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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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.T., 2015 ONCA 904
DATE: 20151221
DOCKET: C57846

Strathy C.J.O., Lauwers J.A. and Speyer J. (*ad hoc*)

BETWEEN

Her Majesty the Queen

Respondent

and

F.T.

Appellant

Timothy Breen, for the appellant

Melissa Adams, for the respondent

Heard: October 1, 2015

On appeal from the conviction entered on June 6, 2013 by Justice J.S. O'Neil of the Superior Court of Justice, sitting with a jury.

Speyer J. (*ad hoc*):

[1] The appellant is the father of four children. Two of his daughters, C.B. and R.G., allege that for many years they were sexually abused by their father. A jury found the appellant guilty of multiple sexual offences in respect to each of the two complainants. Additionally, the appellant was convicted of assaulting C.B., causing her bodily harm.

A. OVERVIEW

[2] This is a case about allegations of historical physical and sexual abuse. A common theme in the evidence of each complainant is that the abuse occurred within a family home that featured an atmosphere of stern discipline and corporal punishment for misbehaviour. While the evidence of each complainant overlapped in certain respects, Crown counsel did not seek a similar act evidence ruling that would have permitted the allegations of one complainant to support or confirm the allegations of the other. The trial judge's instructions to the jury proceeded on the footing of a single accused, charged with multiple offences, which required the jury to decide the case based solely on the evidence applicable to each count.

[3] The appellant testified that the allegations of abuse were untrue. In support of the defence position, the appellant's wife and two of the appellant's other adult children gave evidence refuting specific details of C.B.'s and R.G.'s testimony. In a nutshell, and not untypical of so many sexual abuse cases, credibility was the central issue at this trial.

[4] As the evidence evolved, this case posed a particular set of challenges for both counsel and the trial judge. I make the following two initial observations. First, the record of this trial is overburdened by evidence of the appellant's bad character: specifically, evidence of the appellant's violent behavior in instances

unrelated to any charge on the indictment. That said, it is important to note that the extrinsic evidence of the appellant's discreditable conduct was admitted without objection by the appellant's trial counsel. Indeed, counsel consented to the admission of the evidence for strategic purposes. The trial judge was both alive to and concerned about the potential prejudicial effect of the bad character evidence. He promised to provide a proper limiting instruction. Unfortunately, the instruction provided was inadequate.

[5] Second, absent a similar act ruling, especially on the particular facts of this case, it was of crucial importance that the jury be cautioned that the acceptance of one complainant's evidence could not be used to bootstrap, bolster or confirm the evidence of another complainant.

[6] The reasons that follow explain why a new trial is required. I will outline the facts only to the extent necessary to shed light on two issues that have merit.

B. THE DISCREDITABLE CONDUCT ISSUE

(i) THE NATURE OF THE ALLEGATIONS

[7] In 2010, R.G. was 29 years of age when she complained to the police that, between the years 1988 and 2004, she was sexually abused by her father. The nature of R.G.'s complaint ran the gamut from sexual touching in the early stages of the abuse and escalated over time to continuous acts of fellatio and sexual intercourse. The alleged abuse started when R.G. was 5 or 6 years old and

stopped when she was 13. It stopped when R.G., in grade nine at the time, told her parents that she had been sexually intimate with her boyfriend. The appellant's reaction to this news was to verbally disparage his daughter in the most derogatory manner. Thereafter, until she left home at the age of 16, there were no further instances of sexual misconduct.

[8] C.B. is two years older than R.G. The allegations of C.B.'s sexual abuse are similar in nature to those of her sister. They span a thirteen year period, from the time C.B. was in elementary school and living at home to occasions outside the family residence when C.B. was at university.

(ii) THE ASSAULT CAUSING BODILY HARM CHARGE

[9] This charge, the fifth count on the ten count indictment, relates to three different occasions of alleged physical abuse of C.B. over a one year period from May 1992 to May 1993. These incidents involved injuries that required hospital treatment. C.B.'s was treated for a broken wrist, an injured ankle and a fractured collar bone respectively. While the hospital records indicate the complainant reported innocent explanations for her injuries on each occasion, C.B.'s trial evidence was that each of the injuries was the result of her father's physical abuse: on two occasions she fell and injured herself after being pushed by her father, and on the third, the injury resulted from being struck by the appellant with the handle of a broom.

[10] The appellant denied causing the injuries suffered by C.B. His evidence was supported by his wife and, in particular, by the testimony of the appellant's daughter (the complainants' sister) A.T. A.T. testified she caused C.B.'s wrist fracture when she landed on C.B.'s wrist while jumping on the bed. A.T. also testified she saw C.B. injure her ankle when jumping down a flight of stairs in the family home. The sharp conflict in the evidence was a matter for the jury's determination.

(iii) THE EVIDENCE OF THE APPELLANT'S ASSAULTIVE BEHAVIOR NOT COVERED BY THE INDICTMENT

[11] The appellant was not charged with assaulting R.G. Nevertheless, evidence of the appellant's violent behaviour played a featured role in respect to this complainant's evidence. In the context of testifying that the appellant was a strict disciplinarian, R.G.'s evidence was that she and her siblings were continuously assaulted by the appellant using his belt to strap their bare buttocks. Moreover, beyond the use of the belt, R.G. testified that she was disciplined by slaps to the face and pushing with sufficient force that she would fall to the floor. This complainant testified that the pushing episodes occurred on more than 50 occasions. Indeed, the complainant recounted a time when she was pushed down the stairs of her home and taken to the hospital for X-Rays.

[12] During examination-in-chief of R.G., the trial judge expressed his concerns about the breadth of the evidence as to the appellant's violent behavior that was not set out in any count in the indictment:

> THE COURT: Take a look, defence counsel and Crown counsel, at the first four counts of the indictment alleging offences by [F.T.] as against [R.G.], please, and ask yourselves the question how much further you need to go with this line of questioning and we can do this very briefly.
>
> MS. HEPBURN: Yes, I was just going to ask this last question.
>
> THE COURT: Well, there's no allegation in the indictment that there's an assault out – out – the indictment with respect to charges involving [R.G.] are of a sexual nature. Your questions are turning *vis-à-vis* [R.G.], not [C.B.], are turning to discipline of an injured nature that doesn't form the subject matter of the charge and that's what I'm addressing and that's where we need to have a short discussion and, very briefly, I don't think the jury has to leave. How much further do you need to go at this?
>
> MR. WILCOX: Your Honour….
>
> THE COURT: I don't think that….
>
> MR. WILCOX: If I might, I'm not opposed to my fiend eliciting…
>
> THE COURT: But I might be…
>
> MR. WILCOX: …this evidence from this witness.
>
> THE COURT: …but keep going.
>
> MR. WILCOX: That is to say it would not be objectionable on the basis that it's disreputable conduct not within any of the counts of the indictment…

> THE COURT: Right.
>
> MR. WILCOX: …But I am not making that objection. So, my friend is free to…
>
> THE COURT: All right.
>
> MR. WILCOX: …elicit that evidence.
>
> THE COURT: How much further do you need to go? Certainly, there's allegations of inappropriate and perhaps inappropriate and – *vis-à-vis* the household in general, stern discipline, corporal discipline, but how much further down that road *vis-à-vis* [R.G.], do you need to go? Just to help the jury, there is of course, an allegation of discipline in the 10 counts in this Court case, one of them involves [C.B.] *vis-à-vis* the broken clavicle which we heard about yesterday and you may be asking this witness questions about that. You may not, I don't know, but you're turning now to corporal punishment, an injury, that doesn't form the subject matter of any of the charges *vis-à-vis* this witness.

[13] At a later point in the trial, during Crown counsel's persistent cross-examination of the appellant's witnesses concerning the appellant's use of his belt to discipline his children, the trial judge's frustration seemed to reach the tipping point as captured by the following extract:

> It's – it's almost sounding like the jury is getting pushed to think if he can belt me, and I don't remember him belting the kids when he could sexually assault the daughters. If you get to the belt, you can have fellatio, sexual intercourse in the presence of A.T. and others. Am I being overly vigilant and concerned or should – should we have – or have we gone far enough with this belt questioning? We need to guarantee everybody that steps into this room a fair trial. That's why I've had the jury go out. And I can't second guess myself. I can't say, well I wonder if I should have said something?

> You've spent, whenever we started here, 20, 25, 26, 27 and a half, 30 minutes, mainly about the belt. To me that's enough. I am going to have to obviously give them a caution. We will work that out later, but it just sounds to me that you are trying to develop a theory that a man who belts you and you don't see him belt the sisters is a man who will sexually assault the sisters. It's as simple as that, but maybe I am out to lunch. You've got to help me with this Crown Counsel. Where are you going with this persistent line of questioning on the belt and is it – you have made your point. [Emphasis added.]

(iv) JURY INSTRUCTION ON THE ISSUE OF DISCREDITABLE CONDUCT

[14] The jury instruction dealing with the discreditable conduct issue is as follows:

> I would now like to speak to you about some of the evidence you heard in this case with respect to the use of the belt as a means of corporal punishment.
>
> [F.T.] is not charged in this trial with assaulting any of his children, including [C.B.] and [R.G.] with a belt in any way, shape or fashion. Accordingly, he cannot be convicted of an offence relating to the use of a belt, if any.
>
> For Defence counsel the belt evidence was important for you to consider when assessing [R.G.]'s credibility and truthfulness in light of [R.G.]'s assertion that she saw her father strike her siblings and herself on their bare genitals with a belt.
>
> From Crown counsel's perspective the belt evidence was important for you to consider as a factor as to why the complainants may not have come forward out of fear and as a factor in assessing the credibility of defence witnesses as whether the belt was used in discipline and who may have seen it used and as to

> whether the defence witnesses were consistent in their evidence relating to discipline with respect to the belt.

(v) DISCUSSION

[15] Limiting instructions in relation to evidence of extrinsic misconduct have three elements. The first describes the evidence under consideration, the second element is a positive instruction that advises of the permitted use of the evidence, and the third is a negative instruction cautioning the jury about the prohibited use of such evidence: *R. v. T. (J. A.)*, 2012 ONCA 177, 288 C.C.C. (3d) 1, at para. 53.

[16] The appellant submits that the trial judge's jury instruction was deficient in two respects. The first deficiency pertains to the failure to tell the jury that propensity reasoning based solely on the appellant's discreditable conduct is prohibited. I agree with this submission.

[17] In *R. v. D. (L. E.)*, [1989] 2 S.C.R. 111, 50 C.C.C. (3d) 142, at pp. 127-8, Sopinka J. noted the three dangers of bad character evidence. First, if the jury accepts the accused committed the prior "bad acts", they may assume the accused is a "bad person" who is likely to be guilty of the crimes charged. Second, there is the potential for the jury to punish the accused for past misconduct by finding the accused guilty of the offence charged. Third, the jury's attention is deflected from the main purpose of their deliberations.

[18] Given the seriousness of the allegations of criminal and disreputable conduct, the risk of prejudice to the appellant in this case was high, and a clear instruction as to the prohibited use of the bad character evidence was essential. The trial judge clearly understood those dangers when he told counsel, “it just sounds to me that you are trying to develop a theory that a man who belts you and you don’t see him belt the sisters is a man who will sexually assault the sisters.”

[19] For reasons not apparent in the record, the trial judge failed to provide the cautionary instruction he promised. The jurors ought to have been told that they must not rely on the evidence on other counts of the indictment, or evidence of other uncharged criminal conduct, as proof that the appellant was the type of person likely to have committed the crimes charged: see *T. (J. A.)*, at para. 67.

C. FAILURE TO PROVIDE ADEQUATE INSTRUCTIONS ON MULTIPLE COUNTS

[20] The appellant has a second complaint about the adequacy of the jury charge. It again relates to the failure to provide an appropriate “negative” jury instruction. He submits that the jury ought to have been told that a positive finding of credibility with respect to one complainant could not be used to support the credibility of the second. Again, I agree.

(i) CONTEXT

[21] Both complainants had a troubled history of mental health issues. A detailed canvass of this evidence is unnecessary. However, as a backdrop to the appellant's submission, I make three observations with respect to R.G.'s evidence.

[22] First, R.G. was in a residential treatment centre in British Columbia when she made her complaint of abuse to the police. At trial, an important aspect of her testimony involved "recovered memory" of the incidents of abuse. The complainant's evidence was that for a period of 13 years, from the time she left the family home in Sudbury at the age of 16, until her admission into the faith-based treatment centre at the age of 29, she had no recollections or memories of abuse. No expert evidence was called on the issue of recovered memory nor were therapeutic records filed as exhibits.

[23] Second, when pressed by trial counsel to explain certain important inconsistencies between her statement to police and her trial testimony, R.G. explained that this was a function of her dissociative identity disorder. She testified that a characteristic of this disorder was to have "alter" identities or "different personalities" whom she named Amanda, Emily and Jessica. R.G. explained that it may have been one of her "alters" that experienced the events described in her statement to the police.

[24] Third, very shortly after hearing the complainant's explanation concerning the inconsistencies between her police statement and her evidence, in the absence of the jury, the trial judge suggested that Crown counsel "re-evaluate" the viability of the prosecution. A fair reading of the transcript indicates the trial judge's serious concerns about the reliability of R.G.'s evidence.

[25] I make these observations to provide focus to appellate counsel's argument as to the importance that the jury understand that one complainant's evidence could not confirm the evidence of the other complainant. It is argued this was particularly essential in the circumstances of this case for the jury to understand that a positive finding of credibility of C.B.'s evidence could not bolster the credibility of R.G.

(ii) THE TRIAL JUDGE'S INSTRUCTIONS

[26] The trial judge told the jury:

> Each allegation is a separate charge. You must make a separate decision and give a separates verdict for each charge. The verdict may, but does not have to be the same on each charge. You must make your decision of each charge only on the basis of the evidence that relates to that charge and the legal principles that I tell you apply to your decision on that charge. You must not use evidence that relates only to one charge in making your decision on any other charge.

(iii) DISCUSSION

[27] A fuller limiting instruction was required. While the trial judge's instruction was correct in so as far as it went, it was incomplete. In addition to the caution prohibiting propensity reasoning, the jury should have been advised that they could not use the evidence of one complainant to support or confirm the evidence of another complainant: see *R. v. K.P.*, 2009 ONCA 408, 252 O.A.C. 10, at para. 7. This additional instruction complements and amplifies the admonishment that the jury consider the evidence on each count separately. While this is a case that was approached by counsel and the judge on the basis that similar act evidence did not apply, it is evident that the evidence of abuse of each complainant overlapped to a significant extent. In these circumstances, it was particularly important to displace a juror's normal inclination to reason that the several aspects of similar behavior attributed to the appellant, if accepted, tended to mutually corroborate the evidence of each complainant. That type of reasoning is prohibited and a caution that one complainant's evidence could not confirm the evidence of the other was required.

D. CONCLUSION

[28] The failure to provide the jury with proper limiting instructions constitutes an error in law and necessitates the quashing of all convictions. As a new trial is required, it is unnecessary to address the appellant's other grounds of appeal. The appeal is allowed, the conviction quashed and a new trial is ordered.

Released: December 21, 2015 "GS"

"C.M. Speyer J. (*ad hoc*)"
"I agree G. R. Strathy C.J.O."
"I agree P. Lauwers J.A."