

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. G.D., 2026 ONCA 354¹

DATE: 20260519

DOCKET: COA-23-CR-0636

Trotter, Sossin and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

G.D.

Appellant

Mark C. Halfyard, for the appellant

Hannah Freeman, for the respondent

Heard: April 2, 2026

On appeal from the convictions entered by Justice Irving W. André of the Superior Court of Justice, sitting with a jury, on April 20, 2023.

REASONS FOR DECISION

I. OVERVIEW

[1] The appellant was convicted of sexually abusing his niece over a period of nine years, from 1993-2002, when she was between the ages of 9 and 17 years

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.

old. The complainant came forward to police in 2019. The appellant appeals his convictions on several grounds focusing on the trial judge's charge to the jury, including the charge relating to the eyewitness identification evidence. The appellant also brings an application to admit fresh evidence relating to juror communications that the appellant argues give rise to a reasonable apprehension of bias.

[2] For the reasons that follow, we dismiss the appeal.

II. BACKGROUND

[3] The parties agree that in 1993, the complainant and appellant lived in the same multi-generational family home. Around 1994, the appellant and his parents, the complainants' grandparents, moved into a different home nearby, which the complainant, her sibling, and her cousins would visit regularly. The family had their own business and the appellant worked out of a home studio in the garage of the nearby residence.

The complainant's evidence

[4] According to the complainant, the first instance of abuse happened at the first residence where they lived together. The complainant fell asleep in the basement on the appellant's bed and woke up to him kissing her and touching her chest over her clothes. The abuse continued at the appellant's new residence. The complainant testified that the appellant would lure her to the garage after dinner

with an offer of pizza or cheesecake, where he would kiss her, touch her breasts and vagina, put his penis in her mouth, put his finger in her vagina, and lie on top of her and kiss her. She recalled two occasions when out at the movies with the appellant and her cousins, the appellant attempted to touch her under her clothes.

[5] The complainant testified that when she entered high school, the appellant told her that he was her boyfriend and that she was to call him "Bobby". He bought her expensive gifts, including a cellphone, and gave her a credit card. He attempted to give her his Lexus on her 16th birthday, but her parents refused. On five occasions, the appellant signed the complainant out of school and took her on outings. She testified that twice, he took her to a hotel; on the first occasion he attempted to anally penetrate her but was unsuccessful, and on the second occasion he anally penetrated her.

[6] Years later in 2017, the complainant became pregnant and testified to having dreams about the appellant molesting her future child and about what he did to her as a child. Before this she stated that she had no memory of the abuse, because she had suppressed the memories which were buried deep.

The appellant's evidence

[7] The appellant denied ever touching the complainant inappropriately or treating her any different from his other nieces and nephews. He was generous with all of them. The appellant acknowledged trying to give the complainant his car

for her birthday, though he clarified that this was when she turned 18, not 16. He wanted to repay her family because her father had helped him financially in the past, but the complainant's parents refused the offer. He gave the complainant a cellphone and a phone line on his account at the complainant's mother's request, because it was only about \$10 extra to add a line. The complainant once asked for a credit card to make a purchase, so he procured a card for her that was in her name so she could make the purchase herself. She returned the card to the appellant after about one month.

Other evidence

[8] The trial heard evidence from other witnesses as well, including the complainant's co-worker and high school friends, one of whom identified the appellant, corroborating the complainant's account.

Decision re admissibility of prior consistent statements

[9] In June 2018, the complainant sent an email to the appellant demanding that he pay her \$100,000 to "compensate" her and for her to "stay quiet". She testified at the preliminary inquiry that the day after she sent the email, the appellant called her and agreed to pay her the money. However, the complainant testified that she called him back the next day and told him she did not want the money. In December 2018, the complainant called the appellant, accused him of abuse, and told him to stay away from her and her child. The complainant recorded this phone

call. When the complainant asked the appellant if he had anything to say, he replied, “The only thing I can say is sorry... I apologize to you.”

[10] Prior to trial, the appellant challenged the admissibility of the email and the December 2018 phone call. The Crown conceded during the hearing that the email was inadmissible because it primarily contained the complainant’s prior consistent statements and the necessary context it provided could instead be elicited from the complainant herself. The application judge, Stribopoulos J., ruled that the phone call recording was admissible.²

III. GROUNDS OF APPEAL

[11] The appellant raised four grounds of appeal:

- (1) The trial judge erred in his instruction to the jury on the broader scope of the framework from *R. v. W.(D.)*, [1991] 1 S.C.R. 742 applying to evidence that could assist the defence;
- (2) The trial judge erred in failing to alert the jury to the specific frailties in the eyewitness evidence;
- (3) The trial judge erred in his correction to defence counsel’s submissions regarding the reliability of “recovered memory” evidence; and,

² The application judge’s reasons are reported at 2023 ONSC 829.

- (4) The application judge erred in his pre-trial decision ruling that the complainant's prior consistent statements were admissible.

[12] The appellant also relies on fresh evidence to argue that the conduct of one or more jurors gave rise to a reasonable apprehension of bias. That evidence consists of an agreed statement of facts pertaining to a Facebook message sent by a juror to the complainant the day after the verdict, expressing sympathy and support. The appellant argues that this Facebook message, either alone or together with a note that the foreperson of the jury sent to the trial judge following the first day of the trial judge reading the charge to the jury, creates a reasonable apprehension of bias in the jury.

IV. ANALYSIS

[13] At the outset of the oral hearing of the appeal, the appellant abandoned his fourth ground of appeal relating to the pre-trial ruling respecting the admissibility of the complainant's prior consistent statement.

[14] We did not call on the Crown to address the first or third grounds of appeal.

[15] The submissions at the hearing focused on the second ground of appeal dealing with the jury charge on the frailties of the eyewitness identification evidence, and the fresh evidence relating to the conduct of specific jurors.

[16] We first deal with the first and third grounds of appeal, followed by a discussion of the eyewitness identification second ground of appeal.

[17] We then consider the fresh evidence and the allegation of jury bias.

The trial judge did not err in his instruction to the jury on the broader scope of the *W.(D.)* framework applying to evidence that could assist the defence

[18] The trial judge gave the following instruction to the jury on the *W.(D.)* framework: first, if they believed the appellant's evidence that he did not commit the offences charged, they must find him not guilty; second, even if they did not believe the appellant's evidence, if it left them with a reasonable doubt about his guilt, they must find him not guilty; and third, even if the evidence did not leave them with a reasonable doubt of his guilt, they may convict him only on the rest of the evidence that they do accept, and which proves his guilt beyond a reasonable doubt.

[19] The appellant argues that the trial judge erred in his *W.(D.)* analysis to the jury by tying that analysis to the appellant's evidence standing alone. Relying on *R. v. B.D.*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at para. 114, the appellant contends that the credibility analysis is not limited to the assessment of the accused's evidence alone; it should have considered all evidence that potentially assisted the defence, even where it may have contradicted the appellant's own narrative. Further, it may have been the interaction between the appellant's evidence and the evidence of others that created a reasonable doubt, and so the *W.(D.)* instructions should not have suggested that the evidence of particular witnesses should have been considered in a silo.

[20] The Crown initially raised the problem that the trial judge had confined the *W.(D.)* framework to the evidence of the appellant alone during the pre-charge conference, and asked for a correcting instruction, particularly as it related to the appellant's mother's evidence. The trial judge responded by adding a correcting instruction, telling the jury that the same principles he had set out in relation to the appellant's evidence, also applied to his mother's evidence.

[21] We do not accept that the jury was improperly instructed in this regard.

[22] Read as a whole, the jury would have understood that the reasonable doubt could come from other sources, including his mother's evidence and the Crown's evidence: see e.g. *R. v. Connor*, 2026 ONCA 87, at para. 12. In our view, the charge reveals no *W.(D.)* error.

The trial judge did not err in his correction to defence counsel's submissions regarding the reliability of "recovered memory" evidence

[23] We also rejected the appellant's argument that the trial judge's correction to a defence counsel submission about "recovered memory" gave rise to an error.

[24] In closing, and in taking issue with the "recovered memory" evidence of the complainant, defence counsel stated:

And then she had stress with the baby and that led to these dreams. But trauma has to be recognized as trauma at the time for it to have some effect. If prior events aren't recognized as trauma, what, 20 years later you decide they were traumatic so somehow you retroactively go back and now your new version of history

is traumatic and causes you memory loss 20 years earlier.

You can't retroactively define an event as trauma and then claim that it caused memory loss if it wasn't recognized as trauma at the time. You can't retroactively go back and cause memory loss because the memory loss is existing after events which were not recognized as traumatic. [Emphasis added.]

[25] In the pre-charge conference, Crown counsel asked the judge for a corrective instruction regarding this submission, specifically the idea that trauma has to be recognized as trauma for it to have some effect. The Crown argued that this was a controversial statement which amounted to counsel testifying. Crown counsel noted that there was no expert evidence from a psychologist supporting such a statement. Defence counsel resisted the need for a corrective instruction, explaining that his comment was simply a statement about cause and effect, that the jury would need to believe the complainant's testimony about the sexual misconduct in order to believe her about the reason for her lapse in memory.

[26] The trial judge ultimately agreed to provide the following corrective instruction: "Finally, Mr. Gold stated in his closing address that trauma has to be recognized as trauma at the time of the alleged incident for it to have some effect. Ladies and gentlemen, you should disregard that comment by Mr. Gold."

[27] The appellant now argues that taking one sentence of the defence submissions out of context, the trial judge fell into error, and misled the jury to ignore defence counsel's entire submissions on the issue of her suppressed memory, which was a key issue at trial. Further, recovered memory is an area where caution is required generally and in jury instructions: see e.g., *R. v. B.B.*, 2023 ONSC 396, at paras. 77-103.

[28] We reject the submission that instructing the jury to ignore one statement about trauma would have led the jury to reject the defence's entire arguments with respect to recovered memory. The jury was instructed not to convict unless "the possibility of [the complainant's] recovered memory being false is something the jury can safely dismiss as having been disproved beyond a reasonable doubt", a burden the Crown could only meet "if it can point to evidence that permits the jury to draw this conclusion." He instructed them that it was "dangerous to act upon the recovered memory alone" and they "must look for independent evidence which need not be corroboration in the strict sense, but evidence that restores the jury's trust in the reliability of the witness' memory".

[29] The trial judge is best placed to determine whether and to what extent correction or other remedial action may be required in a jury charge, and the trial judge's determination attracts significant deference: *R. v. McGregor*, 2019 ONCA 307, 145 O.R. (3d) 641, at para. 182.

[30] In this case, we see no basis to interfere with the trial judge's limited and focused correction.

[31] For this reason, we reject this ground of appeal.

The trial judge's eye-witness identification charge to the jury was adequate

[32] A key facet of the Crown's case was a witness who was friends with the complainant in grade 9 and recalled the complainant's boyfriend "Bobby" dropping off a pager at her house. She testified that she recognized him from earlier events at the complainant's home as her uncle, the appellant. The witness first indicated she only had a glimpse of Bobby, but subsequently described having a "solid look" at him.

[33] The appellant argues that the trial judge erred by separating a general caution with respect to eyewitness identification evidence and the witness' specific evidence, including its frailties. To be clear, the appellant does not argue that the trial judge failed to provide an adequate caution or that he failed to raise frailties with the witness' evidence for the jury to consider (though the appellant points out the coverage of the frailties was not comprehensive, and did leave out, for example, a problematic in-dock identification of the appellant by the witness as well). Rather, the basis for the error alleged by the appellant is the failure to situate the frailties in the context of the caution.

[34] The appellant relies on *R. v. Baltovich* (2004), 73 O.R. (3d) 481 (C.A.), at para. 79, where this court, quoting from *R. v. Keane* (1977), 65 Cr. App. R. 247 (Eng. C.A.) at p. 248, noted:

The principle is the special need for caution when the issue turns on the evidence of visual identification: the practice has to be a careful summing-up, which not only contains a warning but also exposes to the jury the weaknesses and dangers of identification evidence both in general and *in the circumstances of the particular case*. [Emphasis added in *Baltovich*.]

[35] The need for the link between the frailties of eyewitness identification evidence generally and the specific frailties of the case before the jury is now well settled: see e.g., *R. v. Brown*, 2007 ONCA 71, 216 C.C.C. (3d) 299, at paras.17-18.

[36] The Crown does not dispute this principle but argues that a functional approach to the jury charge as a whole makes clear the jury could not be confused by the frailties of the witness' identification evidence and the risks of eyewitness identification evidence generally. Both were reviewed by the trial judge in his charge, albeit in different sections.

[37] There is no doubt that an ideal charge would include the risks of eyewitness identification evidence together with the frailties of the specific eyewitness evidence before the jury together in the same section of the charge. However, we reject the submission that this proximity is a requirement of a legally valid charge.

[38] As the Supreme Court of Canada held in *R. v. Abdullahi*, 2023 SCC 19, 428 C.C.C. (3d) 1, at para. 53, the sufficiency of an instruction “must be assessed in the context of the charge as a whole”. There, the Court specifically recognized that an instruction may be insufficiently detailed in one part of the charge but can be supplemented by another part of the charge such that the jury would be equipped with a sufficient understanding of the law to decide the case. In our view, that is what occurred in this case.

[39] The trial judge gave accurate and sufficient instructions on both the general dangers of eyewitness identification, and the specific frailties of the eyewitness identification in this case.

[40] At the outset of the general eyewitness instruction, the trial judge asked the jury to recall the witness’ testimony that she recognized Bobby as the complainant’s uncle when he dropped off the pager at her house. This would have indicated to the jury that her identification evidence should be kept in mind when considering the dangers of eyewitness identification. Later in the charge, after providing detailed summary of the witness’ evidence (which we review next), the trial judge again stated that the witness’ evidence about the delivery of the pager was “not reliable evidence of Bobby as [the complainant’s] uncle because of the inherent dangers of identification evidence.” The jury was therefore alerted to the connection between the dangers of eyewitness identification and this

witness' identification of Bobby both before and after the specific summary of the frailties in her evidence.

[41] The trial judge dealt specifically with the length of the observation, noting that the witness initially testified that "she got a glimpse of him, then she said she got more than a glimpse of him, and then she said she got a solid look at him." He dealt with the fact that the witness told police she had "buried these memories and friendships many years ago". The trial judge dealt with the possibility of tainting of this evidence by the complainant or the police as well as the possibility of the complainant's friend having a motive to assist the complainant. Finally, the trial judge highlighted the disputed evidence about the colour of the car, noting that the witness had testified that Bobby's car was dark coloured, in contrast with the evidence of other witnesses.

[42] We note that experienced trial counsel reviewed the eyewitness identification sections of the charge in detail and was active in suggesting language for the charge relating to the witness' evidence. However, counsel raised no concern with the gap between the general eyewitness identification evidence section of the charge and the concerns with the witness' identification evidence.

[43] For these reasons, we reject this ground of appeal.

The fresh evidence does not reveal a reasonable apprehension of bias on the part of the jury

[44] We turn now to the fresh evidence application.

[45] The appellant claims that the fresh evidence shows a reasonable apprehension of bias on the part of one or more jurors.

[46] The Crown does not object to the admission of the fresh evidence, as it sheds light on the validity of the trial process and therefore need not meet the criteria from *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Jaser*, 2024 ONCA 448, 172 O.R. (3d) 1, at paras. 303-4, leave to appeal refused, [2025] S.C.C.A. No. 127.

[47] The Crown submits that the fresh evidence does not rebut the presumption that jurors will set aside any prejudices and act impartially in fulfilling their duties.

The juror's post-verdict Facebook message

[48] The fresh evidence consists of a message sent to the complainant from a juror through Facebook Messenger. On the day after the verdict, and after the jury was dismissed by the trial judge, juror no. 2 sent the following Facebook message to the complainant.


Hi [complainant], you don't know me but I am juror #2...
I looked at all of you during the trial.

I am a teacher at [a secondary school]... I have seen so many girls go through what you have just gone through. But many of them are not strong and brave like you yo come forward.

I just want to say ,we all want to say ,we are so proud of you. We are all sorry you experienced this in your life as you saw from our emotions at the end of the trial.

There are no words that can change what happened but be proud of yourself. Be proud you had the strength to tell strangers what you experienced. Be proud of you coming forward. Be proud of your husband who saw the letter and helped get justice.

On sentencing day I'm sure many of us jurors will be there until the end to support you. Once again we are all sorry you experienced this this but we are all so so proud on you.

Closure is done and Justice is served. 

[49] According to the appellant, this communication raises tangible concerns that this juror's anecdotal experiences as a teacher generally impacted her acceptance of allegations of historical sexual assault. More specifically, the appellant argues that the message suggests that she was more likely to accept the Crown's position that the complainant made these historical allegations because they in fact happened. Her comment: "I have seen so many girls go through what you have just gone through" suggests that the juror's view of the complainant as a victim coming forward made it more likely that she accepted her evidence as true. The appellant submits that even if this does not rise to the level of proof of actual bias, it raises at least an apprehension of bias.

[50] Further, the appellant notes that the juror seems to suggest that these views are not just her own, but were shared by other jurors: "I just want to say ,we all want to say ,we are so proud of you. We are all sorry you experienced this in your life..." By repeatedly using the word "we", this juror suggested that the jury

collectively shared her views, which were not based on the evidence, but rather on her anecdotal life experiences. While these comments were post-verdict, this does not make them any less concerning. A reasonable person would conclude that these beliefs were in the juror's mind, or jurors' minds, during the deliberations, rather than because of the outcome of those deliberations.

[51] We do not accept this argument.

[52] While jurors should not be encouraged to contact those involved in the case on which they served, and while it may have been an error of judgment for the juror in this case to have done so, given that the jury had been discharged, it did not constitute a violation of any legal duty.

[53] Further, the Facebook message expresses sympathy for the complainant but does not suggest the juror failed to abide by her oath to act impartially or to consider the evidence in light of the trial judge's charge and instructions. It is important to keep in mind that the juror expressed these feelings after a guilty verdict was delivered. She and her fellow jurors had already found the appellant guilty beyond a reasonable doubt. In that context, the fact of her being "proud" of the complainant for being "brave" does not indicate any kind of prejudgment.

[54] Jurors are human beings who may and should feel empathy for victims, as the Supreme Court observed in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 71:

One cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Nor are they expected to remain neutral toward those shown to have committed such offences. If this were the case, prospective jurors would be routinely and successfully challenged for cause as a preliminary stage in the trial of all serious criminal offences. Instead, we accept that jurors often abhor the crime alleged to have been committed – indeed there would be cause for alarm if representatives of a community did not deplore heinous criminal acts. It would be equally alarming if jurors did not feel empathy or compassion for persons shown to be victims of such acts. These facts alone do not establish bias. There is simply no indication that these attitudes, commendable in themselves, unfairly prejudice jurors against the accused or toward conviction. They are common to the trial of many serious offences and have never grounded a right to challenge for cause. [Emphasis added.]

[55] Although parts of the message refer to the juror's life experiences, these experiences also do not mean that she was biased. As the Supreme Court explained in *Find*, at para. 43, "Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations."

[56] We do not see a basis in the message of this juror on which a reasonable person would conclude this juror, or others, were biased.

The foreperson's note

[57] The appellant argues that, in the alternative, if the fresh evidence alone does not raise a reasonable apprehension of bias, then the fresh evidence in conjunction with one of the jury's questions does raise one.

[58] At least some jurors appeared to have started their deliberations before the jury charge was completed. After the first day of the jury charge, the jury submitted the following question:

I'm the foreperson, and I do not think that we should be allowed to leave the courthouse and go home after the, after the detailed description that has been given to us by the Justice Andre. We have already discussed some aspects of the case. We should continue the deliberation as such. Any delay can allow jurors to alter their decisions on the matter. The jury was divided 7/5 of returning home. The final decision should be made by Justice Andre.

[59] This note, taken on its own, is concerning, especially because of its timing prior to the conclusion of the jury charge. The note suggests the jury was engaged in deliberations prior to the completion of the charge, and that at least some jurors may have formed a view on the ultimate guilt of the appellant.

[60] However, when viewed in the context of what followed, we do not see it as a basis for a reasonable apprehension of bias.

[61] The trial judge responded to the note by dismissing the jury for the day, and reminding the jury that "I don't want any jury, any juror to be, feel, to feel that he or

she is under pressure in terms of hearing the evidence, in terms of deliberating for just a short window opportunity, and having to rush to come back”. He expressed concern about the short time frame they would have to deliberate and not wanting jurors to feel “under the gun”.

[62] The following day, after concluding the charge, the trial judge offered the following additional instructions with respect to deliberations:

When you first start your deliberations, it is unwise to take a rigid position. It is better if you don't make any emphatic expressions of opinion. It is very important that no one starts out by telling everybody else that he or she has already made up his or her mind and will not change it, whatever anyone else may say. This is not the way to decide a case.

...

During your deliberations, do not hesitate to reconsider your own opinions. During your discussions I should say. Change your mind if you find that you're wrong. Do not give up your honest beliefs however just because others think differently. Do not change your mind only to get the case over. Your responsibility is to determine whether Crown counsel has proven the accused is guilty beyond a reasonable doubt.

[63] Defence counsel reviewed the note and offered input as to the appropriate response but did not seek any remedy on the basis that the note disclosed bias or compromised the status of the jury.

[64] The jury began deliberations at 10:48 a.m. after the trial judge concluded the charge. They subsequently sent three additional notes asking to see and hear the evidence relating to the complainant's June 2018 email. They did not return a verdict until 7:38 p.m.

[65] The Crown submits that neither the Facebook message nor the foreperson's note suggest a basis to conclude that the traditional trial safeguards against jury partiality faltered in this case. The Crown argues that, far from prejudice, the jury's questions during deliberations show that they were still grappling with a key defence argument about the complainant's credibility long into the deliberations – which lasted almost nine hours.

[66] In light of the trial judge's response to the note, the absence of any objection from experienced defence counsel, and the circumstances of the deliberation itself, including its duration and the subsequent questions posed, we reject the allegation of a reasonable apprehension of bias on the basis of the foreperson's note, whether read on its own, or in conjunction with the fresh evidence of the Facebook message.

V. DISPOSITION

[67] For these reasons, the motion to admit fresh evidence is granted, and the appeal is dismissed.

“Gary Trotter J.A.”
“L. Sossin J.A.”
“J. George J.A.”