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(1), (2), (3) or (4) or 486.6(1) or (2) 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

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

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(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.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

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. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. K. E., 2014 ONCA 186
DATE: 20140310
DOCKET: C56120

Cronk, Epstein and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

K. E.

Appellant

H. John Kalina, for the appellant

Roger Shallow, for the respondent

Heard and released orally: March 7, 2014

On appeal from the convictions entered on May 20, 2012 and the sentence imposed on October 16, 2012 by Justice J. Fragomeni of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] Following a trial by judge and jury, the appellant was convicted of assault, sexual assault and uttering death threats against his girlfriend. He was sentenced to four years' imprisonment. He appeals from his convictions and seeks leave to appeal against sentence.

A. Conviction Appeal

[2] The appellant's sole ground of appeal on his conviction appeal is a claim of ineffective assistance of counsel. He contends that his counsel failed to follow his instructions to oppose the admission at trial of the complainant's evidence at the preliminary inquiry and that, but for his counsel's ineffective assistance in this regard, the evidence in question would not have been admitted because the appellant was denied the opportunity to cross-examine the complainant at the preliminary inquiry.

[3] In our view, the conviction appeal must be dismissed.

[4] The date of the preliminary inquiry was advanced when it was learned that the complainant was suffering from a terminal illness and was not expected to survive for very long. In the result, the complainant did testify at the preliminary inquiry. The record establishes that the court appointed counsel for the appellant in respect of the preliminary inquiry, for the purpose of cross-examining the complainant. The preliminary inquiry judge offered to adjourn the inquiry to permit the appellant's appointed counsel or the appellant himself, presumably alone or with the assistance of other counsel, to prepare for the cross-examination of the complainant. At that time, it was made it clear to the appellant that he would not likely have another opportunity to cross-examine the

complainant. However, the appellant objected to the counsel appointed by the court and stated that he did not wish any cross-examination.

[5] By the time of trial, the complainant had died. It was anticipated that the Crown would seek the admission at trial of her preliminary inquiry evidence under s. 715(1) of the *Criminal Code*.

[6] The appellant claims that he instructed his trial counsel to oppose the admission of the complainant's inquiry evidence on the ground that he did not have full opportunity to cross-examine the complainant at the preliminary inquiry and that his trial counsel refused to follow his instructions. The resulting admission of the complainant's evidence at trial, the appellant says, arose from the ineffective assistance of his counsel and resulted in a miscarriage of justice.

[7] The record before this court belies these claims. First, as we have said, the appellant was afforded an opportunity to cross-examine the complainant at the preliminary inquiry and declined that opportunity. Second, the appellant's trial counsel stated in his sworn affidavit that he advised the appellant to concede the admissibility of the complainant's inquiry evidence at trial, because, in his view, the evidence would be admitted under s. 715(1) of the *Criminal Code*, and the appellant accepted his advice. Importantly, the appellant himself admitted on cross-examination on his affidavit that "in the end [he] agreed" with his counsel and "conceded" to his counsel's advice.

[8] The test for establishing an ineffective assistance of counsel claim is an exacting one. On the facts of this case, simply put, there is no foundation for the appellant's ineffective assistance claim. It is entirely contradicted by the record. The complainant's inquiry evidence was clearly both necessary and reliable evidence. It was therefore admissible at trial under s. 715(1) of the *Criminal Code* since the appellant had not been denied the opportunity to cross-examine the complainant. Further, the appellant accepted his trial counsel's advice not to oppose the admission of the complainant's evidence at trial.

[9] The appellant cannot now be heard to complain about a situation of his own making. Certainly, on the record before us, there is no basis for criticism of his trial counsel's performance in the manner asserted by the appellant. Nor is there any merit to his claim that the events described above led to a miscarriage of justice.

[10] The conviction appeal is therefore dismissed.

B. Sentence Appeal

[11] We also see no merit to the appellant's sentence appeal.

[12] The appellant does not assert that the sentence imposed is outside the appropriate range for his offences. The single error alleged by him is that the sentencing judge failed to consider the appellant's prospects for rehabilitation

and relied solely on the principles of denunciation and deterrence when fashioning a fit sentence.

[13] We disagree. Once again, the record does not support this claim.

[14] The pre-sentence report filed at the appellant's sentencing hearing, which was considered by the sentencing judge, indicated that: (1) the appellant did not express any remorse and did not admit his guilt for any of the offences of which he was convicted; (2) to the contrary, the appellant expressed shock that he was found guilty and took no responsibility for his actions. Moreover, after interviewing the appellant, the author of the pre-sentence report learned that the appellant had a prior conviction in the United States for sexual battery which led to his deportation to Canada.

[15] In light of these considerations, we agree with the Crown that rehabilitation could not have played any significant role at the appellant's sentencing hearing.

[16] The sentencing judge expressly considered the applicable sentencing principles set out in the *Criminal Code*, including the principle of rehabilitation, as well as the circumstances of the offences and of the offender at the time of sentencing. As we have said, he also took account of the contents of the pre-sentence report, in addition to various letters filed on behalf of the appellant. We see no basis for any suggestion that the sentencing judge overemphasized deterrence and denunciation on the facts of this serious case.

[17] The sentencing judge's reasons reflect no error in principle and the sentence imposed was fit. Leave to appeal sentence is therefore granted and the sentence appeal is dismissed.

"E.A. Cronk J.A."
"Gloria Epstein J.A."
"M.L. Benotto J.A."