WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
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> (a) any of the following offences;
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> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
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> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
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> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
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> (b) on application made by the victim, the prosecutor or any such witness, make the order.
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> (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim

shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.A., 2023 ONCA 174
DATE: 20230313
DOCKET: C70055

Simmons, Paciocco and Zarnett JJ.A.

BETWEEN

His Majesty the King

Respondent

and

A.A.

Appellant

Eric Uhlmann, for the appellant

Alysa Holmes, for the respondent

Heard: February 10, 2023

On appeal from the conviction entered on October 19, 2021, and the sentence imposed on October 28, 2021 by Justice A. Thomas McKay of the Ontario Court of Justice, sitting without a jury.

REASONS FOR DECISION

[1] The appellant appeals from convictions for sexual assault, assault with a weapon, unlawful confinement, uttering threats and two counts of breach of recognizance[1]. We dismissed the appeal for reasons to follow. These are our reasons.

[2] The charges arose out of events that occurred on November 4, 2019. Shortly after 3 a.m., the 17-year-old complainant met up with the 19-year-old appellant and a mutual male friend at a McDonald's restaurant. The three walked to a residential apartment tower where they socialized in the lobby. At some point, the appellant and the mutual male friend started physically fighting. After the fight, the appellant was angry, called the complainant names, took her cell phone and purse, and left the building. The complainant also left the building and started walking down the street. Soon after, the appellant joined her, apologized, returned her belongings and invited her to a nearby apartment so she could arrange a way home.

[3] The apartment had a common area, a kitchen and five individual units, each consisting of a bedroom and a bathroom. A friend of the appellant's, Mr. Henriques, occupied one of the units. He and his girlfriend, Ms. Lloyd, were asleep in his bedroom when the complainant and the appellant arrived at the apartment.

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[1] At the opening of trial, the appellant pleaded guilty to the breach count alleging a curfew violation.

[4] According to the complainant, soon after they arrived in the apartment's common area, the appellant took her cell phone from her again and sexually assaulted her. Once the assault was over, the complainant put on her clothes and tried to leave the apartment, but the appellant blocked her way. The complainant picked up a purple knife from the kitchen counter and asked the appellant to let her leave. He grabbed the purple knife, pulled a small, white knife from his pocket, held both knives to her stomach, and threatened to stab her. The complainant managed to get around him and out the apartment door.

[5] The complainant testified that, as she went down the hallway outside the apartment, she tried knocking on doors to seek help. One person opened their door but would not help. The complainant went downstairs to the lobby area where she saw a woman in the laundry room who called 911. Police arrived shortly after the call.

[6] A police officer testified that he attended the apartment and that about 20 minutes after arriving he found the appellant standing in a walk-in closet in one of the bedrooms, facing the wall with his back to the door.

[7] Ms. Lloyd testified at trial and confirmed that she was awakened by loud, hysterical crying at around 9 a.m. She sent Mr. Henriques to the common area to investigate. He told her the appellant was there with a girl. Neither wanted to get

involved. Ms. Lloyd said the crying continued until they heard a door slam. She did not hear any calls for help or for the police to be called.

[8] The appellant testified at trial and asserted that the complainant initiated the sexual contact, which was all consensual. However, when he refused to return the complainant's cell phone after they had intercourse, she threatened him with a knife. He persuaded her to give him the knife and then escorted her out of the apartment.

[9] Both the complainant and the appellant confirmed that Mr. Henriques[2] came into the common area at least once during the sexual activity and appeared to congratulate the appellant. The complainant testified that she screamed for him to call the police. Mr. Henriques was not called to give evidence at trial.

[10] The trial judge found the complainant's evidence internally consistent "in its major elements." Further, he found that while it suggested some inconsistency, overall, the surveillance video of the complainant going down the hallway after leaving the apartment was consistent with her evidence, as was Ms. Lloyd's evidence, and the laundry room video showing the complainant's emotional state.

[11] The trial judge rejected the appellant's evidence, holding it was "completely untrustworthy" and did not raise a reasonable doubt, largely because the

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[2] The complainant did not know Mr. Henriques at the time but testified that a man came into the common area during the sexual activity.

appellant's evolving statements to the police concerning the events at issue demonstrated he had lied to the police, a fact which he admitted. Based on a consideration of the whole of the evidence, the trial judge was satisfied the Crown had proven its case beyond a reasonable doubt.

[12] On appeal, the appellant submitted that the trial judge's reasons were insufficient in several respects. While acknowledging that, considered individually, none of such insufficiencies gives rise to reversible error, he argued that, considered cumulatively, the insufficiencies in the trial judge's reasons require a new trial.

[13] We did not accept these submissions.

[14] The appellant's first argument was that the trial judge's reasons concerning "gaps" in the complainant's testimony were insufficient.

[15] In his reasons, the trial judge noted that the complainant was unable to explain "in any detail" how she got around the appellant and out the apartment door when he was holding two knives to her stomach. However, the trial judge stated that he was "mindful of the fact that … the events described by [the complainant] would have resulted in significant trauma that could affect her memory as to details such as that."

[16] The appellant argued that this reasoning amounted to nothing more than vague speculation. Moreover, he asserted that the missing details in the

complainant’s evidence could not be described as relating to peripheral matters. Rather, they were directly relevant to the elements of both the assault with a weapon and unlawful confinement offences. Finally, the appellant asserted that, if permissible, the trial judge’s finding concerning the complainant’s memory issues cast doubt on her overall reliability, a factor the trial judge failed to address in his reasons.

[17] We did not accept this submission. It is well accepted that peripheral details of a traumatic event can be difficult to recall and accurately describe at a later date: see, for example, *R. v. G.M.C.*, 2022 ONCA 2, at para. 38. The trial judge was clearly alive to the complainant's inability to recall certain specific details of the events. However, as the trier of fact, it was open to him to accept the core of the complainant's testimony, which proved the elements of the offences, while acknowledging that she could not explain all the precise details of how she escaped. The impact of this inability, to the extent that it existed, on both the complainant’s overall reliability and credibility was entirely for the trial judge to assess. We discerned no palpable and overriding error in his reasoning.

[18] The appellant’s second argument was that the trial judge's reasons did not adequately address the absence of evidence from Mr. Henriques. As already noted, both the complainant and the appellant testified that Mr. Henriques came to the common area while the sexual activity was underway. In his reasons, the trial judge declined to draw an adverse inference from the Crown's failure to call

Mr. Henriques as a witness. However, the appellant submitted on appeal that the trial judge erred by failing to explain whether the absence of this evidence gave rise to a reasonable doubt, a matter he claimed was raised by defence counsel at trial in closing submissions.

[19] We rejected this submission. The only issue at trial relating to Mr. Henriques' potential evidence was whether the trial judge should draw an adverse inference from the Crown's failure to call him as a witness. The trial judge rejected defence counsel's request that he draw an adverse inference and his decision in that regard is not challenged on appeal.

[20] Contrary to the appellant's submissions on appeal, there was no live issue at trial concerning whether an absence of evidence on any of the elements of any of the offences charged should give rise to a reasonable doubt. Save for the breach of recognizance offences, which required proof of the recognizances from another source, the complainant gave direct evidence concerning all of the elements of all of the offences charged. There was no requirement for corroboration in relation to any of the offences. In any event, as noted above, in his reasons, the trial judge found that other evidence supported the complainant's testimony. Ultimately, the trial judge was satisfied based on his review of the whole of the evidence that the Crown had proven its case beyond a reasonable doubt. The fact that Mr. Henriques was not called as a witness did not give rise to an absence of evidence with respect to any of the elements of any of the offences.

[21] The appellant's third argument on appeal was that the trial judge's reasons were insufficient because he failed to instruct himself on the applicable legal principles, including *W.(D.)*[3], the presumption of innocence, and reasonable doubt. The appellant submitted that, when considered in combination with the other issues he identified, this failure makes it impossible to discern whether the trial judge properly applied the law in evaluating the evidence and absence of evidence in this case.

[22] We did not accept this submission. For the reasons we have explained, the appellant's other arguments lacked merit. Moreover, as the appellant acknowledged, trial judges are presumed to know the law and do not commit reversible error simply by failing to mention an applicable legal principle. Finally, we observe that while the trial judge did not specifically mention *W.(D.)* in his reasons, a fair reading of his reasons demonstrates that he applied its principles in concluding that the Crown had proved its case beyond a reasonable doubt.

[23] Based on the foregoing reasons, we dismissed the conviction appeal.

[24] We note that, in his notice of appeal, the appellant stated he was seeking leave to appeal sentence. However, he advanced no grounds for obtaining leave

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[3] *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

to appeal sentence in his notice of appeal, his appeal factum or in his oral submissions on appeal. Leave to appeal sentence is denied.

"Janet Simmons J.A."
"David M. Paciocco J.A."
B. Zarnett J.A."