

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

v.

JACK DENSMORE

S U B M I S S I O N S A T T R I A L

BEFORE THE HONOURABLE MR. JUSTICE J. KRAWCHENKO
on July 26, 2024 at HAMILTON, Ontario

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SECTION 486.4 OF THE *CRIMINAL CODE OF CANADA*, BY
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Legend

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(ph) indicates preceding word has been spelled phonetically

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(ph)

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FRIDAY, MAY 31, 2024

THE COURT: Thank you. Thank you, good morning.

MR. FAHMY: Good morning, Your Honour. We don't need an introduction, Your Honour. We've been at this case for almost a couple of years now. And today is the day we make our final pitches, and my client is looking forward to finality and to a not guilty verdict because, Your Honour, the Crown has not discharged its burden to prove that Mr.

Densmore committed a sexual assault beyond a reasonable doubt. I sent Your Honour and my friend a PDF copy of some excerpts of case law. That way you have the electronic version with the hyperlinks. I also provided a paper copy for Your Honour as well.

THE COURT: Thank you.

MR. FAHMY: I don't know if....

THE COURT: Thank you.

SUBMISSIONS BY MR. FAHMY

Your Honour needs no introduction to reasonable doubt. You're sure, and that's what you need to be, is sure that they committed the offence as charged. With the – but the application of reasonable doubt in sexual assault cases is the very same as it is in any criminal trial, but its application can be difficult. In our respectful submission, it should not be in this particular case. But just to keep in mind, Your Honour that the – the classic, he said/she said scenario, it

5 would be wrong for the court to decide the case based on which is a more credible version of the two because that would be to misapply the burden of proof, which my friend has, the Crown has to establish guilt beyond a reasonable doubt. And I'm not going to get into how that could be raised by the evidence generally, whether it arises from what the defendant says with respect to the totality of the evidence.

10 But I wanted to move on to – because I think we're going to hear a lot of this on – sorry, and then this is just the *W.(D.)* analysis. But a particular feature of sexual assault cases, which I wanted to point out, this slide also from *Nyznik*, is that the focus of this trial that we conducted in front of Your Honour is not about vindication for the complainant. The focus must always be on whether Mr. Densmore – whether the Crown has proven beyond a reasonable doubt that Mr. Densmore committed a sexual assault.

25 The scrutiny of the complainant's evidence, it's the same standard as any other witness, Your Honour. I found this starting to creep up in the case law. I'm going to read it in its entirety, it's paragraph 17 of the *Nyznik* decision"

30 Although the slogan 'Believe the victim' has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling

5 the truth is the equivalent of imposing a
presumption of guilt on the person accused of
sexual assault and then [putting] a burden on
[them] to prove [their] innocence. That is
antithetical to the fundamental principles of
justice enshrined in our constitution and the
values underlying our free and democratic
society.

10 And there's another citation there, I believe it's
from Justice Hill, the *E.R.* decision, Your Honour,
which says the same thing.

15 Again, when viewing a complainant's evidence –
this is from Justice Copeland's decision when she
was sitting in Superior Court, the complainant's
evidence is not designed to be put on a better
footing than complainants or witnesses in other
types of cases. It has to be assessed rationally,
20 objectively, in the context of all the evidence of
the trial and with regard to the burden of proof.

25 And this is instructive, Your Honour, because I –
there's boiler – boilerplate submissions that we
see from the Crown, in almost every single sexual
assault case, which is that the court has to be
cognizant of myths and the twin myths and rape
myths and how a victim is supposed to behave, and
what she does or – or what he said or how he
30 reacted. You're going to hear that. I – I – just
from experience. But that's not the law because
the law isn't that this kind of evidence can't be

5 used in the context of what was going on. It's
not that it's — if it's rationally collect —
rationally connected to a logical inference on the
evidence it can be used. You're going to hear a
lot, I'm assuming, from my friend that the reasons
why we have these laws and this is what — none of
that is going to be relevant for Your Honour's
consideration. The only consideration is, what is
10 the evidence, what are the logical inferences from
that evidence, and that it cannot be put on any
kind of footstool or somehow of more weight or
more value than any other witness. The
assessments are still credibility and reliability
on what you've heard and what makes sense.

15 And it goes on to say at paragraph 43 that the
recognition that not all complainants will fight
back or cry out in response to a sexual assault,
and that complainants may react in different ways
20 to a sexual assault, and that assuming either of
those things is a rape myth, does not have the
effect of prohibiting a trial judge from assessing
based on the evidence before them, whether or not
they accept as credible a complainant's assertion.
25 I left that part out because that has to do with
an exception under *Ewanchuk*, but the following
highlighted part of the paragraph, in assessing
credibility of the evidence of a complainant or of
any witness, a trial judge must consider the
30 totality of evidence, including any ambiguous or
contradictory conduct by the complainant.

5 And Your Honour, there's plenty of that to go
around in this case. She goes on to write that,
the effect of this is that sometimes evidence may
be properly relevant to an issue at trial or to
credibility, despite the fact that if used in a
different way, it might be said to involve
engaging in prohibited use of rape myths. So, the
same evidence could be in a context, part of the
rape myths and that exact same evidence under a
10 different context, good, reliable, reasoning
evidence. To assess whether a trial judge has
engaged in impermissible reasoning, one must
consider the particular evidence, the particular
use of it by the trial judge in the context of the
evidence and issues at trial.
15

I'm not going to cite you *Ewanchuk*, Your Honour,
the seminal case about the burden that the Crown
has to – has to discharge, but essentially, the
complainant's evidence is that she did not
20 consent. If you believe that, then the Crown then
needs to prove that my client knew that she didn't
consent or was willfully blind or reckless into
getting her consent – or sorry, into purposely
withholding getting her consent when the
25 circumstances called for it. And what we have in
this case, the defence mistaken belief in
communicated consent. But just because the
complainant says she did not consent, that's in
30 issue, even though its subjective, she can say
that, and if you accept that, then we go on to the
mens rea. But the Crown has to prove that fact

beyond a reasonable doubt, and the evidence can raise a reasonable doubt that she subjectively did consent, even though she said she didn't. That's the law.

What I'm proposing to Your Honour is that there is a reasonable doubt about her subjective statement that she did not consent and that you should find Mr. Densmore not guilty on that basis. If not, further to that, that there is ample evidence to support mistaken belief in consent, and we'll get into all of that. But again, that's your second path to finding Mr. Densmore not guilty.

And there's – and again, Your Honour, the mistaken belief – and actually, before I move on because there was something I wanted to mention, is that the – paragraph 30:

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. [At this point], The accused's perception of the complainant's state of mind is not relevant.

But that only becomes relevant if she is found to be credible at this stage. And then we move on to

5 the second stage, where as Mr. Densmore has done,
denied that he had the *mens rea* of sexual assault
because he – his evidence is, is that she was
consenting, and the evidence is that that would
give rise to his mistaken belief in consent. And
that could be by words, that could be by conduct,
and their agreement as the situation kept
progressing, the initiating reciprocating in the
sexual activity in question.

10 I just want to turn your mind quickly to the law
about collusion, and I think we spoke about this
in quite some detail in the pretrial applications,
but I'm only going to mention a few things about
15 it now. Collusion does not have to be
intentional, malicious, or even conscious. It
could be unintentional, accidental, but when a
witness has their perception – I'm going to read
this because it – it says it so succinctly, Your
20 Honour. This is from the Court of Appeal decision
in *Wilkinson*:

25 The reliability of a witness's account can be
undermined not only by deliberate collusion
for the purpose of concocting evidence, but
also by the influence of hearing other
people's stories, which can tend to colour
one's interpretation of personal events or
reinforce a perception about which one had
30 doubts or concerns.

That's exactly what we have with the complainant

in this particular case. Again:

...communication among witnesses that can have the effect, whether consciously or unconsciously, of colouring and tailoring their descriptions of the impugned events.

"And when there is an air of reality to conscious or unconscious collusion", and:

...when there is an air of reality to conscious or unconscious collusion, [and this applies to similar fact evidence application that it] will not be admissible unless the Crown proves on a balance of probabilities that conscious or unconscious collusion has not tainted the testimony.

But in *R. v. Hill*, quoting a judgment by Justice Nordheimer, which was adopted, which says:

While the issue of collusion most often arises when a court is considering the admissibility of similar fact evidence, it is an issue that has relevance to the evaluation of a witness' evidence in general.

I only brought this to Your Honour's attention because the — the often quote — the often-quoted passage, delaying disclosure, standing alone will never give rise to an adverse inference against the credibility of the complainant. But what we

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5 have here is something so much more different
because this isn't about a delay in disclosing.
The complainant goes to the police, files her
online report a couple days after the meeting with
Mr. Densmore. This is more of a delayed execution
of an investigation, a criminal investigation by
the police that the complainant, which I still to
this day cannot understand how these procedures
are in place.

10 I have the ben - well, I think - in the United
States, that's where the citizen has the right,
depending on the State, to press charges. In
fact, the police are powerless to press charges
15 unless the complainant authorizes them to do so.
That's not what's supposed to happen here. That's
not our law. Our law is, is that if the police
have reasonable and probable grounds of a crime,
they are obligated to charge the perpetrator. How
20 many cases do we hear charges that we hear where
there is a domestic situation, the complainant
changes their mind, and the police turn to them
and say, it's out of our hands, that's not the
law, you made a complaint, we have reasonable
25 probable grounds, we have to take whoever it is
away. That's what's supposed to happen.

30 It's curious, but beyond that, it's something that
this court should be invited to find an adverse
inference over, because a delay in disclosure,
coupled with other evidence, just disclosing it,
coupled with other evidence can be found as an

adverse inference against a complainant. And in this case, we'll go through the evidence and I'll invite Your Honour to make that same adverse inference.

Lastly, with respect to motive to fabricate, the presence or absence of a motive to fabricate, evidence is only one factor to be considered in assessing credibility. In this case, the defence has – will be presenting you several reasons that the complainant had a motive to fabricate. And again, a motive to fabricate does not need to be malicious in any. It's just a reason. Fabricate doesn't mean completely made up. It can, but it can also mean that there are – that there are other considerations of why a witness would say what they said other than that it's not the truth. Very simple.

So, why are we here? Mr. Densmore comes before you an innocent man. We ask you that you keep....
THE COURT: Can I just stop you for a sec? Are we – are we on Zoom now or....

CLERK REGISTRAR: Your Honour, we've always been on Zoom. The – this screen is controlled by defence.

MR. FAHMY: By – sorry, by our.... Yeah, I – I – I disconnected. Do you want me to connect again to stop the video, Your Honour?

THE COURT: No, no, that's fine. I – I....

MR. FAHMY: Is that distracting to you?

THE COURT: No, that's – that's fine.

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MR. FAHMY: It's distracting me a little, to be honest. It'll just be a blank computer screen.

THE COURT: The reason why I ask, is typically, the court should be asked whether or not we're...

CLERK REGISTRAR: Oh, sorry.

THE COURT: ...we're permitting Zoom. That's why I was....

CLERK REGISTRAR: [Indiscernible], Your Honour.

MR. FAHMY: Oh.

CLERK REGISTRAR: Did you want me to dis - disengage?

THE COURT: Well, at this point, it's - it's really not relevant, so we'll - we'll - we'll permit it, but typically, leave should be grant - should be granted in order to proceed in that manner. At least the court should be aware of it, but that's fine, let's proceed. Thank you.

CLERK REGISTRAR: Apologies.

MR. FAHMY: Oh yeah, Mr. Densmore is an innocent man today, and after today, we ask you to return him in that state, that he is presenting himself to you.

So, why are we here? We're here because in a moment, that moment of him trying to protect himself from some advice that he's heard from other athletes, from YouTubers, from 2020, the Me Too movement, the consent, consent, consent, everywhere on social media, get a consent video. In some ways, this is - in some way this is very prevalent in our society today. We have the ability to instantly capture and record right

5 here, in our pockets, real evidence of what was really going on. All the police are getting body worn cameras. It's just permeated into our culture when something happens, when people want to get the evidence, the real evidence of what they're doing, what's going on, and it's being posted everywhere.

10 In another way, as you just heard from the case law, society's mantra of believe the victim has overturned so many presumptions in our society very quickly, including the dangerous – the dangerous one that the victim is to be believed first, without question. In some ways, it's become *faux pas* to say, well, you know, maybe it didn't happen, maybe the accused is just an accused. The victim needs to be believed first, without question, and you're going to hear that again from Dr. [REDACTED] through the evidence. But this can only leave a very dangerous reality that Mr. Densmore found himself in. If he's ever accused of a sexual assault, he's presumed to have done it because [REDACTED] needs to be believed without question. So, what do you do? What does he do? He makes a decision that he will try and protect himself from false allegations by making and keeping a consent video to keep a record of what actually transpired. This, as a layman, who's unfamiliar with the legalities of what constitutes legal consent, but for him, it made sense to try and protect himself from unscrupulous partners who may falsely accuse him. The motivation to do so

is entirely blameless.

And even calling it a "consent video", as the term is being used and misused by the general public, by the general social media public, and even Dr.

[REDACTED]. Nothing you did gave him consent.

She's wrong. That's not the law. Everybody's got it. You've got Youtubers, you've got lay people, you've got all kinds of different – you've got professional therapists that don't know what consent is. And then trying to even obtain a record of consent as a means to shield him from, why he is before Your Honour today. It is ironic in his testimony as he was asked in cross-examination, when he reflected after his encounter with the complainant that perhaps he was being paranoid and no longer needs to make a consent video. She said, turn it off. He did. She complied with her request and she continued to perform oral sex on him. No harm, no foul. Such was the state of mind of Mr. Densmore following his encounter with the complainant. I know we got a lot of evidence about her state of mind after, but that was his. That's what he was thinking.

But it is precisely this attempt to protect himself that ultimately failed him because it caused the complainant to enter into a spiral of panic. And from her perspective, it's understandable, completely. It's one thing to have a – and I'm talking from her perspective – it's one thing to have a one-night stand with a

5 jerk who kicks you out of the house right after
sex. It's quite another for that to happen and
for that jerk to have a video of you on your knees
performing oral sex and also having hundreds of
thousands of followers on social media. Perhaps,
if things had ended differently, he invited her to
continue to watch TV, have some deeper
conversation, make some kind of effort into
aftercare, she would have believed him when he
10 told her that he deleted the video. His evidence
is that he told and showed her. She acknowledges,
belatedly, in cross-examination that he did say
that, it's possible that he said that.

15 However, that comment from him, that
unceremoniously telling her that, I have an early
morning, you should go, instantly made her feel
used, another notch on his belt, and
understandably, would make her question his
20 motives after their sexual encounter and
inevitably question whether indeed he did keep a
video of her. This quickly spiralled into a deep
paranoia, which is understandable. It would be
devastating to her, as nothing, as the saying
25 goes, ever gets deleted from the internet. She
could be associated with that moment, causing it
to, as she wrote in her words, ruin her life.
This is why we're here today.

30 And how I'd like to approach my submissions, Your
Honour is, I mean, very briefly, the complainant's
evidence is not reliable. It has numerous minor

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5 inconsistencies, numerous. We would spend all day talking about them. I'm only going to highlight a few because they – and only – I'm only going to highlight a few and only those that corroborate Mr. Densmore's evidence. But the major inconsistencies, the major inconsistencies affect her credibility to the point where you cannot rest a conviction on Mr. Densmore.

10 First thing I want to talk to you about, Your – sorry, first submissions I'd like to make, Your Honour is about the oral sex. This is one of the biggest inconsistencies. First, was how she described her position on when Mr. Densmore had asked her, according to him, hey, get up,
15 according to her, hey, get on the floor, before the performance of oral sex. In her evidence in-chief, in her evidence in-chief, she had said that when he asked her to get off the bed, she went,
20 was seated, got on the floor, back against the bed, and then he came to her.

25 But in cross-examination, she said that when she got off the bed that Mr. Densmore had already been standing up. And because she said – and then she said – sorry, Your Honour – that she went and sat in front of him, which was very different than what she had said in her evidence in-chief. I gave her a second opportunity about that evidence,
30 but she was adamant and confirmed a second time, no, he was standing up and then I went onto my knees. And just keep in mind, Your Honour, I

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5 didn't - I didn't do a formal count, but in terms
of her absolute assertions of something in her
cross-examination, there aren't that very many. A
lot of things she said could have happened,
possible, could be. Lots. But for this, she was
sure. Who asked her to get on her knees? Not Mr.
Densmore. She did it on her own volition, and
according to her own evidence, twice, she goes to
10 where he was standing right in front of him to her
knees.

15 And actually, Mr. Densmore's evidence is that, no,
she was there first, and then he came to her. And
I remember my friend trying to cross-examine him
on, oh, you're tailoring your evidence to what the
complainant has said. If he was doing that, that
would have been - that would have been a great way
for him to do that. But he stuck to his story,
even, it was beneficial to him. That's why, as
20 you'll see throughout these submissions, Mr.
Densmore's evidence rings true, he is credible, he
makes concessions that - even the hard ones he
makes. The easy ones, no problem, and his
evidence was unshaken in cross-examination.

25 But back to her evidence on this point, in-chief,
she said that when Jack had asked her to get on
the floor, the Crown then asked her, what was
going on in your mind, and her response was, she
30 didn't want to do this anymore, that this is not a
situation she wants to be in, and she is thinking,
she is think - at that moment when she's getting

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5 off the bed, she is thinking about how to get out of it, but instead, according to her, she goes in front of him and gets on her knees. And what's Mr. Densmore doing, we ask her. He's taking off his pants and pulling his penis out. This is a situation that she's arriving into.

10 But then in her evidence in-chief, she says that Mr. Densmore having his penis in her mouth was unexpected. This is clear consent, clear consent on her part that she was wanting, and did in fact perform oral sex with Mr. Densmore. At the very least, at the — I mean, that's for sure, but I don't know in what universe, but even if that
15 couldn't be accepted, if that's what's happening, according to her, then she is indicating to Mr. Densmore that that's what she's willing to do and wanting to do, and in fact she does. She agrees that she opened her mouth and allowed him to put
20 his penis in her mouth with the caveat that he had put, "some force", which she then describes. What is that force, we asked, what force? She says that force is him putting his penis, "to my lips".

25 That's *de minimis*, putting his penis to her lips, that is the very minimal contact for Mr. Densmore, after she indicated she wanted to perform oral sex on him, and it's that moment that she says that's what caused her to open my lips. Sorry, these are
30 quotes, "caused me to open my lips", putting his penis to her lips, that's what caused her to open my lips. She never says, he pressed his penis

5 against her closed mouth. She never said that as soon as there was contact or force that she did not open her mouth. The Crown never re-examined her on that issue. Her evidence is that as soon as he put his penis to her lips, that's what caused her to open her mouth. Those are her words, Your Honour.

10 It's also corroborated by Mr. Densmore's evidence that he took a step towards her to bring his penis closer to her mouth, who, according to both their evidence, after they had already engaged in sexual activity, is still topless, he's got – he's naked from the waist down, and in that moment, she's
15 getting on her knees, without any request from him, even though she said in her evidence, that's not what she wanted. When I asked her, I asked her, perhaps it's possible that this was his initiative, you're reciprocating, and that what
20 had been happening indicated that she consented. And her response was, it could have been. That was her response.

25 Besides this, she accepted – she accepted that it was possible that she was touching or grabbing his penis while she was performing oral sex on him. And when it was suggested to her that she continued to kiss his penis and suck on his penis, she responded, I sucked it, but I didn't kiss it.
30 Her own doing. She accepted. And this is the other glaring inconsistency in her evidence, Your Honour, because she then accepted that she was

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5 able at any time, at any time, that she could have
talked to him. But of her own choosing chose to
remove his penis from her mouth and talk to him,
at the moment with the phone. That's why the
question was asked, well, if you did it then, why
couldn't you do it before or after? No, I could
have done it. That was her evidence. Didn't
really come out that way in-chief, seemed like her
10 head was pressed against the bed, but even in-
chief, she said, she pulled away, was able to talk
to Mr. Densmore.

15 If Mr. Densmore is trying to force himself, if she
moves her head away, he's going to move forward.
If he was not concerned about how she's feeling,
even at that moment, Your Honour, how — how she's
feeling, what's going on with her, he's aware of
what she's consenting to because as soon as he
takes out the phone, she moves her head back, and
20 his evidence, and her evidence confirms this, he
moves his phone away because he — he knew from her
act, oh wait, no, she's not okay with this.
That's evidence that he was conscious and
conscientious of whether she was communicating
25 consent, even without words.

30 I wonder why that he could have just — instead of
moving the phone away, he could have just put the
phone in front of him. If there was some kind of
ill will or malice, you know, he could have taken
a step back and said, aha, and started, like, hey,
let's talk, whatever. No. As soon, as soon, as

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5 soon as she showed any indication that she did not
want something that was happening in that bedroom
that night, he reacted immediately. She had full
control over her movements. There was nothing
blocking her way or forcing her, and this isn't a
rape myth, this has to do with her evidence that
at that moment in-chief, she was trying to figure
out a way out. And why? Because in her evidence
10 in-chief she said that as soon as Jack put his
phone away, two things occurred. First, she said,
when he put his phone away, he created a distance.
He took a step back.

15 Finally, her words, finally, at this moment, I
have a means to escape from between his legs.
Second, she indicated, clearly - sorry, at this
point that she clearly, unequivocally indicated to
- to Mr. Densmore that what - in her words,
whatever else - whatever was going on is now over.
20 That's it. We have - and we'll - I'll get into
it, but I want to go with the more major
inconsistencies first, Your Honour, so I'm going
to be jumping between sex acts. But that was her
evidence. There was the biting of the breast
25 before that and the fingering before that, and
we'll get into that after, but in her evidence,
that's when she gets up, puts her clothes on, and
she started to look for her purse.

30 You know, and I just, Your Honour, I've never
asked a judge to do this, but if I may be so bold
as to, please, if you may, write down, where is

the purse? Because I didn't think that it had any significance at all to what had happened until making these submissions, and I'll come back to it, but just keep that in mind.

Her evidence is she put on her clothes, she starts to look for her purse, she's scanning the room, and she even had her back to Jack before facing the bed. That was her evidence in-chief. But in cross-examination, she accepted that after Jack had put his phone away that there was more time for oral sex. She agreed, she agreed with me that it was possible that it had continued afterwards. How could she be so, come here and sit – to sit on that stand and be so certain, no way, he put out his phone, I got up, I put my clothes on, this was done, I'm done, I'm looking for my purse to leave. So sure. And then right after, nah, it's possible, maybe I didn't do that, maybe I went back down on my knees or I stayed on my knees and continued to perform oral sex on Mr. Densmore. She said it was possible. That's his evidence.

The other glaring inconsistency is with respect to this distance created, this route of escape. That was her in evidence in-chief. But yet again, her evidence is that when this happened, this provided her opportunity to go, the opportunity. We already established that it's possible she didn't even do that, she accepted that, but even the possibility that this route existed has no ounce of credibility, because in cross-examination she

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accepted that when Mr. Densmore picks up the phone, his legs aren't moving. How can they? She's engaged in oral sex with him, and she agreed.

At the same time, this also means that he didn't need to move his legs when he put the phone back down. And she accepted unequivocally, when asked that he didn't need to move away from her to put his phone back. I suggested it to her that that's what happened and she said yes. You cannot, Your Honour, rest a safe conviction on this kind of inconsistency.

If it's possible, as she said — now I'm going get into the intercourse area, Your Honour. If it's possible, as she said, that the oral sex continued afterwards and that Jack had not moved to create the means for her escape, it also mean that all her evidence with respect to her putting on her clothes, indicating to Jack that it was over, she was leaving, is not reconcilable at all. And this is so important because this is what she said was happening just before her and Mr. Densmore engage in intercourse. That's what she's saying, something that cannot be reconcilable, just as she's giving her evidence about the moments after when they engage in intercourse. And the inconsistencies in this area are very important because this is the most grave accusation, and therefore, it's respectfully submitted that even the minor inconsistencies should be given greater

weight.

5 In her evidence in-chief, she says that she put
her t-shirt on and looking for her purse because
she was, in her words, ready to leave, and again,
in her own words, she is doing this silently. In
cross-examination she elaborates and embellishes
on her means of escape. This is just before her
evidence that Mr. Densmore had forced her to have
10 intercourse with him. This is - the - the steps
just before. So, where'd you go? Well, she says
she took two steps away from the bed, or even a
couple of steps, because that was the direction
towards the door. She indicated that she had
15 walked past Mr. Densmore, who was still standing
directly in front of her and still, according to
her, hadn't moved and nude from the waist down. I
think she said, oh, I went to his right to go past
him.

20 But then her evidence gets more confusing because
then she accepts that while putting on her
clothes, the t-shirt, she had only turned around
to face the bed. Well - and that she had not
25 taken any steps, and Mr. Densmore was directly
behind her. This is what's going on in the cross-
examination. She says, no, no, I walked past him.
Actually, no, no, I was still in front of him
facing the bed, no longer going towards the door.

30 Again, when faced with the suggestion that she did
not take any steps away from the bed, she

5 indicates, no, no, actually, after I put my
clothes on, then I went past Mr. Densmore to his
right side. And get this, Your Honour, she took
two steps towards the door and then turned around
and took two steps back towards the bed, and now
she's facing the bed. She literally, literally is
describing how she came right back to where she
was. If this was her means of escape, if this was
her way of saying things were over, she wanted to
10 leave, now it's been provided. She even said she
took two steps away from him to walk to the door,
but her own evidence sinks her because she's not
telling the truth because she says - actually, it
doesn't make sense because that's - I did it - she
15 didn't leave that position. That's why she says
she had to take two steps back.

Somewhere in there is a conscience that's working,
that's convicting, that's spitting out things that
20 did happen but she's trying and she's convoluted
and you saw that throughout her evidence, Your
Honour. Simple things being put to her, things
that just logically make sense, she can't get her
story straight. It's a conflict. And we'll get
25 into that a little bit later. She finally agrees
that she's right back to where she started, in
front of Mr. Densmore, facing the bed, while he
has his pants off. He's naked from the waist
down.

30 THE COURT: So, I think this might be a good point
to pause for our morning break. We'll come back
at 25 to. Thank you.

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R E C E S S

U P O N R E S U M I N G :

SUBMISSIONS BY MR. FAHMY CONTINUED:

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So, where we left off, Your Honour, is with respect to her evidence that she's now stating that she is standing up facing the bed and Mr. Densmore is standing right behind her, naked from the waist down. But apparently, at some point, she turns around because she then says, he started to kiss her, but she didn't kiss him back. But interestingly enough, she then adds that Mr. Densmore had pulled her dress down to where it "originally was", but then clarifies that he had pulled the skirt up when he was kissing her. Where are her hands? At her sides. She does nothing to attempt to stop him.

25
30
And this is not a rape myth, Your Honour, because her evidence previously was, when he had been fingering her earlier, it hurt. She said she said, ow, and she also pushed his hand away. When she says he was biting her breasts, she pushed away from him by pushing herself away from him on his shoulders. But here, her hands are at her sides. Then she says, even though the kissing had lasted for a few minutes and her hands were right there, and even though she had just done it, according to her, from biting her breasts, pushing

5 his hand away from her vagina, for minutes she's, hands at her sides, allowing him, by her own evidence, to pull her skirt up. In these circumstances, you can find a negative inference about our credibility.

10 When she said that Mr. Densmore had forced her down on the bed. That in her evidence in-chief, the whole time his hands were on her back, his hands were on her arms, keeping her flat down on the bed, both hands. In cross-examination, she agrees that Mr. Densmore was no longer holding her down because he had been using his hands that allegedly were forcing her on her stomach on the bed to begin lifting up her dress. Interestingly enough, she denied, when I asked here, well, did you try to push yourself more on the bed to prevent him from doing that even? No. But the words that she uses are so interesting, really revealing, because she says right after that, and I quote, she describes, and I quote, that she was "naturally pressed against the bed". Naturally, without force. If something's happening naturally, nothing's being done to do it, not Mr. Densmore. That's her evidence. And Your Honour, she repeats it again, "naturally [lying] - laying flat on the bed" in a manner that cannot be reconciled with her evidence of being forcefully pressed on the bed by Mr. Densmore.

30 Well, what's the description of how they were even able to have intercourse? She says, on her toes.

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5 He never asked her to go on her toes. She agreed
several times, and we'll go through it, that she
was on her toes, then it was possible, then it
wasn't, okay, no, I agree, yes, I did say that.
She describes the intercourse as Mr. Densmore
inserting his penis all the way into her vagina on
his very first attempt. She denied that there
were any adjustments or any kind of progression in
10 the way that she describes how he entered inside
of her.

15 What does Mr. Densmore say? His evidence is that
he and her were both trying to adjust each other's
bodies because he is — which is uncontroverted
evidence — six-feet-two-inches tall, and she is
five-feet-five-inches tall. A difference of nine
inches. She also accepted that the bed was
unusually high. Get into that a little bit later
with some numbers, Your Honour, but she then
20 accepted not just on her toes, I asked her several
times, her tippytoes, as much as she could. When
asked, questioned, the — the reason why she was on
her tippytoes, so she agrees, but then when I
asked her that the reason that she was on her
25 tippytoes was that so she could level her body,
her vagina to allow Mr. Densmore's penis to enter
her, she immediately responds and recants and now
says, I don't remember being on my tippytoes. But
then when faced with that inconsistency of a
30 question or two ago, she accepts it, flipflops
again to say, yeah, she could have been on her
tippytoes, because that's the only way it makes

5 sense by physics, by logic, by a measuring tape that my client had to take a measurement of that black shelf, which is 30 inches. And I – may I have Exhibit 1A, please, Your Honour. Sorry, Your Honour.

10 What we're looking at now, Your Honour is Exhibit 1A. I'm going to zoom in. You'll recall, Your Honour, that the measuring tape at the top of that black shelf was exactly 30 inches and the be, according to Mr. Densmore that exceeded that, was approximately – I believe his evidence was six to ten inches, even take six inches, Your Honour. That means that the top of his bed is at least 36 inches. She's five-foot-five. That makes her 65 inches, or more than halfway up her body. It only makes sense that if she's able to lay flat on the bed, that she's on her toes to gain that extra leverage and to maintain that position, because 20 then she can no get tired from being on her toes. Do you want me to go through – I have the questions and answers about the tippytoes, but I think Your Honour recalls that evidence.

25 What's a description of how they were able to have intercourse? Both Mr. Densmore and the complainant describe her on her stomach, bent over, on their toe – on her toes, in a – with her arms out, again, to keep her body weight on the bed so that she's not putting the force on her 30 toes. Even if we accept her version of events and he's trying to put her flat on the bed, he's going

5 to lift her up. He has to. It's physics. She's just going to keep hitting the top part of her stomach, not her waist, not being able to get that little extra leverage to get up to be in that position.

10 I think that what she's actually describing is that sweet spot that Mr. Densmore was describing. He said he gave cogent, clear evidence on how they came to that position because, he says, at first, she had her hands on the bed, even bent over, he gave evidence that he had his legs wide apart trying to get underneath her. It wasn't sustainable. They shifted. She's then trying to lower herself by putting her elbows on the bed. 15 He shifts again. He's still too tall. He even says, well, I got it a little bit in, but it wasn't comfortable, and it wasn't sustainable because of the low centre of gravity that he needs to sustain. But that sweet spot is when she lowers herself more and the only way she can do that is to get her toes up. That's - actually, even before that, his evidence was that he - like, he tried to nudge her up, not put his hands on her back. He's trying to get her up. He's trying to 25 level his penis with her vagina from behind. That's why it's consensual. She didn't just take steps. She took her tippytoes as far as she could go to make it possible for them to have consensual sex in that sweet spot. 30

One overall - and Your Honour, Mr. Densmore's
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5 evidence is believable that there was that
adjustment, which indicates to him that she's also
trying from going from her hands up, to her
elbows, to on her toes, three different positions
to accommodate his penis entering her vagina. As
short as she is, the physics of it, the mechanics
of it, if he's also holding her down on the bed,
he can't access her any longer. Doesn't make any
sense because that's not how it happened. An
10 overall point to keep in Your Honour's mind is
that she was not forced.

15 In her messages to C [REDACTED] and N [REDACTED], three
minutes after leaving his house, she tells them
that Mr. Densmore and her had sex but she didn't
want to. When C [REDACTED] asks, did he force you, her
response is, he didn't force me, he just did it.
He didn't force her. Those are her words. This
is immediately after.

20 Your Honour, it's time now to talk about the
purse. I had to read hundreds of pages of what we
made of transcripts from the recordings. I
couldn't figure it out. Where's this purse that
25 she was scanning the room for as she had an
opportunity to make her escape? Where is the
purse? Remember, this is the purse that she's
looking for, when she's got it, she's going to
leave his bedroom. That was her evidence. Well,
30 where was it?

Well, if you'll recall, her evidence was scanning

5 the room, looking for her purse. She takes two
steps, even two steps past Mr. Densmore. And this
is where they are, Your Honour. Here's Exhibit 1.
They are right here in front of this bed, and her
evidence is that Mr. Densmore had not moved, arm –
not even an arm length away from that black shelf
with the mirror on it. She says she walks – she
walks past him two steps towards the door, then
walks right back to where she was in front of him.
10 But she said when asked, she still couldn't find
her purse.

15 Then after she comes back from the washroom, after
having what she described as nonconsensual
intercourse with Mr. Densmore, she finds her
purse. She retrieves her purse. And where was
it? Right there, on the black shelf with the
white mirror on it. That's her evidence. She
literally, in her evidence, walked past her purse
20 one time towards the door and another time back
towards the bed, scanning the room, she says.
It's right there. It's right there. Why is this
inconsistency so important, Your Honour? Because
it's – bellies her idea and evidence that she was
25 trying to escape during the oral sex portion, but
it also undermines her credibility because she
says she finds her purse right there, right after
this nonconsensual intercourse.

30 And Your Honour can look at inconsistencies both
prior to, during and after the acts complained of
to find clearly, she's just making it up as she

5 goes along. And keep in mind, Your Honour, she could have grabbed her purse the first time as she wanted to, she said and just walked out the door. It was right there. But guess what? That purse shows, that purse shows up in a completely different part of his room another time, because when I reminded her about where her jacket was, where's your jacket? With my purse. Where was your purse? It was on the chair.

10 When - this is - I apologize, Your Honour, I don't recall. I think this is 12A, Your Honour. It's the bird's-eye view of Mr. Densmore's room while he's standing on top of his bed. That's the only chair that's in his bedroom that she says, "Actually, that's where my purse was along with my jacket". But here's the best part, when I was entering these exhibits in through her, she pointed it out, said no, no, I remember this, I remember that, but that desk and the chair were not in the room that day. That's what she said. I never thought so much could turn on where her purse was, where she got it, where it was, how many times did she walk past it.

25 Assuming that she's wrong and that that chair was there and her jacket was there and her purse was right there, she had already taken two steps, maybe more, past where Mr. Densmore is standing, because remember, he hasn't moved from right here because she was standing - she was standing and kneeling in front of him, still right there, she's

5 walking by him, she says, towards the door, yet there's the purse. There's the purse, and her jacket apparently. No, there's nothing keeping you in that room, nothing, apparently, and yet, she has no idea what she's saying. She has no idea the depth and magnitude of this carelessness with the truth, and what it's doing to Mr. Densmore.

10 Crying in the bathroom. Again, there's a minor and major inconsistency with her evidence on this. I ask you again, Your Honour, to weigh the minor inconsistency a little bit greater because it's right after the gravest accusation that he, without her consent had intercourse with her, the most grievous act that she's accusing my client of. In cross-examination, in cross-examination, she said, she was in the bathroom for 10 to 15 minutes. If you'll recall, Your Honour, when I was asking her about what she was doing and how long, she gave a ballpark on all the different things. Ten to 15 minutes was the longest period of time that she assigned to any one thing, 10 to — so, when her — I'm not — I'm not trying to be unfair or nitty-gritty and say, oh, you know, she was off by a second or whatever, that's not the point, because she even assigns the penetration 10 to 15 minutes. She assigns the bathroom 10 to 15 minutes. She assigns the oral sex 5 to 10 minutes. All I'm implying by that, Your Honour, is — I'm not putting a stopwatch to that evidence, what I am assigning through her evidence is what

she considered as those events unfolded, which she felt — this is her evidence — which she felt she spent the most time doing.

5 So, I asked her the times. Now we go through the evidence. She's in the bathroom, she says. I asked her, how long were you in the bathroom? Five minutes. No longer a range, direct answer. And I'm not — again, I'm not saying that there
10 needs to be a stopwatch, but from being one of the largest portions of what happened that evening to — besides the two minutes of silence when she comes back, that's the second shortest thing. My client's evidence consistent is, she was in there a minute, minute-and-a-half. She went in, she
15 came out. She was not crying. She did not look like she was crying. But in her cross — in cross-examination, she said it was 10 to 15 minutes and then changes it to five minutes, and when that
20 inconsistency is put to her, she says, actually, 5 to 15 minutes. I'm right either way.

25 That might seem like a minor inconsistency. Oh, it's a stopwatch argument. No. It shows that at that moment, when faced with the inconsistency, instead of being mistaken, instead of saying, oh, you know, when I told you earlier, you know, 10 to 15, I think that was a bit of an overestimation. No kind of sense at all to be, like, hey, let's
30 just tell the truth. It's okay. You know, I get things wrong all the time just to try to be, you know, human about it. But no, nah, I'm right

5 either way, that's why you should believe me,
because I could tailor my evidence. That's the
licence that this complainant feels that she has,
with her words, with her coming and sitting on
that stand and telling this court, swearing, or
affirming to your conscience that you're going to
tell the truth. She does not care. Whenever it's
convenient for her, she'll say, even things that
she could have just said, yes, but no, no, better
10 that I don't remember, I do not recall, but it's
possible. It could have been.

15 Remember, she only gives assertive answers – and
this was actually one of the other reasons why I
wanted to point it out, is that – and I think I
mentioned it, she doesn't give a range even.
She's very direct. And that's why her direct
answers to the questions attract some kind of,
okay, well, let's dig into why she's saying that
20 now.

25 But the major inconsistency about her crying in
the bathroom, Your Honour, and I think it was – I
– I apologize for this reference, I just couldn't
think of any other way to say it, is that there's
a – a villain in Batman and he's literally called
Two Face, and he's got half his face looking like
everything is okay and then half his face is
disfigured, and just two contrasts. It's the same
30 for her. Two completely different faces emerge
from that bathroom in her evidence, one face for
her evidence in-chief and a completely different

face in cross-examination.

5 How did that start? I was trying to elicit that
whatever she had said to my friend, red eyes, my
cheeks were - actually, she never even says that -
that her cheeks were anything. She said, they
would have been, and my friend said, oh, no, no,
but like what - what were they, like were they
actually like that? Oh yeah, yeah, okay. So,
10 even when she starts her answer in-chief, she's
not telling us, she's not directly responsive,
even to questions in-chief of what was happening,
but instead telling us what it would have been if
she had been crying. She's not telling us that
15 she was crying and that's what her face looked
like. Her response to that question was, if I
were crying, I would have had the red eyes, the
puffy cheeks.

20 I'm trying to neutralize some of that evidence
because my client says he - and he took - gave
evidence that looked like she was crying. And I
suggested to her that the - that after she cried,
that she had tried to make sure that before she
25 left the washroom that there was no evidence that
she had been crying. Very simple question.

30 And then the paint really comes off this picture.
And it's interesting and I - I'm - I'm - I want to
read word for word because it's interesting how
she chooses her words. She says, "I did still
have, like we discussed, my eyes were red and

5 there was still smeared makeup", because remember, she'd said, oh, I took some Kleenex to dab my eyes. I'm trying to figure out, well, how did she look like after that? So, I ask her, yeah, but like, not just smears, like, we're talking, like smears all around your eyes, running down your cheeks, both cheeks? She goes for it. Yes. Another direct answer.

10 She goes on - sorry, Your Honour, I don't know if there's....

THE COURT: Please continue.

15 MR. FAHMY: If I can just have a moment, Your Honour. Oh, sorry, Your Honour, just my colleague pointed out that the exhibit that I had showed you was not what I had said it was; it's 9A.

THE COURT: Thank you.

20 MR. FAHMY: And then she really runs with it, "I had streams of mascara running down both cheeks. My eye makeup was smudged and smeared all over my face". She had a runny nose that was running and she was unable to fix herself up, even though she said in-chief that that's what she'd attempted to do. Why didn't you just say that? Why didn't you just say, hey, you know, I went to the washroom, I tried, I couldn't, I came out, I was a mess. But she's just kind of, well, you know, when I do cry, this is what it looks like and - and then she remembered, oh yeah, no wait, in cross-
25 examination, I did put on a lot of makeup, I had fake eyelashes, the glue, she said the glue had started to come off but didn't come off all the
30

way. Such details. Details, embellishments. Why not? Because she's not coming here to tell any semblance of the truth.

5 Another major inconsistency about her crying in the bathroom because there's text message evidence from her immediately, immediately after she leaves his house that I put to her, where she's telling her best, closest friends, I'm holding back the tears, I'm holding back the tears. I believe that. I think that's what happened because that makes sense and it's consistent with her own words to her best friends. When I confronted her with that, not, oh, you know, maybe I was mistaken about all of that. Oh, she can't do that now. She just ran with a whole, like, pie in the face, she came out of the bathroom. So, you know what she says? I may have been alternating between crying and holding back the tears. Again, both are right. Nothing I say is inconsistent. It's mind boggling the entitlement that this person feels that she can come here and make a mockery of what she was supposed to do that day, tell the truth.

25 She doesn't accept — moving on to the idea that the video was deleted. A couple of times, I asked her, he showed you when he deleted the video. No, I don't think it happened that way, whatever, her all standard, evasive answers. Okay. How about maybe Mr. Densmore told you that he deleted the video? Yeah, okay, makes sense. I didn't even

get that answer because she told me. I got that answer because the text messages told me.

5 And Your Honour, I'm sure you're going to get more of these cases in the future, the veracity lies in what people tell their closest friends, their family, their intentions, their motives, because we're going to get into that next, but I just want to take a moment to say one thing. Because
10 genuinely, Your Honour, I felt bad for her. I felt bad for her. The situation that she thought she was in, pretty dire. Personally, I'm a father, I would also be mortified if – if the complainant was my daughter and telling me that I was performing oral sex, this guy that I'd only
15 met for the first time, and he just happens to be a YouTube celebrity. Even if she had told me he deleted it or he showed me that he deleted it, even still, I would try to do something about that. I would. There's nothing wrong with that,
20 Your Honour, nothing is wrong with that because it's a real concern, but it's also her true motive to get out of that situation. That's the situation that's going to ruin her life. That is the situation that she's mortified about. And
25 unfortunately, I hate to talk bad about people, some of her parents didn't react properly. She says that.

30 How could – how – you know, and we know people like that, and there's – sometimes I react in the wrong way as a father. I'm not – I'm not judging,

5 that's not the — that's not what I'm trying to do.
What I'm saying is that in the realm of reactions
to that information from your daughter, that's a
possible one. What were you thinking? What are
you doing? Are you crazy? This guy, he's on
YouTube, he's drinking, he's partying, he's doing
joke videos. What are you doing? How could you
do something like that? You know, not every kids
got Bill Cosby's or — oh, sorry, bad example. I
10 don't even know who the good father role — Tim the
Toolman Taylor. I don't know. Not everybody's
got, you know, the best parents or even decent
parents, and even if they do, they make mistakes.
Maybe that's what happened here.

15 I don't think — I might be wrong, I don't think I
am, but I don't think that the pushback from her
mother and her mother's wife with respect to
blaming [REDACTED], blaming the complainant for what
20 happened, I think — and there's all this talk
about, oh, you say I make bad decisions and this,
that, whatever, and we see that dynamic, but it's
not to cast judgment but it's to show the very
real trouble that she thinks she's in. It's real.
25 How do we know that for a fact? Because the
video, not even the video, I apologize, the
potential, her words, he might, her words. And —
and I'm not discounting that. The — the mere
possibility, her reaction, her fear, her
30 spiralling, that's legitimate, that's legitimate.
But you see that this is her main concern.

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5 I offer her that opportunity in cross-examination.
It makes sense. This guy has a video of you, and
I described it to her, whatever moment in time
that she is captured on that video, and that this
would have been her, and the words, Your Honour,
the words that she uses is, she was more concerned
about the possibility of him having a video, but
she was unsure if she wanted to press criminal
charges for a sexual assault. The — the days, the
10 weeks, even the months after her encounter with
Mr. Densmore are preoccupied with her wish to have
the police go and investigate whether he actually
has anything.

15 But when I asked her that, perfect sense,
completely legitimate, nothing to hurt her
credibility at all with that proposition, her
answer, again, a rare one, no. So, we press, and
we press, and we show her immediately after to
20 your closest friends, to your family, even to your
coworker that you just met two months ago, C —
sorry, and her family, so, C —, A —, C —
C — and N —, her mom, —, everybody,
that's what she's saying.

25 But what does she say about the sex? What does
she say about that? Well, in her email to her
therapist, that night, her very first email, she
says after describing the sexual encounter,
perhaps I'm being dramatic or making it all up,
30 but the one thing in that email that she is
certain of is that if he got a video of her and it

gets out, "It will ruin my life".

5 In her initial contact with the police, her own
free will to say, why do you need the police? Why
are you contacting law enforcement? She indicates
clearly, again, in writing, her concern is if he
had a video of her. And that two days after her
meeting with Mr. Densmore, she says on the form to
the police, whose job, business, reason to exist
10 is to press criminal charges, states clearly, she
doesn't know if she wants to press charges at this
time, but she wants the police to look into
whether he kept any video of her.

15 And there's another thing about this whole
process, Your Honour, which is very — I just don't
get it. I mean, the — if her complaint was that
he may have taken a video of her without her
consent, that's a criminal offence by itself. Why
20 don't the police investigate both? Why don't they
give her the option of saying, okay, well, let's
explore this — this charge about perhaps he took a
video, and then you know, we can put the sex
assault in the back burner. No, no, no.

25 THE COURT: Is this really relevant to what we're
here to talk about, like, what — what those
potential avenues were? I think the point that
you're trying to make is, the — as you've stated,
it's the principal concern is not about pursuing
30 sexual assault charges and you're trying to, you
know, make an argument on that point. The
principal issue is the video. But what...

MR. FAHMY: Okay.

THE COURT: ...the other stuff is really not relevant to what we're here to decide.

MR. FAHMY: I agree. The only reason why I – I brought it up, Your Honour, was to make the point that, I guess if she was sure about pressing any kind of charge, it would be that. But I'll move on, Your Honour.

Then she acknowledges it was possible that before going in to give her formal videotaped statement to the police, in her initial phone conversation with Detective Buszkowski, she agreed it was possible – she was still – still apprehensive about wanting to come in to give an interview, and her main concern the first time they spoke was still about the fact that she wanted the police to look into any photos or videos that Mr. Densmore may have. She also acknowledged that he could have said in response, but the police can't just go and grab people's phones and that she should come in for an interview and if they proceed with charges, they can get a warrant for his phone. Ding. Okay, that's my path. That's my path to get them to look at his phone. Thank you, Detective Buszkowski.

September the 29th, almost two months later, she gets around to doing it. Again, she agrees that she was deeply concerned about the video and unsure if she wanted to press charges, but I don't know if Your Honour will recall that exchange, but

5 incredibly, she could not bring herself to make
the simple admission that being concerned about
something is more serious than simply being unsure
about it. Concerned, unsure. It's not a yes,
it's not a yes or no. That was her response.
Failing to even just give efficacy to normal
understanding of the English language was a
problem for her with respect to this point.
10 Because she knows, she knew, I guess now she does,
if there is no video, the police didn't recover
the video, so now it's not as important.

15 She is concerned about how her evidence is coming
across in Mr. Densmore's trial. What is clear and
plain throughout her communications with the
police, with her friends, with her family and her
coworker, and with her therapist, it's the same
message throughout, she's unsure about charges for
sexual assault but is deeply concerned about the
20 video. Definitely wants the police to investigate
if he has any videos. And Your Honour, I don't
know, I know you're busy, you have lots of other
cases, but when we were making our 278.92
application, I was imploring you that having use
25 of those records would then allow me today, in
closing, to make the submission to you that the
reason why she's unsure is because the very first
person to have a reasonable doubt about what had
happened between her and Mr. Densmore is the
30 complainant. I told you then, I'm going to invite
you to make that finding. I'm asking you now that
it's not just a reasonable doubt. After her

evidence, Your Honour, it's way more than that.

In her evidence, she reluctantly, at times, but when faced with her written words acknowledged that there's a very real struggle within herself, in her mind, in her conscience, there's guilt, in her....

THE COURT: Can we ensure that there's no sound coming into the court?

CLERK REGISTRAR: Sorry, Your Honour.

THE COURT: Thank you.

MR. FAHMY: But that struggle even extends. To reality and her physical reality. She described the evening in several different ways when she's having that struggle, reading into something that didn't happen, overthinking, being dramatic, being stupid that she had brought this whole thing on herself, that it was her fault, which means it wasn't Jack's fault. But right after the evening, that same night, she's even questioning what happened, lost, and confused. She even described the evening as a figment of her imagination when she asks herself, am I just making it all up? But then she even gives herself a reason why she would do something like that when she says that she made it all up as a means of seeking attention.

She repeats the same thing to A [REDACTED], just being dramatic, making a big deal out of it. She says it to her friends, I feel guilty, like I'm just making a big deal out of nothing. Out of nothing. I found that so worrisome when someone is

5 expressing that their conscience feels guilty because they are making something out of nothing. That's what she did. That's what she did. I'm not going to beat around the bush. That's exactly what she did.

10 Truthfully, she should feel guilty because she did make it all up and make something out of nothing, out of nothing, to the point that I'm here on my feet standing in front of you, Your Honour, asking you to find Mr. Densmore not guilty, and she did do all of this to seek attention. Her conscience continued to struggle with the truth, but she's fighting back, trying to blame Mr. Densmore for
15 what happened, and we know that because even after several sessions, even after going to the police, there is something inside of her, stopping her, preventing her from putting that axe down and saying, yeah, go ahead, I'm ready to press
20 charges. There was something fighting inside of her. And that, Your Honour is the truth. What can you make with that evidence?

25 The very first email exchange with her therapist are instructive of how the events unfolded with respect to this evening being converted into a criminal matter. She sends an email to her therapist. Her therapist responds the next morning, suggesting to her, go to the hospital, have the evidence collected in case – in case, a possibility you want to pursue criminal charges
30 even after Dr. [REDACTED] so helpfully confirms for

her this was an assault, this was a criminal act, go get your evidence collected. She knew that she had time limits even when it was collected, all from Dr. [REDACTED]. What's her response?

Well, even on the going to the hospital, still not really sure what I wanna do. But then when it comes to the criminal charges, which are brought up by her therapist for the first time to her, she says, I don't think I wanna press charges. That's her initial response to the first time that mention of law enforcement, criminal sanction is mentioned. And the reason why she doesn't want to press charges is because she is concerned that even her own, her own perception of what happened that evening is just her "blowing things out of proportion", being dramatic. That was her own real concern. Nobody is telling her that. She's not saying this to people and people are, like, no, no, you're, you know, you're blowing it out of proportion, it was not a big deal. That's inside of her.

She had a real concern about involving the criminal justice system, not because she was afraid, not because she wasn't willing to come forward, not because there would be any retribution, but it came from inside of her, like inside of her. Her own perception, her reality of what happened that evening was subject to this very real debate in her mind and her soul and her conscience that she was making it all up, blowing

things out of proportion, an attempt to seek attention, and in her words, reading into something that did not happen. Her actual words, not weeks later, moments, moments that evening.

Her response to her therapist saying charges in her – in her response email, two different times, she says she doesn't want to press charges because of those reasons, and that email isn't very long, but when it's brought up, it shakes her a little bit. She's like, whoa, no, I – maybe that's taking it a little too far. That's her response. And in that email the second time, she concludes that she doesn't want to press charges or anything because part of me feels like there are no boundaries to do that, it's just me, in my head being dramatic. Cross-examination, she tried to disavow that she even understood what she meant when she wrote that. Then finally, she agreed with what is plain – plain to see, that it wasn't within the realm of any boundary of charging Mr. Densmore about the events that had just transpired that evening, for all the reasons we went through with her over and over, I don't want to repeat them, over the course of the next few weeks.

And really, the collusion starts then. This email, the collusion starts then. I'm not saying collusion in – in respect that Dr. [REDACTED] and – and the complaint an agreement to try to do something or – but it's the colouring of her perception of the events that transpired word for

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5 word. As it's written in our law, that is
collusion. Her evidence has — is tainted. It's
tainted. The therapist spends weeks trying to
convince her that Mr. Densmore is a predator. But
what that means for Your Honour is that, again,
there's still something inside of her that's
stopping her from saying, oh no, he definitely is
a predator right away. It takes time. It takes
10 persistence, takes sessions, it takes, no, no,
without question.

15 The doctor, we put to her, that in her first
session, she's saying that, okay, I think I've got
her now convinced that this was an assault, that
this was a criminal matter, and then she even
helps her navigate what you should say, how she
could say it, and even practices how she will give
her statement to the police. And as you see
through the notes that were put to her, even
20 though there's still some hesitation, the
complainant eventually agrees with the doctor,
with the doctor's unfounded, baseless assessment
that Mr. Densmore is a predator. Again, not a
clear answer, it's possible.

25 Not only that, but the collusion continues and
spirals out of control because now Dr. [REDACTED]
is telling her as fact, without any basis, without
any part of any kind of realm of possibility, Mr.
30 Densmore, he's done this before. I can't imagine
the impact of what the complainant is hearing from
her treating therapist. She went on a date with a

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5 guy that she thought was fun and going to his
basement, doing YouTube videos. He thought it was
popular, this [indiscernible], and now, and now,
he's a serial rapist. What? She's there to seek
professional help and guidance, and instead she's
getting collusion. She's getting influenced to
have a completely misguided view of the evening,
and more importantly, to – getting aid and more
poorly to aid this view, an assessment that Mr.
10 Densmore is a predator, and a serial rapist. And
it's not just anybody off the street. This is
somebody that she trusts, somebody that is telling
this to her in her professional capacity, in her
professional opinion. Your Honour, I don't know
15 how many years of school she did to be able to say
something like that, but that's what she did.

20 It's just bizarre. When you think about the level
of outside – outsized influence that this doctor
had on a complainant. Your Honour, the truth of
what happened that evening didn't even stand a
chance. Mr. Densmore didn't stand a chance, and
the bubble keeps growing.

25 But before it does, because she's messaging C [REDACTED],
she is telling her about how the doctor even gave
her legal strategy advice. Write a statement now,
and this is – sorry, this is what the – the
complainant is telling C [REDACTED], write – that the
30 doctor tells her to write a statement now because
over time she'll forget details and that way she
will have a concrete timeline and story which Mr.

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5
Densmore will never have thought to have done.
And I — I want to pause there for a second because
he couldn't have even thought to do something like
that because nothing happened.

10
She goes along with this advice. She acknowledges
that it's her advantage over Mr. Densmore because
she would have that and he would not. It's not
just the doctor, it's her mother sully and
defaming Mr. Densmore as a person, that now will
continue to rape women, and that it fell on the
complainant, on her shoulders that she needed to
stop this monster by pressing charges. In fact,
15 you see that when the complainant talks about her
apprehension in disclosing the evening to her
mother, she says, "She will want me to press
charges immediately". And she does. For what
reason? For what reason? Because of her view
that Mr. Densmore will do this again and it's now
20 the complainant's responsibility, because if she
doesn't, he will do this to other girls. He will
do this to — responsible for him doing this to
other girls, is an exact quote. In her evidence,
she expresses feelings of guilt if she — sorry,
25 yeah — if she doesn't take on that responsibility.

30
And then she also gave evidence that her mother
added more pressure by saying to her, you need to
do something before it happens again. C [REDACTED] gets
in on this by saying, if he's done this to you,
how many others, and that he should have to pay
for what he's done. So, now the complaint's

5 pressured with bringing down this monster who
should pay for what he's done, not just to her,
but to the other countless women in the past, and
then to prevent it from happening in the future.
They can't let him get away with it, he would just
be doing it again. That's motive to fabricate.
That is not a good enough reason to do something
like that.

10 Even though the complaint acknowledges that none
of these people could have possibly known what Mr.
Densmore had done before, and certainly couldn't
possibly know what he could do in the future, and
yet, even she gets in on the act, in responding to
15 C [REDACTED]' message, she says, Dr. [REDACTED] agreed, in
what can only be – be described as how she viewed
Mr. Densmore's predatory behaviour, she adds that
the doctor told her, Mr. Densmore seemed very
calculated and the way he acted, like he had
20 thought it out. She's not the first. He's very
clever and he used his age and power over her,
this magician, this sorcerer, this rapist. I
asked her, how did he use his age or power over
her? She didn't know. But she felt comfortable
25 telling that to people, her family, that that's
what the doctor thought.

30 And more importantly now, is that whatever
misgivings, whatever doubts, whatever, making it
all up, oh, it's starting to turn into something,
because now it's not just about what happened that
evening, now he's – it's premeditated. It's

premeditated. It's getting bigger. Again, the doctor's words to her are, without questions, it's a sexual assault and a rape. It's not her fault for any of it. She made no bad decisions. Don't question it. Stop questioning it. That's really what she's saying. All this to say is that the conscious, unconscious collusion that's happening to colour her views, her perceptions, her understanding of what happened that night.

I'm just looking at the time, Your Honour. I'm, like - I got 10 more pages left, but I can - I just - I don't want to rush either, but I don't know what to do.

THE COURT: Well, how - give me a time estimate of what you think 10 pages translates to.

MR. FAHMY: Probably about 45 minutes.

THE COURT: Well, yeah, certainly, we're not going to continue. We're going to take our lunch break and come back at ten after two. Thank you.

R E C E S S

U P O N R E S U M I N G:

THE COURT: Madam Registrar, is there any way of just shutting the camera off on me and....

CLERK REGISTRAR: Thank you, Your Honour.

Currently, the screen is toggled to counsel, so I have no control over that screen.

THE COURT: Sure. Thank you.

MR. FAHMY: So, Your Honour, I hope to be less

than the time I'd asked for.

5 But where we left off, Your Honour, was the
complainant is in a bubble of collusion that's
spiralling and growing but we can't just blame
them, we have to remember that the information
from that evening came from her. She's not
truthful to Dr. [REDACTED]. When confronted with
that in cross-examination about how she described
10 how Mr. Densmore invited the complainant to his
house, clearly, it was not what happened. Her
answer was, well, I didn't give her all the
details. But that's not a detail. That's a
completely different version of how it happened
15 that made Dr. [REDACTED] come up with a conclusion
that this was a cunning device that Mr. Densmore
used to lure her into his home. She does it - and
she took the stand and said, she was very truthful
with Dr. [REDACTED] and clearly, she was not. She
20 says, again, that she didn't tell the full story,
not in her email and not in her session the
following day. There's the points about the
police interview. I don't want to get into it but
that was another situation where the complainant
25 embellished about how that police interview
actually went. She wasn't able to look at her
notes. She got insensitive remarks. None of
which was true. None of which was corrected.

30 But now, I want to get into the last two areas of
the sexual encounter. But first, let's talk about
the injuries to the breasts. Because besides

5 having an issue of perception of what actually
happened that evening in her mind and the struggle
for the pursuit of criminal charges, the
complainant also struggled with physical reality.
This is someone that came to court and gave sworn
evidence that she suffered injuries to her breast;
bruising, red marks, swelling, for days after
because Mr. Densmore was biting her breasts. She
then gave evidence that the nurse - the sexual
10 assault nurse, inspected her breasts for bruises.
But it's an agreed statement of fact that when the
nurse looked at her breast, the following night,
there were no injuries and she wrote her report to
reflect reality.

15 How can this court have a - not have a reasonable
doubt from her evidence. How is it possible that
she is completely unsure of her own perceptions of
what happened that evening and sadly, even
20 convinced herself of physical injuries that do not
exist. But that kind of frailty with her own
physical reality, her own body, cannot possibly
lead to proof beyond a reasonable doubt. How can
the court convict Mr. Densmore on the words of a
25 person that has such delusions about her own
physical reality. Injuries that do not exist.
But she said they did. I - well, how could that
not have been something we would know. But,
again, careless, callous, disregard for what is
30 truth and it's a key inconsistency, Your Honour,
because in her evidence in-chief, she was adamant
that her consent ended when he was biting her

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5 breasts. Mr. Densmore says he never was - he never bit her breasts. And guess what? The physical - the physical evidence says he never did either.

10 About her withdrawing of consent; in her evidence in-chief, she told the Crown that when Mr. Densmore had started biting her breasts, she pushed herself away from his shoulders but then he continued to bite her breasts. In cross-examination, after catching her about a change in her evidence, she was asked:

15 QUESTION: So now your evidence is that he was biting your breasts, you pushed away and then you got off of him. Is that correct?

ANSWER: Yes.

20 Not possible. Not that he could - yes. Another straight answer. Again, a glaring inconsistency in her evidence on the defining moment when she says, she withdrew her consent to the sexual encounter with Mr. Densmore.

25 The - but then her evidence in-chief is that the consent was withdrawn at the biting of the breasts but then it was withdrawn again when Mr. Densmore had inserted his finger in her vagina. But what's her evidence about how that played out, because
30 according to her, he went from biting her breasts and she withdrew her consent according to her, but then the next thing is, is that she gets off and

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her evidence is, he gets on top of her and starts fingering her, it gets painful, she says, "ow", but he continues to finger her.

5 In cross-examination, she admits that after she got off from him biting her breasts that there was actually consensual sex or touching. She admitted to kissing and kissing him back. She admitted that he's touching her leg and she is touching him with her hands. You know, it's almost as if -
10 like, the biting never happened. And that's what Mr. Densmore says. Because the biting of the breasts in this scenario, doesn't make sense, from her own evidence. We get a consistency of the
15 flow of what happened that matches Mr. Densmore's evidence. If anything, there is another consistency with Mr. Densmore's evidence that she told him to go slower and go softer when he was kissing her breasts. That's indicative of not
20 just consent, but direction, and something she denied ever telling him but he complied. And the sexual encounter progressed consensually.

25 The point being that her evidence was that it was one continuous nonsexual encounter in-chief but now has changed dramatically in cross-examination. There's a point where she even says in cross-examination, that it was hard for her to move -
30 sorry, it was hard not to move where he wanted her because he leaned her back and was on top of her. Now, the way she just described it, it sounds like, he just kinda moved her, picked her up but

5 then she starts to shift her evidence. And all of
a sudden, that moving and leaning back is
romantic. She's saying no, he did it while he was
kissing me and on top of me and touching me but
moments ago, she left all that out. Made it seem
like, it was hard to move. And then she agreed
that it was - that the kissing was consensual.
They were kissing each other. And then she
10 agreed, he initiated, she reciprocated by helping
to move back.

15 She then said, while he was on top of her, she
continued the consensual kissing and touching.
She actually says it a few times, "we were still
kissing." And then she takes a break from the
truth and tries to backtrack and say, but I wasn't
showing any interest because I was no longer
moaning or giving him signs verbally. But then
she says right after that when asked, I was
20 kissing him, yes. And agreed. And agreed right
after that that was a way that she had shown
interest. Even the touching of her vagina, in
cross-examination, started slowly, progressively.
It wasn't aggressive as she had described in her
25 evidence in-chief. And remarkably, she says that
while he is messaging her vagina from the inside,
they're kissing. And then she says it again.

30 I think that covers the four - I kind of described
them as the bite - the breasts, the digital
penetration, the oral sex, and the intercourse. I
don't have anything else - well, I have some

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things to say about the consistency in Mr. Densmore's evidence with - with hers but was there anything that Your Honour had any questions about with respect to those areas. Okay.

This is also a major inconsistency. One of the weirder ones. Which is conversation and sound. Just sound. In her evidence in-chief, she says that there is absolutely no talking, no noises. She even uses the word, "silently" to describe how - to describe how she was when she was looking for her purse except for when she says, "ow". When he says the word "slut" and their exchange over the phone. Even the exchange of words between them after she came back to his room from the washroom, her evidence in-chief was that Mr. Densmore said, hey, I have an early day tomorrow, you should get going. After she had been in the room with him, silently for two minutes. I won't waste the court's time and stand here silently for two minutes but that's a long time.

Jack's evidence is that no, they had some brief conversation. According to her, as soon as the kissing started, in-chief, everything went silent, like someone pushed a mute button on what was going on between them in Mr. Densmore's room. Mr. Densmore's evidence was the back and forth. The noises, the kissing, the - sorry, the noises, the moaning, the words exchanged, things that were said. And the Crown never challenges Mr. Densmore on that evidence. On the words spoken, the sounds

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5 made between them. You know, Your Honour, I guess even the Crown had a hard time figuring out how they were going to put a version of a silent movie to the accused and ask him to corroborate that nonsense. It's an incomprehensible narrative of a silent movie.

10 This is an important and key piece of evidence for the court to consider Mr. Densmore's evidence on this point was not even challenged, so its veracity stands miles apart on the ring of truth compared to what the complainant's evidence is on that. But guess what? As per usual - sorry, Your Honour....

15 THE COURT: It's not so much that it shows up, we're talking now about the video, is that the camera on me is kind of...

MR. FAHMY: Oh, it's distracting to me too...

THE COURT: ...it's....

20 MR. FAHMY: ...Your Honour. I'm - I prefer this.

THE COURT: All right. Thank you.

25 MR. FAHMY: Yes, thank you. In cross-examination, the mute button is now off. At times, she admits now, there was moaning from both of them. That she'd uttered the words, I like that, the things that Mr. Densmore had been doing in their sexual encounter and then she refused, but when confronted with her statement to the police, she had to admit that he had also called her a good girl. And then she even added times when she would be breathing heavily. All of a sudden, it's coming to life. But guess what? The silence

30

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5 returns. There're no noises or anything said just before penetration, during penetration. Nothing. Not a peep. It's silent. I ask her, "Nothing, it's all silent, right?" "Yes." Is her response. About the term, "slut", she'd never used it before and if she had, the Crown could have easily fixed it in her examination. That's another inconsistency.

10 I'm only going to - there are tons of minor inconsistencies, Your Honour, just - I don't want to go through them. They're Saturday Night Live. Why not just admit that. So, innocuous. She denied it so many times and mentioned Andy Samberg, finally she says, oh, could have. She was taking four drugs at the time. She tells the nurse to - there's lots but, the things that she agreed with that were possible that could have been that she did not say in her evidence in-
15 chief, that agree with Mr. Densmore's evidence, like, all the touching. All the caressing. All the hands. Throughout the entire encounter, corroborate Mr. Densmore's evidence.

25 While - even at the beginning while they were on the bed watching T.V., they would look at each other. Something funny would happen. Well, I didn't make that up. That came through Mr. Densmore's evidence and she - and took the stand and said what happened. Looking into each other eyes. Smiling before kissing. While kissing, he would disengage, watch the show and even before
30

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5 intercourse, her evidence was that he only pulled
down her underwear a little bit which is what Mr.
Densmore says. He said he only - he had to just
pull it down a little bit, right? And then it
came off because she had her - it came past her
hips. Another consistency is that after -
afterwards, she was still on her stomach when he
handed her the paper towel, she says that, he says
that.

10 The most important - one of the last things that I
want to leave Your Honour with is this, is that
her evidence that she could have stopped it. She
could have stopped it - him. The sexual
15 encounter. Whatever she didn't want to do, she
knew that she could stop it if she wanted to. And
she tried to wiggle out of that when it was put to
her. She said, oh, well, you know, I didn't know
what to do or hindsight or - I said, no, no, no.
20 No. No. Your evidence was right here, I could
have. Not that I didn't know what to do. She
knew what to do. But more importantly, Your
Honour, is that when she acknowledges that at the
time, she could have made Jack stop. We even have
25 evidence for that. Because even when there's a
disagreement about something that he wanted to do
like, do a consent video, she didn't want to do
it. He says to her, okay. And she acknowledges
that she was making decisions on the date. But
30 like, going upstairs to his bedroom, thing is,
she's still going to go to a restaurant. Your
Honour, come on. This is not somebody who is even

trying to think about her answers.

5 But this is important, Your Honour, is that the
reason why she knew she have stopped whatever it
was, at any time, is because she knew at that time
that Mr. Densmore would have acceded to her
wishes. If she had shown by gesture or by word or
by even just getting out of the way or any
10 discomfort, as he did show. He did. Before she
even said or did anything, he moved it away. He
was conscious and alive to how she's - he is
reading her cues. He is on point.

15 I just want to conclude with this, Your Honour, is
that in the beginning when I first started to
cross-examine the complainant on the point that
how she felt after Mr. Densmore unceremoniously
basically kicked her out of the house right after
she gets back from the washroom. On that day, it
20 was impactful. She had to leave the courtroom.
She got upset, because I think it was the first
time, she actually thought truly about maybe there
was another reason. Maybe there was something
else that was going on instead of all this
25 paranoia. All this collusion that's tainting her
perceptions. Not just of what happened but him -
of Mr. Densmore. And even though she keeps trying
and trying, she - at - later on in cross-
examination, I think the next day, she tried to
30 take it back. No, no, it was, you know, it was
just rude. It was - she tried to play it down.
But it's exactly that moment for her and the

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mistrust over the phone explodes.

5 Actually, if you wanted to give this trial a name,
if you want to give this trial a villain, it's not
Mr. Densmore, it's mistrust. Mr. Densmore got a
feeling didn't trust her. At that moment. He
said he got a weird vibe. Pulls out his phone to
protect himself. The complainant, she didn't
10 trust him, that he did not take a video or that
even if he had said he deleted it, that he would
actually follow through. And that's why, Your
Honour, trust is the bedrock of any and every
relationship can truly we've all witnessed what
that seed of mistrust can spiral into.

15 Thank you, Your Honour, those are my submissions,
subject to any questions.

THE COURT: Thank you. And just for the Crown for
planning purposes, the intention's going to be to
20 try to remain with our schedule for breaks for
staff and so on. So, if you're mindful of the
time...

MR. SOSA: Okay.

THE COURT: ...we'll do that. I don't how long
25 your submissions...

MR. SOSA: I....

THE COURT: ...are going to be but....

MR. SOSA: I have it broken down into different
areas, so I can start and I'll break at the
30 natural conclusion of one of those areas.

THE COURT: Okay. Thank you.

MR. SOSA: So, Your Honour, I have provided a book
Publication Ban

of authorities. It should be in front of Madam Registrar. I provided it to my friend this morning.

5 SUBMISSIONS BY MR. SOSA:

And so, I will be taking Your Honour through the law that is going to be binding on many of the decisions Your Honour will take in this trial.
10 So, that's what I intend on doing. I think I'll begin that way, Your Honour, and then we'll take a break and then I'll get into more of the facts and application of this case.

15 So, I want to start off, Your Honour, by taking you to the provisions in the *Criminal Code*. Specifically, the provisions that circumscribe when consent is vitiated and when honest but mistaken belief is not available. So, Your
20 Honour, at 273.1(1.1) consent must be present at the time sexual activity in question takes place. So, that applies for every sexual activity. The other important provision, Your Honour, is found at 273.2 where belief in consent is not a defence.
25 And for our purposes, Your Honour, I'll be asking that it's not available because at (a)(2), I'm submitting the accused was reckless or willfully blind and then at (b), the accused did not take reasonable steps in the circumstances known to him
30 at the time to ascertain that the complainant was consenting and also he's barred by (c), there's no evidence that the complainant's voluntary

agreement to the activity was affirmatively expressed by words or actively expressed by conduct. So, that's in the *Code*, Your Honour.

5 I've provided a case book, the first case at tab 1 is the Supreme Court's decision in *Ewanchuk* that is the binding authority on the elements of the offence and it describes, Your Honour, the *actus reus* and the *mens rea*. If I could take you to 10 paragraph 25 of tab 1, Your Honour. These - this paragraph contains the three elements that the Crown must prove beyond a reasonable doubt. They are that there was touching, that the touching was sexual in nature and the absence of consent. The 15 first two there, Your Honour, I submit are not an issue in this case. It's admitted, there was sexual touching. There was sexual activity. The third one is with reference to the victim's state of mind. It's a subjective consideration, Your 20 Honour. And that's confirmed at the following paragraph, paragraph 26. It states:

25 Subjective and [it's] determined by reference, the complainant's subjective internal state of mind towards the touching at the time it occurred.

30 So, the focus is solely on what Ms. [REDACTED] [REDACTED]'s subjective state of mind was at every stage of this night. The perception that Mr. Densmore may have had is irrelevant at the *actus reus* stage. So, Your Honour is still the trier of

fact. Your Honour is still the one that needs to be convinced beyond a reasonable doubt but if you accept her evidence that she was consenting, then the *actus reus* is made out.

I'll take you then, Your Honour, to paragraph 2 - sorry, tab 2, this is another Supreme Court decision and if I can then take you to paragraph 97 and I'll summarize, but beginning at paragraph 97 down to paragraph 100, there are three defences that are erroneous and are not available and are mistakes in law and do not exist. And those are implied consent, broad advance consent and a propensity to consent. Continuing with *Barton*, if we turn to page - sorry, paragraph 89 it, again, reiterates - sorry?

THE COURT: What paragraph?

MR. SOSA: Eighty-nine. Halfway through that paragraph:

Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent - plain and simple...the *actus reus* is complete. The complainant need not express her lack of consent, or revocation of consent, for the *actus reus* to be established.

I will take Your Honour through the facts in short order but I just want to lay the foundation that there is evidence available to this court to weigh where Ms. [REDACTED] stated that she was

5 fearful of the accused. So, Your Honour, if we go
back to the *Ewanchuk* decision which is tab 1,
paragraph 39, here's where we get how consent can
be vitiated. So, I've summarized it but what it
says, Your Honour, if you find that Ms. [REDACTED]
[REDACTED] did not want to be sexually touched but
decided to permit or to participate in the sexual
activity as a result of an honestly held fear or
of threats then consent is vitiated. That - this
10 - that paragraph continues to say, the last
sentence there:

15 The complainant's fear need not be
reasonable, nor must it be communicated to
the accused in order for consent to be
vitiating. While the plausibility of the
alleged fear, and any overt expressions of
it, are obviously relevant to assessing the
credibility of...[her] claim that she
20 consented out of fear, the approach is
subjective.

25 So, Your Honour, is still the gatekeeper. Your
Honour is still assessing her evidence whether you
rely - if there was a fear there, but nonetheless,
if you find that there was, there can be no
consent.

30 THE COURT: Just so I understand though, the first
line of authority that you were mentioning, talks
about in order to make out the *actus*, it's
subjective, so...

MR. SOSA: Right.

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THE COURT: ...and no need to express. So, as long as internally I say, I no longer consent, if the court finds that, because the other alternative is, I consent.

MR. SOSA: Right.

THE COURT: I - at which point, then there's no criminal offence. Right? Because one of the essential elements is missing. Because it's a lack of consent that makes it criminal, right? So, if there is internally a decision to say, I - I'm no longer consenting to this, the *actus* is made out. This line talks about somebody who says, I consent but because I'm afraid of him. They're two different pathways, right? To the analysis. They can't be intermingled. It's - like, I think that's what you're getting at, it's sort of an alternative way to work through this, is that what you're saying?

MR. SOSA: Your Honour's correct. In these facts and the factual matrix, we're dealing with, it's basically consent or no consent. However, if Your Honour were to find that while it appears that she was consenting and if you were to rely on the version by Mr. Densmore, you have available evidence that she tried to resist but continued because she was fearful. But I agree, the stronger avenue here is, there was just no consent, so therefore, if you rely on her version that there's no consent then the *actus reus* is made out.

THE COURT: Well, they're simply different avenues, that's all I'm saying.

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MR. SOSA: Right. They are.

THE COURT: That's what you're...

MR. SOSA: Yes, they are.

THE COURT: ...laying out for me is to say, well,
number 1, if you accept that the complainant at
some point, and that will be discussed I'm sure in
your submissions, says, no, no consent. That's
it.

MR. SOSA: Right.

THE COURT: That's the pathway to say, no consent,
the *actus* is made out because of the way this
charge is structured. Then we go onto another
decision - or another pathway for decision-making
which is the - I guess, the defence position that,
you know, the circumstances and so on, led him to
believe something else. This other one, this
Ewanchuk here is where there is evidence of
somebody who says - their testimony is yeah, I
consented only because he said...

MR. SOSA: Right.

THE COURT: ...you know, either do it or I'll beat
you up. Yeah, I didn't want to be beaten up, so I
did it, so that's not a - that's a vitiation.
That's a nonconsent, right? That's a - I did it
but you can't hold me to that because I was
essentially threatened into doing it or I was
scared. Two different avenues.

MR. SOSA: That's a good - that's a fair
characterization.

THE COURT: Okay.

MR. SOSA: Yes.

THE COURT: All right. Go ahead. Thank you.

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5 MR. SOSA: Thank you. So, I'll leave that there,
Your Honour, that's the *actus reus*. That's it
there. The only remaining assessment after that,
Your Honour, would be whether the *mens rea* and
that's what's going on in Densmore's mind. And,
again, it's a general intent defence, so the
authorities are clear, this can be made out with
actual knowledge, if you find that he knew she was
not consenting or that he was reckless or wilfully
10 blind to the absence of consent. And it's also
further down that same page, starting at paragraph
41, *mens rea*.

THE COURT: Tab 1?

MR. SOSA: At tab 1, yes.

15 THE COURT: Thank you.

MR. SOSA: So, what I want to talk about next,
Your Honour, is why honest but mistaken belief is
not available for Mr. Densmore. So, just as a
general overview, if we look at paragraph 43, same
20 page, at tab 1. So, "The accused may challenge
the Crown's evidence of *mens rea* by asserting an
honest but mistaken belief in consent". And then
if we turn to the following page, paragraph 44,
"The defence of mistake is simply a denial of *mens*
25 *rea*. It does not impose any burden of proof upon
the accused". So, I want to make that abundantly
clear, we are in no way saying the onus is on Mr.
Densmore but you have the evidence before you to
make that assessment. So, Your Honour, I'll have
30 to flip to a more recent authority which is
Barton.

THE COURT: That's tab 2?

5 MR. SOSA: Tab 2. And if we can go to paragraph
91. There's been a shift away from simply stating
"honest but mistaken belief in consent". It's now
"honest but mistaken belief in communicated
consent". And I know Your Honour is very familiar
with these concepts but it's important that I go
through all this because Mr. Fahmy submitted that
Your Honour can consider it but did not go through
the legal test. So, if we turn to paragraphs -
10 actually, it's 91, 92, 93, that whole page there,
that's the focus. Communicated consent, Your
Honour. And at paragraph 92, the second sentence
there:

15 This refinement is intended to focus all
justice system participants on the crucial
question of communication of consent and avoid
inadvertently straying into the forbidden
territory of assumed or implied consent.

20 Communication is key. And as I mentioned, Your
Honour, Section 273.2 and 273.1 limit when you can
rely on the honest but mistaken belief in
communicated consent because 273.2 requires the
accused to take reasonable steps. And if we turn
25 to paragraph 104, still at tab 2 of *Barton*....

THE COURT: Oh, hold on. Para what?

MR. SOSA: One-oh-four.

THE COURT: Tab 2, *Barton* - let me just get there.

30 MR. SOSA: Yes.

THE COURT: Go ahead.

MR. SOSA: Yes, so:

5 [Section] 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent – no reasonable steps, no defence.

10 Paragraph 104. They go on to provide some examples as to what is considered reasonable. At paragraph 108. And in particular, when they'll be....

THE COURT: Oh, slow down, slow down, sorry.

MR. SOSA: Sorry.

THE COURT: Every time you say it, I need to note it down, find it in the book and get to that page.

15 MR. SOSA: I will slow down, Your Honour.

THE COURT: Thank you. All right. I'm there.

MR. SOSA: Okay. So, I'm turning your attention to paragraph 108 but the discussion starts where we started at 104. So, if we turn back to
20 paragraph 108:

25 It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one
30 another, thereby raising the risk of

miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.

Your Honour, what was described there is precisely what we have here today. Strangers meeting for the first time culminating in unprotected full vaginal penetration. Paragraph 109:

Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent.

And at that paragraph ends with:

Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care – mere lip service will not do.

There has to be real evidence of reasonable steps being taken.

Your Honour, it's – I have one further area to cover. I think I'll be finishing around the area – the time we take an afternoon break, so I'll

just go that with Your Honour now, and then we can break at that point.

5 So, if I can ask Your Honour to turn to tab 6.
It's Ontario Court of Appeal decision. Now, this case, Your Honour, went up for appeal because the trial judge did not put the defence of honest but mistaken belief in consent to the jury. That was one of the grounds of appeal. So, the Ontario
10 Court of Appeal reviewed that decision and ultimately agreed with the trial judge that it should not have gone to the jury. So, they dismissed that ground of appeal.

15 And just briefly, the facts in this case are that the accused was a club promoter and drug dealer and the female that went to see him basically went along with the sexual activity despite con -
despite subjectively not consenting but
20 demonstrating as if she was and even included - including moaning and perfect - appearing to be an enthusiastic participant. So, I'll turn then to paragraph 95 where the Court of Appeal agrees that:

25 In my respectful view the trial judge properly concluded that the evidence adduced at trial, taken as a whole, fell short of the air of reality threshold required to put this
30 defence...[at] play.

And then in paragraph 96, confirms that this is a
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mistake of fact defence:

It is a defence that is rarely invoked. It does not arise by necessary implication in every case in which a complainant says sexual assault and an accused says consent.

So, the first must be an air of reality, Your Honour, that's the first step. And so, then beginning at paragraph 97:

The trial judge must be satisfied, on the basis of the evidence taken as a whole, that there is evidence on the basis of which a reasonable trier of fact, acting judicially, could find that the appellant:

- (i) took reasonable steps to ascertain ...[in that case, the complainant's] voluntarily agreed to each physical act, ...sexual nature, and that it occurred with the appellant as her sexual partner; and [that]
- ii. honestly believed ...[the complainant] communicated her consent.

So, in this case, there was no evidence to satisfy the air of reality. The complainant testified she said "no", but he proceeded nonetheless and repeated his demands in a "barking" tone. The appellant claimed that she was an active participant who initiated much, if not most, of

the sexual activity. And that nothing was said as the activity progressed through its various stages.

5 The court also found at paragraph 100 that:

10 This is also a case in which the threshold for satisfying the reasonable steps requirement...[were] elevated. The sexual activity was invasive in nature. There was an enhanced risk to M.C.'s health because of unprotected sexual intercourse. The parties were not all that familiar with each other, never having been alone on any previous occasion. The risk of miscommunication, misunderstanding and mistake was palpable.

20 So, Your Honour, that case when you have the opportunity to review it more in depth the - it's rare that there are facts that are on point but the facts in this case, Your Honour, I submit, are pretty close. And it was not available in that case. So, Your Honour, that leaves Mr. Densmore with the only defence being one of consent - full consent. So, I'll stop there, Your Honour. It's Three-ten.

25 THE COURT: All right. We'll take our afternoon recess. We'll be back at 3:30.

MR. SOSA: Thank you.

30 CLERK REGISTRAR: Order. All rise. This court is stood down till 3:30.

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R E C E S S

U P O N R E S U M I N G:

5

MR. SOSA: So, Your Honour, there were a number of submissions made by Mr. Fahmy which he prefaced by saying they're not myths but you can rely on them for this purpose. There's a helpful case, Your Honour, that came out this year. It's the Supreme Court decision *Kruk*, and that's at tab 3, and it — there's a section that deals with myths and stereotypes, Your Honour. So, there's a long discussion, but if I could turn your attention to paragraph 36, please, at tab 3. And — and what the Supreme Court does there is they summarize some of the more prevalent myths and stereotypes about sexual assault complainants.

10

15

20

And so, the one that I want to address, because it seems to be at the core of many of Mr. Fahmy's submissions, was on the following page, one, two, three, the third point there, "If a complainant..."

25

MR. FAHMY: Sorry, what — what page?
Paragraph....

MR. SOSA: Paragraph 36.

THE COURT: Is this the real victim's — about physical injury, that one?

30

MR. SOSA: No. If a complainant remained passive.

THE COURT: Okay. So — and....

MR. SOSA: Oh, you're — sorry, I guess I'm looking

at the wrong one. I'll....

THE COURT: Last paragraph of 36 on that page, right?

MR. SOSA: Yes, that's right.

THE COURT: Got it.

MR. SOSA: Sorry, mine was double-sided, so it changed things. So, if the – what it reads, Your Honour is:

If a complainant remained passive or failed to resist the accused's advances, either physically or verbally by saying 'no', she must have consented, a myth that has historically distorted the definition of consent and rendered rape, 'the only crime that has required the victim to resist physically in order to establish non consent'.

A well-established myth and stereotype, Your Honour. If we turn to paragraph 44, same decision, tab 3, it's a – it's a great way that the Supreme Court captured the current state of the law, and it says:

All of this history puts into perspective the distinct reasons why relying on myths and stereotypes to discredit sexual assault complainants amounts to an *error of law* – as opposed to being an ordinary factual finding reviewable for palpable and overriding error. The very reason this error of law emerged was to prevent the accused from discrediting

5 complainants' testimony on unwarranted,
discriminatory grounds, and accordingly to
correct the particular advantage accused
persons historically had in sexual assault
cases as compared to accused persons in other
cases: myths and stereotypes are no longer
meant to play any role in mounting a defence.
The judicial and legislative developments
designed to eradicate the categorical
10 discounting of women as witnesses do not
create any special benefits in law for
complainants in sexual assault cases. They
simply remove discriminatory barriers,
establish a level testimonial field between
15 sexual assault complainants and complainants
in other cases, and ensure the truth-seeking
function of the trial is not distorted.

20 That is the reason and rationale, and that's the
proclamation from the Supreme Court, Your Honour.

25 With that in mind, Your Honour, we all sat through
this trial. We know the thorough, extensive,
frankly grueling questioning that the complainant
went through in this trial. And I submit to you,
Your Honour, that she was straightforward,
credible, compelling, and importantly, candid.
The topics that she discussed were intimate,
exceedingly private, but she managed to answer
30 them to the best of her ability, and that's what
we ask of witnesses, to do your best, tell the
truth. And I submit that she did.

5 Mr. Fahmy has framed it as her being unsure or
unreliable with respect to her answers on some of
the times that he pressed her on subjects. But
what I submit, Your Honour is that makes her
credible. She conceded when she may have been
forgetful, or she may have been mistaken, but she
was firm when she – when she knew the answer. She
was firm about what happened to her that day.

10 So, we have the ability to assess her evidence.
Overall, her demeanour was pretty consistent. She
wasn't embellishing the way Mr. Fahmy suggests or
submits, I should say. She was candid and open
15 that she was agreeing to go upstairs. She was
candid and open that she was agreeing to kissing.
She was agreeing to the massaging of the breasts.
But then there was a line, and she was firm.

20 There were a number of references made to points
in the evidence that I tried to – to locate in the
transcripts, but I wasn't able to confirm all of
them, but I do have some points, Your Honour that
I want you to turn your mind to, and I provided a
25 copy of transcripts of the complainant's evidence.
They're in front of Madam Registrar at this point.
They're just right in front of your monitor.

CLERK REGISTRAR: Oh, sorry.

MR. SOSA: And I provided a copy to Mr. Fahmy.
And so, what I'll take you to first....

THE COURT: Is this the entirety of the...

MR. SOSA: For the complainant.

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THE COURT: ...examination of the complainant and cross-examination...

MR. SOSA: Yes.

THE COURT: ...and re-examination, if any?

MR. SOSA: Yes.

THE COURT: Okay, thank you.

MR. SOSA: Just not the accused's evidence. That was too quick a turnaround.

THE COURT: Thank you.

MR. SOSA: So, Your Honour, on the evidence of April 12th, 2024, page 17.

THE COURT: Just a second. 12 April, what page?

MR. SOSA: 12, page 17, please.

THE COURT: Page 17. Yes.

MR. SOSA: So, about, at line 20, she acknowledges my question, "What was your response to the kissing?" She says, "I was taken off guard, but I was okay with it at the time". And then further down, also asked about him placing his arm around her, "Again, I was still apprehensive, not sure what to make of the situation". "Were you consenting to the kissing?" "At first, yes." "So, you say at first. Did that change at some point?" "Yes." And when I asked her, "At what point did it change?" The following page 18, "When the kissing progressed to more heavy touching and it became painful".

And then, Your Honour, she continues and states, and her answer at line five:

ANSWER: He started by removing my shirt and
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5 pulling down my dress so that my breasts were exposed, and he started kissing them and then biting them, and that was quite painful, so I kind of pushed away from him that he'd kind of gone over top of me. So I was laying on the bed and he started putting his fingers inside of me, which was also painful. I did not feel comfortable, so I started to push his hand away.

10 That is the pivotal point, Your Honour. This is where it all begins and this is where she makes it clear by pushing his hand away. There does not need to be words. There does not need to be active resistance and attempts to escape. She pushed his hand away. Further down, line 20, "Using your hand to push what?" "I was using my hand to push his hand out from inside of me and from touching me when he was kissing my breast. I was pushing away on his shoulders." Another example of what she's doing to communicate to him she is not consenting, she does not like what's happening. Line 29, after she describes the manner in which she pushed, "That was - I was pushing on his shoulders and he was biting my breast and pushing on his hand when he was inserting it in me". I asked, "Did he say anything in response to those actions?" Answer, "No, he just continued". "And what is it that he continued doing?" "He continued to kiss me and put his fingers inside of me."

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Further down, line 19:

THE COURT: Page 19, line 19?

MR. SOSA: Yes.

ANSWER: Yes, then he told me to get on the floor.

QUESTION: What did you understand that to mean? ANSWER: That he wanted me to sit on the floor by his bed.

QUESTION: All right. And did you do that?

ANSWER: Yes.

QUESTION: Why did you do that?

ANSWER: I was scared at that point. I knew that I didn't want it to progress as far as it did any further, and I felt like my attempts to stop what was happening from continuing had not been met.

Your Honour, page 20, another example, at the top:

ANSWER: he stands in front of me, kind of with his feet at both sides, so my back is against his bed and he's sitting in front of me, and then he pulled his pants down and took out his penis and put it in my mouth.

QUESTION: Were any words exchanged between the two of you?

ANSWER: No. I believe when he was fingering me, I did say, ow. He would have called me names throughout it like a slut.

And then again, Your Honour, at line 14, when I

asked her:

QUESTION: What's going on in your mind?

ANSWER: I'm thinking, I don't want to do this anymore. This is not a situation I want to be in and I'm trying to think about how to get out of it.

Line 22.

THE COURT: Just hold on.

MR. SOSA: Yes. Yes. So, line 22, again, "Yes, I remember, like, gagging because I was not comfortable and it was unexpected". And that's when she gets into the phone coming out.

But up until that point, Your Honour, there's already been multiple times that she's expressed, both subjectively in her mind and objectively to Mr. Densmore, there's no consent, there's no steps taken by him. If we turn to the cross-examination, and these are just some examples, Your Honour, April 17th at page 91.

THE COURT: Yes.

MR. SOSA: Line 14, she's now under cross-examination by Mr. Fahmy. He says:

QUESTION: Okay, okay, now the point at which you say that it wasn't consensual was at the point where he started to bite your breasts, you're saying, right?

ANSWER: Yes.

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5 So again, she's confirming that that's when it all
changed. Same date, Your Honour, page 105, Mr.
Fahmy asks, this is again the same continuation of
the cross-examination, "After you said, ow,
okay..."

THE COURT: What line?

MR. SOSA: Oh sorry, my apologies, at the very
top, line three.

THE COURT: Yes.

10 MR. SOSA: "After you said, ow, okay, and then you
would agree with me then that means that you said
ow, and you took his fingers out and said get -
and said, get on the floor, right"?

15 ANSWER: No, sorry.

QUESTION: Oh, sorry.

ANSWER: It continued.

QUESTION: Yeah.

ANSWER: I said, ow.

20 QUESTION: Sorry, yes.

ANSWER: It kept going, then he said, get on
the floor.

25 So, she's again providing this court with evidence
that she is expressing discomfort that she's not
into what's happening. Further down, Mr. Fahmy at
line 25

30 QUESTION: Okay, all right, let's go with that
scenario, okay? You said, ow, right? He
stopped for a moment and then he continued
again, perhaps a little bit slower, would you

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agree with that?

ANSWER: No.

QUESTION: Okay. Do you agree that he stopped
at all for a second?

ANSWER: No.

Then it continues at page 106, "And how long –
okay, and how long did it continue on for?" "I
don't recall." "Okay, it could have been once
second, two seconds", she's asked. She answers,
"It was longer than a few seconds, at least a
minute".

Your Honour, page 109, same – same tab, or the
same date, I should say. This is when we are now
at the point where there is the movement from the
bed to the floor. Question at the bottom there,
it's line 27:

QUESTION: Okay, and after you get on your
knees, he pulled his pants down, right?

ANSWER: Yeah, pulled his penis out, yeah.

QUESTION: Okay, but his pants were down,
right?

ANSWER: Yes.

QUESTION: Okay. And your dress is still
down, so your breasts are still exposed,
right?

ANSWER: Yes.

QUESTION: And I'm going to suggest to you
that his penis was already erect, right?

ANSWER: Yes.

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QUESTION: I'm going to suggest to you that you were the one that started to kiss him first.

ANSWER: No.

QUESTION: Okay. So, then your evidence is he just put it in your mouth? That's what I think you said at trial.

ANSWER: Yes.

QUESTION: Okay. And how did he do that?

ANSWER: He got closer to my mouth with his penis.

QUESTION: Okay.

ANSWER: And put it against my lips.

QUESTION: And then you opened your mouth, right?

ANSWER: Yes.

QUESTION: Okay.

ANSWER: Because he was putting some force to open my mouth.

QUESTION: Putting some force?

ANSWER: Putting force to open my mouth, yes.

Further down, line 29, "Okay, and you allowed him to put his penis in your mouth, right?"

ANSWER: It wasn't what I wanted, but there was some force by him putting it to my lips that caused me to open it, yes.

Your Honour, it's abundantly clear both in-chief and in cross, there's force, she's not consenting. We turn to the date of April 18th.

THE COURT: Now, the force thing though, I mean,

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the sexual assault is just touching of a sexual nature. There's no requirement as an element to have any force at all.

MR. SOSA: I agree.

THE COURT: All right.

MR. SOSA: I agree. But in this case, it's been described that way.

THE COURT: Okay.

MR. SOSA: So, April 18th, Your Honour, page 12.

THE COURT: Yes.

MR. SOSA: Ms. [REDACTED] is still under cross-examination by the defence. Line 16. Okay, and when he turns you around, right, you're not resisting a turn, you're moving where his hands are moving you, right?

ANSWER: It was hard to resist.

QUESTION: It was hard to resist, because why?

ANSWER: Because his hands were firmly on my side and I was still semi close to him against his body, so it was kind of a forced turn.

And then it continues, "Okay, all right, forced to turn to face the bed, right?"

ANSWER: Yes.

QUESTION: Okay, and this hands, I'm going to suggest to you, leave your hips, would you agree with that?

ANSWER: They — one for sure left my hip, yes.

QUESTION: Okay. And that's because he's using his other hand to bring his penis closer to your vagina, correct?

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ANSWER: No. He was using his other hand to press my back down flat onto the bed.

QUESTION: Okay. So, now his hands are — one hand on your hip, one hand on your back, right?

ANSWER: Yes.

So, if I could then — same — same line of questioning, Your Honour, page 15, line 19:

QUESTION: Okay, and again, that whole portion of the massaging, putting it inside you, there's — he doesn't say anything, you don't say anything, right?

ANSWER: Correct.

QUESTION: No noises from him, no noises from you, right?

ANSWER: No.

QUESTION: And your hands are, as you've said, entire time by your side, right?

ANSWER: Yes.

QUESTION: Okay, and then you say he turns you around, right?

ANSWER: Yes.

QUESTION: And he has one hand on your hip and one hand on your — your back?

ANSWER: Correct.

And then she goes on to describe the manner on which her body's positioned. And then Mr. Fahmy suggests, "Middle centre of your back, okay. And where — I'm going to suggest to you that you're on

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your elbows".

ANSWER: No, I was standing upright and then he pushed me to lie flat on the bed.

QUESTION: Like, so, your body is flat, right?

ANSWER: Yes, on the bed.

QUESTION: Okay, but where are your hands?

ANSWER: They're slightly away from my body.

And then further down, line 18, again, talking about the positioning of her hands:

QUESTION: But maybe like in a W?

ANSWER: Yes, kind of, as if you were to be pushed forward and where your arms kind of would naturally fall.

QUESTION: Okay. And you're saying he pushed you with one hand?

ANSWER: Yes, he forced me down.

QUESTION: He forced you down?

ANSWER: Yes.

Your Honour, it was submitted to you that Ms.

[REDACTED] was somehow cooperating to assist with Mr. Densmore entry into her vagina. That's at page 20, the same line of questioning beginning at line six.

THE COURT: Just a sec. Yes.

MR. SOSA: So, at line six of page 20:

QUESTION: Okay, and I'm going to suggest to you that at first, he isn't, like - like, does

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he just jam it right in? How does he do that?

ANSWER: Yes. He just put it in.

QUESTION: Just....

ANSWER: Fully.

QUESTION: Put it in fully?

ANSWER: Yes.

QUESTION: First time?

ANSWER: Yes.

QUESTION: Okay. I'm going to suggest to you, okay, that at first, he was playing with his tip at the edge of your – or at the outside of your vagina, would you agree with that?

ANSWER: No.

QUESTION: Okay. And what – and that he put it in a little bit and had to like adjust and move, and you guys are both trying to get into like a proper position in order for him to be able to insert himself inside of you, correct?

ANSWER: No.

Your Honour, she's telling you exactly what happened. These are just some examples, Your Honour. She was unshaken in cross. The *actus reus*, without a doubt, is made out, Your Honour. The only thing remaining is whether you just reject her evidence and decide that no, she did consent, because it cannot be made out that Mr. Densmore had an honest but mistaken belief in consent. He took no reasonable steps, both in her evidence and in his evidence.

Now, while there's no – it would be impermissible
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5 for Your Honour to assess whether a witness is
more – or sorry, a complainant is more credible or
less credible based on how she reacted. In this
case, there's evidence to support her version of
events, and Your Honour can rely on that. So, if
I can take you to tab eight of the book of
authorities, Your Honour. So, this is an Ontario
Court of Appeal decision 2022, Associate Chief
Justice Fairburn delivering the judgment here.

10 Your Honour, just briefly, the facts are that this
was a couple that dated at one point. They met
online but hadn't seen each other for many months.
15 They go out many months down the road, and then
they have very different versions of events, but
what is apparent in the facts is that she's
emotionally distraught. And so, the comments that
are applicable to our case, Your Honour are found
at paragraph 43 of this decision.

20 So, one of the grounds that the appellant made in
this decision, Your Honour, is that the trial
judge placed undue emphasis on the complainant's
emotional devastation. So, at 40 – paragraph 43,
25 the court makes these comments and says:

30 In any event, I disagree with the appellant
that the relevance of this evidence rested in
impermissible myths about how sexual assault
complainants behave after being intact. To
the contrary, a complainant's emotional
disintegration after an alleged offence may

5 well be relevant to whether as a matter of
common sense and human experience, the events
occurred as described by the complainant.
While it would be wrong to say that all sexual
assault victims would experience what the
complainant experienced in this case or that
all sexual assault victims would behave as the
complainant behaved in this case, an
impermissible generalization of victims of
10 sexual assault, the undisputed fact is that
the complainant did behave in this way in this
case. The inference to be taken from the
evidence elicited at trial was that the
complainant was emotionally devastated because
something emotionally devastating happened to
15 her. [as read]

And at paragraph 44:

20 This was simply part of the factual matrix
that the trial judge was permitted to consider
in resolving issues of credibility. [as read]

25 Your Honour has several examples in the case at
bar. [REDACTED] was unequivocal that her
crying began the moment she stepped out of that
bedroom and went to the washroom. It continued in
the car. It's undisputed that she immediately
reached out to friends. That went unchallenged.
30 That's accepted, Your Honour. She immediately was
distraught and shared with them what happened.
She shared with them through text that she was

5 crying. It's undisputed that she immediately that same night reached out to her therapist. It's undisputed that she went to the hospital the next day. Her very own testimony, Your Honour, describes the emotional impact it had on her. You can use all of those pieces of evidence, Your Honour, to find support in her version of events.

10 And I do have some of the references in the transcripts. I don't intend on reading them into the record, Your Honour, but in her in-chief at pages 25 to 26, this is where she tells her friends what happened and how she's feeling. In-chief again at page 26 is when she mentions –
15 talks about getting the sexual assault examination kit. All of this, Your Honour supports her version and supports that something emotionally devastating happened to her.

20 I just want to talk about inconsistencies briefly and give you some authorities on addressing inconsistencies, Your Honour, because not all discrepancies are equal. Your Honour, it's the Crown's position that the core of the allegations
25 are not disturbed through cross-examination, and anything that was inconsistent was peripheral, and the – again, the allegations are intact. So, what I want to take Your Honour to next is tab five in the book of authorities, Ontario Court of Appeal
30 decision, 2014, at paragraph 13. Your Honour:

Inconsistencies vary in their nature and
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5 importance. Some are minor, others are not. Some concern material issues, others peripheral subjects. Where an inconsistency involves something material about which an honest witness is unlikely to be mistaken, the inconsistency may demonstrate a carelessness with the truth about which the trier of fact should be concerned. [as read]

10 At paragraph 14, 5th:

15 A trial judge given reasons for judgment is neither under the obligation to review and resolve every inconsistency in a witness' evidence, nor respond to every argument advanced by counsel. That said, a trial judge should address and explain how she or he has [indiscernible] major inconsistencies in the evidence of material witnesses. [as read]

20 Also, tab seven, Your Honour, another Court of Appeal decision in *G.M.C.*, paragraph 38:

25 After his general observations with respect to the assessment of evidence, the trial judge simply expressed some propositions, grounded in common experience, that are familiar to every trial judge and lawyer and to lay people. Although he used different language, I
30 would express these as:

- observations made by witnesses in the Publication Ban

course of traumatic events can be difficult to recall and to describe accurately at a later date;

• a witness cannot be expected to have a faithful memory of minor incidents that occurred during a traumatic event and the inability to recall a minor or insignificant event does not detract from the witness's overall reliability or credibility;

• it is human nature to try to make sense out of bits and pieces of memories about an event, and this may impact the accuracy of a witness's testimony concerning events;

And in the last point there deals with child evidence, so I don't need to read that in, and that was the – the trial judges basically affirmed by the Court of Appeal that these common experiences do not reflect an error in the assessment of the evidence.

Just before I get into the evidence of the accused, Your Honour, this is obviously going to require a *W.(D.)* assessment. We're all familiar with the test. There's one case however I'd like to draw your attention to. It's at tab 4, 2006 Court of Appeal decision, *J.J.R.*, and what it ultimately says is that you're not obliged to find

any fault in the accused testimony. So at paragraph 53 - in order to reject it I should say.

5 So at paragraph 53, the judge's analysis of the evidence demonstrates the route he took to his verdict and permits effective appellate review. The trial judge rejected totally the appellant's denial because stacked beside A.D.'s evidence and the evidence concerning 10 the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt.

15 An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of accused 20 evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused evidence. [as read]

25 So, a conviction may flow from a considered and reasoned acceptance of the complainant's evidence. Your Honour, it's the Crown's view, and I submit that Mr. Densmore knew that Ms. [REDACTED] 30 was not consenting the moment he forced her to perform fellatio on him and that's what prompted the phone coming out. The fact or the submission that he in some way respects the wishes of Ms.

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5 [REDACTED] because he stopped recording is ridiculous. He only stopped because he got caught. He did not respect her wishes. He recorded her without her consent. He held as a belief that it was okay to record this unknowing sexual partner on video, a permanent record. And I submit Your Honour should reject that it was even intended to be a consent video. It was a video that he just wanted to have. Utterly reckless.

10 MR. FAHMY: Your Honour?

MR. SOSA: Your Honour, there's no objections in the submissions.

15 MR. FAHMY: This is a little....

THE COURT: No, there's no objections at this particular point. You can make your submission...

MR. FAHMY: This is beyond the pale, Your Honour.

20 THE COURT: No, the - it's not. There were no interruptions of your submissions. And I expect the same courtesy to the Crown.

MR. FAHMY: Sorry.

25 THE COURT: You had mentioned earlier that you may be raising an issue of reply. If, if it was even appropriate to do so, what you've just done would be at that particular point. Thank you. Please proceed.

MR. SOSA: Thank you, Your Honour.

30 My submission to this court, Your Honour, he knew she wasn't consenting. He wanted to force her on camera, so he could have that to somehow convince somebody she consented. There's no - there's no

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5 video. It was not a consent video. It was a
video for his own enjoyment. And he brought it
out because he knew something was wrong and that's
an indication of guilt, Your Honour. He knew he
should have stopped and asked, but he didn't.
There was absolutely no discussion of performing
oral sex. By his own admission, he says, "Here,
come". That's not consent, Your Honour. That's
not communicated consent. Not even close. "Here,
10 come".

15 There's also a complete absence of any discussion
to do with condom use. A complete absence. As a
matter of common sense and human experience, using
or not using contraceptives has to be one of the
biggest decisions when engaging with a new
partner, Your Honour. That has to be. There's
nothing. He just did it. Plain and simple. Just
like he pushed the boundary with bringing out his
20 phone, he pushed the boundary with her every
single time and put his own interests ahead of
her. He never cared to secure consent. And she
didn't communicate consent.

25 You have Exhibit 16, Your Honour. You have his
Instagram messages to her. He's in control. He
tells her what to do. And that's what happened
when they were back in his room. There's no
reason for Your Honour to think that that sort of
30 conduct wouldn't continue when they're alone in
his room. And if he's so careless to not care
about getting somebody on a private, sorry,

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committing something so private on video without their knowledge, that should really cause this court to pause and consider viability of what he's told this court.

The logical inference, Your Honour, as I've already shared, that he was trying to get consent after he had already committed the sexual act, sorry, the sexual assault.

THE COURT: I think you were saying two things. You said he wasn't trying to get consent, that it was a video for his own pleasure, or he....

MR. SOSA: Which....

THE COURT: Or are you arguing in the alternative, that it was either, I'd already committed a criminal act and I'm trying to get consent now, or this was not a consent video at all. It was for my own pleasure?

MR. SOSA: But they could both serve the same purpose because he could frame it as if that's what his intentions were.

THE COURT: What is your submission? I'm just trying to follow the line of logic.

MR. SOSA: My submission...

THE COURT: Or the alternative. I mean, that could be fair. Like, I didn't quite understand what you're getting at.

MR. SOSA: Right. The position of the Crown is, Your Honour, he was just taking a video and he didn't care about consent. And he only stopped because he got caught. This is the first time he's ever intimate with her. They're strangers.

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5 He agreed, the records reflect and support in an hour and 15 minutes she's on her way home crying. Somebody who went out of his way to put her photo next to him on his thumbnail on Exhibit 13. Somebody who puts all this effort to set up a date, take her out, bring her back, show her around.

10 And that's what should trouble this court, that they never spoke again. And that's consistent with the narrative and the allegations that were made by Ms. [REDACTED], because something bad happened. And he knew it and that's why he never reached out again.

15 THE COURT: Just puzzled with that submission. So this is, it's essentially a post-offence conduct argument? Is that what we're talking about, because I didn't call you, there's an inference of guilt?

20 MR. SOSA: Your Honour, it's an available inference. That's my submission, yes.

THE COURT: I wanted — I wanted to get what you're saying.

25 MR. SOSA: Yes. No, that's my position, Your Honour. That it's consistent with consciousness of guilt.

THE COURT: Okay.

30 MR. SOSA: The timing, Your Honour, is also consistent with an abrupt end to the night. That abrupt end being that she got out of there crying, and he knew. I submit that you should reject his version and rely on what [REDACTED] said happened. So,

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Your Honour, even through the words of the accused, the only issue here for Your Honour to decide is whether there was or was not consent. I submit the Crown has made out its case.

Ms. [REDACTED] did not consent. And Mr. Densmore knew or was reckless. And the only reasonable verdict here is a verdict of guilty.

THE COURT: Thank you. Now, I know it was raised before and if it is going to come up, and I don't know whether it is, again, this right of reply that was raised at the conclusion of trial, it's my inherent jurisdiction to allow it or not. And typically it is with respect to an improper Crown address and only in cases, the clearest cases of unfairness. Now, I'm not suggesting that the Crown has said anything improper, but under the secondary sort of sub-principle of fairness, the issue of this consciousness of guilt, I think it's really the first time that is being addressed at this trial in argument. I - there - I will allow, if defence wishes, a brief reply to simply that argument of consciousness of guilt, the fact that the accused did not call the complainant after that evening. That is it. If you choose to do it.

MR. FAHMY: I have Your Honour's Ruling. But I just, if I could at least address the court as to why I had attempted to interrupt my friend.

THE COURT: I'll give you that opportunity.

MR. FAHMY: Okay.

THE COURT: But please, very brief.

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MR. FAHMY: Absolutely.

REPLY SUBMISSIONS BY MR. FAHMY:

5 I want to speak to that first, because as I tried
to predict with respect to trying to introduce
evidence that Mr. Densmore had done consent videos
in the past, that this was something that he had
done previously, my friend stood up and said it's
10 not relevant. And yet today, he comes and says
there's no way he would have done that. He was
doing it for his own pleasures, and now there's
that evidence that's been left out that could have
- because it's now....

15 THE COURT: But these are - these are only
submissions.

MR. FAHMY: Yes.

20 THE COURT: I'll stop you there for a second. The
beauty of this right now is, it's not the beauty
of it, the simplicity of this process now is that
it's a judge alone trial as opposed to submissions
that are being made to a jury where now we have to
address that. What did they take in? What did
they not? Did they understand the nuances of what
25 went on? You do not have that predicament.

MR. FAHMY: I understand.

30 THE COURT: I have been involved since the outset.
And it's a judge alone trial. And the address and
the use of that information or the submission
itself is really neither here nor there. In the
final analysis, if you sort of step back from the
advocacy role that you are fulfilling. This is

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5 about the court making a determination. That's where all of your submissions sort of, you know, work around is. We have a set of facts. There are inconsistencies suggested by both sides. It's up to the trial judge to decide whether they're minor, major, whether they're reconcilable or not. And then we get into the question. Was the *actus reus* made out? That's the first part.

10 If there was a subjective withdrawal of consent at either one of the points, because many are offered by your friend, you know.

MR. FAHMY: Mm-hmm.

15 THE COURT: But if it was before the, you know, during the course of this interaction, then we switch gears. Now we're talking *mens rea*, right? It's about that. The purpose of the video or any of that nature are really, really not that, that relevant, right? It's....

20 MR. FAHMY: As long as you're applying it on both sides, Your Honour, that's fine.

THE COURT: Absolutely.

MR. FAHMY: Absol - yes, I....

25 THE COURT: And again, like I - your friend didn't get up. And I mean, I gave you a lot of latitude because honestly this is - this is important.

This is not a trifling matter for anybody on either side of this equation. This is important. So I'm trying to allow full answer and defence.

30 You've made your submissions. I just identified that this was kind of new. It was sort of at the end. I don't know whether it was in the prepared

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materials or whether it just sort of came up as
sort of a closer. I don't know. But it was - I
thought I would give you the opportunity just to
address that one thing if you chose to do so.

MR. FAHMY: Yes.

THE COURT: Do you want to or not?

MR. FAHMY: Yes.

THE COURT: All right. Let's do that, briefly.

MR. FAHMY: Okay. They never spoke again means
something bad happened. That is not founded even
on any kind of sense of logic. Any date, when it
ends, it ends. If there's a sexual assault that
had occurred, what possible reason can an accused
who doesn't call have anything to do to show that
there's any kind of consciousness of guilt? That
is beyond impermissible reasoning. And it's also
not logical. What if the person moves away? What
if there's other circumstances? What if a new
love interest enters their life and they just
never called the person back? It just, it bellies
logic. There's no case law to support this. If
there was, it would have been in his book. It's
not there, Your Honour.

THE COURT: Thank you. All right. We are now
approaching 4:30, the end of the court day. I
understand that we had another date set aside to
actually finish the trial, and that was?

MR. SOSA: July 26th.

THE COURT: 26 July 2024. So, because your
writing is more legible than mine, the endorsement
will be that the trial has concluded. The matter
is adjourned to that date at 10:00 a.m., and with

5 the hope of being able to give a decision in this particular matter. We'll use that date set aside for that. So that's what we will target. So, sir, you're remanded to that date and time, 10:00 a.m., for the decision. Let me just gather up my books. Yes?

MR. SOSA: Your Honour, I guess I should make the Book of Authorities an exhibit. Does that....

10 THE COURT: No.

MR. SOSA: No?

THE COURT: No, it's just the Book of Authorities, it's not an exhibit. So I have it. Thank you.

15 ... WHEREUPON THE MATTER IS ADJOURNED.

FORM 3

ELECTRONIC CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

I, Janet Smith, certify that this document is a true and accurate transcript to the best of my skill and ability (and the quality of the copy of the recording and annotations therein) of the recording of Rex v. Jack Densmore in the Superior Court of Justice at HAMILTON, ON, taken from Recording No: 4799 700 20240531 094652 10 KRAWCHJ.dcr, which has been certified in Form 1.

September 4, 2024

Date



Signature of Authorized Person
Janet Smith
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