

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.S., 2026 ONCA 241¹

DATE: 20260402

DOCKET: COA-24-CR-0079

Zarnett, George and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

A.S.

Appellant

Chris Rudnicki, for the appellant

Lorna Bolton, for the respondent

Heard: February 17, 2026

On appeal from the conviction entered by Justice Jill C. Cameron of the Superior Court of Justice, sitting with a jury, on October 24, 2023.

Copeland J.A.:

[1] The appellant appeals from his convictions, in a trial by jury, for two counts of sexual assault, one count of invitation to sexual touching, and one count of

¹ This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

indecent exposure to a person under 16 years of age.² The complainant was the daughter of family friends of the appellant, who was cared for after school in the appellant's home, along with two of the appellant's grandsons.

[2] For the reasons explained below, I would allow the appeal, set aside the convictions, and order a new trial. The trial judge erred in her instructions to the jury on assessing the evidence of witnesses who may have colluded about their testimony, by failing to direct the jury:

- that the collusion instruction did not apply to the appellant;
- that if they rejected the evidence of the appellant's family members, or gave it less weight, on the basis that their evidence was tainted by collusion, they could not use that fact in assessing the appellant's credibility; and,
- that if they rejected the evidence of the other family members, or gave it less weight, on the basis that their evidence was tainted by collusion, they could not use that fact to infer that the appellant was guilty of the offences charged.

² The indecent exposure count was stayed pursuant to *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. The appellant originally appealed his sentence but subsequently abandoned the sentence appeal by a Notice of Abandonment dated July 7, 2024.

I. FACTUAL BACKGROUND

[3] The appellant and his wife resided in a multigenerational home. During the time frame relevant to this appeal, other people lived in the home including the appellant's two adult daughters, and in the latter part of the time frame, the husband of one of the daughters and their two young sons. The appellant's son and daughter-in-law lived nearby on the same street with their two sons. The complainant's aunt and uncle lived across the street from the appellant's family and were close friends with them.

[4] The complainant and two of the appellant's grandchildren went to the same school. Each day after school, the appellant's wife would pick up the grandchildren and care for them at home until dinner time. The appellant's and the complainant's families were close, and the complainant's mother asked if the appellant's wife could also pick up and care for the complainant after school. The appellant's wife agreed. Between approximately 2013 and 2018, the complainant spent nearly every afternoon until dinner time at the appellant's home – with the exception of a period when her grandparents were visiting from outside the country.

[5] The complainant was seven years old at the time of the alleged offences, and fifteen years old at the time of the trial. She testified that she considered the appellant's family to be her family and that she was close with the appellant. Sometimes she would spend time alone with him in his bedroom, watching children's shows and YouTube videos on his television which he streamed from

an iPad. She would also perform gymnastic moves on his bed, like hand stands and back bends, while he physically supported her.

[6] The complainant testified about three episodes of sexual contact from the appellant, all during the 2015-2016 school year.

[7] The complainant testified that on the first occasion,³ she was sleeping over at the appellant's family residence. She was sleeping between the appellant and his wife, in their bed. It was a weekend, possibly a Saturday. She woke to the appellant touching her vagina over her clothing. She got up and went downstairs.

[8] The complainant testified that on the second occasion, she was watching television in the appellant's room. She testified that usually she would watch YouTube streamed from an iPad to the appellant's television. She was sitting on his bed. He was lying down. The appellant got up and locked the door. He began touching and kissing her arms, and touched her vagina over her clothing. He stopped because his wife knocked on the door. He immediately got up and unlocked it and opened it. The appellant's wife said something to him in Tagalog.

[9] The counts of invitation to sexual touching and indecent exposure relate to a third incident. The complainant testified that she was in the appellant's bedroom

³ The complainant testified that she was unsure of the order of what I list was the first two occasions, but was sure that the third occasion was the last one.

when he exposed his penis to her and said “touch”. She did not want to; so, she said “no”, and walked away. The appellant did not do anything further.

[10] The appellant’s family and the complainant’s family had an unrelated falling out in 2018. The complainant did not return to the home of the appellant for the 2018-2019 school year.

[11] The complainant disclosed the allegations to her sister in October 2020. After “quite a few” meetings with her family to discuss the allegations, the complainant gave a formal police statement in late December 2020. The appellant was charged shortly after.

[12] The appellant testified and denied the allegations.

[13] In addition to the appellant, eight other family members testified for the defence: his two daughters, his son, his wife, his two grandsons who were cared for after school with the complainant, and two other grandsons who came to Canada and lived in the appellant’s home starting in March 2016.⁴ All of the grandsons were between the ages of 17 and 20 years when they testified.

[14] In general, the appellant’s family members’ evidence addressed three areas which potentially had exculpatory value.

⁴⁴ These were the sons of one of the appellant’s daughters. She had immigrated to Canada before her husband and sons, and brought them to Canada in March 2016.

- (1) The appellant's wife and two daughters lived in the appellant's family home throughout 2015-2016. They each testified that the complainant never slept over at the home. The appellant's wife denied that there was ever an instance where the complainant slept in her bed between her and the appellant.
- (2) The appellant's wife denied ever being locked out of their bedroom, knocking, and finding the appellant alone with the complainant.
- (3) The appellant's son testified that his father was not technologically savvy. He was in his 70s and had worked with his hands his whole life. The son testified that the television in the appellant's room was not a "smart" TV and could not be used for streaming. In the time period 2015-2016, the television was only connected to a DVD player that the appellant used to play westerns and old Tagalog movies. In 2015-2016, the television could not play TV shows or YouTube videos streamed from an iPad. This did not change until June 2018, when the son bought the appellant his first iPad for his 76th birthday. The son had the receipt for the iPad in his email and produced it at trial. When the appellant received the iPad, he did not know how to use it, and the family had to teach him. The appellant would not have been able to stream from the iPad to the television in his room until December 2018, when his son bought him a Google Chromecast

device. By that time, the complainant was no longer coming to the appellant's family home. The four grandsons provided evidence consistent with the son's evidence. They said that the appellant did not know how to stream from his iPad to his television. Rather, he watched old westerns and action movies using the DVD player connected with a cord to the television. Except for one of the grandsons, they did not watch television in the appellant's room because they did not like the old movies. They never saw the complainant watching television in the appellant's room.

[15] The defence witnesses also testified that the household was very busy, particularly after the sons and husband of one of the appellant's daughters arrived in March 2016. The appellant would help with snacks after school for the children, including the complainant. But after that, he mostly kept to himself, watching movies on his DVD player with headphones. None of the family members saw the complainant alone in the appellant's bedroom or noticed any changes in her behaviour towards him at any point during or after the 2015-2016 school year.

[16] As outlined in more detail below, some of the defence witnesses were cross-examined about family discussions concerning the complainant's allegations, and about their desire to help the appellant.

II. ANALYSIS

[17] The appellant raises two grounds of appeal, both of which relate to the jury instructions regarding the defence evidence. First, he argues that the trial judge erred by failing to instruct the jury about the application of the reasonable doubt standard to issues of credibility in relation to defence evidence other than the appellant's own evidence (the "*B.D.* error", referencing *R. v. B.D.*, 2011 ONCA 51, 266 C.C.C. (3d) 197). Second, he argues that in instructing the jury about how to assess evidence of witnesses who were suggested to have colluded about their testimony, the trial judge made two errors. First, because there was no independent evidence of fabrication on the part of the appellant, the trial judge erred by not making clear to the jury that the appellant was not included in the collusion instruction. Second, she erred by failing to instruct the jury that if they rejected the evidence of the appellant's family members, they could not use that rejection (a) to draw an inference that the appellant was lying, or (b) as circumstantial evidence of guilt.

[18] As noted above, I would allow the appeal on the basis that the trial judge erred in failing to include limiting instructions in the collusion instruction. As a result, it is not necessary to address the ground of appeal regarding the instructions on the reasonable doubt standard and credibility of other defence evidence. However, I comment briefly on this issue at the end of these reasons.

1. Did the trial judge err in the collusion instruction?

[19] The appellant argues that, having made the decision to give an instruction on collusion that included all of the witnesses, the trial judge erred in failing to include certain specific cautions in the instructions in relation to the appellant's evidence.

[20] I elaborate on the appellant's submissions and summarize the Crown's response to these arguments below in the analysis.

[21] It is helpful to review the context of how the collusion issue arose during the trial in order to understand this issue.

a. Evidence relevant to collusion as it related to defence witnesses

[22] Crown counsel at trial (not Ms. Bolton) asked questions in cross-examination of five of the appellant's family members which were capable of providing a factual basis for a collusion instruction about at least some of the defence witnesses.⁵

- **The appellant's son** – The Crown suggested to the appellant's son that he had discussed his evidence with the "entire immediate" family. The son disagreed. The Crown suggested that the son would do anything to help his dad. The son agreed. The Crown then suggested that the son knew his evidence would further his dad's defence. The

⁵ The record in support of the Crown's theory of collusion was relatively thin, but the appellant accepts on appeal that it was sufficient for the Crown to argue collusion with respect to at least some of the members of the family. However, the appellant argues that there was no evidentiary basis to include the appellant in the collusion argument or jury instruction.

son responded, “I am saying what actually happened.” In re-examination, the son said he would not lie to help his father.

- **The appellant’s daughter** – One of the appellant’s daughters agreed in cross-examination that she had a couple of conversations with her family since the appellant was charged. These were on December 30 and 31, 2020, at the time the police notified the family of the allegations and the appellant was charged. After trial counsel was retained, based on “guidance” from trial counsel telling them not to discuss the allegations, the family would only discuss the allegations if there was a specific request for information from trial counsel, for example, for photos relevant to the defence. Crown counsel also suggested that everything in the daughter’s evidence was “specifically for the purpose of helping your father further his defence?” The daughter replied “yes”. However, in re-examination, she was asked if she would help her father if she believed he had sexually assaulted the complainant, and she said she would not.
- **The appellant’s other daughter** – The appellant’s other daughter agreed in cross-examination that around the time the appellant was arrested, there was a family discussion about what was being alleged against the appellant. But she said that the only conversations about the allegations after December 31, 2020 were with the appellant’s trial

counsel. Crown counsel also suggested to the daughter that by testifying she was “just, you know trying to help [the appellant]?” The daughter replied: “I’m trying to just say the truth.” In re-examination, she said she would “definitely not” lie to help her dad.

- **One of the appellant’s grandsons** – The Crown questioned one of the appellant’s grandsons about family discussions of the allegations against the appellant. He said he was aware of family discussions, but not present for them, other than being told about the fact of the allegations. He said after January 1, 2021, he was not present for any other conversations about the allegations. This grandson agreed that he was testifying in the appellant’s defence because he believed the complainant was lying because she had also made a false allegation against this grandson. In re-examination, the grandson was asked whether, if he had seen the appellant sexually abuse the complainant or if the appellant had confessed to doing so, “he would be here helping today?” The grandson replied, “I’d be helping – helping my grandpa still but I’m here to tell the truth and nothing but the truth.”
- **The appellant’s wife** – The appellant’s wife was not cross-examined about whether there were family discussions of the allegations. However, Crown counsel did suggest to her that she was saying what she was saying in her evidence “simply because you want to support

your husband in this trial?” The appellant’s wife responded, “Not really because it’s the truth.” In re-examination, she confirmed that she would not lie to protect her husband.

[23] The appellant’s other three grandsons were not asked any questions in cross-examination that raised the issue of collusion. In particular, they were not asked any questions about family discussion of the allegations; nor were they asked any questions suggesting they were giving their evidence to support their grandfather.

[24] The trial Crown did not ask the appellant any questions about family discussion of the allegations. I note as well that the trial Crown did not ask any of the family members whether the appellant was present for these discussions. This issue was left unclear on the record.⁶

[25] One other important piece of context is that defence counsel cross-examined the complainant about conversations she had with family members and friends about the allegations. The defence raised these issues with a view to arguing that her communications with others about the allegations tainted the reliability of her evidence.

⁶ To the extent the chronology of the appellant’s arrest was discussed in the evidence, it appears that the police notified the appellant of the allegations by coming to the house on December 30, 2020. At that time, they told the appellant the general nature of the allegations, but not who the complainant was. However, rather than arrest him, the police allowed him to surrender the next day.

b. Discussion of an instruction on collusion at the pre-charge conference

[26] An instruction on collusion was discussed at the pre-charge conference.

[27] The issue was initially raised by the defence, seeking an instruction on collusion in relation to the complainant's evidence. The defence request was based on the evidence that the complainant discussed her evidence with her sister and with other family members and friends. The substance of the instruction requested by trial counsel for the appellant (not Mr. Rudnicki) regarding the complainant's evidence included:

- That the jury must consider all of the circumstances that affect the reliability of the complainant's evidence, including the possibility of collusion, collaboration, or tainting of the evidence;
- That if the jury concludes that the similarity of the witness' testimony is the result of collusion, collaboration, or tainting, they must not use it to support the Crown's case;
- Even if the jury does not reach that conclusion, they must still consider whether the evidence is reliable despite the opportunity for collusion, collaboration, or tainting, and whether it should be given less weight or no weight, because it may not be independent.

[28] During the defence submissions requesting a collusion instruction, the trial judge observed that in her view, both the defence and the Crown were raising collusion. It was clear during the pre-charge conference that the trial judge was concerned about balance in the jury instructions.

[29] Crown counsel at trial initially said she wanted a collusion instruction regarding a chart of family relationships filed at trial prepared by the appellant's son because the son agreed in cross-examination that he had consulted with other family members in preparing the chart. The trial judge expressed her reluctance to give that instruction because the evidence was that trial counsel for the appellant asked the son to prepare the chart (as discussed below, the trial judge ultimately excepted the appellant's son from the collusion instruction). However, the trial judge said to Crown counsel that it would be fair to ask that the jury be instructed on collusion of the defence witnesses on the basis that the appellant's family members described their evidence identically, the family was close, and they had an interest in helping the appellant.

[30] Before turning to the substance of the pre-charge conference and the charge itself, I pause to explain how the names of the appellant's and complainant's families are referenced in the transcript extracts below. Because a publication ban applies to the name of the complainant and information which could serve to identify her, I have removed references to her family name and that of the appellant. However, this ground of appeal turns on how the jury would have

understood references to the appellant's family in the Crown's closing submissions and the jury instructions. In order to allow the reader to understand how the references to the families would have been heard and understood by the jury, I have substituted pseudonyms for each family name. I have substituted the last name "Atkins" where counsel or the trial judge referred to the appellant's family by name. I have substituted the last name "Clarke" for references to the complainant's family by name. The substituted names appear in bold so that it is clear where the names have been substituted.

[31] During the discussion with Crown counsel on this issue, the trial judge outlined what she thought was an appropriate instruction:

So, basically what, what I would say, something along the lines of both the Crown and defence raised the issue of collusion and argue the fact that a witness may have colluded with another witness, affects their credibility. And then, for example, the defence posits these scenarios of collusion, the meetings or what took place. The Crown submits that members of the **Atkins** family have colluded by comparing stories and, and whatever, to support, to support their father. And I can specifically mention the chart is not part of that, if [trial counsel] is concerned about that. But the, the part that comes from, from the, the model instruction is, if you conclude that the similarity of the witness' testimony is the result of collusion, collaboration, or tainting, you must not use it to support the Crown's case or, the Crown's position or the defence position. Or I can make those two different paragraphs. If you do not reach that conclusion, you must still consider whether the evidence is reliable despite the opportunity for collusion, collaboration, or tainting, and

whether it should be given less weight or no weight because it may not be independent.

[32] The trial Crown was agreeable to an instruction along these lines. Trial counsel for the appellant vigorously objected to a collusion instruction being given in relation to the defence evidence. He argued there was “no equivalency” between the Crown and defence theories of collusion.

[33] Once the trial judge made clear that in giving an instruction on collusion, she would address both the defence and Crown theories of collusion, trial counsel for the appellant took the position that this would be so prejudicial that he withdrew his request for a detailed collusion instruction and instead requested a more general instruction, “without mentioning either side specifically.”

c. The Crown’s theory of defence collusion in her jury closing

[34] In closing submissions, Crown counsel made the following submissions to the jury:

Similarly, the defence also wants you to find that there was collusion on the part of the **Clarke** family. There is no evidence of this. [The complainant] did not agree that details were discussed. She did not agree that information was fed to her. There was no evidence from the **Clarke** family, the parents weren’t called as witnesses. Mr. Atkins wants you to believe that his family was permitted to discuss the allegations, to try to make sense of them for themselves, but the **Clarke** family was not. Ask yourself if this is the case. I ask you to find that there’s no evidence of collusion on the part of the **Clarke**

family but that there is definitely bias on the part of the Atkins [sic].⁷

It's not abnormal for evidence of witnesses to align, in fact defence counsel has argued to you that, you know, this is because they were telling the truth, that's why their stories were similar. But consider when does similar testimonies [sic] cross over into the realm of collusion. I suggest to you that there are two clear themes that have emerged that would lend support to a finding that the Atkins family colluded and that they have a clear bias against the Clarke family. [Emphasis added.]

[35] Following this submission, Crown counsel enumerated areas of the evidence that she argued showed collusion, focusing particularly on the similarity of language and examples given in the evidence of some of the defence witnesses. While the examples listed by Crown counsel focused on family members other than the appellant, she concluded this portion of her submissions by stating: “Mr. **Atkins** wants you to believe his family and I ask you to find that they’re not credible and not reliable witnesses ... Everyone went out of their way to advance Mr. **Atkins**’ narrative.”

d. The instruction to the jury on collusion

[36] The trial judge gave the following instruction on collusion:

You must consider the possibility of collusion, collaboration, or tainting of the witnesses. By collusion, I am not referring to the evidence of [the appellant’s son]

⁷ Like the pseudonym Atkins, the appellant’s family name ends in “s”. In places in the transcript, the transcriber incorrectly transcribed what was clearly a plural use of the family name. This reference would be correctly transcribed as “Atkinses”.

that he consulted with others about the dates and times in which they came to Canada and lived at [the appellant's address]. That was done on the instruction of counsel. I am referring to the discussions about the substance of the allegations and the surrounding circumstances in which they took place. If you conclude that a witness has discussed their evidence with others, and that the witnesses' testimony is the result of collusion, collaboration or tainting, you must consider whether the evidence is reliable despite the opportunity for collusion, collaboration, or tainting, and whether or not it should be given less weight or no weight because it may not be independent. [Emphasis added.]

[37] I note that the only person excepted from the collusion instruction was the appellant's son. The reason he was excepted, which is only relevant as context, is that he was cross-examined about communicating with family members in order to prepare a chart of how various family members were related. The son's evidence was that he prepared this chart at the request of defence counsel. The trial judge accepted defence counsel's submission that because counsel had requested that the son prepare the chart, it was appropriate to exclude the son from the collusion instruction. Thus, while the appellant's son was specifically exempted from the collusion instruction, no-one else – including the appellant – was.

[38] Further, in summing up the Crown position to the jury, the trial judge dealt with the evidence of the appellant and that of his other family members together:

The Crown submits that the Defence evidence should not leave you in any doubt about what happened as

Mr. **Atkins** and his witnesses were contradictory, rehearsed, and evasive. The Crown submits that they all refused to answer simple and straight forward [*sic*] questions, disagreed with reasonable suggestions, and changed their evidence mid-testimony.

It is the Crown position that the theories of collusion and a motive to fabricate on the part of [the complainant] and her family defy logic. There is no evidence of either. It is the Crown's position that there is however evidence to show a bias on the part of the **Atkins'** [*sic*]⁸ stemming from the disruption of [the appellant's wife's] life, the gossip and desecration of their social reputation, the allegations against [one of the appellant's grandsons], and the "shocking" (but not upsetting) allegations against him. Their strikingly similar testimonies suggest their collective purpose: to advance Mr. **Atkins'** narrative at all costs.

e. Discussion and conclusion on collusion instruction ground

[39] As noted above, the appellant argues that, having chosen to give an instruction on collusion that applied to the defence evidence, the trial judge erred in failing to instruct the jury that the instruction did not apply to the appellant's evidence and in failing to caution the jury that, if they rejected the evidence of the appellant's family members on the basis of collusion, they could not use that rejection (a) to draw an inference that the appellant was lying, or (b) as circumstantial evidence of guilt. The appellant bases this argument on two lines of cases: first, *R. v. Soobrian* (1994), 96 C.C.C. (3d) 208 (Ont. C.A.); and second,

⁸ This should have been transcribed as the plural of the family name, Atkinses, not the possessive.

R. v. O'Connor (2002), 170 C.C.C. (3d) 365 (Ont. C.A.), and *R. v. U.K.*, 2023 ONCA 587, 430 C.C.C. (3d) 81.

[40] *Soobrian* involved circumstances where the Crown called a witness it knew would not support the Crown's case (i.e. a witness friendly to the defence) in order to seek leave to cross-examine the witness and impeach them during examination in chief. The danger identified in *Soobrian* is that if the jury concludes the witness is lying, they may find the witness is doing so to protect the accused and use that against the credibility of the accused as a witness. This court found in *Soobrian* that in those circumstances, a specific cautionary instruction is required to tell the jury that if they reject the evidence of the impeached witness, they must not infer from that rejection either (a) that the accused is less credible, or (b) that the accused is therefore guilty: *Soobrian*, at pp. 218-19; *R. v. Figliola*, 2018 ONCA 578, 363 C.C.C. (3d) 94, at para. 52.

[41] The appellant acknowledges that the context in this case is different, because the Crown did not call the witnesses at issue. However, he argues that the circumstances of this case give rise to the same concerns in relation to the jury misusing a collusion finding in relation to the other defence witnesses to reflect adversely on the appellant's credibility.

[42] The second line of cases relied on by the appellant are those which place limits on the ability of the Crown to argue that rejection of an accused's evidence

may be evidence of guilt and that discuss the required limiting instructions where issues of fabrication by an accused are raised by the Crown. The criminal law draws a distinction between disbelieved evidence and fabricated evidence. The reason for the distinction is the risk of inadvertently shifting the burden of proof by turning disbelieved evidence into positive evidence of guilt. Disbelieved evidence has no evidentiary value. By contrast, fabricated evidence may be considered as circumstantial evidence of guilt. In order to maintain this distinction, absent independent evidence of fabrication, a trier of fact is not permitted to infer guilt from the rejection of an accused's testimony. Where the Crown alleges that the accused fabricated their testimony, the failure to give the jury a specific instruction in accordance with these principles may constitute reversible error. This is because, without a specific instruction, juries may have difficulty understanding the difference between disbelieved evidence and fabricated evidence: *O'Connor*, at paras. 17-23; *U.K.*, at paras. 70-76; *R. v. Al-Enzi*, 2021 ONCA 81, 401 C.C.C. (3d) 277, at paras. 38-39, 41.

[43] The appellant argues that the principles from the *O'Connor* line of cases apply in this appeal because the trial Crown's theory of collusion that was left with the jury did not distinguish between the appellant and the other members of the family. In other words, it was a theory that the appellant fabricated his evidence in collusion with his family. However, there was no evidence (independent or otherwise) of fabrication on the part of the appellant.

[44] The Crown argues that the principles from *Soobrian* are not applicable in the circumstances of this appeal because the witnesses concerned were not called by the Crown for the purpose of attacking their credibility. The Crown argues that the principles from the *O'Connor* line of cases are not applicable because the trial Crown did not implicate the appellant in the alleged collusion; although the Crown acknowledges that there are passages in the trial Crown's jury closing that could have been clearer. In other words, the Crown argues that the trial Crown did not allege fabrication on the part of the appellant.

[45] In my view, the concerns raised in cases such as *O'Connor, U.K.*, and *Al-Enzi*, are applicable to this appeal. As a result, it is not necessary to address the appellant's argument based on *Soobrian*, which would require the court to consider expanding the principles from that case to a different context.

[46] There are two fundamental problems with how the collusion issue was put to the jury in this trial. The first arises out of the Crown's closing. The second out of the jury instructions. Both arise out of the fact that there was no evidentiary basis to permit the jury to consider whether the appellant fabricated his evidence, and in particular, whether he colluded with his family members to fabricate his evidence.

[47] The issues with the Crown's closing may not have been fatal had a limiting jury instruction been given. But, as I will explain, this did not occur. I also want to be clear that, in concluding that it is likely the jury would not have understood

Crown counsel's collusion submission as excluding the appellant, I do not ascribe any improper motive to the trial Crown.

[48] I express no view on whether the trial Crown intended to exclude the appellant from her collusion theory. Whatever the trial Crown's intention, I am satisfied that there is a real possibility, indeed a likelihood, that the jury would have understood the Crown's theory of collusion in its closing address as including all of the defence witnesses – including the appellant. I have extracted a larger portion of the Crown's closing above. The following phrases within it would have suggested to the jury that the Crown's collusion theory included the appellant:

- Mr. **Atkins** wants you to believe that his family was permitted to discuss the allegations....
- I ask you to find that there's no evidence of collusion on the part of the **Clarke** family but that there is definitely bias on the part of the **Atkins**.
- But consider when does similar testimonies [sic] cross over into the realm of collusion. I suggest to you that there are two clear themes that have emerged that would lend support to a finding that the **Atkins** family colluded....
- Mr. **Atkins** wants you to believe his family and I ask you to find that they're not credible and not reliable witnesses ... Everyone went out of their way to advance Mr. **Atkins**' narrative. [Emphasis added.]

[49] I acknowledge, as Ms. Bolton notes, that at one point in Crown counsel's closing, when she was enumerating areas where she contended the evidence of the family members was similar, she referred to the fact that the jury had heard

from “eight family members.” If the jury counted up the witnesses, this would exclude the appellant, as there were nine family members who testified, if he was included. But this was one passing reference in the context of a number of references to the family collectively. Further, as discussed below, the instructions given to the jury by the trial judge did not distinguish between the appellant and the other members of the family.

[50] There was no evidentiary basis for the Crown to argue to the jury (or leave the jury with the impression it was arguing) that the appellant fabricated his evidence in collusion with his family members. The appellant was not cross-examined on whether he at any time discussed the allegations or his evidence with his family. To the extent other family members were cross-examined about family members discussing the allegations against the appellant, none were asked whether the appellant was present for those conversations. As noted above, whether the appellant was present was left unclear on the evidence at trial.

[51] Because there was no evidence that the appellant colluded with his family members to fabricate his evidence, the Crown should not have been permitted to make arguments to the jury suggesting that the appellant colluded with his family to fabricate the defence evidence.

[52] The jury instructions raise the same concern. As noted above, the instruction on collusion was left to the jury in general terms, referring to “witnesses” generally.

The appellant was a witness. The plain meaning of the reference to “witnesses” in the collusion instruction included the appellant. There is every reason to believe the jury would have understood the reference to “witnesses” to include the appellant. Further, the fact that the trial judge specifically excepted the appellant’s son from the instruction (not in itself objectionable), would have signaled to the jury that the instruction applied to all of the other witnesses, including the appellant.

[53] The trial judge’s summary of the Crown position in the jury instruction reinforced that the Crown’s collusion argument was made in relation to the whole family, including the appellant, because it referred to the family members, including the appellant, collectively.

[54] As I have outlined above, there was no evidentiary basis to permit the jury to consider whether the appellant colluded with his family to fabricate his evidence.

[55] The failure to give the jury a limiting instruction in relation to the collusion instruction was an error and it was prejudicial to the appellant. The trial judge should have cautioned the jury:

- that the collusion instruction did not apply to the appellant;
- that if they rejected the evidence of the appellant’s family members, or gave it less weight, on the basis that their evidence was tainted by collusion, they could not use that fact in assessing the appellant’s credibility; and,

- that if they rejected the evidence of the other family members, or gave it less weight, on the basis that their evidence was tainted by collusion, they could not use that fact to infer that the appellant was guilty of the offences charged.

[56] It is well-established that jury instructions are not held to a standard of perfection on appeal. An appellate court must take a functional approach to reviewing a jury charge, and must examine the alleged errors in the context of the evidence, the entire charge, and the trial as a whole. The issue on appeal is whether the jury understood, or was properly equipped with, the law to apply to the evidence: *R. v. Abdullahi*, 2023 SCC 19, 428 C.C.C. (3d) 1, at paras. 35-36, 40-41, and 53-56.

[57] In this case, the failure to provide the limiting instructions outlined above left the jury inadequately instructed on the law as it related to the fundamental credibility issues in this trial.

[58] Before leaving this issue, I address the Crown's argument on appeal that the objection raised by the defence at trial is not the same objection now raised. The Crown argues that the defence took the position at trial that there was an insufficient evidentiary basis for the Crown to argue collusion by the defence witnesses. Once the trial judge ruled that she would instruct on collusion for both the Crown and defence witnesses, the defence withdrew its request for a collusion

instruction and asked that if the trial judge did instruct on collusion, she do so “very generally ... without mentioning either side specifically.” The Crown argues that the defence did not raise any concerns about potential misuse of the evidence.

[59] Respectfully, I disagree with the Crown’s characterization of what happened at trial. Trial counsel for the appellant was concerned that instructing the jury on a Crown theory that the defence witnesses colluded would be prejudicial to the appellant. He raised that objection, and took the position that there should be no instruction on collusion as it related to the defence evidence. When the trial judge ruled against the defence on this issue, trial counsel sought to limit the damage by asking that the instruction be more general. Although trial counsel for the appellant did not frame his objection in precisely the same terms as it is framed on appeal, I am satisfied that the appellant’s trial counsel sufficiently raised concerns about the instruction on collusion prejudicing the appellant. I do not see this as a situation involving a failure of trial counsel to object: *R. v. Mohamed*, 2025 ONCA 611, 453 C.C.C. (3d) 415, at para. 125. Further, I do not see any tactical benefit for the appellant in not having requested at trial the specific instruction contended for on appeal.

f. The curative proviso

[60] The Crown did not expressly invoke the curative proviso in either its factum or oral submissions. In any event, I would not apply the proviso to the errors in the collusion instruction.

[61] Credibility was the central issue in this trial. Although the fact that a trial turned on credibility is not an absolute bar to applying the curative proviso, appellate courts should be cautious in applying the proviso in cases where credibility is in issue and the error may well have impacted the jury's credibility assessments: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 145, citing *R. v. Perkins (T.)*, 2016 ONCA 588, 339 C.C.C. (3d) 438, at para. 32; *R. v. B.(F.F.)*, [1993] 1 S.C.R. 697, at pp. 706-09, 737.

[62] The errors in the collusion instruction were not harmless or trivial. This was not an overwhelming case. I am not satisfied that the verdicts would inevitably have been the same absent the errors in the jury instructions: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-36. A new trial is required.

2. Did the trial judge err in failing to relate the reasonable doubt standard to credibility for defence evidence other than the appellant's testimony?

[63] Because I would allow the appeal and order a new trial for the reasons outlined above, it is not necessary to decide whether the jury instructions failed to adequately explain to the jury the application of the reasonable doubt standard to credibility for other defence evidence. I note that no objection was raised by trial counsel on this issue. As a result, the trial judge did not receive the assistance of submissions from counsel.

[64] The judge presiding at the retrial will have to consider the appropriate instructions in light of the evidence led and issues at the retrial. Without directing any particular wording, I emphasize the fundamental principle that must be conveyed to the jury, as outlined by Watt J.A. in *R. v. E. (F.E.)*, 2011 ONCA 783, 282 C.C.C. (3d) 552, at para. 104:

The principles that underlie *W. (D.)* are not restricted to cases where an accused testifies and where his or her evidence conflicts with evidence of witnesses for the prosecution. Where, on a vital issue, credibility findings must be made between conflicting evidence called by the defence or emerging from evidence favourable to the defence adduced as part of the Crown's case, the trial judge must relate the principle of reasonable doubt to those credibility findings: *R. v. D. (B.)*, [2011] O.J. No. 198, 2011 ONCA 51, 266 C.C.C. (3d) 197, at para. 114. What the jury must understand is that to find an accused not guilty, they need not believe the defence evidence on the vital issue; rather, it is enough that the conflicting evidence leaves them with a reasonable doubt about the accused's guilt in light of all the evidence: *D. (B.)*, at para. 114.

Disposition

[65] I would allow the appeal, set aside the convictions, and order a new trial.

Released: April 2, 2026 "B.Z."

"J. Copeland J.A."
"I agree. B. Zarnett J.A."
"I agree. J. George J.A."