R. v. P.N.W.

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Judges: Miller, Bradley; Paciocco, David M.; George, Jonathon C.
Subject: Criminal

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4 or 486.6 of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes

to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

486.6 (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5 or 486.6 of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

(2.1) The offences for the purposes of subsection (2) are

(a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

(3) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(3.1) An order made under this section does not apply in respect of the disclosure of information by the victim, witness or justice system participant when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim, or witness or justice system participant.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(5.1) If the prosecutor makes an application for an order under subsection (1) or (2), the judge or justice shall

(a) if the victim, witness or justice system participant is present, inquire of them if they wish to be the subject of the order;

(b) if the victim, witness or justice system participant is not present, inquire of the prosecutor if, before the application was made, they determined whether the victim, witness or justice system participant wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (8.2).

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(8.1) If an order is made, the judge or justice shall, as soon as feasible, inform the victims, witnesses and justice system participants who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(8.2) If the prosecutor makes the application, they shall, as soon as feasible after the judge or justice makes the order, inform the judge or justice that they have

(a) informed the victims, witnesses and justice system participants who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(c) informed them of their right to apply to revoke or vary the order.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

486.6 (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. P.N.W., 2024 ONCA 662
DATE: 20240906
DOCKET: C68955

Miller, Paciocco and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

P.N.W.

Appellant

Robert B. Carew, for the appellant

Rebecca De Filippis, for the respondent

Heard: February 9, 2024

On appeal from the convictions entered by Justice Charles T. Hackland of the Superior Court of Justice on September 28, 2017, with reasons reported at 2017 ONSC 5698, and from the sentence imposed on May 14, 2019, with reasons reported at 2019 ONSC 2957.

B.W. MILLER, J.A.:

[1] The appellant was convicted of drugging and sexually assaulting 14 women, including C.R., his girlfriend of four years. He met most of the complainants through his work as a drug dealer, or through C.R., who was a server at several Ottawa bars. The complainants found him pleasant and non-threatening. He would invite them back to his apartment, assuring them that C.R. would also be there. Once at the apartment, he would slip GHB or Ketamine into the drinks or cocaine he provided. They would then have no recollection of events after they awoke, and C.R. would help them get dressed and reassure them that nothing had happened. He also drugged, assaulted, and sexually assaulted C.R. on several occasions.

[2] The appellant was charged on a 45 count indictment. Counts 1-9 relate to assault, aggravated assault, drugging, and sexual assault of C.R. Counts 10-38 relate to the drugging and sexual assault of 14 other women. The remaining counts, to which the appellant pleaded guilty, were trafficking in prohibited substances and the possession of proceeds of crime. The appellant was convicted on 39 counts.

[3] Following the findings of guilt, the appellant conceded that he was a dangerous offender within the meaning of s. 753 of the *Criminal Code,* R.S.C., 1985, c. C-46. He sought a determinate sentence of 15 years followed by a long-term supervision order of 10 years. The trial judge found that a determinate sentence would not adequately protect the public and sentenced the appellant to an indeterminate sentence.

[4] The appellant appealed his convictions on 3 of the 39 counts and appealed the sentence.

[5] For the reasons that follow, I would dismiss these appeals.

Factual overview

[6] The trial judge concluded that C.R. was both the victim of an abusive relationship and a "coerced accomplice" in the appellant's crimes against the other complainants. C.R. assisted the appellant with his drug trafficking business and co-operated when he drugged and sexually assaulted other women. C.R.'s job "was to clean up after the sexual encounters, to help the women get dressed, to reassure them that nothing harmful had happened to them and to help them get a cab or otherwise get them out of the apartment." She also video recorded at least one of the sexual assaults committed by the appellant.

[7] When C.R. first met the appellant she was unaware that he was a drug dealer. She had nearly finished her bachelor's degree, had come off a bad relationship, and did not do drugs. The appellant had a job at a fitness outlet. She moved in with him, and he introduced her to cocaine as something they could do together. She became heavily addicted. The two agreed that the appellant should deal drugs full time to support their addictions.

[8] The four years the two spent together were characterized by conflict and violence. The trial judge chronicled the events triggering the end of the relationship in his sentencing decision:

> The relationship ended when the accused discovered she was about to leave him and this precipitated a brutal beating. Screaming and sounds of violence were heard by a neighbour, the police were called and although the accused attempted to block their entry, the police forced their way into the couples' apartment. The accused resisted arrest but was subdued. The girlfriend was unconscious and was taken by ambulance to hospital where she was placed in intensive care. The next day the couples' child, a fetus near full term, was stillborn. The loss of this child deeply traumatized this young woman as was eloquently explained to the court in her trial testimony and in her victim impact statement.

[9] Warranted searches of the appellant's apartment after his arrest led to the discovery of the video evidence of his sexual assaults. In sentencing, the trial judge described the videos

as "horrific" and showing the appellant "sexually assaulting his victims often in the most degrading fashion." He shared many of the videos with his friends.

[10] The trial judge largely accepted C.R.'s evidence with respect to her relationship with the appellant, his abusive behaviour, and his assaults of her. With respect to her evidence about the sexual assaults committed against others, the trial judge stated the need for caution and corroborating evidence, given C.R.'s admitted involvement in those assaults, and his conclusion that she minimized her role in the assaults in her own testimony.

[11] The appellant's testimony left a negative impression on the trial judge. In particular, the trial judge found that the appellant's denials of having assaulted C.R. were contradicted by much independent evidence as well as his own evidence. At trial, the appellant testified that the victims were willing participants and that the drugs were intended to enhance the experience he believed the women were seeking. In sentencing, the trial judge concluded that "he clearly had no concept of the need for consent nor any concept of how date rape drugs vitiate consent."

[12] One of the three convictions that the appellant is appealing is for an assault on C.R. on November 1, 2014 (count 6). The trial judge found that when C.R. returned to their apartment after work on that occasion, she was upset to see a partially clothed woman unconscious on the couch. The appellant testified that C.R. was not at all upset to see the woman in the apartment, and denied there was any sort of argument, let alone a physical altercation. The trial judge accepted C.R.'s testimony that she was angry and started a physical confrontation with the appellant, who then smashed her head into the floor and then against the wall.

[13] The appellant also appeals his convictions for administering drugs to the complainant T.U. and for being a party to a sexual assault on T.U. With respect to count 31, the trial judge found that the appellant "administered a stupefying drug… likely ketamine, to allow [his landlord, Ali] to have sex with her without any genuine consent, in accordance with the pattern of drugging and sexual assault in many of the other counts." With respect to count 32, the trial judge found that the appellant drugged T.U. to aid and abet Ali's sexual assault of her.

Issues on appeal

[14] With respect to the conviction appeals on counts 6, 31, and 32, the appellant argues that the trial judge erred in his credibility assessments, applied uneven scrutiny, and made other errors in his apprehension of evidence.

[15] With respect to the sentence appeal, the appellant argues that the trial judge erred in concluding that a determinate sentence followed by a long-term supervision order would not adequately protect the public.

Analysis

(1) Count 6: November 1, 2014, Assault

[16] For the most part, the appellant's argument on appeal of the conviction on count 6 – the November 1, 2014, assault of C.R. – is to ask the court to reweigh the evidence and reassess findings of credibility. Absent some reviewable error, that is not the role of this court. The appellant renews many of the arguments he made at trial with respect to C.R.'s lack of credibility due to her inconsistent evidence at the preliminary hearing and her own involvement in facilitating the appellant's offences. However, the trial judge was aware of the need to approach C.R.'s evidence with caution, and expressly self-directed on the "need for caution and the advisability of seeking out corroborative evidence".

[17] The only error identified by the appellant with respect to count 6 arises from the trial judge's use of extrinsic evidence to confirm the evidence of C.R. He found that the November 1, 2014, fight "was likely typical of the fights the neighbour said she listened to once or twice a week."

[18] The appellant objects to the court's reliance on the evidence of the neighbour about frequent fights typical of the physical encounter she heard on November 1, 2014, which was evidence of discreditable conduct by the appellant external to this particular count. The Crown did not seek a ruling on the admissibility of this bad character evidence for the purpose of

proving count 6, and so the appellant argues that he did not have proper notice of it and did not have an opportunity to respond to it.

[19] This court canvassed the legal principles relating to the governing rule, the similar fact evidence rule – particularly in the context of the use of evidence across counts – in *R. v. Tsigirlash*, 2019 ONCA 650, and it is not necessary to repeat that analysis here. In short, the general rule is that evidence of discreditable conduct by the accused is presumptively inadmissible, unless that conduct is the subject matter of the charge. Where, as in the proceeding below, the Crown seeks to use extrinsic discreditable conduct evidence or discreditable conduct evidence admissible on one count to prove a separate count, the evidence will be inadmissible unless the discreditable conduct meets the test for similar fact evidence. The Crown was required to make an application under rr. 30.01-30.05 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, S.I./2012-7, a step intended to give the defence a meaningful opportunity to respond to the admission of the evidence.

[20] In this case, the trial judge held an admissibility inquiry for the cross-count admission of the evidence of the appellant drugging and sexually assaulting women. The evidence was ruled admissible across counts. However, there was no inquiry held with respect to the admissibility of the neighbour's evidence of a history of physical altercations between the appellant and C.R. The neighbour's evidence that she overheard the appellant and C.R. fighting once or twice a week is bad character evidence, not arising from the charged conduct on November 1, 2014. It ought to have been the subject of an admissibility inquiry to determine whether the probative value of the evidence exceeded its prejudicial effect.

[21] However, in this instance the error was harmless. The neighbour's evidence of numerous confrontations could have been called for no other reason than to establish a pattern of violence by the appellant against C.R. The appellant had to have understood this was the Crown's purpose in eliciting evidence from the appellant's neighbour and did not object to it. In its closing arguments, the Crown invited the trial judge to use the neighbour's

testimony both to find it more likely that the assaults occurred, and to lend credibility to C.R.'s own testimony about the assaults. The Crown went on to suggest that "similar fact evidence about what had been going on in that relationship" lent credibility to C.R.'s testimony on count 6. Again, there was no objection. The presence of nearly identical factors led this court, in *R. v. Graham*, 2015 ONCA 113, 330 O.A.C. 394, to conclude that there was no procedural unfairness to the defendant in admitting similar fact evidence without a formal application. In this case these factors also mitigated any risk of unfairness to the appellant.

[22] Had there been an admissibility hearing, the evidence would undoubtedly have been admitted. The evidence was reliable, and was probative when used, as the Crown requested, to support C.R.'s testimony that the appellant had used violence against her during the assault in question. The risk of moral and reasoning prejudice, as described in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, was slight. It is highly unlikely that the trial judge would have used the evidence to draw the impermissible inference that because the appellant was a violent person, he would have committed the assault. The evidence was specific to the nature of the relationship between the appellant and C.R., suggesting a pattern of violence by him against her in particular, showing both a pattern of physical aggression and an animus against her. It was far more likely that the trial judge used this evidence for these permissible purposes than for the prohibited purpose. There was also a low risk of reasoning prejudice. This ground of appeal fails.

(2) Counts 31 and 32: Drugging and Assault of T.U.

[23] Count 31 alleged the appellant gave the complainant T.U. ketamine without her consent with the intention of facilitating Ali's sexual assault on her. Count 32 alleged that the appellant was a party to a sexual assault committed by Ali.

[24] T.U. testified that she had previously purchased cocaine from the appellant on multiple occasions. On the night of the offence she met up with the appellant and Ali at a bar. She accepted their invitation to return to the appellant's apartment, where she assumed they would continue to consume drugs and alcohol. Once there, the appellant gave her what she believed

to be a line of cocaine. She snorted it and blacked out. She woke up on the couch, naked and disoriented. C.R. helped her put her clothes on and walk out the door.

[25] T.U. testified that she believed the drug the appellant gave her was in fact ketamine and not cocaine. She testified that she was familiar with the effects of ketamine, as she had taken it once before. She testified that it made her feel “kind of paralyzed” and “in and out of life”.

[26] C.R. testified that she came into the room to see T.U. engaged in oral sex with Ali, and that T.U. was startled and ran to the bathroom, followed by Ali. She emerged from the bathroom looking “frazzled and scared”, unsteady on her feet, with a torn zipper on her skort and shirt not properly pulled down.

[27] The appellant testified that he gave T.U. cocaine, not ketamine, and that T.U. had oral sex on the couch with Ali but stopped when C.R. came into the room; she then ran to the bathroom with Ali. They all did more cocaine together afterwards.

[28] The trial judge found that the appellant drugged T.U., likely with ketamine, to enable Ali to have sex with her. He found that Ali sexually assaulted T.U. while she was incapacitated, and that the appellant had aided and abetted the sexual assault. The appellant had also been charged with controlling the movement of a person to compel them to engage in prostitution, under what was then s. 212(1)(h) of the *Criminal Code*, and with receiving a financial benefit from sexual services contrary to s. 286.2(1) of the *Criminal Code*, on the theory that the appellant had received a rent reduction from Ali in exchange for drugging T.U., but he was acquitted on both of those charges.

[29] The appellant’s grounds of appeal, as with count 6, were primarily that the verdict was unreasonable. The appellant argued there was no evidence that the appellant was the one who drugged her, that the appellant directed her to have sex with Ali, or that he encouraged Ali in any way. He argues that the trial judge misapprehended the claimant’s evidence, and that she alleged that it was Ali who drugged her, not the appellant. He also argues that the T.U.’s behaviour appeared intentional and inconsistent with having been heavily drugged with ketamine: she was able to actively participate in sexual acts, to get embarrassed at the arrival

of C.R., and to remove herself to the privacy of the bathroom and subsequently go to a friend's house. He argued that the complainant's lack of memory of the sexual acts does not mean she did not consent at the time, just that she had been unable to form any memory of it. The evidence, he argued, was equally consistent with this version of events, such that there was a reasonable doubt that the appellant drugged the complainant to facilitate a sexual assault by Ali.

[30] The appellant's argument is unpersuasive. The complainant testified that she had taken ketamine before, she knew what ketamine felt like, and she felt like the drug the appellant gave her was ketamine. The expert evidence, which the trial judge accepted, was that a person who has taken ketamine is not deeply sedated but is in a dissociative state. They will be unable to form memory, or make informed decisions, but will be able to follow simple directions and perform some physical actions. The trial judge had recourse to cross-count evidence, which the trial judge found established the appellant's specific propensity to administer incapacitating doses of drugs – including ketamine – to women without their consent in order to facilitate sexual assault. The appellant was present at the time of these events. There was therefore ample evidence to support the trial judge's findings of guilt.

(3) Sentence appeal

[31] The appellant conceded that he met the legal criteria for designation as a dangerous offender. The issue at the dangerous offender hearing was the appropriate penalty. Section 753(4.1) of the *Criminal Code* required the trial judge to impose an indeterminate sentence of imprisonment unless he was "satisfied by the evidence adduced during the hearing of the application that there is a reasonable expectation that a lesser measure under paragraph 4(b) or (c) will adequately protect the public against the commission by the offender of murder or a serious personal injury offence."

[32] The appellant sought a 15 year determinate sentence with a 10 year supervision order. The trial judge was satisfied on the evidence presented that a determinate sentence would not be sufficient to protect the public. The appellant argues on appeal that the expert psychiatric

evidence established that there was a reasonable possibility of control of the appellant in the future. He argues that the trial judge erred by speculating that a 15 year sentence would not be sufficient for the appellant to benefit from available programming and reduce his level of risk to a manageable level.

[33] I do not agree that the trial judge erred.

[34] The appellant has an extraordinary record of serious violence and sexual abuse of women.

[35] In addition to the predicate offences, which involved 14 victims and covered an extended period of time, the Crown led evidence of the appellant's behaviour towards a previous intimate partner A.L. This evidence included the appellant killing A.L.'s dog by smashing it against a wall; pulling A.L. from the shower and locking her outside the apartment wet and naked, forcing her to run to her mother's house without clothes in winter; and beating A.L.'s brother with a belt. In the years following his arrest, the appellant was involved in five instances of violence while awaiting trial.

[36] The appellant was assessed by a psychiatrist, Dr. Klassen, pursuant to s. 752.1 of the *Criminal Code*. Dr. Klassen concluded that the appellant satisfied the criteria for antisocial personality disorder and manifests significant features of psychopathy.

[37] The trial judge concluded that, had he been applying conventional sentencing principles, the appellant would have received a combined sentence of 21 years. Relying heavily on the expert opinion of Dr. Klassen, he concluded that there was no reasonable expectation that a determinate sentence would adequately protect the public against a risk of further serious personal injury offences in the future. In his sentencing decision, he came to this conclusion based on the following:

> (a) [The appellant] suffers from Anti-Social Personality Disorder. This is a lifelong affliction which is notoriously difficult to treat and is not curable…
>
> (b) I have accepted Dr. Klassen's evidence that the accused presents a high risk of reoffending both violently and sexually. Indeed his

actuarial scores show that he is at a much higher risk for reoffending than other sexual and violent offenders.

(c) …[T]here is no history of him receiving appropriate therapy, and there is no certainty of the accused's willingness to participate in or of his ability to benefit from such therapy.

(d) The accused is at high risk to re-engage with the drug culture on his release and then fall into his previous behaviour patterns…

(e) In view of the accused's diagnosis and history, the accused will always be at a high risk to re-offend and there is a real possibility of the need for monitoring for the rest of his life. This would render a determinate sentence unsuitable as there would be a fixed termination date for any form of community supervision.

(f) … His skill at manipulating and controlling intimate partners, which is a primary risk with this offender, would provide a significant obstacle to effective supervision in the community. Any supervision regime dependent on the accused's self reporting or that of a domestic partner would likely be problematic and would put the domestic partner at high risk.

[38] The appellant did not identify any error in the trial judge's reasons. The appellant's main submission was that the trial judge was speculating when he concluded that there was no reasonable expectation that the risk posed by the appellant could eventually be managed in the community. The appellant argued that as the appellant had never received treatment for his disorders, it was speculative to conclude that he would not benefit from treatment such that he would cease to pose a significant risk of violent re-offence.

[39] I do not agree with this submission. The evidence is that the appellant suffers from disorders that are notoriously treatment resistant. He poses the greatest risk to future domestic partners, and any conceivable form of community supervision would fall well short of protecting such persons from an unacceptable risk of violence. The conclusions drawn by the trial judge were not speculative. What is speculative is counsel's submission that (1) the appellant would participate in clinical programming, and (2) that he would, contrary to the evidence, sufficiently benefit from it as to not pose an unacceptable risk to future domestic partners.

DISPOSITION

[40] For these reasons, I would dismiss the conviction appeal and the sentence appeal.

Released: September 6, 2024 “B.W.M.”

“B.W. Miller J.A.”

“I agree. David M. Paciocco J.A.”

“I agree. J. George J.A.”