Citation: R v Johnbursom, 2026 MBCA 50
Date: 20260611

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Karen I. Simonsen
Mr. Justice David J. Kroft

B E T W E E N:

HIS MAJESTY THE KING	)	***M. D. Glazer*** *for the Appellant*
Respondent	)	***D. Sahulka*** *for the Respondent*
- and -	)	
VIVIN JOHNBURSOM	)	*Appeal heard:* ***September 16, 2025***
(Accused) Appellant	)	*Judgment delivered:* ***June 11, 2026***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

On appeal from: *R v Johnbursom* (18 January 2024), Winnipeg (MBPC) [*conviction decision*]
R v Johnbursom (22 August 2024), Winnipeg (MBPC) [*sentence decision*]

SIMONSEN JA

[1] The accused, a massage therapist, was convicted, pursuant to section 271 of the *Criminal Code*, RSC 1985, c C-46, of sexually assaulting the victim while giving her a massage. He was sentenced to twelve months' incarceration followed by twelve months of supervised probation. He appeals both his conviction and sentence.

[2] For the reasons that follow, I would dismiss the conviction appeal, grant leave to appeal the sentence and dismiss the sentence appeal.

The Issues on Appeal

[3] The accused raises twelve grounds of appeal. In my view, they can be grouped into five categories, as follows:

In convicting the accused:

1. The trial judge erred in her credibility findings regarding the Crown and defence witnesses and, in particular, by subjecting the evidence of the accused and the victim to uneven scrutiny. (Category 1)

2. The trial judge erred by failing to allow evidence and cross-examination, namely: (Category 2)

    a) She refused to allow trial counsel (different from counsel on appeal) to present a video recording regarding the victim's demeanour when she left the massage room, even though she "unfairly and improperly" used demeanour evidence against the accused when assessing his credibility. Although the accused's complaint about the trial judge not allowing trial counsel to present the video recording was abandoned at the appeal hearing, the accused continues to maintain that the trial judge erred in how she used observations of his demeanour while testifying.

b) She did not allow trial counsel to cross-examine the victim on whether she made notes regarding the alleged incident and did not allow trial counsel to pursue obtaining disclosure of those notes.

c) She did not allow trial counsel to fully question a police officer regarding his meeting with the victim.

3. The trial judge erred by engaging in speculation and stereotypical reasoning when she found that the victim "may well have been in shock" (*conviction decision* at para 46) when meeting with the police officer, as there was a complete absence of evidence that she was in shock at that time. (Category 3)

4. The trial judge erred in her application of *WD* (see *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*]), by failing to provide reasons as to why the testimony of the accused did not raise a reasonable doubt and/or why the evidence she did accept did not raise a reasonable doubt as to his guilt. (Category 4)

In sentencing the accused:

5. The trial judge erred: (Category 5)

a) in principle by (i) treating a lack of remorse as an aggravating factor; (ii) classifying the offence as a major sexual assault; (iii) failing to put proper weight on a

psychological report that was prepared for the sentencing (the psychological report), which was uncontradicted; and (iv) ruling that a conditional sentence order (CSO) could not achieve the principles of denunciation and deterrence—each of which had an impact on the sentence; and

b) by imposing a sentence that was harsh and excessive, that is, demonstrably unfit.

[4] In addition, after this appeal was heard, the accused made a request, under rule 39.1(c) of the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R [the *CA Rules*], for leave to file, as fresh evidence on the sentence appeal, documents regarding a lower back condition he has developed since the appeal hearing (the fresh evidence). The accused's position is that his medical condition, as established by the fresh evidence, is an important aspect of his personal circumstances that could very well affect the outcome of his sentence appeal. He argues that, as such, the fresh evidence should be admitted and considered in determining the fitness of the sentence that was imposed. He contends that a fit sentence, taking into account his medical condition, is a CSO, rather than incarceration.

The Trial

[5] The victim testified that, on approximately the fifth occasion on which she saw the accused for a relaxation massage, the massage initially proceeded in the usual manner, until the accused asked her to turn onto her back so that he could massage the front parts of her body. She said that, after doing so, he inappropriately touched her breasts, inner thigh and near her

vagina. He touched her breasts under a sheet but, when he moved to her abdomen, the sheet was lowered, exposing her entire upper body. She explained that when he moved even further down her body, he removed the sheet entirely such that she was naked on the table, but for her underwear.

[6] The victim further testified that, although she had agreed to the accused massaging her lower body and had responded positively to his inquiries, indicating that his massage of her abdomen and hips felt good, she moved his hand away and said "[n]o" when he was rubbing her inner thigh, and running his hand along the waistband of her underwear and close to her vagina. He did not stop and tried several times to slip his finger into her vagina. She also testified that the accused asked if he could kiss her and suck her breasts, to which she replied no. He then took her hand and asked if she wanted to touch his penis. Again, she said no and pulled back her hand. The massage continued until the accused stopped, saying that time was up.

[7] The victim testified that, during the massage and then again while walking to the reception area, the accused told her that she was asking for this and that it would stay between them. The victim paid for the massage, left, and, once outside, called her mother. She then went back inside to make a complaint.

[8] Another massage therapist employed at the clinic, who was working at the reception desk that day (the receptionist), also testified for the Crown. She explained that the victim's massage ran overtime by almost fifteen minutes; that it was completely out of the norm for the accused to accompany his clients to the reception area after a massage, as he had done with the victim; and that extra certification training (which the accused did not have)

and client consent forms (which were not signed in this case) were required in order for a therapist to perform breast massages.

[9] The receptionist testified that, a few minutes after the victim had paid for the massage, she saw her crying and wanting to file a complaint. Once the complaint was made, the victim was moved into a private room and 911 was called. When the police did not arrive after waiting a considerable period of time, the victim was told to return home, which she did.

[10] Police eventually met the victim at her residence hours later. One of the responding officers (the officer) testified for the defence. There were discrepancies between his evidence and that of the victim as to what they discussed—which I will review later in these reasons. The victim provided a statement to the police a few days later.

[11] The accused testified regarding what occurred during the massage and denied any inappropriate touching. He indicated that the alleged incident occurred on his second last day at the clinic, as he was moving to Alberta with his wife and children. He described in considerable detail how the massage proceeded and said that the victim asked him to massage her abdomen and inner thigh, which was unusual for a relaxation massage. He also explained that, almost invariably, it was his practice to accompany clients to the reception area at the conclusion of a massage. On his way out with the victim, they chatted, but he denied making any comment to her about keeping matters between them.

The Trial Judge's Reasons

[12] In convicting the accused, the trial judge rejected his testimony for a number of reasons:

1. She found that he was not credible when he testified that, ninety-nine per cent of the time, he would escort his clients to the clinic's reception area after a massage. The trial judge found this testimony to be inconsistent with other evidence, namely: the evidence of the receptionist, who indicated that this was not the accused's general practice; the evidence of the victim, who explained that the accused had accompanied her to the reception area after one or two of the previous five massages that she had with him; and a video recording that was tendered showing that he did not escort to the reception area the client immediately preceding the victim. The trial judge determined that "[i]n the face of three contradictory pieces of evidence" (*conviction decision* at para 42), the accused did not normally walk clients to the reception area. She found that he had done so with the victim "to keep an eye on [her] and to see what she may say when she went to pay at reception" (*ibid*).

2. The trial judge had concerns about the accused's evidence regarding the use of a towel. She noted that, although the accused went into great detail about the massage, including descriptions of the exact placement of the sheet covering the victim's body, of him tucking the sheet into her underwear and of using a towel to cover her upper body when she was face up

and he started working on her abdomen, he did not explain what happened to the towel, nor did he mention that he had removed it. The trial judge concluded that "[g]iven the level of detail he provided otherwise, this missing detail was concerning" (*ibid* at para 39).

3. She determined that the accused's evidence was "self serving" (*ibid* at para 40) when he testified that the victim made two specific requests—that he massage her abdomen and her inner thigh. The trial judge noted that the victim never mentioned these requests in her testimony, and the evidence was clear that the victim "had requested and expected her regular relaxation massage" (*ibid*). The trial judge did not accept the accused's testimony about the victim having made these requests and found that he gave this evidence "to explain how it was [that] he was near her vagina at all and to explain why he was massaging her abdomen" (*ibid*).

4. She found that, when the accused testified about massaging the victim's pectoral area, abdomen and inner thigh, "his voice became very shaky [with] a nervousness in his tone" (*ibid* at para 41) that was not present during other parts of his testimony.

[13] Conversely, the trial judge found the victim "to be a credible and reliable witness" (*ibid* at para 43). She noted that the victim's testimony was consistent with the accused's evidence on certain details—such as them discussing, at the outset of the massage, him moving to Alberta. The trial

judge also indicated that the victim's willingness to admit to certain points "add[ed] to her credibility" (*ibid* at para 44). In particular, the trial judge noted that the victim admitted that when the accused began touching her breasts, she did not ask him to stop because she thought that "he knew what he was doing as the professional" (*ibid* at para 43); that she did not tell the accused to stop massaging her abdomen "because it meant he was not touching her breasts" (*ibid*); and that she responded positively when the accused asked her if it "felt good" (*ibid*) when he massaged her hips. The trial judge found that the victim could have left out or denied these details, but did not. As further noted by the trial judge, the victim also admitted to engaging in small talk with the accused after the massage and wishing him good "luck" (*ibid* at para 44) on his upcoming trip. The trial judge accepted her explanation that this was because "she did not want to make a fuss at that point" (*ibid*). She also accepted that the victim "was scared and was not sure how to react to [the accused's] actions during the massage" (*ibid* at para 45).

[14] The trial judge addressed inconsistencies between the victim's evidence and that of the officer regarding their interaction. Specifically, the victim testified that she was told that she could not press charges because she was not raped or penetrated, and that the police did not introduce themselves or give her an incident number or telephone numbers. The officer testified that the victim provided some basic details of what had transpired during the massage, but that she was shaken up due to the five-hour wait and needed to think about how she would proceed. According to the officer, he gave her an incident card with his name on it, said that he would follow up to see how she wanted to go forward, and told her that the matter would be forwarded to the Sex Crimes Unit to investigate further.

[15] The trial judge found that the officer had given the victim his badge number and telephone number and told her that the Sex Crimes Unit would investigate. The trial judge acknowledged that the victim "gave contradictory evidence" (*ibid* at para 46) in that regard, but held that it did not make her "a less credible or reliable witness on the main issue" (*ibid*). The trial judge did not find these contradictions to be material to the "substantive allegation" (*ibid*) and determined that the victim "may well have been in shock about what happened to her and potentially frustrated" (*ibid*) because of the time it took for the police to attend and talk to her about the incident.

[16] With respect to the receptionist's testimony, the trial judge rejected the accused's suggestion that she had animus towards him that would have substantively affected her testimony (see *ibid* at paras 29, 47). Finding the receptionist to be "a credible and reliable witness" (*ibid* at para 47), the trial judge accepted her evidence that it was out of the ordinary for the accused to escort a client to the reception area, indeed, that he was "notorious" for not accompanying clients to the reception area, despite a clinic policy requiring massage therapists to do so. As I noted earlier, a video recording of the client immediately prior to the victim was tendered into evidence to show the accused not walking that client to the reception area.

[17] Having concluded that both the victim and the receptionist were credible and reliable witnesses and that she did not believe the accused's denials, the trial judge found the accused guilty of sexual assault.

[18] On sentencing, the Crown requested a penitentiary sentence of thirty months, and the accused sought a CSO. In imposing a custodial sentence of twelve months, the trial judge noted the victim's vulnerability, the

prolonged duration of the assault, that the assault was over various parts of the victim's body and the significant harm the victim suffered as a consequence. The trial judge expressed concerns about, and gave minimal weight to, the psychological report tendered by the accused, in which the writer concluded that the accused is a low risk to reoffend, either sexually or generally. The trial judge rejected the accused's argument for a CSO, concluding that it would not address the fundamental sentencing principles of denunciation and deterrence in this case.

Discussion and Decision

Conviction Appeal

Category 1: Uneven Scrutiny

[19] An allegation of uneven scrutiny relates to a trial judge's assessment and findings regarding witnesses' credibility.

[20] The accused challenges the trial judge's credibility findings, arguing that she made excuses for deficiencies in the victim's evidence, essentially accepting it at face value, while subjecting the accused's evidence to extensive scrutiny and maximizing any problems with his testimony. The accused also says that the trial judge unreasonably explained away defects in the testimony of the receptionist.

The Law

[21] This Court has addressed claims of uneven scrutiny in many cases. It has held that a claim of uneven scrutiny "is easily made, but seldom successful" (*R v Jovel*, 2019 MBCA 116 at para 38 [*Jovel*]; see also

R v Markwick, 2022 MBCA 20 at para 5). To succeed, "[i]t must be clear from the trial judge's reasons, or the record, that different standards were applied" (*Jovel* at para 38).

[22] That being said, the Supreme Court of Canada has "serious reservations about whether 'uneven scrutiny' is a helpful analytical tool to demonstrate error in credibility findings" (*R v GF*, 2021 SCC 20 at para 100 [*GF*]; see also *R v Mehari*, 2020 SCC 40 at para 1). In *GF*, Karakatsanis J, for the majority, also stated that "[i]n appellate cases that have accepted an uneven scrutiny argument, there was some specific error in the credibility assessments" (at para 100; see e.g. *R v Glays*, 2015 MBCA 76). Ultimately, "the focus must always be on whether there is reversible error in the trial judge's credibility findings" (*GF* at para 100). A trial judge's evaluation of credibility may only be interfered with where it cannot be supported on any reasonable view of the evidence (see *R v Buboire*, 2024 MBCA 7 at para 13, citing *R v CAM*, 2017 MBCA 70).

[23] To support his argument of uneven scrutiny, the accused in the present appeal relies on *R v Rhayel*, 2015 ONCA 377 at paras 105-9 [*Rhayel*], where the Ontario Court of Appeal made a finding of uneven scrutiny that led to the convictions being set aside and a new trial ordered. In *Rhayel*, the Court found that the trial judge's errors in admitting a video recording of the complainant's statement and in placing undue reliance on the demeanour of the complainant in that statement "interfered with his ability to assess, in a balanced fashion, the evidence that was critical to the issues he had to determine" (at para 83). The accused in the present case takes the position that the trial judge's treatment of the evidence was likewise imbalanced and caused a miscarriage of justice.

[24] The accused raises a number of specific concerns in this area which, to some extent, overlap with other grounds of appeal. What I consider to be the accused's key concerns are addressed below.

Inconsistencies with Other Witnesses

[25] Crucial to the accused's position is the argument that the trial judge unfairly dealt with the inconsistencies between the testimony of the victim and other evidence, as compared to inconsistencies between his testimony and other evidence.

[26] As for the testimony of the victim, the accused asserts that she made a serious allegation of professional misconduct against the officer, which the trial judge, in accepting the officer's evidence, determined was unfounded. According to the accused, this should have had a significant negative impact on the victim's credibility generally. Instead, the trial judge found that it did not affect the victim's core allegations. The accused further says that the trial judge engaged in speculative and stereotypical reasoning when she attributed the discrepancy between the victim and the officer to the victim being in shock at the time of their discussion (see Category 3).

[27] At the same time, the accused submits that the trial judge placed too much weight on what he calls a peripheral inconsistency between his evidence that he almost invariably walked clients to the reception area after a massage and the receptionist's testimony that he rarely did so.

[28] I am of the view, as explained in my analysis of Category 3 below, that the trial judge was entitled to come to the conclusion she did about the victim being in shock when speaking with the officer. Furthermore, she was

entitled to conclude that, although she accepted the officer's evidence as to what was discussed, that inconsistency did not undermine the victim's evidence "on the main issue" (*conviction decision* at para 46), namely, what had happened during the massage. A judge is entitled to accept all, some or none of a witness's testimony.

[29] With respect to the inconsistency between the accused's testimony and that of the receptionist about him walking clients to the reception area, the accused questions the trial judge having given weight to this discrepancy as one of the reasons she disbelieved him; the accused argues that this was also a peripheral inconsistency. However, I am of the view that it was open to the trial judge to consider this inconsistency to be more than peripheral because it was integral to the victim's evidence that the accused attempted to intimidate her as they walked to the reception area.

[30] The accused also questions the trial judge having accepted both the victim's evidence that she was smiling as she exited the massage room and the receptionist's testimony that the victim appeared "visibly displeased" and that her face was "tight and stressed" when she paid for the massage. This, in the accused's submission, was an inconsistency. However, the evidence of both witnesses on these points could be true. The victim may have felt one way and appeared another. Also, there is a question of timing; the victim spoke of smiling when she exited the massage room and the receptionist spoke about the victim appearing stressed at the time of payment.

[31] The weight to be given to any inconsistency is within the domain of a trial judge and is entitled to deference if, as was the case here, it is reasonably available.

Admissions by the Victim and the Accused

[32] The accused contends that the trial judge found the victim's credibility to be bolstered by her admissions that she did not tell the accused to stop touching her breasts and abdomen; that she told the accused it felt good when he massaged her hips; and that she engaged in small talk with the accused after the appointment and wished him "good luck" on his trip—but the trial judge made no similar finding that the accused's credibility was enhanced by him admitting that he massaged the victim's inner thigh, abdomen and pectoral area.

[33] In my view, the trial judge was entitled to find that the victim's evidence in this regard enhanced her credibility; she noted that the victim could have left out these details or said that she tried to stop the accused.

[34] Regarding the accused's acknowledgment that he massaged the victim's inner thigh and abdomen, that admission was directly tied to his evidence that the victim had requested a massage in those areas—which the trial judge specifically rejected. As I noted earlier, the trial judge found that the accused had testified about these requests to explain how it was that he was near her vagina at all and to explain why he was massaging her abdomen. This was an available inference. As explained by the trial judge, the victim provided a comprehensive explanation of what had occurred during the massage—and made no mention of these requests. Furthermore, the trial judge's approach was supported by the testimony of both the receptionist and the accused who agreed that, at the outset, the victim had indicated that she was there for her regular relaxation massage, which she had had on all

previous occasions when she saw the accused. The victim also testified that "they had explained that it was a relaxing massage."

[35] Moreover, in fairness to the trial judge, although she did not specifically address what weight should be given to the accused's admission to massaging the victim's abdomen, inner thigh and pectoral areas, it does not appear that this point was raised by trial counsel in his closing argument in support of the accused's credibility. I am of the view that the trial judge did not err in treating the accused's admissions as she did.

Demeanour of the Victim

[36] According to the accused, the trial judge unreasonably excused the victim for not immediately objecting to the massage of her pectoral area or abdomen and/or leaving the massage room, and for wishing the accused good luck on his upcoming move to Alberta at the end of the massage.

[37] In my view, this argument is based on impermissible stereotypes as to how a sexual assault complainant will act (see *R v Kruk*, 2024 SCC 7 at paras 31-44 [*Kruk*]). In any event, the evidence does not support the position put forward by the accused. The victim testified that she "was feeling very scared" during the massage and that she objected to many aspects of it, telling the accused no. As well, regarding the victim's demeanour following the massage, the trial judge specifically accepted her explanation that she was pleasant and wished the accused well because she did not want to make a fuss at that point.

The Evidence of the Receptionist

[38] The accused argues that the trial judge unreasonably determined that the receptionist was not motivated by animus toward him. He also says that the trial judge erred by placing an onus on him to prove a motive to fabricate on the part of the receptionist.

[39] On cross-examination, the receptionist acknowledged that some of the accused's "habits" made her "uncomfortable". She also agreed that she had previously complained about the accused not properly wearing his face mask for COVID-19.

[40] In her reasons, the trial judge stated, "I found nothing in [the receptionist's] evidence or any other evidence to support an argument that she would target [the accused] with false allegations as a result [of not liking him]" (*conviction decision* at para 47). This certainly does not support the accused's assertion that the trial judge placed an onus upon him. Moreover, I do not accept that it was unreasonable for the trial judge to reach the conclusion that she did regarding animus.

[41] The accused also argues that the trial judge accepted as uncontested certain aspects of the evidence of the receptionist—that the accused did not have a specialty to do sensitive massages such as breast massage, that a breast massage was never requested by the victim and that the victim requested her normal relaxation massage. The accused says that these points were, in fact, contested.

[42] The accused did not testify, in response to the receptionist's evidence, that he had a specialty to do sensitive massages—nor was it put to

him in cross-examination. He filed a massage therapy certification transcript that made no reference to such a specialty. The unchallenged evidence was that no consent form was completed for a breast massage that could support the conclusion that a breast massage was requested. Although the accused maintained that the victim asked for a massage of two areas that were out of the ordinary, he agreed with the receptionist that the victim, at the outset, said that she wanted a relaxation massage. I fail to see how the trial judge was unfair in her assessment of the evidence in this area.

Other Reasons for Rejecting the Accused's Evidence

[43] The accused further submits that the trial judge unreasonably rejected his evidence on other grounds. In particular, he questions the rejection of his testimony on the grounds of his demeanour while testifying, his failure to explain what happened to the towel he said covered the victim's upper body, and him giving evidence that the trial judge found was self-serving.

[44] As for the accused's demeanour while testifying (this also forms part of his first argument under Category 2), the trial judge commented on the accused's demeanour while testifying about massaging the victim's pectoral area, abdomen and inner thigh—noting that there was a nervousness in his tone that was not there during other parts of his testimony. The trial judge was entitled to take the accused's demeanour into account, and it is clear that she did not give her assessment of his demeanour significant weight. She acknowledged that his nervousness might be due to "a general nervousness about testifying" (*conviction decision* at para 41). She also stated that she was "mindful that demeanour is a very tricky area to assess" (*ibid*) and that it was

"a minor point in the context of the evidence as a whole" (*ibid*). I see no unreasonable reliance on the accused's demeanour.

[45] The accused also alleges that the trial judge unfairly faulted him for not mentioning having removed the towel or what happened to it. He says that him not mentioning removal of the towel is a minor detail, about which he was not asked on cross-examination.

[46] This submission of the accused may have more merit than others, given that the trial judge's concern seems to relate to a relatively minor point, about which the accused was not cross-examined. However, the accused was the one who introduced the towel to show that the victim was covered, whereas the victim testified that she was naked except for her underwear when he was massaging her lower body.

[47] Finally, the accused criticizes the trial judge for characterizing his evidence as self-serving without considering if it was actually true or raised a reasonable doubt. He contends that by characterizing his evidence in this way, the trial judge engaged in uneven scrutiny.

[48] To simply find that an accused's evidence is self-serving without more may undermine the presumption of innocence because an accused's evidence that is self-serving may still be true (see *Foomani c R*, 2023 QCCA 232 at para 99, quoting *R v Titong*, 2021 ABCA 75 at para 9). However, that is not what occurred in the case at bar. The trial judge provided specifics about the area in which she found the accused's evidence to be self-serving—that is, that the victim requested that he massage her inner thigh and abdomen. As I have already explained, the trial judge was entitled to find that the

accused's evidence about the victim's requests for a massage in these areas was not credible.

Conclusion

[49] While the accused raises the above details as specific errors, it is the cumulative effect of the trial judge's approach that he says gives rise to uneven scrutiny. I am of the view that it was open to the trial judge to assess the evidence as she did. Her analysis was detailed. She did not shy away from dealing with inconsistencies and their impact on her assessment of all of the witnesses' evidence, which is all part of weighing evidence. It is not clear that she applied different standards to the assessment of the evidence of the accused and the victim. I see no reversible error in her approach. It is not the role of this Court to reweigh the evidence and retry the case.

[50] Although the accused relies on the findings and conclusions in *Rhayel*, the evidence and facts in that case are very different from those in the present case, and those differences clearly demonstrate why that Court came to a different conclusion regarding uneven scrutiny than I would here.

[51] Having carefully considered the numerous arguments advanced by the accused about how the trial judge assessed the evidence, I am not persuaded that he has met the stringent threshold for establishing that the trial judge applied uneven scrutiny to his evidence as compared to that of the victim, or that there is a basis for appellate intervention with respect to her credibility assessments.

Category 2: Failing to Allow Evidence and Cross-Examination

[52] The accused challenges discretionary decisions that he says were made by the trial judge during the trial. A discretionary decision is owed deference unless there was a misdirection on the part of the judge or the decision is so clearly wrong as to amount to an injustice (see *R v Caribou*, 2022 MBCA 95 at para 24; *R v JM*, 2022 MBCA 25 at para 23).

[53] I do not accede to the accused's position for the following reasons:

1. The accused argues that he should have been given an opportunity to seek a court order for production of the victim's notes as to what had occurred during the massage. At the trial, trial counsel raised the issue of disclosure of the notes; the Crown replied that he should have made a third-party records application prior to the trial. Trial counsel did not pursue the matter further. That was his choice. There is a strong presumption that lawyers are competent and that they will appropriately advance an accused's defence (see *R v SGT*, 2010 SCC 20 at para 36). I do not accept the accused's assertion that the trial judge nonetheless had an obligation to adjourn the trial, on her own initiative, to facilitate a third-party records application.

2. The accused contends that he was not allowed to fully question the officer regarding his meeting with the victim. The trial judge ruled that a question asked by trial counsel was leading. However, trial counsel was allowed to rephrase the question

> and establish the inconsistency between the evidence of the officer and that of the victim, as had been his intention.

Category 3: Engaging in Speculation and Stereotypical Reasoning

[54] The accused argues that the trial judge engaged in speculative and stereotypical reasoning when she addressed the discrepancies between the evidence of the victim and the officer by finding that the victim may well have been in shock when she spoke with him. The accused says that there was no evidence that the victim was in shock when she talked to the officer. The Crown says that there was ample evidence to support the trial judge's finding.

[55] I am not persuaded that, in making her finding about the victim's emotional state when she spoke with the officer, the trial judge engaged in speculative or stereotypical reasoning in law, as those concepts are explained by the Supreme Court in *Kruk* at paras 31-44, 68. Rather, the trial judge drew a factual inference based on her assessment of the victim's evidence. The issue is whether she made a palpable and overriding error in doing so.

[56] In my view, the trial judge's factual inference as to the victim's emotional state was reasonably available to her based on testimony of the victim, as well as that of the receptionist and the officer himself. The victim testified that she felt scared, trapped and panicked at the clinic, and the receptionist testified that, a few minutes after the victim made payment, she returned to the reception area, sobbing and wanting to make a complaint. The officer's evidence was that, when he met with the victim, she seemed shaken up due to the wait. The trial judge was entitled to draw factual inferences from the evidence to explain the effect of the accused's actions on the victim

and on her subsequent actions, and she did not rely on either impermissible speculation or stereotyping in doing so. I see no palpable and overriding error.

Category 4: Error in the Application of *W(D)*

[57] Finally, regarding the trial judge's alleged failure to apply the *W(D)* test, the accused suggests that she "simply ruled that she was not left with a reasonable doubt" by his evidence without explaining why that was so. While the failure to identify or apply the relevant law, or the misapplication of the legal principles, is an error of law reviewed for correctness (see *R v Ducharme*, 2025 MBCA 85 at para 33; *R v Chung*, 2020 SCC 8 at paras 11, 18; *R v GEH*, 2012 NSCA 69 at para 14), I see no error here. Reading the trial judge's reasons as a whole and in the context of the record, it is clear that she did not commit the *W(D)* error of simply choosing between the Crown and defence evidence (see *W(D)* at 757). As *W(D)* instructs, she clearly explained why she did not accept the accused's evidence—such that it did not raise a reasonable doubt as to his guilt. Similarly, the reason why the evidence that she did accept did not raise a reasonable doubt as to the accused's guilt is also apparent from the record and the evidence that she did accept.

[58] Therefore, I would dismiss the conviction appeal.

Sentence Appeal

Category 5: Error in Principle and Imposition of Demonstrably Unfit Sentence

[59] An appellate court can only intervene to vary a sentence if the

sentence is demonstrably unfit, or the sentencing judge made an error in principle that had an impact on the sentence (see *R v Friesen*, 2020 SCC 9 at para 26 [*Friesen*], citing *R v Lacasse*, 2015 SCC 64 at paras 41, 44 [*Lacasse*]). A sentencing judge's exercise of discretion in weighing or balancing sentencing factors will be an error in principle only if it is exercised unreasonably. As a result, an appellate court cannot disturb a sentence simply because it would have weighed the relevant factors differently (see *R v Harrison*, 2025 MBCA 35 at para 19; *Lacasse* at para 49; *R v Proulx*, 2000 SCC 5 at para 125).

[60] The accused asserts that, in sentencing him to twelve months' incarceration, the trial judge erred in principle by (i) using "lack of remorse" as an aggravating factor; (ii) characterizing the offence as a major sexual assault because, as argued by trial counsel, "a major sexual assault involves more than touching and requires more severe acts such as rape, buggery, fellatio and cunnilingus"; (iii) rejecting the risk assessment in the psychological report when that report was not contested by the Crown; and (iv) ruling that a CSO could not achieve the principles of denunciation and deterrence. Finally, the accused says that the trial judge unreasonably weighed the sentencing factors and arrived at a sentence that was harsh and excessive—that is, demonstrably unfit. (All of the foregoing is included in Category 5).

[61] The Crown submits that the trial judge made no errors in principle. It argues that she (i) did not treat lack of remorse as an aggravating factor; (ii) did not err in characterizing the offence as a major sexual assault; (iii) correctly determined that she was not bound by the psychological report writer's conclusion and that she was required to reach her own conclusion

about the accused's risk to reoffend; and (iv) reasonably concluded that a CSO would not meet the principles of denunciation and deterrence. The Crown also maintains that the sentence was not demonstrably unfit.

[62] As I will explain, I agree with the Crown.

[63] As the trial judge correctly stated, "there is no mitigating factor with respect to remorse" (*sentence decision* at para 41). She did not say that lack of remorse was aggravating.

[64] Further, while the accused argues that the trial judge erred in law by finding that an accused who exercises their right to a trial or does not take steps to rehabilitate is not entitled to a CSO, that is not what she found. Rather, she noted that, in some of the decisions related to granting a CSO that were provided by trial counsel, the accused had expressed remorse either by pleading guilty or by accepting the trial decision and taking responsibility, neither of which happened in the present case. She did not say that a lack of remorse or not pleading guilty made an accused ineligible for a CSO (see *ibid* at para 47).

[65] Regarding the accused's argument that the trial judge erred by determining that the offence was a major sexual assault, trial counsel conceded that it was a major sexual assault, albeit "on the lower end." Furthermore, the jurisprudence has evolved to the point that "it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration" (*Friesen* at para 146). The trial judge's factual finding that the offence was serious was based on many factors, including emotional and psychological harm to the victim. This was clearly a finding that she was entitled to make.

[66] The trial judge had concerns about the risk assessment in the psychological report, which found the accused to be a low risk to reoffend, because there was "no discussion . . . of any underlying factors which may have caused these specific actions on the part of [the accused]" (*sentence decision* at para 39). Of particular concern was what the trial judge described as the only comment in the psychological report that "allud[ed] to the circumstances of the offence and [the accused's] role in it" (*ibid*). That comment stated: the accused "presents as being genuinely distressed, embarrassed and ashamed by his conviction, and by the actions that led to the conviction." The accused contends that evidence about the factors that led to an accused's actions are irrelevant where guilt is denied and where, as here, the expert who prepared the psychological report indicated that the accused did not require "sex-offender-specific treatment."

[67] Generally, the weight to be given to an expert's opinion is within the discretion of the trier of fact and is owed deference on appeal (see *R v Awer*, 2016 ABCA 128 at para 26). Regardless, the trial judge's assessment of the risk assessment was not material to her decision not to impose a CSO; she noted that, even if she had accepted that the accused was not a danger to the community, she still would have rejected a CSO because it was not consistent with the fundamental sentencing principles of denunciation and deterrence in this case (see *sentence decision* at para 51).

[68] While the accused argues that the trial judge erred by ruling that a CSO could not achieve the principles of denunciation and deterrence, that is not what she said. She stated, "I agree that there may be cases where [the fundamental principles of denunciation and deterrence] can be addressed with a CSO, including certain sexual assault cases" (*ibid*). She determined,

however, based on the facts as she found them, that "[t]his is not one of them" (*ibid*). I have concluded that she did not err in this regard.

[69] Finally, the accused argues that the trial judge unreasonably weighed the relevant sentencing factors, which resulted in a sentence that was demonstrably unfit. The accused contends that a CSO is appropriate, given his lack of criminal record, the psychological report which indicates that he is a low risk to reoffend, his exemplary behaviour while on judicial interim release, as well as his supports within the community, as explained in multiple letters of reference. I am not persuaded that the trial judge weighed the relevant sentencing factors unreasonably or that the sentence she imposed was demonstrably unfit. This was a serious crime, involving a significant breach of trust and high moral blameworthiness, with considerable resulting harm to the victim. As the trial judge noted, denunciation and deterrence were the primary sentencing principles. Her decision to impose an incarceratory sentence, rather than a CSO, is entitled to deference on appeal. As stated, I am not persuaded that she erred in doing so.

[70] In all of the circumstances, I see no basis to interfere with the trial judge's decision on sentence.

Post-Hearing Developments

[71] On April 1, 2026, after counsel had been notified that these reasons were ready for release, counsel for the accused advised that he sought to file fresh evidence on the sentence appeal, consisting of documents related to a health issue that the accused had developed. The release of these reasons was postponed to allow him to do so.

[72] The accused then made a written request, under rule 39.1(c) of the *CA Rules*, for leave to file the fresh evidence after the appeal hearing. As noted, the fresh evidence consists of medical reports and records, and other documents, relating to a lower back condition that the accused has developed since the appeal hearing. The accused submits that, due to this condition, his personal circumstances "have dramatically changed", such that the sentence imposed by the trial judge should be substituted with a CSO.

[73] The fresh evidence indicates that the accused, now thirty-eight years of age, suffers from severe lower back and right-sided leg pain, with associated loss of strength and stability. On March 14, 2026, he was diagnosed with a herniated disc in his lower back, impacting his right S1 nerve root.

[74] The fresh evidence also provides information about the treatment for the accused's lower back condition. On April 10, 2026, the accused's family physician referred him for a neurosurgical consult and also prescribed a walker that the accused says he uses mainly for mobility outside his residence. On April 14, 2026, the accused purchased a cane that he says he uses inside his residence. The accused was scheduled to undergo a non-surgical procedure on May 13, 2026, which appears to involve a nerve block injection treatment to alleviate pain. As part of the fresh evidence, the accused's family physician indicates that, if the nerve block injection does not relieve the accused's symptoms, surgery may be required. The accused's family physician also states that it is uncertain whether the accused will require repeat injections if his symptoms do not resolve and that "[w]ithout treatment [his] pain and mobility may get worse."

[75] Fresh evidence will be admitted where it is in the interests of justice to do so. More specifically, the factors to be considered in determining a motion for the admission of fresh evidence, including on a sentence appeal, are the well-known criteria set out in *Palmer v The Queen*, 1979 CanLII 8 at 775 (SCC) [*Palmer*]:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases[;]
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial[;]
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief[;] and
>
> (4) [The evidence] must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

See also *R v Silaphet*, 2024 MBCA 58 at para 76 [*Silaphet*].

[76] The Crown concedes, and I agree, that the first three criteria in *Palmer* are not at issue. The question is whether the fourth criterion is met, namely, whether the fresh evidence could reasonably have affected the sentence imposed by the trial judge.

[77] The medical condition of an offender is part of their personal circumstances relevant to sentencing on the basis that it could mean that a sentence will have a more significant impact on that offender than it would on others. As noted by this Court in *Silaphet*, "a serious illness [of an offender] will . . . be treated as a mitigating factor on the basis that it will cause

additional hardship for an offender during incarceration" (at para 84). This is so even if the correctional authorities can adequately address the offender's condition (see *R v Polanco*, 2019 ONSC 3073 at para 44 [*Polanco*]).

[78] With respect to the admission of fresh evidence regarding a post-sentencing medical condition, this Court stated in *Silaphet* at para 79:

> In cases where no error by the sentencing judge has been demonstrated but an accused is diagnosed with an extreme health condition subsequent to the sentencing, appellate courts will often admit the evidence (see e.g. *R v Andrews (JWL)*, 2004 MBCA 60; *R v Woods*, 2003 BCCA 539; *R v ER*, 1993 CanLII 2599 (BCCA)). In circumstances where less severe medical circumstances are at play or the medical evidence is not clear, appellate courts have shown a greater reluctance to admit the evidence, typically because it will not likely affect the result (see e.g. *R v Boussoulas*, 2018 ONCA 222; *R v BT*, 2013 ONCA 535; *R v Kouznetsov*, 2010 BCCA 585).

[79] In the present case, although the accused has been suffering from pain and mobility restrictions, he has not been diagnosed with "an extreme health condition"; rather, it is closer to "a less severe medical circumstance". His condition is unlike the situation in *Polanco*, relied upon by the accused, where the Ontario Superior Court of Justice, on appeal, substituted a custodial sentence with a CSO due to the offender's post-sentencing medical disability. In that case, the offender had undergone surgery, would require surgery in the future and, at the time of the appeal, was using a wheelchair.

[80] Furthermore, because the accused's future medical needs for his lower back condition are unclear, he has not established that he would be unable to access appropriate treatment while in custody. There is no firm indication in the fresh evidence regarding his further treatment, if any, beyond

the injection scheduled for May 13. More specifically, there is no indication as to whether he will undergo further injections, nor are there particulars regarding the nature of the possible surgery or the potential rehabilitation required. Even if the accused were to require further treatment, provincial correctional institutions are statutorily empowered to have an inmate undergo a medical examination to determine whether they are suffering from any condition that may require special treatment, care or medication, and to remove an inmate from an institution to undergo such an examination or to attend a hospital, clinic or other health facility for the purpose of receiving the proper treatment, care or medication (see *The Correctional Services Act*, CCSM c C230, ss 37-38).

[81] As I noted earlier in these reasons, the accused committed a serious crime involving high moral culpability, breach of a position of trust and significant resulting harm to the victim. Denunciation and deterrence are the paramount sentencing principles. Considering all of the relevant factors, including the accused's personal circumstances, I am of the view that his medical status, as outlined in the fresh evidence, could not reasonably have affected the sentence imposed.

[82] Therefore, I would deny the accused's request for leave to file post-hearing materials under rule 39.1(c) of the *CA Rules* because there is no reasonable prospect that a motion for the admission of the fresh evidence could succeed (see *Aquila v Aquila*, 2016 MBCA 33 at para 34).

[83] Furthermore, as stated in *R v Lévesque*, 2000 SCC 47, "If the fresh evidence [were] admitted, the court of appeal must again consider [it together with] all the other evidence in order to determine whether the sentence

imposed by the trial judge was 'demonstrably unfit'" (at para 24). In this case, I am not persuaded that the fresh evidence, even if admitted, would render the sentence imposed demonstrably unfit.

Conclusion

[84] For the above reasons, I would dismiss the conviction appeal, grant leave to appeal the sentence and dismiss the sentence appeal.

Simonsen JA

I agree: Beard JA

I agree: Kroft JA