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R. v. G.W., 2025 ONSC 1144

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SUPERIOR COURT OF JUSTICE – ONTARIO
207 Cayley Street, Walkerton ON N0G 2V0

RE:	R. v. G.W.
BEFORE:	Justice Chown
COUNSEL:	S. Odom, for the Crown E. Ehlers, for the accused
HEARD:	January 13, 30, 31, February 3, 4, 5, 6, 10, 11, 2025

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REASONS FOR RULING

[1] These are my reasons for ruling certain text messages could not be introduced as exhibits at this trial and for declaring a mistrial.

SUMMARY

[2] The text messages in question were disclosed during examination-in-chief of the accused, GW, and, for one message string, during his cross-examination. The Crown argued that there was no late disclosure as it only received the text messages, and they only took on significance, in response to the accused's position and testimony. The Crown's position was that there was no prejudice to GW. The text messages are harmful to his credibility because they tend to show he lied in his examination-in-chief – but that is not prejudice. The Crown argued that if the court found there was prejudice, it

could be cured by an adjournment or, in the alternative, a mistrial. The Crown argued that the exclusion of the text messages was not an available remedy as the exclusion of evidence for late disclosure is an exceptional remedy and a remedy of last resort. The defence opposed the admission of the text messages into evidence. The defence opposed a mistrial under any circumstances.

[3] I determined that GW had been prejudiced by the timing of the production of the text messages. I ruled that the text messages could not be introduced as exhibits in this trial. I then addressed the practical implications of this ruling on the cross-examination of GW and received submissions. The defence admitted that the subject of the text messages could not be avoided, but proposed restrictions on the use of the text messages during cross-examination of GW. The defence suggestion was not practical. The Crown confirmed its position that a mistrial was a more appropriate remedy than the exclusion of the evidence. The defence maintained its opposition to a mistrial.

[4] The argument regarding these text messages occurred in the context of other problematic factors and developments:

- The trial time was repeatedly delayed by hazardous winter weather, resulting in road closures that prevented jurors from attending court. A major storm was also predicted to begin in the evening of the day after this issue arose.
- The examinations of the witnesses took far longer than estimated.
- It became apparent that the trial could not be completed before Crown counsel had to leave for a scheduled out-of-province vacation. Due to the unavailability of Crown counsel and the court, an adjournment of five weeks became necessary.
- On the day that the issue of the text messages arose, GW was arrested for an incident that occurred in the courthouse. He was taken into custody overnight while in the middle of his cross-examination.

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[5] The possibility of a miscarriage of justice increased with the complexities arising from the production of the text messages and with the other developments. In combination, the issues that arose so tainted the trial that it could no longer be considered a fair trial, and the risk of a miscarriage of justice was high. I therefore declared a mistrial.

THE INDICTMENT

[6] GW is charged with sexually assaulting his son, J. J was five at the time the alleged sexual assault came to light, and seven when he testified at this trial. The indictment alleges that the sexual assault occurred between January 20, 2021 and January 20, 2023. During this time frame, J would have been between three and five years old.

J'S DISCLOSURE

[7] GW and J's mother, SQ, were married in July 2014. They had J together in November 2017. In 2018, they purchased a campground together, moved to it, and began operating it. Their relationship broke down, and they separated in August 2020. They had an antagonistic divorce and business dispute over the campground. That dispute continued when the allegations arose.

[8] SQ testified that on January 13, 2023, J told her, "Mommy, I'm going to suck the juice out of your penis." The next day, SQ recorded J saying that GW sucked his penis. She reported this to child protection authorities. J and SQ gave video recorded statements to police on February 2, 2022. J told police, "My daddy sucked my penis."

THE EVIDENCE REGARDING THE DATE OF THE OFFENCE / OPPORTUNITY

[9] To fully appreciate the impact of the text messages, it is helpful to review the evidence as to when the alleged sexual assault occurred, and when GW may have had an opportunity to commit the offence.

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J's police statement

[10] J's police statement on February 2, 2023 was not detailed. The police did not ask J when the alleged sexual assault occurred. Among other things, no questions were directed towards:

- The date, time of year, season, or how long before the interview the events occurred.
- Whether the sexual assault occurred the last time J was at the campground, or on an earlier occasion.
- Whether any noteworthy events occurred earlier or later on the day of the sexual assault.
- The events that occurred on the day before or the day after the sexual assault.
- How long or how often GW and J were alone in the house.

J's Trial Evidence

[11] During his evidence-in-chief at trial, J said he was five years old when GW sucked on his penis, and that the time of year was winter. If that is literally true, since J turned five in November 2022, there is a limited window for when the sexual assault could have occurred. As I will explain, SQ's evidence indicated that J's visits with GW were limited and the last time that J saw GW at GW's house was in early December 2022.

[12] In cross-examination, J said he remembered getting a Nintendo Switch and that his dad sucked his penis either on the day before or the day after he received this gift. Other evidence suggested that J received the Nintendo Switch in that last visit in early December 2022.

[13] Thus, J's evidence is consistent on when the sexual assault occurred and is consistent with it having occurred in that last visit in early December 2022.

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SQ's Evidence

[14] In her testimony, SQ said that after the separation, there were only "maybe a dozen times" that J visited GW, and J slept over at GW's "maybe two or three times." Those sleepovers happened within "maybe the first two years" of the separation – that is, by approximately August 2022.

[15] SQ's evidence was that J received the Nintendo Switch in the last visit in December 2022, and she did not think that was an overnight visit. This appears to be inconsistent with J's evidence because J seemed to be saying that the sexual assault occurred on that visit.

[16] In addition, the Crown led evidence through SQ: (1) to the effect that J was increasingly reluctant to spend time with GW, starting from the time of the separation; (2) that sometimes GW did not want her to be near them when they were together and "would not allow" her to be with them; and (3) that sometimes when SQ would pick J up, J "wouldn't seem like himself." This evidence seemed designed to invite an inference that J had by then been abused by GW, or that abuse occurred more than once, although J testified that it only occurred once, and it lasted five seconds.

[17] In his cross-examination of SQ, Mr. Ehlers challenged SQ about whether J ever slept at GW's. He suggested to SQ that J's bedroom had been taken over by GW's serval (a large, undomesticated cat).

LQ's Evidence

[18] LQ is SQ's mother and J's grandmother. She said in her examination-in-chief that J slept over at GW's "several times."

[19] The Crown also led evidence through LQ that at some point J did not want to come up to the campground and he grew reluctant to spend time with GW. She said that before that, J was "always wanting daddy." LQ also related an occasion in the fall of 2022 when J asked SQ to come into GW's house with him, and then asked LQ to come with him. This evidence also seemed designed to invite an inference that J had by then been abused by GW, and that would have been earlier than December 2022.

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[20] In his cross-examination of LQ, Mr. Ehlers again challenged the position that J had ever slept at GW's house. He suggested to LQ that certainly while the serval was there, J was not sleeping over at GW's. Mr. Ehlers also attempted to draw out evidence directed at minimizing the time that J was alone with GW.

GW's Evidence

[21] GW denied any sexual impropriety with J. He also testified that J did not sleep at his house. He said that once he moved back into that house after his September 2021 bail variation, J never stayed in that room again. He said J's bedroom became the serval's room, and that the serval had turned J's room into a mess. He said that if J did come up to the campground, he would be staying at LQ's house, "100 percent."

CROWN POSITION ON WHEN THE ALLEGED SEXUAL ASSAULTS OCCURRED

[22] As noted, the indictment does not particularize the date of the alleged assault, except for the two-year window prior to J's police statement. During submissions arising from the text messages, the Crown indicated it did not adopt J's evidence as to when the alleged sexual assault occurred. Rather, the Crown maintains that J was not correct on this point. If J's evidence on when the sexual assault occurred is not accepted, it is possible for the jury to find the sexual assault occurred on an earlier date (based on SQ and LQ's evidence and the text messages). It may also be possible for the jury to find that the sexual assault occurred on a day when J did not sleep over, but merely napped at GW's house. However, that theory is not without its own difficulty (which I need not review here).

TEXT MESSAGES DISCLOSED DURING ACCUSED'S TESTIMONY

[23] During the Crown's cross-examination of GW, the Crown sought to confront GW with the text messages in question. These text messages are between SQ and GW, and support SQ's position that J slept over at GW's house on several occasions.

[24] The first text message the Crown sought to rely on was not disclosed prior to the Crown's attempt to confront GW with it. Other text messages that the Crown intended to

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use during GW's cross-examination were disclosed only after GW's examination-in-chief was almost completed.

[25] As I understand it, the Crown received these text messages from SQ. She provided them because of how she was challenged by Mr. Ehlers (as described above) during her cross-examination. I understand that, after her cross-examination, she searched her phone and found these messages that tend to show her evidence is correct and GW's evidence is not correct on this point. The Crown immediately forwarded copies of these documents to the defence upon receiving them. The one message string that was not disclosed at that time was an oversight by the Crown.

[26] The defence objected to these text messages being used at all on the basis that they had not been produced previously and it would cause prejudice to use them now. The defence argued that:

- The text messages have not been authenticated. Mr. Ehlers said the dates and times on these text messages could be easily faked and he had no adequate opportunity to have an expert consider the authenticity of the text messages. Although they were apparently exchanged with GW, and so were once in his possession, Mr. Ehlers said GW may deny the authenticity of some of them.

- GW did not have a chance to review the text messages prior to testifying and did not have a meaningful chance to review them prior to the start of his cross-examination. Further, he did not have a chance to meaningfully review them with counsel as he was under examination, and he was ill with a stomach ailment on the weekend after they were produced.

- GW will be placed in the difficult position of having to respond to these text messages in front of the jury, without an opportunity, in advance, to evaluate the authenticity of the messages.

[27] The Crown's position was that there was no disclosure failure, the documents were disclosed immediately upon receipt, and the documents only became relevant

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when GW denied that J had slept at his house. The Crown's position is that the circumstance is not one of prejudice to GW, but rather it is the exposure of a lie. Any prejudice that arises from the need to respond to the text messages can be cured by an adjournment. The Crown's alternative position is that the prejudice can be cured by a mistrial.

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THE TEXT MESSAGES ARE HIGHLY RELEVANT

[28] I disagree with the Crown's position that the text messages became relevant only when GW testified that J had not slept over at his house. The date of the alleged assault and GW's opportunity to have committed it were relevant from the beginning. It was predictable that the text messages between the parties would become prominent. In her police interview, SQ said that GW was texting her "every day, all day" at that time. It was apparent from close to the beginning of SQ's testimony that she and GW had exchanged a multitude of text messages during the two-year time frame in the indictment. SQ indicated, more than once I believe, that there would be text messages that supported aspects of her testimony. The question of GW's opportunity to commit the sexual assault was addressed early during SQ's examination-in-chief with questions about how many visits there had been and where they occurred. SQ offered that J stayed over with GW two or three times. She also said that sometimes she would bring J to the campground with the intent to stay over, but she would get text messages about problems, and eventually a text to come and pick him up. She described getting a text she did not like and picking J up as a result and taking him back to Hamilton in the middle of the night. When describing what she knew about the inside of GW's house, she referred to receiving photos of the inside of GW's house by text message. She said she had text messages surrounding the last time J was left alone with GW (December 2022), and said in her evidence-in-chief, "I still have it on my phone. I could look at it." She described that her communication with GW was "[m]ainly texting. A lot of texting." She referred to texting with GW after the allegations came to light. The jury of course heard this evidence and did see some text message conversations that the defence introduced in cross-examination of SQ. It is likely that the jury would be curious to see other text messages between GW and SQ that bear on SQ's evidence.

[29] It is reasonable to infer that, if at any point prior to trial SQ had been asked to provide relevant text messages that addressed when GW was alone with J, she would have done so.

NO RIGHT TO A THOROUGH INVESTIGATION

[30] I am aware that an accused's s. 7 rights do not include a right to a thorough police investigation or a right to direct the conduct of a police investigation: *R. v. Darwish*, 2010 ONCA 124, 100 O.R. (3d) 579, at paras. 29 to 42. In addition, the law does not impose on the Crown an obligation "to disclose material that it does not have or cannot obtain": *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 22. Put differently, the Crown does not have to produce evidence that is "beyond the control of the prosecution": *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 21. However, the Crown has no absolute right to introduce previously undisclosed evidence that would readily have come to light in a thorough investigation. In addition, the Crown does have an "obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted" [emphasis added]: *McNeil*, at para. 13.

[31] At the same time, the defence has its own obligation, in that defence counsel has a duty to diligently pursue disclosure: *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 37.

[32] In this case, it was apparent from the outset that whether GW had the opportunity to commit the sexual assault was important. The officer who interviewed SQ and J was aware, prior to the recorded interviews, that J saw GW only periodically and on no set schedule (see page 18 of the transcript of SQ's recorded interview). The officer was also aware that the last time J was at GW's house was in the beginning of December 2022 (see page 20 of the same transcript).

PREJUDICE TO GW

[33] Regardless of who is to blame for the late disclosure of the text messages, GW has potentially been prejudiced by the timing of the disclosure of these messages for the following reasons:

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- The defence did not have the text messages prior to cross-examining J. If the text messages had been produced before J testified, the defence may have cross-examined J to see if he would confirm that the sexual assault did not occur on the prior dates that he slept over.

- The defence did not have the text messages prior to cross-examining SQ or LQ.

- The defence committed, in cross-examination of SQ and LQ, to the position that J never slept at GW's house. This cross-examination was seriously undermined by the text messages. This parallels the circumstance in *R. v. Wray-McCombs*, 2021 ONSC 7749, at para. 8, where defence counsel had pursued an area of cross-examination of two Crown witnesses that was completely undermined when one of the witnesses provided cell phone screenshots that showed the witnesses were not lying. In that case, unlike here, the Crown did not propose to submit the screenshots as evidence. However, defence counsel could no longer ethically pursue his position that the two witnesses were lying. Gibson J. accepted the defence argument that it was not possible to "unring the bell," and declared a mistrial.

- GW did not have access to the text messages prior to making his decision to testify, and for purposes of preparation before testifying. In saying this, I appreciate that the messages were sent to GW's phone, so at least at the time they were sent to him he had knowledge of these texts (I am assuming he received them). But the question is what knowledge did he have of the evidence against him: *R. v. Calder*, 2010 NSSC 146, 293 N.S.R. (2d) 19, at para. 12, and that changed significantly with the text messages in question.

- GW did not have access to the text messages prior to trial to assess their authenticity.

[34] I acknowledge that an adjournment, conducting a *voir dire*, and/or recalling SQ or LQ, could potentially have addressed some of the above concerns, but not all of them.

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[35] I also acknowledge that GW did not want a mistrial. The only remedy he sought was the exclusion of the text messages. As I will explain, he proposed limited use of the information contained in the text messages, and this was not workable.

[36] I also acknowledge that the defence did not raise all the foregoing elements of possible prejudice. I raised some of them during argument. However, the events of the trial moved quickly with limited time to reflect on the impact these text messages would have on the proceeding. Further, these kinds of concerns sometimes take on additional prominence in an appeal when, as often occurs, new counsel are involved.

[37] The trial judge is ultimately responsible to ensure that the trial is fair. “The decision of whether or not to declare a mistrial falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised”: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 79. In this case, there was such a danger.

THE CROWN’S ARGUMENTS FOR ADMISSION OF THE TEXT MESSAGES

1. The text messages are analogous to proper rebuttal evidence.

[38] The Crown likens the new text message evidence to rebuttal evidence and says the considerations in allowing the use of this evidence should parallel the use of rebuttal evidence. The general rule surrounding rebuttal evidence was recently set out by the Court of Appeal in *R. v. S.M.*, 2025 ONCA 18, at paras. 15 to 16:

> The general rule is that the Crown must introduce all the evidence it intends to rely on before closing its case. This rule against case-splitting ensures that the defence has a full opportunity to respond and is not taken by surprise by new evidence after the Crown has closed its case and the defence is complete.
>
> However, the Crown may call rebuttal evidence where: 1) the defence raised a new matter which the Crown has had no opportunity to deal with and could not reasonably have anticipated; or 2) some matter that emerged during the Crown’s case took on

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added significance as a result of evidence adduced by the defence. [Citations omitted.]

[39] How this issue is framed makes all the difference to its proper outcome. With respect to GW's evidence that J never slept at his house, the Crown would suggest that this is a "new matter which the Crown has had no opportunity to deal with." An alternate framing is that the date of the alleged sexual assault, and the opportunity of GW to commit the assault, are not "new matter[s] which the Crown has had no opportunity to deal with." Rather, these are matters the Crown has always known it must address.

[40] Similarly, while the Crown suggests it "could not reasonably have anticipated" GW's position that J never slept over at his house during the time frame in question, an alternate framing is that the Crown could reasonably have anticipated that there would be text messages tending to show when J may have stayed at GW's house, and "opportunity" is always in issue in a criminal trial unless there has been an appropriate admission.

[41] In my view, the alternate framing is at least as accurate as the way the Crown would frame things. I was not persuaded by this aspect of the Crown's argument.

2. The Crown intends to use the text messages for impeachment only.

[42] The Crown said that it is using the text messages for impeachment purposes only. The Crown invited me to give a limiting instruction to this effect to the jury. Presumably, I would tell the jury it could only use the evidence for its impeachment value in respect of GW's testimony.

[43] Any instruction I could give would not adequately address the issue. The text messages would buttress SQ's evidence and there is no realistic way the jury would be able to consider the text messages when assessing GW's credibility but not when assessing SQ's credibility. The Crown could and should have introduced the text messages during SQ's testimony if it wanted to buttress her testimony with this documentary evidence. Along the same lines, as noted above, the text messages undermine Mr. Ehlers' cross-examination and it is not realistic to say to the jury that they

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cannot use the text messages to evaluate SQ's and LQ's evidence on this point, especially when SQ told the jury she thought she had text messages that would address this point.

[44] The text messages also identify specific dates when GW had opportunity to commit the alleged sexual assault. It would be very hard to expect the jury to disregard this evidence of opportunity but rather only use the text messages for their impeachment value.

[45] As well, the Crown expects to submit to the jury that it should not accept J's evidence when J said the sexual assault occurred on the day before or the day after he got his Nintendo Switch. The text messages will support this position. In result, the Crown will (1) invite the jury to disbelieve J's previously undisclosed evidence as to when the assault occurred, and (2) buttress its position with previously undisclosed text messages. This strikes me as seriously unfair when the Crown could easily have gathered both these undisclosed and highly relevant pieces of information long ago.

3. Exclusion is not the normal remedy for late disclosure.

[46] The Crown also likens the circumstances here to late disclosure cases such as *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, and *R. v. Spackman*, 2012 ONCA 905, 300 O.A.C. 14. The Crown submits that there can be a breach of GW's s. 7 rights only if there has been a breach of the Crown's disclosure obligations which, it submits, has not occurred here. Then, if there has been such a breach, the next required step is a s. 24(1) application by GW. Finally, the Crown submits that the appropriate s. 24(1) remedy in the event of a s. 7 breach arising from a disclosure failure is rarely exclusion of the undisclosed evidence, and exclusion should be a last resort. The court is required to first consider whether any prejudice can be remedied by a disclosure order, an adjournment, or a mistrial. The Crown relies on *Bjelland* for the proposition that exclusion of evidence under s. 24(1) "will only be available in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system": *Bjelland*, at para. 19.

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[47] The late disclosure in *Bjelland* and *Spackman* was late in the process, but in both cases, unlike here, the issue arose before trial. This case is more akin to *Wray-McCombs*, where the trial judge described that "the genie is out of the bottle."

RULING AND RESPONSE TO RULING

[48] Even though GW was in the middle of his cross-examination, I permitted Mr. Ehlers to consult with GW to take further instructions on his position. This included permitting Mr. Ehlers to discuss the evidence GW had given. Ms. Odom objected to this, but fairness and practicality meant this could not be avoided. Without this permission, Mr. Ehlers would not be able to give GW proper advice. After this consultation, GW maintained his position that the text messages should not be introduced into evidence and that he opposed a mistrial.

[49] I ruled that the Crown could not introduce the text messages as exhibits in this trial based on the factors set out in paras. [26] and [33] above. The prejudice could not be adequately addressed through an adjournment or jury instruction in the current trial.

[50] I did not intend that this ruling would necessarily apply to another trial in the event of a mistrial. I did not anticipate that the Crown would maintain its alternative position – that a mistrial was appropriate – but Ms. Odom reminded me of this request. She then made the argument that the appropriate remedy was a mistrial rather than proceeding with the trial with the text messages excluded from evidence. She referred me to *Bjelland*: "[a] fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused": *Bjelland*, at para. 22, citing *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362. She referred me to *Spackman*, arguing that the jury should not be forced to make its decision "on a distorted and incomplete evidentiary foundation": *Spackman*, at para. 145. She sought directions on how she might proceed with her cross-examination of GW without referring to the text messages, since it was necessary to cover whether J ever slept at GW's house.

[51] The defence agreed that the question of when J may have slept at GW's house cannot be avoided in GW's cross-examination, or potentially in the examinations of other defence witnesses. The defence proposed that the Crown could refer to the text

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messages and suggest the text messages were sent, but could not submit them as exhibits or read from them verbatim. That suggestion is unworkable. The jury, having heard that the parties exchanged many text messages and having heard SQ say that her position would be supported by text messages, would have been alerted to the text messages and would have wondered why they would not be able to see them. If GW denied (or refused to admit) the content of the messages, that would create a fresh set of reasons for why the text messages should be admitted and could create a distorted or incomplete evidentiary foundation.

[52] I considered briefly reserving on the issue of the mistrial and allowing the trial to continue; however, after reflection during a short break, I concluded it was necessary to decide whether a mistrial was necessary before permitting further cross-examination of GW. Any prejudice could be compounded by further cross-examination if there was to be a mistrial.

[53] I considered it highly likely that if the trial continued, considerable additional further complexity would arise, and the potential for a miscarriage of justice would only increase.

OTHER FACTORS POINTING TOWARDS A MISTRIAL

[54] The concern regarding the late revelation of the text messages occurred in combination with other important factors that added to my concern of trial unfairness and the potential for a miscarriage of justice.

The Trial Was Taking Much Longer Than Expected

The trial time estimate provided by counsel was originally four days. Jury selection proceeded on January 13, 2025, with the trial proper to start on Tuesday, January 28, 2025; however, this was delayed two days due to inclement weather. The jurors lived from as far north as Lion’s Head and as far south as Lucknow. Due to snow squalls and road closures, the trial could not proceed on January 28 and 29. We returned on January 30, 2025. One juror was excused and replaced by one of the alternates, and the jury was put in charge on that date.

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[55] The Crown called its first witness, J, on January 30, 2025. J's evidence was completed on January 31, 2025.

[56] Weather was an issue throughout the trial. We could not sit on February 7, 2025. A significant storm was predicted to begin in the late afternoon of February 12, 2025.

[57] We also started late on February 4, 2025 due to Crown counsel's involvement in a bail hearing in another matter. The courtroom was also required for that matter.

Unexpectedly Lengthy Evidence

[58] During a hearing immediately prior to jury selection, Mr. Ehlers advised that a defence theory was that J's mother, SQ, made up the allegations against GW and/or influenced J's testimony. The theory was that SQ influenced J to say that GW had sucked his penis as this would get GW out of the way and allow SQ to obtain sole ownership of the campground, even though much of the funding for it had come from GW. I do not know when the Crown first became aware of this theory, but it was no secret when the trial started. In result, both parties called a great deal of evidence about the antagonistic relationship between GW and SQ. This evidence was not central to the issue of whether GW sexually assaulted J. However, each side had its own strategic reasons for wanting to go over this evidence, and this added to the length of the trial.

Mid-trial Arrest of GW

[59] GW's cross-examination began on Monday, February 10, 2025. After a break during his cross-examination, I was advised that GW was to be arrested at the end of the court day in connection with an incident that occurred in the courthouse. I was advised that the incident involved an interaction between GW and LQ. The interaction was witnessed by Ms. Odom, and Ms. Odom had given a statement to police. I was further advised that GW would be taken into custody until a bail hearing could be arranged the following day. I need not review the options that were advanced and that I considered to address this issue. In the end, GW was held at the local OPP detachment overnight in the middle of his cross-examination. On the previous day, I had been advised that GW was suffering from a stomach ailment that started on the preceding

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weekend. Despite these developments, GW opposed a mistrial and did not seek an adjournment.

A Lengthy Mid-Trial Adjournment Became Necessary

[60] On Tuesday, February 11, 2025, it became apparent that the trial could not be completed before Crown counsel had to leave for a scheduled out-of-province vacation. For various reasons, the trial could not resume until March 19, 2025. The jurors all indicated they could make themselves available to resume on that date, but this meant that there would have to be an adjournment of about five weeks. Depending on the length of his cross-examination and whether the storm expected for February 12, 2025 necessitated a shortened court day, there was a good chance that GW would have been under cross-examination during this five-week adjournment.

[61] An adjournment of five weeks in a jury trial is not without precedent, but it was concerning in this case and raised further unease about trial fairness and the potential for a miscarriage of justice.

CONCLUSION

[62] Despite my ruling that the text messages were not to be admitted as evidence, the subject matter of the text messages cannot be avoided in this trial. Further, the lengthy delay of the trial could not be avoided. The revelation of the text messages created unfairness and the possibility of a miscarriage of justice. This concern, in combination with a necessary five-week delay in the middle of the trial, so tainted the trial that it could no longer be considered a fair trial. The risk of a miscarriage of justice was high. I therefore declared a mistrial.

_____
Chown J.

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