COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rousselle, 2020 ONCA 186
DATE: 20200309
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Watt, Pardu and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Paul Rousselle

Appellant

Peter Copeland, for the appellant

Lisa Joyal, for the respondent

Heard: February 25, 2020

On appeal from the conviction entered on November 22, 2010, with reasons reported at *R. v. P.R.*, 2010 ONSC 6426, by Justice Gisele M. Miller of the Superior Court of Justice.

REASONS FOR DECISION

[1] Paul Rousselle was convicted of aggravated assault upon four-month-old Baby L. He appealed, arguing that the trial judge's reasoning process was illogical or irrational and that there must therefore be a new trial. We do not agree. The appeal was dismissed with reasons to follow. These are our reasons.

[2] There was no dispute at trial about the medical evidence that Baby L. had suffered injury, likely due to shaking. The substantial issue at trial was whether the appellant had caused that injury.

[3] Baby L. lived in a townhouse with her parents, C.A. and S.J. The appellant and his partner, S.H.J., also lived there with their own infant son.

[4] On November 14, 2008, during a regularly-scheduled appointment for vaccinations, C.A. and S.J. told the nurse that Baby L. had been sleeping too much, was not eating well, and was projectile vomiting. They took the child to the emergency department on the nurse's advice. There, doctors discovered subdural bleeding that was causing life-threatening increased cranial pressure, and which resulted in lasting impairments.

[5] A medical expert, Dr. Singh, testified at trial that there were three different ages of subdural bleeding apparent on the CT scan of the baby, taken on November 14, 2008. The acute bleeding was zero to three days old, the sub-acute bleeding was between three days and three weeks old, and the chronic bleeding was up to three months old. Another medical expert, Dr. MacMillan, testified that considerable force, well beyond that which any person would have regarded as appropriate treatment of a four-month old baby, would have been required to inflict the injury. The position of the Crown was that the appellant caused the acute injury, occurring within three days of November 14, 2008.

[6] On November 15, 2008, the appellant was interviewed by police at his workplace. He denied shaking Baby L. or knowing of anyone else shaking her.

[7] On November 21, 2008, the appellant was interviewed by police at the police station. The appellant said that one day, while her parents were outside smoking and he was playing a video game, Baby L. began choking. He patted her on the back and then shook her for about five seconds to stop the choking. He said, “I had to shake her fast and I shook fast… I thought that maybe I was shaking her too hard… It might have been too hard, it might have been… I thought about it and it could have been too hard.”

[8] The appellant was cautioned but he declined the opportunity to contact a lawyer and continued speaking. He advised that Baby L. was “OK” after the shaking and that he did not tell anyone at that point what had happened. He could not pinpoint a date but said that this occurred sometime between November 8, 2008 and November 14, 2008.

[9] The appellant was then arrested, re-cautioned, and given the opportunity to contact counsel, which he again declined. After four hours and a meal, he was brought to an interview room. At this point the appellant admitted that he made up the choking story and that he had shaken Baby L. when she would not stop crying. He agreed that he got frustrated because Baby L. would not stop crying, and that her crying made his son cry as well. He maintained that he had not shaken her

hard enough to hurt her and demonstrated the degree of force he used to the police officer.

[10] He said he had to lie about the choking story because “it’s so bad”.

[11] His partner, S.H.J., testified that when she picked up the appellant from the police station on November 21, 2008, he told her he had been arrested, and that he was sorry he could not tell her earlier what had happened. He later told her he had been in the living room playing video games and the two children were both in the room with him. Baby L. started crying, which made his own son start crying too. He said he picked up Baby L. and when she wouldn’t stop crying, he shook her.

[12] At trial the appellant testified that he did not do anything to Baby L. to cause her injury and that he did not shake her. He said he lied to police because he feared that if he did not confess to hurting her, the Children’s Aid Society would take his own son into care. Even if he were found responsible for hurting Baby L., it would be better for his own son to be in his partner’s care than in foster care.

The trial judge’s decision

[13] The trial judge concluded that the appellant truthfully confessed to shaking Baby L. and that the assault endangered her life:

> … I am of the view that *if* Paul Rousselle’s confession to police that he shook [Baby L.] to stop her from crying

> when he was playing videogames was a false confession, he would have to be an actor of extraordinary talent. There is no evidence that he is. The detail he provided in respect of that incident and the emotion he conveyed when telling it to police have the ring of truth. When I consider that evidence in conjunction with Mr. Rousselle's confession to his spouse I accept that what he told police was true.
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> …
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> I am satisfied that when Paul Rousselle shook [Baby L.], he did not shake her for any altruistic reason, such as saving her life from choking, I am satisfied that he shook her deliberately out of frustration when her crying was interrupting his playing of videogames. He knew when he did so that it was wrong to do so and that he could cause her serious injury – injury serious enough to amount to bodily harm. I am also satisfied that any reasonable person would foresee the likelihood of such an injury in those circumstances. In this case the injury inflicted clearly endangered [Baby L.'s] life.

Arguments on appeal

[14] The appellant relies on *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, and submits that it was illogical or irrational for the trial judge to accept his statement to police that he had shaken the baby out of frustration but at the same time to reject the demonstration given to the officer during the same interview suggesting that he used only very minor force that would not have injured the child.

[15] We disagree. It was open to the trial judge to accept all, some, or none of the appellant's statements to police as well as his trial testimony. Her conclusions are both logical and rational and rooted in the whole of the evidence.

[16] The appellant admitted to shaking Baby L. within a time frame during which the acute injury was inflicted. He admitted to his own partner that he had done so. He shook her out of frustration because she would not stop crying. The medical evidence established that considerable force would have been necessary to cause the injury. He shook her until she stopped crying. The medical evidence was that this was a significant indicator of the degree of force used. Dr. MacMillan testified, "[t]he fact that [Baby L.] became quiet subsequent to a shaking raises major concern for me about the extent of the shaking because that action has led to a change potentially in her level of consciousness, in her brain functioning." There was no evidence anyone else shook Baby L. during the three-day interval in which the acute injury was inflicted.

[17] In the light of this evidence, the trial judge was not obliged to accept the appellant's evidence that he used only gentle force when he shook the baby.

[18] The appellant also submits, on essentially the same basis, that the trial judge's reasons were insufficient, or based on a misapprehension of the appellant's interview with police and the medical evidence. We do not accept these arguments for the same reasons expressed above.

[19] The appellant further contends that the trial judge erred in admitting evidence of a previous incident in which the appellant reacted angrily to an interruption of a video game. There was evidence that the appellant's partner

turned off his gaming system while he was in the middle of a game with friends. The appellant responded by picking up a guitar, taking it to the basement and holding it as if he were about to smash it. The appellant argues that this incident was so dissimilar that it should not have played any part in the trial judge's reasoning.

[20] We disagree. There was no objection to the admission of this evidence at trial and the appellant confirmed the accuracy of the account of this earlier incident in his own evidence. It was relevant to show the intensity of the appellant's focus when he played video games and the seriousness with which he approached playing them. The trial judge indicated that this evidence showed that the appellant could react strongly to an interruption of his video game but that it would blow over quickly.

[21] The intensity of the appellant's focus when he played video games, and the seriousness of his engagement with them, could shed light on why the appellant became frustrated and shook Baby L. The probative value of the evidence of the minor earlier skirmish involving a video game was not outweighed by any prejudice associated with that evidence. It had little impact on the trial judge's reasons, given the appellant's admission to police that he shook the baby out of frustration.

[22] For these reasons, the appeal as to conviction was dismissed. The sentence appeal was dismissed as abandoned.

“David Watt J.A.”
“G. Pardu J.A.”
“L.B. Roberts J.A.”