On appeal from a summary conviction in the Provincial Court on January 17, 2024.

Date: 20250619
Docket: CR 24-01-39806
(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Dayna N. Queau-Guzzi
	)	Brett M. Rach
	)	for the Crown
	)	
- and –	)	Saul B. Simmonds, K.C.
	)	Sierra M. Bednarz
KEVIN FEDORUK,	)	for the accused
	)	
accused.	)	Judgment Delivered Orally:
	)	June 19, 2025

HUBERDEAU J. (Orally)

BACKGROUND AND ISSUES

[1] The offender applied for leave to appeal his sentence of one-year incarceration that was imposed in relation to his conviction of possession of child pornography contrary to section 163.1 of the ***Criminal Code***, R.S.C., 1985, c. C-46, (the "***Code***").

[2] Should the Court grant leave and find that the learned sentencing judge erred in her initial imposition of sentence, the offender also seeks the admission of fresh evidence for the determination of a fit sentence.

[3] As to his sentence appeal the offender argues that the sentencing judge erred as follows:

i. committed an error in principle by placing insufficient weight of his mitigating factors and overemphasizing the aggravating factors;

ii. overemphasized ***R. v. Friesen***, 2020 SCC 9, and ***R. v. Bertrand Marchand***, 2023 SCC 26, and failed to conduct a proper analysis of the fourth prong of ***R. v. Proulx***, 2000 SCC 5;

iii. imposed a sentence that was overly harsh and demonstrably unfit;

iv. concluded that exceptional circumstances were required to impose a conditional sentence; and

v. imposed a one-year jail sentence without sufficient reasons to establish the quantum of sentence.

[4] The Crown argues that that no errors were made, and that the offender's appeal is simply an attempt to reargue his sentence hoping for a better outcome and as such, should be dismissed.

THE FACTS

[5] In the fall of 2020, the Royal Canadian Mounted Police were advised that the offender had uploaded child sexual abuse material ("CSAM") on Snapchat. Following an investigation by the Internet Child Exploitation Unit, the offender was arrested, and his electronic devices were seized.

[6] A search of the offender's phone revealed 107 CSAM images, 97 of which were unique. Much of the collection consisted of computer generated or animated CSAM, and two real images of child victims under the age of 18. The fabricated images were sexually graphic and mostly depicted prepubescent female children engaged in sexual activity with adult men. The two real CSAM images included prepubescent girls, the first was nude and posing while the second had pulled up her skirt showing her vagina.

[7] The offender plead guilty to possession of child pornography on December 1, 2022. At the sentencing hearing the offender requested a conditional sentence, without suggesting a specific length, or in the alternative, an intermittent sentence. In support of his request he proffered three reports, namely:

i. a pre-sentence report prepared by probation services (the "PSR");

ii. a report from Mr. Gerry Goertzen, a registered psychotherapist (the "psychotherapist report"); and

iii. a report from Dr. Lawrence Ellerby, a clinical psychologist (the "psychological risk assessment report").

[8] The PSR described the offender as being 27 years old, married with two children, strong family supports, gainfully employed, no criminal record, no addictions issues, good insight with a very low risk assessment using the Manitoba level of service case management inventory.

[9] The psychotherapist report described the offender as having insight and remorse, was a low risk to re-offend and was not a danger to the community given his ongoing rehabilitative efforts.

[10] The psychological risk assessment report found, among other things, the following:

i. despite the offender having accessed a psychotherapist for over two years he remained in the "…early stages of insight development…", he did not "…have a good recollection of what he had worked on and learned in therapy specific to this behaviour…" and was "…still unsure why he was constantly accessing pornography and sought out [CSAM].";

ii. the offender was suffering from a behavioural compulsion and that while he described symptoms consistent with autism spectrum disorder and adult attention deficit hyperactivity disorder, a formal psychiatric assessment was required to confirm this;

iii. that it was challenging to assess the offender's risk given current risk assessment tools associated with CSAM offending had "yet to receive an appropriate level of empirical validation";

iv. that using the child pornography risk tool, he found the offender to be a "low risk" for further CSAM offences and a "very low risk" to commit a "contact sexual offence" against a child; and

v. premised on his belief that the offender was unlikely to be prioritized to receive offence specific treatment in a custodial setting he opined that from "a treatment and risk management perspective there [was] no benefit to a custodial sentence".

[11] In support of its request for an 18-month custodial sentence the Crown proffered two community impact statements. The first was on behalf of the victims of fabricated CSAM, while the other was a video from Phoenix 11, a group of CSAM survivors. Both documents

highlighted the prevalence, harm and devastation caused by CSAM offences, most notably fabricated CSAM.

> Animated material that depicts children in a sexualized manner exemplifies the significant power imbalance between adults and children … The people who produce this content and the people who derive sexual enjoyment from it can strip children of their dignity and make sexual harm towards them seem acceptable.
>
> Drawing that sexualize children are not just cartoons. They send the message that the intolerable – child sexual abuse and exploitation – is tolerable. Moreover, the fact that fabricated child sexual abuse material is not "real" leaves it open to the animator to cater to a wide range of fantasies. This includes being able to depict any type of extreme sexual act that might otherwise be subject to physical limitation or other barriers if real children were depicted.
>
> In the context of fabricated child sexual abuse material, a storyline that depicts the child as a "willing" participant – and has the child saying or doing things that promote the idea that children enjoy sexual activity and are not harmed by – it may introduce or reinforce cognitive distortions in the view over time.
>
> [see Appeal Book, at pp. 16 - 17]

REASONS FOR SENTENCE

[12] In her reasons for sentence the learned sentencing judge considered the following:

i. the facts and circumstances of the offender which included the familial, marital, academic, employment and mental health history and counselling history [see Appeal Book, pp. 143-144];

ii. the PSR, the psychotherapist report and the psychological risk assessment report which described the offender as follows:

   a. his overall cognitive functioning falling in the borderline range (IQ of 77);

   b. having symptoms consistent with both autism spectrum disorder and adult attention deficit hyperactivity disorder; and

c. a very low to low risk to re-offend along with seven letters of reference [see Appeal Book, pp. 143, 144 and 147];

iii. the relevant sentencing principles and jurisprudence in the context of sexual offences, including ***Friesen*** and ***Bertrand Marchand*** highlighting that a "… a strong message [must be sent] that sexual offences against children are violent crimes … and cause profound harm to children… Sentences for these crimes must increase ..." [see Appeal Book, pp. 144-145];

iv. the impact that CSAM generally has on its victims and society. That fabricated CSAM causes harm while also recognizing there being "a different quality between animated images and images of real humans" [see Appeal Book, p. 146];

v. the reduced moral blameworthiness of the offender given the CSAM being largely fabricated [see Appeal Book, p. 146];

vi. the statutorily aggravating factor (child victims), the size of the collection (97 images) and the offender having uploaded and shared images with others [see Appeal Book, p. 146];

vii. the multiple mitigating factors which include the offender's guilty plea, remorse, lack of criminal record, youthfulness, strong family and professional support network, rehabilitative efforts, insight and low risk assessment [see Appeal Book, pp. 145-147];

viii. case law filed by the parties which showed a range of sentences spanning from a conditional sentence to over two years incarceration; and

ix. the test outlined in ***Proulx*** with respect to conditional sentences, noting in the offender's case, the issue turned on whether a conditional sentence would be consistent with the fundamental purposes and principles of sentencing [see Appeal Book, pp. 147-148].

[13] Having considered these factors, including:

i. the offender's "significant strides towards rehabilitation";

ii. nothing in the offender's "background which makes this exceptional[1]";

iii. his strong support network;

iv. the fact the offender "… knew that possessing child pornography was wrong, yet he continued to engage in it"; and

v. the fact "his collection included images of actual children, so there were real victims out there".

the learned sentencing judge found that a conditional sentence would not be sufficiently punitive to reflect the gravity of the offence and the harm caused and imposed a one-year term of incarceration, followed by a two-year period of supervised probation.

STANDARD OF REVIEW

[14] The parties agree that the applicable standard of review is that set out at paras. 25-29 in ***Friesen***, namely that an appellate court must show deference to a sentencing judge's decision and can only intervene if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence. Errors in principle

[1] I will address the learned sentencing judge's use of the term "exceptional", at paras. 45–48 of my judgment.

include an error in law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor.

[15] The parties also agree that the "… weighing or balancing of factors can form an error in principle '[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably'" [see ***Friesen***, at para. 26].

[16] Furthermore, the parties agree that the standard of review for sufficiency of reasons is that of adequacy. A judge's reasons will be adequate when they inform the parties of the basis of the decision, provide public accountability, and permit meaningful appellate review [see ***R. v. Oddleifson (J.N.)***, 2010 MBCA 44, at para. 30].

THE EVOLUTION OF CHILD PORNOGRAPHY SENTENCING

[17] Prior to commencing my analysis, it is important to conduct a brief overview of the key findings and principles derived by various courts across the country relating to the evolution of sentencing in child sexual abuse matters, specifically child pornography.

[18] The link between child pornography and harm to children is very strong. The abuse is broad in extent and devastating in impact [see ***R. v. E.O.***, 2003 CanLII 2017 (ONCA), at para. 7, and ***R. v. Inksetter***, 2018 ONCA 474, at para. 22].

[19] The effect of child pornography on children is enormous [see ***R. v. Fox***, [2002] O.J. No. 3548 (QL), at paras. 65 and 70, affirmed [2002] O.J. No. 5726 (QL)].

[20] Sentencing courts must recognize that all child pornography involves sexual abuse and/or exploitation of children [see ***R v Bock***, 2010 ONSC 3117, at paras. 30-32)].

[21] Possession of child pornography is a very grave offence [see ***R. v. Kwok***, 2007 CanLII 2942 (ONSC), at paras. 49-50; ***Fox***, at paras. 66 and 72, affirmed, and ***Friesen***, at para. 48].

[22] Parliament has signalled a need to increase sentences for child sexual abuse, including child pornography [see ***Inksetter***, at para. 16, and ***Friesen***, at paras. 49, 53-54 and 95-100].

[23] Denunciation and deterrence are the primary sentencing factors in cases involving child pornography. Courts can neither prioritize other objectives to the same degree as or higher than denunciation and deterrence [see ***Inksetter***, at paras. 3 and 16, ***Friesen***, at paras. 101-105, and ***Bertrand Marchand***, at para. 28].

[24] Given the paramountcy of denunciation and deterrence the focus is more on the offence committed rather than on the offender. Put another way, while factors personal to an offender remain relevant, they take on a lessor role [see ***Friesen***, at para. 76, ***R v Johnson***, 2020 MBCA 10, at para. 13, ***Bertrand Marchand***, at paras. 2, 28, 46-47, 153 and 167, ***R v Hiebert***, 2024 MBCA 26, at para. 19, ***R v Dew***, 2024 MBCA 55, at paras. 43-44].

[25] The conduct of those possessing child pornography is very morally blameworthy because they intentionally exploit vulnerable children [see ***Friesen***, at para. 90]. Possession of child pornography is deliberate, not accidental or passive [see ***R. v. Pike***, 2024 ONCA 608, at para. 164].

[26] While there is no presumption against conditional sentences for child pornography possession offences, such a sentence will rarely be appropriate. Cases that rise to this level typically involve some extraordinary mitigating factor(s), in addition to the usual mitigating factors or more compelling personal circumstances, mitigating factors and/or the absence of aggravating factors, that are sufficiently compelling to make a conditional sentence proportionate [see ***Dew***, at para. 64]. The Ontario Court of Appeal has adopted an updated

and modified version of the factors enumerated in ***Kwok*** where sentencing judges can make such determinations [see ***Pike***, at paras. 166-173 and 181].

ANALYSIS

(i) Weighing of the Mitigating and Aggravating Factors

[27] The offender argues that the learned sentencing judge failed to conduct a proper analysis of his mitigating and aggravating factors. On this point he argued that she overemphasized his limited aggravating factors (overall size and sharing of CSAM online) and underemphasized his multiple mitigating factors (guilty plea, remorse, insight, rehabilitation efforts and support network).

[28] In short, the offender argues that the learned sentencing judge failed to perform an in-depth analysis similar to what the court had undertaken in ***Pike*** and ***Dew*** resulting in her imposing an overly harsh sentence that should not be given any deference.

[29] As the Supreme Court of Canada noted at paragraphs 49 and 78 in ***R. v. Lacasse***, 2015 SCC 64, a judge's weighing of the aggravating and mitigating factors is only an error if it is unreasonable.

[30] I begin my analysis by noting that the learned sentencing judge did not have the benefit of the guidance provided in ***Dew*** or ***Pike*** at the sentencing hearing given both cases were only released in 2024. Despite this I find that her reasons, when read as a whole, confirm that she identified, considered and weighed all of the relevant aggravating and mitigating factors as part of her overall analysis.

[31] On this point, I am satisfied she viewed, or the court record showed the following to be aggravating:

i. the offender's collection of 97 images to be large. I note her findings on this point is supported by our Court of Appeal in ***R v Sinclair***, 2022 MBCA 65, where at para. 64, the court noted a collection of 112 images to be significant [see Appeal Book, at pp. 142 and 146];

ii. the graphic nature of the images which depicted prepubescent female children involved in a variety of intrusive and offensive sexual acts such as "… simple posing, vaginal intercourse, anal intercourse, group sex, extreme posing, masturbation" [see Appeal Book, at p. 142];

iii. the offender having shared CSAM on the internet with others [see Appeal Book, at p. 146]. Given the offender disclosed this information during therapy, which can be viewed as strides towards rehabilitation, and given the information at paragraph 10 (i) herein, I am satisfied the learned sentencing judge was entitled to consider this information as aggravating; and

iv. the offender accessed CSAM for a period of almost seven years[2] [see Transcript of Proceedings, December 19, 2023, at pp. 12 and 22, and Appeal Book, at p. 41].

[2] Although not listed in her reasons, the court record indicates the duration to have been for this length.

[32] I am also satisfied that she viewed the offender's youthfulness, good character, employment, support networks, remorse and rehabilitation efforts to be mitigating [see Appeal Book, at pp. 143-144, 146 and 148].

[33] In my view, the trial judge's assessment of both the mitigating and aggravating factors, the conclusions she drew after weighing them were not unreasonable in the circumstances.

> Although much of [the offender's] collection consisted of animated images, it nevertheless causes harm to children. Mr. Fedoruk has made significant strides towards rehabilitation, but there is nothing in his background which makes this exceptional. He has a strong support network, and has done all the right things since being arrested, but the fact remains that at the time of the offence he knew that possessing child pornography was wrong, yet he continued to engage in it. His collection included images of actual children, so there are real victims out there.
>
> [see Appeal Book, at p. 148]

[34] As such, this ground of appeal is dismissed.

(ii) Misapplication of Proulx and overemphasis on Friesen and Bertrand Marchand

[35] The offender argues the learned sentencing judge overemphasized ***Friesen*** and ***Bertrand Marchard*** and failed to conduct a meaningful and proper analysis of the fourth prong of ***Proulx***.

[36] In short, the offender argues that the learned sentencing judge's comments that she was "unable to conclude that a conditional sentence would be sufficiently punitive to reflect the gravity of the offence" amounted to a blanket assertion that a conditional sentence was not available for CSAM offences.

[37] Having reviewed the learned sentencing judge's reasons, as a whole, I am satisfied that she neither misapplied the fourth prong of ***Proulx***, nor did she overemphasise ***Friesen*** or ***Bertrand Marchand***. On this point I find the learned sentencing judge correctly and

concisely followed and applied ***Friesen***, ***Bertrand Marchand*** and ***Proulx*** in that:

i. she properly gave priority to the sentencing principles of denunciation and deterrence while also being mindful she could accord weight to other factors such as rehabilitation [see Appeal Book, at pp. 145 and 147 - 148];

ii. she found the offender's conduct as being serious given the harm that both fabricated and real CSAM has on victims; the overall size of the CSAM and the fact he distributed CSAM images to others [see Appeal Book, at pp. 146];

iii. although she found the offender's moral blameworthiness to be somewhat reduced (given most of the CSAM was fabricated), she ultimately found that it remained at a level where a conditional sentence would not be consistent with the fundamental purpose and principles of sentencing noting in her reasons, or the court record showing the following:

   a. the harm the offender's conduct had on society and children;

   b. there also being real victims in this case;

   c. that despite the offender knowing what he was doing was wrong he continued to engage in it over an extended period[3] [see Appeal Book, at pp. 146 and 148]; and

   d. despite having accessed a psychotherapist for over two years, the offender remained in the "…early stages of insight development…", he did not "…have a good recollection of what he had worked on and learned

[3] Although the learned sentencing judge did not mention in her reasons the overall length of time the offender was engaged in his offending behaviour, the material presented to her indicated the duration to have been approximately seven years.

in therapy specific to this behaviour…" and was "…still unsure why he was constantly accessing pornography and sought out [CSAM]".

iv. she found nothing in the offender's personal circumstances to be exceptional which would warrant the imposition of a conditional sentence[4] [see Appeal Book, at p. 147]; and

v. she was alive to the fact that a conditional sentence was available but rare with respect to this type of offending conduct while also identifying the relevant factors to be considered in determining whether to grant a conditional sentence [see Appeal Book, at pp. 147 - 148].

[38] In the circumstances I find that the learned sentencing judge followed the direction provided by the Supreme Court in ***Proulx***, ***Friesen*** *and* ***Bertrand Marchand***. I further find that her reasons, when read as a whole, support the conclusions that she drew after having weighed all of the evidence.

[39] As such, this ground of appeal is dismissed.

(iii) Demonstrably Unfit Sentence

[40] The offender argues that the one-year sentence imposed in this case is overly harsh and demonstrably unfit.

[41] A sentence that is demonstrably unfit is one that is "clearly unreasonable, clearly or manifestly excessive, clearly excessive or inadequate, or representing a substantial and

[4] The sentencing material presented to the learned sentencing judge indicated despite the offender having accessed a psychotherapist for over two years he remained in the "…early stages of insight development…", he did not "…have a good recollection of what he had worked on and learned in therapy specific to this behaviour…" and was "…still unsure why he was constantly accessing pornography and sought out [CSAM]".

marked departure". The threshold that applies to appellate courts on whether it should intervene is very high [see ***Lacasse***, at para. 52].

[42] Having considered the learned sentencing judge's reasons, as a whole, I am satisfied that the sentence she imposed was proportionate to the gravity of the offence (which she viewed as serious), the degree of responsibility of the offender (which she viewed as being somewhat reduced), the sentencing principles of denunciation and deterrence (which she viewed as paramount) and parity (where she noted that sentencing is an inherently individualized process and that no two cases or offenders are exactly alike).

[43] Although a different judge may have come to a different conclusion and imposed a different sentence, I do not find her sentence based on her reasoning and the evolution in child pornography sentencing to be clearly unreasonable or manifestly excessive.

[44] As such, this ground of appeal is dismissed.

(iv) Concluding that exceptional circumstances were required to impose a conditional sentence

[45] The offender argues that the learned sentencing judge erroneously concluded the need for him to have "exceptional circumstances" to receive a conditional sentence. In support he points to the following comments made by the learned sentencing judge: "[The offender] has made significant strides towards rehabilitation, but there is nothing in his background which makes this exceptional" [see Appeal Book, at p. 148].

[46] Although at first glance it may appear the learned sentencing judge's use of the term "exceptional" is contrary to the Supreme Court's decision in ***Proulx*** and ***R. v. Parranto***, 2021 SCC 46, I am satisfied when reviewing her reasons, as a whole, that she did not intend to depart from either ***Proulx*** (create a presumption that a conditional sentence is

inappropriate for specific offences) or ***Parranto*** (the need for exceptional circumstances to depart from a range).

[47] Like in ***Pike***, I find her use of the term "exceptional", in the context of her reasons, was simply:

i. to convey the need to have more compelling personal circumstances, mitigating factors and/or the absence of aggravating factors, to justify a conditional sentence [see ***Pike***, at para. 181]; and/or

ii. a shorthand approach to describe the need for compelling personal and mitigating circumstances to make a conditional sentence proportionate [see ***Pike***, at para. 182].

[48] As such, this ground of appeal is dismissed.

(v) Insufficient Reasons

[49] Our Court of Appeal in ***R v Hanna***, 2025 MBCA 47, recently addressed the issue of insufficient reasons noting the following at paras. 25-26:

i. section 726.2 of the ***Code*** requires a sentencing judge to provide reasons for the sentence imposed;

ii. this duty is satisfied if the sentencing judge provides "an intelligible pathway to the result reached given the context of the specific case";

iii. even where reasons are "objectively inadequate", the appellate court should not interfere with a decision where the basis for it is apparent from the record, even without being articulated;

iv. the role of an appellate court is not to "finely parse the trial judge's reasons in a search for error";

v. a sentencing judge is presumed to know the law and as such is not held to some abstract standard of perfection by a duty to recite law that is familiar to them akin to a jury instruction; and

vi. an appellate court cannot intervene because a sentencing judge has done a poor job in expressing him/herself.

[50] In addressing this ground of appeal, I highlight the following comments made by the learned sentencing judge:

> [The offender] has made significant strides towards rehabilitation, but there is nothing in his background which makes this exceptional. He has a strong support network, and has done all the right things since being arrested, but the fact remains that at the time of the offence he knew that possessing child pornography was wrong, yet he continued to engage in it. His collection includes images of actual children, so there are real victims out there.
>
> This kind of behaviour must be appropriately denounced and deterred, and in only few cases will a conditional sentence be sufficiently punitive. This is not one of those cases.
>
> Taking into account the whole of the foregoing, I conclude that a term of imprisonment of one year is a fit and appropriate sentence for [the offender]. This takes into account the nature and scope of the CSAM in this case, the rehabilitative efforts taken by [the offender], his lack of a prior criminal record, and his genuine remorse as demonstrated by his actions upon arrest and his guilty plea.
>
> [see Appeal Book, at p. 148]

[51] Having considered these comments along with the balance of her reasons I am satisfied that she did articulate "an intelligible pathway to the result reached given the context of the specific case". I say this given:

i. she rightfully articulated the primacy of denunciation and deterrence;

ii. she articulated, considered and weighed the offender's mitigating and rehabilitative efforts, none of which she viewed as compelling or extraordinary;

iii. although she acknowledged the offender's moral culpability as being somewhat reduced, she also noted in her reasons that sexual violence against children is a highly morally blameworthy act [see Appeal Book, at p. 145];

iv. she considered the issue of parity and given the wide range of sentences and variables she determined in the end that sentencing this offender would be an individualized process [see Appeal Book, at p. 147]; and

v. she considered and addressed the issue of proportionality generally and in the context of the fourth prong of ***Proulx***.

[52] As such, this ground of appeal is dismissed.

CONCLUSION

[53] For the above reasons, I grant the offender leave to appeal his sentence but dismiss the sentence appeal. I am of the view that that there is no basis for appellate intervention. Given I have dismissed the sentence appeal, his motion to adduce fresh evidence is also dismissed.

_____ J.