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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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
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> (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
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> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
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> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. K.L., 2018 ONCA 792
DATE: 20181002
DOCKET: C60643

LaForme, Watt and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

K.L.

Appellant

Alexander Ostroff, for the appellant

David Friesen, for the respondent

Heard: September 24, 2018

On appeal from the conviction entered on March 14, 2015 by Justice Leitch of the Superior Court of Justice, sitting with a jury.

REASONS FOR DECISION

[1] The appellant and the complainant met in 2002 and moved in together within three months. Their first son was born in 2006. They married in 2007. They had a second son in 2008. The relationship ended in 2009. Shortly thereafter the complainant alleged that the appellant abused her, verbally, physically, and sexually, during the relationship.

[2] The complainant alleged a number of incidents took place in which she was sexually assaulted, in addition to an incident involving a non-sexual assault, and another in which she was threatened with sexual violence. The sexual assault allegations involved the appellant's demands that the complainant submit to anal intercourse and vaginal fisting.

[3] The appellant testified that he and the complainant had sex often, in fact, so many times that he could recall no specific incidents. He agreed that they engaged in the acts that the complainant described, but that it was always consensual. The appellant claimed that the allegations were fabricated as part of a custody dispute.

[4] After a six-day jury trial, the appellant was found not guilty on one charge of sexual assault, but guilty on all the other charges. He was sentenced to 4.5 years in custody, less pre-sentence credit of 78 days. He appeals his convictions.

Issues

[5] The main issue the appellant advances is trial fairness. He argues that Crown counsel at trial (not Mr. Friesen) pursued improper lines of questioning during his testimony. The improper lines of questioning had to do with the complainant's attractiveness and the appellant's sex drive. He contends that the unfairness was compounded when the Crown, in his closing address, argued that the appellant was not a credible witness because of his evasive responses to the

improper questions. The Crown also invited the jury to make improper use of the appellant's demeanour on the stand, characterizing it as "controlling".

[6] Finally, the appellant argues that, when the trial judge charged the jury she misstated the complainant's evidence, which had the effect of making her evidence appear both internally consistent, and consistent with her father's testimony when it was not. He also argues that the trial judge misstated background evidence (*i.e.*, the toilet paper incident) that related to the charge of threatening

[7] We are not persuaded by the appellant's submissions on any of the grounds of appeal.

Crown Conduct and Trial Fairness

[8] This Court has previously described the standard of review for assessing the trial fairness arguments advanced by the appellant. First, it will only be conduct that compromises trial fairness that will justify ordering a new trial, not merely improper conduct. Second, while not dispositive of the issue, the failure of defence counsel to object at trial is a relevant factor to consider. And finally, the reviewing court will look at the overall effect of the improper questions and conduct of the Crown in the context of the full cross-examination and the entire trial: *R. v. A.G.*, 2015 ONCA 159, at paras. 20-25.

[9] As to the standard of review when assessing the Crown's closing submissions, the issue is, whether the Crown's closing remarks, caused a

substantial wrong or miscarriage of justice: *R. v. John*, 2016 ONCA 615. Again, this will be examined in the context of the entire trial and a new trial will only be ordered if the appellant's right to a fair trial has been compromised: see *R. v. J.S.*, 2018 ONCA 39, at para. 38.

[10] This court has repeatedly cautioned against improper cross-examinations and closing addresses by the Crown: *R. v. Henderson* (1999), 44 O.R. (3d) 628, at p. 639; and *John*, at para. 77. More particularly, this court has identified the dangers associated with the cross-examinations of an accused person about the complainant's attractiveness: see, for example, *R. v. F. (M.)*, 2009 ONCA 617, at paras. 19-25; and *R. v. E. (F.E.)*, 2011 ONCA 783, at paras. 68-69. Here, Crown counsel ignored these principles of law and pursued the otherwise irrelevant lines of questioning. In doing so the Crown came perilously close to causing this trial to be unfair.

[11] Before pursuing these lines of questioning, Crown counsel ought to have first vetted them with the trial judge, in the absence of the jury: see *E. (F.E.)*, at para. 70. He failed to do so.

[12] Moreover, we do not accept the Crown's submissions on appeal that the appellant's perception of the complainant's attractiveness, or his sex drive, were relevant to any issue at trial. In our view, both lines of inquiry were utterly irrelevant and carried with them the possibility of improper propensity reasoning by the jury.

Indeed, Crown counsel at trial admitted as much in his closing address to the jury, acknowledging that these topics were really just fodder for undermining the appellant's credibility.

[13] Nevertheless, despite these transgressions, no serious prejudice was occasioned mainly because the appellant acknowledged the sexual acts alleged by the complainant, but he claimed that they were consensual. Thus, while some of the cross-examination of the appellant by Crown counsel was improper, as were the related passages in his address to the jury, looked at in the context of the entire trial, these transgressions do not rise to the level of compromising trial fairness.

[14] With respect to the Crown's contention that the appellant was controlling, we are not persuaded that this amounts to the improper use of demeanour evidence. On our review of the record, Crown counsel was asking the jury to consider the appellant's response to questions when he testified and to use this when assessing his credibility. Crown counsel's remarks were really about the appellant's evasive answers, not his presentation when giving them. This is not the same thing as demeanour. There was no substantial wrong or miscarriage of justice.

[15] Finally, we observe that defence counsel did not object to the relevance or propriety of the questions posed by the Crown in cross-examination of the appellant: see *R. v. Middleton*, 2012 ONCA 523, at para. 58. Furthermore, neither

defence counsel nor Crown counsel objected to the other's closing address to the jury. Moreover, neither party sought any corrective instruction in the judge's charge to the jury.

The Trial Judge's Charge

[16] The imperfections in the charge that the appellant urges upon us relate to factual matters (*i.e.*, the so-called toilet paper incident and the details surrounding the common assault charge that occurred at the home of the complainant's parents). The trial judge clearly instructed the jury to make its own factual findings based on its collective view of the evidence. The jury is taken to have abided by these instructions. Accordingly, any minor imperfections in the trial judge's account of the facts, such as there may have been, did not render the trial unfair.

[17] For these reasons the appeal is dismissed.

"H.S. LaForme J.A."
"David Watt J.A."
"Gary T. Trotter J.A."