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 or 486.6 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 162.1, 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).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order; and
>
> (c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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;

(b) on application of the victim or the prosecutor, make the order; and

(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

(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.

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;

(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (3.2).

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

(a) informed the witnesses and the victim who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

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.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(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. Khan, 2024 ONCA 296
DATE: 20240422
DOCKET: C70453

Simmons, van Rensburg and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Waseem Khan

Appellant

Bryan Badali, for the appellant

Molly Flanagan, for the respondent

Heard: November 10, 2023

On appeal from the conviction entered on May 26, 2021, and the sentence imposed on April 14, 2022, by Justice Jill C. Cameron of the Superior Court of Justice.

van Rensburg J.A.:

Overview

[1] The appellant was charged and found guilty of two counts of child luring contrary to s. 172.1 of the *Criminal Code*, and one count of communicating for the purpose of obtaining for consideration the sexual services of a person under the

age of 18 contrary to s. 286.1(2). The appellant was charged after he answered an advertisement and engaged in text communications with a person represented as a 14-year-old girl, to arrange for her sexual services at a hotel. The ad and text messages were in fact posted and communicated by a York Regional Police officer as part of Project Raphael – a program to catch offenders seeking to pay for sex with minors. The appellant was arrested when he arrived at the arranged time at the hotel.

[2] The trial judge rejected the appellant's defence of honest belief in legal age. She concluded that the Crown had proven beyond a reasonable doubt that the appellant believed that the person he was communicating with was underage.

[3] Following the findings of guilt, the appellant brought an application to stay the proceedings for abuse of process. The appellant alleged that the officers broke the law by posting an advertisement for sexual services contrary to s. 286.4 of the *Code*, and that they were only shielded from prosecution by s. 25.1. In his application the appellant challenged the constitutional validity of s. 25.1. The trial judge dismissed the application based on the threshold issue of standing, after concluding that s. 286.4 requires a "genuine offer" to provide sexual services and that no such offer had been made in this case because the officers knew their advertisement was not genuine. As no offence had been committed, s. 25.1 was therefore not engaged.

[4] The appellant was sentenced to a custodial sentence of 18 months, two years' probation, and ancillary orders. A *Kienapple* stay was entered on one of the two counts of child luring. The appellant appeals his convictions and seeks leave to appeal his sentence.

[5] On his conviction appeal the appellant argues that the trial judge erred in her analytical approach to *mens rea*: that, after rejecting his defence that he believed he was communicating with someone over the age of 18 and took reasonable steps to ascertain age, she jumped directly to concluding that he was guilty of the offences. The appellant also contends that the trial judge erred in considering his apologies to the arresting officers as after-the-fact conduct evidence, when there was an equally available inference that the appellant was apologizing for having tried to procure sexual services from an adult.

[6] For the reasons that follow, I would dismiss the conviction appeal based on these grounds. On the first ground, contrary to the appellant's submissions, a review of the trial judge's reasons as a whole makes it clear that she found beyond a reasonable doubt that the appellant had the *mens rea* for the offences: that he believed he was communicating with a 14-year-old girl, not an adult, for the purpose of arranging sexual services from her. On the second ground, it was open to the trial judge to conclude that the after-the-fact conduct evidence had probative value in relation to the offences with which the appellant had been charged, and to consider such evidence in finding him guilty.

[7] In the alternative, the appellant appeals the convictions based on alleged errors in the trial judge's dismissal of the abuse of process application. The Crown concedes this ground of appeal. I agree that the application judge erred in concluding that the appellant failed to establish that the police had committed any criminal offence on the basis that the advertisement was not genuine. Importing a "genuine offer" element into the knowledge component of the *mens rea* requirement is inconsistent with this court's decision in *R. v. N.S.*, 2022 ONCA 160, 169 O.R. (3d) 401, at paras. 152-54. Accordingly, I would allow the conviction appeal on this basis.

[8] The parties agree on the proper disposition of the appeal, in the event that the conviction appeal on the other grounds is dismissed. We, too, agree. Accordingly, I would vacate the convictions pursuant to s. 686(2) of the *Code* but uphold the findings of guilt. Pursuant to s. 686(8), I would order a new trial limited to completing the abuse of process application. The convictions having been set aside, it is unnecessary to consider the sentence appeal.

Facts

[9] On January 18, 2018, the appellant started a conversation by text message with a person he believed was a female advertising sex for money on the website Backpages. In fact, he was responding to an ad placed by a police officer, and he

was texting with another officer, Detective Michael Cook. The officers were working undercover in Project Raphael.

[10] The appellant responded to an ad titled “YOUNG Fresh Shy n New – 18” that had been posted that day at 1:48 p.m. The ad included two photos showing a female from her neck to her knees. In one photo she was wearing boy shorts and a crop top that said “Keswick H.S. Athletics” (the “S” in “H.S.” was slightly obscured by her hair). In the other photo she was wearing boy short-type underwear with a tube top. The person in the photos was a female police officer. The ad indicated a price of $140 for one hour of service. The cell phone associated with the ad was operated by Officer Cook. He and other Project Raphael officers were located at the Staybridge Suites Hotel in Markham.

[11] The appellant texted the number in the ad at 3:28 p.m. A text dialogue between the appellant and Officer Cook about the available services followed. The appellant initially said he wanted “full”, to which the officer replied “Sorry, I’m new to this. What do you want?” The appellant later said “BBBJ” (which meant a blowjob with no condom), to which the officer replied, “no bare oral”. Four hours later, the appellant reached back out to the number and said, “are you there?” Officer Cook replied, “I’m younger is that ok some guys don’t mind”. The appellant replied “okay” and asked for the address. The appellant commented “Gonna be fun”, with a winking emoji. In response, the officer texted to the appellant, “I’m 14 turning 15 but look older. That cool? Some guys don’t mind but I’m told it’s obvious”. The

appellant replied “ok”. The texting continued regarding services. The appellant said he wanted “one hour, full GFE”, and the officer responded, “What is that?”. After some back and forth, the appellant asked what “she” could do, and the officer replied, “sex with condom and oral with condom”. After confirming the sex acts the appellant wanted and the price, Officer Cook sent a text saying, “You know I’m 14. How old are you and background please?” The appellant replied, saying “30 Spanish”. After initially requesting an hour, the appellant changed his request to half an hour. The officer indicated it would be $80 for a half hour of protected sex and asked the appellant to bring a hot chocolate. The appellant said he would and then asked, “Can you suck uncovered?”. The officer replied, “I’m new and very clean. I can’t.”

[12] When he arrived at the hotel room carrying a hot chocolate, the appellant was arrested by Detective Danielle Beaulieu. Officer Beaulieu testified, and an audio recording and transcription of the arrest were in evidence. During and after the appellant was read his rights to counsel, he repeatedly apologized and eventually said that he had “never, ever done this before”.

[13] The appellant was charged with two counts of child luring, contrary to s. 172.1(2) of the *Code*. The first child luring charge alleged that he had communicated with an undercover officer who he believed to be under the age of 18 for the purpose of facilitating an offence under s. 286.1(2) (obtaining for consideration the sexual services of a person under age 18). The second child

luring count alleged that he had communicated with an undercover officer who he believed was under the age of 16 for the purpose of facilitating an offence under s. 152 of the *Code* (invitation to sexual touching). The appellant was also charged with one count of communicating for the purpose of obtaining for consideration the sexual services of a person under the age of 18, contrary to s. 286.1(2) of the *Code*.

The Trial Judge's Reasons

[14] The trial judge provided oral reasons for finding the appellant guilty on all counts.

[15] The trial judge began her reasons with a summary of the evidence, including the details of the ad and the text message exchange, the appellant's evidence about why he believed the person who posted the ad was over 18, the steps he had taken to confirm his belief, and the evidence about the appellant's conduct upon arrest.

[16] The trial judge noted the parties' agreement that the issue before the court was the *mens rea* of the offence: whether the appellant believed the person was 14 or was wilfully blind in that respect. She set out the legal test from *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3: where the defence is that the accused believed the other person was of legal age, first, the accused must show the defence has an "air of reality"; second, the Crown then bears the burden of disproving the

defence beyond a reasonable doubt; and third, regardless of whether the defence can be considered, the trier of fact must ultimately determine whether the Crown has proven beyond a reasonable doubt that the accused believed the other person was underage.

[17] The trial judge first considered whether the appellant had shown that the defence had an air of reality. She noted that the text message exchange, “taken at face value”, undoubtedly showed the appellant arranging to have sex with a 14-year-old girl. The person he believed he was communicating with said she was 14 twice and mentioned being “new” and “young” in the conversation.

[18] The trial judge explained why she rejected the appellant’s evidence as to why he believed the person was over 18 years of age, and found the defence did not have an air of reality. She referred to the appellant’s evidence that he believed the person he was texting with was “role-playing” that she was 14, that he was repulsed by the thought of having sex with a 14-year-old, and that he went back and looked at the ad to confirm that she was 18 by reviewing the photos. The trial judge noted that the appellant did not ask follow-up questions about whether the person was role-playing, and if it were true that he was repulsed by the thought of having sex with a 14-year-old he would have ended the communications with her. The trial judge found that the appellant’s explanation for why he did not end the communications did not make any sense. She also found that his evidence that he relied on the ad to corroborate that the person was over 18 was not credible,

because the appellant also testified that he had not asked follow-up questions as individuals posting on websites such as Backpages often lie about their personal details, including not posting real photos of themselves. The trial judge also found that the appellant was apologizing for his actions when he was arrested, asked the police for another chance, and said he had never done this before and would never do it again. When he made these comments, the appellant had been told he was being charged with attempting to procure sex from an underage person. The trial judge found that, in saying he had never done this before, the appellant could not have been talking about buying sex from an adult online because admittedly he had done so many times in the past.

[19] The trial judge said that "for the reasons stated" she did not find the appellant to be a credible witness, that she rejected his evidence, and that "his evidence [did] not raise a reasonable doubt as to [her] finding that he believed he was communicating with a 14-year-old."

[20] The trial judge went on to say that, if she was wrong and there was an air of reality to the defence, the Crown had disproved the defence beyond a reasonable doubt. She agreed with the Crown that there was a complete failure on the appellant's part to take reasonable steps to ensure the person was of age, and that at the very least he was wilfully blind to the fact he was communicating with a 14-year-old. The trial judge found it was not a reasonable step for the appellant to have returned to the ad to scrutinize it when the information reviewed for

confirmation and assurance was admittedly unreliable to him. It was a step, but not a reasonable one. Further, the appellant never asked for proof of the person's ID or a photo, and he never used language that made it clear he only wanted sex from an adult and that he did not want to role-play with someone acting as a 14-year-old.

[21] The trial judge concluded her reasons by stating that she must determine whether the Crown had proven beyond a reasonable doubt that the appellant believed the other person was underage. She said:

> For all of the reasons I have stated, I have found that the Crown has proven beyond a reasonable doubt that [the appellant] believed the person he was communicating with was 14, and as such, I find him guilty on all counts in the indictment.

Analysis

[22] The discussion that follows addresses the two grounds of appeal raised by the appellant: first, that the trial judge erred in her *mens rea* analysis, and second, that she erred in her reliance on the appellant's apologies as after-the-fact conduct evidence.

(1) Issue One: The trial judge did not err in her *mens rea* analysis

[23] *Morrison* teaches that, where the Crown establishes that an accused failed to take reasonable steps to ascertain age and is therefore barred from relying on a defence of honest belief in legal age, the trier of fact must still consider the whole

of the evidence, “including the evidence relating to the accused’s failure to take reasonable steps”, to determine whether the Crown has proven beyond a reasonable doubt that the accused believed the other person was underage, or was wilfully blind as to whether the other person was underage: at paras. 129, 97. The Court further explained, in the context of a police sting operation, that there are circumstances in which, despite the accused having failed to take reasonable steps to ascertain age, the Crown may fail to prove beyond a reasonable doubt that the accused believed, or was wilfully blind to the fact, that the other person was underage: “for example, the trier of fact may determine that the accused was merely aware of a risk that the other person was underage (i.e. was reckless) or was merely negligent”: *Morrison*, at paras. 131, 83 and 101.

[24] The appellant does not challenge the trial judge’s rejection of his defence of honest belief in legal age. He also accepts that often, as in this case, the same evidence will be relevant to an accused’s affirmative defence and to whether the accused had the necessary *mens rea*. He submits however that, beyond a bare conclusory statement at the end of her reasons, the trial judge did not independently address how the Crown had proven beyond a reasonable doubt that the appellant knew or was wilfully blind to the fact that he was communicating with an underage person. Instead, the trial judge jumped directly from a rejection of the reasonable steps defence to her conclusion that the Crown had proven the *mens rea* for the offence.

[25] I do not give effect to this argument.

[26] I agree with the Crown that the trial judge's oral reasons, when read as a whole, in the context of the evidence and the submissions of trial counsel, make it clear that she articulated the correct test, and she applied it properly. The trial judge made factual findings that led her to reject the affirmative defence, but she did not conclude that because she rejected the defence, it therefore followed that the Crown had proven its case.

[27] First, the trial judge's analysis was structured according to the three-step framework set out in *Morrison*: (1) does the defence of honest belief in legal age have an air of reality?; (2) if so, has the Crown disproven the defence beyond a reasonable doubt?; and (3) has the Crown proven beyond a reasonable doubt that the accused believed the other person was underage?: *Morrison*, at paras. 118-33.

[28] The trial judge set out most of her factual and credibility findings in her discussion of the first issue – whether the defence of honest belief in legal age had an air of reality. In the course of her reasons the trial judge did not simply conclude that the appellant had not taken reasonable steps; she firmly rejected the appellant's assertion that he believed that he was communicating with someone who was over the age of 14. Further, she assessed the evidence and concluded that she was satisfied beyond a reasonable doubt that, contrary to his evidence, the appellant believed he was communicating with a 14-year-old.

[29] The trial judge began her analysis with a summary of the text messages themselves, and she concluded that "[t]he text messages taken at face value undoubtedly show Mr. Khan arranging to have sex with a 14-year-old girl". She noted that she did not find the appellant to be a credible witness, and she explained why she rejected his evidence, stating that it did not raise a reasonable doubt as to her finding that he believed he was communicating with a 14-year-old.

[30] While striking down the s. 172.1(3) presumption of belief in age, the Supreme Court in *Morrison* pointed out that the normal process of inferential reasoning that judges and juries engage in routinely is available to prove the accused's belief in the age represented to him, without the need for a statutory presumption of belief. As stated by Moldaver J., "[w]here the other person is represented to the accused as being underage, the trier of fact can, on the basis of evidence (including the record generated by the police), draw a logical, common sense inference that the accused believed that representation": *Morrison*, at para. 69. This is what the trial judge did in the present case.

[31] In concluding that the appellant believed he was communicating with a 14-year-old, the trial judge relied on the text message communications. There were two points in the dialogue where the appellant was explicitly told the age of the person with whom he was communicating. From the plain meaning of the totality of the text dialogue "taken at face value", there was an inference available to the trial judge that the appellant had turned his mind to the person's age, and that he

was indeed “ok” with the person being 14 years old. This inference was available not merely because a representation of age was made to the appellant, but because of the way he reacted to that information. In addition to the positive response “ok”, he did not express any doubts or incredulity, or say anything else that might have altered the face value meaning of the text dialogue. Moreover, the trial judge also rejected the appellant’s testimony that he was repulsed by the idea of having sex with a 14-year-old girl.

[32] A trial judge’s reasons are not to be read as a “watch me think” process; rather the issue is whether the reasons show *why* the judge made the decision she did: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 17. While some of the credibility findings that the trial judge made in the first step of her analysis might well have been repeated later in her analysis, the reasons when read as a whole make it clear that she was incorporating by reference her earlier findings when she concluded that the appellant’s *mens rea* had been proven by the Crown.

[33] The appellant contends that the trial judge’s approach is indistinguishable from the approach rejected by this court in *R. v. Allen*, 2020 ONCA 664, 396 C.C.C. (3d) 1. In *Allen*, which was decided at first instance before the Supreme Court’s decision in *Morrison*, the trial judge had relied on the statutory presumption of belief in age in s. 172.1(3), which was found to be unconstitutional in *Morrison*. The conviction was not saved by the trial judge’s statement that, in addition, the Crown had the benefit of the overwhelming evidence at the trial that Mr. Allen thought he

was talking to a 14-year-old. The appellant says that, similarly, the trial judge's finding in this case was entirely reliant on and derivative of her reasons rejecting the appellant's defence.

[34] I disagree. As this court stated in *Allen*, at para. 23, the trial judge's reasons must be evaluated by asking whether they convicted the appellant of child luring in a manner consistent with the legal framework enunciated in *Morrison*. In *Allen* this court pointed to passages in the trial judge's reasons that made it clear that the convictions impermissibly relied on the evidentiary presumption in s. 172.1(3) and the absence of reasonable steps under s. 172.1(4). By contrast, in this case the reasons, when considered as a whole, make it clear that the trial judge did not simply move from a rejection of the appellant's affirmative defence to a finding of guilt. She explicitly adverted to the test in *Morrison* and to the need to determine whether the appellant had the necessary *mens rea,* and she relied on the findings that were articulated earlier in her decision to conclude beyond a reasonable doubt that the appellant believed the person he was communicating with was underage. Read fairly, the trial judge's reasons at the first step of her *Morrison* framework analysis went beyond merely concluding there was no air of reality to the appellant's honest belief in legal age defence – she concluded, for reasons that she explained, that the appellant believed he was communicating with a person who was underage.

The trial judge did not err in not considering whether the appellant was reckless

[35] At the hearing of the appeal the appellant's counsel submitted that the appellant might have been reckless, by never turning his mind to the age of the person with whom he was communicating, and that the trial judge erred by not explicitly considering recklessness. He pointed to a passage in the trial judge's reasons where she said that there was a complete failure on the part of the appellant to take reasonable steps, and "at the very least, he was wilfully blind to the fact he was communicating with a 14-year-old". Counsel submitted that one interpretation of this passage is that the trial judge did not believe the appellant had taken any steps to verify age. If the appellant did not turn his mind at all to the question of age, then he was reckless, but not wilfully blind.

[36] I would not give effect to this argument.

[37] As a starting point, I observe that the impugned passage appears at step two of the trial judge's *Morrison* framework analysis, where she considered whether the Crown disproved the appellant's honest belief in legal age defence, in the alternative, in the event she was wrong in her step one findings. It was in rejecting the reasonableness of the steps the appellant said he had taken to verify the age of the person he was communicating with, that the trial judge observed that he was at the very least wilfully blind to the fact that he was communicating

with a 14-year-old. However, by this point in her analysis, the trial judge had already made findings that supported her conclusion that the Crown had proved beyond a reasonable doubt that the appellant believed he was communicating with someone who was underage. Absent error in the trial judge's findings at step one, of which I have found none, the question of recklessness was not a live issue.

[38] Second, and in any event, recklessness in the sense of not turning one's mind to the question of age was not argued at trial. In fact, it is inconsistent with the defence closing submissions in which trial counsel argued that "[the appellant's] behaviour overall, obviously he turned his mind to the issue [of age] based on the evidence that he gave in direct and cross-examination" (emphasis added). Defence counsel asserted that, if the steps taken were not reasonable, then his client was reckless or negligent, but he was not wilfully blind, because he at least took a step to ascertain age. The trial judge's reasons were responsive to this argument. The trial judge rejected the argument that the appellant's steps were reasonable, and she disagreed with defence counsel that the appellant's conduct – that is, the steps he said that he had taken – did not constitute at least wilful blindness. The appellant had been told on two occasions he was communicating with a 14-year-old. In that context, it was open to the trial judge to accept the Crown's submission that the appellant's failure to take reasonable steps was indicative, at the very least, of wilful blindness.

[39] Third, there is no evidentiary support on this record for the recklessness scenario proposed by the appellant's counsel. The appellant's exculpatory explanation for his part in the text dialogue was that he did not believe the text message that the person he was communicating with was a 14-year-old, but believed instead that she was an adult woman role-playing as a 14-year-old and lying to him about her age. His position at trial was that he took reasonable steps to ascertain the person was an adult, by reviewing the information in the ad and the photos several times. Indeed, his counsel had urged the trial judge to accept that the appellant re-checked the ad and photos, and that this constituted a reasonable step. There was nothing on this record to suggest that the appellant was indifferent to the question of age.

[40] Nor would I accept the argument that the trial judge's finding that it was not credible that the appellant "relied on" the ad and photos to ascertain age, meant that she rejected the appellant's evidence that he went back to the ad and photos and reviewed them when he got the text messages about the other person being 14 years old. She acknowledged that "it was a step" but found that it was "not a reasonable one". What the trial judge clearly rejected was that the appellant *relied on* the ad and photos to *honestly believe* that the person telling him she was 14 years old was actually an adult.

[41] Moreover, even if the trial judge did reject the appellant's evidence that the appellant went back to the ad and photos, as I have said, given that the appellant

had been told twice that he was communicating with a person who was underage, it was open to the trial judge to accept the Crown's submission that the appellant's failure to take reasonable steps was indicative, at the very least, of wilful blindness.

(2) Issue Two: The trial judge did not err in her consideration of the appellant's apologies as after-the-fact conduct evidence

[42] Evidence of after-the-fact conduct is a form of circumstantial evidence and is admissible if it is relevant to a live, material issue, if its admission would not violate an exclusionary rule of evidence, and if its probative value exceeds its prejudicial effect: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 107 (*per* Martin J. dissenting, but not on this point). It is for the trier of fact to determine whether after-the-fact conduct evidence is related to the offence before them, rather than to some other reaction, or other culpable act. The fact that alternative explanations for an accused person's conduct exist does not necessarily mean that the evidence is no longer relevant. It is only where the overall conduct and context are such that "it is not possible to choose between the available inferences as a matter of common sense, experience and logic" that relevance is lost: *Calnen,* at para. 124. When "hypothetically it could be one offence or another, common sense and experience may support one inference over the other": *Calnen*, at para. 124.

[43] The appellant submits that the evidence of his apologies at the time of his arrest is the sort of after-the-fact conduct where it is impossible to conclude that it was more likely he was apologizing because he believed he was communicating with a minor than because he was ashamed that he was caught trying to buy sexual services from an adult. The appellant argues that this after-the-fact evidence has no probative value for assessing his *mens rea* for internet child luring, and should not have been relied on by the trial judge. It was undisputed that the appellant had tried to obtain sexual services for consideration, which would be a crime under s. 286.1(1) whether it was in relation to an adult or to a child. The appellant's explanation was that he was not apologizing to the police in relation to child luring, but because he was scared of losing his family and wanted to convince the police to release him.

[44] I would not give effect to the argument that the appellant's apologies lacked probative value. It was possible for the trier of fact to determine as a matter of common sense, experience, and logic that the appellant's apologies were more consistent with one offence than the other.

[45] The trial judge considered and rejected the inference that the apologies were in relation to obtaining sexual services from an adult. First, it was only after he was informed of the specific charges that the appellant said to the police, "I have never, ever done this before". The charges read to him specifically included the words "child under 18" and "person under 18 years of age", which could be understood

by a layperson. Second, the appellant testified that he had purchased sexual services from adults in the past. It was open to the trial judge to conclude that it was not an equally available inference that the appellant was apologizing only for attempting to buy sexual services from an adult. The trial judge stated: “When he made these comments he had been told that he had been charged with attempting to procure sex from an underage person. In saying he had never done this before, he could not have been talking about buying sex from an adult online because admittedly he had done so many times”. The trial judge did not err by determining that the appellant’s apologetic utterances related to the charges before the court, and by incorporating them in her reasoning.

Conclusion and Disposition

[46] For these reasons I would allow the conviction appeal and vacate the convictions pursuant to s. 686(2) of the *Code*[1] but uphold the findings of guilt. Pursuant to s. 686(8) I would order a new trial limited to completing the abuse of process application.

Released: April 22, 2024 “J.S.”

“K. van Rensburg J.A.”
“I agree. Janet Simmons J.A.”
“I agree. J. George J.A.”

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[1] The appellant’s appeal of his convictions having been allowed, the conditional stay pursuant to *Kienapple* is dissolved: see *R. v. Drury*, 2020 ONCA 502, 391 C.C.C. (3d) 18, at paras. 81, 87 and 89.