

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
HER MAJESTY THE QUEEN)	<i>Michael Coristine</i> , for the Applicant
)	
)	Applicant
)	
- and -)	<i>Lon Rose</i> , for the Defendant
)	
JAMES EMSLIE)	
)	
)	Defendant
)	
)	
)	
)	
)	HEARD: October 2, 3, 4, 5, 9, 10, 11, 12, 15,
)	16, 2018 & November 16, 2018

RESTRICTION ON PUBLICATION

BY COURT ORDER MADE UNDER SUBSECTION 486.4(1) OF THE *CRIMINAL CODE*, INFORMATION THAT MAY IDENTIFY A PERSON DESCRIBED IN THIS JUDGMENT AS A COMPLAINANT OR WITNESS MAY NOT BE PUBLISHED, BROADCASTED OR TRANSMITTED IN ANY MANNER. THIS JUDGMENT COMPLIES WITH THIS RESTRICTION SO THAT IT CAN BE PUBLISHED.

REASONS FOR DECISION

FAIETA J.

- [1] The Defendant, James Emslie, is charged with eleven counts of sexual offences more particularly described in Appendix "A" in relation to two children, D.R. and her brother J.R.
- [2] During his closing submissions, the Crown raised two matters.

[3] First, the Crown invited the Court to dismiss all counts in relation to J.R. as he conceded that J.R.'s evidence at trial raised a reasonable doubt of the Defendant's guilt on counts 1-7. I accept the Crown's view and stay counts 1 - 7.

[4] Second, the Crown asked that the Court exercise its authority under s. 601 of the *Criminal Code* to amend the indictment in respect of counts 8-11 which relate to D.R. to conform with D.R.'s evidence: (a) she never consented to the unwanted sexual touching and thus the count of sexual exploitation under s. 153(1.1)(a) of the *Criminal Code* be replaced with a count of sexual assault under s. 271(a) of the *Criminal Code*; (b) the time periods for each count should be from January 1, 2014 to December 31, 2015. The Court has a broad power to amend an indictment provided that there is no irreparable prejudice to the accused and the fairness of the trial is not adversely affected: *R. v. Bidawi*, 2018 ONCA 698, para. 31-34. The Defence agreed that these proposed amendments would not prejudice the Defendant. I see no prejudice and, accordingly, the counts are amended in the manner described below.

[5] Each the three counts of sexual assault (now counts 8-10) reads as follows and each count relates to a separate incident:

James EMSLIE, stands charged that he, sometime between and including the 1st day of January in the year 2014 and the 31st day of December in the year 2015, at the City of Toronto, did commit a sexual assault on [D.R.], contrary to Section 271(a) of the *Criminal Code*.

[6] The charge of sexual interference (now count 11) reads as follows:

James EMSLIE, stands further charged that he, sometime between and including the 1st day of January in the year 2014 and the 19th day of May in the year 2015, at the City of Toronto, did for a sexual purpose touch [D.R.], a person under the age of sixteen years, directly with a part of his body, to wit: his hand, contrary to Section 151(a) of the *Criminal Code*.

[7] Given the date of D.R.'s sixteenth birthday, the count of sexual interference shall cover a period ending May 19, 2015 rather than December 31, 2015.

[8] Accordingly, the only counts that remain outstanding at the end of this trial are three counts of sexual assault in relation to D.R. and one charge of sexual interference in relation to D.R.

BACKGROUND

[9] The Crown and the Defendant agreed to admit the following facts:

- 1) The Defendant was born on July 23, 1966;
- 2) The Defendant's father passed away on January 11, 2014;
- 3) A.R. was born on June 4, 1994;

- 4) D.R. was born on May 20, 1999;
- 5) J.R. was born on June 4, 2001;
- 6) S.W. was born on March 12, 1993; and
- 7) J.L. was born on March 16, 1999.

[10] The following witnesses testified:

- 1) J.L.
- 2) S.W.
- 3) R.W.
- 4) S.M.R.
- 5) R.R.
- 6) J.R.
- 7) D.R.
- 8) Detective Constable Jennifer Featherstonhaugh
- 9) James Emslie

S.M.R.

[11] S.M.R. has six children. The allegations in this proceeding pertain to two of her six children: her daughter, D.R. and J.R. At the time of these allegations she resided in Toronto with D.R, J.R. as well as A.R, an older daughter, born in 1994. R.R. was either imprisoned or in a halfway house during much of the period of these allegations. S.R. is now separated from R.R. and lives in Nova Scotia. The children reside with R.R. in Toronto. R.R. receives Ontario Disability Support Program benefits. S.M.R. is on social services in Nova Scotia while she completes her high school diploma with the goal of becoming a support worker for the elderly.

[12] The Defendant's two sons played with her children. His children would visit his apartment every other weekend. After getting to know the Defendant's children, S.M.R. met the Defendant in about 2009 or 2010. S.M.R. and the Defendant became friends and they socialized together. Both S.M.R. and the Defendant lived in an apartment building. Their apartment buildings were adjacent to one another and it was a "5 second" walk from S.M.R.'s apartment to the Defendant's apartment.

[13] Several caseworkers from the Toronto Children's Aid Society have come to the aid of S.M.R.'s children during the period from about 2008, when her family moved to Toronto, until about 2015. The incidents include:

- In 2008, S.M.R.'s sister, tried to get custody of A.R. because she alleged that S.M.R. was physically abusing her;
- In 2010, J.R. at about the age of 9, tried to commit suicide by jumping out of a window because he had been bullied at school. After being discharged from hospital, J.R. spent about nine months in a group home. A psychiatric assessment followed in 2011 or 2012. Following this episode, J.R. returned to high school. J.R. was diagnosed with ADHD and a severe learning disability in 2011 and currently takes medication called, Concerta at 60 mg dosage; and
- In 2012, it was alleged that S.M.R. struck D.R. S.M.R. stated that "someone put her up to it".

[14] S.M.R. gave conflicting evidence about how often she socialized with the Defendant. In direct examination she stated that she did not see the Defendant much in 2010 – which she equated to 1 to 2 times per week. She stated that she would visit the Defendant at his apartment with J.R. and D.R. Sometimes D.R. went alone. S.M.R. stated that she would "hang out" with the Defendant "quite a bit" when R.R. was in jail and J.R. was not living with her. She also testified that she never went to the Defendant's apartment with J.R. but later stated that she did visit the Defendant's apartment with J.R. and D.R. Later, the Defendant stated that her statement to the police that she had only been to the Defendant's apartment three or four times was inaccurate. She said that when she was at the Defendant's apartment she would keep an eye on J.R. because the Defendant could be someone who touches children. She states that she never saw the Defendant behave inappropriately.

[15] S.M.R. stated that there was a wall in the Defendant's apartment that separated the kitchen from the living room such that a person in the living room could not see someone in the kitchen making a sandwich. S.M.R. also observed that there were two bedrooms in the Defendant's apartment. A video game console had been in one of the two bedrooms but was later moved to the front room.

Safety Plan

[16] In 2011 or 2012, the Defendant told S.M.R. that he had a history with children but did not give her any details. S.M.R. told her CAS caseworker of this disclosure. The CAS caseworker arranged a meeting with the Defendant, S.M.R. and R.R. They developed a "safety plan" to ensure that the Defendant was not a danger to her children. The children were at school during this meeting however S.M.R. later told A.R., D.R. and J.R. about the safety plan. Later, S.M.R. told her children that the Defendant had been charged with something and that he could not be around children. She told her children that D.R. and J.R. could only go to the Defendant's home if they were accompanied by their older sister, A.R.

[17] Once the Safety Plan was in place, S.M.R. did not ask A.R. or D.R. over the next three or four years whether the Defendant had touched them. S.M.R. could not explain why she never asked them this question.

[18] Notwithstanding the fact that S.M.R. did not speak to the Defendant after October or November 2015, S.M.R. also testified that she did not know anything about the Defendant's past inappropriate behavior involving children until he was charged with sexual assault. S.M.R. states that she does not know the identity of the earlier victim. The Defendant told S.M.R. that he had "just rubbed the young girl's leg". S.M.R. thought that "someone is lying".

Cell Phone

[19] S.M.R. states that her daughter D.R. would go to the Defendant's apartment to do chores in exchange for the Defendant buying a cell phone for D.R. and paying for its service costs. The bills for the cell phone were paid every month by the Defendant. She states that the Defendant would call for D.R. to come over to his apartment. S.M.R. testified that she did not want D.R. to have a cell phone. However, D.R. went out with the Defendant and returned with a cell phone when she was 15 years old. S.M.R. testified that she previously told the Defendant that she did not want D.R. to have a cell phone because she was too young. Later, S.M.R. testified, when her memory was refreshed by evidence that she gave at the preliminary inquiry, that she was happy when the Defendant bought D.R. a cell phone because she was "going out so much".

[20] S.M.R. testified that she could have paid for D.R.'s cell phone but then stated she refused to do so when D.R. asked because she was "living day to day". S.M.R. testified that she was aware that the Defendant gave money to D.R. but that he did not give her money all the time. The Defendant stopped paying for the cell phone once he was arrested in relation to the charges involving D.R. and J.R. Text messages on the Defendant's cell phone show that the Defendant told S.M.R. to return to D.R.'s cell phone. The cell phone account was never moved into D.R.'s name and instead she opened another account.

[21] S.M.R. testified that she put her home telephone and later a cable account into D.R.'s name so that R.R. could call home collect while he was in jail. S.M.R. had made these arrangements by telephone with the service provider pretending to be D.R. S.M.R. testified that she had received D.R.'s prior consent to place the account in D.R.'s name, but later testified that she had not obtained her prior approval. R.R.'s brother had paid this account but stopped doing so in the summer of 2015. S.M.R. explained that she became unable to pay for telephone and satellite charges as the money she received from the government had to be used in part to pay for tax arrears resulting from unreported income earned by S.M.R. and R.R. as superintendents in an apartment building. S.M.R. also testified that she had obtained D.R.'s prior approval before putting the home telephone account into her name. S.M.R. testified that there is about \$500 owing on this account and that she is paying off that account.

[22] S.M.R. testified that she heard that the Defendant would not pay the cell phone bill once he learned that he was no longer welcome with her family. S.M.R. could not recall that she was

unable to transfer the cell phone account to D.R.'s name because D.R. had a huge telephone bill associated with the account that S.M.R. had established in D.R.'s name.

First Disclosure of Sexual Abuse

[23] S.M.R. testified that J.R. told her in about 2012 that "Jimmy" had touched his "privates". She recalled that she was alone with J.R. in their living room when he disclosed these allegations. J.R. did not tell her where or when this had happened. She estimates that J.R. was 10 or 11 years and living in a group home. S.M.R. notified the group home of J.R. allegations. However, S.M.R. did not call the CAS as she was certain that J.R.'s allegations were untrue. S.M.R.'s explanation for her failure to report these allegations to the CAS was that J.R. had "a lot of issues back then". S.M.R. denied the suggestion that this disclosure never occurred.

[24] S.M.R. states that, in her home, she asked the Defendant admitted to her that he had touched J.R. The Defendant explained that J.R. wanted to experience homosexuality. She did not believe the reason given by the Defendant but she continued to trust him. She also states that J.R. was not spending time at the Defendant's home as J.R. was at living at the group home during the week and at home only on weekends.

[25] The Defendant lived with his elderly father who died in 2014. The Defendant's father was house bound for about two years before he died, however sometimes, using a walker he went outside on his own. D.R. used to go to the Defendant's home to spend time with his father. She called him "Grandpa". She also called the Defendant "Jimmy". Her children also called the Defendant "Blueberry".

[26] About five or six months after the Defendant's father died, the Defendant stated dating Maria. S.M.R. had been friends with Maria before she started dating the Defendant.

[27] S.M.R. did not have a problem with D.R. going to the Defendant's home because she stated that Maria was there and the Defendant was not home.

[28] On March 27, 2015, R.R. was released from prison and stayed at a halfway house until October, 2015 before returning home full-time. While R.R. was living at a halfway house he was permitted to visit his family during the daytime.

Allegations of Infidelity

[29] S.M.R. states that she was "done with" the Defendant after she learned from R.R. in October 2015 or November 2015 that R.R. had visited the Defendant who told him that S.M.R. had been unfaithful while R.R. was incarcerated. R.R. told her that the Defendant alleged that a man named "Kevin", an adult about 40 years old, had slept over one evening at S.M.R.'s apartment. She denied that Kevin had slept with her and states that he slept on their couch. S.M.R. states that she was "extremely angry" with the Defendant and Maria for telling R.R. that she had been unfaithful. S.M.R. felt hurt and betrayed and has never spoken to the Defendant or Maria again.

[30] S.M.R. told her children that the Defendant and Maria were liars. She also told them R.R. could go back to jail because he could not be around the Defendant because his parole did not permit him to associated with a person who has a criminal record.

Second Disclosure of Sexual Abuse

[31] S.M.R. testified that J.R. reported to her in the second or third week of December, 2015 that the Defendant had touched him. This disclosure occurred in the dining room of her apartment while she was folding clothes. J.R. asked whether the Defendant and his girlfriend, Maria, were coming to their home for Christmas dinner. S.M.R. told J.R. that the Defendant and Maria would not be invited for Christmas dinner. J.R. told S.M.R. that he did not want them to come over because the Defendant had sexually assaulted him. S.M.R. states that she is very religious and that she told J.R., whom she states has never been inside a church, to swear on a bible that he was telling the truth. S.M.R. said she questioned J.R. about these allegations for a total of 1 ½ hours. She asked him "Is this a plot?". After questioning J.R. for about ½ hour, S.M.R. went to her sister's apartment, located in the same building, for support and told her sister, and her daughter A.R. who had to come to her apartment because of what J.R. had told her. S.M.R.'s sister also questioned J.R. that evening. Despite this lengthy interrogation, S.M.R. states that J.R. only told her that the Defendant "touched my privates". During this questioning, D.R. arrived home at about 9 pm or 10 pm and heard their conversation. S.M.R. states that J.R. felt safe with her at that time and that their relationship was good. D.R. did not suggest that evening that she had also been sexually assaulted by the Defendant.

[32] That evening S.M.R. left a voicemail message with her C.A.S. caseworker regarding what J.R. had reported. She also called and spoke to R.R. regarding what J.R. had reported. At about 7:30 am the next morning, the C.A.S. caseworker contacted S.M.R. and arranged for S.M.R. to attend a police station with R.R. and J.R. J.R. gave a video statement. D.R. and A.R. were asked to come to the police station to speak with police. D.R. told the police that she had been sexually assaulted by the Defendant. S.M.R. states that this is the first time that she learned that D.R. had been assaulted by the Defendant. S.M.R. also states that she had never asked D.R. at any time prior to that meeting whether the Defendant had ever touched her. However, S.M.R.'s memory was refreshed by her testimony at the preliminary inquiry and she agreed that she had asked D.R. many times before whether the Defendant had touched her.

[33] S.M.R. emphatically denied that her anger towards the Defendant played no role in reporting J.R.'s allegations to the police. She stated that her relationship with R.R. ended because she felt verbally abused and that it did not end because of the Defendant's allegations of her infidelity. S.M.R. also denied that her telephone bills and bad credit had nothing to do with the report of these allegations to the police.

R.R.

[34] I now turn to R.R. R.R. is S.M.R.'s former husband. He states that they were married in 1984 and separated on December 21, 2017. He did not know the dates of birth of his children other than J.R. He states that he and S.M.R. separated after he learned that S.M.R. had a romantic

relationship in 2017 with another man. Neither he, nor his children (except for A.R.), speak to S.M.R.

[35] R.R. states that he first met the Defendant in 2010 because their children played together. R.R. went to the Defendant's apartment a few times and he considers that he and the Defendant were "friends". They talked on the telephone but never exchanged text messages. He recalls that, at some point, the Defendant told him that he was on probation but did not explain why he was on probation. R.R. also has a criminal record. He received a three-year sentence on March 27, 2015 for trafficking Ritalin and another narcotic substance. It was his first conviction. He was imprisoned for seven months in Dorchester, New Brunswick and, upon release, spent five months in a halfway house in Toronto and then was on parole for two further years. While in prison he spoke to S.M.R. by making collect calls to her on their landline telephone. While he was imprisoned the landline telephone at his home had been cut off because of arrears. S.M.R. obtained another landline telephone by arranging for the account to be placed in D.R.'s name who was 15 years old. R.R. states that he did not speak with the Defendant while he was imprisoned. However, the Defendant did send \$100 to R.R. while he was imprisoned.

Halfway House

[36] R.R. was released to a halfway house in Toronto on October 26, 2015 where he stayed until March 27, 2016. R.R. visited his family almost every day after completing his chores. He would leave his home at about 9 pm each night to ensure that he returned to the halfway house by 11 pm.

[37] R.R. agreed that during each of his visits in October and November, 2015, something would come up about S.M.R. and the children having contact with the Defendant and R.R. would tell them that he did not approve of them having any contact with the Defendant.

Allegations of Infidelity

[38] R.R. recalls that his spouse, S.M.R., had called him while he was imprisoned to say that a person named Kevin was staying over at their apartment one evening because there was no room.

[39] R.R. does not recall being told by the Defendant after his release, that S.M.R. had been unfaithful while R.R. was imprisoned. R.R. states that he believes that S.M.R. was faithful while he was imprisoned. In cross-examination, R.R. recalled visiting the Defendant's apartment after his release from prison and asked about what had happened in his home while he was away and left feeling that S.M.R. had been dishonest with him regarding who had stayed at their home during his absence. Following this meeting R.R. accused S.M.R. of being unfaithful and she denied that claim. He states that S.M.R. was not upset that the Defendant had told him that a man named Kevin had slept over while R.R. was imprisoned.

Defendant's Disclosure of Criminal Record

[40] R.R. recalled that the CAS had set up a meeting with his family and the Defendant after the Defendant disclosed that he was on probation. The purpose of the meeting was to prepare a "Safety Plan" to protect J.R. and D.R. The plan required that the Defendant was not to be alone

with the D.R. or J.R. unless they were with an adult – namely, R.R., S.M.R. or A.R. However, R.R. indicated that he was never around and thus D.R. and J.R. would have to be accompanied by S.M.R. or A.R.

[41] R.R. did not recall telling his family that he would be sent back to prison if he associated with someone that had a criminal record nor did he recall discussing the conditions of his parole with his children. R.R. stated that S.M.R. was of this situation. The children did not express any concern.

Interfering with Family Business

[42] R.R. felt that the Defendant interfered with his family's "business" during October, 2015 and November, 2015.

[43] R.R. was upset when he learned that the Defendant had purchased a cell phone for D.R. and was paying for its monthly cost. He felt that this purchase had been "hidden" from him. R.R. told D.R. to take the phone back as it was not right for the Defendant to buy her a cell phone. He did not speak to the Defendant about his concern because he felt that the Defendant would not listen to him.

[44] R.R. also felt that it was inappropriate for the Defendant to appear in his apartment one evening at about 2 am to confirm that A.R. had returned home safely.

First Allegation of Touching

[45] R.R. recalls that at some point S.M.R. told him that J.R. had been touched by the Defendant. He does not recall when he first learned that J.R. had reported that the Defendant had touched him. R.R. was unaware of any meeting in his home where J.R. told S.M.R., A.R. and D.R. that the Defendant had touched him.

[46] R.R. and S.M.R. "didn't think anything of it". He did not think that the Defendant would do anything like that because he was a good friend.

Second Allegation of Touching

[47] In December, 2015, while he was in the halfway house, S.M.R. called R.R. and told him that "something happened" to their son J.R. and that she had called the CAS who in turn told her to call the police. She also told him that the Defendant had touched D.R.

[48] R.R. states that he and S.M.R. were present with J.R. on the night that he went to Keystone to give a statement. After J.R. gave his statement, R.R. returned to his halfway house.

[49] When asked whether J.R. had "lied a lot" to him in the six months that preceded J.R.'s statement to the police on January 4, 2016, R.R. replied "not to me". He acknowledged that J.R. wouldn't listen to R.R. or S.M.R. He acknowledged telling police that J.R. "likes causing trouble"

and that with his friends he had broken a limb from a tree and had been expelled from the library for making too much noise.

[50] At the time that R.R. learned that the Defendant had touched J.R., R.R. was aware that A.R. and D.R. were spending time with S.M.R. at his apartment however he was not worried that the Defendant had done something similar to them because he was "not thinking about it".

[51] A few weeks after J.R. gave his statement to police, R.R. accompanied D.R. to the police statement where she gave a statement. At that point, he did not know that D.R. was a victim.

[52] I found R.R.'s evidence to be frank and honest.

S.W.

[53] S.W. is a 25-year-old woman who was born in March, 1993.

[54] In the summer of 2005, S.W. was a 12-year-old girl who lived with her younger brother, about age 10, and younger sister, about age 8, in a trailer with her mother in Havelock, Ontario. The trailer park was adjacent to a lake. S.W.'s grandparents also lived at the same trailer park in another trailer. S.W. was a quiet girl who "closed herself out to the world" and only talked to her best friend, a girl that was two years younger than her, and her mother.

[55] S.W. recalls that one day in the summer 2005, the Defendant, his wife R.W. and their boys came to the trailer park to visit her grandparents. S.W.'s mother was not there as she was at work. S.W.'s father and R.W. were siblings. S.W. took her two younger cousins, being the Defendant's two sons, and her two siblings down to the lake to fish. It was about a seven-minute walk from her trailer to the lake. S.W. did not like fishing, so she sat on a bench close to the water and watching the other children fish. After S.W. had been at the beach for about 15-20 minutes, the Defendant walked over and sat on the bench next to her left side. There were no adults at the beach. The Defendant said nothing to S.W. before touching her shoulder and then moved his way to her inner thigh other than "tell me when it gets weird". S.W. did not look at the Defendant. She did not say anything to the Defendant. She felt "trapped" as the Defendant "... was supposed to be someone who cared for me, he was supposed to be my uncle and I trusted him". After five minutes, S.W. got up and told her siblings and cousins that it was time to leave. The Defendant gave her a \$2 coin as she was walking away and told her to buy a treat. S.W. took the four children to a nearby store and they she bought candy, which they shared, with that money.

[56] S.W. knew the Defendant because he was married to her Aunt R.W. She recalls that adults treated the Defendant "like family" and that as she did not get to know the Defendant, her conversations with the Defendant were limited to matters related to his two sons and she did not discuss personal matters with the Defendant. S.W. does not recall how many times she saw the Defendant prior to the incident in the Summer of 2005. She did not see the Defendant in the two-year period following the incident.

[57] S.W. did not tell anyone about this incident. In the summer of 2007, her younger sister, told her mother about what she observed the Defendant had done to S.W. at the beach in the

summer of 2005. S.W. was upset with her sister and told her that she hated her because it was her secret to keep or disclose. Her mother spoke to S.W. in her room and asked about what had happened. S.W. initially refused to tell her mother what had happened as she did not want anyone to get hurt. S.W. did not know what to do because she was scared that the Defendant would seek retribution against her mother or her siblings. S.W.'s mother persisted and S.W. told her that the Defendant had touched her.

[58] S.W.'s mother told S.W.'s grandparents who, in turn, told other persons. S.W. was present for one meeting at her grandparents' home between her mother and her grandparents. Her grandmother would not support S.W. going to the police.

[59] S.W. recalls that she went to the police station with her mother and that she gave a statement to the police. Prior to meeting with police, S.W. provided a videotaped statement to the CAS on June 26, 2007. During cross-examination, the Defence attempted to refresh S.W.'s memory with certain parts of her CAS statement however she refused to refresh her memory by reading it citing fear of a panic attack. The Defence did not accept the Crown's offer to concede the necessity and reliability of S.W.'s statement to the CAS and thus the Defence did not question S.W. in relation to her statement to the CAS.

[60] On August 15, 2007, S.W., her sister and her mother met with police. On August 16, 2007, the Defendant was arrested and charged with Sexual Interference and Sexual Assault. The charges were withdrawn after the Defendant entered a Peace Bond under s. 810 of the *Criminal Code* on March 5, 2008. The conditions of the Peace Bond were that, for one year, he keep the peace and be of good behavior and that he have no contact, communication or association, direct or indirect with S.W. and her mother. The Defendant admitted the sufficiency of the facts to authorize the Peace Bond and, as a result, no facts were read into court.

[61] Clearly, this incident that occurred over 13 years ago has deeply affected S.W.. Had her sister not revealed what she saw to her mother, the incident involving S.W. and the Defendant would have remained a secret. Notwithstanding her unwillingness to read the statement that she made to the CAS in 2007, I found S.W. to be a compelling and credible witness.

J.L.

[62] I will turn to J.L. In February, 2012, J.L. was a 12 year old girl that lived in an apartment building near Tweed, Ontario with her grandmother, mother, step-father and sister. Her grandmother lived upstairs and her parents lived downstairs. The Defendant's ex-wife lived, with her two sons, in the same apartment building and was close friends with J.L.'s grandmother. J.L. was friends with the Defendant's two sons. From time to time, the Defendant would come to the apartment building to visit his two sons. Given her friendship with his sons, J.L. was familiar with the Defendant.

[63] On February 22, 2012, at about 8:30 am, J.L. walked through the apartment hallway to go outside to wait for the school bus. She passed by the Defendant's ex-wife's apartment. The door was open and the Defendant's son, told her that he was sick and not going to school. J.L. continued on her way and walked outside of the apartment building to wait for the bus. The Defendant called

out to J.L. "Hey Jazzy" – that was her nickname – and approached her. The Defendant asked J.L. for a hug and she obliged. He then began to rub her outer thigh while asking her "Is it okay if I touch you right there"? J.L. said "No". The Defendant gave J.L. the sum of \$2.00. She told the Defendant that she did not take money from people and he responded "don't worry, it's a secret between you and me". She left the money on a window sill outside the apartment building and the money was still there when she returned from school that day. That evening, J.L. told her grandmother about this incident.

[64] On February 28, 2012, J.L. and her grandmother attended a police station to provide statements.

[65] On March 5, 2012, the Defendant was arrested for Sexual Assault, Sexual Interference and Invitation to Sexual Touching. On May 4, 2012, the Defendant pleaded guilty to the "lesser and included offence" of Assault *simpliciter*. All other charges were withdrawn.

R.W.

[66] I now turn to R.W. R.W. has known the Defendant for about 32 years. They started living together in about 1996 or 1997. They have two sons: M.E., born October, 1997, and J.E., born October, 2000. R.W. and the Defendant were married from 2000 on. In 2005, R.W. moved into a trailer, near her parents' trailer, with the Defendant. Their marriage ran into difficulty in 2005 as R.W. felt that the Defendant was controlling of her and their sons. For her part, R.W. acknowledges that she is not an easy person to live with as she is stubborn and strong-willed. R.W. and the Defendant separated in 2006 after attempting to reconcile their differences through marriage counselling.

[67] R.W. commenced divorce proceedings in 2006. R.W. and the Defendant moved out of the trailer and R.W.'s sister, K.G., moved into that trailer. The Defendant and R.W. divorced in 2007. At first, R.W., who had been seeking sole custody, restricted the Defendant's access to their sons by requiring that such access occur only at their trailer "due to his temper". In late 2007, R.W. and the Defendant met with a mediator and agreed to that the Defendant would have access to their sons every other weekend and for two weeks each July and August. Although she never told S.W. of her marital problems, R.W. believes that S.W. was told about those problems before the disclosure of the 2005 incident involving S.W. as she had given R.W. a hug and said she was sorry that things were not working out.

S.W. – 2005 Incident – 2007 Report

[68] In relation to the incident involving S.W., R.W. understood that the Defendant had rubbed S.W.'s leg, told S.W. that she was his favourite, and offered her \$2.00. R.W. did not believe that this incident had occurred. She "fought her niece tooth and nail" because she had never previously heard any rumors that the Defendant had touched other children. R.W. believed that S.W. and her mother were "compulsive liars". Nevertheless, she described her relationship with S.W. and KG prior to the reporting of this incident as "good". Further, R.W. has no first-hand knowledge of any lie told by S.W.

[69] R.W. gave two examples as to why she believes that her sister is a compulsive liar:

- (1) R.W. believes that her sister had lied when she told R.W. that KG's boyfriend had sexually assaulted S.W. No further details were provided.
- (2) R.W.'s and another sister, lives in Guelph. After visiting her sister in Guelph, R.W.'s sister returned to Belleville with bruises on her face. KG told R.W. that the bruises were the result of an assault by her other sister's boyfriend and they denied the allegation.

[70] After the Defendant entered a peace bond in 2007 in relation to the charges laid in respect of the 2005 incident involving S.W., R.W. continued to believe that the Defendant was falsely accused by S.W. She states that it was not until 2012 that she came to believe that S.W. had not falsely accused the Defendant.

[71] R.W. also stated that she got into a physical altercation with her sister in 2008 after her sister's boyfriend attempted to hit her son, ME, with his truck while ME played outside her trailer. R.W. had no relationship with K. for three years following this incident until K.'s relationship with her boyfriend ended.

[72] At some point, K. also told R.W. that the Defendant had sexually assaulted her around the time of the 2005 Incident involving her daughter, S.W. No charges were laid.

D.R. – 2011 Incidents

[73] R.W. met D.R. in May 2011. Her son, M.E., was D.R.'s boyfriend. R.W. states that she was at the Defendant's apartment about five or six times when D.R. was also at the apartment.

[74] R.W. stayed overnight at the Defendant's apartment on four occasions in 2011 as a result of surgery required by her son, M.E. On the first occasion, she took her son to a pre-operative appointment and arrived at the apartment at about 6 pm with her two sons. D.R. came over shortly after they arrived at the apartment. D.R. was there about 1 ½ hours. D.R. sat next to the Defendant on the couch and cuddled with him. Her son, M.E., cuddled with the Defendant on his other side. R.W. recalls that she thought that it was inappropriate for the Defendant to have his arm around the Defendant as she was 12 years old.

[75] Three weeks later, on the night of M.E.'s surgery, R.W. returned with her sons. The Defendant and his father were present. D.R. was at the apartment for ½ hour. The Defendant did not behave inappropriately towards D.R. in R.W.'s view that evening.

[76] A few days later, M.E. was released from the hospital and arrived at the Defendant's apartment at about 5 pm. D.R. came to the Defendant's apartment to check on M.E.'s condition and stayed two hours. Once again, R.W. observed that D.R. sat beside the Defendant while he stroked her hair. R.W. recalls that she thought that the Defendant's behavior was inappropriate.

[77] About two weeks later, R.W., M.E. and JE returned to Toronto for a follow-up appointment. They arrived at the Defendant's apartment at 8 pm. The Defendant and his father were in the apartment. Again, D.R. cuddled with the Defendant. The Defendant had his arm around D.R.

[78] R.W. recalls that the Defendant also massaged D.R.'s neck or back on these occasions when she said that her neck or back was sore.

[79] R.W. recalls that D.R. referred to R.W. as "Daddy" and the Defendant's father as "Grandpa" on each of these four occasions.

[80] R.W. found the Defendant's behavior to be "very creepy" and stated that she told the Defendant on two occasions that his behavior was inappropriate and that it made her uncomfortable. She states that the Defendant responded, "I didn't mean anything by it".

[81] R.W. recalls that sometime later she visited the Defendant's father at the apartment when he was ill. D.R. met M.E. at the apartment. The Defendant was not present. R.W. also recalls that she met D.R. at the Canadian National Exhibition, in the Defendant's absence, about two years ago.

[82] R.W. denied that she had any communication with D.R. over the last few years other than to occasionally comment on a posting made by D.R. on Facebook.

J.L. - 2012 Incident

[83] R.W. recalls that the Defendant visited her home for Family Day Weekend in February, 2012. R.W. bought the Defendant a car for \$1,200 in thanks for the financial and other support that he and his father had provided to her while she was unemployed as a result of undergoing cancer treatment in 2011.

[84] R.W. was out of town on the Family Day Weekend and returned Saturday evening. Upon her return, R.W.'s neighbor, J.L, came over that evening to notify her that her granddaughter, J.L., had been touched by the Defendant. Neither J.L., who is very quiet and shy, nor her mother L.V., wanted to "cause problems", wanted to report this incident to the police. One day later, on Monday, R.W. reported the incident involving J.L. to the police based on what she had been told. R.W. also told the police that someone should investigate D.R.'s relationship with the Defendant.

[85] After the incident with J.L. in 2012, the Defendant told R.W. that he had went to the home of D.R.'s parents and told them about his past activities with children. R.W. asked the court to suspend the Defendant's access to her children. She also contacted D.R.'s mother, S.M.R., but was met with the answer that she was a liar and that S.M.R. wanted nothing to do with her.

[86] A few days after the incident involving J.L. was reported to police, R.W.'s sons went to the police to report that they had been inappropriately touched by the Defendant. R.W. states that her sons had told her that the Defendant had brushed across their private parts while he climbed

across them while lying in bed watching television. She believes her sons. Although a charge was laid against the Defendant in respect of these allegations, the charge was later withdrawn.

[87] R.W. also testified that she was unaware of what charges were laid against the Defendant in respect of the incident involving J.L., but she believed that he had pled guilty to sexual assault and that he had went on probation and received a conditional discharge.

[88] R.W. states that her attitude towards the Defendant was "happy" by 2016.

[89] She denied telling J.L. prior to this trial to change her evidence to say that the Defendant touched her inside leg or outside leg. R.W. states that she did not discuss these charges with J.L. or her mom.

J.R.

[90] Although the charges in relation to J.R. were stayed, I am going to review his evidence briefly.

[91] J.R.'s involvement with the CAS started when he was 9 years old. He had two case workers who he liked and felt that if needed, he could call them.

[92] J.R., at age 10, entered a group home and lived there from October 31, 2011 until July 4, 2012.

[93] In his statement to police, J.R. states that the Defendant lives in an apartment building that is behind his apartment building. In 2008, he met the Defendants' two sons who are about his age. They would play in the neighbourhood. He met the Defendant in 2008 playing in front of his building with remote controlled car. J.R. was about 7 years old at that time. J.R. called the Defendant "Jimmy". About one year after they met, the Defendant came to J.R.'s home to meet his parents. The Defendant and J.R.'s mother, S.M.R., became friends and visited one another about three to four times per week until about July or August, 2015. J.R. described the Defendant as his parents' friend rather than his friend.

Earliest Recollection of Being Sexually Assaulted by the Defendant

[94] J.R. stated that he was about 9 or 10 years when the Defendant first sexually assaulted him. This occurred about one month after the Defendant met S.M.R. He invited S.M.R. and J.R. over to his two-bedroom apartment. S.M.R. sat in the living room. He does not have a very good memory of what happened. The Defendant called J.R. into his sons' bedroom to use their video game. J.R. states that the Defendant asked him if he wanted to play the video game while he sat on the couch in the living room in the presence of his mother. J.R. went with the Defendant to the bedroom. The Defendant turned the game on and J.R. played for a few minutes. The Defendant was leaning against the wall and asked J.R. to come over to him, and let him use the video game. The Defendant then told J.R. to come over. The Defendant then touched J.R.'s privates inside his underwear. The Defendant did not have J.R. touch him. J.R. asked "what are you doing"? and the Defendant was then "seeming all innocent" and said "Nothing, nothing really". J.R. told the

Defendant that he needed to leave. His mother left at the same time and J.R. went home. J.R. stated that he noticed the Defendant watch him from his window as he went home. J.R. stated that he felt frightened by what the Defendant did to him. J.R. does not recall why he did not tell his mother about this incident later that evening even though he had a good relationship with her.

Other Incidents of Sexual Assault

[95] J.R. also described other incidents of sexual assault. J.R. states that he does not recall how much time passed before the Defendant sexually assaulted him a second time. However, he states that the Defendant touched him five or six times which amounted to every time that J.R. went to the Defendant's apartment. He states that the Defendant touched him in the same way every time. In the boys' bedroom, the Defendant would put his hands in J.R.'s pants and put his thumb in J.R.'s mouth. Sometimes the Defendant's hands would be outside his pants.

[96] J.R. indicated that these incidents could have happened once a week or over a one-year period. He could not remember.

[97] In cross-examination, J.R. agreed that he went to the Defendant's home at least once each week for four or five years and that the Defendant assaulted him on each occasion. J.R. agreed that this would mean that the Defendant assaulted him about 150-200 times. However, in re-examination, J.R. corrected his evidence to say that he had only seen the Defendant once a week over a five-week period given that this is what he had said in his police interview rather than once per week over a five-year period.

Disclosure in 2012

[98] J.R. states that in 2012, he told his mother S.M.R. in the kitchen of their apartment that the Defendant had touched sexually assaulted him. He told S.M.R. that "he's been touching me weirdly and stay away from him". His mother told J.R. that she did not think that he was being truthful. J.R. insisted that he was being truthful but S.M.R. maintained that she did not believe him. In cross-examination, J.R. stated that he did not have a strong bond with his father at the time of his first disclosure and did not tell him. He felt that his father would not want to hear that J.R. had been sexually assaulted because he was a "busy person". He did not tell him in the mornings because he would wake up and go to work and he did not tell him at night because he went to bed early.

[99] J.R. did not tell anyone else about what the Defendant was doing to him.

Last Sexual Assault

[100] J.R. states that the Defendant sexually assaulted him for the last time in the Summer of 2014. J.R. states that his father and mother and his two sisters were over at the Defendant's dining room table and later sitting in the living room watching a movie. He recalls that the Defendant "did the same thing". The Defendant was cooking dinner for J.R.'s family and he asked J.R. to come into the kitchen. His father R.R. had left by this point. J.R. does not believe that his family heard the Defendant call for him because they were either on their phones or watching television.

J.R. went into the kitchen. He states that the Defendant spoke quietly and put his hands into J.R.'s pants for about two minutes. He states that the Defendant stopped touching him because it became too risky as people were moving in the living room.

Money/Gifts

[101] J.R. stated that the Defendant never gave him money or gifts.

[102] In cross-examination, J.R. agreed with what he had said at the preliminary hearing and stated that he would have given him money a couple of hundred times.

Last Time J.R. Saw the Defendant

[103] In his statement to police, J.R. states that he last saw the Defendant in about July 2015. J.R. stated that his father R.R. told "us all" to stay away from the Defendant about three to four years ago. R.R. had found out through a friend of the Defendant about the sexual assault charges against the Defendant. J.R. stated that his family went to the Defendant's home because the Defendant convinced R.R. that the allegations that he abused children were untrue. He also stated that R.R. told J.R. to stay away from the Defendant because he was saying false things about his family including that his mother had been acting childish.

Disclosure in 2014

[104] In his police statement, J.R. stated that he disclosed to his mother one day earlier on December 14, 2014 that he had been sexually assaulted by the Defendant. J.R. stated that he told his mother a few years ago that the Defendant had sexually assaulted him but that his mother did not believe him as "there was a past that I always lied about stuff". J.R. stated that he was known to lie "all the time". J.R. gave various examples of the types of lies that he told: (1) he would blame his sisters if something went missing; (2) he would steal food from the refrigerator; (3) he would lie about where he had been when he came home late at night.

[105] J.R. stated that on December 14, 2014, S.M.R. was talking about the things that the Defendant was doing - "... like everything that he told her ... every text that he sent my sister". J.R. states that he told his mother again that the Defendant was "doing weird stuff to me". S.M.R. was shocked and, when asked, J.R. stated that this had been going on "ever since he met you". J.R. told his mother again about the sexual assaults because he wanted to "get it out of his system".

[106] In cross-examination, J.R. stated that he was helping his mother with dinner when he told her that the Defendant had sexually assaulted him. His sisters were in the living room and he believes that he recalls them talking about text messages that the Defendant had sent to his mother and sister. He heard some of the conversation that his sisters had over about 30-60 minutes before he disclosed that the Defendant had assaulted him. He does not recall if their conversation had been negative about the Defendant. He states that he made the disclosure because he had felt "too much pressure" and wanted to "get it off his chest". In cross-examination, the Defendant denied that he made this disclosure immediately after he had been playing a video game with D.R. when he asked her to get his mother. He stated that they had a "family meeting" at the dining room table

after J.R. made this disclosure that lasted an hour to one and a half. He does not believe that his father or E. were at the meeting nor does he recall what details he provided to his mother. At the end of the meeting, his mother contacted the police. He does not recall that D.R. disclosed that she had been sexually assaulted by the Defendant. J.R. had never told his sisters before that the Defendant had sexually assaulted him and similarly, D.R. had never told him before that the Defendant had sexually assaulted her.

[107] J.R. did not recall when the Defendant last touched him prior to this disclosure.

[108] J.R. states that his mother told his father by telephone that evening. He knows that his father was silent on the telephone when told about the sexual assaults because S.M.R. kept asking R.R. if he was still on the phone. J.R. stated that he only talked to his father about the sexual assaults at the police station although he also testified that he told R.R. on another occasion but does not remember R.R.'s reaction. J.R. also stated that he and his parents went to the police station by public transit using tickets rather than a transit pass.

[109] J.R. testified that he used the phrase "sexual assault" when he reported the Defendant's actions to his mother. However, J.R. testified that he did not know if it was a sexual assault for someone to touch his penis.

[110] In cross-examination, J.R. agreed that at the time he disclosed to his mother that he disliked the Defendant because the Defendant had been spreading a lie that his mother had cheated on his father and he feared that his parents would separate. As well, J.R. stated that he would feel safer with the Defendant in jail. However, J.R. explained that it would not protect his father from breaching the conditions of probation by having the Defendant in jail because his father had nothing to do with the Defendant at that point. However, once J.R. was shown his evidence at the preliminary hearing, J.R. agreed that he had stated that he was scared that his father would be sent back to jail in October – November, 2015.

D. R.

[111] D.R. is J.R.'s older sister and the other complainant.

[112] At trial, an order permitting D.R. to testify from outside the courtroom via CCTV with the aid of a support person was granted pursuant to sections 486.1 and 486.2 of the *Criminal Code*.

[113] D.R. gave a statement to the police on January 4, 2016. At the Crown's request, an application pursuant to s. 715.1 of the *Criminal Code* to permit the video recording of her statement to be admitted in evidence was granted as: D.R. was 16 years old at the time that she gave the statement to police and thus was under the age of eighteen years at the time that the offences are alleged to have been committed. Secondly, the video recording was made within a reasonable time after the alleged offences given that the recording was made about four months after the last alleged incident. Three, that D.R. described the acts complained of in the video statement. Four, at trial D.R. adopted the contents of the video recording. Five, the admission of the video recording in evidence will not interfere with the proper administration nor did the Defendant take that position.

Health Conditions

[114] In her statement to police, D.R. stated that she, her sister A.R. and her brother J.R. have been diagnosed with ADHD (Attention Deficit Hyperactivity Disorder). She states that she has mild ADHD and no longer takes medication. D.R. states that AR and J.R. have more severe forms of ADHD. She states that J.R. also has been diagnosed with ODD (Oppositional Defiant Disorder).

[115] In her evidence D.R. described that she has been diagnosed also with a mild learning disability and that she has a continuing need for speech therapy arising from a cleft palate that has since been surgically corrected.

Warning

[116] In her statement to the police D.R. stated that she first met the Defendant in about 2010 when she was 9 years old after she had become friends with the Defendant's sons who were about the same age. The Defendant's sons lived with their mother. D.R.'s mother had told her about five or six years earlier that the Defendant's sons live with their mother because a long time ago the Defendant had inappropriately touched a 12-year-old girl and had a criminal record for child molesting. She understood that the Defendant was not allowed to be alone with his children.

Cell Phone

[117] In her statement to the police, D.R. stated that her mother wanted her to have a cell phone for her personal safety. The Defendant told D.R.'s mother that he could pay for the cost of a cell phone for D.R. D.R. believes that she was 13 years old when the Defendant gave her a cell phone and that it was before she entered Grade 9. The cell phone account was in the Defendant's name and he paid the monthly bills associated with the cell phone.

Money

[118] In her statement to police, D.R. stated that:

- (a) the Defendant "always" gave her money;
- (b) the Defendant told her that if she ever needed money that she could go to him;
- (c) Sometimes, she asked for money and other times the Defendant asked D.R. whether she needed some money;
- (d) In return for the money, the Defendant would then touch her, or ask to touch her, in a sexual manner;
- (e) D.R. stated that the Defendant would give her \$20 each time that he touched her; and
- (f) D.R. recalled that on one occasion she was alone in the living room of the Defendant's apartment and asked the Defendant for ten dollars to buy lunch on a school trip at the Science Centre. D.R. was in Grade 9 at this time. The Defendant asked if he could

touch her first and D.R. said no. Nevertheless, the Defendant did give D.R. money and, over top of her clothing, touched her legs, breasts and shoulders while they were sitting on the couch in the living room watching television. He told D.R. "... don't tell anyone. Not even, not even Maria cause Maria gets jealous". This touching continued for five minutes while Maria was out of the apartment.

First Incident of Touching - Summer 2013

[119] In her statement to police, D.R. stated that the first incident of inappropriate touching occurred in the summer of 2013 when D.R. was about 13 years old after the Defendant had purchased the cell phone for her. She stated that the Defendant was not dating his current girlfriend, Maria, at that time. She stated that the Defendant called D.R.'s mother and asked whether she could come over to his apartment to help with some house work. D.R.'s mother approved and when D.R. arrived at the Defendant's apartment she found that no one else was home. After they watched television for about two hours, the Defendant went to his bedroom and called D.R. into his bedroom. She stood at the doorway of the bedroom and the Defendant approached D.R. from behind. He grabbed her breasts and buttocks over her clothing and said "I bet you're tight" and "if you were my age, I would bang you". The Defendant also told D.R. that she was "really attractive" and prettier than her sister A.R. The Defendant touched D.R. for about five minutes. He told D.R. not to tell anyone what "we're doing". D.R. said "okay cause I didn't know what to say". D.R. felt terrified and scared. She did not know what to do. The Defendant told D.R. to leave the bedroom. She sat on the couch in the living room. Then Defendant emerged from his bedroom about 20 minutes later. He invited the D.R.'s mother to come to his apartment for dinner and they watched "Walking Dead" which is a television show that D.R. usually watched when she went to the Defendant's apartment. D.R. did not tell anyone that the Defendant had touched her.

[120] In cross-examination, D.R. had difficulty recalling the first incident of touching by the Defendant but stated that she believed that it occurred in the living room of his apartment.

Second Incident of Touching

[121] In her statement to police, D.R. stated that the second incident of inappropriate touching occurred in the summer of 2015. By this point the Defendant's girlfriend, Maria, was living with him. The Defendant called D.R. on the cell phone that he had purchased for her and invited her to come to his apartment to bake brownies with him and his girlfriend. D.R. went to the Defendant's apartment and during the visit the Defendant's girlfriend left to take their dog for a walk. The Defendant then told D.R. that he needed to speak with her in his bedroom. Once inside the bedroom, the Defendant locked the bedroom door. D.R. complied with the Defendant's request to lay on her back on her bed while he stood between her legs. He complained to D.R. that she did not come over to his apartment enough and that she should return her cell phone to him. She told him that her parents were mad that she spent so much time at his apartment. She also stated that she wanted to spend time with other friends as well. He told her that she was "sexy" and "prettier than her sister". The Defendant began rubbing D.R.'s legs with both hands and he slid both hands up D.R.'s legs and rubbed her vagina over her yoga pants. The Defendant attempted

to remove D.R.'s pants but she said "no". He also asked if she wanted to touch him and she said "no". The Defendant stopped touching D.R. and she got up and walked out of the bedroom and into the living room. The Defendant's girlfriend returned to the apartment as D.R. walked into the living room. The conversation stopped when the Defendant's girlfriend returned. D.R. did not tell Maria what had happened as she was scared to do so. She did not tell her mother what had happened as she did not know if her mother would believe her. The Defendant and D.R. did not bake brownies on this visit. The Defendant touched her for about ten minutes and the entire episode lasted about 15 minutes. D.R. states that she felt a lot more worried than before because the Defendant had asked her to touch him and she said "no" because she was nervous.

[122] In cross-examination, D.R. stated that the second incident of touching occurred when she went to his apartment to make brownies and watch pre-recorded episodes of her favorite television series, the Walking Dead. She stated that Maria left to walk her dog after she had been there for about one hour. The Defendant then told D.R. that she needed to come over to his apartment more often or he would cut off her cell phone. He said "I can't be doing this all the time" that is, telling D.R. to come over more often. They went into the bedroom as soon as Maria left. She stated that the Defendant tried to take her pants off and stopped once she said no. The incident was upsetting. However, D.R. did not tell her mother. She also stayed one hour to watch the Walking Dead television show for about an hour.

Other Incidents of Touching

[123] In her statement to police, D.R. stated that:

- (a) The Defendant began to touch D.R. after the Defendant's father died and this continued until D.R.'s father returned home once he was released to a halfway house;
- (b) The Defendant became more "flirty" with D.R. after his father died. He started to give compliments to D.R. They would have "regular chit chats". The Defendant would ask D.R. "weird questions" such as have you ever had sexual intercourse with anyone. He described to D.R. how he and Maria had sex. He told D.R. that he had "multiple girlfriends". Maria was unaware that the Defendant was being flirty towards D.R. In cross-examination, D.R. stated that the Defendant only started touching her after the Defendant's father died. She had difficulty recalling the first incident of touching, but believed that it was in his living room;
- (c) D.R. also recalled an incident that occurred when she was in Grade 9. She was at his apartment and asked him for money to buy lunch at school. Maria had gone to D.R.'s apartment for five minutes to pick up something. The Defendant gave D.R. money for lunch. While they were watching television, the Defendant started touching D.R.'s shoulders, back and legs over top of her clothing and needed lunch money. This episode ended when Maria returned home and the Defendant went into the kitchen and started washing dishes;
- (d) D.R. also noted that the Defendant only touched D.R. in his apartment;

- (e) When the Defendant wanted D.R. to come to his apartment he would usually call her mom, S.M.R., to allow D.R. to come over to do housework. Once D.R. was at the Defendant's apartment, D.R. would tell her to sit down, watch TV and then touch her. Sometimes he touched her in the bedroom and sometimes he touched her in the living room;
- (f) The Defendant had not touched her inappropriately in the three-year period between the above two incidents. She stated that "she barely went over there because since my dad came back, I've been hanging out with him" and that her father told her that she "wasn't allowed to have any contact with him because he has a criminal record and I said okay";
- (g) The Defendant had touched her on about 20 occasions. She stated that the Defendant touched her only sometimes when she was at his apartment. She could tell that the Defendant was in the mood to touch her as he would get close to her. At trial, in cross-examination, D.R. states that she guessed that the Defendant had touched her on 20 occasions. I note that for many of these occasions the description of what had happened was vague;
- (h) The Defendant asked D.R. to touch him once but she refused;
- (i) D.R. had difficulty recalling the last time that the Defendant touched her inappropriately. She believed that the last occasion was in the summer of 2015 when she went to the Defendant's apartment to watch the second last episode of the television show "Walking Dead". She thought it was at the end of the summer when she was wearing her "Walking Dead" t-shirt and jeans. She had went to retrieve a sweater that she had left in the Defendant's bedroom when he told her to lay down on her front. The Defendant proceeded to touch her behind;
- (j) D.R. and her sister A.R. slept over at the Defendant's home a "couple of times" but he never tried to touch them because his girlfriend Maria was there;
- (k) D.R. never took clothes off; and
- (l) the Defendant told her that she "better not go and tell anyone" about the touching.

[124] D.R. does not recall ever calling the Defendant "Daddy" however she did call the Defendant's father "Grandpa" because she developed a bond with him once the Defendant's boys were no longer permitted to visit the Defendant. D.R. recalls that her parents would refer to the Defendant as D.R.'s "Sugar Daddy".

[125] In cross-examination, D.R. stated that the Defendant touched her, including her back and breasts, both over and underneath her clothing. However, in her statement to the police, she stated that the Defendant only touched her body over her clothing as she would not let him touch her under her clothing. In an attempt to reconcile these seemingly contrary statements, D.R. stated that she had tried to explain to the police that the Defendant's hands had went up her back and on

her breasts while she remained clothed. In cross, D.R. stated that the Defendant would lift her up shirt in order to touch her body.

[126] In cross-examination, D.R. stated that the last incident of touching occurred in August, 2015. She could not recall how many times the Defendant had touched her during that summer. D.R. stated that she could not recall when or where the Defendant last touched her but yet went on to describe that he touched her legs and between her legs but not her upper body. Further at the preliminary hearing, D.R. stated that she told her mother the following day that the Defendant had touched her however on cross, D.R. initially denied telling her mother but later said that she had told her mother but S.M.R. did not believe her.

Modelling Suggestion/Condoms/Pornography

[127] In her statement to police, D.R. states that the Defendant told her while she was in his apartment with her older sister, A.R.O, that they were beautiful, had "nice bodies" and should be models. She believes that this discussion occurred on A.R.'s 15th or 16th birthday. A few days later the Defendant told D.R., while she was alone in his apartment, that he knew someone who could take nude photographs of her for a magazine like Playboy. That evening, D.R. told her sister A.R. what the Defendant had told her about taking nude photos and D.R. told her sister that she should not do it either. D.R. refused to have those type of photographs taken because she does not put herself "out there".

[128] In her statement to police, D.R. recalled that the Defendant's sons showed her that the Defendant had pornographic videos in his apartment but they did not watch those videos. D.R. also recalled that the Defendant showed her and his son, purple condoms at his apartment.

[129] At trial, D.R. she recalled that she dated the Defendant's son, M.E., when they were about 12 or 13 years old. She recalls being in the Defendant's apartment with the Defendant and M.E. when the Defendant showed them some purple condoms that he had in the living room and told them "if you need them, they are here". D.R. thought that the Defendant was joking. D.R. and M.E. looked at one another and laughed.

Defendant's Meddling in Family Business

[130] In her statement to the police, D.R. stated that the Defendant "got into our business". She recalled that her mother, S.M.R., lied to her father, R.R., when she denied that a man named Kevin had slept over. Shortly after R.R. was released to a halfway house, R.R. was at home and read a conversation between S.M.R. and Kevin on S.M.R.'s cell phone. R.R. went to Defendant's apartment and asked the Defendant and Maria many questions about whether Kevin had slept over while R.R. was in prison. Only D.R. was home when R.R. returned. He was very upset because the Defendant and Maria had told him the truth. R.R. asked D.R. the same questions and she told R.R. the truth as well. D.R. stated that this is when "everything started" between her parents and the Defendant.

[131] In her statement to the police, D.R. stated that she "barely went over" to the Defendant's apartment after her father returned home after being permitted to live in a halfway house in late

October, 2015. He told D.R. that she was not allowed to have any contact with the Defendant because he had a criminal record.

[132] In cross-examination, upon request, D.R. gave an example of the Defendant's meddling. She recalled an occasion where the Defendant came to her apartment to tell J.R. to take his medication. S.M.R. felt that the Defendant should not be telling J.R. what to do. J.R. and his mother S.M.R. got into a fight.

Dad Prohibited from Associating with Criminals

[133] R.R. returned to visiting home on October 26, 2015 and later returned home on a full-time basis in March 2016. In cross-examination, D.R. did not know when she learned that her father, as a term of her parole, could not be around someone with a criminal record. She states that her mother S.M.R. told her while her father was in jail that once R.R. returned home he could not associated with anyone that had a criminal record.

J.R. and D.R.'s Disclosure

[134] In her statement to the police, D.R. stated that she revealed that these incidents had occurred because her brother J.R. "had the nerve" to report what the Defendant had done to him. D.R. states that J.R. was in his bedroom when he called his mother into his bedroom to report to her what had happened.

[135] Afterwards, that same evening, her mother had a discussion with J.R., D.R. and their sister A.R. in the living room. D.R.'s father was not present because he had returned to the halfway house for the evening. She is sure that her mother's friend and their neighbor, Edna, was not at the meeting. It was at this point that D.R. told her family what had happened to her:

I told them that he's touched me and, and, and in the private places too. And um he, he's complimented uh me and Ashley and mom was like okay, well this needs to be reported to the police. ... And we all agreed on that.

[136] D.R. stated that this meeting was long and perhaps lasted a couple of hours. She cannot recall if her parents asked J.R. for details. She does recall J.R. telling the group that the Defendant had touched him, multiple times, and was woR.R.ied and sad.

[137] She said they discussed how her father, R.R., would react to the news that D.R. had been molested by the Defendant. Although she feared that he would react violently, she was surprised that he "took it well". In cross, D.R. stated that R.R. was initially at the meeting but had to leave to return to the halfway house.

[138] At trial, D.R. testified that her parents never asked her to come forward with these charges as a means of "getting back" at the Defendant for interfering in their "family business".

[139] She also testified that she never told her mother that the Defendant touched her because S.M.R. was the Defendant's friend and D.R. was scared that her mother would not believe her.

D.R. did not tell her sister A.R. about the Defendant touching her because she did not trust her and did not get along with her.

[140] D.R. stated that she went to the police about three weeks after J.R. had reported to police that the Defendant had touched her because: 1) she was busy with school; 2) dealing with other issues at home; 3) her parents were on ODSP and her mother did not have the \$4 bus fare to take her to the police station. When reminded of her evidence at the preliminary hearing that she had to stay home when her mother went with J.R. to the police in order to look after their dog, D.R. stated that was true as well.

[141] D.R. states that she did not discuss her story with J.R. during the intervening three-week period.

[142] In cross-examination, D.R. states that J.R. had previously told his mother, three or four times, that the Defendant had touched him.

When Did D.R. First Learn that Had Been Charged with Molesting Other Children?

[143] D.R. stated that she knew that the Defendant had been convicted of molesting children but she did not believe it. In cross-examination, she stated that she started believing it after she told her mother what the Defendant had done to her and after her mother told her that such behavior amounted to sexual assault. This conversation occurred a few weeks before J.R. went to the police and D.R. states that it was at that point that she learned what the Defendant had been doing to her was wrong. She stated that there were some points when she thought it was wrong as the Defendant would tell her "I shouldn't be doing this" but he never explained why it was wrong. She testified that she did not know what sexual assault was and that she only had a "child's mind".

[144] In cross-examination, D.R. testified that she first learned that the Defendant had molested other children from the Facebook webpage of the Defendant's former spouse, R.W., in about 2012. D.R. could not remember what she saw however she states that the webpage did not specifically name the Defendant but implicitly referred to him. At this point, D.R. had not been told by her parents to stay away from D.R. She does not recall when her father R.R. told her that she could no longer have any contact with the Defendant.

Parent's Marriage

[145] At trial D.R. states that her mother never told her that she was moving. S.M.R. had an argument with R.R. She went to a women's shelter on December 20, 2017 for a few days and then moved to Nova Scotia. D.R. lives with her father R.R. as well as A.R. and J.R. She does not know what happened to the Defendant's cell phone after it went out of service.

Detective Constable Jennifer Featherstonhaugh

[146] Detective Constable Jennifer Featherstonhaugh is the officer in charge of the investigation of the complaints made by J.R. and D.R. She works for the Youth Bureau at 22 Division of the Toronto Police Service. This investigation was made on the referral of the CAS. She first became

aware that D.R. was a complainant during her interview of D.R. on January 4, 2016. DC Featherstonhaugh believes that she spoke with S.M.R. to set up D.R.'s interview.

The Defendant's Evidence

[147] The Defendant is 50 years old. He describes himself as a well-spoken man who is generally articulate. He has a Grade 12 education and has a few trades "under his belt". He likes to read about geography, far away places and graphic novels. He works 12 hour shifts as a building operator at a hospital and he deals with electrical, mechanical and plumbing issues.

[148] The Defendant has joint custody of his two sons however their primary residence is with his ex-wife R.W. He states he had been unable to see his sons from 2012 until the beginning of 2015.

[149] The Defendant had declared bankruptcy in 2004 with debt of \$125,000. He also lost the home that he and his ex-wife owned. The Defendant agreed that it took him about seven years to remove the stigma of bankruptcy.

[150] In 2012-2013 he earned about \$70,000 per year which amounted to about \$4,000 net income per month. The Defendant's expenses at that time were:

- 1) \$720 per month in child support;
- 2) No spousal support for his ex-wife however he helped her pay bills;
- 3) \$1,024 per month in rent;
- 4) At source deductions for an RRSP and a savings bond;
- 5) Gas and car insurance;
- 6) Food;
- 7) Cost of public transit; and
- 8) Cell phone cost.

[151] The Defendant stated that by 2013 he did not have too much financial trouble and he also indicated that he divorced his wife, R.W., in 2007.

Charge of Sexual Assault - S.W.

[152] R.W.'s sister, KG, has three children. One of her children is S.W. He describes his relationship with KG and S.W. as "non-existent" in 2007 as they were only seen at family functions. R.W.'s parents, brother and KG each had a trailer at the same trailer park. The Defendant stated that he was in the trailer park in 2005 and 2006 but not 2007. The Defendant denies that he approached or touched S.W. in 2005 as she alleges. He has no recollection of any

interaction with S.W. that day. When asked whether he ever gave S.W. money he replied "not directly".

[153] The Defendant stated that he may have seen S.W. at the water on the day in question in 2005. He denied that:

- 1) He was the only adult by the water;
- 2) He sat down next to her on a bench;
- 3) He had any physical contact with S.W.;
- 4) He was attracted to S.W. who as 12 years old at the time;
- 5) He rubbed her leg and told her to "tell me when it gets weird"; and
- 6) He offered \$2 to her as soon as she recoiled to that touching.

[154] The Defendant states that there were other adult family members at the trailer park that day but he did not know whether any other persons had been down by the water. He did not make any inquiries prior to trial whether any of the other adults present that day had seen anyone touch S.W. since he stated that he had not touched her.

Assault Conviction – J.L.

[155] The Defendant stated that he pled guilty to a charge that he assaulted a 12-year-old girl, J.L., in February 2012 by touching her leg.

[156] The Defendant testified that J.L. asked for a hug while they were standing at the doorway. He stated:

... we were both at the doorway and she had asked for a hug, and I proceeded to hug her. We - we do that on occasion when seeing her. She had pulled back and said "no", and she said I had touched her on the leg.

[157] The Defendant stated that J.L. was his son's friend. He stated that he did not know her well but that he would have casual conversations with her such as "Hi Jazzie – how's school"? However, moments later the Defendant stated that he had never called her "Jazzie". The Defendant stated J.L. had exchanged hugs with him and his sons in the past. The Defendant had no reason to explain why he hugged J.L.

[158] The Defendant acknowledged that he became aware that he had done something wrong in touching J.L.'s leg by her reaction to his unwanted touching. The Defendant stated that he did not initiate the touching of J.L.'s leg but rather he had touched her by accident.

[159] He denied that he said anything to J.L. prior to touching her and particularly denied that he had asked J.L. to tell him if the touching felt weird. The Defendant also stated that he did not recall offering \$2 to J.L. immediately after touching her.

[160] Although the Defendant stated that he pled guilty to accidentally touching J.L.'s leg, the Defendant's counsel at the guilty plea proceeding stated after hearing the facts in support of the plea of guilty to assault under s. 266 of the *Criminal Code* stated on May 4, 2012 in the Ontario Court of Justice in Belleville, Ontario:

Just to make sure the facts are completely clear, Your Honour, Mr. Emslie admits that in the course of giving [J.L.] a hug that she requested, he made contact with the outside of her leg and that she did not want that contact, therefore, constituting an assault simpliciter. He does not agree that he told her it was a secret or that he invited the original hug.

[161] The Defendant also stated that he pleaded guilty to assault in order to rather than go to trial even though he "may have touched her leg" and did so by "accident" even though an accidental touching is not an assault under the *Criminal Code*.

Meetings with the CAS

[162] The Defendant states that his children were no longer in his life after February 2012.

[163] The Defendant states that he met R.R. and S.M.R. in April 2012 in order to advise them of the terms of his probation. He had not met them before that time. He believes that one of their children, most likely, A.R., took him to meet her parents. Their apartments face one another and had been neighbours since 2008 but had never met.

[164] The Defendant states that it was a condition of his probation order in relation to the conditional discharge that he received for assaulting J.L. that he had to notify any family with whom he spent time of this charge and that the family be notified that he was not to be left alone with anyone under 18 years of age. Since he was in the company of A.R., however never alone, his probation officer nevertheless encouraged the Defendant to meet with A.R.'s parents to discuss his conditions of probation.

[165] The Defendant testified that in April 2012 he attended a meeting with the R.R., S.M.R. and a caseworker from the Children's Aid Society. They talked about the charges that had been laid against the Defendant and discussed that he was not allowed to be alone with anyone under 18 years of age. They developed a "safety plan" whereby the children would not be permitted to be alone with him at anytime. He felt that the safety plan was the "proper thing to do".

[166] The Defendant testified that a second meeting with the CAS was held later in 2012. He said a short time earlier, a SWAT team followed the Defendant while he was driving a car while A.R. was a passenger. Several police officers met with the CAS caseworker, S.M.R., R.R., D.R. and J.R. The Defendant states that his probation restrictions had expired by the time that he was pulled over by the police. The Defendant was not at that meeting. The Defendant met the CAS

afterwards and it was agreed that they would continue using the safety plan. The Defendant states that the plan was that if any of the kids came over they were would accompanied by an adult.

[167] The Defendant denied that he had a “vested interest” in ensuring that J.R. and D.R. could still “hang out” with him. However, he also disagreed with the suggestion that he did not care whether or not the children could do so.

Relationship with D.R.

[168] The Defendant acknowledged that he thought that D.R. was vulnerable and that she was at a significant disadvantage in one-on-one dealings with him. However, he never noticed that D.R. had a severe learning disability or ADHD. Further, he denied that he thought if she spent more time at his apartment he might be able to groom her to have sex with him.

Relationship with R.R. and S.M.R.

[169] The Defendant states that he had an “incredible” relationship with R.R. prior to the time that R.R. entered prison in March, 2015. He stated that R.R. would call him at 2 am to go grocery shopping. They talked about groceries a lot and that they used to travel the TTC across the city to watch people go by. He described R.R. as “street smart” in that he is tall and rough but not “book smart”.

[170] The Defendant described S.M.R. as “smart” and that she was easy to manipulate by her daughters but not by the Defendant. He agreed that she was neither articulate nor well spoken.

Chores

[171] The Defendant testified that D.R.’s chores were to take care of his father who died in 2014. She would change his bedding, go to Valu-Mart with him and take him to medical appointments. The Defendant would pay D.R. up to \$20. After his father died, D.R. continued to tell S.M.R. that D.R. was coming over to the Defendant’s apartment to do chores but she did not do any chores. The Defendant stated “really it was for her to come over and chum around with Maria and I so she wouldn’t have to stay in her home”. The Defendant continued to give D.R. money to allow her to have breakfast at McDonalds, to have lunch with her girlfriends, so she in his words, “could feel alive”. He states that he cared for D.R. and she was the closest thing he had to family given that he had “destroyed” his own family. Nevertheless, in cross-examination, the Defendant stated that when D.R. would come over to do chores it would take her about ½ hour or an hour to clean the apartment. In that time, D.R. would wash floors and windows. He stated that D.R.’s parents would draw on his windows with highlighters about half the time they were there. The Defendant did not feel that D.R.’s parents’ behavior was immature but rather kept “things light”. The Defendant said she did fewer chores once his father died.

[172] The Defendant denied that he continued to ask D.R. to come over to his home to do chores after his father died so that he could create opportunities to touch her.

Was D.R. Alone at the Defendant's Apartment?

[173] The Defendant does not recall ever being alone with D.R. or J.R. in his apartment. He denied that sometimes D.R. or J.R. were only accompanied by their older sister A.R. He states that S.M.R. was usually with the D.R. or J.R. and sometimes R.R. was with them.

[174] The Defendant states that his girlfriend Maria was always present whenever D.R. visited his apartment. He states that when D.R. came to visit they usually watched television shows such as the Walking Dead and Vikings. They would bake cakes and brownies.

[175] The Defendant also stated that he was never with D.R. in his apartment after 10:00 pm.

[176] The Defendant admitted that he "could likely" have been left alone with D.R. in his apartment while Maria took their dog out for a walk.

Inappropriate Comments/Modelling

[177] The Defendant denies that he told D.R. anything like:

- 1) if you were my age I would bang you;
- 2) you are a really attractive girl, any guy would want you.

[178] However, the Defendant has told both D.R. and A.R. that they are more pretty when they wore a different outfit or changed their hair or makeup. He never thought that D.R. had a nice figure.

[179] The Defendant also stated that he told both D.R. and A.R. that they would be "good for modelling". He agreed that he felt that D.R. was pretty enough to model. The Defendant denied that he would want to have sex with a model because that is "a fantasy" in his words. He looks for more meaningful connection in his sexual endeavours. The Defendant described himself as "very much" sexually attracted to Maria because of "the way she smiles and the way she waits for me when I'm coming home from work, the little text messages through the course of the night during my coffee breaks ... all the little things that I never got from my ex-wife". The Defendant stated he did not get these things from D.R. but she provided "smiles" and was "pretty".

[180] He denied having any acquaintances or friends that were photographers. While he recalled that he once told D.R. that she should be a model the Defendant denied that he suggested to D.R. that she should do nude modelling. The Defendant agreed that it was uncommon for a 14-year-old girl to know the name of Playboy magazine given that it is an older publication. However, the Defendant disagreed that he referenced Playboy magazine to D.R. The Defendant also denied that he bought a bathing suit as a birthday present for D.R.

[181] In reference to the condom incident, the Defendant denied that he retrieved condoms from a drawer in his apartment. He stated that he had a keychain that said "in case of emergency break glass". This keychain, along with his keys and a purple condom in a container, was hung on a wall

in his apartment. The incident with D.R. and his son M.E. being shown this keychain occurred in or before 2012. In 2012, M.E. would have been about 15 years old and D.R. would have been about 13 years old. The Defendant stated that he was not concerned with the optics of having this keychain on display given his prior incident with children.

Touching

[182] The Defendant denies that he:

- 1) played with or rubbed D.R.'s hair;
- 2) massaged her back or shoulders;
- 3) asked her to touch him;
- 4) touched her breasts or her legs;
- 5) touched her in any sexual way;
- 6) touched her vagina over her clothing; and
- 7) went under her clothing in any way.

[183] The Defendant denies that his ex-wife R.W. told him in 2011 that she had seen him playing with D.R.'s hair and rubbing her shoulders and that she felt his behavior was inappropriate.

[184] The Defendant does not recall ever seeing D.R. wear yoga pants and denied that he ever tried to take off her yoga pants.

Money

[185] The Defendant states that he gave J.R. money to buy a bagel with cream cheese and chocolate milk perhaps \$5 once or twice a week. The Defendant said that he gave money to D.R. and J.R. because he was worried that they were not getting enough to eat at home.

[186] When asked why he was worried that the children were not eating enough to eat, the Defendant stated:

I guess it comes down to I was still trying to maintain some humanity in me. I had already had a hard time talking with my ex-wife and talking with my boys, and the only link I had with my boy at that time was through the [S.M.R.'s] family on – you know, when they had Facebook open or something like that.

[187] The Defendant twice spoke to R.R. while he was in prison. He also sent R.R. money while he was in prison. He sent him \$100 a few times while R.R. was in prison.

[188] The Defendant recalled giving \$10 to D.R. when he went on a field trip to the Science Centre. He denies that he touched her at that time.

Cell Phone

[189] The Defendant states that he was at S.M.R.'s home one day and she had told him that D.R. needed a phone for her safety on the streets. D.R. had never had a cell phone. The Defendant offered to buy a cell phone for D.R. as he knew that they could not afford a cell phone for D.R. The Defendant stated that S.M.R. did not pressure him to buy a cell phone for D.R. He stated that he purchased the cell phone for D.R. to be nice to her family. He agreed that he had not offered to buy a cell phone for A.R. or J.R.

[190] The Defendant agreed that buying a cell phone for D.R. would:

- 1) make it easier for him to communicate with D.R.;
- 2) allow him to have private conversations with D.R.;

[191] The Defendant entered a cell phone contract in 2013 for D.R. when she was 14 years old. The contract was with Wind Mobile. It cost him about \$35 per month. He purchased an Alcatel cell phone which was the cheapest cell phone available. The cell phone cost him an additional \$5 per month over the course of the contract. The contract was solely in the Defendant's name and he did not recall the length of the contract.

[192] After November 11, 2015 the Defendant discussed the cell phone with R.R. He wanted D.R. to return the cell phone to the Defendant because S.M.R. did not want R.R. or her children communicating with the Defendant.

Threats

[193] The Defendant denies that he told either J.R. or D.R. that "bad things" would happen if either one told anyone that he had touched them.

[194] The Defendant denied that he ever complained to D.R. that she did not spend enough time with him and he also denied that he ever threatened to take her cell phone away from her.

[195] The Defendant did acknowledge that his instant message to D.R. on June 19, 2014 told D.R.'s boyfriend to put D.R. on the telephone or he would take the cell phone back although he said he was kidding.

Estrangement from R.R. and S.M.R.

[196] On November 10, 2015, R.R. visited the Defendant in his apartment and asked him whether anyone had been in R.R.'s apartment that should not have been there while he was in prison. The Defendant told R.R. that his girlfriend Maria had slept over a few times. The Defendant also said

that a man named Kevin had slept over. R.R. told the Defendant that he wished that Kevin had not been there.

[197] The Defendant states that R.R. told him on November 11, 2015 that S.M.R. did not want the Defendant around her family. R.R. did not want to disappoint his wife. The Defendant states that his relationship with R.R. was "non-existent" after that day.

[198] The Defendant did not simply terminate D.R.'s cell phone because he felt that D.R.'s family should not "shut" him out as he had not done anything wrong.

[199] The Defendant agreed that D.R.'s family dispute about allegations of infidelity was not serious enough that they would make up allegations of sexual assault against him.

Defendant's Cell Phone Records

[200] A selection of certain records, about 70 pages, showing messages and telephone calls sent and received on the Defendant's cell phone during the period July 28, 2012 and January 2, 2016 were admitted as Exhibit #1.

[201] These records show that the Defendant and D.R. communicated through "Instant Messages" as early as July 28, 2012. D.R. testified that she used an application called "Text Now", installed on her Ipad, to exchange messages with the Defendant. In these messages, D.R. would call the Defendant "Blueberry" given that he always wore blue clothes. D.R. would call herself "BunnyBoo" or "Princess Boo Bear".

May 17, 2013

[202] On May 17, 2013 at about 7:42 am, the Defendant initiated the following exchange of Instant Messages which lasted two minutes:

Defendant: Go to school.

D.R.: No.

Defendant: Why ... too early yet

D.R.: Yah

Defendant: Whats 4 breakfast

D.R.: idk [which D.R. states explained "I don't know"]

Defendant: Me neither but I'm hungry

[203] The Defendant stated that he initiated contact with D.R. because he saw that she was online. He agreed that he was not telling D.R. to go to school in a parental way. He stated that he was

doing so in a "chatting" way. He denied that he was being a bit flirty. The Defendant stated that perhaps he should not have chatted with D.R. because it "looks bad".

June 19, 2014

[204] On June 19, 2014, the Defendant exchanged the following Instant Messages with D.R.'s boyfriend at that time, Jordan Fry:

Defendant [8:29 pm]: Nicely written words .. but impress me with good deeds. I had the girls back this morning. I had the fight with [R.R.] and [S.M.R.] b4 girls out of bed. Let [D.R.] tell you .. she was surprised it went as well as it did.. ask her what happened. I had the story covered.. I handled the crap b4 it was taken out on the girls.. I just saying these girls and my own boys mean the world to me .. She shoulda meant the world to you .. I didn't like u last nite .. I over it now.. it takes a lot of work to make good relationships .. you have a lot of work to do. Regards, Your Friend, Blueberry.

Jordan [8:59 pm]: I understand and you have every right to be upset at me. It was my fault, I shouldn't have come to see her yesterday and furthermore should have taken her home before her curfew even though her mom didn't mind her staying out late at night. Thank you for being there to calm things down and sort thing out. It really does mean a lot and I wish you didn't have to. I feel bad because I never want to make you, [D.R.], or anyone upset because you guys are really close to me. I'm really sorry ... [remainder omitted]

Defendant [9:48 pm] : Thanks ... u got it .. u got caught up in it and should have corrected it ... not all you doing for sure ... girls always mess us guys up .. I haven't given up on you. My friends call me Blueberry. Regards, Blueberry

Jordan [9:51 pm] : Thank you for not giving up on me blueberry. It means a lot.

Defendant [10:34 pm]: So now tell her to give over the phone and say night or I take back the phone, thanks bud

[205] D.R. explained that her mother, S.M.R., did not want her to see Jordan because D.R. was always out of the home and did not do her chores at home. D.R. recalls that the Defendant came to her home to speak with her mother but she was in bed and does not recall what the Defendant said. D.R. stated that she discussed her relationship with Jordan with the Defendant but did not complain to the Defendant about her mother's rules.

[206] Her parents had taken her cell phone away from her and the Defendant was helping her get into contact with Jordan.

[207] D.R. recalled that the Defendant would sometimes ask her, through Jordan, to call him to say good night.

[208] The Defendant agreed that he had no reason to concern himself with drama between boyfriends and their girlfriends that are 14 or 15 years old. He was busy enough with his own life

including his girlfriend, Maria, who became his girlfriend in 2014. The Defendant stated that the reason for the concern was that D.R. had stayed out until 3 am with her boyfriend. The Defendant agreed that it was odd that the D.R.'s boyfriend worried about what he thought about him given that the Defendant was not D.R.'s father.

June 20, 2014- June 21, 2014

[209] The Defendant had the following exchange with Jordan asking that D.R. call the Defendant:

Defendant [11:13 pm]: Hey bud.. just a short note that I will be requesting that [D.R.] be having the phone later in the night .. be mindful that I expect you not to be texting constantly during work hours .. you can mention this to [D.R.] that I will be asking .. it needs to be your suggestion to [D.R.] that you guys shut down the phone at 11 pm or so after a real phone call to say good night .. trusting u to do such.

Jordan [June 21, 2014, 12:21 am]: I understand and we agreed to only talk to each other when I'm on my break and I only text when I'm not working such as my breaks. I'll make sure she has the phone off for 11 pm as well. Thank you for letting me know blueberry.

Defendant: [June 21, 2014, 8:17 am]: if [D.R.] free on Mon .. U free ... then thinking of a ttc trip about the city to chum around for a bit ... a way to c [D.R.]

Jordan [June 21, 2014, 9:32 am]: I'm free Monday and if it's okay with you, I'd like to go and see her then.

Defendant [June 21, 2014, 9:37 am]: I haven't seen [D.R.] yet this morning to set it in motion. I will fill u in later.

[210] The Defendant agreed that it appears from the above exchange that he is setting himself up to be the "third wheel" on a teenage date. The Defendant agreed that D.R. wanted to see Jordan and Jordan wanted to see D.R. but that neither wanted to see him. He agreed that it was strange for a neighbor to be inserting himself in a teenage date. He agreed that he would be concerned if D.R. was his daughter. He denied that this was the type of opportunity that he hoped to create when he purchased the cell phone for D.R. The Defendant agreed that he had just got home from work when he sent the message at 8:17 am on June 21, 2014. He acknowledged that seeing D.R. on Monday was "top of mind" for him after a 12-hour shift.

June 21, 2014

[211] The Defendant exchanged the following Instant Messages with Jordan during mid-day on June 21, 2014:

Defendant [11:15 am]: I invited all the kids over for breakfast and the only one that came over was [D.R.]... didn't finish talking with [D.R.] or finish breakfast when [A.R.] calls

her back over to meet up with someone else .. I packed up breakfast and took her back home... I put breakfast and the chocolate milk on THEIR table and just left ... not happy

Jordan [11:57 am]: Awe. I think [D.R.] didn't notice that there was milk on the table. If I knew and was there, I'd eat everything and drink the milk no problem

Defendant [12:05 pm]: All around Rude ..

Jordan [12:06 pm]: Yeah, and [D.R.] knows about that already and she feels really bad about it so I'm hoping she'll cheer you up later to make up for it.

Defendant [12:06 pm]: Her sister is the one who gets her in so much trouble ... and it was really [D.R.'s] money that paid for everyone's food last night. I'm glad I left her some extra pocket money yesterday for herself. I'm really sorry I made her sad too ..

Jordan [12:35 pm]: It's okay and yeah, it was a good call to give a little extra. At least she had a great day yesterday thanks to you.

Defendant [3:13 pm]: I guess she mad at me

Defendant [3:15 pm]: For making her feel bad

Jordan [3:27 pm]: She's mad at me too, I tried to cheer her up but she was just giving short replies and said I really don't care.

Defendant [3:33 pm]: OK call me later on the phone without her knowing.

[212] The Defendant stated that the above messages to D.R.'s boyfriend expressed his frustration that he made breakfast for D.R.'s family but only D.R. came for breakfast. He initially agreed that there were no adults present with D.R. when she came to his apartment for breakfast. However, he later corrected his answer to say that his girlfriend Maria was home even though his text message does not mention Maria.

[213] In reference to his message at 3:33 pm to D.R.'s boyfriend, the Defendant did not recall what Jordan had done to upset D.R. nor why it required a secret discussion however he agreed he getting himself caught up in "really stupid teenage stuff". He denied that this involvement was an attempt to manipulate D.R. by getting close to her boyfriend.

June 22, 2014

[214] The Defendant exchanged further emails with the D.R.'s boyfriend:

Jordan [12:43 pm]: Hey sorry I just got back home from work and I didn't get this message until now since I used up all my data and I doubt you're up but, I do hope everything is okay. [D.R.] is really happy now too since today got much better for her.

Defendant [12:44 pm]: Call me 416 [XXX - XXXX]

[215] At trial, D.R. did not know why she was happy on June 22, 2014.

June 24, 2014

[216] The Defendant exchanged further emails with the D.R.'s boyfriend:

Defendant [9:21 am]: So u need to call me after 5 pm. Not a word to [D.R.] .. I mean it

June 24, 2014

[217] The Defendant exchanged further emails with the D.R.'s boyfriend, Jordan:

Defendant [11:23 pm]: Have a good nite. Don't have her up long .. her parents wouldn't let her stay at my place after 10 .. ask [D.R.] they even gave me attitude tonight ... actually all day really.

Jordan [11:23 pm]: Dang, I'm sorry to hear that, I'll have her off by 11:30 then and tell her good night. I hope you had a fun day though at the lake today.

Defendant[11:26 pm]: Just be mindful of the time .. but talk not text for a bit longer then its bed ... later dork

Jordan [11:27 pm]: alrighty though I think she wants to text rather than talk to not wake her parents up. Take care and have a good night blueberry.

[218] D.R. thinks that she went to Jordan's house. The Defendant, D.R., A.R. and Jordan went by car, about 10-30 minutes long, to Long Branch for a walk along the beach.

[219] The Defendant stated that D.R. was at his home watching television with him and his girlfriend Maria even though there is no mention of Maria. More concerning is why he complains that D.R. cannot stay at his apartment past 10 pm. At trial the Defendant gave the following answers:

A. I'm the one talking in the text message, yes.

Q. Right. "Her parents wouldn't let her stay at my place after ten." I mean you're complaining to [D.R.'s] boyfriend that her pesky parents won't let her hang out longer with you, right?

A. Yes.

Q. Right, why did you care? Don't you want to be alone with Maria, Mr. Emslie?

A. Most often, yes.

Q. Well, I'll tell you one thing, Mr. Emslie, when I have TV time with my

wife, I'm not thinking of having my neighbour's kids over, because I think that that's very unusual, would you agree?

A. No.

Q. No, it would be a normal thing for a neighbour who is 14 years old to go watch TV with her fifty something year old neighbour and his girlfriend alone?

A. She there more to be with Maria than with me.

Q. To chum around, right, as you say?

A. It's a phrase.

Q. But you're not inviting Maria when you go all in the date or a third wheel with her and Jordan on their dates are you?

A. No.

Q. You were going to go yourself that time, right?

A. I think so.

Q. But every time we get to a conversation that implies [D.R.] is at your house, Maria is there, right?

A. Yes.

Q. It seems that way?

A. M'hmm.

Q. Are you certain you were never alone with her watching TV, Mr. Emslie?

A. Yes.

Q. Never?

A. Never.

Q. Never, okay. You're, Mr. Emslie, really trying to take control here of [D.R.] going to bed on time, and not texting too late, I mean what business of that is yours?

A. Not my business.

Q. But you're really making a point to keep Jordan Fry in line aren't you, right?

A. No.

Q. No?

A. No.

Q. You're not trying to manipulate and control these teenagers?

A. No.

Q. Because it's your phone.

A. It's my phone.

Q. Right, and you have oversight over how late she talks, who she talks to, right?

A. Yes.

Q. And you wanted that didn't you?

A. No.

Q. No?

A. No.

Q. Well you're certainly taking advantage of it aren't you?

A. No. [Emphasis added]

November 13, 2014

[220] On November 13, 2014, at about 9:19 pm, the Defendant initiated the following contact with D.R.:

Defendant: Hi girl how r u

D.R.: Lol I just texted u

Defendant: Cant tell if it's a text or what but nice to see u

D.R.: Nothing much I was just done chilling with Dallas I'm going out tomorrow again I'll probably come over on Saturday and pop in :)

D.R.: I got no school tomorrow

Defendant: I rented a car this weekend maybe join us for a ride

Defendant: That's even better I get the car in the morning ... maybe take my 2 best girls out for a bite then

D.R.: :) haha

Defendant: McDonalds yum

D.R.: ooh yummy

Defendant: OK ... I heading back to work ... be good

[221] D.R. has no recollection of the car ride. She assumes that she went for the car ride.

[222] The Defendant denied that he was inviting D.R. to join him on a date with his girlfriend Maria. He stated that he was only inviting D.R. to a meal at McDonalds.

December 3, 2014

[223] On November 13, 2014, at about 9:19 pm, the Defendant initiated the following content with D.R.:

Defendant: Good afternoon girl .. how was ur day

D.R.: Hey good so far with Jessica and Julian at McDonalds :)

Defendant: McDonalds that sounds yummy

Defendant: So you buying for me. Lol

D.R.: Lol uh what do you want ? xP

D.R.: Cheeseburger

Defendant: Just joking. The guy usually buys .. say hi to your friends 4 me and have fun.

[224] D.R. states that she did not bring back any food from McDonalds for the Defendant.

[225] The Defendant stated that he was just joking rather than flirting with D.R. when he said that "the guy usually buys".

February 23, 2015

[226] The first text message exchanged between the parties using the cell phone number that the Defendant purchased for D.R. is shown to have occurred on February 23, 2015 just after 8 pm when the following exchange, which also arranges for D.R., who is 14 years old at that point, to visit the Defendant that evening, occurs:

Defendant to D.R.: "Hey Girl ... Is the phone still working .. I can help .. u able to come over today or morrow."

D.R. to Defendant: Is this Jimmy?

Defendant to D.R.: Yes. LOL.

D.R. to Defendant: Its working okay apparently its due on march 21st o.o

Defendant to D.R.: Yea. Well u going to come over ..

D.R. to Defendant: I will later can u ask mom for me im at jennys atm lol. I'm coming home soon.

Defendant to D.R.: Let's make it for another day ... sooner than later

D.R. to Defendant: because I got cooking tomorrow and Thursday Wednesday I'm free Friday I have a sleep over with Jessica every Friday or Saturday whenever so I could still come over today did u ask my mom I'm suppose to be home around 8:00

Defendant to D.R.: I was just talking to her ... she may call you.. u can come over

[227] D.R. states that she went to the Defendant's apartment on the night of February 23, 2015 as suggested by the above messages.

[228] The Defendant testified that someone who works for the "Geek Squad" was unable to come to his home to fix his laptop and he wanted D.R. to come over to fix it. He also stated that he was having problems with his telephone. He agreed that there was nothing in this message exchange to suggest that the visit was because he needed to have his laptop and telephone repaired. The Defendant disagreed that from the words of the message that it appeared that the problems were with D.R.'s phone rather than the Defendant's laptop and telephone.

June 7, 2015

[229] On Sunday, June 7, 2015, D.R. initiated the following text messages with the Defendant:

D.R. [7:36 pm]: Blueberry can u give me a call when u r free I wan

D.R. [8:26 pm]: I'll come over because I gotta get my student id

Defendant [8:41 pm]: I will c u in the morn

[230] D.R. recalled that she had slept overnight at the Defendant's apartment and had left her student identification card in his apartment. D.R. needed the car as she was going on a field trip on the following day. The Defendant did not recall an incident where D.R. had to come over to pick up her student identification.

June 12, 2015

[231] On Friday, June 12, 2015, the Defendant called the Defendant at 7:49 am. He then followed it up with the following text messages:

Defendant [7:49 am]: Have a good day .. big hugs

D.R. [8:00 am]: Big hugs sorry I woke up late

Defendant [8:11 am]: All good

D.R.: [8:11 am]: :)

Defendant [1:14 pm]: No problem hun but give me a call first chance u g

D.R. [1:19 pm]: Huh

Defendant [2:09 pm]: Call me

D.R. [2:09 pm]: I'm in class

Defendant [4:10 pm]: OK

[232] At trial, D.R. could not recall what the telephone call that she had with the Defendant was about.

[233] The Defendant denied that he sent a message to D.R. after she did not answer his call because he could not wait to speak with her. He stated that his message sent in the early morning before she went to school did not strike him as odd. He denied that he was infatuated or obsessed with D.R. He agreed that it appeared that he was "significantly better" friends with D.R. than he was with her father R.R. whom he described as an "incredible" friend. He agreed that it was "off the charts" how close it appears he wants to be with D.R.

[234] The Defendant also could not remember why he called D.R. at 2:09 pm while she was in class. He agreed that it was "pretty unusual behavior". He denied that he sent the message because he missed D.R. or was thinking of her in a sexual way.

June 21, 2015

[235] On Sunday, June 21, 2015, at about 7:53 am, the Defendant initiated the following exchange of text messages with D.R., which lasted about five minutes:

Defendant [7:53 am]: Where are u

D.R. [8:34 am]: I'm at the stop.

D.R. [8:35 am]: Coming now

Defendant [8:39 am]: At value mart

D.R. [8:40 am]: I'm at ur house

Defendant [8:43 am]: Come to the streetcar

[236] D.R. recalls that she spoke to the Defendant and he told her that she should be coming to his apartment more often. He also talked to D.R. about the cell phone and how they were going to pay for it.

[237] The Defendant denies that he complained to D.R. about her not visiting him enough on this occasion. The Defendant testified that the above conversation was about D.R. seeking transit tokens from the Defendant. The Defendant gave D.R. tokens at a store near the streetcar stop.

July 8, 2015

[238] On Wednesday, July 8, 2015, D.R. exchanged the following text messages with the Defendant:

D.R. [5:58 pm]: Blue berry can I ask you something c: is it okay I

D.R. [5:58 pm]: I will clear off the beds in the bedroom

D.R. [5:59 pm]: Please :3

Defendant to Maria [6:04 pm]: Crown royal is rye ..wanted rum .. captain morgans

Call from Defendant to D.R. [6:04 pm]

Call from Defendant to Maria [6:05 pm]

Call from Defendant to D.R. [6:10pm]

Defendant to D.R. [7:10 pm]: Call me

Call from D.R. to Defendant [7:13 pm]

[239] Before the Defendant asked D.R. to call him at 7:10 pm, the phone records show that the Defendant had called D.R. at 7:04 pm and 7:10 pm. D.R. did not recall why she offered to clean off the Defendant's beds.

[240] D.R. did not recall why she had asked to stay at the Defendant's apartment however she agreed with the suggestion that it was because she wanted to go to a party.

[241] The Defendant testified that D.R. asked to stay overnight with her sister A.R. He does not know if she stayed overnight because he was at work. He states that the rum was for a party that was going to be in an empty apartment.

July 19, 2015

[242] On Sunday, July 19, 2015, at about 12:06 am, D.R. sent a message to the Defendant using Maria's cell phone. D.R. was 16 years old.

D.R. [12:06 am]: Its [D.R.]. Jesse and I broke up he cheated on me wi

Defendant [12:24 am]: Awe so sorry

D.R. [12:25 am]: Yeah I'm going to have a few drink over ur place

Defendant [12:27 am]: I don't mind. Sorry hun. All the more reason damian

Defendant [12:29 am]: Other than this shit. How is the party.

D.R. [12:29 am]: Great ur gf is drunk lol

Defendant [12:32 am]: You girls take it easy and DON'T TOUCH MY RUM. lol

Maria [12:34 am]: [D.R.] is sleeping over hun

[243] D.R. stated that she broke up with her boyfriend earlier and her mother, S.M.R., told her that she could go to the Defendant's apartment and permitted her to have a drink. D.R. and Maria went to a party that evening in her building. D.R. testified that she had never drank alcohol before that evening. Just she and Maria stayed at the Defendant's apartment that evening.

July 29, 2015

[244] On Wednesday, July 29, 2015 the Defendant initiated the following exchange of text message with D.R.:

Defendant [10:06 am]: Good morning hun try and have a great day love you

[245] The Defendant did not receive a reply. He called D.R. at 12: 14 pm. The Defendant then sent a short follow up message to which D.R. responded:

Defendant [12:14 pm]: Hi girl. Just a short hello. Miss you.

D.R. [12:22 pm]: Miss you too.

Defendant [1:29 pm]: R my best girls u and my maria taking me swimming

D.R. [1:30 pm]: Yes later tho I am going to nofrills with mom righ

Defendant [1:31 pm]: OK :)

Defendant [1:44 pm]: Buying me something special?

[246] D.R. does not recall that she bought anything for the Defendant on that occasion.

October 8, 2015

[247] On October 9, 2015 the Defendant initiated the following exchange of text messages with D.R.:

Defendant [9:58 am]: Thinking about paying phone today

D.R. [10:24 am]: I'll be home early today if u want me to go with u

D.R. [10:25 am]: I get out at 12 today

Defendant [10:29 am]: I am meeting Maria at school and we going then. So

D.R. [10:33 pm]: Thanks :)

[248] At trial D.R. stated that she did not go with the Defendant on that occasion to pay the cell phone bill. She explained that the Defendant had purchased the cell phone service from Wind Mobile. She did not know if the Defendant had purchased the cell phone. The Defendant paid the monthly bills for her cell phone service. She believed that the cost was about \$50 per month as she had unlimited text, data and calling. D.R. testified that the Defendant was at her home one day when her mother said that D.R. needed a cell phone but that S.M.R. could not afford to provide her with a cell phone. The Defendant said he would pay for D.R.'s cell phone. D.R. was surprised and felt that her mother should have done so or at least contributed to its cost however her mother told her she could not afford to do so.

[249] The Defendant could not explain why he notified D.R. that he was going to pay the bill for her cell phone. He said it wasn't a gentle reminder that he was paying for her cell phone.

October 16, 2015

[250] On October 16, 2015, D.R. and the Defendant exchanged the following Instant Messages:

D.R. [7:38 am]: Wow so your telling my mom to take my phone away from me this weekend everything is so unfair

D.R. [7:40 am]: Whatever thanks I'm not seeing my boyfriend this weekend cuz of you guys now I got my mom saying I'm always involved with Jesse and not her like whatever I'm pissed off

Defendant [8:43 am]: I was not interested in taking the phone and I had not suggested she take it from you.

D.R. [8:44 am]: I know.

D.R. [8:44 am]: Well apparently I gotta do work at ur place this weekend so that's why I gotta come over

Defendant [8:46 am]: I know Maria had said 2 you that u should spend time at home but I thought that was bc of you mom and dad fighting about he deciding not to come home.

D.R. [8:47 am]: I honestly am confused but apparently mom wants me to go over ur house to help out at ur house

Defendant [8:51 am]: It turned out that way because we needed extra help but not sure myself how that came about you would be helping but I may have said that you should come over

D.R. [8:51 am]: Yes I will come over

D.R. [8:51 am]: Cuz I don't want to be home anyways.

Defendant [8:52 am]: I confused too. I don't like being there much sometimes.

D.R. [8:54 am]: I go to my bfs to get advice about my dad's situation my mom can't help me with that I was crying in my bfs arms cuz of this situation the things Jesse says makes me feel better he even cried cuz he wants my dad to come home too.

D.R. [8:55 am]: He doesn't want me upset.

Defendant [8:56 am]: Yes. I've never said ill things about Jesse as long as he treats you good.

D.R. [8:56 am]: The only 3 guys in my life rn is my brother u and Jesse I'm not worrying about my sister.

D.R. [8:56 am]: The only person isn't here is my dad m

Defendant [8:57 am]: I miss him too.

[251] The Defendant denied that he used his provision of a cell phone to D.R. as an excuse for her to come to his apartment. The Defendant stated that D.R. did not have to come to his home if she did not want to do so. He agreed that his statement at 8:51 am suggested that he wanted D.R. to come over to his apartment and was threatening to take away her cell phone if she refused. He also acknowledged at trial that he had no chores for her to do at his apartment. At trial, the following answers were given by the Defendant:

Q. So what kind of chores are we talking about?

A. None.

Q. Because on line 5739 it says, "It turned out that way because we needed extra help, but not sure myself how that came about you would be helping, but I may have said that you should come over." So you're acknowledging that you may have suggested...

A. M'hmm.

Q. ...hey, ...

A. Yes.

Q. ... [D.R.] needs to come over and do chores, ...

A. Yes.

Q. ...right? Okay. So you wanted her to come over and somehow in that conversation it was threatened that her phone would be taken away, can we agree that that appears to be the case?

A. That appears that way, yes. [Emphasis added]

[252] D.R. agreed with the suggestion that she went to the Defendant's apartment because it was sometimes a safer place than being at home. D.R. states that during August 2015 – December 2015 she spent more time at the Defendant's apartment than usual. During that period Maria was in a school for adults.

[253] D.R. states that she went to the Defendant's apartment because states she was upset because she missed her father who was still in prison. She testified that she used the Defendant's cell phone, made three telephone calls on October 16, 2015 to Jesse at 5:02 pm, 6:14 pm and 8:41 pm. He received a return call from Jesse at 9:19 pm and then a text message from Jesse at 9:20 pm which D.R. responded to using the Defendant's cell phone:

Jesse [9:20 pm]: Oh can you tell [D.R.] I love her and idk what happe

D.R. [9:28 pm]: Love you too

[254] D.R. testified that she slept that evening at the Defendant's apartment but could not recall where she slept in that apartment.

[255] D.R. stated that on Saturday, October 17, 2015, D.R. and her boyfriend Jesse exchanged the following text messages while D.R. was using the Defendant's cell phone:

D.R. [10:58 am]: Sasha chilling here beside me. She was cuddling me the whole night.

D.R. [11:00 am]: I might be having money for Monday for us

D.R. [11:01 am]: Blue berry giving me some money.

[256] D.R. stated that she told the Defendant that she was going on Monday to see Jesse. The Defendant asked D.R. if she needed money to go out and she responded that she didn't know. The Defendant told D.R. that he would give her some money on Monday. D.R. did not recall if she had to let the Defendant touch her or do anything in exchange for the money. The Defendant agrees that it appears that D.R. slept over that evening and that he was present given that she used his cell phone.

October 24, 2015

[257] On October 24, 2015, D.R. and the Defendant exchanged the following text messages:

D.R. [10:08 am]: Good morning blue berry

Defendant [10:09 am] : Morning hunny. R u good

D.R. [10:10 am]: I'm good want me to come over today :)

Defendant [10:10 am]: I am at work :- (

D.R. [10:11 am]: Oh no lol. What time are you off?

Defendant [10:11 am]: 700

D.R. [10:12 am]: KK

Defendant [10:12 am]: Just call me if your alone. On break now.

D.R. [10:13 am]: KK hold on.

[258] D.R. recalls speaking with the Defendant at about 10:14 am but she does not recall the contents of their conversation.

[259] The Defendant states that the word "alone" in this message may been present as a result of an "autocorrect" function in the text program. He agreed that it was unlikely that the word "alone"

was generated in error. The Defendant did not explain why he wanted to speak to D.R. alone on that day.

October 26, 2015

[260] On October 26, 2015, D.R. and the Defendant exchanged the following text messages

D.R. [6:40 pm]: hey blue berry, I'm sorta emotional and idk what to

D.R. [6:42 pm]: can u give me advice :(

D.R. [6:44 pm]: I'm over at jesses right now and both of us already

D.R. [6:45 pm]: And you're the only person who knows me best for adv

Defendant [7:09 pm]: Call me

[The Defendant received a call from D.R. at 7:10 pm]

D.R. [7:25 pm]: on my way over

[261] D.R. does not recall why she was emotional that evening however she stated that she went to the Defendant's apartment that evening.

October 27, 2015

[262] On October 27, 2015, D.R. exchanged the following text messages with the Defendant:

D.R. [5:56 pm]: I be over soon dad calling in and I'll be leaving

Defendant [5:56 pm]: KK

[263] D.R. does not recall going to the Defendant's home that evening.

October 31, 2018

[264] On October 31, 2018, the Defendant exchanged the following text messages with D.R. between 9:22 pm and 9:42 pm:

Defendant [7:37 am]: Morning Hunny ... Keep your Chin Up

D.R. [7:59 am]: You at work?

Defendant [7:59 am]: I am

[265] D.R. does not recall being upset on that day.

November 4, 2015

[266] On November 4, 2015, the Defendant exchanged the following text messages with D.R. between 8:38 am and 8:43 am:

Defendant: That sucks.

D.R.: Yeah

D.R.: I got the chance to talk to maria last night told

Defendant: Yea. I'm at a loss for words I sent u dad money ea

Defendant: well not each month

Defendant: don't think anyone else did

D.R.: Yeah I know

D.R.: I have no clue

Defendant: Your officially clueless lol

D.R.: Yup a bit I am but so much bullshit over here its

D.R.: It shouldn't be allowed

Defendant: I agree. I don't have idea how to help fix this

D.R.: Yeah it can't be fixed cuz [A.R.] fucked everythin

Defendant: We'll see just how smart she is ... its gotta backfir

D.R.: Yep

Defendant: Hang in there hun. Feel better

D.R.: Thanks I'll see you guys later

Defendant: For sure.

[267] D.R. recalled that the problem referenced in this exchange of text messages related to D.R.'s mother threatening harm to D.R. as she wrongly believed that D.R. had told other persons that D.R.'s father had been in jail. D.R. states that it was her sister A.R., not D.R., that had told a friend about R.R. being in prison. D.R. contacted the CAS. In cross-examination, D.R. stated that her mother had threatened to "put her in a coffin". After speaking with her guidance counsellor at school, D.R. called her caseworker, Karen Lett, at the CAS. She liked and trusted Ms. Lett. It

was the only time that she had called the CAS. When asked why she had not called the CAS to report that the Defendant had been touching her, D.R. responded that she did not have the telephone number for the CAS and agreed that it would have been easy to find her telephone number online. D.R. met Ms. Lett in D.R.'s bedroom. When asked why she had not told Ms. Lett at that time that the Defendant had touched her on many occasions, D.R. stated that matter was not "at the top of my head" and that Ms. Lett "was not there for that situation and she was there because her mom was threatening her.

[268] In cross-examination, D.R. was asked what the text messages above were about. She did not remember. However, she did recall that she found marijuana in her sister A.R.'s bed. She also smelled marijuana from A.R.'s room. D.R. told her mother more than once that there was marijuana in A.R.'s room however when S.M.R. checked she could not find any marijuana.

[269] The Defendant testified that D.R. had found drugs on her sister's bed that had been left there by A.R.'s boyfriend. A.R. had said that the drugs belonged to D.R. The Defendant was concerned that the money that he gave S.M.R. was not being used as it should. R.R. was at home at this time and did not want any drugs in the home.

November 11, 2015

[270] On November 4, 2015, the Defendant exchanged the following text messages with D.R.:

Defendant: You up girl

D.R.: Yes I am

Defendant: You ok. Your dad called me last night and explaine

D.R.: Alright

[271] D.R. believes that the context for these messages was that her father R.R. had accused her mother S.M.R. of having men in their apartment while he was incarcerated. D.R. recalls seeing R.R. tell S.M.R. that the Defendant and his girlfriend Maria had told him she had been sleeping with someone. D.R. states that she told the Defendant that her mother was not the type of person to sleep around.

[272] In cross-examination, D.R. stated she overhead arguments, almost on a daily basis, between R.R. and S.M.R. about S.M.R. being unfaithful which started once R.R. was home until about December 2015. Both D.R. and her brother J.R. understood that these arguments were the result of the information about infidelity that the Defendant and Maria had told R.R.

[273] The Defendant acknowledged that his first contact that morning was to D.R. on the cell phone that he had purchased for her.

November 22, 2015

[274] On November 22, 2015, S.M.R. sent the following text message to the Defendant at 6: 13 pm:

S.M.R.: Jimmy we want the phone that [D.R.] has cut off

[275] Rather than respond to D.R.'s mother, the Defendant sent the following text message two minutes later to D.R. and they exchanged the following messages over the next five minutes:

Defendant: Why you want the phone cut off

D.R.: No

D.R.: What

D.R.: Call me right now

[276] D.R. testified that she did not know why her mother wanted the phone cut off as her mother told her that the Defendant wanted the phone cut off.

[277] The Defendant denies that he was upset when he contacted to find out why she wanted her cell phone "cut off". He agreed that the proper response for an adult in that situation would have been to first contact S.M.R. to find out why she wanted the cell phone "cut off" rather than contact the child who uses the cell phone.

November 23, 2015

[278] On November 23, 2015, D.R. exchanged the following text messages with the Defendant:

D.R. [8:58 am]: Morning blue berry

Defendant: Morning. Are you going to be ok. Were you scared t

D.R.: NO I went to bed when I got home and I'm doing oka

Defendant: So nothing was said to you

D.R.: Nope

D.R.: Woke up took a shower went out to grab my bag my m

D.R.: She never even woke me up my alarm went off thank

Defendant: Wow

D.R.: She normally comes in my room to see if I'm up

D.R.: It's okay though I always have my alarm on my phon

Defendant: She texted Maria b4 me and Maria texted back to sa

D.R.: about what the phone?

Defendant: She thought your folks were going to set [get] the phone

D.R.: She's going to get in a lot of trouble if she doesn

Defendant: OK I'm home today too

D.R.: Ooh okay perfect :D

Defendant: Yea

D.R.: I'll talk to u after and let you know though for a

Defendant: Stick to your guns. U said u didn't do anything w

D.R.: Yup so true and I did nothing wrong I said how I f

D.R.: Said

Defendant: Smart

Defendant: Don't give them anything that they can use against

D.R.: [9:40 am]: I will and I miss u guys too [Emphasis added]

[279] D.R. did not recall what the Defendant was referring to when he told her to "stick to her guns" and to not "give them anything that they can use against" you.

[280] The Defendant stated he meant "get" the phone rather than "set" the phone. He denied that he was coaching D.R. on how to persuade her parents to let her keep her cell phone. He agreed that he did not ask for the cell phone back in this message.

November 24, 2015

[281] On November 24, 2015, the Defendant called D.R. at 9:06 am and then exchanged the following text messages with the D.R. from 9:06 am to ??

Defendant [9:06 am]: Morning Hunny. You alright

D.R.: Yeah I'll be over today sorry I got caught up into

Defendant: Just making sure your ok

D.R.: I was watching paper view cuz I didn't see all of

Defendant [9:08 am]: No problem.

...

Defendant [9:30 am] at: Making coffee ... have a good day at school

D.R.: I will are u off today or no?

Defendant: I at home and have money for your choirs [chores] u do for

Defendant: Is that good with you

D.R.: Okies

D.R.: Yes

Defendant: [9:37 am] :-)

...

D.R.: [4:20 pm]: Hii I'm on my school bus now I'll be over after I take my shower and when I get home

Defendant: OK

D.R.: :D

D.R.: [5:17 pm]: I'm done in the shower I'll be over as soon as I take the towel out of my head children's aid is here and they were talking about me cuz [AR] informed me right now I'm dressed already and I got a appointment to see Irene tomorrow

D.R.: [10:49 pm]: Hey I'm safe and sound at home nothing was said to me with dad and mom

D.R.: [10:50 pm]: Well with mom dad isn't here

Defendant: [11:17 pm]: Nite nite

[282] D.R. explained that she watched a lot of wrestling on television and that the pay per view show that she referred to was a wrestling show. D.R. states that she went to the Defendant's apartment on November 24. She does not recall doing chores but does recall receiving \$40 from him. She states that the most that she received for "hanging out" with the Defendant at his apartment was \$50 but that he normally gave her \$40. The greatest amount of money that he ever gave her was \$100 for her birthday. In cross-examination, D.R. stated that the Defendant gave her \$100 for her 16th birthday and bought her a bikini from a store called Hot Topic. She also agreed

with the suggestion that the Defendant gave her \$5 on a couple of occasions, sometimes he gave her \$20 and sometimes \$40. She recalled that the Defendant once gave her \$40 "out of the blue" so she could go to a mall.

[283] D.R. recalls that the CAS visited her home because her mother S.M.R. had threatened her about telling other persons that her father was in jail. D.R. also acknowledged that she had lied to her mother about her relationships. She states that her mother did not like Jesse but that the Defendant allowed her to use his cell phone to contact Jesse as the Defendant told her that it was wrong for S.M.R. to not allow D.R. to talk to Jesse.

[284] The Defendant agreed that D.R. was at his home from 5:17 pm until 10:49 pm. He agreed that the response that her parents said nothing to her related to the fact that she had seen the Defendant against their prior direction. The Defendant stated that at that point D.R.'s parents were okay with short visits to his home by D.R. However, he acknowledged that he had not directly asked D.R.'s parents whether they were okay with D.R. visiting the Defendant at this point.

[285] The Defendant also agreed that, at this point, D.R. did not want to lose her cell phone and the Defendant did not want the cell phone returned to him.

November 26, 2015

[286] On November 26, 2015, the Defendant exchanged the following text messages with the D.R. at 1:44 pm:

Defendant: Enjoying your lunch I hope. R u good

D.R.: Yes I'm good :)

Defendant: :-)

[287] When asked why he was concerned during the day regarding whether D.R. had enjoyed lunch, the Defendant speculated that he might have given her lunch money for that day.

November 27, 2015

[288] On November 27, 2015, the Defendant exchanged the following text messages with the D.R.:

Defendant: [1:14 pm]: :-)

D.R.: [1:21 pm]: Hiii

Defendant: [1:25 pm]: Just saying hello girl

D.R.: [5:03 pm]: Hey tell maria not to say anything to edna because

Defendant: OK. But she says she'd had only talked about us bu

D.R.: I've heard that maria texted edna saying that you

D.R.: [5:11 pm]: When I got home

[289] The Defendant agreed that the above messages show that he initiated contact with D.R. using a smiley face emoticon for no reason. He denied that he was daydreaming about D.R. He agreed that he did not send smiley face emoticons to other children in the neighbourhood.

[290] The Defendant called D.R. at 5:16 pm and then followed with a text:

Defendant: [5:16 pm]: We have taken them from FB but never said anything

D.R.: Lol np :D yeah I won't believe edna

Defendant: :-)

[291] D.R. could not recall what the above messages were about.

[292] The Defendant could not explain why he sent D.R. a smiley face message during the day. He also agreed that the messages suggested that he is teaming up with D.R. to ensure that they are on the "same page".

November 28, 2015

[293] On November 28, 2015, D.R. exchanged the following text messages with the Defendant:

D.R.: [5:34 pm]: Hey letting you know I'm not coming over for suppe

Defendant: More for me. Lol

D.R.: Lol haha

Defendant: But I will miss you

D.R.: [5:40 pm]: I will miss u too

[294] D.R. recalls that her father took her and her boyfriend out to dinner that evening.

December 3, 2015

[295] On December 3, 2015, at 9:07 pm, the Defendant sent a MMS message to D.R. that was followed a few minutes later by the following exchange of text messages:

D.R.: [9:11 pm]: Heeeu

D.R.: Heeey

Defendant: Yea. I haven't received a text from u

D.R.: Sorry I've been busy chilling with mom dad edna ab

Defendant: That's nice. All is happy then

Defendant: :-)

D.R.: [9:19 pm]: Yes

[296] D.R. explained that she was spending more time at home after her father was released from prison as he was permitted to stay at home during daytime and only had to return to a local halfway house in the evenings. She also explained that once her father had returned home there were more rules that restricted her from going out as often as she had. As well, D.R. had got into fight with the Defendant as he had told R.R. that her mother S.M.R. had cheated on him while he was in prison.

[297] The Defendant denied that he was trying to make D.R. feel guilty for not sending him a text message. When asked what he was thinking when he told D.R. that he had not received a text from her the Defendant responded "No thoughts. Just wondering why".

December 16, 2015

[298] On December 16, 2015, the Defendant exchanged the following text messages with D.R.:

Defendant: [12:53 pm]: U to get Cell service from parents come Xmas. I gather from virgin bc bad credit with Rogers n Bell. In case it didn't happen I wanted to change cell into your name. It can't be done bc [you have] bad credit bc of massive unpaid bills. Call me

Defendant: Not upset with you hun

D.R.: Huh

D.R.: Hold on I'll call you

Defendant: [1 pm]: OK

[299] D.R. called the Defendant at 1:02 pm. This call was followed by text messages between the Defendant and D.R. and the Defendant and S.M.R. (D.R.'s mother):

S.M.R. to Defendant [1:34 pm]: Hey you keep your nose out of my business

Defendant to D.R. [1:49 pm]: Didn't take long for your mom to find out girl. You spoke to her already? Wow screwed up it is

Defendant to S.M.R. [1:57 pm]: Good going. Tried to change phone into your daughters name so you guys can pay the bill or not. How Rotten that she now has bad credit. Illegal too.

D.R. to Defendant [2:03 pm]: I called her and I kinda got mad but she said she's paying it off

Defendant to D.R. [2:05 pm]: Glad she admitted it. You shoulda kept your cool.

Defendant to D.R. [2:06 pm]: I havnt sent back a reply to her.

Defendant to D.R. [2:11 pm]: Wow. Sorry for a new pile of shit.

D.R. to Defendant [2:12 pm]: Well she did but she said she was going to tell me eventually but I told her why would u hide it this long and not tell me

Defendant to D.R. [2:34 pm]: and still continues to punish you about the phone and punish you with you not allowed over or [J.R.] even to say Hi and I wouldn't count on them for a phone they may decide t take away for punishment. Sorry I have nothing nice to say. Sorry hun

D.R. to Defendant [2:39 pm]: Yeah I know.

[300] The Defendant testified that he went to Wind Mobile to have the cell phone account changed to D.R.'s name. He states that the cell phone company did a credit check on D.R. and found that she had bad credit due to unpaid bills.

[301] The Defendant testified that after December 16, 2015 he had no further communication with D.R. and her family other than to say hello and Merry Christmas. He also states on about December 14, 2015 that he asked for the cell phone to be returned or else he would be filing a report with the police.

[302] The Defendant denied that his message at 1:49 pm was meant to scold her for the message that he had just received from her mother. He stated that he was not upset or disappointed by the fact that D.R. had told her mother that the Defendant had told her that she has bad credit because of her mother but later agreed that he had scolded her.

[303] The Defendant also admitted that his message to D.R. at 2:06 pm was a lie because he had responded to S.M.R. at 1:57 pm. The Defendant states that he lied because he wanted to keep her trust.

[304] The Defendant also agreed that his message at 2:34 pm, which states that D.R.'s parents are punishing her by not allowing her to come to his apartment and by taking away her cell phone, was childish and looks like a message by a teenager to his girlfriend. He stated that he was "peeved at the parents".

December 26, 2015

[305] On December 26, 2015, the Defendant sent the following text messages:

Defendant to S.M.R. [12:26 pm]: Merry Christma. Wish you all Well

Defendant to R.R. [12:26 pm]: Merry Christmas

Defendant to D.R. [12:27 pm]: Merry Christmas. Wishing you Well

D.R. to Defendant [12:28 pm]: Thanks blue berry you too

[306] D.R. states that she responded to the Defendant's message as she got over the fact that she felt that the Defendant was interfering in her parent's marriage. However, she states that her mother did not respond as her mother holds a grudge. D.R. also stated that her parents never asked her to come forward with these charges as a way of "getting back" at the Defendant.

December 29, 2015

[307] On December 29, 2015, the Defendant sent the following text messages:

Defendant to S.M.R. [8:36 pm]: Told last night [D.R.] missing. Called and texted her and no answer. Maria and [A.R.] not saying anything. D not talking to me lately and [J.R.] wouldn't say hi to me so I assume she has new phone. Return the phone in working order or I be filing report to police for theft and other legal stuff.

Edna to Defendant [9:23 pm]: [D.R.] is fine she came home earlier today

Defendant to Edna: Who's this

Edna to Defendant: Edna

Defendant to Edna: Thanks

Edna to Defendant: yw but you owe an apology to maria. She's over here crying cuz you thought she lied when in fact she knew nothing until [A.R.] told her last night

[308] The Defendant stated that he was not threatening to file a police report regarding the cell phone that had not been returned but rather a missing persons report because he stated that D.R. had not been home for a few days and he thought that D.R. might be dead.

January 1, 2016

[309] On January 1, 2016 at 11:47 pm the Defendant sent the following text message to D.R.:

Hi girl. Hope all is well.

[310] There was no reply to this message. The Defendant agreed that he was with his girlfriend at the time but was thinking of D.R. as he missed her.

ANALYSIS

[311] The following general principles inform the determination of whether the Defendant is guilty of the offences for which he has been charged:

First, the Defendant is presumed innocent;

Second, the Crown must prove the Defendant's guilt on each count beyond a reasonable doubt;

Further, the credibility and reliability of the evidence of a witness must be assessed. Credibility turns on the truthfulness of a person's evidence. Reliability turns on the accuracy of a person's evidence: See *R. v. C.(H.)*, [2009] O.J. No. 214 (C.A.), at para. 41;

Credibility of a witness is not gauged solely by the test of whether the demeanour of the witness carried conviction of the truth. The real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: See *R. v. Norman*, (1993), 16 O.R. (3d) 295, para. 47 (C.A.);

The credibility of a person's evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate: See *W.(D.)*, para. 26;

While minor inconsistencies may not diminish the credibility of a witness, 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 given the totality of the inconsistencies, particularly when there is no supporting evidence on the central issue: See *R. v. M.(G.)*, (1994), 73 O.A.C. 356, para. 24 (C.A.).

Although D.R. testified as to events that occurred when she child, she is now 19 years old and the credibility of her evidence is to be assessed in same manner as any other adult witness with the exception that inconsistencies on peripheral matters, such as time and place, should be considered in the context of the age that she was at the time of the alleged events: See *R. v. A.M.*, 2014 ONCA 769, para. 25; and

The existence or absence of a motive by the complainant to fabricate evidence is a relevant factor to be considered.

[312] The Defendant denies that the events that are alleged to form the basis of the sexual offences for which he is charged ever took place. I am mindful of the following instruction that it is typically given to a jury in these circumstances:

It is for Crown counsel to prove beyond a reasonable doubt that the events alleged in fact occurred and that the Defendant was the person involved in them. It is not for the Defendant to prove that these events never happened. If you have a reasonable doubt whether the events alleged ever took place, you must find the Defendant not guilty.

You do not decide whether something happened simply by comparing one version of events with another, and choosing one of them. You have to consider all of the evidence and decide whether you have been satisfied beyond a reasonable doubt that the events that form the basis of the crimes charged in fact took place [See Watt, page 1259]

[313] Given that the Defendant has testified, I also mindful of the instruction arising from *R. v. W.(D.)*, [1991] 1 S.C.R. 742:

If you believe the Defendant's evidence that he did not commit the offence charged, you must find him not guilty.

If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must find the Defendant not guilty because the Crown would have failed to provide the Defendant's guilty beyond a reasonable doubt.

Even if you do not believe the Defendant's evidence, if it leaves you with a reasonable doubt about an essential element of the offence charged, you must find him not guilty of that offence.

Even if the Defendant's evidence does not leave you with a reasonable doubt about an essential element of the offence charged, you may convict him only if the rest of the evidence that you do accept proves his guilt beyond a reasonable doubt. [Watt, page 271]

[314] Further, the following myths have no place in assessing the credibility of a complainant in a sexual offence trial:

- A complainant's credibility is affected by her delay in disclosure: *Criminal Code*, s. 275; *R. v. D.D.*, 2000 SCC 43, para. 65;
- Victims of sexual assault do not associate with the perpetrator after the offence: *R. v. Caesar*, 2015 NWTCA 4, para. 6.

Assessment of the Accused's Evidence

[315] In assessing the Defendant's evidence, I find that the defendant's evidence was not credible. Examples include the following:

- (1) He asserted that obviously flirtatious text messages to D.R., such as "the guy usually buys" were merely conversational;

- (2) He denied that he was undermining R.R. and S.M.R.'s parental authority over D.R. by giving D.R. and her boyfriend advice on how to avoid getting into trouble with D.R.'s parents.
- (3) He denied that he was manipulating D.R. to communicate with him and to come over to his apartment by paying for her cell phone even though he later admitted that a text message that he sent to D.R. appeared to threaten her with taking away the cell phone if she did not come over to his apartment to do chores;
- (4) He suggested that R.R. was "street smart" and that S.M.R. was "smart", yet they permitted him to buy their daughter a cell phone and to continue to pay for that cell phone. They also permitted D.R. to spend inordinate amounts of time with D.R. doing "chores" at his apartment even though they both knew that he was on probation for assaulting a child. Their evidence on the witness stand shows that R.R. and S.M.R. were unsophisticated people while the Defendant was more sophisticated and able to manipulate other persons;
- (5) The Defendant asserted that purchasing a cell phone for D.R., and paying its monthly cost, presented no financial difficulty for him even though he was recovering from the consequences of a bankruptcy and earned a modest income as a janitor, paid child support, as well as living expenses for himself and his partner.
- (6) In exchange for the cell phone, D.R. was required to do chores for the Defendant. After his father died in early January, 2014, the Defendant continued to ask S.M.R. to come over to his apartment to do chores even though she typically watched television with him rather than do chores.
- (7) The Defendant states that D.R. was at his home more to be with Maria than with him. However, the cell phone records show many messages from the Defendant wanting D.R. to come to his apartment but it does not show any messages from Maria asking D.R. to come over to the Defendant's apartment to spend time with her.
- (8) He described R.R. as an "incredible" friend although unable to articulate why he felt this way other than to say they occasionally went grocery shopping and took rides on the TTC together. This assertion is at odds with the Defendant's behavior in spreading rumours about S.M.R.'s infidelity or covering up for D.R. when she got into trouble with her parents.
- (9) He described S.M.R. as easy to manipulate by his daughters but not by him. He described her as "smart" although not articulate. In fact, like R.R., S.M.R. presented as someone who was unsophisticated.

[316] The evidence, and the text messages in particular, reveal the Defendant as having an inappropriate attraction to D.R. He suggested that she should be a model at age 14. He referred to her as his "best girl" and texted her "big hugs". He also recognized that D.R. was vulnerable and at a significant disadvantage in one-on-one dealings with him although he remarkably did not

notice her severe learning disability or ADHD. The Defendant was aware that he could exercise control over D.R.'s activities by providing her with a cell phone that her family could not otherwise afford. The cell phone became the Defendant's means to speaking with D.R. whenever he wanted and it also created a lever whereby he could ask her to come over under the pretence of doing chores as, the text messages show, when what the Defendant really what was her company and to be involved in her personal affairs. In addition, the Defendant also periodically provided D.R. with small amounts of money and thus created a further means of manipulating D.R.'s behavior. His inappropriate involvement with D.R. is reflected by text messages where he initiates contact with smiley faces and random messages while D.R. was at school, offering to join D.R. and her boyfriend on a date, complaining to D.R. that he did not see or hear from her enough and telling her "I miss you".

[317] I do not believe the Defendant's denial of these incidents of sexual touching described by D.R. nor was I left with a reasonable doubt that they occurred as a result of his evidence.

Assessment of D.R.'s Evidence and Other Evidence

[318] D.R. presented as a vulnerable young woman whose evidence, although repeatedly challenged, nevertheless, at its core, remained firm on the essential point that, on many occasions, the Defendant touched various parts of her body when she went to his apartment.

[319] The Defence submits that D.R. had two motives to fabricate her evidence that the Defendant sexually assaulted. First, the Defence submits that D.R. was aware that her father R.R. as a condition of his release from prison in September 2015 could not associate with persons, such as the Defendant, who had a criminal record. Second, the Defence submits that D.R. had an animus towards the Defendant because he had lied to her father, R.R., about her mother, S.M.R., having possibly been unfaithful while R.R. was imprisoned. D.R. denied that her parents had asked her to come forward with these allegations of sexual assault as a means of "getting back" at the Defendant. There is no evidence that D.R. had animus towards the Defendant at the time that she reported these matters to police. To the contrary, in December 2015, D.R. responded to the Defendant's Christmas greetings in kind as she indicated that she got over the fact that the Defendant interfered in her parents' marriage. Considering all of the evidence, I do not believe that D.R. made up the details of the incidents that she described nor these other details:

- Most of the touching occurred outside her clothing;
- The Defendant only asked that D.R. touch him once;
- He told her "I bet that you are tight";
- The Defendant told her that she should model for "Playboy Magazine";
- After two sexual assaults, the Defendant stayed in his bedroom for 15 to 20 minutes;
- The Defendant show her purple condoms on one occasion; and

- The Defendant did not touch her every time that she went to his apartment.

[320] I also accept R.W.'s evidence that over the course of three or four visits to the Defendant's apartment she saw the Defendant sitting on his couch with his arm around D.R. and, amongst other things, play with her hair. I also accept that she questioned this behavior and that the Defendant denied that he was doing anything inappropriate.

[321] The Defence submits that "it only makes sense that she would have said something, to somebody, if he had assaulted her". D.R. did ultimately report the Defendant's sexual assault. In cross-examination she stated that she did not know that the Defendant's behavior was wrong and gave the following explanation for not reporting sooner:

Because, like, I didn't know that, that, like him touching me and then him being, him being at the, at the age that he is now, and then me being at, me being a minor at the time, I didn't know what sexual assault actually mean. Like, if you get the bigger picture here, like, I was only a child. Like, I, I had a child mind. I, like, like, how would, how would you feel if somebody gave, somebody went up to you when you were young, if you were a, a, a young girl like me at the age of 12 years old, and him giving you money and then, like, him not even explaining on what he's doing to you? (sic)

[322] In any event, as noted earlier, a complainant's credibility is not affected by her delay in disclosure.

[323] D.R. gave conflicting evidence at trial of when some of the events in question occurred and when she told her mother that the Defendant had sexually assaulted her. However, her inconsistencies regarding the timing of these events are peripheral matters that, on totality of the evidence, do not undermine the credibility of her evidence on the essential points particularly related to the three incidents relied upon by the Crown.

Assessment of Similar Fact Evidence

[324] The following instruction, taken from Watt's Manual of Jury Instructions, Second Edition, Thomson Reuters Canada Limited, pages 361-362, adopted to the circumstances of this case, guides the use of similar fact evidence:

- (a) James Emslie is charged with sexual assault and sexual interference. You are trying him for those offences. You are not trying him for any other conduct.
- (b) The real issue to decide in this case is whether the offences charged ever actually took place.
- (c) You have heard evidence that James Emslie has done other things that are similar to those with which he has been charged in this case. You are not trying James Emslie for that other conduct. Be careful not to jump to the conclusion that just because the other acts and those charged appear similar, the offences charged must have taken place.

- (d) You may, but do not have to find that there is a pattern of similar behaviour that confirms D.R.'s testimony that the offences charged took place. It is for you to say. In considering these offences, bear in mind the relationship between James Emslie, D.R. and the witnesses who testified about the other conduct, as well as the circumstances in each situation.
- (e) In deciding whether such a distinctive pattern of similar behaviour exists, you should consider all the circumstances including these:

Similarities Between Similar Acts and Offences Charged:

- The Defendant was in a familial position of trust with S.W., J.L. and D.R.;
- S.W., J.L. and D.R. were adolescents, about 12-14 years old, when the touching began;
- The Defendant rubbed each of the three children on her lower body – outside of their clothes; The Defendant also attempted to remove D.R.'s pants;
- S.W., J.L. and D.R. each received money or other material benefit from the Defendant;
- The Defendant asked S.W., J.L. and D.R. for permission either before or during his touching;

There are many more dissimilarities Between Similar Acts and Offences Charged:

- The timing of the incidents span ten years – from 2005 to 2015;
- The behavior related to D.R. involves repeated touching over about two years whereas the incidents involving S.W. and J.L. only involved a single episode;
- D.R. had a close relationship with the Defendant as she spent a great deal of time in his home and communicating with him whereas S.W. and J.L. had a distant relationship with the Defendant as they spent little time with him and spoke very little, if at all, with him;

Consider whether the evidence of the other conduct and that charged reveals a distinctive pattern of conduct by the Defendant. Ask yourself whether it would defy coincidence that two or more people independent of one another would lie or be mistaken in their evidence about the Defendant's conduct.

- (f) If you conclude that there is a distinctive pattern of similar behaviour between the other things that the Defendant has done in the past and the conduct with which he

has been charged in this case, you may use the evidence of that other similar behaviour to conclude or help you conclude that the offences alleged here actually took place. This is the only way you can use the evidence of any other conduct in deciding whether Crown counsel has proven beyond a reasonable doubt that the Defendant committed the offences charged.

- (g) If you conclude that the Defendant did any other similar things in the past, you must not use the evidence of that conduct to conclude or help you conclude that the offences charged likely took place because the Defendant is a person of bad character or disposition who likely committed the offences charged because of that character or disposition.
- (h) Further, if you conclude that the Defendant did the other similar things in the past, you must not punish the Defendant for that conduct by finding that the offences charged actually took place, and that he is guilty of them simply because those other things happened before or happened as alleged.
- (i) If you do not or are unable to conclude that the Defendant did the other similar things in the past, you must not use the evidence of that other conduct to conclude or help you conclude that any offence charged actually took place.
- (j) Whether or not you use the evidence of the other things to help you decide this case, you must not find the Defendant guilty of any offence unless Crown counsel has satisfied you beyond a reasonable doubt that the offence charged actually took place and that the Defendant was the person who committed it.

[325] The dissimilarities between the events involving S.W. and J.L. as compared to those involving D.R. are significant and having considered all of the evidence presented at trial, it is my view that there is not a distinctive pattern of similar behaviour between the other things that the Defendant has done in the past in relation to J.L. and S.W. and the conduct with which he has been charged in this case.

[326] Accordingly, I will not use the evidence of the Defendant's conduct involving J.L. and S.W. in assessing whether the Defendant is guilty of any of the charges in this case.

Sexual Assault

[327] The Defendant is charged with three counts of sexual assault under s. 271(a) of the *Criminal Code* in relation to J.R. and one count of sexual assault under the same provision in relation to D.R.

[328] In order for the Defendant to be found guilty of sexual assault, the Crown must prove each of the following essential elements beyond a reasonable doubt:

- 1) That the Defendant intentionally applied force to the complainant;

- 2) That the complainant did not consent to the force that the Defendant intentionally applied;
- 3) That the Defendant knew that the complainant did not consent to the force that the Defendant intentionally applied; and
- 4) That the force that the Defendant intentionally applied took place in circumstances of a sexual nature.

[329] As to the second and third elements, the law is clear that a complainant that is under the age of 16 cannot consent to a sexual act or touching: *Criminal Code*, s. 150.1

Count #8: Did the Defendant sometime between and including the 1st day of July in the year 2014 and the 31st day of December in the year 2015, at the City of Toronto, commit a sexual assault on D.R.?

[330] D.R. recalled that the Defendant first touched her in a sexual manner in the Summer of 2013. Later, her evidence was that the first incident did not occur until after the Defendant's father had died in early January, 2014. As noted earlier, the Defendant called S.M.R. to ask that D.R. come over to help with house work. No one was home when D.R. arrived. The Defendant was not living with Maria at this time. The Defendant and D.R. watched television for two hours. The Defendant went into his bedroom and then called for D.R. D.R. stood near the doorway and the Defendant approached her behind and grabbed her breasts and buttocks over her clothes using his hands. The touching lasted for about five minutes. Amongst other things he told her "if you were my age, I would bang you". After the touching ended, the Defendant told D.R. to leave the bedroom. The Defendant emerged about 20 minutes later. He told her not to tell anyone what they had done. She returned home and did not tell anyone about what had happened.

[331] I find that, on the totality of the evidence, the Crown has proved each of the elements of sexual assault as alleged in Count #8 beyond a reasonable doubt.

Count #9: Did the Defendant sometime between and including the 1st day of July in the year 2014 and the 31st day of December in the year 2015, at the City of Toronto, commit a sexual assault on D.R.?

[332] D.R. also recalled another incident that occurred in the Summer of 2015. Maria was living with the Defendant. The Defendant called D.R. on her cell phone and invited her to come over to his apartment to bake brownies with Maria and him. While at the Defendant's apartment, Maria left to walk her dog. While she was gone, the Defendant told D.R. that he needed to speak with her in his bedroom. He locked the bedroom door. The Defendant told D.R. that she should return his cell phone because she did not spend enough time with him at his apartment. She told the Defendant that she wanted to spend time with other friends as well. The Defendant told her that she was "sexy" and prettier than her sister. The Defendant slid both hands up D.R.'s legs and rubbed her vagina over her yoga pants. He tried to take off her pants but D.R. said no. He asked D.R. to touch him but she said no. This episode lasted about 10 or 15 minutes and ended when Maria returned.

[342] I find that, on the totality of the evidence, the Crown has proved each of the elements of sexual assault as alleged in Count #9 beyond a reasonable doubt. In particular, I find it inconceivable that the Defendant did not appreciate that D.R. did not consent to the force that he intentionally applied.

Count #10: Did the Defendant sometime between and including the 1st day of July in the year 2014 and the 31st day of December in the year 2015, at the City of Toronto, commit a sexual assault on D.R.?

[333] D.R. also recalled another incident that occurred when she was in Grade 9. She was at his apartment and asked him for money to buy lunch at school. Maria had gone to D.R.'s apartment for five minutes to pick up something. The Defendant gave D.R. money for lunch. While they were watching television, the Defendant started touching D.R.'s shoulders, back and legs over top of her clothing and needed lunch money. This episode ended when Maria returned home and the Defendant went into the kitchen and started washing dishes.

[342] I find that, on the totality of the evidence, the Crown has proved each of the elements of sexual assault as alleged in Count #10 beyond a reasonable doubt.

Sexual Interference

[334] The Defendant is charged with one count of sexual interference under s. 151(a) of the Criminal Code in relation to D.R.

[335] In order for the Defendant to be found guilty of sexual interference, the Crown must prove each of the following essential elements beyond a reasonable doubt:

- 1) That the complainant was under sixteen (16) years of age at the time;
- 2) That the Defendant touched the complainant; and
- 3) That the touching was for a sexual purpose.

[336] Touching is done for a sexual purpose if, considering all of the surrounding circumstances, it is done for the Defendant's sexual gratification or to violate the complainant's sexual integrity: Watt, p. 570

Count #11: Did the Defendant sometime between and including the 1st day of July in the year 2014 and the 31st day of December in the year 2015, at the City of Toronto, did for a sexual purpose touch [D.R.], a person under the age of sixteen years, directly with a part of his body, to wit: his hand ..."?

[337] I adopt my findings in relation to Count #8 which I find occurred when D.R. was under the age of 16 years. I find that, on the totality of the evidence, the Crown has proven each of the elements of sexual interference as alleged in Count #11 beyond a reasonable doubt.

JUDGMENT

[338] My Judgment is as follows:

- Counts 1 through 7 are stayed;
- As to Count 8 – Sexual Assault – guilty;
- As to Count 9 – Sexual Assault – guilty;
- As to Count 10 – Sexual Assault – guilty; and
- As to Count 11 – Sexual Interference – guilty.



FAIETA J.

Delivered Orally: March 11, 2019
Released: July 19, 2019

APPENDIX "A"

[1] James EMSLIE, stands charged that he, sometime between and including the 1st day of March in the year 2010 and the 30th day of June in the year 2010, at the City of Toronto, did for a sexual purpose touch [J.R.], a person under the age of sixteen years, directly with a part of his body, to wit: his hand, contrary to Section 151(a) of the *Criminal Code*.

[2] James EMSLIE, stands further charged that he, sometime between and including the 1st day of March in the year 2010 and the 30th day of June in the year 2010, at the City of Toronto, did commit a sexual assault on [J.R.], contrary to Section 271(a) of the *Criminal Code*.

[3] James EMSLIE, stands further charged that he, sometime between and including the 1st day of January in the year 2011 and the 31st day of December in the year 2011, at the City of Toronto, did for a sexual purpose invite [J.R.], a person under the age of sixteen years, to touch directly with a part of his body, to wit: his hand, the body of James EMSLIE, contrary to Section 152(a) of the *Criminal Code*.

[4] James EMSLIE, stands further charged that he, sometime between and including the 1st day of January in the year 2011 and the 31st day of December in the year 2011, at the City of Toronto, did for a sexual purpose touch [J.R.], a person under the age of sixteen years, directly with a part of his body, to wit: his hand, contrary to Section 151 (a) of the *Criminal Code*.

[5] James EMSLIE, stands further charged that he, sometime between and including the 1st day of January in the year 2011 and the 31st day of December in the year 2011, at the City of Toronto, did commit a sexual assault on [J.R.], contrary to Section 271(a) of the *Criminal Code*.

[6] James EMSLIE, stands further charged that he, sometime between and including the 1st day of July in the year 2014 and the 31st day of August in the year 2014, at the City of Toronto, did for a sexual purpose touch [J.R.] a person under the age of sixteen years, directly with a part of his body, to wit: his hand, contrary to Section 151(a) of the *Criminal Code*.

[7] James EMSLIE, stands further charged that he, sometime between and including the 1st day of July in the year 2014 and the 31st day of August in the year 2014, at the City of Toronto, did commit a sexual assault on [J.R.], contrary to Section 271(a) of the *Criminal Code*.

[8] James EMSLIE, stands further charged that he, sometime between and including the 1st day of July in the year 2013 and the 31st day of August in the year 2013, at the City of Toronto, did for a sexual purpose touch [D.R.], a person under the age of sixteen years, directly with a part of his body, to wit: his hand, contrary to Section 151(a) of the *Criminal Code*.

[9] James EMSLIE, stands further charged that he, sometime between and including the 1st day of July in the year 2013 and the 31st day of August in the year 2013, at the City of Toronto, did commit a sexual assault on [D.R.], contrary to Section 271(a) of the *Criminal Code*.

[10] James EMSLIE, stands further charged that he, sometime between and including the 1st day of July in the year 2015 and the 31st day of August in the year 2015, at the City of Toronto, did commit a sexual assault on [D.R.], contrary to Section 271(a) of the *Criminal Code*.

[11] James EMSLIE, stands further charged that he, sometime between and including the 1st day of July in the year 2015 and the 31st day of August in the year 2015, at the City of Toronto, being in a position of trust or authority towards [D.R.], a young person, did for a sexual purpose touch directly the body of [D.R.], a young person, with a part of his body, to wit: his hand, contrary to Section 153(1.1)(a) of the *Criminal Code*.

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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

Applicant

- and -

JAMES EMSLIE

Defendant

REASONS FOR DECISION

FAIETA J.

Delivered Orally: March 11, 2019
Released: July 19, 2019