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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 subpara. 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 subpara. (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 (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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 para. (a).
>
> (2) In proceedings in respect of the offences referred to in para. (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Pascal, 2020 ONCA 287
DATE: 20200506
DOCKET: C53388

Watt, Miller and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Stewart Pascal

Appellant

Stewart Pascal, appearing via videoconference

James Lockyer and Catriona Verner, for the appellant

Craig Harper, for the respondent

Heard: September 11-12, 2019

On appeal from the conviction entered on January 8, 2009 and the sentence imposed on June 11, 2010 by Justice Terrence A. Platana of the Superior Court of Justice, with reasons reported at 2010 ONSC 3187.

Watt J.A.:

[1] S.S. and B.S. had summer jobs at a provincial park near Kenora. On a scheduled day off, they travelled to Kenora and rented a room at Luby's Motel.

[2] Sometime later, Stewart Pascal (the appellant) and his friend Dawley Dunsford, walked by the open door of S.S. and B.S.'s motel room. The appellant and Dunsford were invited in for a drink. They joined S.S., B.S. and M.B., a man whom S.S. and B.S. had earlier invited for a drink.

[3] Hours later, S.S. and the appellant were alone on a picnic table by a dock near the motel. It was there, S.S. alleged, that the appellant sexually assaulted her causing injuries to different parts of her body.

[4] Arrested shortly after these events, the appellant was charged with sexual assault causing bodily harm and two counts of failing to comply with the terms of a recognizance on which he had earlier been released.

[5] After a trial before a judge of the Superior Court of Justice sitting without a jury, the appellant was convicted of sexual assault causing bodily harm.[1] The Crown instituted dangerous offender proceedings. The trial judge found the appellant a dangerous offender and imposed an indeterminate penitentiary sentence.

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[1] The appellant pleaded guilty to both counts of failure to comply with a recognizance. Those convictions are not under appeal.

[6] The appellant appeals his conviction of sexual assault causing bodily harm. He also challenges his designation as a dangerous offender and the indeterminate sentence imposed upon him.

[7] These reasons explain why I would allow the appeal from conviction based on the appellant's application to introduce fresh evidence. In these circumstances, it is unnecessary to consider the sentence appeal.

The Background Facts

[8] The circumstances underlying the appellant's conviction took place over a few hours. They involve as principals, S.S. and the appellant, although other witnesses contributed to the unfolding of the narrative.

The Principals and Their Relationship

[9] S.S. and B.S. had summer jobs at a provincial park. With some days off, S.S. and B.S. decided to spend some time in Kenora. They rented a room at Luby's Motel, bought some liquor and mix and returned to their room for a drink.

[10] As they returned to their motel room, S.S. and B.S. noticed a man outside the room next door. The man had long hair. He was holding a baby. The room he was standing outside was occupied by his wife and two of his three children.

[11] The man had his long hair in a ponytail. He and his friend were living at a treatment centre nearby. They were required to refrain from consuming alcohol

and abide by a curfew. The man with the ponytail was the appellant; the other man was his friend, Dawley Dunsford.

[12] A convenience store was part of the Luby's Motel complex. Deidre Jarvis, who would later testify at the appellant's trial, worked at the convenience store and lived on the lower level of the motel. She knew the appellant because she had seen him several times around the motel – in particular, in and around Unit 44.

The Early Events

[13] After having a drink in their room, S.S. and B.S. walked across the road to another motel which had video games. They remained there and had more drinks until the bar closed. They met a man, M.B., whom they invited back to their motel room for more drinks.

[14] Later, as S.S., B.S. and M.B. sat around the motel room, the appellant and Dawley Dunsford stopped at their door. The appellant asked what was going on. S.S., who had seen the appellant earlier outside the room next door, invited the two men to join them. Both the appellant and Dunsford entered the room.

The First Incident

[15] After some initial socializing, S.S. and the appellant began demonstrating self-defence manoeuvres. The appellant accidentally struck S.S. during the course of this demonstration.

[16] Soon afterwards, according to S.S., Dawley Dunsford pushed B.S. down on one of the beds and got on top of her. When S.S. intervened, the appellant threw her down on the other bed and tried to kiss her. She pushed him away and yelled at him to get off her. M.B. helped to pull both men off the two women. S.S. ran to the bathroom.

[17] M.B. told the appellant and Dunsford to leave the room. When both men came towards him, M.B. bolted from the room. He asked the clerk in the convenience store to call the police.

[18] Eventually, after things quieted down, S.S. came out of the bathroom. She closed the curtains, turned off the lights and shut the door to make it appear that she and B.S. were sleeping.

The First Police Response

[19] In response to a 911 call, the police arrived. They spoke to S.S. and B.S. and advised them to stay in their motel room with the door locked. S.S. and B.S. followed the officers' instructions. The police left. Later, M.B. knocked on the door. S.S. opened the door and let M.B. join them in the motel room.

The Return Visit

[20] As S.S., B.S. and M.B. sat in the motel room with the door locked, lights off and curtains drawn, S.S. heard a loud banging on the door and window. The banging was so forceful that S.S. thought the door might break. B.S. was crying.

S.S. told B.S. and M.B. to call the police. S.S. then left the room. She saw the appellant and Dunsford, who was pounding on the door next to S.S.'s room.

[21] The appellant recalled a different series of events. When M.B. went to phone the police, he and Dunsford left the motel and went into town. The appellant knew he was in breach of two conditions of his recognizance and did not want the police to find him. At some point, the appellant lost his watch. After about 45 minutes in town, the appellant and Dunsford returned to the motel. Dunsford knocked on the door next to the room occupied by S.S. and B.S. The appellant waited on the stairwell. S.S. approached the appellant and offered him a kiss.

The Dock

[22] S.S. told the appellant and Dunsford to leave because they were scaring B.S., who was only 18 years old. The appellant stepped towards S.S. She stepped back. With each step she moved further away from her room. The appellant extended his arms so that S.S. could not get by him to return to her room. She backed down the stairs to ground level. The appellant grabbed her around the waist, tightening his grip as she tried to walk away.

[23] S.S. recalled that she and the appellant got to the picnic table at the dock. Aware that the police were likely on their way, S.S. tried to stay calm. She attempted to get the appellant to talk about his children. They sat on the picnic table smoking a cigarette. The appellant began to rub S.S.'s back.

[24] The appellant said that S.S. approached him outside her room and offered him a kiss. He put his arm around her and they walked to the dock area. They chatted and giggled. S.S. was cold. The appellant put his arm around her as they sat on the picnic table.

The Sexual Assault

[25] S.S. testified that she got up to leave from the picnic table when the appellant began to rub her back. The appellant grabbed her around the waist and pulled her towards the end of the picnic table closest to the water. When she resisted, the appellant threw her down on the dock. She landed on her face, then rolled over onto her back. The appellant pinned her hands down above her head. She squirmed and yelled, but could not escape. He put his left hand on her breasts under her shirt. She yelled: “Don’t do this. Stop”. The appellant persisted. He got her pants and underwear down and began feeling around her pubic and vaginal areas.

[26] S.S. then noticed Dawley Dunsford standing on a grassy area near the dock. The appellant got off her. S.S. pulled up her underwear and pants. She tried to escape. The appellant blocked her way. He spoke to Dunsford in a language S.S. did not understand. Dunsford walked away.

[27] According to S.S., after Dunsford left, the appellant threw her onto the end of the picnic table, then picked her up again and threw her down on the dock. She

landed face down. The appellant got on top of her. She grabbed his ponytail with both hands. She yelled for him to stop. He got her pants and underwear down. He removed his own pants, then tried to put his penis into her vagina. He did not fully penetrate her. She screamed loudly when she felt the appellant's penis at her anus. The appellant then put his hand over her mouth and nose. He pinched her nose. She could not breathe. He then took his hand away from her mouth and slammed her face down twice on the dock.

[28] S.S. recalled that she almost lost consciousness when the appellant slammed her face down on the dock. She went limp. She told the appellant "I'll stop, do whatever you want. I'll stop". Then someone yelled "What's going on out there?" S.S. no longer felt the appellant on top of her. She rolled over and pulled up her pants and underwear. She grabbed some things that she thought might be evidence and ran towards the motel, then to the road, yelling for help. When she saw two police officers, she ran over to the female officer (who had responded to the first 911 call) and turned over the things she had gathered as evidence.

[29] The appellant denied any sexual assault or removal of S.S.'s clothing. He testified that after he had put his arm around S.S. as they sat on the picnic table, he saw Dunsford standing near some trees. He spoke to Dunsford in Ojibwe, telling him to give them (he and S.S.) a minute. Dunsford left. S.S. wanted to go back to her room, but the appellant was reluctant to do so. The police had been there earlier. S.S. grabbed his ponytail with both hands to force him to accompany her.

The appellant lost his temper. He punched S.S. once and pushed her. She landed on the dock and did not move. The appellant panicked and ran to his wife's room.

[30] After the appellant had been in his wife's room for about 15 minutes, Dunsford tried to open the door to the room. Unsuccessful, Dunsford turned and walked towards the room S.S. and B.S. shared.

The Second Police Response

[31] When police officers were speaking to M.B. in response to the second 911 call, they heard a scream emanating from a motel building by the area of the creek. They then saw S.S. try to flag down a vehicle on a road near the motel. She was hysterical. She was standing in the middle of the roadway yelling "Help me. Help me."

[32] When a male police officer approached S.S. to help her, she yelled "Get away from me" twice. S.S. calmed down when a female officer came towards her. S.S. turned over the items she had gathered as evidence, which included a ball cap, a wristwatch and a package of cigarettes.

The Complainant's Injuries

[33] S.S. was examined and treated at a local hospital. There were bruises to the right side of her neck, and bruises and skin tears on both elbows. A superficial laceration and considerable swelling were visible on S.S.'s nose. A bruise, 2 cm x

2 cm, was apparent on S.S.'s left thigh, about 6-7 cm from her vaginal opening. Some scar tissue remained on her face at the time of trial.

The Forensic Evidence

[34] The appellant's DNA was detected in fingernail scrapings from S.S.'s hands. One bloodstain from the dock contained long black hairs.

[35] S.S.'s DNA was detected in bloodstains found at the dock and outside Room 44 at Luby's Motel. Room 44 was the room occupied by the appellant's wife and children, to which he returned after the alleged sexual assault. S.S.'s DNA was also detected on the wristwatch she turned over to police, as was DNA from at least one male contributor.

The Eyewitness Evidence

[36] At trial, the Crown called Deidre Jarvis, who worked at the time in the convenience store at Luby's Motel. Ms. Jarvis also lived in the motel, in Unit 21. Her room was on the lower level and overlooked the dock area.

[37] Ms. Jarvis testified that on the night in question, she was awakened around 3:00 a.m. by noises coming from the dock area. It sounded to Jarvis like a "casual, friendly conversation." She looked out the window and saw a man – identified at trial as the appellant – sitting with a woman. Jarvis fell back asleep. Around 4:00 a.m. she was awakened again, this time by a "ruckus". There was no more friendly conversation. This time the woman sounded distressed, as though she were trying

to call for help. Jarvis went outside and yelled at the couple to “get off the dock.” At this point the man ran away, making motions which indicated to Jarvis he was pulling up his pants.

[38] As discussed below, this testimony was inconsistent in several respects with an initial statement Jarvis provided to police a few days after the incident. Jarvis was cross-examined on these inconsistencies by defence counsel at trial.

[39] Notwithstanding her inconsistent accounts, the trial judge ultimately accepted Jarvis’ evidence at trial and relied on it to reject the appellant’s version of events.

The Appeal Against Conviction

[40] The appellant advances two grounds of appeal alleging errors in the trial judge’s reasoning process. He says the trial judge erred:

i. in relying on the identification evidence of Deidre Jarvis; and

ii. in failing to consider the absence of evidence, thus shifting the onus of proof from the Crown to the appellant.

[41] The appellant also challenges his conviction on the basis of evidence which he tenders for reception in this court. As this appeal turns on that application, and a new trial is required, it is unnecessary to consider the other grounds of appeal.

Ground #1: Motion to Admit Fresh Evidence

[42] The appellant invokes s. 683(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, to introduce in this court evidence not tendered at trial. The proposed evidence targets the credibility of Deidre Jarvis and the reliability of her testimony.

[43] The core of the proposed fresh evidence consists of Deidre Jarvis' criminal record and of several charges outstanding against her when she testified at trial. Included in the latter category is evidence of her relationship with a notorious local drug dealer, Frank Novelli. The record filed in support of the application also includes evidence about Deidre Jarvis' subsequent involvement in the criminal justice system, including charges laid and convictions entered after she testified at the appellant's trial.

[44] It is common ground that prior to and at trial, the Crown had not provided and trial counsel had not sought disclosure of any information about Jarvis' prior convictions or outstanding charges.

[45] Recall that Deidre Jarvis provided two statements to police, the second of which was far more incriminating of the appellant. More detail on Jarvis' statements and her evidence at trial provides the backdrop essential for an understanding of this ground of appeal.

The First Statement of Deidre Jarvis

[46] Deidre Jarvis was first interviewed by DC Jackson of the Kenora Police Service about two days after the alleged sexual assault. Ms. Jarvis recalled having been awakened from sleep by a man and a woman talking and giggling on the dock. After about an hour, she fell back asleep. She was awakened a second time, around 4:00 a.m. The voices were loud. The man was doing most of the talking. Ms. Jarvis could not tell whether either of them appeared distressed. Jarvis heard them discussing a third individual; she was not certain of the name but mentioned B.S.'s first name as one of two possibilities. She went outside and yelled at them "I'm trying to sleep". The man had a ponytail. She had seen him before in the convenience store and around Room 44 where his girlfriend lived. She saw the man get up, but did not see the woman.

[47] DC Jackson wrote out the questions she asked Ms. Jarvis as well as the answers Ms. Jarvis provided. The statement was not audio or video recorded, nor was it sworn. It was completed and signed in 17 minutes.

The Second Statement of Deidre Jarvis

[48] The second statement was provided after PC Spencer had reviewed Deidre Jarvis' first statement with her to prepare her for trial. This statement, provided on the first day of trial, was made about 17 months after the relevant events and the first statement. Like the first, the second statement consisted of questions and

answers in written form, but was not audio or video recorded or sworn. It was completed in 11 minutes.

[49] In its material parts, the second statement reads:

> Q: I have just finished reading you your statement from the 17 Aug 07. You have indicated that you have some additional information. What can you tell me?
>
> A: That the girl was distressed which is why I finally intervened. I saw him with his hand over her mouth. It sounded ok at the start but it wasn't friendly anymore and sounded more violent.
>
> Q: Can you tell me what was being said?
>
> A: No. I just went outside because it sounded bad. I didn't want to get too close because I didn't know what he was capable of. When I yelled at him to get off the dock he stood up and I know he had to be pulling up his pants. At this time there was no movement from her so I went back inside. I didn't want him coming towards me.
>
> Q: What made you say that you think he was pulling up his pants?
>
> A: Just his movement. He was putting on something. It had to be because of how he moved.
>
> Q: Can you describe his movements?
>
> A: Bent over hands near ankles and a pulling motion coming up.
>
> Q: Did you hear any yelling from the dock area?
>
> A: It was really his hand over her mouth. He was stifling her. Stopping her from yelling.

The Trial Testimony of Deidre Jarvis

[50] In her examination in-chief at trial, Deidre Jarvis gave evidence of her observations consistent with the substance of her second statement. She explained that she first realized a misunderstanding with her first statement when she reviewed it on the first day of trial:

> I realized that the end of it was wrong ‘cause it, I realized the distressed part. ‘Cause if there wasn’t distress then I would have, I would have stayed out of it, so then I, I corrected it.

[51] Defence counsel cross-examined Ms. Jarvis about the discrepancies between her statements:

> Q. Okay ma’am, I’m going to read to you the question. Okay? Perhaps we’ll go back to it. Do you recall on the 17th day of the eighth month of 2007 that you were interviewed by a police officer by the name of Jackson?
>
> A. Yes.
>
> Q. Yes? Okay. Do you remember him asking you certain questions and giving certain answers?
>
> A. Yes, I do.
>
> Q. Do you recall being asked this following question and giving this following answer: “Question, Could you tell at the time if anyone appeared to be distressed? … Answer, No, I couldn’t. I could hear him talking mostly. Not too much from her.”
>
> A. Mm-hmm.

Q. Do you recall giving that answer to that question?

A. Yes, I do.

Q. Were you being truthful at that time…

A. Not truthful enough.

Q. …to the best of your ability?

A. No.

Q. Do you recall being asked the question by the police officer in that statement on that day, “Could you tell if they were clothed at the time? …” And giving the answer, “No, but I didn’t have my glasses on.” Do you recall giving that answer to that question?

A. Not until today, no. I didn’t remember when I wrote my statement until today when I reviewed it, and it wasn’t very thorough, and I’m sorry that it wasn’t very thorough. But today I figured, you know, like that’s wrong. … Because, I mean, there was more to it, and I was in a hurry, and, you know that’s sad of me to say because I should have been more thorough with the investigators, but I was working and I was going back to work. So, I mean, I should have been more thorough and went over the statement with them that day.

Q. So you recall being asked the further question, “Could you tell if they were clothed at the time?” And answering, “No, but I didn’t have my glasses on.”?

A. Yes.

Q. Were you being truthful at that time?

A. No, I guess not.

The Reasons of the Trial Judge

[52] The trial judge acknowledged the frailties of Deidre Jarvis' evidence, including her nearsightedness, mistaken estimate as to her distance from the dock, and the inconsistencies between her statements. He nonetheless invoked Jarvis' testimony at several points in his reasons.

[53] For one, he cited Jarvis' evidence to confirm S.S.'s narrative of events at the dock. The trial judge admitted "concern" with respect to S.S.'s evidence of "how [she and the appellant] got from the motel room to the dock." However, he accepted S.S.'s account of the sexual assault, explaining:

> Regardless of any concern I may have had in relation to that issue of moving down to the dock, I have no doubt on the evidence as to the following events. As I noted, it is in the accused's own evidence that when Dawley arrived, and this was before any evidence of anything physical between the two, [S.S.] a desire to leave. As noted previously, there is significant evidence of [S.S.] of resistance found in the evidence of Deirdre Jarvis, who heard the screaming and who saw Stewart ultimately pull up his pants and run away. [Emphasis added.]

In accepting S.S.'s evidence the judge also relied on the evidence of responding officers, who testified as to her distraught condition.

[54] The trial judge also resorted to Jarvis' evidence to reject aspects of the appellant's testimony. The most significant of which being the appellant's account of what occurred at the dock, including his denial that he ever removed S.S.'s clothing. The trial judge said:

> In light of the earlier incident in the room when [the appellant] accidentally struck [S.S.] while doing some form of self-defence manoeuvre, and the evidence of subsequent events, I have no difficulty in not being able to accept his evidence that she was pulling him by the hair in an attempt to get him to go back up to her room. It simply makes no sense in context.
>
> He makes no reference in his evidence to her screaming down at the dock. That is clearly contradicted by the evidence of Deidre Jarvis. I have commented earlier that I have considered the difference in Ms. Jarvis's evidence given at trial, as opposed to that given in an August, 2007 statement to the police.
>
> I also note the fact that Mr. Pascal states that at no time did he ever remove [S.S.]'s clothes. That is also contradicted by Deidre Jarvis, who says that she saw the man get up, pull his pants up, and then run away. She then saw the other individual getting straightened up.
>
> I am satisfied that in spite of the evidence as to distance where she may have been mistaken, and the evidence of not having her glasses on, the evidence of Deidre Jarvis was still solid and unequivocal, and is sufficient for me to accept her evidence of what occurred at the dock. [Emphasis added.]

The Fresh Evidence

[55] The materials filed in support of the motion to adduce fresh evidence may be divided into several categories. The most significant of which are the then-existing convictions and charges outstanding against Deidre Jarvis, and the knowledge of the trial participants about them. Although not tendered as fresh

evidence, I will briefly describe some further charges and their disposition to complete the narrative.

The Criminal Record

[56] At the time of trial, Deidre Jarvis had previous convictions of possession under, two counts of possession of controlled substances and one of possession of a controlled substance for the purpose of trafficking. The convictions were entered on September 10, 2001, over seven years prior to the appellant's trial.

[57] Deidre Jarvis' convictions arose after police executed a search warrant at her residence in Fort Frances. In her home, Ontario Provincial Police ("OPP") officers found three different kinds of controlled substances, a small amount of cash, seven unsafely stored long guns and assorted drug paraphernalia.

The Outstanding Charges

[58] Between her first and second statements Deidre Jarvis accumulated a number of criminal charges. In chronological order, those charges were:

- Possession of proceeds, over $5000 (March 2008)
- Failure to appear (May 5, 2008)
- Possession of cocaine for the purposes of trafficking (July 31, 2008)
- Possession of proceeds, over $5000 (July 31, 2008)
- Failure to comply (July 31, 2008)
- Possession of proceeds, under $5000 (August 28, 2008)
- Trafficking cocaine (2 counts) (August 28, 2008)

None of these charges were disclosed to the defence. And none of them were disposed of until after the appellant's trial was complete.

[59] The first charge (possession of proceeds over) was laid in March 2008. Deidre Jarvis and Frank Novelli were passengers in a motor vehicle stopped by an OPP officer. Jarvis had a backpack that contained $7,000 in bundled Canadian currency. Frank Novelli was believed to be involved in the drug trade and often had large amounts of money. Jarvis, who had been dating Novelli for seven months, claimed the money was her own. About 20 months later Jarvis pleaded guilty to possession over and received a one-year conditional sentence.

[60] The second charge was laid in May 2008 when Jarvis failed to appear in relation to the possession over charge. The failure to appear charge was later withdrawn.

[61] The next three charges arose from police surveillance of Jarvis and Novelli on July 31, 2008. After completing what appeared to be a drug transaction with an unknown person, Novelli went to an area near an old age home. He emerged from a wooded area and handed a bag to Jarvis, who shoved it down the front of her pants. Police arrested the couple. The bag in Jarvis' pants contained 60.5 grams of cocaine. Police also found 16 ounces of cocaine in the wooded area. It was valued at $40,000. A search of the couple's home yielded $6,850 in cash.

[62] Deidre Jarvis was charged with possession of cocaine for the purpose of trafficking, possession of the proceeds of crime and failure to comply with an undertaking. Jarvis pleaded guilty to these charges on September 20, 2010. She

received a six-month jail sentence (less credit for pre-sentence custody) on the possession for the purpose count and conditional sentences on the other charges. At the hearing, Jarvis acknowledged a relationship of three and one-half years with Frank Novelli. The couple had a child who was then 16 months old.

[63] The final charges – two counts of trafficking cocaine and one count of possession under $5000 – arose from police surveillance of Jarvis and Novelli's residence between March and May, 2008. During this period, officers noticed as few as 3 and as many as 40 persons visit the house each day for short periods of time. Officers confirmed the visitors had purchased cocaine.

[64] After the appellant's trial, four of these charges were ultimately withdrawn: failure to appear, possession under, and two counts of trafficking in cocaine. On the other counts, Jarvis was sentenced as follows:

- Possession of proceeds over – One year conditional
- Possession of proceeds over – One year conditional and concurrent
- Possession cocaine purpose of trafficking – Six (6) months jail less pre-sentence custody, concurrent
- Fail to comply with undertaking – 30 days conditional and concurrent

The Post-Testimony Charges

[65] On September 3, 2009 Jarvis and Novelli were arrested in connection with possession of less than 30 grams of marijuana and Percocets, as well as various counts of failure to comply with earlier forms of release. All charges against Jarvis were withdrawn on November 25, 2009.

[66] In 2017 and again in 2018, Deidre Jarvis was arrested in Fort Frances and charged with a number of property offences and failures to comply with the terms of prior forms of release. In none of these alleged offences was she charged with Frank Novelli, although one count alleged that she stole Novelli's car.

The Evidence of Knowledge and Disclosure

[67] The record on the fresh evidence application includes affidavits and statements of several persons involved in investigating the offences of which the appellant was convicted and of trial counsel for the appellant, as well as counsel who represented the appellant at the preliminary inquiry. The record also includes cross-examinations of several, but not all, participants.

The Evidence of Defence Counsel

[68] A lawyer from Winnipeg represented the appellant at the preliminary inquiry. The Crown disclosed to him a copy of Deidre Jarvis' first statement. He received no disclosure about Jarvis' criminal record or outstanding charges. He was unaware of the disclosure practices of the Crown Attorney's office in Kenora. It was not his practice, at that time, to ask for disclosure of the criminal records of or outstanding charges against Crown witnesses.

[69] Trial counsel was an experienced criminal lawyer who practiced law in Thunder Bay. He was contacted by Legal Aid Ontario to take over the appellant's defence and agreed to do so. He had two to three months within which to review

the disclosure and prepare for trial. The disclosure materials included the first statement of Deidre Jarvis whom he considered a possible defence witness. Trial counsel considered Ms. Jarvis' description of having heard a man and woman "laughing and giggling" on the dock as confirmatory of the appellant's version of events. He had no reason to request her criminal record.

[70] Trial counsel explained that in Thunder Bay where he practices, he would have known whether a witness had a criminal record. He would also have received disclosure of the record from the Crown as was the practice in that jurisdiction. He agreed that, as a general rule, criminal records of proposed Crown witnesses were disclosed on request.

[71] On the morning the appellant's trial began, defence counsel received a copy of Deidre Jarvis' second statement given that day. Nothing in it gave him any reason to inquire whether Ms. Jarvis had any criminal history. He considered it raised a reliability issue, one which could be dealt with through cross-examination to neutralize the incriminating aspects of her testimony and bring her back to the portions of the contemporaneous first statement which were compatible with the defence position.

[72] When he received Deidre Jarvis' second statement, trial counsel did not seek an adjournment. His client had been in custody in a century-old jail for 17 months. The conditions were deplorable. An adjournment would have resulted in

a delay of several months, perhaps even a year. The appellant was not a candidate for release pending trial. There was also a funding issue with Legal Aid Ontario.

[73] Trial counsel did not seek disclosure from the Crown of the criminal record or history of Deidre Jarvis. He saw no warning signs. She remained a clerk from the convenience store at Luby's Motel. Her second statement took counsel by surprise. He considered that her revised version might have had some racial overtones since it supported the account of the Caucasian female, describing a violent sexual assault by an Aboriginal male. In the end, he considered the second statement to have been made, taken and disclosed in good faith.

The Police Evidence

[74] DC Renita Jackson of the Kenora Police Service was the officer in charge of the investigation into S.S.'s allegations. DC Jackson took Deidre Jarvis' original statement two days after the alleged offence. The statement was handwritten during an interruption of Jarvis' work shift at the convenience store. Jarvis did not appear concerned about the interruption.

[75] DC Jackson, who was a sergeant with the OPP at the time of trial, assigned Constable Spencer to review Deidre Jarvis' statement with her as part of witness preparation requested by the trial Crown. Constable Spencer, who was there on his day off, reported that Deidre Jarvis had more information to provide. The trial Crown directed that a further statement be taken from Deidre Jarvis so it could be

disclosed to defence counsel. Constable Spencer took the statement in a handwritten question and answer format.

[76] Sgt. Jackson acknowledged she was familiar with Deidre Jarvis although she could not recall whether she was aware at the time of the statements or trial of Ms. Jarvis' criminal record, the outstanding charges against her or her relationship with Frank Novelli. In accordance with Kenora Police Service practice at the time, Sgt. Jackson did not do, nor was she asked to do, a criminal record check on Deidre Jarvis or determine whether Jarvis had any outstanding charges.

[77] Constable Spencer was involved in the early stages of the investigation. He executed a search warrant at Luby's Motel and participated in the post-arrest interview of the appellant. Although it was his day off, Constable Spencer attended the first day of the appellant's trial and was assigned to review Deidre Jarvis' statement with her. He prepared Ms. Jarvis' second statement, but cannot recall who directed him to do so. Constable Spencer remained in the courtroom while Deidre Jarvis testified, but did not testify himself at trial.

[78] Constable Spencer was a detective constable with the Kenora Police Service at the time of the investigation and trial. He acknowledged the Kenora Police Service was a small force in which "everyone knew everyone". He was aware that Deidre Jarvis was the girlfriend of Frank Novelli whom Spencer considered "the biggest drug dealer in Kenora". He assumed that Jarvis lived with

Novelli in his Kenora home. Constable Spencer testified that he did not know whether Deidre Jarvis had a criminal record or any outstanding charges at the time of the appellant's trial. However, the officer had entered Deidre Jarvis' statement given after her arrest on March 20, 2008 into the records management system of the Kenora Police Service.

[79] Constable Gordon participated in the investigation and was the file manager in the courtroom during the appellant's trial. He was familiar with Deidre Jarvis' first statement. He knew that a second statement had been taken by DC Spencer but had not seen the statement and was not sure at whose request it had been taken.

[80] Constable Gordon knew about Novelli's drug dealing activities and his relationship with Deidre Jarvis but he was not sure about any charges against Jarvis because drug investigations operated out of a different police unit than he did. He did not inquire into potential outstanding charges. It was not the practice of Kenora Police Service to do so except where the Crown asked about criminal records and outstanding charges in connection with a person proposed as a surety. He did not consider Deidre Jarvis a significant witness in the prosecution of the appellant.

[81] Constable Gordon assumed the trial Crown would be aware of any outstanding charges against Deidre Jarvis. He based his conclusion on the fact that disclosure in drug cases is made through the local Crown Attorney's office, in

the absence of a standing Federal agent in Kenora, and that the provincial and Federal Crowns are in the same courtroom at the same time. In this case, no affidavit was filed on behalf of the trial Crown.

[82] Constable Frankcom was the only forensic identification officer at the Kenora Police Service. He was in the courtroom throughout the appellant's trial assisting counsel on both sides with the presentation of forensic evidence gathered during the investigation. He did not testify at trial.

[83] Constable Frankcom was aware of Deidre Jarvis and her involvement in various narcotics investigations. He had been assigned the task of checking baggies for fingerprints and preparing a list of the exhibits seized during the investigation. He continued to work on the drug investigation during the appellant's trial. He was also aware of Jarvis' relationship with Novelli and their shared residence in Kenora.

[84] Constable Frankcom testified that it never occurred to him to tell the Crown about the drug seizures and the ensuing investigation involving Deidre Jarvis. In his mind, Jarvis' testimony at the appellant's trial and her involvement in drug investigations were two different things, neither of which had anything to do with his duties as a forensic identification officer.

The CPIC Inquiry

[85] Three days before the appellant's trial was to begin, a civilian employee of the Kenora Police Service entered a query in the Canadian Police Information Centre ("CPIC") system in connection with Deidre Jarvis. This occurred two weeks after Jarvis' last court date and six weeks before her next one. Constable Gordon suggested the query was probably for validation purposes – i.e., to confirm the accuracy and purge inaccuracies in the entries concerning outstanding charges.

The Arguments on Appeal

[86] The parties join issue on the obligation of the Crown to disclose Deidre Jarvis' criminal record and outstanding charges in advance of trial as part of the first party disclosure obligation. They are at odds over the effect of the failure to disclose on the outcome of the trial and the fairness of the trial proceedings.

[87] The appellant submits that pre-trial disclosure of Deidre Jarvis' criminal record and outstanding charges was required under the first party disclosure regime of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. This information was in the possession or control of the Crown and was relevant to the credibility of an important Crown witness, as well as the reliability of her testimony.

[88] To assess the impact of the Crown's disclosure failure, the appellant continues, this court must conduct a two-step inquiry. First, we must assess whether there is a reasonable possibility the verdict rendered could have been

different had the disclosure been made. Second, we must assess whether the failure affected the overall fairness of the trial proceedings.

[89] The appellant says there is a reasonable possibility that the verdict rendered could have been different had the required disclosure been made. The original statement of Deidre Jarvis provided material support for the appellant's defence since her description of "laughing and giggling" with no apparent distress was incompatible with the complainant's version of events. The second statement was fatal to the defence if the substance of it became Deidre Jarvis' evidence at trial. It was critical for the defence to be able to undermine the reliability of her second statement and not just by virtue of its timing relative to the events described.

[90] The undisclosed material including Deidre Jarvis' criminal record and outstanding charges, the circumstances underlying them, and her relationship with the most notorious drug dealer in Kenora provided a storehouse of impeachment material, including information that could support a claim that she had a motive to fabricate her evidence to curry favour with the Crown in respect of her own outstanding charges. Jarvis was not simply a clerk at Luby's Motel who happened to hear and see things on the dock. Impeachment of the reliability of her evidence would reduce its confirmatory potential to the vanishing point, giving rise to the reasonable possibility of a different result at trial.

[91] The appellant also submits that the non-disclosure affected the overall fairness of his trial. The failure to disclose deprived the appellant of the evidentiary resources needed to effectively impeach the credibility of Deidre Jarvis and the reliability of her testimony.

[92] The appellant accepts that due diligence is a relevant factor, but submits that trial counsel in this case lacked sufficient information to request the materials now proposed as fresh evidence. Defence counsel at trial was unfamiliar with the local disclosure practices. Prior to the first day of trial, all indications were that Deidre Jarvis was a witness of unremarkable background, whose observations were consistent with the appellant's account. An adjournment was not a viable option. There was no reason to question the *bona fides* of Jarvis' revision of her original statement.

[93] The respondent acknowledges that Jarvis' record and outstanding charges were relevant for cross-examination purposes. However, the respondent emphasizes that appellate intervention is only warranted where an appellant demonstrates that non-disclosure impacted his right to make full answer and defence. In this case, the appellant has not satisfied this burden.

[94] The respondent accepts that the trial judge relied on Deidre Jarvis' testimony to confirm some aspects of S.S.'s evidence. But his key findings were not reliant

on Deidre Jarvis' evidence. Nor was his rejection of the appellant's account based on an acceptance of Deidre Jarvis' version of events.

[95] The trial judge accepted S.S.'s evidence and found it was confirmed by her physical injuries, her distraught condition immediately afterwards, the DNA findings and, in some respects, by the appellant's own testimony.

[96] The disclosure failure had no impact on trial fairness. It did not impact defence counsel's ability to advance his position: that while an assault occurred, there was no sexual component.

[97] In addition, the respondent continues, lack of due diligence constitutes a significant impediment to the appellant's motion. Trial counsel was aware of the general practice that the criminal records and outstanding charges of witnesses were only disclosed if a specific request was made for them of the Crown. An experienced criminal lawyer, he made no such request in connection with Deidre Jarvis. Further, the claim that an adjournment was not realistic because of the delay that would likely ensue rings hollow. Trial counsel was well aware that if the appellant was convicted, the court would institute dangerous offender proceedings which, by their very nature, are protracted.

[98] Overall, defence counsel made a tactical decision to attempt to have Deidre Jarvis confirm her observations as reported in his first statement. He should not now be permitted to reverse course because the result was unfavourable.

The Governing Principles

[99] The principles that inform our determination of this ground of appeal are those that define:

i. the disclosure obligations of the Crown;

ii. the evidentiary use of previous convictions and outstanding charges in impeachment of a non-accused witness; and

iii. the remedies available on appeal for disclosure failures at trial.

The Disclosure Obligations of the Crown

[100] Two different disclosure regimes govern disclosure in criminal cases. First party disclosure under *Stinchcombe* supplemented by the duties imposed upon the Crown and investigating police in *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, and third party disclosure under *R. v. O'Connor*, [1995] 4 S.C.R. 411. The purpose of each regime is to protect an accused's right to make full answer and defence, while at the same time to recognize the need to impose limits on disclosure when required: *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35, at para. 29; *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207, at para. 115.

[101] First party disclosure under *Stinchcombe* imposes a duty on the Crown to disclose all relevant, non-privileged information in its possession or control, whether that information is inculpatory or exculpatory, unless disclosure of that

information is governed by some other regime. This duty is ongoing and corresponds to the accused's constitutional right to the disclosure of all material which meets the *Stinchcombe* standard: *Gubbins*, at paras. 18-19; *Stinchcombe*, at pp. 339; and *R. v. McQuaid*, [1998] 1 S.C.R. 244, at para. 22.

[102] The purpose of disclosure is to protect an accused's *Charter* right to make full answer and defence. That right will be impaired where there is a reasonable possibility that undisclosed information could have been used by the accused to meet the case for the Crown, to advance a defence or to otherwise make a decision which could have affected the conduct of the defence: *Gubbins*, at para. 18; *McQuaid*, at para. 22.

[103] Crown entities other than the prosecuting Crown – including the police – are third parties for the purposes of disclosure. They are not subject to the *Stinchcombe* regime: *Gubbins*, at para. 20; *McNeil*, at para. 22; and *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 11. The prosecuting Crown's disclosure duty under *Stinchcombe* is triggered upon a defence request for disclosure: *Gubbins*, at para. 19; *Stinchcombe*, at pp. 342-43.

[104] It ill lies in the mouth of the prosecuting Crown to explain failure to disclose relevant material on the basis that the investigating police service failed to disclose it to the Crown. When put on notice of potentially relevant material in the hands of the police or other Crown entities, the prosecuting Crown has a duty to make

reasonable inquiries. Correspondingly, the police have a duty to disclose to the prosecuting Crown all material pertaining to its investigation of the accused. This material is often termed “the fruits of the investigation”: *Gubbins*, at para. 21; *McNeil*, at paras. 14, 22-24 and 52.

[105] The “fruits of the investigation” refers to the police investigative files, not their operational records or background information. In other words, “fruits of the investigation” refers to information “generated or acquired during or as a result of the specific investigation into the charges against the accused”: *Gubbins*, at para. 22.

[106] However, the police obligation of disclosure to the prosecuting Crown extends beyond the “fruits of the investigation”. The police should also disclose to the prosecuting Crown any additional information that is “obviously relevant” to the accused’s case. This “obviously relevant” information is not within the investigative files, but must be “disclosed under *Stinchcombe* because it relates to the accused’s ability to meet the Crown’s case, raise a defence, or otherwise consider the conduct of the defence”: *Gubbins*, at para. 23.

[107] To determine which disclosure regime applies to information, a court must consider whether:

i. the information sought is in the possession or control of the prosecuting Crown; and

ii. the nature of the information sought is such that the police or another Crown entity in possession or control of it should have supplied the information to the prosecuting Crown.

The second question will be answered affirmatively where the information is part of “the fruits of the investigation” or is “obviously relevant”. An affirmative response on either of these issues means that the first party or *Stinchcombe* disclosure regime applies: *Gubbins*, at para. 33.

Evidentiary Use of Prior Convictions and Outstanding Charges

[108] Section 12(1) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, permits questioning a witness on whether they have been convicted of any offence. The fact that a witness has been convicted of a crime is relevant to that person’s trustworthiness as a witness. Some convictions – for example, offences involving dishonesty or false statements – have a greater bearing on testimonial trustworthiness than others. The probative value of prior convictions also varies with other factors. The number of prior convictions. Their proximity or remoteness at the time of the witness’ testimony. See e.g. *R. v. Brown* (1978), 38 C.C.C. (2d) 339 (Ont. C.A.), at p. 342; *R. v. Murray* (1997), 115 C.C.C. (3d) 225 (Ont. C.A.), at para. 9.

[109] As a general rule, an ordinary witness, unlike an accused, may be cross-examined on unrelated misconduct which has not resulted in a criminal conviction.

This includes cross-examination on conduct that underlies charges outstanding against a witness at the time of their testimony. The purpose of this cross-examination is to impeach the witness' credibility: *R. v. Davison*, *DeRosie and MacArthur* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.), at pp. 443-44, leave to appeal refused, [1974] S.C.R. viii; *R. v. Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.), pp. 510-11; and *R. v. Gassyt* (1998), 127 C.C.C. (3d) 546 (Ont. C.A.), at para. 37, leave to appeal refused, [1999] 2 S.C.R. vi.

[110] As a general rule, the mere fact that a witness is charged with an offence cannot degrade the witness' character or impair their credibility. Generally this rule would mean that a witness could not be cross-examined about whether they were then charged with a criminal offence. But this rule gives way and permits cross-examination for the purpose of showing that the witness has a possible motivation to seek favour with the prosecution. A circumstance that may permit cross-examination on the fact of outstanding charges arises when the same police service that laid the charges outstanding against the witness also laid the charges against the accused about which the witness testifies for the Crown: *Gonzague*, at p. 511; *Gassyt*, at paras. 36-38; and *R. v. Titus*, [1983] 1 S.C.R. 259, at p. 263.

Appellate Remedies for Non-Disclosure

[111] An appellant who seeks to set aside a conviction on the basis of the Crown's failure to meet its disclosure obligations bears the onus of establishing not only a

breach of the right to disclosure, but also a breach of the right to make full answer and defence. This is so because the right to disclosure is a component of, but not coextensive with, the right to make full answer and defence. And it is a breach of the right to make full answer and defence that forms the basis for the remedy of the new trial: *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at para. 71; *R. v. Dixon*, [1998] 1 S.C.R. 244, at paras. 23-24.

[112] An appellant who seeks a new trial based on a disclosure failure must first demonstrate a breach of the right to disclosure. This requires that the appellant demonstrate a *reasonable possibility* that the undisclosed information could have been used:

i. to meet the case for the Crown;

ii. to advance a defence; or

iii. to make a decision that could have affected the conduct of the defence.

See *Dixon*, at paras. 22-23.

[113] Second, the appellant must establish, on the balance of probabilities, that his right to make full answer and defence was impaired by the Crown's failure to disclose: *Dixon*, at paras. 31, 33. To discharge this burden, the appellant must demonstrate there is a reasonable possibility that the non-disclosure affected either the outcome at trial or the overall fairness of the trial process. This reasonable possibility must be based on *reasonably* possible uses of the

undisclosed evidence or *reasonably* possible avenues of investigation that were closed to the accused as a result of the disclosure failure. Mere speculation does not satisfy this reasonably possible standard: *Dixon*, at para. 34. See also *R. v. C.(M.H.)*, [1991] 1 S.C.R. 763, at pp. 776-77.

[114] A two-step analysis is necessary to determine whether the disclosure failure impaired the appellant's right to make full answer and defence. The first step invites an assessment of the reliability of the verdict. The second step involves an assessment of the effect of the disclosure failure on the overall fairness of the trial process: *Dixon*, at para. 36; *Taillefer*, at paras. 80-81.

[115] At the first step, to assess the reliability of the result at trial in light of the disclosure default, we are to examine the undisclosed information to determine the impact it might have had on the decision to convict as expressed in the reasons for judgment. If, *on its face*, the undisclosed information affects the reliability of the conviction, we should order a new trial. The application of this test requires that we determine whether there was a reasonable possibility that the trier of fact, with the benefit of all the relevant evidence, might have had a reasonable doubt about the appellant's guilt. This determination is made on the basis of the evidence in its entirety: *Dixon*, at para. 36; *Taillefer*, at paras. 81-82.

[116] If the undisclosed evidence does *not* itself affect the reliability of the verdict, the second step requires us to consider the effect of the non-disclosure on the

overall fairness of the trial process. To do this, we must assess, on the basis of reasonable possibility, the lines of inquiry with witnesses or the opportunities to obtain additional evidence that could have been available to the defence had timely disclosure been made. This step has to do not only with the content of the undisclosed information, but also with "the *realistic* opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence": *Dixon*, at para. 36 (emphasis in original).

[117] This step involves weighing and balancing. Important factors are the materiality of the undisclosed information and the diligence of counsel in its pursuit: *Dixon*, at paras. 38-39. If defence counsel knew – or should have known based on other Crown disclosure – that the Crown had failed to disclose information, yet remained passive as a result of a tactical decision or lack of due diligence, it would be difficult to establish that trial fairness was affected: *Dixon*, at paras. 37-38.

The Principles Applied

[118] I would give effect to this ground of appeal. The appellant has established a breach of his right to disclosure and a consequent impairment of his right to make full answer and defence.

[119] The analysis that follows involves a series of steps. It begins with a consideration of the subject-matter of the alleged disclosure failure.

The Subject-Matter of Disclosure

[120] Deidre Jarvis was a witness whom the Crown intended to call at the appellant's trial. On the basis of her first statement to police, she could fairly be described as a "mixed" witness.

[121] It is well established that as a witness in a criminal trial, Deirdre Jarvis could be cross-examined on any prior convictions under s. 12(1) of the *Canada Evidence Act*. And as a non-accused witness, she could be cross-examined on disreputable conduct – for example, her outstanding charges at the time of trial, and the conduct underlying those charges.

[122] It follows that Deidre Jarvis' criminal record, as well as information about outstanding charges and the circumstances on which those charges were based, was relevant in the sense that it could be used to impeach Ms. Jarvis as a witness. This information was not substantively admissible. Its use was limited to impeachment.

The Applicable Disclosure Scheme

[123] To determine which, if any, disclosure regime required disclosure of this information in advance of trial, it is necessary to consider two questions:

- Is the information in the possession or control of the prosecuting Crown?

- Is the nature of the information sought such that the police or another Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown?

[124] No one suggests that the information at issue here was in the possession or control of the prosecuting Crown. Even if it be assumed that the local Crown was aware of the antecedents of the witness, this does not amount to possession or control of the information: *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, at para. 64.

[125] On the other hand, it cannot be seriously suggested that the investigating police service is not in possession or control of a prospective witness' criminal record since that force has access to records of criminal convictions through CPIC. Likewise, at the very least where that force is the investigating agency, or a participant in a joint forces investigation into the alleged criminal conduct of a witness, that agency can be said to have possession and control of the information with which we are concerned here.

[126] To engage the obligation of a police service in possession or control of information to supply that information to the prosecuting Crown, that information must be either part of the "fruits of the investigation" or "obviously relevant".

[127] I am not satisfied that the information at issue may fairly be categorized as "fruits of the investigation" in the circumstances of this case.

[128] However, in my respectful view, the information with which we are concerned here falls within the “obviously relevant” category for disclosure purposes. It follows that it was incumbent on the police to turn over this information to the prosecuting Crown for disclosure to defence counsel.

[129] The phrase “obviously relevant” describes information that is not within the investigative file but is nonetheless required to be disclosed under *Stinchcombe* because it relates to an accused’s ability to meet the case for the Crown, to raise a defence or to otherwise consider the conduct of the defence: *Gubbins*, at para. 23. Logically, this would include evidence that could be used to impeach the credibility of witnesses to be called to establish the accused’s guilt: *Taillefer*, at para. 62. The relevance of outstanding charges in particular was emphasized by the Court in *Titus*, at pp. 263-64:

> [T]he accused is entitled to employ every legitimate means of testing the evidence called by the Crown to negative that presumption and in my opinion this includes the right to explore all circumstances capable of indicating that any of the prosecution witnesses had a motive for favouring the Crown. In my opinion the outstanding indictment preferred against the witness by the same police department that had laid the present charge against Titus constitutes such a circumstance … . [Emphasis added.]

[130] It is difficult to gainsay the relevance of the information at issue here. A criminal record. Outstanding charges. Evidence about the circumstances underlying the relevant charges. Each available for impeachment of a witness

called by the Crown. Each a relevant factor in deciding whether to call Deidre Jarvis as a defence witness in the event she was not to be called by the Crown. Relevance is the controlling principle, not the likelihood of use or prospect of success.

[131] Several police officers were examined under oath about their knowledge of any outstanding charges against Deidre Jarvis at the time she testified at the appellant's trial. Two constant refrains emerged from their testimony. They did not conduct the investigation; thus they did not know anything about it or about any charges that may have resulted from it. And it was not the practice in Kenora at the time to check for a criminal record or outstanding charges against a Crown witness, or to discuss these issues with the prosecuting Crown.

[132] Kenora is not a large place. It had a police service at the time of about 40 members. That police service conducted or participated in the investigation that led to the charges against Deidre Jarvis and her partner, Frank Novelli, the biggest drug dealer in town. The offences involved were significant. Some of the arrests, including that of Jarvis, were publicized on local media outlets. One of the officers who was involved in the investigation of the offence alleged against the appellant was in the courtroom assisting in the organization of the exhibits throughout the appellant's trial at which Deidre Jarvis testified. During the same period of time, the same officer was conducting forensic analyses of some exhibits seized during the investigation of the drug charges then outstanding against Deidre Jarvis and

essential to the proof of those charges. I am satisfied the police knew about Jarvis' outstanding charges.

[133] The local practice, if such it be, not to discuss the criminal records or outstanding charges faced by a Crown witness did not obviate the disclosure obligation on the police. Even if it could be argued that the disclosure obligation had not clearly crystallized when Deidre Jarvis gave her first statement, it had plainly crystallized by the time she provided her second statement on the morning of the first day of trial.

The Disclosure Failure

[134] I have concluded that the police working on the appellant's case knew about Deirdre Jarvis' outstanding charges. Accordingly, they carried a disclosure obligation to turn over to the Crown Ms. Jarvis' criminal record and information concerning the outstanding charges she was then facing. The Crown was then required to disclose this information to the defence.

[135] Without the benefit of hindsight, it is difficult to assign fault to defence counsel for a failure to request disclosure and information of which he was neither aware nor had any reason to suspect existed even after the *volte-face* of the witness on the first day of trial.

The Impact of Non-Disclosure

[136] The appellant has demonstrated a breach of his right to disclosure. But, as we have seen, to obtain a new trial the appellant must also demonstrate that this breach infringed his right to make full answer and defence. To do so he must show a reasonable possibility that the disclosure failure affected the outcome of his trial or the overall fairness of the trial process: *Dixon*, at para. 34; *Taillefer*, at para. 71.

[137] As I will explain, I find the appellant has shown both.

The Reliability of the Verdict

[138] In my examination of the undisclosed information to determine the impact it might have had on the decision to convict, I have the advantage of the trial judge's reasons that describe the extent to which he accepted Deidre Jarvis' evidence and how it influenced his decision to convict. My analysis proceeds through several steps.

[139] First, the nature and scope of the controversy at trial.

[140] At trial, it was uncontested that, at the material time, the appellant and S.S. were at the dock area together. The appellant admitted punching S.S. in the face. This caused her to fall to the ground. Her injuries amounted to bodily harm within its definition in s. 2 of the *Criminal Code*. The essential issue at trial was whether a sexual assault had occurred and, to some extent, in light of the appellant's claim of third party authorship by Dawley Dunsford, the identity of its perpetrator.

[141] Second, the evidence of sexual assault.

[142] Aside from S.S.'s evidence, Deidre Jarvis' testimony constituted the main evidence that a sexual assault occurred. While forensic evidence confirmed contact between the appellant and S.S., this evidence did not necessarily contradict the appellant's version of events.

[143] Third, the substance of Deidre Jarvis' evidence.

[144] The substance of Deirdre Jarvis' testimony at the appellant's trial consisted of observations of activity on the dock area which she made on the night in question. Ms. Jarvis' evidence confirmed the appellant's presence on the dock with a woman. This was uncontroversial. But other aspects of her testimony – particularly the man pulling up his pants – went to the key issues at trial.

[145] Fourth, the trial judge's use of Deidre Jarvis' evidence.

[146] The trial judge rejected the appellant's version of events including those that took place in the motel room prior to the trip to the dock and the events that took place there. The trial judge accepted the evidence of S.S., B.S. and M.B. that the appellant pushed S.S. down on the bed and tried to kiss her. The evidence of Deidre Jarvis played no part in this finding.

[147] However, the same cannot be said of the trial judge's findings about what occurred at the dock. In rejecting the appellant's version of events, the judge accepted Deirdre Jarvis' "solid and unequivocal" evidence about "what occurred at

the dock." Although the trial judge also rejected the appellant's evidence on the basis of its inherent implausibility in light of the evidence of what had occurred earlier in the evening and the 911 call that resulted, it cannot be said that Deirdre Jarvis' evidence was peripheral to the trial judge's rejection of the appellant's evidence or to his conclusion that the prosecution had proven the appellant's guilt in relation of the sexual assault beyond a reasonable doubt.

[148] Aggravating matters is the trial judge's use of Jarvis' evidence to confirm critical aspects of S.S.'s testimony. While he also enlisted the testimony of responding police officers, his acceptance of S.S.'s version of events at the dock was based, at least in part, on the "significant evidence of … resistance found in the evidence of Deirdre Jarvis, who heard the screaming and who saw [the appellant] ultimately pull up his pants and run away."

[149] Finally, the undisclosed information and its impact on the reliability of the result at trial.

[150] Were the application based solely on Deidre Jarvis' criminal record, I would not allow the appeal. The criminal record is dated. No offences of dishonesty. No disobedience of court orders. No interferences with the administration of justice. There is no reasonable possibility that disclosure could have impacted the result at trial.

[151] However, the outstanding charges are a different matter. While evidence of Jarvis' charges was not relevant or admissible to prove any material issue at trial, it was highly probative of Jarvis' credibility and was admissible for impeachment purposes.

[152] Facing charges laid by the same police service handling the appellant's case, Jarvis may have been motivated to ingratiate herself with the police and prosecution. Between her first and second statements, Jarvis accumulated eight charges. Some were minor. Others – related to trafficking of cocaine – less so. None were resolved by the time of the appellant's trial. Jarvis' first statement, before the charges, was consistent with the appellant's version of events. Her second, after the charges, was not. To the contrary, her testimony provided tailored support for the Crown's position on the contested issues at trial.

[153] I take no position on whether Jarvis in fact altered her account to curry favour with the prosecution. The relevant point is that Jarvis, at first a key but mixed witness for the Crown, 17 months later, on the morning of the first day of trial, while herself facing serious outstanding charges laid by the same police service that investigated the appellant, transformed into a witness who sealed the case for the Crown on the critical issue at the appellant's trial, the sexual nature of the assault.

[154] Without the benefit of this information, the trial judge apparently accepted Jarvis' explanation that her first statement was incomplete because the interview

had interrupted her shift at the convenience store. As explained above, the trial judge proceeded to accept Deidre Jarvis' evidence and rely on it to reject the appellant's narrative of events at the dock.

[155] Under these circumstances, I am satisfied that with the benefit of all the relevant evidence, the trial judge may have been left with a reasonable doubt and reached a different conclusion.

The Fairness of the Trial

[156] Even if the trial result was not affected, I would allow the appeal on the basis that the non-disclosure compromised trial fairness. As noted, this step involves balancing factors such as the materiality of the undisclosed information and the diligence of counsel in its pursuit: *Dixon*, at paras. 38-39.

[157] The materiality of the undisclosed information is high. As I have explained, the outstanding charges imbued Jarvis with a strong motivation to alter her statement in order to curry favour with the prosecution. Failure to disclose these charges foreclosed the possibility for defence counsel to impeach Ms. Jarvis on this basis.

[158] While trial counsel did not request the undisclosed information, I do not find this omission was based on a tactical decision. In his affidavit, counsel explained that had he known of Jarvis' charges and convictions, he would have conducted further investigation and tried to impeach her on this basis. Indeed, defence

counsel attempted to impeach Jarvis' credibility through cross-examination on her inconsistencies. But in this attempt he was deprived of certain tools to which he was entitled.

[159] Nor do I find that trial counsel's conduct amounts to a failure of due diligence of the magnitude which would preclude a finding of trial unfairness. Defence counsel did not practice in the jurisdiction in which the trial was conducted. He was unaware of the disclosure practices of the local Crown Attorney's office. Based on his practice in Thunder Bay, he would have expected the record of Crown witnesses to be disclosed to him even absent a request.

[160] In these circumstances, trial counsel's failure to request the information does not outweigh its materiality with respect to the impeachment of Deidre Jarvis. The appellant has established that the non-disclosure caused trial fairness to be compromised, and his right to make full answer and defence, breached.

DISPOSITION

[161] For these reasons, I would allow the conviction appeal and order a new trial. It is therefore unnecessary to consider the appeal against sentence.

Released: "DW" May 6, 2020

"David Watt J.A."
"I agree. B.W. Miller J.A."
"I agree. Fairburn J.A."