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# R. v. J.W., 2024 ONSC 4443

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**CITATION:** R. v. J.W., 2024 ONSC 4443
**COURT FILE NO.:** CR18-365
**DATE:** 20240806

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | | |
| HIS MAJESTY THE KING | | James Spangenberg, for the Crown |
| **– and –** | | |
| J.W. | | |
| | Defendant | Alan D. Gold and Ellen C. Williams, for the Defendant at Sentencing |
| | | **HEARD:** Jury Verdict: October 11, 2023<br>Sentencing Submissions heard:<br>April 26, 2024<br>Sentencing Decision: August 6, 2024 |

**JUSTICE P.J. MOORE**

**W A R N I N G**

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code.* This subsection and subsection 486.6(1) of the *Criminal Code,* which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

**486.4 Order restricting publication — sexual offences.** — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1,172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph

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(i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph *(a)*.

(2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

. . .

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

## REASONS FOR SENTENCE

### I. OVERVIEW

1. There is a publication ban in place preventing the publication of the complainant's name or any identifying information in this case. Before these reasons are released or published, the complainant's name shall be initialized.

2. Following a jury trial in October 2023, *J.W.* was found guilty on all counts on a six-count indictment as follows:

i. Choking to overcome resistance to a sexual assault, s. 246(a) (July 15, 2015);
ii. Assault causing bodily harm, s. 267(b) (January 13, 2014);
iii. Sexual assault, s. 271; (July 15, 2015);
iv. Forcible confinement, s. 279(2) (November 30, 2013 – December 31, 2015);
v. Forcible confinement, s. 279(2) (July 15, 2015); and
vi. Assault, s. 266 (November 30, 2013 – December 31, 2015).

3. Following the trial, *J.W.* retained new counsel. Sentencing submissions were heard on April 26, 2024. This Court must now determine the facts upon which *J.W.* is to be sentenced and impose an appropriate and fit sentence.

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## II. **FACTS**

**Circumstances of the offence**

4. In *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 16-19, the Supreme Court of Canada described how a judge ought to determine the relevant facts for the purposes of sentencing following a jury trial:

> [U]nlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.
>
> Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict*": R. v. Brown*, [1991] 2 S.C.R. 518 (S.C.C.), p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (Criminal Code, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown; R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
>
> Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown; R. v. Fiqia* (1994), 162 A.R. 117 (Alta. C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: (ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368 (S.C.C.); *R. v. Lawrence* (1987), 1987 58 C.R. (3d) 71 (Ont. H.C.)). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

5. In determining whether any real ambiguity has been created by the verdicts returned, I must consider how the case was presented by the parties and the nature of the evidence led: *R. v. J.M.*, 2016 ONSC 5139, [2016] O.J. No. 6819, at para. 12. Only if there is ambiguity based on the evidence, the defences asserted at trial, and/or the verdicts does the Court have jurisdiction to undertake its own independent factual assessment: see *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.), at paras. 24-25, 30; *R. v. Gauthier* (1996), 108 C.C.C. (3d) 231 (B.C.C.A), at paras. 23-24 ; *R. v. Ferguson*, 2008 SCC 6, [2008] 1

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S.C.R. 96, at paras. 16-18; *R. v. L.M.*, 2014 ONCA 640, 122 O.R. (3d) 257, at paras. 49-51. It is not necessary for the trial judge to find a series of facts that least implicate the accused, particularly if the weight of the evidence convinces her of a more onerous foundation in the facts: *R. v. Medwid*, [2008] O.J. No. 1992.

6. This case dealt with allegations of physical, mental, and sexual abuse within a domestic relationship between 2013-2015. The complainant testified to multiple allegations of abuse, including forcible confinement (some of which were set out in particular counts and some of which were captured by the global counts in Count 4 and 6 which span most of the duration of the relationship between the complainant and the accused). At trial, the accused denied all of the allegations. The only two witnesses at trial were the complainant and the accused.

7. At trial, I ruled an audiotape that had been recorded by the complainant of a conversation between her and the accused admissible. In the audiotape, T.P. accused *J.W.* of being controlling and abusing her. The accused makes denials at some parts of the audiotape but then speaks of "snapping" and of the complainant "pushing his buttons" at are parts. I do not find, considering the evidence as a whole, that the denials on the audiotape leave me with a reasonable doubt as to the allegations of abuse made by the complainant. I find that the audiotape supports the complainant's testimony of the accused as a controlling person who blamed the complainant for any violence in the relationship.

8. The facts underlying the specific allegations set out in Counts 1, 2, 3, and 5 are not in dispute as the facts underlying those counts related to specific dates and are clear from the evidence and the jury's verdict. I will deal with those counts first and then turn to the global counts.

**Counts 1, 3, 5 – July 15, 2015**

9. T.P. testified that on or about July 15, 2015, she was living with the accused and their son. She also had two children from a prior relationship that lived with them. She waved at a neighbour who had slowed down in the parking lot for her and her daughter. This upset the accused who believed she was flirting with the neighbour. She testified that she was arguing with the accused and started screaming. The accused grabbed her by the hair and dragged her to the bedroom. In the bedroom, he threw her on the bed. She begged him to let her go, but he refused. She tried to push him away and he grabbed her by the throat. She couldn't breathe. While holding her throat, he then shoved his fingers into her vagina and asked if the neighbour turned her on before penetrating her vaginally with his penis. She testified that a neighbour was banging on the wall and then someone came to the door. She told the accused he raped her and testified that he responded that she couldn't prove it as he didn't finish. Thereafter, he spat on her and left. She curled up in a ball in the fetal position. It hurt to swallow, and she was bleeding and sore. She testified that the accused left and, when he returned several hours later, blamed her for what happened, saying it was her fault for flirting with the neighbour. These facts form the basis of the jury's verdict on the following counts: choking to overcome resistance or to assist in committing a sexual assault, sexual assault, and forcible confinement.

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**Count 2 – July 13, 2014**

10. T.P. testified that on or about July 13, 2014, she told the accused that she was pregnant. She testified that they were arguing because she wanted to keep the baby and he wanted her to have an abortion. The accused denies having this argument or any violence arising from this situation. I decline to make any finding as to the source of the argument. T.P. testified that the accused was insulting her asking her how she could bring a child into the world when she couldn't even make chicken that wasn't greasy or keep up with the laundry. T.P. was hysterical. TP testified that the accused had her against a wall and punched her in the face. Part of a tooth broke off and the accused laughed, stating that there must be something wrong with the tooth anyway and that it was free dental care. T.P. tried to leave, but the accused wouldn't let her go until she apologized. The incident ended when a neighbour came to the door. T.P. didn't get treatment until 2016 and by that point the broken tooth was infected and had to be pulled, along with some other teeth. T.P. recalled this incident specifically as on other occasions, the accused had said "its not like I punched you".

11. This incident is also one of the possible bases for the forcible confinement count in Count #4.

**Count 4 and 6 – November, 30, 2013 – December, 31, 2015**

12. I have combined these two counts as most of the forcible confinement allegations are described as occurring at the same time as some of the various assaults, specifically 13(i) and (ii) with a further allegation of forcible confinement at 13(xi) as set out below.

13. T.P. testified about multiple assaults occurring throughout her relationship with the accused. Specifically, she testified about the following:

    i. November 30, 2013 – T.P. and the accused were arguing as T.P. had seen some Facebook posts of the accused and a woman. T.P. was yelling and the accused was telling her to calm down and listen. When T.P. continued screaming, the accused pinned her against a wall in the bedroom near the closet with his forearm and "smacked" her in the face with an open hand. When T.P. tried to call her dad, the accused took her phone and refused to let her leave until she apologized for raising her voice to him. The incident lasted 20-25 minutes.

    ii. December 2013 – T.P. had told the accused that she was uncomfortable with his ex-girlfriend coming to Christmas. They got into a screaming match, and he pushed her against a wall and "smacked" her twice and told her that she didn't have a choice as he was in charge. T.P testified that the accused was trying to convince her why he needed to hit her and wouldn't let her leave the bedroom. She tried to leave through the bedroom window. The accused took a video and said he would show everyone how crazy she was. Additionally, the accused told T.P.'s son that she was trying to kill herself.

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iii. May/June 2014 – T.P. was five months pregnant. The accused and T.P. began fighting; he was choking her on the bed, whereupon she got off the bed and he kicked her while still laying on the bed. T.P. doesn't think he was trying to kick her in the stomach but that's where it hit her. A photo of her pregnant stomach with a bruise was introduced into evidence that may have been from this incident.

iv. December 2014 – a week after their son was born, T.P. testified that the accused was making noise in the kitchen. T.P. and the accused got into an argument. The next thing T.P. recalled was lying on the floor with blood all over her when a neighbour came to the door. The accused told the neighbour T.P. was throwing up. T.P. testified that further assaults involving fighting, hitting, choking, and smacking occurred in 2014.

v. Spring 2015 – T.P. testified that the accused started to digitally penetrate her and ask if she was "wet". Her pain would turn him on.

vi. August 2015 – T.P. went out East to visit her family. When T.P. returned, she stayed with her mother or slept in her car. Upon returning to the residence, the accused said T.P. was keeping their son from him and grabbed the baby. T.P. grabbed the baby back and hugged him to her chest. She testified that she was on the floor with the baby and the accused was kicking her and screaming at her for 15-20 minutes. She said that it wasn't that hard as she was holding the baby.

vii. 2015 – T.P. recalls being on the floor by the front door and the accused kicking her and smacking her repeatedly and calling her names until she peed herself. Thereafter, the accused would call her "disgusting", and told her to clean it up.

viii. October 17, 2015 – The day before their son's baptism, T.P. testified that the accused was angry with her and pushed her up against her vehicle. T.P. submits that the next day she woke up with a bruise on her face.

ix. Christmas 2015 – T.P. and the accused were no longer living together, but the accused came to her residence with a gift for her birthday. They were intimate and T.P. hoped that they had "turned a corner". The accused wanted to stay and when T.P. said "no", the accused pinned her up against a wall. A neighbour came and told the accused to leave.

x. Photos – T.P. went through the various photos depicting injuries and testified that she didn't recall the exact circumstances that resulted in each bruise as she had so many bruises throughout the relationship. She recalled the following in relation to the photo exhibits:

    a) Exh. #2, which depicted a bruised ear that was caused by the accused punching T.P. The punching caused an earring to dig into the side of

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T.P.'s neck, which left a mark on her neck and a resultant bruise on her ear.

b) Exh. #4, which depicted the bruise to T.P.'s stomach caused by the accused kicking her.

c) Exh. #5, which depicted an injury to T.P.'s ankle caused when the accused threw a toy car or train at her, striking her in the ankle.

d) Exh. #8, which was a photograph of an injury to T.P.'s face that occurred during the assault the week after their son's birth.

e) Exh. #9, which depicted facial injuries that occurred during a fight in July 2015 right before T.P.'s trip out East. T.P. and the accused were arguing over money. T.P. testified that the accused was spitting on her and punching her when she was by the front door with their son.

f) Exh. #10, which depicted a bruise along the jawline that T.P. believed might have been from the day of the baptism.

xi. Spring 2015 – T.P testified that things were really bad. The accused wouldn't let her leave the house. She would try to leave through the front door or the patio door but wasn't allowed to. T.P. would eventually climb onto the ledge above the stairwell with the baby as this was the only spot the accused couldn't reach her. A photo of T.P. standing on the shelf above the stairwell with the baby in her arms was put into evidence by the accused but he provided a different explanation as set out below.

14. At trial, *J.W.* testified that he had never hit, kicked, or sexually assaulted T.P. He said that she was out of control much of the time – screaming, hitting her elbows and head on the walls, and hitting herself in the head. The only time the accused intervened, he alleges, was to stop T.P. from hitting herself or when she tried to take pills while threatening to kill herself. The accused testified that T.P. did not suffer any injuries on the occasions he intervened.

15. The accused further testified that it was T.P. that wouldn't let him leave the residence and threatened to destroy his property or kill herself if he left. He also said that she jumped on his car once when he tried to leave. T.P. agreed that she might have done this when he had her phone. The accused testified that T.P. had climbed onto the ledge above the stairwell because he didn't bring her flowers and threatened to drop the baby if he didn't stop recording with his phone, so he stopped.

16. It is clear from the jury's verdict that they believed the testimony of T.P. and disbelieved the testimony of the accused that there had never been any incidents of assault, sexual assault, or forcible confinement. It is impossible to know the exact facts that the jury relied on for the two global counts of assault and forcible confinement.

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17. In order to make findings on these counts, I must make my own assessment of the credibility and reliability of the complainant and the accused and consider any exculpatory evidence that may impact those findings.

18. The Crown urges me to accept the testimony of T.P. with respect to all allegations. The Crown submits that this was an ongoing pattern of conduct which escalated over time.

19. The Defence submits that T.P. did not have a perfect memory and that she spoke in generalities for many of the incidents. He also suggests that she simply embellished her testimony. For example, the Defence points out that the neighbour that allegedly banged on the door was never called as a witness. Also, the complainant testified that the accused would videotape her, but there is no evidence she told the police about videotaping. The police did not seek a warrant for the accused's phone. Counsel also submits that the Court should not find that the incidents escalated but only that the complainant's version of events escalated. Nevertheless, Mr. Gold submits that on the evidence the Court could find that there were some incidents of punching, smacking, maybe a kick or two along with some brief periods of confinement.

20. I found T.P. to be a credible witness, although she did appear to have some difficulty remembering the order of some of the assaults and some of the details. I do not find that her version of events was shaken on cross-examination. I believe that the photos that were presented in Court were actual photos and not doctored photos, as was suggested by the Defence at trial. It is not surprising that where there are numerous incidents, a witness may not recall their precise order or every detail of every incident.

21. *J.W.* testified that there were absolutely no incidents of violence in the relationship by him towards T.P. At most, *J.W.* testified that he would try to physically restrain T.P. when she was hitting herself, hitting the walls, trying to hit him, or trying to harm herself. I do not accept his testimony. I find that the testimony of T.P., the photos of injuries, and the audio recording captured by T.P. undermines *J.W.'s* version of events and does not leave me with a reasonable doubt. In that recording, when she is accusing him of abuse, for the most part he does not deny the abuse, but instead he blames the complainant for causing his behaviour.

22. I don't need to make specific findings with respect to each allegation that underlies the global counts of assault and forcible confinement. I need only make findings sufficient to inform the sentencing on this matter. I find that *J.W.* physically assaulted T.P. by both slapping and kicking her on numerous occasions throughout their relationship, sometimes to the point of leaving bruises. I find that this abuse was on-going and occurred quite frequently throughout the relationship starting in November 2013.

23. The abuse in the relationship appears to follow a pattern to a degree. The couple would start arguing about some issue, T.P. would become overwrought and hysterical, and the accused would strike her with his hands, fists, or feet. On some occasions, the accused would want to explain why he had to do so or require an apology from the complainant

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before she was allowed to leave. The facts I do accept lead me to conclude that the accused was very controlling toward the complainant.

**The Impact on the Victim**

24. T.P. provided a victim impact statement (VIS).

25. The Defence made submissions in relation to the VIS as to parts he felt should be excised and not considered by the Court. These included references to being "held hostage", that the accused has a "history of being violent", and that the complainant fears the accused will cut her brake lines and will have his friends break-in and gang rape her in front of her children. Further, Counsel submitted that any references to the impact on the children should be excised.

26. While I can appreciate the purpose of the VIS is for the complainant to talk about the impact the offences have had upon her, including any fears and insecurities they have caused, I acknowledge that the only "history" I am aware of is the allegations in the case before the Court. Of note is the fact that *J.W.* has no criminal record. I don't believe there was any evidence at trial about brake lines being cut or threats of a gang rape. Accordingly, I will disregard these portions of the VIS. For the most part, the references about the children are about how the trauma from the offences has impacted the victim and her personality, which, in turn, has impacted her ability to parent her children, thereby directly impacting her children. This harms both her and the children. I find that is a fair comment. The complainant does indicate that witnessing the abuse had an emotional impact on the children but does not expand on this. I find that this general statement is something the Court could find often in the situation when children witness domestic abuse. I will disregard the message from the stepmother the complainant says was left on her cell-phone.

27. The Defence also submitted there was no evidence of spitting, but the Crown took me to some references in the transcript. The complainant testified about being spat on when she was on the floor near the front door after being hit or kicked.

28. The VIS outlines that these offences have had a significant impact on T.P. Ten years have passed since she began her relationship with the accused, and she reports that she is still suffering significant emotional and psychological trauma as well as some physical trauma. She indicates that she went from being a "free spirit, brilliant mind and a confident woman" to being a "shell incapable of any form of vulnerability" who has a hard time living with this "level of emotional paralysis and fear".

29. T.P. reported that she still has panic attacks and night terrors. She indicated that she still lives in fear and is unsure if her sense of safety will ever return. She indicates that the trauma has greatly impacted her ability to work. She states that she was a straight-A scholarship student and was pursuing a post-graduate degree when she met the accused. She dropped out of school and is terrified about the idea of going back and cannot work outside her home as she can't cope with the unpredictability of a work environment.

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30. T.P. outlines how the offences have impacted her ability to connect with her new husband, her children, and other loved ones. She asks: “Emotionally, your violent crimes against me have torn me apart. I have never felt so isolated and alone, how do I ever allow anyone that close to me again?”.

31. Physically, T.P. describes the bruises, scratches, and bumps caused by the abuse and the ongoing physical response she has to the trauma caused by her continued fear and anxiety. She states that she used to jog daily but hasn’t since her ankle was injured. I have no other evidence of this injury other than the bruise she testified was caused by a toy car or train being thrown at her.

**Circumstances of the offender**

32. *J.W.* is 49 years old and has no prior criminal record.

33. A pre-sentence report was prepared. It indicates that *J.W.* came to Canada from Beirut, Lebanon with his family in 1978. He had a stable childhood free from abuse or violence. He continues to have a good relationship with his parents and siblings.

34. *J.W.* advised the writer that he has been with his current spouse for nine years and married for one. His wife reported that they had been together since 2018 and denied any violence or abuse in their relationship. His current wife reported that she was in a car accident in 2017 and relies on the accused for support at home. He provides for her, his children, and his parents.

35. Prior to his relationship with T.P. the accused., *J.W.* had another long-term relationship and shares a daughter with that former partner. The former partner was contacted and described *J.W.* as a “calm, likeable guy” and confirmed that there was no violence in their relationship.

36. *J.W.* sees his 17-year-old daughter every other weekend and also normally sees the 9-year-old son he shares with T.P. every other weekend. However, *J.W.* reported that he had not seen his son for about a month prior to the report.

37. *J.W.* advised the PSR writer that he received a mechanical engineering college degree. He has owned an autoshop since 2005 and also owns a fleet of taxis for a local taxi service.

38. *J.W.* reported some back and heart issues, but no other significant physical or mental health concerns. He reported no issues with alcohol or drugs.

39. Along with a pre-sentence report, the Defence filed nine letters of support from the following individuals who know the accused:

    a) *I.L.*, his current spouse;

    b) *J.T.* his former partner and mother of his daughter;

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c) Mirza Burzic, a realtor and close friend;

d) Brenda Goldsmith, a tenant and friend;

e) *L.W.*, his daughter;

f) Jo-Ann Bakker, an accountant, friend, and customer;

g) I.G., his sister-in-law;

h) Junior Sorzano, a Senior Pastor; and

i) Rev. Mariela Rivera, Reverand of the Church of the Nazarene.

40. I am not going to detail the contents of all the letters of support, but have reviewed them all carefully. The letters describe *J.W.* as a caring, loving, and supportive husband; a wonderful and involved father; and a hard worker and true friend. The letters indicated that *J.W.* is caring and non-violent in his relationships with the authors and is slow to anger. His former partner refers to him as a "gentle giant". His current spouse outlines the support that he provides to her physically, emotionally, and financially since her car accident and the impact any period of incarceration would have on her. He is described as a mentor, a father figure, and an older brother by some of the authors. The letters detail various acts of selflessness and kindness. It is clear that his family and friends have difficulty reconciling the man they know with someone who could commit the offences *J.W.* has been convicted of. He has the support of his church community as well.

**CROWN AND DEFENCE POSITIONS**

41. The Crown in this case seeks a sentence of six (6) to eight (8) years incarceration plus ancillary orders. They suggest a breakdown of 5 years on the sexual assault and 1 year concurrent on the overcoming resistance by choking and the forcible confinement , 1-1.5 years consecutive on the assault causing bodily harm, and 1-1.5 years consecutive on the global assault with 1 year concurrent on the forcible confinement.

42. The Defence suggests that a conditional sentence would be the appropriate sentence in this case. He also submits that a SOIRA order should not be imposed in this case but takes no issue with the other orders being sought. Mr. Gold suggests 2 years less a day on the sexual assault with the overcoming resistance and forcible confinement counts running concurrently, 4-6 months concurrent on the assault causing bodily harm counts, and 4-6 months concurrent on the assault and forcible confinement counts. Mr. Gold did not propose any probation.

**THE FIT AND PROPORTIONAL SENTENCE IN THIS CASE**

**Sentencing Principles to be Applied**

43. The offences of sexual assault, assault causing bodily harm, and forcible confinement carry a maximum penalty of ten years when prosecuted by indictment. The offence of

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assault when prosecuted by indictment is punishable by up to five years imprisonment. The offence of overcoming resistance to the commission of an offence is punishable by imprisonment for life.

44. The fundamental purpose of sentencing is to protect society; to ensure respect for the law; and to maintain a just, peaceful, and safe society. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. A just sentence meets the goals of deterrence, denunciation, retribution, rehabilitation, and protection of society.

45. In arriving at a just sentence, the Court must consider the aggravating and mitigating factors unique to each case. Sentencing is a highly individualized process, and each case must turn on its own specific facts. Individualization is central to the assessment of proportionality as it requires a focus on the individual circumstances of the offender: *R. v. Parranto*, 2021 SCC 46, 411 C.C.C. (3d) 1, at para. 12; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 58.

46. The Court of Appeal has stated that sentencing judges have wide discretion when imposing sentences: *R. v. Kerr* (2001), 153 O.A.C. 159 (Ont. C.A.)

47. I have considered the principles of sentencing as set out in Section 718 to 718.2 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Criminal Code*"). One must keep in mind the goals of parity, consistency, and fairness in applying those principles.

48. In this case, I find that denunciation and deterrence are key principles which factor into the sentencing of *J.W.* Having said that, I must consider all of the goals of sentencing, including rehabilitation and restraint. Restraint is codified in section 718.2(d) and means that a sentencing court should seek to impose the least intrusive sentence and the least quantum that will achieve the overall purpose of being an appropriate and just sanction: see: *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 96. Restraint is of particular importance when sentencing first-time and youthful offenders: see: *R. v. Priest* (1996), 30 O.R. (3d) 538 (C.A.) at pp. 543-544 and *R v. Borde* (2003), 63 O.R. (3d) 417 ( C.A.), at para. 36.

**Parity in sentencing**

49. Parity in sentencing refers to the principle that similar offences committed in similar circumstances by an offender of a similar background should attract a similar sentence. It is part of the concept of proportionality. Of course, the reality is that no two cases are exactly alike, and sentencing remains an individualized process.

50. The Crown provided me with numerous cases and a sentencing chart to show the evolution of the law but relied mainly on two cases in their submissions: *R. v. A.J.K.*, 2022 ONCA 487, 162 O.R (3d) 721 and *R. v. S.R.M*, 2023 NSPC 33. The Crown submits that the sentencing chart clearly shows the evolution of sentences involving sexual violence within an intimate partner (IP) relationship and that sentences have increased.

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The Crown submits that the court must be conscious of whether cases predate or post-date *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424 and *A.J.K., supra.*

51. In the recent Ontario Court of Appeal decision in *A.J.K.*, at para. 76, the Court held that there was "no justifiable reason why sexually assaulting an intimate former partner is any less serious then sexually assaulting a stranger." In that case, the judge accepted the complainant's evidence that she did not wish to have sex with the appellant, but he took her to a parking lot and had vaginal intercourse with her from behind, all while choking her. Afterwards, he started punching her in the head and pressed her so hard against the side of the car she could not breathe. He left her in a parking lot on the side of Highway 401. She had various injuries which were documented by the sexual assault nurse including swelling to her jawline, abrasions on her hand, and red discoloration to her ear and scalp.

52. The Court of Appeal indicated that in cases of forced vaginal intercourse, absent some highly mitigating factor, the sentence would be at least three years in the penitentiary: *A.J.K.*, at para. 77. Although the Court in *R. v. Bradley*, 2008 ONCA 179, 234 O.A.C. 363, held that a sentencing range of three to five years was appropriate for non-intimate partners, this is simply a range and a departure from that range, either above or below, is entirely appropriate depending on the circumstances: *ibid.* The Court upheld a sentence of five years imprisonment for sexual assault, assault, and breach of probation. The appellant had a record that included an offence of communicating with an underage person for the purpose of prostitution.

53. The Crown submitted that there are factual similarities between this case and *A.J.K.* In both cases, there was violence, sexual intercourse, injuries or choking and, in this case, forcible confinement. Although the accused in this case does not have a criminal record, this is a case of long-term abuse and a relationship of trust.

54. The Crown also relies on the case of *R. v. S.R.M*, 2023 NSPC 33 . The Crown acknowledges that *S.R.M.* is not binding on this court but submits that its review of the principles of sentencing and review of caselaw is helpful. In *S.R.M.*, the accused was convicted of six counts of intimate partner violence involving his spouse and daughter including sexual assault, assault causing bodily harm, threats to property, and threats to cause bodily harm to the daughter. The accused and complainant had been in a 19-month relationship which the complainant described as "hell". Similar to this case, the abuse had a significant impact on the complainant's physical, emotional, and psychological well-being. The complainant reported that the impact was ongoing and had changed her as a person. The Crown and the defence made a joint submission for 3.5 years for the sexual assault with all other offences concurrent. After the trial judge expressed concern, a submission for 4.5 years was proposed. The trial judge imposed 7 years in custody.

55. The trial judge in *S.R.M.* outlined the egregious facts of that case at paras. 6-22, which included punching the complainant "full force" about 50 times, dragging her by the hair into the bedroom, continuing to punch her stomach, slapping her face and smacking her in the head, and trying to choke her while attempting to vaginally penetrate her. The

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bodily harm involved the accused pushing her and her falling and striking her head and bleeding. The victim wasn't allowed to leave the residence due to the visible injury and she lost her job. She testified to numerous frequent assaults involving punching and other controlling behaviour. The complainant captured audio recordings which depicted an unhealthy relationship.

56. Importantly, the accused in *S.R.M.* had a related criminal record involving four offences on two prior intimate partners including assault (three counts) and uttering threats, for which he had received a conditional discharge in 2010 and a 30-day conditional sentence in 2016.

57. S. Russell, A.C.J., in *S.R.M.* does a very thorough job of outlining the principles of sentencing and the roles of denunciation, deterrence and rehabilitation as well as the importance of proportionality and parity and individualization at paras 42-48. I would adopt all of these comments. As mandated by s. 718.2 (a)(ii) and 718.201 of the *Criminal Code*, the trial judge went on to consider the aggravating factor that the offences involved the abuse of a domestic female partner. The trial judge then went on to review recent caselaw involving intimate partner violence and major sexual assaults, at paras. 49-67. It is clear from a review of the caselaw that intimate partner violence continues to be of significant concern to courts and that denunciation and deterrence must be central considerations.

58. The cases cited also recognize that in cases of intimate personal violence, the complainant's sense of personal security can be "totally destroyed", as indicated in *R. v. Somers*, 2021 BCCA 205, B.C.J. No. 1111, at para. 69:

> [69] When abuse occurs in the complainant's own home and family environment, the complainant's sense of personal security can be totally destroyed. The loss of a sense of security is usually not limited just to the occasions of abuse but continues on an ongoing basis, as the intimate partner does not know who to trust, where to stay safe, and when the next act of violence is going to occur…

59. The trial judge, at para. 54, cites the Ontario Court of Appeal cases of *R. v. Inwood*, 32 O.A.C. 287 (C.A.) at p. 181 and *R. v. Bates*, 134 O.A.C. 156 (C.A.), at para. 30 for the proposition that the principles of deterrence and denunciation take priority for sentencing offenders convicted of domestic violence.

60. In *S.R.M*, in a section "A Decade Later: Revisiting the Court of Appeal *Decision R. v. J.J.W.*", at para. 61-62 , the trial judge reviewed the Supreme Court's recent jurisprudence in *R. v. Goldfinch*, 2019 SCC 38, at para. 37 and *R. v. Friesen, supra*, at para. 89. I believe these two paragraphs bear repeating:

> [37]… as time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens... Throughout their lives, survivors may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal

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> behavior. A recent Department of Justice study estimated costs of sexual assaults at approximately $4.8 billion in 2009, an astonishing $4.6 billion of which related to survivors' medical costs, lost productivity (due in large part to mental health disability), and costs from pain and suffering. The harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era.
>
> [89] All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender – the offender is treating the victim as an object and disregarding the victim's human dignity (see *R. v. Mabior*, 2012 SCC 47, [2012] 2 SCR 584 at paras. 45 and 48). As L'Heureux-Dube reasoned in *L.(D.O.)*, "the occurrence of child sexual assault is one intertwined with the sexual abuse of all women" precisely because both forms of sexual offences involve the sexual objectification of the victim (p. 441). Courts must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assess the offender's moral blameworthiness and to the sentencing objective of denunciation (*Benedet*, p. 310; *Hajar*, at para. 67).

61. In my review of the caselaw provided by the Crown, the case of *R. v. Clase*, 2017 ONSC 45 stands out as somewhat similar. In that case, the accused was found guilty after trial of sexual assault and attempt to choke. He and the victim had met at a bar and afterwards they attended the residence of the accused's friend. The accused pushed the victim down and engaged in forced vaginal intercourse while choking her. The accused was 36 and had no prior record. He was described by others as "a good person" and a "reliable worker". He was sentenced to five years incarceration.

62. The Defence provided the court with a number of cases where the sentences imposed for IPV assaults ranged from 90 days to 18 months. I shall review those cases briefly now.

63. *R. v. Smith*, 2011 ONCA 564 was a conviction and sentence appeal. The Court quashed the convictions on six of the counts and therefore had to consider the appropriate sentence on the remaining counts. The Crown had not cross-appealed the sentence so the Court was constrained to imposing a maximum sentence of three years. The Court held:

> [86] The jurisprudence of this court suggests that a sentence of one to two years will generally be appropriate for a conviction for common assault based on facts such as those comprising count ten, committed against a spouse or domestic partner in the context of a lengthy pattern of domestic abuse: see *R. v. Petrovic* (1984), 47 O.R. (2d) 97 (C.A.), *R. v. Inwood* (1989), 32 O.A.C. 287 (C.A.), *R. v. (B.S.)* (2006), 81 O.R. (3d) 641 (C.A.), *R. v Sidhu*, 2011 ONCA 139, *R. v. States* (2006), 214 O.A.C. 106 (C.A.).

64. In *R. v. E.N.F.*, 2005 MBCA 110, the accused pled guilty to assaulting his wife and choking her to overcome resistance. The offence was alleged to have occurred after the accused arrived home and his wife was not there; the accused located her at a friend's home and found her walking home. He demanded she get in the car and when she did, he

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punched her in the leg, slapped her, and began choking her. Once at the house, he grabbed her as she was walking in, he grabbed her from behind, and started choking her. She ran inside and said she was calling the police. Sometime later that night/early morning, the accused returned still angry and argued with his wife. He grabbed her by the throat and lifted her up so she couldn't breathe, punched her once in the head, and dragged her into the residence while slapping her. He threatened her and the kids if she called the police on him. The accused was 36 with no record. He was the sole support for his wife and three children, and she expressed a desire for him to return home. He expressed a desire to obtain counselling. The trial judge imposed a sentence of 11 months and 2 years probation in addition to credit for 1 month's time served. The appellate court agreed that a conditional sentence was not appropriate as it would not meet the principles of denunciation and deterrence but found that insufficient weight was given to (1) the fact that the accused was a first-time offender; and (2) the principle of rehabilitation, including the fact that the accused was the sole support for his family. Accordingly, the accused's sentence was reduced to five months less pre-plea custody, leaving the probation intact.

65. In *R. v. Heiser*, 2016 SKPC 153, the accused was convicted of unlawful confinement, threatening, assault, extortion, and choking to overcome resistance. The victim was a sex worker whom he assaulted to get his money back. During the assault, the accused choked the victim until she was almost unconscious. He received 4.5 years for the choking offence with all other offences being concurrent. I take care to note that the "choking" being referred to in *Heiser* is analogous to the choking in the case at bar, which involves choking to overcome resistance to commit another indictable offence and not the relatively new offence of "choking" as a means to commit an assault cause bodily harm (as per s. 267(c) of the *Criminal Code*). The trial judge noted that this offence carries a maximum penalty of life imprisonment. Additionally, the trial judge noted that most of the caselaw under this section involved choking in the commission of a sexual assault, which was not the case before the court. The Crown and the Defence agreed that if that had been the case the appropriate range began at three years: *Heiser*, at para. 29. In a case not involving sexual assault, the trial judge found the appropriate range to be 18 months to six years.

66. In *R. v. Wardak*, 2011 ONCJ 583, [2011] O.J. No. 5247, the accused was found guilty of a domestic assault and threatening against his wife. He punched her after a heated argument and made comments amounting to a threat to kill her. She scaled the outside of a building to escape, fell and hurt her back. She reported the incident to the police and also advised that he had been physically and emotionally abusive during their 18-year marriage. The accused was 59, unemployed, with no criminal record at the time of sentencing. All five children of the marriage resided with him. He had spent two and a half years on strict bail and 57 days in presentence custody. The Crown sought 60-90 days custody and two years probation, while the Defence sought a suspended sentence and two years probation. The trial judge imposed 90 days jail less pre-sentence custody and three years probation. The trial judge noted that but for the overly lenient position of the Crown of 90 days, he would have been inclined to sentence the offender to a much lengthier period of incarceration: *Wardak*, at para. 28.

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67. In *R. v. Kalinics*, 2022 QCCQ 720, [2022] Q.J. No. 1349, the accused was found guilty of strangling, assaulting, and threatening to kill his wife. They had married on January 30, 2020, but by August 2020, the relationship had deteriorated with emotional abuse and some incidents of pushing. For the first assault, the accused began yelling at his wife and accusing her of infidelity and then he kicked her on her upper leg. The next day, their argument continued, and he grabbed her by the throat lifting her off the ground and threatened her. She was afraid and remained still and calm until he eventually put her down. She escaped at the earliest opportunity. She complained of ongoing neck pain for several months after the incident. The accused was 40 years old with no prior record and had worked as an interpreter in several languages. The Court found that on the facts of the case, a sentence in the range of nine months would have been fit and appropriate, but as the Crown had only sought four months, the judge imposed the lesser sentence and three years probation.

68. In *R. v. S.W.*, 2021 QCCQ 3732, the accused pled guilty to assault by pulling the hair of his pregnant wife and banging her head against the car window while she was driving. It was not an isolated incident and the trial judge outlined other physical and emotional abuse during the relationship: *S.W.*, at para. 8. The accused was 44 years old and worked as an emergency room orderly; he had undergone treatment for drug addiction and had been sober for two years at the time of sentencing. He had also undergone counselling for anger management. He indicated that he was genuinely remorseful for his actions and that there was no violence in his new relationship. He had a related criminal record. The victim reported PTSD with ongoing cold sweats and nightmares. In her VIS, the victim described how she no longer recognized herself. She had once been a strong and independent woman who was bettering her and her child's life, but all that changed during the relationship with the accused, who repeatedly beat her and ultimately stripped her of who she was. The Crown sought a one-year jail term and the Defence sought a suspended or intermittent sentence. The trial judge discussed the "added weight that must be given to the objectives of denunciation and deterrence in the context of domestic violence" which must take precedence over the objective of rehabilitation: *S.W.*, at paras. 61-68. He imposed a 12-month term of imprisonment and a three-year probation order.

69. The Defence provided the case of *R. c. B.F.*, 2022 QCCQ 1719 for its extensive review of caselaw and principles. In *B.F.*, the accused was found guilty after trial on 13 counts involving his spouse, his three sons, his father-in-law, and his mother-in-law. The Court found the accused guilty of multiple incidents of assaultive behaviour against these persons over an eight-year period including pinching, pushing, grabbing, dragging, spitting, slapping, and throwing shoes at his children. The Crown sought a sentence of 30-36 months imprisonment. The accused asked for an intermittent sentence, citing his lack of a criminal record, his need to pay spousal support, his compliance with bail terms, COVID-19, his lack of contact with any of his children for the last four years, and the happy times the family had.

70. The Court made a number of important observations about the social evil of domestic violence at paras. 18-31 and the Court's increased recognition of the issue which I adopt and some of which I reproduce below (citations omitted).

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> [18] In Canada, we live in a civilized and democratic society where every person has the right to their physical integrity and where the survival of the fittest no longer applies. Our society is committed to protecting the personal integrity, both physical and psychological of every individual. Canadian society aims to eliminate domestic violence and promote equality between the sexes.
>
> ...
>
> [21] No man has the right to abuse his spouse. Marital problems are not solved by resorting to violence. Every person is entitled to protection from violence form their intimate partners just as strangers are. In this regard, the Court adopts the teachings of the Ontario Court of Appeal in *R. v. Glen:*
>
> > [14]….This Court has a duty to make it clear that however unhappy a spouse may be about his or her marital life, and however great the marital stress may become, resorting to violence is not the answer. The sanctions for violence will be severe.
>
> [23] Domestic violence is a crime and must be denounced. It manifests itself in all societies and across all social classes. The courts now recognize that domestic violence is a pressing social issue in Canada and internationally. The seriousness of the issue of domestic violence is acknowledged across Canada and it is considered a social evil that must be eradicated.

71. The Court went on to discuss the applicable sentencing principles as follows:

> [25] The sentence imposed for domestic violence must reflect society's condemnation of these offences. The role of the courts is to condemn violence, protect the weakest in our society and contribute to the development of a society that is as healthy and safe as possible.
>
> [26] The sentence imposed for domestic violence must meet two requirements: that of denouncing the unacceptable and criminal nature of domestic violence, and that of increasing the confidence of the victims and the public in the administration of justice.
>
> [27] Further, it is well established that courts should prioritize the objectives of denunciation and deterrence in matters of domestic violence. This is particularly the case if the episodes of domestic violence are cyclical and persistent. The same is true if the violence lasts for years, affects young children and is accompanied by constant threats.
>
> [28] Similarly, the principle of restraint must yield, to a large degree, to the objectives of denunciation and protection of the victim in domestic violence cases.

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72. The Court undertook an extensive review of the caselaw and then concluded based on the aggravating and mitigating factors present in the case, a sentence of 36 months of incarceration on the first count was appropriate. Given the principle of totality, all other counts of various lengths were to be served concurrently.

73. The Defence submits that the cases provided demonstrate that for the assault, assault causing bodily harm, and global forcible confinement, a sentence in the range of one (1) to two (2) years would be appropriate and *J.W.* would therefore be eligible for a conditional sentence on these counts.

74. On the sexual assault and related counts of choking to overcome resistance and forcible confinement, the Defence submits that these offences are also eligible for a conditional sentence.

75. The Defence also relies on the *A.J.K.* case in support of their position. They point to para. 77 in *A.J.K.* where the Court indicates that three to five years is simply a range and departure from that range either above or below, is entirely appropriate depending on the circumstances. See *R. v. Jacko,* 2010 ONCA 452, 101 O.R. (3d) 1, at para. 90 and *R. v. D.D.* (2002), O.J. No. 1061 (C.A.), at para. 33. *A.J.K.*, at para. 82, which also emphasizes the importance of individualization as a tool that is designed to calibrate proportionate sentences and which is central to the assessment of proportionality as it demands focus on each offender's individual characteristics. The court must consider the principal of restraint: *A.J.K.*, at paras. 84-85. Finally, in *A.J.K.*, at para. 85, the Court emphasized that sentencing is a highly subjective process and trial judges are in the best position to determine what is fit in all of the circumstances. The Court quotes a number of cases in support of this proposition.

76. In *R. v. S.W.*, 2024 ONCA 173, the Ontario Court of Appeal overturned a conditional sentence and imposed a sentence of three years imprisonment. The case involved an intimate partner relationship where the accused had sexually assaulted his partner by having non-consensual vaginal intercourse with her on four occasions without a condom throughout the night while she feigned sleep. The Crown at sentencing had sought a penitentiary sentence of three years: *S.W.*, at para. 14.

77. The Defence submits that individualization and restraint are extremely important in this case. They point out that *J.W.* has no criminal record. They also argue that the relationship with T.P. was an aberration and that his otherwise good conduct and generous nature can be seen in the many letters of support that were filed, most of whom were authored by women. Importantly, the Defence submits that the Court must consider that *J.W.* had nearly two decades of positive domestic relationship free from violence: 11 years with *Ms. T.* and eight years and continuing with *Ms. T.* The Defence also emphasizes that *J.W.* is a hardworking businessman and valuable member of the community.

78. The Defence submits that *J.W.'s* overall positive characteristics and history of positive healthy domestic relationships demonstrate that his conduct with T.P. was completely out

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of character and that he does not need to be taught about the vileness of domestic violence. According to the Defence, these particular and unique circumstances make the imposition of a conditional sentence appropriate and bring it below the range as set out in *A.J.K.*

**ANALYSIS**

79. Each case is unique and while the court must consider parity in sentencing, no two cases are exactly alike. I must consider the particular facts in this case, along with the mitigating and aggravating factors to arrive at an appropriate sentence.

80. I adopt many of the comments in the cases provided by counsel as to the serious nature of intimate partner or domestic violence. This is a persistent, wide-ranging problem of significant concern to the Courts. As can be seen from the review of the cases and the VIS in this case, such violence often has a devasting impact on the victim and is most often committed against females. The victim's sense of self and security of person is impacted, often for a long period after the abuse has ended. As stated in *R. v. Fraser,* 2016 ONCA 745, 33 C.R. (7th) 205, at para. 30: "Domestic violence is an insidious crime, the effects of which endure long after the victim's physical wounds have healed."

81. The impact on T.P. has been significant. Despite the passage of over nine years since she left the relationship, she is still experiencing physical, emotional, and psychological difficulties arising from the trauma of her two-year relationship with the accused. This has impacted all aspects of her life, including her ability to work outside the home, go back to school, and to parent her children how she would like to. She outlines how she still suffers from significant anxiety and fear despite seeking help through counselling.

82. I found that the abuse in this case was ongoing. It involved the accused exercising control over the complainant as demonstrated by the sexual assault precipitated by the complainant waving at a neighbour and forcing the complaint to apologize before she could leave after being physically assaulted on several occasions.

83. Parliament has recognized that the abuse of a domestic partner is an aggravating sentencing factor, as per s. 718.2(a)(ii) of the *Criminal Code*.

84. The sentence imposed for domestic violence must meet two requirements: that of denouncing the unacceptable and criminal nature of domestic violence, and that of increasing the confidence of the victims and the public in the administration of justice.

85. In the case at bar, we have the additional element of a sexual assault. In relation to sexual assaults, I agree with the statement of D.E. Harris J. in *R. v A.G.*, 2023 ONSC 3049, at para. 9, which is relevant to the facts of this case:

> One thing can safely be said. A sexual assault is always about dominance over the victim. That element is ever present underlying the crime. A sexual assault is all about the accused, a profoundly and thoroughly selfish act. Sexual assault objectifies the victim and robs her of her autonomy, dignity, and her

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> very identity as a person: *R. v. Mabior*, 2012 SCC 47 (S.C.C). An attack against sexual integrity is a profound denigration of personhood.

86. The sexual assault in this case was on the serious end of the scale. It was precipitated by the benign act of the complainant waving at a neighbour which resulted in the accused becoming jealous. It is clear from the evidence that the sexual assault was not about sexual gratification as much as it was about domination and control. He dragged T.P. to the bedroom and accused her of flirting, shoving his fingers in her vagina and asking if the neighbour turned her on, before penetrating her vaginally, all the while choking her with one hand. She was begging him to let her go and he refused. She testified she had a hard time swallowing and was bleeding and sore following the incident.

87. The Defence submits that a sentence in the reformatory range would be appropriate for all of the offences and that a conditional sentence should be imposed.

88. A conditional sentence is only available if (1) I find that a sentence in the reformatory range is appropriate (s. 742.1 of the *Criminal Code*); and (2) if I find that a conditional sentence would meet all the principles of sentencing. I am aware that the Supreme Court has said that a conditional sentence can meet the principles of denunciation and deterrence: see *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61.

89. The fact that *J.W.* has had (1) two other long-term domestic relationships that were non-violent and healthy; (2) other positive relationships with females; and (3) other mitigating factors that are applicable do not bring this case into the reformatory range. That submission is akin to suggesting that if a person only stole from one of his three employers or only assaulted one of his three daughters, that should result in a sentence that is significantly below the normal range. It also has an air of "victim-blaming" in the sense that it is not the accused's fault, but the victim's actions that caused the behaviour. While it certainly would be aggravating if the accused engaged in offensive conduct with more than one victim, it is not mitigating that there is only one victim.

90. I find that a sentence in the reformatory range would not be proportionate to the gravity of the offences and the moral blameworthiness of the offender. I do not find there is any basis to depart from the three to five-year range set out in *A.J.K.* Further, as stated in *R. v. R.S.*, 2023 ONCA 608, 168 O.R. (3d) 641, at para. 27: "[i]t may be that, in some circumstances, a conditional sentence is appropriate for sexual assault at the lowest end of the range of wrongful conduct. But there is no basis to suppose that it is appropriate for sexual assault at the higher end of the range." A sentence in the reformatory range would not meet the objectives of denunciation and deterrence which are the overarching sentencing principles in a serious sexual assault: see: *A.J.K*, at para. 83.

**Consecutive or Concurrent Sentences**

91. The Supreme Court of Canada recently reviewed the methodological considerations about how to approach sentencing for multiple offences and when sentences should run concurrently or consecutively in *R. v. Bertrand Marchand*, 2023 SCC 26, 431 C.C.C. (3d) 1.

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92. The Court approved the following approach regarding sentencing: first, determine the sentence for each offence individually; second, determine whether the sentences ought to be consecutive or concurrent; and third, consider the principle of totality in s. 718.2(a): see *Bertrand Marchand*, at paras. 91-93.

93. The Court stated at para. 95:

> [95]…..[G]enerally speaking, "offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences" (*Friesen*, at para. 155; see also *Criminal Code*, s. 718.3(4)(b)(i)). Determining whether sentences should be consecutive or concurrent is a fact specific inquiry to be undertaken in the context of each case (C.C. Ruby, *Sentencing* (10th ed. 2020), at §14.13)

94. The principle of totality requires any court that imposes consecutive sentences to ensure that the total sentence does not exceed the offender's overall culpability: *Friesen*, at para. 157; *Criminal Code*, s. 718.2(c); and *R. v. M. (C.A.)*, 1996 SCC 230, [1996] 1 S.C.R. 500, at para. 42. After determining the total sentence, the sentencing judge must examine it to ensure that it is "just and appropriate" and not one that will be "crushing" or not in keeping with the offender's record and prospects: *M. (C.A.)*, at paras. 42-44.

95. Against this backdrop, I have to consider the individual circumstances of *J.W.* and the aggravating and mitigating factors in this particular case. Although the principles of denunciation and deterrence are paramount, I cannot lose sight of the need for restraint, especially in relation to a first-time offender. I must also keep in mind the principle of rehabilitation.

**Aggravating and Mitigating Factors**

96. I take into account the following aggravating factors of this particular case:

i. In committing the offence, the accused abused his former domestic partner (s. 718.2(ii)).

ii. The sexual assault, in addition to being non-consensual, was violent and caused injury to the complainant, including difficulty swallowing, soreness, and bleeding.

iii. The sexual assault was committed in circumstances to demean or punish the complainant for flirting.

iv. The abuse has had a significant long-term impact on the complainant's physical and psychological health as is set out in her VIS.

v. The assaultive behaviour was ongoing and repetitive.

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vi. Some of the assaults took place while the complainant was pregnant and, later, in the presence of the couple's child.

97. I take into account the following mitigating factors of this particular case:

i. *J.W.* has no criminal record.

ii. He has been on release for these charges for over five years with no breaches or other issues.

iii. He received a college degree in engineering.

iv. He is a hard-working businessman who runs two businesses and is a landlord.

v. He is a caring and involved father to his children and provides support for them.

vi. He provides financial and emotional support to his current wife who has some medical issues and is reliant on him.

vii. He supports his parents.

viii. He has wide community support, including within his church, and has strong relationships with his family and friends, including his former partner and mother of his daughter.

**CONCLUSION**

98. I will determine the sentence on the sexual assault first. As I have indicated, I do not see any reason to depart from the range indicated in *A.J.K.* I note in *S.W.* that while only three years was imposed, that was the sentence sought by the Crown. I find that the sexual assault in this case was meant to demean the complainant and was accompanied by significant violence including being dragged to the bedroom, and digital penetration followed by penile penetration. I find that this offence falls at the upper end of the range in severity and that a sentence of five years would be appropriate. In coming to this number, I have considered the elements of choking and forcible confinement. Those sentences shall therefore be concurrent.

99. The offence of choking to overcome resistance is eligible for a life sentence. The Crown sought a sentence of one year. I would have been prepared to impose a lengthier sentence on this count but find that the Crown's request is reasonable. I find that a sentence of one year is appropriate and impose one year for the offence of choking. The sentence on the related offence of forcible confinement connected to the sexual assault shall be six months.

100. On the offence of assault causing bodily harm, there was a single incident of a punch to the face. However, the accused showed no concern for the harm he caused and in fact suggested that it constituted "free dental". The injury eventually led to infection and the pulling of multiple teeth. I don't know if there were other contributing factors to this

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outcome. I find that this single incident of assault causing bodily harm, if considered in isolation, warrants a sentence of six months of incarceration.

101. I find the simple global assault count in this particular case is deserving of a higher sentence than the assault causing bodily harm count. The facts underlying the global assault count show a pattern of violence towards the complainant and it is this repetitive violence that often underlies the long-term psychological effects that we find in this case. Although these were not charged as assault causing bodily harm offences, it is clear that they left both physical and psychological bruises on the complainant. I find that the appropriate sentence on this count is a sentence of 16 months incarceration.

102. The incidents of forcible confinement accompanied the physical assaults and were simply a further means of exerting control over the complainant. The sentence on the global forcible confinement count is six months incarceration. This count forms part of the assaultive behaviour and shall be served concurrently with the global assault count.

103. I find that the global counts of assault and forcible confinement should be served consecutively to the sexual assault and related offences. The sexual assault and related offences are part of a pattern of controlling behaviour but deal with an additional element and should be sentenced separately.

104. I have to determine whether the assault causing bodily harm count should run concurrently with the global assault and global forcible confinement count. When considering this, I analyze such factors as the similarity of the offence, the time frame within which the offences occurred, and whether a new intent or impulse initiated each separate offence: see *R. v. Naugle*, 2011 NSCA 33, 271 C.C.C. (3d) 321. In this case, the violence perpetrated against the complainant was not a "spree" in the classic sense. Rather, there was a separate assault with its own factual underpinnings that resulted in bodily harm. The assault causing bodily harm also falls within the same time frame as the other multiple allegations that form the basis of the global assault. In this case, I have decided that this sentence should run concurrently to the global assault and global forcible confinement counts.

105. In summary, before considering totality, the sentence of incarceration would be as follows:

Count 3: sexual assault, s. 271 – 5 years incarceration;

Count 1: choking to overcome resistance to a sexual assault, s. 246(a) –1 year concurrent with count 3;
Count 5: forcible confinement, s. 279(2) – 6 months concurrent with count 3;
Count 2: assault causing bodily harm, s. 267(b) – 6 months concurrent with count 4 and 6, but consecutive to count 3;
Count 4: forcible confinement, s. 279(2) (global) – 6 months concurrent with count 2 and 6, but consecutive to count 3; and
Count 6: assault, s. 266 (global) –16 months concurrent with count 2 and 4, but consecutive to Count 3.

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106. Before considering totality, the total sentence would be six years and four months incarceration. I must consider whether this sentence would be "unduly long and harsh", as per s. 718.2(c) of the *Criminal Code*. I must also consider whether the sentence is proportionate to the gravity of the offence and degree of responsibility of the offender and is the least punishment that would be appropriate in the circumstances.

107. After considering the repeated cycle of intimate partner violence against T.P. and the profound effects it has had on her, I do not find that the aggregate cumulative sentence would be unduly harsh in the circumstances. However, I am mindful that the accused has no criminal record and appears to be an otherwise pro-social member of his community who has the support of his family and friends. I am of the view that the cumulative aggregate sentence does not adequately account for these other important principles and may have an unintended impact on *J.W.'s* rehabilitation and reintegration back into society.

108. As a result, I have determined that the least restrictive sentence that would meet all of the sentencing goals is one of six years incarceration in total. Further, I am aware that *J.W.* spent four days in custody before being release on bail. I am prepared to give him credit of six days for that time spent in pre-sentence custody.

109. Accordingly, the final sentence will be five years, 11 months, and 24 days. I have adjusted the sentence as follows:

Count 3: sexual assault, s. 271 – 5 years incarceration;
Count 1: choking to overcome resistance to a sexual assault, s. 246(a) – 1 year concurrent with count 3;
Count 5: forcible confinement, s. 279(2) – 6 months concurrent with count 3;
Count 2: assault causing bodily harm, s. 267(b) – 6 months concurrent with count 4 and 6, but consecutive to count 3;
Count 4: forcible confinement, s. 279(2) (global) – 6 months concurrent with count 2 and 6, but consecutive to count 3; and
Count 6: assault, s. 266 (global) – 12 months concurrent with count 2 and 4, but consecutive to count 3 less credit for presentence custody of 6 days for a sentence of 11 months 24 days.

**Ancillary Orders**

110. The Defence does not take issue with most of the orders sought by the Crown but submits that no SOIRA order is necessary. The Defence submits that *J.W.* is at no risk to re-offend and that the Ontario Registry, often referred to as *Christopher's Law*, would more than adequately deal with any concerns that may exist.

111. Following *R. v. Ndhlovu*, 2022 SCC 38, 419 C.C.C. (3d) 285, which ruled s. 490.012 of the *Criminal Code* unconstitutional, Parliament enacted a new legislative scheme for SOIRA orders under Bill S-12, which received royal assent on October 26, 2023.

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112. A court can exempt a person convicted of sexual assault (which is a primary offence and where registration is presumptive) from registration if it finds that: (1) the order would have grossly disproportionate effects on the offender; and (2) making the order would have no connection to the purposes of helping police prevent or investigate sexual offences.

113. The new legislation sets out the factors a court is to consider in exercising its discretion whether to impose an order. These factors include:

> (a) the nature and seriousness of the designated offence;
>
> (b) the victim's age and other personal characteristics;
>
> (c) the nature and circumstances of the relationship between the person and the victim;
>
> (d) the personal characteristics and circumstances of the person;
>
> (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
>
> (f) the opinions of experts who have examined the person; and
>
> (g) any other factors that the court considers relevant.

114. As already noted, *J.W.* has no criminal record. No expert opinion was proffered. I will examine the other factors.

***The nature and seriousness of the designated offence***

115. The designated offence in this case was sexual assault. It was serious. It involved both digital and penile penetration and took place in circumstances of additional violence and in conjunction with the offences of choking to overcome resistance and forcible confinement. It also took place in the wider context of a controlling relationship.

***The victim's age and other personal circumstances***

116. T.P. was an adult. She was the mother of two children with a former partner and to the couple's 7-month-old baby at the time of the designated offence.

***The nature of the circumstances of the relationship between the person and the victim***

117. T.P. was in an intimate partner relationship with the accused. They shared a young child together. The relationship was abusive and controlling with numerous assaults.

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***The personal characteristics and circumstances of the person***

118. *J.W.* is a respected businessman in the community with close relationships with family and friends and previous and subsequent positive domestic relationships. Numerous letters of support were filed on his behalf.

119. The Defence provided the court with two cases. The first case, *R. v. Clayton Capot* Blanc, 2023 NWTTC 7, was a request for a constitutional exemption to the suspension of declaration of invalidity prior to the new legislation being enacted. The trial judge determined that the SOIRA should not be imposed. Of note, the trial judge found that the offence in that case was at the lowest end of the spectrum of seriousness. The trial judge found that the accused is not a low risk to offend but that any sexual offending would be of a similar characteristic to his prior offending by way of non-sexual offences and his current sexual offence (i.e., intimidating and overt with no attempts to conceal his identity or apparent fear of being caught). With respect, I do not find this case persuasive as it would limit registration to only the most serious sexual assaults by strangers which I find is not in keeping with the decision in *Ndhlovu.*

120. The second case, *R. v. Towler,* 2023 BCSC 1209, is also a constitutional exemption case. In this case, a psychiatrist opined that the offender's risk to re-offend sexually was negligible. He had been sentenced in 2019 for sexual assault and given a six-month sentence, but no probation. The Crown agreed that Towler had discharged his onus and should receive the remedy sought.

121. In *Ndhlovu* , the majority of the Supreme Court found that mandatory registration was unconstitutional because it was overbroad as it captured offenders who were at no increased risk to re-offend, undermining any real possibility that their information on the registry will ever prove useful to the police in investigating offences. The focus was clearly on the risk to re-offend. They gave examples of a person in a wheelchair and a person who, due to advanced age and mobility issues, would be unable to re-offend. I am mindful of the caution offered by the dissenting Justices, who were concerned that if discretion was restored to sentencing judges, then exemptions would be granted based not on the impact of registration on the offender but on whether the offender was the "type" of person for whom the registry was intended (i.e., a "real" sex offender).

122. Clearly, the new legislation is not aimed at only so-called "sexual predators" who prey on strangers. In this case, given the domestic nature of the offence, identification is not a significant issue. However, the sexual assault was of a serious nature, accompanied by additional violence and was intended to demean the complainant. It also occurred within the context of repeated assaults over the duration of the relationship.

123. The Defence's argument is essentially the same argument as that of why a conditional sentence was appropriate – only T.P. was at risk and other than her, no other woman is or will be at risk in the future. This sexual assault was not an isolated incident. It was another type of assault intended to demean the complainant that formed a pattern of assaults within the relationship. Given the serious nature of the assault and the pattern of violence in the relationship, even taking into account the evidence of the accused's otherwise impeccable character, I do not find that the accused falls into the category of an

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offender who would not be at an increased risk to re-offend and that his placement on the Registry would therefore have no connection to the purposes of helping police prevent or investigate sexual offences. I was provided no evidence of how his inclusion on the registry would have grossly disproportionate effects on him.

124. Given that the designated offence is sexual assault prosecuted by indictment which carries a possible term of imprisonment of ten years, the duration of the SOIRA order shall be for a term of 20 years.

**IMPOSITION OF SENTENCE**

125. *J.W.*, please stand. I am sentencing you to a term of five years, 11 months, and 24 days in custody, as I have previously outlined.

**Ancillary Orders**

126. There shall be a s. 743.21 order that while in custody you shall not communicate directly or indirectly with T.P.

127. The sexual assault, overcoming resistance, forcible confinement and assault causing bodily harm offences are primary designated DNA offences; assault simpliciter is a secondary DNA offence. I find that for the secondary offence such an order would be a minimal intrusion on the adult offender's security of person given his diminished expectation of privacy following conviction and would be in the best interest of justice. You will therefore provide such samples of your DNA as may be reasonably required for forensic testing and will accompany an officer for that purpose.

128. There will be a mandatory s. 109 order for life.

129. You will be placed on the Sexual Offender Information Registry for 20 years.

130. Victim fine surcharge. In the circumstances, I will waive the imposition of the victim fine surcharge.

131. I want to thank both counsel for your very able assistance with this matter.

***"Justice P.J. Moore"***

Released: August 6, 2024

**NOTE:** *As noted in court, on the record, this decision in writing is to be considered the official version of the Reasons for Sentence and takes precedence over the oral Reasons read into the record.*

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**CITATION:** R. v. J.W., 2024 ONSC 4443
**COURT FILE NO.:** CR18-365
**DATE:** 20240806

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**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

HIS MAJESTY THE KING

**– and –**

J.W.

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**REASONS FOR SENTENCE**

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Justice P.J. Moore

**Released:** August 6, 2024