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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 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, c. 43, s. 8;2010, c. 3, s. 5;2012, c. 1, s. 29.

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. F.C., 2015 ONCA 191
DATE: 20150324
DOCKET: C57450

Watt, Pepall and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

F.C.

Appellant

Anne Marie Morphew, for the appellant

Amanda Rubaszek, for the respondent

Heard: January 28, 2015

On appeal from the conviction entered on March 4, 2013 by Justice J. Peter Wright of the Ontario Court of Justice.

Pepall J.A.:

Introduction

[1] The appellant, F.C., was convicted of one count of sexual assault and one count of sexual interference against his step-granddaughter, G.L. ("the child"). At the time of the offence, she was five years old and he was 45.

[2] The case turned on credibility. The trial judge gave brief reasons for decision. The appellant advances four grounds of appeal but places particular emphasis on his claim that the trial judge's reasons were inadequate. The remaining three grounds of appeal are that the verdict was unreasonable, the trial judge misapprehended the evidence, and he erred in the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[3] For the reasons that follow, I would dismiss the appeal.

Background Facts

[4] The appellant is married to L.C. Together, they have one child C.C. who, at the time of the offence, was 10 years old. L.C. also has a daughter, T.L., from a previous relationship. T.L. has three children, one of whom is the complainant.

[5] In June and August of 2011, the child spent time at the home of the appellant and L.C. On the first occasion, the child and her brother stayed overnight and on the second occasion, the child stayed for four days commencing Tuesday, August 23, 2011.

[6] On September 5, 2011, the child's family was having toast with peanut butter, and a suggestion was made that they bake some peanut butter cookies. The child then said to her mother, T.L., that Grandpa F.C. had done something gross. Her mother asked what Grandpa had done. The child answered "C'est trop dégueulasse, peux pas dire [*sic*]" which was translated by T.L. to mean "It's

too gross, I can't say." The child looked pretty serious to T.L. So that others could not hear, T.L. asked the child if she would tell her in her ear. The child agreed and said "Grandpa F. a lucher [*sic*] ma pitoune" which meant he had licked her vagina.

[7] T.L. brought the child into another room and asked her to repeat what she had said. She responded that Grandpa F.C. licked her vagina, it tickles. T.L. asked where she had been and the child responded that they were upstairs but it was okay because they closed the door so Grandma would not know. T.L. asked where C.C. was when this happened and the child responded "she was downstairs, she was gone camping." T.L. told her daughter that it was okay and that she had done nothing wrong. The child then said that he had put peanut butter on her vagina and it tickled.

[8] T.L. then called her mother, L.C., and advised her of the child's comments. L.C. said nothing and hung up the telephone. A few hours later, L.C. called T.L. and told her that it had not happened and that the child had walked in on the appellant while he was watching a pornographic movie.

[9] The next day, T.L. took the child to the police station, where she was interviewed. In the interview, the child stated:

- that sometimes F.C. touches her pee-pee with his hands (and she illustrated how);
- he lowers her pants a little bit;

- it's ticklish;
- sometimes they go in the bathtub together;
- her grandmother was downstairs playing on the computer and C.C. was watching TV;
- "sometimes he licks my pee-pee. Sometimes he puts – he put peanut butter on my pee-pee. I said all that";
- they were in his room and "he locked the door so nobody knows";
- the appellant would take the peanut butter upstairs and put it on his dresser;
- they would do tippy-toes into the bedroom;
- to remove the peanut butter, they were in the tub; and
- he licked her private parts without the peanut butter.

[10] At trial, the videotaped statement of the child was admitted into evidence. The statement was also adopted by the child at trial. In addition, T.L. testified for the Crown. The trial took three days.

[11] At trial, the child stated that peanut butter had got onto her underwear. She testified that when she and her grandfather were in the tub, the bathroom door was closed. She said that both she and the appellant had taken their clothes off and put them away in their respective rooms and went back to the bathroom. The bath included games, talking, laughing and splashing each other. Afterwards, the

child partially dried her hair, changed into a new outfit, and went to see L.C. in the living room where the child then started to watch television.

[12] The child testified that she had once seen a movie at her own home where they showed private parts but she had never seen a movie like that at Grandpa F.C.'s home. She identified the private parts she had seen by motioning to the top of her chest. She said she had never seen a movie where a man was licking a woman's "pitoune".

[13] T.L. testified at trial that prior to the child's disclosure, the child was "kinda acting out a bit – she was having nightmares and kept saying she was scared". T.L. acknowledged that there might be other explanations for this behaviour but it stopped after the disclosure.

[14] The defence called the appellant, the appellant's wife L.C., and R.C., who is the appellant's nephew and godchild.

[15] The appellant denied the child's allegations. He testified that on Tuesday, August 23, L.C. went with the child for fish and chips and the appellant ate dinner at home. Then he walked the dog for an hour and a half, or two hours and he did not see the child again that evening. The appellant did not recall being alone with the child at any time during that August week.

[16] The appellant testified that at some point, he could not remember when, the child walked in on him while he was watching a pornographic movie. I will

return to this incident below, when I discuss the contradictions between F.C.'s account of this incident and the testimony provided by L.C.

[17] R.C. testified that after dinner, he would usually go to the park with the appellant to take the dog for a run for "usually about an hour." He admitted under cross-examination that he had no specific recollection of what happened during the week of August 22, and that all of his answers were based on the appellant's general routine.

[18] L.C. would spend a lot of time playing games on her computer which was located in the living room. She commenced playing between 5:30 and 6:00 a.m., and continued playing until 7:00 a.m. She played again in the afternoon when the daycare children she supervised were in bed and then again at night on and off for an hour and a half. From her computer, she could see the stairs to the upper level of the house, and she would be able to hear a bath being drawn. She testified that during the last week of August, she did not see the appellant and the child go upstairs together.

[19] She said that the appellant started work at 7:30 a.m. and got home between 4:30 and 5:00 p.m. After supper, he would walk the dog for an hour or two or sometimes three hours.

[20] She did not recall washing any of the child's underwear that had peanut butter on it, seeing the child with unexplained wet hair, seeing a wet bathroom

without knowing who had taken a bath, or noticing that the child had changed her outfit.

[21] L.C. testified that the house was old and the floors would creak when people walked. The child was heavy and she could hear her. L.C. initially asserted that she knew where the child was at every moment of every day, however, under cross-examination, she acknowledged numerous specific occasions when she, in fact, did not know the child's location. For example, L.C. acknowledged that she did not know where the child was when the child walked in on the appellant when he was watching the pornographic movie. She also acknowledged that she would have no reason to monitor whether her husband was alone with the child.

[22] The evidence of the appellant and L.C. differed on a number of issues including the issue of the pornographic movie incident. The appellant said he took the movie from a bunch on the table downstairs. The DVD looked like *Pirates of the Caribbean*. He took it upstairs to watch and left his bedroom door open. When the "porn stuff" started, the child had walked in on him. He had turned the television off and told no one of the incident until he had to explain the child's allegations against him. The event occurred in the morning right before he went to work, around 6:30 a.m.

[23] In contrast, while she buys porn movies for friends, L.C. said there was only one pornographic movie in the house and it was kept on the top of the wall unit in her bedroom. She thought the label was entitled “Lady” something and had two women on it. It was clearly not a child’s movie, which was why it was in her bedroom. L.C. testified that she had never seen her husband watching a movie before going to work and that he would not watch movies in the morning. She would know because she knew what was going on in the house.

[24] Other inconsistencies between the appellant’s evidence and that of L.C. related to opportunity. The appellant repeatedly testified that he never went into the house during his work day; he would wait outside and L.C. would bring him his lunch. In contrast, L.C. testified that he would come in and grab something to eat or drink. While this is a small detail in and of itself, the accused’s adamant denials that he ever entered the house at lunch time were flatly contradicted by his own spouse’s evidence, becoming yet another example of the inconsistencies.

[25] L.C.’s evidence or recollection differed from that of the child. She testified that the child had never been alone with the appellant; she was always with L.C. or C.C. L.C. also testified that:

- she had daycare kids at the house in June and August from 6:00 a.m. or 6:30 a.m. until between 5:00 p.m. and 6:00 p.m.;

- the appellant had never given the child a bath;
- L.C. would hear a bath if she were in the living room;
- she buys large (two-kilogram) jars of Kraft peanut butter with a green label and lid;
- she has never seen the appellant take the peanut butter upstairs with the child;
- she does not remember washing any underwear with peanut butter the week the child was there and peanut butter is something she would notice because she sprays her underwear;
- she did not notice the child having wet hair without knowing why. She would notice because she is the one who washes and combs the child's hair.
- she also did not notice a wet bathroom or that the child had changed her outfit, both being things she would have noticed.

Submissions of Counsel at Trial

[26] In closing submissions, both counsel commenced their submissions by stating that this was a *W.(D.)* case or situation. The trial judge inquired about the wet hair evidence and the presence or absence of C.C. C.C. had gone camping on Tuesday and returned on Thursday.

Reasons for Judgment

[27] The trial judge gave oral reasons for judgment. They were very brief, consisting of only five pages of transcript. Like counsel in their closing submissions, he commenced his reasons with the need to be mindful of, and to

follow, the principles of *R. v. W.(D.)*. He reviewed T.L.'s evidence, the video, the child's examination-in-chief, and cross-examination. He noted the ambiguity relating to the presence of C.C. at the home. He concluded that the child's account had the ring of truth. He then turned to the defence evidence noting that it consisted of that of the appellant, L.C., and R.C. He identified the defence as being one of denial and lack of opportunity. He found the appellant not to be credible and that his evidence did not raise a reasonable doubt.

[28] He then considered the totality of the evidence. He specifically addressed the child's evidence that her hair was wet following the bath. He concluded that it was not clear how wet her hair would have been or when the incident took place. It was also not clear that L.C. would have noticed the child's wet hair. Further, he found that it was "equally clear that there would have been opportunities, given the contradictions in the evidence between [the appellant] and his spouse." Additionally, he found that L.C. had no issue leaving the appellant alone with the child. He was satisfied that the criminal standard had been met and that the Crown had proved the essential elements of the offences beyond a reasonable doubt.

Analysis

(1) Sufficiency of Reasons

[29] As mentioned, the inadequacy of the trial judge's reasons was the appellant's primary ground of appeal.

[30] While the reasons were short and it would have been preferable had the trial judge analyzed the evidence in greater detail, his reasons satisfied the requisite threshold. As explained in *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, the reasons, read in context, showed why the trial judge decided as he did.

[31] The trial judge found the evidence of the child to be credible and reliable and that it had the ring of truth. There was ample support for this finding. Moreover, he was alive to issues relating to frailties in the child's evidence such as the evidence surrounding her wet hair and the whereabouts of C.C. Furthermore, he was not obliged to discuss all of the evidence on any given point: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 32, and 64; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 30; and *Vuradin*, *supra*, at para. 21.

[32] He addressed the appellant's credibility. He clearly rejected the appellant's denial and concluded that his evidence did not raise a reasonable doubt.

[33] Turning to R.C.'s evidence, it did not require further comment in the reasons. R.C. himself admitted that he had no specific memory of the relevant time period.

[34] As for L.C.'s testimony, although the trial judge was indirect in his treatment of her evidence, he clearly considered it. This is evident from his findings on opportunity and on the child's wet hair. The only two witnesses who testified on the issue of the child's wet hair were L.C. and the child. Moreover, the trial judge also commented on the contradictions between L.C.'s testimony and F.C.'s testimony. Read in context, the trial judge's reasons revealed that he rejected L.C.'s evidence where it conflicted with the child's, and that the evidence led at trial, in totality, did not raise a reasonable doubt.

[35] As stated by Karakatsanis J. in *Vuradin*, supra, at para. 12:

> Ultimately, appellate courts considering the sufficiency of reasons "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": *R.E.M.*, at para. 16. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did" ([*R.E.M.*] para. 17).

[36] I would not give effect to this ground of appeal. In oral argument, the appellant did not press his remaining grounds of appeal. Nonetheless, I will briefly address each of them.

(2) Reasonableness of Verdict

[37] The appellant's second ground of appeal is that the verdict was unreasonable and not supported by the evidence.

[38] In considering this ground of appeal, an appellate court is to determine whether, on the whole of the evidence advanced at trial, the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered. The appellate court should ask whether there is evidence in the record to support the verdict and whether the verdict conflicts with the bulk of judicial experience: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 36 and 40.

[39] In applying the unreasonable verdict test, the Supreme Court has stated that the Court of Appeal "must re-examine and to some extent at least, reweigh and consider the effect of the evidence… that said, in applying the test, the Court of Appeal should show great deference to findings of credibility made at trial": *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at p. 131.

[40] Moreover, as noted by McLachlin J. (as she then was) at p. 132 of *W.(R.)*, while the requirement that a child's evidence be corroborated has been removed, this does not prevent a judge from treating a child's evidence with caution. The standard of proof is not to be lowered: *R. v. B.(G.)*, [1990] 2 S.C.R. 3. That said, a child's evidence should not be discounted automatically. As McLachlin J. observed in *W.(R.)*, *supra*, it may be wrong to apply an adult's test for credibility

to the evidence of children. Details important to adults may be missing from a child's recollection.

[41] Here, the findings made were clearly available based on the evidence before the trial judge. The child's evidence at trial and her video interview were compelling and indeed did have the "ring of truth" as found by the trial judge. She made a spontaneous report to her mother. Her evidence on such things as walking on tippy-toes and the locking of the bedroom door serve to render her testimony believable. While there were inconsistencies between her and L.C.'s evidence on such things as the colour of the peanut butter jar, these facts were peripheral in nature. As evident from his comments on the child's wet hair and opportunity, the trial judge rejected L.C.'s version of events when it conflicted with that of the child.

[42] The trial judge's findings were supported by the record. The verdict was reasonable. I would not give effect to this ground of appeal.

(3) Misapprehension of Evidence

[43] Thirdly, the appellant submits that the trial judge misapprehended the evidence with respect to the presence of C.C., opportunity, and the child's wet hair.

[44] I disagree.

[45] First, the trial judge found ambiguity in the child's statements concerning C.C.'s whereabouts at the relevant time. His appreciation of this evidence was available on the record before him including the child's video statement and cross-examination.

[46] Secondly, the trial judge found that there would have been opportunities for the appellant to be alone with the child. This finding was supported by the evidence, given the contradictions between the testimony of the appellant and L.C. Furthermore, L.C. testified that she had no reason to worry about the appellant being alone with the child and she did not know where the child was every moment of the day. Significantly, the child testified that she did not tell L.C. that she was going to take a bath and did not see L.C. before the bath. In my view, the trial judge did not misapprehend the evidence on opportunity.

[47] Thirdly, the same is true with respect to the evidence of the child's wet hair. The trial judge noted that the child said that her hair was wet after the bath. He correctly found that it was unclear how wet her hair would have been. The child testified that the appellant had splashed water on her hair and she had taken a towel and rubbed it on her hair. The trial judge reasonably found that it was not clear that L.C. would have noticed. Again, there was no misapprehension of the evidence by the trial judge.

(4) Application of the *R. v. W.(D.)* Principles

[48] Lastly, the appellant submits that the trial judge erred in his application of *R. v. W.(D.)*.

[49] The trial judge commenced his reasons with a discussion of the *W.(D.)* principles. The appellant does not allege that the trial judge's articulation of the principles was in error. The trial judge addressed the application of the three elements of *W.(D.)* and found that a reasonable doubt was not raised. The principle of *W.(D.)* remained the trial judge's central consideration and he did not simply choose between the evidence of the child and the appellant. After rejecting F.C.'s evidence, he turned to consider the whole of the remaining evidence led at trial. The trial judge's findings on opportunity were an obvious rejection of L.C.'s evidence.

[50] As stated by Karakatsanis J. when discussing the application of *W.(D.)* in *Vuradin* at para. 21, the process followed by a trial judge in reaching a verdict need not be explained in detail. In my view, the trial judge properly applied the principles in *W.(D.)*. I would not give effect to this ground of appeal.

Disposition

[51] In conclusion, for the reasons given, I would dismiss the appeal.

Released:
"DW"
"MAR 24 2015"

"S.E. Pepall J.A."
"I agree David Watt J.A."
"I agree Grant Huscroft J.A."