

PROVINCIAL COURT NOVA SCOTIA

Citation: *R. v. Percy*, 2018 NSPC 57

Date: 20181214

Docket: 8173520, 8173521

Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

MATTHEW ALBERT PERCY

Restriction on Publication:

s. 486.4: Bans under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

Editorial Notice: The electronic version of this judgment has been modified to remove identifying information.

DECISION ON TRIAL

Judge: The Honourable Judge Elizabeth Buckle

Heard: August 27, 28, 29, 30, 31, October 2, 4 & 12, 2018

Decision: December 14, 2018

Charge: Sections 271 & 162(1)(c) *Criminal Code*

Counsel: Rick Woodburn for the Crown
Brad Sarson for the Defence

By the Court:

Introduction

[1] Before September 15, 2017, Matthew Percy and T.J. were friendly acquaintances. He worked as a groundskeeper at St. Mary's University (SMU) where she attended school, lived in residence and worked part-time. On that date, they ran into each other in down-town Halifax after each had consumed alcohol, she more than he. They walked together back to her residence room. Once there, they engaged in sexual activity, some of which was recorded by Mr. Percy on his phone. In the early morning, after Mr. Percy had fallen asleep, T.J. left the room and went to the security desk. She was distraught and had difficulty communicating but reported that she had been sexually assaulted.

[2] As a result of that report and the ensuing investigation, Mr. Percy was arrested, the recordings were discovered on his phone and he was charged with sexual assault and voyeurism.

[3] The significant events occurred in private, witnessed only by Mr. Percy and T.J. who both testified. However, the recordings made by Mr. Percy provide objective evidence of a portion of those otherwise private events and I had the benefit of expert evidence about the impact of alcohol on behaviour.

Position of the Parties

[4] The defence does not dispute that Mr. Percy and T.J. engaged in sexual activity and that Mr. Percy recorded that sexual activity.

[5] The defence argues that the Crown has not proven that T.J. did not consent or did not have the capacity to consent to that activity. Alternatively, the defence argues that if I find the Crown has proven lack of consent or capacity, Mr. Percy should be acquitted because he honestly believed, based on reasonable steps, that she both had capacity to consent and did consent. Further, the defence argues that the Crown has not proven that the recording was made surreptitiously.

[6] The Crown argues that T.J. did not consent to sexual activity and lacked the capacity to consent due to impairment by alcohol and possibly prescription drug. The Crown also argues that Mr. Percy's claim that he honestly believed she was consenting and had capacity to consent should be rejected because it is not credible and because, even on his evidence, he has not demonstrated that he took reasonable steps to ensure she was consenting. Further, the Crown argues that T.J. was not aware that Mr. Percy was recording their sexual activity and the only reasonable inference from the evidence is that Mr. Percy intentionally hid the fact that he was recording.

[7] In general, my task is to decide if the Crown has proven the offences beyond a reasonable doubt. However, because of the concessions, the real issues are:

1. Has the Crown proven beyond a reasonable doubt that (a) T.J. did not consent to sexual activity with Mr. Percy; or, (b) did not have the capacity to consent to sexual activity?
2. If I am persuaded that she either lacked capacity or did not consent, has the Crown proven that Mr. Percy knew or was reckless or willfully blind to her lack of consent or capacity?
3. Has the Crown proven that the recording was made surreptitiously?

[8] There is a general narrative that is not disputed. However, deciding the issues will require me to assess the credibility and reliability of the two main witnesses, Mr. Percy and T.J.

[9] The defence does not argue that T.J. is purposefully lying in her testimony. Their position is simply that because of her intoxication and memory loss, her recollections are too disjointed and fragmented to be relied on and in some instances her recollections are directly contradicted by objective evidence.

[10] The Crown argues that Mr. Percy's evidence is not credible because his testimony appeared rehearsed, that his testimony was full of inconsistencies and was generally implausible.

[11] A criminal trial is not about simply choosing whether I prefer the complainant's or the accused's version of events. Doing that would undermine the presumption of innocence and the requirement that the Crown prove the case beyond a reasonable doubt. I must consider Mr. Percy's evidence within the context of the other evidence. Where his testimony is inconsistent with guilt,

if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject his testimony, I have to examine the remaining evidence that I do accept and only convict if the Crown has proven guilt beyond a reasonable doubt (*W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Dinardo*, 2008 SCC 24).

[12] T.J. gave two statements to D/Cst. Mitchell, one on the morning after the events and one on November 3, 2017. Mr. Percy also gave a statement to investigators on the morning after the event. Both were cross-examined on various discrepancies between their testimony and prior statement(s). Both testified that their statements were not provided in ideal conditions. T.J. was upset, hung over, tired and sick from medication given to her at the hospital. Mr. Percy was tired and upset by the arrest and surrounding circumstances. It is understandable that not all details or imperfect details might have been provided by both. Not every inconsistency impacts credibility or the overall reliability of the evidence of either T.J. or Mr. Percy.

General Principles

[13] There are general principles that apply to every criminal trial:

1. Mr. Percy is presumed to be innocent of these charges;
2. The Crown bears the burden of proving each and every element of the offences beyond a reasonable doubt;
3. Proof beyond a reasonable doubt is a high standard. It is more than suspicion of guilt or probable guilt. It is not proof to an absolute certainty but falls much closer to absolute certainty than to proof on a balance of probabilities. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt. It is based on reason and common sense, and not on sympathy or prejudice. (*R. v. Starr*, [2000] S.C.J. No. 40; *R. v. Lifchus*, [1997] 3 S.C.R. 320.);
4. I am entitled to accept all, some or none of the testimony of any witness;
5. The charges can be proven through direct or circumstantial evidence. In this case, due to the consumption of alcohol, the complainant has very little recollection of the events, including of the sexual activity and whether she consented. Like any other element of any other offence, absence of consent in a sexual assault prosecution can be established through

circumstantial evidence. The burden on the Crown in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence (*R. v. Griffen*, [2009] S.C.J. No. 28, paragraph 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn. A reasonable doubt may be logically based on a lack of evidence (*R. v. Vilaroman*, 2016 SCC 33, at para. 36). The question is “whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty”(Vilaroman, at para. 38). If so, then the accused must be acquitted.

Evidence

[14] On September 14, 2018, T.J. was a student at Saint Mary’s University. She lived in the [...] residence in an apartment style unit with roommates. She also worked at the [...] services desk. This is how she was acquainted with Mr. Percy who was also employed at SMU, as a groundskeeper. Both T.J. and Mr. Percy testified that before the night of the incident, they were acquainted through their respective employment but had no previous interaction outside work. They disagree on the amount of contact they had but I am satisfied that they were friendly acquaintances.

[15] They agree that they ran in to each other in downtown Halifax in the early morning hours of September 15th, walked together back to T.J.’s residence at SMU, went in to her apartment there and had sexual activity. T.J. has very little memory of the events. Mr. Percy testified to a detailed recollection.

[16] Each had been drinking alcohol that evening. T.J. had been socializing with friends and consumed a significant amount of alcohol from early in the evening until about 2:30 a.m.. She recalled sharing a bottle of wine with a friend in her apartment, then going to the SMU pub where she consumed more alcohol and then to a downtown bar where she continued to drink. Blood samples were taken the next morning and the expert toxicologist, Christopher Keddy, was able to extrapolate back to provide her range of blood alcohol concentration (BAC) at the time of the significant events. He estimated that her BAC at 3:30 a.m. was between 166 mg/ml and 225

mg/ml. The details of his testimony will be discussed later but I am satisfied that during the time she was with Mr. Percy, she was impaired.

[17] Mr. Percy testified that between approximately 9 p.m. and approximately 2:30 a.m., he had 2-3 glasses of wine and 4 or 5 beer. All but the last beer would have been consumed while he was in the company of his friend, Scott Purdis. Mr. Purdis' testimony was put before the court by way of an agreed statement that, he only saw Mr. Percy consume 1 beer that night. Mr. Percy's testimony was that he drank the wine at Mr. Purdis' house. Mr. Purdis may not be expected to remember how many beer Mr. Percy drank but I would expect that he would remember if Mr. Percy had wine at his house. Mr. Purdis has no apparent motive to lie to the court. I accept his evidence that Mr. Percy did not consume wine at his home. Therefore, I am satisfied that at most, Mr. Percy consumed 3 beer that night between 10:30 p.m. when he went to the Lower Deck and approximately 2:30 a.m. when he left the last bar and would not have as intoxicated as he described. Mr. Percy testified that by the time he left the final bar he felt intoxicated and would describe himself as a 7 on a scale of 1 to 10 where 10 is "falling down" drunk. Given the amount of alcohol he drank and the time period in which he drank it, I do not believe he was intoxicated to that extent.

[18] T.J. testified that from just after midnight until around 2:30 a.m., she was at the Dome, a bar that incorporates three related drinking establishments. She did not have a clear recollection of events there. She recalled that her friend, A.R., had reserved a VIP section and she was with friends there. She acknowledged in cross-examination that she had discussed the evening with others who were there and information from them may have triggered her memory or filled in blanks. She recalled dancing and consuming more alcohol, including tequila shots, champagne and mixed drinks, but could not remember how much. She recalled that her feet began to hurt and she decided to leave the bar alone.

[19] Mr. Percy testified that he saw T.J. and spoke with her inside the bar. She was friendly and touched his arms or shoulders while they spoke. She returned to her friends but said she'd come back later. He saw her again as she was leaving the bar and thought she was looking for him.

He tried to get her attention but failed and followed her outside. Once outside, he called to her and she came toward him.

[20] T.J. did not recall seeing Mr. Percy inside the bar but could not say it did not happen. Her first recollection of seeing him was when she was outside looking for a cab. Cst. Potthier, one of two officers who responded to her complaint of sexual assault, testified that while speaking with him she said something like “she was downtown and recognized an individual at the bar, Matt, who was a groundskeeper at SMU”. I am satisfied that T.J. and Mr. Percy spoke inside the bar.

[21] T.J. testified that she recognized Mr. Percy as “Matt” from SMU and told him she was looking for a cab to go home. He said he lived in the area of SMU and would walk her home. She agreed and was planning to walk until she found a cab.

[22] Mr. Percy said that when he first saw her outside, her clothing was disheveled with the buttons of her shirt open, revealing her bra, so he did up the buttons for her. T.J. had no recollection of that.

[23] There is no dispute that they walked back to her residence together. She testified that she was still very intoxicated and was stumbling and felt disoriented. She had only brief recollections from the walk home. She recalled being at the top of Tower Road near the V.G. hospital parking lot and crying because she was missing A.R. She could not recall how she got to the parking lot or anything along the way. She believed they went down Tower Road as that would be her normal route but couldn’t recall anything until she got to her apartment.

[24] Mr. Percy testified that they were holding hands for much of the walk home and stopped to kiss several times. He had a detailed recollection of the route they took and that she initiated the first kiss. Her feet were sore, so she took off her boots and he carried them. A little later, he carried her on his back for a while. Eventually they arrived at the main entrance of the [...] building. He denied that T.J. cried while on the way home. He could not recall if she was speaking about A.R. but testified that she wasn’t crying or calling out for anyone.

[25] Mr. Percy said there was conversation during the walk home but could not recall much of it. She didn't tell him she was going home or where she was going, and he didn't ask. By the time they got to Tower Road, he assumed she was going to SMU. He knew she was a student but didn't know she lived on campus. By the time they got there, he assumed they were going to her room, but it wasn't discussed.

[26] Surveillance video from SMU was played. It was agreed that the time stamps on the recording are accurate. This exhibit contains a series of short segments that show T.J. and Mr. Percy entering [...] residence at approximately 3:04 a.m. and making their way through interconnecting hallways to [...] residence. Both T.J. and Mr. Percy were asked to comment on this video. T.J. could not recall the events captured in the video. She testified that the way she is walking in the video is not how she normally walks. She said she appeared to be very intoxicated, stumbling, off-balance, mis-stepping, and swaying.

[27] Mr. Percy testified and was cross-examined at length about the events depicted in the video. He eventually acknowledged that some of his recollections were not supported by the video. For instance, in his statement he had reported that they met two people while walking through the hallways. The video only shows them meeting one person. He had also said that T.J. put her boots on, but the video clearly establishes that she did not.

[28] He testified that they kissed in the elevator to her floor. T.J. could not recall being in the elevator but assumed they took it since she lived on [an upper] floor.

[29] T.J. remembered being in the entrance of her apartment, near the front door and thanking Mr. Percy for walking her home. She testified that he started to make her uncomfortable because he became very quiet, giving only short answers, and seemed intense. She felt scared because he seemed different. She acknowledged in cross-examination that she had not told police in either of her two interviews that his demeanour had changed or that she had felt afraid. In fact, she had told D/Cst. Mitchell that she trusted him, kind of knew him and was ok with him being in her apartment.

[30] Once inside the apartment, T.J. recalled telling Mr. Percy that she wanted to go to bed. She recalled unscrewing the cap for her medication which helps her sleep. She could not recall whether

she actually took it but believed she had since this was part of her nighttime routine. Her next recollection was of entering the shower in her bathroom. She said this would be her normal practice when she gets home after an evening out, that she wanted to get away from Mr. Percy and hoped he would leave. Mr. Percy made two recordings on his phone (Ex. 11). Based on the first of these recordings, I am satisfied that there is a gap in T.J.'s memory between when she arrived in the apartment and when she went to the shower. Her hair is dry in the first recording which began at 3:16 a.m. Her hair is wet in the second video which began at 3:42 a.m. Based on this, and the timing of the recording, I believe that the activity in the first video took place before T.J. went into the shower. In that first video, T.J. is performing oral sex on Mr. Percy. T.J. did not recall having done this.

[31] Mr. Percy testified that once T.J. opened the apartment door, she told him he could go in and then directed him to her bedroom. He went in, followed by her. Once inside, she immediately removed her shirt by taking it off over her head, along with her bra and threw them on the floor. He was cross-examined extensively on this. He acknowledged that no bra can be seen in the photographs taken in her room the next day (Ex. 2) and the Agreed Statement of Facts (Ex.1) confirms that police did not find a bra on the floor with or near the clothing she'd worn that night. The only bra located was in the closet under clothing. T.J. was not asked about her bra and I don't know if the bra in the closet is the one she was wearing that night or not. This is not significant, since even on her evidence, she took her clothing off and put a robe on to go to the shower.

[32] According to Mr. Percy, she then removed her pants and was totally naked. He then removed his shirt and pants and put his phone on the bedside table. T.J. then immediately left the room for 5 - 10 seconds and when she returned, she went to the desk and picked up a container of lubricant and some condoms from the right side of the desk which was located near the window. He lay down on the bed and removed his underwear. She came to the bed, sat on top of him, straddling him and tossed the condoms onto his chest. Mr. Percy acknowledged that in his statement to police he said that she had removed the condoms and lubricant from a drawer of a dresser located near the window. The photographs in Ex. 2 show that the piece of furniture in that

area is a desk, not a dresser, and it has no drawers. The photographs show a strip of condoms on the bedside table.

[33] T.J. testified that the lubricant and condoms were kept in a drawer in the bedside table not on the desk. However, she testified that she had recently moved in to the residence and not everything was unpacked and put away. Photographs taken of the room after the events show miscellaneous items on top of the desk. These include moisturizer, makeup, bottles of prescription and non-prescription medication, a hairbrush, and a makeup mirror. I believe that some of these items would normally be kept elsewhere so, while I accept that the condoms and lubricant would normally be kept in a bedside drawer, it is quite possible that they had not yet been put away and were on the desk with the other items.

[34] Mr. Percy recalled that after she tossed the condoms onto his chest, he picked up his phone to set his alarm. She started putting lubricant on his penis, he had the phone in his hand and she was looking at it. At this point, the camera in his phone was not on. She then started to perform oral sex on him, looking right at the phone and, according to him, “performing for the camera”. She stopped performing oral sex for a moment, giggled and asked him to hold her hair. He did so and pressed record on the camera. He said he believed, from her actions when looking at the phone, that he had her consent to record.

[35] Mr. Percy testified that while she was performing oral sex on him, he could see her looking at the camera. He recalled that, during the recording, he explicitly asked her if she liked what she was doing and if she wanted to have intercourse to which she gave affirmative responses. The recording confirms these questions were asked and answered in the affirmative, but does not, in my view confirm that she looked at the camera. The recording begins with T.J. in the process of performing oral sex on Mr. Percy. This continues for most, if not all, of the recording. During the recording, there are periods when the screen goes black. During this time, sounds can be heard, including Mr. Percy’s voice, so I infer that the recording continued but the phone was put down or the lens otherwise covered.

[36] Mr. Percy testified that after the end of the recording, they changed positions and she lay on her back with him over her. He then grabbed a condom, put it on and they began having missionary intercourse. After about 5 minutes, he removed his penis from her vagina, intending to switch positions, but she stood up, rubbed her vagina and left the room. He then heard the shower.

[37] T.J. had no recollection of any of this, including of performing oral sex on him, the missionary sex or the recording. She testified that she did not consent to this activity and would not have consented. When cross-examined on her apparent voluntary engagement in performing oral sex on him in the first video, she testified that there may have been some force or threat applied before the recording was turned on.

[38] She recalled going into the shower almost immediately after entering her apartment. She recalled sitting in the bathtub with the shower running and believed she started to fall asleep as she next recalled the door opening, someone pulled the shower curtain back, picked her up and carried her back to her bedroom. She was naked. The light in the bathroom wasn't on and, at the time, she thought it was her roommate or her roommate's fiancée who was carrying her, but the bedside light was on and when she got in to the bedroom she realized it was Mr. Percy.

[39] She recalled putting her robe on and telling him that she wanted to go to bed. She then lay down and believed she passed out. She testified that her next memory was of waking up with Mr. Percy on top of her, with his penis in her vagina, her knees pinned up to her chest and his full weight was on her knees. She recalled that she told him she was in pain, that it hurt, and wanted him to stop. She testified that she did not want the intercourse to happen and did not consent to it.

[40] She described another brief recollection of looking up and seeing Mr. Percy sitting on the edge of the bed performing oral sex on her. It is not clear where this fits chronologically. She recalled moving away from him and he got up on the bed over her, apparently preparing to have vaginal intercourse. She recalled seeing that he wasn't wearing a condom and told him to stop because he didn't have a condom but there happened to be a condom nearby. She testified that she didn't consent to him performing oral sex on her and didn't want it to happen. She said she did not

want to have intercourse with him and hoped that by telling him he couldn't have intercourse because he wasn't wearing a condom, it would be a way to get him to stop without making him angry. It didn't work because there were condoms on the bedside table.

[41] Mr. Percy testified that after he heard the shower and she didn't return, he went to the bathroom door to check on her. The lights in the bathroom were off and she was sitting in the tub with the shower on. She confirmed she was ok when asked. After asking for and receiving permission, he got into the tub and held her. After a few minutes, she suggested getting out and they did. Neither dried off and they walked back to her bedroom.

[42] The Crown elicited evidence from D/Cst. Wood that when he entered the apartment the next day to photograph the scene and take exhibits, neither the carpet nor the sheets on the bed were wet. The Crown submitted that if two wet naked people had walked down the hall and gotten into bed, they would have been. I simply don't have the evidence to be able to say that. In my view, it is not a matter of simple common sense to say how much water would have been on the carpet or, in the absence of evidence about what kind of carpet it was, how fast it would dry, etc.

[43] Mr. Percy testified that once back in her bedroom, he asked her if she wanted to continue having sex and she said yes. At this point he started to perform oral sex on her and she grabbed his hair and started pulled him closer to her. The photographs of Mr. Percy taken the day after (Ex. 10) show that his hair was very short - shaved almost to the skin on the sides and a little longer on the top and back. The Crown submits that it is not credible that she could have been holding his hair because of its length. I agree that it is unlikely she was holding his hair. However, he also said she was holding his head. I attribute the use of the word "hair" as a lack of precision in his evidence as opposed to an inconsistency that impacts credibility.

[44] Mr. Percy testified that after 3 - 4 minutes of him performing oral sex on her, they resumed missionary vaginal intercourse. According to him, he still had the condom on from before and it had remained on through the shower and while he performed oral sex on her. Only one used condom and one empty wrapper were found in the room.

[45] He testified that she had been actively engaged and moaning during the intercourse and he grabbed his phone and started taking another video. He believed her earlier consent to be recorded continued. This second recording began at 3:42 a.m. and is just over 5 minutes in duration. In it, Mr. Percy is having vaginal intercourse with T.J. in the missionary position. Mr. Percy testified that when T.J. become louder, he didn't know if she was climaxing or in pain so asked if she wanted to stop. He said that she very quietly said "no", and then he reiterated "no" and then she again said "no". So, they continued to have intercourse. He testified that he was asking her if she was ok and she was confirming she was ok by nodding. This recording also goes black after a couple of minutes, but the audio continues. Mr. Percy testified that this is because he put the phone down, intending to turn off the camera but it didn't go off, so the recording continued with just audio. After a couple of minutes, he realized the camera was still recording so turned it off.

[46] T.J. testified that she was not aware these recordings had been made until the police told her in November of 2017. She said she did not consent to being recorded, was not aware she was being recorded and would not have consented. She said she barely knew Mr. Percy and would not have consented to being recorded even if she was with a boyfriend or girlfriend because nothing is ever private.

[47] She described the sounds she is making in the second recording as sounds of pain, not of pleasure. She testified that what she sees in the second video is not consistent with either of the memories she had of their sexual activity. I infer from this that she has no memory of the activity captured in the recordings. In cross-examination, it was suggested that when asked in the second video if she wanted to stop, she said "no". She initially agreed that she thought that's what she had said. After being given an opportunity to listen again, she said she wasn't sure what she'd said.

[48] Mr. Percy testified that they continued to have intercourse for about 5 more minutes after he turned off the second recording. Then, she tapped his shoulder and told him she had to stop because she was sore, he said no problem and they stopped. He threw the condom on the floor, she asked him to cuddle her and they rolled over to go to sleep.

[49] T.J. testified that when she woke with him asleep beside her, her robe was still on and she got up and ran down to the security desk. She was frightened and told the security people that she'd been raped, he was still in her room and she wanted the police called. She recalled that the police and paramedics arrived, she was taken to hospital where a sexual assault evidence kit was completed, and she then went to the police station to provide a statement. She said she experienced vaginal and hip pain and significant nausea after the medication she was given at the hospital.

[50] Mr. Percy testified that he was woken by police. The officer who arrested him had a flashlight and he believed he had his gun drawn. Mr. Percy could not clearly see because of the flashlight but assumed that police draw their guns when making an arrest. He was naked in bed and was arrested. I accept the evidence of Sgt. Bourdage, who arrested Mr. Percy, that he did not have his gun drawn during the arrest. However, I believe that Mr. Percy believed he did.

[51] Cst. Antoine Varin testified that he received a call a little after 4 a.m. that there had been a sexual assault at [...] residence.

[52] The agreed upon evidence discloses a broad timeline for the significant events. At approximately 2:30 a.m., T.J. and Mr. Percy left downtown and walked back to SMU, arriving at the entrance to the [...] residence at 3:04 a.m. At 3:16 a.m. until 3:19, T.J. was performing oral sex on Mr. Percy. Sometime between 3:19 and 3:42 a.m., T.J. entered the shower and came out. At 3:42 a.m. until 3:47 a.m., Mr. Percy and T.J. had intercourse. A little after 4:00 a.m., Cst. Varin received a call of a report of a sexual assault at [...] Residence, meaning that by then, T.J. was at the front desk and had reported the incident.

[53] Cst. Varin and Cst. Potthier responded to the call and met with T.J. who was in a staff room. She was wearing a bathrobe with no shoes or socks. She was hugging her legs, crying and shaking, and had her head buried between her knees. She smelled strongly of alcohol. Cst. Varin introduced himself and explained why he was there. He said that for the first 8 - 12 minutes, she did not respond to questions and there was no conversation at all. She was hyperventilating, so he gave her time and consoled her. It was not his role to take a statement and he didn't want to be looking down to write while she was speaking so his notes are not detailed. Once she began

talking, she provided her name but cried during the whole process and the information she provided was in small snippets which didn't seem chronological. It took about half an hour to find out there was a suspect but still they didn't know where he was. They eventually learned that he might still be in her room.

[54] In cross-examination he confirmed that during their conversation, T.J.'s utterances to him included:

- "sleep with him just a little bit so he falls asleep" - he explained that this was said in the context of actually "sleeping" and was not a reference to sexual intercourse
- pretend to sleep while he was going down

[55] Cst. Brian Potthier confirmed the general description of T.J.'s demeanour provided by Cst. Varin. He was not present for the entire time that she was with Cst. Varin, however, when he was present, he was able to take more notes than Cst. Varin. He testified that she was extremely disoriented and her demeanour and utterances were alarming to him. She said she lived in the building but was providing different room numbers so he spoke with staff to get her correct room number. Staff said that none of the addresses provided by her were correct. She was referring to herself as "you", saying "you do ... "or "you do that". Her demeanour changed quickly from hysteria to clarity and then back.

[56] Cst. Potthier also testified that T.J. made a number of utterances, including:

- She was downtown and recognized an individual at the bar, Matt, who was a groundskeeper at SMU
- I slept with him just enough to have him fall asleep then escape
- The whole thing just happened, what you do is just lay there and pretend to sleep and then leave
- I woke up in the middle of it and he was full on raping me
- Almost an hour later he was done
- I was so tired and just going along

[57] T.J. could not recall making these utterances, but I am satisfied that she made them. They are not admissible for their truth. Those that are inconsistent are available as prior inconsistent

statements for the purpose of assessing credibility or reliability. They are also available for the purpose of establishing her demeanour and emotional state after the events.

[58] Lynn Dorcas, a sexual assault nurse examiner, testified. She confirmed that she had conducted an exam on T.J. on the morning of September 15th. She examined her, took photographs and collected evidence. She observed bruises on her right knee, right outer thigh, outer right knee and right shin. During the internal exam, she noticed swelling of the hymen and redness of the genital walls. T.J. was given medication for common sexually transmitted disease, the morning after pill and antibiotics. Some of these medications can cause stomach problems, including nausea and cramping.

[59] Urine and blood samples were taken from T.J. at approximately 8:30 a.m. on September 15th. Analysis of her blood showed presence of alcohol and Venlafaxine (a prescription drug) in a range associated with therapeutic use.

[60] Christopher Keddy, a forensic toxicologist, was qualified as an expert to provide opinion evidence in: drug and alcohol analysis; the human absorption, metabolism, and elimination of drugs, alcohol and other intoxicants; and, the effects of drug, alcohol and other intoxicants on the human body, including performance and behaviour. A summary of his credentials and experience is set out in his C.V. (Ex. 4). His report was entered on consent. (Ex. 5).

[61] Mr. Keddy's BAC extrapolations for T.J. were based on assumptions that she consumed her last drink no later than 2:30 a.m. and that she was an average eliminator. I am satisfied that Mr. Keddy's assumptions are reasonable, so his extrapolations are valid. He testified that if her last drink was at 2:30 a.m., her BAC at 3:30 a.m. was between 166 and 215 mg/ml. If her last drink was at 2:00 a.m., the estimated BAC at 3:30 would be between 171 and 225 mg/ml.

[62] He also provided opinions about the level of impairment and impact on behaviour that one would expect with this BAC alone and in combination with Venlafaxine.

Legal Principles and Analysis

Sexual Assault in General

[63] In *R. v. Ewanchuk* ([1999] 1 S.C.R. 330), the Supreme Court of Canada clarified the elements of sexual assault. Those elements, when applied to this case, mean that the Crown is required to prove: (1) Mr. Percy touched T.J.; (2) he intended to touch her; (3) The touching was of a sexual nature; (4) she did not consent; and, (5) he knew that she did not consent or was reckless or willfully blind to her lack of consent.

[64] The defence does not dispute that Mr. Percy touched T.J., that he intended to touch her and that the touching was sexual. At issue is whether the Crown has proven that she did not consent to the sexual activity and that Mr. Percy knew that she didn't consent.

[65] In *R. v. Hutchinson* (2014 SCC 19), Cromwell, J. said that the *Criminal Code* provides for a two-step process for analyzing consent to sexual activity. The first step is to determine whether the evidence proves the complainant did not consent. Consent at this stage is defined in s. 273.1(1) as the voluntary agreement to engage in the sexual activity in question. If there is a reasonable doubt about whether the complainant consented, the court must go on to the second step and determine whether there are circumstances that invalidate that consent.

[66] Sections 265(3) and 273.1(2) list circumstances where consent is not obtained. Those that may apply to this case are:

- s. 265(3) ... where the complainant submits or does not resist by reason of:
 - (a) the application of force to the complainant ...; or,
 - (b) threats or fear of the application of force to the complainant

- s. 273.1(2) . . . no consent is obtained where:
 - (b) the complainant is incapable of consenting to the activity;
 - (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.

[67] The focus of the evidence and submissions in this case was on whether T.J. was incapable of consenting due to the consumption of alcohol and prescription medication (s. 273.1(2)(b)).

[68] Following the instruction from *Hutchinson* requires me to first consider whether the Crown has proven that T.J. did not consent. If I have a reasonable doubt about whether she consented, I will go on to determine whether the Crown has proven that her consent was invalidated by any of the circumstances in s. 265(3) or s. 273.1.

[69] Finally, even if the Crown proves that T.J. did not consent or that her consent was invalidated, I must determine whether the Crown has proven that Mr. Percy knew of or was reckless or willfully blind to the fact that she was not consenting or that her consent was not valid.

Issue 1: Has the Crown Proven that T.J. Did Not Consent to the Sexual Activity?

[70] As I said above, consent is defined in s. 273.1 as the voluntary agreement to engage in the sexual activity in question. The Supreme Court of Canada, in *J.A.*, described it as “the conscious agreement of the complainant to engage in every sexual act in a particular encounter (2011 SCC 28, at para. 31). In that case, the court was asked to determine whether a person could provide consent in advance for sexual activity that occurred after they were unconscious. The court’s conclusions were summarized at para. 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*.

[71] The absence of consent is subjective and determined solely by reference to the complainant’s “subjective internal state of mind towards the touching, at the time it occurred” (*Ewanchuck*, at para. 26). Absence of consent is proven if I am convinced beyond a reasonable doubt that T.J. was not, in her own mind, agreeing to engage in the sexual activity.

[72] In cases where capacity to consent is an issue, it is very difficult to address consent without considering capacity. If consent requires “voluntary” and “conscious” agreement, the analysis necessarily engages a consideration of capacity, especially, where, as is the case here, there is a suggestion that the complainant was unconscious during some of the sexual activity.

[73] The Crown submits that the only reasonable inference from the second recording taken by Mr. Percy (Ex. 11) is that T.J. was unconscious when he was having intercourse with her. The defence argues that there is a reasonable doubt about whether she was unconscious. He suggests that there is movement of her head and a possible movement of her arm which is suggestive that she is not unconscious. Further, because of the comments made by T.J. to the responding officers, the defence argues that it is possible that she was only pretending to be asleep during this recording.

[74] Cst. Varin testified that T.J. said something like “pretend to sleep while he was going down” and Cst. Potthier testified that she said to him “what you do is just lay there, pretend to sleep, then leave”. T.J. could not recall saying these things so could not explain them. These statements were made at a time when T.J. was, according to the officers, hysterical, intoxicated and making very little sense. The comment to Cst. Potthier is capable of more than one interpretation. The most favourable to the defence is that she was telling the officers that at some point during the sexual activity with Mr. Percy she pretended to be asleep.

[75] To properly explain my conclusions on this point, I have to describe the second video in some detail. At the beginning of the recording, the camera is moving and not focussed on anything. The first clear image, at 15 seconds, is of T.J. Her lower face, neck, breasts, upper arms and hair can be seen. She is laying on her back with her head on its side, her right arm stretched out to her side at shoulder level and her left arm stretched out vertically above her. Mr. Percy can be seen having vaginal intercourse with her, in the missionary position. For most of the video portion of the recording, the camera’s focus is on T.J.s breasts or on their pelvic area. Mr. Percy can be seen thrusting. At certain points, the screen is black for brief periods. After the first of these periods, T.J.’s head is no longer off to the side. After the second, her head is again off to the side. At no point does the video capture her moving her head or show her eyes open. Her arms remain in the same position throughout. When the view expands, her legs can be seen. Both legs are up and on either side of Mr. Percy. During the recording, Mr. Percy pauses his thrusting from time to time and when he does, T.J. does not move. Mr. Percy can be heard speaking but virtually nothing can be heard from T.J. for the first 2 minutes. After 1 minute and 51 seconds, the video becomes black

but the audio continues. At approximately 2 minutes, T.J. can be heard making sounds like moaning or whimpering.

[76] So, for approximately 2 minutes, there is no indication that T.J. opens her eyes, voluntarily moves any part of her body or makes any sound, even when Mr. Percy is vigorously thrusting. During that time, the position of her arms is virtually unchanged. Her head is back and appears to be almost hanging over the edge of the bed. Her body appears flaccid and is jostled by Mr. Percy's thrusting. Her head is seen in two different positions but the transition from one to the other and back again occurs during a time when the camera is not capturing any video. Her head obviously moved but I do not believe that she consciously moved it.

[77] The recording is clear and convincing and does not allow for any reasonable inference other than that she is unconscious for approximately 2 minutes, during which Mr. Percy is having intercourse with her. Her comments to the police officers that she may have pretended to be asleep at some point during the sexual activity do not raise a reasonable doubt about her state of consciousness during the period captured in this recording.

[78] I will come back to this when I address capacity to consent but, in my view, the fact that T.J. was unconscious during a part of the sexual activity, establishes absence of consent without recourse to a capacity analysis under s. 273.1(2)(b). I say this because the statutory and common law definition of consent referred to above requires "voluntary", "conscious", "actual active" consent. A person who is unconscious cannot possibly provide consent in a way that satisfies this definition.

[79] In *J.A.*, the court also said that a person cannot consent in advance to sexual activity while unconscious. Consent requires "a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act." (*J.A.*, at para. 45). Therefore, any consent obtained prior to her becoming unconscious would not make the sexual activity while she was unconscious consensual.

[80] Sexual activity also occurred between T.J. and Mr. Percy during a time when T.J. was conscious. It may not be strictly necessary for me to consider whether the Crown has proven absence of consent to that activity but because it may be relevant to the rest of my analysis, I will.

[81] Mr. Percy testified that T.J. initiated much of the sexual activity, that he regularly asked her if she wanted to continue and that she was a willing partner throughout. The Crown suggests that his evidence is overly rehearsed, implausible, internally inconsistent and should be rejected outright. In arguing that absence of consent has been proven beyond a reasonable doubt, the Crown relies on T.J.'s testimony that she did not consent, her testimony that she would not have consented, her negative feelings toward Mr. Percy when they got to her room and her behaviour after the event.

[82] T.J. did recall two brief episodes of sexual activity and testified that she did not want this activity to happen and did not consent to it. Because consent is determined solely by reference to T.J.'s state of mind, if accepted, this testimony would constitute evidence of absence of consent. However, for a number of reasons, I cannot conclude that her memory of these events and of her absence of consent during them is reliable. I say this because of her level of impairment at the time, because her memories are generally disjointed and fragmented and because of specific issues with her recollections.

[83] For example, in cross-examination, T.J. acknowledged that D/Cst. Mitchell asked her if she at any point told Mr. Percy to stop. In response to that question, she told D/Cst. Mitchell that she remembered scratching his face or neck. In the interview she went on to say that he was hurting her and she wanted him to stop and confirmed that she scratched his neck on his left side. She did not tell D/Cst. Mitchell that she told him she wanted him to stop. However, she testified in direct, that she told him it hurt and that she wanted him to stop. She did not testify in direct about scratching or attempting to scratch Mr. Percy. Photographs taken of Mr. Percy on September 15th don't show any marks on Mr. Percy's face or neck and D/Cst. Wood, who took the photographs, confirmed that he looked at Mr. Percy's face and neck and did not see any injuries. Whether T.J. told Mr. Percy to stop or struck him is not determinative of whether she consented. She is not required to tell him to stop or strike him. However, it is relevant to my assessment of

the reliability of her recollections. I accept that T.J. was tired, hung over, perhaps still intoxicated and sick when she spoke to D/Cst. Mitchell and cannot be expected to have recalled and reported minor details. However, the question from D/Cst. Mitchell about whether she told him to stop was a clear and direct question concerning an important piece of information. Her response to that question was significantly different than her evidence at trial.

[84] She also gave evidence that she would not have consented to sexual activity with Mr. Percy that night. Initially when asked in direct examination about the sexual activity in the first video, her response was suggestive of an actual memory of absence of consent. However, in cross-examination, she revised or clarified that testimony and agreed that she had no actual memory of whether she had consented to the activity in either the first or second recording but that she assumed she was not consenting because she would not have consented to sexual activity with Mr. Percy that night. Later, she again confirmed that, with the exception of her memory of telling him to stop because she was in pain, her testimony that she did not consent to sexual activity was based on her belief that she would not have consented as opposed to any actual memory of not consenting.

[85] In *Al-Rawi*, the Nova Scotia Court of Appeal seems to have accepted that this type of evidence about whether a complainant “would have” consented may have a bearing on the determination of consent. (para. 70).

[86] In this case, I find that T.J.’s evidence that she would not have consented has very little impact on my determination of whether she did consent. I say this because of the evidence of her consumption of alcohol and the expert’s opinion about the likely effects of alcohol on behaviour. The evidence establishes that T.J. consumed a significant amount of alcohol prior to the sexual activity and had a BAC of two to three times the legal limit. The expert, Mr. Keddy, testified that at this BAC, people experience impairment with typical effects that include: decreased inhibitions; increased confidence; inability to assess risk; increased risk taking; and reduced ability to make sound judgements. Mr. Keddy agreed in cross-examination that impairment can create a person who is willing to do things that he or she would otherwise not do. I accept T.J.’s evidence that alcohol does not make her a different person. I also accept that she would not have consented to

sexual activity with Mr. Percy that night if she had been sober. However, in light of the expert testimony, I cannot say that she would not have consented to sexual activity with him, given her impairment by alcohol.

[87] The Crown says that T.J.'s feeling toward Mr. Percy when she first entered her room is suggestive that she did not consent. She testified that she started to feel scared when she got to her room because his demeanour changed. Despite feeling scared, she believed she took her medication which she uses to help her sleep, removed her clothing and went to the shower while he was still there. I accept that in her intoxicated state, she might have thought this was a way to move away from him. However, her recollection of the order of things does not accord with the objective evidence in the recordings. Because of the significant gaps in her memory when she first got back to her apartment, I cannot rely on the accuracy of her recollections of how she felt when she arrived. Further, the first recording, taken at 3:16 a.m. (within 10 minutes of arriving in her room) shows her performing oral sex on Mr. Percy. What is shown in that video tends to contradict that she was afraid and wanted him to leave.

[88] The Crown also points to her reaction when she woke up and went to report the incident. I have no doubt that she was distraught when she woke up naked, next to Mr. Percy with few recollections of what had happened, in pain, perhaps still intoxicated and disoriented. When she met with staff and police she was sobbing and clearly felt violated. I have no doubt that she would have been very distressed, but her level of distress is equally consistent with the general circumstances and her level of impairment/intoxication and not necessarily indicative of absence of consent.

[89] The first recording is highly indicative of consent. In it, T.J. is performing oral sex on Mr. Percy. The video continues for 3 minutes and 16 seconds and, in it, she appears to be a willing participant. During most of the recording, Mr. Percy's hand can be seen on the back of T.J.'s head in her hair. There does not appear to be any force being applied to her head. His hand is in her hair but not apparently pulling it and there is no indication that T.J. is any pain or distress. Mr. Percy can be heard encouraging her to continue. She is actively involved and appears to respond

to him both verbally and through her actions. She seems to give an affirmative response when asked if she likes it.

[90] During the audio-only portion of the second recording, T.J. is apparently no longer unconscious as sounds can be heard from her. Mr. Percy can be heard saying “do you want me to stop?”, followed by “no”. He testified that she said “no” twice. She initially testified that she could hear herself say “no” in response to that question but after listening to the recording again, said that she couldn’t be sure. From his tone, it seems that he is confirming what she’s said but even after repeatedly listening to this portion of the audio, I am unable to hear what she says. Later, near the end of the recording, Mr. Percy can be heard saying “do you want me to stop?” No response can be heard from T.J. Mr. Percy can then be heard saying “are you ok?” Again, there is no reply. Then he says “are you ok sweetie? We can stop. It’s fine. Are you all right? I’m right here. I’m right here sweetie”. During this time, all that can be heard from T.J. is some whimpering and what sounds like an intake of breath.

[91] I believe that T.J. was probably not consenting during the audio-only portion of the second video. I believe she had just regained consciousness and was in some pain. I believe she probably did not want to engage in sexual activity, but leaving aside issues with capacity, I cannot say that absence of consent has been proven beyond a reasonable doubt during this part of the recording.

[92] In summary, the Crown has not proven absence of consent for the sexual activity that took place when the complainant was conscious. However, the Crown has proven beyond a reasonable doubt that T.J. was unconscious and not consenting to the sexual activity recorded on the first part of the second recording.

[93] Of course, that is not the end of the matter. The Crown still has to prove that Mr. Percy knew or was reckless or willfully blind to the fact that she was not consenting.

Issue 2: Has the Crown Proven that Consent was Vitiating Through Lack of Capacity or Otherwise?

[94] As I have said, the law is clear that an unconscious person is incapable of consenting (*R. v. Al-Rawi*, 2018 NSCA 10; *R. v. Esau*, [1997] 2 S.C.R. 777; and, *R. v. J.A.*, 2011 SCC 28). During

the part of the recording when I have found that T.J. was unconscious, she clearly also did not have the capacity to consent.

[95] Issues with her capacity short of unconsciousness as they relate to the other sexual activity are more difficult to resolve. Mere consumption of alcohol, impairment or even severe intoxication is insufficient to vitiate consent. An intoxicated person whose inhibitions are reduced may choose to have sex with people or in circumstances they would not choose if they were sober. They may have significant and painful remorse or regret when they become sober. That does not mean their consent at the time was not valid. Having sex with a severely intoxicated person may be unethical or immoral but it is not always illegal. Recently, in *Al-Rawi* (at para. 66), after a comprehensive review of the pre-existing jurisprudence, the Nova Scotia Court of Appeal articulated the test for capacity as follows:

Therefore, a complainant lacks the requisite capacity to consent if the Crown establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity.

[96] T.J. consumed a significant amount of alcohol before the sexual activity with Mr. Percy. She described herself as having a high tolerance for alcohol given her size (5'2" and 90 pounds) and she regularly consumes moderate to high amounts of alcohol.

[97] Mr. Keddy, the expert toxicologist, differentiated between impairment and intoxication. He said that impairments are experienced but don't necessarily result in outwardly visible effects, whereas intoxication is the external manifestation of impairment. He said that tolerance does not impact impairment, just the behavioural manifestations of that impairment (intoxication). Therefore, it is T.J.'s level of impairment that is relevant to her capacity to consent. Her level of intoxication and her tolerance may be relevant to Mr. Percy's knowledge of whether she had capacity to consent but are not relevant to her actual capacity to consent.

[98] Mr. Keddy testified that everyone experiences impairment with a BAC of 100 mg/ml or above, whether they are an experienced drinker or not. T.J.'s BAC was between 166 and 225 mg/ml, depending on whether she consumed her last drink at 2:00 a.m. or 2:30 a.m. Even the lowest is significantly above 100 mg./ml. Mr. Keddy testified that he would expect a person with a BAC in the range attributed to T.J. to have a high degree of impairment.

[99] Mr. Keddy testified that the impairing and intoxicating effects of alcohol are dependent not only on the ultimate BAC but also the rate at which the person attains that BAC. A person who consumes stronger drinks such as shooters in rapid succession, may get a rapid rise in BAC and have a greater degree of impairment/intoxication. There is some evidence that T.J. was consuming tequila shooters and other hard liquor while at the Dome. However, the sexual activity in question took place an hour or more after she stopped drinking and I don't have evidence about whether or not any spike in BAC would have dissipated so I am not relying on this portion of Mr. Keddy's opinion.

[100] Mr. Keddy also testified about the potential effects of Venlafaxine, the medication T.J. regularly took, when combined with alcohol. T.J. testified that she regularly took Venlafaxine at bed time. She could not recall whether she actually took the medication that night. The report of blood analysis simply says that the drug was in her system at therapeutic levels. Mr. Keddy was not asked to explain what this meant. Without expert assistance, I cannot say whether presence of the drug in her blood at "therapeutic levels" the next morning confirms that she took the medication the night before or not. Given this and her lack of memory, I cannot conclude that she took the medication so cannot say that the potential impacts of the drug described by Mr. Keddy were present.

[101] Mr. Keddy did say that even normal concentration of the drug combined with high alcohol concentration would make the impairing and intoxicating effects of the alcohol occur at lower concentration and have more profound effect. However, the increasing effect would not be profound.

[102] Level of impairment is internal so has to be determined by reference to the person's self assessment together with evidence about the quantity of alcohol consumed, expert evidence and inferences from the outward behavioural indicia of impairment. In this case there is considerable evidence to suggest that T.J. was severely impaired:

1. She consumed a significant amount of alcohol;
2. She described herself as being extremely drunk and as drunk as she'd ever been. She could not recall ever having passed out due to consumption of alcohol in the past;
3. She has significant memory loss, including of significant events. She said that she had experienced memory lapses from drinking in the past, perhaps once or twice a year, but not to the extent that she experienced here;
4. Mr. Percy said that when he first saw her, her clothing was disheveled with the buttons of her shirt open, revealing her bra;
5. The evidence from Mr. Keddy as to the normal impairing effects of alcohol consumption with a BAC of 166 mg./ml to 215 mg. /ml;
6. The fact that she passed out and became unconscious during the sexual activity; and,
7. Within half an hour after the sexual activity she was sobbing, hysterical, and not able to provide a coherent chronological narrative.

[103] In contrast, the surveillance video which records her at approximately 3:05 a.m. (about 10 minutes before the first sexual activity) shows T.J. walking for some time and over some distance. She can be seen swaying and weaving but is walking without staggering or stumbling. She is seen dropping a boot but bends down to pick it up without falling or stumbling. She is holding Mr. Percy's hand but does not appear to be using him for support and does not lean on him or need him to help hold her up. Before entering the building, they are not holding hands and T.J. is walking on her own without any apparent difficulty.

[104] There is no evidence that she threw up (other than the next morning after receiving medication) or lost control of her bodily functions.

[105] In the first of the two recordings, at 3:16 a.m. she appears to be alert and engaged.

[106] One of her recollections is significant because it directly relates to the criteria for an operating mind set out in *Al-Rawi*. In her testimony about Mr. Percy performing oral sex on her, she said that she realized he was not wearing a condom and recalled telling him that they could not have intercourse without a condom. This demonstrates an appreciation of the nature and quality of the sexual activity and an understanding that she could agree or decline to engage in, or to continue, the sexual activity. The third aspect of the test for capacity set out in *Al-Rawi* is that she know the identity of the person wishing to engage in the sexual activity. There is ample evidence that she knew who she was with. Immediately after the event, she was able to tell the officers that his name was Matt, that he was the groundskeeper and that they'd run into each other downtown.

[107] As I have said, the Crown is required to prove beyond a reasonable doubt that T.J. lacked the capacity to consent. When I apply the legal test to the evidence, with the exception of the period when she is unconscious, I am not convinced beyond a reasonable doubt that she lacked the minimal capacity required to consent to sexual activity.

[108] Consent can also be vitiated through threats or violence. T.J. suggested in her direct testimony that it was possible that Mr. Percy had threatened her before engaging in the recorded oral sex. She did not testify that she remembered being threatened so there is no direct evidence of this and there is nothing in the video to suggest that she was being forced in any way. As such, I do not believe that consent was vitiated by use of force or threats.

[109] Consent could also be vitiated if T.J. expressed, by words or conduct, a lack of agreement to engage in the activity; or, having consented, expressed, by words or conduct, a lack of agreement to continue to engage in the activity. T.J. testified that she said no and/or scratched or tried to scratch Mr. Percy. As I have said, I do not find that her recollections about this are reliable. She also recalled telling him that they could not have intercourse without a condom. However, he put a condom on and her evidence suggests that she consented once that condition was complied with.

Issue 3: Has the Crown proven that Mr. Percy Knew or Was Reckless or Willfully Blind to the Fact that T. J. Was Not Consenting or Lacked Capacity to Consent?

[110] Because of my conclusions on the issue of consent, I need only consider if the Crown has established the requisite level of knowledge for the period when she was unconscious. Of course, evidence relating to this issue can come from elsewhere.

[111] The defence in this case disputes that the knowledge requirement has been proven by asserting an honest but mistaken belief in consent and capacity. The defence of “honest belief in consent” (or capacity) is simply a specific application of the common law defence of “mistake of fact”: an accused is not guilty of an offence if he honestly believed a state of facts, which, if true, would render his conduct lawful. In the sexual assault context, the defence has been qualified by common law and Parliament.

[112] To succeed, the accused’s “belief in consent” must be more than just a belief that the complainant, in her mind, was consenting. The “belief in consent” must include a belief that the complainant “affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused” (*Ewanchuck*, at paras. 49 & 64; also see *R. v. Park*, at para. 39).

[113] The court in *Ewanchuck* (at para. 65) also said that “to be honest, the accused’s belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors listed in ss. 273.1(2) and 273.2 of the *Code*.” The applicable portions of s. 273.1 are set out above. The portions of s. 273.2 which are potentially applicable in this case are:

- s. 273.2 It is not a defence to a charge under sections 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 wilful 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.

[114] The defence is not available simply because an accused asserts it. Particularly with a jury, it is important for the judge to first determine if there is an air of reality to the defence (*Esau*, at para 15; *R v Osolin*, [1993] 4 SCR 595 at 682. If there is no air of reality, for any reason, including that the statutory preconditions are not met, then the defence should not be considered. (*R. v. Barton* 2017 ABCA 216, at para. 248, appeal heard and reserved, [2017] S.C.C.A. No. 387). In

this case, there is an air of reality to the defence of honest but mistaken belief in consent and capacity.

[115] The law relating to honest but mistaken belief in capacity to consent is not as well developed as it is in the context of mistaken belief in consent. The court in *J.A.*, which is the leading case from the Supreme Court of Canada on capacity in the sexual assault context, did not deal with this issue directly. However, it appears from other cases, that the common law “mistake of fact” defence would apply to a mistake about capacity to consent (*Esau; R. v. A.A.*, [2001] O.J. No. 1718). Where the defence is applied, the same common law and statutory restrictions that apply to the defence in the consent context would also apply in the capacity context.

[116] The court in *J.A.* did comment on the inherent difficulty in applying a “mistaken belief” defence when the complainant is unconscious:

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. (*J.A.*, para. 49)

[117] I am approaching my task from the perspective that if Mr. Percy honestly believed that T.J. was conscious, had capacity to consent and communicated her consent, was not willfully blind or reckless about those things, and took reasonable steps to ascertain that she was consenting, he would be entitled to an acquittal.

[118] Mr. Percy testified that before the recording, he asked T.J. if she wanted to have sex and she said yes. He also testified that both before and after the video, T.J. was much more engaged. She was moaning, had her hands on his back and was an active partner. Further, he believed her head and her arm moved a bit in the video and that this movement was voluntary. In summary, the gist of his testimony is that he believed she had consented before, believed she was conscious during and confirmed with her that she was ok and consenting to continue.

[119] The defence argues that Mr. Percy’s testimony should be believed or leave me with a reasonable doubt on this issue. He submits that the circumstances, including their earlier

consensual sexual activity and the fact that she communicated her agreement to have intercourse prior to the second recording supported Mr. Percy's belief that she was continuing to consent. Further, Mr. Percy's testimony, corroborated by the recording, that he asked her if she was ok and if she wanted to stop establishes that he took reasonable steps to ensure she was consenting. Finally, the defence argues that there is no evidence that Mr. Percy had his eyes open or was looking at T.J. during the period when I have determined that she was unconscious, so it is possible that he wasn't alert to what the video shows.

[120] Dealing with Mr. Percy's testimony requires me to consider his credibility in general and specific to these issues. The Crown has argued that his testimony was rehearsed. I agree that his manner of giving evidence was odd. He seemed to struggle with answering a direct question with a concise answer. It often seemed that in order to answer a question, he had to go back to some pre-set point in time and recite everything verbatim leading up to the point of the answer. That could be an indication of a witness who has memorized and rehearsed a story. In Mr. Percy's case, I'm not sure it is. I believe it could be a personality quirk or even a mild disorder/disability. He also at times seemed to be overly particular about the way a question was framed or overly precise in his answer. That could be interpreted as evasiveness or "being difficult" but, again, with Mr. Percy I am not sure it is. I believe it may be the result of being worried that the questioner was tricking him. As such, I am not going to use his demeanour or manner of testifying to assess his credibility.

[121] There were also numerous minor internal inconsistencies in his evidence or between his testimony and the statement he gave police. Many are not significant and have virtually no impact on my credibility or reliability assessment. Others don't impact credibility but do impact reliability. For example, his recollection of how much he drank, his certainty that T.J. put her boots back on while waking through the corridor at SMU, and his belief that they met two people in that corridor, not one. These inconsistencies may not have been motivated by a desire to mislead the court and are not significant in and of themselves. What is significant is the level of confidence he expressed that he was correct in those memories until he was proven to be wrong.

[122] There are also some inconsistencies and areas of implausibility that relate directly to the sexual activity and do impact my assessment of his credibility. For example, Mr. Percy's testimony about the duration and circumstances of their intercourse was different than what he described in his statement to police. In his testimony, he said that after the shower, he performed oral sex on T.J. and then they had intercourse for just over 10 minutes. He said 5 of those minutes were captured on the second recording and after the recording, they continued to have intercourse for another 5 minutes before she said she was sore and they stopped. In his statement to police, he told the officer that after they came back from the tub, he performed oral sex on her and then they had vaginal sex for 3 - 4 minutes. The version he testified to is also unlikely given the objective timeline of events. The recording ended at approximately 3:47 a.m. T.J. recalled waking and finding Mr. Percy asleep beside her. She then got up and went down to the security desk by way of walking down at least one set of stairs before getting the elevator. Cst. Varin testified that he received the call to attend the residence a little after 4:00 a.m. at which point T.J. must have been already at the security desk and have reported the incident. On the version Mr. Percy gave in court, they would have stopped having intercourse at about 3:52. This would mean that in less than 8 minutes, they both fell asleep, she woke again, made her way downstairs, spoke to the staff, they called police and police were dispatched. This may be theoretically possible but I don't believe it is what happened. It makes much more sense that there was no more sexual activity after the second recording ended. In some circumstances, an error about timing would not be consequential but here it directly relates to the act and Mr. Percy could be motivated to say that the sex continued after the recording ended to support his testimony that she was more engaged than what is captured on the recording.

[123] His testimony that T.J. was active and engaged before and after the recording and that all of her voluntary movements occurred when the camera was down is simply too coincidental to be believed.

[124] Addressing the defence argument that Mr. Percy may not have been aware that she was unconscious in the first part of the video. I agree that there is no direct evidence that Mr. Percy's eyes were open or that he was looking at T.J. during the recording but there is circumstantial

evidence. Mr. Percy is holding the recording device and for most of the recording it is focussed on the breast area or on where their pelvic areas are joined. It also appears that, at points, the camera is moved closer or zoomed in for a close-up. The only reasonable inference is that Mr. Percy was attending to the quality of the recording and must have been, at points, checking the screen to ensure he was capturing what he wanted to capture.

[125] I accept that there could be instances when people are engaged in sexual activity where one partner might not notice their partner's state for a short period. For instance, in the dark, if their eyes are closed or at the height of passion. This was not that situation. It was not a short period of time, it was not dark, and Mr. Percy's camera appeared focussed on what he wanted to record.

[126] Even if I were to accept Mr. Percy's evidence that she was more engaged before and after the video, this does not change what is on the video. I accept that T.J. had a tolerance for alcohol which may have caused her to appear to be less impaired than she actually was during much of their interaction. However, this also does not change what is on the video. His honest belief that she was consenting and had capacity at an earlier time could not continue in the face of what was clearly right in front of him, the fact that she was unconscious.

[127] The defence submits that Mr. Percy's questions to T.J. during the audio-only portion of the second recording satisfies the requirement that he take reasonable steps to ensure consent and/or capacity. However, it is only at about the midway point in the recording, that he starts to ask if she is ok and wants to stop. His questions might be interpreted as reasonable steps to ensure that she was consenting at that point in time but those steps do not, in my view, operate retrospectively to validate the previous 90 seconds when he took no steps.

[128] She was unconscious on the video, I am convinced beyond a reasonable doubt that Mr. Percy knew that she was unconscious and took no steps whatsoever to ensure she was consenting during that period which continued for almost 2 minutes.

[129] In summary, I find that the Crown has proven that, for the period when T.J. was unconscious, Mr. Percy knew she was unconscious, knew she was incapable of consenting and took no steps to ensure that she was consenting.

[130] Therefore, I find him guilty of sexual assault contrary to s. 271 of the *Code*.

Issue 4: Has the Crown Proven the Recordings were Made Surreptitiously?

[131] Mr. Percy has been charged with the offence of voyeurism contrary to s. 162 of the *Code*. To convict him of that offence, the Crown must prove: (1) Mr. Percy surreptitiously recorded T.J.; (2) In circumstances that gave rise to a reasonable expectation of privacy; and, (3) The recording was made for a sexual purpose.

[132] The provision contains exemptions which do not apply in this case. The defence has conceded that Mr. Percy made the recording, that T.J. had a reasonable expectation of privacy and that the recording was made for a sexual purpose. The only issue is whether the recording was made surreptitiously. That term is not defined in the *Criminal Code*. In *R. v. Pall* (2017 ONSC 6900) it was defined as “secretive, clandestine, or unnoticed” (at para. 35). In *R. v. Lebenfish* (2014 ONCJ 130, at para. 25), Judge Green defined it and provided examples from previous cases:

Although not a word of common legal usage, the word "surreptitiously" bears a common understanding. The *Canadian Oxford Dictionary* defines "surreptitious" as "obtained, done, etc. in secret or by stealth or by illicit means; clandestine". The entries in *Black's Law Dictionary* and *The New Penguin English Dictionary* are to identical effect. The "surreptitious" nature of the impugned conduct is rarely at issue in the relatively few reported cases respecting the offence of voyeurism. By way of example only, these cases include those in which:

Video images were captured by way of a camera concealed in a stepdaughter's bedroom (*R. v. S.W.*, [2011], O.J. No. 5555 (C.J.), *R. v. F.G.*, [2011] N.J. No. 95 (P.C.)) and *R. v. M.S.A.*, [2013] A.J. No. 489 (P.C.);

*A video-recording was made of a thirteen year old girl in a hotel shower by way of a camera secreted in a shaving bag (*R. v. R.H.C.*, [2010] B.C.J. No. 2960 (P.C.);

*A video camera was hidden in a wastebasket in an office washroom so as to afford an angled view of the toilet (*R. v. Laskaris*, 2008 BCPC 130);

*A man relieving himself at an office urinal was secretly photographed by a co-worker seated in a nearby closed toilet cubicle (*R. v. Weinheimer*, [2007] A.J. No. 1459 (P.C.));

*The genital and anal regions of a young female child being changed by her caretaker in a park were videotaped by a man using a zoom lens and a "blind" while hiding in his car in a nearby parking lot (*R. v. Rudiger*, *supra*).

[133] In *Lebenfish*, the accused had taken photographs at a public beach. His camera was small but not miniaturized, concealed or disguised. The photos were taken from the side or behind and one person testified that she was not aware she was being photographed and would not have consented. Judge Greene concluded that the Crown had not established that the recordings were surreptitious. In doing so, he said that the subject's absence of consent or lack of awareness of being recorded are not essential elements of the offence. Rather, the section focuses on the conduct of the accused (para. 27). He went on to say that absence of consent and awareness could allow for an inference of surreptitious conduct, if combined with evidence of a hidden or disguised recording device.

[134] It is unclear whether the Crown is required to prove not only that the recording was surreptitious but that the accused intended it to be so. This issue arose in *R. v. M.E.N.* (2014 ONCA 69) but the court did not decide the issue because the trial judge's reasons demonstrated that he had found both that the Appellant's recordings were objectively surreptitious and that he had subjectively intended it to be so (at para. 4). In *Lebenfish*, Judge Green said that this will rarely be an issue as in the majority of cases, proof that an accused concealed a recording device in a private setting will almost inevitably result in the inference that he intended to record surreptitiously (at para. 33).

[135] In this case, T.J. testified that she did not know she was being recorded and would not have consented to being recorded. She said she did not learn of the existence of the recordings until November of 2017 when D/Cst. Mitchell advised her. Her absence of consent and knowledge is

not determinative of whether the recording was surreptitious but could give rise to an inference that it was.

[136] Mr. Percy testified that he was holding the phone to set his alarm and that, before T.J. started to perform oral sex on him and before he started the first recording, she was playing for the “camera”. He interpreted this as knowledge and her consent to have him record both recordings. He also testified that during the recording, she looked at the “camera” and that for both recordings, the “camera” was held within her eyeline, not far from her and without any obstructions.

[137] The defence argues that Mr. Percy believed she was aware she was being recorded and did nothing to hide the fact that he was recording. The phone was held in plain sight, in close proximity to T.J. and there were no obstructions between her and the phone. Therefore, the defence argues, there is no evidence of stealth or secrecy.

[138] I do not accept Mr. Percy’s evidence that T.J. knew she was being recorded. Again, it is too coincidental to be believable that the “playing” for the camera and the looking at the camera occurred only before the recording was started. In the first recording, which is 3 minutes long, at no point did I see her look at the phone which was held off to her side. In the second video, her eyes are closed throughout.

[139] I accept that the phone was held such that T.J. could have seen it if she looked and in that sense the device was not concealed. However, a phone is not the same as a camera. A phone is commonly used to record or take photographs but that is not its only use. Openly holding a camera, as was the case in *Lebenfish*, may negate a finding that any recording made is surreptitious. However, openly holding a cellphone does not. The real issue in s. 162 is whether the recording was secretive not whether the device was secretive. A cellphone held openly could, in my view, still result in a surreptitious recording if the fact that the phone was being used for that purpose was hidden.

[140] Further, there are instances during each video where the video goes black but the audio recording continues. I infer that this occurs because the phone is put down. I find that, in the second recording, the times when the phone is put down coincides with times when T.J. is

apparently stirring. The only reasonable inference from that is that he was trying to avoid detection.

[141] I am convinced beyond a reasonable doubt that the recordings were made surreptitiously because while the device was not hidden, the fact that the device was being used to record was kept secret. I am also convinced beyond a reasonable doubt that Mr. Percy intended the recordings to be surreptitious.

Conclusion

[142] I have a reasonable doubt as to whether T.J. consented and had the capacity to consent when sexual activity between her and Mr. Percy began. However, at some point she lost consciousness. For approximately 1 ½ minutes to 2 minutes she was unconscious while Mr. Percy had intercourse with her. The law is absolutely clear that an unconscious person cannot consent to sexual activity. During that time, Mr. Percy knew that she was unconscious. As such he knew she was not consenting or lacked the capacity to consent. He took no steps during that time to ensure that she was consenting. Therefore, I find him guilty of sexual assault contrary to s. 271 of the *Criminal Code*.

[143] Mr. Percy recorded T.J. during the sexual activity with him. That recording was made for a sexual purpose, was made secretly, without her knowledge and consent, and Mr. Percy intended it to be secret. Therefore, I also find him guilty of voyeurism, contrary to s. 162 of the *Criminal Code*.

Elizabeth Buckle, JPC.