Citation: R v NNO, 2025 MBCA 76
Date: 20250904
Docket: AY24-30-10142

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre
Mr. Justice James G. Edmond

***B E T W E E N:***

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| | ) | ***S. B. Simmonds, K.C.*** |
| ***HIS MAJESTY THE KING*** | ) | *for the Appellant* |
| | ) | |
| *Respondent* | ) | ***C. R. Savage*** *and* |
| | ) | ***K. Basarab*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| ***N. N. O.*** | ) | *Appeal heard:* |
| | ) | ***June 9, 2025*** |
| *(Young Person) Appellant* | ) | |
| | ) | *Judgment delivered:* |
| | ) | ***September 4, 2025*** |

**NOTICE OF RESTRICTION ON PUBLICATION: No one may publish any information that could identify a person as having been dealt with under the *Youth Criminal Justice Act*, SC 2002, c 1, s 110(1).**

**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 young person appeals his convictions for sexual assault and choking to overcome resistance. He also seeks leave to appeal and, if granted, appeals the custodial portion of his sentence.

[2] On the conviction appeal, the young person argues that the judge made legal errors, misapprehended the evidence and drew unreasonable inferences and that these errors affected his credibility assessments. On the sentence appeal, the young person asserts that the judge erred in his application of the principles of sentencing under the *Youth Criminal Justice Act*, SC 2002, c 1 [the *YCJA*].

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

## The Conviction Appeal

### *Background*

[4] The young person was seventeen years old at the time of the incident. The victim was fourteen, although she had told the young person, via social media, she was fifteen or sixteen.

[5] The victim's evidence at trial was that, after communicating on social media for a few days, she met the young person in person for the first time outside a movie theatre in Winnipeg. They walked behind the movie theatre where they started "play fighting". While they were play fighting, the young person suddenly pinned the victim against the exterior wall of the movie theatre with her hands behind her back. He tried to kiss her and told her that he wanted to have sex with her. The victim resisted and repeatedly told the young person to stop. As she was pinned against the wall, the young person had vaginal intercourse with her. He also choked her to obtain her compliance.

[6] The victim initially disclosed the sexual assault to friends and then to her parents, following which the police were contacted. Several days after the sexual assault, the police seized the victim's underwear worn during the attack. Forensic testing determined that a small amount of the young person's DNA was on the inside of the victim's underwear in the crotch area (the DNA evidence).

[7] At the time of his arrest, the young person gave a statement to the police. In his police statement and his trial testimony, the young person admitted that he and the victim kissed and wrestled, but he denied having intercourse with the victim or otherwise assaulting her.

*The Judge's Decision on Conviction*

[8] In his reasons for conviction, the judge applied the test articulated by the Supreme Court of Canada in *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*] (the *W(D)* test). He rejected the young person's evidence and found that it did not raise a reasonable doubt when considered in the context of all the evidence. The judge found the young person's testimony to be "self-serving and contrived". In his view, the young person was argumentative with both counsel and he "tailor[ed] or [made] up [his] evidence rather than simply answer the questions posed to him."

[9] The judge pointed to three areas of the young person's evidence that undermined his credibility. First, the young person testified without prompting that the wall of the movie theatre against which the victim said he pinned her was "spiky." The judge found this was a detail that the young person had raised for the first time at trial and that he was confident about.

[10] Second, the young person testified that there were cameras outside the movie theatre and that he was careful to stay in an area where he would be captured on camera. However, a police officer testified, and the judge accepted, that there were no cameras visible at the back of the movie theatre where the sexual assault occurred.

[11] Third, the judge found that the DNA evidence corroborated the victim's version of events and negatively affected the reliability and credibility of the young person's testimony.

[12] The judge accepted the victim's testimony, finding her to be a credible witness despite her admission that she had lied to the young person about her age. He grappled with that evidence and the fact that she had no physical injuries apart from one bruise to her leg. He found that she had no motive to lie. The judge was satisfied on the totality of the evidence, which included the DNA evidence, that the Crown had proven the young person's guilt beyond a reasonable doubt.

*The Issues on Appeal*

[13] On appeal, the young person argues that the judge found he deliberately fabricated his testimony, that the judge used this finding as circumstantial evidence of guilt and that this affected the judge's *W(D)* analysis. He also argues that the judge "misapprehended the evidence by: (a) drawing unreasonable inferences regarding the [young person's] testimony regarding the texture of the [movie theatre] wall; and (b) in the interpretation of the DNA evidence." His position is that there were other reasonable inferences relating to this evidence that were inconsistent with

guilt and that the misapprehensions were central to the judge's credibility assessments.

*Whether the Judge Made a Finding of Fabrication or Misapplied the W(D) Test*

[14] A finding of fabrication in the absence of independent evidence of fabrication to avoid liability is an error of law. Misapplying the *W(D)* test is also an error of law. Absent an error of law, a judge's credibility findings are entitled to deference and reviewed on the standard of palpable and overriding error (see *R v Kruk*, 2024 SCC 7 at paras 81-84 [*Kruk*]).

[15] A trier of fact may make a finding that an accused person deliberately fabricated their evidence, but only where there is independent evidence of fabrication for the purpose of avoiding liability (see *R v UK*, 2023 ONCA 587 at para 72 [*UK*]). This ensures that the burden of proof remains on the Crown in accordance with the third branch of the *W(D)* test.

[16] A judge's rejection of an accused's exculpatory testimony as untruthful or unbelievable does not assist the Crown in proving its case. As explained in *UK* at para 71:

> The law draws a distinction between statements or testimony by an accused which are disbelieved, and therefore, rejected, and statements or testimony which are found to be fabricated in an effort to avoid culpability. A disbelieved statement or evidence has no evidentiary value. A statement or evidence found to be fabricated in an effort to avoid liability may be considered as circumstantial evidence of guilt . . ..

[17] The young person points to two findings made by the judge that he says are findings of fabrication: (1) that the young person "was more interested in attempting to convince the court of his version of events and, in fact, tailor or make up the evidence rather than simply answer the questions posed to him", and (2) that he was "willing to deceive the court by attempting to introduce false evidence of what he [felt would] serve his ends."

[18] In my view, the judge did not make a finding that the young person fabricated his evidence for the purpose of avoiding liability or misapply the *W(D)* test. A functional and contextual reading of his reasons demonstrates that the impugned statements were made in the context of the judge's credibility assessment of the young person in accordance with the first two prongs of the *W(D)* test. He clearly signalled this in his reasons both before and after making these statements.

[19] The judge used signposts throughout his reasons to indicate the pathway to his decision. After a brief introduction, he reviewed the relevant legal principles, including the analysis he was required to engage in pursuant to the *W(D)* test and how to properly analyze witness credibility. Next, he summarized the important facts by reviewing the testimony of the victim and the young person. After his factual summary, the judge conducted a *W(D)* analysis.

[20] Before finding that the young person made up his evidence to deceive the Court, the judge stated, "I turn now to an analysis under the salient *W.(D.)* test. After carefully listening to the evidence in this trial I have concluded that I do not believe [the young person's] version of events. Nor

am I left with a reasonable doubt based on his testimony." After explaining his reasons for these conclusions, he reiterated them in the following way:

> Bearing in mind the Manitoba Court of Appeal's dicta in *R. v. Menow*, I am required to look at all of the evidence in the entire context of the trial and not in an isolated fashion. As I look at all of the evidence collectively including the challenges and accepting the testimony of [the young person] coupled with the DNA evidence implicating him, I simply do not believe [the young person] on the first ground of the *W(.D.)* test, nor am I left with any reasonable doubt on the second ground of the *W.(D.)* test.

[21] Also relevant to my view that the judge did not make a finding of fabrication is the fact that the Crown did not lead any evidence to establish that the young person's testimony was fabricated to avoid liability, nor did it make a fabrication submission in closing arguments. This context supports the conclusion that the judge did not make a finding of fabrication.

[22] As explained in *R v GF*, 2021 SCC 20 [*GF*], an appellate court's role is not to "scrutinize the text of trial reasons in a search for error" (at para 76) and, "[w]here ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error" (at para 79).

[23] The accused's argument that the judge raised the spectre of fabrication by his language in the impugned statements would be an incorrect application of the law of fabrication because there was no independent evidence that the young person fabricated his testimony for the purpose of avoiding liability. Nowhere in his reasons did the judge indicate that he considered whether the young person had fabricated his testimony to avoid

liability and the judge is entitled to the presumption of correct application, particularly where he correctly applied the law when assessing the effect of the defence evidence and the credibility of the witnesses.

[24] Finally, and perhaps most importantly, the judge did not use the young person's testimony as positive circumstantial evidence of guilt. Once he had completed his assessment of the young person's credibility, he moved on to a determination as to whether the young person's guilt had been proven on the evidence. He stated:

> I turn now to the final and third prong of the *W.(D.)* test. While I have concluded that I cannot rely on [the young person's] evidence nor am I left with a reasonable doubt by it that does not end the matter. The Crown, of course, still bears the responsibility and onus of proving the guilt of [the young person] beyond a reasonable doubt.

[25] Following this statement, the judge critically analyzed the victim's evidence, but made no mention of the young person's testimony, except to point out that the victim's description of the movie theatre wall was different from the young person's description.

[26] While the judge's language may have been imprecise, when the impugned statements are considered in the context of the reasons as a whole and the submissions of the parties, I am satisfied that he did not make a finding of fabrication or misapply the *W(D)* test.

*Whether the Judge Misapprehended the Evidence*

[27] Whether the judge misapprehended the evidence is a question of mixed law and fact reviewed for palpable and overriding error. As stated in

*R v Walsh*, 2016 ABCA 280, "If a misapprehension of evidence is established, the issue of whether or not that misapprehension resulted in a miscarriage of justice is a question of law reviewable on a standard of correctness" (at para 19).

The Texture of the Movie Theatre Wall

[28] The victim's evidence was that the wall of the movie theatre against which she was pushed and sexually assaulted was made of stone. She said that it was hard and rough.

[29] After hearing the victim's testimony, the young person described the movie theatre wall as "very rough, very spiky." On cross-examination, he agreed he was suggesting that, based on the victim's description of the events, she should have had injuries consistent with being pushed against a rough and spiky wall. He also agreed that he did not tell the police that the movie theatre wall was rough and spiky.

[30] When the Crown asked the young person whether he could describe the texture of the outside walls of the courthouse in comparison to the movie theatre wall, initially, he said that he could not and then he said, "The texture of the courthouse, if I really want to remember it, I'm pretty sure it's a black marble." The Crown then suggested that the young person's testimony was self-serving and said, "what I'm suggesting to you is that you can recall the texture of something when it's helpful to you to remember it a certain way."

[31] After taking judicial notice of the fact that the exterior courthouse walls were a "lighter tan Tyndall stone and nothing close to resembling black marble", the judge found that the young person "[was] willing to deceive the

court by attempting to introduce false evidence of what he [felt would] serve his ends" and that this "undercut" the young person's credibility.

[32] I have already addressed the submission that the judge improperly found that the young person fabricated his evidence. The young person also argues that the judge used his testimony about the courthouse walls improperly because the young person's description of the courthouse walls had no bearing on the issue of the texture of the movie theatre wall.

[33] I am not convinced that the judge misused this evidence. The young person's ability to accurately observe and recall details was a live issue at the trial. The judge's description of the courthouse walls was uncontroversial (see *R v Find*, 2001 SCC 32 at para 48). In my view, it was open to the judge to use the young person's inability to accurately describe the courthouse walls in concluding the young person was "careless with the truth" (*R v OCFG (No 1)*, 2025 MBCA 27 at para 154). It was appropriate for the judge to take into account the inconsistency that the first time the young person described the movie theatre wall as spiky was during his testimony; this was not something he told the police (see *ibid* at paras 153-54). Moreover, the victim was not cross-examined as to whether the movie theatre wall was spiky.

The DNA Evidence

[34] The judge found that the DNA evidence corroborated the victim's version of the events. In making this finding, he considered the expert evidence regarding the possibility of DNA transference and determined that innocent transfer was an unlikely explanation for the DNA evidence. He stated:

> While it is certainly possible the fact remains that somehow biological material of [the young person] found its way into the inside crotch area of [the victim's] underwear based on [the young person's] version of events seems quite unlikely.
>
> The DNA evidence is simply strong independent corroborative evidence that points evidentially towards the court finding it unable to accept [the young person's] testimony as neither reliable nor credible.

[35] The young person argues that the judge misapprehended the DNA evidence because the DNA expert was unable to say how the young person's DNA got on the inside crotch of the victim's underwear. The expert's evidence was that it could have been deposited there directly, or it could have been transferred there, including from the victim's hand or another piece of her clothing after she threw her clothes in a pile.

[36] The difficulty with this argument is that there was no evidence that, after coming into contact with the young person, the victim's hand or another piece of her clothing also came into contact with the inside of her underwear (see *R v Hall*, 2018 MBCA 122 at paras 157, 197 [*Hall*]). The victim was never asked about how she removed her underwear, where it was in the pile of clothing or whether it was positioned in a way that could result in the transfer of DNA to the inside crotch area. Therefore, it would be speculative to conclude that the young person's DNA transferred to the victim's underwear from her hand or another piece of her clothing.

[37] In my view, the judge was entitled to find, on a consideration of the whole of the evidence, that the possibility of innocent transfer of the young person's DNA was "rather remote", and that the DNA evidence corroborated the victim's testimony. As I will explain, this was a reasonable inference.

Whether the Verdict Is Unreasonable

[38] The young person's final submission is that the verdict was unreasonable because there were inferences available on the evidence that were inconsistent with guilt. Specifically, he argues that the DNA evidence was consistent with innocent transfer and, therefore, guilt was not the only reasonable conclusion on the evidence.

[39] This was not a circumstantial evidence case. In addition to the DNA evidence, the victim provided direct evidence about the offences. The judge was entitled to reject the inference that the DNA evidence resulted from innocent transfer. This was an underlying factual inference, not an element of the sexual offence to which the *Villaroman* analysis applies (see *R v Villaroman*, 2016 SCC 33; see also *R v McIvor*, 2021 MBCA 55 at para 41).

[40] Moreover, the evidence supported the judge's inference. The victim and the young person had never met in person prior to the date of the offences. As I have said, the victim was not cross-examined at trial about how the young person's DNA may have transferred to the inside of her underwear. The young person merely asserted that the evidence that the two were play fighting and that the victim threw her clothing into a pile after taking it off raised the spectre of innocent transfer.

[41] The expert evidence was that there are a number of variables that affect the likelihood of DNA transfer from person to person and/or items, including the type and amount of biological material shed, the amount of friction, the length of time between the primary and subsequent transfers, and whether other surfaces were touched.

[42] The judge considered the young person's position that the DNA evidence may have been the result of innocent transfer. However, there was no evidence, beyond the expert's opinion, as to how DNA transfer might occur or as to the likelihood of innocent transfer. The judge was tasked "to draw the line between speculative and reasonable inferences" (*Hall* at para 200) which arose on the record. I see no error in the conclusions he reached.

*Conclusion*

[43] The judge carefully considered the credibility of the young person and the victim on a proper application of the *W(D)* test. I have not been persuaded that he made a palpable and overriding error in his conclusions on credibility or that he erred in law when assessing the evidence. I would dismiss the conviction appeal.

[44] One final comment: various cases were raised by counsel on the conviction appeal. In my view, care needs to be taken in light of the Supreme Court decisions in *Kruk* and *GF* when an appellate court is asked to reinterpret the evidence. When relying on decisions of this Court pronounced prior to *Kruk* and *GF*, a cautious approach is required to ensure that the reasoning is consistent with that set out in these recent Supreme Court decisions.

The Sentence Appeal

*The Judge's Decision on Sentence*

[45] Before imposing sentence, the judge carefully considered the purpose and principles of sentencing under the *YCJA*. He understood that the sentence he imposed must be proportionate to the seriousness of the offences

and the degree of responsibility of the young person and that it must be the least restrictive sentence that is the most likely to rehabilitate, reintegrate and promote a sense of responsibility in the young person (see the *YCJA*, ss 38(2)(c), 38(2)(e)). He also understood that he needed to consider all available sanctions other than custody that were reasonable in the circumstances and that he could consider the objective of denunciation (see *ibid*, ss 38(2)(d), 38(2)(f)).

[46] The judge found that the victim was "deeply affected" by the offences and that the young person's moral blameworthiness was high. He considered the relevant aggravating and mitigating factors.

[47] The judge determined that, in committing the offences, the young person caused serious bodily harm such that a deferred custody and supervision order was not available (see *ibid*, s 42(5)(a)). The judge concluded that a period of probation was not an appropriate sentence due to the seriousness of the offences, the harm suffered by the victim and the need to denounce the young person's conduct. After weighing all relevant factors, he imposed a 120-day custody and supervision order (eighty days' open custody and forty days' community supervision) followed by two years' supervised probation.

*The Issues on the Sentence Appeal*

[48] On the sentence appeal, the young person argues that the judge failed to appropriately consider and apply the principles of youth sentencing set out in the *YCJA* and that this led to the imposition of a demonstrably unfit sentence. In particular, the young person argues that the judge failed to recognize the presumption of diminished moral blameworthiness

underpinning the youth sentencing regime (see *R v DB*, 2008 SCC 25 at para 41; see also *R v Okemow*, 2017 MBCA 59 at paras 48-49 [*Okemow*]); that he failed to appropriately emphasize accountability, rehabilitation and reintegration; and that he wrongly focussed on the seriousness of the offences and denunciation in imposing a custodial sentence, despite multiple mitigating factors.

*Standard of Review*

[49] The standard of review on a sentence appeal is highly deferential. This Court will not intervene absent a material error in principle or a sentence that is demonstrably unfit (see *R v Friesen*, 2020 SCC 9 at para 26; *R v Houle*, 2016 MBCA 121 at para 11).

*Discussion and Conclusion*

[50] I have not been persuaded that the judge committed a material error in principle in imposing a custody and community supervision order or that the sentence is demonstrably unfit.

[51] The judge is presumed to know the law and, as I have already explained, he is presumed to have correctly applied it (see *GF* at para 74). Regardless, the judge was acutely aware that the applicable sentencing regime under the *YCJA* is different than the law that would have applied if the young person was an adult. Twice the judge commented that a young offender is treated "vastly differently than an adult", after counsel for the young person, in his submissions on sentence, pointed out that moral culpability is treated differently under the *YCJA* and argued that this is especially the case for sexual offences because young people are learning about sexuality.

[52] As stated in *Okemow*, "[t]he focus of sentencing under the *YCJA* remains about balancing conflicting principles to arrive at a sentence tailored to the individualized circumstances" (at para 47).

[53] In my view, the judge was entitled to find on the evidence that the young person's moral culpability was high and that denunciation required a custodial sentence. The judge was also entitled to weigh the relevant factors as he saw fit. It is not this Court's role to re-weigh them.

[54] The young person had no prior criminal record. He was assessed as a low risk to reoffend by the probation officer who prepared the pre-sentence report and on the low end of the moderate risk range to reoffend sexually by the child and adolescent psychiatrist who prepared the forensic psychiatric assessment. The young person had a strong support network of family and friends, as well as prospects for post-secondary education and future employment. Prior to sentencing, he was on judicial interim release for approximately fourteen months without issue.

[55] The offences were serious. The young person used violence to sexually assault the fourteen-year-old victim and choked her to overcome her resistance, causing her serious psychological harm. The young person was admittedly experienced sexually and was only nine months shy of his eighteenth birthday when he committed the offences.

[56] Absent exceptional circumstances, a custodial sentence is the only realistic sentencing option where a deferred custody and supervision order is not available (see *R v BS*, 2017 MBCA 102 at para 10; see also *R v IG*, 2024 ABCA 264 at para 28).

[57] In my view, the sentence meets the purpose and principles of sentencing under the *YCJA*, including by holding the young person accountable for serious offences and providing meaningful consequences that promote his rehabilitation and reintegration into society. I see no basis for appellate intervention.

[58] I would grant leave to appeal the sentence, but dismiss the sentence appeal.

Conclusion

[59] In the result, I would dismiss the conviction appeal, grant leave to appeal the sentence, but dismiss the sentence appeal.

leMaistre JA

I agree: Mainella JA

I agree: Edmond JA