CITATION: R. v. Camino-Ruiz, 2024 ONSC 145
COURT FILE NO.: CR-23-1000000500-AP
DATE: 20240108

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:		
HIS MAJESTY THE KING	Respondent	*J. Andres Hannah-Suarez*, for the Respondent Crown
- and -		
VIRGILIO CAMINO-RUIZ	Appellant	*Chris Rudnicki*, for the Appellant
		HEARD: November 3, 2023

RESTRICTION ON PUBLICATION

On January 24, 2022, an order was made by Justice M. McLeod pursuant to s. 486.4 of the *Criminal Code*, directing that the identity of the complainant and any information that could disclose such identity shall not be published in any document or broadcast or transmitted in any way.

J.M. BARRETT J.

REASONS FOR DECISION

OVERVIEW

[1] On February 28, 2022, Mr. Camino-Ruiz was convicted by McLeod J. in the Ontario Court of Justice of one count of sexual assault that was alleged to have occurred on June 5, 2019.

[2] On this appeal, the appellant raises the following three grounds of appeal against his conviction:

i. The trial judge erred in dismissing the appellant's s. 276 application;

ii. The trial judge erred in failing to apply *W.D.* and instead approached the conflicting evidence as a credibility contest; and,

iii. The trial judge misapprehended two key areas of evidence that were material to the complainant's credibility.

[3] For the reasons that follow, the appeal is allowed on the third ground as set out above. Accordingly, the conviction is set aside and a new trial is ordered.

BACKGROUND

(1) Evidence

[4] The appellant and complainant, C.A., met at a national wrestling competition on April 1, 2019, where they were both assigned to officiate on the same wrestling mat. The multi-day tournament was held in Fredericton, New Brunswick. At the time, C.A. was a nineteen-year-old student, living in New Brunswick. The appellant was 50-years old and had been living in Toronto since 2016, when he first came to Canada as a member of the Cuban Olympic wrestling team. During the tournament, the appellant spoke to C.A. about his wife and children who were still living in Cuba. The appellant spoke of his efforts to have his family join him in Toronto.

[5] Before the end of the tournament day, the appellant and C.A. exchanged contact information. C.A. planned to spend the upcoming summer in Toronto. The appellant invited C.A. to reach out to him once she was in Toronto. C.A. testified that she viewed the appellant as a wrestling mentor and coach given his experience with Cuba's national team. C.A. knew of the appellant and that he was involved in coaching at a Toronto wrestling club. C.A. testified that she had no romantic interest in the appellant.

[6] After the tournament, C.A. and the appellant exchanged messages on Facebook. When C.A. arrived in Toronto, she messaged him to advise that she was available to meet and chat about wrestling. The appellant suggested they meet at his home on June 5, 2019. He gave C.A. his address. C.A. testified that she was not concerned about going to the appellant's home because she knew the appellant had a wife and children. She assumed they would be at his apartment. They were not. The appellant's family were still in Cuba.

[7] As found by the trial judge in his Reasons for Judgment ("Reasons"), there was substantial agreement in the testimony of the appellant and C.A. as it related to: (i) the nature of the relationship leading up to June 5, 2019; (ii) what occurred at the appellant's apartment for the first thirty minutes after C.A. arrived; and (iii) what occurred after the sexual activity in the appellant's bedroom as well as during the following 10 days, ending on June 15, 2019, when the appellant was arrested.

[8] For instance, there was no issue that prior to June 5, 2019, the communications between C.A. and the appellant were professional. All communications focused on wrestling. This was also true of the first thirty minutes after C.A. arrived at the appellant's apartment on June 5, 2019,

during which time they spoke about an upcoming wrestling competition in July 2019 – the Ontario Cup. C.A. wanted to compete in this competition and wanted the appellant to coach her at his wrestling club.

[9] There was also no issue that the physical touching started after C.A. complained of soreness in her lower back and shoulders. The appellant asked if C.A. wanted a massage and retrieved a bottle of lotion. From this point their narratives diverged. C.A. testified that she did not consent to any of the touching that followed. The appellant testified that he explicitly asked C.A. for her consent to each act, including the massage. The appellant described C.A. as a willing and engaged partner throughout.

[10] There is no dispute that the appellant massaged C.A. Nor was it disputed that during the massage, C.A. removed her shirt and bra when asked to do so by the appellant. The appellant kissed C.A.'s eyes and told C.A. she was beautiful. The appellant and C.A. moved from the kitchen to the bedroom. C.A. removed her jeans and underwear. Both C.A. and the appellant testified that oral sex occurred in the bedroom. There was conflicting evidence about whether vaginal intercourse occurred. The appellant testified that there was no vaginal penetration because when C.A. got on top of him, he was unable to get an erection. C.A. testified that after the oral sex, the appellant got on top of her and vaginally penetrated her for about 10 minutes.

[11] C.A. testified that while being penetrated she repeatedly asked the appellant to stop. She told him that she was in pain. C.A. testified that she had had an abortion on May 14, 2019, and that to have any sexual relations for four to eight weeks afterwards could have harmed her healing. C.A. testified that the appellant knew of her abortion because they had originally planned to meet in May during the Victoria Day weekend. C.A. postponed the meeting and, in a Facebook message, told the appellant of her abortion. The appellant testified that it was only when they were at his apartment that C.A. told him she had a medical appointment the next day (*i.e.*, June 6, 2019) and that it was for an abortion. The appellant testified that C.A. had previously told him that she was pregnant. The appellant denied knowing that C.A. was recovering from surgery when she went to his apartment on June 5, 2019. The appellant testified that when they were in the bedroom, C.A. never spoke of being in pain.

[12] C.A. and the appellant gave consistent accounts of what occurred after they left the appellant's bedroom. The appellant asked if C.A. planned to attend practice the next day. C.A. said she would be there. The appellant asked C.A. to take a selfie of them. She did. C.A. sent the photo to the appellant sometime after she left his apartment. In the days that followed, the appellant regularly messaged C.A. on Facebook. In some messages, the appellant told C.A. that "everything will be perfect for you tomorrow" and asked, "how is your recovery?"

[13] C.A. ignored most of the appellant's messages. C.A. ultimately blocked the appellant on Facebook. On June 15, 2019, the appellant went to C.A.'s workplace. He knew from C.A.'s Facebook page that C.A. worked as a lifeguard at Wet'n'Wild water park. When C.A. learned of his presence, she notified her work supervisors. The police were called. The appellant was arrested at the water park.

(2) The Trial Judge's Reasons

[14] The trial judge observed that C.A. and the appellant "presented as being honest and sincere in their effort to recount […] what occurred" from the time they met to the date of the appellant's arrest. The trial judge correctly identified consent as the key issue for his determination. On the issue of consent, he found C.A.'s account to be "internally coherent and inherently plausible". The trial judge found C.A.'s evidence to be reliable as it concerned her lack of consent and her lack of any sexual interest in the appellant because it was "completely consistent with the totality of the evidence".

[15] In finding a lack of consent, the trial judge explicitly referred to the fact that C.A. had "recently undergone a surgical abortion and had a follow-up medical appointment scheduled for the following day". The trial judge described this fact as being "more consistent with the unlikelihood of spontaneously forming the intention to participate in sexual acts with a male acquaintance such as [the appellant] in the circumstances described". The trial judge noted that this consideration, while not definitive, was relevant.

[16] Elsewhere in his Reasons, the trial judge described C.A.'s abortion as a "significant factor" which preceded their meeting on June 5, 2019. The trial judge noted that both C.A. and the appellant were questioned fairly extensively about what C.A. disclosed to the appellant concerning her surgery and the purpose of her appointment on June 6, 2019. The trial judge stated that the nature of what was "communicated" to the appellant was of less significance than "the fact that the surgical abortion had been performed in May 2019, and that the follow-up medical appointment was scheduled for June 6, 2019".

[17] Ultimately, the trial judge found that the appellant was wilfully blind to C.A.'s lack of consent. The trial judge found that the appellant acted unilaterally in initiating each physical act. The trial judge found that the appellant's "present lack of insight was reflective of his lack of insight at the time of the sexual touching". The trial judge found the appellant's testimony that he sought C.A.'s consent to each physical act to be "highly improbable". The trial judge found that the appellant's wilful blindness to C.A.'s lack of interest in him continued after the incident as demonstrated by the appellant sending C.A. messages and showing up unexpectedly at C.A.'s work. In contrast, the trial judge observed that after June 5, 2019, C.A. had "little or nothing more to do with [the appellant]" apart from sending the appellant the selfie and a single response to one message in which C.A. declined an invitation to attend a party with him because she wanted to watch a Raptors game. This was in contrast to C.A.'s original plan to train with the appellant.

(3) The s. 276 Application

[18] Pre-trial, the appellant applied under s. 276.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, for permission to lead evidence of prior statements made by C.A. about the appellant and what happened on June 5, 2019. The prior statements were made to Dylan Williams, a former friend of C.A.'s who, at the time of the application, was also charged with sexually assaulting C.A. in Edmonton on June 12, 2019 and October 17, 2019.

[19] In his application, the appellant expressed an intent to call Mr. Williams and the investigating officer of the Edmonton charges to elicit details of C.A.'s prior statements. In support

of the application, the defence submitted the following five-paragraph statement, dated August 1, 2021, and signed by Mr. Williams:

> In May of 2019 [C.A.] mentioned she now had a new prospect for a friends with benefits situation. She asked, 'Do you know the ref Villy?' I said, 'Nope, never heard of him'. [C.A.] went on to say, 'How do you not know? He's the older Black ref.' I still had no idea who Villy was the only other Black ref I knew was from Montreal Patrick Okalugo. There aren't many Black members of the wrestling community especially refs so I was extremely confused until she clarified he was from Cuba. At this time I still had no idea who Villy was, she went on to say how she was surprised I didn't know him since I knew of just about everyone in the wrestling community. She then added that he was new to Canada and a friends with benefit situation worked because of the age difference and he had a wife and kids in Cuba.
>
> A couple days had passed and [C.A.] once again brought up Villy and that he and her were going to sleep together. [C.A.] asked, 'How bad does the age difference look and be honest?' This was because [C.A.] had told me Villy was in his 40's. I said, 'It doesn't look the best that a guy that much older is sleeping with you but who cares as long as you both want it and it's discreet.' 'I'm sure you can find a guy around your age.' [C.A.] then said that guys her age were assess [*sic*] and immature and brought up how previously guys her age had assaulted her back in New Brunswick.
>
> Just after my birthday I believe June 1 [C.A.] messaged me on snapchat and asked about how much fun I had partying on my birthday based on my snapchat stories and posts. I just stated I was hungover and hanging out with my friends and housemates. She brought up Villy and again her plans to sleep with him and that they would be friends with benefits until his family came from Cuba. [C.A.] also mentioned that she would need to come to Edmonton Alberta around June 15-26 to have a knee consultation with a knee and hip specialist.
>
> A week or so passed and [C.A.] texted me stating that Villy had sexually assaulted her she said she had gone to his place to hangout and he raped her. I was extremely confused and said weren't you both friends with benefits and she deflected stating she just had a bad feeling about him. Her ideas were scattered and I told her we would talk further in a week when she was in Edmonton for her knee consultation.
>
> While [C.A.] was in Edmonton she began telling me her vague recollection of the events stating she never said she wanted to sleep

> with him, that she thought his wife and kids were here in Canada and that's why she went over. I was confused because everything she had told me in the prior weeks was in direct conflict with what she said. [C.A.] stated multiple times that she wanted to sleep with Villy. [C.A.] had told me she knew his family was in Cuba and that's why they had entered this friends with benefits arrangement.

[20] It was the position of the defence that the proposed evidence was admissible because C.A.'s statements were inconsistent with her allegations against the appellant. Although the defence did not file an affidavit, counsel for the appellant agreed that Mr. Williams would be made available if the Crown sought to cross-examine him. Counsel for the Crown and counsel for C.A. opposed the application and sought its dismissal at stage one given its lack of relevance beyond the prohibited twin myths.[1]

[21] After hearing submissions at stage one,[2] the application was dismissed on grounds that the trial judge found the proposed evidence to be of "minimal probative value and the prejudice to the reputation of the administration of justice would be considerable". The minimal probative value was due largely to the fact that the proposed evidence had "no assurance of reliability". The trial judge noted several concerns regarding the reliability of Mr. Williams' recollection of C.A.'s statements and concluded that "the probative value should be considered minimal in general terms and non-existent with respect to the principle [*sic*] issues in the trial".

ANALYSIS

(1) Whether the Trial Judge Misapprehended the Evidence

[22] The appellant alleges that the trial judge misapprehended two key areas of evidence, namely: (i) the timing of C.A.'s abortion; and (ii) C.A.'s Facebook messages sent after June 5, 2019. I agree.

[23] A misapprehension of evidence can occur in a multitude of ways. These were described by Doherty J.A. in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 538 (C.A.), as follows: "[a] misapprehension of the evidence may refer 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".

[24] The standard for demonstrating that a trial judge is mistaken as to the substance of material parts of the evidence is stringent. The error must play an essential, material part in the reasoning of the trial judge. Where a misapprehension plays an essential part in the reasoning process, the verdict is not true and the trial has been unfair. The consequence is a miscarriage of justice even if

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[1] At the outset of the application, counsel for the Crown and counsel for C.A. sought to have the application dismissed on the basis that it failed to provide detailed particulars. However, during submissions on the first day of the application, further materials were filed by the defence and it was agreed that these fulfilled the applicant's duty to provide detailed particulars.

[2] Although counsel for complainants do not have standing to make submissions at stage one of the application process, the trial judge heard submissions from counsel for C.A. at stage one.

the evidence adduced at trial is otherwise capable of supporting a conviction as it is in this case: *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at paras. 1, 2, citing *Morrisey*.

[25] In *R. v. S.R.*, 2022 ONCA 192, 79 C.R. (7th) 162, at para. 15, the Court of Appeal for Ontario stated that "[w]here the alleged misapprehension is respecting evidence used to assess credibility, the decision whether a miscarriage of justice has occurred turns on the extent to which the misapprehended evidence played a role in the trial judge's credibility assessment".

[26] The trial judge treated both (i) and (ii) as non-disputed established facts. This is plainly wrong and reflects a mistake as to the substance of the evidence. That said, only the first misapprehension played an essential role in the trial judge's reasoning process.

[27] In his Reasons, the trial judge relied on "the fact" that C.A. had a surgical abortion in early May 2019 and had a follow-up appointment scheduled for June 6, 2019. The trial judge found that for his purposes "in determining the issues in dispute" he did not find the questioning of C.A. and the appellant about the abortion to be a useful exercise because what C.A. "communicated to [the appellant] about the abortion, or the reason for the medical appointment on June 6, 2019, was of less significance than ***the fact*** that the surgical abortion had been performed in May 2019, and that the follow-up medical appointment was scheduled for June 6, 2019" [emphasis added]. The trial judge then relied on this fact to support C.A.'s testimony that she had "no sexual interest in [the appellant] and no desire to have him touch her body in a sexual manner" as she was recovering from the abortion which was "more consistent with the unlikelihood of spontaneously forming the intention to participate in sexual acts with a male acquaintance such as [the appellant] in the circumstances described".

[28] The trial judge was mistaken as to the substance of the evidence regarding the timing of C.A.'s abortion. The ***timing*** of the abortion, not just what C.A. ***communicated*** to the appellant about its timing, was a disputed issue. It was also central to each party's theory of its case.

[29] The defence theory was that the abortion did not occur in May. Rather, it was scheduled to occur on June 6, 2019. In support of this theory, the defence relied on C.A.'s testimony that during the alleged sexual assault, she told the appellant she was pregnant. The defence also relied on the appellant's Facebook messages after the incident in which he inquired about her recovery. The Crown theory was that the abortion was in May. The medical appointment on June 6, 2019, was simply a follow-up appointment. This timing supported C.A.'s testimony that she was in pain when the appellant vaginally penetrated her and that she did not consent to any of the sexual activity because she was in a "post-op" recovery period where this would risk further damage.

[30] These competing theories were reviewed by counsel during their closing submissions. For instance, during the Crown's closing submissions, the trial judge was urged to find that C.A. "ought to be believed on that point" as she had no motive to fabricate the date of her abortion. The Crown argued that if C.A. was believed on this point, it meant "she had another three to four weeks of recovery" when she went to the appellant's apartment on June 5, 2019. The trial judge did not resolve this critical issue. While the trial judge may have ultimately chosen to believe C.A.'s testimony that her abortion occurred in May, it does not alter the fact that he erred in conducting his analysis on the basis that this was an established fact. Moreover, this misapprehension of

evidence was critical to the outcome of the case. The timing of C.A.'s abortion played a key role in the trial judge's path of reasoning that resulted in the appellant being found guilty.

[31] The trial judge's other misapprehension of evidence was ***not*** material to his reasoning process. Specifically, the trial judge stated that "both parties agree that the only communication from [C.A.] to [the appellant] consisted of her sending him a copy of one of the pictures taken at his request; and a single response to one of his messages, indicating that she would rather watch a Raptors game than attend a party with him". There was no such agreement between the parties. However, this misapprehension did not infect the very core of the trial judge's reasoning process. Rather, the extent of communications, was merely one of several examples given by the trial judge of C.A.'s demonstrated lack of interest in having any on-going relationship with the appellant after June 5, 2019. Of greater relevance was C.A.'s abandonment of her plan to train with the appellant during the summer. The trial judge contrasted C.A.'s conduct with that of the appellant's which showed a strong interest in continuing a relationship.

[32] Given my finding that the trial judge materially misapprehended the evidence at trial as it related to the timing of C.A.'s abortion, it is not necessary to determine the other grounds of appeal raised by the appellant. However, as the scope of cross-examination may become relevant at the appellant's new trial, it may be helpful to address the appellant's first ground of appeal which alleges that the trial judge erred in dismissing his s. 276 application.

(2) Whether the Application Judge Erred in Dismissing the s. 276 Application

[33] On an application to adduce evidence that the complainant has engaged in sexual activity other than that which forms the subject matter of the charge, the applicant has the onus of establishing its admissibility in accordance with the conditions of admissibility set out in s. 276(2) of the *Criminal Code*. In determining the admissibility of the evidence, the judge is statutorily mandated to consider the factors outlined in s. 276(3) of the *Criminal Code*.

[34] The *Criminal Code* sets out a step-by-step process through which evidence of other sexual activity is "carefully vetted and winnowed down to its essentials. To make its way into evidence at trial, such evidence must withstand careful scrutiny at each stage of the process"*: R. v. Goldfinch,* 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 82 (per Moldaver J., concurring).

[35] At stage one, the presiding judge reviews the application on its face to determine whether the evidence sought to be adduced "is capable of being admissible under subsection 276(2)": *Criminal Code,* s. 278.93(4). As explained by Moldaver J., in *Goldfinch* at para. 94, "[w]here the judge is satisfied that (a) the application was made in accordance with s. 276.1(2), (b) certain filing requirements have been met, and (c) the evidence sought to be adduced is capable of being admissible under s. 276(2), then he or she shall hold a *voir dire* […] to determine whether the evidence is admissible under s. 276(2)". It is only if the written application is deficient that discretion exists to dismiss it without a stage two *voir dire*. This determination is a question of law reviewable on a standard of correctness: *Goldfinch*, at para. 101.

[36] The threshold test at stage one is low. Any doubts as to whether evidence is capable of admissibility should be resolved after the stage two hearing: *R. v. Peters*, 2023 MBCA 96, at para. 24.

[37] In the present case, the trial judge was satisfied that the proposed evidence fell within the purview of s. 276(1) and was therefore presumptively inadmissible. Although concerns were expressed at the start of the hearing about the sufficiency of the materials, and whether they provided "detailed particulars" of the evidence sought to be adduced, counsel ultimately agreed that this statutory prerequisite was met. Accordingly, the only remaining issue was whether the proposed evidence was "capable of being admissible" under s. 276(2). At the outset of his ruling on the appellant's s. 276 application, the trial judge recognized that this was the limited issue for his determination at stage one. He also noted the low threshold test at this stage, equating it to the "air of reality" test applicable in other contexts.

[38] To determine whether the proposed evidence was capable of admissibility, the trial judge was required to consider the "conditions for admissibility" set out in s. 276(2) of the *Code*, namely that the evidence: (a) was not being adduced to support the prohibited twin-myth reasoning that C.A. was more likely to have consented to the alleged activity with the appellant, or was less worthy of belief; (b) was relevant to an issue at trial; (c) was of specific instances of sexual activity; and, (d) had significant probative value that was not substantially outweighed by the danger of prejudice to the proper administration of justice.

[39] The trial judge identified three aspects of Mr. Williams' statement that were potentially "connected to an issue in the present trial". These were: (i) the "friends with benefits" comment; (ii) C.A.'s statement that she was "raped" by the appellant in June 2019; and (iii) Mr. Williams' observation that C.A. "deflected" when Mr. Williams expressed confusion over C.A.'s allegation of rape because he believed C.A. and the appellant were "friends with benefits". However, the trial judge was not satisfied that any were relevant to an issue at trial. The trial judge found that: (i) the "friends with benefits" comment was "irrelevant in fact and law to the issues in dispute in the present trial"; (ii) C.A.'s statement that she was "raped" was "at best" a prior consistent statement; and, (iii) C.A.'s purported "deflection" – in response to Mr. Williams' comment that he was confused by C.A.'s allegation of rape – "is a statement of opinion or suggestion based on the subject's interpretation of his general recollection of what was said by the complainant […] and are patently inadmissible".

[40] The trial judge proceeded to consider the admissibility of one further component of Mr. Williams' statement – the potential inconsistency between "the information attributed to the complainant by police in Edmonton, that she 'confided in Williams all of the details of the other sexual assault' and Mr. Williams' recollection […] that when asked about the sexual assault 'her ideas were scattered' and she told him 'her vague recollections of the events'". The trial judge found that this too was not capable of admissibility because there was no "assurance of reliability". The trial judge found that:

> At best it appears to be a reconstruction made months after the fact, based on the recollections of a layman of his understanding of what he was being told about an emotionally charged experience of the complainant. The observation that her 'ideas were scattered' is itself so vague as to be valueless, even if it had been made contemporaneously by an objective third party striving to accurately record what was said. The same is true of the conclusory statement that all she had were 'vague recollections'.

The trial judge found that these were not prior statements of C.A., but "recorded recollections of Mr. Williams' reaction, interpretation or understanding of what he presently believes was the complainant's state of mind and/or the quality and content of her unexpressed recollections of an event that Mr. Williams' [*sic*] has no other knowledge of". The trial judge found that the reliability of this evidence was "further compromised" by the fact that at the time of Mr. Williams' statement, he too was facing charges of sexually assaulting C.A.

[41] The trial judge also weighed the probative value of the proposed evidence against the danger of prejudice to the proper administration of justice. Having done so, the trial judge concluded that "the probative value should be considered minimal in general terms and non-existent with respect to the principle issues in the trial". Weighing against this "minimal probative value" was the "considerable" prejudice to the administration of justice if the evidence was admitted even for purposes of cross-examination. Consequently, the trial judge dismissed the application without proceeding to a stage two *voir dire*.

[42] In dismissing the application at stage one, the trial judge erred. By the end of the stage one hearing, the parties agreed that the application was not deficient as to its form, content, or the timing of its service. Accordingly, provided the appellant could point to *some* legitimate use, the trial judge was statutorily mandated to grant the application and proceed to a stage two hearing: *Criminal Code,* s. 278.93(4); *Goldfinch*, at para. 106; *R. v. J.J.*, 2022 SCC 28, 81 C.R. (7th) 1, at para. 28.

[43] While not addressed in the s. 276 ruling, one proposed use identified in the application materials was not capable of admissibility. Specifically, the s. 276 application sought permission to call, as witnesses, Mr. Williams and the Edmonton officer in charge of the Edmonton investigation for purposes of eliciting extrinsic evidence of C.A.'s statements. This proposed purpose would violate the collateral fact rule and therefore is "clearly inadmissible": *R. v. B. (A.R.)*, 41 O.R. (3d) 361, 128 C.C.C. (3d) 457 (Ont. C.A.), aff'd 2000 SCC 30, [2000] 1 S.C.R. 781; *Peters*, at paras. 20-27.

[44] However, the application disclosed two legitimate bases of admissibility. First, Mr. Williams' claim that C.A. had previously expressed an interest in a "friends with benefits" relationship with the appellant was potentially admissible as a prior inconsistent statement as it conflicted with C.A.'s evidence that her interest in the appellant was solely professional. This is distinct from the prohibitive twin-myth reasoning with which the trial judge was correctly concerned. The same is true of C.A.'s purported statement that the appellant's wife and children were in Cuba; if made, this statement conflicted with C.A.'s testimony that she believed they would be at the apartment. This, however, was not considered by the trial judge. Both purported statements by C.A. had *some* probative value as prior inconsistent statements and to support the defence theory that C.A. failed to give a fulsome account of events to the police: *Goldfinch*, at para. 63; *R. v. Crosby*, [1995] 2 S.C.R. 912, at paras. 6-11; *R. v. Ururyar*, 2017 ONSC 4428, at paras. 36-40; *R. v. J.C.*, 2022 ONSC 4991, at paras. 68-75.

[45] The trial judge was right to be concerned about the risk of prejudice and the risk of the evidence engaging prohibitive twin-myth reasoning. However, defence counsel identified a potential legitimate use for two aspects of Mr. Williams' statement which could be used in cross-

examination to challenge C.A.'s credibility on two *specific* issues. In the present case, credibility was the central issue.

[46] The trial judge's concerns about the reliability of Mr. Williams' statement was a factor of consideration at stage two, not stage one. During the stage one hearing, defence counsel advised that Mr. Williams would be made available for cross-examination. However, as the application did not proceed beyond stage one, this never occurred. Had Mr. Williams been called, this may well have impacted the trial judge's assessment of the probative value of his evidence. Any doubts the trial judge had regarding the actual admissibility of the proposed evidence ought to have been reserved until after he heard full submissions at stage two: *R. v. Ecker* (1995), 96 C.C.C. (3d) 161, 37 C.R. (4th) 51 (Sask. C.A.) at 181-182.

DISPOSITION

[47] For the above reasons, the appeal is allowed, the appellant's conviction is set aside, and a new trial is directed.

J.M. Barrett, J.

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Released: January 08, 2024

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SUPERIOR COURT OF JUSTICE

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REASONS FOR DECISION

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