R. v. A.S.

Ontario Judgments

Ontario Superior Court of Justice

M. Bordin J.

Heard: October 15-17, 2024.

Judgment: October 23, 2024.

Court File No.: CR-23-18

[2024] O.J. No. 4741 | 2024 ONSC 5880

Between His Majesty the King, and A.S.

(149 paras.)

Case Summary

Criminal law — Criminal Code offences — Sexual offences, public morals, disorderly conduct and nuisances — Offences tending to corrupt morals — Child pornography — Offences against person and reputation — Assaults — Sexual assault — Consent — Honest but mistaken belief — Wilful blindness or recklessness — Trial of AS found guilty of sexual assault against AL — He was also charged and found not guilty with possession of child pornography — The Court found AL was a credible, reliable and believable witness — Her evidence fit the reactions and actions of a 16-year-old with the specific experiences and in the particular circumstances of AL — The evidence regarding why AL sent the semi-nude phot and whether it was knowingly acquired left the Court with a reasonable doubt that the accused was in the possession of child pornography.

Criminal law — Elements of the offence — Actus reus — Mens rea — Recklessness — Wilful blindness — Trial of AS found guilty of sexual assault against AL — He was also charged and found not guilty with possession of child pornography — The Court found AL was a credible, reliable and believable witness — Her evidence fit the reactions and actions of a 16-year-old with the specific experiences and in the particular circumstances of AL — The evidence regarding why AL sent the semi-nude phot and whether it was knowingly acquired left the Court with a reasonable doubt that the accused was in the possession of child pornography.

Criminal law — Evidence — Burden and standard of proof — Standard of proof — Beyond a reasonable doubt — Methods of proof — Inferences — From conduct — Publication bans and confidentiality orders — Witnesses — Credibility — Children — R. v. W.(D.) analysis

— Trial of AS found guilty of sexual assault against AL — He was also charged and found not guilty with possession of child pornography — The Court found AL was a credible, reliable and believable witness — Her evidence fit the reactions and actions of a 16-year-old with the specific experiences and in the particular circumstances of AL — The evidence regarding why AL sent the semi-nude phot and whether it was knowingly acquired left the Court with a reasonable doubt that the accused was in the possession of child pornography.

Trial of AS charged with one count of sexual assault against AL. He was also charged with possession of child pornography. AL went to AS's apartment. They began to watch a movie. After a few minutes, they began to kiss following which AS digitally penetrated AL's vagina. They went to his bedroom and had vaginal sex. An agreed statement of facts confirmed that AS's semen was found on AL's underwear. At the time of the incident, AL was 16 years old and AS was 28 years old. AL said that she did not consent to kissing, digital penetration, being undressed or vaginal penetration. AL stated that she twice objected when AS's penis was inside her. AS said that all aspects of the sexual encounter were consensual. Alternatively, he mistakenly believed that AL had communicated her consent. The charge of possession of child pornography was based on a topless photo of AL that AL testified she sent to AS. AS denied receiving the photo.
HELD: AS found guilty of sexual assault and not guilty of possession of child pornography.

The Court found AL was a credible, reliable and believable witness. AL was consistent in her evidence as to what occurred in AS's apartment. Her evidence was internally consistent and unwavering. Her evidence fit the reactions and actions of a 16-year-old with the specific experiences and in the particular circumstances of AL. Except with respect to the kissing on the couch, the Court had no reasonable doubt that there was no honest but mistaken belief in communicated consent. Thus, the defence of honest but mistaken belief in communicated consent failed with respect to the digital and vaginal penetration of AL. The Crown had established the actus reus elements of sexual assault. It found that AS knew that AL was not consenting to the digital and vaginal penetration, was reckless as to the absence of her consent and was reckless and wilfully blind to the reality that AL was not consenting after AL said ow, stop and ow, no, he remained inside her and continued to vaginally penetrate her. The evidence regarding why AL sent the semi-nude phot and whether it was knowingly acquired, and whether AS knew it was a semi-nude photo that satisfied the definition of child pornography that he was opening, left the Court with a reasonable doubt that the accused was in the possession of child pornography.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, R.S.C. 1985, c. C-5

Criminal Code, R.S.C. 1985, c. C-46, s. 4(3), s. 163.1(1)(a) (ii), s. 163.1(4), s. 271, s. 273.1, s. 273.1(2), s. 273.2(b), s. 273.2

Counsel

F. McCracken for the Crown.

B. Mohan and S. Kalkat, for the Accused.

THIS JUDGMENT IS SUBJECT TO A BAN ON PUBLICATION PURSUANT TO S. 486.4 OF THE CRIMINAL CODE OF CANADA. THE ORDER DIRECTS THAT ANY INFORMATION THAT COULD IDENTIFY A.L. OR A WITNESS SHALL NOT BE PUBLISHED IN ANY DOCUMENT OR BROADCAST OR TRANSMITTED IN ANY WAY.

REASONS FOR DECISION

M. BORDIN J.

Overview

1 A.S. is charged with one count of sexual assault against A.L. pursuant to s. 271 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. He is also charged with possession of child pornography between May 1, 2022 and June 30 2022, contrary to s. 163.1(4) of the *Criminal Code*.

2 The Crown called one witness - A.L. A.S. testified in his defence.

3 On June 8, 2022, at approximately 10:00 a.m. A.L. went to A.S.'s apartment. They began to watch a movie. After a few minutes, they began to kiss following which A.S. digitally penetrated A.L.'s vagina. They went to his bedroom and had vaginal sex. An agreed statement of facts confirms that A.S.'s semen was found on A.L.'s underwear. At the time of the incident, A.L. was 16 years old and A.S. was 28 years old.

4 A.L. says that she did not consent to kissing, digital penetration, being undressed or vaginal penetration. A.L. states that she twice objected when A.S.'s penis was inside her. A.S. says that all aspects of the sexual encounter were consensual. Alternatively, he mistakenly believed that A.L. had communicated her consent. Accordingly, the main issue on the charge of sexual assault is consent which primarily hinges on the credibility and reliability of A.L. and A.S.

5 The charge of possession of child pornography is based on a topless photo of A.L. that A.L. testified she sent to A.S. A.S. denies receiving the photo.

6 I address the charge of sexual assault first and the possession of child pornography charge at the end of my reasons.

Legal Principles

7 As the parties did, I begin by setting out relevant legal principles. I address the law with respect

to honest but mistaken belief in communicated consent later in my reasons when I address *mens rea* and that defence.

Presumption of innocence, reasonable doubt and the burden of proof

8 The accused is presumed innocent. The Crown must prove the elements of the offences beyond a reasonable doubt and disprove any defences beyond a reasonable doubt. I must consider the evidence as a whole in determining whether the Crown has proved its case beyond a reasonable doubt.

9 Beyond a reasonable doubt has been described as one that is not far-fetched, imaginary, or frivolous. It is not based on sympathy or prejudice. It is based on reason and common sense. It is logically derived from the evidence or absence of evidence. The reasonable doubt standard has been described by the Supreme Court as falling much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 at para. 242. However, the Crown is not required to prove anything with absolute certainty. It is nearly impossible to do so.

The elements of sexual assault

10 The Supreme Court of Canada in *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801 set out the elements of the offence of sexual assault at para. 25 (internal references omitted):

> [25] The *actus reus* of sexual assault requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent. The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant's internal state of mind towards the touching. At the *mens rea* stage, the Crown must show that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent. The accused's perception of consent is examined as part of the *mens rea*, including the defence of honest but mistaken belief in communicated consent.

11 The Crown is required to establish as an element of the offence of sexual assault that the accused knew that A.L. was not consenting to the sexual act or was wilfully blind or reckless as to whether A.L. consented, irrespective of whether the defence of honest but mistaken belief in communicated consent is available: *R. v. Degale*, 2024 ONCA 720 at para. 16.

12 The Crown's legal burden remains, even if the displacement of a defence (or its unavailability) makes conviction a 'virtual certainty' and if, for practical purposes in most cases, there is little distance between negativing a defence (or its unavailability) and proving the requisite *mens rea*: *Degale* at para. 16 citing *R. v. H.W.*, 2022 ONCA 15, 160 O.R. (3d) 81 at para. 60.

Consent

13 Section 273.1 of the *Criminal Code* provides in relevant part:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (1.1) Consent must be present at the time the sexual activity in question takes place.

14 Whether A.L. consented is a purely subjective analysis, determined by reference to A.L.'s internal state of mind at the time of the touching: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 26-27; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 400 at paras. 34 and 43-44. At the *actus reus* stage, consent means that A.L., in her mind, agreed to the sexual touching taking place: *R. v. G.F.* 2021 SCC 20, [2021] 1 S.C.R. 801 at para. 29.

15 The Supreme Court in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579 at paras. 88-89, summarized the principles of consent at the *actus reus* stage:

a. Consent is the "conscious agreement of the complainant to engage in every sexual act in a particular encounter", and it must be freely given.

b. This consent must exist at the time the sexual activity in question occurs, and it can be revoked at any time. Consent must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner".

c. Consent means that the complainant in her mind wanted the sexual touching to take place. The focus is placed squarely on the complainant's state of mind. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent.

16 A.L. need not express her lack of consent, or revocation of consent, for the *actus reus* to be established. As explained by the Supreme Court in *Barton* at para. 98, there is no implied consent in Canadian law. In short, it is an error of law to assume that unless and until a woman says "no", she has implicitly given her consent to any and all sexual activity.

17 Consent cannot be given broadly, in advance. A.L. must consent to the activity at the time it occurs: *Barton* at para. 99.

18 While a complainant is not required to express her lack of consent for the *actus reus* to be established, when she does so it is directly relevant to whether there was subjective consent to the sexual activity in question and may also impact whether a mistaken belief in consent could be reasonable under the *mens rea* analysis: *R. v. Kirkpatrick*, 2022 SCC 33, 471 D.L.R. (4th) 440, at para. 47

W.D. analysis

19 I am guided by the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. In *W.(D.)*, the court set out a suggested formula for assessing credibility in the context of the criminal standard of proof:

> If I believe the evidence of the accused, I must acquit.
>
> If I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit.
>
> Even if I am not left in doubt by the evidence of the accused, I must ask myself whether, based on the evidence that I do accept, I am convinced beyond a reasonable doubt of the guilt of the accused.

20 The evidence of the accused in the *W.(D.)* formulation applies not just to the accused's testimony, but to exculpatory evidence led by the accused or arising out of the Crown's evidence.

21 The analysis of credibility between Crown and defence witnesses is never a contest of credibility and triers of fact need not accept the defence's evidence to acquit: *R. v. Kruk*, 2024 SCC 7, 489 D.L.R. (4th) 385 at para. 61. My verdict is not to be based on a choice between the evidence of the accused and the Crown's evidence, but on whether, based on the evidence as a whole, I am left in a reasonable doubt as to the accused's guilt: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5 at para. 8. If I cannot decide whether to believe A.S. or A.L., the Crown has not established the offences beyond a reasonable doubt, and I must find A.S. not guilty.

Credibility and reliability generally

22 Credibility and reliability are not the same thing. Credibility has to do with a witness's veracity or honesty. A witness may be credible but not reliable. A witness may be credible but mistaken. A witness who is not credible on an issue cannot give reliable evidence on that issue. Credibility is not all or nothing. A court may accept a witness's evidence in whole or in part or may reject it all.

23 Reliability has to do with the accuracy of a witness's testimony and is concerned with the ability to accurately observe, recall, and recount events. A witness who is credible may still give unreliable evidence.

24 To be relied upon, a witness's evidence on an issue must be both credible and reliable.

The Evidence of A.L. and A.S.

Background Facts

25 The general background facts are not in dispute.

26 A.S. worked at the S. in Dunnville, Ontario from February 2020 until after the sexual incident with A.L. in June 2022. A.L. started working at S. around December 2020. She would have been 15 at the time. Both were employees and were "sandwich artists". A.L. worked at S. until about May 7, 2022. She may have worked a few shifts after that. A.S. worked about 40 hours per week and A.L. worked full time as well - around 40 hours per week. A.S. knew that A.L. worked 35-40 hours per week. They worked together on about three shifts per week. There were typically two to three employees working together per shift. When at work together, A.L. and A.S. joked and flirted.

27 A.L. understood that A.S. was promoted to assistant manager at some point. A.S. denies he was ever the assistant manager but acknowledges that around March 2022 the assistant manager left, and he started doing the assistant manager's duties. However, A.S. says he did not have the official title of assistant manager. A.S.'s cousin, with whom he lived, was the manager. A.S. says that A.L. had similar duties to his. It is the evidence of both A.S. and A.L. that A.L. had the code to the safe, assisted with inventory, was in the management WhatsApp chat group, and trained staff.

28 At the time he worked at S., A.S. had a girlfriend to whom he is now married.

29 A.L. was in grade 9 when the COVID pandemic occurred. After that, and during her time working at S., A.L. was being homeschooled by her parents. A.S. knew this. A.L. really had only one friend outside of her family, E.G. who was dating A.S.'s cousin, with whom A.S. lived. A.S. knew this. A.L. lived with her parents. A.S. knew this as well. Working at S. was A.L.'s only exposure to the outside world during the time she worked there. She missed out on a lot of normal teenage experiences.

30 A.S. knew that A.L.'s parents controlled her phone use in the evenings and limited the amount of time she could be out of the house when not at work.

31 A.L. had attended at A.S.'s apartment a number of times to see her friend E.G. who was often there. A.S. may have been there on occasion. A.L. and A.S. met once outside of work at the nearby river. The meeting occurred by happenstance.

32 Around the time that A.L. knew she would be leaving her job at S., she obtained the Snapchat particulars of employees at work, including A.S., to keep in contact with them. A.S. does not remember who was the first to send a message to the other on Snapchat. A.L. testified that they mutually reached out to each other. They then communicated regularly on Snapchat with photos and messages.

Relationship at work

33 A.S. repeatedly gave evidence that he and A.L. were flirting on Snapchat and at work and that A.L. would tell him that she loved him, had a crush on him, and asked to be his girlfriend. A.L. was not asked in cross-examination whether she had a crush on A.S., whether she loved him, or asked to be his girlfriend. A.S. enjoyed the attention that A.L. bestowed on him.

34 A.L. agreed that she and A.S. would joke around at work. They kept it professional but also flirted. They both enjoyed it and enjoyed working together.

35 A.L. testified that she would bring her schoolwork with her to work. The books had numbers on the covers. She testified about talking to A.S. about going back to Dunnville Secondary School and working fewer hours.

The notes from A.L.

36 It is common ground that A.L. gave or left two notes for A.S.

37 A.S. described the first note with the heading "Poem for A..." as a love letter. The first note was given to A.S. by A.L. or left for him at work. It is a single-page handwritten note. The left side of the page contains what can be described as a poem under the heading. The poem is fashioned in a "roses are red" style. On the right-hand side of the page is another note which begins, "to my dearest [A.] and the love of my life". It refers to the accused working fast at work and concludes "now thats hot" and "love you soooooo much" with A.L.'s first name with two hearts drawn on either side.

38 The second note was left at A.S.'s residence by A.L. when she stopped in to use the washroom. It is a double-sided document. The top side of the first page contains a short message to A.S. It begins "love you [A.]" and "Dear [A.]". The message ends with, "I hope work went well have a good life" with a version of A.L.'s name following. The bottom half of the first page contains a drawing of two figures holding heart shaped balloons. The word "you" is written in one balloon and the other balloon has the word "me!".

39 The top side of the second page of the second note contains a drawing and a description. The description states, "Us madly in love watching a lovely sunset." The drawing reflects the description. The bottom of the second page contains another drawing and a description. The description states, "We are swimming, and you are showing off your huge sexy muscles." The drawing depicts two figures swimming with the words "you" and "me" written above the figures.

40 A.L. acknowledged that the figures in the drawing represented her and A.S. A.L. denied that the documents indicated that she wanted a romantic relationship with A.S. or that she wanted more than a friendship with him. She testified that she thought they were funny. When asked about the "sexy muscles" reference, A.L. said that he had an interest in powerlifting and

bodybuilding at the time and was always doing funny flexing with everyone. She was not challenged on this evidence.

41 A.S. testified that when he got the notes he started believing that A.L. loved him, and he had a "soft corner" for her.

A.L. and A.S. agree to meet on June 8

42 A.S. testified to communicating with A.L. the day before June 8 about meeting the next day. He testified that it was a mutual agreement to meet on June 8, 2022, and that A.L. said she could go to his place when her parents were not around. There was nothing sexual in their communications about meeting. A.S. testified that he thought he was going to get lucky.

43 A.L. testified that they planned to meet up, though she is not sure where, but they ended up agreeing on his apartment. She agreed that her mother was at work.

44 A.L. walked to A.S.'s apartment on the morning of June 8, 2022. She arrived there around 10:00 a.m. A.L. testified that she messaged A.S. when she arrived, and he came to let her in. A.S. gave no evidence about this. They went to A.S.'s apartment.

The encounter in the apartment

A.S.'s evidence

45 When asked "what happened when [A.] arrived at your apartment?" A.S. delivered the following evidence without interruption:

> We sat on my couch and started watching a movie. While watching the movie we both leaned onto each other, and we started kissing each other. And from that we started touching each other and she gave me love bites and hickeys and I started touching her private parts and she started touching my private parts. I suggested we go to the bedroom and she said yes and she followed me there. And we both took our clothes off and we started hugging each other and after that she laid on the bed and we both were on the bed. And she asked me to put the condom on. I put the condom on. And I again asked her if she was totally sure about this and if she wants to have this and this she said yes. And I inserted my penis inside her. And it hurt and she asked and I stopped right away. And I pulled out and I waited for some time and after getting her ok and I asked her if I can carry on and she nodded yes and I inserted my penis again and it hurt again and I stopped right away and I pulled out and waited for some time and got her ok. Like we were kissing and hugging at that time and I asked her again if we can carry on. She nodded yes and I inserted my penis again. Shortly after that I ejaculated. Then I cleaned myself up and we were lying on the bed and I asked her if she wanted something and she said she was gonna use the washroom and she went to the washroom and came back saying she got her period.

> I suggested we to go to Rexall. We went to the Rexall and she grabbed whatever she wanted. After that we came back to apartment. And she went to the washroom again and she came back. I asked if she wanted something, maybe she was hungry and she said food and we went to Tim Hortons and we grabbed food there. We came back and we started watching the movie again and we ate our food and it was time her parents were about to get home and she asked me to drop her home. I dropped her at the nearby street and she hugged me and kissed me and that is when she left. After that we talked for a few days. She said she missed me. I think I was in Brampton that day, maybe it was a weekend or something, I don't remember. After that, suddenly out of nowhere she blocked me.

46 When asked why he believed he had A.L.'s consent to take her to the bedroom, A.S. said it was because she followed him there and she had clothes on and could have walked away if she did not want this to happen.

47 When asked in cross-examination why he believed he had A.L.'s consent to put his fingers in her vagina when they were on the couch, he said that while kissing she touched his private parts and he put his hands down her panties. Then he added the detail that she hugged him tightly and her breath was raised, which he had not mentioned in chief.

48 When asked why he believed he had consent to insert his penis into A.L.'s vagina, A.S. elaborated on his earlier evidence and added details:

> We talked about it when we were on the bed and I asked her if she is totally sure we are gonna do this and she said yes and she asked me to put the condom on and I again asked her if she was sure about this and she said yes and I inserted my penis and I always checked on her kept opening my eyes, looking at her and when she asked me to stop I stopped right away and would not start until she said yes.

49 In testifying about putting his penis in her vagina, he repeatedly testified that he asked her if she was ok with "this". What "this" was, was never explained by A.S. At the time, they were naked on the bed. Whether "this" meant what was going on at the time or meant that he was about to insert his penis into her was never made clear.

50 When asked how he knew he had consent to keep having sex with A.L., A.S. said "it was from her actions."

A.L.'s evidence

51 A.L. testified that when they arrived in A.S.'s apartment he asked if she wanted to watch a movie. He started the movie and sat a little close to her which was uncomfortable, but she acknowledged it was not the biggest couch, so she did not want to think anything of it. A few minutes into the movie, A.S. put his arm around her and turned to kiss her. She kissed him back

because she did not know what to do and thought that was what you did when someone kissed you. She testified that she was not okay with A.S. kissing her.

52 A.L. testified that A.S. then turned her from her seated position onto her back and put his hand down her shorts under her underwear and put his fingers inside her vagina and touched a lot. A.L. testified that she was not okay with A.S. doing this. She said that it hurt pretty bad.

53 A.L. testified that A.S. then said something about his bedroom. Her brain was not functioning. She followed him in. He unzipped her sweater and helped her take her clothes off and grabbed her into a hug while leading her back to the bed. The back of her legs then hit the bed and she laid down. He helped move her on the bed. She acknowledged in cross-examination that her head was on a pillow. He then took off his clothes and put a condom on.

54 A.L. testified that A.S. then got on top of her and put her legs on his shoulders, a detail that was not mentioned by nor challenged by A.S., and he put his penis in her vagina. A.L. testified that it hurt pretty bad and that she said "ow; stop". A.S. stopped, looked at her and then continued. She then said "ow; no" and A.S. stopped but then kept going. A.L. testified that A.S. said nothing to her when she said those things. A.S. acknowledged in cross-examination that A.L. said "Ow; stop" and "Ow; no".

55 A.L. testified that she did not consent to vaginal penetration. She felt uncomfortable, numb and could not think. She testified that A.S. never asked her if he could do these things to her or if she was okay with what was happening. A.L. denies that A.S. pulled out at any time.

56 A.L. testified that A.S. continued to thrust into her and said he was going to "come". He then got off her and went to clean up. She laid in bed. He returned and asked if she needed anything. In cross-examination she acknowledged that when he returned, he laid back in bed. She said she needed the bathroom. She went to the bathroom and urinated and noticed there was a lot of blood. A.L. said this was her first time and she recalled learning about that. She told A.S. that she had her period and had to get something for it, although she knew it was not her period. She did not recall sitting at the side of the bed at this point but agreed that is what happened when shown her statement to the police.

57 A.L. and A.S. went downstairs to the Rexall where she bought tampons. They returned to the apartment and A.L. went to the bathroom. When she came out of the bathroom A.S. asked if she needed anything else and she said she was quite hungry. They went to a Tim Hortons. Then they went back to the apartment. A.L. did not want to stay long and asked A.S. to take her home. A.L. denies hugging A.S. when she was dropped off at home.

58 A.L. agreed that she never told A.S. to stop kissing her, to stop inserting his fingers in her vagina, that she did not want to go to the bedroom, or that she did not want him to take her clothes off. She acknowledged that she did not say she did not want to have sex with A.S. She does not

recall how long the kissing and touching lasted or how long they were in the bedroom. She denies giving A.S. a hickey or touching his private parts when kissing on the couch.

59 In cross-examination, when specifically asked, A.L. agreed that there were moments when she was on the bed where she froze during the vaginal intercourse. She said it did not feel like her body was acting normal at the time. She acknowledged that at times when she felt frozen her body continued to work or perform, such as when she walked through the bedroom.

60 That evening, A.L. spoke to E.G., but did not tell her what happened with A.S. Later, A.L. told her sister. She does not recall exactly what she told her sister. Later her mother approached her, and she had three conversations with her mother. The details of these conversations are addressed below. A.L. spoke to her counsellor and decided to go to the police.

After-the-fact conduct

61 Shortly after June 8, 2022, A.S. texted E.G. and said "so [A.L.'s] parents found out that we hung out, that's what she told me and she wouldn't talk to me. I know I might have made a mistake but I was just wondering if she is okay if that's the case. Did you talk to her." He then sent follow up messages including one asking if everything was ok with A.L.

62 A.S. testified that the mistake he was referring to is that A.L. may have wanted a relationship when he did not. The Crown's position is that what the messages communicate is that the mistake A.S. was referring to was that he had sexually assaulted A.L. and was worried the word would get out.

63 The existence of alternative explanations for an accused's conduct does not mean that certain evidence is no longer relevant. The overall conduct and context must be such that it is not possible to choose between the available inferences as a matter of common sense, experience and logic: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at para. 124.

64 The probative value of after-the-fact conduct evidence depends on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial: *R. v. S.C.*, 2023 ONCA 832 at para. 21, citing *Calnen* at para. 119.

65 After-the-fact conduct evidence will not be relevant when the conduct is "equally consistent" with the proposed inference and an alternative inference. Equally consistent means, in this context, that the conduct is not capable, as a matter of logic, common sense, and experience, of favouring one inference over another: *R. v. Ethier*, 2023 ONCA 600, at para. 59, citing *Calnen*, at paras. 106, 108-112 and 124.

66 I find that the text messages are as "equally consistent" with the proposed inference as they are with an alternative inference. The text messages are not capable of favouring one inference

over another. It is not possible to choose between the available inferences and the evidence is not relevant to the issue of consent or *mens rea*.

Credibility and reliability of A.S.

67 Generally, A.S. was calm in giving his evidence except when testifying specifically about his sexual encounter with A.L. During that evidence, his breathing audibly changed. There could be different reasons for this. However, demeanor is but one minor aspect of assessing the credibility of a witness.

68 A.S. began his evidence by telling the court that he is a permanent resident of Canada and that if he is convicted he will be deported. He then confirmed he is employed, that he had no criminal record, and that he had never been arrested. He concluded his evidence by referencing his good character, saying he would never force himself on a woman, saying he would not throw away his life in Canada for ten minutes of sex. He said that that A.L. came to his apartment, and it was all her "wish".

69 When asked what happened when A.L. arrived at his apartment, A.S. delivered, in a continuous monologue a complete recounting of the events. The account sounded rehearsed and memorized as did many of his answers to questions.

70 During his monologue about what occurred in the apartment, A.S. left out details that were not flattering such as the fact that he digitally penetrated A.L. on the couch and did not ask A.L. before doing so. or that A.L. said "ow; stop" and "ow; no" during vaginal penetration. He only admitted this in cross-examination. He did not mention putting A.L.'s legs on his shoulders.

71 A.S. embellished his evidence in cross-examination, adding details that strengthened his evidence, for example, adding that A.L.'s breath was raised when he inserted his fingers into her vagina.

72 A.S. speculated and blamed others. For example, he speculated on reasons why A.L. would change her mind and her reasons for not remaining in contact with him shortly after June 8, 2022. He blamed A.L.'s parents.

73 When it suited his position, A.S. sought to downplay his communication with A.L. His evidence that he and A.L. did not talk much at work was not credible and contradicted his evidence about flirting at work and his evidence about their interactions away from work.

74 A.S. often elaborated on details that were not necessary to answer questions. For example, when asked whose idea it was to meet on June 8, he said it was mutual but then explained in detail about where he was, and what was said between them. I also note that significant portions

of this evidence were not put to A.L. in cross-examination, undermining the weight of any of this evidence.

75 A.S. struggled to admit that some of the content of the two notes from A.L. were jokes or attempts to be funny. He refused to admit that the following lines from one of the letters was a joke: "roses are red / violets are blue / [J..] may love you / but he ain't for you". J. is referring to A.S.'s cousin with whom he lived.

76 At times A.S. was evasive. For example, it took eight questions related to whether he enjoyed the attention from A.L. for A.S. to admit that he liked it. He often did not answer questions posed to him, instead offering explanations not responsive to the questions.

77 A.S.'s evidence was internally inconsistent. He testified that A.L. said yes to everything which contradicted his own evidence because he never testified that A.L. said yes to kissing or to being digitally penetrated. A.S.'s refusal to admit the meaning of the "fire" emoji was internally inconsistent and not believable.

78 A.S.'s evidence that he did not know that A.L. was in high school strained credulity. He simply refused to acknowledge that he knew she was in high school. He would not even admit that he knew she was not in grade 8. He said he did not know what grades comprised high school even though he had been in Canada since 2017, has a bachelor's degree from outside Canada, obtained a diploma in Canada in project management, worked with high school students, knew that A.L. was being homeschooled by her parents, and knew they were not teaching her university courses.

79 A.S. refused to admit that he knew A.L. was 16. He said he did not know. He said he thought she was "like 17 or 18" because when you look at someone you can imagine what age they would be. He was asked if he ever thought to ask A.L.'s age before having sex with her. He did not say yes or no but said he thought she was 17 or 18 and he repeated his answer about asking A.L. if she was sure.

80 When asked how he knew he was not having sex with a 15-year-old, he struggled to answer and said, "I don't completely remember, maybe, I didn't exactly know what her age was". The question was repeated. He again struggled to answer and said he knew she was over 16 but did not know her exact age. He repeatedly said A.L. was over 16 but that he did not know her exact age. He also said that normally everyone who worked at S. was over 16, which is contradicted by the fact that A.L. had only recently turned 15 when she started working at S.

81 A.S. denied ever seeing A.L. at work with schoolbooks or studying at work. Then he changed his answer and said he was not sure if he saw her do this, maybe once or twice. Then when asked about A.L.'s curfew, he testified that he knew she would come to work, and she would do her schooling.

82 When his cross-examination continued the following day, he bolstered his reasons for believing A.L. was 17 or 18 by adding that she had an older sister and friend who were both 19, and that she did the things people over 16 do. He did not explain what those things were. He also speculated that maybe someone talked about A.L.'s age.

83 When it was suggested in cross-examination that he knew he had a teenager at his apartment, he responded that she was there of her own will. When asked if he considered A.L.'s level of maturity before having sex with her, he said it was her will.

84 For the reasons reviewed above and discussed further below, I do not find A.S.'s evidence credible on the facts in dispute.

Credibility and reliability of A.L.

85 A.L. delivered her testimony in a forthright manner. She was not argumentative, did not speculate, and readily admitted when there were things she did not remember. A.L. readily conceded facts that did not put her in a good light, but also stood her ground on suggestions she did not agree with without fanfare. Her evidence was consistent, and she was unshaken despite a detailed cross-examination. In closing submissions A.S. submitted that there is no doubt that A.L. sincerely believes her evidence to be true and that she was trying to be honest, but her evidence cannot be relied upon.

The alleged inconsistencies in A.L.'s evidence

86 A.S. asserts two inconsistencies in A.L.'s evidence. The first relates to an alleged inconsistency between her notes to A.S. and her police statement about the nature of the relationship that she wanted to have with A.S. There is no such inconsistency. A.L. denied at trial that she wanted a romantic relationship with A.S. or that she wanted to be more than friends. No inconsistency in the police statement was put to her.

87 It may be that, although not explicitly expressed, A.S. is actually asserting that A.L.'s evidence at trial that she was not interested in a romantic relationship with A.S. is not believable in light of the notes she gave to A.S., thereby undermining her credibility. I note that the meaning of "romantic relationship" in the context of what occurred with A.S. was not canvased with A.L.

88 A.L. testified that she thought the notes she left for A.S. were funny. The notes certainly contain content that is objectively intended to be a joke, or tongue in cheek. The notes could also be seen as flirtatious or an expression of romantic interest.

89 But does this potential expression of romantic interest mean that A.L.'s trial evidence is not credible? This must be put in context. A.L. was a 16-year-old who spent part of grade 9 in high

school before COVID struck. She then spent the next two years being homeschooled, with a limited social life apart from her family, E.G., and work. At the best of times, adolescence can be a confusing and challenging time for young people as they grow and mature, navigate friendships and peer groups, and discover their sexuality: *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 153. Even more so in the circumstances faced by A.L. because of the COVID pandemic and her extremely limited peer relationships. In such circumstances, and on the evidence before me, I do not read much into A.L.'s notes and find no reason to not accept her evidence that she did not want a romantic relationship with A.S. The notes and her evidence about them do not undermine her credibility.

90 The second alleged inconsistency is between A.L.'s evidence that A.S. put on a condom and two medical notes from January 19, 2023.

91 The two medical notes from January 2023 refer to A.L. being "raped" in March 2022. The parties agree that this is a reference to the incident with A.S. on June 8, 2022. The two notes appear to record that there was unprotected vaginal sex and the patient was unsure if a condom was worn. A.L. denies telling anyone at the hospital that she had unprotected sex or that there was no condom. She was tested for herpes. The results were negative.

92 The two medical notes are not a prior inconsistent statement. A.L. did not review the medical notes at the time. She did not sign them. She did not approve them. They were put to A.L. in cross-examination. She did not agree with key aspects of the notes.

93 The medical notes are not admissible in evidence. No notice was given under the *Canada Evidence Act*, R.S.C. 1985, c. C-5 that the notes would be tendered in evidence. A.S. says that he was not required to give notice of intention pursuant to the *Canada Evidence Act* because the document was produced to him by the Crown. No cases were provided to me in support of this proposition. No leave was sought to tender the records. The medical notes were marked as lettered exhibits. The contents of the notes are not admissible in evidence.

94 Even if the contents of the notes were admissible, they ought to be given little to no weight. They contain a significant error in the date of the alleged sexual assault. The notes were not made by and not approved by A.L. Further, A.S. testified that he wore a condom. This is consistent with A.L.'s evidence. I would find there was no inconsistency in A.L.'s evidence regarding the use of a condom.

The "17" alleged memory failures in the police statement

95 A.S. asserts that A.L.'s evidence is not reliable. The principal reason is that there are allegedly at least 17 times A.L. told the police in her statement that she did not remember. On the second day of her cross-examination, 14 of these instances were put to A.L.

96 Only one specific instance of A.L.'s memory fading by trial was canvased with her; it was with respect to the name of the movie they were watching on June 8, 2022. She no longer remembered the name of the movie.

97 The following are summaries of the examples of the statements to the police that were reviewed with A.L., grouped by topic:

1. Page 4 - A.L. was not fully sure if they were going to meet at the water but then it was switched to the apartment;
2. Pages 22-23 - A.L. did not fully remember the name of the movie they were watching, but suggested a title;
3. Page 25 - A.L. said A.S. said something about going to the bedroom - but she did not know if he was asking or telling her;
4. Page 29 - A.L. was unsure how long she was in the bedroom;
5. Page 9 - A.L. did not really remember telling her sister what happened;
6. Page 33 - A.L. provided some details of what she thought she said to her sister but did not recall when she told her;
7. Page 34 - A.L. said she did not think she told her sister she had sex with A.S. but could not remember what she told her;
8. Page 36 - A.L. could not recall whether a person she spoke to was a counsellor or a mentor;
9. Page 51 - A.L. gave information and answers about working together with A.S., but she was not certain exactly how often it occurred;
10. Page 54 - A.L. did not recall how long she met with A.S. at the river on a prior occasion although she provided an estimate;
11. Page 12 - A.L. said she did not really remember how the exchange of the partially nude photos went;
12. Page 13 - A.L. did not really remember the order in which the photos were sent, just that they both sent them;
13. Page 15 - A.L. did not remember if A.S. was wearing pants or shorts in the photo; and
14. Pages 63 - 64 - A.L. recalled vague details about what was discussed about the exchange of photos but did not recall anything else.

98 A.S. conceded that these statements were not inconsistent statements. A.S. submits the portions of the police statement read into the record form part of the evidence at trial. There are several issues with this. The statements are hearsay. No exception to the hearsay rule was relied upon for their admission. They were not properly used to refresh A.L.'s memory. On only two

occasions was the excerpt from the statement summarized and A.L. was asked if that summary was what she told the police. In virtually every other instance, A.L. was simply asked "you remember that", or a slight variation of that question, to which she responded "yes" after which counsel moved on to the next portion of the statement. On one occasion she was asked "correct?" and on another, whether she remembered being asked those questions and giving those answers after which counsel moved on to the next portion of the statement.

99 A.S. submits that asking the above questions, together with A.L.'s admission that she gave truthful answers to the police is all that is required to admit the statements as evidence. I do not agree. More is required.

100 A.L.'s statements to the police do not become evidence unless adopted by A.L.: *R. v. Atikian* (1990), 1 O.R. (3d) 263 (C.A.). Before I can accept what A.L. said in the statement as proof of the truth of the facts stated therein, I must be satisfied that she acknowledged that she made the statement and that the statements were true.

101 Apart from a general question whether she was 100 percent truthful with the police, which was asked on her first day of cross-examination prior to asking about one particular issue, A.L. was not asked whether the answers to all of the questions read to her in the excerpts referenced above were true. She was not asked if she accepted the answers as correct (except perhaps for one instance). A.L. simply confirmed in most cases that she "remembered that". Remembering being asked questions and giving answers is not an acknowledgement that the answers are true. Something more is required to base a conclusion that A.L. adopted the statements. I find that A.L. did not adopt the statements.

102 Even if the statements were adopted by A.L., or if the purpose of tendering the statements is not for the truth of their contents but to establish that at the time of the statement, nine days after the alleged sexual assault, A.L. did not recall details of certain events, the statements do not undermine her credibility or reliability.

103 Some of the statements (1 and 9-14) refer to events that occurred before June 8, 2022. Some of the statements (2-4) refer to the events that occurred in the apartment that day. Some refer to a single conversation A.L. had with her sister after June 8 (5-7) and one (8) refers to not remembering the title of a person she spoke to after June 8. In each of the statements, it is not the case that A.L. had no memory of the events discussed in the statements. A.L. does in fact offer details about what transpired. What she communicates to the police officer is that she is fuzzy on some of the details or exactly how sure she is that what she is saying is completely accurate. She did not want to overstate her recollection. This is reasonable given A.L.'s circumstances; she was a relatively sheltered 16-year-old girl being interviewed by the police with respect to allegations of sexual assault.

104 Finally, the details that A.L. is uncertain about are not the core details of what occurred in

the apartment on June 8, 2022. She knows she watched a movie but was uncertain of the title. She knows that A.S. said something about going into the bedroom but did not recall the exact words. She knows they were in the bedroom but does not know for how long. At the time of the police statement, A.L. did have a recollection of some details of the various matters referred to in the above list. There were no cogent inconsistencies between her evidence and the statements. The statements do not undermine her reliability with respect to the events in the apartment and immediately afterwards.

Motive to fabricate or being brainwashed

105 An absence of motive does not equate to enhanced reliability. A.S. does not assert that A.L.. had a motive to lie or fabricate, but in submissions, A.S. asserted that A.L. was "brainwashed" or mislead into believing that she was sexually assaulted.

106 A.S. asserts that A.L. wanted a romantic relationship with him, that A.L. did not tell him that she did not want sex with him, that she was confused and disappointed about the sex and felt used, that she did not tell E.G. about the sexual assault but told E.G. she felt taken advantage of and used, and that it was not until A.L.'s mother confronted her about sexual assault that A.L. concluded she had been assaulted.

107 Later on June 8, 2022, A.L. spoke to E.G. She told E.G. about the movie and meeting with A.S., but not about the sex. A.S. submits that the failure to disclose the sexual assault to her best friend and instead to tell her that she was taken advantage of and felt used goes to her believability and to the issue of consent.

108 A few days later A.L. spoke to her sister. She does not recall exactly what she told her sister. Her sister told her mother and A.L.'s mother approached her. A.L.'s mother asked A.L. if what she heard was true. A.L. did not want to admit it to her mother. She was embarrassed and uncomfortable. She denied having sex. Her mother spoke to A.L. a second time and A.L. told her she had sex but did not tell her that it was forced on her. A.L.'s mother spoke to her a third time and this time A.L. told her mother that she was forced to have sex. This third conversation occurred shortly before going to the police.

109 A.L. testified that she was the one who decided to go to the police and her mother did not pressure her. A.L. acknowledged that at some point, her mother spoke to her about online research, where her mother looked at signs of sexual assault and challenged A.L. It is not clear from the evidence when this occurred. It may have been after the first conversation or after the second. It is not clear from the evidence why A.L.'s mother did online research, but common sense suggests that A.L.'s mother had concerns about A.L. and her behaviour.

110 A.L. agreed that she felt that she had been used for sex. She acknowledged that she felt confused and disappointed afterwards and was not sure if she was supposed to enjoy it or not

when it was hurting. She testified that she did not really know what to feel. She was in shock. She was disappointed because she felt very used. It was not something she wanted. Such a reaction is entirely plausible for a someone in A.L.'s circumstances.

111 Delay in a complainant's disclosure of a sexual assault alone does not undermine the credibility of a complainant's disclosure: *Kruk* at para. 41. There is no inflexible rule on how people who are the victims of trauma, like sexual assault, will behave: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65. There are many reasons for delay in reporting sexual assault: *D.D.* at para. 65. A.L.'s reticence in telling her mother is entirely plausible in her circumstances. Her failure to immediately tell her mother does not undermine her credibility.

112 The same is true of her disclosure to E.G.. A.L. expressed other concerns about disclosure, including the impact on work or people at work, and on E.G. All of these concerns are plausible given A.L.'s particular circumstances.

113 As conceded by A.S. in submissions, feeling confused, disappointed, taken advantage of and used is not inconsistent with a sexual assault. Indeed, expressing to E.G. that she felt used and taken advantage of could be understood as an attempt by someone in A.L.'s circumstances to be a way of trying to express that she had been assaulted.

114 I accept A.L.'s evidence that her mother's research did not influence her. A.L. was not brainwashed or misled. It took some time for A.L. to fully process, understand and disclose what had happened and to report it to the police.

Conclusion on credibility and reliability of A.L.

115 Considering the above factors and evidence, I find A.L. is a credible, reliable and believable witness. I accept her version of events. A.L. was consistent in her evidence as to what occurred in A.S.'s apartment. Her evidence was internally consistent and unwavering. Her evidence fits the reactions and actions of a 16-year-old with the specific experiences and in the particular circumstances of A.L.

Honest but mistaken belief in communicated consent

116 The accused raised the defence of honest but mistaken belief in communicated consent. The defence is satisfied by raising a reasonable doubt that the accused possessed an "honest but mistaken belief that the complainant actually *communicated* consent, whether by words or conduct": *Barton* at para. 91.

117 Section 273.2 of the *Criminal Code* provides:

> It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from

(i) the accused's self-induced intoxication,

(ii) the accused's recklessness or wilful blindness, or

(iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

118 Section 273.1(2) of the *Criminal Code* provides in relevant part:

(2) For the purpose of subsection (1), no consent is obtained if

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

119 The following excerpts from paras. 46 - 52 of the Supreme Court of Canada's decision in *Ewanchuk* are apposite:

> 46 [T]he evidence must show that [the accused] believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in A.L.'s mind provides no defence.
>
> 47 For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions.
>
> ...
>
> 51 [A] belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, 1994 CanLII 77 (SCC), [1994] 2 S.C.R. 3 ...
>
> 52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that

> there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, 1997 CanLII 312 (SCC), [1997] 2 S.C.R. 777, at para. 79, the Court stated:
>
> > An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii).

120 There is no defence of honest but mistaken belief in communicated consent without reasonable steps to ascertain that A.L. was consenting: *Barton* at para. 104. The reasonableness of those steps is assessed in light of the circumstances known to the accused at the time but s. 273.2(b) of the *Criminal Code* does not require the accused to take "all" reasonable steps: *Barton* at para. 104.

121 At para. 107 of *Barton*, the Supreme Court considered things that are not reasonable steps, such as reliance on sexual assault myths or stereotypical assumptions about women, or "testing the waters" by recklessly or knowingly engaging in non-consensual sexual touching. At para. 108 of *Barton*, the Supreme Court identified circumstances where the threshold for satisfying the reasonable steps requirement is elevated. These circumstances include more invasive sexual activity and where the accused and complainant are unfamiliar with one another, suggesting a reasonable person would take greater care in ascertaining consent in such circumstances.

122 I find that the accused had an honest but mistaken belief in communicated consent with respect to kissing A.L. The evidence from both A.L. and A.S., including that A.L. admits she kissed A.S. back, raises a reasonable doubt that A.S. may have had an honest but mistaken belief in communicated consent with respect to kissing.

123 However, the evidence does not raise a reasonable doubt that A.S. possessed an honest but mistaken belief that A.L. communicated consent, by words or conduct, with respect to the digital and vaginal penetration of A.L.

124 I find that A.S. never asked A.L. how old she was and that he did not know how old she was. A.S. did not care to know how old A.L. was and did not bother to find out.

125 I do not accept A.S.'s evidence that he asked A.L. at any time if she was sure she wanted to do "this", or anything related to the sexual activity. I find that he never asked A.L. if she was okay with any of the sexual activity. I reject his evidence that he pulled out after each time that he vaginally penetrated A.L., and that he then asked for confirmation to proceed.

126 A.S.'s evidence that it was A.L's choice to come to the apartment and that she could have walked away if she wanted to belie his true understanding of the situation. I find that A.S.

believed that A.L. had consented to whatever he wanted to do because she came to the apartment on her own, never said "no" prior to him inserting his penis into her vagina, walked into the bedroom on her own, and "chose" not to leave.

127 A.S. relied on the myths that if a complainant remains passive or failed to resist the accused's advances, either physically or verbally by saying "no", she must have consented: *Kruk* at para. 36. He similarly relied on the myth that a complainant's "failure" to resist or cry out is suggestive of consent: *Kruk* at para. 41.

128 At a minimum, A.S. was reckless as to whether A.L. consented to digital penetration and went ahead anyway. He did not care whether she consented or not. Kissing is not an expression of consent to digital penetration. There is a significant degree of difference in the invasiveness of kissing and digital penetration. A.S. penetrated A.L. with his finger without asking for consent or obtaining any. There is no evidence of any discussion about it. There was no verbal consent to the digital penetration and A.S. knew this. There is no evidence that it was invited by A.L.'s actions or that her actions expressed consent to it. A.S. knew this.

129 Even on his own evidence, which I do not accept, A.L. touching A.S.'s genitals over clothing is significantly different than digital penetration and does not imply consent to digital penetration. There is simply no evidence that A.L.'s voluntary agreement to digital penetration was affirmatively expressed by words or actively expressed by conduct. Even if A.L.'s breath was raised during digital penetration as testified to by A.S., which I do not accept, in those circumstances there could be alternative reasons for this, such as stress or pain from the digital penetration. A belief by A.S. that A.L. in her own mind wanted him to digitally penetrate her but did not express that desire, is not a defence.

130 In addition to the difference between kissing and digital penetration, the accused had no idea how old A.L. really was. He knew she was still in school. He knew there was a significant age difference between them. They had never been alone together in his apartment. These things elevate the threshold for satisfying the reasonable steps requirement. A.S. did not take basic reasonable steps to ascertain consent to digital penetration.

131 At a minimum, A.S. was reckless as to whether A.L. initially consented to vaginal penetration.

132 Following A.S. to the bedroom does not constitute consent to being undressed by him or to vaginal sex. Being undressed in these circumstances is not consent to vaginal sex. Having rejected A.S.'s evidence that he asked A.L. if she was sure she wanted "this", there is no evidence that A.L.'s voluntary agreement to the initial vaginal sex was affirmatively expressed by words or actively expressed by conduct. In fact, after A.S. put A.L.'s legs on his shoulders and entered her vagina, she said "ow; stop". After pausing and looking at her, he continued. She then said "ow; no". He again paused and looked at her and then continued. A.S. knew A.L. was not consenting to

being vaginally penetrated but went ahead anyway, not caring whether she consented or not. At the point that A.L. said "ow; stop" and "ow; no" A.S. knew A.L. was not consenting.

133 Even if it could be construed from the evidence that A.L. somehow initially consented to vaginal sex, A.L. explicitly stated, during the vaginal sex, that she did not consent to it continuing. A.L. clearly told A.S. to stop. Not once, but twice. He did not. I reject his evidence that he pulled out each time, then asked for confirmation to proceed. There is no evidence that A.L. was actively engaged in the sexual act in the bedroom and actively expressed agreement by her actions. A.S. continued with the vaginal intercourse without confirming A.L.'s consent. He deliberately chose to ignore those indications because he did not want to know the truth. He was reckless and wilfully blind in doing so.

134 For the reasons articulated above, the threshold for reasonable steps was elevated. A.S. not only failed to meet this elevated threshold but also failed to meet the lower threshold of taking basic reasonable steps. A.S. failed to take basic reasonable steps to ascertain A.L.'s consent to vaginal penetration. He failed to take reasonable steps to ascertain that she had truly changed her mind after she said "ow; stop" and "ow; no" before proceeding with vaginal intercourse. A.L. and A.S. looking at each other while he paused but remained inside her vagina does not constitute reasonable steps to ascertain consent in the circumstances known to A.S. He cannot rely on the mere lapse of time or A.L.'s silence or equivocal conduct.

135 Except with respect to the kissing on the couch, I have no reasonable doubt that there was no honest but mistaken belief in communicated consent. Thus, the defence of honest but mistake belief in communicated consent fails with respect to the digital and vaginal penetration of A.L.

Was A.S. in a position of trust?

136 The Crown did not seriously press its assertion that A.S. was in a position of trust on June 8, 2022.

137 A.S. denies he was in a position of trust. He submits that there was no imbalance of power between A.L. and A.S. despite their age differences. He submits that A.L. had many management responsibilities as did A.S. A.L. had no longer been at work for about a month before June 8, 2022, and any position of trust ended when she left employment.

138 The evidence does not satisfy me that A.S. was in a position of trust on June 8, 2022. There is little evidence of A.S.'s control over A.L.'s work. She had similar responsibilities at work despite their age difference. As of May 7, 2022, A.L. was no longer working in her former capacity except possibly for a few days here and there. Even if there had been a relationship of trust because of the work circumstances, it is not clear that it continued after May 7, 2022.

Conclusion on Sexual Assault: Consent, Actus Reus and Mens Rea

139 I reject A.S.'s evidence as to what occurred in the apartment where it conflicts with A.L.'s. A.S.'s evidence does not leave me with a reasonable doubt that A.L. did not consent. I accept A.L.'s evidence as to what occurred in the apartment on June 8, 2022. Her evidence satisfies me beyond a reasonable doubt that she did not consent to any of the sexual activity in A.S.'s apartment on June 8, 2022. I find that the Crown has established the actus reus elements of sexual assault.

140 I find that A.S. knew that A.L. was not consenting to the digital and vaginal penetration, was reckless as to the absence of her consent with respect to digital penetration and the initial vaginal penetration and was reckless and wilfully blind to the reality that A.L. was not consenting after A.L. said "ow; stop" and "ow; no"; he remained inside her and continued to vaginally penetrate her. Except with respect to kissing, the evidence does not raise a reasonable doubt with respect to honest but mistaken belief in communicated consent.

The possession of child pornography charge

141 The Crown's case for the charge of possession of child pornography rests on A.L.'s evidence that she sent a picture of herself, topless, and wearing either shorts or underwear to A.S. on Snapchat.

142 The essential elements of possession of child pornography are knowledge and control: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 15. "Possession" is defined in s. 4(3) of the *Criminal Code* to include personal possession, constructive possession, and joint possession.

143 A.L. is unclear as to whether she sent the photo to A.S. first, or whether he sent her a photo of his penis first. It took her a while to answer who sent the first photo, but she testified that she believes she sent her photo first. In her statement to the police she also said she believed she sent the first photo but was not entirely certain. A.L. does not recall the specifics of how it arose that she sent her photo. She testified that A.S. hinted at her sending the photo and suggested that she could show him something. I do not doubt that she sent the photo, but unlike her evidence with respect to what occurred in the apartment, she struggled to recall precisely how the exchange of photos arose and transpired.

144 A.L. did not recall whether she received a confirmation that the photo was opened or seen. She did not recall exactly how A.S. responded but he used the fire emoji which she understood to mean hot or fire.

145 A.S. denied sending a picture of his penis to A.L. or receiving a topless photo of her. I do not accept his evidence. I accept the evidence of A.L. that she sent the photo.

146 A.L. was 16 at the time, potentially satisfying the definition of child pornography under s.

163.1(1)(a)(ii) of the *Criminal Code*. However, there is no physical evidence of the picture. The police had A.S.'s phone but were not able to access the phone, did not request the password, and did not obtain a warrant to search the phone. Further, there was no evidence as to the nature of the topless photo and how A.L. was situated in the photo, other than being on her bed. I can assume the photo likely satisfies s. 163.1(1)(a)(ii), but I am not satisfied beyond a reasonable doubt that it does.

147 Given the evidence that they communicated daily on Snapchat and that he responded with a fire emoji, I find that A.S. opened the photo on Snapchat.

148 Neither party provided the court with legal authorities to assist the court. In my view, to be convicted of possession of child pornography in these circumstances, A.L. would have to know that the "snap" (photo) he was receiving on Snapchat contained child pornography: *R. v. M.N.*, 2017 ONCA 434 at para. 37. He must knowingly acquire the underlying data files and store them in a place under his control: *Morelli* at para. 66. The evidence regarding why A.L. sent the semi-nude photo and whether it was knowingly acquired, and whether A.S. knew it was a semi-nude photo that satisfied the definition of child pornography that he was opening, leaves me with a reasonable doubt that the accused was in the possession of child pornography.

Disposition

149 I find that the Crown has established beyond a reasonable doubt the *actus reus* and *mens rea* required for a sexual assault but has not established the offence of possession of child pornography beyond a reasonable doubt. I find the accused not guilty on count one and guilty on count two of the indictment.

M. BORDIN J.

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