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), (2.1), (2.2), (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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (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 victim of the right to make an application for the order; and

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

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, 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); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

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. R.O., 2015 ONCA 814
DATE: 20151125
DOCKET: C57676

Gillese, Tulloch and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

R.O.

Appellant

Erika Chozik, for the appellant

Lucy Cecchetto, for the respondent

Heard: May 7, 2015

On appeal from the conviction entered by Justice Linda Walters of the Superior Court of Justice, sitting with a jury, on August 7, 2013, and from the sentence imposed on September 26, 2013.

Tulloch J.A.:

FACTS

[1] The appellant appeals against his conviction on one count of sexual assault and one count of sexual interference, following a six-day trial by a judge and jury. He also appeals his sentence of seven years' incarceration.

[2] The charges arise from allegations by the complainant of a prolonged period of sexual abuse that occurred between May 2002 and October 2008, when she was 7 to 13 years of age. The complainant was the stepdaughter of the accused. The abuse began with touching over the complainant's clothing and escalated to intercourse and oral sex.

[3] After the appellant and the complainant's mother separated in 2006, the complainant moved between their homes. In 2007, the complainant's brothers were both living with the appellant when the complainant asked to join them. By the fall of 2007, all four of the appellant's children and stepchildren were living with him. They lived together until October 2008.

[4] At trial, the complainant testified that after the appellant and her mother separated, the appellant would supply drugs and alcohol to her, her older brother, and her step-sister. She was allowed to do whatever she wanted, which included skipping school, drinking alcohol, and smoking drugs. The complainant was described as defiant and out of control by her mother and the appellant.

[5] The complainant's evidence was to some degree corroborated by her brother, who testified that the appellant supplied him and the complainant with drugs and alcohol, and that the complainant would routinely sleep in the appellant's bed. The complainant's brother also described that, on at least one

occasion, he observed what he determined to be inappropriate sexual behaviour between the two.

[6] Eventually, the complainant disclosed the sexual assaults to her mother and a report was made to the police. On November 4, 2008, police seized a used condom from the appellant's bedroom in his home. The appellant's semen and the complainant's DNA were present on the condom.

[7] The appellant raises four grounds of appeal:

> 1) The trial was rendered unfair due to the admission of evidence of discreditable conduct. The limiting caution given in relation to this evidence was insufficient to cure the prejudice caused.
>
> 2) The trial judge erred by allowing the Crown to invite the jury, in the absence of expert evidence, to infer that the complainant's allegations of abuse were corroborated by her behaviour.
>
> 3) The exhortation given by the judge to the jury was improper.
>
> 4) The sentence of seven years is excessive due to the trial judge's failure to appropriately take into consideration the five years he spent on strict bail conditions.

ANALYSIS

(1) Was the trial rendered unfair due to the admission of evidence of discreditable conduct? Was the limiting instruction given in relation to this evidence sufficient to cure any resulting prejudice?

Positions of the Parties

[8] The appellant submits that the jury heard a significant amount of evidence about his bad character. This included irrelevant details about his relationship with the complainant's mother, that he had a 19-year old girlfriend, kept his house in a poor state, neglected his youngest child, sold drugs, and was alleged to have assaulted his sister when they were young. The appellant argues on appeal that his character and lifestyle were clearly put on trial. This was not relevant to the sole issue at trial – whether he had committed the sexual abuse alleged by the complainant. The admission of this evidence was improper and rendered the trial unfair.

[9] The appellant further submits that the risk associated with evidence of disreputable conduct is so great that the jury might have misused the evidence and convicted the accused unfairly even if given proper instructions. In this case, the caution by the trial judge was insufficient.

[10] The Crown's position is that the evidence of drug and alcohol use and the living conditions at the appellant's home were necessary and relevant to establish the nature of the relationship between the appellant and the

complainant, explain why she did not complain, and explain why she wanted to continue to live with the appellant, despite the abuse. This evidence was also relevant to the appellant's attack on her credibility. The state of the house was relevant to the circumstances in which the condom was found.

[11] The Crown submits that the bad character evidence went in as part of a strategic decision by defence counsel. In fact, it was the appellant who caused it to be introduced. His strategy was to depict the complainant as out of control, addicted to drugs and alcohol supplied by others, and as a person who made false allegations against people. No issue about the competence of trial counsel has been raised. Finally, the jury instruction on the evidence was adequate and approved by defence counsel.

Discussion

[12] I would first note that the admissibility of the evidence of discreditable conduct was not raised at trial. The trial judge was not asked to rule on the admissibility of any of this evidence, as there were no objections by counsel.

[13] The failure to object to the admissibility of evidence at trial is not fatal to an appeal. However, it is more difficult for this court to undertake the required analysis based on a record where the defence chose not to litigate the admissibility of the evidence at trial. In *R. v. Bero* (2000), 137 O.A.C. 336, Doherty J.A. commented, at para. 12:

> Absent any suggestion of ineffective representation at trial, or some other adequate explanation for the absence of any objection to admissibility at trial, I would not give effect to an argument that comes down to the contention that an accused should receive a new trial on the ground that had he chosen to challenge the admissibility of evidence at trial he might have been successful.

[14] Not only were there no objections to this evidence, the defence introduced and amplified much of it as part of its strategy to emphasize the bad character of the complainant and diminish the credibility of the complainant, her mother, and her brother.

The Evidence of Discreditable Conduct

[15] Character evidence showing only that the accused is the type of person likely to have committed the offence in question is generally inadmissible. However, evidence of relevant discreditable conduct may be admitted for a variety of legitimate purposes, including providing narrative or context: see *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716.

[16] The ultimate issue at trial was whether the appellant had committed the sexual abuse alleged by the complainant. Information about the family dynamic and the relationship between the complainant and the appellant was necessary for the narrative. The credibility of the complainant and the manner in which the appellant allegedly carried out the offences were also relevant to the main issue. Character evidence has been held to be admissible for these and similar

purposes: see, for example, *R. v. F. (D.S.)* (1999), 43 O.R. (3d) 609 (C.A.), at p. 616; *R. v. C.B.*, 2008 ONCA 486, 237 O.A.C. 387, at para. 30. In this case, the impugned evidence was relevant and admissible.

[17] During oral arguments, the appellant conceded the relevance of the evidence of drug and alcohol use and the evidence that he was supplying drugs and alcohol to his children and stepchildren. I agree that this evidence was pertinent to the nature of the relationship between the appellant and the complaint.

[18] This evidence was also relevant to the evaluation of the complainant's credibility. The theory of the defence was that the complainant made up allegations and fabricated evidence so that she could live with her mother in a beautiful, new home. This theory required the defence to attack the complainant's credibility and character. She was accused of lying and being out of control. Evidence about the freedom the complainant enjoyed while living at the appellant's home, the drug and alcohol use, and the supply of these substances was relevant. It went to the determination of the complainant's credibility and to understanding the context in which the abuse occurred. It also helped explain why she did not complain about the abuse when she was living with him and why she continued to want to live with him. These two questions were central to the defence's theory.

[19] The testimony about the family breakdown, the appellant's girlfriend, and the state of the living conditions, were part of the context of who was living where and why. The living arrangements at the time of the abuse, and why the complainant continued to live with the appellant, were issues at trial. The credibility of the complainant's evidence that she wanted to live with the appellant because there were no rules was borne out in the testimony about the state of the appellant's home.

[20] Evidence about the appellant's home provided the backdrop to the information that the complainant would often sleep in the appellant's bedroom. The state of the house was connected to the partying and freedom that the complainant sought and enjoyed at the appellant's place. Evidence about the home also helped explain the finding of the condom.

[21] The two pieces of evidence that the appellant now argues were most prejudicial were introduced by the complainant during her cross-examination by the defence.

[22] The complainant's assertion that the appellant was selling drugs was made in response to counsel's suggestion that the appellant was providing for his family and would not have had money to supply the complainant with drugs.

[23] Defence counsel also elicited details of a conversation between the complainant and the appellant's sister, in which it was mentioned that the

appellant had raped his sister when they were young. The Crown elicited from the complainant that she had spoken to the appellant's sister about the abuse. Defence counsel asked for details of the conversation in an attempt to impugn the complainant's credibility. It was at this point that the comment about the assault on the appellant's sister was made. This line of questioning by the defence also confirmed that the complainant and the appellant's sister were heavily under the influence when the conversation occurred.

[24] In addition to being relevant to issues at trial, the probative value of evidence of discreditable conduct must exceed its prejudicial effect: *G. (S.G.)*, at para. 65; *F. (D.S.)*, at p. 617.

[25] As discussed, the lifestyle evidence was relevant and material. It was critical to the narrative of the relationship between the complainant and the appellant, went to the credibility and mental state of the complainant, and was part of the manner in which the appellant continued to carry out the offences. These were significant issues at trial, in particular because the defence theory was that the complainant had fabricated the allegations and possibly the evidence of the condom.

[26] The prejudicial effect of evidence of extrinsic misconduct can impact a jury in three ways: i) the jury may assume, from its acceptance of the evidence of extrinsic misconduct, that an accused is a "bad person", thus likely to be guilty of

the offences charged; ii) the jury may tend to punish the accused for the extrinsic misconduct by finding him or her guilty of the offences charged; and iii) the jury may become confused by the evidence of extrinsic misconduct, their attention deflected from the main purpose of the trial, the offences charged, and substitute their conclusion on the extrinsic misconduct for their verdict on the indictment they are trying: *R. v. J.A.T.*, 2012 ONCA 177, 288 C.C.C. (3d) 1, at para. 52.

[27] In this case, the primary concern is that the jury may have misused the bad character evidence by inferring guilt based on the character or disposition of the accused.

[28] In my view, the most prejudicial evidence was about the drug use in the house and the appellant's provision of drugs to members of his family. It was conceded that this was relevant to the narrative at trial, and in my view, the jury would not have improperly used this evidence to infer that the appellant was also guilty of sexually assaulting his stepdaughter when she was 7 to 13 years old. Though there was significant evidence about drugs and alcohol, I do not think the jury would have been distracted or overwhelmed by it.

[29] Other issues, like the state of the appellant's home and his finances, were not at all related to the appellant's propensity to commit a sexual offence on a minor. Any prejudice that might have resulted was not significant. The same can be said about the alleged neglect of the appellant's son on one day in October

2008, which provided important context for the discovery of the abuse by the complainant's mother. This evidence did not distract from the real issues at trial.

[30] The evidence that the appellant had, at one time, a 19-year old girlfriend, was part of the context of the appellant's move to Windsor. Though her age was not particularly relevant, I do not think it would have led to propensity reasoning. There is a significant difference between the sexual abuse of a family member aged 7 to 13 and a legal relationship with a 19-year old.

The Jury Instruction

[31] The trial judge brought up the need for an instruction on the bad character evidence. Counsel had a copy of the proposed charge and neither objected.

[32] The trial judge gave a clear limiting instruction on the purpose for which evidence of discreditable conduct could and could not be used. The evidence could be used as context or background to the events that unfolded, to resolve discrepancies between the witnesses regarding what did and did not occur, and to help in assessing the credibility of various witnesses.

[33] She stated that to use this evidence to reason that the appellant was the type of individual who would commit sexual assault was forbidden reasoning. Nor could the evidence be used to provoke hostility or bias against the appellant, or to indicate that he is deserving of punishment. In essence, the trial judge

specifically instructed on the prejudicial effects of the evidence discussed above and negated any risk of prejudice.

[34] Finally, a specific instruction on the complainant's testimony about the appellant's sister would have highlighted the comment. In *R. v. Beausoleil*, 2011 ONCA 471, 283 O.A.C. 44, this court held that a limiting instruction on bad character evidence is not necessary in every case: para. 20. One of the circumstances mentioned was the likelihood that such an instruction would unnecessarily draw attention to the discreditable conduct. In my view, this consideration applies to the hearsay evidence about the appellant's sister.

[35] In all of the circumstances, the evidence of discreditable conduct was admissible and the limiting instruction was appropriate.

(2) Did the trial judge err by allowing the Crown to invite the jury, in the absence of expert evidence, to infer that the complainant's allegations of abuse were corroborated by her behaviour?

Positions of the Parties

[36] The appellant submits that Crown counsel improperly invited the jury to infer that the appellant's out of control behaviour could confirm her claim of sexual abuse by the appellant, and that the escalation of her bad behaviour corresponded to an escalation in the sexual abuse. There is no basis on which to draw an inference that certain behaviours were linked to sexual abuse. In the absence of expert testimony, there is an even greater danger that the jury might

be left with the impression that there is a scientific basis on which to conclude that these behaviours make a complainant's testimony more credible. Further, there was no instruction to the jury on the distinction between legitimate inference and speculation on this point. The trial judge also did not emphasize for the jury the other possible explanations for the complainant's behaviour advanced by the defence.

[37] The Crown submits that it was entitled to invite the jury to find that the complainant's behavioural problems were related to the abuse and the threats made by the appellant to silence her. This was an appropriate argument, and not one that needed expert evidence.

Discussion

[38] The theory of the defence was that the complainant made up allegations and fabricated evidence so that she could live with her mother in a new home. The defence strategy was to diminish the complainant's credibility as much as possible. Understandably, highlighting her bad behaviour was part of that strategy.

[39] The Crown was entitled to respond by arguing that the complainant's problems were consistent with the timing of the abuse. The Crown provided a theory as to why she was acting out. In its closing address and again in the judge's summary of the Crown's position, it was suggested that the complainant's

worsening behaviour was consistent with the impact that abuse would have on her. This theory competed with the theories put forward by the defence that the complainant was wild perhaps because of her parents' separation, or because her father did not play a role in her life, or because she was associating with other troubled kids and had access to drugs and alcohol.

[40] I disagree with the defence submission that the Crown argued for a scientific link or inference between the complainant's behaviour and the existence of abuse. The Crown did not argue that the complainant's behaviour confirmed the abuse. There was very little evidence led on this point. The Crown questioned the complainant about her bad behaviour, including skipping school and drinking, as well as the timeline of the alleged abuse. The Crown then put to the appellant that the complainant's problems at school increased as the sexual abuse escalated, which the appellant denied.

[41] No expert evidence was proposed on this point at trial. Expert evidence on the behaviour of child sexual assault victims, sometimes known as Child Sexual Abuse Accommodation Syndrome and popular in the 1990s, has been found to be inadmissible: *R. v. K. (A.)* (1999), 45 O.R. (3d) 641 (C.A.). In the circumstances of this case, expert evidence on the behaviour of the complainant and its potential causes would lend the evidence unwarranted significance. In *R. v. Olscamp* (1994), 95 C.C.C. (3d) 466 (Ont. C.J. (Gen. Div.)), Charron J. (as she then was) described this danger. She held, at p. 475, that "[t]he admission of

evidence ‘dressed up in scientific language’ in support of the complainant’s testimony may well be given far more weight by the jury than it deserves and may even become determinative of the ultimate issue” (citations omitted). An allegation of a scientific link between the complainant’s bad behaviour and escalating abuse by an expert would have led to enormous prejudice against the appellant.

[42] Triers of fact are capable of relying on their common sense and experience to understand why a complainant may act in a certain way. The Court of Appeal of Alberta in *R. v. R.A.N.*, 2001 ABCA 68, 152 C.C.C. (3d) 464, at para. 20, found this to be the case in the context of sexual offences and evidence of declining academic performance, running away, and rebelliousness.

[43] The jury was able to consider the complainant’s rebelliousness and assess that there could be more than one cause for it. Bad behaviour may be related to the stress of abuse at home, or it may not be. It was open to the jury to assess this possible explanation for the complainant’s behaviour and weigh it accordingly.

[44] I disagree with the appellant that the trial judge misled the jury into believing that this evidence was definitive on the issue of whether the complainant had been sexually abused. The trial judge simply summarized the position of the Crown. This included the assertion that bad behaviour was

consistent with the impact of abuse, as well as other points related to the credibility of the complainant. The trial judge also provided the defence position that the complainant was abusing drugs and alcohol, lied in the past, and was not to be believed.

(3) Was the instruction given by the judge in response to the jury question improper?

Positions of the Parties

[45] After nearly a day of deliberations, the jury asked: “What happens when we are 11 to 1?” The trial judge explained that “a verdict means that all 12 of you must agree” and that a verdict must be unanimous. The trial judge instructed them to continue to try to arrive at a unanimous verdict, and if that was not possible, to pass her a note.

[46] The appellant submits that the trial judge erred in this exhortation to the jury by not telling them that they had a right to disagree. Improper pressure was placed on the one juror to simply change his or her mind, and no tools were given to the jury to help them resume their deliberations.

[47] The Crown disagrees. The jury was not deadlocked and had only been deliberating for about four and a half hours. The trial judge’s response to their question was vetted by counsel and was adequate.

Discussion

[48] The jury had been deliberating for only about five and a half hours, with a one hour lunch break, when they asked “[w]hat happens when we are 11 to 1?” I do not think it is fair to say that this question was indicative that the jury was deadlocked.

[49] The judge explicitly stated that if it was not possible for the jurors to reach a unanimous verdict, they should pass her a note. Implicit in this instruction is that the jury might not reach a unanimous verdict – they might disagree. There was no objection to the re-charge.

[50] The right to disagree was part of the initial charge to the jury. In her initial charge, the judge explained “[t]here are times, however, when a jury is unable to reach a verdict. Jurors have the right to disagree…You must not agree, however, only for the purpose of returning a unanimous verdict.” The judge reiterated: “Sometimes jurors can’t agree. Under our law, jurors have the right to disagree. However, no jury will be in any better position or different position to decide this case than you are right now.” She also explained the process of notifying the court if the jury was unable to reach a unanimous verdict.

[51] Both parties rely on the guiding principles in *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362. In that case, the trial judge recalled the jury and urged them to consider the public expense of a new trial, the inconvenience that it would cause

to all participants, the hardship to the accused and the complainant, and suggested that the minority might want to reconsider what the majority were saying. Only fifteen minutes later, the jury returned with a verdict of guilty. These pressures and factors are irrelevant to the duties of the jurors and were therefore held to be inappropriate in an exhortation.

[52] That is not the case here. The language used in response to the jury's question did not place undue pressure on the jury or introduce irrelevant factors. It did not encourage jurors to simply change their minds for the sake of conformity. Instead, it encouraged the jurors to deliberate further to see if they would be able to reach a unanimous verdict, and explained the process – to pass a note to the judge – if indeed unanimity was not possible. It reiterated, in part, the proper instruction given to the jury before they began their deliberations.

[53] The Supreme Court at para. 17 of *G. (R.M.),* citing *R. v. Sims*, [1992] 2 S.C.R. 858, explained that the goal of an exhortation is to assist the process of deliberation as opposed to influencing the content of the jury's discussion. I am not of the view that the judge's instruction would have influenced the content of the jury's deliberations. In all, I do not believe the trial judge erred in her answer to the jury's question.

(4) Is the sentence of seven years unfit? Did the judge err by failing to consider the five years that he spent on strict bail conditions?

Positions of the Parties

[54] The appellant submits that the custodial sentence of seven years was unfit. The appellant spent five years on strict pre-trial release. He was initially under house arrest and a curfew. He was subject to weekly reporting, required to abstain from alcohol and drug use, and required to live with his surety. He was prohibited from having contact with his son. The appellant's lengthy period under pre-sentence house arrest and other conditions was a relevant mitigating factor, as it demonstrated that he was on a path to rehabilitation. In light of this, the sentence was excessive.

[55] The Crown submits that the trial judge considered all of the appropriate legal principles, including the time the appellant spent on judicial interim release, in imposing a sentence. The judge stated that, while not assigning a particular credit to the terms of bail, she had taken it into her global consideration of sentence. The seven-year sentence cannot be said to be demonstrably unfit in the circumstances of the offences.

Discussion

[56] Appellate courts must show great deference in reviewing sentences, and may not vary a sentence simply because it would have imposed a different one.

Courts are not to vary a sentence imposed by a trial judge absent an error in principle, failure to consider a relevant factor, an overemphasis of the appropriate factors, or the imposition of a sentence that is demonstrably unfit: *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at para. 14; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90.

[57] The trial judge was fully alive to and gave cogent reasons on the matter of pre-trial release, noting that a lengthy period on bail is a mitigating factor. She mentioned that the appellant had spent five days in pre-trial custody and five years on bail with onerous conditions. She considered the disruption that the bail conditions had on the appellant's relationship with one of his daughters, but also that there was no evidence that the appellant sought to vary any of the terms of his bail.

[58] Though no specific credit was assigned for the appellant's pre-trial bail, the judge explained that it was taken into account "globally," and specified in her reasons for sentence that she had "considered this pre-trial custody and pre-trial bail conditions as a mitigating factor." The judge fulfilled the approach to credit for pre-trial bail conditions outlined in *R. v. Downes* (2006), 79 O.R. (3d) 321 (C.A.), at para. 37.

[59] Further, it is clear from the reasons that the trial judge also considered the appellant's positive steps toward rehabilitation while on bail as a mitigating factor.

She mentioned that the appellant was not currently abusing alcohol and drugs, was attending a methadone clinic and had tested negative for illegal substances since he began the program, and that he had abided by all of the conditions for five years without incident.

[60] The trial judge appropriately considered and weighed all the relevant factors. In the case of an adult offender in a position of trust who sexually abused a child on a regular basis, the sentence of seven years imprisonment cannot be said to be demonstrably unfit: see, for example, *R. v. D.D*. (2002), 58 O.R. (3d) 788 (C.A.), at para. 44; *R. v. P.M.*, 2012 ONCA 162, 282 C.C.C. (3d) 450, at para. 46; *R. v. D.M*., 2012 ONCA 520, 111 O.R. (3d) 721, at para. 44.

DISPOSITION

[61] I would therefore dismiss the appeal and grant leave to appeal sentence but dismiss the sentence appeal.

Released: “EEG” NOV 25, 2015

“M. Tulloch J.A.”
“I agree. E.E. Gillese J.A.”
"I agree. P. Lauwers J.A."