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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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
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> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
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> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (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;
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> (b) on application made by the victim, the prosecutor or any such witness, make the order; and
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> (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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. T.C., 2024 ONCA 304
DATE: 20240422
DOCKET: COA-22-CR-0025

Trotter, Harvison Young and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

T.C.

Appellant

Myles Anevich, for the appellant

Sunil S. Mathai, for the respondent

Heard: April 16, 2024

On appeal from the convictions entered by Justice Myrna L. Lack of the Superior Court of Justice, sitting with a jury, on May 30, 2022 and from the sentence imposed on September 2, 2022.

REASONS FOR DECISION

[1] The appellant, T.C., was convicted of five counts of assault contrary to s. 266 of the *Criminal Code*, R.S.C. 1985, c. C-46, and of one count of sexual assault contrary to s. 271 the *Criminal Code*. He was sentenced to five years'

imprisonment: three years for the sexual assault, four months for each of the assaults on S.M. and six months for each of the assaults on A.C.

[2] The appellant appeals both his convictions and his sentence.

[3] The heart of the appellant's appeal against his convictions is that the trial judge committed two errors which, in combination, compromised the fairness, or at least the appearance of fairness, of the trial. First, he submits that the trial judge erred by allowing the Crown to re-call the complainant, S.M., for further re-examination after it had closed its case. Second, he submits that the trial judge erred in failing to directly relate inconsistencies in S.M.'s evidence to the more general parts of her charge on the assessment of prior inconsistent statements.

[4] The appellant also appeals his sentence on the basis that the trial judge should have ordered that the sentences for the assault convictions be served concurrently rather than consecutively.

[5] At the oral hearing, we dismissed the appeal with reasons to follow. These are those reasons.

BRIEF FACTUAL BACKGROUND

[6] The appellant and S.M. met in February 2017. They moved in together during the summer of 2017, and S.M. became pregnant in October of that year. The couple married in February 2018 and their daughter, A.C., was born in May 2018.

[7] The five assault convictions related to three assaults against S.M. and two assaults against A.C.

[8] The three assaults against S.M. took place between October 2017 and May 2018. On each occasion, the appellant pushed S.M. to the floor and slapped her. On two of the occasions, he also punched and kicked her.

[9] The two assaults against A.C. took place in May and June of 2018. On both occasions, the appellant attempted to stop A.C. from crying by covering her face and suffocating her.

[10] During the second assault on A.C., S.M. tried to stop the appellant. To punish S.M. for interfering, the appellant forcibly had anal sex with her, despite her repeated pleas for him to stop.

ANALYSIS

[11] The appellant first argues that the trial judge erred in allowing the Crown to recall S.M. after it had closed its case.

[12] During S.M.'s cross-examination, in response to questions asked by defence counsel, S.M. disclosed other incidents of assault and sexual assault by the appellant. S.M. alleged that the appellant would force her to take cold showers as punishments and that he regularly sexually assaulted her. She explained that she had not viewed the shower assaults as "major" and only now viewed them as

assaults. She testified that she had only recalled the shower assaults and the sexual assaults during her cross-examination.

[13] During S.M.'s re-examination, defence counsel objected to the Crown asking questions about what triggered S.M. to recall this uncharged conduct. Defence counsel argued that it was improper to elicit evidence of prior discreditable conduct. Initially, the trial judge agreed, stating that S.M. had already given evidence on why she had not previously disclosed the uncharged conduct.

[14] However, after the Crown closed its case, but before the defence was asked whether it would lead evidence, the trial judge asked whether an instruction should be given to the jury to completely disregard the uncharged conduct. Defence counsel opposed this, as they were intending to use the fact of the late disclosure to support the theory that S.M. was "making it up as she goes along." The Crown argued that it would be prejudiced if this occurred without recalling S.M., since S.M. and the Crown had not had an opportunity to respond to this allegation through re-examination.

[15] The trial judge permitted the Crown to recall S.M. for the limited purpose of questioning her about what triggered her memory. The trial judge explained that the defence should not be allowed to challenge S.M.'s credibility without giving the Crown an opportunity to re-examine S.M. on this issue. The Crown was not

permitted to, and did not, ask questions about the details of the uncharged conduct.

[16] In the final instructions, the trial judge provided the jury with an instruction that the evidence of the uncharged conduct "[could not] be used at all to conclude that [the appellant] is guilty of the offences charged." She told the jury that the evidence could only be used to assess S.M.'s credibility and that it could not be used to conclude that the appellant was "a person of bad character and was therefore more likely to have committed the offences with which he stands charged." In addition, just prior to S.M. being re-called, the trial judge provided a mid-trial instruction to the jury that they should "make nothing" of the sequence of the complainant being re-called and that they should "just treat it as though it were part of [the] original examination."

[17] The appellant claims that the trial judge's approach undermined the adversarial process and created an appearance of unfairness. He further claims that it resulted in reasoning prejudice as it placed the jury's focus on these incidents during their deliberation.

[18] We do not agree that the trial judge erred in allowing the Crown to recall S.M.

[19] First, the trial judge deserves no criticism for reconsidering her initial ruling in the circumstances. The Crown had not raised any prior discreditable conduct in

its examination in chief. The reference to other uncharged conduct, such as the forced cold showers, came out in cross-examination. The trial judge was clearly considering trial fairness in somewhat dynamic circumstances.

[20] Second, neither the decision to allow the Crown to re-call S.M., nor the fact that the trial judge reconsidered her initial position created any actual prejudice, or the appearance of prejudice, to the appellant's right to a fair trial.

[21] The trial judge's ruling did not allow for a broad re-examination and the re-examination itself was very brief. The mere fact that this was the last item of evidence heard by the jury after the Crown had closed its case is not a basis for finding any unfairness in these circumstances.

[22] Moreover, the trial judge effectively addressed this concern in the final charge. We see no merit to the appellant's claim that this caused "reasoning prejudice" during the jury's deliberation.

[23] We dismiss this ground of appeal.

[24] The appellant also argues that the trial judge failed to sufficiently instruct the jury on prior inconsistent statements and relate the evidence to the issues in the case.

[25] The defence focused on several alleged inconsistencies in S.M.'s evidence, including her explanations about why she did not take photos of her injuries,

whether she sought medical treatment for herself or A.C. following the assaults, and the controlling nature of her relationship with the appellant.

[26] In her charge to the jury, the trial judge gave several instructions related to credibility and prior inconsistent statements generally. The charge only referred to the specific inconsistencies in S.M.'s evidence in her summary of the Crown and defence positions.

[27] The appellant argues that the trial judge should have separately reviewed the inconsistencies in S.M.'s evidence and that it was insufficient to only refer to the specific inconsistencies in the summaries of the positions of the parties.

[28] We disagree. If the trial judge had done what the defence was requesting by referring to the inconsistencies identified by the defence, the trial judge would have arguably been usurping the role of the jury by identifying evidence as "inconsistent". That is up to the jury to determine.

[29] In addition, this was a short trial. The central issue was the reliability and credibility of S.M. The only witnesses were S.M. and her mother. Trial counsel did not ask for further detail regarding the evidence of inconsistencies.

[30] Furthermore, the jury was not only given the written charge when they were deliberating but also while the trial judge was charging the jury so that they could follow along. The charge included summaries of both the Crown and the defence positions. These positions, along with their closing submissions, canvassed the

alleged inconsistencies raised by the defence in S.M.'s testimony and set out each side's position on how the jury should treat these inconsistencies. This adequately equipped the jury with the tools to determine whether the impugned statements were actual inconsistencies and whether S.M. addressed them adequately.

[31] The trial judge was alive to the risk that further detail could tip the fairness balance one way or the other. In light of these considerations, we see no basis for finding that she committed any legal error in her charge.

[32] We dismiss this ground of appeal.

[33] Finally, the appellant submits that the trial judge erred by imposing consecutive sentences for the assaults. He argues that the sentences for the assaults should have been imposed concurrently to each other, but consecutively with the sentence for the sexual assault, with the result that the global sentence be varied from five years to three and a half years.

[34] We disagree.

[35] The trial judge's decision to impose consecutive as opposed to concurrent sentences is entitled to considerable deference: *R. v. Rajkovic*, 2021 ONCA 11, at para. 19; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 46.

[36] The trial judge considered the principle of totality and found that a five-year sentence was "proportionate to the circumstances and not unduly long or harsh." This was directly responsive to defence counsel's argument that concurrent

sentences should be imposed for the assaults on S.M. and A.C. In any event, we consider the total sentence imposed to be manifestly fit in all of the circumstances.

[37] We see no error in principle that would warrant appellate interference with this sentence.

[38] We dismiss this ground of appeal.

DISPOSITION

[39] The appeal against the convictions is dismissed. Leave to appeal the sentence is granted and the sentence appeal is dismissed.

"Gary Trotter J.A."
"A. Harvison Young J.A."
"J. Copeland J.A."