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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
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> (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
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> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. M.M., 2018 ONCA 1019
DATE: 20181211
DOCKET: C63554

Hoy A.C.J.O., Feldman and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

M.M.

Appellant

Brian Greenspan and Michelle Biddulph, for the appellant

David Friesen, for the respondent

Heard: December 5, 2018

On appeal from the conviction entered by Justice Anne M. Molloy of the Superior Court of Justice on December 16, 2016.

REASONS FOR DECISION

[1] This is an appeal from conviction for sexual assault. The appellant maintains that his trial counsel provided ineffective assistance and that this resulted in a miscarriage of justice. We dismissed the appeal with reasons to follow. These are those reasons.

[2] To succeed on an ineffective assistance claim, the appellant must establish the material facts upon which he relies, that the assistance was ineffective and that the ineffective assistance resulted in a miscarriage of justice, either by virtue of an unreliable verdict or an unfair trial. Deference is owed to counsel's performance at trial and there is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance": *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 27; *R. v. L.H.E.*, 2018 ONCA 362, at paras. 6-7.

[3] We are not persuaded that any of the alleged failings on the part of trial counsel amounted to ineffective assistance and, in any event, are satisfied that there was no miscarriage of justice.

[4] The appellant argues that his trial counsel failed to give him disclosure and failed to prepare him to testify. Trial counsel responds that the appellant was given disclosure and that any lack of preparation arose from the appellant's own conduct. Trial counsel describes the appellant as having been very difficult to deal with and somewhat "cocky". That description of the appellant is consistent with the trial judge's observation that the appellant displayed a "swaggering pompous attitude"

in court. It is also consistent with the appellant's attitude during cross-examination on his fresh evidence affidavit, where he affirmed that counsel had him attend at counsel's office to discuss his testimony. The appellant asked rhetorically, "what is there to discuss"? He said that he was intent on testifying in a way that was consistent with what he had told the police and others.

[5] In our view, if there was any lack of preparation, it arose from the appellant's attitude (as reflected in the cross-examination on his affidavit in this court) and not a lack of effort on trial counsel's part. Moreover, trial counsel cannot be blamed for the fact that the appellant's version of events, as first told to the police, simply made "no sense" to the trial judge. Counsel cannot be blamed for evidence that is "inherently difficult to believe in several important respects": *R. v. Dunbar*, 2007 ONCA 840, at para. 27.

[6] The appellant also claims that trial counsel was incompetent by failing to obtain his medical and phone records. We disagree. As for the medical records, the appellant contends that he had a shoulder injury that would have made it impossible for him to have committed the offence, including ripping the complainant's bra at the front and tearing a hole in the crotch of her tights. The appellant says that the purpose of the medical records would have been to substantiate his claim that his shoulder had been injured, making him incapable of tearing the complainant's clothes. Notably, we see no support in the fresh evidence to sustain the proposition that the shoulder injury made it impossible for the

appellant to have committed the offence. Moreover, the trial judge effectively accepted the fact of the injury and simply found as a fact that it would not take much strength or dexterity in the injured shoulder to tear the complainant's clothing. There is nothing in the fresh evidence that belies that finding of fact.

[7] As for the phone records, the appellant says that they would have supported the fact that the complainant called him after he had left her apartment. In the cross-examination on his affidavit on appeal, the appellant acknowledged that he had a burner phone registered under a false name. Leaving aside the fact that it could have been difficult to obtain those records, there is nothing in the evidentiary record on appeal to suggest that the absence of the records gave rise to a miscarriage of justice. Indeed, the fact of communication between the appellant and complainant was clear and had been memorialized in text message communications, including the appellant's response to the complainant's suggestion of rape, that she had a good memory for an "uncomphous [unconscious] bitch."

[8] The appellant also complains that his trial counsel should have confronted the complainant with a DNA report showing male DNA on her neck and left breast. The appellant contends that the DNA analysis would have undermined the complainant's denial that the appellant had consensually touched and kissed her in that location of her body. However, in light of the complainant's evidence that when she awoke from a state of unconsciousness, her breasts were exposed and

the appellant was naked beside her and penetrating her vagina with his penis, it is difficult to see how the DNA report showing male DNA in her breast area could have undermined her credibility or assisted his.

[9] Having regard to the suggestion that trial counsel failed to confront the complainant with inconsistent statements, the allegedly contradictory statements came from the notes of police officers and paramedics who attended the scene. It is not clear that the authors of those notes were recording what the complainant had told them firsthand. In any event, the alleged inconsistencies were on peripheral matters that could not have shaken the complainant's evidence.

[10] Trial counsel's conduct fell within the range of reasonable professional assistance.

[11] The appellant acknowledges that this case turned on credibility. At the core of the trial judge's reasons for rejecting the appellant's evidence was her finding that his evidence made "no sense." She concluded her judgment with the following observations:

> As I have stated, I do not believe [M.M.], nor do I find his explanation for these events to be remotely plausible. I fully accept that [M.M.] went to Toronto, to Ms. A.'s apartment, expecting to get sex. He knew she was drunk and messed up on drugs and that she wanted company. He added that together and concluded he would get sex; that was his expectation.
>
> However, I also accept Ms. A.'s evidence that she was vulnerable, intoxicated, and afraid to be alone. She

> thought [M.M.] was coming as a friend to help her. She was not expecting to have sex with him. I accept Ms. A.'s evidence that she passed out, and that she woke up to find [M.M.] naked in her bed, engaging in sexual intercourse with her.
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> I am satisfied beyond a reasonable doubt, based on all of the evidence that [M.M.] ripped Ms. A.'s bra and tore a hole in her leggings. I do not believe his evidence that he was physically incapable of doing so. It does not take enormous strength or dexterity to accomplish such a task, and all he had to do with his left arm was hold on, while his right hand and arm could do all the tearing.
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> I do not believe for a second that Ms. A. tore her own clothing after the fact, to frame [M.M.]. [M.M.] did that after she was unconscious, and he did so for the purpose of carrying out the sexual acts that were the only reason he drove to Toronto in the first place. Further, he did so without regard to the fact that Ms. A., completely unconscious, was not consenting.
>
> I am satisfied beyond a reasonable doubt that [M.M.] engaged in sexual acts with Ms. A., including penetrating her vagina with his penis, while she was unconscious, and knowing she was not consenting.

[12] This was a fair trial and there was no miscarriage of justice.

[13] For these reasons the appeal was dismissed.

"Alexandra Hoy A.C.J.O."
"K. Feldman J.A."
"Fairburn J.A."