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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. Nelson, 2014 ONCA 853
DATE: 20141201
DOCKET: C55902

Simmons, Tulloch and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Kevin Nelson

Appellant

Kevin Nelson, appearing in person

Erika Chozik, appearing as duty counsel

Molly Flanagan, for the respondent

Heard: May 12 and 13, 2014

On appeal from the convictions entered on March 12, 2012 by Justice Janet Wilson of the Superior Court of Justice, sitting with a jury, and from the sentence imposed on July 19, 2012, with reasons reported at 2012 ONSC 4248.

Tulloch J.A.:

A. OVERVIEW

[1] On March 12, 2012, the appellant was convicted in a trial by judge and jury of threatening death, unlawful confinement, sexual assault causing bodily harm, and assault with a weapon, contrary to ss. 264.1(1)(a), 279(2), 272(1)(c) and 267

of the *Criminal Code*, R.S.C. 1985, c. C-46. He was acquitted of attempted choking with intent to enable himself to commit a sexual assault and aggravated sexual assault by wounding. He was sentenced to a global sentence of five years in custody, minus 19 months' credit for pre-sentence custody on a 1:1 basis. He appeals his conviction and seeks leave to appeal his sentence.

[2] In these reasons, I begin by giving a brief outline of the factual background that gives rise to this appeal, after which, I will deal, in sequential order, with the main grounds of appeal raised by the appellant.

B. BACKGROUND

(1) Facts and Evidence at Trial

[3] All charges arose from an incident that occurred in the early hours of December 25, 2010. The complainant was an acquaintance of the appellant, and they had met a few times before the night in question. After midnight on December 25, 2010, the complainant and the appellant were at a night club where the complainant consumed three drinks and danced with the appellant.

[4] At the end of the night when they decided to leave, the complainant accepted a cab ride offered to her by the appellant. The complainant testified that she had intended to sleep at her mother's apartment. A security camera shows that the complainant, the complainant's friend and the appellant entered the lobby of her mother's apartment building and that the appellant and the

complainant subsequently got back into the cab. The complainant and the appellant arrived at the appellant's apartment shortly before 4:00 a.m. During the time when the complainant was at the appellant's apartment, she sent and received a number of text messages and phone calls.

[5] During this time, there was sexual activity between the appellant and the complainant. The complainant alleged that the appellant had non-consensual vaginal intercourse with her, cutting off her body suit to facilitate the act, which resulted in her finger being cut. According to the complainant, the sexual assault took place over several hours in several episodes beginning after 4:00 a.m., and continuing to sometime after 7:15 a.m. She alleged that he threatened her with a knife or scissors and held it to her throat, attempted to choke her, hit or punched her in the left eye, pinned her legs in a painful position and refused to let her leave. She testified that at one point when the appellant went to the bathroom, she kicked the knife to the floor from the bed. The complainant called 911 and the appellant was arrested. When the police attended at the appellant's apartment, they located an open knife by the foot of the appellant's bed on the floor.

[6] The appellant's version of events was very different. The appellant claims that the sexual activity was all consensual. According to the appellant, the sexual intercourse was consensual, as was the cutting off of the body suit. He claims

that he accidentally cut the complainant's finger in the process. He denies causing any intentional injury to the complainant whatsoever.

[7] Evidence was presented at trial of cuts and scratches to the complainant's neck, swelling around her eye, a laceration to her finger, and bruising on her legs. There was also evidence that the complainant suffered psychological harm as a result of the incident.

[8] The defence alleged that the complainant was not credible, as she admitted in cross-examination that she had lied under oath in court in the past after accusing a man of sexually assaulting her and that she lies when it is in her interest to do so. The complainant testified that she had lied under oath because the man she had accused of sexual assault was the father of her daughter and he had threatened to take away her daughter and harass her family if she testified against him.

[9] Two further pieces of evidence are relevant to this appeal. First, the complainant testified that, prior to the night in question, the appellant had sent her several text messages trying to convince her to go out with him. In one of those text messages, the complainant testified that the appellant said, "I don't take no", which she interpreted as meaning that he would not take no for an answer. Second, the complainant testified that, while she was at the appellant's

residence on the night of the incident, he said to her, “I kill people for fun, I kill people for money.”

(2) The Charge to the Jury

[10] After the three-week trial, the jury was charged on March 12, 2012. The trial judge provided the jury with general instructions on their duties as triers of fact, the presumption of innocence, reasonable doubt, and assessment of evidence. She outlined the Crown’s theory of the case followed by the defence’s position. She provided a chronology of the facts which made reference to Crown and defence evidence. She then instructed the jury on the elements of each count.

[11] The trial judge organized her charge on the counts in a somewhat unusual fashion. Rather than going through them sequentially, she began with the counts she considered unrelated – count two: uttering a death threat; count three: attempted choking; and count four: unlawful confinement – and then proceeded with the counts she considered related – count six: aggravated sexual assault; count five: sexual assault causing bodily harm; the lesser and included offence of sexual assault; and count one: assault with a weapon.

[12] In respect of counts six and five (aggravated sexual assault and sexual assault causing bodily harm), the trial judge instructed the jury that the defence of consent was not available for those counts if they were satisfied that the

appellant both intended to cause and did cause bodily harm to the complainant. Rather, consent would only be a defence if the jury reached the lesser included offence of sexual assault:

> The defence of consent is not available to [the appellant] if you conclude that the Crown has proved beyond a reasonable doubt that [the appellant] both intended and caused the harm contemplated in either Count 6 or in Count 5.
>
> The defence of consent is relevant to your considerations only with respect to the lesser included offence of sexual assault, if you conclude that the Crown has not proved the charges against [the appellant] in either Count 6 or Count 5.

[13] On the count of sexual assault causing bodily harm, the jury was instructed that, in order to find the appellant guilty of sexual assault causing bodily harm, it had to be satisfied beyond a reasonable doubt:

> 1. [that the appellant] intentionally applied force to [the complainant];
>
> 2. that the force [the appellant] intentionally applied caused bodily harm to [the complainant];
>
> 3. that the force intentionally applied took place in circumstances of a sexual nature, and;
>
> 4. that [the appellant] intended to cause the bodily harm to [the complainant].

[14] The trial judge did not list lack of the complainant's consent as an element of the offence of sexual assault causing bodily harm.

[15] With respect to the element of intentional application of force, the trial judge listed the forms of force that the Crown relied on in relation to this count and instructed the jury that, in order to constitute an assault, the intentional application of force must have been against the complainant's will. Further, the trial judge instructed the jury that if it was not satisfied that the appellant had intentionally applied one of the forms of force relied on by the Crown, then it must acquit the appellant:

> The Crown alleges that [the appellant] intentionally applied force by using a knife or scissors to her neck, causing laceration or lacerations, or by attempting to choke her with his hands, and two additional items of evidence in Count 5, or by punching her in the left eye area or by forcing her legs or pinning her legs in a painful position against her wishes.
>
> …
>
> To be an assault, [the appellant] must apply the force intentionally and against [the complainant]'s will.
>
> …
>
> If you are not satisfied beyond a reasonable doubt that [the appellant] intentionally applied force to [the complainant] by using one of a knife or scissors held to her throat, or his hands to choke or attempt to choke her, or by causing an injury to her left eye, or by pinning her legs against her will, you must find [the appellant] not guilty of [sexual assault causing bodily harm]. [Emphasis added.]

[16] On the element of bodily harm, the jury was instructed that the following evidence could be used to satisfy them that bodily harm was caused:

photographs and other evidence of lacerations to the complainant's throat or neck area, photographs showing redness to the complainant's neck, evidence of physical injuries to the face and bruises to the legs of the complainant, and evidence of psychological harm caused to the complainant. With respect to psychological harm, the trial judge stated:

> The evidence of [the complainant's] mother and [the complainant] is that psychological harm has been far more enduring and debilitating than any physical injury. [The complainant] described how she had to move back home, how she imagined hearing knocking at the door, and that she has lost her ability to trust people. Her mother describes her to this day as "closed up".

[17] The jury was told: "you do not all need to agree on the kind of bodily harm, as long as each of you concludes that the Crown has proved beyond a reasonable doubt that either physical or psychological harm that was more than fleeting or minor in nature was caused by the force that [the appellant] applied".

[18] Concerning the element of the sexual nature of the application of force, the trial judge instructed the jury that "[s]exual assault is any intentional application of force which occurs in circumstances of a sexual nature, such that the sexual integrity of the complainant is violated," and that "[s]exual integrity is violated by any act that is meant to degrade or demean."

[19] On the element of subjective intent to cause bodily harm, the trial judge referred to bodily harm generally and did not differentiate between physical and psychological harm.

(3) Grounds of Appeal

[20] The appellant appeals from his convictions and seeks leave to appeal his sentence. With respect to the convictions, duty counsel argues on the appellant's behalf that the trial judge made three errors:

1. The trial judge erred in instructing the jury on consent and intention to cause bodily harm with respect to the charge of sexual assault causing bodily harm;
2. The trial judge erred by failing to provide a limiting instruction on bad character evidence; and
3. The trial judge presented an unbalanced jury charge.

[21] With respect to the sentence appeal, duty counsel argues that the trial judge erred by failing to give credit for pre-sentence custody on a ratio of 1.5:1, as well as by failing to make independent determinations of fact consistent with the jury's verdict.

C. ISSUES AND ANALYSIS

(1) Jury instruction on sexual assault causing bodily harm

(a) Positions of the Parties

[22] On behalf of the appellant, duty counsel argues that the trial judge did not sufficiently emphasize the element of consent in the charge to the jury on the

count of sexual assault causing bodily harm. The trial judge did not list lack of consent as one of the required elements of the offence, as she was required to do according to the fifth step of the instruction set out in *R. v. Zhao*, 2013 ONCA 293, 297 C.C.C. (3d) 533, at para. 107. Duty counsel argues that consent should have been prominent in the instruction because the presence or absence of consent was the key factual dispute in the case. She argues that while consent may be negated by intentionally caused bodily harm under the rule in *R. v. Jobidon*, [1991] 2 S.C.R. 714, psychological harm, which was put to the jury, cannot negate consent in the same way. Further, the trial judge failed to refer specifically to psychological harm on the element of intent to cause bodily harm.

[23] The respondent agrees with the appellant that the trial judge omitted the fifth step of *Zhao*, but the respondent argues that this was to the appellant's benefit. The fifth step of *Zhao* is a second path to conviction in cases in which the jury is not satisfied beyond a reasonable doubt that the accused subjectively intended to cause bodily harm. By omitting this instruction, the trial judge closed off a potential route to conviction, which could not have prejudiced the appellant. Counsel for the respondent submits, further, that psychological harm is a form of bodily harm that may negate consent when it is subjectively intended and caused. Further, although psychological harm was put to the jury, the bulk of the evidence of harm was of physical harm; this was not a case that rested solely on psychological harm.

(b) Analysis

(i) Adequacy of the trial judge's instructions on lack of consent

[24] In *Zhao*, at para. 107, this court provided guidance to trial judges on the proper instruction to juries on the offence of sexual assault causing bodily harm:

> 1. The jury must be satisfied beyond a reasonable doubt that the accused intentionally applied force to the complainant.
>
> 2. The jury must be satisfied beyond a reasonable doubt that the intentional application of force to the complainant took place in circumstances of a sexual nature such as to violate the complainant's sexual integrity.
>
> 3. The jury must be satisfied beyond a reasonable doubt that the intentional application of force in circumstances of a sexual nature caused bodily harm.
>
> 4. If in addition to the above three criteria, the jury is satisfied beyond a reasonable doubt that the accused intended to inflict bodily harm upon the complainant (a subjective criterion), then consent is irrelevant, and the accused would be found guilty of sexual assault causing bodily harm.
>
> 5. If the jury is not satisfied beyond a reasonable doubt that the accused intended to cause the complainant bodily harm, then they would need to go on to consider whether they are satisfied beyond a reasonable doubt that the complainant did not consent to the intentional application of force by the accused.

[25] A finding of guilt under the first four steps set out in *Zhao* does not require that a jury make a finding of lack of consent. This follows from the rule in *Jobidon* that a person cannot legally consent to intentionally inflicted bodily harm. The fifth

step of *Zhao* represents an alternative path to conviction. Under the fifth step, if the jury is not convinced that the accused subjectively intended to cause the bodily harm, it may nevertheless find the accused guilty of sexual assault causing bodily harm if it is satisfied that the complainant did not consent to the intentional application of force and that the risk of bodily harm was objectively foreseeable: *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 961; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. S.(F.)*, (2006) 262 C.C.C. (3d) 472 (Ont. C.A.), at para. 28.

[26] *Zhao* was decided after this case was tried. As a result, the trial judge could not have given the five-step *Zhao* instruction set out above. However, as I will explain below, a review of the charge in its entirety reveals that the trial judge made it clear to the jury that to find the appellant guilty of sexual assault causing bodily harm it had to be satisfied that the appellant intentionally applied force to the complainant against her will. Based on the trial judge's instructions, the jury in this case must have found lack of consent. It was therefore unnecessary that the jury also find a subjective intention to cause bodily harm; rather, all that was necessary was a finding that the risk of bodily harm was objectively foreseeable.

[27] The following review demonstrates that the trial judge made it clear to the jury that to find the appellant guilty of sexual assault causing bodily harm, it had to be satisfied that the appellant intentionally applied force to the complainant against her will. On the element of "intentional application of force", the trial judge stated: "To be an assault, [the appellant] must apply the force intentionally and

against [the complainant]'s will". If the force was applied against her will, it was applied without her consent.

[28] Further, the trial judge pointed out that the types of force identified by the Crown as constituting an intentional application of force were not consistent with the complainant's consent: a knife or scissors held to her throat; attempted choking; punching her in the left eye, or pinning her legs in a painful position against her wishes:

> If you are not satisfied beyond a reasonable doubt that [the appellant] intentionally applied force to [the complainant] by using one of a knife or scissors held to her throat, or his hands to choke or attempt to choke her, or by causing an injury to her left eye, or by pinning her legs against her will, you must find [the appellant] not guilty of [sexual assault causing bodily harm].

[29] That the trial judge intended to limit the jury's consideration to these forms of force for the purposes of the sexual assault causing bodily harm count is also made clear by her instructions on intentional application of force in relation to sexual assault *simpliciter*:

> The force in relation to this count is in relation to the sexual activity, as compared to Counts 6 and 5 where the force is in relation to the knife or the scissors or [the appellant]'s hands on the complainant's throat or a punch to the face.

[30] The defence's position was that the complainant consented to sexual intercourse and that there was no physical violence. According to the defence, any injury to the complainant was purely accidental. The Crown's position was

that the complainant did not consent. As stated by defence counsel in pre-charge discussion:

> I think it would be ridiculous for me to stand up in front of a jury to say if he held a knife to her throat she consented. That wouldn't make any sense.
>
> …
>
> This isn't – it's not a situation where we're raising some kind of S and M type of scenario. This is very simplistic. Our position is there was no knife and if the jury finds there was a knife held to her neck I think we're done.

[31] Neither party asked the jury to conclude that the complainant consented to any form of physical violence, including a knife or scissors being held to her throat, causing injury to her left eye, or "pinning her legs against her will". Indeed, in charging the jury on the third element of the offence of sexual assault causing bodily harm – "that the force intentionally applied took place in circumstances of a sexual nature" – the trial judge stated:

> It is acknowledged by the defence that vaginal intercourse took place. The defence does not dispute that <u>if the sexual intercourse was not a voluntary act of [the complainant] due to the presence of a knife or scissors</u>, or because [the appellant] was choking her or that he had punched her in the face or that he intentionally pinned her legs in a painful position against her will, that one of these acts violates the sexual integrity of the complainant. [Emphasis added.]

[32] It is obvious from the jury's verdict on the assault with a weapon count that they were satisfied beyond a reasonable doubt that the appellant held a knife or scissors to the complainant's throat without her consent. In that regard, I note

that the trial judge's instructions on that count included lack of consent as an element along with intentional application of force. The trial judge noted in the instruction on consent on the count of assault with a weapon that "[t]he defence does not dispute that if you conclude that a knife or scissors were held to [the complainant]'s throat, that it was done without her consent."

[33] Based on the portions of the charge excerpted above, I conclude that the jury could not have found the appellant guilty of sexual assault causing bodily harm unless every jury member was convinced beyond a reasonable doubt that there was no consent.

(ii) The appellant was not prejudiced by the omission of the fifth step in the jury instruction in *Zhao*

[34] The argument that the trial judge erred by omitting the fifth step of the jury instruction in *Zhao* cannot succeed. As I have said, this case was tried prior to this court's decision in *Zhao*. The fifth step of *Zhao* is an alternative path to conviction used when a jury is not convinced that an accused subjectively intended the bodily harm caused. While it would have been advisable for the trial judge to have included the fifth step of *Zhao* in her charge, in the particular circumstances of this case, the omission of an alternative path to conviction did not prejudice the appellant.

(iii) The role of psychological harm

[35] Psychological harm resulting from sexual assault may constitute bodily harm: *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 34. Section 2 of the *Criminal Code* defines “bodily harm” as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”. In *McCraw*, at p. 81, the Supreme Court of Canada held that the words “any hurt or injury” are “clearly broad enough to include psychological harm.”

[36] The appellant asks us to decide that psychological harm can never negate consent and therefore the jury must always find lack of consent when psychological harm is put to the jury as a path to conviction under the *Zhao* instruction. The appellant alternatively argues that psychological harm cannot negate consent unless the appellant had a specific subjective intention to cause psychological harm.

[37] I find that it is not necessary to decide these issues, since it is apparent that the jury was convinced that the complainant did not consent. In this case, I need not determine whether and in what circumstances psychological harm can negate consent, because there was no consent to negate. I see no substantial wrong in the trial judge's failure to instruct the jury on the objective foreseeability of a risk of bodily harm in light of the trial judge's instruction that the jury must be

satisfied of a higher threshold – namely, that the appellant subjectively intended to cause bodily harm.

(2) Failure to provide a limiting instruction

[38] The jury trial was scheduled for three weeks. It began on Monday, February 27, 2012 with 11 jurors present, as one of the jurors who had been selected was sick. On the second day of trial, another juror was sick. The trial judge asked the jury to deliberate on whether the jury wished to proceed with ten jurors or wait until the next day to see if the sick juror recovered. The jury expressed a desire to wait until the next day and work longer hours in order to finish within the three weeks scheduled for the trial. Accordingly, the trial judge instructed the jury:

> [T]he staff will let you know when to be here and then I'm going to ask for a supervisor and make sure we get [the appellant] here on time tomorrow. Okay. Thank you very much, ladies and gentlemen. Our apologies. It's just life.

[39] When the jury retired, defence counsel told the trial judge, "Your Honour just now on two occasions telegraphed to the jury that my client is in custody." Defence counsel requested a mistrial, arguing that the jury was not entitled to know that the appellant was in custody, and that defence counsel had taken steps to ensure that the jury was not aware of that fact. The trial judge declined to grant a mistrial but offered to make a statement to the jury. Defence counsel stated, "Your Honour is talking about making a statement. My position is it should

be a mistrial. If Your Honour is declining that remedy then I would prefer you say nothing at all."

(a) Positions of the parties

[40] Duty counsel for the appellant does not argue that the trial judge erred in failing to declare a mistrial. However, she submits that the trial judge erred by failing to provide a limiting instruction with respect to the inference before the jury that the appellant was in custody and with respect to two other pieces of what she contends was bad character evidence. The first additional piece of evidence was the complainant's evidence that the appellant sent her a text message in the month before the offence, saying, "I don't take no", which she interpreted to mean "I don't take no for an answer". Second, the complainant testified that on the night in question, the appellant said, "I kill people for fun, I kill people for money."

[41] In calling on the respondent, we indicated that this issue was not a focus of our concerns and the respondent did not make submissions on this point.

(b) Analysis

[42] In my view, it was unnecessary that the trial judge provide a limiting instruction on bad character evidence in the circumstances of this case. The appellant's trial counsel not only did not request such an instruction, he

specifically asked the trial judge not to comment on the revelation that the appellant was in custody.

[43] As for the other two pieces of evidence, the “I don’t take no” evidence was ambiguous and the appellant denied sending the text which allegedly contained that statement. The “I kill people” evidence was part of the evidence relied on by the Crown in support of the uttering death threats charge. The Crown relied on the statement for its intimidating effect and not for the truth of its contents.

[44] Had the trial judge given a limiting instruction concerning the latter two pieces of evidence, it could have been damaging to the appellant by drawing attention to the potentially prejudicial aspects of the evidence. Counsel had the opportunity to make submissions on the charge in a pre-charge conference. In the absence of a request for such an instruction from experienced defence counsel, I am not persuaded that the appellant suffered any prejudice through the absence of such an instruction. This ground of appeal is rejected.

(3) Unbalanced jury charge

(a) Positions of the Parties

[45] Duty counsel on behalf of the appellant submits that the jury charge was unbalanced because it overemphasized the Crown’s evidence in comparison to the defence’s evidence. The appellant submits that the charge did not meet the legal standard of understanding the value and effect of the evidence, as required

in *R. v. Azoulay*, [1952] 2 S.C.R. 495. As an example, duty counsel points to the charge on unlawful confinement which provided a long explanation of the Crown's evidence followed by a brief statement that the appellant denies this evidence. The appellant also submits on his own behalf that the charge was unbalanced as it ignored key defence evidence and did not include evidence of the weaknesses in the complainant's credibility.

[46] The respondent submits that the charge was balanced. The defence's theory of the case was put to the jury over 16 pages of transcript. The Crown's theory took up approximately 18 pages. Then the trial judge provided a "chronology" of events, which related both Crown and defence evidence to the jury. The instruction on each count consisted of mainly legal instruction. Both Crown evidence and defence evidence were mentioned briefly on each count. The respondent submits that when read as a whole, on a functional approach, this charge was balanced.

(b) Analysis

[47] The jury charge met the legal requirement to "review the *substantial* parts of the evidence and give the jury the position of the defence so that the jury may appreciate the value and effect of that evidence and how the law is to be applied to the facts as it finds them": *R. v. Huard*, 2013 ONCA 650, 311 O.A.C. 181, at para. 53 (emphasis in original). It cannot be the case that the amount of time

spent reviewing the parties' evidence must be exactly equal. Neither *Huard* nor *Azoulay* imposes such a strict requirement. The appellant raises *R. v. Baltovich* (2004), 73 O.R. (3d) 481, at paras. 112-119, in which this court found that a jury charge was unbalanced. However, the jury charge in *Baltovich* "unduly promoted the case for the Crown and effectively ignored and denigrated the case for the defence" (at para. 113). As long as the substance of the defence position was put to the jury, the fact that the trial judge spent more time on Crown evidence than on defence evidence is not a sufficient basis to find that the charge was unbalanced. The trial judge reviewed the defence evidence during the sections of the charge on the "theory of the case" and the "chronology". Then, the trial judge briefly reviewed the relevant evidence during the instruction on particular counts. The jury would have appreciated the value and effect of the defence evidence.

(4) Sentence appeal

(a) Positions of the Parties

[48] Duty counsel submits that it was an error to fail to give 1.5:1 credit for 19 months of pre-sentence custody. Additionally, duty counsel submits that the sentencing judge failed to make independent determinations of fact that were consistent with the jury's verdict. The trial judge left many paths to conviction open to the jury; however, on sentencing, she assumed that the appellant was convicted on all of those bases.

[49] The respondent argues that enhanced credit is not appropriate in this case in light of *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575. In that case, Karakatsanis J. stated at para. 79 that the onus is on the offender to justify an award of enhanced credit and "if the accused's conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit". Mr. Nelson has had three incidents of discipline while in jail. This justifies denying enhanced credit.

[50] Duty counsel argues in reply that these disciplinary incidents did not rise to the level of matters that would result in someone being denied parole.

(b) Analysis

(i) Credit for pre-sentence custody

[51] The Supreme Court recently told us in *Summers* at para. 79, that "[t]he onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention." While defence counsel did not request enhanced credit in submissions on sentencing, this is not determinative.

[52] Justice Karakatsanis continued at para. 79:

> Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the Crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom

> early release and parole are simply not available. Similarly, if the accused's conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process.

[53] The appellant spent 19 months in pre-sentence custody. According to *Summers*, this will generally be sufficient to justify enhanced credit. The respondent has not successfully challenged the inference that the appellant has lost eligibility for early release or parole. The respondent raised three incidents for which the appellant was disciplined while in custody. However, the respondent has not convinced me that these incidents are sufficiently serious such that the appellant, a first-time offender, would be denied early release or parole. Additionally, the sentencing judge relied on these disciplinary actions as an aggravating factor in sentencing. Just as Karakatsanis J. explained, at paras. 81-83 of *Summers,* that mitigating factors related to the circumstances of the offender cannot be "double count[ed]" to justify enhanced credit, aggravating factors should not be double counted either.

[54] The appellant was entitled to credit for pre-sentence custody at a ratio of 1.5:1.

(ii) Consistency of findings of fact on sentencing with verdicts

[55] Contrary to the submissions of the appellant, the sentencing judge did not assume that the jury convicted the appellant on all of the bases put to it.

[56] Under s. 724(2)(a)-(b) of the *Criminal Code*, a sentencing judge must accept as proven all facts that are essential to the jury's guilty verdict, and may find other relevant facts disclosed by evidence at trial. A sentencing judge is not permitted to make findings of fact that are "consistent only with a verdict rejected by the jury": *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 17. The appellant relies on *R. v. Cooney* (1995), 80 O.A.C. 89 (C.A.), to argue that where the factual basis for a jury verdict is uncertain, the sentencing judge must assume that the jury took the most lenient path to conviction. However, this view is inconsistent with the Supreme Court's decision in *Ferguson* and was expressly rejected in *R. v. Roncaioli*, 2011 ONCA 378, 271 C.C.C. (3d) 385, at para. 59.

[57] While the sentencing judge's findings of fact did not represent the minimum facts on which the jury could possibly have reached a guilty verdict, no finding of fact made on sentencing was consistent only with a verdict rejected by the jury. Notably, the sentencing judge did not find as a fact that the appellant had attempted to choke the complainant, and therefore there is no inconsistency with the acquittal on attempted choking.

[58] Nor were the findings of fact on sentencing inconsistent with the jury's acquittal on aggravated sexual assault. The sentencing judge appeared to be satisfied that the appellant held a knife or scissors to the complainant's throat. While this finding of fact would have been consistent with a finding of guilt on aggravated sexual assault, it is also consistent with an acquittal. The jury may

have acquitted on that count because it was not satisfied that the appellant intended to wound or endanger the life of the complainant. It is not clear how the jury reached its acquittal on aggravated assault; however, a sentencing judge "should not attempt to follow the logical process of the jury": *Ferguson*, at para. 18.

[59] A finding that a knife or scissors was held to the complainant's throat is clearly consistent with the jury's finding of guilt on the charge of assault with a weapon. The sentencing judge properly made her own findings of fact on sentencing. No finding of fact was inconsistent with the verdict.

D. DISPOSITION

[60] The conviction appeal is dismissed. I would grant leave to appeal sentence and vary the sentence by allowing credit for pre-sentence custody on a 1.5:1 basis. Otherwise, the sentence appeal is dismissed. In the result, the appellant's sentence is varied to 5 years' imprisonment less 28.5 months' credit for pre-sentence custody. All other terms of the sentence imposed remain in full force and effect.

Released: "MT" December 1, 2014

"M. Tulloch J.A."
"I agree. J. Simmons J.A."
"I agree. P. Lauwers J.A."