

CITATION: R. v. Nyznik, 2017 ONSC 4392  
COURT FILE NO.: CR-16-00000131-00MO  
DATE: 20170809

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )  
)  
HER MAJESTY THE QUEEN ) *Philip Perlmutter, Thaddeus Ofiara, and*  
) *Mabel Lai, for the Crown*  
-- and -- )  
)  
LESLIE NYZNIK, SAMEER KARA and ) *Harry Black and Joanne Mulcahy, for the*  
JOSHUA CABERO ) Defendant Leslie Nyznik  
)  
Defendants ) *Alan D. Gold and Melissa Austen, for the*  
) Defendant Sameer Kara  
)  
) *Patrick Ducharme, for the Defendant Joshua*  
) Cabero  
)  
) HEARD: June 5, 6, 7, 8, 9, 12, 13, 15, 16,  
) 19, and 20, 2017

MOLLOY J.:

REASONS FOR JUDGMENT

A. INTRODUCTION and OVERVIEW

[1] Leslie Nyznik, Sameer Kara, and Joshua Cabero are charged with sexual assault. All three are police officers with the Toronto Police Service (“TPS”) and work out of the same platoon within a TPS Division. On January 16, 2015, they (and a number of other off-duty officers from the platoon) attended a party that started at a room they had rented at the Toronto Westin Harbour Castle and continued on through several bars in downtown Toronto. One of the attendees during the bar-hopping portion of the evening was a female parking enforcement officer (“AB”)<sup>1</sup>, who was not employed by the Division, but whose geographic patrol area was

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<sup>1</sup> I issued an order at the beginning of this trial prohibiting the publication of the name of the complainant or any information that would tend to identify her. I have identified her in this decision as “AB.” Those are not her actual initials. I have also used initials to identify three witnesses that testified at trial, also to protect the privacy rights of the complainant.

within that Division. Shortly after midnight, the three defendants and AB ended up back at the hotel room. AB alleges that each of the three defendants sexually assaulted her in the hotel room and that she was unable to resist because she was completely incapacitated by either alcohol, or a stupefying drug that had been administered to her without her knowledge, or some combination of the two. The complainant testified that she did not consent to any of the sexual acts carried out by the three defendants. The defence maintains that AB was fully conscious and capable at all times, that she freely consented to all of the sexual contact between them, and that she initiated much of it.

[2] Fact-finding in this case is hampered by the complainant's patchy memory of many of the events of that night and inconsistencies in her evidence, as well as conflicts between her evidence and other objective evidence. It is clear that much of the sexual activity she describes did occur. Indeed, the evidence of Mr. Nyznik is largely corroborative of many of those details. However, on the sole contentious issue of consent, her evidence stands alone. In order to convict, I would need to be satisfied beyond a reasonable doubt that her evidence was both credible and reliable with respect to the issue of consent. Given the frailties in her evidence, I simply cannot be sure of that important fact to the degree of certainty necessary to make a finding of criminal responsibility.

[3] Accordingly, I find the three defendants not guilty. My detailed reasons follow.

## **B. LEGAL FRAMEWORK**

### **(1) The Presumption of Innocence and Proof Beyond a Reasonable Doubt**

[4] Each of the three defendants is charged with sexual assault, a criminal offence under the *Criminal Code of Canada*, R.S.C., 1985, c. C-46. As such, each is presumed to be innocent unless and until the Crown has proven their guilt beyond a reasonable doubt. The presumption of innocence is a cornerstone of our criminal justice system, originally embedded in our common law tradition and now guaranteed as a fundamental legal right under our constitution.<sup>2</sup>

[5] The presumption of innocence, and along with it the standard of proof beyond a reasonable doubt, are important safeguards to ensure that no innocent person is convicted of an offence and deprived of his liberty. Without these protections, there would be a serious risk of wrongful convictions – an outcome that cannot be accepted in a free and democratic society.

[6] The concept of proof beyond a reasonable doubt is not an easy one to define. It is clearly more rigorous than the balance of probabilities standard applied in civil cases. The balance of probabilities requires the party bearing the onus to establish that the proposition they advance is "more likely than not" – *i.e.* better than 50/50. In its landmark 1997 decision in *R. v. Lifchus*, the

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<sup>2</sup> *Canadian Charter of Rights and Freedoms*, s. 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

Supreme Court of Canada held that the following definition would be an appropriate instruction for a criminal jury:<sup>3</sup>

[...]

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[7] This instruction, with very little modification, is now the standard instruction on reasonable doubt given to criminal juries throughout Canada. The same standard is applied by judges sitting without a jury on criminal trials. The bottom line is that probable or likely guilt is insufficient. If all I can say is that the defendants in this case are likely guilty, I must acquit. It would not be safe to convict someone of a criminal offence with only that degree of confidence. Before I can find the defendants guilty, I must be sure that they committed the offence charged.

## **(2) Essential Elements of Sexual Assault**

[8] Every criminal offence consists of an *actus reus* (the physical act that constitutes the offence) and *mens rea* (the intent required to commit the offence). For sexual assault, the *actus reus* consists of three essential elements, each of which must be proven by the Crown beyond a reasonable doubt. In this case, the Crown must establish: (1) that the defendants knowingly touched the complainant; (2) that the touching was of a sexual nature; and (3) that the complainant did not consent to that sexual contact.

[9] In this case, there is no issue with respect to there being sexual contact between the complainant and each of the three defendants. The sole issue in the trial is whether that contact was consensual.

[10] The presumption of innocence applies to a person accused of sexual assault in the same way that it applies in any other criminal offence. The Crown must prove that this was an assault

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<sup>3</sup> *R. v. Lifchus*, [1997] 3 S.C.R. 320, 118 C.C.C. (3d) 1, at para. 39.

rather than consensual contact. There is no burden on the defence to prove that AB consented to the sexual contact between them. Rather, the burden is on the Crown to prove beyond a reasonable doubt that the defendants had sexual contact with her without her consent.

### **(3) Application of the Reasonable Doubt Principle in Sexual Assault Cases**

[11] As I have stated, the presumption of innocence and the standard of proof beyond a reasonable doubt apply in a sexual assault case just the same as in any other criminal trial. However, there are aspects of sexual assault cases that can make the application of the standard a difficult one.

[12] First of all, the very nature of the act underlying a sexual assault usually means that there are seldom any eye-witnesses apart from the complainant and the person or persons accused of the offence. Often, these cases come down to the word of one person against the other – the classic “he said/she said” scenario. In that situation, it would be wrong for the trial judge to decide the case based on which is the more credible version of the two. To do so would be to misapply the burden of proof on the Crown to establish guilt beyond a reasonable doubt. The correct application of the burden of proof requires the judge to acquit if the evidence of the accused, when seen in the context of all of the evidence, raises a reasonable doubt as to his guilt. It is possible that the judge might not fully believe the defendant’s version of the events, and might find the complainant’s version to be more credible, but still be uncertain as to what actually happened. In that situation, there is a reasonable doubt, the benefit of which must go to the defendant, even where the complainant’s story is more plausible or more believable than that of the defendant.

[13] To assist in the proper application of the burden of proof when there are competing versions of what happened, the Supreme Court of Canada has recommended that the issue be considered in three steps, as follows:<sup>4</sup>

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

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

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

[14] This instruction, commonly referred to as “the *W.(D.)* instruction,” has become another standard instruction given to all criminal juries, and criminal trial judges will generally instruct themselves in the same manner. However, as was said in the *W.(D.)* case itself, and in subsequent decisions of the Supreme Court of Canada, there is no particular magic in the incantation of these three steps.<sup>5</sup> It is not essential that the trial judge rigidly follow the three

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<sup>4</sup> *R. v. W. (D)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397, at p. 758.

<sup>5</sup> *W. (D)*, at p. 758; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at para. 7.

steps in the *W.(D.)* instruction. What is critical is for the judge to avoid turning the fact-finding exercise into a choice as to which is the more credible version of the events. This cannot be a credibility contest, with a conviction if the complainant wins the contest and an acquittal if the defendant does. To treat it as such would be to improperly shift the burden of proof. Rather, if the defence evidence, seen in the context of all the evidence, raises a reasonable doubt, then the trial judge cannot convict. Even in a situation where the trial judge completely rejects the defence evidence and has no reasonable doubt as a result of that evidence, he or she must then assess the evidence as a whole and determine whether the Crown has discharged its burden of proving guilt beyond a reasonable doubt. In some cases, even without any evidence from the defence, it is not possible to be satisfied beyond a reasonable doubt based on the evidence of the complainant.

[15] Typically, the outcome of a sexual assault trial will depend on the reliability and credibility of the evidence given by the complainant. Reliability has to do with the accuracy of a witness' evidence – whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian. Credibility has to do with whether the witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying her best to tell the truth and will fervently believe the truth of what she is relating, but nevertheless be mistaken in her recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be proven wrong by incontrovertible extrinsic evidence. Although honest, their evidence is not reliable. Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt.

[16] It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a heavy burden, and one that is hard to discharge on the word of one person. However, the presumption of innocence, placing the burden of proof on the Crown, and the reasonable doubt standard are necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.

[17] Although the slogan “Believe the victim” has become popularized of late, it has no place in a criminal trial. To approach a trial with the assumption that the complainant is telling the truth is the equivalent of imposing a presumption of guilt on the person accused of sexual assault

and then placing a burden on him to prove his innocence. That is antithetical to the fundamental principles of justice enshrined in our constitution and the values underlying our free and democratic society.

#### **(4) Consent and the Interaction of Alcohol and Drugs**

[18] At the heart of the offence of sexual assault is the right of every person to autonomy over his or her own body. Any sexual touching without consent is a violation of that personal autonomy. The Supreme Court of Canada discussed this fundamental principle in *R. v. Ewanchuk*, as follows:<sup>6</sup>

The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.

[19] As I discussed previously, the crime of sexual assault consists of an *actus reus* and a *mens rea*. At the *actus reus* stage of the analysis, the consideration of whether there was consent relates to the subjective intent of the complainant – whether she voluntarily and knowingly agreed to the sexual contact at issue. As stated in *Ewanchuk*:<sup>7</sup>

While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.

The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only

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<sup>6</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 481, at para. 28

<sup>7</sup> *Ewanchuk*, at paras. 29-30.

arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

[20] Consent is defined under s. 273.1(1) of the *Criminal Code* as being “the voluntary agreement of the complainant to engage in the sexual activity in question.” Mere acquiescence in, or a failure to specifically object to, sexual contact does not constitute consent at this stage of the analysis.<sup>8</sup> In Canada, there is no such thing as “implied consent.” Rather, the question is whether, in the complainant’s own mind, she was agreeing to the sexual activity in question.<sup>9</sup>

[21] The *Criminal Code* specifies some circumstances in which the sexual activity in question is deemed to have been without consent. For purposes of this case, the relevant provision is s. 273.1(2)(b) which states that no consent is obtained where “the complainant is incapable of consenting to the activity.” Incapacity to consent is a broad term and encompasses both situations where a person is incapacitated due to mental disability and situations where a person who would otherwise be competent to consent has been rendered unable to do so, whether or not it was the defendant who caused her to be incapable. To use an obvious and extreme example, a complainant who is unconscious (whether, for example, from alcohol, drugs, or a blow to the head) lacks the capacity to consent. She has no conscious knowledge of what is happening and is not capable of directing her mind to whether she wants to engage in the activity in question. Therefore, any person who proceeds to have sexual activity with an unconscious person commits the offence of sexual assault. That is the case regardless of the defendant’s involvement, or lack of involvement, in how the complainant came to be unconscious. As stated by McLachlin C.J. in *R. v. J.A.*:<sup>10</sup>

The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.

[22] Although an unconscious person is by definition incapable of consenting to sexual activity, the same is not the case for a person who is intoxicated by alcohol or drugs. There will be times when a person is so impaired by alcohol and/or drugs that he or she is incapable of consenting. Whether or not that state of incapacity has been reached is a factual finding to be made in the circumstances of each case. The fact that a complainant does not remember engaging in sexual acts, or has a complete blackout of the time in question, is not the same thing as lacking mental capacity to consent.<sup>11</sup>

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<sup>8</sup> In some cases, where the complainant says and does nothing, this may be relevant to the defence of honest but mistaken belief in consent, but that defence is not raised in this case.

<sup>9</sup> *Ewanchuk*, at paras. 48-49, 51-52.

<sup>10</sup> *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 66; see also paras. 36 and 44.

<sup>11</sup> *R. v. Meikle*, 2011 ONSC 650, 84 C.R. (6th) 172, at paras. 48-49, citing *R. v. J.R.* (2006), 40 C.R. (6th) 97, 2006 CanLII 22658 (Ont. Sup. Ct.), at paras. 17-20, 43, aff’d 2008 ONCA 200, 59 C.R. (6th) 158.

[23] In *R. v. J.R.*, Ducharme J. noted:<sup>12</sup>

...The question is whether or not the complainant was able to make a voluntary and informed decision, not whether she later regretted her decision or whether she would not have made the same decision if she had been sober. Thus, an obvious example of incapacity would be the complainant who was unconscious or in a coma at the relevant time. As I have already explained, memory loss, without more, is not sufficient proof of incapacity. Similarly, while intoxication, self-induced or otherwise, might rob a complainant of capacity, this is only a possible, not a necessary result...

[24] Similarly, in *Meikle*, Trotter J. (as he then was) adopted the following observations of Duncan J. in *R. v. Cedeno* as follows:<sup>13</sup>

Cases where the complainant is said to be incapable [due to] consumption of alcohol or drugs are less clear-cut. Mere drunkenness is not the equivalent of incapacity. Nor is alcohol-induced imprudent decision-making, memory loss, loss or inhibition or self-control. A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at time[s]. [footnotes omitted]

[25] With these general principles in mind, I turn then to the evidence of the particular case before me, and the application of these principles to that evidence.

### C. THE EVIDENCE

[26] The case for the Crown centered largely on the testimony of AB. In addition, two friends of AB testified about their interactions with AB after the events in question – one who went with her to the hospital and the other who spoke with her and encouraged her to report the incident. Video footage was provided from two of the bars the group attended that night, as well as from the entrance and lobby areas of the Westin Harbour Castle. Some text messages received and sent by the complainant were marked as exhibits at trial. An expert toxicologist, Betty Chow, provided evidence as to the effects of alcohol and drugs. There were also many admissions of fact filed, including evidence from the hospitals AB attended and forensic evidence as to DNA.

[27] Two witnesses who were in attendance at the various bars testified – one (Elias Tissawak) called by the Crown and the other (Barry Radford) called by the defence.

[28] Leslie Nyznik testified in his own defence. The other two defendants called no evidence.

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<sup>12</sup> *J.R.*, at para. 43.

<sup>13</sup> *Meikle*, at para. 57, citing *R. v. Cedeno*, 2005 ONCJ 91, 195 C.C.C. (3d) 468, at para. 18.



**Background Facts**

[29] All three defendants are police officers within the same platoon. They had planned a night on the town (known as "Rookie Buy Night") for January 16, 2015. This is a regular initiation type ritual for new officers who join the Division. The rookies treat the other officers in the platoon to dinner and drinks, up to a fixed monetary limit, after which everyone pays for themselves. Mr. Nyznik booked a hotel room at the Westin Harbour Castle, with the cost to be shared among him, Mr. Kara, and Mr. Cabero. This was to provide a starting off point where officers could come at the completion of their shift to change and get ready for the night, and to partake in some pre-event drinking. The three defendants also intended to spend the night there so that they would not need to drive home.

[30] After the pre-party, the group went to CC Lounge and Whisky Bar ("CCs") on Front Street, where they had booked a booth from 6:00 p.m. to 9:00 p.m. for dinner and drinks. Prior to the complainant's arrival, there was only one woman in attendance. She was a member of the platoon and apparently left after the dinner at CCs. The complainant arrived at CCs at approximately 8:45 p.m.

[31] The group left CCs shortly after 9:00 p.m. Some went home from there, but others continued on to a vodka bar called Pravda a short walk away. There was further drinking there. Mr. Kara became ill as a result of his excessive drinking. His colleague, Elias Tissawak, took him back to the hotel in a cab. Mr. Kara was unable to stand or walk without assistance. On the way to the elevator, he threw up a number of times in the hotel lobby. Mr. Tissawak put Mr. Kara to bed, where he immediately fell asleep. Mr. Tissawak then returned to the group at Pravda.

[32] At about 10:30 p.m., the group left Pravda. Some went home from there, but a small group, including the complainant, continued on. They first walked to a nearby bar called Switch and spoke briefly with the management there, but did not stay as the bar was closed. Next, they went to the Brass Rail, which is a strip club on Yonge Street just south of Bloor. Mr. Nyznik, Mr. Tissawak, Mr. Radford, and the complainant took a cab. Mr. Cabero and another officer (Mr. Mills) took the subway.

[33] The group that came by cab entered the Brass Rail at 10:54 p.m. Mr. Tissawak went to a bank machine across the street and the other three (including the complainant) entered the Brass Rail and went to the upstairs lounge. Mr. Radford immediately went to the washroom, had a discussion with Mr. Nyznik there, and then left to go home at 10:59 p.m. Mr. Mills and Mr. Cabero arrived at approximately 11:04 p.m. The group of five – the complainant and Messrs. Nyznik, Cabero, Tissawak, and Mills – ended up at a small table at the front of the club, directly in front of the stage.

[34] At 11:56 p.m., all five left the bar. Mr. Tissawak walked to the subway, Mr. Mills reportedly went back to the Pravda bar, and the complainant got into a cab with Mr. Nyznik and Mr. Cabero, heading for the hotel.

[35] The cab arrived at the hotel at 12:10 a.m. and pulled up to the front entrance. AB had been in the backseat of the cab between the two defendants. The arrival is captured on video. Mr. Nyznik got out of the driver's side rear door and Mr. Cabero got out of the passenger side rear door, which was closest to the entrance. AB then emerged from the back seat. Nobody assisted her and she can be seen exiting without even holding on to the door. She appeared to lose her balance briefly upon standing up, but quickly steadied herself by touching the side of the cab. She then stood by the cab chatting as Mr. Cabero paid the driver. The three of them went through the revolving door into the hotel, first Mr. Nyznik, then AB, and then Mr. Cabero. AB was walking without assistance and did not appear to be having any difficulty doing so. Another video camera recorded them as they approached and stood waiting for the elevator. AB can be seen walking unassisted and chatting and laughing with the other two. According to the hotel's records from the digital door entry system, they entered the hotel room at 12:20 a.m.

[36] AB left the hotel room at approximately 3:30 a.m. There is video footage of her exiting the elevator and immediately turning towards the lobby. Another camera from the lobby shows her speaking briefly with a cleaner who pointed her to the front entrance. She went through the revolving door and spoke with the attendant, who ordered a cab for her. When it arrived, she got in smoothly and the cab then left.

[37] Late on the night of Saturday, January 17-18, AB went to the North York General Hospital with her friend TC. She was triaged and spent nearly five hours waiting to be seen. The staff there did not initially understand that AB was alleging a sexual assault. When they realized the situation, she was seen briefly by a doctor. She told the doctor she had been sexually assaulted by three men whom she knew and that she did not want to report the assault to the authorities. The doctor sent her to the Scarborough Grace Hospital, which has a special unit to deal with sexual assault. AB arrived at the Scarborough Grace Hospital at about 6:00 a.m. and was examined there a few hours later. A full sexual assault kit was not done.

[38] On the afternoon of Monday, January 19, AB returned to the Scarborough Grace Hospital. A full examination and sexual assault kit was done at that time and samples were collected.

[39] AB stayed off work for a period of time, claiming sick leave. The first day she returned to work was Monday, January 26. Before starting her duties, she had an emotional breakdown at the station, which culminated in her disclosing to her supervisor that she had been sexually assaulted. The police were notified. AB was interviewed briefly on the evening of January 26, and gave a more comprehensive statement on January 27. The clothes and a necklace she had been wearing on January 16-17 were seized on January 26 and sent for analysis.

[40] From the forensic testing results, I draw the following conclusions:

- Mr. Kara's semen was found on two swabs taken from AB's external genitalia and a rectal swab, all of which were taken at the Scarborough Grace Hospital on January 19;

- Mr. Kara's semen was found on the jeans, bustier, and black top that AB had been wearing on the night of January 16-17 and which were seized by the police on January 26; and,
- Mr. Nyznik's semen was found on the necklace AB had been wearing and on two areas inside her bra as well as on the outside left cup.

[41] Based on the admitted facts from the expert witnesses, it is likely that the presence of semen on AB's external genitalia, after AB had already showered and cleaned that area, is because there had been internal ejaculation which later drained. This is consistent with Mr. Kara having had vaginal intercourse with AB. The presence of semen detected inside the rectum is not necessarily caused by ejaculation inside the rectum. Other possible explanations include natural drainage, leakage, wiping, clothing friction, and possibly semen that had been present on the external surface of the sphincter being retained on the swab in the course of swabbing the interior of the rectum.

#### **D. THE TESTIMONY OF THE COMPLAINANT**

##### **(1) Events Prior to the Party**

[42] AB testified that she had only been at the Division for a few months and did not know the police officers very well, but that she was closest to Mr. Kara, whom she considered to be a friend. She had also met Mr. Nyznik a few times, but did not know him as well as Mr. Kara. She said that she had originally planned to attend the Rookie Buy Night at the suggestion of her friend "AC", who was also a parking enforcement officer working out of the same Division. Subsequently, AC made other plans for that night, but AB decided she would still attend because her mother encouraged her to go and she needed a night out. She also thought this would be a good opportunity for networking and team bonding. Although she had met with the police and the Crown on numerous occasions prior to trial to provide formal statements and to review her evidence, AB had not previously disclosed to police these reasons for attending the Rookie Buy Night. When asked about her failure to disclose this, she explained that she had not been asked. I have not seen the transcripts and notes from all of the interviews, but based on those I have seen, that seems to be correct – she was not previously asked to explain why she went.

[43] AB said that Mr. Kara invited her to attend the pre-party, but she was uncomfortable doing so. She also decided not to attend the dinner as she was not a member of the platoon and felt it would not be fair to make the rookies pay for her dinner. She said she made up a story about having an earlier commitment to have dinner with a friend and told Mr. Kara she would meet up with the group for drinks after dinner.

[44] On the afternoon before the party, AB attended a formal job interview for a different civilian position within the Toronto Police Service. She testified that the meeting started at 1:00 p.m. and lasted about one hour. After the interview, she delivered a coffee to her mother at her workplace. She said that on her way home, she stopped at the parking lot on Shuter Street where Mr. Kara often parked to write up his notes. He was there alone, in uniform, in his marked police cruiser. AB testified that she spoke with Mr. Kara for a few minutes just to confirm the

plans for the evening. On cross-examination, AB conceded that in all of her previous statements to police she had never mentioned that on the Friday afternoon she took coffee to her mother or that she met up with Mr. Kara in the parking lot sometime after 2:00 p.m. on her way home. Also on cross-examination, AB was confronted with video footage of Mr. Kara and Mr. Nyznik entering the Westin Harbour Castle at 2:03 p.m., where they remained until the party. Upon seeing the video, AB agreed that she could not have met Mr. Kara after the interview. However, she said she had a clear memory of meeting with him when she was dressed for the interview and in her personal car. She suggested it was possible she met Mr. Kara prior to her interview rather than afterwards.

[45] AB denied the suggestion on cross-examination that a few days prior to the party she had a conversation with Mr. Kara, in the presence of Mr. Nyznik, about what to wear to the party. She specifically denied ever saying that she intended to wear a “short skirt for easy access.”

[46] At trial, AB said that she had dinner alone at home and did not consume any alcohol before she left to meet up with Mr. Kara and the others at the bar. However, in a text to her friend AC the next day, she said she had hung out with her friend Mark at his place and then had dinner with him. She added that she went out with “the guys” after that. She then wrote that Mark told her he had a work function he had to go to after dinner, but that when she was with “the guys” at Pravda, “Mark was there on a date!!! Hahahahaha.” When cross-examined about the inconsistency between that text and her evidence at trial, AB said that she had made up the story about having dinner with Mark to explain why she was not attending the pre-party or dinner with the guys from the platoon and was just repeating that story. She said that she had asked her friend Mark if he wanted to have dinner with her downtown that night, but he told her he had a work function he had to attend.

[47] In that same series of texts, when discussing how drunk she was the night before, AB wrote “I drank at Marks. I drank at dinner. Then I played catch up with the guys. Sooooo much soooo fast.” Similarly, in an email exchange with Mr. Tissawak on the afternoon after the event, AB said she had a “pretty bad” hangover. Mr. Tissawak commented that she “looked buzzed but not drunk!!” AB then responded:

It kicked in pretty quick after. That was a lot really fast... and I was buzzed before I got there.

[48] AB offered an explanation for these inconsistencies. She said that with AC, she was merely keeping up the pretence of her earlier date with Mark and with Mr. Tissawak, she was just exaggerating.

## **(2) The First Two Bars: CCs and Pravda**

[49] After exchanging some text messages with Mr. Kara, AB took a cab to CCs and entered that establishment at 8:45 p.m., as confirmed by video footage from the bar’s security cameras. In her testimony at trial, AB estimated her time of arrival at between 9:00 and 9:30 p.m. She was cross-examined about her prior statement to the police that she arrived at about 9:30 p.m. I

attach no significance to these time estimates. AB never purported to be precise about timing, nor was there any particular reason for her to remember the exact time that she arrived.

[50] AB testified that when she arrived at CCs, Mr. Kara was outside having a smoke and he directed her to the area inside where the group was seated. She went inside and said hello to some of the officers she knew. Mr. Tissawak took her to the bar, asked her what she would like to drink, ordered a rum and coke for her, and gave it to her. This can be seen on the video footage from the bar. She and Mr. Tissawak returned to the group. She said she socialized with the officers there and went outside a couple of times to accompany Mr. Kara when he went for a cigarette. She was not a smoker. It was 12 degrees below zero. She was wearing a low cut, dressy top with slits down the sleeves. She did not put her coat on before going outside.

[51] AB denied the suggestion from defence counsel that she was flirting with Mr. Nyznik at CCs.

[52] From CCs, the group headed to Pravda Vodka Bar. AB and Mr. Kara were the last to leave. Just prior to exiting, they each had a tequila shooter, which were poured by the bartender and provided to them without charge. AB testified that she was feeling fine when she was leaving CCs and by that point, she had only had two drinks – the rum and coke poured at the bar when she entered (which was at 8:45 p.m.) and the tequila shooter just prior to leaving (which was at 9:10 p.m.). She described Mr. Kara as being “very intoxicated.”

[53] AB testified that as she and Mr. Kara were walking to Pravda (which was a short distance away), Mr. Kara asked her to kiss him. She complied, intending to kiss his cheek, but at the last moment he turned his head so that her kiss would land on his lips, which she avoided. She said he immediately apologized for making her uncomfortable, and she told him it was “not a big deal.” They continued on to Pravda, arriving at about 9:15 p.m. Upon entering Pravda, AB and Mr. Kara each had a shot of tequila, which were purchased by AB. They then went upstairs where the others in the group were gathered.

[54] AB testified about seeing her friend Mark at a table on the second floor at Pravda. She said that she went over and spoke to him and that Mr. Kara came over to make sure that she was not being pestered. She introduced the two men.

[55] AB testified at trial that there was a bottle of vodka provided at the table, with a variety of mixes, and that one of the officers there, she was not sure which one, poured her a drink of vodka mixed with cranberry juice. She said that later at Pravda, she had another cranberry and vodka that Mr. Kara got for her from the bartender at the bar. While at the bar, she said that she and Mr. Kara kissed. Mr. Kara then wanted to go outside for a cigarette and she went with him. On the way outside, she purchased two more tequila shots, intending them to be for her and Mr. Kara. However, Mr. Kara said that he was not able to drink anything more, so AB drank both shots herself. Thus, according to AB’s evidence at trial, she had five drinks at Pravda, four of which were poured by a bartender in her presence, and the other by an unknown officer out of her sight. Based on her evidence at trial, she had a total of eight drinks that night: two at CCs; five at Pravda; and one at the Brass Rail.

[56] AB was cross-examined about the discrepancy between her evidence at trial and what she had said on previous occasions about what she had to drink. When she was examined at the hospital on January 19, she said she had a total of seven drinks. In her initial statement to the police on January 26, she said she had seven drinks (two at CCs, four at Pravda and one at the Brass Rail). In her formal statement to the police on January 27, she provided exactly the same information. In that statement, she said the four drinks she had at Pravda were an initial tequila shot, one cranberry and vodka drink upstairs with Mr. Kara at the bar, and two more tequila shots before leaving (hers and Mr. Kara's). Her evidence at trial was the first time she ever reported getting an additional vodka drink at Pravda, poured by an unknown person. Her explanation for not disclosing this in her prior statement was that the police were jumping around from topic to topic in the interview and it was confusing to her. She denied lying about this additional drink.

[57] After AB downed the two tequilas shots, she went outside with Mr. Kara. He was feeling ill and vomited on the sidewalk. She said that she was helping him to stay upright. After throwing up, he went back into the bar with AB and they both got glasses of water from the bar. However, Mr. Kara felt ill again and left quickly for the washroom. AB saw Mr. Tissawak in the area and alerted him to the fact that Mr. Kara was sick in the washroom. Mr. Tissawak went in to help, and emerged supporting Mr. Kara. He told AB that he was taking Mr. Kara back to the hotel and they both left. AB agreed that Mr. Tissawak was holding Mr. Kara up and that he was incapable of walking on his own.

[58] After they left, AB went upstairs and spoke to Mr. Nyznik. She told him that Mr. Kara was sick and that Mr. Tissawak had taken him back to the hotel. She testified that she then told Mr. Nyznik that, now that Mr. Kara was gone, she would be his responsibility. She testified that what she meant by that was that he should keep an eye out for her, like a buddy system, and make sure she was not harassed and that she got into a cab to get home safely. However, she acknowledged that this was implied; she did not specify to Mr. Nyznik what she meant by it. She denied on cross-examination that she used the word "babysit" in this conversation.

[59] AB testified that she was feeling fine when she left Pravda, in control of her own decisions, and able to walk on her own. However, at 10:15 p.m., while she would still have been at Pravda, AB sent a text, out of the blue, to her friend AC stating, "Yo I'm so drunk." When confronted with this on cross-examination, AB said that she did not remember sending the text. She explained that she considered herself to be "intoxicated" at that point, although still in control of herself.

### **(3) The Brass Rail**

[60] AB testified that at some point there was a decision to leave Pravda and walk to another bar close by. She said she walked over with six or seven other officers. Some of those officers spoke to people in the bar whom she surmised to be the owners. However, the bar was not open. She said that the guys then decided to go to the Brass Rail and Mr. Nyznik asked her if she was okay with that, to which she replied it was "not a big deal."

[61] On cross-examination, it was suggested to AB that the discussion about going to the Brass Rail took place on the sidewalk outside Pravda. She denied being part of any such

discussion, or knowing anything about it. She said the discussion about the Brass Rail was after leaving the bar that was closed (Switch). Also on cross-examination, AB acknowledged that she had not previously disclosed that Mr. Nyznik had specifically invited her to the Brass Rail and asked if she was okay with it. She explained that she has always had a memory of that, but simply failed to mention it before.

[62] In her evidence in chief, AB said that after leaving Switch, she walked the entire way to the Brass Rail with this group of six or seven men. She recalled that at one point along the walk, she and Mr. Tissawak exchanged texts so that they would have each other's contact information.

[63] On cross-examination, AB conceded that she could not have walked to the Brass Rail. Based on the video footage from the Brass Rail, she acknowledged that she had arrived in a cab with Messrs. Nyznik, Tissawak, and Radford. She said she has no memory at all of being in the cab or of any conversation that took place in the cab. Although recognizing that it is faulty, she has an actual memory of walking to the Brass Rail.

[64] In her evidence in chief, AB testified that upon reaching the Brass Rail, the group entered together and one of the men (a detective she later identified as Mr. Radford) left almost immediately. She said that he basically went up the stairs and out again, without actually entering the bar itself. The rest of the group sat at a table in front of the stage. She said there were herself and four men at the table – Messrs. Nyznik, Cabero, Tissawak, and Mills.

[65] She testified that a waitress came and took their drink orders, and that she ordered a vodka and cranberry juice. She said that after the orders were placed, Mr. Nyznik excused himself to go to the washroom, but had returned by the time the waitress arrived with the drinks.

[66] In cross-examination, after reviewing the video footage, AB acknowledged that she arrived at the front entrance of the Brass Rail with Messrs. Nyznik, Tissawak, and Radford at about 10:54 p.m. and immediately headed upstairs. The other two (Mr. Mills and Mr. Cabero) arrived about ten minutes later, at 11:04 p.m. Therefore, all of them could not have been at the table immediately upon AB's arrival. AB's recollection of Mr. Radford having entered the premises and left almost immediately is correct. Mr. Radford went straight to the washroom upon entering, and then left the bar. The video footage also shows that Mr. Nyznik went to the washroom at the same time as Mr. Radford and also exited at the same time. The video footage shows that: the initial group reached the upstairs area of the bar at 10:55:40 p.m.; Mr. Radford entered the washroom area at 10:56:31; and Mr. Nyznik entered the washroom area at 10:56:40. It follows that Mr. Nyznik could not have been at the table with the others long enough to have placed an order with the waitress and then headed to the washroom, arriving only 9 seconds behind Mr. Radford.

[67] AB testified that Mr. Nyznik was very friendly with the waitress when she came back with the drinks and that they were "clearly continuing a conversation that they seemed to have just been in." She said that Mr. Nyznik told the waitress that they were all there from Miami and that they were an adult film crew. She said that the other men at the table all played along with this story, saying what their various roles were on the crew, and that the waitress "seemed to be

buying it hook, line and sinker.” She described being “shocked at the stupidity” of this conversation and “flabbergasted at how seamless it was.”

[68] On cross-examination, AB admitted that the first time she disclosed this conversation about the film crew was at trial. Although her January 27<sup>th</sup> interview with the police was almost three hours long and covers 158 pages of transcript, she made no mention of this conversation. Her explanation was that she was exhausted at the time of the statement and very stressed. Her focus was on what happened at the hotel afterwards, not what was said by the others at the Brass Rail. She denied being part of the conversation about the fictitious film crew and denied proposing that she participate in the “audition” of the waitress in the hotel room. She also denied that she proposed taking part in sexual acts with the others in the hotel room, or that they should feel free to bring a stripper back to the hotel, or that she wanted to join in, or that she wanted to be “spit roasted” with Mr. Nyznik and Mr. Cabero. She said she did not even know what the term meant. She also denied boasting about her expertise in giving blow jobs. She denied having any sexually explicit conversations whatsoever.

[69] AB testified that they had one round of drinks at the Brass Rail and then left. She said there was no discussion inside the bar as to where they might go next. However, once they were out on the street, Mr. Tissawak said he was going home and Mr. Mills said he was going back to Pravda. She said she wasn’t sure what time it was, but that it felt early. She testified that “there was conversation” about going back to the hotel, getting Mr. Kara, and taking him back to Pravda. She said that she “wasn’t thrilled” about going to the hotel, but “wanted to continue the night.” She explained that she felt more comfortable going back to the hotel with officers she knew, just to get Mr. Kara and then leave, than she felt about going to Pravda with Mr. Mills, with whom she was less familiar. She recalled that they took a cab, but did not know what hotel they were going to. She thought that she and Mr. Nyznik were in the backseat and Mr. Cabero in the front passenger seat, but conceded when shown the video footage of their arrival at the hotel that Mr. Cabero was also in the back seat, on the passenger side, with her in the middle between the two men.

[70] Before getting into the cab, AB said that she felt “okay-ish” but “a little tipsy.” She said she could walk on her own and talk without slurring her speech. However, she said once the cab started to move, her condition changed significantly. She described having a “sudden intense headache,” being unable to follow conversation, and feeling “really unwell.” She said her vision was impaired and “it was almost like going through a Star Trek warp field.” She had no memory of anything that was said in the cab and no memory of arriving at the hotel, other than that the cab went up some sort of ramp with an overhang.

[71] On cross-examination, AB said that she attributed the symptoms she was experiencing in the cab to having been drugged. She did not know who drugged her or when, but said that the two possible explanations were that an unknown person put a drug into either the first drink that she had at Pravda (which she did not see being poured) or the drink that she had at the Brass Rail (which was delivered by the waitress). She further agreed that because the drink at Pravda had been about two hours before she experienced the symptoms in the cab leaving the Brass Rail, it was not likely to be the source of the drug.



**(4) The Events at the Hotel**

[72] AB reported virtually no memory of arriving at the hotel in the cab, no memory of entering the hotel or walking to the elevator, no memory of chatting and laughing with Mr. Cabero and Mr. Nyznik while waiting for the elevator, no memory of being in the elevator, and no memory of the hotel corridor leading to the hotel room. After being in the cab, her next memory is when she entered the hotel room. She did identify herself on video footage showing her arriving at the hotel, entering the hotel through the revolving door, walking to the elevators, and chatting and laughing with Mr. Cabero and Mr. Nyznik while waiting for the elevator. However, she has no memory of doing any of these things.

[73] AB said that when she entered the hotel room, she immediately took off her coat and placed her coat and purse on the desk. She then used the washroom. She said that when she came out of the washroom, somebody else went in. She then went to the bed closest to the washroom and tried to wake up the sleeping Mr. Kara. She said she was calling his name and recalls at one point being “kind of on all fours on the bed” while trying to wake him. None of these attempts were successful in rousing Mr. Kara.

[74] AB testified that she recalls Mr. Nyznik telling her not to wake him up yet. She said she was confused and asked him why. The next thing she remembers is being on her back beside Mr. Kara on the bed. She does not remember how she got to that position. She testified that Mr. Nyznik was standing at the head of the bed with his jeans at his ankles and his penis exposed and was pulling her head towards him. She said he held her head and said “suck my cock” and then “penetrated [her] mouth with his penis.” AB testified that at this point, she was unable to move her arms and legs in any meaningful way. She was trying to talk but was unable to form words and was essentially just moaning. She also reported having trouble breathing. While Mr. Nyznik’s penis was in her mouth, she also had the sensation of somebody touching her legs and crotch over her jeans.

[75] She said that the next thing she remembered was Mr. Nyznik saying “Suck my boy’s dick” and then a pause. She wasn’t sure if the person who was penetrating her mouth had switched or if there was just a pause in that activity. At the same time, she had the sensation of her jeans being removed. She could feel vaginal penetration, but could not tell if this was with a penis or fingers. Then she heard Mr. Cabero asking Mr. Nyznik if he should “fuck [her] in the ass.” After that, she again had the sensation of vaginal penetration, but could not see who was between her legs. She did not know if the lights were on or off at that point. She said there was light in the room when she first entered, but the lights were off when she later left the room. She did not know about the times in between when the sexual acts were occurring.

[76] AB testified that while this was ongoing, Mr. Kara woke up and said, “Guys stop, Josh stop,” and then “come on, stop.” Initially in her evidence, she did not recall anything else being said before the other two men stopped and she was covered by a blanket. However, after being given the opportunity to refresh her memory from her January 27 statement, she added that Mr. Kara said, “Josh stop, she’s out.”

[77] After being covered by the blanket, the next thing AB reported remembering was Mr. Kara waking her up by tapping her face and saying her name over and over. She said he asked her a bunch of questions, which she had trouble following, except that one of the questions was asking her why she was in his bed. She also recalled him asking her to kiss him, but she did not remember kissing him. She said the next thing she remembered was being on top of Mr. Kara and not being able to hold herself up in that position. She then remembered being placed on her back and the sensation of a towel wiping her chest. She said that Mr. Kara said "Thanks" and they were all laughing. Then immediately after that, she was penetrated vaginally again. She believed it was Mr. Kara who was penetrating her vaginally because she could hear his voice above her. She said she could hear the other two men laughing from across the room and Mr. Kara saying, "Leave me alone, I'm just tired," after which he continued penetrating her. She testified that at some point, Mr. Kara asked if he could come inside her and she did not respond because she was unable. She stated, "I was powerless. I couldn't move. I couldn't talk. I couldn't stop what was happening." She next remembered the "sensation of some ejaculate on [her] lower stomach pelvic area," followed by a conversation among the three men about whether or not they still wanted the hooker for the night. She recalled Mr. Nyznik saying he had arranged it, that all he had to do was text her, and that it would cost \$200. That was the last thing she remembered before waking up in the room with everyone else asleep.

[78] Throughout these sexual acts, AB said she had some visual glimpses, but that her main sensations were of hearing and feeling things and her "sensations felt different than they normally would."

[79] AB testified that she did not want any of this sexual contact and did not consent to any of it. She denied suggestions put to her in cross-examination that she had initiated any of it, or given specific consent to any of it.

[80] AB testified that when she first woke up, the room was completely dark and she had "such an excruciating shooting pain" in her head that she had to lie back down. When she sat up again, she was having trouble moving and figuring out her surroundings. She had no clothes on below the waist, but managed to find her jeans and boots and put them on. She could not find her underwear. She picked up her coat and purse and left the room. All three men were asleep. None of them woke up.

#### **(5) Getting Home and the Next Day**

[81] AB described being very confused after leaving the room because she could not remember how she got into the room and did not know the way out of the hotel. She found the elevator, but was still confused about how to get out of the hotel. She testified that when she got near the front doors, two guys were coming towards her and they said, "Hey, weren't you at the party?" AB said this terrified her and that she "kind of panicked" because she "felt like [she] had it, what had happened, written all over [her] and [she] just needed to get out of there." She asked a nearby hotel employee in some type of uniform how to get out of the hotel and he pointed her towards the lobby where there was another employee mopping the floor. That employee pointed her out the door to a kiosk and the employee there got a cab for her. Although AB did not know

what time it was when she left, she accepted the accuracy of the hotel video which showed her getting into the cab at 3:30 a.m.

[82] The detail of two men in the lobby commenting that they remembered her from the party was not something AB had mentioned prior to her evidence at trial. However, AB denied that this was a new memory. Similarly, AB acknowledged that she did not previously say she was terrified in the hotel lobby, but maintained that she nevertheless did feel that way.

[83] When asked in her evidence in chief to describe her level of sobriety and consciousness as she was leaving the hotel, AB said that all she could remember was focusing on getting out of there. However, she said she felt “extremely sick” and “nauseous” once she was in the cab and was struggling to stay conscious. She could not recall the entirety of the cab ride. She said that she could recall the sensation of the cab stopping and of vomiting, but did not know what order that happened in. Her next memory was waking up in her bathroom, still wearing her winter jacket and boots, “face down in a puddle of vomit” and “choking on vomit.” She said she threw up and retched for what “felt like forever” and “wasn’t even able to catch [her] breath between retching and vomiting.” She also reported having an “excruciating” headache that was unlike anything she had ever experienced before. She was confused because there were so many gaps in her memory. However, her first and overpowering feeling was of fear. She said she believed that because these three men were police officers, it would be a lot easier for them to cover this up and that their word would be stronger than hers because there would be three of them to corroborate it. She added, “They carry firearms.” She said that there would be no way to report this because she would essentially have to tell their colleagues and that she “felt like they would kill [her] if it got out.” She therefore decided to destroy the evidence by showering and washing her clothes.

[84] AB conceded on cross-examination that in her initial statements to police on January 26 and 27, 2015, she did not tell the police that she was fighting to stay conscious while in the cab. The first time she revealed that memory was 17 months later, in her statement to police on July 4, 2016. Her explanation for not providing that information earlier was that at the time of the interviews in January 2015, she was on medication (for HIV prevention), had not slept, was exhausted, and was in a state of crisis. On cross-examination, AB also admitted (based on records from her cell phone) that she sent a text message to a friend from the taxi on the way home. The text, which was sent at 3:43 a.m., was to Richard Rhone and stated, “R u back? Need ur help.” Mr. Rhone did not respond at the time because he was not yet back from vacation. AB testified that she has no memory at all of sending that text.

[85] In her prior statements to police, AB did not say anything about feeling sick in the cab or of having the sensation of the cab stopping and her vomiting. However, in text exchanges with others the next day, she did describe this. To AC shortly after noon on Saturday, January 17, she wrote, “Dude the taxi had to pull over twice! I barely remember getting home.” To Mr. Tissawak, at 1:37 p.m. that same day when discussing her hangover, she texted, “The taxi had to pull over on the Dvp. Hahaha.” When asked on cross-examination whether the text to AC was true, she said she did not know.

[86] In her statements to police in January 2015, AB said nothing about being afraid for her life because her three assailants all carried firearms. When challenged about that in cross-examination and asked why she didn't tell the two officers interviewing her about her fears, she replied that those two officers also carried firearms.

[87] In one of her texts to AC on Saturday, January 17 (at 10:39 a.m.), in the course of talking about her hangover, AB wrote, "I feel drugged. Lol." Her friend's response was a joking reference to various hangover cures, without any mention of the comment about drugging. AB testified that by referring to feeling like she had been drugged, she was "testing the waters" to see how her friend reacted, but when AC just laughed it off, AB decided to say nothing further.

[88] In that same text, AB mentioned that she had a bruise and that she was going to have to explain both the bruise and the hangover to Marcus. Under cross-examination, AB said that "Marcus" was a friend of hers and that his name was DA. (I note that DA testified at trial and denied that AB or anybody else ever called him "Marcus"). Although AB implied in her text to AC that she was going to Marcus' home that day, there was no such plan, nor is it even clear who Marcus is. AB did not call DA until Sunday, January 19.

[89] From 9:49 a.m. until 7:36 p.m. on Saturday, January 18, AB exchanged numerous text messages with Mr. Tissawak, initially responding to his inquiry about whether she had fun and then making joking references to her having a hangover. The general tone of these emails is light, flirtatious bantering. There is an interruption in the chain of emails between 4:00 p.m. and 7:30 p.m., during which time AB met up with her friend Gabriella for pre-planned pedicures. Then she went out for dinner with Gabriella, her husband, and another couple.

[90] AB testified that she told Gabriella "a little bit" about what happened and Gabriella urged her to report it, which she refused to do. Gabriella also told her she should at least go to the hospital to get checked out, which AB also refused to do. However, she did go with Gabriella to a drugstore and purchased "Plan B" (a pill taken after unplanned sexual contact to avoid pregnancy). AB said that during dinner, she felt "uncomfortable" in the pelvic area and excused herself a number of times to go to the washroom. On one such visit, she texted her friend TC, who then phoned her back. TC is also a parking enforcement officer and AB said she thought she would be more understanding of her situation at work. At TC's urging, AB agreed to go to the hospital to be checked out and said she would meet TC at North York General.

[91] TC was called as a witness at trial, but Gabriella was not. AB confirmed on cross-examination that she told TC that she remembered being at the Brass Rail, but then didn't remember anything else until she woke up in the hotel room, naked, with the three men and that she was bruised. She told her that she had been sexually assaulted and that she remembered one of the men saying, "Guys, stop, she's completely out."

[92] After this text exchange, TC told AB to take a photograph of the bruise. However, AB did not do so. No bruise was noted in the course of two medical examinations done on January 19 and 20. AB explained at trial that the bruise was on her forehead and was very small.

**(6) Hospital Attendances and Reporting to Police**

[93] AB and her friend TC arrived at North York General just after midnight on the Saturday night. It would appear that she did not initially tell anyone that she had been sexually assaulted or that she believed she had been drugged. She reported to the triage nurse at 1:34 a.m. that she was experiencing burning upon urination, which she believed was as a result of intercourse. AB testified that the triage nurse asked her some questions about the sexual intercourse, but that she told the nurse she did not know because she had been unconscious. For whatever reason, this was not flagged as a sexual assault until much later. Hours passed before she was seen. An assessment was done by a nurse at 4:18 a.m., who noted that AB said she had been at a party the night before and “did not recall much of it, only remembers flashes, woke up at 0350, left hotel, saw multiple men.” The nurse also recorded that AB knew the men involved, did not want to report it to the police, and only wanted to be checked out for sexually transmitted diseases. AB accepted at trial that this was an accurate summary of what she told the nurse. It is also an agreed fact that the nurse noted “no acute distress,” and that she recorded a report of “soreness to the groin,” but no bleeding and no vaginal discharge. AB was then seen by an ER doctor, Dr. Tepper, at 4:35 a.m. It is an agreed fact that Dr. Tepper did not record any report of anal or vaginal discomfort, bruising, or symptoms of drugging, and would have recorded them if they had been made. Dr. Tepper also noted that AB told him that she had been raped by three men, that she had been drinking and that she thought she had also been drugged, but that she did not want to report this to the police because she feared repercussions. AB acknowledged on cross-examination that this reference to being drugged was the first time she reported that suspicion to anyone at the hospital. AB received no medical treatment at North York General. Given her report of sexual assault, AB was referred to the Scarborough Grace Hospital, which has a unit with special expertise in such matters.

[94] AB, again accompanied by her friend, arrived at the Scarborough Grace at 6:05 a.m. It was now Sunday morning, January 18. A sexual assault nurse was called in and she examined AB at approximately 8:45 a.m. AB told the nurse that she would not be reporting the assault to the police. She described the nurse as being “upset” and “annoyed” and said that she did the “bare basics examination” and then provided her with medication to protect against sexually transmitted diseases and HIV. According to the notes of the nurse conducting the examination, which AB accepted as an accurate summary, AB reported that: she did not know how she got to the hotel; she had been orally and vaginally penetrated; she could hear conversation between her three assailants and physical sensations on and off; she was unable to move her body; when she woke up at 3:30 a.m., the three assailants were asleep; and, she then left in a taxi. The nurse also checked off a box of the medical form indicating that the complainant reported a loss of consciousness.

[95] AB’s cell phone records indicate that at 7:48 a.m., she did an internet search on her cell phone and looked at a website providing details about the two most common “sexual assault drugs” – Rohypnol and GHB. On cross-examination, defence counsel suggested to AB that the purpose of this research was to find out the symptoms exhibited by someone who had been given one of these drugs, so that she could report those symptoms to the nurse. AB denied this. She testified that she was worried about the lapse in time and was checking to see how long these drugs would stay in a person’s system. She said she only did one search and she believed it was

when she was at the North York General. Based on the timing, however, the search would have been done after arrival at the Scarborough Grace, but before examination by the nurse.

[96] Later on Sunday, January 18, AB contacted her friend DA, who is also a parking enforcement officer. He came to her home to check up on her. She testified, and DA confirmed in his evidence at trial, that she was very upset and crying. In her presence, he contacted a crisis centre that provides counselling through their employee assistance plan. However, he was advised that AB would have to contact them directly, which she did after he left. AB attended for crisis counselling on Monday, January 19. As a result of the information she received, she again contacted the Sexual Assault Centre at the Scarborough Grace and complained that a full sexual assault evidence kit had not been done. She was advised to return, which she did. On this examination, samples and swabs were taken, which were later obtained by police and sent for forensic analysis. After a full examination of AB's body, the nurse doing that examination noted no injuries, bruising, or tenderness in any areas of the complainant's body with the exception of some reddening at the opening of the rectum (which she thought could be caused by constipation and straining) and an excoriation that looked like a scrape at the opening of the rectum.

[97] AB was scheduled to be at work on Thursday, January 22. She called in sick that day, and for the following three days, those being all the sick days she had. On Monday, January 26, she first attended traffic court and then reported for work at the station at about 2:00 p.m., for a shift that started at 2:30 p.m. She testified that when she attempted to change into her uniform, she felt claustrophobic and sick so she went to a supervisor and said that she could not work. She then spoke to the male shift supervisor who asked what was wrong. She said that by then, she was hyperventilating and crying. He agreed she should go home. The female area supervisor came into the change room to speak to her. AB testified that by then, she had collapsed on the ground crying and her supervisor was "able to get out of [her] that [she] had been raped by service members." Ultimately, police were called.

[98] AB gave an abbreviated statement on the evening of January 26, 2015, accompanied officers to her apartment, turned over items of clothing and a necklace she had been wearing on the night of January 16/17, and then gave a more detailed formal statement on January 27, 2015.

## **E. THE TESTIMONY OF THE DEFENDANT LESLIE NYZNIK**

### **(1) The Planning and Pre-Party**

[99] Leslie Nyznik chose to testify in his own defence. He was one of the organizers of the Rookie Buy Night and he was the one who booked the hotel room as well as the dinner and drinks venue. Mr. Nyznik testified that he barely knew AB before the night of the party. He had been introduced to her in December 2014 by another parking enforcement officer (AC) and had run into her a few times when he and his partner Mr. Kara were on the road. He was aware that she was friends with Mr. Kara and that he had invited her to the Rookie Buy Night. Mr. Nyznik said that a few days before the party, he and Mr. Kara were in their cruiser in a parking lot on Shuter St. writing up their notes, as it was often their habit to do, when AB stopped by to chat. He said she asked Mr. Kara what he was going to wear to the party and he said he was going to

wear a shirt. According to Mr. Nyznik, AB then volunteered that she was going to wear a “really short skirt” for “easy access.”

[100] On the day of the party, Mr. Nyznik and Mr. Kara arranged to finish their shift by 2:00 p.m. so that they could go to the hotel and set up for the party. Mr. Nyznik brought about 30 sampler-size bottles of liquor and some mix. He and Mr. Kara had checked into the hotel at about noon and then returned shortly after 2:00 p.m. to set up. Other officers arrived at about 5:00 p.m. and they all left for CCs at about 5:45 p.m. Those times are confirmed by the hotel records and video footage. Mr. Nyznik said that in the hotel room he had a shot of Jager and three drinks of vodka mixed with Red Bull, for a total of four ounces of liquor.

## **(2) The First Two Bars: CCs and Pravda**

[101] Mr. Nyznik said that at CCs he was just chatting with people, mainly Mr. Mills and Mr. Radford. He had two beers and two mixed drinks while he was there. He said dinner was not served until about 8:00 p.m. When the complainant arrived, Mr. Nyznik was standing with a group that included Mr. Radford. He said that Mr. Radford asked who she was and what she was doing there, as the event was supposed to be only for members of the platoon. He told Mr. Radford that AB had been invited by Mr. Kara. AB approached them and Mr. Nyznik introduced her to Mr. Radford. He testified that he continued his conversation with Mr. Radford and Mr. Mills, during which time AB said nothing but was staring at him, smiling, and tilting her head. Just before 9:00 p.m., Mr. Kara said he was going outside for a cigarette and AB went out with him, even though she does not smoke. Shortly after that, the group decided to move on to Pravda. Mr. Nyznik went outside to tell Mr. Kara. He said that AB was with Mr. Kara, wearing no coat and shivering in the cold. It was 12 degrees below zero.

[102] The group walked to the Pravda Vodka Bar, where they were greeted by the manager, Ashley Kerrigan. Mr. Nyznik had previously dated Ms. Kerrigan and said they still remained friends. She was aware the officers were coming and had set up a bottle of vodka, various mixes, and some food for them on the second floor, all complimentary. Mr. Nyznik agreed on cross-examination that the bottle of vodka alone was priced on the menu at \$750.00. In addition, Ms. Kerrigan took Mr. Nyznik and Mr. Radford to a separate vodka refrigerator and poured each of them a shot of an even more expensive vodka. Mr. Nyznik said he spent most of his time at Pravda on the main floor chatting with Ms. Kerrigan as she was tending the bar there. Mr. Nyznik agreed on cross-examination that he had been trying to persuade Ms. Kerrigan to go back to the hotel with him because he wanted to have sex with her, but that she refused.

[103] Mr. Nyznik was aware when they were at Pravda that Mr. Kara was quite intoxicated, but he did not see him leave. He said that towards 10:00 p.m., he was coming up from the washroom in the basement and about to go up to the second floor when he was approached by AB. He testified that she hooked her arm through his and told him that Mr. Kara had gone back to the hotel. He reported that she then told him, “Sameer [Mr. Kara] was going to be my babysitter and now you’re going to be my babysitter,” to which he replied, “OK, whatever.” He testified that he found this behaviour “odd” because he “barely knew” AB. He did concede, however, that she probably knew him better than the other men who were there. Mr. Nyznik denied having any further conversation with AB. He left and went upstairs. He said that AB

was being friendly and flirtatious with the guys and seemed to be “very happy.” He had seen her with a drink in her hand, but did not believe her to be intoxicated.

[104] Not long after this conversation with AB, Mr. Tissawak arrived and told Mr. Nyznik that Mr. Kara was very sick and that he had taken him back to the hotel. Mr. Tissawak told him that Mr. Kara threw up all over the hotel lobby and that he had trouble getting a cab to take them because Mr. Kara was so drunk. He said that he had to basically prop him up.

### **(3) The Brass Rail**

[105] Mr. Nyznik said that at about 10:30 p.m., he told Mr. Radford and some of the others that he was going to the Brass Rail if anyone wanted to join him there. He denied inviting AB to go along, stating that “it was a strip club and [he] barely knew her.” The group headed outside. A couple of the guys said they would meet them at the Brass Rail. Mr. Nyznik suggested to Mr. Radford and Mr. Tissawak that he wanted to stop in at Switch just to say hello to a couple of people there that he knew. They headed out on foot. He said he was surprised to see AB coming along with them, but denied having a conversation with her about it. The staff at Switch invited them inside and offered them a drink, even though the bar was not open yet. He said the management there knew him from encounters with him as a police officer when there had been fights in the area. They declined the drinks and headed in the direction of the Brass Rail, getting into a cab at approximately King and Church Streets.

[106] Mr. Nyznik testified that: Mr. Radford sat in the front passenger seat; he sat behind Mr. Radford; Mr. Tissawak sat behind the driver; and AB sat in the middle of the backseat. He said that in the taxi on the way to the Brass Rail, AB said that it had “been a while since she had good sex.” At that point, Mr. Radford turned away and started talking to the cab driver, causing AB to comment that he should have been talking to them rather than to the cab driver. Mr. Nyznik testified that as soon as they entered the Brass Rail, Mr. Radford said that he needed to use the washroom. Because Mr. Nyznik needed to use it as well, he asked Mr. Tissawak to find them a table. He then followed Mr. Radford into the washroom. This timing is confirmed by the Brass Rail video footage, which shows Mr. Radford entering the area outside the washroom at 10:56:31 and Mr. Nyznik entering at 10:56:40. They spoke briefly in the washroom lobby area and then went inside the washroom. Mr. Radford came back into the washroom lobby area at 10:57:26, with Mr. Nyznik following at 10:58:28. Mr. Nyznik testified that Mr. Radford then said he was leaving, giving as an excuse that the drinks were too expensive. After Mr. Radford left, Mr. Nyznik can be seen having a brief conversation with a scantily clad woman. He said she was a stripper<sup>14</sup> and had been asking him if he wanted a lap dance in a private room and that he told her “not right now, maybe later.”

[107] According to Mr. Nyznik, he then went to the table where AB and Mr. Tissawak were sitting. The waitress had just arrived and asked what he wanted to drink and he ordered a glass of water. He said that he did not leave the table again until just before they all left, which was

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<sup>14</sup> Throughout these reasons I have referred to certain employees at the Brass Rail as being a “waitress,” “stripper,” or “hooker.” I use these terms because they are the words used by the witnesses.



close to midnight. The waitress returned with their drinks, and when Mr. Tissawak attempted to pay her, she told him the first round was on the house. Shortly afterwards, Mr. Mills and Mr. Cabero arrived, and they also ordered drinks from the waitress.

[108] There was general small talk at the table. Mr. Nyznik testified that he was sitting across from AB and commented to her that “girls” don’t usually come to strip clubs. He said that AB responded that she did not mind being there and that she appreciates a “girl’s naked body.” She then volunteered that if Mr. Nyznik wanted to bring a girl back to the hotel, she would have no objections. Mr. Nyznik testified that he did not reply to this, but that he was surprised because there had been no invitation or suggestion that AB would be coming back to the hotel room.

[109] Mr. Nyznik then described a bizarre conversation that occurred at the table. He said that the stripper he had spoken to shortly before came up to the table and asked what they did and where they were from. For some wholly inexplicable reason, Mr. Nyznik told her that they were from Miami and that they were with an adult film production crew in Toronto to make a movie. The stripper asked if they were from Vivid, and they told her they were. Mr. Nyznik was familiar with Vivid being a porn production company based out of Miami. He said that Mr. Mills and Mr. Cabero played along with this ruse, lying about various roles they played in this fictitious film crew. They also suggested to the stripper that perhaps she could come back to their hotel for a “private audition.” Mr. Nyznik said he then turned to AB and said, “Maybe you would be so kind as to film it, so that we can show it to Sameer [Mr. Kara] afterwards.” He said that AB responded, “Why do I have to videotape it, why can’t I join in?” At some point after that, Mr. Nyznik claimed that AB leaned in and said to him that she loved “giving blow jobs” and that she was the best. He said he asked her how good she was on a scale of 1 to 10, and she said she would usually be a 10 out of 10, but that night she had been drinking and so would only be a 9.5 out of 10. He then testified that she told him what she really wanted was for him and Josh to take her back to the hotel and “spit roast” or “DP” her.<sup>15</sup> She purportedly added one condition – that this had to be done over Mr. Kara while he was passed out. Mr. Nyznik said he was surprised to hear her say that, but that as he did not know how she normally spoke, he did not take it seriously and just laughed. However, he said he repeated to Mr. Cabero what AB had just said to him, while she just sat there grinning at them.

[110] Mr. Nyznik testified that shortly before midnight, he announced to the table that his night was done and that he was going back to the hotel. Mr. Cabero said that he was leaving as well and the two of them walked out. They both went to the washroom. The Brass Rail video shows Messrs. Nyznik and Cabero entering the washroom area at 11:49:51 and a stripper can be seen hovering nearby. They both go into the washroom, with Mr. Nyznik exiting at 11:51:35 and Mr. Cabero right behind him at 11:51:46. Mr. Nyznik said that on the way out, as they passed the bar, they ran into the same stripper they had spoken to before and told her they were going back to the Westin Harbour Castle and might call her for a private audition. She gave him her phone number but said that he should not call until after 2:00 a.m. as she was working until then. He said they then went back to the table and told Messrs. Mills and Tissawak that they had the hooker’s number and might call her to come for a private audition at the hotel room. At that

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<sup>15</sup> These are slang references to group sex involving one female and two males.

point, Mr. Tissawak said he was going home, Mr. Mills said he was going back to Pravda, and AB said nothing.

[111] Mr. Nyznik said that he then left, with Mr. Cabero right behind him. He said he was unaware that AB was following them out. He said he had no expectation as to where AB was going from there. Outside, he and Mr. Cabero walked a short distance south on Yonge St. and hailed a cab. He said he got into the backseat of the cab first and slid across to the seat behind the driver and that as Mr. Cabero was holding the door, AB suddenly jumped into the cab and slid across to the middle. He said that he asked, "Where do you think you're going?" and AB replied that she was just going back to check on Mr. Kara and placed her left hand on his right thigh. Mr. Cabero then got into the cab and they drove to the hotel.

[112] According to Mr. Nyznik, AB was behaving completely normally in the cab. She did not appear to have any vision problems or any difficulty following the conversation. She did not mention feeling ill, or having a headache, or any other complaint. He said she "didn't even seem drunk," and that she was walking fine and talking without slurring her words. He maintained that if he had seen anything of this nature, he would have sent her home in the cab after they reached the hotel.

#### **(4) The Events at the Hotel**

[113] At the hotel, AB got out of the cab unassisted and entered the lobby through the revolving doors. Mr. Nyznik testified that he unlocked the hotel room door and AB entered, removed her coat, and placed her coat and purse on the desk. He said there were two queen-sized beds in the room and lots of ambient light from outside (because the curtains were open) and from the bathroom (because the door was open and the light had been left on). He said that AB got onto the bed in which Mr. Kara was sleeping (the closest to the bathroom) and crawled over him on all fours, squeezing him, rubbing his arms and chest, and telling him to wake up, all to no avail. Then she went into the washroom. While she was in the washroom, Mr. Nyznik walked between the two beds and was standing near the head of the bed, checking on Mr. Kara. When AB came out of the washroom, Mr. Cabero went in. Mr. Nyznik said AB then lay down on the bed on her right side, with her back to Mr. Kara, reached out, undid his pants, took out his penis, and "proceeded to give [him] oral sex." While she was doing this, she was rubbing the unconscious Mr. Kara's stomach and chest with her left hand.

[114] According to Mr. Nyznik, the next thing that happened was Mr. Cabero came out of the washroom, saw what was happening and said, "Oh, looks like you are having a party. Can I join you?" and AB answered in the affirmative. He said that Mr. Cabero then took the same position he had been in and he went to the foot of the bed while AB started performing oral sex on Mr. Cabero, again while simultaneously rubbing Mr. Kara (who was still unconscious) near the groin and abdomen area with her left hand. Mr. Nyznik testified that AB then turned onto her back, arched her back and pulled her pants down, with assistance from Mr. Cabero in removing her pants and boots. He said that while Mr. Cabero was doing that, AB asked Mr. Nyznik, "Well are you going to fuck me?" and he said "No." He said he then went back to the head of the bed and AB "grabbed" him and "placed [him] in her mouth again." While AB was doing this, Mr. Cabero asked her if he could fuck her and she took Mr. Nyznik's penis out of her mouth long

enough to say "Sure." Mr. Nyznik said he went over to his overnight bag, which was on the other bed beside him, and gave Mr. Cabero a condom. He then returned to his previous position at the top of the bed and continued to receive oral sex, this now being the third time. According to Mr. Nyznik, what then transpired was AB performing oral sex on him, having vaginal intercourse in the missionary position with Mr. Cabero, and continuing to rub Mr. Kara with her left hand. He said this went on for about five minutes until Mr. Kara woke up and said, "Fuck off guys, I'm tired." Everybody then stopped. AB stayed in bed with Mr. Kara, lying on her left side facing Mr. Kara. Mr. Nyznik and Mr. Cabero got into the other bed.

[115] Mr. Nyznik testified that he heard Mr. Kara say, "What are you doing in my bed?" After some period of time, which he could not quantify, he heard a commotion and looked over to the next bed. He said Mr. Kara was on his back and AB was on all fours over him and performing oral sex on him. Mr. Nyznik watched. He said AB then climbed on top of Mr. Kara and was having intercourse with him. Mr. Nyznik continued to watch. He said he saw Mr. Kara's hands go around AB's buttocks and that he rolled her onto her back and began having intercourse with her in the missionary position. Mr. Nyznik continued to watch. He said that AB saw him watching and beckoned him over to the bed with her hand, smiling at him, and then proceeded to give him oral sex again (this being the fourth time). Throughout this encounter between Mr. Kara and AB, Mr. Nyznik claims to have heard Mr. Kara ask AB twice "Are you OK with this?" and each time she replied, "Yeah, why wouldn't I be."

[116] Mr. Nyznik testified that just as he was about to ejaculate he asked AB where she wanted him to come and she said not in her mouth, so he ejaculated onto her upper chest area. She asked him to wipe her off, so he went into the washroom, grabbed a small towel and wiped her off. She said, "Thank you."

[117] Throughout these events, and notwithstanding the four separate instances in which Mr. Nyznik alleged AB initiated oral sex, he maintained that he never once touched AB. He denied ever placing his hands on her head, hair, or anywhere else. He insisted that the only time he touched her at all was to wipe his ejaculate off her chest, as she requested him to do.

[118] After all of this sexual activity, Mr. Nyznik said he had a conversation with Mr. Cabero about whether they should still call the stripper and they decided against it. He said AB asked if she could stay the night and he told her she could. They all went to bed and he fell asleep between 1:00 and 1:30 a.m. He said that when he woke up in the morning, she was gone. He did not see or hear her leave.

[119] Throughout his evidence, Mr. Nyznik described AB as a willing participant in all sexual contact and as the initiator of much of it. He said she was alert and coherent throughout, physically coordinated, and able to speak properly. He saw no signs that she was unwell and she never mentioned any symptoms. He knew AB had been drinking, but did not believe her to be drunk.

### **(5) Subsequent Events**

[120] Shortly after midnight, Mr. Tissawak sent an email to Mr. Nyznik thanking him for organizing the rookie night. Mr. Nyznik replied at 8:45 a.m., "No problem buddy glad you had a good night." Mr. Tissawak responded, "Did you do [your] audition?" Mr. Nyznik then replied. "We didn't. We all passed out at 130. I missed it."

[121] Later that same morning, he had a similar message from Mr. Mills asking "How was the audition." Mr. Nyznik replied, "A no go. We passed out by 130."

[122] Mr. Nyznik had no contact with AB after the events in the hotel. He denied having any concerns about whether word would leak out about what happened with AB in the hotel room. He scoffed at the suggestion by Crown counsel that he believed AB would say nothing for fear of being black-listed by fellow officers. He said that simply would not happen.

### **E. ANALYSIS**

#### **(1) I Do Not Necessarily Believe Mr. Nyznik**

[123] The first step in the typical *W.D.* analysis is to consider whether or not I believe the evidence of Mr. Nyznik. Certainly, if I believe his evidence as to AB's role in that hotel room, he is not guilty of sexual assault. Mr. Perlmutter, for the Crown, submits that I should find Mr. Nyznik to have been untruthful in his evidence. He describes Mr. Nyznik's evidence as being "scripted" and missing in details except for those aspects that had been "rehearsed." He noted, in particular, some of the dialogue Mr. Nyznik described as reading like the script of a bad movie. He referred to other aspects of his testimony as being implausible.

[124] I agree with much of the Crown's submissions. However, making a determination that someone has lied under oath is not an easy task. There are certainly aspects of Mr. Nyznik's testimony that I did not find convincing. I agree that his evidence appeared to be scripted or rehearsed. On the other hand, I do not know how Mr. Nyznik normally converses. I would expect that a person in his position, charged with an offence such as this, would have gone over and over his testimony in his own mind prior to entering the witness box, and likely with his counsel as well. That may be a complete explanation for the stilted or somewhat scripted way in which he presented his evidence.

[125] I did not find the absence of memory of some of the details (such as which superior officer gave him permission to leave early or who drove them to the hotel when they checked in) to be a significant factor. There were very few details Mr. Nyznik did not recall, and for the most part, his evidence was completely consistent with objective evidence such as video tapes and subsequent text messages, as well as with other witnesses. However, these other details are largely irrelevant. Regardless of what happened prior to arriving at the hotel, the critical issue is what happened in the room.

[126] More concerning is the plausibility of some of Mr. Nyznik's evidence about what happened inside the hotel room. He described AB almost as the aggressor, simply pulling down his zipper and taking his penis into her mouth without any assistance from him and with no prior

discussion whatsoever, all while she was simultaneously sexually caressing the unconscious body of Mr. Kara. He described four separate incidents of oral sex in which he claimed AB was performing fellatio on him, sometimes while having sexual contact with one or both of the others, all without him once touching any part of her anatomy (except for wiping off her chest with a towel at her request and with her expressed gratitude). I find that unlikely. Mr. Nyznik was also careful to provide evidence about each separate variation of sexual contact either being initiated by AB or the subject of a specific and explicit spoken request from one of the men and spoken consent by AB – also unlikely. There was no fluidity, nothing seemed to flow naturally, and even the language was stilted (*e.g.*, Mr. Cabero, “Oh, looks like you’re having a party. Can I join you?”) Some of this simply did not ring true. Further, his description of how the group sex was carried out, particularly with the complainant purportedly servicing all three of them at once without Mr. Nyznik as much as touching her to provide assistance, seems improbable. As the Crown pointed out, AB would have to be some kind of contortionist to accomplish all of that at once.

[127] Mr. Nyznik was also less than forthright in some of his evidence. For example, when the Crown was trying to make the point that AB was a parking enforcement officer, but aspired to become a full police officer, Mr. Nyznik refused to agree that there was any hierarchy between police officers and parking enforcement officers. However, later in his evidence, he said that he knew of some police officers who “dropped down” to parking enforcement, clearly a reference to his belief that police officers are higher on the chain. Similarly, he refused to acknowledge the possibility that there would ever be any career repercussions or “blacklisting” if a woman within the force reported she had been sexually assaulted by police officers. I find it hard to accept this as an honestly held belief.

[128] On the other hand, Mr. Nyznik freely acknowledged many things that were not to his credit: *e.g.* the amount of drinking that was going on; the extent of the free food and drinks and privileged treatment provided by the bars they attended; his familiarity with the Brass Rail and its staff, showing him to be a frequent customer; the ease with which he (and the others) lied to the stripper at the Brass Rail about being a pornographic movie crew; his plan to hire a prostitute for group sex at the hotel later; and the shocking insensitivity and cruelty (regardless of whether the sex with AB was consensual or not) of finishing with the complainant and then asking the other two men if they should still call the “hooker” to come over. Perhaps these disclosures were inevitable in the course of the evidence, but at least Mr. Nyznik was frank in making those admissions.

[129] To summarize, I do not find Mr. Nyznik’s version of the events to be compelling and I am not able to say I necessarily believe him. However, neither am I in a position to say that I reject his evidence as untruthful. I simply do not know whether or not he is telling the truth about the critical issue – the consent of the complainant to the acts he described.

## **(2) No Reasonable Doubt Arising from Defence Evidence**

[130] The only defence witness called, apart from Mr. Nyznik, was Mr. Barry Radford. I found him to be a reliable and truthful witness. He was quite obviously not keen to be testifying in this case, and displayed no bias for one side or the other. He clearly, and quite understandably, did

not approve of the conduct of many of the officers who were there that night. Nevertheless, he was called as a defence witness and he cooperated fully. He had no particular allegiance to either side. Mr. Radford has been with the Toronto Police Service since September 1988, nearly 30 years of service. Within the TPS staff development program, he had been a direct supervisor of Mr. Nyznik and Mr. Kara, each for six months, and was about to start a six-month period of supervising Mr. Cabero. However, he was not friends with any of the defendants, had no social interaction with them outside of work, and has had no contact with them since January 2015. By the same token, I detected no element of animosity towards the complainant. I consider Mr. Radford to be a wholly impartial witness who was trying his best to give an honest account of the events he observed.

[131] Mr. Radford was chatting with Mr. Nyznik at CCs when AB arrived. He asked Mr. Nyznik who she was and was told that she was a parking enforcement officer. He noticed that she always seemed to be looking at Mr. Nyznik from wherever she was. He described this as just his personal opinion or observation, but it was nevertheless something that he noticed. He said that he saw no physical contact between AB and Mr. Nyznik, but that Mr. Nyznik would talk to her and then move away, and she would always come back.

[132] While at CCs, everyone decided they would walk across to Pravda. Mr. Radford said he did not see AB at Pravda. He was aware that Mr. Kara had been taken back to the hotel by Mr. Tissawak and that he had thrown up in the lobby.

[133] Mr. Radford did not recall stopping at the bar called Switch, but did recall the cab ride to the Brass Rail. He said he was on the sidewalk with a group of people, including AB. He said that he initially intended to get into the backseat of the cab, but when AB got into the backseat, he went around the front of the cab and got into the front passenger seat. In the backseat were Mr. Nyznik, AB, and Mr. Tissawak.

[134] Mr. Radford testified, "Call me old-fashioned but I didn't feel comfortable going to a strip club with a woman I didn't know." He said he wanted nothing to do with the conversation that was going on in the backseat and did not want to be a witness to anything. He said there was a lot of laughter and sexual innuendo from the back seat. There were comments about sex, about going to the Brass Rail, and about AB being willing to go to the Brass Rail. Mr. Radford stated his opinion (indeed, somewhat prophetically) that this was "a recipe for disaster." He deliberately tuned this out by talking to the driver about where he was from, how long he had been driving a cab, whether he liked it, and things of that nature. When the cab got to the Brass Rail, Mr. Radford went straight inside, up the stairs, and to the washroom. He had a conversation there with Mr. Nyznik and told him he was leaving, giving as an excuse that the beer was too expensive. He said Mr. Nyznik told him he would be leaving soon as well.

[135] Mr. Radford testified that he considered all three of the people in the backseat to be sober, as opposed to inebriated beyond control. They were able to carry on a fluid conversation without slurring their words. He had a lengthy conversation with Mr. Cabero prior to going to the Brass Rail about what to expect during his upcoming six-month rotation in the Criminal Investigation Bureau and said he found him to be sober and able to carry on normal conversation. Mr. Radford also had a lengthy conversation with Mr. Kara at CCs. He said Mr.

Kara was drunk and, with the benefit of “liquid courage,” decided to air his grievances about uniformed officers versus detectives. Mr. Radford considered this inappropriate conduct, and agreed that Mr. Kara was being discourteous and unprofessional. However, rather than create even more hard feelings, he simply allowed Mr. Kara to get things off his chest without saying anything to him.

[136] Mr. Radford was cross-examined about his failure to intervene at the Brass Rail if he thought things were headed for disaster. He replied that he was not psychic and they were all adults. He was not comfortable with the way things were headed, and he made his own decision to leave. It was not for him, off-duty, to tell them what to do.

[137] I accept Mr. Radford’s evidence without hesitation. To some extent, it corroborates the testimony of Mr. Nyznik about events prior to the sexual activity in the hotel at the end of the night. Also to an extent, it undermines the reliability of the complainant’s evidence, particularly with respect to her conduct at CCs and in the cab on the way to the Brass Rail. I also note that the two officers who did not go back to the hotel both sent text messages to Mr. Nyznik the next morning asking how the audition went. I find this corroborates at least that detail of the conversation at the Brass Rail testified to by Mr. Nyznik. However, this corroborative evidence adds nothing to the analysis of whether or not AB consented to the sexual activity at the hotel and it does not contribute to whether I have a reasonable doubt about that issue.

[138] To be clear, it does not matter that the complainant appeared to be interested in Mr. Nyznik. It does not matter that she was flirting, or kissing Mr. Kara, or that she willingly agreed to accompany a group of her male workplace colleagues to a strip bar. It does not matter if she was exchanging sexual banter with the other two men in the back seat of the cab. It would not even matter if she proposed going back to the hotel to have group sex (although I hasten to add that I am not finding as a fact that she made such a proposition). In terms of consent, all that matters is what happened at the time of the activity in question. Did the complainant consent? Or was she too incapacitated to consent? Whatever the complainant said or did earlier that night does not mean she consented later. However, what she said and did earlier may have relevance to the reliability and credibility of her evidence at trial. For example, if she does not have a reliable memory for important things earlier, can I safely say that her memory of things later is reliable? Or, if I find she was not truthful about details that happened earlier, does that affect my assessment of her credibility on the more crucial events later?

[139] As I have stated above, the defence evidence does not cause me to acquit. I have struggled with whether I nevertheless have a reasonable doubt arising from the defence evidence. I have concluded that I do not. Really, it is the difficulties with the complainant’s evidence that causes me to have a reasonable doubt, particularly when seen within the context of the whole of the evidence, and I therefore turn to that third branch of the *W.D.* analysis.

**(3) Difficulties with the Complainant's Evidence**

**(i) Specific Memories That Are Demonstrably Wrong**

[140] AB had a specific memory of her route home on the afternoon of January 16. As part of that, she recalled stopping on her way home to talk to Mr. Kara who was in uniform and parked in his cruiser on Shuter Street. Based on when she had her job interview, that conversation with Mr. Kara would have been 2:00 p.m. or later. However, at 2:03 p.m. Mr. Kara was at the hotel already. That memory is clearly wrong.

[141] Even more troubling is AB's specific memory of walking to the Brass Rail with a group of six or seven of the guys, including Mr. Nyznik and Mr. Tissawak. This memory is also clearly wrong. I believe the evidence of Mr. Radford as to what happened in the cab. His evidence is substantially similar to that of Mr. Nyznik about there being sexual innuendo and laughing in the backseat. Mr. Radford deliberately talked to the driver instead of his colleagues in the backseat. Both Mr. Nyznik and Mr. Tissawak (who was a Crown witness) described the complainant laughing and complaining about Mr. Radford talking to the cab driver instead of to them. The video footage from the Brass Rail confirms that this group arrived by cab first, and the other two men who joined the group arrived ten minutes later. AB conceded on cross-examination that she must have taken a cab. However, even then, she maintained that she had a memory of walking there with the whole group. One thing is clear, however. She went to the Brass Rail in a cab. Her memory of walking is wrong.

[142] There are two possibilities: one is that AB has a memory of having walked to the Brass Rail and honestly believes it to be true; the other is that she initially lied about the cab ride in order to avoid the evidence about her sexual banter en route. Either is problematic. It does not matter if AB walked to the Brass Rail or took a cab, and it does not matter what she said while in the backseat. However, if she has a real memory of walking, and honestly believed it to be true, then she has reconstructed it after the fact and is convinced as to its accuracy. If she has reconstructed a false memory about walking to the Brass Rail, how do I know she has not done the same thing with respect to her conduct at the hotel afterwards? If she has lied about the cab ride to the Brass Rail, how do I trust that she has told the truth about what happened in the hotel room?

**(ii) Inconsistent Versions of Alcohol Consumed**

[143] AB told the police in her initial statement on January 26 that she had consumed seven alcoholic drinks at the Rookie Buy Night on January 16. She said the same thing in her more detailed statement on January 27. She also told the nurse doing the Sexual Assault Evidence Kit on January 19 that she had seven drinks (some tequila, some vodka). In her police interview, she was able to pinpoint specifically which drinks she had in which bar: one mixed drink obtained at the bar upon entering CCs; one shot of tequila when leaving CCs; one tequila shot upon entering Pravda; one cranberry juice and vodka obtained from the bar at Pravda; two shots of tequila at Pravda just before Mr. Kara became ill; and one cranberry juice and vodka delivered by the waitress at the Brass Rail. AB consistently told police, and testified at trial, that she had nothing alcoholic to drink that day prior to arriving at CCs.



[144] At trial, AB gave exactly the same evidence as before as to what she had to drink and where, except that she added one additional drink – a vodka and cranberry juice at Pravda, which she said she did not see poured but which was given to her by someone in the group from a table-service bottle of vodka.

[145] It is somewhat troubling that this information had not been disclosed earlier. AB had many opportunities to do so in her formal interviews and multiple interactions with the police and Crown prosecutors in the 29 months prior to trial. What is equally troubling is the potential explanations for this lapse. One possible and innocent explanation is that AB's memory failed her and she only remembered that additional drink just prior to giving her evidence. However, her evidence was not that she suddenly remembered the additional drink later, but rather that she was confused and tired at the time of her police interview. Another possible explanation is that she invented this additional drink, either to buttress the case for her being more intoxicated, or to provide an explanation for how she might have been drugged without her knowing it. It is interesting that this was the only drink for the entire night that was not actually poured by a bartender and, apart from the drink at the Brass Rail (a point to which I will return), the only drink that could have been tampered with.

[146] Whether AB did or did not have this additional drink at Pravda has almost no impact on her state of sobriety at the time of the alleged assault. That drink was consumed more than two hours before the alleged assault occurred. One additional drink would have had little impact on her blood alcohol level. Further, if a drug had been added to that drink, the impact would have been felt long before the first symptoms described by AB, which was in the cab after leaving the Brass Rail at about midnight. Therefore, whether AB had this drink is not so much the issue. However, the inconsistency between her prior evidence and evidence at trial is an additional factor affecting the overall assessment of her reliability and credibility as a witness.

[147] In addition to the slight discrepancy between what AB told the police and what she said at trial, there is a significant discrepancy between AB's trial and police statement versions and what AB told her friends about how much she had to drink. For example, she told both her friend AC and Mr. Tissawak that she had quite a bit to drink before she even got to CCs. She texted AC at 10:15 p.m. from Pravda, unsolicited, stating "Yo, I'm so drunk." Mr. Tissawak testified that at one point at Pravda, AB told him she was drunk. However, his own comment to her in a text message the next day was that she "looked buzzed but not drunk." AB's explanation was that she was lying to AC to back up her earlier lies and that she was exaggerating to Mr. Tissawak. She may have been telling the truth about her lying, but it is still a concern.

**(iii) Discrepancies Regarding the Drink at The Brass Rail**

[148] AB testified that everyone arrived at the Brass Rail at the same time. She said all five of them sat at a table and ordered drinks from the waitress, after which Mr. Nyznik went to the washroom. Quite simply, she is wrong. Her evidence on this issue is completely unreliable, inconsistent with the video footage of when people arrived at the bar, and inconsistent with the testimony of Mr. Radford, whose evidence I accept. Mr. Tissawak also testified that Mr. Nyznik went to the washroom immediately and that he and AB were initially the only ones at the table.

Mr. Nyznik then came out of the washroom and joined them. I accept the evidence of Mr. Nyznik on this issue, as it is largely corroborated by the video footage and by Mr. Radford. Mr. Nyznik was at the table when the drinks order was placed with the waitress, and stayed at the table until the end of the night when he was leaving the bar.

[149] It follows that AB was also wrong in her perception that Mr. Nyznik had a prior discussion with the waitress and was continuing it at the table when she came back with the drinks. The picture she painted was of the waitress taking their drink order, Mr. Nyznik leaving the table and having a discussion with the waitress, and then the waitress returning to the table with the drinks and picking up with Mr. Nyznik on their earlier discussion. AB then described the conversation with the waitress about them being an adult movie crew, a discussion in which she said all of the officers participated.

[150] I accept that a conversation of this general nature took place, as it is confirmed by Mr. Nyznik. However, I accept Mr. Nyznik's evidence that the conversation about making a pornographic movie was with the stripper he had met earlier in the area outside the washroom, not the waitress who took their drinks order. His interaction with the female employee outside the washroom is recorded on video. It is clear from all the video footage that waitresses and strippers were dressed differently. The woman Mr. Nyznik was chatting with was a stripper, not a waitress.

[151] AB testified that she believed she had been drugged. She also said that to medical staff she spoke to at the hospital the day after the alleged assault. AB conceded in cross-examination that the only possible drinks she had that could have been tampered with were: (1) the freely poured vodka at Pravda (which she had never revealed until her evidence at trial); or (2) the drink brought by the waitress at the Brass Rail. She further conceded that if a drug had been slipped into the initial vodka drink at Pravda, she would have been experiencing the effects far earlier, likely before she even got to the Brass Rail. This was supported by the expert evidence at trial. AB's testimony about Mr. Nyznik leaving the table after the drinks were ordered and then being familiar with the waitress when the drinks were delivered, as if continuing a conversation, is highly suggestive that this was his opportunity to have tampered with her drink. However, AB's recollection about this discussion being with a waitress is not correct. I am satisfied on the whole of the evidence that this discussion was with a "stripper."

[152] In her testimony, AB spoke with disgust about this conversation. She described it as "shocking" and said she was "flabbergasted." Yet, despite all of her pre-trial preparation meetings and formal witness statements in this matter, she never mentioned anything about this incident until her testimony at trial. Given that her "memory" isn't even accurate on this point, I can't help but wonder, as suggested by the defence, whether she chose not to disclose this conversation earlier because she herself was a participant in it, but later saw the utility of it as a means of demonstrating that Mr. Nyznik had access to her drink before she got it. It is, however, possible that she only recognized the possible significance of it later and innocently reconstructed a memory that was inaccurate in some material respects, but which she has come to believe as true. Either way, this is problematic.

**(iv) Testimony That Is Implausible**

[153] AB testified that when they left the Brass Rail, there was a discussion about going back to Pravda. She said that Mr. Tissawak indicated he was going home, that Mr. Mills said he was going directly to Pravda, and that Mr. Nyznik and Mr. Cabero proposed going back to the hotel to get Mr. Kara and take him back out drinking with them. AB knew firsthand how sick Mr. Kara was. He had refused the tequila shot she bought for him at Pravda because he felt ill. She then went outside with him and held him up on the sidewalk as he vomited. She knew that when they went back in and he had a glass of water, he felt ill again and went running for the washroom. She sent Mr. Tissawak in to check on him and saw Mr. Tissawak bringing Mr. Kara out, as he was unable to walk on his own. She knew that Mr. Tissawak took him back to the hotel because he was so incapacitated. It stretches credulity to suggest that now, a mere two hours later, it was remotely reasonable to wake this man up and take him back out drinking. Mr. Tissawak, who was present for this alleged discussion outside the Brass Rail, would never have gone along with such an idea. Mr. Tissawak had difficulty even getting a cab to take Mr. Kara to the hotel from Pravda because of the state he was in. Mr. Kara was so out of it that he threw up three more times in the lobby of the hotel. The video footage of Mr. Tissawak bringing Mr. Kara into the hotel tells the whole story. He could barely stand up. It is inconceivable that the plan was to go back and get Mr. Kara and bring him out on the town again. Why, for example, would they not simply call Mr. Kara to see if he wanted to, or was capable of, going out? Why go all the way back to the hotel to get him? If he was capable of going back out, could he not go out on his own and meet them at the bar? Why would three of them have to go back to the hotel to pick him up, particularly given that they were not even sure that he would want to go, or be able to even walk? In her evidence at trial, AB recognized the ridiculous nature of this plan, but nevertheless maintained that this was the joint plan they made. She said that, because of her level of intoxication, she was not making sensible decisions.

[154] I do not believe AB's evidence on this point. Her evidence is also contradicted by the testimony of Mr. Tissawak and the limited video footage available of the group leaving the Brass Rail. Mr. Tissawak was aware that Mr. Nyznik and Mr. Cabero were going back to the hotel, but denied hearing any discussion about AB going there as well. He testified that when they were on the sidewalk outside the Brass Rail and a taxi pulled over, Mr. Nyznik and Mr. Cabero moved toward the taxi, whereupon AB moved quickly forward and jumped into the car. He said he was surprised by this and that he had no understanding of why she would be getting into the cab. I find the evidence of Mr. Tissawak to be corroborative of Mr. Nyznik's testimony. Mr. Nyznik testified that he had no conversation at all with AB about continuing the night and that he and Mr. Cabero simply headed out to get a cab, having told the group they were leaving. The video footage of the front door of the Brass Rail shows Mr. Nyznik exiting and Mr. Cabero right behind him. Mr. Cabero seemed to have no understanding that AB was right behind him. He simply let the door close in her face and she pushed it back open. Mr. Nyznik said that he got in the cab first and moved over behind the driver and that Mr. Cabero was holding the door when AB rushed past him and jumped unexpectedly into the back seat. Mr. Nyznik asked her what she was doing and she said she wanted to check on Mr. Kara. It is not that Mr. Nyznik's story makes a lot of sense. However, it is supported by Mr. Tissawak's evidence, which I find to be reliable and credible, and is consistent with the video footage.

[155] AB testified that she was literally afraid for her life after the assault, pointing out that the three defendants “carry guns.” She agreed on cross-examination that the two officers who were investigating her complaint had been professional and courteous with her and that she had said nothing to them about such a fear. Her response was to point out that those two officers also carry guns. I have no difficulty understanding why the complainant could be fearful about many things. The possibility that the defendants, or the officers investigating her complaints, might come after her with guns is not one of them.

(v) Testimony Inconsistent with Video Footage and Text Messages

[156] As I have already discussed, much of AB’s testimony about how she got to the Brass Rail, the way things transpired there, and how she left is inconsistent with the video footage. I will not repeat that here.

[157] In her evidence at trial, AB gave a vivid description of how she was feeling in the cab on the way to the hotel. She described a “sudden intense headache” as soon as the cab started to move. She said her vision was impaired, “like tunnel vision,” almost like going through like a Star Trek warp field.” She also said she was unable to follow conversation and felt really unwell. Apart from that, she could recall nothing about the cab ride or anything that was said en route. The cab arrived at the hotel at 12:10 a.m. and the group entered the hotel room at 12:20 a.m. AB maintained she had no memory whatsoever of anything that happened during those ten minutes. However, shortly after entering the hotel room, she again reported problems with her vision, this time being unable to see at all. She said she was also unable to speak and could not move any of her limbs. However, for that whole period of time, she was not unconscious and has no reported memory blackout. She remembers what happened in the hotel room. However, she reported that she was physically incapacitated and unable to object physically or verbally.

[158] The symptoms described in the hotel room are not unlike, or are at least a plausible continuation of, the symptoms described in the cab. There is no video available for those portions of time for which AB has a memory. However, there is footage of her getting out of the cab, walking through the revolving doors into the hotel, walking into the elevator lobby, and waiting in the lobby for the elevator. That footage paints a completely different picture of AB’s condition. AB got out of the backseat of the cab completely unassisted. Both men just got out of the cab and left her sitting there, essentially ignoring her. She moved from the middle backseat of the cab to standing upright outside the cab without even holding on to the door for support. There was a brief wobble as she stood beside the cab, which is easily accounted for by the fact that she was wearing high-heeled boots on a cobblestone surface. However, she steadied herself by briefly touching the side of the cab. She then stood by, chatting with Mr. Nyznik while Mr. Cabero paid the cab driver. All three then entered the hotel through the revolving door. Neither of the men touched her at all. She walked completely unassisted and her gait appeared normal and steady. The same applies to her ability to walk as she entered the elevator lobby. She stood alone without any difficulty and was laughing and chatting with the two defendants in the lobby while waiting for the elevator. She did not appear to be in any pain or discomfort. She had no apparent difficulty moving her limbs or conversing. There did not appear to be any difficulty with her vision. In short, she appeared to be perfectly normal.

[159] There is a similar discrepancy between the way AB described she was feeling when leaving the hotel and what can be seen on the video footage. AB said she was confused and did not know where she was going. However, the video footage shows her walking steadily out of the elevator lobby and making an immediate left turn towards the front entrance. She testified that she turned left because that was the only way to go. That is not the case. In other video footage, people can be seen walking straight past the elevator lobby, obviously on their way to somewhere else to the right of the elevator lobby. Also, a diagram of the main floor of the hotel shows that there are things to the right of the elevator bank, certainly enough to make a person at least hesitate and look both ways. AB, however, walked out of the elevator and made an immediate left, heading for the front lobby as if she knew exactly where she was going. She did not appear to be in any great hurry, nor did she appear terrified, as she described. Again, she seemed to be walking and behaving normally. It is, of course, possible for a person to feel terrified without appearing to be so, particularly when trying to avoid drawing attention to oneself. Nevertheless, this is another detail where the objective evidence does not support the complainant's version of the event, even though it may not directly contradict it either.

[160] AB testified that she remembered almost nothing of the cab ride from the hotel to her home except that she was feeling ill and fighting to remain conscious. She also testified that she could recall the sensation of the cab stopping and also of throwing up, but could not identify where, or in what order, that occurred. However, at 3:43 a.m., while in the cab on the way home, she sent a text to her friend Richard Rhone stating, "R u back? Need ur help." She was therefore coherent enough not only to compose and send the text, but also to remember that Mr. Rhone was on vacation and might not be back yet. Again, this is surprising coordination for a person who is barely able to remain conscious. Also, the day after these events, AB texted two separate people that the cab had to pull over on the Don Valley Parkway so that she could throw up. When asked why she would send those texts if she did not remember what happened, she said that she was "still processing the entirety of the evening" and wrote it "without knowing" whether or not it was true.

[161] Given these various conflicts, it is hard to determine whether AB's testimony at trial about her condition at the time of her leaving the hotel is accurate.

[162] One of the things AB texted to AC on Saturday morning after she woke up was a reference to a person named Marcus, with whom she seemed to imply she was having a relationship. She texted the following at 10:39 a.m.:

I didn't tell Marcus I was going out. Now I'm going to have to explain the hangover and the bruise on my forehead. Lol I'm blaming you !!. Hahahaha.  
He's gonna be home in an hour or two. Fack!!  
I feel drugged. Lol.

[163] To this, AC replied as follows:

Lmfao  
Advil  
And gingerale

And mcdonalds  
Lol

[164] AB responded:

I'm doing all that...minus the mcdonalds...but I guess I could get some on my way to his place

[165] AB was cross-examined about who "Marcus" was and she testified that he was a friend, and then added, "It is actually DA." According to AB, and according to DA who testified at trial, AB was not in a relationship with DA. Furthermore, DA testified that nobody ever called him "Marcus," and he was only known by his given name "D." He testified that the first contact he had with AB that weekend was when she called him, very distraught, on the Sunday night and he went to her home on his way to work to check on her. That was at 10:30 p.m. on the Sunday. There was no plan that she would be going to his place on Saturday. As for the bruise, nobody ever saw it. AB testified that her friend TC told her to take a picture of the bruise, but that she did not do that. She also did not disclose it to any of the medical staff she saw on any of the occasions she was at the hospital, nor did any of those personnel notice it independently. There is also nothing in AB's narrative of what happened inside the hotel room that night that would explain a bruised forehead.

[166] In short, nothing AB wrote in this text exchange appears to be true. That is both perplexing and troubling.

**(vi) Testimony Contradicted by Toxicology Evidence**

[167] Betty Chow is a forensic scientist with the Centre of Forensic Sciences in Toronto. She is an expert in toxicology. There was no challenge from the defence as to Ms. Chow's expertise to provide opinion evidence as to the effect of alcohol and drugs on the functioning of the human body. The defence did challenge the admissibility of Ms. Chow's evidence with respect to the possible effects of various "date rape" drugs in relation to some of the symptoms reported by AB. I ruled that the evidence was admissible, for reasons that are delivered separately.<sup>16</sup>

[168] Ms. Chow's initial report with respect to the effect of alcohol was based on the assumption that AB was 5'9," weighed 200 pounds, and had consumed seven 1-ounce servings of alcohol between 9:30 p.m. and midnight. Based on those factors, she projected AB's blood alcohol concentration ("BAC") at midnight to have been 65-90 mg. of alcohol in 100 ml. of blood. By 4:00 a.m., the BAC would have been 0-50 mg. of alcohol per 100 ml. of blood.

[169] AB testified at trial that her weight at the time was between 190 and 200 pounds. I do not accept her evidence on that point. The weight she gave to the detective who inquired about it was 200 pounds, and that is the weight he provided to the toxicologist in order to obtain the expert opinion. That weight was obtained from AB close to the time in question when she would have had a better idea of her precise weight, and in circumstances where she was aware of the

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<sup>16</sup> R. v. Nyznik, 2017 ONSC 4338

need to be precise. Accordingly, I am taking the 200-pound weight as an accurate basis for making the calculations. However, I do note that the 10-pound weight difference would have had virtually no impact on the BAC and does not affect my ultimate conclusion in this case.

[170] AB also testified at trial that she had eight drinks, rather than the seven drinks she had previously disclosed. I am uncertain whether that is true. However, I have considered the expert evidence on the assumption that there were eight drinks rather than seven, and it has no impact on my conclusion. Ms. Chow's calculations are also based on the assumption that there was no alcohol in AB's system prior to attending CCs. Although AB told her friends that she had been drinking earlier, she said at trial that she had been lying about that. For the purposes of this exercise, I accept her evidence at trial that her first drink that day was shortly after she entered CCs.

[171] The start time has also changed. It was established in the evidence that AB arrived at the first bar at 8:45 p.m. and had her first drink at about that time, rather than at 9:30 p.m. as she had previously estimated. This would extend the period of time during which the alcohol would have been eliminated from her system and would have the effect of decreasing rather than increasing the BAC at the relevant times.

[172] Ms. Chow testified at trial that if the time AB started drinking was at 8:45 p.m., instead of 9:30 p.m., her BAC at midnight would have been between 50 and 80 mg., and at 4:00 a.m. would be between 0 and 40 mg. If one ounce of vodka is added to the total alcohol, the BAC ranges at midnight would increase by 15 mg (so between 65 and 95 mg.), but would still be between 0 and 40 mg by 4:00 a.m.

[173] These ranges are based on an elimination rate of 10 mg per hour, which is a conservative estimate. Ms. Chow testified that a 10 mg/hour elimination rate is "very rare" and that most people eliminate alcohol at 19 mg/hour. If the average elimination rate of 19 mg/hour is applied, the complainant's BAC at midnight would be 50 mg and would be down to 40 mg within half an hour. It is therefore likely that the concentration of alcohol in AB's system was lower than the 65-95 mg range suggested.

[174] Ms. Chow testified that a BAC of 65-95 mg at midnight was not consistent with the symptoms reported by AB. With that amount of alcohol in her system, AB would not be likely to have memory blackouts or to lose consciousness. Ms. Chow explained the difference between a loss of consciousness and a memory blackout. If unconscious, the person is literally passed out. No memory is formed because the mind is not consciously operating. Memory blackouts of chunks of time, either in large blocks or fragments, can be caused by alcohol. During the period of time that is blacked out of the person's memory, the person may have been walking and talking and been completely functional. They simply have no memory of it. However, these blackouts occur only at high BAC levels. In Ms. Chow's opinion, the BAC levels AB would have had at the crucial times "would not come close to" the level required to cause a memory blackout.

[175] Further, AB's reported inability to move her arms and legs and inability to speak are not symptoms that can be attributed to the effects of alcohol at all. In addition, nausea and vomiting

are more likely to occur close to the time of the drinking. A person who had ingested alcohol prior to midnight and had no vomiting close to then, would be unlikely to be vomiting violently at 3:30 a.m. and several hours after that.

[176] Ms. Chow testified that the symptoms described by AB could not be attributable to the consumption of alcohol alone. I accept that completely, and indeed, it was not really contradicted by any party at trial. The real issue here is whether the condition described by AB could have been caused by the ingestion of a drug.

[177] By the time samples were taken of AB's blood, there was no trace of any drug in her system. That is not surprising given the time that had elapsed after the drug would have been administered.

[178] Ms. Chow considered the common drugs found in these types of situations, such as GHB and Ketamine, both of which operate as central nervous system depressants (as does alcohol). The presence of such a drug, particularly when combined with alcohol, could account for some of these symptoms, including loss of memory and loss of consciousness. These drugs have a similar effect to alcohol resulting in increased sociability, drowsiness, varying degrees of consciousness, lack of balance, and slurred speech. Also, if there is a loss of consciousness after ingesting a high dosage of a drug like GHB, vomiting would be common upon regaining consciousness. A sudden onset of a severe headache is a common side effect. Ms. Chow pointed out that people under the influence of CNS depressants such as GHB, Ketamine, and alcohol sometimes describe their limbs as feeling heavy. However, CNS depressant drugs would not cause an inability to move or inability to speak. Ms. Chow postulated that these symptoms could be caused by muscle relaxants such as Robaxacet if taken in an amount far beyond a therapeutic dosage. I note that what AB described was a complete inability to move her limbs, and not merely feeling that her arms and legs were heavy.

[179] Ms. Chow testified that these kinds of drugs would start to take effect within 15 to 30 minutes of being ingested. The symptoms would intensify fairly rapidly until the maximum effect is reached, and then diminish until the effects have disappeared. She agreed that this would be along a steady continuum with an increase, a peak, and then a decrease. Depending on the dosage, the peak level of symptoms for GHB would be between 15 minutes to an hour, usually between 30 and 45 minutes, but this is variable depending on the dosage and the person's individual susceptibility. The effects of GHB can last up to four hours. For Ketamine, the most intense effects would be gone after one hour. With respect to all such drugs, if they were administered in a sufficient dosage to cause unconsciousness, there would be obvious signs of impairment prior to that, starting about 15 minutes after ingestion. Ms. Chow testified that symptoms of impairment from drugs do not start, and then stop, and then start up again. They move along a continuum. A person who has been given GHB can be awake and reacting to the environment but not forming memories, such that the person will have no memory later of having done those things. A patchy memory, losing chunks of time here and there over the course of a period of time, is more associated with alcohol. GHB and Ketamine are more likely to result in a complete memory loss of the whole block of time, depending on the dose, but there can be different effects on different individuals.



[180] On cross-examination, Ms. Chow was presented with a scenario that involved AB entering the hotel, removing her coat, and using the washroom without difficulty, but shortly after emerging being unable to see or move and having only auditory sensation. In her opinion, this is not consistent with a drug having been administered half an hour earlier.

[181] I conclude from this evidence that the symptoms described by AB are not consistent with the amount of alcohol she consumed. If she in fact suffered from those symptoms, she must have been given some type of drug without her knowledge. The symptoms she described in the cab after leaving the Brass Rail are consistent with a CNS depressant drug (possibly GHB or Ketamine) being put in her drink at the Brass Rail. However, those effects would continue to intensify as she was entering the hotel and going into the hotel room. AB professes no memory of getting out of the cab, entering the hotel, or taking the elevator. However, she recalls entering the hotel room, removing her coat, placing her coat and purse on a desk, and using the washroom without any difficulty and with no impairment of vision, ability to move, or ability to speak. She then reports the sudden onset of those very extreme symptoms along with a patchy memory and eventual unconsciousness.

[182] Ms. Chow was shown video footage of AB as she emerged from the cab, entered the hotel, and waited for the elevator. She was asked to express an opinion as to whether she was showing signs of impairment. Although there was no objection to this line of questioning at the time, my view is that this evidence is outside Ms. Chow's area of expertise as a toxicologist. It is true that a layperson can give opinion evidence as to another person's level of impairment. However, Ms. Chow was not present at the time and made no personal observations other than of the videotape. She is in no better position to make an assessment of the level of impairment based on viewing the video footage than I would be. I have therefore disregarded her evidence on this point.

[183] However, based on my own observations of AB on video, and taking into account the expert evidence as to the symptoms of impairment from CNS drugs and/or alcohol, my opinion is that AB was showing little, if any, impairment at the time she emerged from the cab. She was walking without assistance and able to converse normally.

[184] Any drug that was administered to AB could only have been at the Brass Rail and could therefore only have been given to her between 11:00 and midnight. If so, that could explain the symptoms in the cab. However, it does not explain her high level of functioning after the cab ride and when first entering the hotel room, nor does it explain the variety and intensity of symptoms she reported thereafter. Likewise, the drugs do not explain what she alleges to be a period of floating in and out of consciousness while in the cab after 3:30 a.m., given that she was also exhibiting a high level of functioning on the video footage of her exit from the hotel just before getting into the cab. Likewise, her getting home in the cab and entering her home unassisted, but then passing out on her bathroom floor fully-clothed until she woke up in a puddle of vomit several hours later, is also not consistent with the expert evidence as to how these drugs work. The effects of the drugs do not wax and wane and then wax again and then wane again and then wax again. They operate on a continuum.

[185] Thus, the symptoms described by AB are not consistent with impairment by alcohol, nor can they be explained by a possible administration of a drug such as GHB or Ketamine, even if combined with Robaxacet. That does not necessarily mean that AB was lying about these symptoms. It is possible she has an inaccurate or unreliable memory of her symptoms. It is also possible, particularly in light of earlier events, that she has reconstructed a memory of her own participation in the hotel room and believes it to be true. It is even possible that these symptoms did occur, for reasons we are unable to explain. The important point, however, is that science cannot explain or corroborate as plausible what AB has described about her condition in the hotel room.

#### **(4) Irrelevant Evidence and Things I Have Not Taken Into Account**

[186] In the course of a trial, it is not always apparent what will turn out to be relevant to final fact-finding and what will be irrelevant. Sometimes, evidence can have tangential relevance for some purposes, but be irrelevant to the central issues in the case. Because of the sensitivity of some of the evidence involved in this case, I wish to make it clear that there are some aspects of the evidence that have not factored at all into my ultimate decision making.

[187] The defence introduced evidence that a few days prior to this event, AB told Mr. Nyznik and Mr. Kara that she was planning to wear a short skirt for easy access. First of all, I am not satisfied that this comment was even made. I have only Mr. Nyznik's word for it, which I do not find to be wholly reliable. Secondly, even if the comment was made, it is irrelevant to whether or not AB consented to sexual intercourse with three men several days later. If I was satisfied the comment was made and that AB's denial was a lie, that might be relevant to her overall credibility. However, I have not made that finding.

[188] There was nothing at all wrong with what AB was wearing that night. In cross-examination, defence counsel suggested to her that she wore a low-cut top in order to make herself attractive to all the men who would be present at the party. I found that suggestion to be offensive and irrelevant. What a woman wears is no indication of her willingness to have sexual intercourse, nor can it be seen as even the remotest justification for assuming she is consenting to sex. I considered the nature of what AB was wearing to have relevance for two purposes. First, her top was light weight and provided no warmth. However, she repeatedly went outside for cigarette breaks with Mr. Kara, on a 12 degrees-below-zero January night, wearing nothing but that flimsy top, even though she was not herself a smoker. I take that as an indication that she was very interested in spending time with Mr. Kara. Second, I considered her high-heeled leather boots in my consideration of her balance and ability to walk outside the hotel. Otherwise, the whole issue of clothing is irrelevant.

[189] I do not see anything nefarious in AB conducting internet research on the effects of sexual assault drugs. In this day and age, most young women are all too well aware of the effects of such drugs. AB said that long before she went to the hospital, it occurred to her that she might have been drugged. In that situation, I would be more surprised if she had not checked online to see if her symptoms could be explained that way. Further, the search found on her phone was done after AB had already told the doctor at North York General that she believed she

had been drugged. In any event, the symptoms she described did not perfectly match those in the article she consulted. I have not taken this internet search into account in reaching my decision.

[190] I consider it irrelevant that AB willingly went to a strip club with five male colleagues. I draw nothing from her attendance there as relevant to any issue in the trial. However, the fact that she either forgot or lied about how she got there is relevant to her reliability as a witness. Also, I rejected her evidence about how the conversation with the stripper (as opposed to the waitress) evolved, which has an impact on her overall reliability as a witness. I do not necessarily accept Mr. Nyznik's evidence about what was said by AB during this exchange. I have not concluded that AB said those things, and I have therefore not found her evidence on this point to be lacking in credibility. However, even if AB did say those things, I would not have considered them to be indicative of consent to sexual intercourse. I certainly do not infer that her attendance there, or anything she might have said, can properly be taken as an indication that she was the "kind of person" who would have consented to the sex acts later described, or that she was more likely to have consented. That would be an improper line of reasoning, in my view.

[191] There is no relevance to the fact that AB voluntarily went to the hotel with Mr. Nyznik and Mr. Cabero. It is also irrelevant that she essentially invited herself along. I do not know why she did that, but I do not believe her evidence that it was because Mr. Nyznik and Mr. Cabero told her they were going to wake up Mr. Kara and take him back out to a bar. I do not know why AB decided she would go to the hotel, but I draw nothing from it. Her willingness, or even desire, to go to the hotel does not mean she consented to have sex with these three defendants, or any of them, nor does it mean that she was more likely to have consented. The fact that AB was not completely honest, or at least that her evidence was not reliable, with respect to why she went to the hotel room, is a factor relevant to her overall reliability and credibility as a witness. Beyond that, it has no significance to my decision. The same reasoning applies to the sexual innuendo banter in the backseat of the cab on the way to the Brass Rail. I do find that there was joking of that nature. However, it means nothing, other than as a potential problem with respect to reliability and/or credibility.

[192] I attach no significance to AB's initial decision that she did not want to report that she had been assaulted. Many women who are victims of sexual assault do not report the attack immediately; some of them never do. The reasons for delaying are complex and individualistic. AB had legitimate reasons for her hesitation, and I do not question them. The only issue I take with her explanation for the delay is her alleged fear of being murdered by the defendants, and/or by the investigating officers. I do not believe her evidence on that point. Her exaggeration on this issue is one of the factors, albeit a minor one, which I have taken into account in assessing AB's overall reliability and credibility as a witness. Otherwise, the delay in reporting is irrelevant to anything I have to decide, as is the even shorter delay in having a medical examination.

[193] There is nothing about AB's conduct in the few days following this incident that gives me any pause. Some of things she texted to her friends became relevant as prior inconsistent statements when she gave different evidence at trial. That is the extent of any relevance. In particular, a woman who has been the victim of a sexual assault will not necessarily exhibit immediate symptoms of trauma. She might, or might not, be weepy. She might, or might not, be

depressed and withdrawn. She might, or might not, be hysterical. Or she might cover up any of those kinds of emotions with an exterior of jocularity. The fact that AB spent some time engaged in light-hearted texts with Mr. Tissawak and other friends does not mean she was not assaulted. Women who have been assaulted might still get a pedicure, or go out for dinner with friends. These things are all irrelevant. Equally irrelevant is the tone and nature of the text messages between AB and Mr. Tissawak on Saturday, some of which had sexualized overtones. The suggestion that this is somehow inconsistent with having been sexually assaulted the night before is completely without merit and has no foundation in the reality of women's lives. There simply is no "normal" or "typical." I have not taken any of this conduct into account in reaching my decision.

[194] By the same token, I have not considered AB's emotional state as reported by DA to be a factor corroborative of her allegation of sexual assault. I take the same position with respect to her emotional breakdown at work on the day that she ultimately made her report to the police. Both are properly regarded as prior consistent statements and are not admissible to buttress her evidence at trial. More importantly, her distraught state is also consistent with having consented to the sexual activity with colleagues and then deeply regretted it. I do not draw an inference one way or the other.

#### **F. CONCLUSIONS**

[195] The Crown has failed to discharge its onus of proving beyond a reasonable doubt that the complainant did not consent to the sexual acts she described. That does not mean that I necessarily believe the testimony of Mr. Nyznik that she freely and specifically consented to each and every act that occurred. It also does not mean that I necessarily prefer the evidence of Mr. Nyznik to the word of the complainant. It is not that I find him more credible than her. That is not the way the burden of proof and the standard of reasonable doubt work in a criminal trial.

[196] Even if I do not believe Mr. Nyznik and even if I do not have a reasonable doubt based on the defence evidence, I must still consider the whole of the evidence and determine whether I am satisfied beyond a reasonable doubt that AB did not consent to the activity that occurred. She described the acts that occurred and who did them. Oddly enough, her evidence in that regard was corroborated by Mr. Nyznik. However, the issue is not whether the acts occurred, but rather whether she consented. That issue comes down to the reliability and credibility of the complainant.

[197] As I have outlined above, there are many problems with the complainant's evidence. Her evidence was at times inconsistent with what she previously told the police and at times inconsistent with what she told other people. She made significant revelations in her evidence at trial that were not previously disclosed. The accuracy of one of those disclosures (with respect to the discussion with the waitress/stripper at the Brass Rail) is seriously in doubt. Her evidence as to the symptoms she was experiencing is inconsistent with the objective video footage. For areas where such conflicts exist, she often claims to have no memory whatsoever, and is therefore not in a position to provide any explanation for the discrepancy. I find some aspects of her evidence to be simply untrue. Importantly, her evidence as to the symptoms she was

experiencing is not corroborated by the scientific evidence as to how the alcohol and drugs would have affected her.

[198] It is possible to make a finding of sexual assault based solely on the uncorroborated evidence of one witness, usually the complainant. Indeed, it is typically the case that there will be no other witnesses, and often the case that there will be no corroboration on the material points. However, where there are frailties in the complainant's evidence, as is the case here, it is useful to look for corroboration. In the case before me, the complainant's evidence, [REDACTED] is too fraught with problems to stand alone. I have looked in vain for corroboration. There is some from the defendant, Mr. Nyznik, with respect to the nature of the sexual activity involved, but nothing on the crucial element, whether there was consent, and the extent of any incapacity of the complainant. Indeed, what objective evidence there is (the video footage and the toxicologist's opinion evidence), contradicts rather than corroborates the complainant's evidence.

[199] I return to the fundamental legal principles I outlined at the outset. The defendants are charged with an offence under the *Criminal Code*. The question is not whether they behaved admirably, or even ethically. The question is whether I am satisfied beyond a reasonable doubt that the Crown has discharged its onus of proving that the complainant did not consent to the sexual activity at issue or that she lacked the capacity to do so. That depends entirely on the reliability and credibility of the complainant, both of which are problematic. I cannot make a finding of guilt based on evidence such as this. Based on the complainant's evidence, I cannot be sure about what happened in that hotel room. It is simply not safe to convict. Accordingly, I find all three accused not guilty of the offence charged.

  
MOLLOY J.

Released: August 9, 2017

**CITATION:** R. v. Nyznik, 2017 ONSC 4392  
**COURT FILE NO.:** CR-16-00000131-00MO  
**DATE:** 20170809

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**HER MAJESTY THE QUEEN**

**- and -**

**LESLIE NYZNIK, SAMEER KARA and JOSHUA  
CABERO**

**Defendants**

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**REASONS FOR JUDGMENT**

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**MOLLOY J.**

**Released: August 9, 2017**