NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Coburn*, 2021 NSCA 1

Date: 20210105
Docket: CAC 495770
Registry: Halifax

Between:

Paul Christopher Coburn

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	December 8, 2020, in Halifax, Nova Scotia
Subject:	Criminal Law – Unreasonable Verdict and *W.(D.)* Analysis
Summary:	Mr. Coburn was convicted of an offense under s. 286.1(1) of the *Criminal Code* as a result of a search for massage services on Craigslist which led to a sexual encounter in his hotel room. He was acquitted of four other charges. Mr. Coburn appeals his conviction on the basis that the trial judge's decision was unreasonable and she improperly shifted the burden of proof to him contrary to the principles in *R. v. W.(D.).*
Issues:	(1) Was the trial judge's decision unreasonable?? (2) Did the trial judge err in her application of *R. W.(D.)?*
Result:	Appeal dismissed. The trial judge carefully considered all of the evidence and did not misapply the test in *R. v. W.(D.).* The verdict was reasonable and there was no error in her approach or analysis.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 19 pages.

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Her Majesty The Queen

Respondent

Judges:	Wood, C.J.N.S.; Hamilton and Fichaud, JJ.A.
Appeal Heard:	December 8, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Wood, C.J.N.S; Hamilton and Fichaud, JJ.A. concurring
Counsel:	Brian H Greenspan and Naomi Lutes, for the appellant Jennifer A. MacLellan, QC, for the respondent

Reasons for judgment:

[1] At approximately 11:30 pm on February 21, 2017, Paul Christopher Coburn had sex in a Halifax hotel room with a 15 year old girl ("C.C"). She had been delivered to the hotel by Leeanthon Oliver, who was subsequently convicted of offences including sexual interference, sexual assault, and trafficking of a person under the age of 18 years. The meeting had been arranged by an exchange of text messages between Mr. Coburn and Mr. Oliver.

[2] As a result of these events, Mr. Coburn was charged with the following offences:

- Touching a person under the age of 16 for a sexual purpose contrary to s. 151 of the *Criminal Code*;
- Inviting a person under the age of 16 to touch him sexually contrary to s. 152 of the *Criminal Code*;
- Sexual assault contrary to s. 271 of the *Criminal Code*;
- Obtaining, or communicating for the purpose of obtaining, sexual services for consideration from a person under the age of 18 contrary to s. 286.1(2) of the *Criminal Code*;
- Obtaining, or communicating for the purpose of obtaining, sexual services for consideration contrary to s. 286.1(1) of the *Criminal Code*.

[3] At trial, Mr. Coburn testified he had been looking for a therapeutic massage by searching on Craigslist, a website through which various services were offered for sale. Mr. Coburn said he believed the person he was texting with was a woman who would provide that service. The trial judge, Elizabeth Buckle of the Nova Scotia Provincial Court, did not believe this testimony and found, as a fact, that Mr. Coburn was looking for sexual services in his communications with Mr. Oliver.

[4] The trial judge acquitted Mr. Coburn of the charges under s. 151, 152, 271, and 286.1(2) of the *Criminal Code* on the basis the Crown had not proven those offenses to the requisite standard. He was convicted of the offence under s. 286.1(1) of the *Criminal Code* and sentenced to a fine of $1000.

[5] Mr. Coburn appeals his conviction alleging that the trial judge's verdict was unreasonable, included contradictory factual findings, and was based upon unwarranted speculation about what constitutes common sense behaviour on the part of someone in Mr. Coburn's circumstances. He also alleges the trial judge improperly shifted the burden of proof which should have remained on the Crown throughout.

[6] For the reasons that follow, I would dismiss the appeal and uphold the conviction.

Background

[7] At trial, and on appeal, much of what happened on February 21, 2017 was not in dispute. By way of background, I will outline the events that relate to the charge on which Mr. Coburn was convicted.

[8] Mr. Coburn came to Halifax for meetings and checked into the Marriott Harbourfront Hotel at 5:49 pm. He testified he wanted to obtain therapeutic massage services for a longstanding back problem. Using his phone he conducted a search on Craigslist while travelling to the hotel. Mr. Coburn said he understood this to be a site used for the purchase and sale of items and services. He testified he was searching for therapeutic massages, but there is no record of the precise search parameters. At trial, the parties filed an Agreed Statement of Fact which included the following description of Craigslist:

> Craigslist is an online website where people post ads for goods and services which can include therapeutic massages and personal ads. There is no tab or folder explicitly identifying 'sex for sale' or 'sexual services or pleasures' for sale or the like; typically, ads for sexual services often have language other than saying the explicit words 'sex for sale'. Craigslist has a classified section where you can buy almost anything that people are willing to sell.

[9] An extraction report resulting from the analysis of Mr. Coburn's cell phone carried out by a member of the RCMP indicates that between 5:40 and 5:43 pm on February 21st Mr. Coburn accessed 11 listings on Craigslist which had the following titles:

- Look no further…Get relaxed
- Amazing European lady massage

- Don't be boring and try something ordinary
- Morning rubs
- Looking for nuru massage
- Massage with Exotic Male
- Massage to leave you relaxed
- Relaxing massage 😊😊😊
- Feels good and taste even better
- Vanilla flavour female here
- Truly relaxing massage for male by male

[10] In his testimony, Mr. Coburn agreed that some of these titles had a sexual connotation and it occurred to him they might have a sex worker behind them. He said he did not contact those ads.

[11] After checking in, Mr. Coburn said he went to the spa in the hotel to ask if a massage was available. He was told there were no openings but he should search the internet for other options. Mr. Coburn then went out to dinner with a friend following which the extraction report indicates he accessed six additional listings on Craigslist between 9:42 and 9:44 pm. The titles of those listings were:

- Students!! Looking to hire you!
- Experienced, affordable massage (in or out) by Joseph
- Need help? Need advice? Write me
- 24/7 Male Massage in HFx Hotel Room Or House
- Stress Free Male Massage/Bodywork by male
- Male Massage/Bodywork by male

[12] Mr. Coburn says that he contacted a few listings on Craigslist but does not remember which one led to his encounter with C.C.. He said he received a

response that seemed appropriate and this resulted in a text exchange described by the trial judge as follows:

> [27] That text communication was recovered from Mr. Oliver's phone and is included in the excerpts in Exhibit 4, at tabs 4 and 6. Mr. Coburn testified that he did not know he was communicating with a third party and believed he was communicating with the masseuse. Mr. Oliver was apparently involved in multiple text conversations so the messages from Mr. Coburn and the responses are not sequential. In direct and cross-examination, Mr. Coburn was shown the excerpts in these tabs and asked to identify those parts he remembered as being part of his conversation or those that he did not dispute were part of the conversation (Tab 4):
>
> 387: 10:09: Coburn – Hi
>
> 386: 10:09: Oliver – How are you
>
> 385: 10:09: Coburn – Hi I was wondering whut ur rates are?
>
> 384: 10:09: Oliver - $200hr $100hh non rushed
>
> 382: 10:09: Coburn – Free tonight?
>
> 381: 10:09: Oliver – Yes I am love
>
> 380: 10:10: Oliver – Where are you located
>
> 379: 10:10: Coburn – Marriot
>
> 374: 10:11: Coburn – How do your services work
>
> 373: 10:13: Oliver – All I would need is your hotel room number and I'll call to confirm with you and I'm on my way to do whatever you want
>
> 372: 10:13: Coburn – Room 509
>
> 371: 10:14: Oliver – What's the name of the under because they will ask me for a last name
>
> 370: 10:15: Oliver – Which Marriott are you staying in?
>
> 369: 10:16: Coburn – Harbourfront
>
> 368: 10:16: Coburn – Coburn
>
> 367: 10:16: Coburn – Paul
>
> [28] Mr. Coburn testified that he asked if the person wanted something to drink on arrival. There is no text containing that question. Gilles Marchand, a civilian member of the RCMP who was qualified as an expert in relation to the forensic analysis of electronic devices testified. He acknowledged that items might be missing from the report if they had been deleted and overwritten. The following text exchange appears to be responsive to a question about a drink:
>
> 353: 10:33: Oliver – rum or vodka

351: 10:35: Coburn – vodka rocks?

350: 10:35: Coburn – sofa? (Mr. Coburn testified this should have said "soda")

[29] Mr. Coburn testified he was concerned that it was taking a long time for the masseuse to arrive, so communicated about the delay:

363: 10:27: Oliver – Hey sweetie just waiting on my cab

345: 10:49: Oliver – Hey love in the cab

344: 10:49: Coburn – close?

343: 10:49: Coburn – Still?

342: 10:49: Oliver – It just got here

341: 10:50: Coburn – 10 mins?

340: 10:50: Oliver – 15

339: 10:50: Coburn - K

336: 11:07: Oliver – Room509 right

332: 11:12: Coburn – sure u r coming?

330: 11:13: Oliver – Im downstairs

326: 11:15: Coburn – Coming up?

[13] C.C. arrived at the hotel at 11:14 pm and left at 11:49 pm. The trial judge did not accept C.C.'s evidence and concluded she could not rely on it except where it was supported by independent evidence. This was due to significant inconsistencies and acknowledged lies in her statements to police. Although not accepted by the trial judge, C.C.'s testimony was that she went to the hotel room on Mr. Oliver's instruction to collect money. She did not recall if she asked Mr. Coburn for money; however, he told her to undress and they engaged in sexual activity.

[14] Mr. Coburn's testimony was that once C.C. entered his room they discussed the price for the massage ($80) and engaged in some small talk which he described in his direct examination as follows:

> And then the conversation that we had there on how long she'd been doing massage, the fact that she was in school, had a roommate, lived across the bridge, all those sorts of things. And then that she also came prepared for massage with either lotions or oils in the bag and her initial ... her initial request thereof of asking what kind of massage that I would like and the fact that she said, Please undress and cover yourself with a sheet, I'm going to go get myself ready by washing my hands is very typical to someone who has done massage before.

[15] On cross-examination, Mr. Coburn said:

> **Q.** And when she came in to the room you had conversation with her and you call it small talk, right?
>
> **A.** Small talk, general conversation; general conversation, I guess.
>
> **Q.** Like, where are you coming from?
>
> **A.** Right. I ... Do you want me to repeat them all or ...
>
> **Q.** Yeah, go ahead.
>
> **A.** We spoke about ... When she came in, exactly when she came in?
>
> **Q.** Go ahead.
>
> **A.** We talked about ... I inferred about where she came from because it took a lot of time to get there. I asked about if she, how long she'd been doing massage. I asked about what else she did besides massage. And then I asked her a couple of follow-up questions based on what her answers were, itself.
>
> **Q.** Such as?
>
> **A.** Such as when I asked her how long she's doing massage, she said two years, and that's when I asked about what else does she do. She said she goes to college and also, after she said she lives across the bridge, I said, Do you live with a roommate? She ... I also asked is she going to school at all for anything massage-related. She said no, but she said she did have a two-year massage certificate. I believe it was either a certificate or whatever word she might use. Those are the, a lot of the questions that we covered.

[16] Mr. Coburn testified that after paying C.C. the agreed amount of $80, he undressed and lay on his stomach on the bed, as instructed, with the lower portion of his body covered by a sheet. C.C. provided a back massage and after twenty minutes she instructed him to roll onto his back which he did. He noticed that she was undressed from the waist down. He said C.C. removed the sheet from his body, climbed onto the bed, straddled him and they engaged in vaginal intercourse. After a brief period of sexual activity, they stopped, got dressed and Mr. Coburn asked C.C. to leave, which she did.

The Trial Decision

[17] The trial judge acquitted Mr. Coburn of the charges under s. 151, 152, 271, and 286.1(2) of the *Criminal Code*. The Crown conceded that the elements of the s. 152 offence had not been proven and, with respect to the other three, the trial judge was satisfied that Mr. Coburn honestly believed C.C. was at least 18 years old and

the Crown had not proven beyond a reasonable doubt that he failed to take all reasonable steps to ascertain her age.

[18] Mr. Coburn was convicted of an offence under s. 286.1(1) of the *Criminal Code* which provides:

> **Commodification of Sexual Activity**
>
> **Obtaining sexual services for consideration**
>
> **286.1 (1)** Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of
>
> > **(a)** an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
> >
> > > **(i)** in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,
> > >
> > > > **(A)** for a first offence, a fine of $2,000, and
> > > >
> > > > **(B)** for each subsequent offence, a fine of $4,000, or
> > >
> > > **(ii)** in any other case,
> > >
> > > > **(A)** for a first offence, a fine of $1,000, and
> > > >
> > > > **(B)** for each subsequent offence, a fine of $2,000; or
> >
> > **(b)** an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,
> >
> > > **(i)** in the case referred to in subparagraph (a)(i),
> > >
> > > > **(A)** for a first offence, a fine of $1,000, and
> > > >
> > > > **(B)** for each subsequent offence, a fine of $2,000, or
> > >
> > > **(ii)** in any other case,
> > >
> > > > **(A)** for a first offence, a fine of $500, and
> > > >
> > > > **(B)** for each subsequent offence, a fine of $1,000.

[19] As noted by the trial judge, there are two distinct routes to liability for this offence. The Crown could obtain a conviction by proving either of the following:

1. That Mr. Coburn's communication by text was for the purpose of obtaining sexual services for consideration.

2. That Mr. Coburn obtained sexual services for consideration.

[20] With respect to the first path to liability, the trial judge described why she convicted Mr. Coburn:

> [81] I do not believe Mr. Coburn's evidence that he was seeking a massage and paid for a massage. His evidence on this does not raise a reasonable doubt and I am convinced beyond a reasonable doubt on all the evidence that his communication was for the purpose of obtaining sexual services for consideration. My reasons for saying this include the context and circumstances, the nature of the ads and the content of the communication. I do not believe that an educated, experienced and well travelled man such as Mr. Coburn would resort to Craigslist to find a therapeutic massage, especially at 5:40 p.m. when other options might have been available. Common sense tells me that someone looking for a massage would first check the internet for spas or therapeutic massage in Halifax or would contact the hotel to see if they had a spa with an opening. According to his testimony, Mr. Coburn did not check the hotel spa until after he checked in and after he'd already looked on Craigslist. He did testify that he might have used his iPad, computer or personal phone to conduct those searches but did not recall. I do not believe that he made those inquiries as, if he had, he would have remembered he did. I do not believe that at 9:40 p.m., he expected to find a professional masseuse who would do a "house call" to a hotel room. Some of the ads in his web history (Exhibit 4, Tab 2) have sexually suggestive titles: "vanilla flavour female here"; "feels good and taste even better"; and; "morning rubs" and he considered the possibility that some might relate to sexual services. I do not believe his evidence that he thought it was normal for a professional masseuse to use language like "sweetie" and "love", to ask for an alcoholic drink while working, or offer to "do whatever you want". I am satisfied beyond a reasonable doubt that he went to Craigslist because he was seeking sexual services and then communicated by text for the purpose of obtaining those services.

[21] With respect to the second manner in which a conviction might be obtained, the trial judge said:

> [82] Once Ms. C. was in the hotel room, he paid her and there was sexual contact. Even if I accept his evidence that he paid her before the sexual contact, I am satisfied beyond a reasonable doubt that he gave her the money in anticipation of her providing sexual services. That conclusion is obviously impacted by the fact that I have concluded that he brought her there for the purpose of obtaining sexual services but is bolstered by my assessment of the circumstances in light of common sense. Mr. Coburn testified that there was no discussion of sexual

> services when she arrived and has, in effect, said that he was surprised when she took off her clothes and straddled him because he thought she was there to provide a massage. I reject that evidence. The inconsistency in his evidence concerning the condom contributes to that conclusion because if he were telling the truth about how the sexual activity came about, he would remember whether she put a condom on him. However, the main reason I reject it is that it does not accord with common sense. To accept his testimony on this point, I would have to believe that he gave her $80 for a massage, they agreed that she would give him a massage, and then Ms. C. decided to provide him with vaginal sexual intercourse. It is simply not believable. If, even unbeknownst to him, she was a sex worker, she would have inquired as to what sexual service he wanted and would not have provided any sexual service if she thought that for the same fee he would be satisfied with a massage. If she was not a sex worker and was simply there to provide a massage, his version is even more incredible.
>
> [83] I have decided that I cannot rely on Ms. C.'s evidence about what happened in the hotel room and I reject Mr. Coburn's testimony about the details of how the sexual act came about. So, I am left with what inferences I can draw from the circumstantial evidence and the facts that Mr. Coburn admits.
>
> [84] The only reasonable inference from the evidence, including the web history, the text communication and Mr. Coburn's admissions, is that he paid Ms. C. for sexual services. Therefore, I am satisfied that the Crown has met its burden on both routes to conviction under s. 286.1(1) and find him guilty of Count 5. Because Count 4 is impacted by my analysis of his 'mistaken belief in age' defence, I will address it when I deal with that defence.

[22] The reference to Mr. Coburn's evidence concerning the condom in para. 82 relates to his police statement where he said C.C. put a condom on him. At trial, he says that, upon reflection, he no longer believes that she did.

Issues

[23] In his factum, Mr. Coburn describes the issues as follows:

> **I. <u>Unreasonable Verdict</u>**
>
> 48. It is the position of the Appellant that the verdict is unreasonable in light of the trial judge's factual findings and the absence of evidence as to an essential element of the offence.
>
> **II. <u>*W.D.* Error</u>**
>
> 49. The Appellant argues that the learned trial judge erred in her approach to *W.D.* Having rejected the evidence of the complainant as untrustworthy and dangerous, the trial judge failed to adequately explain her conclusion that the totality of the evidence nevertheless convinced her of guilt beyond a reasonable doubt in

> accordance with the third branch of *W.D.* The failure to properly consider the third branch was compounded by material misapprehensions of the evidence.
>
> **III. The Material Contradiction in the Analysis**
>
> 50. The conviction is undermined by a critical contradiction in the analysis. The trial judge rejected the Appellant's evidence in assessing the charge upon which he was convicted, yet in acquitting him of another charge, found as a fact that there had, in fact, been a conversation about the complainant holding a massage certificate.
>
> **IV. Error in Assumptions about 'Normal Behaviour'**
>
> 51. The Appellant submits that the trial judge erred in implicitly taking judicial notice of facts not in evidence. Her assumptions about normal behaviour were not founded in the evidence and were critical to her assessment of the Appellant's evidence.

[24] In its factum, the Crown says issues 3 and 4 are simply subsets of the unreasonable verdict issue. At the oral hearing of the appeal, counsel for Mr. Coburn agreed with the Crown's assessment. As a result, I would restate the issues as follows:

1. Was the trial judge's verdict unreasonable?
2. Did the trial judge err in her application of the test in *R. v. W.(D.)*?

Standard of Review

[25] In a case where the Crown relies on circumstantial evidence, the test for determining whether the verdict was reasonable is found in the Supreme Court of Canada decision in *R. v. Villaroman*, 2016 SCC 33 at para. 55:

> [55] A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: *Yebes*, at p. 186; *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 4; *R. v. Liu* (1989), 95 A.R. 201 (C.A.), at para. 13; *R. v. S.L.R.*, 2003 ABCA 148 (CanLII); *R. v. Cardinal* (1990), 106 A.R. 91 (C.A.); *R. v. Kaysaywaysemat* (1992), 97 Sask. R. 66 (C.A.), at paras. 28 and 31.

[26] In such cases, a trial judge's decision is entitled to considerable deference. As noted by Strathy, C.J.O. in *R. v. S.B.1*, 2018 ONCA 807:

> [139] Consistent with the observations of Cromwell J. in *Villaroman*, the cases illustrate a high level of deference to a trial judge's conclusion that there are no reasonable alternative inferences other than guilt. In *R. v. Loor*, 2017 ONCA 696, this court observed, at para. 22, that, '[a]n appellate court is justified in interfering only if the trial judge's conclusion that the evidence excluded any reasonable alternative was itself unreasonable.'

These comments were adopted by this Court in *R. v. Roberts*, 2020 NSCA 20 at para. 57.

[27] An allegation that a trial judge did not properly apply *R. v. W.(D.)*, [1991] 1 S.C.R. 742 raises a question of law and is to be reviewed on the standard of correctness.

Analysis

Issue 1 – Was the trial judge's verdict unreasonable?

[28] Mr. Coburn does not challenge the trial judge's finding that some of his evidence at trial was not believable, however, he argues the remaining evidence is not sufficient to ground a conviction. He says for the trial judge to conclude otherwise was unreasonable.

[29] The burden of establishing that a verdict was unreasonable is a high one. The trier of fact is entitled to significant deference. In *Villaroman*, the Supreme Court of Canada described the proper appellate approach:

> [69] These were gaps in the Crown evidence about Mr. Villaroman's possession and control of the computer that the trial judge had to take into account in weighing the evidence. However, the Court of Appeal, in its analysis of these gaps, in effect retried the case. It was for the trial judge to decide, as he did, whether the evidence of Mr. Villaroman's powers of control and direction over the computer; the coincidence of his name and the only user name on the computer; the file names descriptive of their pornographic contents; the admission in relation to the non-involvement of two other people with whom he lived; and the length of time the pornography had been on the computer, when considered in light of human experience and the evidence as a whole and the absence of evidence, excluded all reasonable inferences other than guilt. In my view, while not every trier of fact would inevitably have reached the same conclusion as did the trial judge, that conclusion was a reasonable one.

…

> [71] The Court of Appeal's analysis overlooks the important point made in *Dipnarine* that it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable. While the Crown's case was not overwhelming, my view is that it was reasonable for the judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt.

[30] As these passages indicate, it is crucial to examine the evidence as a whole. In this case, it is clear the trial judge based her conclusion of guilt on the entirety of the record. She considered all of the evidence and assessed it logically and in light of human experience and common sense. This is precisely what is expected of her. Her decision was not based solely on her conclusions about what would be common sense behaviour for a person in Mr. Coburn's circumstances; although that was obviously a factor in her analysis.

[31] The trial judge's assessment that Mr. Coburn's text communications were for the purpose of obtaining sexual services for consideration was based on "all the evidence" including "the context and circumstances, the nature of the ads, and the content of the communication" (para. 81). Her conclusion that Mr. Coburn paid for sexual services was an inference she drew from the "evidence including the web history, the text communication and Mr. Coburn's admissions" (para. 84).

[32] As part of his argument that the verdict was unreasonable, Mr. Coburn says there is a material contradiction in the trial judge's analysis. This inconsistency is argued to be between the finding that the text messages were for the purpose of obtaining sexual services for compensation (rather than a therapeutic massage) and the acceptance of Mr. Coburn's testimony that the small talk in the hotel room included a discussion of C.C.'s experience as a masseuse and whether she held a formal certificate. In my view, there is no contradiction. Mr. Coburn's apparent interest in C.C.'s personal background is not inconsistent with a person seeking to obtain sexual services for consideration.

[33] At several points in his submissions Mr. Coburn emphasizes that neither he nor C.C. testified that the purpose for meeting was to obtain sexual services and so an element of the offense was not proven. The trial judge did not believe Mr. Coburn's testimony on this issue in light of all the circumstances, including the text messages. C.C.'s evidence was found to be unreliable by the trial judge and, in addition, she was not a party to the exchange between Mr. Coburn and Mr. Oliver. The purpose of the meeting was established by the text messages and C.C.'s intention in going to the hotel was irrelevant.

[34] Mr. Coburn takes issue with the trial judge's rejection of his evidence as not being in accordance with common sense. With respect, appraisal of evidence based on common sense is precisely what trial judges are expected to do. They must carefully listen to witness testimony and assess both its reliability and credibility in light of all of the circumstances including other evidence, logic, common sense, and human experience. As an example, the Supreme Court of Canada in *Villaroman* said:

> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered 'speculative' by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt 'is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence': para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[35] And similarly in *R. v. Calnen*, 2019 SCC 6:

> [112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn 'must be reasonable according to the measuring stick of human experience' and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence: *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null: see *R. v. Allen*, 2009 ABCA 341, 324 D.L.R. (4th) 580, at para. 68. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. 'It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct': *Smith*, at para. 78.

[36] The entirety of the circumstances lead to the conclusion that the trial judge's finding of guilt is not just reasonable but compelling. Mr. Coburn says that on February 21, 2017 he was interested in obtaining a massage. The first place he looked was Craigslist and his search generated a number of listings, most of which had a sexual connotation. Mr. Coburn agreed some of the ads may have been placed by sex workers. He returned to that site later in the evening and made contact with someone offering services. There was a series of texts, none of which refer to massages although there is a reference to "services". The person communicating with Mr. Coburn refers to him as "love" and says they are on their

way “to do whatever you want”. It is late in the evening and Mr. Coburn offers to get them an alcoholic drink.

[37] Everything in the lead up to the events in the hotel room is suggestive of an illicit encounter and not a professional massage. This is borne out by the fact that sexual activity occurred within minutes of C.C.’s arrival at the hotel room.

[38] In order to uphold the verdict, it is sufficient to conclude a conviction was reasonable under either of the alternative avenues to liability found in s. 286.1(1) of the *Criminal Code*. In my view, the trial judge’s verdict was reasonable with respect to both. I would note, in particular, the following findings by the trial judge:

> [81] … I do not believe that at 9:40 p.m., he expected to find a professional masseuse who would do a ‘house call’ to a hotel room. Some of the ads in his web history (Exhibit 4, Tab 2) have sexually suggestive titles: ‘vanilla flavour female here’; ‘feels good and taste even better’; and; ‘morning rubs’ and he considered the possibility that some might relate to sexual services. I do not believe his evidence that he thought it was normal for a professional masseuse to use language like ‘sweetie’ and ‘love’, to ask for an alcoholic drink while working, or offer to ‘do whatever you want’. I am satisfied beyond a reasonable doubt that he went to Craigslist because he was seeking sexual services and then communicated by text for the purpose of obtaining those services.

[39] These facts are sufficient to ground a conviction for communicating for the purpose of obtaining sexual services for consideration and are amply supported by the evidentiary record.

Issue 2 – Did the trial judge err in her application of the test in *R. v. W.(D.)*?

[40] The Supreme Court of Canada decision in *R v. W.(D.)*, [1991] 1 S.C.R. 742 is often cited as the leading authority with respect to the burden of proof in criminal cases which requires the Crown to prove an offence beyond a reasonable doubt. When the accused testifies, it is imperative the trial judge not allow the trial to become a credibility contest, inadvertently shifting the burden to the defense. The proper *W.(D.)* analysis was described by the Ontario Court of Appeal in *R. v. V.Y.*, 2010 ONCA 544:

> [8] The Supreme Court Canada decision in *W.(D.)* is the seminal authority on defining the burden of proof in criminal trials. It sets out a three stage analysis to

be included in jury instructions, and while the steps are familiar and often recited in decisions, they are worth restating as it would, in my view, have been helpful to apply them in the circumstances of this case:

> First, if the trial judge believed the evidence of the appellant, he must be acquitted.
>
> Second, if the trial judge did not believe the evidence of the appellant, but was left in reasonable doubt by it, then again, he must be acquitted.
>
> Third, even if the trial judge was not left in doubt by the evidence of the appellant, he was then required to decide whether, on the basis of the evidence he did accept, he was convinced beyond a reasonable doubt by that evidence of the guilt of the appellant.

[41] A trial judge must remain focused on the purpose of a *W.(D.)* analysis which is to avoid an improper shifting of the burden from the Crown to the accused. For this reason, it is not enough for a trial judge to recite the three well-known steps. Their analysis must reflect a proper application of the burden of proof. As noted by this Court in *R. v. J.P.*, 2014 NSCA 29:

> [61] But correct articulation of the *W.D.* jury instruction is no guarantee the burden was properly applied (see: *R. v. D.D.S*., 2006 NSCA 34 at para. 45; *R. v. A.P*., 2013 ONCA 344 at para. 39). This legal reality was eloquently explained by Watt J.A. in *R. v. Wadforth*, 2009 ONCA 716:
>
>> [50] In cases like this, involving near-equivalent opportunity to commit the offence charged and conflicting assertions and denials of responsibility, it is crucially important that the trial judge's reasons reveal an understanding of the relationship between reasonable doubt and credibility. The failure expressly to articulate the word formula of *W. (D.)* is not fatal. What must appear, however, from the reasons as a whole, is the trial judge's clear understanding of the relationship between reasonable doubt and the assessment of credibility and its application to the case at hand: *W. (D.)* at p. 758; *R. v. Y. (C.L.)*, [2008] 1 S.C.R. 5, at paras. 7 and 9; *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3, at para. 46; *R. v. S. (J.H.)*, [2008] 2 S.C.R. 152, at para. 13.
>>
>> [51] The formula in *W. (D.)* is *not* a magic incantation, its chant essential to appellate approval and its absence a ticket to a new trial. Its underlying message is that the burden of proof resides with the prosecution, must rise to the level of proof beyond a reasonable doubt in connection with each essential element of the offence, and, absent statutory reversal, does not travel to the person charged, even if his or her explanation is not believed: *S. (J.H.)* at para. 13.
>
> [62] In this case, not only did the trial judge accurately instruct himself on the proper application of *W.D.*, he also recognized the *raison d'etre* for such an

instruction: to prevent a trier of fact from viewing the outcome of a criminal charge as a credibility contest. It is useful to repeat some of what the trial judge said:

> [19] And so I may, according to *W.D.*, accept all, part, or none of what a witness or a set of witnesses may say. Credibility here, as I've said, is extremely important, and the test in *W.D.* must be scrupulously applied. The test is designed not to simply allow the Court to apply the burden of proof as a credibility contest between the complainant and the accused. This is so notwithstanding that the only two parties, truly in a position to know are H.M. on behalf of the Crown, (as well as other Crown witnesses); but in particular H.M., and Mr. P. on his own behalf.

[42] Mr. Coburn's factum describes the trial judge's alleged errors in relation to this issue:

> 69. It is submitted that the learned trial judge erred in her approach to *W.D.* Having rejected the evidence of the complainant as untrustworthy and dangerous in the absence of confirmation, the trial judge failed to adequately explain why the totality of the evidence nevertheless convinced her of the Appellant's guilt beyond a reasonable doubt. The approach to the credibility of the complainant and the Appellant reveals that the trial judge failed to properly consider the third branch of *W.D.*

[43] He goes on to argue the trial judge did not adequately explain why the totality of the evidence established guilt beyond a reasonable doubt.

[44] Mr. Coburn also says the trial judge's basis for rejecting his evidence was flawed:

> 76. The Appellant testified in a forthright and straightforward manner. He was logically consistent and uncontradicted in his evidence. He was candid about the fact that there was sexual contact but steadfastly maintained that he had sought only a massage. There were no issues with his demeanour or manner of presenting his evidence which the Crown could rely upon. Instead, the Crown pointed to three inconsistencies in an attempt to challenge his evidence: i) his recollection as to whether there was a condom; ii) the number of bags Ms. C. had with her; iii) details about the conversation with Ms. C in the hotel room. The trial judge rejected the second of these alleged inconsistencies but accepted the Crown's submissions as to the other two inconsistencies.

[45] Mr. Coburn does not directly challenge the trial judge's decision not to believe his testimony concerning the purpose of communicating with Mr. Oliver. This is understandable given the high degree of deference accorded to trial judges' credibility findings. As this Court said in *R. v. Thompson*, 2015 NSCA 51:

> [80] As stated in *R. v. R.P.*, 2012 SCC 22, ¶10, an appellate court should not interfere with a trial judge's credibility assessments except in very particular circumstances.
>
> [81] While the question of whether a verdict is reasonable is one in law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility to determine, for example, whether the verdict is reasonable, cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" *(R. v. Burke, supra* at ¶7).
>
> [82] The trial judge's assessment of Constables Wilson and Cooke's credibility is entitled to deference given the advantage she had in seeing and hearing the witnesses' evidence. She made no palpable and overriding error in her analysis of identity or credibility, both questions of fact.

[46] The issue with respect to this ground of appeal is whether the trial judge's decision shows she improperly applied the burden of proof by placing the onus on Mr. Coburn to raise a reasonable doubt. A careful review of her decision shows she did not.

[47] The trial judge started her decision with a classic description of *W.(D.):*

> [8] The credibility of Mr. Coburn and Ms. C. will be central to my analysis of these issues. I am entitled to accept all, some or none of the testimony of any witness. In light of the presumption of innocence and the requirement that the Crown prove the case beyond a reasonable doubt, it is important to keep in mind that a criminal trial is not about simply choosing whether I prefer the complainant's or the accused's version of events. Doing that would undermine the presumption of innocence. I must consider Mr. Coburn's evidence within the context of the other evidence. Where his testimony is inconsistent with guilt, if I believe it or find that it raises a reasonable doubt, I must acquit. Even if I reject his testimony, I have to examine the remaining evidence that I do accept and only convict if the Crown has proven guilt beyond a reasonable doubt (*W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Dinardo*, 2008 SCC 24).

[48] She began her credibility analysis by concluding the complainant's testimony was not reliable. She then turned her mind to the balance of the trial evidence:

> [74] Having decided that I cannot rely on much of Ms. C.'s testimony, I still have to assess Mr. Coburn's testimony and the remaining evidence and decide if the charges have been proven beyond a reasonable doubt.

[49] In assessing Mr. Coburn's testimony, the trial judge concluded there were portions she believed, others she absolutely rejected, and some which left her with a reasonable doubt. For example, she accepted his evidence there were discussions in the hotel room about C.C.'s background and massage experience. She also accepted his testimony he believed she was 18 years of age which led to an acquittal on four of the charges. With respect to the charges under s. 286.2(1) of the *Criminal Code*, the trial judge described an exercise completely consistent with *W.(D.)*:

> [80] The two offences under s. 286.1 are identical except for the added requirement in s. 286.1(2) that the Crown prove the complainant was under 18 years old. There are alternate routes to liability for these offences. The Crown can prove either that Mr. Coburn's communication was for the purpose of obtaining sexual services for consideration or that he did obtain sexual services for consideration. He has testified that his purpose in communicating was not to obtain sexual services and that the money he paid her was not for those services. **If his evidence is believed or raises a reasonable doubt, he must be acquitted. Even if I reject his evidence, he cannot be convicted unless the remaining evidence proves his guilt beyond a reasonable doubt.** That evidence is largely circumstantial, so to convict Mr. Coburn I would have to be convinced that the only reasonable inference available from the facts is that his purpose was to obtain sexual services for consideration or that he obtained those services for consideration.

[Emphasis added]

[50] The trial judge did not believe Mr. Coburn's evidence he was only seeking a massage and not sexual services, but went on to consider the balance of the evidence as required by *W.(D.):*

> [81] I do not believe Mr. Coburn's evidence that he was seeking a massage and paid for a massage His evidence on this does not raise a reasonable doubt and **I am convinced beyond a reasonable doubt on all the evidence** that his communication was for the purpose of obtaining sexual services for consideration. My reasons for saying this include the context and circumstances, the nature of the ads and the content of the communication…

[Emphasis added]

[51] The trial judge's conclusions with respect to the offence for which she convicted Mr. Coburn demonstrates she never took her focus off whether the Crown had proved all elements of the offence beyond a reasonable doubt. Contrary to the submissions of Mr. Coburn, she did not improperly place any burden on him.

The preponderance of evidence satisfied her that the Crown had proven the offence:

> [83] I have decided that I cannot rely on Ms. C.'s evidence about what happened in the hotel room and I reject Mr. Coburn's testimony about the details of how the sexual act came about. So, **I am left with what inferences I can draw from the circumstantial evidence and the facts that Mr. Coburn admits.**
>
> [84] The **only reasonable inference from the evidence, including the web history, the text communication and Mr. Coburn's admissions**, is that he paid Ms. C. for sexual services. Therefore, I am **satisfied that the Crown has met its burden on both routes to conviction** under s. 286.1(1) and find him guilty of Count 5. Because Count 4 is impacted by my analysis of his 'mistaken belief in age' defence, I will address it when I deal with that defence.

[Emphasis added]

Conclusion

[52] Many of Mr. Coburn's submissions on appeal take the form of invitations to re-weigh the evidence and arrive at different conclusions, particularly with respect to Mr. Coburn's credibility. It is not the role of an appellate court to reconsider such findings when they are supported by the evidentiary record.

[53] The trial judge's decision reflects a careful and reasoned approach to the evidence before her. She acquitted Mr. Coburn with respect to the more serious offences because the Crown did not prove them beyond a reasonable doubt. She found the Crown met this standard with respect to the s. 286.1(1) offence, and I see no error in her approach or analysis.

[54] I would dismiss the appeal and uphold Mr. Coburn's conviction.

Wood, C.J.N.S.

Concurred in:

Hamilton, J.A.
Fichaud, J.A.