DATE: **20040206**
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COURT OF APPEAL FOR ONTARIO

DOHERTY, ROSENBERG and MOLDAVER JJ.A.

B E T W E E N:

HER MAJESTY THE QUEEN	)	D. Edwin Boeve for the respondent
	)	
Respondent	)	
- and -	)	
	)	
WAYNE HUNTER	)	Alison Hurst for the appellant
	)	
Applicant/Appellant	)	
	)	
	)	Heard: January 20, 2004

On appeal from the conviction and sentence imposed by Justice M. Lack of the Superior Court of Justice dated October 19, 2001 and March 4, 2002.

BY THE COURT:

[1] The appellant was convicted of sexual interference and sentenced to eight months in jail to be followed by two years probation. He appeals conviction and sentence.

[2] Counsel advanced one ground of appeal in the conviction appeal. He argued that the trial judge erred in allowing the Crown to elicit the content of several prior consistent statements made by the complainant to others. The Crown elicited these prior consistent statements during the re-examination of the complainant, on the cross-examination of certain defence witnesses and in reply from a witness called by the Crown specifically for the purpose of eliciting a prior consistent statement.

[3] The appellant had challenged the credibility of the complainant during cross-examination. Certain prior inconsistent statements were put to the complainant and it was also established on cross-examination that she had denied being assaulted by the appellant when first asked by her mother.

[4] The Crown argued that the cross-examination opened the evidentiary door to evidence of all prior consistent statements made by the complainant. The trial judge appears to have accepted this submission. She did, however, add this caveat:

> The real crux of the issue is the use I put to the evidence that I hear of prior consistent statements, if that is what comes out in this witness' evidence. The Crown tells me it will. So since it is the use that I will be putting to those statements, that can also be dealt with again in submissions. I am capable of hearing something and then instructing myself at a later time that I cannot use it for a purpose or I can it for a purpose.

[5] We cannot agree that cross-examination on the alleged inconsistencies rendered admissible the contents of all prior consistent statements made by the complainant. Where evidence of a prior consistent statement is offered to support credibility, the trial judge must decide whether in all of the circumstances, evidence that the witness made the prior consistent statement could assist the trier of fact in making an accurate assessment of the witness' credibility by removing potential mistaken impressions based on an incomplete picture of what the complainant had said or not said about the relevant events on other occasions. The trial judge must make this determination bearing in mind that normally the mere fact that a witness has made prior consistent statements is of no assistance in determining the credibility of that witness. The trial judge must also consider whether the admission of the prior consistent statement would unfairly prejudice the accused or unduly prolong or complicate the proceedings. Finally, the trial judge must decide, if he or she determines that evidence of the prior statement should be admitted, whether it is appropriate to admit all or part of the contents of the prior statement or to only allow counsel to lead evidence that a consistent statement was made on the prior occasion.

[6] In the present case, the cross-examination on alleged inconsistencies in prior statements by the complainant did not justify adducing evidence of the content of all of the prior consistent statements made by the complainant. For example, we think the admission in reply of a prior consistent statement was wrong. It was also wrong in the circumstances of this case to permit evidence of prior consistent statements where no part of those statements had been the subject of cross-examination.

[7] We are satisfied, however, that the appellant suffered no prejudice as a result of the improper admission of some of the prior consistent statements. The trial judge made no reference to the prior consistent statements in her reasons. She considered the alleged prior inconsistent statements in assessing the complainant's credibility and resolved the

alleged inconsistencies in favour of the complainant by reference to matters other than the prior consistent statements.

[8] In the final analysis, the trial judge viewed the evidence of the conversation between the complainant and the appellant's daughter immediately after the alleged assault and the evidence concerning the complainant's attendance at the eleventh birthday party of the appellant's daughter as the two key factual issues at trial. The trial judge's analysis of the evidence relating to those issues, reveals a full and accurate appreciation of the evidence and was not dependent upon the evidence of the prior consistent statements. The trial judge's reasoning on these issues is compelling.

[9] The appeal from conviction is dismissed.

[10] With respect to the sentence appeal, we are satisfied that the trial judge made two errors in principle. First, she found that the fact that the complainant was required to testify on the preliminary and at trial was an aggravating factor. The fact that the appellant pleaded not guilty and took advantage of the statutory right to a preliminary inquiry and a trial cannot be aggravating factors.

[11] The second error in principle is the trial judge's finding that there was a risk that the appellant would re-offend. The trial judge did not refer to any evidence to support this finding. The offence involved the touching of a ten-year-old child who was sleeping over with the appellant's daughter. The offence apparently occurred in 1996. The appellant was charged in 1999 and sentenced in March 2002. Aside from serving fourteen days of the sentence, the appellant has been on bail since 1999, without incident. The appellant had a minor record in 1990 for simple assault and assault with intent to resist arrest. The pre-sentence report indicates that people who know the appellant considered this offence to be out of character. The appellant is now 53 years of age and self-employed. There is nothing in his background or in the pre-sentence report to suggest that he would re-offend.

[12] In the circumstances, particularly taking into account the time served, the time that has passed since the offence occurred and charges were laid and the appellant's conduct since he was charged, we conclude that a conditional sentence would be an appropriate disposition. The appellant will be sentenced to a term of fifteen months imprisonment to be served in the community on the conditions to be set out in the draft order. Those conditions will include a curfew and a substantial community service requirement. The probation order imposed by the trial judge will remain in effect.

RELEASED: "DD"
"FEB 06 2004"

"Doherty J.A."
"M. Rosenberg J.A."
"M.J. Moldaver J.A."