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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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 from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (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.
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> (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shall not be published in any document or broadcast or transmitted in any way.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.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 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.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Jarrar, 2023 ONCA 67
DATE: 20230130
DOCKET: C64541 & C65712

Trotter, Sossin and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Steven Hassan Jarrar

Appellant

Steven Hassan Jarrar, acting in person

James Carlisle, appearing as *amicus curiae*

Philippe Cowle, for the respondent

Heard: December 8, 2023

On appeal from the convictions entered on March 4, 2016, by Justice Kelly P. Wright of the Superior Court of Justice, sitting with a jury; the convictions entered on September 21, 2016, by Justice Kelly P. Wright of the Superior Court of Justice, sitting without a jury; and the dangerous offender designation and indeterminate sentence imposed on July 21, 2020.

George J.A.:

Overview

[1] On September 21, 2016, the appellant was convicted of sexual assault, sexual interference, child luring, making child pornography, accessing child pornography, and possessing child pornography. On a separate information he was convicted of two counts of failing to comply with a s. 810.2 recognizance. For the sexual offences, he was designated a dangerous offender and sentenced to an indeterminate period of incarceration. For the breaches he received consecutive 24-month sentences on each count, to be served concurrently with the indeterminate sentence.

[2] In his notice of appeal, and supplementary notice of appeal, the appellant sets out numerous grounds, detailed over the course of several pages. With respect to the substantive offences, the appellant alleges, *inter alia*, that the trial judge exhibited bias; that his proceeding was unfair (i.e., Crown counsel engaged in jury tampering; the jury did not render a unanimous verdict; trial judge failed to declare a mistrial when she should have); ineffective assistance of his counsel; and that the verdict was unreasonable. As for the dangerous offender designation, the appellant argues that the sentencing judge erred by finding that he had engaged in a pattern of behaviour sufficient to warrant the designation. Alternatively, having found him to be a dangerous offender, the sentencing judge erred by imposing an indeterminate sentence. With respect to the breaches, he,

again, alleges bias on the part of the trial judge; that she improperly allowed the Crown to reopen its case after closing; and that the verdict was unreasonable.

[3] For the reasons that follow, I would reject each of these grounds, and dismiss the appeal.

Background Facts

[4] The appellant, aged 41 at the time, developed an online relationship with the then-14-year-old complainant, K.S., whom he met on a website called Badoo. K.S. testified that she told the appellant she was only 14 years old, and that she was in high school. The appellant would ask K.S. for phone sex and that she send him explicit videos and photographs. At some point, the appellant asked K.S. to meet him at the Queensway Motel in Toronto. K.S., who lived in Bowmanville, travelled on the GO train to Toronto and met with the appellant at the motel, where they spent the weekend together. There, the appellant took photographs and videos of K.S. in explicit positions. K.S. testified that she believed the appellant “drugged” her, removed her clothes, digitally penetrated her, and washed something “sticky” off her stomach. She testified that the appellant told her that they had sexual intercourse, but she does not remember. This relationship, including the online communications before their in-person meeting at the motel, began in December 2013 and ended in February 2014. A jury found the appellant guilty.

[5] On April 30, 2013, the appellant was ordered to enter into a recognizance pursuant to s. 810.2 of the *Criminal Code*. It was alleged that his relationship with K.S., and their time together at the motel, breached this recognizance. This trial occurred after the trial on the substantive offences discussed in the previous paragraph. The parties agreed that all the evidence heard at his jury trial – except his testimony – would apply to the breach trial. The recognizance prohibited the appellant from having any contact with a female under the age of 16, and required him to abide by a curfew by remaining in his residence from 12:00 a.m. to 6:00 a.m., except in certain circumstances. This order was in effect during the appellant's relationship with K.S.

Decisions Below

[6] A jury convicted the appellant of the sexual and child pornography offences.

[7] During the sentencing phase of the proceedings, the appellant did not dispute that the offences for which he was convicted were 'serious personal injury offences'. The trial judge considered the appellant's background and the fact he refused to participate in the assessment process. She referred to, and relied on, the victim impact; the parole officer's indication that the appellant was one of the "most difficult" inmates to manage; his refusal to participate in programming; and a letter penned by fellow inmates who described the appellant as a "dangerous threat". Based on this evidence, and the psychiatric assessment that suggested

the appellant had a paraphilic disorder (and specifically an interest in coercive or aggressive sexuality), the trial judge found that the appellant was a dangerous offender.

[8] The trial judge concluded: 1) that there was a pattern of behaviour, as the appellant had previously been convicted of an aggravated sexual assault and that, in both that case and this one, he targeted vulnerable female victims, and used violence; 2) that the appellant had exhibited a failure to restrain his behaviour, not just because he had a prior conviction for a related offence, but because he had demonstrated a “sexualized hatred for women”, and rejected any therapeutic attempts to mitigate against it; 3) that he had inflicted severe psychological damage on his victims; and 4) that there was a substantial probability that the appellant would reoffend.

[9] Relying on many of the factors she considered at the designation stage, the trial judge concluded that a fit sentence was an indeterminate period of incarceration. She found that if the appellant was released on a long-term supervision order, there was no reasonable treatment plan in place to manage or reduce the risk he posed.

[10] The trial judge considered the breach allegations at a separate trial. In the end, the trial judge believed K.S., who testified that she told the appellant she was 14 years old and in grade 9. The trial judge found that the two had daily contact

during the period in question, and that K.S. accurately described what transpired in the motel room.

[11] With respect to the condition that the appellant not communicate with females under the age of 16, the only issue was whether the appellant had actual knowledge of, or was wilfully blind, to K.S.'s age. The trial judge rejected the appellant's mistake of fact argument. As for the curfew condition, the appellant argued that the recognizance did not specify what address he was to reside at, and that the Crown had failed to establish beyond a reasonable doubt that he was not living at the Queensway Motel. The trial judge rejected this argument as well.

Analysis

Sexual Assault, Luring and Child Pornography Offences

[12] I will begin with the sexual offences, including conviction, the dangerous offender designation, and sentence.

[13] The appellant claims that: 1) the trial judge erred by not granting a mistrial; 2) the Crown tampered with a juror; 3) he received ineffective assistance from his counsel; 4) the trial judge exhibited bias; and 5) the verdict was unreasonable.

[14] In the appellant's view, there were two instances when the trial judge should have granted a mistrial. The first is after juror no. 3 sent this note to the trial judge: "Queensway Motel has been the object of police investigations over the years, is

that correct? Two, it is in the area of the House of Lancaster where there had been gunfire a couple of years ago. Three. Question, is Mr. Jarrar's place of residence also in the area or has he associations in these areas? (Not to cast aspersions on his character)." As opposed to isolating juror no. 3 and questioning him alone, the trial judge chose to instruct the entire jury not to speculate about the appellant's residence and, in terms of how to treat the evidence they will hear about his residence, to await her final instructions.

[15] While the note from juror no. 3 was regrettable, the trial judge's choice of remedy attracts a high degree of deference: *R. v. Wise*, 2022 ONCA 586, at para. 21. A mistrial should only be granted when it is necessary to prevent a miscarriage of justice, and only as a last resort: *R. v. John*, 2016 ONCA 615, 133 O.R. (3d) 360, at para. 82. I would defer to the trial judge's discretion and judgment because she was better positioned than I am now to assess the potential risks this note presented, and what would best ameliorate against it. I otherwise see no reason to interfere with the trial judge's decision to caution the jury in the way she did.

[16] The second instance arises from what the appellant alleges was a problem with the polling of the jury. He says that after the guilty verdict was read, and while being polled, one of the jurors indicated that they "disagreed" with the verdict. In other words, he contests the unanimity of the verdict. In my view, the trial judge

correctly concluded that there was no issue with the validity of the verdict, and was right to deny the request for a mistrial. As the trial judge observed:

> There is no dispute that after deliberations, the foreperson verbally indicated on the record that the jury reached a unanimous verdict, finding Mr. Jarrar guilty of the six counts they were asked to consider. The verdict sheet, which has been marked as an exhibit, was completed by the foreperson and it also reports the findings of guilt were unanimous. The rendering of the verdict was followed by defence counsel on behalf of Mr. Jarrar, asking that the jury be polled. The jury was polled, and their responses recorded on the court record. No clarifications or concerns were brought to the court's attention at that time and no further mention was made of the matter on that day.

[17] Further, I have had the opportunity to listen to the recording of the polling, and it appears that when this juror was asked if they agree or disagree – the only two possible responses – they said "yes, agree". The jury's verdict was unanimous, and the verdict was recorded accurately.

[18] As for the appellant's complaint that the trial judge did not grant a mistrial based on the juror's note, I observe that his trial counsel did not seek a mistrial. While it is difficult to discern, it appears that his counsel's failure to seek a mistrial at the time is the basis for the appellant's claim of ineffective assistance of counsel. Where ineffective assistance is alleged, the onus is on the appellant to establish same: *R. v. Girn*, 2019 ONCA 202, 145 O.R. (3d) 420, at para. 91. As there is a broad spectrum of professional judgment that is reasonable, and since counsel is

not held to a standard of perfection, this is a high bar to meet: *R. v. Fiorilli*, 2021 ONCA 461, 156 O.R. (3d) 582, at paras. 52-53. In this case, counsel's failure to seek a mistrial because of the juror's note falls far short.

[19] As stated, it is difficult to discern what exactly the appellant's concern with his counsel's conduct is because he also alleges that they were wrong to not insist that the complainant be recalled to the stand after the Crown closed its case, because of an alleged violation of the rule in *Browne v. Dunn*. That said, even this is difficult to know because, on this question, he appears to lay the blame squarely at the feet of the trial judge. In either case, there is no merit to this argument. Even when the rule in *Browne v. Dunn* is violated, the remedy is often for it to go to weight: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at para. 119, leave to appeal to S.C.C. refused, [2016] S.C.C.A. No. 203. As such, the failure to have the complainant recalled – either at the request of defense counsel or on the trial judge's own motion – falls well short of the threshold for either an ineffective assistance finding or a mistrial.

[20] I see no merit in any of the appellant's remaining grounds, including that the trial judge was biased (or that she did anything to create a reasonable apprehension of bias), that the Crown tampered with a juror, and that the verdict was unreasonable.

[21] First, there is nothing in the record to support the very serious allegations of jury tampering or judicial bias. Second, this is not an unreasonable verdict according to the principles set out in *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, and *R. v. C.P.*, 2021 SCC 19, 457 D.L.R. (4th) 553.

[22] I turn now to the dangerous offender designation, and the imposition of an indeterminate sentence. The onus was on the Crown to prove beyond a reasonable doubt that the appellant met the criteria in ss. 753(1)(a)(i), 753(1)(a)(ii) or 753(1)(b). The appellant's central complaint is that the trial judge erred by concluding that he had engaged in a pattern of repetitive behaviour, including the offences before the court, demonstrating a failure to restrain his behaviour. I see no error in the trial judge's finding that the appellant is a dangerous offender. There was ample evidence to support the conclusion that the appellant engaged in a pattern of repetitive behaviour and that he represents a threat to the life, safety or physical or mental well-being of other people.

[23] To establish a pattern of repetitive behaviour, the Crown had to prove significant similarities between the acts of violence committed by the appellant: *R. v. Tynes*, 2022 ONCA 866, at para. 67. While the facts are quite different, it was open to the trial judge to conclude that the behaviour underlying the predicate offence, and the appellant's prior conviction for aggravated sexual assault,

constituted a pattern of repetitive behaviour. The trial judge observed that behaviour between factually different offences can be repetitive if they share enough common elements and if they demonstrate that the offender is likely to repeat his dangerous behaviour and cause death or serious injury in the future: *R. v. Camara*, 2017 ONCA 817.

[24] When convicted of aggravated sexual assault, the appellant was found to have resorted to predatory violence to control a 19-year-old sex worker. The appellant, after beating the victim, left her near death in the snow with severe head trauma and other injuries, which she will never recover from. While factually disparate, the similarities are significant: 1) then, as with K.S., the appellant manipulated a young female victim; 2) both offences are sexual in nature; and 3) while the degree of physical violence is different, these were both violent offences – sexual offences, including the appellant's conduct with K.S., are inherently violent.

[25] Moreover, there is other evidence in the record which: 1) supports the suggestion that the appellant harbours hatred towards women; and 2) establishes that the appellant's behaviour cannot be restrained. This includes a past assault upon his sister, whom he called a "whore"; the commission of the predicate offence while subject to a s. 810.2 recognizance – imposed specifically to keep him away from young females; his demonstrated hatred for a female correctional officer while

in custody, whom he wrote about pulling into his cell and assaulting; his harassment of a female lawyer; and evidence that he maintained a calendar book which detailed his surveillance of a coffee shop, in particular its female patrons, who he referred to in sexualized and derogatory terms.

[26] Also, as the Crown pointed out, the appellant's rate of offending – which the appellant argues is a factor in his favour – is skewed by the time he has spent in custody. Consider that, for the aggravated sexual assault, the appellant received a life sentence (reduced to 15 years on appeal), for which he served every day. And then, within fairly short order, he committed the predicate offence.

[27] Similarly, I see no error in the trial judge's decision to sentence the appellant to an indeterminate period in custody. The standard of review, for both designation and sentence, is reasonableness. While it is more robust than a regular sentencing appeal, findings of fact are due deference. Here, the trial judge reasonably found that no other sentence would adequately protect the public from the appellant. As Karakatsanis J. wrote in *R. v. Tremblay*, 2010 ONSC 486, at para. 154, "the determination of whether an offender's risk can be reduced to an 'acceptable' level requires consideration of all factors, including whether the offender can be treated, that can bring about sufficient risk reduction to ensure protection of the public. This does not require a showing that the offender will be 'cured' through treatment or that his rehabilitation may be assured". The trial judge considered all of the relevant

factors, and there was no evidence before her that the appellant would willingly participate in therapeutic options which might reduce his risk of committing serious personal injury offences in the future.

Breaches of the s. 810.2 Recognizance

[28] I conclude by addressing the appeal against conviction for breaching the s. 810.2 recognizance. As mentioned, the evidence at the appellant's jury trial was applied at this trial. For essentially the same reasons set out in my discussion about the appellant's jury trial, I reject the allegation that the trial judge exhibited bias. Nor do I accept that this was an unreasonable verdict. Further, there was no evidence that the Queensway Motel was the appellant's residence, and no basis upon which to conclude that the appellant left the motel, and was at his residence, before his curfew.

[29] As for his claim that the trial judge improperly permitted the Crown to reopen its case, it appears that the appellant is referring to the trial judge's decision, at the Crown's request (and after its case had closed), to amend the indictment to reflect that the appellant committed an offence pursuant to s. 811 of the *Criminal Code*, and not s. 145(3). I am not entirely certain as both the appellant's notice of appeal and oral submissions were scant on detail. In any case, I see no error in the trial judge's decision, which complied with s. 601. Furthermore, as the underlying facts remained the same, neither the decision to allow the amendment, nor refusal to

grant an adjournment, prejudiced the appellant. I would reject this ground of appeal.

Conclusion

[30] For these reasons, I would dismiss the appeals against conviction and dangerous offender designation. While I would grant leave to appeal the indeterminate sentence, I would dismiss the sentence appeal.

Released: January 30, 2023 “G.T.T.”

“J. George J.A.”
“I agree. Gary Trotter J.A.”
“I agree. Sossin J.A.”