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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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. Romero-Araya, 2015 ONCA 744
DATE: 20151104
DOCKET: C59405

Laskin, Pardu and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Daniel Romero-Araya

Appellant

Anthony De Marco, for the appellant

Hannah Freeman, for the respondent

Heard and released orally: October 30, 2015

On appeal from the conviction entered on June 27, 2014 by Justice Robert A. Clark of the Superior Court of Justice, sitting without a jury.

ENDORSEMENT

[1] The appellant appeals his convictions for sexual interference and sexual assault (though the latter conviction was conditionally stayed by the trial judge). In support of his appeal the appellant seeks to introduce fresh evidence, an affidavit of his younger sister. He also alleges that his trial counsel was incompetent and that his incompetence prejudiced the appellant's defence.

[2] The complainant alleged that when she was 14 years old the appellant had sexual intercourse with her in his basement apartment. The appellant not only denied the sexual intercourse, he also denied that she was even in his apartment. The trial judge gave a thorough and well-reasoned decision in which he rejected the appellant's evidence, accepted the complainant's evidence, and found the appellant guilty of both charges.

[3] The appellant makes two main submissions on his appeal. First, the trial judge's assessment of the credibility of the complainant's and the appellant's evidence reflected uneven scrutiny. And second, the trial judge misapprehended the appellant's evidence, and this misapprehension tainted the trial judge's reasons. We reject these submissions.

[4] The trial judge's assessment of the evidence of the complainant and the appellant was fair and balanced. The appellant's argument is nothing more than an attempt to have this court re-try the case. The trial judge did misapprehend one part of the appellant's evidence, but it was on a minor point, and could have had no impact on the trial judge's finding that the appellant was the author of the emails in Exhibit 2, including the email that said: "I miss you."

[5] We have reviewed the fresh evidence and the evidence in support of the ineffective assistance of counsel claim. We decline to admit the proposed fresh evidence of the appellant's sister. It could not reasonably have affected the

verdict. The complainant gave detailed evidence about being in the appellant's basement apartment, including details not referred to by the sister. Those details included knowledge about when the appellant's father went to work and knowledge that the appellant kept a tin of condoms in his apartment.

[6] We have also reviewed the evidence concerning defence counsel's performance at trial, which is presumptively considered to be competent. Nothing in the record displaces that presumption. Defence counsel could, for example, have cross-examined the complainant differently as the appellant alleges he should have, but in our view, his conduct of the trial on behalf of the appellant was competent.

[7] Accordingly, the appeal is dismissed. Leave to admit the fresh evidence is also dismissed.

"John Laskin J.A."
"G. Pardu J.A."
"L.B. Roberts J.A."