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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Wright, 2024 ONCA 310
DATE: 20240424
DOCKET: COA-22-CR-0321

Trotter, Zarnett and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Hopeton Wright

Appellant

John Fennel, for the appellant

Philippe G. Cowle, for the respondent

Heard: February 27, 2024

On appeal from the conviction entered on July 29, 2021 by Justice Rita-Jean Maxwell of the Superior Court of Justice, sitting with a jury.

Trotter J.A.:

[1] The appellant was found guilty of three counts of sexual interference and three counts of sexual assault in relation to two of his common law partner's children, S.M. and A.M. The three sexual assault counts were stayed in accordance with *Kienapple v. R.*, [1975] 1 S.C.R. 729. The appellant received a total sentence of four years' imprisonment on the sexual interference counts.

[2] The appellant appealed his convictions. He advanced two grounds of appeal. First, that the trial judge erred in admitting similar fact evidence in relation to an alleged assault on another child of his common law partner. Second, that the trial judge erred in her instructions to the jury on the use that could be made of prior inconsistent statements. At the conclusion of the hearing, we dismissed the appeal, with reasons to follow. These reasons explain why the appeal was dismissed.

A. FACTUAL BACKGROUND

[3] The appellant was charged with committing offences against his common law spouse's daughters, S.M. and A.M. They testified that these offences took place in the early 2000s when they were about 12 to 13 and 10 to 11 years old, respectively. The Crown also relied on the evidence of a similar fact witness, J.D.; she is also the daughter of the appellant's common law spouse, and the half-sister of S.M. and A.M. To be clear, the appellant is not the father of S.M., A.M., or J.D.

[4] The appellant was originally charged with the sexual assault and sexual interference of all three sisters, including J.D. The offences against J.D. were alleged to have occurred when she was around six to seven years old. However, she was unavailable to testify at the preliminary inquiry, causing the Crown to withdraw the charges that related to her. At that time, the Crown gave notice that it intended to tender J.D.'s evidence as similar fact evidence at trial.

[5] All three complainants testified that the appellant touched them while they were staying in the same house as him. At the time of these events, J.D. was living in the house with the appellant and her mother. S.M. and A.M. lived with their father, but would visit the appellant and their mother from time to time.[1]

(1) Assaults Against S.M.

[6] S.M., the eldest of the sisters, testified to incidents that occurred during visits to the mother and appellant's home. S.M. described three incidents of sexual offending. On one occasion, when the appellant was attempting to drain a boil that had developed on her wrist, the appellant attempted to pull her shirt up and then pull her pants down. S.M. resisted and the incident came to an end.

[7] Later that night, when S.M. was asleep on the appellant's bed, she woke up to feel warmth on her vagina. She saw the appellant kneeling on the floor with his face in her vaginal area. It came to an end after she turned over and saw her sister asleep on the same bed. This was the second instance of sexual touching.

[8] With respect to the third instance, S.M. described incidents that occurred when the family slept on blankets and pillows on the living room floor. A number of times, she had woken up to feel the appellant's hands between her legs. The

---

[1] There were other children living in the house at the time. They were sometimes in close proximity when the offences occurred. None of them were called as witnesses.

appellant was lying on the floor behind her. When she woke up, he pretended to be asleep.

(2) Assaults Against A.M.

[9] A.M., who is one year younger than S.M., described one instance of sexual offending that happened in the basement while the family watched a movie. The appellant was near A.M. and massaged her feet. She started to fall asleep. She described that, while she was falling in and out of sleep, she felt the appellant's hand going up her leg, underneath her clothing, and rubbing her vagina. She fell back asleep. Later that night, she woke up to the appellant asking her "[A.M.], can I?" He was trying to put his penis in her vagina. She "squirmed out of it". The appellant apologized and then left. On another night soon afterwards, the appellant put his hands inside her pants, while A.M.'s mother slept close by. A.M. said she clenched her body. The appellant then desisted and left.

(3) Assault Against J.D.

[10] As noted above, J.D. lived with her mother and the appellant. She remembered S.M. and A.M. visiting the house around the time when the appellant assaulted her. She slept in the basement one night and woke up to find that her pants had been pulled halfway down and that the appellant was rubbing his penis against her from behind. J.D. said she felt moisture where the appellant had been touching her, but she did not know if he had ejaculated.

[11] Although J.D. disclosed the abuse to her mother soon after the incidents, S.M. and A.M. did not disclose their experiences until some years later, perhaps between 2010 and 2013. All three girls approached their mother, who did not believe them. At trial, it was suggested that J.D., S.M., and A.M. colluded with each other.

[12] The mother testified. She spoke of the locations where various family members lived at the time, how often S.M. and A.M. visited, and the general arrangements within in the household (e.g., who slept where).

B. SIMILAR FACT EVIDENCE

[13] At the outset of the trial, the Crown applied to have the evidence of J.D. admitted as similar fact evidence. The Crown also indicated that, at the conclusion of the trial, it would also seek to have the evidence of S.M. and A.M. applied as similar fact evidence.

[14] In his submissions on the *voir dire*, counsel for the appellant foreshadowed that he would be advancing a collusion defence at trial, and that the evidence of J.D. would come out in any event. He ultimately submitted that J.D.'s disclosure of sexual abuse was the catalyst for S.M. and A.M. coming forward.

(1) The Trial Judge's Ruling

[15] The trial judge provided thorough written reasons for her decision to admit the evidence of J.D. as similar fact evidence: *R. v. H.W.*, 2022 ONSC 5792. It is

not necessary to track through this ruling in its entirety. Suffice to say, the trial judge identified the correct principles and applied the governing authorities.

[16] The trial judge reached the following conclusion about the proposed use of the similar fact evidence, at para. 47 of her reasons:

> In my view, the proposed similar fact evidence is probative of a material issue, that is, the complainants' credibility as it relates to the *actus reus* of the offence. The cogency of the similar fact evidence as it relates to the *actus reus* lies in the fact that the similar fact evidence is capable of giving rise to an inference that the accused has a specific propensity to engage in sexual touching of pre-pubescent children, who are female and not his biological children, within the family home, exploiting his status as the boyfriend of their mother.

[17] The trial judge further noted that the evidence of J.D. was probative of the surrounding circumstances of the incidents, including the relationships between the witnesses and the location of the incidents. Applying *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, the trial judge carefully evaluated the similarity and dissimilarities of the proposed evidence of J.D. as compared to the evidence of S.M. and A.M.

[18] The trial judge recognized the uncertainty around the timing of the sexual assaults, but she held that they were "sufficiently proximate in time" and temporally linked to a period of time when the girls' mother lived at a particular address with the accused: at para. 62. She also found the nature of the sexual contact with J.D., S.M., and A.M. was similar, as were the surrounding circumstances (e.g., among

other things, they occurred at a time when other people in the family were close by, and the accused desisted each time when the girls woke up).

[19] The trial judge also addressed the potential of collusion between the girls once their respective disclosures were made. She acknowledged there were opportunities for collusion, but this was insufficient; the Crown had proved on a balance of probabilities that there was no air of reality to the possibility of collusion: at para. 117. On the issue of prejudice, the trial judge rejected the submission that J.D.'s age was prejudicial. The age gap between the girls was not significant and J.D. alleged conduct of similar gravity.

[20] The trial judge concluded that the proposed similar fact evidence outweighed its prejudicial effect. She indicated that she would instruct the jury on the proper use of the evidence, which she did. No issue is taken with her instructions to the jury on this point.

[21] At the conclusion of the evidence, the Crown asked the trial judge to rule that the evidence of A.M. and S.M. could be used as cross-count similar fact evidence. Although the appellant objected to this request, he made no submissions on the issue.

(2) Discussion

[22] The appellant submits that the allegations of J.D. were not sufficiently similar to those of S.M. and A.M. to warrant admission as similar acts. The appellant relies

on the fact that the allegations in relation to J.D. involved a single episode, one that occurred when she was appreciably younger than her two half-sisters, S.M. and A.M. He submits that J.D.'s age would have been absolute "poison" in the minds of the jury.

[23] I would reject this submission. It amounts to a claim that the trial judge erred in her weighing of the various factors that are relevant to the admissibility of similar fact evidence. Similar fact rulings are entitled to deference on appeal, especially in the balancing of the probative value of the evidence against its prejudicial effect: see *R. v. J.H.*, 2018 ONCA 245, at para. 11; *R. v. Wilkinson*, 2017 ONCA 756, 356 C.C.C. (3d) 314, at para. 27; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 738; *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 42; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 73; and *Handy*, at para. 153. Appellate interference is only warranted if the ruling is "unreasonable, or is undermined by a legal error or a misapprehension of material evidence": *R. v. James* (2006), 84 O.R. (3d) 227 (C.A.), at para. 33, leave to appeal refused, [2007] S.C.C.A. No. 234. See also *R. v. Cresswell*, 2009 ONCA 95, at para. 7; *J.H.*, at para. 11; *Wilkinson*, at para. 27.

[24] As discussed above, the trial judge weighed the relative similarities and dissimilarities at play in this case. These included that: (1) J.D. stood in the same relationship to the appellant as did S.M. and A.M. (i.e., the daughter of the appellant's common law spouse); (2) the incidents occurred in the same residence; (3) they occurred during the same time period of time; (4) they all happened at

night; (5) the nature of the sexual conduct was similar; (6) the circumstances of the offences were similar (except on the occasion where the appellant was treating S.M.'s boil, the appellant initiated contact with all three girls when they were asleep, and then stopped when they woke up or stirred); and (7) the incidents occurred when others were nearby.

[25] The appellant further submits that the trial judge erred in how she characterized the cogency of the similar fact evidence in para. 47 of her reasons. As noted in para. 47 of the trial judge's reasons (reproduced in para. 16 above), the trial judge referred to all three girls as pre-pubescent.[2] The appellant submits that the trial judge erred by describing all three girls as pre-pubescent. He submits that this may have been the case with J.D., but, given general variations that exist in the age of the onset of puberty, it was an error to similarly characterize S.M. and A.M. as pre-pubescent in the absence of expert evidence about their levels of development at the time of the offences.

[26] I do not accept this submission. There is no indication that the trial judge used this expression in a strict biological or medical sense, by referring to developmental milestones. It is clear from the trial judge's reasons that she used the expression compendiously to describe girls of a young age. This is borne out

---

[2] She also used this expression at paras. 63, 71, 72, and 77.

in a subsequent passage in the trial judge's reasons, where she said, at para. 72: "The unifying features are the ages of the girls (all pre-pubescent), their relationship to the accused, the location of the incidents, and the nature of the touching" (emphasis added). On another occasion she said, at para. 70:

> In my view, the similarities in the anticipated evidence of A.M. and S.M. and that of J.D. go beyond generic similarities that might suggest a general propensity on the part of the accused to sexually assault young girls. The particulars of J.D.'s allegations are sufficiently similar to the charged conduct to support an inference that the accused may have been acting in conformity with a specific disposition.

[27] Again, at para. 128, the trial judge said:

> The similar fact evidence gives rise to an inference that the accused has a specific propensity to commit sexual abuse (specifically touching of the genital area) on the female children of his common-law partner (children with whom he does not share a biological relationship), in the family home.

[28] Thus, I consider that the references to the term "pre-pubescent" were used as a short-hand or proxy to describe the young age of these complainants. Moreover, the use of this terminology was restricted to the trial judge's ruling on similar fact evidence. The expression "pre-pubescent" does not appear anywhere in the trial judge's instructions to the jury. This strongly suggests that the use of "pre-pubescent" did not hold any real importance in the trial judge's analysis beyond describing the approximate age of the three young girls.

[29] Having reached this conclusion, it is not necessary to consider the appellant's contention that expert evidence was required before the trial judge would have been warranted in using this expression. However, I would also note the impracticality of imposing such a requirement, especially in a historical case such as this one, along with the indignity that it would inflict upon complainants in these circumstances. The appellant's counsel himself said that it would be a "very intrusive" procedure.

[30] Lastly, the appellant further submits that the trial judge erred in her reliance on the fact that the jury would hear J.D.'s evidence in any event as part of the narrative. There was no error in this. This was acknowledged by the appellant's counsel during submissions on the admissibility of J.D.'s evidence. It was relevant to the assessment of the prejudice involved in introducing the evidence of a witness who was not the subject of any of the counts on the indictment.

[31] I would dismiss this ground of appeal.

C. THE INSTRUCTION ON PRIOR INCONSISTENT STATEMENTS

[32] The appellant submits that the trial judge erred in instructing the jury on the use that could be made of the alleged prior inconsistent statements of S.M., A.M., and J.D. In the course of her final charge, the trial judge delivered the following instruction (which was also provided to the jury in written form):

> Prior Inconsistent Statements of Witnesses
>
> At times during this trial, witnesses were cross-examined about a statement or evidence they gave on an earlier occasion, either a statement to the police or given at the preliminary inquiry or at an earlier court proceeding. When a witness says one thing in the witness box, but has said something you find to be quite different about the same thing on an earlier occasion, your common sense tells you that the fact that the witness has given different versions may be important in deciding whether or how much you believe or rely upon the witness' testimony. The same principle applies if you find that a witness said different things about the same event at different times in their evidence during the trial. [Emphasis added.]

[33] The appellant objected to this instruction at trial. Pointing to the underscored portion of the passage above, he submitted that it had the effect of limiting the instruction to prior statements made to the police, or statements made in court. He requested a clarifying instruction that encompassed all prior statements, irrespective of to whom they were made. The appellant sought to rely on inconsistencies in what S.M., A.M. and J.D. said to each other.

[34] The trial judge refused to re-charge the jury on this issue. She rightly considered the objection to be about inconsistencies between the girls' accounts, not contradictions in what each of them said.

[35] Moreover, the impugned part of the trial judge's instruction must be viewed in context. References to a police statement or other court proceedings were merely examples of prior inconsistent statements – ones likely to be captured in

the most discernible form, having been recorded or transcribed. This did not limit the ability of the jury to consider other prior inconsistent statements. The trial judge told the jury to consider whether the witness said something different about something on an earlier occasion multiple times.

[36] In her review of the evidence, the trial judge highlighted certain inconsistencies in the accounts of all three girls. Importantly, with respect to who said what and to whom, all three witnesses had little recollection, if any, of what they said to each other. Any internal contradictions were minor.[3] Thus, if there were any shortcomings in the charge on this issue, they were inconsequential.

[37] I would dismiss this ground of appeal.

D. CONCLUSION

[38] The appeal is dismissed.

Released: April 24, 2024 “G.T.T.”

“Gary Trotter J.A.”
“I agree. B. Zarnett J.A.”
“I agree. Sossin J.A.”

[3] For instance, S.M. testified that she had a boil on her wrist that the appellant was treating during one incident. J.D. testified that S.M. told her that the appellant treated a cut on her ankle.