CITATION: R. v. M.R., 2016 ONSC 4240
COURT FILE NO.: 159/14
DATE: 20160629

ONTARIO

SUPERIOR COURT OF JUSTICE

SUMMARY CONVICTION APPEAL

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Elena Middlekamp,* for the Respondent
	)	
Respondent	)	
	)	
– and –	)	
	)	*Joanne Prince,* for the Appellant
M.R.	)	
	)	
Appellant	)	
	)	
	)	**HEARD:** April 18, 2016

B.P. O'MARRA J.:

REASONS FOR JUDGMENT
[On Appeal from Convictions entered on September 16, 2014 and Sentences imposed on December 4, 2014 by Justice M. Zuker of the Ontario Court of Justice]

[1] The appellant was convicted of two separate incidents of assault against her five year old daughter in June and August of 2013. She was also convicted of assault with intent to resist arrest. This last incident occurred when police attended her residence to arrest her for the two allegations of assault. The appellant received a concurrent suspended sentence on each count with three years probation. She now appeals both the convictions and sentence.

[2] The appellant testified and denied all of the allegations. A brief overview will illustrate the critical issues on each count.

[3] Count one alleged that on or about June 14, 2013 the appellant slapped her daughter while they were in a public park. Nicole Sirchich was present with her child and observed the event. She had never met the appellant before. Several days later she contacted Toronto Police Service (TPS) and asked what she should have done. She was advised to call 911 if she saw the

culprit and her daughter again. Approximately one month later, Nicole Sirchich saw the same woman and her child crossing at an intersection. The woman appeared to forcefully pull her child across the road. The child appeared to have healing scars on her arm. Nicole Sirchich did not have her phone at the time, so she did not call police.

[4] On August 3, 2013, Nicole Sirchich saw the woman and her child for the third time at another park. She called the police. Constable Radford of TPS attended and took a statement from Nicole Sirchich. The officer located the appellant and her child in the park. He recognized the appellant from a previous incident. The officer took no further action other than advising the Youth Bureau of TPS of the information.

[5] Count two alleged that the appellant assaulted her daughter between August 1, 2007 and August 6, 2013 in their home. This count was based entirely on the evidence of the appellant's young daughter.

[6] Based on information received, Detective Constable Amy McGuire of TPS attended the appellant's home on August 6, 2013 to arrest her for the two alleged assaults against her daughter. A scuffle ensued and the appellant was arrested and charged with the additional count of assault with intent to resist arrest.

[7] The young complainant on counts one and two testified by video link. She did not refer to an incident in a park but did describe abuse by the appellant against her in their home. The Crown's case on count one depended on the reliability and accuracy of the identification made by Nicole Sirchich. The appellant testified that she was not present in the park with her daughter that day. She also denied that she ever assaulted her daughter in their home.

[8] On count three there was no dispute that Detective Constable McGuire was in the lawful execution of her duties and had grounds to arrest the appellant for the alleged assaults against her daughter. The appellant testified that she was assaulted by the police. The critical issue on that count was credibility.

Proceedings at Trial

[9] The evidence and submissions were completed over the course of five days in June and September of 2014. The evidence of the appellant extends for eighty-five pages of transcript.

[10] Oral reasons for judgment were delivered on September 14, 2016. That transcript extends for nineteen pages. The first seventeen pages deal with counts one and two. There are only a few brief references to the appellant's evidence. The trial judge referred to extensive portions of the evidence of Nicole Sirchich and the complainant. There were references to issues raised by the defence. It was certainly open to the trial judge to find that the evidence of Nicole Sirchich and the young complainant was reliable and accurate. It was also open to the trial judge to reject the evidence of the appellant. It may be implicit that he did so. However, there is no

indication as to why the appellant's evidence was rejected or why it did not raise a reasonable doubt.

Analysis

[11] The appellant submits that the trial judge made the following errors:

(1) He misapprehended the evidence of identification on count one;

(2) He erred in regard to issues of credibility and the burden of proof;

(3) The reasons for judgment are insufficient.

Misapprehension of Evidence

[12] The Court of Appeal for Ontario in *R. v. Cloutier*, 2011 ONCA 484, 272 C.C.C. (3d) 291, efficiently summarized both the legal standard and applicable case law for appellate review based on a trial judge's alleged misapprehension of evidence as follows, at para. 60:

> A misapprehension of the evidence may relate to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at para. 19; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at paras. 1-2; *R. v. Morrizzey*, (1995) 22 O.R. (3d) 514 (C.A.), at p. 538. To set aside a conviction on the basis that the trial judge misapprehended the evidence, the appellant must meet a stringent standard. The misapprehensions must be of substance rather than detail, they must be material rather than peripheral to the judge's reasoning and the alleged errors must play an essential part in the reasoning process, not just of the narrative. A mere misstatement or inaccuracy in the trial judge's treatment of the evidence does not constitute a reversible error: *Lohrer* at para. 2; *Morrissey* at p. 541; *R. v. T.(T)* (2009), 2009 ONCA 613, 68 C.R. (6^{th}) 1 (Ont. C.A.), at para. 33.

[13] The appellant characterized the evidence of Nicole Sirchich as "in dock" identification that was misapprehended by the trial judge. That witness testified that she saw the appellant on three different occasions over several weeks.

[14] It is inaccurate to describe this as "in dock" identification with its attendant frailties. I am not satisfied that the trial judge misapprehended this evidence.

Credibility and Sufficiency of Reasons

[15] These two grounds of appeal are related and require that the appeal be allowed in regard to counts one and two.

[16] The application of the principles in *R. v. W. (D.)* [1991] 1 S.C.R. 742 is particularly important in a case such as this where there is a testimonial denial in the face of evidence from a very young complainant. A trier of fact could reasonably find that the complainant is credible and reliable and nonetheless acquit based on the second or third steps set out in *W.D.* The Crown's case on count two rested entirely on the complainant's testimony.

[17] On applying the principles of *W.D.*, a trial judge is not required to proceed by rote through the three steps set out therein. Justice Code referred to a "totality" approach in *R. v. Thomas*, 2012 ONSC 6653 at paras. 21-24:

> 21. The Appellant submits that the trial judge misapplied the burden of proof when resolving the central issues of credibility and reliability against Thomas and in favour of the five independent Crown witnesses. He relies on the well-known principles set out in *R. v. D.(W.)* (1991) 1991 CanLII 93 (SCC), 63 C.C.C. (3d) 397 (S.C.C.).
>
> 22. The first aspect of this argument is based on a literalist reading of the model jury charge in *W.D.*, as if it sets out three sequential steps that the trier of fact must take, one at a time. Mr. Gold submits that the trial judge erred in his timing because he accepted the Crown's evidence ("step 3") before he even considered Thomas' evidence ("step 1" and "step 2"). Mr. Gold concedes that the trier of fact must take all the evidence into account, at "step 1" and at "step 2", but that it is an error to actually accept the credibility and reliability of the Crown's witnesses when undertaking the first two temporal stages of this complex analytical exercise.
>
> 23. In my view, this is a misreading of *W.D.* That case does not describe three sequential analytical steps that a trier of fact must pass through, one at a time. Rather, it describes three distinct findings of fact that a trier of fact can arrive at, when considering all the evidence at the end of the case, namely, complete acceptance of the accused's exculpatory account ("step 1"), complete acceptance of the Crown witnesses' inculpatory account ("step 3"), or uncertainty as to which account to believe ("step 2"). See: *R. v. Edwards*, 2012 ONSC 3373 (CanLII) at paras. 13-25 (S.C.J.), where the authorities on this point are discussed at some length.
>
> 24. Mr. Gold's approach is unworkable in practice. A trier of fact must look at all the evidence, when deciding whether to accept the accused's evidence and when deciding whether it raises a reasonable doubt. It is at that same point in time that

> the trier of fact will also determine whether the Crown's witnesses prove guilt beyond reasonable doubt and whether the accused's contrary exculpatory account must necessarily be rejected. In other words, these decisions are all made at the same time on the basis of the same total body of evidence. The so-called "three steps" in *W.D.* are simply different results, or alternative findings of fact, arrived at by the trier of fact at the end of the case when considering the totality of the evidence.

[18] In *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, the Supreme Court of Canada, at para. 28, indicated the following:

> The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

[19] Several years later, the Supreme Court in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15, confirmed *Sheppard* as advocating for "a functional context-specific approach to the adequacy of reasons in a criminal case." The court held that, "The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review." The court further noted, at para. 16, that "[C]ourts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered".

[20] Even more recently, in *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 15, the court held that the core question is as follows: "Do the reasons, read in context, show why the judge decided as he did on the counts relating to the complainant?"

[21] The trial judge did not specifically refer to *W.D.* in his reasons. He was not obliged to do so but he was required to apply the principles. The reasons for judgment have very few references to the appellant's evidence which extended for eighty five pages. References to denials by the appellant do not reveal why her evidence was rejected or why it did not leave a reasonable doubt. The reasons are insufficient in relation to the analysis and impact of the appellant's evidence.

[22] The situation in regard to count three is different. The reasons for judgment set out specifically why he rejected the evidence of the appellant and why he relied on the evidence of the police. The appeal in regard to count three is dismissed.

Sentence Appeal

[23] Since the appeal as to count three will be dismissed, I now address the sentence issue on that count.

[24] The appellant submits that the trial judge erred in not imposing a conditional discharge instead of a suspended sentence and probation.

[25] The Supreme Court of Canada recently reviewed the standard wherein an appellate court may intervene and vary a sentence imposed by a trial judge in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 41 and 44. The court reaffirmed that absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appellate court should only intervene to vary a sentence if the sentence is demonstrably unfit. Further, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears that such an error had an impact on sentence.

[26] The appellant was a forty-two year-old first offender. However, she also was found to have been belligerent and physically aggressive with the officers who came to lawfully arrest her. There is a significant general deterrent aspect to sentences for such offences. I am not persuaded that there was an error in principle in imposing a suspended sentence and probation on that count or that the sentence imposed was demonstrably unfit.

[27] RESULT: The appeals as to the convictions on counts one and two are allowed. A new trial is ordered on those counts before a different judge of the Ontario Court of Justice.

[28] The appeals as to conviction and sentence on count three are dismissed.

B.P. O'Marra J.

Released: June 29, 2016

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