

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Snow*, 2022 NSSC 175

Date: 20220623

Docket: Hfx No. 506693

Registry: Halifax

Between:

Her Majesty the Queen

v.

James Snow

TRIAL DECISION

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

Judge: The Honourable Justice Christa M. Brothers

Heard: April 11, 12, 13, and May 19, 2022, in Halifax, Nova Scotia

**Additional
Written**

Submissions: May 13 and 17, 2022, in Halifax, Nova Scotia

Decision: June 23, 2022

Counsel: Alonzo Wright, Q.C., for the Crown
Peter Mancini, Q.C., for the Defendant

Order restricting publication - sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 - other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

[1] Mr. Snow is charged in a four-count Indictment involving one complainant. The Indictment charges the accused as follows:

THAT HE DID for a sexual purpose expose his genital organs to P.J., a person under the age of sixteen years, contrary to Section 173(2) of the *Criminal Code*;

AND FURTHERMORE, at the same time and place aforesaid, while being at large on a Release Order, did fail, without lawful excuse, to comply with a condition of that Release Order, to wit: do not have any contact or communication, directly or indirectly with or be in the presence of any person you know to be or who reasonably appears to be under the age of sixteen years of age, contrary to Section 145(5)(a) of the *Criminal Code*;

AND FURTHERMORE, at the same time and place aforesaid, while being at large on a Release Order, did fail, without lawful excuse, to comply with a condition of that Release Order, to wit: do not attend at any public park, school ground, daycare centre, swimming pool, playground, skating rink, community centre or recreation centre or anywhere person under the age of sixteen years of age, are present or might reasonably be expected to be present, contrary to Section 145(5)(a) of the *Criminal Code*;

AND FURTHERMORE, at the same time and place aforesaid, while being at large on a Release Order, did fail, without lawful excuse, to comply with a condition of that Release Order, to wit: House Arrest to remain in your residence at all times; exception: between the hours of 1:00 p.m. and 5:00 p.m. on Saturdays each week for the purpose of attending to personal needs, contrary to Section 145(5)(a) of the *Criminal Code*.

Background

[2] The Crown called witnesses and entered a video taped statement made by the complainant. Identity is the main issue in this case, and I will address the issue of eyewitness identification. In addition, deciding whether the Crown has met its burden of proof requires an assessment of the credibility and reliability of the evidence. I will summarize the evidence. In doing so, I will focus on the evidence that is relevant to the essential elements and that which is necessary to place the factual conclusions in context. While I will not recount every piece of evidence adduced at trial, I have considered all of the testimony and exhibits.

The Presumption of Innocence

[3] The Crown has the burden throughout to prove beyond a reasonable doubt that the accused is guilty of the offences charged. There is no burden on the accused to prove his innocence. The accused begins the proceedings presumed to be innocent of all the charges. That presumption remains with him throughout the case unless or until the Crown proves his guilt beyond a reasonable doubt.

[4] Reasonable doubt is based on reason and common sense, arising from the evidence or absence of evidence. Reasonable doubt is a standard that is closer to absolute certainty than to a balance of probabilities. Thinking the accused is probably guilty or likely guilty is not enough. Justice Cory summarized the principles governing the reasonable doubt standard in *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36:

- 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.

[5] I also rely on the summary of the guiding principles set forth by Hunt, J. in *R. v. Baxter*, 2019 NSSC 274.

[6] There was conflicting evidence at trial between the complainant and her mother that the accused exposed his penis to the complainant, and the statement attributed to the accused when confronted by the mother that she was “crazy” and “a cuckoo lady”. I am guided by the decision of the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. The instruction in considering evidence in such cases is:

- (a) If the evidence of the accused is believed, he must be acquitted;

(b) If the evidence of the accused is not believed, but the evidence still raises or leaves a reasonable doubt, he must be acquitted; and,

(c) Even if the evidence of the accused does not raise a reasonable doubt, he must be acquitted if a reasonable doubt is raised by other evidence that is accepted. In order to convict, the evidence that the court does accept must prove his guilt beyond a reasonable doubt.

[7] It is not a matter of who I believe; it is a matter of whether, based on all the evidence or absence of evidence, the Crown has proven its case beyond a reasonable doubt. It is not for a trier of fact to simply choose which version of the events to believe, if any. The trier of fact must consider all of the evidence.

[8] In considering the evidence, if I find the complainant credible, it does not in any way shift the onus to the accused (*R. v. C.L.Y.*, 2008 SCC 2). All of the evidence needs to be considered (*R. v. E.M.W.*, 2009 NSPC 33, aff'd 2011 SCC 31. As Judge Campbell (as he then was) stated in *E.M.W.*, at para 47:

...It is not only appropriate, but necessary for judges to consider all the sources of reasonable doubt. The sources may include the doubt left by the complainant's evidence, the doubt created by the evidence of the accused, the doubt found in any other evidence or the doubt arising from the combination of those sources.

Evidence and Admissions

[9] On the third day of trial April 13, 2022, the Crown and defence entered the following Agreed Statement of Facts.

1. That James Michael Snow agrees that jurisdiction is not an issue at trial.
2. That James Michael Snow will not contest Crown's application under 715.1 to admit P.J.'s January 16, 2021, video tape statement into evidence for the truth of its content.
3. That James Michael Snow agrees to admit the sketch created by P.J. during her January 16, 2021, interview.
4. That James Michael Snow agrees to admit the USB that contains the Truro Walmart security footage from January 16, 2021.
5. That James Michael Snow agrees to admit a Google Street Maps depicting Walmart Supercentre in Truro, Nova Scotia East past Young Street in the Town of Truro Nova Scotia.
6. That James Michael Snow agrees that on January 16, 2021, he was subjected to a release order that contained the following:

a. Do not have any contact or communication, directly or indirectly with or be in the presence of any person you know to be or who reasonable [sic] appears to be under the age of sixteen years of age:

AND

b. To not attend at any public park, school ground, daycare center, swimming pool, playground, skating rink, community centre or recreation centre or anywhere persons under the age of sixteen years of age, are present or might reasonable [sic] be expected to be present.

7. That James Michael Snow agrees that if finding of guilt is rendered on count one (1) of the indictment, convictions will be entered on counts two (2) and three (3) on the indictment.

8. That the Crown is offering no evidence on count four (4) on the indictment. The court is invited to enter an acquittal on count four (4) on the indictment.

[10] As noted in paragraph eight and confirmed on the record by the Crown on April 13, 2022, the Crown had no evidence to offer on count four of the indictment. Consequently, the court entered an acquittal on count four on April 13, 2022. What remains is a three-count indictment.

***Voir Dire* – Admission of Video-Taped Evidence**

[11] There were no pre-trial applications. On the first day of trial, Crown counsel sought to enter a videotaped interview of the complaint, P.J., pursuant to s. 715.1 of the *Criminal Code*. Section 715.1 states:

Evidence of victim or witness under 18

715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

[12] Although the defence consented to the admission of the videotape, that does not end the matter. As Mitchell J.A. cautioned in *R. v. R.A.H.*, 2017 PECA 5, “beware of defence counsel bearing gifts” (para. 44). Notwithstanding counsel’s consent, I concluded that a *voir dire* was necessary to discharge my obligation as gatekeeper to determine whether the conditions for admission in s. 715.1 had been met (*R. v. R.A.H.*, at paras. 51-53, 67).

[13] The videotaped statement of the complainant is presumptively inadmissible hearsay. Section 715.1 provides a statutory exception permitting a video recording of an out-of-court statement to be admitted for the truth of its contents where certain conditions are met. The purposes of the section were reviewed in *R. v. L (D.O.)*, [1993] 4 S.C.R. 419 and *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, and were discussed in David Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at p. 587:

Section 715.1 is designed to achieve two main purposes. First, it aids in the preservation of evidence and the discovery of truth. The videotape preserves an early account of the child's evidence, given in a more natural setting, which may well provide the best account of what took place and is also an account free from subsequent influence or suggestion. "The video record may indeed be the only means of presenting a child's evidence. For example, a child assaulted at the age of three or four years may have very little real recollection of the events a year or two later when the child is attempting to testify at trial." Second, using the videotape at the trial makes it less stressful and traumatic for the child. It reduces the number of interviews that the child must undergo prior to trial in which the child faces repeated questioning, most often by strangers, usually concerning a very painful incident. At trial, the child is freed from the initial need to recount the incident in direct examination, although, to be sure, the child will still be subject to cross-examination.

[14] The conditions for admissibility in s. 715(1) are as follows:

1. the video-recorded statement must have been taken within a reasonable time after the alleged offence;
2. in his or her statement, the witness must describe the acts complained of;
3. the witness must, while testifying, adopt the contents of the video-recorded statement; and,
4. the presiding judge or justice is not of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

(*R. v. Osborne*, 2017 ONCA 129, at para. 38)

[15] The onus falls upon the Crown to establish on a balance of probabilities that the requirements for admissibility under s. 715(1) are met (*R. v. S. G.*, 2007 CanLII 20779 (Ont. Sup. Ct. J.)).

[16] On the *voir dire*, the complainant's mother, S.J., testified as to P.J.'s age. She reviewed the videotape and testified that the statement was recorded within hours of the alleged incident. She said that P.J. had watched the video on two occasions in the week prior to trial. In addition, the complainant, P.J., reviewed the videotape and indicated that she was trying to be truthful and was being honest when she gave the statement.

[17] Based on the evidence adduced on the *voir dire*, I was satisfied that the requirements under s. 715(1) have been proven on a balance of probabilities. P.J. is under 18 years of age. In her statement, which was provided within hours of the alleged incident, she clearly described the acts being alleged. As noted at para. 30 in *R. v. R.A.H.*, "[t]he test for adoption of the video statement is not onerous. The child need only attest he/she was attempting to be truthful at the time the statement was made." P.J. testified that she was trying to be honest and truthful at the time she made the statement, and I accept that evidence. Finally, I am not of the opinion that the admission of the videotaped statement would interfere with the proper administration of justice. The videotaped statement was therefore admitted.

Evidence at trial

S.J.

[18] S.J. is the complainant's mother. She testified that she is in a relationship with B.S. S.J. has two children, P.J. and C.J. P.J. attends a Truro elementary school and was eight years old on January 16, 2021. P.J. is now nine years of age.

[19] On January 16, 2021, S.J. and P.J. attended Walmart in Truro, which is four or five minutes away from their residence. S.J. testified that they arrived at Walmart between 2:00 – 2:30 pm. They picked up a shopping cart and proceeded through the store, making their way to the cookware aisle. While S.J. was looking at the cookware items, P.J. asked if she could go look at toys in the toy aisle. S.J. allowed P.J. to go to the toy aisle on her own because it was close to the cookware aisle. S.J. said she could see the toy section from the cookware aisle. S.J. said it was common for her to let P.J. look at the toys by herself. She had done it many times.

[20] S.J. said that she and P.J. were apart for less than five minutes. When S.J. was done in the cookware aisle, she went to find P.J. She said that when she approached the aisle, she could see the edge of her daughter. There was a man standing behind P.J., with his back to S.J. The man was big. He had on a black t-shirt and dark pants, and was standing very close to P.J., slightly bent over. The scene struck S.J. as odd.

When S.J. called out P.J.'s name, the man "jerked back". He walked quickly past S.J. and around an aisle. S.J. watched him walk away. He looked back at S.J. before he rounded the aisle, and they made eye contact.

[21] At that point, P.J. said, "Mom, mom, I just saw his penis. He had his penis out." S.J. asked P.J. to repeat what she said, which she did. With P.J. in tow, S.J. chased the man through the store. She kept catching glimpses of him at the ends of aisles and over the top of the lower aisles as she followed him. S.J. testified that she was chasing him because he had exposed himself to her daughter and she wanted him caught. S.J. caught up to the man at the front doors of Walmart. By this time, he was wearing a "greenish blue" plaid hunting jacket, which S.J. had seen him carrying in his arms earlier in the store. S.J. was very upset and screamed, "You had your penis out in the toy aisle! You can't do that!" The man responded loudly and aggressively, calling her "a crazy lady", "cuckoo" and "nuts". S.J. told the greeter to call the police and told him what happened. She then told P.J. to stay with the greeter and followed the man out of the store. She said she wanted to see if he got into a car so she could try and get a photo of a license plate. S.J. said the man cut across the parking lot and she used her phone to take a picture of him from behind as he was walking away from her. The man continued walking in the direction of a path across the road.

[22] S.J. went back into Walmart to retrieve P.J, who was upset. After abandoning their cart, they got into the car to drive home. The drive took approximately four minutes. S.J.'s partner B.S. and her other daughter, C.J., were home when they arrived. S.J. told B.S. what had happened and told him that the man had been walking toward the path across the street from Walmart. S.J. testified that B.S. was quite angry. He left in his truck and S.J. assumed he was going to the area of the path to locate the man. S.J., P.J., and C.J. got into bed and snuggled. S.J. did not recall them talking about the incident, but once they finished snuggling, they continued making bread that they had started earlier in the morning. B.S. then called S.J., and they immediately went to the police station. After they arrived at the police station, S.J. gave her statement first, followed by P.J.

[23] S.J. identified the accused as the man she had seen in Walmart. She was shown a booklet of photographs which were admitted by consent and identified the man she said committed the acts. S.J. was also taken through surveillance videos retrieved from Walmart and entered by consent. The first video depicted the entrance of Walmart at approximately 1:46 pm. S.J. identified the accused as the person depicted in the video wearing dark pants, a black shirt, a ball cap, and a jacket. She

said the man in the video was the same person she saw in the toy aisle. The only difference in his appearance was that he had put his jacket on at some point after he left the toy department. S.J. also identified herself and P.J. in the video. S.J. said that in the area just before the doors, which is not depicted in the video, she confronted the man and made what she described as “a bit of a scene”. The video showed P.J. stepping into a shopping cart and sitting down in the larger area of the cart, waiting as her mother left the store. The greeter also left the store for a period of time before coming back and standing next to P.J.

[24] When shown footage of the toy department aisles, S.D. identified the person in the video holding a coat and wearing a black t-shirt, ball cap and mask as the accused. S.D. testified that neither she nor P.J. were depicted in the toy aisle video.

[25] On cross-examination, S.J. agreed that she was not depicted in the toy department video shown in court, which started at approximately 1:29 pm and ended at 1:35 pm. That video also did not show her pursuit of the man. She said she was not quite sure of the exact time when the incident in Walmart occurred. She recalled that she was in Walmart between 1:30 and 1:45 p.m. She assumed that the video of the toy department was taken before the incident, since she chased the man out of the store. S.J. testified that the man she identified as the accused was carrying a jacket when she saw him in the aisles. She said at some point that he put his jacket back on, but she did not see him do it.

[26] S.T. agreed that during her pursuit of the man, she lost sight of him long enough for him to put his jacket on. She described the man to police as having “some sort of plaid jacket, green or blue”. She was sure it was not brown. She explained that in her mind, there are two types of hunting plaid jackets – the “muddy” colours, like oranges, browns, and reds, and the bright colours, like blue and green. She said she knew it was a blue or a green.

[27] S.J. said that when the man left the toy aisle after she called out P.J.’s name, he walked away quickly. When he stopped to look at her, it was very quick, approximately two seconds. She said she had an opportunity to see him when he walked toward and past her, and that was just for a few seconds. She agreed that she had, at most, three to four seconds to observe him. She confirmed that he was masked, and that the mask covered his nose. He also had on a ball cap. The conversation they had near the entrance lasted for approximately ten seconds. At the time that S.J. and the man made eye contact in the toy aisle, she was not yet aware of what P.J. alleged. It was only after he left the aisle that P.J. told her the man had exposed himself to her. S.J. rejected the suggestion, however, that she had

no particular reason to take notice of the man when she first saw him. S.J. testified that she had reason to take notice of him because when she walked up, the man was standing “very, very close” to P.J., and it occurred to her that that was very strange. It was also why she turned to look over her shoulder at him, because it struck her as odd. She agreed that she was shocked when P.J. advised her of the incident. She described P.J. as being very upset and confirmed that she too was upset. S.J. agreed that she did not observe the incident.

[28] S.J. agreed that she told the police she could not tell them how tall the man was, but that he was “big”, “like probably had a beer gut” and had “big shoulders”. She described him as having dark pants on. At the time, she did not know whether those pants were jeans, corduroys, or work pants. She knew only that they were dark. S.J. described him as having a “bandanna mask”, with no straps to hook behind his ears. She believed there was a pattern of some sort on the bandanna, with some navy in it. She told the police that she could not estimate his weight but described him as “heavysset”. S.J. described him as being “baldish”, with some hair coming out the back of the ballcap. She had never seen the man before. He had no tattoos, and she could not say what type of shoes he had on. When S.J. left Walmart to pursue the man, she did not place P.J. in the car but left her in the store.

[29] When S.J. arrived home, P.J. was present for her conversation with B.S. S.J. confirmed that P.J. would have heard her give B.S. a description of the man, but she said that both she and P.J. were telling the story and she could not recall who gave what description. S.J. confirmed again that she had never seen this man before and agreed that she had never seen him without a mask or a ballcap on.

[30] After S.J. conveyed the information to B.S., he left the home within approximately five minutes. She testified that he did not return home and that they met him at the police station.

[31] She agreed that the man in the video is carrying a jacket, but that she can not tell the colour of the jacket from the video.

[32] When asked whether she and P.J. discussed the incident or what the man was wearing on the drive home from Walmart, S.J. said she could not remember. S.J. confirmed that after the man left the store, she watched the man walk toward the path, but she did not see him actually enter the path. She said the path turns up to the golf course in less than one kilometre.

[33] On re-direct, S.J. agreed that as she was pursuing the man in Walmart, she could see him from the neck up, while at other times she could only see him the top of his head. Her visual of him lasted for several minutes.

P.J.

[34] P.J. testified via CCTV in the presence of a support person over the course of two days. She watched the video and testified that it depicted her and her mom and that she was sitting on the couch next to her mom. She recalled holding a stuffed animal and that she was being honest and truthful at the time. She testified that she had watched the video before.

Video Statement of P.J.

[35] P.J. was interviewed by a police officer and a social worker. Her mother was with her. In the video, P.J. answers questions about her age, what grade she is in, her friends, her teacher, her favourite things at school, and the extracurricular activities she engages in. She is asked questions by the police officer to ascertain whether she knows the difference between the truth and a lie. P.J. is then asked about what happened at Walmart. She takes some time to describe the events and has great difficulty saying that the man had his penis out and that she saw his penis.

[36] P.J. goes on to say that the man looked like he was going to do something, "like, something bad". She says the man who exposed his penis had jeans on. She says he did not take his penis out, but that it was out the whole time. When the police officer erroneously suggests or asks when the man pulled his penis out, P.J. corrects him immediately and says she never saw him pull his penis out, and that it had been out the whole time. She says that when she went over to her mom, the man put his penis back in his pants. She says that after she told her mom the man's penis was sticking out of his jeans her mom told her to wait in the car and she went to try to find him so she could take a picture of his license plate. Then they went home.

[37] At one point, the police officer draws the figure of a man on a piece of paper and asks P.J. to take a pen and show where a penis would be on the man's body. She draws an arrow on the paper and writes her initials on the page. The arrow is clearly pointing to the genital area.

[38] After watching the video, P.J. said she recalled giving the statement. She testified that she was being honest and truthful when she gave it. P.J. was not asked whether the man from Walmart was in the courtroom.

[39] On cross-examination, P.J. recalled that she went to the toy aisle to play with Lego. The man was in the toy aisle when she went in, and no one else was there. She said he was between the beginning and the end of the aisle when she entered it. P.J. could not recall what type of Lego she was looking at. Although she recalled playing with another toy, she did not remember what it was. P.J. said the man came towards her and his penis was exposed the whole time. When she heard her mother calling her, she went to her and told her what happened. She described her mother as being shocked. She said she was also shocked.

[40] P.J. testified that she followed her mother who was following the man. She said the man had a jacket, but she could not recall the colour. She remembered he was wearing a black shirt and that he had his jacket in his hands. He had a mask on, but she did not know the colour. P.J. believed the man was bald and did not have any hair.

[41] P.J. said that after she and her mom got home, the police were called. B.S. and her sister and their dogs were at home. She finished making bread with her mom. She believed that B.S. called the police. She could not recall whether her mother told B.S. what happened. She did not hear B.S. on the phone with police. She could not recall if, during the drive home from Walmart, her mother had asked her any questions about the man.

[42] P.J. was asked how many teachers she has at school. She said she does not have the same teacher for the whole day because she also has a gym teacher and a music teacher. She said she does not take any courses in school which instruct her about a person's body. P.J. testified that her mom taught her about body parts. She did not know how she was taught or if she was shown books. She did not recall looking at any books.

[43] P.J. said that when she saw the man's penis in the toy aisle, she was upset. She did not run when she saw the man's penis because her mom called her right afterward. She could not recall how long she saw the man's penis, or where his hands were. P.J. was asked whether his hand was holding his jacket close to his waist. She said that it could have been. When asked whether what she saw might have been a finger, P.J. emphatically said "no" while shaking her head to the left and right. She agreed that the man looked weird, but she could not explain how. She had never seen the man before. He had a mask on over his nose, but she could see his eyes. P.J. could not recall the colour of his eyes. She remembered he was wearing jeans.

[44] P.J. recalled telling the police that she waited in the car for her mother. When they left Walmart, they went straight home. She says that she watched the video statement of herself three times. This is corroborated by her mother who said that she watched the video last week two times and then watched it again in court. She could not remember, while following the man with her mother, if she was holding her mother's hand. She recalled that her mother and the man talked to each other, but she could not remember where they were in the store or what they said to each other

[45] On re-direct, P.J. stated that the man's jeans were blue in color. She said again that she waited in the car while her mom followed the man outside the store.

B.S.

[46] B.S. testified that he is S.J.'s partner and that he lives with her and her daughters, P.J. and C.J. They have lived at the same residence for the last two years. Their home is one kilometre and a four-to-six-minute drive from Walmart. B.S. testified that he recalled the events on January 16, 2021. It was a Saturday, and he was at home with C.J. in the bedroom reading books. S.J. and P.J. returned home from Walmart between 2:00 and 2:05 pm. They came in the bedroom and were visibly upset. B.S. asked what took place. They explained what occurred at Walmart. B.S. described them as distraught. He tried to console them. His next step was to try to locate the man. B.S. said very little time had passed between when S.J. and B.J. returned home and when he left in his work truck to try to find the man. He described it as "instantaneous".

[47] When asked how he went about locating the man, B.S. explained that their residence is adjacent to the golf course, and the Cobequid walking trail is on the other side of the golf course, in close proximity to Walmart. He learned through his conversation with S.J. that the individual was on foot, so he "took a leap of faith" and headed in that direction. He then located the accused crossing Willow Street in a crosswalk. B.S. said it was about a minute and a half between when he left home and when he located the accused.

[48] B.S. explained that he knew who to look for because he learned from his conversation with S.J. that the man was wearing a black t-shirt and dark jeans. He followed the man in his work truck. He said the man he located had no face mask on. He was bald with a goatee, and he was wearing a black t-shirt, dark jeans, and dirty work boots. There was a jacket of some sort in his left hand. Compared with the description provided by S.J., the only difference was that the man was not

wearing a mask. B.S. said he came within 50 metres of the man. He called the Truro Police Service's main line immediately. He was on with the dispatcher who instructed him not to approach the man, but to "keep him in eyeshot".

[49] B.S. continued to follow the man about 150 metres until Kaulback Street, where the street stopped, and B.S. had to turn left. He said he never lost sight of the individual. He used his phone to record a video and take photographs of the man walking.

[50] The man proceeded to King Street. From there, B.S. pulled beside one of the Truro Police constables. At that point, he thinks another police officer was dispatched and the man was arrested near Dominion Street. B.S. said they could see him being taken down at that location.

[51] B.S. was shown several photographs that he took of the man. He said the man in the photos was holding what appeared to be a jacket. The man in the photo was wearing a black t-shirt, dark jeans, and work boots. B.S. identified the accused in the courtroom as the man in the photos he took on January 16, 2021.

[52] After B.S. saw the accused being arrested, he went home to take S.J. and P.J. to the police station to open a formal complaint.

[53] On cross-examination, B.S. testified that he did not know the accused before this incident. He said that when he left his home to look for the man, he was not aware of any surveillance video from Walmart. He was operating solely on the basis of a description S.J. had given to him. B.S. agreed that he is not trained in any police activity and has no search and rescue experience.

[54] B.S. confirmed that he saw the accused being arrested near Dominion Street, on the railway tracks. He said a second Truro police unit had the accused next to the police vehicle. It appeared to B.S. that they were putting handcuffs on him. He was sure that he saw handcuffs being put on the accused, but he did not see the police put the man in the car.

[55] When shown one of the photos he took. B.S. agreed that the man in the image was looking directly at him. He agreed that the man did not increase his gait or try to get away when he saw B.S. taking photos, but he pointed out that the man did not know who he was. B.S. said he was about 50 metres away from the man when he was taking pictures. He confirmed that he was driving very slowly, with his iPhone

at the driver's side window opening, taking photos and following the man. B.S. agreed that he did not know if the man saw B.S. filming him.

[56] B.S. agreed that when S.J. told him what the man was wearing, he did not make any notes. It was a simple description. When asked if he was upset by what S.J. and P.J. had told him, B.S. said he was "upset but calm".

[57] B.S. estimated that S.J. and P.J. had gotten home at between 2:00 and 2:05 p.m. When asked what time he was filming the man, he pointed out that the pictures are date stamped 2:15 p.m. He said the Truro police officers arrived very quickly after he called them – within six to seven minutes, 10 minutes at the most. B.S. agreed that the individual in the photos was not wearing a hat and he never saw him with a hat on. He never saw the man wearing a jacket and could not describe the colour of the jacket. B.S. said that from the pictures, the inside of the jacket appeared to be a greyish color. The man was carrying the jacket the whole time that B.S. observed him.

Constable Lamont

[58] Cst. Lamont is a police officer who has been with Truro Police Service for 11 years. On January 16, 2021, in the early afternoon, he was requested to assist in locating male who had possibly exposed himself to children at Walmart. Cst. Lamont was in uniform and driving a marked police vehicle. He was advised that the man was walking along the train tracks somewhere in the area of Kaulback, King, Pleasant, and Dominion Streets. He explained that these streets all run parallel to one another, while the train tracks run perpendicular. Cst. Lamont proceeded to the area around King Street, looking up and down the tracks to see if he could spot the male walking. Next, Cpl. Hall, who was in another marked police unit, radioed and said he had located a male fitting the suspect's description in the area between Dominion and Pleasant Street, just off the edge of the road on the tracks. Cst. Lamont pulled around and pulled up beside Cpl. Hall. He did not exit his vehicle, but his window was down. Cpl. Hall was standing with the male, speaking with him. Cst. Lamont described the man as a white male with grey hair wearing a blue and black plaid jacket and blue jeans. The man was holding a wallet and papers in his hands and speaking face to face with Cpl. Hall. Cst. Lamont was approximately 25-30 feet away from the man. He recognized the individual from earlier police briefings. Cst. Lamont identified the accused as the man.

[59] After pulling up, Cst. Lamont inquired as to whether Cpl. Hall required assistance. Cpl. Hall said he was fine. The sergeant then radioed and directed Cst.

Lamont to attend Walmart to view some CCTV footage to confirm the police were speaking with the right person. Walmart was one to two kilometres away. Cst. Lamont was not sure what time it was when he arrived at Walmart. He knew it was the early afternoon, possibly 1:30 or 2 pm, but he did not recall the exact time. Once at Walmart, Cst. Lamont proceeded immediately to the back office where the Loss Prevention Officer has the camera system set up. He said they visit that area often to review footage. He estimated that he had been to that Walmart location 50 or 60 times over the previous 11 years and said he was very familiar with the “Genetec” encrypted video system Walmart uses. He said that it is a common video system for big stores. Cst. Lamont added that the Truro Police Services has a Genetec video player at the police station because so many stores use that system.

[60] Cst. Lamont explained that Walmart has various cameras all over the store, covering the main entrance and exit and the main, “more problematic” “high-theft” aisles. The video system does not cover the whole store. There are pockets of the store that are not captured by the cameras, which he referred to as “dead zones”. As a result of these dead zones, when viewing the footage, you can see an individual entering an area covered by cameras, then lose sight of them for a period of time until they enter another area covered by the cameras.

[61] Cst. Lamont reviewed the videos, looking for a white male with grey hair wearing a black and blue plaid jacket and blue jeans. When he located the man on the video, he proceeded to “follow” him as he walked through the store, using time stamps and different cameras. Cst. Lamont noted that the individual on the video who he identified as the accused was wearing a ball cap in the store, but he was not wearing it when located by police. When asked if anything changed about the man’s appearance in the videos, Cst. Lamont said the man took his jacket off and draped it over his left arm. He described the accused holding his left arm up as if it were in a sling. Cst. Lamont believed the accused was wearing a grey hoodie underneath the black and blue plaid jacket. When the jacket was folded up, you could see the grey hood and part of the hoodie, but you could also see a little bit of the blue and black. Cst. Lamont recalled that the accused had a black bandanna around his neck that was pulled down slightly. He but could not recall if there were any markings on it.

[62] Cst. Lamont observed the accused in the surveillance video slowly walking around the store, up and down the aisles, without a shopping cart. He said the accused did not stop and look at or pick up any items. He stuck close to the toy aisles for the majority of the video. Cst. Lamont testified there were three to five toy aisles. Some of the toy aisles were covered by surveillance cameras and others were not.

[63] Cst. Lamont testified that the video showed the accused tapping his right hand on his right leg as he walked by two small, female children. He did this several times, walking up and down the aisle. Cst. Lamont said that at one point, when the accused went back down the aisle, facing the camera, you could see that his penis was out of his pants.

[64] Cst. Lamont was taken through several Walmart video surveillance excerpts with time stamps spanning from 12:53 pm until 1:46 pm. He continuously identified an individual, initially wearing the black and blue hunting jacket and ball cap, then holding the jacket and wearing a black t-shirt, as the accused. The video surveillance shows that some aisles in the store are higher than others, and that it is possible to see people over the tops of the aisles

[65] Cst. Lamont testified that the videos from Walmart depict the same individual who was stopped on the side of the road with Cpl. Hall. The man in the video and the man he saw with Cpl. Hall had the same stature, same height, same grey hair, same jacket, same hoodie, and same pants. The only difference was that when Cst. Lamont saw him with Cpl. Hall, he was not wearing a hat. Cst. Lamont did not know whether the man had been holding the hat in his hand. He said that in the time that he was looking for a man matching the description provided to him, he did not encounter any other individuals that matched that description before he met up with Cpl. Hall and the accused.

[66] Cst. Lamont testified that at the time, the accused lived at a residence on East Prince Street, which is approximately a kilometre or 1.5-kilometre further east from the point where the accused was walking on January 16, 2021.

[67] After reviewing the videos, Cst. Lamont seized a copy and took the information back to the station to inform Cpl. Hall, Sgt. Taylor, and Cst. Bowden of what he saw. That was the end of his involvement in the matter.

[68] On cross-examination, Cst. Lamont said he was moving slowly in a patrol car in the area of King Street trying to find the individual who matched the description he had been given. He then heard over the radio that Cpl. Hall had located a male matching the description, and he gave his location. Cst. Lamont stopped his car right along the edge of the train tracks and he could see Cpl. Hall's police unit and Cpl. Hall outside of the vehicle with the male. He did not see any other vehicles in the area. He did not observe a white truck in the area. When he saw Cpl. Hall, Cst. Lamont turned around, went up to MacDonald Street, and then drove back down to

Dominion Street so he could pull up beside Cpl. Hall. Cst. Lamont did not see Cpl. Hall leave. He left the area prior to that to go to Walmart.

[69] Cst. Lamont confirmed that when the man was speaking to Cpl. Hall, he had a blue and black plaid jacket on. Cst. Lamont could not see the colour of his shirt underneath, and the man was not wearing a ball cap. He did have a bandanna mask on but it was pulled down, not over his face, while he was talking to Cpl. Hall. Cst. Lamont described it as a “black circle scarf that pulls up”.

[70] Cst. Lamont agreed that when he reviewed the surveillance footage at Walmart, he assumed that he saw the incident complained of in the video. He believed he saw an incident of indecent exposure and he assumed that it was P.J. was depicted in the video with her mother and another child. Cst. Lamont did not ever show that portion of the video to S.J., P.J.’s mother. He now believes that the video does show the accused exposing himself to P.J., quite far up in the distance in one of the aisles, but said it was not the same portion of the video as he initially thought. Cst. Lamont reported the fact that he thought he had seen the incident complained of to Cst. Bowden, the lead investigator.

[71] Cst. Lamont confirmed that the accused was arrested in the afternoon, but he did not know who made the arrest because he was not involved with the file any further.

[72] Cst. Lamont agreed that when he saw the man speaking with Cpl. Hall, he made notes of the man’s description. The description was of a white male wearing jeans and a blue plaid checkered shirt. There was no mention of a black bandanna or scarf. Cst. Lamont agreed that when he testified earlier that the man stopped by Cst. Hall was wearing a black bandanna; he was going by his memory. He further agreed that it was only after he had reviewed the surveillance video that he wrote in a supplemental occurrence report that the man he saw with Cpl. Hall was wearing blue jeans and a dark face bandanna.

[73] Cst. Lamont’s notes also indicated that the video depicted the man taking off his coat and hanging it over his arm. Cst. Lamont agreed, however, that he was not sure the video actually showed that. This certainly raises an issue of the reliability of Cst. Lamont’s note taking. Furthermore, in the supplemental occurrence report, Cst. Lamont incorrectly stated that the man had been in the store for two hours. He testified that he believes he made that mistake because he spent two hours watching the video footage. He was not careful in his note preparation and again this raises questions of the reliability of his notes.

[74] Cst. Lamont could not recall any other vehicles in the area when he pulled up beside Cpl. Hall and the accused. He agreed that he had never seen the accused in person before that day but said he had previously seen a photograph of him. Cst. Lamont agreed that the distinguishing feature for him in looking for the individual was the blue and black plaid jacket. He agreed that there were a number of people with the same stature and dark ball caps in Walmart at the time. He also indicated that there could have been others at the time in Walmart with plaid jackets

Constable Bowden

[75] Cst. Bowden has been with the Truro Police Service for two years and was involved in this investigation. On January 16, 2021, Cst. Bowden received a call from dispatch from B.S. advising that he was near the train tracks in Truro and that an incident had allegedly occurred in Walmart. Cst. Bowden met B.S. at the train tracks in the area of King Street or Dominion Street. B.S. showed Cst. Bowden a picture of the person who he alleged had committed an indecent act at Walmart. There was no one else present when he met with B.S.

[76] After speaking with B.S., Cst. Bowden radioed other officers in the area and gave them a description of the possible suspect and advised that he was walking along the train tracks. Cst. Bowden then heard on the radio that Cpl. Hall had stopped a man matching the suspect's description on the train tracks about one block away. Cst. Bowden proceeded to that location. When he arrived, he spoke with Cpl. Hall about what had happened. At that time, the suspect was walking away. Cst. Bowden could not recall if he got out of his patrol car.

[77] Cst. Bowden believed the individual walking away was the same person in the photograph he was shown by B.S. He asked Cpl. Hall about the content of his conversation with the suspect. As a result of that conversation, Cst. Bowden returned to the Truro Police station to write a report on the investigation up to that point. His supervisor, Sgt. Taylor, had tasked Cst. Lamont with attending Walmart to obtain security footage.

[78] Cst. Bowden subsequently received word that Cst. Lamont had located the individual on the video and believed that the video depicted the indecent act. As a result, Cst. Bowden believed he had reasonable and probable grounds to arrest the suspect. Accompanied by Sgt. Taylor, Cst. Bowden went to the suspect's residence in East Prince Salmon River. Cst. Bowden knocked on the door of the residence. When the suspect answered the door, Cst. Bowden identified himself and Sgt. Taylor and advised the suspect that they had reasonable grounds to believe that he had

committed an indecent act at Walmart earlier that day and that they would be effecting an arrest. Cst. Bowden arrested the suspect without incident. Before putting the suspect in the back of the police car, Cst. Bowden read him his right to counsel and police caution. The suspect was then taken to the cells at Truro Police Service. Cst. Bowden identified the suspect as the accused.

[79] On cross-examination, Cst. Bowden said that when he spoke to B.S., they could not see Cpl. Hall from their location. Cst. Bowden said it was only a minute or two after he provided the description over the radio that Cpl. Hall radioed to say that he had stopped a person matching that description about one hundred meters away.

[80] Cst. Bowden agreed that at the time he spoke with Cpl. Hall by the train tracks, no arrest was made because they did not think they had reasonable and probable grounds. It was only after Cst. Bowden heard from Cst. Lamont that he believed he had reasonable grounds for an arrest. This contradicts the evidence of B.S.

[81] Cst. Bowden briefly reviewed the surveillance footage. Cst. Lamont indicated that the incident was depicted on the video and Cst. Bowden believed that that was accurate. Cst. Bowden was never told that the incident was not depicted on the video. When asked if the fact that the alleged incident was not captured on the video would have changed his mind as to whether they had reasonable and probable grounds to arrest, he answered no. He said it was simply another piece of evidence.

Security Footage from Walmart

[82] There were many security camera angles presented at trial. Videos of the front entrance, vestibule, sports department, and toy department were entered as exhibits, and portions were played at trial. These videos show the movements of the identified individual in certain areas of the store at certain times. I have reviewed all of the videos.

[83] The videos depict the following:

- The person alleged to be the accused entering Walmart wearing dark jeans, work boots, blue plaid jacket with a black t-shirt underneath, ball cap, and a black bandanna mask with an insignia of some sort on the left side.
- The man walks through the store with no shopping cart. He has a distinct gait – his cadence is slower on one leg than the other. This makes it quite

easy to spot him on the video as he moves from one aisle to another in the store.

- He is seen exiting an aisle minutes later with his jacket slung over his left arm. He has a black t-shirt on dark jeans and work boots. The blue plaid of the jacket is on the underside, and the grey lining of the jacket is face up over his arm.
- The man stops in the sports aisle and stops to put his jacket back on. He stretches his arms out in front of him for a moment – down toward his zipper area - and puts on the jacket.
- Before 1:00 p.m. he is seen walking with his coat on by the craft aisles. At 1:14, the man is near the craft section holding his coat in both hands in front of his waist area.
- At approximately 1:29 p.m., he is in an aisle in the toy department. He is carrying his coat over his left arm. He is then shown in an adjacent aisle with this jacket over his left arm. He walks away from the security camera with his left arm at a 90-degree angle, with his coat still draped over it. His right arm is across the front of his body and then moves to his side.
- The man is in the hardware area from approximately 1:00 p.m. to 1:30 p.m. He goes in and out of the aisles. His jacket is turned inside-out over his left arm. His right arm is free in front of him, at times at his side and at times holding on to the jacket.
- The video which depicts two side by side toy aisles has some of the clearest footage of the individual alleged to be the accused. When he comes into sight at 1:30 p.m., his right hand is in front of his waist and pants zipper area. He looks down and he moves his hands in that region. He then turns up the next aisle with his back to the security camera, jacket slung over his left arm. As he walks by and stops next to unidentified children, his right-hand pats or taps the side of his right leg. It appears, as Cst. Lamont testified, that the man has his penis exposed as he walks toward the video camera. However, this is not footage of the alleged incident reported by the complainant in this case.
- The man proceeds down another toy aisle, again using his right hand to make contact or adjustment to the area near his pants zipper. The video evidence last shows the man, with his jacket back on, leaving Walmart at

1:47, followed by S.J. and P.J. S.J. points at him while saying something to the Walmart greeter.

[84] Although the videos do not depict the alleged incident, they provide a clear view of the person alleged to have committed the offence. They show him with and without his jacket on, and offer a clear picture of his clothing, mask and gait.

[85] The security videotape was of excellent quality. It is even possible to zoom in on sections of the video, although this does negatively affect the clarity. The alleged perpetrator is clearly visible for significant periods of time in various areas of the store, and the images are sharp and clear enough to make assessments.

Photographs

[86] S.J. took a photograph of the man leaving Walmart, in the parking lot. There are also photographs taken by B.S. of a man walking by the train tracks.

[87] The photograph in the Walmart parking lot was taken from behind and is consistent with the man identified in the surveillance footage. The man in the photos taken by B.S. is not wearing a hat or a bandanna mask, but he does have his jacket slung over his left arm. The jacket appears to have a grey lining. The man is wearing work boots, a black t-shirt, and dark jeans.

Position of the Parties

Defence

[88] The defence submits that the identity of the accused has not been proven beyond a reasonable doubt. It says the identification evidence in this case is frail and does not meet the standard required for a conviction. In addition, the defence submits that the identification of the man on the tracks as the perpetrator of the crime led to a flawed investigation, resulting in the accused's wrongful arrest and prosecution.

[89] The defence submits that all the identification evidence relied on by the Crown is seriously flawed. The complainant only interacted with the man in Walmart for a few seconds. She never identified the accused as that man, nor did she identify the man in the video as the man who committed the offence. S.J. had only seconds to observe the man in the store, and he was masked and wearing a ball cap the entire time. Only the man's eyes would have been visible. S.J. was also very upset at the time. Her description of the man's clothing was generic. She told the police that she couldn't describe the height of the man nor his approximate weight. Nor could she

tell the police anything distinguishable about him. Yet she identified the accused in the courtroom as the man in the aisle with P.J. more than a year after the incident.

[90] The defence says that any other identification of the accused as the perpetrator came from other witnesses, none of whom were eyewitnesses to the event. B.S. identified the accused as the man on the tracks whom he photographed. He located the man based on S.J.'s generic description. Cst. Lamont also said the man on the tracks was the accused. Cst. Bowden said the photos of the man on the tracks taken by B.S. were of the accused. The defence says the Crown then tried to link their identification of the man on the tracks to the accused, and then the accused to the man in the video through those witnesses. In short, the defence submits, the Crown is asking the court to use the evidence of these witnesses to find that the accused is the man on the tracks, and then that the man on the tracks is the man in the video. The defence says the evidence of these witnesses does not establish beyond a reasonable doubt that the man in the video is the accused.

[91] As for the surveillance video itself, the defence submits that the video is taken from a distance and there are no close ups of the masked man. The video does not depict the crime as it occurs. The reported interaction between S.J. and the masked man, which took place in the lobby of the Walmart store, is not in the video.

[92] The defence submits that, even taken as a whole, the evidence led by the Crown is insufficient for the court to find that identification has been proven beyond a reasonable doubt.

Crown

[93] The Crown submits that the identification evidence, when viewed in its entirety, is both credible and reliable. It says S.J.'s evidence on identification is very credible. She had more than a fleeting glance of the individual. In fact, her initial contact with the accused in Walmart was very close and eye contact was made. S.J. was then able to follow him through the Walmart store for several minutes. S.J. can be seen on the video pointing at the accused from what appears to be a two-to-three metre distance. S.J. and the accused then exchanged words.

[94] The Crown submits that when the court considers the eyewitness evidence together with the video evidence, the location where the accused was walking, the photos taken by S.J. and B.S., the evidence of both B.S. and Cst. Lamont that the accused was the man walking on the trail, and Cst. Lamont's evidence that the man

on the trail was the same man who appears in the video, identification has been proven beyond a reasonable doubt.

Law and Analysis

Credibility and Reliability

[95] In reviewing the evidence and considering the issues of reliability and credibility, I start with the comments of Judge Tax in *R. v. Jacquot*, 2010 NSPC 13:

40 There are many tools for assessing the credibility and reliability of testimony. First, there is the ability to consider inconsistencies with previous statements or testimony at trial and with independent evidence which has been accepted by me. Second, I can assess the partiality of witnesses due to kinship, hostility or self-interest. Where an accused person testifies this factor must be disregarded insofar as his or her testimony is concerned, as it affects every accused in an obvious way, and may have the effect of reversing the onus of proof. Third, I can consider the capacity of the witness to relate their testimony, that is, their ability to observe, remember and communicate the details of their testimony. Fourth, I can consider the contradictory evidence as well as the overall sense of the evidence and when common sense is applied to the testimony, whether it suggests that the evidence is impossible or highly improbable.

41 Considering the evidence adduced at trial, I may believe and accept all, some or none of the evidence of a witness or accept parts of the witness's testimony and reject other parts.

[96] Further, in *R. v. D.F.M.*, 2008 NSSC 312, Murphy J. stated:

9. Assessing evidence is not a credibility contest. It is not a matter of which witness is believed, and who is disbelieved. The Court is able to accept some or all of a witness' evidence. Those principles are highlighted by the Supreme Court of Canada in *R. v. S. (J.H.)*, 2008 SCC 30 (S.C.C.). I also refer to *R. v. F. (S.)*, 2007 PESCAD 17 (P.E.I. C.A.) and in particular, para. 31 where the Court said as follows with respect to the credibility issue:

A conviction can only come about if the Crown evidence is so reliable, so consistent and so believable that it proves beyond a reasonable doubt the guilt of the accused. There must be no other reasonable conclusion from the evidence. If there is any reasonable doubt remaining after you hear the evidence of the Crown, either because of inconsistencies, unreliability, a lack of credibility or anything else, the Court must acquit — no matter what you thought of the accused's evidence.

[97] I also note the well-known statements on credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

[98] The following are helpful considerations when assessing the credibility of witnesses: the attitude and demeanor of witnesses, prior inconsistent statements, external consistency, internal consistency, motive to mislead, ability to record events in memory, and application of common sense to the evidence to consider whether it suggests the evidence is impossible, improbable, or unlikely. (*See R. v. D.F.M., supra*).

[99] In *R. v. M.G.* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), the majority commented on the means of assessing credibility as follows:

[27] Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness said on other occasions, whether on oath or not. Inconsistencies on minor matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.

[28] The effect of inconsistencies upon the credibility of a crucial witness was recently described by Rowles J.A. speaking for the British Columbia Court of Appeal in *R. v. B.* (R.W.) (1993), 40 W.A.C. 1:

Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.

In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

(See also, *R. v. H.C.*, 2009 ONCA 56, and *R. v. D.L.C.*, [2001] N.S.J. No. 554 (Prov. Ct.)).

[100] In *Baker-Warren v. Denault*, 2009 NSSC 59, the Court identified a series of factors that may be useful in assessing at para 19:

With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- 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*, 2008 NSSC 283 (N.S. S.C.);
- b) Did the witness have an interest in the outcome or was he/she 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 he/she 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* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.);
- 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?

[101] While these factors are helpful, there is no perfect formula for making findings of credibility. In *R. v. Gagnon*, 2006 SCC 17, the majority of the Supreme Court acknowledged how challenging it is for a trial judge to precisely explain their reasons on credibility:

20 Assessing credibility is not a science. It is very difficult for a trial judge 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. That is why this Court decided, most recently in H.L., that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[102] To similar effect, in *R. v. R.E.M.*, 2008 SCC 51, the Court, *per* McLachlin C.J., stated:

[49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[103] As I consider the evidence and whether the Crown has proven the charges beyond a reasonable doubt, I am mindful of *R. v. Mah*, 2002 NSCA 99, where Cromwell J.A. (as he then was), writing for the Court, said:

41 The *W. (D.)* principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, *W. (D.)* describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. *W. (D.)* reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: ... As Binnie, J. put it in *Sheppard*, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

...

46 The *W. (D.)* analysis requires consideration of whether all the evidence leaves the judge with a reasonable doubt. Looking at all of these passages in the context of the reasons as a whole, I am persuaded that the judge did not approach the evidence in this way. The decision read as a whole reflects a chain of reasoning from credibility to guilt without recognition that the ultimate issue is not credibility but reasonable doubt.

[104] I turn now to my assessment of the evidence. The test in *R. v. W.D.* is not a credibility contest between witnesses. It ensures that the burden of proof remains on the prosecution throughout in connection with the essential elements of the offences charged. I recognize that I may accept some, none, or all of the evidence of any witness.

[105] I must consider whether any inconsistencies are minor, whether alone or taken together, or whether they are of sufficient weight, alone or taken together, as to impact the credibility or reliability of the complainant. As stated in *R. v. R.W.B.*, [1993] B.C.J. No. 758 (C.A.):

29 In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

Credibility Assessment

[106] There are some issues with regards to consistency of evidence. The complainant testified that she waited in the car while her mother followed the man in the parking lot to try and get a picture of a license plate. However, the video clearly indicates that she waited in a shopping cart inside the Walmart lobby where a greeter spent some time with her. While an inconsistency, I find this is not one that is troubling and nor does it go to the core of the allegation. It is not surprising for a trier of fact to find an inconsistency in some peripheral details. There is also an inconsistency between the complainant's evidence and that of her mother about what happened immediately after the alleged exposure. P.J. testified that her mom called to her and S.J.'s evidence is consistent on this point. However, P.J. testified that she went over to her mother when she was called, while S.J. said the man left and she then went over to P.J. This is an inconsistency I have considered but I do not find that it takes away or diminishes P.J.'s otherwise consistent evidence on the core allegation.

[107] On the whole, the complainant struck me as a very impressive witness. Despite her age, she was poised and attentive throughout the questioning. She was focused and engaged in the process. While a child's evidence does not need to be corroborated to be accepted, her evidence was certainly corroborated in many respects. For example, she testified that she watched the video three times. That was corroborated by her mother who said that P.J. watched it twice with her, and then she watched it again in court. The complainant was intelligent, patient and a very impressive young person. She readily admitted when she could not recall

information. While she was in error that she waited in the car that is not an inconsistency that goes to the core allegations. The core allegations remained the same throughout. In fact, on cross-examination, she was able to emphatically give evidence. When it was put to her that maybe what she saw was a finger since the man was holding his jacket in his hand close to his waist, she emphatically shook her head back and forth and stated “No!” She did not hesitate, and her response was both physically and verbally emphatic.

[108] Given the operation of s. 715.1 of the Criminal Code, the complainant’s video statement is admitted as her direct evidence in this trial. The video statement was made within hours of the incident. While the statement was made in her mother’s presence, P.J. had little time to discuss her evidence beforehand. Her answers were not suggested to her; she was only encouraged to tell the truth and try to speak about the alleged events. The male officer left the room briefly in an effort to alleviate some of P.J.’s obvious discomfort about describing the man’s penis being exposed. The officer returned once P.J. had given her statement on that point. Her evidence in the video is not contradicted in any way from the evidence that was adduced at trial. Her evidence is reliable and credible.

[109] Portions of B.S.’s evidence was inconsistent with the evidence of other witnesses, including that he saw the accused being arrested, and that he picked up S.J. and P.J. to take them to the police station. S.J. testified that she and P.J. met B.S. at the station. Cst Bowden and Hall indicated that no arrests were made on the train tracks.

[110] I found S.J.’s evidence to be both credible and reliable. Her testimony was consistent with the other evidence in almost all respects. Her recollection of the time she was at Walmart varied slightly in direct and cross, ranging from 1:30 pm until 2:30 pm. Other evidence, including the time stamps on the video, indicate that she would have returned home before 2:30 pm. However, aside from that point, her evidence was internally consistent and not contradicted by other evidence.

[111] Cst. Lamont was careless in his note preparation and did not accurately report how long the alleged perpetrator was in Walmart. He also could not recall whether his note indicating that the video showed the man removing his coat and hanging it over his arm was accurate. However, his other evidence about his involvement and his identification of the accused was not successfully challenged. It was consistent throughout.

Eyewitness Identification

[112] The case against the accused depends to a large extent on eyewitness testimony. The burden of proving identification beyond a reasonable doubt clearly rests on the Crown (*R. v. Nicholson* (1984), 12 C.C.C. (3d) 228 (Alta. C.A)).

[113] More recently, our Court of Appeal addressed eyewitness evidence in *R. v. Downey*, 2018 NSCA 33. In that case, four masked individuals entered a residence and one of the intruders shot the three occupants. The principal issue at trial was whether the Crown had proven beyond a reasonable doubt that the accused was the shooter. The trial judge acquitted the accused. The Court of Appeal overturned the trial judge on the issue of eyewitness identification.

[114] Saunders, J.A., for the Court, explained identification evidence and recognition evidence as a subset of eyewitness evidence commentaries. The review of the legal principles by our Court of Appeal is of guidance:

52 Ordinarily, "identification evidence" is used to describe the kind of evidence offered by eyewitnesses who are strangers to an accused but who later testify that the person on trial is the individual they observed at the scene of the crime, and which eyewitness reporting is perhaps later confirmed after pointing out that same individual in a police photo line-up during the course of the investigation.

53 That kind of eyewitness identification evidence offered by strangers is to be distinguished from voice or visual identification evidence offered by witnesses who are "familiar" with the accused. Such evidence is properly characterized as "recognition evidence" because the witness is able to verify their identification of the accused from recognizing the voice and/or appearance of the accused based on their familiarity and interaction one with the other.

54 A helpful explanation of this distinction can be found in the decision of the British Columbia Court of Appeal in *R. v. Bob*, 2008 BCCA 485 (B.C. C.A.) where Neilson, J.A., writing for a unanimous court said:

[13] ... this was a case of recognition, rather than identification. There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence: *R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), *aff'd* [1996] 2 S.C.R. 461, 107 C.C.C. (3d) 194.

[Underlining mine]

55 Recent observations by the Ontario Court of Appeal, *per curiam*, in *R. v. Campbell*, 2017 ONCA 65 (Ont. C.A.), are equally apt:

[10] This court has confirmed that "recognition evidence is merely a form of identification evidence" and, as such, "[t]he same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence": *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at para. 39. This court also noted in that paragraph, however, that "[t]he level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence." Unlike cases involving the identification of a stranger, the reliability of recognition evidence depends heavily on the extent of the previous acquaintanceship and the opportunity for observation during the incident: *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), at p. 424, citing *R. v. Smierciak* (1946), 87 C.C.C. 175, at p. 177. Recently, in *R. v. Charles*, 2016 ONCA 892, at paras. 50-51, this court noted the "critical difference" between recognition cases and cases involving identification by a witness of a complete stranger and referred to the relevance of the "timeline of the identification narrative". See also *R. v. Peterpaul* (2001), 52 O.R. (3d) 631 (C.A.), at p. 638.

56 The frailties of eyewitness testimony and the cautious careful scrutiny which must be given to it as a consequence, have long been understood. Identification experiments have demonstrated the fallibility of powers of observation, as have examples of wrongful convictions and imprisonment based on eyewitness testimony later shown to have been wrong.

57 Our law recognizes the inherent dangers of identification evidence, especially where the witness appears both honest and convincing. Consequently, fact-finders (whether trial judges or juries) must be satisfied as to both the credibility and the reliability of the eyewitness testimony. As the Alberta Court of Appeal observed in *R. v. Atfield*, 1983 ABCA 44 (Alta. C.A.) at ¶ 3:

[3] The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses but must be tested by a close scrutiny of other evidence. In cases, where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in *Turnbull*, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the

identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe and will be set aside. It should always be remembered that in the famous Adolph Beck case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer.

58 Paciocco, J. (as he then was) makes the same point very well in *R. v. Ambrose*, 2015 ONCJ 813 (Ont. C.J.):

[4] The law is cautious with identification evidence, particularly when, as here, it is offered by strangers to the person being identified. Mistaken identification is known to have caused wrongful convictions and so decision-makers are required to exercise great care before acting on eyewitness opinions that the accused is the perpetrator: *R. v. Goran*, 2008 ONCA 195; *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.), and see *R. v. Bigsky* (2006), 45 C.R. (6th) 69 (Sask C.A.). In dealing with identification evidence, it is imperative that judges not focus solely or unduly on the credibility of identification witnesses, since neither their honesty nor confidence ensures accuracy: *R. v. Candir*, [2009] O.J. No. 5485. Most inaccurate identifications occur because honest identification witnesses are wrong. The reliability of identification evidence is therefore of deep concern, and deserves emphasis: *R. v. Oliffe*, 2015 ONCA 242. A judge must recognize and allow for the fact that case-specific problems with the opportunity to observe the identified individual, as well as variable limits in the ability of witnesses to discriminate between individuals, or to recall details, contribute together to the risk that honest identification witnesses will be mistaken: *R. v. Jack* (2013) 294 C.C.C. (3d) 163 (Ont. C.A.), Peter DeCarteret Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001). In addition, the quality of description of the suspect by the witness requires attention: *R. v. Jack*, supra at para 14. If there are notable dissimilarities between features of the description and the accused, the identification will have no probative value without other evidential support: *R. v. Bennett* (2003), 19 C.R. (6th) 109 (Ont. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 534, 2004 CarswellOnt 1325. ...

[115] I must be very cautious about relying on eyewitness testimony to find the accused guilty of any criminal offence charged. In the past, there have been miscarriages of justice, including wrongful convictions, because eyewitnesses have made honest mistakes in identifying the person they saw committing a crime. Eyewitnesses identification may seem more reliable than it actually is because it is given by a credible and convincing witness who honestly, but perhaps mistakenly, believes that the accused is the person the witness saw commit the offence.

[116] Eyewitness testimony is an expression by a witness of their belief or impression. It is quite possible for an honest witness to make a mistake in identification. Honest people make mistakes. An apparently convincing witness can be mistaken. So can several apparently convincing witnesses. Little connection exists between the great confidence of the witness in the correctness of their identification and the accuracy of that identification. Confidence and accuracy are two different things. Even a very confident witness may be honestly mistaken or entirely wrong about the identification of the person who committed an offence.

[117] When I decide how much or how little to believe or rely upon this evidence, I should keep in mind several factors that relate specifically to the reliability of the eyewitness and their identification of the accused:

- Did the witness have good eyesight?
- Was the witness wearing his/her glasses?
- Was the witness' ability to observe impaired (affected) by the consumption of alcohol or drugs?
- How reliable is the witness' memory?
- How capable is the witness of communicating his/her observations?
- Is the witness an accurate judge of distance?

[118] Here, the witnesses who identified the accused did so in circumstances where their ability to observe was not impaired by lighting conditions, inebriation, or some other factor. They were close to him, had reliable memories, and could communicate. S.J. was mere inches away from the accused for a few seconds and had reason to scrutinize him after discovering him standing so close to P.J. She was then within a few feet of the accused as she followed him throughout the store, confronted him, and continued following him into the parking lot. S.J. had plenty of time to observe him. While he did have a bandanna over his mouth, his build, clothing, and other aspects of his appearance remained the same. The encounter between S.J. and the accused occurred during daylight hours and in a well-lit store. Nothing prevented her from observing him.

[119] The Supreme Court of Canada's decision in *R. v. Hay*, 2013 SCC 61 stands for many propositions, including that, in some cases, the testimony of one eyewitness can provide the basis for a conviction. In this case, however, the court has more than the evidence of S.J., a single credible and reliable eyewitness. There

is also the surveillance video evidence and the evidence of Constable Lamont who testified that the individual stopped by Cst. Hall was the same man as depicted in the security footage from Walmart.

[120] The surveillance footage is clear, and while it does not depict the alleged events, it does depict the alleged perpetrator, his movements, his time in Walmart and the fact that he walked in with a jacket, removed it at some point, and put it back on in an aisle before he left. The video is clear and of good quality. It can be used as part of the assessment of whether identity has been proved (*R. v. Nikolovski*, [1996] 3 S.C.R. 1197.)

[121] Additionally, convictions have been upheld where the perpetrators were masked (see *R. v. Lira*, 2017 ONCA 214.)

[122] Some other considerations are the circumstances in which the witness made his/her observations.

- Did the witness know the person before s/he saw him/her at the time?
- Had the witness seen the person on a prior occasion?
- Was the person wearing a disguise?
- How long did the witness watch the person s/he says is the accused?
How good or bad was the visibility?
- Was there anything that prevented or hindered a clear view?
- How far apart were the witness and the person whom s/he saw?
- How good was the lighting?
- Did anything distract the witness' attention at the time s/he made the observations?

[123] Here, there are witnesses who saw the man in conditions of good visibility. Their views were clear, the lighting was good, and the witnesses were close to the individual.

[124] There was no evidence that the witnesses were distracted. In fact, S.J. was focused on the task at hand - following the man in the store for the purposes of confrontation and identification. Cst. Lamont was working and on duty at the time. He was obviously focused on the matter. Neither knew the accused beforehand.

[125] The man was not wearing a disguise but was wearing a mask. S.J.'s evidence is clear that she had the opportunity to observe the individual at Walmart and she even spoke to him. She had no difficulty identifying the accused as the man found walking on the train tracks and the man she encountered in Walmart. Cst. Lamont was tasked with watching the surveillance he also had no difficulty identifying the man with Cst. Hall as the same man depicted in the video surveillance from Walmart. While he initially assumed incorrectly that the alleged incident was depicted on the video, this error was wrong and the alleged incident was not depicted on the video, this mistaken impression did not undermine his identification.

[126] Other relevant considerations relate to the descriptions given by the witnesses after they made their observations:

- How long after the events did the eyewitness give the first description?
- How specific was the description?
- How did the description compare to the way which the accused actually looked at the time?
- Did the witness describe any features peculiar to the accused?
- Did the witness miss any obvious physical features of the accused?
- Did the witness give (an) other different description(s) of this person?
- Was/were the other description(s) similar to or different from the first?
- Are any differences significant or minor?
- How certain was the witness about the other description(s)?

[127] S.J. and Cst Lamont were able to give descriptions on the same day as the alleged incident. The description included his lack of hair, ball cap, the colour and type of mask he was wearing, the colour and pattern of his jacket, the colour of his pants, and the colour of the t-shirt under the jacket. There were no real differences in the description. P.J. too gave a similar description, including the type and colour of his shirt, pants and mask, and his lack of hair.

[128] There is no evidence that any of these individuals have changed their descriptions or recanted their identifications. There is no evidence that they have changed their descriptions after hearing any descriptions given by others.

[129] Crown counsel must prove beyond a reasonable doubt that it was the accused who committed the offences charged. It is not necessary that an identification witness be free from doubt about the correctness or certainty of their identification. What is required, however, before I find the accused guilty of any offence, is that I am satisfied beyond a reasonable doubt, on the whole of the evidence, that it was the accused who committed that offence.

[130] The identity of the person P.J. says exposed his penis to her on January 16, 2021, is very much an issue in this trial. There was in-court identification of the accused. S.J. testified that the man she saw in Walmart, chased through the aisles, confronted inside the store and photographed in the parking lot was the accused, James Michael Snow. Despite the court's comments in *R. v. Hibbert*, 2002 SCC 39, the Court of Appeal stated in *R. v. Al-Rawi*, 2021 NSCA 86:

53. Although the trial judge in *Hibbert* gave a warning to the jury about the perils of the in-court identification evidence, the Supreme Court determined in those factual circumstances, a stronger warning to the jury was warranted. What is notable, however, is the Court did not prohibit the use of such in-court identification evidence, but that the nature of the warning required a contextual consideration...

...

Mr. Al-Rawi's final complaint regarding the trial judge's use of the identification evidence was the manner in which the trial judge chose to reference it.

[131] Here, there was in-dock identification by multiple witnesses including S.J., B.S., and Cst. Lamont. I do not accept the evidence of B.S. as to the identity of the accused as reliable. I accept that he believes it to be true but his inability to recollect the events at the time the accused was stopped and his erroneous recollection that he saw the "take down" of the accused leaves me unable to rely on his evidence of identification. As I noted earlier, there were inconsistencies in his evidence. I do accept his evidence as to the direction he travelled, the person he encountered, and the photographs he obtained of that person.

[132] I accept S.J.'s identification for the reasons I have discussed above. She had sufficient opportunity to observe and take note of the accused. She followed him, confronted him, and followed him out of the store taking pictures. Her evidence has been consistent throughout.

[133] There is also the evidence of P.J. who described the perpetrator as having a plaid jacket (maybe blue or green), and wearing jeans, a black t-shirt, and a bandanna for a mask with some sports pattern on it. This description matches the individual

identified by S.J. in the surveillance footage. Aside from P.J.'s lack of certainty about the colour of the plaid jacket, the description is clear and unequivocal.

[134] Lastly, there is the evidence of Cst. Lamont, as well as the surveillance footage and photographs.

[135] The presentation of evidence – including the surveillance footage, photographs, and *viva voce* evidence – created an effect similar to an old fashioned "flip book." The man who enters Walmart is visible on video in many sections of the store, both with and without his coat on. As he leaves, S.J. and P.J. are seen following him, as they have described, and S.J. pursues him and takes a photograph. Then, within minutes, B.S. locates the same man and photographs him. Cst. Lamont and Hall are then in contact and add to the identification evidence. When taken collectively, one has a clear picture of the man who committed these acts, and the Crown has proven beyond a reasonable doubt that it is the accused.

Essential Elements of Offence

[136] Section 173(2) of the Criminal Code creates an offence for committing an indecent act or exposing oneself in certain circumstances. The elements of the offence include:

1. Exposing one's genitals
2. To a person under the age of 16
3. For a sexual purpose

[137] Having concluded identification is proven beyond a reasonable doubt, the issue is whether the accused actually exposed his penis to P.J. I accept this exposure occurred as testified to by P.J. As discussed, I find her evidence to be compelling and reliable as to the core allegation and credible.

[138] I make this finding despite the accused's comments to S.J. that she was "crazy" and "cuckoo". After having accepted that identity is proven, I have considered these statements made by the accused to S.J. in the context of the *R. v. W.(D)*. analysis. I do not believe the accused's denial, and it does not raise a reasonable doubt. When I weigh all of the other evidence, I find that the Crown has proven beyond a reasonable doubt that the accused exposed his penis to P.J.

[139] There is no question that P.J. is under the age of 16.

[140] Whether the act was done for a sexual purpose is the *mens rea* of the offence.

[141] In *R. v. L. (B.)*, 2011 ABQB 361 it was held that "[i]t is an essential element of the offence charged [section 173(2)] that the exposure of the genital organs have been for a sexual purpose" (at para. 92).

[142] The words "for a sexual purpose" are found in various Criminal Code provisions ss. 151 (sexual interference); 152 (invitation to sexual touching); 153(1) (sexual exploitation); 153.1 (sexual exploitation of person with disability); 162(1) (voyeurism); 160(7) (in the definition of bestiality); and 163.1(1) (in the definition of child pornography). A consideration of how these words have been interpreted in other provisions can be helpful, but not determinative. I say this because the words "for a sexual purpose" must be interpreted in the context of the underlying purpose of the specific provision being interpreted.

[143] In *R. v. H. (R.S.)*, 2013 NSPC 129, it was held that s. 173(2) of the Criminal Code "explicitly requires that the exposure be for a sexual purpose. This suggests that Parliament was cognizant to the prospect that some, but not all, indecent acts have a sexual purpose" (at para. 67).

[144] In *R. v. K.S.T.*, 2018 BCPC 238 however, it was held that s. 173(2) of the Criminal Code creates an offence "of general intent which can be established if the Court draws an inference that by committing the act the accused intended the natural consequences of his action" (at para. 92).

The Meaning of "For a Sexual Purpose":

[145] The words "for a sexual purpose" are not defined in the Criminal Code. The word "sexual" has been defined as "relating to or associated with sex or the sexes". The word "purpose" as meaning "something set up as an object or end to be attained" (see www.merriam-webster.com).

[146] In *R. v. Trachy*, 2019 ONCA 622, the Ontario Court of Appeal considered the *mens rea* required for the offences of sexual interference and sexual exploitation, both of which refer to the accused touching a child for a "sexual purpose". The Court of Appeal held that the "*mens rea* for both offences are the specific intention to touch for a sexual purpose" (at para. 70). The Court contrasted these two offences with the offences of indecent assault and sexual assault, noting that the latter offences "do not require proof of sexual purpose or sexual gratification on the part of the accused" (at para. 72).

[147] In *R. v. Hobin*, 2020 CarswellNfld 332 (Nfld. Prov. Ct.), the court stated at para. 48:

48 In the context of section 173(2) of the Criminal Code, I conclude that this provision creates an offence in which the Crown must prove that the accused exposed his genital organs to a child "for a sexual purpose" (the *mens rea*), though it is not necessary to prove that a sexual purpose was the sole or dominant purpose (see *R. v. B.J.T.*, 2019 ONCA 694 (Ont. C.A.), at paragraph 37). Thus, it is not sufficient to prove only that the accused exposed his genital organs to a child. As an example, in my view, a naked adult getting out of a shower in the presence of a child who, unbeknownst to the accused is present, would not have the *mens rea* for a conviction to be entered under section 173(2) of the Criminal Code, unless they immediately failed to cover their genital organs.

49 Determining whether a person exposed his or her genital organs for a sexual purpose requires a consideration of the circumstances involved. Proof of purpose can be inferred from the circumstances or proven through recklessness or wilful blindness. I agree with K.S.T. that an accused person's purpose can be inferred from her or his acts. For instance, a very different inference might be drawn from an accused found urinating outside a primary school at 3:00 p.m. as compared to an accused found urinating outside a bar at 3:00 a.m. It is important to remember that section 173(2) is purposely limited to children under sixteen years of age. This provision seeks to protect children from genital exposure because it can impact their sexual integrity. When the exposure is done purposely, a very strong if not overwhelming inference that it was done for a sexual purpose can usually be drawn.

50 In *R. v. Gipp*, 2020 ONSC 5522 (Ont. S.C.J.), in considering the elements of section 173(2) of the Criminal Code, Justice Conlan held that a conviction cannot be entered pursuant to this provision unless the Crown proves beyond a reasonable doubt "that the exposure of [the accused's] penis was wilful and, further, that it was done for a sexual purpose" (at paragraph 20). It was also indicated that an accused person charged with this offence cannot be convicted "if the exposure of [the] penis was accidental" (at paragraph 21). I would suggest that the latter comment should be qualified to the extent that proof through recklessness or wilful blindness will suffice.

[148] Here, the video evidence shows the accused wandering through Walmart from aisle to aisle. He does not stop to look or pick up any items except on one occasion where he stops while in the vicinity of children. He has his jacket over his arm and adjusts or touches the front of his pants on occasion. He taps his pants with his free hand as he passes young children. How could it be an accident that his penis was exposed in a toy aisle of Walmart? This is not a plausible conclusion. Certainly, having one's penis exposed outside one's jeans while walking around a department store in the circumstances disclosed by the evidence in this case is no mere mistake

or accident. The only conclusion on this evidence is that, occurring in the toy aisle of a large department store where children are reasonably expected to be present, it was done for a sexual purpose.

Conclusion

[149] After considering and weighing all of the evidence, I find that the Crown has proven identity and the essential elements of the charge under 173(2) of the Criminal Code. I am left with no doubt. There is an agreement between the parties that the breach charges will follow the decision on the principal charge. Given my findings and conviction on the s. 173(2) charge it follows convictions should be entered on charges 2 and 3. Consequently, I enter convictions on the remaining three charges on the indictment.

Brothers, J.