

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Julian Fitzgerald*, 2023 NSSC 431

Date: 20231201
Docket: *Yarmouth* No. 510361
Registry: Yarmouth

Between:

His Majesty the King

Plaintiff

v.

Julian Joseph Fitzgerald

Defendant

Restriction on Publication: Restriction on Publication: s.486.4CC

Judge: The Honourable Justice Pierre Muise

Heard: December 1, 2023 in Yarmouth, Nova Scotia

Counsel: Chelsea Cottreau, for the Plaintiff
Christopher Arisz, for the Defendant

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

- (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
- (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a)

By the Court:

DECISION FOLLOWING TRIAL (Delivered Orally December 1, 2023)

INTRODUCTION

- [1] Mr. Fitzgerald was tried on charges alleging that he, on or about September 12, 2019, at or near Yarmouth, Nova Scotia, did commit a sexual assault on FM, contrary to section 271 of the Criminal Code, and did unlawfully confine her contrary to section 279(2) of the Criminal Code.
- [2] If the allegations are true, the following occurred. Mr. Fitzgerald locked the doors of his car, physically forced FM into the back seat, pulled her pants down, and had sexual intercourse with her against her will. After he was done, he unlocked the door she was leaning against and told her to go. This all occurred when Mr. Fitzgerald had only met FM briefly, for the first time, about two weeks prior and, in communications regarding meeting on the day in question, FM had made it clear that she did not want to engage in sexual activity.
- [3] Mr. Fitzgerald said the incident did not occur and he was not even there.
- [4] If the circumstances alleged are proven, there is no reasonable inference other than that the touching was intentional, for a sexual purpose, and Mr. Fitzgerald knew, or was wilfully blind to the fact that, FM was not consenting, and the confinement was intentional with no indication of lawful authority.
- [5] The evidence of FM is clear that she did not consent. There is nothing supporting an air of reality to the defence of honest mistaken belief in communicated consent.
- [6] Therefore, if FM's allegations are accepted as having been proven beyond a reasonable doubt, the offences charged are made out.
- [7] Consequently, the issue in the case at hand is that of the credibility and reliability of the witnesses, and whether it is such that the alleged sexual contact and confinement have been proven beyond a reasonable doubt.
- [8] I am rendering this decision orally. Should it be reduced to writing, I reserve the right to edit it for grammar, structure, organization, ease of reading, and complete citations or references, without changing the reasoning or the result.

LAW AND ANALYSIS

W. (D.) CREDIBILITY AND RELIABILITY ANALYSIS APPLYING STANDARD OF PROOF BEYOND A REASONABLE DOUBT

[9] Mr. Fitzgerald testified. If his evidence denying the impugned activity is believed it cannot co-exist with a finding of guilt.

[10] Justice Rosinski, in *R. v. W.G.L.*, 2020 NSSC 144, at paragraphs 30, 99 and 100, used the four-point expanded *W. (D.)* test, proposed by Justice Paciocco.

[11] The four points are articulated, at paragraph 99 of *R. v. W.G.L.*, with case specific commentary omitted, as follows:

1. if you accept as accurate evidence that cannot coexist with a finding that the accused is guilty, obviously you must acquit
2. if you are left unsure whether evidence that cannot coexist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit
3. you should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused
4. even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt

[12] I also highlight that Justice Paciocco, as noted at paragraphs 30 and 31 of *R. v. W.G.L.*, warns against a “sequential” application of the “*W.(D.)* rules” which leads to the misconception that the exculpatory evidence is to be considered in “isolation from the conflicting evidence” to determine whether it can be rejected. As he stated:

In deciding whether the Crown has proved the accused to be guilty beyond a reasonable doubt the evidence must be considered as a whole. It is therefore possible to reject entirely evidence that is inconsistent with the guilt of the accused and convict solely because of the considered and reasoned acceptance beyond a reasonable doubt of evidence that the accused is guilty.

[13] Also, as noted at paragraphs 140 to 143 of the dissenting judgment in *R. v. Jeffrey Lea Hogg*, 2013 PECA 11, evidence that is disbelieved or rejected cannot raise a reasonable doubt. The Supreme Court of Canada, in *R. v. Hogg*, 2014 SCC 18, agreed with the dissenting judgment and allowed the appeal.

[14] There can be evidence which, though it could, even if true, co-exist with a finding of guilt, may, if accepted or not rejected, raise a reasonable doubt, for instance because it undermines the credibility of the vital Crown witnesses. That possibility is, at least impliedly, provided for in item 4 of the Paciocco formulation. However, to ensure the standard or proof beyond a reasonable doubt is applied throughout it is helpful to expressly highlight it.

[15] As cited with approval in *R. v. R.R.D.G.*, 2014 NSSC 78, at paragraph 10:

Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. [Emphasis in the original]

[16] This statement emphasizes that evidence which, if accepted, or at least not rejected, cannot co-exist with a finding of guilt can be from any source, not just the accused or other defence evidence.

[17] To ensure consideration of these additional points, I would add to the expanded *W. (D.)* test, proposed by Justice Paciocco, by reformulating the fourth point as follows:

4. Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit, considered in the context of the evidence as a whole, proves the accused to be guilty beyond a reasonable doubt. If there is evidence from any source, that you accept or do not reject, which raises a reasonable doubt, you must acquit. However, evidence that is rejected cannot raise a reasonable doubt.

[18] No one, other than FM and Mr. Fitzgerald would have been present for the alleged sexual contact and confinement.

[19] So, this case, like many, revolves around the credibility and reliability of the evidence of the complainant and the accused, bearing in mind that it is not simply a credibility contest, and the alleged offending behaviour must be proven to have occurred beyond a reasonable doubt.

[20] I will start by assessing the credibility and reliability of the complainant, while commenting on that of the other lay Crown witnesses as well.

FM

- [21] FM provided evidence which includes the following.
- [22] She met Mr. Fitzgerald through a mutual friend, HS, when she accompanied her to the CIBC bank in Yarmouth where Mr. Fitzgerald gave HS some money.
- [23] She had been informed that Mr. Fitzgerald was paying HS just to hang out with him. Her family was struggling financially at the time. She thought it would be good if she could also get paid simply for hanging out with him.
- [24] So, she started communicating with him on social media.
- [25] They had only been communicating maybe two weeks before she met up with him in person.
- [26] She explained that they arranged to meet to go for a drive, have a chat, and get breakfast and that she would get paid for doing so.
- [27] On that day, September 12, 2019, she took the bus to her school, the Yarmouth High School. She arrived there slightly before 9 AM. However, she did not go into the school. She walked straight to the ballfield that is next to the gun range near the school.
- [28] She was 16 years of age at the time. She was not sure how old he was. However, she estimated he was between 30 and 40 years of age. She had told him she was 16 when they first started talking.
- [29] Mr. Fitzgerald picked her up there around 9:10 am. He was driving and she was in the front passenger seat. They drove around the block, which was an 8 to 10-minute drive. They pulled back into the same area, parking at the far-left corner. You could not see the road from there and there were no other vehicles around.
- [30] He then locked the doors using the automatic lock, turned towards the passenger seat area, grabbed her by the shoulder, pushed her into the backseat through the middle of the two front seats, went into the back with her, pulled her pants down, pulled his own pants down, pulled the fabric of her body suit to the side of her vagina, and proceeded to have vaginal intercourse with her.

- [31] She was asked on cross-examination whether there was a centre console that she was pushed over. She said there was a something in the middle but it was not a huge obstacle.
- [32] She said she was laying sideways on the backseat leaned up against the back door or “doorish” area on the driver side and gestured with her hands to illustrate the point. His body weight was on top of her body and his penis was in her vagina. He did not use protection.
- [33] She testified that she did not say “no” nor “yes”. However, she did not consent and, in communications leading up to the meeting, she had stated that she did not want to engage in sexual activity.
- [34] She explained that she had to specifically make that clear in communications for the following reasons. In one text message there had been a discussion about sending nude pictures. She had sent photos of herself topless but with her hands covering her breasts, as well as a photo of herself in her underwear, through Snapchat. In addition, she was not sure what he and HS had done. She thought it might have involved sexual activity so she wanted to make it clear that she would not do anything sexual.
- [35] She volunteered that she was very naïve in trusting that he would hang out with her and give her money.
- [36] He did not ask permission and she did not give him permission to do what he did.
- [37] She was feeling scared and hurt. She was not really there. She just let him do what he did. It felt disgusting and terrible.
- [38] She had felt scared and confused when he had locked the doors. She had not asked him to lock the doors.
- [39] The force he had used to put her in the back was also enough to be scary to her.
- [40] She did not know how long the intercourse went on for. She thought it was maybe 3 to 7 minutes, not a long time.
- [41] When he finished, he told her to pull up her pants and go. She did pull up her pants. He unlocked the door by flicking the mechanism on the door she was

leaned up against. She left and walked back to the school. It was only a 4 to 5-minute walk.

- [42] She was feeling so many emotions, including anger, sadness, regret for being there, to the point where it was almost as though she was feeling nothing, and ignoring what was happening.
- [43] She explained the word “finished” as meaning that he stopped having sex with her. She said he did not ejaculate.
- [44] She arrived back at the school between 9:30 and 9:45. The first class, which was the law class and went until 10 AM, had not finished. There, she saw her friend, SH. She pulled SH out of the law class and told her the gist of what had happened between her and Mr. Fitzgerald, without getting into detail. She was not sure whether she told her Mr. Fitzgerald’s name. SH did not question her about the incident.
- [45] A few days later she received a message request from Mr. Fitzgerald on Facebook messenger, referencing Snapchat not working or he not being able to contact her on Snapchat. However, there was no other contact after the fact.
- [46] Prior to meeting up they had each other on Facebook and Snapchat. Afterwards she removed him from social media.
- [47] It was not until November that she spoke to the guidance Counsellor, Dave Phillips, about what had happened. He is the one who contacted the authorities.
- [48] She said she did not provide Mr. Fitzgerald’s name at first because she was afraid of talking about it and, at that point, she was afraid of going through the legal system. She said she made up a name for the guidance counsellor because she felt guilty and that maybe it was her fault and that she might be throwing someone under the bus. She was not comfortable enough talking about the incident to name the perpetrator. It only became real to her when she had to talk to the police and identify the person. At that point she told the police that it was Mr. Fitzgerald.
- [49] She identified Mr. Fitzgerald in the courtroom. She had not seen him since September 12. However, prior to that she had seen him when: she met him with HS; at social events; and, out about working.

- [50] She described the car as a dark grey car with a dark or black interior. However, she said she did not recall many details. She was not sure about the make of the car. She had a hard time remembering. She could not recall whether she ever felt she knew the make. She said it might have been a Honda or a Toyota. When she had met him at the CIBC, she was not sure whether he had a car or not. She did not look for it. Cst. Hugh Martin testified that the car Mr. Fitzgerald had when he was arrested in December 2019 was a Dodge Dart.
- [51] She explained she was able to remember the date because she went back on Snapchat and found a photo of herself that day which allowed her to match the clothes she was wearing to the date.
- [52] On cross-examination it was suggested to her that there was a child car seat in the back of the car. She firmly and confidently disagreed with that suggestion, clearly stating there was no car seat in the car.
- [53] Similarly, she firmly and clearly disagreed with the suggestion that she told HS or anyone that she was lying.
- [54] She did not recall telling HS about what happened. She admitted it was possible that she had but that it was very unlikely because she and HS had an altercation shortly after the incident. She thought someone else brought it to HS' attention.
- [55] HS testified. Her evidence was consistent with that of FM. More specifically, the points she confirmed include the following:
- She, herself, got to know Mr. Fitzgerald as a customer when she was working at Tim Horton's. They started communicating through Facebook messenger, then Snapchat. He messaged her asking if she wanted \$200. She of course said yes. He told her to meet him at the Yarmouth CIBC. So that she would not be alone, she brought FM. She was 16 at the time. He did give her the \$200 while FM was with her.
 - She also confirmed that FM did not tell her about what had happened with Mr. Fitzgerald. She found out about it through others.
 - She also testified on cross-examination that she did not have any discussion with FM after September 12, 2019. That is consistent with FM's evidence that they had an altercation with each other.

[56] She testified that she had known FM 16 or so years and that they were close until probably three years ago when they were in the Yarmouth Consolidated Memorial High School. However, the fact that they went their separate ways and had no discussion after September 12, removes any concern that HS may be providing evidence to help FM as a long-time friend.

[57] What is even more noteworthy is that she testified that, about two years before her testimony, Mr. Fitzgerald messaged her asking what side she was taking. She responded that it was not about taking sides, it was about what is right and what needed to be said.

[58] Further, on cross-examination, it was suggested that FM had sent her text messages about the matter. She clearly denied that. She was asked whether she told anyone that there would be any text messages like that. She clearly said there would not be.

[59] That confirms FM's evidence that she did not send a text to HS saying she was lying about what happened with Mr. Fitzgerald.

[60] I note as well that there was no evidence introduced at trial to indicate any such communication occurred between FM and HS, or anyone else for that matter. Therefore, there is no indication of any basis for those suggestions.

[61] There was similarly no indication of any basis for the suggestion that FM had told anyone she had lied.

[62] SH also testified. Her evidence was consistent with that of FM. More specifically, the points she confirmed include the following:

- On September 12, 2019, she, herself, was in law class, sitting in the chair closest to the door. The class started at 9 AM. However, it was probably close to 9:30 AM before she saw FM. The door opened. FM's face was bright red. She was crying profusely. She looked very distraught. She had also seen FM through the classroom windows, as she was walking into the school from outside, and FM appeared upset at that time as well.
- The emotional state described is consistent with that which one could reasonably expect from a person who had just been through what FM described.

- She went out in the hallway and asked FM if she was okay. FM did not tell her details of what had happened. She had understood that FM was supposed to meet Mr. Fitzgerald for breakfast in exchange for money. FM had told her that a couple of days before. That morning FM told her that the breakfast did not happen and that “he” had other plans. Later the same day she specifically gave the name Julian Fitzgerald as the “he” she was referring to. However, she had previously named him when talking about the breakfast plans.

[63] The evidence regarding FM telling SH, a couple of days before, that she planned to meet Mr. Fitzgerald for breakfast was not admitted as a prior consistent statement. It was admitted as context for the comment that breakfast did not happen and he had other plans. In addition, it was elicited on cross-examination with a view to eliciting evidence that was inconsistent with her statement to the police. She agreed that it was supposed be first thing in the morning. She was asked if she could have mixed it up. She volunteered that she did get it mixed up when she gave her statement to the police. She had said that it was supposed to be for lunch, but she corrected herself. She was asked why she mixed it up. She said it was because she gave the statement four months after the incident. That is a reasonable explanation, and she did correct herself with the police. That “mix-up” does not detract from the credibility and reliability of her evidence in any meaningful way.

[64] She acknowledged that she and FM had been friends for about three years before the incident. She said she did not talk to FM about what she would say in court. She only asked FM how the court proceedings were going. She also did not talk to FM about what she would say before going to the police. She didn’t even think she would be speaking to the police because she had not seen what had happened. She said FM did not give her details to tell. FM only told her that she mentioned her name to the police. So, she knew it was possible that the police would want to talk to her. These points alleviate much of the potential concern that, SH, as a friend might give her statement and evidence in such a way as to buttress FM’s evidence.

[65] All Crown witnesses gave their evidence in a straightforward and un-evasive manner.

[66] There was no change of demeanour on direct examination and cross-examination.

[67] Their evidence made sense. It had a logical flow.

[68] FM made statements against interest in explaining why she did what she did. She referred to being naïve in believing Mr. Fitzgerald would pay her for going to breakfast or hanging out. She volunteered her family's financial hardship as making the chance of bringing in \$200 just by hanging out appealing to her, as a 16-year-old. She felt guilty and was blaming herself.

[69] HS made a similar statement against interest regarding accepting \$200 from Mr. Fitzgerald.

[70] FM readily admitted things she could not recall for sure and acknowledged that they could have been as suggested by the Defence, while still conveying what was likely the case. There was clearly no professed lack of memory to avoid answering any questions,

[71] There were no inconsistencies in the Crown evidence that were not reasonably explained. For example:

1. SH provided a reasonable explanation for mixing up whether the plan had been to go for breakfast or lunch, which explanation I have already discussed.
2. FM provided a reasonably plausible explanation for why she initially gave the guidance Counsellor a false name.

[72] There was one point at which FM's evidence came across as somewhat flippant. When it was suggested to her that the false name she gave to the guidance Counsellor was Jeff Doucette, she responded by saying: "you could say it was Timbuktu and I wouldn't be able to recall what I said". However, that may have not been meant to be flippant but rather to highlight that she had no recollection of the name that she gave. In addition, otherwise, she displayed respectful and proper attitude throughout her testimony.

Sense

[73] I was able to observe both FM and Mr. Fitzgerald on the stand. FM is a very tiny person. Mr. Fitzgerald is taller and more corpulent than average. It was apparent that it would have been relatively easy for him to grab her and put her in the back seat as she describes. So, her description of that action is plausible.

[74] Especially given her size, it would make sense that a center console would not create a huge obstacle.

[75] There is nothing surprising about a 16-year-old, in the same circumstances as FM, not knowing the make of the vehicle she was in. There is even less reason to expect that, even if she did know it at the time, she would remember it 4 years later when she is testifying.

[76] FM's evidence that the car was grey is consistent with Mr. Fitzgerald's evidence he had a grey Dodge dart. On direct he said it had an all-grey interior, without specifying the shade of grey. On cross-examination he said it was light grey. Nevertheless, that is not necessarily inconsistent with a dark interior. Even a light grey would be dark compared to a white or light beige interior. He suggested that FM would have known the colour of his car because she and HS would have walked past it on the way into the CIBC as it was parked right in front. However, there was no evidence that either of them had seen him in that car before. There was also no evidence indicating that they were looking for his car. The only evidence is that they were meeting at the bank for Mr. Fitzgerald to give HS money.

[77] Mr. Fitzgerald's evidence was that she referred to his grey Dodge dart in her first communication with him. If that is true, it shows that she observed it somewhere or it was described to her by someone. On the other hand, if Mr. Fitzgerald knew that he had met her in that car and was telling Cst. Martin he was not there, he naturally would want to give Cst. Martin a reason for why FM would be able to describe his car.

[78] From the moment FM began talking about Mr. Fitzgerald locking the doors she became choked up and teared up. That caused her to have to pause mid-sentence. She finished her sentence by stating that he ended up assaulting her. Upon uttering that, she once again choked up and teared up. Similarly, when she first described the body parts involved, specifically his penis being in her vagina, her voice was shaking. It was obvious she was, again, holding back her emotions. Such emotional reactions are consistent with the trauma she alleges.

[79] Her description of what happened is consistent with her not responding to his communications to her after that date, which he, himself, acknowledged on cross-examination.

[80] FM testified that her family was experiencing financial difficulty. Therefore, the thought of being paid \$200, as had happened with HS, was appealing to her. Mr. Fitzgerald testified that it was a loan. Either way money was provided. Though it was not explored in any depth in the evidence as a potential motive to fabricate, I will address whether Mr. Fitzgerald not providing FM with money, as he had done for HS, might provide a motive for her to fabricate.

[81] To fabricate, she would have had to have orchestrated a lot of moving parts, including the following:

- She would have had to tell SH in advance she was meeting Mr. Fitzgerald for breakfast, even though it was not true.
- She would have to deliberately go away from the school when she got off the bus, without going into the school first and risk being seen by someone just waiting somewhere, as opposed to being in Mr. Fitzgerald's car.
- She would have to work herself into such a state that she could convince SH that she was distraught, in an emotional state and crying, or convince SH to play along with her fiction.
- She would have to go back to class late and tell SH that he had other plans.
- She would have to go to the guidance Counsellor knowing that he would report to the police.
- In deliberately giving a false name she would have to have planned to tell the police that it was really Mr. Fitzgerald and risk not being believed that the perpetrator was actually Mr. Fitzgerald.

[82] It would make no sense that she would go through all those hoops and emotionally taxing processes over \$200.

Julian Fitzgerald

[83] Mr. Fitzgerald provided evidence which includes the following.

[84] He received a message from FM some time around the beginning of September. She said that HS had told her to reach out to him. She asked to borrow \$250 from him. He said no. She asked again. He said no again. She asked him once to hang out. He said no. She was asking him for money to hang

out and help pay bills for her family. Otherwise, their communications were just small chitchat. They went on for around two weeks. She initiated them.

[85] When asked what was meant by hanging out, he responded that she: wanted to hang; spend time together; go for breakfast and stuff; and he said no.

[86] He agreed he tried to send a Snapchat message to FM after September 12, and, after it did not go through, he sent her a Facebook messenger message saying “hey what’s up”. However, he denied that the message also referred to Snapchat not working.

[87] On cross-examination, he acknowledged that he and FM had been communicating every other day through Facebook messenger and Snapchat. When it was suggested that he asked her to switch to Snapchat he replied that she requested it first.

[88] He said she did not say anything in her communications about sex not taking place.

[89] The only time he saw FM in person was when he met HS at the CIBC and FM walked in with HS. On cross-examination he acknowledged that he was 30 years of age at that point. He said that he was lending money to HS, not giving it to her.

[90] His car was parked in front of the CIBC. HS and FM would both have seen his car when they came around the corner as it was right there. At the time, he had a grey Dodge dart with an all-grey interior.

[91] He said that the armrest in it was “that high” and motioned with his arm and hand to signal that it would have the height of his chest. Therefore, he said there would not have been much room.

[92] He had a car seat that was always in the back on the passenger side because his wife had a three-year-old child who needed a car seat. He sometimes had to transport the children to school and sports.

[93] He added that the backseat was full of garbage and clothes, including work clothes.

[94] He testified that the backdoors had to be unlocked from the front to undo the child safety locks. The door would not open in the back unless you pushed the

button in the front. There was no manual release on the back door. The child locks were on when he bought the car. He never took them off because he had the three-year-old in back all of the time.

[95] He described what he did on September 12, 2019 as follows. He got up at 7:00 am. At 7:30 he went to the Yarmouth Tim Hortons/Wendy's location. Then he went up Starrs Road to Winners World, put gas in his car, bought cigarettes and played the machines. He then left to go to Meteghan to complete his first painting job since he took over his late father's painting company. He planned to be there around 10:30 or 11:00. He said he knew the date because it was his first job as a painting contractor and he was getting paid that day.

[96] He denied assaulting or confining FM.

[97] Mr. Fitzgerald answered questions, on both direct and cross-examination, without hesitation.

[98] However, it was not consistently in a straightforward and un-evasive manner.

[99] One notable example is reflected in the following exchange on cross-examination:

- He agreed that, when he was arrested, he was not tipped off that they were coming and it took him by surprise. He agreed that he had no chance to check his schedule.
- Then it was put to him that he spoke to Constable Martin from memory. He responded that he had it written down. There is no indication that he had any opportunity to check whatever he may have written down when he was speaking with Constable Martin. So, his answer was evasive and did not make sense.
- He agreed he told Constable Martin to check the cameras at Winners World. It was suggested to him that he said that to Cst. Martin before he was told about the date of the alleged incident. He was asked when Constable Martin told him the date. His response was that, when Constable Martin said the date, he told Cst. Martin that is where he was. He added that Constable Martin told him after telling him what he was charged for and who the person was.

- The exchange in the interview where Constable Martin first mentioned the September 12 date was put to him. It was as follows:
 - He told Constable Martin to check the cameras at the Reserve.
 - Constable Martin asked why?
 - He replied “I was there probably, I was there gambling.”
 - Constable Martin asked him if he gambled every morning.
 - He replied “sometimes, yeah”.
 - Then, Constable Martin told him it was September 12.
- In response to being shown that exchange, Mr. Fitzgerald stated that Constable Martin had told him the date on the way to the police station after he picked him up at Wedgeport Lobster.
- Even if Constable Martin did tell him the date on the way to the police station, there still was no evidence on where Mr. Fitzgerald may have written down that he was at Winners World on September 12, nor that he had any opportunity to consult such writing, before telling Constable Martin he was at Winners World. So, his explanation regarding having written it down did not make sense.
- It also came across as him making things up as he went along to provide as advantageous a response as he could come up with on the spot.
- Another point indirectly related to the request to check cameras at Winners World is that, at trial, Mr. Fitzgerald testified that there was no one at Winners World besides him and the worker who usually works there every morning. However, there is no evidence that he provided any name or description of that worker to facilitate police contacting her and interviewing her.

[100] Another example is the following:

- He agreed that he had told Constable Martin he only spoke to FM once on Facebook messenger, then he stated he had talked 12 to 15

times. Then he proceeded to make his answer evasive and vague by adding that he had said they just talked here and there, not every day.

- The Crown repeated its question as to why he said there was only one message. He said it was because they switched to Snapchat after.
- The Crown asked him whether he did not think it was important. He responded that it was only a few messages.
- The Crown reemphasized that he had said there was only one message. He responded that there was only one on Facebook messenger. He added that he was allowed to maintain his presumption of innocence with Constable Martin and that he was not required to say.
- In the end, it was not clear whether he was actually saying that there was really only one message on Facebook messenger. If that had been the case, it would have made more sense that he simply would have answered that when the Crown first asked. He appeared to come up with that answer because he saw himself painted into a corner.

[101] A further example of evasiveness combined with inconsistency is revealed in the following exchange on cross-examination:

- It was suggested to him that he told Constable Martin on December 6, 2019, that he had never met FM in person. He did not directly answer that he had told Constable Martin that. However, he stated in his evidence that he never did meet FM.
- It was suggested to him that he met her at the CIBC that day with HS. He responded that he did not know it was her at CIBC that day.
- It was suggested to him that he knew by the time he gave the statement on December 6, 2019. He evasively answered that he only knew after Constable Martin told him who it was. He added that he did not know and was supposed to be meeting HS at the CIBC.

- Then he was reminded that he had testified that Constable Martin had told him it was FM on the way to detachment to interview him. He agreed, but returned to the explanation that he did not know who she was at the bank that day because HS did not say who was with her.
- It was suggested to him that, when FM reached out, he realized it was her that had been with HS at the bank. He responded: “after she reached out to me - the day after when she asked for the money”.
- Once again it was suggested that that was before December 6. He agreed and added he knew who she was.
- It was put to him that he had met her at the bank. He responded that he had met with HS at the bank.
- It was put to him that FM was there. He agreed.

[102] An additional, but less extensive example is when it was suggested to him that he had asked that they switch from Facebook messenger to Snapchat. His answer was that she had requested it first. In addition to being evasive in the sense of trying to deflect some of the responsibility for that decision away from himself, it did not make sense that, if she had asked to do so, he would not simply have said “okay”. There was no explanation for why he would ask for the same thing himself instead. It is hard to imagine a plausible explanation for that.

[103] Especially, when one juxtaposes that non-sensical answer with his denial that, in his post-September 12 Facebook messenger message, he referred to Snapchat not working, it suggests he wanted to distance himself from preferring the Snapchat platform to communicate with FM. Cst. Martin testified that things disappear quickly from Snapchat and it is hard to retrieve anything. Therefore, Snapchat would be less likely to leave a trail of his communications with FM. If he was engaging in inappropriate communication with her, he would want to erase the trail. However, in response to the allegations before the court he would want to make it appear as if he did not have anything to hide.

[104] There was little change in demeanour from direct to cross-examination. However, his evasiveness was revealed on cross-examination as described.

[105] He did make some admissions or statements against interest, such as:

- Meeting up with HS at the bank to hand her money; and,
- engaging in social media communications with FM, which included him getting a photograph of her, all when each of them was only 16 years old.

[106] His evidence that the armrest portion of the centre console would have reached the height of his chest appeared to be an exaggeration and did not appear plausible. Even at his height, an armrest that high would place his arm at an uncomfortably high position if he were to use it as an armrest. He was of above average height. So, for a person of average stature, it would have been so uncomfortable that it would have been unusable as an armrest. His exaggeration of the height of that centre console was obviously for the purpose of giving the impression that it would not have been reasonably possible to force FM through the front seats to the backseat.

[107] If Mr. Fitzgerald's evidence that he would transport the other children to school and sports is accurate, he would have been accustomed to picking up the clothes and garbage he said were on the backseat and putting them in the trunk to make room for the other children. It would have been easy for him to do so in preparation for meeting up with FM, either because he planned to put her in the backseat or because he did not want her to see the garbage and work clothes. The same comment applies to the car seat. He testified that he deleted FM's messages because he did not want his wife to see them. Conversely, it would make sense that he would not want FM to see him as a family man and would put the car seat in the trunk for that reason. If he did meet up with FM, it would make more sense that his backseat would have been cleared than cluttered, even if he was only meeting to hang out or go for breakfast.

[108] FM's evidence that she sent him a picture of herself topless and another in her underwear appears to be more plausible than her sending him a picture of herself dressed in a tank top and shorts on Snapchat, which he deleted and never responded to. He did not specifically explain why he would feel he would have to delete a picture of her fully dressed. It may be explained by his evidence that part of the reason he deleted messages was so his wife would not see them.

[109] On direct examination, he was asked how he could remember where he had been on September 12. The answer he gave was that it was because it was the last day of his first job after having taken over his father's painting business and that he was getting paid for the job that day. That would be an obvious reason to

remember that he had gone to the job site that day. If one is to believe his evidence that he was regularly at Winners World in the mornings before work, it would not provide much reason to remember that he had been at Winners World that specific day. Yet, on direct examination he did not mention anything about having won \$500 at Winners World that day.

[110] It was only on cross-examination, when he was asked how he knew specifically he went to Winners World that day, that he said it was because he had won \$500. In the circumstances, it does not appear to make sense that he would not initially mention that \$500 win, in combination with his first payday as an independent painting contractor, as being what made him remember what he did that day. Him coming up with that answer on cross-examination presents as him inventing an explanation on the spot because the Crown's question made him realize that him being paid for the painting job would not link him to Winners World.

[111] The Defence suggested that there was some sort of obligation on Cst. Martin to investigate what it called an alibi from Winners World. Firstly, there was no one from Winners World who testified about him being there. So, there was no alibi evidence. Secondly, FM only spoke to the police 3 months after-the-fact. Cst. Martin, knew, from past experience, that it was futile to try to get surveillance video footage from Winners World after a much shorter period than that, ie. 7 days. Thirdly, if Mr. Fitzgerald actually won \$500 that day, he could have inquired whether they had a record of paying out those winnings to him. That could potentially have provided a very solid alibi. Cst. Martin would have no reason to do so because the information only came out for the first time at trial.

[112] In addition to those already mentioned previously in discussing evasiveness and plausibility, there were other inconsistencies in his evidence, including the following:

- His answer to the question as to why he stopped communicating with FM was that she kept asking for money, so he stopped. That is inconsistent with his evidence that, after he had answered "no" to both of her requests for money, they continued to engage in what he referred to as "chit chat" communications. It is also inconsistent with his acknowledgement, on cross-examination, that he did

initiate communication with her after September 12, though he brushed it off as just saying “hey what’s up?”

- It was suggested to him that he told Constable Martin that, FM, in her first message to him, said “hey what’s up ... you drive that grey Dodge Dart?” He responded that she had just said “hey what’s up”. The relevant portion of the interview was put to him, and he had said to Constable Martin what the Crown had suggested. He then explained that she had said it to him, in messenger, and that he was tired at trial because he worked all night. That may provide some explanation for that inconsistency at trial.
- On direct examination he had testified that, on September 12, 2019, he had the car seat in the car because of his wife’s three-year-old child. On cross-examination, he was asked when he started having the car seat in his car. He said it was in 2017 when he “got with Jody” and that he had it in there when the child was between the ages of three and five. So, if he started in 2017, it would have come out at some point in 2019, and, the child would have been five years of age in 2019, not three.
- He said that he never took off the child locks because he had the three-year-old in the back of car all the time. He also testified that the child locks were on when he bought the car and that he did not know how to turn them off. Those were somewhat inconsistent explanations.
- There is also a plausibility question regarding the child locks. Mr. Fitzgerald, testified that, between 2017 and 2019, he was using the car to transport all the children, including to school and sports, not just a three to five-year-old. Unlike the three-to five-year-old, the older children could be more independent and make their own way out of the car. In those circumstances, it does not appear plausible that he would not have learned how to turn off the child locks.
- Plus, he did not provide any explanation for why he would only have the paint brushes in the trunk and not his painting clothes. It would appear to make more sense he would put his painting clothes there than on the back seat.
- On cross-examination, it was suggested to him that he had told Constable Martin that FM wanted him to pick her up on the

morning in question. He said he did not recall telling Constable Martin that and that he did not think that he had. He was referred to the portion of his statement where he told Constable Martin that FM had said she wanted him to pick her up that morning but that he never did pick her up. He then agreed that he had said that and that he did not pick her up. That inconsistency is on a point that approaches a central issue. As such, it is a more significant inconsistency. It demonstrates a desire, at trial, to distance himself as much as he can from even any potential of him having had contact with FM.

[113] Mr. Fitzgerald argued that any inconsistencies did not address the main point that he did not commit the offence. With respect, when the defence is that he was not there, the inconsistency regarding FM asking him to pick her up the morning of the offence is very close to being directly on the main point of whether he was there or not. The only inconsistency that would be more directly on that main point than an inconsistency regarding whether he was invited, would be an inconsistency regarding whether he went.

[114] One of the theories advanced by the defence is that someone else may have committed the offence. However, it would not make sense that FM would make plans to meet two different people the same morning.

[115] In addition, a multiplicity of inconsistencies and evasive answers can undermine the credibility and reliability of a witness, even if they are not on central points.

CONCLUSION ON CREDIBILITY AND RELIABILITY OF WITNESSES

[116] I have considered the multiple points I have outlined in relation to credibility and reliability. I recognize this is not a credibility contest.

[117] I find there are no real concerns relating to the credibility or reliability of FM's evidence.

[118] However, the multiple issues I have outlined in relation to Mr. Fitzgerald's evidence reveal significant credibility and reliability concerns in relation to his evidence.

CONCLUSION

[119] Given those concerns, I cannot accept Mr. Fitzgerald's evidence that he was not present and did not engage in the actions alleged.

[120] I reject that evidence of his. This rejection is based on my concerns regarding his evidence standing alone. It is also based on the fact that the evidence of the Crown witnesses was, for reasons outlined, so solid, watertight and had such a logical flow that it clearly is to be accepted.

[121] Since I reject Mr. Fitzgerald's evidence that cannot co-exist with a finding of guilt, it cannot raise a reasonable doubt.

[122] The evidence of FM is clearly to be accepted and it proves beyond a reasonable doubt that he committed the acts she described and that she did not consent to them being perpetrated on her. There is nothing in the evidence as-a-whole which raises a reasonable doubt regarding that. There is no evidence which raises an air of reality to any defence of honest mistaken belief in communicated consent.

[123] The forced sexual intercourse was clearly intentional direct touching in circumstances of a sexual nature.

[124] FM did not consent to the sexual activity. Her lack of protest was clearly a surrendering and acquiescence to the apparent inevitable.

[125] In the circumstances, Mr. Fitzgerald had to know, or at least have been wilfully blind, to the fact she was not consenting.

[126] There is nothing which would have communicated that she was consenting. To use the language in s. 273.2 of the *Criminal Code*, there is no evidence that FM's "voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct". In addition, the circumstances cried out for him to take reasonable steps to ascertain that FM was consenting. He took no steps. He just forced her into the back seat and engaged in sexual intercourse without any questioning regarding whether she wanted to and without any signal from her that she did. Therefore, pursuant to s. 273.2, belief in consent would not be a defence.

[127] The events described by FM establish that Mr. Fitzgerald intentionally locked the doors, physically forced her into the back seat, and put his body

weight on her, preventing her from leaving, for at least the time it took to get her in back, pull down her pants, and pull her body suit bottom aside, plus the three to seven minutes in which he was violating her sexually. There was clearly no evidence of any lawful authority for him to do so.

[128] Consequently, I find Mr. Fitzgerald guilty of both offences charged.

[129] We now need to set a date for sentencing.

Muise, J.