

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.L., 2026 ONCA 339¹

DATE: 20260512

DOCKET: COA-23-CR-1341

Miller, Dawe and Wilson JJ.A.

BETWEEN

His Majesty the King

Respondent

and

M.L.

Appellant

Michelle Psutka, for the appellant

Eunwoo Lee, for the respondent

Heard: February 12, 2026

On appeal from the conviction entered by Justice R. Dan Cornell of the Superior Court of Justice, sitting with a jury, on June 16, 2023.

Dawe J.A.:

¹ This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46.

I. OVERVIEW

[1] The appellant, M.L., was charged with two counts of sexual interference.² The first charge, Count 2, related to his older now-adult daughter, S.L., who testified at trial that the appellant had sexually abused her years earlier, when she was between five and eight years old.

[2] The second charge, Count 4, related to the appellant's granddaughter, A.J., whose mother is his younger daughter, A.J.J. Because they have similar initials, I will refer to A.J.J. as "A.J.'s mother".

[3] The evidence on Count 4 consisted of A.J.'s mother's testimony about a statement she said her daughter made to her in 2018, when her daughter was three years old. The trial judge ruled that A.J.'s hearsay statement to her mother was admissible for its truth under the principled exception to the hearsay rule.

[4] The jury found the appellant guilty of the charge relating to S.L., Count 2. However, the jurors were unable to reach a verdict on the charge relating to A.J., Count 4. The appellant was accordingly convicted on Count 2, while Count 4 was stayed.

[5] The appellant appeals his conviction on Count 2. His main ground of appeal is that the trial judge erred by finding that A.J.'s hearsay statement met the requirement of threshold reliability under the principled exception. Although A.J.'s

² M.L. was also charged with two counts of sexual assault, Counts 1 and 3, but they were not left with the jury and were ultimately withdrawn by the Crown.

statement only pertained directly to the charge in Count 4, the jurors were instructed that they could also use it as similar fact evidence on the charge relating to S.L. in Count 2. The appellant accordingly argues that the trial judge's error in admitting A.J.'s hearsay statement for its truth undermines the conviction on Count 2. He also argues that the trial judge erred by refusing to grant a mistrial as a remedy for the Crown's inflammatory closing address, and erred further by giving an unbalanced jury charge.

[6] For the following reasons, I agree that the trial judge erred by admitting A.J.'s out-of-court statement to her mother under the principled exception to the hearsay rule. I would allow the appeal on this basis, and would order a new trial on Count 2. This makes it unnecessary for me to address the appellant's other grounds of appeal which, if successful, would also result in a new trial being ordered.

II. BACKGROUND FACTS

[7] In 2018 the appellant was living with his elderly mother, B.L., at her home. For several weeks in the late summer, the appellant's younger daughter left her two children – her three-year-old daughter A.J. and her infant son – in the care of the appellant and B.L.

[8] A.J.'s mother testified that on September 3, 2018, shortly after A.J. returned home from this visit, she made a statement that her mother interpreted as an allegation that A.J. had been sexually abused by the appellant. I will discuss the

details of this statement later, when I address its admissibility under the principled exception to the hearsay rule.

[9] A.J.'s mother contacted the police, who over two days made three fruitless attempts to conduct a video-recorded interview of A.J. Their efforts were unsuccessful because A.J. repeatedly became distracted, or would respond to their questions with non-sequiturs.

[10] A pre-trial *voir dire* was conducted into the substantive admissibility of A.J.'s out-of-court statement to her mother. The trial judge ruled that A.J.'s hearsay statement was admissible for its truth, and later provided written reasons for his ruling.

[11] S.L. testified at trial that in early September 2018, A.J.'s mother phoned her to report A.J.'s disclosure. This led to S.L. going to the police herself and making her own historical allegations against the appellant. She maintained that years earlier, when she was between the ages of five and eight years old and had lived intermittently with the appellant and her grandmother, the appellant had regularly spent hours at a time in the bathtub. Since the house only had one bathroom, S.L. sometimes had to use the toilet while her father was in the bathtub. She testified that he would masturbate in her presence, and eventually began having her rub his penis with her hand. The sexual abuse then progressed to the appellant performing oral sex on S.L. in her bedroom.

[12] There was conflicting evidence about whether S.L. had disclosed her own allegations about the appellant to A.J.'s mother before September 2018, and about whether S.L. had ever previously arranged for the appellant to look after A.J. and her younger brother.

[13] The appellant, who represented himself at trial, testified and denied sexually assaulting either complainant. He denied ever bathing in S.L.'s presence when she was a child. While he acknowledged bathing A.J. and her brother, he denied any sexual contact with A.J.

[14] The appellant's mother, B.L., also testified. Her recollection was that when S.L. and A.J.'s mother were young they were not allowed to use the bathroom when the appellant was taking baths. She confirmed that the appellant was responsible for bathing A.J. and her younger brother when they stayed over at her house, because she was in her mid-80s and "getting up there in years", but maintained that she was present when this happened.

III. ANALYSIS

1. A.J.'s out of court statement to her mother

[15] When A.J.'s mother testified on the *voir dire* into the admissibility of A.J.'s hearsay statement, she gave the following account:

It was in the evening [of September 3, 2018] and [A.J.] had made a comment that her pretty hurt. I immediately

was very concerned because like I asked her what she meant by her pretty and she pointed to her vagina.

And being like a nurse I always use anatomically correct words for body parts, so I would never refer to it as that. So I had asked her who calls it her pretty and she told me that Papa did. And she got – like, she didn't – she got very shy, she didn't really want to talk more about it. So I had asked her if she had any other special secrets with Papa that she wasn't allowed to tell mommy and again she was really, really reluctant to talk and I said like it's okay, you're not in trouble, do you have any other special secrets that you're not allowed to tell mommy with Papa and she said – she kinda got excited and nodded her head and said, yeah. And I asked her what the special secret was and she told me that she – she didn't say the word lick but she gestured... she made the gesture for licking Papa's penis.

THE COURT: Let the record reflect the fact that the witness was flicking her tongue out in a licking motion as she gave that evidence.

A: ... And I was really upset at this point and I asked her if Papa ever did anything to her, lick her, and again she was very shy, but she said yeah. And I asked her where Papa licked her and she pointed to her vagina and she said her bum, but she was pointing to her vagina. I asked her where this happened and she pointed to – or she said – she said at grandma's house... I asked her like where at grandma's house and she – 'cause we were in the bathroom at this time, I had taken her into the bathroom, again I'm a nurse, I wanted to check her out and see why she was saying that she was sore. So we were in the bathroom and when I asked her where at grandma's she pointed to the bathtub and she said that she licked Papa – well, she made the gesture again in the bathtub and she said that they both got out of the bathtub and then he licked her. [Repeated words omitted.]

A.J.'s mother later explained that when she and A.J. referred to "Papa", they meant the appellant.

[16] A.J.'s mother testified further that:

[A.J.] referred to Papa's penis, she – I mean, she pointed, she used a lot of gestures, she didn't have all the words for certain things like lick, so she gestured it. She pointed to her vagina, but she called it her bum.

[17] A.J.'s mother explained that when A.J. used the word "pretty" to refer to her vagina:

I was shocked. I immediately knew something was wrong because that's not a word that would ever be used to describe a vagina in my home. ... [T]o me that's completely inappropriate So I was really, really upset because I immediately knew that something had happened, something was wrong, that's why I continued to ask her questions. [Repeated words omitted].

[18] However, A.J.'s mother testified that she had tried to conceal her distress from A.J., explaining:

I knew that if I was outwardly upset that I wouldn't be able to – like she would – shut down, so I did everything in my power to remain calm, cool and collected and happy while speaking to her because I wanted to know what was going on, but as soon as I got the information out of her I couldn't even I just I broke down. I was crying, she did see me upset after that. [Repeated words omitted].

[19] A.J.'s mother testified that she examined her daughter's genital area and saw that A.J.'s vulva was "very red", so she applied diaper rash cream to it. She

explained that although A.J. was learning to use the toilet, she still wore diapers at night.

2. The governing legal principles

[20] Hearsay statements are presumptively inadmissible for their truth, but may be admitted under the principled exception to the hearsay rule if they meet the twin requirements of necessity and threshold reliability: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 9.

[21] In this case it was undisputed that necessity was established, since by the time of the appellant's trial in 2023 the now eight-year-old A.J. no longer remembered any events from September 2018, when she had been only three years old. The admissibility of A.J.'s out-of-court statement to her mother thus turned on whether the Crown could establish threshold reliability.

[22] In her majority reasons in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 40, Karakatsanis J. emphasized that:

[I]n assessing threshold reliability, the trial judge's preoccupation is whether in-court, contemporaneous cross-examination of the hearsay declarant would add anything to the trial process.

At para. 57, she explained further that trial judges must conduct a four-step inquiry, in which they:

1. identify the material aspects of the hearsay statement that are tendered for their truth;
2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[23] The admissibility of hearsay evidence is a question of law, and “the legal principles a trial judge utilizes are to be reviewed on a correctness standard”: *R. v. Mohamed*, 2023 ONCA 104, 423 C.C.C. (3d) 308, at para. 37. However, a trial judge’s factual findings on which an admissibility ruling is based are subject to appellate deference. Moreover, since trial judges are “well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them, ... absent an error in principle, the trial judge’s determination of threshold reliability is entitled to deference”: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 31; *R. v. Charles*, 2024 SCC 29, 496 D.L.R. (4th) 581, at para. 41.

3. Threshold reliability was not established

[24] As I will explain, I would find that the trial judge made several errors in his threshold reliability analysis that justify appellate intervention.

[25] The first step in the *Bradshaw* analysis required him to identify the material parts of A.J.'s statement – that is, “the aspect of the statement that is tendered for its truth”: *Bradshaw*, at para. 45. In this case, the material aspects of A.J.'s statement were those parts where she had, through a combination of words and gestures, led her mother to believe that the appellant had touched her, and had her touch him, in a sexual manner.

[26] The second step of the *Bradshaw* inquiry required the trial judge to identify the specific hearsay dangers that these material aspects of A.J.'s statement presented in the particular circumstances. These potential hearsay dangers included the inability “to inquire into [the declarant’s] perception, memory, narration or sincerity”: *Khelawon*, at para. 2; see also *Bradshaw*, at para. 20; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 32.

[27] In my view, the primary hearsay dangers presented by A.J.'s out-of-court statement to her mother included (i) the possibility that A.J.'s mother might have misinterpreted what A.J. had been trying to convey through her non-verbal gestures (narration); and (ii) the possibility that A.J. may have said things that were untrue, in response to her mother's suggestions (memory and sincerity). This second danger was heightened by A.J.'s young age and, as I will discuss, the

extent to which her statement was elicited by her mother's leading questions and suggestions.

[28] The trial judge's first error was that he failed to advert to either of these two hearsay dangers.

[29] With respect to the first danger – the risk of misinterpretation by A.J.'s mother – the trial judge concluded that A.J.'s "memory of ... events and the narration of them with words and gestures provides the accuracy that is required given her age and the level of detail that was provided". However, he failed to recognize that A.J.'s mother's evidence on the *voir dire* was that one important material aspect of A.J.'s statement – her "flicking her tongue out in a licking motion" – was non-verbal and ambiguous.

[30] A.J.'s mother testified that she interpreted A.J.'s motion with her tongue as "the gesture for licking Papa's penis", but in her *voir dire* testimony she did not describe A.J. as ever saying verbally that she had licked the appellant, let alone that she had licked his penis, specifically.³ The trial judge thus had to grapple with the possibility that A.J.'s mother may have misunderstood what A.J. had been trying to convey.

[31] Regarding the second danger – the possibility that A.J.'s statement was influenced by her mother's suggestions – the trial judge concluded that an

³ In her subsequent testimony before the jury A.J.'s mother was cross-examined about this and testified for the first time that A.J. had also pointed between her legs and said the words "his penis".

important circumstantial guarantor of threshold reliability was “that [A.J.’s] disclosure was unprompted”. However, he failed to appreciate that this was only true of A.J.’s initial utterance that “her pretty hurt”.

[32] The trial judge placed “no reliance” on A.J.’s mother’s observation that her daughter’s genitals were red, because it was “equally possible that such redness may have been due to the fact that A.J. was wearing a diaper at night and on occasion, during the day”. If A.J. had diaper rash, there was nothing surprising or concerning about her spontaneously telling her mother that her private parts were sore. Moreover, since the appellant had been caring for A.J. for the past few weeks, it was not inherently suspicious that they might have talked about her private parts while the appellant was changing her diaper or giving her a bath. A.J.’s initial spontaneous utterance that “her pretty hurt” thus did not incriminate the appellant.

[33] In my view, the trial judge erred by not recognizing the extent to which the rest of A.J.’s statement was elicited by her mother’s suggestive questioning. It was A.J.’s mother, not A.J. herself, who first introduced into the conversation:

- (i) that the word “pretty” was a secret that A.J. was to keep from her mother;
- (ii) that A.J. might have “other special secrets with Papa that she wasn’t allowed to tell mommy”;
- (iii) that these secrets were ones A.J. might think she would get in trouble for disclosing; and

(iv) that “Papa” had also licked A.J.

[34] The third and fourth steps of the *Bradshaw* inquiry required the trial judge to “consider alternative, even speculative, explanations for the statement”, and decide whether the only likely explanation was that A.J.’s statement was true and accurate: *Bradshaw*, at para. 57. In making this assessment, the trial judge’s “preoccupation” should have been on whether in-court, contemporaneous cross-examination of A.J. “would add anything to the trial process”: *Bradshaw*, at para. 40.

[35] As I have discussed, one possibility the trial judge had to consider was that A.J.’s mother might have misinterpreted A.J.’s licking gesture and jumped to the wrong conclusion about what A.J. meant by it. Contemporaneous cross-examination of A.J. might well have shed light on this question.

[36] The trial judge also had to grapple with the possibility that A.J.’s subsequent statements were prompted by her mother’s suggestions and leading questions. In particular, the trial judge had to consider how a very young child like A.J. might plausibly react to being pressed to admit that she had a “special secret” with her grandfather that she was not supposed to tell her mother. While A.J.’s mother interpreted her daughter’s initial reluctance to speak as a sign that she was concealing something, the trial judge had to consider the alternative possibility that A.J. had reacted to her mother’s evident belief that A.J. was hiding something by making up a story that she thought would satisfy her mother; a story that was built

on her mother's suggestions, including her leading question about whether "Papa" had licked A.J. The trial judge also had to consider whether A.J. might have described the incident as taking place in the bathroom because this happened to be where her mother had just taken her when A.J. said this.

[37] In my opinion, the trial judge did not properly consider any of these alternatives, nor did he adequately turn his mind to the extent to which contemporaneous cross-examination would have meaningfully contributed to the trial process.

[38] The trial judge dismissed the possibility that A.J. "was joking or playing when she made the statements" on the basis that "there is nothing whatsoever about the circumstances or words used in the exchange that would suggest that she was doing so". In my view, the trial judge failed to grapple with the alternative possibility that A.J. was not "joking or playing" but was instead reacting to her mother's "shock" and distress by agreeing with her suggestions.

[39] The trial judge also concluded that A.J. had, "[w]ith words and gestures ... described sexual activity that would be unknown to a child of that age". In so finding, he failed to consider that on A.J.'s mother's *voir dire* testimony it had been her who had interpreted A.J.'s neutral gesture of sticking out her tongue as "the gesture for licking Papa's penis". Likewise, he failed to consider that A.J.'s subsequent statement that "Papa" had also licked her was a response to a leading

question from her mother about whether this had happened. Although A.J.'s mother described A.J. as then pointing unprompted to her genital area, the trial judge had to consider whether this could properly be viewed as a demonstration of sexual knowledge by A.J., rather than merely reflecting the fact that the discussion had started by A.J. saying that her private parts were sore.

[40] Equally importantly, the trial judge did not consider how contemporaneous cross-examination might have assisted the jury. The situation here was very different from that in *R. v. Khan*, [1990] 2 S.C.R. 531, where the reliability of the three-year-old complainant's statement had been confirmed by evidence that she had semen on her clothing. While the trial judge in this case noted that the absence of physical evidence was "to be expected when the allegations are limited to touching, and in this case, licking", the point was not whether the lack of physical confirmatory evidence was surprising if A.J.'s statement was true. Rather, the relevant question was whether, even with no confirmatory evidence, the hearsay dangers associated with A.J.'s out-of-court statement had been adequately addressed: see *Bradshaw*, at para. 52.

[41] This case was also unlike *Khan* or *R. v. S.S.*, 2022 ONCA 305, 161 O.R. (3d) 641, *rev'd* 2023 SCC 1, [2023] 1 S.C.R. 3 (where a majority of the Supreme Court of Canada adopted the dissenting reasons in this court of MacPherson J.A.), since in both of those cases the statements at issue were elicited from the young complainants using non-leading questions.

[42] The trial judge concluded that A.J.'s statement was "so reliable that it is unlikely to change under cross-examination", and that "the only likely explanation is that the statement is true given the circumstances under which the statement was made, and the level of detail provided". For the reasons I have outlined, I do not consider either of these conclusions to be supportable in the circumstances here. I would accordingly find that the trial judge erred by finding that threshold reliability had been established, and by admitting A.J.'s hearsay statement into evidence for its truth.

[43] Although A.J.'s statement was primarily adduced to support the charge in Count 4, rather than the charge in Count 2, the jury was instructed that they could use the evidence on each charge as similar fact evidence across counts. I agree with the appellant that it is reasonably possible that at least some jurors may have relied on A.J.'s hearsay statement as similar fact evidence to find the appellant guilty on Count 2.

IV. DISPOSITION

[44] I would accordingly set aside the appellant's conviction on Count 2 and order a new trial on that charge.

Released: May 12, 2026 "B.W.M."

"J. Dawe J.A."
"I agree. B.W. Miller J.A."
"I agree. D.A. Wilson J.A."