# IN THE PROVINCIAL COURT OF NOVA SCOTIA

**Citation:** R. v. A.W.H. 2017 NSPC 19

**Date:** April 13, 2017

**Docket:** 8015595, 8015596

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

A.W.H.

**Restriction on Publication: Section 486.4 of the Criminal Code**

## TRIAL DECISION

| | |
|---|---|
| **Judge:** | The Honourable Judge Anne S. Derrick |
| **Heard:** | November 15 and 17, 2016; March 27, 28 and 30, 2017 |
| **Decision:** | April 13, 2017 |
| **Charges:** | sections 151, 271 of the *Criminal Code* |
| **Counsel:** | Rick Woodburn, for the Crown |
| | Brad Sarson for A.W.H. - November 15 and 17, 2016. |
| | Tara Smith for A.W.H. - March 27, 28, and 30, 2017. |

**By the Court:**

*Introduction*

[1] A.W.H. is charged with touching G.M. for a sexual purpose when she was three years old, an offence under section 151 of the *Criminal Code*. He is also charged with sexually assaulting G.M., contrary to section 271 of the *Criminal Code*. These offences are alleged to have occurred between October 1, 2013 and October 31, 2014. This is the approximate time period during which A.W.H. was involved in an intimate relationship with G.M.'s mother, M.M.

[2] G.M. was interviewed twice about A.W.H., the first time in February 2015 when she was four and again in February 2016 when she was five. On both occasions the interview with G.M. was conducted by a police officer and a child-protection social worker from the Department of Community Services. In the first interview, G.M. made no disclosures of sexual touching. In the second interview, G.M. said there had been incidents of A.W.H. touching her vagina.

[3] Following a *voir dire* pursuant to section 715.1 of the Criminal Code, I admitted the February 2016 interview of G.M. into evidence. (*R. v. A.W.H., 2016 NSPC 69*) G.M.'s evidence from the *voir dire* and the February 2015 video-taped interview were admitted as evidence at the trial by consent.

[4] In addition to G.M., four other witnesses testified: G.M.'s mother, M.M. and maternal grandmother, J.M., Cassandra Knight, and Cst. Nancy Wagner. Ms. Knight and Cst. Wagner conducted the February 2016 video-taped interview with G.M.

[5] A.W.H.'s trial was heard for two days in November 2016. Additional dates in November and December 2016 and January 2017 were scheduled for the continuation of the trial. The trial instead proceeded on dates in March 2017 because A.W.H. discharged Mr. Sarson and retained Ms. Smith.

[6] In September 2016 when A.W.H. was charged with the offences in relation to G.M., Mr. Woodburn and Mr. Sarson asked me to hear his trial. A.W.H. has

been before me on other charges which Mr. Woodburn and Mr. Sarson were also dealing with and which remain outstanding. I have treated those other charges about which I have heard no facts and which are scheduled to return before me in June for sentencing, as completely irrelevant and they have played no role in my adjudication of the sexual offence charges.

*The Crown's Burden of Proof Beyond a Reasonable Doubt*

[7] A.W.H. enjoys the presumption of innocence, a presumption only displaced if the Crown proves his guilt beyond a reasonable doubt.

[8] A reasonable doubt is based on reason and common sense which must be logically connected to the evidence or lack of evidence. Suspicion and probability fall far short of the reasonable doubt standard. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus, [1997] S.C.J. No. 77, paragraph 36; R. v. Starr, [2000] S.C.J. No. 40, paragraph 242)*

*The Evidence on Which the Crown Relies*

[9] The allegations of sexual assault and interference against A.W.H. emerge from G.M.'s February 2016 video-taped interview. Mr. Woodburn says that G.M.'s claims of being touched sexually by A.W.H. on various occasions are credible and reliable. Ms. Smith says they are not. What Mr. Woodburn submits as consistency by G.M. Ms. Smith says is the result of G.M. being influenced and encouraged to reveal something that in fact never happened. It is Ms. Smith's submission that the Crown has failed to establish proof beyond a reasonable doubt.

[10] I have had to examine all the evidence carefully, with particular attention to G.M.'s responses to questions in the interviews of February 2015 and February 2016.

*The Events Leading Up to G.M.'s February 2015 Interview*

[11] A.W.H. met G.M.'s mother, M.M. at work in October 2013 and was involved in a relationship with her for a year. He stayed quite often with M.M. at the home where she lived with her three children and her parents. He occasionally

took G.M. to pre-school when neither M.M. nor M.M.'s parents were available to do so.

[12] One evening in early October 2014, G.M. started crying when M.M. told her A.W.H. would be taking her to pre-school the next morning. According to M.M., G.M. told her that she did not want A.W.H. touching her anymore. M.M. testified that G.M. said: "I don't want him tickling me."

[13] The statements by G.M. to her mother are inadmissible hearsay. It is only the fact that they were made that is admissible. G.M. mentions tickling again in the February 2015 interview.

[14] M.M. did not know "what to make of it from a three-year old" but what G.M. said to her raised concerns and led to M.M. breaking off the relationship with A.W.H. She did not question or confront A.W.H. or question G.M.

[15] M.M. testified that she believed G.M. was "legitimately scared of something" when she cried about A.W.H. taking her to pre-school. In cross-examination she said G.M.'s resistance to being taken to pre-school by A.W.H. was not typical behaviour. She told Ms. Smith that G.M.'s reaction was anomalous as she had not refused to go places with anyone else.

[16] After M.M. ended the relationship with A.W.H. in October 2014, G.M. had no further contact with him and M.M. only saw him at work. M.M. testified she did not talk to G.M about A.W.H.

[17] M.M. testified that subsequently something happened at work that "got [her] thinking" so she called the police about what G.M. had told her earlier. This led to the interview of G.M. at the IWK in February 2015.

*The February 2015 Interview of G.M.*

[18] The February 2015 interview was conducted by social worker Hans and D/Cst. Brigitte Cross. In it G.M. made no disclosures of any criminal wrong-doing by A.W.H. When asked if she knew A.W.H., G.M. said: "He's my boyfriend before" but then could or would not say how she came to call him that. After an exchange about that, G.M. was asked if she had told her mother anything about A.W.H. She said no. She was asked a couple of back-to-back questions: "Didn't

tell your mom anything about [A.W.H.], how you didn't really like something? Was [S...] nice?" G.M. responded to the second question by nodding her head affirmatively and then acknowledging by nodding that she was "comfortable" around A.W.H. and safe.

[19] At this juncture, the following exchange took place:

Hans: Did you have any secrets with [A.W.H.]?

G.M.: Yes.

Hans: What were your secrets?

D/Cst. Cross: Your mom said it's okay for you to tell us the secrets.

[20] Although G.M. nodded her head affirmatively when Hans asked if she wanted him and D/Cst. Cross to know the secret, she could not be cajoled into saying more. She shook her head "no" when asked if she wanted to whisper it or show it to them. She nodded when asked if she had ever talked about it with her mother.

[21] D/Cst. Cross and Hans talked to G.M. about how their respective jobs focused on keeping kids safe and reassured G.M. that she would be kept safe. She was then told by D/Cst. Cross:

> We want to make sure that you feel safe and that nothing happened to you that made you feel unsafe, and if something did happen, we would like to know about it, okay, because your mom brought you here because we think something happened and we want to make sure you're okay and she would like you to...talk to us about it..."

[22] Asked if she wanted to tell her secret, G.M. shook her head, "no." She also shook her head when asked if she could "draw" her secret. She shook her head "no" when asked if she would like her mother "to come in and give you the okay to talk about it?"

[23] G.M. was assured she would not be in trouble for talking about the secret. And then she was asked: "So…if I said to you that you had said to mom that you

didn't like the way [A.W.H.] tickled you, what would you say about that?" G.M.'s spontaneous response was: "He's not nice" D/Cst. Cross commented: "No, he doesn't sound like he's nice."

[24] After this D/Cst. Cross and Hans struggled to make headway with G.M. Hans asked G.M. what she thought her mother would say if he asked her what G.M. had told her. G.M. said she didn't know. Asked about whether she and A.W.H. ever played games, G.M. said no. D/Cst. Cross commented to Hans that she was "at a loss" at this point but Hans circled back to the "not nice" comment that G.M. made about A.W.H. He had the following exchange with G.M.:

> Q.(Hans) So you said…what did you say about [S...]. When you said, He's not a nice man, is that what you said? He's not nice? What did you…
>
> G.M. When he doesn't tickle me right.

[25] G.M. resisted the efforts Hans and D/Cst. Cross made to try and get her to explain or demonstrate what "not tickling right" meant. When asked if she could show them on a doll, G.M. repeatedly shook her head, "no". They then switched to talking about good tickling and when Hans asked: "…what is good tickling, can you tell me that?" and D/Cst. Cross said, "Show me good tick…", G.M. interjected with: "That means he's nice."

[26] G.M. said she did not know when asked what "good tickling" was but agreed to show Hans and D/Cst. Cross on a doll.

[27] G.M. was excited for the doll. D/Cst. Cross told her: "Okay, so on the doll, you're going to show us what good tickling is, right, and what's bad tickling." G.M. responded to this by saying: "I'm scared."

[28] G.M. said "yes" when D/Cst. Cross and Hans asked if she had talked about secrets with A.W.H. but responded, "don't know" when asked "what did you talk about?" G.M. answered "yeah" when asked if she remembered what A.W.H. said but responded with "I don't know" to the question, "What did he say?"

[29] D/Cst. Cross continued to inquire about G.M.'s secrets asking her, "Okay, so when you and [A.W.H.] talked about secrets…what are your secrets?" G.M.'s

response – about playing in an airplane that crashed and left her stuck - bore no relationship to the question. D/Cst. Cross came back to the "secrets" issue: "So any other secrets that you had with [A.W.H.]? So what did you tell your mom about [A.W.H.]?" G.M. answered: "I don't know."

[30] When D/Cst. Cross returned to the question of what G.M. may have meant when she said A.W.H. didn't tickle right, G.M. said: "Tickle in my neck…in the back…in the front…on the sides. Everywhere. Everywhere on it." The video shows that the "it" she was referring to was the doll. Asked again what was the secret she had with A.W.H., G.M. said: "When he comes to my house again, then I'm not going to let him…take any…any of my dolls."

[31] D/Cst. Cross reassured G.M. that A.W.H. would never be coming to her house again and stressed the importance of G.M. telling the secret – "But it's very important that if you guys had a secret, then it's important that you tell Hans and I, okay because it's…it's what's going to keep you safe, okay? So what secret did he tell you?"

[32] G.M. responded as follows:

> …when he went to my house before, when he was having a thing with my mom…he was…he was going to do…when he waked up, he was…(inaudible) when I get out of my room, I…I sit on the couch…and then he was coming and then he was going to come and tickle me.

[33] G.M. said the tickling was "in the neck". She said she "laughed" when asked what she hadn't liked about being tickled. She said "No" when asked "Did you like being tickled?" She said "I don't know" when she was asked what she meant by saying A.W.H. hadn't tickled her right. She repeated that response "I don't know" when urged by D/Cst. Cross, "Are you sure you don't know. Think real hard."

[34] G.M. also told D/Cst. Cross she didn't know what she meant by saying that A.W.H. was her "boyfriend." G.M. said, "I really want to go colour." When asked, "What does a boyfriend mean to you?", G.M. responded: "When he tickles me…comes to my house some day" and described the location of the tickling as "Right in my neck, remember."

[35] D/Cst. Cross wanted to know if G.M. was "okay" if A.W.H. didn't come around anymore. G.M. was and confirmed she didn't want A.W.H. around. She affirmed the positive responses she had made at the start of the interview – that she felt okay around A.W.H. all the time.

[36] At the end of the interview, G.M. was asked to demonstrate on various parts of the doll's body where she had been tickled and by whom. She mentioned A.W.H. only once in her responses. D/Cst. Cross pointed to the doll's neck and asked "Who tickles you here?" G.M. said A.W.H.

[37] After confirming that she knew what her vagina was, G.M. responded with "Unh-unh" when asked if anyone had tickled her there. Mr. Woodburn submitted this was a "non-answer" to the question but I disagree.

[38] Having watched the video several times I am satisfied that G.M.'s response was a denial that anyone had ever "tickled" her on her vagina. The reaction of D/Cst. Cross and Hans to G.M.'s answer solidifies my view: right after G.M.'s response, D/Cst. Cross says: "Okay, okay, we're done. Go colour." This is not how G.M.'s interview would have concluded if her response had been equivocal.

[39] G.M.'s "tickling not right" allegation against A.W.H. did not lead to any charges.

[40] M.M. testified she was not told anything about the content of G.M.'s February 2015 interview other than that G.M. had said she did not want A.W.H. tickling her which is what she had been told by G.M. herself.

*After the February 2015 Interview*

[41] In June 2015 M.M. started taking G.M. to see a psychologist. She wanted G.M. to have professional help for what she believed might have been a traumatizing experience. She had not talked to G.M. about A.W.H. so it was not that she had any new information.

[42] G.M.'s maternal grandmother, J.M., did not typically go with M.M. and G.M. to G.M.'s appointments. J.M. testified that one day G.M. asked her to come along and she agreed to do so. While waiting to go in to the appointment, J.M. asked G.M. to please do her a favour and tell the psychologist "everything." G.M.

said she couldn't. She said she had a secret with A.W.H. and was not allowed to tell a secret. J.M. informed M.M. who passed this on to the psychologist and did not ask G.M. directly about it.

[43] What G.M. said to her grandmother and mother is hearsay. It cannot be used for its truth, that is, it cannot be used as evidence that G.M. had a secret with A.W.H. It can only be used as evidence that G.M. said she had a secret with A.W.H.

[44] M.M. told G.M. it was "okay" to tell the secret and within a week after first mentioning it, G.M. said A.W.H. had "punched" her in the vagina. M.M. told this to the psychologist as well and contacted the police. All she said to G.M. was that she did not think A.W.H. would have "punched" her. This claim by G.M. didn't make sense to her. M.M. left it up to the psychologist "to figure it out."

[45] Again, what M.M. says G.M said to her is hearsay. It is relevant only in that it is one of several utterances by G.M. that M.M. has said she did not try to explore: she simply passed it on to the psychologist and brought it to the attention of the police. No suggestions were made to G.M. about what could have happened.

[46] M.M. and the psychologist did reassure G.M. that she was safe. G.M. was fearful that A.W.H. would hurt her. M.M. told her "the bad man was in jail." M.M. acknowledged on cross-examination that she had said to G.M. at the appointments with the psychologist probably four times that A.W.H. had done "bad things" in his past. She denied telling G.M. that A.W.H. had done "bad things" to her.

*The February 2016 Interview*

[47] The February 11, 2016 interview with G.M. was conducted by Cassandra Knight, a child-protection social worker with the Department of Community Services and Cst. Nancy Wagner of the RCMP. Ms. Knight and now-retired Cst. Wagner testified at this trial. They had both been trained in forensic interviewing, a type of interviewing that seeks to avoid leading or biased questions. In Ms. Knight's words, it is an interviewing technique that "allows the child to tell their story without any help."

[48] In the February 2016 interview G.M. said A.W.H. did "stuff bad to me" and talked about A.W.H. touching her vagina with his hand and his feet.

[49] G.M.'s allegation that A.W.H. "did stuff bad" to her was an immediate response to Cst. Wagner asking G.M. to tell her "about [A.W.H.]" Cst. Wagner asked G.M., "Can you tell Cassandra and I about that?" a request that G.M. responded to saying: "And then can I go after this?" Cst. Wagner was vague in explaining why she and Ms. Knight wanted G.M. to talk to them. She said,

> …we just kind of wanted to have a talk with you and see how things were. And your mommy said that there had been some stuff that you told her so we just wanted to know what you could tell us about that today.

[50] When G.M. was asked to tell "about the time you said he did something to you", the following exchange occurred:

| | |
|---|---|
| G.M. | What he did…I was…when he did he…I was asleep that…on last year. |
| Cst. Wagner | You were asleep? |
| G.M. | So he was in jail. He…so…who put him in jail when he was being too bad? |

[51] Cst. Wagner said she did not know who had put A.W.H. in jail and G.M. changed the subject. When asked did she want to tell what it was that A.W.H. had done to her, G.M. shook her head, "no". Cst. Wagner said they "pretty much know" what G.M. told her mother and G.M. was asked, "Could you tell us what you told your mommy so that we know for sure?" G.M. obliged by saying: "When I was asleep he touched all over me even on the head…And then when I was asleep he touched me on the face."

[52] G.M. told Cst. Wagner that she had been sleeping in her bed. She went on to describe another occasion when she was sick and sleeping in the living room "he also touched me down here." G.M. identified "down here" as "my vagina." G.M. said she was three at the time. She indicated A.W.H. touched her with his hand. She was wearing pajamas at the time and said A.W.H. touched her inside and outside her pajamas.

[53] G.M. then said that A.W.H. "just ran away when I seen him do it…I was mad."

[54] When asked who was home when the touching happened, G.M. said her mother, grandparents, brother and D., a man her mother was seeing. She was asked where they were and responded: "They were in the living room and I was sleeping in the living room and they were sleeping and then I said, 'Help, help me, help me' and they just waked up and helped me."

[55] Right after relating this, G.M. expressed her hostility for A.W.H.:

> And the day that he's in…come back I'm just going to poke a stick in his eye…Well, next time…if he knows where our house is and he comes here to our house, I'm going to kick him in the face…And I'm going to trip on his face.

[56] After reassuring G.M. that A.W.H. would not be coming to her house again, Cst. Wagner asked G.M. about the time she said A.W.H. had touched her "in your bed." G.M. responded:

| | |
|---|---|
| G.M. | So when I was in my bed and I was sleeping he came and touched me down there again. |
| Cst. Wagner | And do you remember if he said anything to you? |
| G.M. | No. |
| Cst. Wagner | And so when he touched you when you were sleeping in your bed what were you wearing? |
| G.M. | Clothes. |
| Cst. Wagner | Clothes. Did he touch you on the outside of the clothes or the inside of the clothes? |
| G.M. | Outside and inside. |
| Cst. Wagner | On the inside. And what did he use to touch you that time? |
| G.M. | His feet. |

Cst. Wagner His feet?

[57] G.M. responded to Cst. Wagner by shaking her head affirmatively and said A.W.H.'s feet were "stinky."

[58] When asked where her mother had been when A.W.H. touched her while she was in bed, G.M. said, "She was on the couch and then I just yelled help again." Asked what her mother had done when G.M. yelled help, G.M. replied: "She came out and helped me and she jumped on his head…in his face."

[59] G.M. was asked if there were any other times when A.W.H. "did something he wasn't supposed to?" She said there were not. She said there were no other situations she wanted to talk about. She said A.W.H. had not babysat her but that he had taken her to school before, "but I didn't like it." G.M. said this was because A.W.H. was "too mean" to her. "He touched me everywhere because he did not like me and I don't like him." Her answer to Cst. Wagner's question about what she meant by saying that A.W.H. had touched her "everywhere" went off on a tangent.

[60] G.M. told Cst. Wagner the touching by A.W.H. when he drove her to pre-school was like the time she had been on the couch and when she was in bed. What follows is the exchange:

G.M. And then I just moved into my bed when I was done sleeping in…on the couch…in on the couch. And when I was on the couch I just moved into my bed and [A.W.H.] knew because he was sleeping right beside me.

Cst. Wagner On the couch or in the bed, sleeping right beside you?

G.M. On the couch. And he knew because when I got off he feeled me get off.

Cst. Wagner How could he feel you get off? And what happened after that?

G.M. He woke up, can't find me. He found me in my room sleeping under my covers and when I…when I was under the covers he touched me everywhere.

| | |
|---|---|
| Cst. Wagner | He touched you everywhere. Was that the same time that you told us about or a different time? |
| G.M. | A different time. |
| Cst. Wagner | A different time. How many times do you think he did that? |
| G.M. | 10 and 20. 10, 20, 30 |

*G.M.'s Testimony in November 2016*

[61] When G.M. testified in November 2016 she was six years old. Her birthday is [Date…].

[62] Mr. Woodburn asked G.M. how she knew A.W.H. She responded by saying: "He did something bad." She was asked if she could remember "what that was" and G.M. said, "Not that much." She added: "I don't know if I can remember anything" and became upset. She wanted her mother. We took a recess.

[63] When she returned to the witness box, G.M. was asked what a "bad thing" was and said it was "touching somebody somewhere bad." But she did not want to talk about it beyond that. She said she knew where "a bad place" was but did not want to say. She then said she was scared to be in the courtroom. She followed that by saying that A.W.H. made her feel "sad" and "scared." She answered "yes" when asked if A.W.H. was one of the reasons she was scared. G.M. requested another break and said she was feeling "a little scared."

[64] On her return to the courtroom, Mr. Woodburn asked G.M. whether she had a secret which she said she did. But it was not one she wanted to tell. She said her secret was not about why she was in court. She told Mr. Woodburn she did not know why she didn't want to tell the secret. He asked her how she felt about telling "the secret" and "the bad thing" and G.M. said, "really scared".

[65] Following the testimony I have just summarized, Mr. Woodburn proceeded to make the section 715.1 application for the admission of the February 2016 video-taped interview. G.M. was shown the video and confirmed it was her being interviewed. She correctly identified Ms. Knight – "Cassandra" - and Cst. Wagner – "Nancy"- and said the video helped her remember. She said she was telling the

truth in it. She remained resolute about not wanting to tell Mr. Woodburn anything. He asked her if she wanted "to try and tell us, in your own words today, what happened." G.M. said no, and answered "I just don't want to" when asked why she said to Mr. Woodburn she did not want to tell him anything, "I just don't want to."

[66] Under cross-examination during the *voir dire* G.M. agreed that her mother had told her that A.W.H. was "a bad man" who was in jail. She also agreed with the suggestion that her mother had said that A.W.H. "had done things to you he shouldn't have." She said she did not remember when her mother made these comments but later agreed that her mother had told her before the February 2016 interview that A.W.H. was in jail. She also testified that her mother had asked her specific questions about what A.W.H. had done. She agreed with the suggestion that she had been asked what happened and "Did [A.W.H.] touch your vagina?" G.M. said her mother's comments and these questions came after G.M. had last seen A.W.H. I know from M.M.'s evidence that G.M. would have last seen A.W.H. in October 2014.

[67] Asked on cross-examination about her "poke a stick in his eye" and "kick him in the face" comments during the February 2016 interview, G.M. agreed that she really didn't like A.W.H. by the time she was interviewed the second time. She testified she didn't remember why her feelings had changed toward A.W.H. whom she had said in the February 2015 interview she felt comfortable around.

[68] G.M. said there were "lots of times" that her mother had told her that A.W.H. had done "bad things" to her. She didn't know if some of those times were between the first interview in February 2015 and the second interview in February 2016.

[69] And although on re-examination by Mr. Woodburn G.M. said her mother had told her to lie, when asked if her mother had told her to lie about A.W.H., she said: "No."

[70] M.M. denies telling G.M. that A.W.H. had done bad things to her. M.M. also testified that she did not tell G.M. to lie.

*Cross-examination of G.M.– March 2017*

[71] Mr. Woodburn had no further questions for G.M. when A.W.H.'s trial resumed in March 2017.

[72] G.M. told Ms. Smith on cross-examination that she did not like A.W.H. driving her to pre-school. It was put to her that she had said "yes" in November to Mr. Woodburn's question about whether her mother had asked her to lie. G.M. said she did not remember saying "yes" and told Ms. Smith her mother had never asked her to lie.

[73] G.M. testified that she remembers her mother telling her that A.W.H. had done bad things and that she remembered talking about those "bad things." When asked by Ms. Smith what those bad things were, G.M. answered, "I forget."

*Assessing the Credibility and Reliability of the Evidence of Children*

[74] I am dealing with the evidence of a young child. Certain principles must be kept in mind when considering such evidence. The standard of proof – proof beyond a reasonable doubt – does not get lowered in the case of child complainants. The credibility of child witnesses must be carefully assessed. That careful assessment must take into account the fact that, "Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection." (*R. v. W.(R.), [1992] S.C.J. No. 56, para. 24*) A "flaw", such as "a contradiction" in a child's testimony "should not be given the same effect as a similar flaw in the testimony of an adult." (*R. v. B.(G.), [1990] 2 S.C.R. 30, para. 48*) As the Supreme Court of Canada has said: "While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it." (*R. v. B.(G.), para. 48*)

[75] The assessment of a child's evidence should not fall prey to rigidity and should draw on common sense. "Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate." And "…the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of

the age of the witness at the time of the events to which she is testifying." (*R. v. W.(R.), para. 26*)

[76] I have applied these principles in assessing G.M.'s allegations and the Defence submissions that they have been concocted.

[77] Ms. Smith submits that G.M.'s allegations against A.W.H. are simply untrue, and possibly the product of influence, bias or fantasy. Ms. Smith noted that the interview closer to the time A.W.H. spent in G.M.'s household – the February 2015 interview, the interview when G.M. would be expected to have the more accurate memory – disclosed no allegations of sexual touching. Ms. Smith submits that when the February 2016 interview took place G.M. had been encouraged by her mother and grandmother to share her "secret". In Ms. Smith's submission, this created the potential that G.M. started to believe there was something to tell, something that must have happened to her, a belief that would have been oxygenated by M.M. telling her that A.W.H. was a "bad man" who was in jail. By the time G.M. was being interviewed in February 2016 Ms. Smith says she could have been feeling pressured to say something had happened to her when in fact, it hadn't.

*The Pre-School Routine and G.M.'s Negative Reaction in October 2014*

[78] In early October 2014, A.W.H. had been a feature in G.M.'s life for about a year. M.M. described him as "an active participant" with the household and her children. G.M. went to pre-school twice a week. Pre-school had a start time of 9 a.m. and G.M. was typically taken there by her grandparents because M.M. had to be at work for 7 a.m. A.W.H.'s work didn't start until 2 p.m.

[79] According to M.M., A.W.H. had taken G.M. to pre-school approximately six times. This was because no one else was available. M.M. testified that on these occasions J.M. had gone to work and M.M.'s father was in hospital. She said of A.W.H.: "He was there to help me with the kids."

[80] J.M. was asked about getting G.M. to pre-school. She testified that if M.M. was home she would do it. If she and her husband, that is G.M.'s grandfather, were home they would take her. And if they weren't and A.W.H. was there, he would take her. J.M. said A.W.H. would take G.M. "because we were all working."

[81] According to M.M. getting G.M. ready for pre-school involved a routine that included removing wet pull-up diapers and washing her vaginal area. J.M. also mentioned this routine.

[82] I find the evidence does not answer the question of whether A.W.H. participated in getting G.M. ready for pre-school. M.M.'s evidence indicated there were occasions when A.W.H. was the only adult at home with the children once she and J.M. had gone to work and when her father was in the hospital. J.M.'s evidence made it less clear. She testified that "maybe occasionally" G.M.'s grandfather would get G.M. ready and A.W.H. "would drive her if no other car was at home." She thought her husband had been in hospital years before A.W.H. appeared on the scene, but she was not sure. J.M.'s evidence suggested that A.W.H.'s role in G.M.'s pre-school routine was as the driver.

[83] M.M.'s evidence satisfies me that A.W.H. took G.M. to pre-school a couple of times in the fall of 2014 and had taken her previously. I am unable to say with certainty if he got her up on those occasions and was responsible for her morning routine. However, I have no hesitation in finding that in early October 2014 G.M. suddenly balked when she was told A.W.H. would be taking her to pre-school the next morning. G.M. reacted by crying and saying she did not want A.W.H. to drive her. Her unusual reaction had not happened before. It was sufficiently disturbing to M.M. that she ended the relationship with A.W.H.

[84] G.M. told M.M. she did not want A.W.H. taking her to pre-school because she did not want him "tickling" her. As I have said already, this is hearsay and not evidence that A.W.H. had "tickled", in other words, touched G.M. in a manner that she did not like. It is merely evidence of these words being said by G.M. to her mother.

*Negative Themes at the February 2015 Interview*

[85] At the February 2015 interview G.M. answered affirmatively when she was asked if she had any secrets with A.W.H. She could not be persuaded to say what the secrets were. She did not bring up tickling by A.W.H. She was asked to comment on having said to her mother that she hadn't liked the way A.W.H. "tickled" her. Her spontaneous response was, "He's not nice." When she was asked about this statement, G.M. said: "When he doesn't tickle me right."

[86] While waiting for the doll to be fetched, Cst. Cross mentioned to G.M. that she would be showing them what good and bad tickling is. G.M. reacted to this reference to "bad tickling" by saying: "I'm scared." I note that before this point in the interview G.M. had not mentioned being scared.

[87] As I indicated previously, during the February 2015 interview G.M. did not disclose sexual touching by A.W.H. She resisted all efforts by Cst. Cross and Hans to get at the secret she said she had with him but she did not deny having a secret.

[88] I will pause here to address Ms. Smith's submission that between the February 2015 and the February 2016 interviews, G.M. was influenced by her mother's negative characterization of A.W.H. as a "bad man" who was in jail.

*Assessing G.M.'s Evidence for Indications She was Influenced to Make Allegations Against A.W.H.*

[89] I find the evidence does not support the suggestion that M.M. incubated in G.M. a negative attitude toward A.W.H. out of which her allegations against him were born. I accept M.M. evidence concerning how she handled what G.M. was saying about A.W.H. I found M.M. to be a very credible witness.

[90] Where M.M.'s evidence is different from G.M.'s, I find M.M.'s evidence to be more reliable. At various times G.M. agreed with propositions put to her on cross-examination, contradicting M.M. For example, as I noted earlier, when cross-examined in November during the *voir dire*, G.M. agreed with the following: that her mother had said A.W.H. had done things to her he shouldn't have, that her mother had asked her specific questions about what A.W.H. had done, that she had been asked what happened and "Did [A.W.H.] touch your vagina?", and said "yes" when asked if her mother had told her to lie. I find, based on M.M.'s testimony, that none of this occurred.

[91] I accept M.M.'s evidence that she took a consciously cautious approach to what G.M. said about A.W.H.: that between October 2014 and February 2015 she did not talk to G.M. about A.W.H., she did not try to explore what G.M. said to her at various times, did not ask her pointed questions, and did not interrogate G.M.'s unusual claim that A.W.H. had "punched" her in the vagina.

[92] I accept that M.M. did not ask G.M. directly what the secret was that G.M. had mentioned to her grandmother, never used the phrase "bad things", knows nothing about what G.M. said in either of the video-taped interviews and never asked G.M. to lie about the matters before me or anything else.

[93] M.M. impressed me as a responsible and careful parent. She sought out professional help for G.M. and passed along what G.M. said to her without probing G.M. She left matters in the psychologist's hands, and explained what she saw as her own limitations: "I am not a psychologist." Her characterization of A.W.H. to G.M. as a "bad man" who was in jail did not come about until the summer of 2015 when G.M. started going to counselling.

[94] M.M. and J.M. both testified to having no concerns with A.W.H. being around G.M. They never saw him touch her inappropriately. The questions posed on cross-examination that elicited these answers provided an opportunity for M.M. and J.M. to cast A.W.H. in a negative light. It was an opportunity they did not make any attempt to exploit. I find them to have been fair and honest witnesses and I am satisfied they did nothing to prejudice G.M. against A.W.H.

[95] There is also no evidence that M.M. and A.W.H. had a fraught relationship or an unusual level of discord. M.M. denied having had a conflictual relationship with A.W.H. She acknowledged the relationship had "ups and downs" and there were arguments. J.M. says she observed nothing more than the "occasional spat." She described the relationship with A.W.H. in benign terms: "We all got along great with [A.W.H.]"

[96] Another concern raised by Ms. Smith, was G.M.'s attitude toward A.W.H. in the February 2016 interview. She entertained the notion of physically hurting him, a contrast to having confirmed in February 2015 that she felt comfortable around him.

[97] There are several relevant observations to be made about G.M. expressing openly antagonistic feelings toward A.W.H. in the February 2016 interview. G.M.'s negative sentiments were not new. She had characterized A.W.H. in February 2015 as "not nice" and said that she did not want him around anymore. Her stronger statements in February 2016 were made long after she had last seen A.W.H. and since being reassured that he was "a bad man" and was in jail. Viewed

in context, and given M.M.'s evidence, I find the February 2016 statements made by G.M. about A.W.H. do not cause me to conclude she developed hostile feelings about him that led to her concocting her allegations.

[98] I do not find evidence that G.M. had a motive to lie about A.W.H. It would be incorrect however to leap from a finding of no motive to fabricate to a conclusion that G.M. must therefore be telling the truth. More is required in the assessment of whether the Crown has proven its case beyond a reasonable doubt. (*R. v. M.(O.), 2014 ONCA 503, para. 108*)

*G.M.'s Allegations and the Crown's Burden of Proof*

[99] In the February 2016 interview G.M. made a statement about A.W.H. that was consistent with her negative reaction in early October 2014 to being told he would be taking her to pre-school. Asked by Cst. Wagner, "Tell me about [A.W.H.]", G.M. immediately said: "He did stuff bad to me." In a narrative during the interview that concluded with some details I will address shortly, G.M. gave a consistent description of A.W.H. touching her, including on her vagina. She was forthcoming with the specifics. It was when she was wearing pajamas. She was touched inside and outside her pajamas. She recalled not having liked A.W.H. taking her to pre-school because he "touched me everywhere."

[100] Touching did not come out of the blue in February 2016. G.M. mentioned it in the February 2015 interview. She had mentioned it to her mother in October 2014: she had not wanted A.W.H. to "tickle" her. I reiterate: what G.M. said to her mother is hearsay and inadmissible for its truth. What is admissible is the fact of her having said it.

[101] In October 2014 G.M. reacted spontaneously and with unusual distress when M.M. told her that A.W.H. would be driving her to pre-school. She answered "yes" when asked during the February 2015 interview if she had any secrets with A.W.H. She did not want to tell the interviewers what it was. When the subject was brought up of having told her mother she didn't like the way A.W.H. tickled her, G.M. immediately said A.W.H. was "not nice." She appeared comfortable and relaxed with Cst. Cross and Hans until it was said to her, as she and Cst. Cross waited for the doll, that she would be showing them "bad tickling." G.M. reacted to this by saying she was "scared."

[102] There is a consistent thread of G.M. having a negative reaction about A.W.H., harbouring a secret and referencing touching that she didn't like. The consistency that runs through G.M.'s responses to the subject of A.W.H. is compelling.

*Discounting Certain Narrative Details*

[103] I must consider, in assessing the credibility and reliability of this narrative thread, details that G.M. included when telling Cst. Wagner and Ms. Knight in February 2016 about A.W.H. touching her. These details, added on to G.M.'s description of being touched by A.W.H., require me to treat everything G.M. said about A.W.H. with considerable caution.

[104] In the February 2016 interview – and the one in February 2015 – it was established that G.M. understood what was meant by truth and lies. In February 2016 Ms. Knight and Cst. Wagner emphasized to G.M. that the interview was being conducted in the "truth" room and that they expected her to tell the truth.

[105] Notwithstanding the emphasis on truth-telling, I find that certain things G.M. told Ms. Knight and Cst. Wagner during the February 2016 interview had to have been invented by her. I am referring specifically to G.M. saying that she called out for help when A.W.H. touched her in the living room and when she was in bed. M.M. and J.M. never mentioned G.M. calling for help. Indeed, as I noted earlier, they both testified they had never witnessed anything untoward and had no concerns about A.W.H. And I accept M.M.'s evidence that she never confronted A.W.H. I therefore find there to be no validity to G.M.'s claim of calling for help from her bed and her mother coming and jumping on A.W.H.'s head.

*Consistent Themes and G.M.'s Core Allegations*

[106] I have reflected carefully on the fact that I am unable to accept everything G.M. described in her February 2016 interview. It does not change the fact that she has been strikingly consistent in her negativity toward A.W.H, the fact of having a secret, and not liking how he touched her.

[107] G.M. had a negative response about A.W.H. in October 2014 and in the interviews of February 2015 and February 2016. This is a consistent theme that made its first appearance before M.M. ever said anything about A.W.H. being a "bad man."

[108] And there is the consistent theme of a "secret". In February 2015 it was Hans who asked G.M. if she had any "secrets with [S...]." It is not just that she said "yes" – she could have just been suggestible – it is that she resisted strenuously the efforts to get her to reveal the secret and never sought to end the questioning by withdrawing her claim of having one. Months later, G.M. again mentions having a secret to her grandmother. It is another consistent theme.

[109] G.M. has also been very consistent in her reluctance to talk about A.W.H. In the two video-taped interviews and in court, G.M. impressed me as bright and readily able to respond to questions she was willing to answer. In these various contexts, as can be seen from the excerpts I have recited from the interviews, G.M. employed techniques to avoid talking about A.W.H. She changed the subject. She refused to answer. She made it clear there were certain subjects she did not want to discuss. She said she couldn't remember. She deflected certain inquiries. For example, when asked by Cst. Wagner in February 2016 what she meant by saying that A.W.H. had touched her "everywhere", G.M.'s response veered away from the question and avoided answering it:

> It means that it's not nice because when you touch people and hurt them it…if it really hurt that means if it's bleeding really bad and the Band-aid is on it and it starts to fall off it never will go back on and then you have to go to the hospital.

[110] In court, G.M. was very reluctant to talk about A.W.H. and resisted doing so. She asked for breaks. She said she was scared. She said to Mr. Woodburn that she didn't want to tell him anything – "I just don't want to."

[111] G.M.'s consistency makes her a credible witness. Her reluctance to answer questions about A.W.H. and the techniques she used to navigate the questions help me understand the narrative embellishments I mentioned earlier. They are consistent with G.M.'s narrative patterns. I find they were another technique G.M. used in dealing with the information she had resisted sharing. The timing is

relevant: G.M. added the embellishments just after disclosing that A.W.H. had touched her in a bad way.

[112] I am not required to accept everything a witness has said in order to be satisfied that crucial aspects of the witness' evidence are true. G.M.'s narrative flourishes have not caused me to disbelieve her core allegations against A.W.H. I find they do not go to the heart of G.M.'s allegations that A.W.H. touched her sexually.

[113] I find the secret G.M. resisted sharing in the February 2015 interview was touching by A.W.H. Touching is what she revealed in the February 2016 interview. In that interview she took the final further step of disclosing that the touching had been sexual.

[114] I have considered carefully the Defence submission that by the time of the February 2016 interview G.M. could have been feeling pressured to create a story to satisfy the expectations of adults in her life – family and the interviewers – that AW.H. had done something to her. I find the evidence runs counter to the suggestion that G.M.'s allegations about A.W.H. touching her sexually were manufactured.

[115] It is the consistency of G.M.'s allegations – the nature of them as allegations of touching and the associated themes she reiterated over time – that displaces the presumption of A.W.H.'s innocence. I find the Crown has proven beyond a reasonable doubt that A.W.H. touched G.M. with his hand for a sexual purpose on more than one occasion while he was in a relationship with M.M. I find that the sexual touching happened in or around October 2014. I accept that the touching, which was a "secret" and which in G.M.'s words was "not tickling right", occurred when A.W.H. and G.M. were alone, while he was transporting G.M. to pre-school and while she was in her pajamas in bed.

[116] I am unable to determine if touching occurred on a couch in the living room, which would have been a more public space, and I am not satisfied that G.M.'s evidence of being sexually touched by A.W.H.'s "stinky feet" is a reliable allegation. But these claims are not untethered from plausibility: G.M. may have been lying on a couch just before being touched by A.W.H. once she had moved into her bed. And she could have noted an odour from A.W.H.'s feet at some point.

The "stinky feet" detail may have been another deflection strategy after disclosing information to Cst. Wagner and Ms. Knight about being touched on her vagina.

[117] I have also been unable to determine what G.M. meant when she answered Cst. Wagner's question, "How many times do you think he did that?", a question that was asked in the context of G.M. having said that A.W.H. had touched her "everywhere." I am not sure how to interpret G.M.'s response of "10 and 20, 10, 20, 30" and Cst. Wagner did not follow-up.

[118] These details I have just mentioned need to be considered in light of G.M. trying to describe as a five-year old in February 2016 events that had happened sixteen months earlier. As I noted previously, the inability of a child to "recount precise details" and communicate with exactitude when and where an event occurred "does not mean they have misconceived what happened to them and who did it." (*R. v. B.G.), para. 48*)

[119] Most significantly, G.M.'s core allegations have remained intact: those aspects of her narrative that I have not accepted have not raised a doubt about, and do not detract from, the reliability of the allegations she made that underpin the charges against A.W.H.

*Conclusion*

[120] I find it has been proven beyond a reasonable doubt that A.W.H. touched G.M. on her vagina with his hand contrary to section 151 of the *Criminal Code.* I accordingly enter a conviction on the first Count on the Information. On the basis of the principles in *R. v. Kienapple*, [1975] 1 S.C.R. 729 I am staying Count 2.

Derrick, P.C.J.