sexual or carnal assault and would be found to be so by any reasonable person observing the same video.
- [38] I make this finding acknowledging that there was no verbal interaction between the complainant and Mr. Fidgen, the contact was brief and took place in an easily visible area of the store. None of this leads to any reasonable doubt in my mind.
- [39] Verbal interaction is not required. A long touch, grope, or any other physical assault is not required for either of the offences to be proven. The fact that it occurred in a visible area of the store is not sufficient to raise reasonable doubt. I find that Mr. Fidgen took an opportunity that presented itself when the complainant was without her mother and no other adult was nearby. He was prepared to take the risk of touching without knowing that he was being observed by a police officer and Mr. Mallon at that very moment.
- [40] I therefore conclude that the Crown has proven the essential elements of both offences, and I find Mr. Fidgen guilty of sexual interference and sexual assault.

Timothy Daley, JPC

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