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R. v. D.F., 2024 ONSC 1247

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CITATION: R. v. D.F., 2024 ONSC 1247
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ONTARIO

SUPERIOR COURT OF JUSTICE

2024 ONSC 1247 (CanLII)

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	*Stuart Rothman and Jessica Cheng,* for the Crown
– and –	)	
	)	
D.F.	)	*Lydia Riva and Elysia Nocida,* for D.F.
	)	
	)	
	)	
	)	**HEARD:** January 15, 17, 18, 19, 22, 23, 24, 25, 26 and 29, 2024
	)	

NON-PUBLICATION ORDER UNDER S. 486.4 OF THE *CRIMINAL CODE*

AN ORDER IS IN PLACE DIRECTING THAT ANY INFORMATION THAT COULD IDENTIFY THE VICTIM OR WITNESSES SHALL NOT BE PUBLISHED IN ANY DOCUMENT OR BROADCAST OR TRANSMITTED IN ANY WAY

PINTO J.

REASONS FOR JUDGMENT

Overview

[1] This ten-day judge-alone trial considered whether the defendant, D.F., physically and sexually assaulted C.L., his former partner, over the course of many years. D.F. plead not guilty to all 28 counts on a single indictment, which contained offences that were alleged to have occurred between 2008 and 2020.

[2] C.L., the complainant, met D.F. when she was a teenager and he was in his twenties. D.F. and C.L. never married. They lived together for a number of years. They separated in 2017. They have two children: J., now 13, born in October 2010; and M., now 10, born in April 2013.

[3] C.L. testified that D.F. repeatedly physically and sexually assaulted her. She described roughly 17 incidents of abuse and indicated that more were undocumented. D.F. denied that he had ever abused C.L. He claims that C.L. fabricated the incidents in the context of their

family law dispute. He testified that once C.L. found out that he had a new partner in September 2019, she started claiming abuse.

[4] C.L. filed an application in family court in October 2020 seeking sole custody,[1] child support and a restraining order against D.F. She also alleged that D.F. sexually abused their older child. The latter allegations are the subject of a separate criminal proceeding that is not before me.

[5] At trial, C.L. and her mother, A.L., testified on behalf of the Crown. D.F. and his current partner, A.D., testified for the Defence.

[6] For the reasons that follow, I find D.F. not guilty of any of the offences charged. There were numerous inconsistencies and contradictions in C.L.'s evidence. Her testimony was neither credible, nor reliable. I find that she manipulated text messages to make it look as if D.F. admitted to the allegations when he did not do so. This was not a case where I was not sure whom to believe. I believe D.F.'s overall account of what transpired and he must be acquitted.

Facts not in dispute

[7] I find it beneficial to summarize certain facts that are not in dispute.

[8] C.L. and D.F. met around the time of the Caribana festival. She says they met in 2008, but he says it was 2009. I take judicial notice of the fact that Caribana is an annual Caribbean cultural festival that takes place in Toronto during the first long weekend in August.

[9] At the time, D.F. was living in a one-room apartment in the basement of a rooming house at 1285 Jane Street in Toronto.

[10] The couple started living together when C.L. was pregnant with their first child in 2010. They have two sons, born in 2010 and 2013.

[11] The couple moved residences frequently over the years.

[12] They separated on or around March 31, 2017.

[13] After separation, C.L. was the children's primary decision-making parent. D.F. had parenting time (formerly called access) with the two children based on an informal arrangement with C.L. and not subject to a separation agreement or court order. D.F. attended at C.L.'s apartment building on Tuesdays to pick up the boys after school, and dropped them off on Thursdays. The pick-ups and drop offs were by the elevator on the floor of C.L.'s apartment.

[14] The Crown presented a video and separate 911 audio recording of an incident that took place on Tuesday, February 11, 2020. This incident, discussed in greater detail below, led to

[1] Under changes to family law legislation including the *Family Law Act*, R.S.O. 1990, c. F. 3, effective November 20, 2020, "custody" is now called "decision-making responsibility" and "access" is called "parenting time."

2024 ONSC 1247 (CanLII)

D.F. being charged criminally. C.L. gave two statements to police, one on February 11, 2020, the other almost a year later on February 9, 2021.

Summary of C.L.'s evidence about the physical and sexual assaults

[15] C.L. testified that she was physically and sexually assaulted by D.F. soon after they met and throughout their relationship. She claimed that she was 16 when she met D.F., who was 26 years old at the time. She denied being attracted to D.F. and testified that, at their first meeting, he tricked her into getting her telephone number by claiming to have lost his phone so she would give him her phone. He called her and they eventually started dating.

First Sexual Assault in 2008 at 1285 Jane Street

[16] She testified that the first sexual assault happened when she was 16 years old. She had slipped out of D.F.'s apartment after a visit. He convinced her to return and they got into an argument about her leaving. She testified that he blocked the door and verbally abused her. Then he punched and grabbed her. He came to where she was on the bed, pulled her pants down and raped her.[2] She was in shock. She did not remember the conversation thereafter. She believes this incident occurred around August or September 2008. She was still living with her mother at the time.

[17] She started going over more often to D.F.'s residence, and spent weekend nights at his place. She learned that she was pregnant as a result of the sexual assault. D.F. told her that, due to their age difference, he would get into trouble if she continued with the pregnancy, and that she should have an abortion. She proceeded with the abortion.

[18] She testified that D.F.'s violence against her occurred both before and after the abortion. It seemed that if anything went wrong, D.F. hit, slapped and punched her.

Second Sexual Assault

[19] By this time, D.F. had moved to another basement apartment behind a 7-11 store.

[20] C.L. testified that another sexual assault occurred likely in the month of November 2008, following an argument where D.F. was looking through her phone and asking her about the identity of a specific caller. D.F. was holding her phone above her head so that she could not reach it. He shoved her and she hit her head on the back of a cabinet. She blacked out for a moment, but came to. She had a lump on the back of her head but did not seek any medical attention. D.F. told her not to seek help as "they would make him go to jail." She testified that D.F. raped her that night.

Forced Oral Sex in Park

[21] C.L. testified about another sexual assault that allegedly happened in 2008. She and D.F. were at a friend's place, but the friend was not present. D.F. was trying to put his hands down her pants and into her underwear. She was resisting, saying that someone was going to

[2] C.L. used the word "rape" during her testimony which I understand to mean "non-consensual vaginal sexual intercourse". Where C.L. testified to being anally raped, I have said so.

2024 ONSC 1247 (CanLII)

come. They got into an argument. She left the apartment, with D.F. following behind her. They found themselves in a children's park. It was late in the evening. She was on a merry-go-round. D.F. took his penis out of his pants, forced her to perform oral sex and ejaculated in her mouth. She estimated the sex act lasted around five minutes. Afterwards, she got up, went to a bus stop, and took the bus home.

Forcible Confinements in an Armoire

[22] In examination in chief, she testified that D.F. forced her into an armoire in their residence and prevented her from coming out. In cross-examination, she testified that, in fact, there were three occasions when D.F. confined her in the armoire.

[23] They were arguing the first time she was confined. He pushed her. She fell back, got up and tried to get past him. He shoved her into the armoire and eventually completely locked it. Her whole body was trapped inside. In examination in chief, she testified that she was confined for hours. D.F. used a lock and/or a fashion chain from his trousers, or his body weight to lock her within.

[24] She testified that the second and third time she was confined for a couple of minutes, maybe 10, 15 or 20 minutes.

Assault and Sexual Assault with a Dildo

[25] She testified that she was pregnant with the couple's first child at the time of this assault. They argued again. D.F. struck her with a plastic dildo and then rammed it into her vagina. He then forcibly had intercourse with her. She had a pre-natal appointment a week after this incident but did not bring up the incident at the appointment. She testified that she was afraid of D.F. and believed that he would kill her one day.

Assault on the Balcony (25 Stong Court)

[26] She testified that, at a time when she was still pregnant with the couple's first child, they had returned from a pre-natal appointment when he assaulted her. They were arguing about D.F. talking to his ex-girlfriend and ended up on the balcony of their apartment at 25 Stong Court, a high-rise building. She recalls the apartment being closer to the top of a 16 to 20-storey building. The residence was a two-bedroom apartment. D.F. pushed her against the metal bar of the balcony. She begged him to stop as she felt like she was going to fall off the balcony. He was laughing. Eventually he stopped. She re-entered the apartment and went into a bedroom. D.F. grabbed her by the collar and yanked her. The necklace she was wearing was damaged. She ended upon on the bed. He put his knees against her and raped her. She bled vaginally.

Cooking Incidents

[27] She testified that D.F. threw a plate at her which hit her after he complained of an undercooked hotdog. She got hurt with cuts and bruises. D.F. suggested that she was trying to poison him. He then punched her with a closed fist to the top front of her head and in the mouth. The argument shifted from the food to a dispute about the boyfriend she had when she was 15.

2024 ONSC 1247 (CanLII)

[28] In another cooking related incident, she testified that D.F. complained about chicken not being cooked properly and the counters not being wiped down. D.F. grabbed her head, rammed it down, and slid it across the kitchen counter. D.F. punched her and spat on her face. She almost fell on her stomach, but quickly turned as she did not want to fall on her belly as she was pregnant.

2024 ONSC 1247 (CanLII)

Choking Incident on Bathroom Floor

[29] She testified that there was an occasion during her second pregnancy when she was not feeling well. She asked D.F. to get her some asthma medication (i.e. a puffer) but he refused to do so. She was in a washroom when an argument ensued. D.F. became enraged and ended up choking her very badly on the floor of the bathroom. She could not breathe at all. She somehow ended up in a hospital and woke after being in a coma for seven days. She wanted to stay longer in the hospital but D.F. coerced her into discharging herself early. She recalls that this choking incident happened in 2012, in the same apartment as the two cooking related incidents.

[30] She acknowledged that she has asthma and had what appeared to be an asthma attack. She believes the argument was related to D.F. believing that she was calling a man to get her asthma medication when, in reality, she was calling her mother. She remembers, after the choking, D.F. pacing back and forth and "freaking out" outside the washroom door. She remembers crawling but does not recall how she ended up at the hospital. She suspects her mother or someone else may have called an ambulance. She believes she completely lost consciousness when the doctors intubated her through an incision in her throat.

[31] She testified, concerning the choking, that D.F.'s thumbs were pressing directly down the middle of her throat, like he was trying to kill her. As a result, she had an outline around her neck.

[32] She recalled waking up at the hospital and a pastor being present who told her that he was reading her the "Rites of Passage", which I interpret to be a reference to the "Last Rites". D.F. was just outside the hospital room.

[33] She testified that, ever since the choking incident, she has a lot of coughing and throat sensitivity, and gets lightheaded very easily.

[34] Notwithstanding this choking incident, she continued to live with D.F. Their second son was born in April 2013.

Sexual Assault Three Days After Giving Birth to Second Child

[35] She moved with D.F. to a four-storey building on Tretheway Drive in Toronto around 2013. She testified that, three days after giving birth, D.F. raped her. She had been advised to avoid sexual intercourse shortly after giving birth, but D.F. did not care. She was wearing shorts and was sitting on a futon in the living room. D.F. approached her, pulled her pants down and penetrated her anally and then vaginally without her consent. He accused her of trying to seduce him because she was wearing shorts. She experienced bleeding from her anus and vagina after the assault and, to this day, still gets a throbbing version of the pain that she originally experienced. She received no medical attention after the assault. She testified that

D.F. threatened to kill her. She believes that, although she had a follow-up appointment with a physician after having just given birth, she did not attend the appointment because she feared that the physician would question her and determine that something was not right about her, gynecologically.

Assaults at Beaumonde Heights Drive, Etobicoke

[36] She moved with D.F. to a house on Beaumonde Heights Drive in Etobicoke somewhere towards the end of 2015, possibly 2016. She was sleeping on her back. D.F. was beside her. He flipped on to her and then flipped her over and anally penetrated her. She was screaming, "don't do this" which woke up their youngest son. D.F. ejaculated and then went to smoke. She cleaned herself up and went to sit down in the living room.

[37] On another occasion when D.F. choked her, she pretended to call 911 and then D.F. called 911 to check if someone had called from their residence. Police ended up attending the residence but she did not tell them what happened. The police alerted the Children's Aid Society (CAS).

[38] After CAS left, D.F. threatened her with a knife warning her that if she contacted the police again she was going to lose her children and her life. The argument continued and culminated in D.F. raping her on the sofa in the living room. She asked him to stop but he did not. This incident happened very late, around 1 a.m.

[39] On yet another occasion, the neighbours who lived on the floor above, became involved in a dispute. The house had a shared laundry room in the basement. One of C.L.'s items of clothing was in the laundry. The neighbours consisted of "two girls and an older man". The girls were in their twenties and the man in his forties. One girl was from Nigeria, the other from somewhere in Africa. The older man was from Jamaica. The neighbours and D.F. started ganging up on her. D.F. got a pouch from a closet in the laundry room and pulled out a gun and pointed it at her from about a foot away. It was a small black gun. The neighbours were almost adding fuel to the fire. D.F. complained that she was not a good woman, and she did not cook and clean like he wanted her to. He asked, "do you want me to shoot you?" She felt sick to her stomach.

[40] The incident ended when the older gentlemen intervened and diffused the argument. She did not call police because she was terrified of D.F.

Assaults at Residence on Amaron Avenue

[41] They rented part of a three-bedroom house on Amaron Avenue in Toronto. Until then, D.F. had not wanted her to work as he did not want her to leave the home. However, their rent was higher. She took up a job at a Samsung call centre.

[42] An argument broke out after she returned from work. D.F. accused her of not really being at work and instead being out with a man. It was her "time of the month", and she did not have any sanitary pads. She asked D.F. to buy her some and he responded with, "why don't you ask the guy you were out with?" D.F. then punched her in the mouth causing her to bite her lip and her braces to snap. This incident happened in 2017.

2024 ONSC 1247 (CanLII)

[43] Regarding another incident, D.F. had a friend who shared the same birthday as her in April. Their youngest child's birthday was two days earlier. D.F.'s friend drove the family to Ripley's Aquarium. Upon returning home, D.F. accused her of wanting his friend just because she had wished him a happy birthday. An argument ensued. D.F. punched her in the mouth. This happened in the area just past the front door. The children were in the sunroom at the time. She "kind of crawled" into the front of the kitchen. He kicked her and told her to stand up. He started complaining about various random things, like the boyfriend she had when she was 15. He then went to retrieve his handgun. She ran to get her kids from the sunroom. D.F. blocked her from leaving as he was standing in the doorway with the gun.

[44] The issue that D.F. was complaining about was that she still wanted her ex-boyfriend. The whole argument lasted around two hours from the time they returned from the aquarium. D.F. placed the gun on a wooden column that separated the door from the living room. He pushed her into a glass side table which caused the glass table to break. She injured her right hand, causing it to gush blood. She received other cuts and hurt her hip. Once again, she did not contact the police as she was afraid of D.F.

Sexual Assault on Christmas Day 2018

[45] In 2017, the couple separated when D.F. abruptly moved out of the Amaron residence, which was experiencing a number of flooding and sewage issues. The landlord turned off the water completely. C.L. did not have first and last month's rent to move elsewhere because D.F. kept all the money. She packed up the children and moved in with a friend and then with her mother for a while. Then she moved with the children to an apartment at 2757 Kipling Avenue.

[46] She testified that, notwithstanding all the abuse, she did not see D.F. as a terrible father at the time, and wanted the children to have a relationship with him.

[47] On Christmas Day 2018, D.F. came over to drop off gifts for the children. After the children went to bed, he followed her to her room. He pulled down her pants and started to rape her. She could not remember if he said anything. She ran into the children's room but when she came out, he pulled her onto the bed and continued to rape her. When she told him to stop, he said he did not care. He ejaculated. She does not know if he wore a condom. When he was done, she got up and ran inside a washroom. She testified that he "teared" her skin "down there". She texted him and he tried to say sorry. After that, she kept her distance.

[48] Between December 25, 2018 and February 11, 2020, there where instances where they would occasionally see each other. She let D.F. "do stuff with the children, like at Halloween."

February 11, 2020

[49] She was living with the two children on the 13th floor of an apartment building at 2757 Kipling Avenue. February 11, 2020 was a Tuesday. It was D.F.'s regular day to pick up the children. Instead of taking the children downstairs once he met them at the elevator, he brought them to her apartment door to start a fight over the fact that he had purchased a particular sweater for the oldest son, but that she had not dressed him up in that sweater. The reason was that the sweater was being washed.

2024 ONSC 1247 (CanLII)

[50] D.F. angrily confronted her at the apartment door causing other neighbours to come out into the hallway. During the altercation, D.F. lunged at and grabbed her, resulting in her being scratched. Then he headed back towards the elevators, dragging the children. She called 911 and ran out to the elevator. She held the elevator door open while she remained on the phone with the 911 operator. The verbal altercation with D.F. was captured on an audio recording of the 911 call. The altercation was also captured on a video recording of the 13th floor hallway. During the altercation, D.F. called a woman on the telephone who threatened C.L. and said that she would come and beat her up. Eventually, about 36 minutes after she initiated the 911 call, two police officers arrived on scene. D.F. left without the children. Later that day, she attended the police station to give a statement. Photographs of the scratch on her arm as well as of the inside of her mouth, where D.F. had punched her some years ago, were taken.

[51] She decided that she had had enough of D.F.'s assaults and abuse. That led to the charges against D.F. that are the subject of this trial.

2024 ONSC 1247 (CanLII)

D.F.'s Evidence

[52] D.F. categorically denies assaulting or sexually assaulting C.L. He also denies confining her in an armoire or pointing a firearm at her. In fact, he denies even possessing an armoire or similar cabinet, or firearm.

[53] D.F. was born in Ghana in February 1982. He arrived in Canada at the age of 13 on July 31, 1995. He testified that he never became a Canadian citizen because he left home at the age of 18 or 19, when his mother still had control over his citizenship application. He never made further inquiries.

[54] He has no criminal record.

[55] He has worked at a national retailer as a forklift operator since 2012. Prior to that, he worked different jobs through an employment agency.

[56] He is confident that the first time he met C.L. was on July 31, 2009 because July 31 was the anniversary of his arrival in Canada. He testified that, when they first met, C.L. told him that she was 19 years old and studying physiotherapy at the University of Toronto. She told him that she was working at Sam's Club, a part of Walmart. He asked her for ID and she showed him a card from work but it did not have her age on it. He testified that he only found out C.L.'s real age during her pregnancy with their first child.

[57] After separating from C.L., he has been in a relationship with A.D. since August 2017. They have a daughter together, now aged three.

Relevant Legal Principles

Presumption of Innocence and Requirement of Proof Beyond Reasonable Doubt

[58] The starting point of my analysis is that D.F. is presumed to be innocent, unless and until the Crown has proven the offences against him beyond a reasonable doubt. It is not enough for me to believe that he is possibly or even probably guilty. I must be convinced of his guilt beyond a reasonable doubt. As a standard, reasonable doubt does not require proof

beyond all doubt, nor is it proof to an absolute certainty. At the same time, reasonable doubt lies far closer to absolute certainty than it does to a balance of probabilities.

W.D. Analysis

[59] I must comply with the analysis in *R. v. W.(D).,* [1991] 1 S.C.R. 742 ("*W.D.*"), at p. 758:

> First, if [I] believe the evidence of the accused, obviously [I] must acquit.
>
> Second, if [I] do not believe the testimony of the accused but [I am] left in reasonable doubt by it, [I] must acquit.
>
> Third, even if [I am] not left in doubt by the evidence of the accused, [I] must ask [myself] whether, on the basis of the evidence which [I] do accept, [I am] convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[60] I also accept that, in deciding whether the accused's evidence leaves me with a reasonable doubt, I cannot consider the accused's testimony in isolation from the rest of the case: *W.D.*, at p. 757.

Credibility and Proper Approach to Inconsistencies in Evidence

[61] Neither the Crown nor Defence made submissions about how I should treat C.L.'s testimony given that at the time of trial she was 31 years old testifying about events that allegedly occurred when she was as young as 16 years old. In *R. v. A.M.*, 2014 ONCA 769, 123 O.R. (3d) 536, the Court of Appeal for Ontario provided some guidance on this point as well as on the assessment of credibility:

> [9] First, every witness, irrespective of age, is an individual whose credibility and evidence should be assessed according to criteria appropriate to his or her mental development, understanding and ability to communicate: *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, [1992] S.C.J. No. 56, at p. 134 S.C.R.
>
> [10] Second, no inflexible rules mandate when a witness' evidence should be evaluated according to "adult" or "child" standards. Indeed, in its provisions regarding testimonial capacity, the *Canada Evidence Act*, R.S.C., 1985, c. C-5 eschews any reference to "adult" or "child", preferring the terms "14 years or older" and "under 14 years of age". An inflexible, category-based system would resurrect stereotypes as rigid and unyielding as those rejected by the recent developments in our approach to children's evidence: *W. (R.)*, at p. 134 S.C.R.
>
> [11] Third, despite this flexibility, there are some guiding principles. Generally, where an adult testifies about events that occurred when she was a child, her credibility should be assessed according to the criteria applicable to adult witnesses. However, the presence of inconsistencies, especially on peripheral matters such as time and location, should be considered in the context of her

2024 ONSC 1247 (CanLII)

> age at the time the events about which she is testifying occurred: *W. (R.)*, at p. 134 S.C.R. See, also, *R. v. Kendall*, 1962 CanLII 7 (SCC), [1962] S.C.R. 469, [1962] S.C.J. No. 27.
>
> [12] Fourth, one of the most valuable means of assessing witness credibility is to examine the consistency between what the witness said in the witness box and what she has said on other occasions, whether or not under oath: *R. v. G. (M.)*, 1994 CanLII 8733 (ON CA), [1994] O.J. No. 2086, 93 C.C.C. (3d) 347 (C.A.), at p. 354 C.C.C., leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 390. Inconsistencies may emerge in a witness' testimony at trial, or between their trial testimony and statements previously given. Inconsistencies may also emerge from things said differently at different times, or from omitting to refer to certain events at one time while referring to them on other occasions.
>
> [13] Inconsistencies vary in their nature and importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned: *G. (M.)*, at p. 354 C.C.C.

[62] The credibility of witnesses "must be judged in the overall context of the plausibility of the conduct they allege": *R. v. Gostick* (1999), 121 O.A.C. 355, at para. 12. Particularly where the prosecution case depends on the unsupported testimony of a complainant, the trier of fact:

> . . . must reasonably subject [the witness'] story to an examination of its consistency with the probabilities that surround the currently existing condition. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357, cited in *R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), at pp. 355-6.

[63] In particular, with respect to assessing the accused's evidence, the Court of Appeal for Ontario has explained in *R. v. G.C.*, 2021 ONCA 441, at para. 15:

> [15] As noted in *R. v. R.A.*, 2017 ONCA 714, 421 D.L.R. (4th) 100, at para. 55, aff'd 2018 SCC 13, [2018] 1 S.C.R. 307, an accused person is not entitled to an acquittal simply because his evidence does not raise any obvious problems. His evidence may be rejected "based on considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence" which may provide "as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence": *R. v. J.J.R.D.* (2006), 218 O.A.C. 37 (C.A.), at para. 53, leave to appeal refused, [2007] S.C.C.A. No. 69. …

2024 ONSC 1247 (CanLII)

No Requirement for Corroboration Before Conviction

[64] There is no legal requirement that a complainant's evidence be corroborated before a conviction can follow: *Criminal Code*, R.S.C., 1985, c. C-46, s. 274. However, where there are concerns about the reliability of a complainant's testimony, "corroboration can provide a basis for resolving those concerns and concluding that guilt has been proven beyond a reasonable doubt": *R. v. A.S.*, 2021 ONSC 8549, at para. 63.

Sexual Assault and Trauma

[65] There is no hard and fast rule as to how people who are the victims of trauma like sexual assault will behave: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65. It is an error of law to make assumptions about how a victim of sexual assault should or will react to the assault: *R. v. A.R.D*, 2017 ABCA 237, 422 D.L.R. (4th) 471, at para. 50, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218, at para. 2; *R. v. A.B.A.*, 2019 ONCA 124, 145 O.R. (3d) 634, at para. 4.

Cross-Count Evidence Allowed

[66] I granted the Crown's application to rely on cross-count evidence in relation to C.L.'s evidence. I found that, given that this was a judge-alone trial, the concerns about reasoning prejudice and moral prejudice against the accused were diminished: *R. v. J.H.*, 2018 ONCA 245, at para. 23. Where the alleged similar fact evidence comes from the same complainant who is testifying with respect to the criminal charge before the court, and does not come from other individuals, the admissibility of the similar fact evidence is usually considered differently, at least when the complainant provides evidence of an earlier, similar crime by the accused: *R. v. C.L.*, 2013 ONSC 277, 274 C.R.R. (2d) 342, at paras. 63-67.

The Context of the Allegations

[67] The first important aspect of C.L.'s allegations is that, despite being together with D.F. for nine years (between 2008 and 2017), and being separated from him for almost three (from 2017 to 2020), the first time she complained to the police about D.F.'s criminal conduct was February 11, 2020.

[68] I accept that victims of abuse may need several years to process their experience and recover from trauma before feeling ready to file a complaint. I also accept that victims of abuse, particularly domestic violence, may present to others as having a normal relationship with their aggressor. But that does not mean that evidence of the parties' amicable relationship counts for nothing. It is just that such evidence should be treated with caution. Here, the evidence indicates that, from the time of their separation in 2017 to the fall of 2019, the couple maintained an amicable and cooperative relationship concerning decision-making and the allocation of parenting time with the children. The arrangements concerning the children were done without the involvement of legal professionals or court orders. Beyond C.L.'s allegation that she was raped on Christmas day 2018, an allegation that I find implausible for reasons discussed below, there is no evidence of conflict between the couple between their separation in March 2017 and the fall of 2019.

2024 ONSC 1247 (CanLII)

[69] The second contextual point is that the evidence indicates that the couple's relationship deteriorated in or after September 2019 when C.L. learned that D.F. had a new partner, A.D. C.L. dropped off some children's clothing at D.F.'s apartment and found A.D. there.

[70] The third aspect of C.L.'s allegations is that between her first police statement in February 2020 and her second statement a year later in February 2021, she filed a complaint alleging that D.F. had sexually abused J., their older son, which resulted in criminal charges being laid on or around September 1, 2020. Those charges are not before me.

[71] Fourth, C.L. also commenced an application in family court dated October 20, 2020 seeking:

- interim and permanent custody of the children;
- an order for child support; and
- an order that D.F. not communicate with her or the children or come within 500 metres of them.

The Problems with C.L.'s Testimony

[72] There were numerous contradictions in C.L.'s testimony. The contradictions were identified in the defence's *aide memoire* that was provided to me in closing submissions. The Crown did not take issue with the accuracy of the identified contradictions, albeit the Crown submits that the contradictions are relatively minor and do not detract from C.L.'s overall credibility and reliability. I adopt the contradictions section of the *aide memoire* as an accurate description of the contradictions found in C.L.'s evidence.

[73] C.L. had the benefit of legal counsel when filing her family law application. In it, she stated that she was in a relationship with D.F. from approximately 2009 to 2017. When confronted with the inconsistency between her family law pleading and her insistence at trial that she met D.F. in 2008, she suggested that after they met, it was some time before they were "in a relationship."

[74] There was compelling evidence that C.L. met D.F. in 2009, not 2008. In addition to her family law pleading, she testified that their relationship started when they moved in together in 2010. A card and text messages put into evidence also support the 2009 date. Finally, C.L. testified that she had a bad memory with respect to dates.

[75] C.L. stated in her family law pleading that D.F. was "abusive toward [her] throughout our relationship" but no particulars of the abuse were provided in the pleading.

[76] For all of her examination-in-chief, C.L. insisted that the reason why she went years without telling anyone about the abuse was that she was terrified of D.F. and feared for her life. Yet, in cross-examination, she stated that:

- many people told her to leave D.F.;
- before separation, she told her aunt about the abuse and her aunt said, "why don't you just leave him"; and
- she told a friend who D.F. was close with, "your friend is really hitting me."

2024 ONSC 1247 (CanLII)

[77] C.L. was unclear about whether she told her mother about D.F. assaulting her. She testified that, on one occasion, D.F. choked her when they were living on Beaumonde Heights Drive in Etobicoke. This would have been around a year-and-a-half before their separation. She called her mother to pick up the kids and said that she and D.F. were fighting. When asked by defence counsel whether she told her mother about being assaulted, she said, "I'm pretty sure I told her something along those lines, but I don't think I went into detail because it was like the heat of the moment and I wanted my kids like out of there."

[78] If C.L. did, in fact, tell D.F.'s close friend about the abuse, would she not be concerned that the friend would tell D.F.? If many people were telling C.L. to leave D.F., was it because she had told them about the abuse? But that would contradict her testimony that she did not tell anyone because she was too frightened of D.F. Or did many people tell her to leave D.F. because she told them that she was in a bad, albeit non-assaultive, relationship with D.F., which would also contradict her narrative of abuse? The inconsistencies were never explained.

Testimony of A.L. ((C.L.'s Mother) Not Reliable

[79] A.L. testified that, there was a time when the couple was living on Amaron Avenue that C.L. called her in distress. A.L. testified that she went over to the couple's residence and saw bruises on C.L.'s hands and legs. The mother, who is of Trinidadian origin, clarified that, in her West Indian "twang", "hands" includes "arms." The mother testified that C.L. was complaining that her body was aching and showed her the bruises.

[80] I find that the mother's evidence was generally not reliable.

a) A.L. testified that she only found out about the bathroom choking assault after the couple were totally broken up, which would mean after 2017, yet she also said that she learned of it two to three years after the choking incident happened. Given that C.L. was allegedly choked on the bathroom floor in September 2012, A.L.'s evidence does not make sense.

b) A.L. testified that she saw bruises on C.L.'s hand and legs at the Amaron apartment. Then "arms" became "upper arm." Yet, in A.L's statement to the police, she claimed to see a mark on C.L.'s leg.

c) A.L. testified that D.F. stopped paying the rent at Amaron Avenue, when the reality is that the lease on the apartment had come to an end.

[81] Ultimately, I formed the impression that A.L. was either unable or unwilling to separate out what she had been told by her daughter from what she herself observed. She gave the same response as her daughter that "as time passed, she remembered more things" to explain any inconsistencies in her evidence. She also acknowledged that "I did have issues with [D.F.] due to my grandchildren," which I take to be a reference to the allegation that D.F. sexually assaulted the older son.

2024 ONSC 1247 (CanLII)

Discussion of Six Key Incidents

[82] Focusing on six key incidents, I will explain why I not only disbelieve C.L.'s testimony, but why I believe that D.F. did not assault nor sexually assault C.L. The incidents pertain to C.L.'s allegations in respect of:

a) being confined in an armoire on three occasions.
b) being choked on a bathroom floor, resulting in hospitalization.
c) D.F. pointing a firearm at her.
d) being raped on Christmas Day 2018.
e) exchanging text messages with D.F. where he admitted to assaulting and raping her.
f) being assaulted when D.F. came to her apartment on February 11, 2020.

Allegations concerning being confined in an armoire on three occasions

[83] It is worth noting that C.L.'s allegations about being confined in an armoire only arose at trial. Neither of her two police statements mention confinement.

[84] At trial, C.L. and D.F. described the layout of some of their residences. C.L. testified that the first time she was confined by D.F. was in some sort of armoire or stand-alone cabinet that was located in his one-room apartment in the basement of a rooming house on Jane Street.

[85] C.L.'s evidence was that this armoire was roughly six feet and four inches tall, with drawers on the bottom. Apparently, an "old-school" TV was placed on top of the armoire. She described the width of the armoire as just short of her outstretched arms. She testified that the armoire never contained any of D.F.'s clothes, but later contained some DVDs. The confinements happened in more than one apartment, so it must have been that the armoire was moved.

[86] I find it unlikely that D.F. ever possessed an armoire. First, it makes little sense that he would furnish his single-room basement apartment with such a large piece of furniture, or that, if he did, it would lay empty, or only contain some DVDs, and not his clothing. I note that C.L. testified that the armoire had a bar for hanging clothes inside. Second, why would D.F. place a TV *on top* of such a tall piece of furniture? C.L. agreed that there was a TV stand, but described it as broken. Third, it is uncontested that the couple moved multiple times between 2010 and 2017. Why would D.F. move this large piece of furniture from location to location, when it served no particular purpose and there was no evidence of his attachment to it. Fourth, C.L. testified that she could not remember if D.F. had a closet in the basement apartment at 1285 Jane Street. His evidence was that he had a closet that was built into the drywall. Accordingly, it is not as if C.L. testified that D.F. did not have a closet, which would imply that a stand-alone cabinet or armoire was necessary.

[87] Many aspects of C.L.'s evidence concerning the armoire are inconsistent. In chief, she stated that the first time she was locked in the armoire, she was in there "for hours, it was a very long time." In cross-examination, she changed this estimate to 30 minutes to an hour. Her evidence of how she was locked within the armoire also seems implausible. Initially, she described D.F. as adding locks to the armoire. Why D.F. would add locks to a mostly empty

2024 ONSC 1247 (CanLII)

armoire was not explained. Then C.L. suggested that the "old-style" armoire was locked via a combination lock, which would imply that the locks on the armoire could accommodate such a lock. She claimed that D.F. had such locks because he used a locker at work. But D.F. only had a job where he had access to a locker much later in their relationship, so the timing would not correspond to when C.L. was confined in an armoire. C.L. also described D.F. as using a fashion chain from his trousers as a locking device, or by placing his body weight against the door. She testified that she was kicking and screaming during the confinement, yet none of D.F.'s apartment mates ever intervened.

[88] C.L.'s description of her injuries arising from the confinement seem exaggerated. She testified that she had cuts and bruises all over her body from the confinements and, in particular, a pretty deep cut (or scar) that ran across her arm. Yet, she never described this scar to police or discussed the confinements at all in her two meetings with police that collectively lasted over five and a half hours. No photo of such a scar was ever presented at trial.

[89] In sum, C.L. never said anything at all to the police about D.F. confining her in an armoire. Then, in chief, she testified she was confined once. In cross-examination, this became three times, and the duration and methods of confinement were described inconsistently.

[90] For his part, D.F. denied confining C.L. He denied having an armoire or any similar stand-alone cabinet. He testified that in the first rooming house apartment, he had a closet. He placed his TV on a small TV stand.

[91] I find that it is not proven beyond a reasonable doubt that D.F. confined C.L.

Allegation about being choked by D.F. on a bathroom floor resulting in her hospitalization

[92] There are a number of significant inconsistencies in C.L.'s account of being choked by D.F. on a bathroom floor. She testified that this assault resulted in her hospitalization in September 2012, when she was pregnant with her second child.

[93] She remembered what prompted the argument – D.F. becoming enraged when he believed incorrectly that she was calling a man to provide her with an asthma puffer when, in fact, she was calling her mother. She remembers what happened *after* she was transported to hospital – she remained conscious until the point she was intubated. Yet, she cannot remember who made the 911 call.

[94] She testified that D.F. choked her so violently that she had an outline around her neck. Yet, by her evidence, none of the trained medical professionals at the hospital noticed the outline and simply treated her breathing difficulties as related to her severe asthma.

[95] Her evidence that D.F. was almost constantly at the hospital and present when she was being given the Last Rites was contradicted by her mother who testified that D.F. was not present on that occasion, and was rarely at the hospital as he was at home looking after their first child.

[96] C.L.'s testimony is also at odds with her mother's in respect of the choking incident. According to C.L., the choking happened *after* she called her mother to bring over a puffer as

2024 ONSC 1247 (CanLII)

she had run out; yet her mother testified that C.L. never ran out of puffers, and the first she learned of C.L. being in distress was when D.F. contacted her.

[97] Another inconsistency is that, despite supposedly being almost choked to death in September 2012, C.L. wrote a very complimentary letter to D.F. in or around December 2012. Entitled "To My Good Man", the letter contained the following statements:

> A lot of "men" think being a gangster and controlling their women make them a man but you are the prime example of what a man should be, you have a woman that loves you to death through the good the bad and the ugly and a son that loves his father unconditionally. Plus another son that will love you too.
>
> You are my man the only man I'll ever know inside out you bring the good out of me like no other you make me laugh and smile everyday although we have gotten in a lot of fights over the years I never love you any less. 2012 is over now here comes 2013 a new beginning with new things in store for us. The lord has blessed us when we crossed paths with each other.

[98] C.L. testified that she wrote the complimentary letter because she had "Stockholm Syndrome" and that, in fact, D.F. had assaulted her just the day before she wrote the letter. Writing the letter was her way of "taming the monster." C.L. conceded that this assault was not one that she told the police about.

[99] Of course, D.F. denies ever choking C.L. He testified that C.L. was not at home when she had whatever medical incident that resulted in her being taken to hospital. He found out from C.L.'s mother that C.L. was in the hospital. He went with the couple's son to the hospital where he met C.L.'s brother, who had also gone over. In her evidence, C.L. made no mention whatsoever of her brother attending the hospital.

[100] Ultimately, C.L.'s evidence about an alleged choking incident makes little sense. She claims that D.F. nearly choked her to death because he thought she was asking some man to bring over a puffer when, in fact, she was simply on the phone asking her mother to bring one over. Yet, D.F. had refused to get her a puffer, so it is unclear why D.F. would become so upset that C.L. was trying to get a puffer from someone else, let alone her own mother. Then apparently due to the choking, C.L. blacked out but regained consciousness until the point of being intubated at the hospital. Yet, she cannot remember who called 911 or how she got to the hospital. Despite being given the Last Rites – effectively being on her death bed – she still did not tell her mother, brother or any medical professional that D.F. almost choked her to death. No medical professional noticed an outline or bruising on her neck, even though this is precisely where she was intubated. The medical staff diagnosed the medical event as entirely consistent with C.L.'s severe asthma and make no reference whatsoever to choking.

[101] C.L.'s letter in late 2012 describing D.F. as a prime example of what a man should be is also at odds with her account of having being violently choked on the floor of a bathroom in September 2012.

[102] D.F.'s explanation aligns more closely with the available objective evidence. C.L. conceded that she has severe asthma and that she was hospitalized on two occasions before the

2024 ONSC 1247 (CanLII)

incident in question, and one time after. C.L.'s mother described C.L.'s asthma as "dangerous." D.F. testified that he received a call from C.L.'s mother that C.L. was in the hospital. The defence put in evidence that an "ICAD report" of the 911 call associated with the incident contained two addresses: one at 1225 Weston Road, the couple's residence, and another at 55 Outlook Avenue, which is about a 16-minute walk from the residence. It is a reasonable alternative inference that an ambulance picked C.L. up from 55 Outlook Avenue after C.L., or someone other than D.F., called 911.

[103] I reject C.L.'s account of D.F. choking her on the bathroom floor as there are too many inconsistencies in her testimony related to this incident. C.L.'s mother's account is itself inconsistent with C.L.'s narrative.

[104] I find that it is not proven beyond a reasonable doubt that D.F. choked C.L. on the bathroom floor.

Allegations about D.F. pointing a firearm at her

[105] C.L. alleged that when she lived with D.F. in the house on Beaumonde Heights Drive in Etobicoke, during an argument, he retrieved a small black gun from a pouch in a closet, and pointed it at her face from about a foot away. The dispute supposedly occurred between 1 and 3 a.m. in the basement laundry area of the house. The gun was out for between 15 to 30 minutes. According to C.L., two female neighbours who were in their early to mid-20s came down and engaged in the argument. They ganged up on C.L., complaining that she was not a sufficiently traditional woman in terms of cooking and cleaning for D.F. One or both women insinuated that D.F. should shoot her. The women giggled and found it funny. The argument ended when an older man intervened and diffused the situation.

[106] I have difficulty believing C.L.'s version of events. It seems incongruous that women roughly the same age as C.L. would be so nonchalant about D.F. having a gun in the house and pointing it at C.L.'s face for up to half an hour. Or that the young women would take D.F.'s side in the dispute over whether C.L. was sufficiently traditional as a woman. That one or both women were of African origin does not necessarily mean that they believed that women should perform domestic duties for their partner.

[107] The police never found a firearm belonging to D.F. C.L. did not mention that D.F. possessed a firearm when the 911 operator on February 11, 2020 asked her if D.F. was known to carry weapons. Instead, she mentioned that he had a pocket-knife. C.L. also failed to mention anything about D.F. possessing a firearm in her family court application filed on October 11, 2020. In cross-examination, C.L. testified that she simply believed D.F. when he said that he had gotten rid of the gun.

[108] C.L. made another allegation that, when the couple lived on Amaron Avenue, following the family's return from Ripley's Aquarium, D.F. retrieved his handgun from a pouch. This time the fight was apparently because C.L. had wished D.F.'s friend a happy birthday. She testified that the gun was retrieved from the same pouch that was in a closet near the laundry in the basement. She testified that D.F. punched her and threatened her with the gun. Then he threw her onto a glass side table that shattered. Her children were hiding in the sunroom. She testified that she "dislocated" or "dented" her hip and that her hand was gushing blood. Yet

2024 ONSC 1247 (CanLII)

she managed to clean up the glass that lay shattered on the floor. She did not tell anyone about this incident because she was too afraid of D.F.

[109] Once again, the sequence described by C.L. seems incoherent and implausible. Someone with a dislocated hip and hand gushing blood is unlikely to be able to clean up shattered glass. At trial, she said the punch occurred before D.F. went to get his gun, but in her second police statement, the punch comes after the gun is retrieved. In a text to D.F., C.L. referenced the "pictures of my hip when you pushed me on an open screw and punctured my hip I need [justice]". The Crown presented no medical or photographic evidence whatsoever of C.L. having a hip injury or a cut or scar on her hand. Moreover, it is difficult to understand why, at trial, she would describe what happened as being pushed on to a glass table, but in a text message to D.F. as being pushed on to an open screw. D.F. testified that no such incident happened, and that the only table they had was a heavy glass dining table.

[110] Another inconsistency regarding C.L.'s gun allegation is that C.L.'s mother testified that C.L. told her that J., the older child, had seen the gun. Contrary to C.L.'s evidence, the mother did not testify that C.L. told her that *C.L. herself* had seen the gun. When confronted with this discrepancy, C.L. claimed that she had told her mother about the gun in 2017.

[111] I find that it is not proven beyond a reasonable doubt that D.F. pointed a firearm at C.L.

Allegation about being raped on Christmas Day 2018

[112] C.L. testified that on Christmas Day 2018, she was raped by D.F. after the two children went to sleep. At the time, C.L. and the children were living in an apartment at 2757 Kipling Avenue.

[113] D.F.'s evidence was that, on Christmas Day 2018, he picked up the boys from C.L.'s place and took them to his residence to spend Christmas. He testified that the rape never happened.

[114] I find that the evidence does not support C.L.'s account that she was sexually assaulted on Christmas Day 2018.

[115] I rely on an important text message and inconsistencies in C.L.'s evidence to conclude that there is no veracity to her claim.

[116] The defence produced a text exchange between D.F. and C.L. from Christmas Eve 2019, a year after the alleged rape, where C.L. texted:

> Tomorrow is Christmas so you have to pick them up [tomorrow] evening that's what we do every year. You can keep them till Friday.

[117] I find that the text corroborates D.F.'s testimony which was that every Christmas since the time they separated – so Christmas 2017, 2018 and 2019 – the routine was that D.F. would pick up the boys and take them to his place for Christmas. This contradicts C.L.'s evidence that D.F. came to spend Christmas 2018 with the boys at her apartment, and then raped her when the boys went to sleep.

2024 ONSC 1247 (CanLII)

[118] When defence counsel suggested to C.L. that she would not write "that's what we do every year" if, in fact, just the previous year D.F. had done something different, C.L. answered "that's just the way I talk."

[119] I also note that Christmas day, December 25, 2018 was a Tuesday, which was the start of D.F.'s regular mid-week parenting time. It would not make sense for D.F. to allow the boys to sleep over that night.

[120] There were also a number of inconsistencies about the alleged rape in C.L.'s evidence.

[121] In examination in chief, she claimed that after D.F. started raping her in her bedroom, she got up "mid-rape" and ran into the children's room. Then the rape continued when D.F. pulled her back onto the bed in her bedroom. In cross-examination, she conceded that she said nothing about the "mid-rape" interruption in her statement to the police.

[122] She also conceded that at trial she referred to wearing shorts or pants that D.F. apparently pulled down when he raped her, but in her statement to police, she said that she was wearing a nightgown.

[123] C.L.'s explanation for these inconsistencies was that more things were coming to her as she sat in the witness box at trial, than what she remembered when she was speaking to the police.

[124] When asked why she would change into her nightclothes, if D.F. had not left her apartment, she testified that she left him on the balcony and simply assumed that he had left. I find it surprising that C.L. would do so without first checking that D.F. was safely out of her apartment. Recall that C.L. testified that even after they separated, she remained fearful of D.F. due to his history of abuse and ongoing harassment. It seems incredible that she would celebrate Christmas 2018 with D.F. in her apartment, change into her nightclothes, and go to bed without even checking that he had left.

[125] I find D.F.'s testimony far more credible. He testified that by Christmas 2018, he had re-partnered with A.D., his girlfriend since September 2017; and that for Christmas 2017, 2018 and 2019, he picked up the boys from C.L.'s apartment and took them to his place to celebrate Christmas.

[126] I find that it is not proven beyond a reasonable doubt that D.F. sexually assaulted C.L. on Christmas Day 2018.

Allegations about exchanging text messages with D.F. where he admitted to assaulting and raping her

[127] The Crown produced several text messages that C.L. identified as an exchange between her and D.F. One set of text message was from C.L.'s Android phone, another was from her iPhone.

2024 ONSC 1247 (CanLII)

Alleged Text Messages on C.L.'s Android iPhone

[128] C.L. testified that after she texted D.F. the message, "I made it past your abuse rape and manipulation and your bitter and mad", he replied, "And so….." She testified that this exchange occurred around Halloween 2019.

[129] D.F. testified that the actual sequence of text messages was as follows (the wording of the texts has not been corrected for spelling or grammatical errors):

C.L.: I was with you raising the kids because [older son] had autism and [younger son] wasn't talking. I wills never leave my kids eith strangers with that condition than I did what I had to do now I'm better than ever and your mad.

C.L.: Get a life

C.L.: Jealous bird

DF: And so…..

C.L.: I made it past your abuse rape and manipulation and your bitter and mad

DF: Who u telling

DF: Never touch u

C.L.: That's all that is you wanted me to fail and I never

C.L.: Did

C.L.: Get a life

C.L.: Jealous bird

DF: Anyways…. Do what u gotta do

C.L.: You beat me from 17 to 25

DF: Never touch u

C.L.: I have pictures of the bruises scars my braces broken swollen you know what you did

DF: Anyways…..

C.L.: I never deleted a text ever because I knew this day would come

DF: Anyways….

[130] D.F. brought the Android phone that these text messages were on to the courtroom and demonstrated that the above sequence was the actual sequence of texts on his phone, not just something that he had cut and paste and given to his lawyer. The Crown accepted that D.F.'s phone contained the above text messages.

2024 ONSC 1247 (CanLII)

[131] C.L. was cross-examined on why she presented a different sequence of texts and why, in particular, her version of text messages omitted D.F.'s texts such as "Who u telling" and "Never touch u" that appear directly after her allegation "I made it past your abuse rape and manipulation and your bitter and mad."

[132] First, C.L. claimed that it was actually D.F. who had deleted text messages on his phone. Defence counsel demonstrated that C.L. was incorrect and that the relevant text messages remained on D.F.'s Android phone.

[133] Next, C.L. testified that she never received D.F.'s texts "Who u telling" and "Never touch u" following her "I made it past your abuse…" text. In response, defence counsel pointed out that C.L. had received all of D.F.'s other messages.

[134] Then, C.L. suggested that if she did not receive the messages, it must have been due to a network error.

[135] C.L. finally settled on the explanation that she just took screen shots of what was on her Android phone which resulted in the version of the text messages that the police received and which the Crown presented at trial.

[136] C.L.'s response was, in my view, a non-sensical and ultimately unconvincing explanation of why she did not present the same version of text messages that D.F. had on his Android phone. C.L. admitted to receiving the rest of the text messages from D.F., but not the texts where he denied her abuse allegations. The Crown admitted that the correct set of messages was on D.F.'s phone. The issue was not that the order of the texts appeared differently on C.L. versus D.F.'s phone. Rather, the issue was that the text messages that C.L. presented at trial completely misrepresented their communications to make it look like D.F. was admitting to criminal conduct. I find that C.L. altered the text messages to make D.F. look guilty.

Allegation of bruise from undisclosed assault

[137] C.L. was also cross-examined about her text message "I never deleted a text ever because I knew this day would come." She answered that she wrote this because, just prior to sending the text message, D.F. had assaulted her. She testified that she told D.F. that she was going to call the police but did not actually do so. She just wanted D.F. to leave her alone.

[138] Upon further questioning about the assault, C.L. testified that she was in her car when D.F. came to pick up the children. They ended up arguing. D.F. reached into the car and hit her. She acknowledged that she had never mentioned this assault in either of her two statements to the police. She stated that the reason why she remembered the assault was because the trial was "jogging memories." She believed that the text messages being discussed were from around Halloween 2019.

[139] In re-examination, which took place on Friday, January 26, 2024, Crown counsel asked C.L. more questions about the injury that she allegedly sustained when D.F. hit her by reaching into her car. She testified that she sustained a large bruise and pointed to an area that started at the top of her right shoulder and travelled down past her elbow. She indicated that she was pretty sure that photos of the bruise would be found on her old Android phone. She indicated

2024 ONSC 1247 (CanLII)

that, two days earlier on January 24, 2024, she had sent the phone to a repair shop to be fixed. The screen of her Android phone had broken, probably when the phone fell, and it had sustained some water damage. She indicated that her phone would be repaired by Saturday, January 27, 2024.

[140] I excluded C.L. from the courtroom so that I could receive submissions on what the parties wanted to do in light of C.L.'s revelation that she believed that photos of the injury she sustained when D.F. assaulted her were likely to be found on her old Android phone which was being repaired. Initially, the Crown submitted that a short adjournment of the trial would be in order to allow C.L. sufficient time to pick up the repaired phone and return to answer more questions about any relevant photos or texts found on the phone. Defence counsel opposed the request, pointing out that it had prepared its defence on the Crown disclosure it had received, and that it would be unfair to permit C.L. to testify about a new incident so late in the trial proceeding. Ultimately, upon further reflection, the Crown withdrew its request and C.L. did not answer any further questions about her phone or about the alleged assault that happened in her car.

Alleged text messages on C.L.'s iPhone

[141] C.L. also testified about another series of text messages, this time on her iPhone, that was exchanged with D.F. on December 26, 2018. She testified that she wrote:

> All the text msgs I'm putting on the internet I need justice I'm tired of ppl doing stuff and getting away with it plus this will go to court because the night you raped me you reared my skin and it hurt your not getting away with this one
>
> Teared*
>
> And if you harm those children or make anyone harm them or hurt/leave them their will be severe price to pay you would need to go back home because I will make sure you don't enjoy life in Canada because if you can beat me for years and rape me than you are capable of anything what you did is horrible and it's a crime you have no heart at all for everything I done for you and been for you I didn't deserve that at all not at all

[142] And to that D.F. replied:

> Now why would u wanna do this. I'm your kids father. We just broke up not too long ago. You are my kids mother. It's obvious there is feelings. This is the most fucked up Christmas ever.

[143] In yet another series of text messages on her iPhone, she testified that they exchanged the following messages:

C.L.: Why would I stay with a man beating me when there is love out there makes no sense just because that's what you want heck no I deserve better and I'm not neglecting myself for you to feel good

2024 ONSC 1247 (CanLII)

DF: But honestly I wish I didn't do none of that to u cuz it just became a pattern. I have good intentions mama I just can't carry it out. I m Soo sorry but not having my family with that's u and the kids have make me a little insane

DF: Yes I'm not the same. U guys were my rock.

C.L.: You have a very negative spirit

[144] When D.F. was shown these iPhone text messages, he denied that he ever received or responded to them.

[145] First, examining the text messages themselves, I find it unusual that the first text message commences with, "All the text msgs I'm putting on the internet I need justice…". According to C.L., she wrote this text on December 26, 2018. By her account, this is literally the day after she was raped by D.F. in her bedroom. She threatens that she will put the message on the internet and go to court, but the evidence is that the first time she went to the police was on February 11, 2020, some 13 months later. I find that the text messages are more in the nature of a "memo to file" created to preserve evidence, rather than a genuine text conversation between ex-partners.

[146] Second, by C.L.'s testimony, we are to believe that D.F. texted "we just broke up not too long ago." Yet, C.L.'s family law application says that they separated in July 2017. They stopped living together on or around March 31, 2017 after a sewage problem arose at the apartment on Amaron Avenue. It is not clear why D.F. would be referring to having just broken up if the break-up took place 18 to 21 months earlier.

[147] Third, accepting that D.F. sent these text messages to C.L. would mean accepting that he texted that he cried "two nights strait" and "is still crying" over some aspect of their relationship. It would also mean accepting that, even though D.F. had been in a relationship with his new partner A.D. since September 2017, he still considered C.L. his "family." There was not one shred of evidence that D.F. had shown contrition for abusing C.L. since 2008, so his apology in the text messages seems anomalous. In sum, the text messages purportedly sent by D.F. do not make sense in the context of the evidence heard at trial.

[148] Having found earlier that D.F. did not rape C.L. on Christmas Day 2018, and that C.L. altered text messages from her Android phone to make D.F. look guilty, and that the text messages on her iPhone do not make sense in the context of the evidence, I find that the text messages purportedly on C.L.'s iPhone are not authentic. Instead, they were fabricated by C.L. for the purpose of making D.F. look guilty.

Allegation about being assaulted when D.F. came to her apartment on February 11, 2020

[149] The Crown's position is that D.F. assaulted C.L. on February 11, 2020. The Crown contends that, during an angry argument with C.L. at her apartment door, D.F. reached into the apartment and grabbed her, making forceful and deliberate contact with some part of her body. The Crown submits that this resulted in the scratch seen in a photo of C.L.'s upper arm that was taken by police later that evening. The Crown does not suggest that C.L. got injured at any other point during the incident on February 11.

2024 ONSC 1247 (CanLII)

[150] For the reasons that follow, I find that D.F. did not assault C.L. during the February 11 incident. The evidence suggests that if there was any physical contact between D.F. and C.L., it was a split-second accidental touch that was unlikely to have caused any injury to C.L., let alone the injury depicted in the photo shown at trial.

[151] No medical evidence was called at trial. Only one photo was shown of C.L.'s purported injuries sustained on February 11, 2020. The photo shows a scratch on the inner side of C.L.'s right bicep. The scratch consists of two parallel lines on C.L.'s skin, each roughly 1.5 inches long, a few millimeters apart. The lines are slightly offset from each other, and look like unhealed cuts from a sharp instrument.

The video recording

[152] At trial, a video recording of the hallway outside C.L.'s apartment was shown. The camera angle looks down the length of the hallway.

[153] The video recording commences at 4:03:30 p.m. on February 11, 2020. It begins with D.F. and the two boys walking towards C.L.'s apartment on the 13th floor. D.F. appears to be texting someone as he walks down the corridor. The three arrive outside C.L.'s apartment door. D.F. does not knock. After about ten seconds, D.F. is seen talking to someone, undoubtedly C.L., who is not visible on the video but who is inside her apartment door.

[154] D.F. never enters the apartment. At all times his feet remain in the hallway outside the apartment door. The two boys are also in the hallway beside him. J., the older son, is on D.F.'s right, and M., the younger son, is on his left as D.F. faces the apartment door. A few seconds later, the video shows D.F. having a conversation with C.L. and pointing towards the upper part of J.'s body. This action is consistent with both C.L. and D.F.'s evidence that they were arguing about J's sweater, or lack thereof. D.F. testified that, since it was February and still winter, he was upset that C.L. had sent J. out without a sweater under his winter coat. C.L. testified that D.F. was upset because she did not clothe J. in the particular sweater that he had bought.

[155] At 4:04:30, the video shows D.F. using his right hand to gesticulate towards C.L. He appears angry. C.L. remains just inside the apartment door, out of camera view.

[156] At 4:04:36, several things happen over one or two seconds in the following order:

- D.F. uses his left hand to pull his younger son back from the apartment door. The boy looked like he was about to enter the apartment.
- C.L. emerges partially from the door turning left in the direction of J. The front of her body is facing the camera. She appears to be reaching towards J. and pulling him into the apartment.
- A split second later, as the older son looks like he is following his mother and trying to squeeze between his father and the door to re-enter the apartment, D.F. uses his right hand to reach into the apartment and yank his son back. Only D.F.'s right hand and possibly part of his right arm cross the threshold of the door.

2024 ONSC 1247 (CanLII)

[157] On my repeated viewing of the video, including at one quarter of its normal speed, it appears that D.F. is holding his cell phone in his left hand and only his right hand makes contact with his older son. I find that his intention was to prevent J. from re-entering the apartment. If there was contact with C.L. with his right hand, it was accidental and would have lasted a split second. At no point did D.F. hit or strike C.L. in the sense of using intentional force. Unless D.F. had very sharp nails, or there was something sharp in his right hand or near it – and there was no evidence of this – I cannot see how D.F. could have caused the scratch consisting of two distinct lines that the Crown showed in the photo. It is also difficult to see how D.F. could have caused injury to C.L. with his right hand, when he was using the same hand to yank his son back from the apartment door.

[158] In some ways, what happens after this sequence is irrelevant to the charge of assault on February 11, 2020. This is because the Crown maintained that the only assault that occurred happened when D.F. was at C.L.'s door.

[159] Still, given that what happened after may shed some light on the incident in question, I will go on to describe the event.

[160] After D.F. pulled the boys back from re-entering the apartment, he and C.L. continue to argue as the boys remain in the hallway. D.F. and the boys move toward the elevator. Two neighbours emerge from their units, presumably due to the commotion in the hallway. At 4:05:34, D.F. appears to yell at someone who is out of range of the video camera. I infer that he is telling someone to mind their own business. About 20 seconds later, he walks with the boys towards the elevator bank. At 4:06:12, C.L. rushes out of her apartment, holding a phone to her head, and runs towards the elevators.

[161] At 4:06:18, the camera angle on the video changes to showing the elevator bank area. C.L. can be seen entering into the camera frame from the direction of her apartment. At 4:06:37, just as an elevator opens, D.F. lifts up M. and carries him in his left arm. At this point, C.L. is between D.F. and the open elevator door. She appears to be holding onto J.'s coat with her left hand and M. with her right hand. D.F. moves toward the open elevator door with M. in his arms, but C.L. pushes J. away from the elevator entrance. Everyone ends up against the wall on the right side of the now open elevator door. D.F., holding M. in his left arm, rotates clockwise around C.L. and grabs J. with his right arm, swinging him into the elevator in one fell swoop. At 4:06:42, D.F. and the two boys are in the elevator and can no longer be seen on the video. C.L. can be seen at the elevator entrance. A few seconds later, C.L. enters the elevator and goes out of camera view, but the elevator door remains open. Two neighbours come by and look into the elevator in a concerned manner. Over the next several minutes, other elevators doors open and let people out onto the floor. The elevator remains open until 16:41 p.m. when two police officers emerge out of another elevator and enter the elevator containing C.L., D.F. and the two boys.

[162] My finding, based on the video evidence, that D.F. did not assault C.L., is consistent with the fact that, at trial, C.L. had difficulty identifying where she was injured on February 11.

[163] In her examination in chief, she testified that it was:

2024 ONSC 1247 (CanLII)

- in her chest-shoulder area, where her bra strap would have been. She pointed to the right upper part of her chest.
- a cut on one of her arms, like a scratch.
- her lower left arm.
- her shoulder area, where she said D.F. grabbed her.
- She said that when D.F. grabbed J by the hand, he also grabbed her and hit her.
- her left wrist.
- her upper chest, where she said D.F. grabbed her.
- her hand, which was injured when D.F. grabbed her and was actually bleeding as a result.

[164] Later, when confronted about the difference between an injury to her hand versus an injury to her arm, she claimed that, in her Caribbean culture, she uses the term "hand" and "arm" interchangeably. To be fair, I note that when C.L.'s mother testified, she said the same thing. Even if I were to find that when C.L. said "hand", she meant "arm", I would still find that the scratch shown in the police photo, is not the type of injury one would sustain from the contact shown on the video.

C.L.'s claims about being hit by D.F.

[165] In the 911 audio recording of February 11, which captured what C.L. and D.F. said in the hallway and elevator area, she made a number of comments to the 911 operator. I find that these comments do not accurately represent what was actually going on at the material time and reflect poorly on C.L.'s credibility and reliability.

[166] C.L. made the following comments:

- My children's father just hit me in front of my kids. He's picking them up.
- He just hit me and he pushed my son.
- You just hit me. He's [inaudible] hit me.
- No, he's trying to kidnap my kids.
- Look at what you did to my hand.
- He grabbed me and he pushed me, then he dragged my son in the elevator.
- He just hit me.
- Look at what you did to the kid's hand.
- There's records of you beating me.
- I have pictures.
- Don't touch me. Don't touch me.
- You just hit me.
- Look at my hand.
- You get them every week. You shouldn't have hit me.

[167] The video of the hallway and elevator bank area do not show what transpired within the elevator which remained open. However, C.L. never testified that she was hit or assaulted

2024 ONSC 1247 (CanLII)

by D.F. *in* the elevator. She maintained that the one and only assault on February 11 occurred when D.F. was at the door of her apartment.

[168] Accordingly, it is difficult to understand why C.L. would repeatedly tell the 911 operator that D.F. had *just* hit her. Clearly, this would indicate to the operator that D.F. was repeatedly assaulting her during the phone call. However, there was no evidence of repeated hits, nor was there any evidence of D.F. pushing C.L.

[169] The Crown submits that C.L.'s words should not be parsed too carefully given the heated altercation with D.F. So, if "arm" became "hand", or "he hit me" became "he just hit me", C.L.'s overall narrative of being assaulted should not be criticized.

[170] I disagree.

[171] I find that, following the dispute over the sweater at the door, C.L. decided that she had had enough and that she was not going to permit D.F. to have the kids that day. This would explain why both boys move to re-enter the apartment and why D.F. pulls them back. I find that D.F. got angry and decided that he was not going to leave without the kids. C.L. decided to call 911 and the rest of the conversation is recorded on the 911 audio recording.

[172] C.L. provided a revealing answer as to why she called 911.

> Q. Okay. And why did you call 911?
>
> A. I was — so before all of this, the previous month he showed up to my door, banging my door, trying to open my door. I had called 911. They didn't send a police officer that time. And then eventually he left. He would threaten to kill me, so you know, I — he's always threatened to kill me, but it just — it felt so weird. I — and, and up until that time I was — it's weird, but I was, like, having, like, kind of dreams and weird things, and I was just getting such a bad feeling. So this time I was, like, I'm not gonna let him keep doing this to me, and I just decided I'm gonna call the police and see what can happen.

[173] The Crown presented no evidence that emergency services received a call from C.L. about a month prior to February 11, 2020. I find it highly unlikely that C.L. actually called 911. I assume that if she did and told them that her violent ex-partner was banging at, and trying to open her door, this would be a high priority call for the police. Presumably, C.L. would have also advised the 911 operator that she had two young children living with her in the apartment. The hallway video from a month previously could have been reviewed to determine whether D.F. showed up at C.L.'s door.

[174] C.L.'s testimony that she called 911 so that D.F. can "see what can happen" is also revealing. On the 911 call, C.L. appears to make every effort to cast D.F. in the worst possible light.

[175] She tells the 911 operator that D.F. is kidnapping her kids. In reality, D.F. was doing what he had done for many years which was to pick up the children on Tuesdays. In 2020, the couple had no formal separation agreement or court order concerning parenting time for the children.

2024 ONSC 1247 (CanLII)

[176] She tells D.F., while on the phone with the 911 operator, that "there's records of you beating me" and "I have pictures", yet no photo was produced at trial that was taken earlier than the February 11 incident, and no records of D.F. previously beating C.L. were produced.

[177] During the 911 call, C.L. references her allegation, which I dismissed earlier in these reasons, that D.F. raped her on Christmas Day 2018. She says:

> C.L.: You didn't come to my house and fight me on Christmas? You didn't rape me on Christmas? *Watch*. [emphasis added]
>
> Dispatcher: Ma'am? Ma'am? I heard you say, did he sexually assault you at Christmas?
>
> C.L.: Yes, he did.

[178] Given that this call was occurring in February 2020, I imagine that C.L. would have used different language in order to avoid the operator or D.F. thinking that she was referring to Christmas 2019, which had just passed. But having earlier found that her allegation of being raped in Christmas 2018 was not true, I find that C.L. was essentially threatening D.F. about what was going to happen now that he had crossed her path. Again, she casts D.F. in the worst light possible in front of law enforcement.

[179] Another aspect of the 911 call that sheds light on C.L.'s credibility and reliability is her comments that "the girl" that D.F. has on the phone is threatening her as well. It is common ground that, during the incident on February 11, 2020, D.F. telephoned his current partner, A.D.

[180] A.D. testified at trial that she met D.F. in August 2017 and that their relationship commenced shortly thereafter.

[181] A.D. testified that:

a) the first time she met C.L. was in September 2019 when C.L. came to drop off some children's clothing at D.F.'s residence.
b) she overheard about five or six telephone conversations between D.F. and C.L. In about three of the telephone conversations that happened after September 2019, C.L. accused D.F. of assaulting her and threatened to go to the police.
c) prior to September 2019, she had not heard C.L. make such threats.
d) when she was on the phone with D.F. on February 11, 2020, she did not threaten or insult C.L.
e) she acknowledged that she was upset and that it was possible that she may have told the police that C.L. was jealous of her because she was pregnant with D.F.'s child.
f) she agreed that she told police that C.L. does drugs and drinks too much. This was based on what D.F. had told her about what C.L. had said.

[182] The Crown submitted that A.D. would do and say anything to protect D.F., her current partner. While there is no doubt that A.D. has a vested interest in the outcome of this trial, I find that A.D. was measured and thoughtful in her testimony. She conceded that she may have

2024 ONSC 1247 (CanLII)

suggested that C.L. was jealous and provided a thoughtful response when it was suggested that she did not like C.L. very much. She answered that she did not know C.L., but that the situation did not make C.L. a very likable person.

[183] As I believe that A.D. did not threaten C.L. over the phone on February 11, I find that C.L. was not being truthful when she told the 911 operator that "the girl" on the phone was threatening her.

[184] Notably, towards the end of the 911 call, C.L. made the following comments:

> No, your time, your time ends today. Your time ends today.
>
> I have text messages and I have pictures.
>
> I'm gonna sue your ass, man.
>
> I have the text message.
>
> Watch, when they come.
>
> I'm pressing charges and you're going to jail.

[185] Based on the audio, video and testamentary evidence presented at trial, my overall conclusion is that C.L. was not assaulted by D.F. on February 11, 2020. I accept that D.F.'s right hand may have made split-second contact with some part of C.L.'s arm or body, but the evidence does not support her contention that she was scratched, hit or intentionally touched with force by D.F. that day.

[186] Based on my review of the evidence, I find that there was a verbal confrontation at C.L.'s apartment door about C.L. not clothing J., the older son, in a sweater. There is no doubt in my mind that D.F. was angry. However, the situation unraveled when C.L. decided that she was not going to relinquish the children to D.F. that afternoon. D.F. initially pulls the younger boy back from re-entering the apartment. Then C.L. reaches in the direction of J. to pull him back into the apartment. D.F. reaches his right hand only into the apartment and forcefully pulls J. back into the hallway, either making no contact or, at most, a split-second accidental contact with some part of C.L.'s hand or arm. The rest of the altercation remained verbal and was captured on the 911 recording.

[187] I find that C.L. took it upon herself to call 911. It appears that, by February 11, 2020, she had grown frustrated by aspects of their family relationship including the amount of child support that D.F. was providing.

[188] I believe A.D.'s evidence that, since the fall of 2019, C.L. had been threatening D.F. that she was going to go to the police with assault allegations. I disbelieve C.L.'s evidence that D.F. had harassed her a month earlier at her door. In any event, rather than simply letting D.F. leave with the children, as it was his parenting time, she decided to follow D.F. and the children to the elevator and hold the elevator door open while arguing with D.F. D.F. acknowledged that he acted in an aggressive and irresponsible manner when he swung the older boy into the elevator but, by that point, a full-blown argument had ensued.

2024 ONSC 1247 (CanLII)

[189] D.F. wanted to leave and even suggested that the police could come to his residence but, at some point was convinced by some combination of C.L., A.D. or the 911 operator that it would be better for him to remain put until the police officers arrived on scene.

[190] D.F. was arrested due to the incident and, as of the time of writing, has not seen his two sons in four years. C.L. has since complained that D.F. sexually violated their older son and those charges remain outstanding.

Remaining Allegations

[191] I do not find it necessary to go into detail about the other incidents raised at trial. Focusing on six key incidents, I find that C.L. was not a credible or reliable witness. I would say the same about the rest of the incidents.

[192] I have focused significantly on C.L.'s lack of credibility, exemplified most significantly by her manipulation and misrepresentation of text messages before this court.

[193] But I also find that C.L. was an unreliable witness.

a) she insisted that she was 16 when she met D.F. even where multiple pieces of evidence pointed to her being 17.
b) she claimed that they lived closer to the top of a 16 to 20-storey building on Stong Court, but then admitted that they lived on the 10th floor of the building.
c) she claimed that February 11, 2020 was during the time of COVID, when it is generally acknowledged that the pandemic began approximately a month later.
d) she claimed that D.F. paid her $400 in child support four or five times when, in fact, it was 14 times.

[194] Conversely, I found D.F. to have been credible and reliable in terms of his testimony. Virtually the only example that the Crown could give of D.F. not being credible was that he initially testified that he did not touch C.L. on February 11, 2020, but then admitted that he pushed her hand off. I find this admission to be of no moment.

[195] I am also entitled to draw inferences from other aspect of D.F.'s testimony. He has no criminal record. He was able to recount in a detailed manner the series of residences in which he and C.L. lived. While he can be fairly criticized for not paying C.L. an appropriate quantum of child support, the evidence indicates that he paid off one of C.L.'s debts to the Ministry of Transportation so that she could obtain a driver's license. After separation in 2017, he also allowed C.L. to use his name to rent premises given that she had no credit history. Given the sprawling allegations made by C.L., it is notable that I found virtually no inconsistencies in D.F.'s testimony. In this case, I believe D.F.'s overall narrative that he did not assault or sexually assault C.L. The charges against him must be dismissed under the first branch of *W.D.*

2024 ONSC 1247 (CanLII)

Conclusion

[196] I find D.F. not guilty of any of the offences charged. A criminal trial is not a credibility contest between the complainant and the accused. However, this is not a case where I am acquitting D.F. because I am not sure whose evidence to believe. Here, I believe D.F.'s overall account of what transpired, and he must be acquitted.

Pinto J.

Released: February 28, 2024

2024 ONSC 1247 (CanLII)

COURT FILE NO.: CR-23-00000048-00MO
DATE: 20240227

2024 ONSC 1247 (CanLII)

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

HIS MAJESTY THE KING

- and -

D.F.

REASONS FOR JUDGMENT

Pinto J.

Released: February 28, 2024