

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Percy*, 2020 NSSC 138

Date: 20200724

Docket: Hfx No. 481119

Registry: Halifax

Between:

Her Majesty the Queen

v.

Matthew Albert Percy

Restriction on Publication: Sections 486.4 and 486.5 of the <i>Criminal Code</i>

Judge: The Honourable Justice Joshua M. Arnold

Heard: February 18, 19, 20, 21, 24, 25, 27 and 28, 2020, in Halifax,
Nova Scotia

Counsel: Rick Woodburn, for the Crown
Peter Planetta, for the Defence

Overview

[1] The accused, Matthew Percy, is charged with sexual assault causing bodily harm. The complainant, B.W., met Mr. Percy on her way home from a bar in Halifax in the early morning hours of December 6, 2014. They went back to her dormitory, where, she said, they had sex in her bedroom. After that, she said, Mr. Percy had forcible anal intercourse with her in the bathroom, despite her protests, non-consensual vaginal sex in the shower, and non-consensual oral and vaginal sex in the bedroom. Her memory was hazy about the sex in the bedroom, however, it was much clearer about the forced anal intercourse and what happened in the shower.

[2] B.W. said she had bite marks on her neck and back, and bruising on her backside as a result of Mr. Percy sexually assaulting her. She underwent a lengthy examination by two SANE nurses, who noted the bite marks, bruising, and erythema on her anus and vaginal wall.

[3] Mr. Percy gave a voluntary video statement to the police on December 16, 2014, in which he agreed he had sex with B.W., explained the chronology of events slightly differently than B.W., but said that all activities were consensual.

Evidence

The evening at Cheers

[4] B.W. was 24-years-old at the time of the trial. She graduated from Dalhousie University in Halifax in 2017 with a Bachelor of Science degree. On December 5, 2014, B.W. was living in a residence “pod” with four roommates in a Dalhousie residence. She had just turned 19 (and drinking age) and was celebrating with her roommate K.L. They had drinks and got dressed to go out. Neither could remember what, or how much, they had to drink. B.W. said she “had a good buzz” before going downtown around 11:00 PM.

[5] B.W. and K.L. ended up at a Halifax bar called Cheers (also referred to during the trial as the “Liquor Dome”), where they drank and danced. Neither could recall what, or how much, they drank. K.L. said B.W. was about an eight out of ten on an intoxication scale with “one” as sober and “ten” as passed out. B.W. said she was about a seven on the same scale, but that she was only a few drinks away from passing out. She said her ability to walk was likely not great, and she could have been stumbling.

[6] Later in the evening or in the early morning hours, K.L. left Cheers to meet a friend. B.W. stayed at the bar, alone and intoxicated. She had met a bouncer during the evening and went to say goodbye to him. She could not find him, and left the bar. She could not recall whether she left on her own or was escorted out. Either way, she intended to go home alone.

[7] The accused, 31-year-old Matthew Percy, was outside Cheers smoking a cigarette with another man when B.W. came out of the bar. He later told police that he was working as a cook in a nursing home and at a restaurant, and as an apprentice bricklayer; that his mother had left hospital three or four days earlier after a stroke, and he was responsible for her care part of the time. His stepfather also had health problems. Mr. Percy said he was “incredibly stressed out” with his work and his family’s health issues, that he “wanted to blow off some steam”, and was looking for a one-night stand. He said he had had a few drinks through the evening, but there was no evidence as to his level of intoxication. On the videos shown in court (and in court almost six years later) Mr. Percy appeared to be a physically fit man.

The complainant and the accused meet

[8] When B.W. exited Cheers, she said, Mr. Percy called out “how are you doing?” and invited her over to talk with himself and his friend. Mr. Percy’s version was that B.W. came up to them, made small talk and told them she was 19. He said they were “flirting a bit”. It was December and B.W. was not wearing a coat. Mr. Percy offered her his sweatshirt, which she took. Mr. Percy asked B.W. if she wanted to get poutine, and she agreed. He went back into Cheers to get his coat. I infer from the fact that his coat was still inside that Mr. Percy was not planning to leave Cheers until he met B.W.

[9] When Mr. Percy came back outside, they walked towards Willy’s Poutine, several blocks away. B.W. said they stopped at the Toothy Moose bar on the way. She thought she had a Molson Canadian Cider, but was not sure. Mr. Percy, however, told the police that they went directly to Willy’s, and that they were kissing while walking. B.W. testified that she did not remember kissing, but said it was possible. They went to Willy’s and bought a poutine. B.W. thought they were going to sit outside and eat it on the street. She did not recall holding hands or kissing at that time, and did not think that occurred.

[10] B.W. said she did not recall falling during the evening, K.L. likewise said she had no recollection of B.W. falling, and Mr. Percy did not say that B.W. fell.

B.W. said she was wearing boots with heels, and agreed that she had fallen other times while drinking and wearing heels. On cross-examination she said it was possible she fell, although she had no memory of falling.

[11] B.W. said she could not recall how she and Mr. Percy ended up in a taxi, but they did, and went to her residence. She recalled Mr. Percy paying for the taxi.

Arrival at the residence

[12] Security video shows B.W. and Mr. Percy entering the residence and moving through the building to B.W.'s room. The video shows B.W. using her electronic key to enter the building, with Mr. Percy following. They appear to be together, but there is no touching, kissing or other intimate activity visible while they enter and walk through the building. B.W. appears unsteady on her feet at times, first stumbling while entering the building, and again while getting off the elevator. After she leaves the elevator, Mr. Percy's sweatshirt droops off of her shoulder, her eyes are down, and she appears to be choosing her steps carefully while walking down the hallway. Mr. Percy is immediately behind her and would be able to see these indices of impairment. Conversely, nothing unusual is apparent about Mr. Percy's movements.

[13] B.W. shared a residence "pod" with three other students. They each had their own bedroom, and two each shared a bathroom. One of B.W.'s roommates, E.C., had gone to bed early, as she had an exam the next morning. B.W. and Mr. Percy went into the pod and then went directly to B.W.'s bedroom. B.W. testified that due to intoxication and the passage of time, her memory for some of the subsequent events was hazy or void. She recalled Mr. Percy putting the poutine down on the nightstand and helping her remove her shoes. Mr. Percy said they began to kiss and take off each other's clothes. B.W. did not recall this, but said it was possible.

The sexual activity in bedroom

[14] The chronology of when and how the sexual activity occurred while in the residence pod differs in some ways between B.W. and Mr. Percy.

[15] Mr. Percy told the police that when they arrived at B.W.'s residence the following occurred:

Mr. Percy: Where there's, ah, separate doors and then they're all locked and they're all separate rooms. And we went right into her room. I put down the poutine. And she closed the door. And we -- we just started making out, and, like, you know, like, taking off each other's clothes. Then she grabbed a condom, ah, from her stack and threw it on the bed. And I asked her if she would give me a blow job.

Um, I was laying down on the bed and she was in between my legs and giving me a blow job. And I -- I wasn't, ah, I wasn't getting hard. And I asked her to get on her knees. And um, and then she started, ah, blowing me on her knees. And I, ah, I -- you know, the pillow thing, like you said yesterday.

Mr. Percy: I put a pillow down for her knees. She was blowing me like that for a bit. And then I -- I said, ah, "No hands."

D/Cst. Cross: So why did you say, "No hands"?

Mr. Percy: I don't -- I don't know. It just...

D/Cst. Cross: I mean...

Mr. Percy: It turns...

D/Cst. Cross: ... it's important.

Mr. Percy: It turns -- it turns me on, I -- I guess.

D/Cst. Cross: What do you mean?

Mr. Percy: I -- I don't know. I just, ah...

D/Cst. Cross: Well, you do know. I mean, you know what turns you on, you're -- you're a man.

Mr. Percy: Yeah.

D/Cst. Cross: So explain to me what...

Mr. Percy: I...

D/Cst. Cross: That's important.

Mr. Percy: Yes, ma'am.

D/Cst. Cross: It's an important fact.

Mr. Percy: Yes, ma'am. Ah, just, um -- I don't know. I -- I...

D/Cst. Cross: Is it a control thing?

Mr. Percy: I -- I -- yes.

D/Cst. Cross: Okay.

Mr. Percy: I think so.

D/Cst. Cross: Did you have a hold of her head?

Mr. Percy: Yes, ma'am.

D/Cst. Cross: Okay.

Mr. Percy: Yes.

D/Cst. Cross: Were you motioning her head?

Mr. Percy: Yes, ma'am.

D/Cst. Cross: Okay.

Mr. Percy: Um, and we -- she was blowing me and we were making out too at the same time. And then she stood up after -- after she was done blowing me. And -- and -- and I -- I -- she turned around. And I looked at her -- at her bottom. And it was, like, it was, like, all bruised, like she -- like, it looked like, ah, like she, like, slid on, like, turf, you know, like, ah...

...

Mr. Percy: Well, when we're -- when we were -- when I -- she was blowing me, or, like, when she was on her knees blowing me, she was, like, "Take me, take me." And I was like, "Okay, okay." And so then, ah, I put her up on the bed and we -- we had vaginal sex. And she was still saying, "Take me, take me, take me."

...

D/Cst. Cross: So when she was on her knees blowing you was she gagging at all?

Mr. Percy: Yes, ma'am.

D/Cst. Cross: Okay.

Mr. Percy: But it's...

D/Cst. Cross: Why was she gagging?

Mr. Percy: But it's not, like, ah, because I was, ah, forcing her down on -- on my penis. And...

D/Cst. Cross: Okay.

Mr. Percy: But, like, you know, we'd -- she'd do it and then she'd, like, stop and then she'd start again and -- or we'd, like, make out.

D/Cst. Cross: um-hmm.

Mr. Percy: And then she'd start doing it again and...

D/Cst. Cross: So you said it was, like, a control thing, like, it was a -- it was a turn-on -- it's a turn-on for you to -- to shove her head into your penis. Is that what you're talking about?

Mr. Percy: Yes, ma'am.

D/Cst. Cross: Okay.

Mr. Percy: It was just, like, a, like, a rough blow job.

[16] When describing the rough oral sex, Mr. Percy said he asked B.W. “for a blow job”, “asked her to get on her knees”, motioned her head while holding it, and, while she was performing oral sex, he said “no hands”. Mr. Percy told the police that he could not initially achieve an erection and had to increase his sexual excitement by controlling B.W., by holding her head and forcing it down on his penis, causing her to gag.

[17] As noted above, Mr. Percy said that after the oral sex, B.W. turned around, and he saw bruising and marks on her backside. He said in his police statement:

Mr. Percy: Um, and we -- she was blowing me and we were making out too at the same time. And then she stood up after -- after she was done blowing me. And -- and -- and I -- I -- she turned around. And I looked at her -- at her bottom. And it was, like, it was, like, all bruised, like she -- like, it looked like, ah, like she, like, slid on, like, turf, you know, like, ah...

D/Cst. Cross: Okay.

Mr. Percy: Like, it was all scraped up. And I -- I said to her, I was, like, “What’s -- what’s wrong with your ass?” like. And...

D/Cst. Cross: What did she say?

Mr. Percy: And she -- she said to me, she was, like, “You did that.” And I was, like, “How -- how did I do that?” Like, I -- I didn’t even touch her ass, like, at all.

...

Mr. Percy: And I was, like, “No, I didn’t.” And then she was, like, she was, like, “No, it’s from when I was -- when I was younger I was a little bit bigger.” And ah, I -- I didn’t understand. But it looked like someone had -- someone had, like, hit her ass, like, the night -- or hit her bottom the night before.

...

Mr. Percy: But it -- like , there -- there were scrapes on it, like, ah, like -- like a turf burn.

...

Mr. Percy: You know? And -- but I -- I -- I didn’t...

D/Cst. Cross: So there were, like, stretch marks?

Mr. Percy: Yes, yes. Yes, ma’am.

[18] Mr. Percy told D/Cst. Cross that after his comment about the injured appearance of her backside, he took off B.W.’s panties and they started having vaginal sex without a condom. As to not using a condom, Mr. Percy said, “it totally, like it totally slipped my mind. We just both started having sex.”

[19] B.W. said her recall of the events in the bedroom was hazy or nonexistent on some details, but that her memory for some details was clear. Much of what she did recall accorded with Mr. Percy's police statement, although there were chronological differences, and differences regarding the issue of consent. B.W. described their arrival at the apartment as follows:

We got into the apartment and completely skipped the dining room. I don't know why we didn't sit at the table. It only makes sense to eat food at a dinner table. Anyways, we sat at on my bed and he took my shoes off for me. I thought that was also nice. And then the poutine got set down on the bedside table. I don't know if food got put down first or my shoes got taken off, I don't remember that, but then I don't remember which one of these happened first or second, but he had taken the pillow off my bed and put it on the floor and told me to get on my knees and I was confused.

[20] B.W. said that after Mr. Percy took her shoes off, the next thing she recalled was both of them being naked. She could not recall how they undressed. She said she did not want to have sex with Mr. Percy: "I did not want him to stay. I didn't want him to be there from the beginning. As soon as it started I did not want it to happen." B.W. said the following on direct examination:

Q. Do you remember going from there and anything in between until you got to your room, if there was anything?

A. No. I just remember the shoes coming off, my shoes being taken off.

Q. When you say taking the shoes off, sounds silly, but is there, were they tied up, are there straps or how do you get those shoes off?

A. They were lace up.

Q. Okay. Just regular or a little more complicated then most to get them off?

A. No, normally just pull the string and pull them out a little bit and the shoe comes off.

Q. And did he take off both your shoes for you?

A. I think so. I remember one, the other one fuzzy. One shoe definitely was untied and taken off.

Q. And where were you when the, where were you when this was happening?

A. I think I was sitting on the bed, because you can't take your shoes off standing up.

Q. You were in your bedroom?

...

A. Yes, yes, yes.

Q. And do you remember how you got in there?

A. Walked. I don't remember walking in there though.

Q. Okay. Assuming you still had your pants on because you had your shoes on. What was your state of dress otherwise? Do you remember what you, what your state of dress was at that particular point when he was taking your shoes off?

A. I think the shoes were the first things to come off.

Q. Okay. Do you recall how the rest of your clothes came off?

A. No.

Q. Do you know if you took them off?

A. No.

Q. Do you know if he took them off?

A. I don't know.

Q. What is your next memory after the shoes come off?

A. I don't remember if it was the oral, pillow on the ground, or if I was laying on the bed unrobed and he was over top of me. I don't remember which one of those came first.

Q. What was your state of dress when the pillow was on the floor and the oral sex took place.

A. I don't remember. When he put the pillow on the floor and told me to get on my knees I don't remember if I was wearing clothes or not.

Q. Okay, and what about him?

A. I don't remember.

Q. Okay. Was his pants down or opened?

A. I... I don't remember, like I think his pants were off, but I don't, I can't say for sure.

Q. Was his penis exposed?

A. I... I think so.

Q. When you said oral sex, you said put the pillow on the floor and oral sex, did you give him oral sex at that particular point?

A. I did, yeah.

Q. And what else can you remember about that particular part of the event?

A. I just remember the pillow being thrown on the ground because I was wondering why he was putting the pillow on the ground and then he told me to

get on my knees and then I was like, oh, I see what's going on, and then did what he said.

Q. Did you respond in any way to him, do you remember? Did you talk to him? Did you say anything to him?

A. I don't think I, I don't think I responded.

Q. And the other memory, you were on your bed, how were you on your bed, were you sideways, back?

A. I was on my back and he was over top of me.

Q. And what was your state of dress?

A. Both un, both lacking clothes, neither of us wearing any clothes.

[21] At this point, B.W. said, she rolled over to get a condom from the nightstand, and when she tried to give it to Mr. Percy he asked her if she was on birth control. She said yes. He then said that she did not need a condom. B.W. said this confused her, because in her mind condoms and birth control have two different purposes. She said she did not want to have sex without a condom. She said Mr. Percy then had vaginal intercourse with her without a condom, and she had no further memory of that stage of the events. She said she did not find a used condom or wrapper in her room the next day.

[22] B.W. said that the rough oral sex occurred later in the evening after the incident in the bathroom.

The move into the bathroom

[23] Mr. Percy told the police that after having oral and vaginal sex for some period of time in the bedroom, they moved into the bathroom. He explained why:

Mr. Percy: Um, then we were still -- like, I -- I was really sweaty, I was -- like, I didn't think I was going to come. And then we -- then we went into the bathroom. And ah, we were continuing to make out. And I -- I had my hands on her, I was making out with her. And I turned her around, and feeling her breasts, like, ah, looking at her in the mirror.

...

D/Cst. Cross: Okay. So how would you categorize this sexual encounter? Is it -- was it rough, was it -- you know, because when you...

Mr. Percy: Yes, it...

D/Cst. Cross: When you meet someone...

Mr. Percy: Yes, it was.

...

Mr. Percy: Well, when we're -- when we were -- when I -- she was blowing me, or, like, when she was on her knees blowing me, she was, like, "Take me, take me." And I was, like, "Okay, okay." And so then, ah, I put her up on the bed and we -- we had vaginal sex. And she was still saying, "Take me, take me, take me." And I was -- you know, it was -- you know, we were going pretty hard, like, not, like...

D/Cst. Cross: Yeah.

Mr. Percy: Not, like -- I wasn't trying to...

D/Cst. Cross: No, but...

Mr. Percy: I wasn't trying to hurt her.

D/Cst. Cross: No.

Mr. Percy: I was just -- we were just...

D/Cst. Cross: Passionate.

Mr. Percy: ... in the moment, in the moment.

D/Cst. Cross: Yeah.

Mr. Percy: And -- and then, ah, and then, ah, and then we got up and we went into the bathroom.

D/Cst. Cross: Um-hmm.

Mr. Percy: And ah, and um, and like I said, we were still making out.

[24] When they went into in the bathroom, Mr. Percy said, they switched from vaginal to anal intercourse. He told the police, variously:

Mr. Percy: And I turned her around, and feeling her breasts, like, ah, looking at her in the mirror. And then I bent her over and I continued to have sex with her in her vagina.

And -- and -- and then when -- when we were having sex she kept on saying to me, "Take me, take me, take me."

D/Cst. Cross: Um-hmm.

Mr. Percy: And ah, I -- I was, like, "I am taking you, I am taking you." And ah, and then, ah, and then I said, "I'm -- I'm going to take you in the ass." And she -- she looked behind at me and she's, like, "No, you're not." And then I -- I was, like, "Please let me -- let me have -- let me fuck you in the ass." [Emphasis added]

...

D/Cst. Cross: So you go into the bathroom.

Mr. Percy: Yes.

D/Cst. Cross: Um, you're vaginally having sex with her.

Mr. Percy: We were, like, making out, and then, you know, I turned her around and I was feeling her breasts and...

...

Mr. Percy: ... looking at her in the mirror. And then I bent her over. And ah, she had her hands on the sink. And ah, I was having vaginal sex with her like that.

...

D/Cst. Cross: So when you say, um, "Let me" -- or, "Let me take -- let me fuck you in the ass," and she says, "No, you're not," how did that do after? You said...

Mr. Percy: I -- I -- I was just, like, "Please, would you let me have sex with you in the ass." And I was...

D/Cst. Cross: And what was she saying?

Mr. Percy: I was just, like, "I don't think I'm going to come."

...

Mr. Percy: "I don't think I'm going to come inside you." And ah, then I was, like, "Would you let me please," you know...

...

Mr. Percy: And -- and then, ah, and then, ah, and then we got up and we went into the bathroom.

...

Mr. Percy: And ah, and um, and like I said, we were still making out. And ah, and as I -- as I said, I turned her around, and still making out. And then I -- I put her down on the sink and...

...

Mr. Percy: And I was, like, "I'm going to take you in your ass."

D/Cst. Cross: Um-hmm.

Mr. Percy: And she -- she's, like, "No, you're not." And then I -- I was, like, "Oh, please, I -- please let me." And I'm just about to come, you know, and -- and -- and she was, like, "Okay." And then I went into her...

D/Cst. Cross: Yeah.

Mr. Percy: I didn't think I did anything wrong. [Emphasis added]

[25] As noted above, Mr. Percy told D/Cst. Cross that B.W. said “No you’re not”, and then the following occurred:

Mr. Percy: “Please let me fuck you in the ass.” And, like, trying to -- trying to let her. And ah -- let her let me. And then she said, “Okay.” And then we had anal intercourse. And I came inside of her.

...

D/Cst. Cross: So when you say, um, “Let me” -- or, “Let me take -- let me fuck you in the ass,” and she says, “No, you’re not,” how did that go after? You said...

Mr. Percy: I -- I -- I was just, like, “Please, would you let me have sex with you in the ass.” And I was...

D/Cst. Cross: And what was she saying?

Mr. Percy: I was just, like, “I don’t think I’m going to come.”

D/Cst. Cross: Okay.

Mr. Percy: “I don’t think I’m going to come inside you.” And ah, then I was, like, “Would you let me please,” you know...

D/Cst. Cross: Um-hmm. And what did she say?

Mr. Percy: She -- she finally said, “Okay.”

D/Cst. Cross: Okay.

Mr. Percy: And -- and then we -- then we started having anal intercourse.

D/Cst. Cross: How long did the anal intercourse last?

Mr. Percy: Ah, maybe three minutes.

[26] B.W. recalled being in the bathroom with Mr. Percy, but did not remember how they got there. She was naked facing the mirror over the sink, with Mr. Percy behind her. B.W. was adamant that Mr. Percy did not ask her consent to have anal sex, and that she did not consent to have anal sex. She said Mr. Percy held her hair, which went halfway down her back, so that she could not move, and then anally penetrated her with his penis. She said she started to cry, and said no repeatedly, but Mr. Percy continued until he ejaculated on the floor and on her. She could not say how long this took. B.W. said that Mr. Percy bit her and struck her. She recalled him biting her neck, but not her back, although she had a bite mark on her back the next morning. During direct examination B.W. said:

Q. And you were in front of the mirror and you mentioned that your hands were down, what, if anything, was he doing?

A. He was holding my hair, holding my head, holding my hair.

Q. Did he say...

A. I don't know if one or two hands, I just know my hair was being held.

Q. I see today that your hair is fairly long. It looks like in the front it will drop mostly the way down your back I would imagine. How long was it that night?

A. At least half way down my back in lengthy at least.

Q. We saw the video as you were walking out and your hair. Is that accurate, accurately depict about how long your hair was that night?

A. Yeah.

Q. And it was curled up, so, but it was curled?

A. No, I was trying to grow my bangs out, I had bangs, and I was trying to grow them out and it was, yeah.

Q. So, I'm sorry, but we're going to have to go through this one more time if that's okay.

A. Okay.

Q. Hand in your hair and you're going to have to take us through this and I'm going to have see if there's any details you left out.

A. Yeah, he had me in front of the mirror and he was behind me and then I don't know if he said anything particularly, but then I remember he had inserted his penis into my rectum and I, stop, just said no, no, no, no, no, no, no, no and crying and crying and crying and he just kept going and told me, you know, shhh it's fine.

Q. And how did it feel like physically how did it feel?

A. Oh, I mean, I don't want to be dramatic, but it was slightly excruciating, at least for me.

Q. Maybe you can expand on that a little bit on that for us. I know that you're, it's very uncomfortable, but this is the kind of things that we're going to need to know.

A. Right, well, I mean it's, for me, the rectum is an exit only and to have something inserted from the opposite direction was extremely painful and burning and just pressure that I...

Q. Was it a surprise when it came?

A. Yeah.

Q. And after you felt the initial shock and pain, what was your response? What did you say? What did you do?

A. No. No, no, no, no, no, no, no, no, no, no. Crying. No. Crying a lot.

Q. And your level and tone is important. Are you saying it loud enough to be heard or are you whispering it to yourself or is this inside your head?

A. Oh no, it was pretty shrill. I had been shocked. Loud. I'm not going to whisper ouch that hurts, like it was extremely unpleasant for me, I was vocalizing my pain. No. No. No. No. No. He could hear me crying. He could hear me saying no.

Q. And how long after he finished did the, was he sitting on the toilet next to you or was there anything in between, do you remember?

A. I don't remember. I don't remember when he stopped, and I don't remember if he had ejaculated on me before or after he sat on the toilet and I don't think he sat down for very long.

Q. When you say he ejaculated, you said on you, did he ejaculate anywhere else?

A. Me and on the floor.

Q. And where on the floor roughly?

A. Um, in front of the sink. So, like if you were standing in front of the sink and then turned to the side or maybe if you had taken a step back or something it would have been on the floor.

Q. Do you whether or not that night at any point he had ejaculated inside of you?

A. I don't know. I don't know.

[27] B.W. testified that after Mr. Percy ejaculated he sat on the toilet and asked her what her "problem" was. She said that it was then that Mr. Percy asked her about the marks on her backside. B.W. described this exchange as follows:

And then after that we were in the washroom. I remember he had me in front of the mirror in the washroom and he had my hair so I could not, so I could not move very well, I did not have control and then he proceeded to absolutely anally rape me and when that started I started to cry and I said no. So many times I said no. He didn't stop. He did not stop. And then after some time that had ended, I don't know how long. After that he, I don't know if he sat down to pee, he sat down on the toilet and asked me, you know, what was my problem and noticed bruising on my rear end and the bites that he had caused on my neck and I told him that it was from him and that he did that to me. I had no bruises before. He had struck me, I don't know how many times, but I know that he had struck me and there was biting. He had bit me on my neck and I don't remember if he had bit me on my back, but there was a bite mark on my back as well.

The shower

[28] B.W. testified that Mr. Percy then drew the shower curtain back and told her to get into the shower, and she complied. She said she was facing the wall in the shower, and Mr. Percy had vaginal intercourse with her. B.W. said that, while she did not want to have intercourse with Mr. Percy in the shower, whatever occurred in the shower was better than what she had been subjected to at the sink, that being forced anal intercourse.

[29] According to Mr. Percy's police statement, he and B.W. continued to "fool around" and "make out" in the shower after the anal intercourse. He said, "[a]nd then we both continued to make out. And we both got into the shower. And we were continuing to, like, just fool around, make out after sex, you know. And then, ah, I just went into the bedroom with her and we both fell asleep."

The return to the bedroom

[30] B.W.'s evidence was very different from Mr. Percy's statement as to what happened after they left the shower. When they went back into the bedroom, B.W. said, Mr. Percy told her to get on her knees, and he held her head, forced it down on his penis, and forced her to perform oral sex. B.W. said this is when the "rough blow job" Mr. Percy described as occurring before the shower took place. B.W. said she was gagging and choking, that she thought she was going to throw up, and that she tried to push away, but Mr. Percy knocked her hands away and said "no hands." At one point her teeth scraped his penis and he said "no teeth." In more detail, she said, on direct examination:

Q. ... I understand the shower and then we're back into the main part of your room and you said you have two more memories and maybe you could tell us again, and once again I'll get some more detail from you about the oral sex and how that, where you were and where he was and so forth.

A. He was sitting on the bed and I was on my knees on the side of the bed and he had my head and he was pushing my head down on to his penis and he was choking me and gagging me and I was, you know, I don't want to throw up, so I put my hands on his thighs to push away and he hit my hands away and said no hands and then kept choking me and gagging me and kept going and I, you know, thought maybe I would throw up again so I put my hands on his thighs to push away a second time to push myself away from him again and he moved my hands away again and said no hands and then still controlling my head he kept going and then my teeth scraped his penis and he said no teeth and then I don't remember after...

Q. You motioned, oh sorry, keep going.

A. I don't remember after that.

Q. You made a motion this morning that I didn't highlight because you were in the middle of your testimony. You did something with your hands when you said he was pushing your head down. You the motion with both of your hands that, and you actually demonstrated with your own head how, but it didn't get picked up obviously, so maybe you can describe and just show His Lordship where his hands were in relation to your head.

A. He had them here.

Q. So for the record.

A. On my head.

Q. For the record, she's got both her hands behind her head, obviously she, and pushing in a downward motion. That a fair characterization?

Court: Thank you.

Mr. Planetta: Yes.

Q. Were you, was it obvious I guess, were you verbalizing the gag, the gagging when you were...

A. I don't know if he didn't hear me or not, but I can feel myself going to gag or gagging. I'm not a very loud vomiter, so maybe he might have missed the fact that I was gagging, but I tried to push away and I couldn't say anything because my mouth was full.

Q. Did you want any of that to happen?

A. No.

[31] B.W. said Mr. Percy also had vaginal intercourse with her when they returned to the bedroom. She believed this occurred after the forced oral sex, but could not remember the transition. She said they were both still undressed. She did not know whether Mr. Percy used a condom, or whether he ejaculated. B.W. said the following exchange occurred while this was happening:

Mr. Percy: How old are you?

B.W.: 19

Mr. Percy: How does it feel just being fucked by a 31-year-old?

B.W.: Why would you say that?

Mr. Percy: I don't know. I'm not 31, I'm 24.

[32] In his police statement, Mr. Percy initially denied, and then agreed, that he had said words to this effect to B.W. when he felt sex with her was finished:

D/Cst. Cross: And how old are you now?

Mr. Percy: I'm 31.

D/Cst. Cross: Okay. So at the end of it did you say, "How does it feel to be fucked by a 31-year-old?"

Mr. Percy: No, I don't believe so, ma'am.

D/Cst. Cross: Because she's claiming that's what you said, and then you said, "No, no, I'm just -- I'm 24."

Mr. Percy: Um, no, I did say that.

D/Cst. Cross: Okay.

Mr. Percy: I...

D/Cst. Cross: So why would you say that?

Mr. Percy: I -- I don't -- I don't know.

D/Cst. Cross: Okay.

Mr. Percy: I don't know.

[33] On direct examination, B.W. was asked to describe Mr. Percy's demeanour during her time with him. She said:

Q. One more question, and this is the portion with regards to the oral sex where you were pushing away, just so we can get an idea. Do you know what he demeanour was like during that time period? Do you understand what I mean by demeanour?

A. Yeah, it was very threatening and scary. I was very threatened at that point.

Q. You mentioned up until taking your shoes off what was his demeanour like up to the point where he's taking your shoes off? What did you find, what was his demeanour like?

A. Kind. Thoughtful. Considerate.

Q. Could you tell or did you know when that demeanour, if it did, changed?

A. When he first put the pillow on the ground I was, it was different, he was more stern, like I'm telling you to do this, so slightly, you know, threatened at that point, but when he had me on my knees for the second oral part, when he had my head I was very, that was probably the part where I was really the most uncomfortable and the most scared. [Emphasis added]

[34] During the police interview Mr. Percy said variously, "I wasn't trying to hurt her", "I didn't mean to do anything wrong", "I didn't think I did anything wrong", and "I didn't want any -- anything like this to happen."

[35] B.W. said that after these events ended, she curled up in her bed against the concrete wall to get as far away from Mr. Percy as possible.

The next morning

[36] Mr. Percy testified that he woke up in the morning, got dressed, and left B.W.'s dormitory:

D/Cst. Cross: Did you guys have a conversation?

Mr. Percy: No, not at all. She didn't talk to me at all in the morning. She was asleep. She was, like, ah -- I was laying on the bed and she was like that on the bed, with her back -- she was, like, nestled into the pillow like that.

...

Mr. Percy: So I -- I just got up and put on my coat. I just thought, like, one-night stand, you know.

...

Mr. Percy: And ah, um, then I went -- I -- I went out of her apartment, walked to the elevator, went downstairs, got the girl in the -- in the lobby to call me a cab.

...

Mr. Percy: And then I got a cab home.

[37] B.W. said she woke up in the morning to Mr. Percy grabbing her backside. Mr. Percy then got up, took the poutine and left.

[38] B.W. said she looked at her phone and saw that her roommate E.C. had sent her a text that night asking her to be quiet. B.W. replied that she had just had the worst experience of her life.

E.C.'s evidence

[39] B.W.'s roommate, E.C., gave a statement about the events of December 6, 2014, in February 2018. E.C. was sleeping in her room on the opposite side of the pod while B.W. and Mr. Percy were in B.W.'s room. E.C. said she could not normally hear what was going on in other people's rooms while she was in her own room. She also said that it takes a lot to wake her up. She said that on December 5, 2014, she went to sleep between 10:00 and 11:00 PM. She had an exam the next morning so did not stay up late. She said no one else was in the pod when she went to sleep.

[40] Sometime early in the morning of December 6, E.C. said, she was woken by the sound of slapping coming from another room. E.C. also heard other noises that she described as moaning. She could hear voices, but could not discern any words. E.C. said that she was angry at being woken up. She had an exam that morning. E.C. agreed that in her statement to the police she said she believed she was hearing B.W. having sex with someone and that they must be enjoying it. At trial she said she assumed it was enjoyable because she did not hear otherwise and she could not imagine anything bad happening where she lived. E.C. said she listened to the sounds for five to ten minutes, sent B.W. a text asking her to be quiet, and went back to sleep.

[41] The next morning E.C. got up and left to write her exam without seeing anyone else in the pod. When she returned around noon she found B.W. and some of their friends in the living room. B.W. was crying and continued crying throughout the day. B.W. showed her a bruise on her neck and bruises on her backside. She said they discussed B.W.'s experience and whether she was going to make a police complaint.

B.W.'s decision to go to the police

[42] During direct examination B.W. described talking to her friend and roommate, K.L., who arrived home around nine the next morning, after Mr. Percy left. B.W. said her demeanour would have been "Confused. Scared. Shaken", although she could not remember whether she cried. As for the bruising, she said:

A. I showed them for sure the neck. I don't know if I had showed them my butt cheek.

Q. What about your back? Did you show them that?

A. I don't remember.

Q. Did you have an opportunity to see S. and E.C. the next day or sometime after that?

A. I don't know.

Q. You're not sure if you saw them the next day or afterwards?

A. Well I know I had talked to them, like I had responded to E.C.'s text message, but I don't remember if I saw them.

[43] Initially, B.W. said, she did not want to go to the police due to embarrassment, and she felt that it would not matter that she said "No." She said her friend B. convinced her to go to the police. B.W. said she gave a brief

statement to the police, then went to the hospital to see the SANE nurses for the “rape kit” examination, received medication to prevent gonorrhea and chlamydia, had photos taken of her injuries, and later provided a more detailed statement to the police:

A. [B] had come to see how the night went before for the birthday celebration and I told her what had happened instead and I didn’t want to go to the police because I felt embarrassed and that it wouldn’t have mattered to them that I had said no because he was in my house, not that that mattered at all because you don’t go into someone’s house thinking, you don’t let someone into your house thinking you’re going to get raped. So it took a little bit of convincing, but she convinced me to go to the police and I had given them my statement and showed them some photos of my neck and my bruising on my rear and they had taken me to get a rape kit done and the nurses there were nice, warned me that the process was invasive and I don’t entirely remember that whole event, but I remember them being very kind and they had taken photos and they had done swabs of my vaginal and rectal area and then they had given me pills to take after for Gonorrhea and Chlamydia if I contracted either of those since the condom was denied, since I was denied use of a condom and yeah, and then I had gone to give my statement to another officer later on and there’s record of that one I believe here.

B.W.’s efforts to contact Mr. Percy

[44] In his police statement, Mr. Percy said B.W. had tried to message him on his phone sometime later, but he erased the message because he did not want his girlfriend to find out. He continued:

Mr. Percy: I -- I didn’t think I did anything wrong.

D/Cst. Cross: So what did she say on the text?

Mr. Percy: She was just, like, ah, “I was trying to” -- ah, it was something like, ah, um, “Who is this? I don’t know whose number this is.”

D/Cst. Cross: Okay.

Mr. Percy: And that’s it.

D/Cst. Cross: Okay.

Mr. Percy: And -- and then I just erased it.

D/Cst. Cross: Okay. So you have a girlfriend?

Mr. Percy: Yes.

D/Cst. Cross: Okay. Did she -- did she find out about the girlfriend?

Mr. Percy: No.

D/Cst. Cross: Okay. So the girlfriend never came up?

Mr. Percy: No.

[45] In her evidence, B.W. confirmed that she tried to contact Mr. Percy the next morning, by texting a number on her phone that she believed was his. She said her reason for contacting him was to “make sure that I had his number for when I went to the police so I could give that number to them.” She said she “asked if it was Matthew ... or something along those lines and no response.”

B.W.’s injuries

[46] B.W. said that after the alleged assault she could not sit down for a day, and could not have a bowel movement for two days as her rectum was bruised and sore. She said her backside was sore both inside from the anal penetration and outside from Mr. Percy hitting her. She described bite marks on her neck, and one on her back. She said she had bruises on her backside and on her knees. When shown photographs of the bite marks on her neck, B.W. testified:

Q. Just tell me about the photograph and whether or not that’s what you looked like on that day?

A. Yes, that was the next day. It was before, it was, I’m sure it was the next day, but it looks just like multiple bite marks on my neck, completely bruised from Percy.

Q. Do you remember how you got this specific mark on your neck?

A. From biting. I don’t remember the event. I don’t remember him biting me, I don’t, but I know.

Q. And why can you say that?

A. You can see distinct upper and lower bite marks and I remember talking about it the next day saying he was biting me, he had bit me, these are bite marks on my neck.

Q. Now, did you want that to happen?

A. No, of course not.

Q. And now, did you have those prior to going out and prior to getting home with Mr. Percy?

A. No. If I had those before I would have gone out I would not have gone out.

Q. And did you have them in the morning after he left?

A. Yep. Absolutely, I did.

[47] B.W. said that Mr. Percy hit and bit her, told Mr. Percy that he caused the marks on her backside but she could not specifically recall receiving the injuries. She identified photos taken by the SANE nurses that showed bruises “that look like a hand”. According to the SANE photos, there were two finger-shaped bruises on her backside, as well as a large triangular bruise. B.W. said she did not have the bite marks or the bruises before she met Mr. Percy. She said they were there when she woke up the next morning and she did not consent to receiving them.

[48] K.L. said that on the day after the incident B.W. was visibly upset, crying and lying on her bed. She said the only other time she had seen B.W. upset like this was when her dog died. K.L. said she saw bruises on B.W.’s neck and backside that she said were not there the night before when they were at Cheers. She said B.W. appeared to be in pain, was having a hard time moving and would wince whenever she tried to lie on her back or sit down. On cross-examination K.L. agreed that she did not give a police statement until January 24, 2018. In that statement she referred to “bruises” (plural), not “a bruise” (singular), when describing the injury to B.W.’s neck. She also agreed that she had not seen B.W.’s backside the night before, so could not comment as to whether she had those bruises before meeting Mr. Percy. As noted earlier, E.C. also said she saw bruises on B.W.’s neck and backside the next day.

[49] Constable Colin Graves and Constable Geoff McNamara met with B.W. on December 8, 2014, at the Halifax Regional Police Station when she arrived to make an initial complaint of sexual assault. Both officers said that B.W. appeared emotionally upset. She was crying and hunched over, and her hands were shaking. She had yellowish bruising on her neck, which Constable Graves said looked like a bite mark.

[50] Corrine Thompson was one of two SANE nurses who examined B.W. together on December 8, 2014. She described the examination as intrusive and lengthy, involving a complete examination from head to toe. It included blood and urine collection, and an internal examination of the vagina. Ms. Thompson said B.W. was crying and whimpering during the exam. Ms. Thompson described the injuries with reference to a numbered chart illustrating a body, on direct examination:

A. So number two, the acronym RUQ is right upper quadrant of the right buttock. There was a triangle shape bruise, blue-green in colour, four centimeters by three

centimeters by three centimeters, and if you look at the diagram you can see where we've, where I've drawn that in.

Q. Okay.

A. Number three, RLQ right lower quadrant of the right buttock, two oblong parallel bruises, green, three centimeters by one centimeter each. Number four, left mid back, oval bite like pattern bruise, red in colour, three centimeters by three point five centimeters. Number five, right knee, three circular brown discolorations in a triangular pattern, two centimeter by one point five centimeter each. Number six, left top of shin, so below the left knee, brown circular discoloration, one centimeter by one centimeter. So all of these injuries were observed with the naked eye. These were all visible on physical exam.

Q. And I understand how you and your partner divided up the work.

A. Um hmm.

Q. Are you also physically observing these injuries or are you just listening and writing it down?

A. No, we have to both witness any injury that's documented. If I am writing down right neck bite and giving this description, she has to observe before I can write this down because she's going to sign off on this, she's going to initial.

Q. Okay, but do you actually physically see all this when you are writing it down?

A. Yes. As each is identified, if she is there at the bedside with the client and she has identified something then I get up and I observe the injury before I document it.

[51] When cross-examined about the bite mark, Ms. Thompson stated:

Q. Okay, and I guess, the first thing I would suggest to you is that the best that you can really say is that it looks like a bite mark, correct?

A. Correct.

Q. I mean, theoretically it could be something else?

A. Based on, based on having several siblings, raising three children, nursing for thirty years, I feel very confident to say that that is a pattern bite mark.

[52] Ms. Thompson agreed on cross-examination that it was possible the mark could be a hickey.

[53] Ms. Thompson testified that this examination took three hours and fifteen minutes, and involved use of a speculum, without lubrication in order to preserve

evidence. She explained that this involves physically touching the area to check for tenderness and injury:

A. So, the external labia majora and minora there was no trauma noted. The posterior fourchette and the introitus, there was no injury noted. The hymen, there was no injury noted. There was discharge when we viewed the vaginal orifice with speculum and the light, there was thick brownish discharge present.

Q. What was that?

...

A. Thick brownish discharge, um, beyond, I can't identify it other than describe what I seen.

Q. So if you look at exhibit number six, the "Patient's Consent Form".

...

Q. And on the back, um, about three quarters of the way down, it says vaginal discharge prior to assault and then since assault. Who detailed that and what's that about?

A. This is my documentation. So prior to the assault she noted, gave a narrative that there was discharge. Since the assault she described frank bleeding from her vagina, and frank bleeding meaning bright red bleeding.

Q. And is there another note below that?

A. Yes, on December 6, changed to brown discharge. So from December 6 until when we examined her on December 8, the brown discharge persisted, so that was still present there.

Q. Continue on after it says discharge present and you checked off yes, what's after that?

A. So, the vaginal, vagina, when you insert the speculum and observe into this orifice, the cervix is at the end of the vagina as a structure and on the right vaginal wall there was erythema, redness.

[54] Ms. Thompson confirmed that such redness was not normal:

A. No, that's not normal, that would be indicative of trauma to that area. That there was some kind of force that would cause that area to become reddened or erythema. The uterus and the adnexa is further internal structure. We do not physically assess that, we, so that's why it was not examined. It's beyond the cervix and it's just not something that is done during the physical, the sexual assault examination kit. The anus and rectum. When you examine the anus, the anus is a sphincter muscle and it will immediately tense if there's, if there's any touch to the area, so, in order to examine the anus, the anus is directly below the vagina with the distance of the perineum in between, you put your hands on the client's buttocks so

that the sphincter muscle will relax and this can take maybe a minute, sometimes a little longer, sometimes a little less, and when, because otherwise the anus is, is, is well, it's very tight, it's a tight muscle that scrunches itself up and in order to see within the folds you have to let it relax and once we had done that, when we're describing that area, we liken it to a clock face, so, and the reason is that a clock face is a universal recognizable symbol, you know, numbers go from one to twelve around the circle, and so when we viewed the anus we seen redness from four o'clock, which would be sort of down, you know, at the sort of bottom perimeter of the anus, over to seven o'clock, and that redness is not usual, it's not something that we would expect to see if there was not trauma. So there was trauma to the area to cause that redness, and what kind of trauma would be like pressure or abrasion, yeah.

[55] Ms. Thompson said that although the erythema to the vagina and anus were caused by trauma, they are not considered serious injuries.

Forensic Evidence

[56] Detective Constable James Wasson testified about forensic identification. He went to B.W.'s residence pod on December 8, 2014, where he took photographs and looked for forensic material, including bodily fluids. He introduced laboratory reports regarding semen and DNA. The forensic testing confirmed that Mr. Percy's semen was found on the bathroom floor near the sink. No other forensic material was discovered in B.W.'s bedroom or elsewhere in the pod.

B.W.'s memory and inconsistencies

Constable Geoff McNamara

[57] B.W. gave two statements to the police in December 2014. Between those police statements, she underwent the SANE examination, which involved an explanation of her allegations.

[58] B.W.'s first statement was given to two police officers who were not trained in taking statements from sexual assault complainants, Constable McNamara and Constable Graves. There was no audio or video recording. B.W. provided an uninterrupted narrative. They did not take a written statement and did not write down what she was saying word-for-word. Constable McNamara took abbreviated notes. B.W. did not have a chance to review the police notes for accuracy.

[59] In the initial discussion, according to Constable McNamara's notes, B.W. told them that she went to the Toothy Moose and Willy's Poutine with Mr. Percy and his friend. At trial, B.W. said only her and Mr. Percy went to the Toothy Moose and Willy's. Counsel referred Constable McNamara to a passage from his Initial Officer's Report indicating that B.W. had stated that "at this point the three decided to go to Willy's to get some poutine. While walking to Willy's they decided to go into the Toothy Moose for a drink." He confirmed she said this when giving her account to the police.

[60] Counsel referred Constable McNamara to a statement to the effect that B.W. told him that she may have initially consented to having sex with Mr. Percy:

A. She, she said that she was kind of hazy on the details. She remembered waking up and the two of them were naked in her bed. I believe she may have initially consented, but she couldn't remember.

Q. Okay, so you recorded, the exact words that you recorded were, she stated that she initially consented to having sex with the male. So in that discussion is that something that she said? That, what you specifically wrote down there?

A. I'm not sure that's exactly how she said it.

Q. Okay, but the gist of it was that she had initially consented?

A. She thought, yeah, initially she thought she did, but wasn't sure due to her memory.

...

Q. Alright. Okay, and then the final thing that I will ask you is towards the bottom of page seven of your notes, or your initial report, you stated that, she waited a few days to report the incident because she was embarrassed and felt like it was her fault for inviting the male back to her dorm. Is that something that she said to you?

A. Yeah, I don't know if it was exactly those words, but along that line, yes.

Q. So she said to you that she had indicated that she had invited the male back to her dorm?

A. More so that she allowed him to come back with her and, yeah.

Q. Okay. Why didn't you type down that she allowed him to come back as opposed to invite him?

A. I'm just, right now, I'm not sure exactly how she worded it.

Q. Okay. But it is safe to say that whatever it was that she said it left you with the impression that, that, you know, that you then recorded that she'd invited him?

A. Yeah, well, she told me they agreed to take the poutine back to her dorm.

Q. Okay.

[61] Constable McNamara confirmed that B.W. also told him Mr. Percy had asked whether she was on the pill, and that when she tried to get a condom, Mr. Percy would not let her. On re-direct, the Crown directed Constable McNamara to the full text of what he recorded, and the following sentence, which stated, “[s]he stated she initially consented to having sex with the male and told him she was going to get a condom. The male asked her if she was on the pill and would not let her go get a condom.”

Corrine Thompson (SANE nurse)

[62] Ms. Thompson testified that B.W. was emotionally stable during the SANE exam, but was crying and whimpering. In explaining the portion of the SANE Report (which was in evidence) dealing with a complainant's version of events, which Ms. Thompson filled out herself, she described B.W.'s emotional state:

A. Yes, I can. I remember this client. I remember that her, her affect was, I think I described it as euthymic meaning that there was no broad range up or down, that it was steady, and that her, I recall her whimpering, and I know that it is not noted here, but I do recall that. I do recall her whimpering.

Q. And do you know whether or not she, she was tearful, crying, happy during the exam?

A. Well, whimpering, she was crying during the exam.

Q. Okay, and that's what you meant by whimpering?

A. Yes. Sorry, yes.

[63] Ms. Thompson testified that the notes on "Details of the Assault" would have been reviewed with the client for clarification purposes. As to the purpose of taking the details on a sexual assault exam, she was questioned as follows:

Q. For example. Why during this sexual assault exam would you be taking details of the assault, for what purpose?

A. So it will direct both myself and my partner because this is, remember, the narrative part is the beginning of the physical assessment. It will direct where we can look, like, over and above doing a head to toe assessment, if there are direct details in a narrative it will direct us to pay further attention to this particular part of the body when we get to the physical exam.

Q. Is this narrative done to aid in the examination of the victim?

A. It's done to aid in the exam of a victim. It's also done to frame the details of the event that has brought them to hospital.

[64] Less than half a page of the SANE Report is designated for the note-taker to provide written details of the alleged assault. B.W. said on cross-examination that she may not have reported every detail in the interview. She said she would have provided a detail "if it had come into my mind, if they had asked about it, I was pretty traumatized, I could have missed it."

[65] During cross-examination, Ms. Thompson confirmed that she had filled out the “Physician’s Guide and Record of Examination” form in the report, and that she would have filled it out chronologically starting on the first page. Counsel went on to ask questions about the narrative:

Q. ... So at the beginning of your notes taken under that heading, C Additional Details of Assault, the first summary, the first thing that you wrote down there, you have Cheers in quotations. So that’s, you had indicated on direct exam that when you put quotations that’s something specific that you heard that stuck in your mind?

A. Exactly.

Q. Okay. He invited client to go for poutine at Willy’s. Afterwards client invited assailant back to her apartment to eat. That’s all thing, is that all an accurate record of things that the client said to you?

A. It is.

Q. Okay. Anything missing from that?

A. I would, when I make my notes, I document word for word as she is speaking. So this would have been what she said in that order and when I put Cheers and Willy’s in italics or quotations, it’s just to further emphasize a direct statement from her.

Q. Okay.

A. Everything that’s documented here was spoken by her and I scribed it down.

Q. As she was saying it?

A. As she was saying it.

Q. Okay. So in that passage, when she was saying that to you and you were taking your notes, if it’s not in your notes is it fair to say that she didn’t say to you that, that, you know, they met at Cheers, invited her to go for poutine at Willy’s and then they went to another bar? She didn’t say that, right?

A. Correct.

[66] Ms. Thompson was also cross-examined respecting the narrative of what occurred at B.W.’s room:

Q. ... They were in her room and the next thing she remembers is having no clothes on and he’s on top of her penetrating her vaginally. It’s a blur. The next thing she remembers is being in the bathroom. Is that an accurate record of what she said to you during the interview?

A. It is.

Q. Okay, and so, nowhere in that, in that uh narrative, in that sequence of events did she mention going to get a condom or trying to get a condom or anything like that?

A. Correct.

Q. And nowhere else in the "Additional Details of Assault" did she make mention of going to or trying to get a condom or anything like that?

A. Correct.

...

Q. ... A couple of lines down from there, she describes, assailant forced victim to perform oral penile sex, penile sex on him, states he held her by the head. Unsure if he choked her or not. Is that an accurate record of what she said during the interview?

A. Correct.

Q. Okay, so she said that during oral sex, when he was holding her head, she was unsure if she was choked?

A. Correct.

Q. Okay. And again, this, your narrative is chronological in the manner that she's speaking this happened, then this happened, then this happened, correct?

A. As she's giving the narrative, it's in the order of...

Q. Okay.

A. In the manner that she's giving it to me.

Q. Okay. So, reviewing that, your record of the, of her narrative, would you agree with me that she does not describe any sexual intercourse after she describes the anal intercourse?

A. I'm just reading this. And that's correct.

B.W.'s testimony

[67] B.W. agreed on cross-examination that due to her intoxication on December 6, 2014, and the passage of time, there are large parts of the night that are blank in her memory. She testified that she did not remember consenting, or saying that she consented, but that she did remember saying no. On cross-examination, she said she might, in a phone conversation after giving her statement, have told D/Cst. Cross that she may have consented to some of the sexual activity. She initially denied telling her that she did not want to proceed with charges because she had consented. The exchange continued as follows:

Q. Now you spoke with Detective Constable Cross. We just covered that you, you gave her, she took a statement from you?

A. Yeah.

Q. You also spoke with her, uh, some point after that about whether there were charges going to be laid?

A. I think so, yeah.

Q. Okay. You recall her advising you eventually that there were no charges going to be laid?

A. Yes.

Q. Right. Okay. At around that time when you were meeting, was this conversation on the phone or was it in person?

A. I don't think I met with her after I gave my statement. I think it was on the phone.

Q. Okay. No meetings after that, so it would have been on the phone. Okay. So, we'll assume it was on the phone that you were speaking with her and in one, I don't know, was there more than one conversation? After the statement with Detective Constable Cross?

A. I don't remember.

Q. You don't remember. Okay. So at some point you're speaking on the phone with Detective Constable Cross, do you recall telling her that you didn't want to proceed with charges because you had consented to having sex?

A. Sorry?

Q. Do you recall telling Detective Constable Cross that you didn't want to proceed with charges because you had consented to having sex?

A. No.

Q. You don't recall that?

A. No.

Q. Okay. Is that, is that again that you, you just don't remember? So you're not denying saying that?

A. I deny saying that.

Q. You deny saying that? You don't recall it, but you deny it?

A. I know I did not say that I had given consent.

Q. Okay. Do you recall telling her that you didn't want to proceed with charges?

A. I did not say that.

Q. You didn't say that either?

A. No.

Q. Okay. Did you then have a conversation with your father and then get back to Detective Constable Cross?

A. I don't remember.

Q. You don't remember that?

A. No. I don't remember.

Q. Okay. Okay, at some point after that you were then advised that there weren't going to be any charges against Mr. Percy, right?

A. Right.

Q. Okay, and then you, no contact with the police, nothing further happens until 2018, right?

A. I don't, I don't, maybe.

Q. It sounds about right, 2018 sometime?

A. Yep.

Q. And, um, that was when Detective Constable Mitchell contacted you, is that right? Okay, you know her, she is here?

A. Yeah.

Q. Okay. Alright. So, after, after that time, so you gave the statement in 2014, never been re-interviewed, right?

A. I don't think I was, no.

Q. No. I'm sure you had some meetings and discussions, but there was never another statement taken from you?

A. Right.

Q. Okay. And, so, the nature of that contact at some point was, you know, the case is being re-opened, do you want to proceed with it, something along those lines?

A. Yeah.

Q. Okay. Alright. In that, in that, uh, timeframe, um, I'll put it to you this way, you didn't provide any new information to police, right? Between 2014 and uh, at or around the time of the case being re-opened?

A. No.

Q. No. Okay. Okay, um, so just back to, um, Detective Constable Cross, you're, you're certain that that conversation never took place, that you didn't say that you consented to any of the sex to her?

Court: That wasn't your original question.

Q. Okay, I'll rephrase. The question that I asked you was that you didn't want to proceed because you consented to having sex. You're denying that you said that, right?

A. I don't entirely remember. I don't fully remember.

Q. Okay. So is that something that you may have said to Detective Constable Cross around that time?

A. I guess so.

Q. Okay. Okay, and the reason why you may have said that to her around that time is because you consented to at least some of the activity that you described yesterday, right?

A. Okay. I don't remember.

Q. You don't remember what? You don't remember consenting?

A. I don't, I don't remember consenting, if I did, with, if, I don't remember. I know that I did say no. I know that I said no.

Q. Okay, we'll get to that, right now I'll just ask you is the reason that you said, made that statement to, or may have made that statement to Bridget Cross, is the reason for that because you, you did consent to some of the sexual activity?

A. It could be possible.

[68] B.W. was asked if seeing a police chalk mark on the bathroom floor caused her to remember the place where Mr. Percy ejaculated, but maintained that she remembered before seeing the chalk, although she agreed that she was aware that the police had been looking for evidence in the room. She said she did not believe that anyone informed her what was found.

[69] B.W. did not recall telling the SANE nurses that she and Mr. Percy went to Willy's for poutine, without mentioning stopping for a drink at the Toothy Moose, after which she invited Mr. Percy to her place to eat. In her evidence she maintained that they did go to the Toothy Moose, and she had no explanation for not mentioning that detail to the SANE nurses. She also did not remember them kissing while walking to Willy's, but agreed that it might have happened. She agreed that after getting the poutine, they took a cab back to her place.

[70] B.W. did not have a strong recollection of what happened from when she and Mr. Percy left for poutine and when they arrived in her bedroom. She could not recall how they undressed. She was not sure if she was trying to take her own pants off when Mr. Percy helped her with her shoes.

[71] B.W. testified that Mr. Percy did not physically stop her from getting a condom, but told her she did not need one, and she said that it was possible she agreed to this.

[72] B.W. did not disagree that she was initially a willing participant when they began having sex in the bedroom. She was not sure whether vaginal intercourse occurred before or after some oral sex, and agreed that she did not recall giving any indication that she did not want to perform oral sex in the bedroom initially. She also agreed it was possible that there had been oral sex on the bed before Mr. Percy put the pillow down for her to kneel on. She did not know whether Mr. Percy ejaculated before they went into the bathroom. She also could not recall how they got to the bathroom, and specifically had no memory of Mr. Percy moving her.

[73] In short, B.W. could not recall whether she indicated consent to some of the oral sex she described occurring prior to going into the bathroom. She could not recall whether she had consented to the vaginal sex she described as having occurred prior to going into the bathroom. Following what B.W. recalled as having occurred in the bathroom, from her own perspective she did not consent, but there were “blanks”. She had voids in her memory of what occurred in the bedroom both before and after the events in the bathroom. She agreed that she “may have been a willing participant and don’t recall.”

[74] She was, however, certain that she said “No” repeatedly when Mr. Percy began anal penetration in the bathroom, and that she cried while he was doing it:

Q. Okay. So it happens and then you testified yesterday that you said no repeatedly and that you were crying?

A. Yes, I said.

Q. Okay, and um, and then Mr. Percy said something like calm down or something along those lines? Okay.

...

A. Yeah, he did.

...

Q. Alright, and um, you described what you said when you said no repeatedly you described it as being loud and shrill?

A. Yeah, I said no, he absolutely heard it.

Q. Okay. Yelled it?

A. I don't know if I yelled it, but you know, surprised, yell voice. I don't know if I yelled, but I said no, loud enough for everyone in that room, both of us, to hear it.

Q. Okay. And, um, given the acoustics of the apartment, likely for anyone else in the apartment to hear it?

A. Um, there's a possibility that other people in the apartment could have heard it, yes.

[75] B.W. believed that D/Cst. Cross made an assumption about her consent, and said she did not give her a fair chance to give a statement:

Q. Okay, um, so in that passage that I had you read, you would agree that's a passage in your statement where you're talking about the anal intercourse, right?

A. Right.

Q. Okay. Detective Constable Cross is talking to you about, uh, suggesting to you that there's a degree of consent in the whole thing, right?

A. She was, she was asking, yeah.

...

Q. She's asking you and she says, because we have a degree of consent, right?

A. Well, it seems more like an assumption on her part.

Q. Okay.

A. That's what I thought.

...

A. Sorry. Um, yeah, I just had never told her that I did consent, and then she said that I had consented, so on my end it seemed like she was making an assumption.

Q. Okay. In that passage you don't come out and say to her, other than the anal intercourse and we're getting to that, but she's saying that there's a degree, a degree of consent to the whole thing and you don't come right out and say no, I didn't consent to anything, right? You could have disa, it was open for you to disagree with her?

A. Right.

Q. And you didn't?

A. Right.

[76] On direct examination B.W. said that she said no repeatedly, shrilly and loudly. Mr. Planetta cross-examined her on her police statement on this point:

Q: Okay, so what I was asking you about was when the anal intercourse was occurring, you testified yesterday that you said no repeatedly, loudly and shrilly, and that you were crying at that time.

A: Right.

Q: Okay. And so, my question to you is there's nowhere in your statement where you say that, right?

A: Right, not, yeah right.

Q: There is, you pointed out a reference to crying, but that is at a different time, right?

A: Right. It was shortly after is when I had mentioned here.

Q: Okay. So, you know, all of those things that you said it loudly and shrilly and that you were crying while you said it, you had every opportunity to tell that to Detective Constable Cross when giving that statement.

A: Yep.

[77] Several of these points were revisited in B.W.'s redirect examination:

Q: ... Recall that cross-examination? And specifically about over the I said no probably in the washroom when he had me bent over the sink?

A: Yep.

Q: Okay. Now, earlier in that statement, page 14, lines 15 and 16.

A: Right.

Q: This is you, it says, Ms. W., um, and then he penetrated me anally, and I was... I said no repeatedly, I just...

A: Yeah.

Q: Are those words that you used?

A: Yep.

Q: And are those words that you used to describe the anal sexual assault?

A: Yep.

[78] B.W. explained that she told the police that she said no repeatedly during the anal intercourse. She did not say anything to the police about being loud or shrill.

[79] B.W. was further cross-examined about her statement to the SANE nurses, and specifically her failure to tell them about sexual activity that she said occurred after the anal intercourse in the bathroom:

Q: If that had happened, the sex in the shower, or what happened, what you say happened in the bedroom next, is that something that you would have told the SANE nurses when you met with them?

A: I mean, if it had, if it had come into my mind, if they had asked about it, I was pretty traumatized, I could have missed it.

Q: Okay. You would agree with me that those are two important events in this whole narrative, right?

A: Right.

Q: And you were, you were aware that that would be important, and you were trying to tell the SANE nurses everything that was important, right?

A: Right, I mean I don't fully remember that, I just remember, photos and medication. I don't remember all the conversations that we had is what I'm saying, sorry.

Q: Okay, alright. So the, I'll ask you a couple questions about that. When you went to the hospital and had the SANE kit done, you weren't intoxicated?

A: No.

Q: The medications that you were given had you taken them at that time?

A: After they had given them to me, I was, I was told to take them in the room. I took them, they gave me the medications and the water, and I took them in the room.

Q: But that would have been kind of after you sat down and told them what happened, wouldn't it?

A: I think so.

Q: Okay. So, did those medications have any like intoxicating effect on you?

A: No.

Q: No, okay. So, they wouldn't affect your ability to tell your story or in any event, right?

A: No.

Q: No, okay. And beyond, besides that you probably hadn't taken them until after you told?

A: Right.

Q: Okay. Alright. And you know, we talked a little bit about passage of time and that having some, you agree that has some effect on your memory, right?

A: Right.

Q: So, your memory back when you were at the hospital in 2014 is probably better than it is now?

A: Yeah.

Q: Okay. How long was the intercourse in the shower?

A: I don't know.

Q: At that point, do you recall, were you actively participating?

A: I don't remember.

Q: Were you saying anything:

A: I don't remember.

Q: Did he ejaculate in the shower?

A: I don't remember.

[80] B.W. was also cross-examined about what she said to the SANE nurses about being choked during oral sex:

Q: When you go back into the bedroom and you described oral sex there and kind of being choked, did he ejaculate there?

A: I don't remember.

Q: How did it stop? How did it end?

A: I don't remember.

Q: Alright, do you recall telling the SANE nurses about being, during oral sex at some point being held by the head, unsure if choked or not, do you remember saying that?

A: I don't remember if I had told them or not.

[81] On re-direct B.W. was referred to the phrase "he held her by the head, unsure if he choked her or not", and was then directed to her police statement:

A: Okay. Like there was more oral sex, like he, I was doing it to him, except he had my head like this. He was holding my head and he was choking me with his penis because he was pushing my head down so far and I felt like I was going to gag or like puke on him so I put my hands on his thighs to try and push away and he like hit my hand away and he was like "no hands" and I like he started pushing my head down more so and like my gag reflexes are not so great so.

[82] B.W., having just turned 19-years-old, described herself as being embarrassed, upset, and in pain after the incident. She underwent a lengthy and

invasive examination by two SANE nurses who were strangers to her. She was given medication for sexually transmitted diseases. She had photos taken of her injuries. In the circumstances, she may have understandably omitted some details when summarizing the incident during the SANE examination:

Q. Do you recall telling the SANE nurses about being, during oral sex at some point, being held by the head, unsure if choked or not, do you remember saying that?

A. I don't remember if I had told them or not.

Q. Okay. So, you wouldn't have lied or misled the SANE nurses, right?

A. No.

[83] B.W. described the rough oral sex as follows:

Q. Okay. You described during that, moving his, you know, pushing back or moving his hands, what did you do? Do you remember? How you did that?

A. My hands, I put them on his thighs and tried to push away, tried to push myself away.

Q. Okay, and what did you do anything to his hands?

A. I don't remember, I just remember trying to push away.

Q. Okay, and then you said that he said something, no hands...

A. No hands.

Q. Or something like that. Did he touch you in anyway at that time?

A. He had moved my, he had removed my hands from his thighs...

Q. How did he do that?

A. I don't remember if he hit or...

Q. What kind of motion was it?

A. Sorry?

Q. What kind of motion was it? How did he do that?

A. I don't remember, I just remember that he had moved my hands. I don't remember if he had hit them or moved them or.

Q. Can't say anything about that?

A. I don't remember in what manner he had removed my hands.

Q. Okay. And your evidence is that that occurred twice, was it?

A. Yes.

[84] Mr. Percy corroborated many aspects of B.W.'s explanation of the rough oral sex in his statement, including the holding of B.W.'s head, her gagging on his penis and the "no hands" comment.

[85] B.W. agreed that the bruises on her knees could have had a different cause other than Mr. Percy. She did not recall a fall on the night of the incident, but agreed that if she did fall, this could have caused bruising. She also agreed that a bruise would not appear immediately after the trauma that caused it. The exchange continued:

Q. Okay. And, um, your evidence is that when Mr. Percy, when you were in the bathroom and he, he commented about uh, about your bottom, um, it was a bruise at that point? You described it as a bruise, right?

A. Yeah, red and, red and bruising.

Q. Okay. Was it a bruise or was it something that later became a bruise?

A. I'm not sure. I don't remember anymore.

Q. Okay. Your friends, um, E.C. and K.L., saw the bruises later, right?

A. I don't know if I had shown E.C., but yes.

Q. Okay. So if they, if they, if they testify before this court later and say that they saw it, then they probably did, you wouldn't disagree with that?

A. Right, yes.

Q. Okay. Alright. So your evidence is that, um, he caused this mark or bruise or whatever and then asked you what happened to you?

A. Yeah.

Q. Alright. Can you look at your statement, page sixteen, and read from line fourteen to the next page at line three to yourself. So in that passage, you would agree with me, you're talking about the, you're explaining the, the injuries that you had, right?

A. Right, one of them.

Q. Okay. And at the bottom of page sixteen, um, you know, you're talking, in that passage you're talking about when he asked you what happened and you're talking about the bruising that, you're talking about the bruising on your bottom at that point, right?

A. Um hmm, yeah.

Q. Okay, and you say at line twenty-two, he did some of it, right?

A. Yes.

Q. Okay, so clearly what you were saying there at the time that you gave your statement was that he did or caused some of the bruising?

A. Yeah.

Q. You didn't say that he caused all of it?

A. Right, I was trying to be as honest as I could so I didn't want to say if I was not entirely sure if he caused all of it then he at least definitely caused some of it I think is what I was trying to say there.

Q. Okay, and so you said only some of it because you were trying to be as honest as you could?

A. Right.

Q. As opposed to a couple of minutes ago when you told me that he caused all of it?

A. Right, well, yeah. I mean I was just confused.

Q. Can I see exhibit three. Um, sorry, if you don't mind me approaching you. I have it opened to photograph nine, this is exhibit three.

A. Right.

Q. If you want to just take a look for a sec, and when you, if you need to refer to another picture feel free, but you, I think, refer to that as seeing finger marks or what looks like a...

A. Right, these two right here look as though they...

Q. Okay, and you're referring to kind of...

A. The two spots near the base of the rear.

Q. Okay, so kind of to the, to the righter edge of your body that's depicted there?

A. Yeah, right there, like in the middle far right.

Q. Okay. Alright. So you're saying that they look like finger marks?

A. Yeah, this one here and this one here.

Q. Okay. Alright. It could be a whole bunch of other things too, right?

A. Right.

[86] B.W. agreed that she may have outwardly appeared to be a willing participant during the initial sex in the bedroom. She did not deny saying "take me" several times during sex in bedroom. However, she adamantly denied she said anything like this prior to the anal intercourse. She was certain she said "no" repeatedly as soon as Mr. Percy started anal intercourse:

Q. Okay. The vaginal sex on the bed was first with you laying on your back and then there was some with Mr. Percy behind you and you on your knees?

A. Right on separate occasions.

Q. In the bed?

A. I don't remember.

Q. You don't remember. Okay. In the bathroom, um, you again say take me, he says to you, I'm going to take you in the ass, do you remember that?

A. No.

Q. You say no, he says please let me, and you say yes?

A. I never, ever, said yes to that. [Emphasis added]

[87] B.W. said that she thought she said no loud enough for E.C. to hear, but did not know if she actually did.

Law

Consent

[88] Mr. Percy is charged with sexual assault causing bodily harm. Section 265 of the *Criminal Code* describes the offence of assault. It states:

265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;

- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[89] The offence of sexual assault is created by s. 271, and sexual assault causing bodily harm by s. 272(1)(c). Sections 273.1 and 273.2 of the *Criminal Code* deal with consent. They state:

273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent

(1.1) Consent must be present at the time the sexual activity in question takes place.

Question of law

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

No consent obtained

(2) For the purpose of subsection (1), no consent is obtained if

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (a.1) the complainant is unconscious;
- (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or wilful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[90] I note that sections 273.1 and 273.2 have been amended since the events with which this decision is concerned: see S.C. 2018, c. 29. I am satisfied that these amendments did not change the substantive law applicable under these sections, but only brought them into line with the interpretation of these provisions as developed by the courts: see, e.g., *R. v Gray*, 2019 BCSC 1327, at paras. 65-68.

[91] In *R. v. Al-Rawi*, 2018 NSCA 10, Beveridge J.A. reviewed the essential elements of sexual assault, as set out in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. He discussed the *actus reus* as follows:

[19] *R. v. Ewanchuk* ... is the seminal decision on the elements the Crown is required to prove in a sexual assault prosecution. The decision cemented the demise of implied consent and reinforced the necessity of focussing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching.

[20] The *actus reus* of the offence is simply the intentional sexual touching of the complainant and the absence of consent. Justice Major, for the majority, wrote:

[23] A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

...

[25] The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour...

[26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred...

[92] Section 273.1 defines "consent" as "the voluntary agreement of the complainant to engage in the sexual activity in question." The majority in *R. v. Hutchinson*, 2014 SCC 19, described a two-step process for analysing consent to sexual activity. Chief Justice McLachlin and Cromwell J. said:

4 ... The first step is to determine whether the evidence establishes that there was no "voluntary agreement of the complainant to engage in the sexual activity in question" under s. 273.1(1). If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent. Section 265(3) defines a series of conditions under which the law deems an absence of consent, notwithstanding the complainant's ostensible consent or participation... Section 273.1(2) also lists conditions under which no consent is obtained. For example, no consent is obtained in circumstances of coercion (s. 265(3)(a) and (b)), fraud (s. 265(3)(c)), or abuse of trust or authority (ss. 265(3)(d) and 273.1(2)(c)).

[93] In *Al-Rawi*, Justice Beveridge explained the significance of the complainant's subjective state of mind in the context of the *actus reus*:

[42] With respect, there is nothing in the words of s. 273.1(1) that suggest the Crown need establish communication of a voluntary agreement to prove the *actus reus* of the offence of sexual assault. The issue of communication, or lack thereof, of a voluntary agreement is highly relevant to the issue of the *mens rea* of the offence—that the accused knew that the complainant did not consent to the activity in question—particularly in light of the statutory requirement in s. 273.2

of the *Code* that an accused took reasonable steps to ascertain the existence of consent.

...

[48]... Consent is entirely an inquiry into the subjective state of mind of the complainant, not about what she did or did not communicate. Major J. succinctly summarized this principle. I quoted from his judgment above, but it is convenient to repeat it:

[26] The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred...

[49] This is also reinforced by the majority reasons for judgment later written by McLachlin C.J. in 2011 in *R. v. J.A.*, *supra* where she stressed the difference between the *actus reus* and *mens rea* of the offence of sexual assault. The issue of communication of consent is only relevant to the issue of *mens rea*. She explained:

[37] The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*... Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to express her lack of consent or her revocation of consent for the *actus reus* to be established.

[94] In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, reviewed the role of consent in a sexual assault analysis:

89 Consent is treated differently at each stage of the analysis. For purposes of the *actus reus*, "consent" means "that the complainant in her mind wanted the sexual touching to take place"... Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent -- plain and simple... At this point, the *actus reus* is complete. The complainant need not express her lack of consent, or revocation of consent, for the *actus reus* to be established...

90 For purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused"... Hence, the focus at this

stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions"... [Citations omitted.]

[95] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J., for the majority, commented on the process of analyzing credibility with respect to consent:

61 In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.

62 If there is reasonable doubt as to consent, or if it is established that the complainant actively participated in the sexual activity, the trier of fact must still consider whether the complainant consented because of fear, fraud or the exercise of authority as enumerated in s. 265(3). The complainant's state of mind in respect of these factors need not be reasonable. If her decision to consent was motivated by any of these factors so as to vitiate her freedom of choice the law deems an absence of consent and the *actus reus* of sexual assault is again established.

[96] The relevant time period for analysis is when the sexual acts occurred, not before or after: *R. v. Rand*, 2012 ONCA 731, at para. 17. The majority of the Supreme Court of Canada said, in *R. v. J.A.*, 2011 SCC 28:

[46] The only relevant period of time for the complainant's consent is while the touching is occurring: *Ewanchuk*, at para. 26. The complainant's views towards the touching before or after are not directly relevant. An offence has not occurred if the complainant consents at the time but later changes her mind (absent grounds for vitiating consent). Conversely, the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact.

[97] Mr. Percy is charged with sexual assault causing bodily harm, which imposes an additional essential element that must be proven by the Crown beyond a reasonable doubt.

Governing legal framework - Burden of proof and presumption of innocence

[98] Section 11(d) of the *Canadian Charter of Rights and Freedoms* provides that a person charged with an offence has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” Mr. Percy is presumed innocent of the charge, unless the Crown proves each element beyond a reasonable doubt. Cory J., speaking for the majority in *R. v. Lifchus*, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt, as it should be explained to a jury:

36 ... It should be explained that:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
 - the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
 - a reasonable doubt is not a doubt based upon sympathy or prejudice;
 - rather, it is based upon reason and common sense;
 - it is logically connected to the evidence or absence of evidence;
 - it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
 - more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.
- [Emphasis in original.]

[99] Iacobucci J., for the majority, said in *R. v. Starr*, 2000 SCC 40, that “an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities” (para. 242). Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person, in this case Matthew Percy, beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

Credibility and reliability

[100] The trier of fact must consider all of the evidence. In this case, I have to decide if I am satisfied beyond a reasonable doubt that the Crown has proven that Mr. Percy committed a sexual assault causing bodily harm against B.W. This will require consideration of the credibility of witnesses, including the complainant. In

Faryna v. Chorny, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, the majority of the British Columbia Court of Appeal discussed credibility as follows:

11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[101] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. summarized the principles governing credibility assessment (some citations omitted):

13 Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:

* Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.

* There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re, supra*.

* Demeanor is not a good indicator of credibility: *R. v. Norman*(1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.

* Questions which should be addressed when assessing credibility include:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;
- b) Did the witness have an interest in the outcome or were they personally connected to either party;
- c) Did the witness have a motive to deceive;

- d) Did the witness have the ability to observe the factual matters about which they testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*...;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[102] The majority in *Lifchus* acknowledged that “certain doubts, although reasonable, are simply incapable of articulation” and emphasized that a “juror should not be made to feel that the overall, perhaps intangible, effect of a witness’s demeanor cannot be taken into consideration in the assessment of credibility” (para. 29).

[103] A related principle to credibility is reliability. The relationship between the two concepts was explained in *Cameco Corporation v. The Queen*, 2018 TCC 195:

[11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:

. . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

R. v. W.(D.).

[104] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] 1 S.C.R. 742, Cory J., for the majority, instructed triers of fact in applying the burden of proof where evidence has been led on behalf of the accused. Noting that the “trial judge should instruct

the jury that they need not firmly believe or disbelieve any witness or set of witnesses” (para. 27), he set out the following sequence, at para. 28:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused...

[105] In *R. v. Dinardo*, 2008 1 S.C.R. 788, Charron J., for the court, commented on the application of the *W.(D.)* analysis:

23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W.(D.)*; it will depend on the context... What matters is that the substance of the *W.(D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused’s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused’s guilt beyond a reasonable doubt...

[106] Although Mr. Percy did not testify, his police statement was entered into evidence as part of the Crown’s case. Therefore, the test as laid out in *W.(D.)* and the related cases applies to my analysis.

Circumstantial evidence

[107] In *R. v. Villaroman*, 2016 SCC 33, Cromwell J., for the court, noted that “in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt” (para. 30). He went on to explain that the modern state of the law is that inferences consistent with innocence do not require proven facts:

[35] At one time, it was said that in circumstantial cases, “conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts”... However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise

from proven facts... Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[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.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt... I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused"... "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Some citations omitted.]

[108] Justice Cromwell went on to contrast the approach to exculpatory circumstantial evidence to that governing inculpatory evidence, citing *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375, where the court stated that "[i]n the inculcation of an accused person the evidentiary circumstances must bear no other reasonable explanation" (emphasis in original). The court explained that "according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed" (emphasis omitted). Justice Cromwell commented that this idea — "that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative" — was a helpful way of describing the line between plausible theories and speculation" (para. 41).

[109] In *R. v. Calnen*, 2019 SCC 6, Martin J., dissenting in part, discussed circumstantial evidence, in the form of after-the-fact-conduct evidence:

[111] After-the-fact conduct is circumstantial evidence. Like other forms of circumstantial evidence, after-the-fact conduct allows a fact finder to draw particular inferences based on a person's words or actions... This process of inductive reasoning is a cornerstone of the law of evidence, and is used frequently to draw inferences from circumstantial evidence, as well as to assess credibility and to determine the relevance and probative value of evidence...

[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... That there may be a range of potential inferences does not render the after-the-fact conduct null... 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"... [Citations omitted.]

[110] The majority agreed with this articulation of principles by Justice Martin.

[111] In *R. v. J.A.A.*, 2011 SCC 17, Charron J., speaking for the majority, cautioned against an over-reliance on a complainant's demeanour following an allegation of sexual assault. She said:

14 In my respectful view, it would be unsafe to uphold the convictions on the strength of the other factors which the trial judge considered supportive of his conclusion. The majority in the Court of Appeal found two of these factors to be "particularly powerful": "the complainant's physical and emotional state in the minutes and hours after the event" and "the logic of the complainant's testimony", as opposed to the appellant's version of consensual sex... I agree with counsel for the appellant that it would be dangerous for this Court to uphold the convictions and thus resolve the credibility issue in this case on the strength of demeanour evidence, or on the basis that one party's version was less plausible than the other's. While one may reasonably view the appellant's version of consensual sex implausible in the circumstances outlined by the majority..., counsel aptly points out that the same could be said about the complainant's version...

[112] However, in dissent, Rothstein J. pointed out that post-event demeanour has long been used as circumstantial evidence to corroborate a complainant's version of events:

40 I agree with the majority of the Court of Appeal that this post-event demeanour evidence was "strong evidence indeed"... This Court has long held that

evidence of the demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events. In *Murphy v. The Queen*, [1977] 2 S.C.R. 603, Spence J., writing for the majority and the unanimous Court on this point, found (at pp. 612-13):

The respondent's factum, I believe, sets out the proper view as follows:

Independent testimony of a rape complainant's emotional condition is capable at law of corroboration where it is sufficiently damning that it may be considered by a jury to be more consistent with her denial of consent than with the existence of consent, or, to put it another way, where a reasonable inference can be drawn by a jury, considering all the circumstances, that there is a causal relationship between the assault and the complainant's distraught emotional condition.

... Her mental condition was most marked and very convincing evidence thereof was given by both the cousin and the policeman. I am of the opinion that such evidence could qualify as corroboration within the provisions of s. 142 of the *Criminal Code*. The weight which should be given to such evidence was, of course, a matter for the jury and it must be presumed that the jurors did assess its weight in accordance with their sworn duty.

41 *Murphy* dealt with the now repealed s. 142 of the *Criminal Code*. That section required a judge to warn a jury that it was unsafe to find the accused guilty in a rape case in the absence of corroborating evidence, if the only evidence implicating the accused was the testimony of the complainant. This corroboration requirement no longer exists. Nonetheless, the reasoning in *Murphy* still supports the use of post-event demeanour evidence as circumstantial evidence to support a complainant's version of events. If evidence of a sexual assault victim's post-event demeanour was capable of being corroborative then, it is certainly capable of constituting relevant circumstantial evidence now. In my respectful opinion, in this case, it was entirely appropriate for the judge to have regard to the demeanour evidence as part of all the evidence considered by him.

[113] This use of post-event demeanour evidence was approved in *R. v. Mugabo*, 2017 ONCA 323, where Gillese J.A. stated, for the court:

24 On a fair reading of the trial judge's reasons, the Impugned Comment simply reflects his view that the presence of the injuries on the complainant's genitals and the fact that she submitted to a sexual assault examination made it unlikely that the complainant had imagined being sexually assaulted. He found that a sexual assault had taken place, in part because of the complainant's physical injuries, as documented through the sexual assault examination. It was clearly open to the trial judge to rely on the nurse's evidence as being supportive of the complainant's version of events...

25 It is well-established that this court owes deference to a trial judge's findings of fact, including credibility findings. In the present case, the trial judge's credibility assessment of the complainant was informed by a number of factors, including the complainant's observed physical injuries by a trained sexual assault nurse which corroborated the complainant's version of events, the complainant's willingness to undergo the invasive sexual assault examination, and the complainant's demeanour immediately after the assault (crying "hysterically" and shouting that the appellant had had sex with her without her consent). It has long been held that post-event demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events... [Citations omitted.]

[114] I will now consider the evidence.

Actus reus

[115] In considering whether the *actus reus* has been proven beyond a reasonable doubt, the principle issue in this case is whether the complainant subjectively consented. As discussed above, this is a separate question from whether the accused had an honest but mistaken belief in communicated consent, which goes to the *mens rea* of the offence.

Initial sex in the bedroom

[116] B.W.'s evidence regarding her consent to the initial sexual contact with Mr. Percy is inconsistent. Her memory of the sexual activity in the bedroom was hazy. She was heavily intoxicated, as is clear from her own evidence, the evidence of K.L., and the video evidence of her and Mr. Percy entering her residence. She testified that she did not want any sexual activity with Mr. Percy, but also agreed that she might have been a willing participant in the early stages. Mr. Percy maintained in his police statement that all of the activity was consensual.

[117] The evidence regarding the initial sexual activity in the bedroom was in some respects, but not all, consistent between B.W.'s evidence and Mr. Percy's statement. B.W. agreed that there was vaginal intercourse and oral sex, although she could not say in which order. Mr. Percy said in his statement that he asked for oral sex when he could not achieve an erection. However, he said this proceeded to rough oral sex, with him taking control over B.W., then to rough vaginal intercourse.

[118] B.W. testified that the rough oral sex took place in the bedroom toward the end of the entire incident, not the beginning, as stated by Mr. Percy. However, her memory was hazy about the events in the bedroom. B.W. said that she did not consent to the rough oral sex, that Mr. Percy forced her head down onto his penis by holding her head, she could not speak because her mouth was full and when she tried to push away from him by putting her hands on his thighs he said “no hands” and moved her hands away. Mr. Percy agreed that he forced B.W.’s head down onto his penis, that she was gagging, that she tried to push away from him with her hands and that he said “no hands”. However, he says that B.W. consented to all of this and that they were “making out” off and on during the oral sex.

[119] There is no doubt that rough oral sex occurred. However, B.W.’s memory is hazy about the events in the bedroom. I am not satisfied on the evidence whether the rough oral sex occurred in the bedroom prior to the anal intercourse as stated by Mr. Percy, or afterwards, as stated by B.W.

[120] B.W. said she may have consented to some of the initial sexual activity in the bedroom. She said that the rough oral sex occurred in the bedroom, but after the anal sex, and she did not consent to that activity. I am not satisfied on the evidence what, if any, sexual activity occurred in the bedroom after the anal intercourse, because of B.W.’s hazy memory of the events in the bedroom and her agreement that she might have consented to some of the sexual activity in the bedroom, combined with Mr. Percy’s police statement. If the rough oral sex took place as and when described by Mr. Percy then the Crown has not proven beyond a reasonable doubt a lack of consent regarding that incident.

[121] In my opinion, the Crown has not proven beyond a reasonable doubt a lack of consent by B.W. in respect of the sexual activity in the bedroom including vaginal sex and oral sex before they went into the bathroom, and anything that may have occurred in the bedroom after the incident in the bathroom.

Anal intercourse in the bathroom

[122] In his statement Mr. Percy said that after the rough sex in the bedroom he was sweaty and they went to the bathroom to shower. Mr. Percy said they were having vaginal sex, in front of the sink, while he was standing behind B.W. He asked B.W. if he could “take her in the ass” and she turned, looked at him, and said “No.” He said he kept asking to penetrate her anally, and she eventually agreed.

[123] B.W. could not recall how they ended up in the bathroom. She recalled facing the sink, with Mr. Percy behind her, holding her by the hair. On direct examination she said “ He had struck me, I don’t know how many times, but I know that he had struck me and there was biting. He had bit me on my neck and I don’t remember if he had bit me on my back, but there was a bite mark on my back as well.” However, she also testified that she could not recall being struck or bitten.

[124] B.W. testified that Mr. Percy did not ask her consent before attempting anal intercourse. She was consistent and adamant that she did not consent to anal intercourse, and that she said “no” repeatedly, loud enough for him to hear her, while crying. She directly recalled that she did not consent to anal intercourse, and also said that she would never have consented to anal intercourse.

[125] B.W.’s memory of the events in the bathroom was much clearer than her recollection of the other events in the bedroom. It also corresponded with certain important aspects of Mr. Percy’s statement, particularly his need to control her for sexual stimulation and her (initial) refusal to have anal intercourse. (Mr. Percy told the police that he turned her around, bent her over, “put her down on the sink” and asked repeatedly to have anal intercourse, and that B.W. refused, but eventually agreed.) I accept B.W.’s account as the accurate description of what actually occurred and I reject Mr. Percy’s claim that B.W. eventually consented to anal intercourse. To be clear, I accept B.W.’s evidence that her own traumatic reaction to what was happening caused her to recall these events in greater detail than what had already happened in the bedroom. I am sure that what B.W. described in the bathroom is what happened.

[126] I do not believe Mr. Percy’s claim that he asked B.W. for anal intercourse, nor do I believe that after his claimed persistent requests, B.W. relented and agreed. Even in his efforts to downplay and normalize what occurred in his police statement, Mr. Percy described his need to control, dominate and humiliate B.W. for his own sexual gratification. By his own admission he grabbed her by the head during oral sex, forced her face down onto his penis until she gagged and when she tried to push away said “no hands”. He could not achieve an erection until he controlled and humiliated her and said he could not ejaculate through either oral sex or vaginal intercourse. He then forced anal intercourse on B.W. until he ejaculated. I accept B.W.’s own evidence that she did not consent, and that she made it known to Mr. Percy that she did not consent, saying “no” repeatedly and crying while he was doing it.

[127] I note that B.W. testified not only that she did not consent to anal intercourse, but that she would never have consented to it. In *Al-Rawi*, Beveridge J.A. discussed the relevance of a witness saying they would never consent to certain activity:

70 Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent... [Citations omitted.]

[128] In *R. v. Garciacruz*, 2015 ONCA 27, the court stated that evidence of the "complainant's pre-existing attitudes and assumptions" can serve as a basis for an inference that a complainant clearly would have refused to consent "regarding the period during which [the complainant] has no recollection" (para. 69). Similarly, in *R. v. Kontzamanis*, 2011 BCCA 184, the court held that although the complainant had no memory of the alleged assault, the jury could "make the crucial credibility finding that the complainant subjectively did not consent, based on her unequivocal evidence that, under no circumstances, would she have consented to sex with the appellant at any time" (para. 31).

[129] The Supreme Court of Canada considered this type of evidence in *R. v. Esau*, [1997] 2 S.C.R. 777, where McLachlin J. (as she then was), dissenting, accepted that evidence that the complainant "would not have consented ... because the respondent was her second cousin" was "consistent with denial of consent or with unconscious incapacity to give consent" (paras. 91-92). However, the majority, *per* Major J. stated that the conclusion that "the complainant would not for personal reasons have consented ... in view of the complainant's failure to remember, is no evidence of her denying consent" (para. 23). This comment has been treated as being limited to the immediate facts of *Esau*. In *R. v. J.R.*, 2008 ONCA 200, Feldman J.A. said, for the court:

[17] The trial judge in the present case found that because of intoxication, the complainant did not have the capacity to consent. He also reasoned, based on her evidence, that she would not have consented and he accepted that the evidence of a lack of struggle also supported his conclusion of the complainant's lack of capacity in those circumstances. In my view, the trial judge was entitled to view the cumulative effect of the evidence and draw the conclusions he did. In *Esau*, the majority was not laying down a rule, but was instead discussing why it rejected the

minority's view of the value and effect of the evidence in that case in the context of the defence of honest but mistaken belief in consent.

[130] I am satisfied that B.W.'s assertion that she would never consent to anal intercourse is circumstantial evidence that can be considered among the constellation of evidence presented at trial to determine whether the Crown has proven Mr. Percy's guilt beyond a reasonable doubt. However, it must be noted that there is no void in B.W.'s memory on the issue of her lack of consent to anal intercourse as there was in some of the cases referenced above. I accept that her memory was clear in respect of the anal penetration. As such, I accord very little to weight to the specific assertion that she *would not have consented*, in view of her clear and specific evidence that she *did not consent*.

[131] To a limited extent, my assessment of the evidence also takes into account certain aspects of other circumstantial evidence. This includes the complainant's post-event demeanour and the bruises that were visible after the events. B.W. was tearful, upset and embarrassed when speaking with her friends the day after the incident. She was tearful, upset, and withdrawn during the initial police interview the next day. She was described as tearful and whimpering during the SANE examination.

[132] Defence counsel raised the possibility with the witnesses that B.W. may have been so intoxicated that her bruises were caused by falling while walking in heels. As noted earlier, B.W. did not recall falling, but agreed it was possible, and agreed that she had stumbled and fallen on other occasions when intoxicated. K.L. had no recollection of B.W. falling that evening. E.C. had seen B.W. stumble and fall while intoxicated on other occasions. Mr. Percy did not say that B.W. had fallen in his police statement. While it is not impossible that the bruising on her knees, and some of the bruising on her backside, may have been caused by a fall, a fall would not explain the bite marks on her neck and back. Moreover, E.C. was awoken by the sound of slapping. In summary, there is no evidence that the bruises or bite marks had any source but Mr. Percy's actions.

[133] B.W.'s memory of the forced anal intercourse was clear. Despite some inconsistencies in her evidence, many of which are inconsequential (such as the issues with her statement to Constable McNamara and the SANE nurse as discussed above) I find her testimony to be credible and reliable in relation to the anal intercourse. On the other hand, I reject Mr. Percy's claim that B.W. indicated consent to anal intercourse at any time. On the contrary, I find that she indicated

her non-consent throughout. With regard to the anal intercourse in the bathroom, I find beyond a reasonable doubt that B.W. did not consent.

Vaginal sex in the shower

[134] Mr. Percy said in his statement that after the anal intercourse they “fooled around” in the shower. He did not provide any further details of significance.

[135] B.W. testified that after the anal intercourse, she recalled that Mr. Percy directed her into the shower and had vaginal sex with her. She said that she was traumatized after the forced anal intercourse and did not consent to any of the activity that followed. B.W. said that she may not have outwardly shown her lack of consent because vaginal intercourse in the shower was preferable to the forced anal intercourse she had just endured. That does not equate to consent in these circumstances.

[136] With regard to the vaginal intercourse in the shower, I am satisfied that the Crown has proven beyond a reasonable doubt that B.W. did not consent.

Second incident of oral sex in the bedroom

[137] In his statement, Mr. Percy said the “rough blow job” took place in the bedroom before they went into the bathroom, in order to help him achieve an erection. B.W. testified that while oral sex did occur in the bedroom initially, the “rough” oral sex took place when they returned to the bedroom from the shower.

[138] As noted above, Mr. Percy agrees that he grabbed B.W.’s head and repeatedly forced her mouth down onto his penis until she gagged, however, he says this was all consensual and that he and B.W. were making out off and on while this was happening. I accept that Mr. Percy said “no hands” and moved B.W.’s hands off of his thighs as she tried to push away from him. I accept that Mr. Percy said “no teeth” when B.W.’s teeth grazed his penis. B.W. said that she could not speak since her mouth was full. As noted above, there is a conflict in the evidence as to whether this incident occurred during the initial sexual encounter in the bedroom or after the anal intercourse when they returned to the bedroom. Equally, there is a conflict in the evidence about whether all of the vaginal sex in the bedroom occurred prior to the forced anal intercourse or whether some occurred in the shower and the bedroom after the anal intercourse.

[139] If the rough oral sex occurred after the forced anal intercourse then there was clearly no actual consent to further sexual activity on the part of B.W. She had just been subjected to forced anal intercourse. She was traumatized and injured. She said she did not consent. Even if B.W. acquiesced to further sexual activity with Mr. Percy for her own safety she was not consenting.

[140] If the rough oral sex occurred in the bedroom before the anal intercourse then some consideration has to be given to B.W.’s comments regarding her consent to certain aspects of the initial sexual activity. While she said that she could not recall some or most of the initial events and whether or not she consented, she was adamant that because Mr. Percy was forcing her head down on his penis and making her gag and choke that she tried to push on his thighs to get away from him. She testified that she did not consent and was scared and threatened during the rough oral sex. Mr. Percy said “no hands” and moved her hands away from his thighs so she was forced to continue. Again, Mr. Percy essentially confirmed much of B.W.’s testimony about the rough oral sex but said that it was consensual and that he and B.W. were kissing off and on during this incident.

[141] While B.W. said that she did not want any of the sexual activity to have occurred, she also said that she may have consented to some of the initial sexual

activity. She was hazy as to the chronology of the sexual activity in the bedroom. Considering the voids and haziness of her memory for the sexual activity in the bedroom I am left with a reasonable doubt in relation to her consent to the sexual activity in the bedroom.

[142] Considering the *W.D.* standard, while I do not believe many aspects of Mr. Percy's statement regarding B.W.'s consent, as noted above, the evidence as whole leaves me with some doubt about when the rough oral sex occurred, not whether it occurred. I have a doubt as to whether the rough oral sex occurred after the anal intercourse. Mr. Percy's description of his escalating need to control and humiliate B.W. in order to achieve sexual gratification, combined with B.W.'s hazy memory due to the combination of alcohol and the passage of time, leads me to conclude that the rough oral sex may have occurred prior to the anal intercourse in the bathroom. B.W. said that she may have consented to some of the initial sex in the bedroom. Again, if the rough oral sex occurred during the initial sex in the bedroom then I have a reasonable doubt about B.W.'s lack of consent. While I think that B.W. *probably* did not consent to the rough oral sex whenever it occurred, in particular when she attempted to push away from Mr. Percy and he said "no hands" and moved her hands off of his thighs, "*probably*" is not enough in a criminal matter. I must be convinced beyond a reasonable doubt. I am therefore left with a reasonable doubt regarding the lack of consent by B.W. in relation to the rough oral sex.

Mens Rea

[143] Because I am convinced beyond a reasonable doubt that B.W. did not consent to the anal intercourse and the vaginal intercourse that followed in the shower, the *actus reus* of sexual assault is established regarding that activity. Although Mr. Percy has not expressly asserted honest but mistaken belief in communicated consent (as opposed to consent *simpliciter*), in the event I am wrong in finding that he knew B.W. did not consent, I will consider it as an alternative defence, out of an abundance of caution. I must therefore go on to consider the *means rea*.

[144] Once again, the principal issue with *mens rea* in this case relates to consent, but not the complainant's subjective consent, as with the *actus reus*. We are now concerned with the accused's state of mind. In his police statement Mr. Percy said that B.W. consented to all of the sexual activity. In relation to the anal intercourse, as the court noted in *R. v. Orwin*, 2017 ONCA 841, the "complainant's version was

one of unmistakable resistance. The issue was one of credibility, of consent or no consent” (para. 31).

[145] On the *actus reus* analysis, I have found that there was no consent to the anal intercourse or the vaginal intercourse that occurred in the shower after the anal intercourse. This followed from my acceptance of B.W.’s evidence and my rejection of the assertions in Mr. Percy’s police statement. Moving on to *mens rea*, I am satisfied that Mr. Percy knew that B.W. did not consent to anal intercourse, or to anything that followed. The evidence I have accepted establishes that B.W. made her lack of consent known in unmistakable terms to the anal intercourse, and never gave any positive consent to anything that followed the forced anal intercourse, which I can only be certain includes vaginal sex in the shower, nor did Mr. Percy make any attempt to ascertain that she was consenting.

[146] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J. considered the parameters of honest but mistaken belief in consent:

52 Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:

An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(a)(ii).

[147] Justice Major went on to discuss *mens rea* and consent:

63 Turning to the question of *mens rea*, it is artificial to require as a further step that the accused separately assert an honest but mistaken belief in consent once he acknowledges that the encounter between him and the complainant unfolded more or less as she describes it, but disputes that any crime took place... In those cases, the accused can only make one claim: that on the basis of the complainant's words and conduct he believed her to be consenting. This claim both contests the complainant's assertions that in her mind she did not consent, and posits that, even if he were mistaken in his assessment of her wishes, he was nonetheless operating under a morally innocent state of mind. It is for the trier of fact to determine

whether the evidence raises a reasonable doubt over either her state of mind or his.

64 In cases such as this, the accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.

65 Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

66 Cases involving a true misunderstanding between parties to a sexual encounter infrequently arise but are of profound importance to the community's sense of safety and justice. The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.

[148] In *Barton*, Moldaver J. expanded on *Ewanchuk*, holding that the defence should be referred to as honest but mistaken belief in communicated consent:

91 This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" ..., and the *Code* itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct... [Emphasis added.] As L'Heureux-Dubé J. stated in *Park*, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 [Emphasis in *Park*.]).

92 Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in communicated consent". This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.

93 Focusing on the accused's honest but mistaken belief in the communication of consent has practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she communicated consent to the sexual activity in question at the time it occurred.... As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact. [Emphasis added.]

94 However, great care must be taken not to slip into impermissible propensity reasoning... The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the *Code*. [Some citations omitted.]

[149] In discussing the parameters of the defence, Moldaver J. outlined the need for reasonable steps to ascertain consent:

104 Section 273.2(b) imposes a precondition to the defence of honest but mistaken belief in communicated consent -- no reasonable steps, no defence. It has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time... Notably, however, s. 273.2(b) does not require the accused to take "all" reasonable steps, unlike the analogous restriction on the defence of mistaken belief in legal age imposed under s. 150.1(4) of the *Code*... [Citations omitted.]

[150] As to what constitutes "reasonable steps", Moldaver J. stated that the "inquiry is highly fact-specific, and it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps or obscure the words of the statute by supplementing or replacing them with different language" (para. 106). He did, however, consider the parameters:

107 That said, it is possible to identify certain things that clearly are not reasonable steps. For example, steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law... Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step... Accordingly, an accused's attempt to "test the waters" by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a

reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants...

108 It is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated. For example, the more invasive the sexual activity in question and/or the greater the risk posed to the health and safety of those involved, common sense suggests a reasonable person would take greater care in ascertaining consent. The same holds true where the accused and the complainant are unfamiliar with one another, thereby raising the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case.

109 Overall, in approaching the reasonable steps analysis, trial judges and juries should take a purposive approach, keeping in mind that the reasonable steps requirement reaffirms that the accused cannot equate silence, passivity, or ambiguity with the communication of consent. Moreover, trial judges and juries should be guided by the need to protect and preserve every person's bodily integrity, sexual autonomy, and human dignity. Finally, if the reasonable steps requirement is to have any meaningful impact, it must be applied with care -- mere lip service will not do. [Citations omitted.][Emphasis added.]

[151] As to the significance of the word “no”, Campbell J. stated in *R. v. Singh*, 2019 NSSC 115:

36 "No" does not mean later and is not an invitation to ask again. Once the word no has been uttered, any change of mind must be made explicit. Anyone who continues with sexual activity once that word has been spoken does so at some legal peril. It is difficult to revoke the explicit "no" with inferences drawn from actions because those actions can be a person's reaction to the refusal of the accused person to accept the explicit "no".

[152] For the purposes of the *mens rea*, the focus shifts to whether Mr. Percy honestly believed that B.W. effectively communicated consent through her words or actions.

[153] Mr. Percy could not ejaculate while having vaginal and oral sex with B.W. in the bedroom so he moved B.W. to the bathroom, held B.W. roughly by the hair while standing behind her, “put her down on the sink”, and had anal intercourse with her. Once B.W. realized what Mr. Percy was doing to her, she said “no” clearly and repeatedly, so that he would have been able to hear her. He would also have been able to see that B.W. was crying. He slapped and bit B.W. with enough force to leave visible bite marks and bruising.

[154] Again, Mr. Percy and B.W. met very shortly before these events. They were completely unfamiliar with each other. Mr. Percy was a physically fit 31-year-old man. He knew that B.W. was a highly intoxicated petite 19-year-old. Rough oral sex and anal intercourse are highly invasive forms of sexual activity. Once he began anal intercourse without seeking or receiving consent, B.W. clearly said “no” repeatedly, but Mr. Percy continued by force nonetheless. After that, B.W.’s silence or passivity did not equate to the communication of consent, and Mr. Percy made no attempt to obtain or ascertain consent. There were no reasonable steps taken by Mr. Percy to determine B.W.’s consent.

[155] Mr. Percy told the police that he was stressed on December 5, 2014, and that he wanted to blow off steam through a one-night stand. He found a highly intoxicated 19-year-old outside a bar, offered her his sweatshirt, lied about his age, asked her to get something to eat, paid for a taxi to her residence, undressed her and discouraged her from using a condom. He also said in his statement that having control of B.W. was a sexual turn-on for him. What followed included rough oral sex, moving her hands away from his thighs and directing “no hands” when she tried to push away, saying “no teeth” when her teeth grazed his penis and then holding B.W. by her hair, turning her around, putting her down on the sink, forcing anal intercourse, slapping her backside hard enough to leave finger shaped bruises, biting her neck and back hard enough to leave large bruises. He then directed her into the shower and had vaginal intercourse with her. When he was no longer interested in sex, he asked “How does it feel to have been fucked by a 31-year-old?” Mr. Percy left B.W. traumatized, obviously bruised and so sore that she was unable to sit down or have a bowel movement for two days. Mr. Percy took no reasonable steps to determine B.W.’s consent to anal intercourse in the bathroom and vaginal intercourse in the shower.

[156] On all the evidence, even if Mr. Percy did not know that B.W. was not consenting to the anal intercourse and vaginal intercourse in the shower (and I have found that he did know she was not consenting), a claim of honest but mistaken belief in communicated consent would not and does not raise a reasonable doubt in these circumstances.

Bodily harm

[157] Mr. Percy is charged with sexual assault causing bodily harm. According to B.W.’s evidence, in the aftermath of the assault, she was unable to sit properly or

have a bowel movement for two days. Further, the evidence establishes that she was left with bruises and bite marks. She did not report pain from the bite marks.

[158] The *Criminal Code* defines “bodily harm” at s. 2, as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature...” The requirements for establishing bodily harm were recently considered in *R. v. Landry*, 2019 ONSC 3700:

[133] Bodily harm means “any hurt or injury that interferes with the complainant’s health, comfort or psychological well-being”, provided that it is “something more than brief or fleeting or minor in nature”; *R. v. F.*, 2017 ONSC 5625, at para. 168. The Crown has provided me with cases where a court found bodily harm based on bruising, scraping and a goose egg on the complainant’s head (*R. v. Rabieifar*, 2002 CarswellOnt 5591 (ONSC), aff’d at [2003] OJ No 3833 (ONCA)); based on a bruise and anal tearing (*R. v. K(C)*, 2001 BCCA 379); or based on facial bruising and swelling (*R. v. Peterson*, 2017 ONSC 7008). These decisions suggest that the Crown does not need to show that the complainant required medical treatment to establish that she suffered bodily harm. There was however in each of these cases a record of some sort of tangible injury.

[134] The Alberta Court of Appeal held in 2015 that the threshold to establish bodily injury is low, and the Crown does not need to prove that the injury lasted for any set length of time or that any medical treatment was required. The cases it cites in support are the same ones I have just mentioned, as well as other cases involving bruising, scrapes, lacerations and pain that lasted over a week; *R. v. Bulldog*, 2015 ABCA 251, at para. 44.

[135] In *R. v. McLeod*, 2002 NSCA 24, the Nova Scotia Court of Appeal held that bodily harm includes psychological injury. In that case, the complainant suffered scrapes and cuts during her struggle with the accused, and testified that she had difficulty trusting men after the assault. We have no such evidence in this case.

[159] The complainant in *Landry* experienced severe pain for several hours after the assault, but there was no evidence of any “tangible physical or psychological injury, however fleeting, that rises to the level of bodily harm”, leaving the trial judge with a reasonable doubt as to bodily harm (para. 136). By contrast, in this case the complainant was left with tangible bruises and bite marks, as well as anal damage that interfered with her normal physical and bodily functions for several days.

[160] I am convinced beyond a reasonable doubt that B.W. did not have the injuries described in court prior to meeting Mr. Percy. I am convinced beyond a

reasonable doubt that Mr. Percy caused these injuries. I am convinced beyond a reasonable doubt that B.W. did not consent to any of these injuries. I conclude that the physical injuries B.W. experienced were beyond the *de minimis* level, and are sufficient to constitute bodily harm.

Uneven scrutiny

[161] I was cautioned by counsel for Mr. Percy not to fall into the trap of applying “unequal scrutiny” to the evidence of Mr. Percy and B.W. That is, I was cautioned not to unevenly look for every flaw in Mr. Percy’s evidence as presented through his police statement and of the various witnesses for both Crown and defence, and conversely not to unevenly overlook the flaws in B.W.’s testimony.

[162] The dangers of “unequal scrutiny” were considered by Wood C.J.N.S., for the court, in *R. v. Willis*, 2019 NSCA 64:

[43] Indeed, the use which the trial judge makes of minor or collateral inconsistencies or contradictions appears to be a theme in some successful appeals based upon uneven scrutiny. When those issues are used to undermine the credibility of the defence evidence, but ignored or diminished in relation to the Crown evidence, a successful appeal may result as happened in *Kiss*. This was also the case in *R. v. Gravesande*, 2015 ONCA 774 where the Court said:

42 When read as a whole, the trial judge’s reasons demonstrate a degree of scrutiny of the prosecution evidence that was tolerant and relaxed as compared to the irrelevant, tenuous and speculative observations largely about collateral matters applied to unfairly discount the appellant’s evidence.

[44] Uneven scrutiny may also be found when there is no critical assessment of inconsistencies which could undermine the Crown evidence. *R. v. D.D.S.*, 2006 NSCA 34 was such a case. In that decision Saunders J.A. described the approach to be taken as follows:

51 The judge was obliged to look at all of the evidence not simply to see if there was other evidence which supported and enhanced that of the complainant, but also to determine if there were evidence that contradicted or tended to contradict that of the complainant; and more importantly, whether that evidence, or lack thereof, created a reasonable doubt.

[163] As noted throughout my review of the evidence and analysis, when testifying, B.W. displayed and admitted to memory gaps due to alcohol intoxication on the evening in question, and due to the passage of time between the

incident and trial. Mr. Percy's police statement, given shortly after the incident, was entered into evidence. I conclude that B.W.'s evidence regarding the initial sex in the bedroom, and particularly her hazy memory and inconsistencies regarding consent, leaves me with a reasonable doubt regarding Mr. Percy's culpability regarding the initial sex, which might have included the rough oral sex, and whether or not oral and vaginal sex took place in the bedroom after they were in the shower.

[164] However, I find B.W.'s evidence credible, reliable, and consistent regarding the forced anal intercourse and the vaginal intercourse in the shower. The bulk of the other evidence, particularly the descriptions of her injuries, and the evidence of Ms. Thompson, K.L., and E.C., all tend to support B.W.'s account of what happened in the bathroom, and to undermine Mr. Percy's exculpatory claims to the police, and particularly his claim that everything that happened was consensual. I acknowledge that B.W.'s roommate E.C. heard sounds that she subjectively took to be indications of pleasurable sex. She could not say at what stage of the events in question this was and she experienced the incident with the mindset that nothing bad could occur in the safety of their residence pod. Looked at in the context of all the evidence, E.C.'s evidence does not disrupt this finding.

W.(D.) Analysis

[165] As noted earlier, although Mr. Percy did not testify, his police statement was entered into evidence as part of the Crown's case. Therefore, the test as laid out in W.(D.) and the related cases applies to my analysis.

First, if you believe the evidence of the accused, obviously you must acquit

[166] I do not believe Matthew Percy's statement that B.W. consented to all the sexual activity, including anal intercourse and/or any "fooling around" in the shower afterwards.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit

[167] Mr. Percy's evidence does not leave me with a reasonable doubt regarding B.W.'s lack of consent to anal intercourse or the vaginal intercourse in the shower that followed.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused

[168] On the basis of all of the evidence presented at trial, I am not sure that the oral sex and vaginal intercourse that occurred in the bedroom was not consensual, I am not sure whether the rough oral sex occurred after the anal intercourse, or that more vaginal sex occurred in the bedroom after the anal intercourse. Because I am not sure when the rough oral sex occurred, combined with the doubt I have regarding B.W.'s lack of consent to the initial sexual activity in the bedroom, I am not sure that the rough oral sex was not consensual.

[169] I am convinced beyond a reasonable doubt that Mr. Percy had forced, non-consensual anal intercourse with B.W. in the bathroom. I am also convinced beyond a reasonable doubt that Mr. Percy had non-consensual vaginal intercourse with B.W. in the shower after the forced anal intercourse. I am equally sure, and therefore convinced beyond a reasonable doubt, that there was no honest but mistaken belief in communicated consent in relation to both of those sexual activities.

[170] I am also convinced beyond a reasonable doubt that Mr. Percy caused bodily harm to B.W. during the sexual assault.

Conclusion

[171] For the reasons above, I find Mr. Percy guilty of sexual assault causing bodily harm.

Arnold, J.