Citation: R v Laliberte, 2026 MBCA 25
Date: 20260326

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Janice L. leMaistre
Mr. Justice James G. Edmond

B E T W E E N:

	)	***J. D. Poettcker***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***R. Lagimodière***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
DANIEL LALIBERTE	)	***October 21, 2025***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***March 26, 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).

LEMAISTRE JA

Introduction

[1] The accused appeals his conviction, after a trial in the Provincial Court, for accessing child sexual abuse and exploitation material (CSAEM) (the accessing offence).

[2] The accused argues that the trial judge erred in his application of the law regarding *mens rea* and misapprehended the evidence.

[3] For the reasons that follow, I would dismiss the appeal.

Background

Circumstances of the Offence

[4] In November 2020, the Winnipeg Police Service received a report from the National Center for Missing & Exploited Children that a video containing CSAEM had been uploaded to Google Photos from an account registered to the accused. On May 27, 2021, police seized the accused's smart phone (the phone) pursuant to a search warrant. The accused admitted that he had received a link to CSAEM that he clicked on. However, the video was not found on the phone and it was unclear how it was uploaded to Google Photos from his account.

[5] Software used by the police to examine the data on the phone (the software) located fifty-five videos depicting CSAEM (the videos) in the download folders of two applications on the phone, Telegram and MEGA. The software also determined that most of the videos had been "modified" on May 21 or May 23, 2021.

[6] In June 2021, after the police completed their forensic analysis of the phone, the accused was charged with possessing and accessing CSAEM (see *Criminal Code*, RSC 1985, c C-46, ss 163.1(4)–163.1(4.1) [the *Code*]). At the time of his arrest, he provided a videotaped statement (the statement).

[7] During the statement, the accused acknowledged having a problem with pornography, admitted he had entered chat rooms in search of material related to "age play" and "bestiality", and indicated that CSAEM "popped up"

while he was in these chat rooms. He also stated that he went back to one of the chat rooms a second time where CSAEM had previously popped up with the hope that he would not see it, but it was still there. As a result, he deleted Telegram, the application he had been using, from the phone.

The Trial

[8] At the trial, the Crown called two police witnesses who testified about the examination of the phone and their knowledge of the applications used by the accused, as well as other similar applications. The Crown also tendered the statement.

[9] One of the police witnesses, Detective Lofto (Det. Lofto), testified that the software could recover files that had been deleted or overwritten. He stated that Telegram has an automatic download function and that he was uncertain whether the videos had been saved by the accused or had been downloaded to the phone automatically. Det. Lofto further testified that no cached images containing CSAEM—which would have confirmed that the images had been viewed—were found on the phone.

[10] Finally, Det. Lofto testified that the software identified two dates on which the videos were modified. He explained that, ordinarily, the software provides quite a bit of information regarding a device's usage, including web browser history, internet searches, chats broken down by the application in use, when the device was being used, where videos or images were located and when they were created, accessed and modified. In this case, the software was unable to obtain an accurate history of the dates when the files containing the videos were created and accessed because the phone was a model that did not fully comply with the software. However, he said that the modified dates

indicated that the videos were "potentially . . . downloaded or put on the phone on two separate days".

[11] At the close of the Crown's case, the accused brought a motion for a directed verdict. The Crown responded, in part, by directing a stay of proceedings with respect to the charge of possession of CSAEM. Its position was that there was evidence that the videos could have been downloaded onto the phone automatically, in other words, unintentionally. Therefore, the evidence did not establish, beyond a reasonable doubt, the necessary *mens rea* for that offence.

[12] The trial judge dismissed the motion with respect to the accessing offence, finding that there was some evidence the accused had knowingly accessed CSAEM.

[13] The accused did not testify or call any other evidence. He argued that the Crown had not established the necessary *mens rea* for the accessing offence. His position was there was no evidence that he knowingly accessed CSAEM because he was not looking for CSAEM when it popped up on his phone; his access was inadvertent.

The Trial Judge's Reasons

[14] In his reasons for conviction, the trial judge reviewed the evidence relevant to the issue of *mens rea*. He found that Det. Lofto testified that the videos had been viewed. Importantly, he also found that without the statement, there was insufficient evidence to convict. After reviewing Det. Lofto's testimony, including evidence about the forensic analysis of the phone, he stated:

> In my mind, if the evidence stopped here, then I do not think I have enough evidence to find that [the accused] knowingly accessed [CSAEM]. The evidence shows that the videos were downloaded onto his phone, but the evidence of Detective Lofto does not prove beyond a reasonable doubt that [the accused] knowingly accessed [CSAEM] or showed the requisite *mens rea* of the offence.

[15] As a result, the trial judge conducted a careful review of the statement. After doing so, he found that, when the accused admitted going back to the chat room a second time to see if the CSAEM was still there, this was an admission that the accused knowingly accessed CSAEM. The trial judge acknowledged that the accused did not "come right out and confess in exact words". However, after considering the context in which the accused's comments were made, he inferred they amounted to a confession.

Issues on Appeal

[16] The accused advances four grounds of appeal. He asserts that:

1. The trial judge misapplied the law on motive and intention.

2. The trial judge misapplied the law on accessing CSAEM.

3. The trial judge drew inferences that amounted to a misapprehension of the evidence.

4. The trial judge made factual errors regarding the evidence of Crown witnesses.

[17] The accused submits that the evidence was insufficient to establish the necessary *mens rea* for the accessing offence. He argues that the trial judge conflated motive and intention when finding that he knowingly, rather than

inadvertently, accessed CSAEM. He further contends that the trial judge erred in finding that he admitted, in the statement, to knowingly accessing CSAEM. He says that there were other reasonable inferences available on the evidence.

[18] The accused also argues that the trial judge erred when he found that Det. Lofto testified the accused viewed the videos and must have accessed the videos for them to download to the phone. He maintains that the trial judge used these findings to infer that he committed the accessing offence on two occasions and that these inferences were central to the trial judge's reasoning in convicting.

[19] In my view, the accused's arguments raise two main issues:

1. Did the trial judge err in finding that the accused had the requisite *mens rea* for the accessing offence?

2. Did the trial judge misapprehend the evidence in a material way?

Standard of Review

[20] The identification of a legal standard and its application to the facts of the case are reviewed for correctness (see *R v Shepherd*, 2009 SCC 35 at para 20; *R v Araujo*, 2000 SCC 65 at para 18). Whether the Crown has proven the requisite *mens rea* for a criminal offence is a question of fact (see *R v Cook*, 2023 SKCA 117 at para 65).

[21] Where the Crown's case depends on circumstantial evidence, the question on appeal is "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable

conclusion available on the totality of the evidence" (*R v Villaroman*, 2016 SCC 33 at para 55 [*Villaroman*]). This question requires "the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence" (*ibid*).

[22] A misapprehension of evidence may include "a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence" (*R v Morrissey* (1995), 97 CCC (3d) 193 at 218, 1995 CanLII 3498 (ONCA) [*Morrissey*]). A misapprehension of the evidence must not be confused with a different interpretation of the evidence from that reached by the trial judge (see *R v Lee*, 2010 SCC 52 at para 4). The standard for establishing a misapprehension constituting a miscarriage of justice is stringent (see *R v Lohrer*, 2004 SCC 80 at para 2).

[23] Not every misapprehension will lead to a conviction being quashed under section 686(1)(a)(iii) of the *Code*. A conviction amounts to a miscarriage of justice when the trial judge misapprehends evidence that is essential to the reasoning leading to the finding of guilt. Where mistakes as to the substance of the evidence play a key role in the conviction, the verdict is not truly based on the evidence, is not reliable and the accused has not received a fair trial, resulting in a miscarriage of justice (see *Morrissey* at 221).

The Law

[24] There is no appellate jurisprudence addressing the *mens rea* required for the offence of accessing CSAEM. The analysis of whether the trial judge erred in finding that the accused possessed the requisite *mens rea* therefore requires a review of the relevant provisions of the *Code*, as well as case law

interpreting the *mens rea* for the related offences in sections 163.1(2) and 163.1(3).

[25] Section 163.1(4.1) creates the offence of accessing CSAEM. Section 163.1(4.2) provides interpretive assistance. These provisions state (in part):

Accessing child sexual abuse and exploitation material **163.1(4.1)** Every person who accesses any child sexual abuse and exploitation material is guilty of	**Accès au matériel d'abus et d'exploitation pédosexuels** **163.1(4.1)** Quiconque accède à du matériel d'abus et d'exploitation pédosexuels est coupable :
(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year[.] . . .	**a)** soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an[.] . . .
Interpretation **163.1(4.2)** For the purposes of subsection (4.1), a person accesses child sexual abuse and exploitation material who *knowingly* causes child sexual abuse and exploitation material to be viewed by, or transmitted to, himself or herself.	**Interprétation** **163.1(4.2)** Pour l'application du paragraphe (4.1), accède à du matériel d'abus et d'exploitation pédosexuels quiconque, *sciemment*, agit de manière à en regarder ou fait en sorte que lui en soit transmis.

[emphasis added]

[26] The offence of accessing CSAEM criminalizes the act of intentionally viewing CSAEM "without having 'possession' of it" (*Quebec (Attorney General) v Senneville*, 2025 SCC 33 at para 164).

[27] When Parliament added the offence of accessing CSAEM to the *Code* by way of the *Criminal Law Amendment Act, 2001*, SC 2002, c 13 (as enacted by Bill C-15A, *Criminal Law Amendment Act, 2001*, 1st Sess, 37th Parl, 2001, cl 3 (assented to 4 June 2002)), the then Minister of Justice and Attorney General of Canada explained that the offence was not intended to capture inadvertent viewing of CSAEM. She stated ("Bill C-15A, Criminal Law Amendment Act, 2001", 2nd reading, *House of Commons Debates*, 37-1, vol 137, No 54 (3 May 2001) at 1620 (Hon Anne McLellan) online: <ourcommons.ca>):

> Bill C-15 seeks to create four new offences: an offence of transmitting [CSAEM] to cover one to one distribution, such as e-mail sent to one person only; an offence of making [CSAEM] available to cover those who post [CSAEM] on a publicly accessible website but take no other steps to distribute it; an offence of exporting [CSAEM] to meet our international obligation; and *an offence of accessing [CSAEM] to capture those who intentionally view [CSAEM] on the net but where the legal notion of possession may be problematic. The offence is defined to ensure that inadvertent viewing would not be caught under this offence*.
>
> [emphasis added]

[28] As Fish J explained in *R v Morelli*, 2010 SCC 8 at para 27 [*Morelli*]:

> What made a charge of possession "problematic", of course, is that possessing a digital file and viewing it are discrete operations — one could be criminalized without also criminalizing the other. In the case of [CSAEM], Parliament has now criminalized both. But

> viewing and possession should nevertheless be kept conceptually separate, lest the criminal law be left without the analytical tools necessary to distinguish between storing the underlying data file and merely viewing the representation that is produced when that data, residing elsewhere, is decoded.

[29] In *Leary v The Queen*, 1977 CanLII 2 (SCC), Dickson J, writing in dissent, but not on this issue, considered the requirement that a person have a blameworthy state of mind in order to be convicted of a criminal offence. He explained the concept of *mens rea* in the following way (*ibid* at 34):

> The mental state basic to criminal liability consists in most crimes in either (a) an intention to cause the *actus reus* of the crime, *i.e.* an intention to do the act which constitutes the crime in question, or (b) foresight or realization on the part of the person that his conduct will probably cause or may cause the *actus reus*, together with assumption of or indifference to a risk, which in all of the circumstances is substantial or unjustifiable. This latter mental element is sometimes characterized as recklessness.

See also *R v Sault Ste Marie*, 1978 CanLII 11 (SCC).

[30] The Supreme Court of Canada, in *R v ADH*, 2013 SCC 28, described this concept as the presumption of subjective fault (see para 23). The subjective fault standard focusses on what was in the accused's mind at the time the offence was committed and "may be met by sufficient evidence of intention or actual knowledge, recklessness coupled with knowledge of the consequences, or wilful blindness, but not mere negligence" (*R v Spencer*, 2011 SKCA 144 at para 64 [*Spencer*], citing *Regina v Buzzanga and Durocher* (1979), 49 CCC (2d) 369 at 381, 1979 CanLII 1927 (ONCA) [*Buzzanga*]; see also *R v Park*, 2024 MBCA 93 at para 36).

[31] In *Spencer*, Caldwell JA considered the mental element required for the offence of making available CSAEM pursuant to section 163.1(3) of the *Code* and whether it "imports a *mens rea* requirement of 'knowingly'" (at para 60). As he pointed out, that section does not expressly set out the required *mens rea*. After applying the principles of statutory interpretation articulated in *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), Caldwell JA determined that "the *mens rea* element of s. 163.1(3) requires that an accused *knowingly* make available [CSAEM]" (*Spencer* at para 65) [emphasis in original].

[32] Relying on *Buzzanga*, he concluded (*Spencer* at para 64):

> [I]t must be presumed the *mens rea* requirement of s. 163.1(3) is subjective (*i.e.*, an aware state of mind or guilty mind) and, therefore, the *mens rea* element of the offence may be met by sufficient evidence of intention or actual knowledge, recklessness coupled with knowledge of the consequences, or wilful blindness, but not mere negligence.

[33] The Ontario Court of Appeal, in *R v McSween*, 2020 ONCA 343 [*McSween*], considered the *mens rea* requirement for the offences of making and distributing CSAEM contrary to sections 163.1(2) and 163.1(3), and agreed with *Spencer*. Writing for the Court, Trotter JA stated (*McSween* at para 87):

> Sections 163.1(2) to (4.1) of the *Criminal Code* are silent on the intent required to prove [CSAEM] offences. This is not an unusual state of affairs. In *Sweet v. Parsley*, [1969] 1 All. E.R. 347 (H.L. U.K.) at p. 349, Lord Reid observed that while Parliament quite frequently does not specify the *mens rea* required for an offence, Parliament did not intend to punish the unblameworthy:

> [W]herever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in the words appropriate to require *mens rea*. The appropriate *mens rea* words for subjective intent -- knowledge, recklessness, or wilful blindness -- ensure only the blameworthy are punished.

[34] Although section 163.1(4.1), which creates the offence of accessing CSAEM, does not use the term "knowingly", section 163.1(4.2) does. In my view, the element of knowledge in section 163.1(4.2) relates to awareness, whether through knowledge, recklessness or wilful blindness, of the existence of CSAEM, a factual prerequisite to the offence, rather than to the prohibited act of accessing CSAEM. Otherwise, section 163.1(4.1) would attract a higher *mens rea* standard such that recklessness would be insufficient to establish the offence (see e.g. *R v Noble (PDJ)*, 2010 MBCA 60 at para 11).

[35] In my view, Parliament did not intend to establish a more stringent *mens rea* requirement for the offence of "merely viewing" CSAEM (*Morelli* at para 27) than for possessing it. I agree with *Spencer* and *McSween*: the *mens rea* for accessing CSAEM, like that for offences under sections 163.1(2) and 163.1(3), is satisfied upon proof of subjective intent, including knowledge, wilful blindness or recklessness.

[36] I will now turn to whether the trial judge erred in finding that the accused had the necessary *mens rea* for the accessing offence.

Discussion

Did the Trial Judge Err in Finding That the Accused Had the Requisite Mens Rea for the Accessing Offence?

[37] The accused argues that the Crown failed to prove that he intended to access CSAEM. He submits that the evidence demonstrates his access was inadvertent. He says the evidence shows that his purpose in entering the chat room was to confirm the videos had been removed and that, by deleting the application when the videos appeared a second time, he acted consistently with that intention. He further contends that the trial judge erred in characterizing this as his motive and in concluding that his motive was irrelevant.

[38] I am not convinced that the trial judge erred when he inferred that the accused confessed, in the statement, to knowingly accessing CSAEM when he said he went back to the chat room a second time "to see if the [CSAEM] had been removed".

[39] It is important to remember that a trial judge's assessment of circumstantial evidence and what inferences can reasonably be drawn from it can be set aside only where the assessment is unreasonable (see *Villaroman* at para 71) and that "it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation" (*ibid*).

[40] During the statement, the accused admitted he had a problem with pornography. The officer then suggested that his searching for "regular pornography" on the internet may have led him down a "rabbit hole" to watching videos involving children. Immediately following this comment, the

accused stated, “I saw that on my phone and in the chat rooms”, “all that stuff popped up on [different applications I had]” and “it kept coming back.” “I saw myself doing it, going down that hole. And I’m like, ‘Why are you not stopping? Stop. Stop doing that. Stop. Stop. Stop. Stop.’ And I just kept going.”

[41] The accused also acknowledged “there [were] multiple dates” when he saw CSAEM and he was “scrolling through” the chat rooms, hopeful that the videos had been removed so that he would not “see it anymore. But it kept coming back.”

[42] In my view, the accused’s words, considered in their full context, support the trial judge’s inferences that the accused was referring to viewing CSAEM, in the statement, and that he saw CSAEM when he returned to the chat room a second time. These inferences were therefore reasonably open to the trial judge.

[43] The accused submits that there was an inference available on the evidence in addition to the inference of inadvertent viewing argued at trial. He suggests that it would have been reasonable to infer that he did not view the videos; instead, he saw filenames and thumbnails (smaller images or videos that are often blurry), realized the videos were still present, and left the chat room.

[44] In my view, this inference is not reasonable. As I have already explained, in the statement, the accused admitted seeing “that on [his] phone and in the chat rooms”. He stated, “I [saw] it” and “it kept coming back.” He also said he was hopeful that “those videos” would be removed. He did not say he saw filenames and thumbnails.

[45] Considering this context, it would be speculative to infer, without something more, that it was the presence of filenames or thumbnails that caused the accused to realize the videos were still present in the chat room. The accused's language reasonably leads to the inference that he saw the videos in the chat room.

[46] In addition, in my view, the trial judge correctly recognized that motive and intent are different, and that the accused's purpose in returning to the chat room was irrelevant.

[47] In *R v Abdullah (G) et al*, 2010 MBCA 79, Hamilton JA explained the distinction between motive and intent. She stated (*ibid* at paras 40-41):

> Intention is not to be confused with motive. Motive is the reason why someone does something. It is possible to have a specific intention for doing an act that is different from the motive for that same act. If a person robs a bank to pay for medical treatment, the intention would be to commit the offence of robbery, while the payment of the medical expenses would be the motive. Motive is not an element that the Crown must prove, so it is important to differentiate between the required intention, which forms a part of the offence that the Crown must prove, and motive, which does not.
>
> *Intention should also not be confused with desiring or wanting a particular outcome. A person can intend a particular outcome, in the sense that he or she knows or foresees it, even if he or she does not want or desire that it occur.*
>
> [emphasis added]

[48] Here, the trial judge found that the accused knew he would view CSAEM by returning to the chat room. The trial judge rejected the accused's argument that his actions were inadvertent. As the Crown points out, there

was nothing in the evidence to suggest that the videos would be removed beyond the accused's mere hope.

[49] Even if I were persuaded that the trial judge erred in finding that the accused acted with actual intent, in my view, his actions were, at a minimum, reckless. Despite having seen CSAEM in the chat room, the accused returned only two days later. He took no steps to reduce the risk of viewing CSAEM before returning; he merely hoped that the videos had been removed. This mere hope did not negate his awareness of the risk. He knew from experience that there was a danger that CSAEM would pop up in the chat room, but he continued despite that risk (see *Sansregret v The Queen*, 1985 CanLII 79 at para 16 (SCC); see also *R v Barca*, 2022 MBCA 80 at para 96).

[50] Next, I will consider whether the trial judge materially misapprehended the evidence.

Did the Trial Judge Misapprehend the Evidence in a Material Way?

[51] When summarizing the evidence, the trial judge stated, "Detective Lofto said it was hard to determine when [the] videos were downloaded, but he did say that they were viewed." He also stated, "Detective Lofto testified that [the accused] had to have accessed [the videos] on those dates . . . for them to have been downloaded on [the] phone."

[52] I agree with the accused that these are mistakes as to the substance of the evidence.

[53] Det. Lofto testified that the presence of a cached image on a phone is "proof" the image has been viewed. No cached images of CSAEM were

found on the phone. He also testified that the forensic analysis of the phone could not establish whether the videos had been accessed or viewed.

[54] Det. Lofto further testified that one of the applications being used by the accused, Telegram, had an automatic download feature. His evidence was unclear as to whether a file could be automatically downloaded without being clicked on. In response to a question about how WhatsApp (an application similar to Telegram) typically behaves when the automatic download function is active, he stated:

> That would mean either that somebody would send you a picture and it would automatically go into your WhatsApp photos folder, or into your actual photo album. If they send it to you -- and I don't know if that means that you'd have to actually physically click on it or not, but it would -- there's a -- yeah. There's a chance that something in a chat -- clicked on or not -- could end up in -- in your photos folder or in a WhatsApp folder or -- or somewhere else where you may have it programmed to go.

[55] Det. Lofto's evidence did not establish that the accused viewed or accessed the videos. However, in my view, these two misapprehensions of the evidence are not material.

[56] The trial judge primarily relied on *the statement* to find that the accused knowingly accessed CSAEM. He found that the police evidence, including Det. Lofto's testimony, was not sufficient on its own to establish "beyond a reasonable doubt that [the accused] knowingly accessed [CSAEM] or showed the requisite *mens rea* of the offence."

[57] The forensic analysis of the phone established that the videos were in the download folders of two applications on the phone and that most of the

videos had been saved or accessed on two separate dates. There were a total of fifty-five videos depicting CSAEM.

[58] There was no issue that the videos depicted CSAEM.

[59] Furthermore, the factual errors did not play an essential part in the trial judge's reasoning process resulting in the finding of guilt.

[60] As I have already explained, the trial judge found that Det. Lofto's evidence on its own was not sufficient to convict. Striking the findings from the reasons would not leave the trial judge's reasoning on which the conviction was based on "unsteady ground" (*R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 67, quoting *R v Sinclair*, 2011 SCC 40 at para 56; see also *R v Storheim (SKW)*, 2015 MBCA 14 at para 47).

[61] As stated by the trial judge in his reasons, what was important to his reasoning was Det. Lofto's testimony that the videos were modified on two separate dates *and* the accused's admission that he accessed CSAEM "at least one other time".

[62] The trial judge addressed his mind to all of the evidence and was simply mistaken about what Det. Lofto said in his evidence in two respects. These were fact-finding errors that cannot be said to be overriding (see *Morrissey* at 222).

Conclusion

[63] I am not persuaded that the trial judge erred in finding that the accused possessed the requisite *mens rea* for the accessing offence. In my view, the trial judge's assessment of the statement was not unreasonable nor

was his conclusion that the evidence established the accused knowingly accessed CSAEM. The factual errors identified neither compromised trial fairness nor met the stringent standard to constitute a miscarriage of justice (see *R v Lymych*, 2024 MBCA 61 at para 121).

[64] In the result, I would dismiss the appeal.

leMaistre JA

I agree: Monnin JA

I agree: Edmond JA