SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Burton*, 2017 NSSC 57

Date: 2017 03 03
Docket: CRH No. 443267
Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Shawn Burton

Restriction on Publication: S. 486.4 and 539

Judge:	The Honourable Justice Joshua Arnold
Heard:	December 5, 6, and 12, 2016, and January 9-12, 2017, in Halifax, Nova Scotia
Counsel:	Robert Kennedy, for the Crown Peter Planetta, for the Defence

By the Court:

Overview

[1] February 2, 2014, was Super Bowl Sunday. Robert Shawn Burton invited R.P. to his home for a Super Bowl party. R.P. stayed overnight. Later that week R.P. went to the police to complain that Burton sexually assaulted her. Burton now stands charged as follows:

> That he on or about the 3rd day of February, 2014 at, or near Lower Sackville, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on R.P., contrary to Section 271(1) of the *Criminal Code.*

Facts

History Between R.P. and Burton

[2] Burton and R.P. met approximately one year prior to the incident of February 2, 2014. They met at a party at Burton's home in May or June of 2013. R.P. said that Burton asked for her number that night, but she declined as she had just met someone she was interested in dating. Later, Burton added her as a friend on Facebook.

[3] Burton said that R.P. gave him her telephone number the night they met. He agreed that shortly thereafter he asked her to be his Facebook friend and she agreed. He said that when he first asked R.P. out she said no as she was seeing someone. In October 2013, through her Facebook status, Burton determined that she was single and asked her out.

[4] R.P. eventually went out with Burton. They had a limited, casual relationship which, according to R.P., involved two or three visits by her to Burton's home, one being overnight, and one weekend where Burton stayed overnight at her home during a snowstorm about a month and a half prior to the incident. The Crown introduced the prior sexual history between Burton and R.P. R.P. said that she had sex with Burton on a couple of occasions during the snowstorm weekend.

[5] Burton said that in November 2013, R.P. came to his house to play poker. Another friend of Burton's, Jean Martin, was also there playing.

[6] In December, about a month and a half prior to the Super Bowl, Burton and Jean Martin went to R.P.'s apartment to play cards. That was the snowstorm weekend. Burton stayed at R.P.'s apartment. Jean Martin did not. During the course of the card game, Jean Martin referred to R.P. as Burton's girlfriend. This agitated R.P. She says that following the girlfriend comment she clarified with Burton that she was not his girlfriend. R.P. said that Burton apologized for making her uncomfortable. R.P. stopped seeing Burton at the end of that weekend. She felt that Burton wanted more of a relationship with her than she was interested in having with him and therefore discontinued communications with him. She said that she told Burton she was not interested in a relationship with him. R.P. described Burton merely as a friend. At trial she denied they were in a romantic relationship.

[7] Burton denied that R.P. had ever become upset with him over the use of the word "girlfriend". Burton also said that R.P. invited him to go out in early January to a restaurant/bar with two of her friends. He did agree that he did not have contact with R.P. after that until he contacted her on February 2, 2014, about the Super Bowl.

[8] On one weekend, R.P. said she was at Burton's home where she played poker, drank to excess, took her sleeping pills prior to going to bed and lost her ability to look after herself. That night R.P. slept with Burton in his bed, but there was no intimacy. The next day Burton had commented to R.P. about how hard the pills had hit her.

[9] Burton said that during the poker night in November 2013, R.P. was drinking alcohol. He said she was knocked out of the card game and then wanted to go to bed. He saw her take two pills out of her purse and consume them. Fifteen to twenty minutes later Burton said that R.P. was slurring her speech, stumbling when trying to walk and needed help undoing her own pants to use the washroom. He said he helped her up and down the stairs, helped her undo her pants to use the washroom and helped put her to sleep in his bed.

[10] R.P. said that on this poker playing occasion at Burton's home she consumed far more alcohol than she did during the Super Bowl party, as she did not have to work the day following the November poker game, but did have to work the day after the Super Bowl.

[11] R.P. said she uses sleeping pills every night for insomnia. She said that Burton was fully aware of her use of sleeping pills each night. Burton agreed on

cross-examination that R.P. had advised him that she took sleeping pills every night. However, he said this night in November 2013, was the only time he saw R.P. take her sleeping pills and said he did not actually believe she took them every night. He also did not believe that she drank an excessive amount of alcohol on that November night.

[12] R.P. said that Burton had seen her take the sleeping pills on at least two occasions prior to February 2, 2014, once at her apartment and once at his home. R.P. testified that during the December snowstorm weekend she had told him that she knew she could trust him by taking the pills in his presence and then falling asleep with him. She said Burton assured her that she could trust him and that she should be careful as she sleeps like the dead when she takes them.

[13] On cross-examination Burton said:

> Q: Now in relation to [redacted]'s prescription for sleeping pills, okay, so again, you were aware that she had insomnia? Did you know that?
>
> A: She had told me that, yeah.
>
> Q: Yeah. And you know insomnia to be a sleep disorder?
>
> A: Yes.
>
> Q: And you know that people with insomnia typically have difficulty sleeping? You are aware of that too?
>
> A: That is the symptoms of insomnia, yes.
>
> Q: Yeah. That's your understanding though…
>
> A: Yeah.
>
> Q: Yeah. Okay. Now, and again, you knew the effect that the pills had on [redacted]?
>
> A: Yes, from that occasion, yeah.
>
> Q: And you had joked with her on a previous occasion that she could sleep through a hurricane or sleep like the dead? Remember saying that?
>
> A: Yeah, that particular night it's like she didn't even move.
>
> Q: Yeah.
>
> A: The position that she was in the night before was the position that she woke up in.
>
> Q: Yes, but you remember actually having that jar with [redacted] on previous occasions? It was a joke with her?

A: Yeah, I had that conversation with her, that yeah you sleep, don't know my exact words, but…

Q: Sure, but the language you could sleep through a hurricane or sleep like the dead or is that your words? Do you remember saying that?

A: I don't recall those words.

Q: Okay, but you had a conversation about something to that effect with her?

A: I remember letting her know that when she slept she slept and didn't move.

Q: Yeah. So do I understand the night your perception of that is based not only on the one incident when you had to help her in the bathroom, but on other occasions too where she's taken sleeping pills?

A: No. Only that one occasion.

Q: Okay, so I understand that she was drinking that night?

A: The night of the Super Bowl?

Q: No, sorry, the night that you helped her in the bathroom.

A: Yes.

Q: She was drinking that night. So why would you make a comment about the sleeping pills particularly and not the alcohol in combination with the sleeping pills? Why would you talk about her sleeping like the dead when she takes sleeping pills and not talk about the alcohol in terms of the combination of the two?

A: I don't know.

Q: So when did you have that conversation about sleeping like the dead or sleeping like sleeping through a hurricane with [redacted]?

A: I don't recall.

Q: Okay. Relative to the date when you helped her in the bathroom, do you know if it was that same day? Was it in relation to that day? Or was it something else?

A: I don't know if it was the same day or on another occasion. I don't, I don't recall, I recall having said something like that, as far as what day it was or was it that day or, I don't recall what day I had told her that.

[14] Burton said they slept together on five occasions prior to the Super Bowl weekend, and one of those occasions they did not have sex. He agreed that he wanted more of a committed relationship with R.P. R.P. did not want a relationship with Burton. He said that a three to four week absence of

communication or contact was typical between he and R.P. He wanted to see her more, but that did not happen.

[15] On February 2, 2014, Super Bowl Sunday, Burton contacted R.P. via text message. This resulted in text messages being exchanged between the two that led to R.P.'s attendance at Burton's Super Bowl party.

The Pre-Super Bowl Text Messages

[16] Burton objected to the admission of the text messages between himself and R.P. in and around the time of the incident. Following a pre-trial *voir dire*, the text messages were admitted for the truth of their contents (*R. v. Burton*, 2017 NSSC 3). Crown and defence jointly requested that the evidence presented during the *voir dire* be admitted at trial.

[17] During his testimony on the trial proper Burton agreed that he had sent texts inviting R.P. to his Super Bowl party. The text messages that led to R.P.'s arrival at Burton's Super Bowl party on February 2, 2014, are reproduced below:

Burton:	What are you up to?
R.P.:	My CUPE rep Peter is having a super bowl party
Burton:	My team Denver is playing at not sure if I watch here at house or not … can't wait for the game
R.P.:	Lol … I hope your team wins.
R.P.:	Peter lives in Sackville… let me know where you are… I may stop in… you watching with the guys.
Burton:	That would be nice… I will let you know where… just not sure if I would like to just stay home and watch the game
R.P.:	Well Peter just cancelled… something with grandchild.
Burton:	Then you are with me… I want you with me for the game… I will always remember this game… it will be even be better if you were with me and my team wins!!!
R.P.:	I'm waiting to hear from my dad… my jeep is in Sackville… Peter was going to pick me up… I can't afford to go out and I have beer here. I didn't even pick up liquor. Maybe the gods are telling me something… LOL.
Burton:	Then I should pick you up some and we watch the game together at your place
Burton:	I will come get you and bring you to Sackville.

R.P.: I need my Jeep… I'll text you in a bit… mom or dad should call soon.

Burton: Kidnap you or something.

Burton: Let me know if you hear from mom and dad

Burton: What would you like to drink.

Burton: First I should ask… would you like to come hang out with me?

R.P.: Can we hang out like friends rob… I'm scared we can't.

Burton: It would be nice to see you… I will take friendship over not seeing you.

Burton: I respect the honesty you bring… let's hang out as friends.

Burton: But here is the kicker… I would like to hang out more often than three weeks… LOL

R.P.: Are you having other people over… its party Sunday.

Burton: What would you like… people around or just us.

R.P.: I'm in the mood for people

Burton: Then people it will be… did you hear from mom dad… what do you feel like drinking?

R.P.: Mom is on her way… I'll call you from Kendas.

Burton: Ok sounds good

R.P.: So what's going on

Burton: We are going where I was going.

R.P.: Were is that.

Burton: My buddy Blake – but more options… we can talk about it

Burton: We can do whatever.

R.P.: I'm good… what time should I come over.

Burton: I have to go to liquor store… what would you like? Around four would be good… pre drinks.

R.P.: I have your beer with me… I'll have Smiroff ice.

Burton: Ok good choice.

R.P.: Is that your physio friend.

Burton: No. LOL.

R.P.: So where is this place at

Burton: We might just have it here at my place.

R.P.:	Oh how come.
Burton:	They are coming here now.
R.P.:	Ok… I'll be over soon. Are you sure your ok with it.
Burton:	Yes
Burton:	Heading to liquor store in about 10 mins.
R.P.:	I'm broke till next pay… plus I owe you already for the other…
R.P.:	(unreadable)
Burton:	They are welcome for sure to come up.
R.P.:	Are u home.
R.P.:	(unreadable)
Burton:	Hey I was just at store home in two mins I got things for us
R.P.:	I have a cop on my ass… am almost to Dartmouth
Burton:	(unreadable)
Burton:	Com back
R.P.:	After
Burton:	I was just at grocery store and liquor store.
Burton:	After?
Burton:	I bought you two one litre bottles of Smirnoff.
R.P.:	I'm home going to let the dog (out?)… it doesn't start for a while… I come back out after.
Burton:	Awesome
R.P.:	Are ya drinking yet
Burton:	LOL going to crack one soon
Burton:	You coming soon
R.P.:	Yep
Burton:	(unreadable)
Burton:	(unreadable)
Burton:	(unreadable)

[18] Burton said on cross-examination that he already had a sexual relationship with R.P., but wanted a committed relationship with her. Through the text messages it was clear that Burton wanted more than friendship, but he would take friendship over not seeing R.P.:

R.P.:	Can we hang out like friends rob… I'm scared we can't.
Burton:	It would be nice to see you… I will take friendship over not seeing you.

[19] Burton agreed on cross-examination that he knew prior to the Super Bowl party that R.P. just wanted to be friends and nothing more. He said that he felt sex was likely with R.P. after the Super Bowl party because she had previously referred to him as just a friend and then had sex with him. He testified that the text messages simply meant that R.P. was afraid they could not just hang out as friends without having sex. Burton agreed that there was no discussion with R.P. about having sex before or during the Super Bowl party.

The Super Bowl Party

[20] R.P. arrived at Burton's home in Lower Sackville for the Super Bowl party about thirty-five minutes before game time. His home was about a fifteen minute drive from R.P.'s home.

[21] According to the evidence heard at trial, the people present during part or all of the party were: Burton, R.P., Fenwick King, Dean Downie, Blake Berryman and Dwayne Chalk.

[22] Both R.P. and Burton consumed alcohol and drugs during the party, as did some of the other guests. The Crown did not call any of the party guests, but Burton called two of them, King and Chalk.

[23] R.P. said that present during the party were Burton and several of his friends: one younger man who was a car salesman; a taller man named Dean; a younger man with a neck tattoo; and Dwayne, who lived in a downstairs apartment.

[24] R.P. brought her sleeping pills to Burton's party since she intended to sleep overnight there. R.P. said she knew she would be consuming alcohol and did not want to drink and drive. She did not bring an overnight bag. She did not bring pajamas.

[25] R.P. said that Burton had two vodka coolers waiting for her. There was some discrepancy as to whether each bottle was one or two litres in size. At the preliminary inquiry she said they were two-litre bottles of Smirnoff Ice. At trial she initially said they were two-litre bottles and then corrected herself and was

adamant that she had made a mistake and Burton had purchased her two one-litre bottles. She said that she drank one of the one-litre bottles of vodka coolers during the game. R.P. testified that the second vodka cooler was never opened.

[26] Burton testified that during the game he drank four to five beer, R.P. was drinking Smirnoff Ice (one-litre bottles) and that all partygoers who were present prior to kick-off (including Burton and R.P.) consumed Twisted Ice shooters.

[27] R.P. said that marijuana was shared by some in the form of a joint/cigarette. She said that Burton participated and she had one or two puffs. Burton said that a marijuana joint was passed around at the party and everyone except King participated.

[28] R.P. said that Burton also offered her a powder to snort that was not cocaine. She did not know what it was, but said Burton told her that it would make her feel better. R.P. said that she, Burton, Dean and the man with the neck tattoo all snorted some of this powder in Burton's bedroom before the game started. R.P. said that she was unaffected by this powder. She admitted on cross-examination that she had not mentioned ingesting the powdered substance in her police statement or at the preliminary inquiry. The cross-examination continued at trial:

> Q: And then your answer, the first part of your answer was I had a couple puffs of weed, right?
>
> A: Yes.
>
> Q: And you go on for the next little bit and you talk about the weed and then Cst. Seeley gets you back on point and says did you do anything else, any other kind of pills or drug, and your answer was no I just drank.
>
> A: Yes, that was my answer.
>
> Q: Okay. That's not the same as what you said today, right?
>
> A: No.
>
> Q: You'd agree with me that obviously Cst. Seeley clearly asked you did you take any other drugs that evening and you answered no?
>
> A: Right.
>
> Q: Okay. And then furthermore, she asks you okay, and do you know if Rob did any other kind of pills or drugs, and your answer was not that I know of.
>
> A: I didn't know. I don't know if he did. That's what I said.
>
> Q: Okay. That's not the same as what you're saying here today, right?

A: I am saying what happened. When I gave the statement it was, it happened so fast and…

Q: I'm sorry, what happened so fast?

A: I don't know why I would say…

Q: Is that because you're just out of the hospital and your mind wasn't clear when you gave that statement?

A: I, I don't know. It, there, it just, there wasn't any really amount of anything, I guess it never, I wasn't thinking the weed had more effect on me obviously, that's why…

Q: Okay, but the question wasn't did he or did you do any huge amount of drugs other, it was did you take anything, and you said no on both counts, right?

A: Yes.

Q: Okay. That's not the only time you were asked about that, was it?

A: I was asked about that in the statement.

Q: Okay. I'll have to ask you to speak up, I'm having trouble hearing you.

A: What was the question?

Q: That's not the only time that you were asked about if anybody had taken other drugs?

A: I don't remember.

[29] Counsel then referred R.P. to the transcript at the preliminary hearing:

Q: And in that passage that you just reviewed Mr. Morrison for the Crown asked you did you take any drugs throughout the course of that evening, and again, you said, well in that case you said they had weed, right?

A: I have not denied having weed.

Q: Well, his follow up, you didn't offer it at first until he said okay did you have any of that, and then you said yes I did, or sorry, just I did, right?

A: I never denied it, yes.

Q: Okay. You didn't answer when he first asked the question though, you didn't say yeah I did, you said they had, and then he followed up and you said I did, right?

A: Well I was probably a little nervous.

Q: I can't hear you.

A: I said I was probably a little nervous. Sometimes people misspoke, misspeak.

Q: Okay, and then on the next page you're asked point blank, okay any other drugs that were being consumed and you say, I don't believe so, right?

A: Yes.

Q: That's not the same as what you're saying here today.

A: I'm saying, I'm saying the truth. Why would I lie about drugs? Like it was, maybe I remembered it clearer later when I wasn't so, everything just keeps coming back more and more, so, and when I said it with Mr. Kennedy I said it like I assumed everybody knew. I have never, I'm not trying to hide anything.

Q: Okay, so when I was asking you questions about the, you know the first part, I was asking you about the statement and in reference to the statement you said well I was just out of the hospital and my head wasn't clear, it all happened very quickly, right?

A: Yes.

Q: But the preliminary inquiry, that doesn't apply to that, right, that's months down the road, it's, that was in September 2015. You had lots of time to think about it before then.

A: I was in the hospital for quite a while and so there was a few times where my head was pretty fuzzy.

Q: Oh, okay, so now that applies to the preliminary inquiry as well, is that what you're saying?

A: Those are your words. I'm just telling you what what I'm leaving through.

Q: Okay, well, you weren't fresh out of the hospital when you gave your evidence at the preliminary inquiry, right?

A: No.

Q: And the matter wasn't fresh, you had had time to think about it by the time you testified at the preliminary inquiry?

A: I have a lot of time to think about it.

Q: You had a lot of time to think about it before the preliminary inquiry? Is that correct?

A: What am I thinking about? Am I thinking about what happened or am I…

Q: I'm asking you, [redacted], because you're the one who said it all happened so quick I didn't have time to think about it when I was asking you about the preliminary inquiry.

A: But what part?

> Q: I'm asking you about the statement that I've just put to you were you said I don't believe there were any other drugs being consumed. You had ample time to think about that.
>
> A: As soon as I remembered anything I told the truth, I, same as when you asked me if there was a huge amount, maybe that's why I didn't remember because there was such a little thing it never even occurred to me.
>
> Q: Okay, so let me, just let me make sure we have this all straight then. You're telling the truth today when you talk about this powdered substance, right?
>
> A: Yes.
>
> Q: You were telling the truth when you testified at the preliminary inquiry?
>
> A: To the best of my ability of my knowledge that I could remember.
>
> Q: Okay, so today you're telling the truth, but at the preliminary inquiry you were telling the truth to the best of your ability, now that I've put this inconsistency to you, is that fair to say?
>
> A: It's all been consistent. I wouldn't add something like that…

[30] When pressed, R.P. said she said thought she had mentioned the white powder at the preliminary inquiry and also believed she had mentioned it during pre-trial preparation meetings with Crown Attorney Robert Kennedy and Cst. Seeley. According to an Agreed Statement of Facts filed on January 11, 2017:

> On May 26, 2016, [redacted] and Cst. Laura Seeley attended a meeting with Crown Attorney Robert Kennedy of the Dartmouth Crown Attorney's Office. [redacted] did not mention at that meeting that she snorted a white powdered substance while at Robert Burton's residence located at 227 Stokil Drive, Lower Sackville, Nova Scotia, on February 2, 2014.

[31] Burton testified that he had an acquaintance (whom he named) deliver white, powdered MDMA to the party. He said he, R.P. and his acquaintance snorted the MDMA through a straw.

[32] R.P. said that she did not feel intoxicated in any way during the Super Bowl party evening and was completely aware of her surroundings. However, she did believe that she would have been over the legal limit to drive and as a result did not want to drive herself home.

[33] The seating arrangements to watch the game in Burton's living room involved a couch and a couple of single chairs. R.P. said that she sat in a single chair to watch the game and no one, including Burton, ever sat with her. She said

there was a good atmosphere among the group prior to the game commencing. She said that she did not know much about football and picked the underdog to win to go against the grain of the majority at the party.

[34] Burton said that R.P. was aware that his favourite team was the Denver Broncos. The majority of the other people at the party were rooting for the Broncos. R.P., therefore, chose to cheer for the underdog Seattle Seahawks.

[35] As the game progressed, the Broncos were not doing well. As a result, R.P. said, the mood quieted and there was little celebrating by Burton or his guests.

[36] Burton said that whenever the Broncos did poorly, or the Seahawks did well, R.P. would "do a little victory dance", would "hoot and holler" and would "play up to" him. Burton described the victory dance done by R.P. as putting her hands on his shoulders while facing him and wiggling around.

[37] Much was made by Burton about R.P.'s behaviour during the football game. For instance on cross-examination R.P. was asked:

> Q: During the Super Bowl party when the, when the game was on you were having fun cheering for the team that you had chosen? Right?
>
> A: Yes, I was watching the game.
>
> Q: When they made a good play or got a good call you got up and danced around in celebration, joking around, right?
>
> A: I don't recall. I remember my, the team I picked was winning and half way through nobody was doing anything because everybody was mad, but if my team would've gotten a point I imagine I would have celebrated. I don't recall just getting up and dancing around.
>
> Q: Okay. During the Super Bowl party, before you went to bed, there was some contact and some flirting between you and Mr. Burton?
>
> A: No.
>
> Q: So you never touched him at all?
>
> A: No.
>
> Q: Obviously if I suggest that you did you'll disagree with that?
>
> A: I would disagree.
>
> Q: And if I suggest to you that you were flirting with him that night you would disagree with that?
>
> A: I would disagree with that.

[38] As the game progressed and the Broncos were losing R.P. said that she was poking fun of Burton. She said that she was not touching him or flirting with him, and was treating him the same as the other party guests. She said that there was no discussion about sex with Burton during the party.

[39] R.P. said that she had never previously consumed marijuana and then taken her sleeping pills, although she had taken them after drinking alcohol. In her experience consuming alcohol would accelerate the effect of the sleeping pills. She described the effect of taking her sleeping pills as simply getting a metallic taste in her mouth and then lying down to fall asleep.

Fenwick King

[40] Burton called Fenwick King to testify in his defence. King testified that he has known Burton for approximately twelve years. King described attending the Super Bowl party at Burton's house. King said that when he arrived the game was already under way and partygoers included Burton, two other men (Dean and Blake) and a woman whom he had never seen before or since. King described this woman as very attractive.

[41] King said he stayed at the party for approximately one and a half to two hours and consumed only one beer over the course of the evening. He said he left twenty to thirty minutes after the game ended.

[42] King said he did not see Burton drinking much alcohol. He saw the lone female drinking out of a cup, but could not say what she was consuming. King said he did not speak to her while he was at the party. He said that whenever the less popular team scored she would become very active. He made the general comment that she seemed very flirtatious with Burton. When asked to describe what she was doing that would constitute being flirtatious, King said that: 1) she sat next to Burton on the couch; 2) whenever the other team scored she "poured it on" by jumping up and down, shaking her body and touching Burton around his head and neck; and 3) she was saying things to Burton about her team scoring/doing well and his team not scoring/doing poorly. On cross-examination he said that whenever the other team scored she put on a show that he felt was a sexual advance toward Burton.

[43] King said that he does not consume marijuana, but agreed there may have been some at the party. He also said that he thinks some people may have been using powder, likely cocaine, but he was not sure. He thought the female may

have left the room a few times during the party, but did not see her consume drugs. King said that she did not appear to be intoxicated and appeared very aware of her actions.

[44] He believed that when he left, only Burton and the female were still at Burton's home, and he saw the female enter Burton's bedroom.

Dwayne Chalk

[45] Although there was an exclusion of witnesses, Chalk sat through King's entire testimony. He said he was not aware he was coming to court until about two hours prior to being called to testify and was not aware of the exclusion.

[46] Chalk lived in a basement apartment in Burton's house. He testified that he has known R.P. for three years. Although he said R.P. had spent time drinking at Burton's home in the past, he had not seen here there for about one month prior to the Super Bowl party.

[47] Chalk was splitting time between two Super Bowl parties, Burton's and one at a friend's house about four streets away. During Burton's party he saw Burton, R.P., Donnie, Dean and Blake. He left part way through the first quarter, then returned for briefly and left again to watch the rest of the game at the other party. He did not return home until about forty-five to sixty minutes after the game ended. He did not ever see King at the party. When he arrived home after the game ended he did not see Burton or R.P.

[48] Chalk said that before he went to the other party everyone shared a marijuana cigarette, including Burton and R.P. He believed that cocaine was used in Burton's bedroom.

[49] Chalk said R.P. did not appear to be intoxicated and was friendly to everybody. He said she was doing a lot of "smack talking" because her team was doing better than everyone else's team. He saw R.P. give Burton a little peck, and said she was hugging him and teasing him when his team was losing. Burton, however, denied R.P. kissed him or gave him pecks during the party.

[50] On cross-examination Chalk admitted that he had a criminal record for "getting upset with a police officer" for which he received fifteen months probation. He agreed that he had thirty to forty puffs of marijuana during the evening between Burton's party and the other party, drank three or four coolers

and snorted cocaine at the other party. At the time, he said, he was using cocaine three to four times per week. He said he drove back and forth between the two parties despite having ingested drugs and alcohol.

After the Super Bowl

[51] R.P. testified that the partygoers left when the game ended a little after 11:00 PM. Dean had left an item behind, either his hat or his phone, and had returned shortly after leaving to retrieve it. Burton also said that the game ended after 11:00 PM. Because the Broncos had lost, he said, people just grabbed their jackets to leave as soon as the game ended. He said that Dean left, forgot his phone and returned to pick it up.

[52] R.P. had determined before arriving that if she consumed alcohol then she was going to stay at Burton's and not drive home. She said that she trusted Burton, considered him to be her friend, was not scared of him and thought it would be safe. R.P. said that staying overnight at Burton's was not a big deal as she had done it previously.

[53] R.P. said that once everyone left, she and Burton were cleaning up and chatting about the game. Burton said that R.P. helped him clean up. On direct examination R.P. said that she took her sleeping pills out of her purse in the kitchen after the game. She believed that she took either one or two pills around 11:30 PM. She said that she and Burton did not discuss her taking the pills.

[54] R.P. said that immediately after she took her pills, she and Burton walked up the hall to Burton's bedroom. They sat on the bed. R.P. was wearing jeans, a loose fitting tank top and a pullover sweater. She was not wearing undergarments. She said Burton lent her a pair of jogging pants to wear to bed.

[55] Burton said that by the time Dean had returned to retrieve his phone, R.P. was already in his bedroom.

[56] R.P. testified that she changed into the jogging pants in the bathroom. However, at the preliminary inquiry, R.P. said that she could not remember where she changed. She said she had no difficulty changing her clothes as a result of taking the sleeping pills. She said that her jeans were dirty and she lay them on the floor next to the bed where she was sleeping. R.P. said Burton wore a t-shirt and jogging pants to bed.

[57] Burton agreed that he lent R.P. either sweat pants or pajama bottoms to wear to bed. He said she changed in his bedroom, in front of him. He said he could see that she was not wearing any underwear.

[58] Both R.P. and Burton agree that they had previously slept in the same bed without having sex.

[59] R.P. said she lay down in Burton's bed around midnight. Burton was also in the bed. They chatted about the game. Burton told her that he had to get up early for work and would be leaving before her. She told him that she would lock the door when she left in the morning. There was no talk of sex or intimacy. They were lying on their sides facing each other while chatting. R.P. said she then said goodnight, rolled over to face the fish tank while lying on her stomach and fell asleep.

[60] Burton agreed they both lay down on opposite sides of the bed. He said R.P. had her back to him. He agreed that there was no discussion about having sex before, during or after the Super Bowl party. This is where their stories diverge greatly.

The Incident

[61] According to R.P. , the next thing she remembers is waking up around 2:45 AM. She says she was face down in her pillow with her rear end in the air. Her sweatpants were off and her tank top was over her head. Burton was behind her having intercourse, as R.P. described, moving his penis in and out of her vagina. He was holding her by her sides. She initially did not know what was going on and was groggy from the effects of her sleeping pills. She pushed herself up. When she did that Burton stopped having sex with her and sat back. He did not have underwear or pants on. She did not know whether he was wearing a condom. She asked where her clothes were and Burton said he had taken them off. She spotted her jeans on the floor and put them on. She said she was surprised and shocked to wake up without clothes and with Burton having sex with her.

[62] R.P. said she then made her way to the kitchen to get a glass of water. She found her phone in her purse. When she looked at her phone it was about 3:00 AM. She sat on the couch in the living room. Burton approached her and told her it would be okay. She asked him what he had been doing and he said he thought it would be fun or exciting. R.P. agreed that she had used the word fun instead of

exciting when previously describing what Burton had said when she was in the living room:

Q: Alright. We're getting towards the end [redacted], just a few more. One thing that I wanted to ask you about was that this morning My Friend asked you, you know, after you woke up and you got up out of the bed, was anything, when you initially woke up, was there anything that was said, and you're response, if I heard you correctly, was that Mr. Burton said he thought it would be exciting?

A: I asked him where my clothes were…

Q: Right.

A: and he said that he took them off of me.

Q: Okay, that's not what I'm asking you about. I'm asking you about when you said that he said, maybe it was when he was in the, when you were out in whatever room, you said that he said it was exciting, he thought it would be exciting. Do you remember saying that?

A: I remember, I remember saying that. I remember like, what are you doing? And I don't remember the whole sentence. I just remember, thought it was exciting, thought it exciting, I just remember saying like what are you doing?

Q: So you're not sure what he said.

A: All I know is that he says exciting. I was like, what are you doing, and he's like, I just remember him saying that and…

Q: Okay.

A: I was, I couldn't believe it.

Q: So he said, as you said earlier today, he said he thought it would be exciting, and that's what you remember?

A: I remember him saying like I thought it'd be exciting. I don't remember his exact words. I just remember what he, what if he said something before thought it would be exciting. I remember him saying that he took my clothes off of me and that it was exciting, that he thought it was exciting, and I, I was kind of shutting down.

Q: Okay, [redacted], I'm just asking you, is that exactly what he said? That he, exciting, did he say the word exciting?

A: Yes.

Q: That's exactly what he said?

A: I remember him saying exciting.

[63] Counsel then referred R.P. to the transcript of the preliminary inquiry:

Q: So when you testified at the Preliminary Inquiry, you didn't mention the word exciting, right?

A: No…

Q: You said that…

A: I think it when I gave my statement though. I…

Q: You think you said it when you gave your statement?

A: I thought I said it when I gave my statement.

Q: Okay. Let's just go one step at a time here. When you testified at the Preliminary Inquiry you didn't say anything about the word exciting. You didn't mention it.

A: No, just that, fun. That he said it was fun or something. I remember him saying exciting. I…

Q: And I take it you don't remember him saying that he thought it would be fun, which is what you said under oath at the Preliminary Inquiry?

A: I, like I just said, I don't know what he said exactly before that. He said it was exciting, that it was, that he thought it would be exciting. Maybe I was nervous at the other hearing. I don't, I'm just now starting to realize that word for word, I guess is what you want, so…

Q: Let's just, let's just, can we agree on this? What you said at the Preliminary Inquiry is not the same as what you said today on that point, right?

A: The words are different.

Q: The words are different. Okay.

A: The meanings are basically the same.

Q: And you think that you said that in your statement? That he said it would be exciting? Right? That's what you just said to me?

A: I believe so. I said I think I thought I said that in my statement.

[64] Counsel then referred R.P. to her statement:

Court: Mr. Planetta, for the record do you want read in what those lines say?

Q: Yes My Lord and I'll ask some follow up questions about that. Okay. So the passage that I just had you read, [redacted], says when I went to sit down on the couch and Rob kind of grabbed me by the shoulders he's like no go just come come lay down and I remember I said to him I was

like why would you do that. When you say that you're referring to what happened in the bedroom, right?

A: I had said that when we were in the bedroom I said that I was stunned and he just said when he brought me back from the living room he just said, he said it would be okay.

Q: [redacted], the passage that we're reading here is that you asked him, you said in your statement, why would you do that? And he just said that he thought it would be okay. It's the same thing that the other passages, what you said this morning and the other passage from the PI that I just, from the Preliminary Inquiry that I showed you. It's the same question, isn't it?

A: I'm trying to keep, I'm trying, my timelines in my head. It's seems like forever and it was such a short period of time. I don't know where he said it to me. I know that he said it would be okay. I know that he said he took my clothes off and that he thought it would be exciting. I don't know if you're trying to break that down into order. I just. I'm telling you what I remember.

Q: [redacted], just, just, allow me for a second. And I remember I said to him I was like why would you do that? And he just said that he thought, he thought it would be okay. That's not him telling you it's going to be okay let's go to the bedroom, right? That's when you asked him why did you do that, it's right there, why did you do that, you said okay. You didn't say exciting…

A: I did not say okay.

Q: and you didn't say fun. No, what you said relating what he said to you. Today you said exciting. At the PI you said…

A: I asked him numerous times even in the text messages…

Court: So, [redacted], [redacted], please let Mr. Planetta finish asking his question and then we'll get your answer. Okay. Thank you.

Q: It's the same question that you put to him, why would you do that? You're telling the same tale. The same point in time. You're question, why would you do that? And you've given three different answers, right?

A: And I have three different answers in, because that's the truth. I asked him why he was doing it there. I asked him why he was doing it in his texts.

Court: [redacted], you still, you still have not let Mr. Planetta finish asking his question.

A: Oh okay.

Q: So you gave three different wordings to that question. In your evidence this morning you said he said he thought it would be exciting, right?

A: Yes.

Q: And then we just went over at the Preliminary Inquiry you said that he said I thought it would be fun, right? And when you gave your statement to Cst. Seeley you said he thought that it would be okay. Those are three different descriptions of what he said, right?

A: Yes. I have them all in text messages too when I asked him and he said pretty much the same three answers.

Q: Well that's an interesting point because you've read the text messages. You read them before the Preliminary, before the Preliminary Inquiry. You read them before coming here today, right?

A: I've, I've, I've looked at them, yes.

Q: Okay, well you read them while you were on the stand here in court at the voir dire.

A: Yes.

Q: Right? And there was a text message which the handwritten notes said I thought it would be exciting, and now that's part of your evidence.

A: I would have saw that text message first when it came across my screen, just like how I read the one that you picked out that was blurry…

Q: Okay.

A: Like I, I was the one that originally sent them and he sent them to me.

Q: Okay, well that was before you when you saw it on your screen that would have been before you gave your statement to Cst. Seeley.

A: That's right, so…

Q: And it would've been before you…

A: It would have been this is what he said to me everything…

Court: [redacted],

A: everything was so confused.

Court: [redacted], let Mr. Planetta finish asking…

A: But if I don't answer him then he just moves on to another one and I don't get to answer.

Court: No, you always have an opportunity to give a full answer.

A: Okay.

Q: You would have seen that on your screen if you received it back on whatever date it was. You would have seen that before you testified at the Preliminary Inquiry, right?

A: I saw them, I've seen them when he originally sent them to me and when they, when they were given to me again.

Q: Okay, so when he originally sent them, when you're saying he originally sent them to you and you read them on your phone, that was before both the statement that you gave to the police and your testimony at the Preliminary Inquiry, right?

A: I received those messages before…

Q: Before both of those.

A: Yes, before I went I didn't go to the RCMP station until 7th.

Q: Okay, and you didn't, when you used, when you gave your statement you didn't use the word exciting.

A: I, I, I, maybe I didn't. I don't know, I was very, I could've mish moshed all of his answers together, but they were all to the same question. He had full knowledge that I was sleeping and he thought it was going to be exciting. I told him what the fuck were you doing. I was sleeping. And he said along the lines, I broke your trust.

Q: He didn't say that to you in person?

A: No, I never saw him again.

Q: I just want, we're talking right now about…

A: But I'm trying to say what I, if I was giving my statement I had just got out of the hospital maybe I said the wrong word or not exciting, but I know he said it to me and you want a word for word, but then you don't want to use his own words, like he, I don't know if I said it at the wrong time then I'm sorry I said it at the wrong time. He put me by my shoulders and he said it'll be okay. I asked him where my clothes were, he said that he took them off. I

Court: Go ahead Mr. Planetta.

Q: Okay. Just to follow up on that and then I want to back to the, but just to, we already went through this, you know, and you agree with me from reading the portion of the video statement that I read to you that you're not saying that he's, that he said you know come back to the bedroom it'll be okay, in this instance, right?

A: He never said…

Q: This is the same question. It's the one where you ask why would you do that and he thought it would be okay, so any now you're going back to no

that was when he was saying it would be okay to go back to the bedroom, that's not what that wording it talking about, you'd agree with me on that?

A: He said it'll be okay when he was walking me to the bedroom.

Q: Okay, forget about that. That's not what we're talking about right now. What we're talking about is that this question right here you acknowledge that you were asked that you said why would you do that and he said he thought it would be okay. That's, we're not, that's what we're talking about, you understand? I thought we'd covered this, and a couple minutes ago you agreed with me that you gave three different descriptions of what he said in response to that question.

A: Cause he said them all. I just, I don't, I….

Q: Oh, now he said them all?

A: He has. They're in my messages. I know what he said, I'm just, everything after I woke up is so, it was like…

Q: [redacted], we're not talking about the messages. Are you having trouble separating the messages from the face to face conversations?

A: No, because I never saw him again after I left.

Q: Okay, why then are you answering questions, my questions about what was said at the time with responses about the text messages?

A: Because when I gave my statement, you're asking for a reason, I don't know why I didn't say anything that wasn't true, maybe I had put the time together wrong. I know what happened when it happened. I don't know what he said to me maybe exactly right when it happened. I know what he told me afterwards because I have that timestamped. I, there was never a clear-cut conversation after anything happened with us face to face.

Q: There was never a clear-cut conversation after face to face, there was no, that night. So this part, am I understanding then what the when you asked him why would you do that and he said I thought it'd be exciting or fun or okay or whatever he said, that didn't happen?

A: I don't, I couldn't understand why he would say that he thought that would be exciting. I was sleeping, how is that exciting? I…

Q: [redacted], did he say that to you…

A: Yes.

Q: in the, in the house shortly after you woke up or not?

A: He said that he took my clothes off. I remember I said it to him more than once, why did he do that. I remember the word exciting and him telling me that it would be, that it's okay, just come here. I…

Q: Alright. When you gave your statement you said to that question, and I know I've asked you this a few times, but you keep going back to the he said it would be okay to come back to the room, I'm not asking you about that. I'm asking you about your response right here on the paper, why would you do that and he said he thought it would be okay. That's your answer to that question and that's different, right, then the others?

A: That he thought it would be okay? He said I would be okay.

Q: Okay, I'll show you the passage again.

A: You can show me all you want, I just…

Q: Page 5 and it's actually underlined there. It doesn't say he thought that he said it would be okay. That's not what you're saying there, right?

A: Then maybe it was a, it was, maybe it was a miss thing. I said when, and every time I've said this, when he's taking me by the shoulders, that it's okay, that it will be okay. I don't know, I… I've said it and I've said it and I've said it, he took me by the shoulders and said it would be okay.

Q: Okay. So you don't agree with me…

[65] Court then adjourned for the day. Counsel renewed this line of questioning the next day:

Q: When we left off yesterday I was asking you about the, a portion of your statement where you had said he thought it would be fun. Are you maintaining your answer that, or sorry that he said that he thought it would be okay. Are you maintaining your answer that that was in relation to you know, it's okay, come back to the room?

A: When, I'm saying that when I went to sit on the couch he brought me up by the shoulders and said it would be okay, just come and lay back down.

Q: Okay, so just to be clear, the passage in your statement that you review said, he's like no go just come, come lay down. And I remember I said to him I was like why would you do that and he just said that he thought he thought that it would be okay. And your evidence is that that's that that that last part he just said that he thought he thought it would be okay.

A: I remember him telling me that it'll be okay just come lay down, just come back and lay down. I remember I asked him, I asked him what he was doing and I believe that's when he said it was, he thought it would be fun and then when I asked him again in the text message, cause I didn't really say anything to him after he brought me back from the couch, was when he said that he thought it was going to have an exciting ending.

Q: Okay. So when you said yesterday that you asked him right after, why would you do that, and he said that he thought it would be exciting, you're now saying that that was a text message the next day?

A: I'm saying that I remember him when I asked where my clothes were, he said that he had taken them off. I remember him sitting when I was trying to put my clothes on. I remember him telling me that it was going to be okay to come lay back down. I remember I was confused. I remember…

Q: You're not really sure what he said to you are you?

A: I do know what he said to me. He told me that it would be okay, to come lay back down. He said that he took my clothes off and then I remember after I'd left the hospital and looking down because I'd asked him so many times what he did and he said that he thought it was going to have an exciting outcome, but I remember him taking me by the shoulders and saying it was okay…

Q: Okay.

A: it was going to be okay and come just lay back down, it'll be okay.

Q: Alright, so when you said in your statement here, in your video statement, I was like why would you do that and he just said that he thought he thought it would be okay. That has nothing to do with his answer, that's him saying that..

A: Him saying that when I gave my video I had every thought going through my head. I didn't, I just finished reading text messages saying that he wanted it to be exciting. In my video, in my preliminary hearing that's when I said that he said it would be okay, everything would be okay, that you can just lay back down. I wasn't sure if we were allowed to talk about the text messages because they said they weren't allowed in and in my preliminary it said that I had asked him again and I didn't and he didn't, I didn't answer, we didn't talk after that and it was through those messages that he kept saying that he thought it was going to be exciting, that…

Q: Okay, but you understand I'm not asking you about the text messages, I'm asking you about the discussion right there, and you just said that yesterday that in the PI we went through yesterday that you actually said at the PI you asked him why would you do that and he said I thought it would be fun and…

A: I believe that's when he said it, on the bed.

[66] Counsel then pursued the claim that the complainant had offered "three different versions" of what Burton said to her:

A: I've given what he said to me. I've told you what he said to me.

Q: Okay, but you gave three different versions of what he said to you, right?

A: But he said, I've told you what he said to me.

Q: [redacted], you've gave three different versions of what he said to you.

A: I've told you what he said to me.

Q: And they were three different versions, correct?

A: He's spoken to me on three different occasions. I've told you what he said to me…

Q: So these are three different times that you are talking about. Once at that statement you're talking about one time, at the PI you're talking about another time, and yesterday at the trial you're talking about yet another time, is that what you're saying?

A: I'm saying that he said all of those things to me.

Q: He said all of those things, okay, and you mentioned one of them in your statement and you mention another one of them at the PI and you mentioned a third one at the trial yesterday, is that?

A: And they're all mentioned in the text messages. I may have had a hard time deciphering when I had my video statement the exact time because I was…

Q: Okay. Why do you keep bringing up the text messages because I'm asking you about the discussion right after the fact? The text messages were the next day and I'm trying to parse that out as a separate issue, but you keep going back to the text messages, why?

A: Because I was so, I was so messed up from everything that happened by the time I had gotten to the police station which was seven days later. I was trying to figure out why he would have done this. I was confused, I was, but I knew what he did, I knew what he said, I knew he said, I knew I was sleeping, and I knew he said that it was going to be exciting. He told me it was okay and to come lay back down. So I've answered your question. I don't know how else to answer your question.

Q: I'm going to suggest to you that you read the text messages. They were given to you, the handwritten notes…

A: The hand ones, they weren't given to me then. I had them on my phone. He was sending them to me.

Q: I wasn't finished my question My Lord.

Court: Thank you.

Q: You were given the text messages before the preliminary inquiry…

A: Not before I did my statement.

…

Q: I'm suggesting to you, you were given the text messages, the handwritten copy written by Cst. Johnson before the preliminary inquiry. You reviewed them and they are part of your memory of what happened now, right?

A: Yes…

Q: That's why you keep… when I'm asking you about what you said at the time, that's why you keep going to the text messages because that's what you're basing it off.

A: I remember him taking me by the shoulders and saying it'll be fine come lay down, you'll be fine.

Q: Alright, last time I'm going to ask you this, that's not what I'm asking you about, the taking you by the shoulders and saying it'll be fine. I'm asking you about when he, when you said to him why would you do that, okay? And you said on one occasion he said he thought it would be okay, on the second occasion you said he thought it would be fun and then yesterday you said he thought it would be exciting. The same question that you asked. Are those three separate instances, is that how you're explaining that?

A: I know that I asked him that on more than one occasion.

Q: You have no idea what his answer was to that question, do you?

A: I do.

Q: Okay, well which one of those three was it?

A: He said all three of them.

Q: Oh, he said all three of them. But you'd agree with me that in your police statement you didn't say that he said all three of those things, right?

A: I believe that they knew that because they were reading the text messages.

Q: I'm not asking you what other people knew. I'm asking you about what you said in your statement. You did not say in your police statement that he said all three of those things when you asked him that question.

A: They had the messages there. They knew what he had said.

Q: [redacted], you didn't say in your police statement that he had said all of those three things, right?

A: No, I gave them the messages and then we just talked.

Q: You didn't say at the PI that he had said all three of those things when you asked him those questions, that question?

A: I was told that we weren't allowed to really speak about the text messages.

Q: We're not talking about the text messages, we're talking about what what, the face to face conversation, okay? You didn't say at the PI that he had said to you all three of those things?

A: No, I said that he said it would be okay and just to come lay down, and I didn't really talk to him after that. He said…

Q: He… Okay, we went through the PI yesterday, right? We went through the transcript. I showed you the portion. Do you remember that? And we're not talking about him saying it'll be okay to come back to the bedroom. I showed you the portions. If you want to take a look at it again. Page 36, line 8, answer, I just asked him what he was doing, question, and did he answer, answer, he thought it would be fun, question, anything else that you remember from that moment, no response, question, did you say anything back after he said he thought it would be fun, and then answer, I didn't say it then I said it later on in the afternoon. So we're not asking, we're not talking about when you're out on by the sofa or whatever. We're talking about right after. And it's the same thing that I was just asking you about the statement, right? It's the same conversation. And you didn't say there that he said to you all three of those things, right?

A: When I was putting my clothes on? I believe he said it would be fun.

Q: The question [redacted] is that at the preliminary inquiry you did not say that he said all three of those things to you at that time?

A: I said where are my clothes and in between that and putting, coming from the couch that's when he would have said it would've been fun. I didn't talk to him after he said just to come back and lay down that it would be okay. It wasn't I talked to him in the afternoon, it was just through messages.

Q: Okay, you didn't say that at the PI. Can we agree on that?

A: I didn't say, I said that more was said in the afternoon.

Q: Okay. Back to my question which you haven't answered yet is you said a couple minutes ago that he said all three of those things and now I'm going through and you know you didn't say all three of those things in the statement. Now I just read back the portion of the PI transcript to you. You didn't say all three of, that he said all three of those things at the PI, right?

A: I said that he said more, but it was mentioned later in the text messages. I said in the PI that he said that it would be okay, just to lay down or just to come back and lay down, it would be okay.

Q: No, you said that, the question that was asked to you back then was did you say anything back after he said he thought it would be fun, and you said, I didn't say it then I said it later on that afternoon. So you're saying that you said something later on that afternoon. I'm asking you what he said to you and asking you whether or not you said at the PI the three things that you just told me he said and you didn't say them, right?

A: I have said them, I don't know in what time on there, but I'm not going to sit here and say that they weren't said because they were said.

Q: Right, they were all said, they were all said at different times by you. Never the same.

A: More by Rob.

Q: I'm asking about your evidence. You testified yesterday when Mr. Kennedy was asking you questions and he asked you, you gave evidence on this point and you said that you asked him why would you do that and you said that his response was he thought it would be exciting. You didn't say yesterday that he said all three of those things to you, that it would be okay, it would be fun and it would be exciting, right? You didn't say that yesterday?

A: I have said that. When they asked me when somebody asked me if he said, what he said to me when I went to sit down on the couch, it's the same thing, he said that it would be okay just come back and lay down. I remember thinking how could somebody think that this was exciting. He had said that to me on numerous occasions. I…

Q: [redacted], yesterday you did not say that he said all three of those things to you on direct examination. Is that correct or incorrect?

A: I answered the questions that I was asked.

Q: Okay. You did, and you did not say that he said all three of those things to you yesterday.

A: I said what I was asked. I don't remember if he said if we broke things down or into time like what you're trying to do. All I know is that what Rob said and what happened and…

Q: So you can't acknowledge that you've been inconsistent on what he said?

A: I've been very consistent on what happened.

Q: Okay, so on this point when you said three different ways what he said that's consistent?

A: It is because he's answered it three different ways at three different times.

Q: I'm asking you about your answers. Your answers have been inconsistent, right?

A: No.

Q: No. Okay.

[67] R.P. testified that she was nervous at the preliminary inquiry and did not realize the importance of precision in describing the exact words Burton said until testifying at trial. In her initial police statement R.P. said that Burton told her it would be okay. At trial R.P. was certain that while she was putting her jeans on Burton had said he thought it would be fun, that he said he thought it would be exciting in response to her asking him what he was doing and that Burton had said it would be okay when he was leading her back to the bedroom. Although R.P. agreed that she had not referenced all of these three statements by Burton in her police statement or at the preliminary inquiry she felt she had been consistent and maintained that she had merely answered the questions she had been asked.

[68] R.P. said she was still groggy from the sleeping pills when she woke up. She said that after Burton led her back to the bedroom and told her it would be okay, she lay down on the bed on her side facing the fish tank. R.P. felt that she was in no condition to drive. She did not feel she could physically defend herself if she confronted Burton and was concerned that if she yelled he might become violent. She therefore decided to pretend to be asleep.

[69] After some period of time lying on her side facing away from Burton and pretending to sleep she heard Burton repeatedly tell her how beautiful she was and also heard him masturbating. She said he ejaculated, maneuvered her left hand behind her and rubbed his ejaculate on it. R.P. said she told herself not to move. She was hoping the effects of her pills would wear off so that she would feel safe leaving.

[70] R.P. then felt Burton fall asleep. She recalled lying on her stomach and not wanting to move to avoid waking Burton. She said she must have fallen asleep and when she awoke it was early morning and light outside. She said that Burton was masturbating again and that he again rubbed his ejaculate into her hand when he had finished. On cross-examination Burton suggested that at the preliminary inquiry R.P. stated that she was woken up by him moving her arm, after which he rubbed his ejaculate into her hand. This led to the following exchange on cross-examination:

Q: Okay, so that passage that you just read, when you finished reading you said that's the same as what I just said? Right?

A: With the second time?

Q: Uh huh. The passage starts with my question to you it says okay so then you fell, after the, after he masturbated the first time then you fell asleep and I wasn't clear when my friend asked was asking you did you wake up when he was masturbating the second time or and your response was just as he finished and then I asked you okay so what was, what was it that woke you up and your response was he moved, he had moved my arm.

A: I said he, I could hear him and he moved my arm slightly and then my hand was wet again.

Q: Alright. You didn't say earlier that he moved your arm and that's what woke you up.

A: I said not even two minutes ago that I said my arm was moved slightly and then it was my hand was wet. He had moved my arm from underneath of me the first time that he did it the night before and the second time he, where I had rolled over he pulled my hand over and then he put his ejaculate and rubbed it into my hand.

Q: Alright. So I asked you just before we read that passage, I asked you what woke you up and you said it was the noise and then you felt your hand wet and I asked you if you were sure and you said yes, right?

A: Yes.

Q: And now I, you read the passage and now you agree that you're saying that that's the same and that yeah he moved my arm.

A: I said that he moved my arm slightly.

Q: Okay. It's not the same answer is it? Because I asked you at the preliminary inquiry what woke you up and it was the moving of your arm. Do you agree that that's not the same response?

A: I woke up to him masturbating beside me and him moving my arm and putting his ejaculate into my hand.

Q: Okay, you didn't mention that it was him moving your arm that woke you up until I showed you that passage.

A: I believe I said it right before you showed me that. I said that it, he had moved it slightly.

[71] On re-direct examination R.P. was directed to the preliminary inquiry transcript:

Q: Okay, so were you asked I guess to read to yourself lines 5 through 18 of that page and I guess you, during cross-examination you were, in terms of what is reflected in the record, you were stopped at line 11, so it says

> starting at line 5, okay so then you fell after the after he masturbated the first time then he fell asleep and I wasn't clear when my friend asked was asking you did you wake up when he was masturbating the second time or. Answer, just as he finished. Question, okay, so was it the was that what woke you up? Answer, he had moved my arm. I guess I'll just get you to read aloud line 12 through 14.
>
> A: I can't hear you. Can I just get you to repeat yourself. He had moved my arm and he was making noise and then I felt my hand wet.
>
> Q: Okay. Is that what you recall saying at the preliminary inquiry?
>
> A: Yes.

[72] R.P. said that just after the second masturbation incident there was a knock at Burton's door. He got up and left. As soon as she confirmed Burton's vehicle was gone, R.P. grabbed her things, drove herself home, ripped her clothes off and immediately jumped into the shower.

[73] When questioned as to why she did not wake up when someone was allegedly moving her around, R.P. stated that she never had anyone else move her around in her sleep so she does not know how she would normally react. R.P. said that her sleep with sleeping pills was different than her sleep without the medication. She inferred that her sleeping pills would have made it more difficult for her to be woken. She said that nothing like this had happened before and she wished she had never woken up. She denied any history of sleepwalking. Then the following exchange took place:

> Q: Tell me, how is it that somebody moving your arm would wake you up, but somebody lifting you up and moving your legs and repositioning your whole body wouldn't wake you up?
>
> A: Well my sleeping pills were pretty much out of me by then so I would say that's how.
>
> Q: Well, you testified yesterday that you were still groggy and you wouldn't have been able to make it to your car at that point.
>
> A: And that was the first time that he decided to masturbate on me, a little after three o'clock in the morning. Now we're talking about an incident where he decided to masturbate on me again which was the following morning and that is when I did get up and leave when I felt safe when Rob left.

[74] R.P. was asked on cross-examination why she did not just go home that evening:

Q: So, about leaving. You said yesterday that you didn't feel you could drive. You only, you didn't, you only lived a short distance away, why couldn't you take a cab if you wanted to go?

A: At three o'clock in the morning? I wasn't even thinking about taking a cab. I had just been raped…

Q: No, I'm talking, I'm asking you about before…

Court: Mr. Planetta, we're going to let the witness answer the question, then you can move on to your next question. Thank you. [redacted], finish your answer. Thank you.

A: Three o'clock in the morning. I had just been physically assaulted. Sexually assaulted. I was confused. I was groggy from my pills. I could have enough sense that I knew I couldn't defend myself. I wasn't going to fight. I wasn't going to argue. I couldn't drive. I wanted it over and the minute that I was able to drive and that I was safe and that I knew there wasn't going to be an altercation I left.

Q: You mentioned that yesterday and I just want, I understand what's going through your head, but I mean, Mr. Burton had never been violent to you before?

A: You have no idea what has been going through my head.

Q: Okay, but I'm asking you, Mr. Burton's never been violent to you before, right?

A: Mr. Burton had never sexually assaulted me either, but that had just happened.

Q: Okay. So look my question is, let's go back to before you went to bed, before you took your sleeping pill, before you decided to take your sleeping pill and go to bed at Mr. Burton's house. You said yesterday that you couldn't drive, that's what I'm asking you about. You didn't live far away, you could've taken a cab?

A: Actually I probably couldn't have taken a cab because I wouldn't have had the money and I had mentioned that to Rob when he was asking what I was going to buy to drink and I said that I was broke. And I believe that's in one of the messages too.

Q: You didn't make any attempts to get money to take a cab home?

A: Before the assault happened? I was in, I had no, I did no worries.

Q: No, because you wanted to stay there.

A: No, because I had no fear of staying there. There is two different things. I didn't have any fear to stay there. It was not, you asked me why I didn't bring a toothbrush or anything like that. Why would I need fresh breath? I

didn't want to have a relationship with Rob. He knew that. I said that to him. I sent it to him in messages. He knew I have no fear of him.

Q: You would agree with me that had you wanted to go home you could've drank less or not at all so that you would've been ok to drive right?

A: I, that's a, what kind of question is that? I don't know how to answer that question. We were there. We were having a few drinks. It wasn't something that was out of the norm. I was not scared of Rob. I didn't think that this, anything like this would have happened. I didn't, I was wrong, I should have had the forethought to think oh maybe he's going to sexually assault me I should make sure I have money to get home. I didn't, it wasn't a matter if I wanted to stay there, I felt safe.

Q: What I'm asking you is simply this, had you wanted to go home you could've not drank as much or not drank at all so that you would've been able to drive?

A: You could say that to anybody about anything.

Q: I'm asking you.

A: Well, it didn't cross my mind that I was going to be in put in to position where I'd have to get out of there.

[75] Burton said he and R.P. went to bed between 12:30 and 1:00 AM. When they got into bed R.P. was lying on her side facing away from him. He "snuggled" into her back and talked about the football game. Not long after this, Burton said, they were grinding and caressing each other. He said he ran his hand down her thigh. Then R.P. clutched his penis. Burton said that neither he, nor R.P. were asleep at any point prior to having sex. He said he then reached down the front of R.P.'s jogging pants to touch her vagina. R.P. then turned onto her back. Burton said he then put his fingers into her vagina and she started moaning. He said she brought her knees up and pushed her pajama bottoms down. He then took his own pants off and continued to push his fingers into her vagina.

[76] Burton said R.P. then turned over onto her belly and got into, as he described, a "doggie style" position. He said while he was kneeling next to her, R.P. was touching his penis while he had his fingers inside of her. He said this foreplay went on for about twenty minutes. He then moved behind R.P. and put his penis into her vagina. Burton said that as soon as he put his penis in her vagina, R.P. jumped up and said "I don't want that". Then she put her jeans on and left the bedroom.

[77] Burton said that while R.P. was out of the bedroom he lay in the bed naked and was masturbating. He said that while he was masturbating, R.P. came back into the bedroom with a glass of water. She was coherent and able to speak without difficulty. According to Burton, she said she didn't want to have sex as she just wanted to be friends. He said, "We were fine with foreplay". He said she then lay down beside him and masturbated him until he ejaculated.

[78] On cross-examination Burton said that while he was on the bed masturbating he was aware that R.P. was upset and had told him, "I didn't want that". When explaining his text messages he talked about how much he cared for R.P. Yet Burton testified that when R.P. got out of bed angry he did not follow her into the kitchen. Instead he started masturbating. He did not stop to speak with R.P. The following exchange occurred during cross-examination regarding the compassion he maintained that he was showing on his text messages, as opposed to his behaviour when R.P. jumped out of bed:

> Q: So after [redacted] jumped up from the bed, when you put your penis inside her vagina, and left to go to kitchen area, right?
>
> A: Um hm.
>
> Q: So that's where we're at now. I understand that she came back and you were naked on the bed masturbating?
>
> A: I was still naked on the bed and yes I was stroking myself.
>
> Q: Okay, you'll agree with me that at that time you knew that she was distraught? You knew that she was upset?
>
> A: She was upset, that she said I didn't want that.
>
> Q: Okay. So she said I didn't want that and yet you, you're, you're at that time masturbating, right?
>
> A: Yes.
>
> Q: Okay. You didn't stop masturbating to explain yourself to her at that time?
>
> A: No.
>
> Q: You didn't stop to have a conversation with her? You just continued to masturbate?
>
> A: Yeah.
>
> Q: I mean, throughout your text messages after the fact you show a lot of concern for [redacted]...
>
> A: Yes.

Q: And yet at that moment in time you say nothing, you just continue to masturbate?

A: It's not like I was focused on the masturbation. My penis was still erect and I was stroking it and she came back in and sat on the edge of the bed. It wasn't like I was focused on, I don't know how to explain that, but that's…

Q: I mean it must have caught you off guard that you, you put your penis in her vagina and then momentarily she leaves the bedroom…

A: Yeah.

Q: And you stay and masturbate? You don't pursue her? You don't say anything at that point, you just continue to masturbate? That's your reaction?

A: She got up to put her pants on and she went out to the kitchen and she came back with a glass of water. During that time I was still naked, yes. I still had an erection, yes.

…

Q: So [redacted] leaves the bed, puts her pants on, her jeans on, leaves the bedroom, right?

A: Yes.

Q: You stay put. You're still in the bed.

A: I'm still in the bed, yes.

Q: And you're masturbating.

A: I am naked. I'm not pulling on myself to masturbate to ejaculate. I'm stroking myself. I don't know how else to describe that.

Q: Okay.

A: I'm not…

Q: Sorry, are you finished?

A: Yeah.

Q: I guess at this point [redacted] says to you I didn't want that or I don't want that, and that's when she left, right? I don't want that.

A: When I went to put my penis in her…

Q: Yeah.

A: And stuff I…

Planetta: He wasn't finished My Lord.

A: Go ahead.

Q: No, I was going stop.

A: No, she got up from the bed when I put, when I went to put my penis in her.

Q: So she says though, I don't want that or I didn't want that and leaves and you stay in the bed and pleasure yourself.

A: I'm stroking myself. I'm not like masturbating to ejaculate, no.

Q: Wouldn't that be alarming to you at the time that she's, like within seconds of you putting your penis in her vagina has left the bed and said I don't want that, and you just stay and continue to stroke yourself?

A: I, at that particular time, that's, her leaving, I don't recall if she said anything as far as where she was going to, but it wasn't long, I could hear the tap running, so cause the kitchen's not far from my bedroom and it wasn't long before she was back in my bedroom.

Q: So you disagree that you left the bedroom to go talk to her or offer an explanation? You didn't do any of that?

A: No. I was naked.

Q: And then when [redacted] arrives back you're still pleasuring yourself, right?

A: Uh, yes, I'm laying there and yes, I have my hand on my myself, yes.

Q: Sorry. And you'd agree that at that point [redacted] by her, by her comments to you certainly appeared to be confused about what just happened?

A: Yes.

Q: And appeared to be, to have no memory of what just happened in terms of the comments to you?

A: Other than the fact that she said that she didn't want that, it didn't, her confusion comments didn't come until later.

Q: Did she make any comments to you at that point that I was asleep?

A: Not at that time.

Q: When did those comments come out?

A: That comment of her saying that she was asleep was one of the last comments she had made.

Q: While you were in the bedroom?

A: While I was in the bedroom, yes.

Q: And again, when [redacted] arrives back, you don't put your clothes back on, you continue to pleasure yourself, right? You don't put your clothes back on?

A: No.

Q: And you, at the very least, have a discussion with her at that time. What was the discussion you had with her at that time?

A: She told me that she did not want to have sex, so, by that time, as I said, she already had come in and sat on the bed and shortly after that it was, she was laying on the bed and she knew that I was stroking myself or I wasn't masturbating as far as to try to climax, but, so anyway she laid on her side turned to her right side knowing that I was still hard and erect and playing with myself that she started to manually stimulate myself until I ejaculated.

Q: So how long was the conversation you had with her before you say that she manually stimulated you?

A: There, as far as a conversation, there wasn't much of any conversation when she came back into the bedroom.

Q: Did you discuss anything at that point?

A: After I ejaculated then she started to ask me like how did my clothes get off and I proceeded to tell her from start to finish as far as how we got from getting in bed to her getting off the bed.

Q: And I understand you did ejaculate and you said you ejaculated on your own stomach?

A: Yes, I assume that that's where.

Q: And the semen just stayed on your stomach, you didn't go clean it off?

A: I don't recall if I grabbed the blanket or whatever. I don't recall.

Q: Okay. And did you go to bed naked? Like when you actually slept. Did you sleep naked?

A: When I first got in bed?

Q: No, no, like after you ejaculated, did you, when you went to sleep?

A: Yes.

Q: You didn't put your pajama pants…

A: No I didn't.

Q: Pajama pants on?

A: No.

[79] Burton said that after she helped him ejaculate, R.P. then said, "How did my clothes come off?", and he explained to her what happened just as he did in court. He agreed on cross-examination that he thought having to explain this was peculiar.

[80] Burton said that R.P. then said, "I wasn't aware what was going on" and "You know about my pills". He testified that this made him feel uncomfortable and he told her that he doubted she had taken her medication due to her mobility in going into and out of the kitchen for water. He said he told her that she was fine with the foreplay and she had only jumped up when he put his penis in her.

[81] Burton said that R.P. then turned her back to him while lying on the bed. He felt she was unhappy with the situation. He said she stated, "I was asleep and woke up with your penis inside me". He said her comment made him "feel uncomfortable with that situation, I could feel distance, I could feel that she was not happy and it just made me feel sad". He said there was no further conversation between them and he fell asleep.

[82] Burton denied masturbating for a second time in the morning.

[83] Burton said that every morning his roommate, Donnie, would knock on his door to wake him up for work. Donnie knocked on his door on the morning in question, at which time he told R.P. that she could lock up and leave. Burton said he knew she was upset and there was not much conversation at that time.

Post-Super Bowl Text Messages

[84] R.P. said that on February 3, 2014, almost immediately after she left Burton's home, he contacted her via text. This led to an exchange of text messages spanning the next few days:

Burton:	Awesome day – sucks my team lost though
R.P.:	Last night was a little messed up… just getting ready for work.
Burton:	Hope you had a good day at work
Burton:	And yes it was.
Burton:	I feel real shitty about last night… so out of line… so sorry.
R.P.:	I'm confused… I was sleeping I don't know what to think.
R.P.:	My pills knock me out… you know this Rob… I don't get it.

Burton: I have not stopped thinking about how you must feel… and I do know how your pills affect you… feel so low right now… so sorry

R.P.: I trusted you… I don't know what to say… I don't know what to feel right now… have you ever woken up with someone inside of you? I don't know what to think… think it's better not to talk right now.

Burton: I should have protected you.

Burton: I failed you so bad

Burton: How has your day gone so far? Haven't stopped thinking of you?

R.P.: I never want to hear from you again.

Burton: This is so shitty… you should know that it was not any intention of mine to hurt you in any way… I have analyzed my actions last night and I would like to have a moment to talk… please do not throw this away… you know how my face lights up when I see you. I know that it was selfish of me and wrong. I had my heart convinced that it would not have turned out the way it did… my heart aches now of even the idea of not seeing you.

R.P.: You were fucking me while I was asleep… I was out… and you decided to have sex with me… are you fuckin serious rob…

R.P.: I cried and showered for hours… wtf rob… we were friends

Burton: I know this how feel and it breaks my heart. I was convinced that it was going to have a different outcome an exciting one but it wasn't which made it such a wrong decision that I made… I'm so sorry for the outcome… it has bothered my conscience sense… I can't stop thinking about you and your feelings

Burton: Allow me to fight for you.

Burton: You still awake?

Burton: My thoughts are with you as I lay in bed… thinking of you

Burton: Hope you have a good nite.

Burton: I have not stopped thinking of you… hope your day goes well… I do want you to know that its tearing me apart… you already know how I feel about you and this has gotten me down just thinking of how you feel xo

R.P.: Leave me the fuck alone… how much clearer do I have to be… I don't care how you feel

Burton: I will… you must know that it was not in my mind or heart to hurt you in any way… it was meant to be exciting… sorry it did not work out that way… I will respect your wish.

Burton: I am so sorry!

R.P. Reporting the Incident

[85] R.P. said her normal work shift was 3:00 to 11:00 PM. She went into work the day of the incident and while she was there Burton was sending her text messages. She was at a nurses station when one of his texts arrived and R.P. became upset. She told a co-worker who was an R.N. what had happened and showed her the text messages. That co-worker told R.P. that she had been "raped" and suggested that she go home. After having been at work for only an hour, R.P. left work, went home, took another shower, called 811 for advice and then went to the hospital.

[86] R.P.'s friend, Kenda, went with her to the hospital. They arrived between 7:00 and 8:00 PM. After being examined in the hospital R.P. returned home. Burton was still texting her. R.P. drank alcohol and overdosed on sleeping pills. She was taken to hospital again twice that week and was released on February 7, 2014, after speaking to a psychologist.

[87] R.P. then attended at the Lower Sackville R.C.M.P. Detachment on February 7, 2014, to make a complaint that she had been sexually assaulted. Her complaint was taken by Cst. Laura Seeley and Cst. Wayne Johnson. At that time, Seeley was a seven-year member of the R.C.M.P. Johnson was working only his second shift as an R.C.M.P. officer. Prior to joining the R.C.M.P., Johnson had been a member of the Military Police for 25 years. Seeley was Johnson's training officer.

[88] Seeley said R.P. attended the Lower Sackville Detachment on February 7, 2014, at approximately 4:00 P.M. to make a complaint of sexual assault against Burton. Seeley says that while making her complaint R.P. was crying, shaking and was visibly upset. Seeley says she appeared traumatized.

[89] R.P. told the police officers that her Nokia cell phone contained text messages that could be of interest. She gave her phone to Seeley who read the text messages, then gave the phone to Johnson and asked him to read them.

[90] Once Johnson had reviewed the messages, Seeley told him to use his personal iPhone to take pictures of the messages on the screen of R.P.'s phone. He did so. R.P.'s phone was returned to her at the end of the interview.

[91] When R.P. left the R.C.M.P. Detachment, she believed that the officers had taken everything that they required from her cell phone. She then sat in her vehicle in the parking lot and deleted the text message exchanges between herself and Burton.

[92] On February 8, 2014, the thirty pages of text message photos Johnson had taken with his iPhone were printed by the police. The quality of the printed photos was poor and many of the texts were illegible.

[93] On that same day Seeley therefore directed Johnson to use the photos of the text messages on his iPhone to help create a transcript of the text messages. Johnson took each page of the printed text messages and wrote his transcription underneath the photo of each text. When a text was difficult to read on his own iPhone Johnson enlarged the photo on his screen and then either wrote the word on the printed copies or noted that the particular text was "unreadable" within the transcription.

[94] Seeley asked R.P. to return her cell phone to the police on March 11, 2014. She then took it to the R.C.M.P. "Tech Crime" Unit to request that they retrieve and print off the texts, but Tech Crime was unable to retrieve the deleted texts.

[95] Johnson had emailed a copy of the photos from his iPhone to Seeley. Those emails were not produced during the trial. Johnson was asked by the Crown sometime during the Spring of 2016 to provide them with his personal iPhone, but he could not find the iPhone he used to take the photos.

[96] Both Johnson and Seeley said they used Johnson's personal iPhone because the R.C.M.P. cameras available to them were of a poorer quality than the iPhone camera. They said that the R.C.M.P. cameras were normally kept in the police vehicles, it was February and the cameras would be cold and therefore more likely to either malfunction or result in poor photos being captured.

[97] Seeley testified that she did not take screen shots of the texts with R.P.'s own phone; she did not take any notes during a discussion with R.P. prior to taking her recorded statement because she was consoling her; she did not seize Burton's phone when she arrested him and did not subsequently request a warrant to seize Burton's phone; and she did not request a production order to seize the texts from either R.P.'s cellular service provider or Burton's because she believed this would only produce dates and times and not the content of the texts.

[98] The text messages and transcripts prepared by Johnson were admitted at the trial for the truth of their contents.

[99] R.P. also provided the police with a videotaped statement.

[100] Following the meeting with R.P., Seeley determined that she had reasonable grounds to arrest Burton.

Arrest of Burton

[101] On February 8, 2014, Seeley and Johnson went to Burton's home. They were in a marked police vehicle and wearing full uniform. Seeley did not know exactly what Burton looked like before attending, but had a general description. The officers knocked on the door and observed a male come toward the door, getting close enough to make eye contact with them. He looked at them, did not open the door, turned around, and went back upstairs for a few minutes.

[102] The male then returned to the door and opened it. The police were just outside the door on the front step. Seeley identified herself as a police officer and asked if Burton was home. They male said Burton was not home as he was attending a Mooseheads game. He identified himself as Burton's roommate. Seeley said the man who dealt with her at the door was 5'10", slim, with an athletic build and short grey hair and was approximately 45 years old. He asked why the police wanted to speak with Burton and Seeley said they would have to discuss that with Burton. Seeley did not see anyone else inside the house, but saw vehicles in the driveway. She gave the man her business card and left.

[103] Seeley suspected that the man who answered the door was Burton. She called R.P. to obtain a more detailed description and on February 9, 2014, Seeley and Johnson returned to Burton's home. They knocked on the door and this time the same man who had previously answered the door identified himself as Burton. He was arrested and taken to the R.C.M.P. detachment.

[104] Burton said that he noticed the police at his door on February 8, 2014. He did not know what they might want. He said that he had people over visiting at his house, told them the police were outside and they said he better answer the door. When he answered the door the police asked if Robert Burton was there. He said he had never previously been asked for by the police, panicked and said no, Burton was not at home and was at a Mooseheads game. This idea came to him as his friend, Dwayne, was at the Mooseheads game.

[105] The police left. Burton said he felt that if it was important they would return. He did not make any effort to contact the police to advise that he had panicked and misidentified himself.

[106] The police returned and this time when he answered the door he properly identified himself as Robert Burton. After Burton was cautioned and provided his right to counsel, he gave a video recorded statement to the police, that he concedes is admissible.

[107] On cross-examination, Burton was questioned about his knowledge as to why the police showed up at his door twice. He denied that the complainant was on his mind when he saw them. He made reference to involvement with drugs, and said he had thought the police might be looking for him to ask him about "perhaps someone that I had dealings with." The examination went on:

Q: Now, you'll agree with me though that the next day…

A: Yes.

Q: You told police when they first picked you up, when police came to your house a second time on February 9…

A: Yes.

Q: That when they picked you up you told them you had an idea where this might be coming from. Remember saying that?

A: They had already arrested me and told me what I was being charged with.

Q: No, didn't they…

A: Or it was the text messages then, cause after that night I made calls and no one was, no one that I knew was having any difficulty or any trouble when it came to reference to drugs. Then when it came to, well, you're going to have to find out, well, then it was like okay well the only other thing that's going on in my life I bet you it's dealing with these text messages.

Q: You genuinely believed at that time that the police were there because you had done drugs in the past? And you didn't believe that they were there because of [redacted] and she just made allegations to you about having with her while she was asleep? You didn't believe that was, that wasn't even on your radar?

A: I can't say it wasn't on my radar, but as I said, my initial was because I was involved with drugs.

Q: Now, again, you agree that you said to police that when they initially picked you up, you said to police when they initially picked you up on February 9, that you had an idea where this might be coming from?

A: Yeah.

Q: And again, the idea you had was that it was about [redacted], right?

A: Yeah, the text messages and stuff.

Q: So you're saying then today that your idea changed from they were there for drugs to they were there for sexual assault investigation 24 hours based on some phone calls that you made to some of your associates, is that what you're saying?

A: Yes.

Q: So you called some of your drug associates and based on that you said well there's no heat on them therefore it must be about the sexual assault, is that what you're saying?

A: I didn't refer to it as sexual assault, just to the text messages.

Q: Okay.

A: That I had an idea.

[108] Burton was then directed to his statement:

Q: Yeah, so, again, page 3 of your statement, very bottom of the page. The question is put to you at line 22. Question, okay, so you know that it's regarding [redacted], [redacted] is her last name, and you say um hm. So I guess when they picked you up they told you you were being charged with sexual assault, but they didn't say who it was in reference to, right?

A: No.

Q: So you just knew you were being charged with sexual assault, right?

A: Yep.

Q: Okay. So are you saying that you made the inference then that it was about [redacted] at that time?

A: What did you say, the inference?

Q: Inference, like you made the conclusion that it was about [redacted] because you were being charged with sexual assault?

A: Yeah, cause she was the only person I had been with at the time.

Q: Can you flip to the next page.

Planetta: Well, My Lord, he was answering the question when my friend started to ask the next question. If he could be allowed to finished his answer.

Court: Want to just repeat that last answer?

A: Because it was [redacted] that I was sexually active with at that time.

Q: Okay, we can just flip to the next page, page 4, very top of the page, and are you at page 4?

A: Yeah.

Q: Line 1, question, and you said initially when we picked you up that you had an idea where this might be coming from? Answer, yeah. So when your reference, when the reference is made to initially when police picked you up I take it that's before your brought to the police cruiser and told you were under arrest for sexual assault, right?

A: I'd have to say yes.

Q: Okay, and again, when you're saying you had an idea where this might be coming from you're talking about [redacted], it was about [redacted], that's why the police were there?

A: I, yes and text messages.

[109] During his police interview, Burton was shown a one-page summary of some aspects of the thirty pages of the post-Super Bowl text message exchange with R.P. That summary is reproduced below:

R.P.: Last night was a little messed up

Rob: I feeling shitty about last night…so out of line…so sorry

R.P.: I'm confused…I was sleeping…do not know what to think

My pills knock me out Rob. You know this. I don't get it.

Rob: I have not stopped thinking about how you must feel and I do know how your pills affect you…feel so low right now…so sorry

R.P.: I trusted you. I don't know what to say. I don't know what to feel right now. Have you ever woke up with someone inside of you?

Rob: This is so shitty. You should know that it was not my intention to hurt you in any way…I know that it was selfish of me and it was wrong…

R.P.: You were fucking me while I was asleep. I was out. And you decided to have sex with me. Are you fucking serious Rob?

Rob: I was convinced that it was going to have a different outcome an exciting one but it wasn't which made it such a wrong decision that I made

R.P.: Leave me the fuck alone

Rob: I should have protected you. I failed you so bad.

[110] While being shown the one-page summary, the following exchange took police between Burton and the police:

Q: I just typed out the text messages.

Mean anything to you? You're not going to give me anything, are you?

A: Am I allowed to have a copy of that?

Q: No, but you will get one.

A: Okay.

Q: In disclosure. If there's… it's right from yours and her phone. So …

A: No, I do remember that conversation I had with her.

Q: Was there a verbal conversation that she didn't tell me about?

A: Of course.

Q: After that night?

A: During that night. Of course, right? You know, things that happened after that and before she went home, you know? So you … you'll sit with me all night, won't you?

[111] In his police statement Burton also said that he wanted a female opinion:

A: If you were one of my friends, I'd … I'd pour … pour my heart and soul out to you, right? And tell you exactly how … how I feel. I feel … exactly how I feel. I …

Q: Mmm.

A: I'm going to be calling one of my friends up.

Q: Tonight.

A: You know?

Q: Mmm.

A: And it would be a female friend, right?

Q: Mmm.

A: To tell them, you know, the … the whole thing, right? And just ask them their opinion.

Q: Mmm.

A: Right? Tell me. You know, people (that know me and my relationship?). I've had people that I've been in a relationship in a past. I would … you know, to be my character witnesses.

[112] On cross-examination Burton was directed to his statement and asked why he said he wanted a female opinion:

Q: … So do I take it at that point in your statement you're subjectively believing that you did something wrong and you want a third party opinion as to whether that was right or wrong?

A: Just the opposite.

Q: Okay, so why would you talk to a female friend about whether this was, you know to get their opinion, why would you do that?

A: Why would I do that?

Q: Yeah.

A: I think it would be better than talking to a male about it. I think a female might have better input.

Q: Wouldn't you agree that you were confident that what you did was not wrong, right? You didn't think that what you did was wrong?

A: No.

Q: Okay, so why would you talk to anybody about that if you were confident that you thought what you did was okay?

A: I'm in a police station in a video interview room and as far as me doing, feeling anything wrong, here I'm sitting, so if I'm going to call someone and ask for someone's opinion, it's obvious that someone feels that I did something wrong. I didn't feel I did anything wrong.

Q: Okay, if you didn't feel you did anything wrong, then I guess my question is why are you talking about going to see a third party female?

A: I don't know, probably just to have the conversation with them. I don't know. I don't know where your…

Q: Sorry, so are you talking about sort of putting the hypothetical to them and see if they think that was okay or not okay? I said a hypothetical, what happened with you and [redacted] in the bedroom.

A: I would presume that that's, yes.

[113] Burton agreed that his arrest caused him to assume that R.P. had talked to the police. He did not know independently that she had done so. He was then asked about the circumstances of his arrest:

Q: Okay. Okay, so you come to the door initially when police arrive at your house on February 8, right?

A: Yeah.

Q: You see the police standing there, right?

A: Yeah.

Q: Alright, and then you go back upstairs…

A: Yeah.

Q: So you see the two police officers and then you go back upstairs. You go upstairs and you indicate there's people over?

A: Yes.

Q: Okay, do you remember who was over?

A: No, I don't recall.

Q: You don't remember? Do you remember how many people were over?

A: I don't even know. A couple people. I don't know. I can't recall. All I know is going upstairs as far as there wouldn't have been a lot, one or two people, but I don't recall how many, right.

Q: You don't know who it is?

A: No, I don't recall who it was.

Q: I mean you remember very specifically who was at the Super Bowl party, but you don't remember who was at your house when police arrived?

A: No.

Q: Okay. Was Dwayne there? Dwayne your roommate?

A: I don't recall if he was or not. Oh the first time, no, he was at, he was the one that was actually at the Moosehead game.

Q: He was actually at the Moosehead game. What about Johnny? Was Johnny there?

A: Uh, Donnie?

Q: Sorry, Donnie, the guy that lived in your house.

A: I'd say that might have been a possibility, but if that was the weekend he lives in Truro. He leaves Friday night and doesn't come back til Sunday evening for work.

Q: So I guess your evidence is you don't know how many people were there and you don't know who was there?

A: All I know is I come back upstairs and say the police are down there.

Q: Okay. So you go back upstairs and have a conversation, okay, you're saying you had a conversation with some people, right, upstairs?

A: Yes.

Q: And you're up there for a couple minutes, right?

A: I don't know how long it was. To me it didn't seem to be a couple of minutes.

Q: I mean you had a conversation with the people upstairs.

A: I just said, long enough to say the police are at the door because I didn't look out the front window until I come up the stairs to see that there was a police car, but when I went down the stairs I could tell that it was, there was police officers at the door.

Q: Do you have any recollection of what was happening at your house at that time? Like what was, what were you doing?

A: No I don't.

Q: Upon police arrival?

A: No I don't.

[114] Similarly, when asked on cross-examination who he called to see if there were potential drug investigations, the following exchange occurred:

Q: You have no criminal record, right?

A: No criminal record.

Q: Okay. And at that time you had no reason to believe police were investigating you for anything else?

A: As I said, I was involved with drugs and my initial response was to find out if anyone's in trouble or I was going to be asked about anyone that I had association with at that time.

Q: Okay. So you, do I understand then that you pick up the phone after police leave and you call your drug associates?

A: I call different ones that would be, have come to my house or that I know is anybody in trouble that perhaps I could be called in to question on or whatever.

Q: Okay. Who did you call?

A: I don't know at the time.

Q: You have no idea who you called?

A: Because I'm not involved with anything now. I, it's been three years.

Q: I'm not asking you that. I'm asking who you called. Who specifically did you call?

A: I would've probably called Blake would have been one. If you're…

Q: Do you remember specifically calling Blake?

A: I'm talking about people that would have come up. I would have called Blake, yes.

Q: What's Blake's last name?

A: Berryman.

…

Q: Do you know his date of birth? His date of birth?

A: No, I have no idea.

Q: No. How old is he?

A: I wouldn't know that either.

Q: Okay. Who else did you call?

A: Um, I would have called my buddy Dwayne.

Q: Okay, and Dwayne is your roommate.

A: Roommate, yes.

Q: Okay. And Dwayne's at the Mooseheads game.

A: Yes.

Q: Did you call him during the Mooseheads game? Was he at the game when you called him?

A: I waited until he got home.

Q: Okay. I mean you must have been panicking at this point, right? Thinking that your being picked up on drugs.

…

A: Just being asked questions. That's all.

Q: And you were prepared to wait until Dwayne got home?

A: Like I said, I did not think that it was any reference to [redacted].

Q: Okay. Who else did you call? Anybody else?

A: As I said, I don't, I don't recall the people that I called.

Q: Do you remember how many people you called?

A: It only would have been a handful because there's only a handful that I… I don't recall.

Q: Okay, when did you finish speaking to those people? When… like in terms of talking to Dwayne. Calling Blake. Calling whoever else you had to call. When did you, when did you finish that task of calling those people?

A: Well when my buddy Dwayne came home he, you know, after talking to him, it was just like, you're just going to have to answer the door and find

out what it's about. I said well if we're at this point where there's no one is in trouble or whatever that I, well if it's important they'll be back.

Q: Okay, so you were prepared at that point then. You've eliminated the possibility I guess in your own mind that it was drug related why the police were there, right?

A: Yeah.

Q: And you're prepared just to lie to the police, right? You lied to the police?

A: I've never been in trouble before.

Q: I'm asking, you lied to police, right?

A: Yes, I did.

Q: Okay. And you're prepared to lie to police. You're prepared to just wait and see if they come back, come back to your house.

A: At that time, yeah.

Q: So I guess at the very latest that evening after you talk to Dwayne you must have thought at least that point that it was about the sexual assault, the sexual assault allegation in relation to [redacted].

A: I'd say within the day or so it would have been a thought, yes.

Q: Okay. You didn't think at that point to reach out to Cst. Seeley and say sorry I panicked, I lied, I'm willing to come in now?

A: But still I didn't know what it was about, right. I didn't know if it was important or not. I still didn't know for sure. It's not like is it, oh, okay, that must be what they're here for.

[115] Burton agreed that he had made no effort to contact the police after they came the first time, thinking that "if it's important they'll come back." The cross-examination continued:

Q: Okay, February 9th, is the next day, police come back to your house, right?

A: Yes.

Q: You told, at that point you told Cst. Seeley that you lied because you were caught off guard that police were looking for him, looking for you…

A: Yes.

Q: And you had friends over and didn't want to deal with whatever police wanted to discuss.

A: Yes.

Q: Right. And really, that's not the truth either, is it?

A: Um, no, yeah, that is the truth as well, right, cause I had friends over. So what I had said that, I, that's the truth as well.

Q: Okay. Again, you don't even know who was over, how many people were over?

A: No.

Q: Right, you just remember people being over?

A: Yes.

…

Q: You didn't reference anything about your friends being over. You referenced how you thought there might be heat on you because of drugs.

A: Yes.

Q: But you didn't say anything about your friends being over and not wanting to deal with the situation at that time, right? When I asked you a moment ago.

A: No.

Q: And I mean really you weren't really caught off guard. Like let's be honest. I mean you, you must have known given the text messages that that was a possibility, at least at that time, right?

A: At that time when the police came and asked for me, when I opened up the door, I did not expect to hear my name.

The Law

Sexual Assault

[116] Section 271 of the *Criminal Code of Canada* reads:

> 271 Everyone who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

[117] The essential elements of s. 271 are:

i. that Burton intentionally applied force to R.P.;

ii. that R.P. did not consent to the force that Burton (intentionally) applied;

iii. that Burton knew that R.P. did not consent to the force that Burton (intentionally) applied; and

iv. that the force that Burton (intentionally) applied took place in circumstances of a sexual nature.

Presumption of Innocence

[118] In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court of Canada discussed the presumption of innocence:

> 29 The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.
>
> …
>
> 32 In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(d) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 357:
>
> > Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

> Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(d), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

Reasonable Doubt

[119] The Crown must prove each essential element of its case beyond a reasonable doubt. In *R. v. Lifchus*, [1997] 3 SCR 320, [1997] S.C.J. No. 77, Cory J., speaking for the majority of the Supreme Court of Canada, discussed the concept of reasonable doubt:

> 27 First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titanic and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[120] While discussing reasonable doubt in the context of jury instructions, Cory J.'s comments are equally applicable to a judge sitting alone. He went on to summarize the majority position of the reasonable doubt standard*:*

> 36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
>
> · the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> · a reasonable doubt is not a doubt based upon sympathy or prejudice;
>
> · rather, it is based upon reason and common sense;
>
> · it is logically connected to the evidence or absence of evidence;
>
> · it does not involve proof to an absolute certainty; it is not proof beyond <u>any</u> doubt nor is it an imaginary or frivolous doubt; and

> · more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.

[121] In considering the innocence or guilt of Burton, I therefore do not simply choose which version of the events that I believe. I must consider all of the evidence. In this case, I have to decide if I am satisfied beyond a reasonable doubt that Burton sexually assaulted R.P. as the Crown alleges.

[122] In discussing reasonable doubt, Iacobucci J., writing for the Supreme Court of Canada in *R. v. Starr*, 2000 SCC 40, stated at para. 242:

> In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much more closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said at p. 177:
>
> > If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed …

[123] Probability is never enough in a criminal matter. The standard in a criminal matter is that the Crown must prove the guilt of an accused person, in this case Burton, beyond a reasonable doubt. This standard lies somewhere between probability and absolute certainty, but closer to absolute certainty.

Assessing Credibility

[124] Both Crown and defence suggest that this is “a classic *W.D.* case”.

[125] In *R. v. W.(D.)*,[1991] 1 S.C.R. 742, [1991] S.C.J. No. 26, Cory J. provides clear instructions for a trier of fact when assessing credibility:

> **27** In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> **28** Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[126] More recently in *R. v. J.H.S.*, 2008 SCC 30, the Supreme Court of Canada expanded on the *W. (D.)* analysis:

> [10] ...As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation. . . . The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused, suggests to some critics that the first W. (D.) question is something of an oversimplification.
>
> [11] As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.

> [12] The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in *H. (C.W.)* suggested an additional instruction:
>
> > I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit." [p. 155]
>
> [13] In short the *W. (D.)* questions should not have attributed to them a level of sanctity or immutable perfection that their author never claimed for them. *W. (D.)*'s message that it must be made crystal clear to the jury that the burden *never* shifts from the Crown to prove *every* element of the offence beyond a reasonable doubt is of fundamental importance but its application should not result in a triumph of form over substance. In *R. v. S. (W.D.)*,1994 CanLII 76 (SCC), [1994] 3 S.C.R. 521, Cory J. reiterated that the *W. (D.)* instructions need not be given "word for word as some magic incantation" (p. 533). In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56 (CanLII), Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[127] In *R. v. Van*, [2009] 1 S.C.R. 716, 2009 SCC 22, the majority discussed *W.(D.)*, and confirmed:

> [20] In *W. (D.)*, this Court held that a jury should be instructed that they must acquit if (1) they believe the evidence of the accused, (2) they do not believe the accused's testimony but are left in reasonable doubt as a result of it, or (3) they do not believe the accused's testimony but still have reasonable doubt as to the accused's guilt based on the balance of the evidence as a whole (p. 758). This instruction is particularly important when the credibility of the accused is pitted against the credibility of a Crown witness, as in this case. …
>
> …
>
> [23] The purpose of the *W. (D.)* instruction is to ensure that the jury know how to apply the burden of proof to the issue of credibility. The jury must be cautioned that a trial is not a contest of credibility between witnesses, and that they do not have to accept the defence evidence in full in order to acquit (*W. (D.)*, at p. 757; *R. v. J.H.S.*,2008 SCC 30 (CanLII), [2008] 2 S.C.R. 152, at para. 9.
> …

[128] The majority of the Supreme Court of Canada in *Lifchus* articulated some of the issues facing a trier of fact when assessing a witness's credibility:

> 29 … certain doubts, although reasonable, are simply incapable of articulation. For instance, there may be something about a person's demeanor in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness's demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility.

[129] The Supreme Court of Canada again examined the issue of assessing credibility in the context of reasonable doubt in *R. v. Dinardo*, 2008 SCC 24, 2008 1 S.C.R. 788, where Charron J. spoke for the unanimous Court:

> 23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge's decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.

[130] Charron J. went on to add:

> 31 As I explained at the outset of the analysis, the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue — the trial judge recognized it as so during the *voir dire* to determine whether the complainant was competent to testify. At trial, two of the witnesses testified that the complainant could be untruthful and manipulative. While it was open to the trial judge to conclude that he was convinced beyond a reasonable doubt of the guilt of the accused, it was not open to him to do so without explaining how he reconciled the complainant's inconsistent testimony, particularly in light of the accused's own evidence denying her allegations.

[131] In discussing credibility, McLaughlin C.J. stated on behalf of the unanimous court in *R. v. R. E. M.*, 2008 SCC 51:

> [48] The sufficiency of reasons on findings of credibility — the issue in this case — merits specific comment. The Court tackled this issue in *Gagnon*, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science." They went on to state that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.
>
> [49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
>
> [50] What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility . . . the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.
>
> [51] The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

[132] Burton and R.P. were the only people who were present when the incident in question occurred. They agreed on many points, but disagreed on the facts regarding the incident that forms the basis for the charge. Other witnesses testified

about the interaction between Burton and R.P. at the Super Bowl party, but not during the incident. I have admitted the text message exchanges between Burton and R.P. leading up to, and following, the Super Bowl party. Burton also gave a statement to the police and that statement is in evidence. Therefore, a detailed analysis of all of the evidence as a whole is critical.

R.P.'s Demeanor

[133] In closing submissions, Burton commented on R.P.'s demeanor throughout the course of the trial. He says that she was cooperative on direct examination, but was difficult and hard to follow during cross-examination. He says that she is less worthy of belief as a result.

[134] R.P. presented on direct examination as highly nervous and uncomfortable. She said she had ADHD, and was prescribed daily medication for this, that she takes on mornings she had to work, but could not remember if she took it on the date in question. She would often not make eye contact with anyone in the courtroom, spoke very softly, was often visibly shaking and occasionally appeared to have difficulty processing questions on direct and cross. I took her mannerisms to be a product of anxiety or being nervous.

[135] On cross-examination, R.P. was a difficult witness at times. She periodically tried to anticipate the questions, or the reasons for the questions, instead of merely answering the questions put to her. At times during cross-examination she was calm. At other times she was upset. And on other occasions she became angry.

[136] Burton's demeanor was consistent throughout his testimony. He answered questions on direct and cross with the same calm demeanor.

[137] In *Faryna v. Chorny*,[1952] 2 D.L.R. 354, the British Columbia Court of Appeal stated, at p. 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth the story of a witness in such a case must be its harmony with the preponderance of the probabilities which are a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[138] Although discussing out of court demeanor, in *R. v. J.S.*, 2016 YKTC 63, Cozens C.J. succinctly addressed the issue of analyzing the demeanor of a sexual assault complainant during or after a sexual assault:

> 40 There is no "right way" for the victim of a sexual assault to act during or after a sexual assault, including one in which forced intercourse is part of the incident. As stated by Horkins J. in *R. v. Ghomeshi*, 2016 ONCJ 155 in para 135:
>
> > As I have stated more than once, the courts must be very cautious in assessing the evidence of complainants in sexual assault and abuse cases. Courts must guard against applying false stereotypes concerning the expected conduct of complainants. I have a firm understanding that the reasonableness of reactive human behaviour in the dynamics of a relationship can be variable and unpredictable. However, the twists and turns of the complainants' evidence in this trial, illustrate the need to be vigilant in avoiding the equally dangerous false assumption that sexual assault complainants are always truthful. Each individual and each unique factual scenario must be assessed according to their own particular circumstances.

[139] In this case, the demeanor of R.P. and Burton in court, and R.P.'s demeanor after the incident, is of little assistance to my analysis as to whether the Crown has proven the charges against Burton beyond a reasonable doubt. Instead I must consider all of the evidence as a whole and whether the Crown has proven its case beyond a reasonable doubt as delineated in *W.(D.)*.

Admissions

[140] In my decision on the *voir dire*, I determined that the text messages were admissions and admissible as an exception to the hearsay rule (*R. v. Burton*, 2017 NSSC 3).

[141] In *Watt's Manual of Criminal Evidence* (Westlaw Online) at **§**27.10:

> The admissions doctrine is more likely a product of the adversary system than the result of the application of the principles of necessity and reliability. Admissions are presumed truthful because they have been made by D and are tendered by P to advance its case. They are received as an exception to the hearsay rule as evidence of the truth of their contents.
>
> Admissions may be made orally, in writing, or by conduct by or on behalf of D. They need not be against D's interest when made. It is left to P to determine whether they will be tendered in evidence. D need not have personal knowledge of the fact(s) admitted, provided s/he exhibits a belief in the truth of the

> information conveyed. Admissions are evidence both for and against their maker, D, who is entitled to offer explanation(s) for having made them.
>
> Silence may also constitute an admission, at least where a denial would be the only reasonable course if D were not responsible as alleged. Adoption by silence is a form of admission that should be approached by counsel and judges with great caution. The principle does not apply, however, where D is in the presence of police at the material time.
>
> Failure to deny an accusation is not the only form of adoptive admission. Any words, conduct, action or demeanour that amounts to an acknowledgement of the truth of an accusation, in some instances even a denial, may constitute an adoptive admission, depending upon all the circumstances.
>
> The trial judge must determine whether there is any evidence that D, by words, action, conduct, or demeanour, has adopted a statement made in his/her presence as his/her own, before the trier of fact may find it to be an admission and make use of it as such. All the circumstances must be considered. The weight of the admission is for the trier of fact.

[142] As LeBlanc J. stated when discussing admissions made through Facebook messages in *R. v. J.S.M.*, [2015] N.S.J. No. 547 (N.S.S.C.):

> 53 Other out-of-court statements, including those of the complainants and various others introduced by the defence in the course of cross-examination, are inadmissible as proof of the offences, and may only be used for impeachment purposes to establish inconsistencies between the statements and their trial evidence. They may not be used to corroborate or confirm evidence given at trial. I note that this exclusionary rule does not apply to statements of the accused (such as the Facebook messages), which are admissions, admissible against the accused, with weight to be determined by the court: see David Watt, *Watt's Manual of Criminal Evidence 2015* (Toronto: Carswell, 2015) at s.36.02. [emphasis added]

[143] In *R. v. G.S.*, [2012] O.J. No. 305, Code J. convicted the accused of an historical sexual assault. During the course of his analysis, Code J. considered the impact of an audio recording and transcript of a conversation between one complainant and the accused that was surreptitiously recorded by the complainant at a restaurant. In determining the admissibility and use of the conversation, where admissions were implied and where a denial was called for but not given, Code J. stated:

> 231 This brings me to the last item of evidence that supports J.H.(1)'s account which is the tape recorded conversation itself. This is the most important piece of evidence in the case and I have listened to it many times. There is no issue concerning the reliability of the tape. G.S. conceded that it accurately records

their conversation and he conceded that J.H.(1) unambiguously and repeatedly confronted him with her allegations of childhood sexual abuse. I am satisfied that G.S.'s responses, viewed in their totality, amount to an implicit admission that he had sexually abused J.H.(1).

232 I have already set out my findings above, in some detail, as to what was said on the tape. What is compelling about it, as incriminating evidence, is the number of responses that J.H.(1) elicited in answer to her allegations. It is not just one or two isolated or ambiguous responses. Rather, I have found at least fourteen distinct responses. Furthermore, all of the responses are either extremely suspicious or they are a form of admission. For example, the following statements, in particular when viewed cumulatively, amount to an implied admission of J.H.(1)'s accusation of childhood sexual abuse: "I didn't say you deserve it"; "I have never ... intend in any way to hurt you, to degrade you ... I obviously feel guilty. ... Believe me, I am not that kind of person who would want to do that to another person ..."; "I suppose the only thing I can say is how I feel about it ... maybe you don't want to listen to it, then fine ... we don't talk about it ..."; "All you can think of from your childhood is this bad thing"; "look J.H.(1), I'm sorry, I don't know"; "you don't realize how much I really did care about you. I'm sorry all this happened"; "I know you find it hard to believe me ... but I care about you. I cared about, I still care about you. I am not the monster that you think I am. I know its hard for you to believe but I don't know what else to say"; "No" [admitting he did not think about "the repercussions"]; "All I can do is ... hope at some stage in your life, in my life ... something happens ... that allows you to see through this ... dark cloud and see a glimmer that says, you know, for you to realize, hey, gee, this guy really does care about me ... You have no idea how much I cared about you, and, in fact, really loved you"; "Your mother had absolutely nothing to do with anything"; "What I keep saying is that the blame that you place on your mother is undeserved ... not based on fact or reality or anything like that. She doesn't deserve it ... I could burn in hell, but she sure as hell doesn't deserve it" [Emphasis added]. The entire premise for these responses is that the abuse did happen. G.S. refers to it as "this bad thing" or "all this" or simply as "that" or "it" or "anything".

233 In addition to these implied admissions, what is also noteworthy about the taped conversation is G.S.'s repeated failure to deny the allegations. He was not refusing to discuss the allegations of sexual abuse, contrary to what he claimed in his testimony. The discussion of alleged abuse went on openly for some time, at the restaurant, and he made repeated responses. He was simply refusing to deny the allegations, when a denial was called for, assuming the allegations were false. It is well established that a failure to deny an accusation, where a denial could reasonably be expected, can in itself amount to an implied admission. See: *R. v. Christie*, [1914] A.C. 545 (H.L.); *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525 at 538-540 (Ont. C.A.); *R. v. Eden*, [1970] 3 C.C.C. 280 at 283 (Ont. C.A.); *R. v. Govedarov et al* (1974), 16 C.C.C. (2d) 238 at 278-9 (Ont. C.A.); Sopinka et al, *The Law of Evidence in Canada*, 3rd Ed. 2009, at 375-7. In the case

> at bar, there is far more than a mere failure to deny J.H.(1)'s accusations. As noted, there are also numerous responses from which an admission can be implied. In effect, what G.S. was saying was that he could not deny the allegations in relation to himself, that he could only deny any complicity by W.T., that he felt "guilty" and was "sorry" for what had happened, that his only explanation or excuse was that he did not "intend" or "want" to "hurt" or to "degrade" J.H.(1) in any way, that he did not think of the consequences of his conduct, that he truly did love her and care for her, and he hoped that one day she would realize this.
>
> 234 G.S.'s final vigorous defence of W.T. in the taped conversation is telling as it belies his evidence that he did not want to confront J.H.(1) and cause a scene in a public restaurant. G.S. is not a shy, retiring individual. He is an outspoken, accomplished, argumentative, forceful adult and he was confronted by a young twenty year old who he knew well and over whom he had exercised various forms of control or influence or authority. He firmly and forcefully refused to agree to her requests for money for her tuition and then he vigorously defended W.T. from complicity in the sexual abuse. It is only himself who he declined to defend from the allegations of sexual abuse and, instead, implicitly admitted them. Indeed, if the allegations of sexual abuse were false, as against G.S., then there would be nothing for W.T. to be complicit in and nothing to defend her against. The very fact that G.S. leapt to defend W.T., against party liability, implied that there was a principal.
>
> 235 In conclusion, the tape recorded admissions made by G.S. in 2003 are independent evidence of guilt. These admissions, in combination with the circumstantial evidence analyzed above, provide abundant support for J.H.(1)'s evidence.

[144] Burton adopted the text messages attributed to him as his during the course of his testimony.

[145] Just because the text messages sent between Burton and R.P. were admitted into evidence as admissions, and just because Burton agreed that the text messages were his (although he could not confirm every detail likely because the text exchange was so lengthy), does not mean that every text sent by Burton must be considered inculpatory. Some of the texts might help Burton or support his explanation. The texts can be used to support a conviction or to raise a reasonable doubt.

General Framework For Analysis: Consent and Honest, but Mistaken Belief in Consent

[146] In this case the defence of honest but mistaken belief in consent is raised. Section 265 of the *Criminal Code* describes the assault offences, and sets out this defence:

> 265 (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> Application
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> Consent
>
> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than the complainant;
>
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> (c) fraud; or
>
> (d) the exercise of authority.
>
> Accused's belief as to consent
>
> (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[147] Section 273.1 of the *Criminal Code* states:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), consent means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> Where no consent obtained
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> > (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> >
> > (b) the complainant is incapable of consenting to the activity;
> >
> > (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> >
> > (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> >
> > (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> Subsection (2) not limiting
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[148] Section 273.2 states:

> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> > (a) the accused's belief arose from the accused's
> >
> > > (i) self-induced intoxication, or
> > >
> > > (ii) recklessness or willful blindness; or
> >
> > (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[149] Burton argues either that R.P. consented to the sexual activity or that he had an honest but mistaken belief in her consent. In *R. v. J.A.*, 2011 SCC 28, the majority of the Supreme Court of Canada outlined a general framework for determining reasonable doubt in a sexual assault case as alleged here:

> [23] A conviction for sexual assault under s. 271(1) of the *Criminal Code* requires proof beyond a reasonable doubt of the *actus reus* and the *mens rea* of the offence. A person commits the *actus reus* if he touches another person in a sexual way without her consent. Consent for this purpose is actual subjective consent in the mind of the complainant at the time of the sexual activity in question: *Ewanchuk.* As discussed below, the *Criminal Code*, s. 273.1(2), limits this definition by stipulating circumstances where consent is not obtained.
>
> [24] A person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent. The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. However, as discussed below, ss. 273.1(2) and 273.2 limit the cases in which the accused may rely on this defence. For instance, the accused cannot argue that he misinterpreted the complainant saying "no" as meaning "yes" (*Ewanchuk*, at para. 51).

[150] In *J.A.*, after referencing the relevant *Criminal Code* provisions, the majority went on to consider the principles of statutory interpretation (para. 32), and discussed consent at paras. 31-43, concluding:

> [66] The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.

[151] It is Burton's position that R.P. consented to sexual activity with him that forms the basis of the sexual assault charge. Burton does not have to prove that R.P. consented to the sexual activity. It is up to the Crown to prove beyond a reasonable doubt that R.P. did not consent. R.P.'s state of mind toward Burton's conduct at the time and in the circumstances in which the sexual activity occurred is what matters. Only R.P.'s actual state of mind is of import. Consent has nothing to do with Burton's state of mind. Consent is R.P.'s voluntary agreement to take part in the sexual activity that she says happened. If R.P. was asleep when the sexual activity occurred then she could not provide valid consent.

[152] Burton argues that R.P. was awake and was an active, consenting participant during all of the sexual activity in question. He says that an issue only arose when he switched from manual stimulation of her vagina to putting his penis into her

vagina. He says that as soon as R.P. objected to his attempting vaginal intercourse, he stopped. He then says that R.P. consensually manually masturbated him until he ejaculated.

Honest But Mistaken Belief in Consent

[153] The Supreme Court of Canada clarified the law relating to the defence of honest but mistaken belief in consent in *R. v. Ewanchuk*, [1999] 1 SCR 330, wherein the majority stated:

> 36 To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant's ostensible consent or participation. As enumerated in s. 265(3), these include submission by reason of force, fear, threats, fraud or the exercise of authority, and codify the longstanding common law rule that consent given under fear or duress is ineffective: see G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at pp. 551-61. …
>
> 37 The words of Fish J.A. in *Saint-Laurent v. Hétu*, 1993 CanLII 4380 (QC CA), [1994] R.J.Q. 69 (C.A.), at p. 82, aptly describe the concern which the trier of fact must bear in mind when evaluating the actions of a complainant who claims to have been under fear, fraud or duress:
>
> > "Consent" is . . . stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.
>
> 38 In these instances the law is interested in a complainant's reasons for choosing to participate in, or ostensibly consent to, the touching in question. In practice, this translates into an examination of the choice the complainant believed she faced. The courts' concern is whether she <u>freely</u> made up her mind about the conduct in question. The relevant section of the *Code* is s. 265(3)(*b*), which states that there is no consent as a matter of law where the complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force.
>
> 39 The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the *actus reus* of sexual assault is established. The trier of fact has to find that the complainant did not want to be touched sexually and made her decision to permit

> or participate in sexual activity as a result of an honestly held fear. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective.
>
> 40 Section 265(3) identifies an additional set of circumstances in which the accused's conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant's testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused's perception of the encounter and the question of whether the accused possessed the requisite *mens rea*.

[154] The majority went on to discuss the *mens rea* of sexual assault:

> 41 Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement. See *R. v. Daviault*, 1994 CanLII 61 (SCC), [1994] 3 S.C.R. 63.
>
> 42 However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, 1993 CanLII 61 (SCC), [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See *Park*, *supra*, at para. 39.
>
> 43 The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC), [1980] 2 S.C.R. 120, at p. 148, by Dickson J. (as he then was) (dissenting in the result):
>
> > Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely

> possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.
>
> 44 The defence of mistake is simply a denial of *mens rea.* It does not impose any burden of proof upon the accused (see *R. v. Robertson*, 1987 CanLII 61 (SCC), [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

[155] As to the meaning of "consent" in the context of "honest but mistaken belief in consent", the majority said:

> 45 As with the *actus reus* of the offence, consent is an integral component of the *mens rea*, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park, supra*, at para. 39, L'Heureux-Dubé J. (in her concurring reasons) stated that:
>
> > . . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".
>
> 46 In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.
>
> 47 For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law:
>
> > **273.1** (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> 48 There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea.* For the purposes of the *actus reus*, "consent" means that the complainant in her mind wanted the sexual touching to take place.
>
> 49 In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – "consent" means that the complainant had

> affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.

[156] Discussing the limits of the "honest but mistaken belief" defence, the majority noted that such limits arise both from common law and from ss. 273.1(2) and 273.2 of the *Criminal Code*:

> 51 For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, 1994 CanLII 77 (SCC), [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:
>
> > One "No" will do to put the other person on notice that there is then a problem with "consent". Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner. [Emphasis in original.]
> >
> > I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.
>
> 52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, 1997 CanLII 312 (SCC), [1997] 2 S.C.R. 777, at para. 79, the Court stated:
>
> > An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii).

[157] More recently, the majority in *J.A.* again discussed "consent" in the context of "honest but mistaken belief in consent":

> D. The Concept of Consent in the Jurisprudence

[44] The jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act. While the issue of whether advance consent can suffice to justify future sexual acts has not come before this Court prior to this case, the tenor of the jurisprudence undermines this concept of consent.

[45] As held by Major J. in *Ewanchuk*, "[t]he absence of consent. . . is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred" (para. 26 (emphasis added)). The trier of fact must determine what was going on in the mind of the complainant in response to the touching. The majority repeatedly underlined that the focus is on the complainant's "state of mind": paras. 26, 27, 29, 30, 33, 34 and 48; see also *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836, at para. 16, referring to the consent of the complainant as a "mental state" (*per* L'Heureux-Dubé J.). Moreover, as noted above, the complainant is not required to express her lack of consent: *M. (M.L.)*. Rather, the absence of consent is established if the complainant was not experiencing the state of mind of consent while the sexual activity was occurring.

[46] The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuk*, at para. 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact.

[47] The jurisprudence of this Court also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defence of implied consent to sexual assault: *Ewanchuk*, at para. 31.

[48] The cases on the *mens rea* defence of honest but mistaken belief in consent take the same view. At common law, this was a standard defence of mistake of fact: the accused was not guilty if he honestly believed a state of facts, which, if true, would have rendered his conduct lawful: *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC), [1980] 2 S.C.R. 120, at pp. 134 and 139. In *Ewanchuk*, this Court held that it is not sufficient for the accused to have believed that the complainant was subjectively consenting in her mind: "In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question" (para. 46 (emphasis in original)). See also *Park*, at para. 39 (*per* L'Heureux-Dubé J.). It thus is not sufficient for the accused to have believed the complainant was consenting: he must also take reasonable steps to ascertain consent, and must believe that the complainant communicated her consent to

> engage in the sexual activity in question. This is impossible if the complainant is unconscious.
>
> [49] The respondent argues that my dissenting reasons in *Esau* suggest that an individual may consent while unconscious for purposes of the *actus reus* of the offence. The issue in that case was whether the defence of honest but mistaken belief was available where the complainant asserted that she was unconscious due to drunkenness at the time of the sexual activity. The majority of the Court, *per* Major J., held that the evidence sufficed to raise a basis for the defence. My dissenting reasons argued that the defence did not arise because an unconscious complainant "lacks the capacity to communicate a voluntary decision to consent. . . . To put it another way, the necessary (but not sufficient) condition of consent — the capacity to communicate agreement — is absent" (para. 73). I further stated:
>
> > The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent. [*ibid.*]
>
> [50] Simmons J.A. read this passage as supporting the view that an individual may consent while unconscious (para. 82). However, the point of the passage is simply to cast doubt on whether the defence of honest but mistaken belief can arise with respect to an unconscious complainant, assuming (without deciding) that the *actus reus* could be made out. The passage thus does not support the view that advance consent prior to unconsciousness can establish consent for purposes of the *actus reus* of the offence. [emphasis added]

[158] In dismissing arguments supporting consent applying to a sleeping or unconscious person, the majority in *J.A.* stated:

> [58] The respondent also argues that requiring conscious consent to sexual activity may result in absurd outcomes. He cites the example of a person who kisses his sleeping partner. In that situation, he argues, the accused would be guilty of sexual assault unless he is permitted to argue that his sleeping partner consented to the kiss in advance.
>
> [59] The first difficulty with altering the definition of consent to deal with the respondent's hypothesis is that it would only provide a defence where the complainant specifically turns her mind to consenting to the particular sexual acts that later occur before falling asleep. The respondent's position is that there is no sexual assault in this case because the complainant consented to both being rendered unconscious and to engaging in the sexual activity that occurred while she was unconscious. If a hypothetical complainant did not expect her

partner to kiss her — or whatever other acts are at issue — while she was asleep, the respondent's approach would not provide a defence.

[60] The second difficulty is the risk that the unconscious person's wishes would be innocently misinterpreted by his or her partner. Sexual preferences may be very particular and difficult for individuals to precisely express. If the accused fails to perform the sexual acts precisely as the complainant would have wanted — by neglecting to wear a condom for instance — the unconscious party will be unintentionally violated. In addition to the risk of innocent misinterpretation, the respondent's position does not recognize the total vulnerability of the unconscious partner and the need to protect this person from exploitation. The unconscious partner cannot meaningfully control how her person is being touched, leaving her open to abuse: *R. v. Osvath* (1996), 1996 CanLII 10220 (ON CA), 46 C.R. (4th) 124 (Ont. C.A.), *per* Abella J.A. (as she then was), dissenting.

[61] A third difficulty is evidentiary. If the complainant is unconscious during the sexual activity, she has no real way of knowing what happened, and whether her partner exceeded the bounds of her consent. Only one person really knows what happened during the period of unconsciousness, leaving the unconscious party open for exploitation. The complainant may never discover that she was in fact the victim of a sexual assault. Fish J. correctly points out that in some cases, there may be forensic evidence that establishes conclusively that the accused exceeded the bounds of the consent given. However, if the complainant never suspects that a sexual assault has occurred, no forensic evidence will be gathered. Moreover, many acts of sexual assault leave no forensic evidence.

[62] A fourth difficulty is jurisprudential. Recognizing exceptions to the requirement of conscious consent would not only run counter to the definition of consent in the *Criminal Code*, but would impose on the courts the task of determining how consent to unconscious sexual activity can be proven. The respondent suggests that the court could ask if the complainant consented before losing consciousness to the sexual acts that subsequently occurred — pre-unconsciousness authorization. This would require the court to determine what the unconscious party wanted just prior to going unconscious, and then assess if this is what indeed occurred. This inquiry would be objective, contrary to the subjective inquiry required by the *Criminal Code*. The only other option — post-unconsciousness determination of consent where the complainant decides when she regains consciousness if she would have consented to all the acts that occurred — is also problematic. A *post facto* determination runs contrary to the rule that the complainant's post-act sentiments are irrelevant; if a complainant consents to sexual activity while it is taking place, but later decides that she should not have, the accused should be acquitted on the *actus reus* of the offence.

[159] Following the analysis set out by the Supreme Court of Canada, I note that Burton says that either R.P. consented to the sexual activity or that he honestly believed that she voluntarily agreed to participate in the sexual activity with which he is charged. In order for the defence of honest but mistaken belief in consent to be considered I must be convinced beyond a reasonable doubt that the sexual activity occurred as charged. If I conclude that the sexual activity occurred as charged between Burton and R.P., and if I am convinced beyond a reasonable doubt that there was no consent, this would constitute a sexual assault.

[160] R.P. says that when she woke up, Burton was having vaginal intercourse with her. She also says that Burton masturbated twice and on both occasions rubbed his ejaculate in her hand, once while she was pretending to be asleep and once while she was sleeping. Burton admits that he had vaginal intercourse with R.P. He says that R.P. masturbated him.

[161] If I find that the sexual activity occurred, then I must be sure that R.P. did not consent before finding that a sexual assault occurred. R.P. says she was asleep and woke up with Burton's penis inside of her vagina. R.P. says that she was pretending to be asleep when Burton masturbated and that Burton rubbed his ejaculate into her hand. If I am convinced beyond a reasonable doubt that R.P. was asleep when Burton put his penis in her vagina, she therefore could not consent to the sexual activity.

[162] It is only after those two steps are determined that I go on to consider whether Burton had an honest but mistaken belief that R.P. was consenting to the sexual activity in question.

[163] Burton does not have to prove that he honestly believed that R.P. voluntarily agreed to participate in the sexual activity with which he is charged. It is the Crown's burden to prove beyond a reasonable doubt that Burton had no such honest belief. If I have a reasonable doubt about whether Burton honestly believed that R.P. consented to the sexual activity with which he is charged then I must find Burton not guilty.

[164] Burton's belief must be honest, but it does not have to be reasonable. However, the reasonableness aspect is important in deciding whether or not Burton actually had the honest belief he claims to have had at the time of the sexual activity.

[165] Burton agrees that if R.P. was asleep during the sexual activity then she could not have consented. If R.P. was asleep when the sexual activity occurred, and if Burton was aware that R.P. was asleep when the sexual activity occurred, then there could be no honest belief that she voluntarily agreed to participate in the sexual activity.

Post-offence Conduct

[166] The Crown urges the Court to consider Burton's behaviour upon arrest as evidence that he committed sexual assault. Is the fact that Burton lied to the police about his identity when they first arrived at his door to speak to him on February 8, 2014, evidence from which I can infer guilt in combination with the rest of the evidence presented at trial? Am I satisfied beyond a reasonable doubt that his guilt is the only rational inference that can be drawn from all of the evidence?

[167] Burton testified that he did not know why the police would be looking for him. He said that his social group was involved with drugs and I infer from his comments in this regard that he was concerned that the police may have arrived at his home in relation to a drug investigation. He said he had people in his home during that first police visit and, essentially, panicked. Burton said he called several of his drug connections once the police left in order to determine if anything unusual had occurred.

[168] On cross-examination Burton was asked who was in his home when the police arrived on February 8, 2014. He agreed that the police had never previously asked for him at his door and that he had never previously been arrested. Burton testified that part of the reason he lied to the police was because he had people in his home. Yet, when asked who the people were in his home, Burton said he could not recall. I do not find this to be believable. If Burton had people in his home, and if their presence contributed to his decision to lie to the police, then he should be able to remember the identity of those people. If Burton did not actually have people in his home then he lied to the police about his identity for other reasons. Either Burton was not telling the truth in court about his inability to remember the names of the persons who were in his home when the police arrived to speak to him or he was not telling the truth in court as to why he had misidentified himself to the police.

[169] Burton was also asked on cross-examination who the drug connections were that he says he contacted immediately after the police left. He had no difficulty naming the individual who brought the powdered MDMA during the Super Bowl

party yet he initially said he could not remember the names of the drug connections he said he telephoned after the police left. Further questioning on cross-examination led to Burton mentioning one name.

[170] If Burton had called his drug contacts after the police left then he would know their names. He did not indicate that he was reluctant to name them because of their involvement in criminal activity and he had no difficulty naming his drug contact during his earlier testimony. Either Burton was not telling the truth in court about his ability to remember the names of his drug contacts or he was not telling the truth in court about making calls to his drug contacts after the police left.

[171] In relation to Burton's testimony regarding the identity of the persons in his home and his testimony regarding the names of the drug contacts he telephoned once the police, while I do not draw any inference regarding Burton's guilt in relation to the sexual assault charge because of this evidence, it does have an impact on his credibility. Burton had no hesitation in lying to the police when they came to his door. He was not truthful in court regarding the names of the people in his home or the names of the drug contacts he telephoned.

Analysis

R.P.'s Credibility

[172] Burton argues that because of eight inconstancies in R.P.'s testimony, she is not worthy of belief, and as a result there is a reasonable doubt.

[173] The first inconsistency pointed out was R.P.'s denial at trial that she was in a relationship with Burton after using the word "relationship" at the preliminary inquiry. R.P. says that it was the Crown who first introduced the word relationship during direct examination at the preliminary inquiry. The following excerpt of R.P.'s direct examination evidence from the preliminary inquiry was put to her on cross-examination at trial:

> Q: Okay. Throughout that year that you had known him, had you ever been involved in a romantic relationship with him?
>
> A: About three weeks before the… before Super Bowl.
>
> Q: Okay. And just to be clear, February 3rd, 2014… February 2nd, 2014, that was the night of the Super Bowl. Is that what you're saying?
>
> A: Yes.

> Q: Yes. Okay. So on February 2nd, were you in a romantic relationship with Mr. Burton?
>
> A: No.
>
> Q: Okay. And who had ended that particular relationship?
>
> A: I had told him.
>
> Q: And do you remember when you had told him you didn't want a romantic relationship?
>
> A: We had talked about it before, but that night … or that day, I had asked him if it was … if it would be okay if I go, as long as … as friends, if it wasn't going to bother him, you know, just to be friends and me being there.

[174] According to this excerpt it was the Crown who introduced the term "romantic relationship" at the preliminary inquiry. The connection between Burton and R.P. was not well defined. They socialized together on a few occasions. They slept together on a few occasions, sometime involving sex and sometimes not. R.P. had clearly distanced herself from Burton in the month or so prior to the incident. Burton acknowledges this in his own texts. I do not find the inconsistency in R.P.'s alleged use of the word "relationship" at trial to be of any significance in assessing her credibility.

[175] The second inconstancy pointed out by Burton was R.P.'s statement that Burton had purchased two two-litre bottles of Smirnoff Ice, and later saying that he had purchased two one-litre bottles. R.P. testified that (whatever the size of the bottles) she drank one bottle and did not open the second. She said that she was not intoxicated, but did not feel comfortable driving. She was clearly focused on describing the sexual assault allegations. In Burton's texts and in his testimony he said he purchased two one-litre bottles of Smirnoff Ice for R.P. R.P. confirmed this later in her evidence. In the context of the overall circumstances of the case, I do not find that her referring to the bottles of Smirnoff Ice as either two or one litres is of much significance in relation to a credibility assessment.

[176] Of more significance is the third inconsistency pointed out by Burton, relating to the powdered MDMA. In her police statement R.P. said that she had not consumed any drugs other than alcohol, marijuana and her sleeping pills. At trial she stated she and Burton had also snorted an unknown white powder. Burton confirmed during his own testimony that he and R.P. had snorted white powder during the party and said that it was MDMA. On cross-examination, R.P. said that she believed she had mentioned the white powder to the Crown during pre-trial

preparation. The Crown has filed an agreed statement of fact that no such conversation with R.P. ever took place. This has a negative impact on R.P.'s overall credibility.

[177] The fourth inconsistency pointed out by Burton was R.P.'s testimony that Burton had been in the kitchen with her after the party ended and likely would have seen her take her sleeping pills. It was pointed out that in her police statement she had said Burton was in the hallway when this occurred. When pressed, R.P. was adamant that the hallway and the kitchen were immediately adjacent to each other and there was little or no difference between them. I do not find this to be a material inconsistency that would impact on R.P.'s credibility, although it does impact on whether Burton had seen her take her sleeping pills.

[178] The fifth inconstancy pointed out by Burton was R.P.'s testimony as to whether she took one or two sleeping pills before going to bed. She said she was prescribed two pills and thought she had taken two, but conceded that she might have taken one. Of significance is the fact that R.P. was certain she took her sleeping pill or pills and never wavered from this position.

[179] The sixth inconsistency relates to R.P.'s testimony as to where she changed before getting into bed. At trial she said she went into the bathroom to change. Burton pointed out that at the preliminary inquiry she said that she could not remember where she changed. This is an inconsistency in R.P.'s testimony. However, I do not find this to be of great significance in the overall context of the allegations. Why would she remember a detail like this differently at trial than at the preliminary inquiry?

[180] The seventh inconsistency pointed out by Burton relates to R.P.'s waking up in the morning during the second alleged incident of masturbation by Burton. Burton pointed out the difference between her testimony at the preliminary inquiry when R.P. said she was woken up by her arm being moved and then she felt Burton put his ejaculate in her hand as opposed to her testimony at trial where she said she was woken up by the sound of Burton masturbating and then felt her hand get wet as Burton put his ejaculate on it. I do not find the inconstancy between her testimony at the preliminary inquiry and at trial to be material considering the overall circumstances of the allegation. R.P. alleges that she had taken sleeping pills, had woken up being sexually assaulted, tried to stay awake and then was asked to pinpoint what woke her up again versus what was happening when she woke up. She was consistent as to what was happening when she woke up for the

second time. As was noted on re-direct examination, R.P. said at the preliminary inquiry that she was awoken when her arm was moved, she heard Burton masturbating and something wet was put in her hand.

[181] Burton also says this inconsistency is significant because it is not believable that R.P. could sleep through having her pants removed, having her tank top pulled up and having her backside lifted into a position where he could have intercourse with her from behind, yet she would wake up when her hand was moved slightly. R.P. said that she took her sleeping pills around midnight. She said that she always falls into a deep sleep shortly after taking her pills and wakes up in the morning. Burton himself described her as "sleeping like the dead" when she takes her pills. R.P. said on the night in question she woke up at 2:45 AM, only two or three hours after she took her pills with her pants off, top up over her head, facedown in a pillow and in a position that would allow for Burton to have sex with her. If she took her sleeping pills around midnight, and if her pills send her into a deep sleep very quickly after ingestion but allow her to wake up in the morning, it is perfectly consistent that it would more be difficult for her to be woken up at 2:45 AM than at 6:00 AM.

[182] The eighth and final inconsistency pointed out by Burton involves the comments R.P. says Burton made after she woke up with him having sex with her and said "What are you doing?". In her police statement R.P. said Burton said that he "thought it would be OK". At the preliminary inquiry, she said Burton said "I thought it would be fun". At trial she initially said Burton told her "I thought it would be exciting". During cross-examination at trial R.P. also referred back to Burton's text messages where he said he thought it would be "exciting". R.P. admitted on cross-examination during the *voir dire* that she could not "unlearn" what she had read in Burton's text messages. Twice in Burton's text messages he said that he thought what he did would be exciting.

[183] At trial, R.P. stated that she believed all three of these comments were made by Burton between the time she woke up and said "what are you doing" through the time she went to get a drink of water and Burton guided her back to bed until the time she laid back down in his bed.

[184] Burton says the inconsistencies relating to what he allegedly said to R.P. when she woke up should raise red flags regarding R.P.'s testimony. Of course, it is also possible that in the confusion of waking up to find herself being sexually assaulted that R.P. was merely confused about the precise timing and exact

wording of Burton's comments, but that Burton made all three of the comments as alleged.

[185] Burton also suggested that R.P. was misleading the court when she denied flirtation or touching Burton during the Super Bowl. Burton's witnesses said variously that R.P. appeared to be flirting with him, giving him pecks and holding his hands. Burton himself denied R.P. kissed him or romantically held his hand during the party. The flirtatious behaviour as described by Burton's witnesses seems to have been attention seeking behaviour that in no way could be said to go to R.P.'s consenting to sexual activity with Burton or providing Burton with an honest but mistaken belief in her consent. I do not find the evidence of King or Chalk to be of much assistance in analyzing whether the Crown has proven the guilt of Burton beyond a reasonable doubt.

[186] Burton also suggested that if R.P. could get out of bed after asking him "What are you doing?", put on her pants and get a drink of water, then she would have been able to drive her jeep home. R.P. described still being groggy from her sleeping pills, given she had only taken them at most three hours prior to being woken up. There is a significant difference between simply putting on pants and getting a drink of water and the intricacies of operating a motor vehicle.

[187] Through cross-examination of R.P., Burton suggested the possibility that she might sleepwalk or perform unusual activities in her sleep. R.P. did not agree with these suggestions and there was no evidence whatsoever to support those assertions.

[188] Most of the inconsistencies in R.P.'s testimony pointed out by Burton are inconsequential given the nature of what occurred on February 2, 2014, and the following early morning hours. However, several of the inconsistencies are significant. Nonetheless, all of the evidence admitted at trial must be considered in determining whether the Crown has proven its case beyond a reasonable doubt.

[189] Burton agrees with much of R.P.'s testimony surrounding the incident: R.P.'s use of sleeping pills; the impact on R.P. when she takes her sleeping pills; that she and Burton had not seen each other for a few weeks prior to his texting her; that he initiated contact on February 2, 2014; the content of the text messages leading up to the Super Bowl party; that R.P. only wanted to be friends with him; that he wanted a more involved relationship; that he purchased her alcohol that evening; the amount of alcohol consumed by her; that neither party was intoxicated at the end of the Super Bowl party; that there was no discussion of sex between

them that night; that there was no discussion of R.P.'s staying overnight at his place after the party; generally they agreed as to who was at the party; the use of marijuana; the use of the powdered white substance; the lack of romantic exchanges between R.P. and Burton during the game; the Broncos doing poorly during the game; R.P.'s teasing Burton when the Seahawks were doing better than the Broncos; the approximate time everyone else left the party; what they wore before they went to bed; what they wore to bed; their positions on the bed when they initially got into bed; the position of the fish tank next to the bed; R.P.'s position when Burton put his penis in her vagina; R.P.'s reaction when Burton put his penis in her vagina; R.P.'s rejection of sexual intercourse; R.P.'s asking how her clothes came off; R.P.'s getting out of bed, putting jeans on and going to the kitchen for water after rejecting sexual intercourse; Burton's ejaculation through masturbation; R.P. being dressed when Burton ejaculated; the plan for Burton to get up early for work; and the knock at the door in the morning and Burton leaving for work.

Burton's Evidence

[190] Burton's explanation of the incident itself does not make sense. Both he and R.P. agree they had engaged in sexual intercourse on several occasions previously. He claims that after the Super Bowl party R.P. went to bed, gave no impression of being asleep, immediately engaged in foreplay by grabbing his penis, participated actively while he manually stimulated her vagina, rolled over so that she was face down with her rear end up in the air while continuing to be manually stimulated by Burton and while still grabbing Burton's penis, but then jumped out of bed and asked him how her clothes came off as soon as he changed from digital penetration to using his penis.

[191] Equally unrealistic is his claim that after R.P. jumped out of bed, appeared angry, put on her pants, asked how her clothes came off, left the bedroom and went to get a drink of water, and when she came back into the bedroom, he just lay in bed masturbating during that whole time period. Keeping in mind that Burton says he had very strong feelings for R.P. as evidenced by his testimony and the text messages, his claim that stayed in bed and masturbated while R.P. leapt out of bed confused and left the bedroom in all of those circumstances does not make sense.

[192] Not only does Burton claim that he did not ask R.P. on her return to the bedroom why she was acting so strangely and instead merely lay in bed masturbating, but he says that R.P. then manually stimulated his penis until he

ejaculated and only then angrily asked what had happened. Burton says he then explained to her that she had actively participated in the sexual activity until he put his penis in her vagina and that R.P.'s reaction to this information was essentially to roll over and sleep until the morning.

Burton's Text Messages

[193] Burton's story is not only fantastic on its own, but does not accord with his own text messages. The texts leading up to R.P.'s arrival at Burton's for the party show Burton as desperate for R.P.'s company:

> Then you are with me… I want you with me for the game… I will always remember this game… it will be even be better if you were with me and my team wins!!!; Then I should pick you up some and we watch the game together at your place; I will come get you and bring you to Sackville.; Kidnap you or something.; Let me know if you hear from mom and dad; What would you like to drink.; First I should ask… would you like to come hang out with me?; It would be nice to see you… I will take friendship over not seeing you.; I respect the honesty you bring… let's hang out as friends.; But here is the kicker… I would like to hang out more often than three weeks… LOL; What would you like… people around or just us.; Then people it will be… did you hear from mom dad… what do you feel like drinking?; We can do whatever.; I have to go to liquor store… what would you like? Around four would be good… pre drinks.; Heading to liquor store in about 10 mins.; Hey I was just at store home in two mins I got things for us; Com back (sic); I was just at grocery store and liquor store.; I bought you two one litre bottles of Smirnoff.; LOL going to crack one soon; You coming soon.

[194] Despite Burton's testimony that his text messages following the incident were worded to avoid confrontation with R.P. and to try to connect with her in an effort to salvage their relationship based on all of the evidence, I do not believe him. I believe that his post-party text messages are admissions of guilt and support R.P.'s allegations.

[195] The texts following the evening of the Super Bowl party begin:

Burton:	Awesome day – sucks my team lost though
R.P.:	Last night was a little messed up… just getting ready for work.
Burton:	Hope you had a good day at work
Burton:	And yes it was.

[196] Burton agrees that the previous night was "a little messed up". Burton says that refers to R.P. jumping out of bed when he switched from digital stimulation to intercourse. Yet he goes on to state:

> Burton: I feel real shitty about last night… so out of line… so sorry.

[197] Considering that they had previously had intercourse, it makes no sense that he would be "feeling real shitty about last night" and consider himself to having been "so out of line" and need to say "so sorry" for attempting intercourse following the foreplay he says occurred. However, in the context of having been caught having sex with R.P. while she was asleep under the influence of sleeping pills, Burton's comments make perfect sense.

[198] Then R.P. goes on to text:

> R.P.: I'm confused… I was sleeping I don't know what to think.
>
> R.P.: My pills knock me out… you know this Rob… I don't get it.

[199] In response to this Burton says:

> Burton: I have not stopped thinking about how you must feel… and I do know how your pills affect you… feel so low right now… so sorry
>
> R.P.: I trusted you… I don't know what to say… I don't know what to feel right now… have you ever woken up with someone inside of you? I don't know what to think… think it's better not to talk right now.

[200] In this text Burton does not dispute R.P.'s claim to have been asleep. He agrees that he knows how R.P.'s pills affect her. Why would he acknowledge the effect of her pills if he did not think she had taken them and was asleep when he was having sex with her? Otherwise, any reference to the pills would be irrelevant. Why would he, immediately after R.P. says she was asleep and his own acknowledgement of the effect of the pills, say "feel so low right now"? Why would he apologize if not for having sex with her while she was asleep? He testified that he was merely apologizing for switching from digital penetration to intercourse. In the context of his description of what occurred (R.P. consenting to the sexual activity until intercourse was attempted) this text message would be a strange apology and makes no sense.

[201] In response to Burton's apology, R.P. again directly confronted him with having had sex with her while she was asleep when she texted:

Burton: I have not stopped thinking about how you must feel… and I do know how your pills affect you… feel so low right now… so sorry

R.P.: I trusted you… I don't know what to say… I don't know what to feel right now… have you ever woken up with someone inside of you? I don't know what to think… think it's better not to talk right now.

[202] Instead of denying that R.P. had woken up with his penis inside of her vagina, Burton replies:

Burton: I should have protected you.

Burton: I failed you so bad

Burton: How has your day gone so far? Haven't stopped thinking of you?

R.P.: I never want to hear from you again.

[203] When R.P. texts "I never want to hear from you again", Burton admits his act was "selfish" and "wrong" and "was convinced that it would not have turned out the way it did":

Burton: This is so shitty… you should know that it was not any intention of mine to hurt you in any way… I have analyzed my actions last night and I would like to have a moment to talk… please do not throw this away… you know how my face lights up when I see you. I know that it was selfish of me and wrong. I had my heart convinced that it would not have turned out the way it did… my heart aches now of even the idea of not seeing you.

[204] In response to Burton's efforts to apologize, R.P. again directly accuses him of sexually assaulting her:

R.P.: You were fucking me while I was asleep… I was out… and you decided to have sex with me… are you fuckin serious rob…

R.P.: I cried and showered for hours… wtf rob… we were friends

[205] Burton does not deny the sexual assault allegations. Instead he again acknowledges that his actions were wrong, that his conscience is bothering him as a result and that he thought it would be exciting:

Burton: I know this how feel and it breaks my heart. I was convinced that it was going to have a different outcome an exciting one but it wasn't which made it such a wrong decision that I made… I'm so

sorry for the outcome… it has bothered my conscience sense… I can't stop thinking about you and your feelings

Burton: Allow me to fight for you.

Burton: You still awake?

Burton: My thoughts are with you as I lay in bed… thinking of you

Burton: Hope you have a good nite.

Burton: I have not stopped thinking of you… hope your day goes well… I do want you to know that its tearing me apart… you already know how I feel about you and this has gotten me down just thinking of how you feel xo

R.P.: Leave me the fuck alone… how much clearer do I have to be… I don't care how you feel

[206] Burton gave the following explanation for this text during direct examination:

Q: Flip forward to it's labelled 28 at the top of the handwritten notes. Do you have that one?

A: Yep.

Q: Do you have anything, any comment on what you're saying in that message?

A: Again, trying to connect with her on how she may feel. I just let her know in a message that you know again that what was taken place the night of the Super Bowl of us being both awake that why I said that I'm convinced that it was going to have a different outcome, an exciting one, but it wasn't because of how it ended which made it such a wrong decision because of how she felt afterwards and what she had told me.

Q: Okay. So what were you, so when you said that what were you referring to? What was it that you had expected to have a different outcome?

A: From going from like when we were doing foreplay and I was using my fingers to go from manual to using my penis.

[207] Burton testified that when he said he thought there would be an exciting outcome he simply meant switching from digital penetration to intercourse. In the context of the previous history between Burton and R.P., Burton's assertions at trial are simply unbelievable. Considering all of the evidence presented it is clear that he was apologizing for having sex with R.P. while she was asleep. From his text messages, Burton appears to have thought this was perfectly acceptable behavior and that it would add excitement to their relationship.

[208] R.P. then sent her final text:

> Burton: I have not stopped thinking of you… hope your day goes well… I do want you to know that its tearing me apart… you already know how I feel about you and this has gotten me down just thinking of how you feel xo
>
> R.P.: Leave me the fuck alone… how much clearer do I have to be… I don't care how you feel

[209] Burton again says that he mistakenly thought his actions would be exciting, says that he did not mean to hurt her and again apologizes profusely. Why would he be apologizing for hurting her if he merely switched from digital penetration to intercourse given their history and his own description of the foreplay?:

> Burton: I will… you must know that it was not in my mind or heart to hurt you in any way… it was meant to be exciting… sorry it did not work out that way… I will respect your wish.
>
> Burton: I am so sorry!

W.D. **Analysis**

[210] According to the Supreme Court of Canada in *W.D.*, I must take a three step approach to assessing the evidence:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[211] In undertaking the first step of *W.D.*, I do not believe the evidence of the accused, Robert Burton.

[212] With regard to the second step of *W.D.*, I do not believe the testimony of Burton and I am not left in a reasonable doubt by it.

[213] Third, not only am I not left in doubt by the evidence of Burton, but, on the basis of the evidence I accept, including (but not limited to) the evidence of R.P., the statement of Burton and the text messages from Burton, I am convinced

beyond a reasonable doubt of the guilt of Burton. Put another way, on the basis of the evidence I do accept, I am sure that Burton sexually assaulted R.P. during the early morning hours of February 3, 2014, following the Super Bowl party of February 2, 2014.

Conclusion

[214] Robert Burton is accused of sexually assaulting R.P. by having intercourse with her while she was asleep and by twice masturbating and rubbing ejaculate into her hand without her consent. He initiated a text message conversation with R.P. after the incident. When confronted by R.P. about having sex with her while she was asleep, Burton did not deny the allegations, instead apologized and said he thought things would be exciting.

[215] I find that R.P. took her sleeping pills before she went to bed following the Super Bowl party. Whether or not Burton saw R.P. take her pills that evening, he was aware that she used sleeping pills and that she fell into a very deep sleep once she took her pills. I am convinced beyond a reasonable doubt that R.P. was under the influence of sleeping pills and was asleep when Burton had sex with her.

[216] I am also convinced beyond a reasonable doubt that Burton did not have an honest but mistaken belief that R.P. was consenting to sexual activity. I find that Burton's story at trial as to what happened after they got into bed is not believable, was contrived, was tailored to defeat R.P.'s allegations and does not make sense in and of itself, nor in comparison with the text messages Burton wrote to R.P. following the incident.

[217] I am convinced beyond a reasonable doubt that: R.P. fell asleep shortly after getting into Burton's bed; Burton knew that R.P. "slept like the dead" when she took her sleeping pills; Burton had sex with R.P. while she was asleep; Burton knew R.P. was asleep while he was having sex with her; R.P. could not and did not consent to the sexual activity with Burton; and Burton did not have an honestly held belief that R.P. was consenting to such sexual activity as he knew she was asleep.

[218] Burton thought having sex with R.P. while she was asleep would be fun and exciting. Upon his arrest he said he wanted a female opinion as to the propriety of his behavior. He may not have been aware that having sex with R.P. while she was asleep was illegal. In an effort to avoid culpability, he now says that R.P. was

awake and an active and willing participant in the sexual activity of February 3, 2014.

[219] R.P. was asleep when she awoke to find Burton having sex with her. A sleeping person cannot consent to sex. It is therefore illegal to have sex with someone while they are asleep. Burton did not have an honest but mistaken belief that R.P. was consenting as he knew she was asleep when he had sex with her.

[220] R.P. was pretending to be asleep when Burton masturbated and then rubbed his ejaculate into her hand the first time. R.P. was asleep and woke up to Burton masturbating and rubbing his ejaculate into her hand the second time.

[221] Burton is guilty of sexual assault on R.P. as charged.

Arnold, J.