W A R N I N G

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(1), (2), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) 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, 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a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

(2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, 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or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

(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.

(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 significant 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.

(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. 2005, c. 32, s. 15.

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

(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. 205, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. S.G., 2012 ONCA 895
DATE: 20121219
DOCKET: C53495

Juriansz, Watt and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

S. G.

Appellant

S. G., in person

Delmar Doucette, duty counsel

Eric Siebenmorgen, for the respondent

Heard and released orally: November 21, 2012

On appeal from the conviction entered on January 27, 2011 and the sentence imposed on March 25, 2011 by Justice Paul F. Lalonde of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] The appellant was convicted by a jury of two counts relating to assaults committed on her 23-month-old daughter. She defended the case primarily on the basis that the assailant was her then boyfriend who had a disposition for violence.

[2] Mr. Doucette raises three grounds of appeal. Mr. Siebenmorgen, for the respondent, acknowledges that errors in the jury selection process warrant the setting aside of the convictions and an order for a new trial. We agree

[3] The first error has to do with the timing of the decision to choose alternate jurors. Under s. 631(2.1) of the *Criminal Code* the decision to choose alternate jurors must be made before the clerk of the court withdraws any cards from the box at the outset of jury selection. Here, the trial judge did not make his decision to select alternates until a jury of 12 had already been selected. No statutory authority permits the decision to select alternates to be made at the time of the selection process at which it was made here.

[4] Of greater significance, however, is the second error. During the selection of the alternates for which each party would have been entitled to two further peremptory challenges, the trial judge erroneously concluded that the appellant had exhausted all her peremptory challenges. As a result, an alternate who later became a juror by substitution, was selected without affording the appellant a peremptory challenge to which she was entitled.

[5] Whether the first flaw, considered on its own, would be fatal, and not remediable under s. 643(3), s. 670(a), or s. 686(1)(b)(iv), or their combination, we need not decide. The respondent acknowledges and we agree that the second

error is fatal to the validity of the conviction. It cannot be saved by either s. 670 or s. 686(1)(b)(iv) whether considered singly or in combination.

[6] In the result, the appeal is allowed, the convictions set aside, and a new trial ordered. In the circumstances, we do not need to consider the other grounds of appeal advanced on the appellant's behalf.

"R. Juriansz J.A."

"David Watt J.A."

"Gloria Epstein J.A."