WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

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

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

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

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

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information

that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

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

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

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

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

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Clyke, 2021 ONCA 810

DATE: 20211116

DOCKET: C66622

Rouleau, van Rensburg and Huscroft JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Shawn Clyke

Appellant

Margaret Bojanowska, for the appellant

Benita Wassenaar, for the respondent

Heard: April 30, 2021 by video conference

On appeal from the conviction entered on July 7, 2017 by Justice Julie A. Thorburn of the Superior Court of Justice, sitting with a jury.

By the Court:

A. OVERVIEW

[1] The appellant and two co-accused were charged with sexual assault and several related offences. The charges arose from an alleged attack on the complainant by three individuals in the early hours of the morning in an abandoned shed in downtown Toronto. The appellant and Derrick Goulding were tried together, while the third individual was tried separately.

[2] The Crown's theory at trial was that the appellant and Mr. Goulding had participated in an opportunistic crime. Mr. Goulding testified. He claimed that on the day of the alleged offence he and the complainant had sex in a consensual sex-for-drugs transaction, and that no sexual assault or assault had taken place. The appellant did not testify. His counsel argued that the case against him had not

been proven beyond a reasonable doubt and that the complainant's late identification of him as one of her assailants was suspect.

[3] After an 18-day trial, the jury found the appellant and Mr. Goulding guilty of two counts of assault *simpliciter* and one count of assault causing bodily harm. Both were acquitted of sexual assault, unlawful confinement, sexual assault with a weapon, and being a party to a sexual assault.

[4] The appellant appeals his convictions based on alleged improprieties in the Crown's closing argument. He submits that the Crown's closing submissions contained serious improper and inflammatory remarks that rendered his trial unfair.

[5] The impropriety of Crown counsel's conduct at trial is not disputed. The respondent acknowledges that the Crown's closing submissions at trial crossed the line in many respects. Nevertheless, the respondent contends that the trial judge's corrective instruction and passages from the charge to the jury, taken together, adequately addressed any prejudice to the appellant arising from the Crown's closing submissions.

[6] For the reasons that follow, the appeal is allowed, the appellant's convictions are set aside and a new trial on the charges of assault and assault causing bodily harm is ordered.

[7] Briefly, we conclude that the Crown's closing submissions contained improper and inflammatory remarks that cumulatively rendered the appellant's trial unfair and resulted in a miscarriage of justice despite the trial judge's corrective instruction and charge.

B. BACKGROUND

(1) An Overview of the Evidence at Trial

[8] The complainant, S.L., alleged that, on the morning of April 22, 2015, she was assaulted by three men in an abandoned shed at College Park, in Toronto. At the time she was 20 years old and lived in a women's shelter. The police learned of the assault after S.L. returned to the shelter, in serious distress. The attending officer believed that a sexual assault had taken place.

[9] Mr. Goulding was found the following day, in the shed where the assault was alleged to have taken place, and arrested shortly thereafter. The appellant was not identified by the complainant as an assailant until several months later, in November 2015. Ultimately, three men – the appellant, Mr. Goulding and a third person, P.S. – were charged with several offences: assault, unlawful confinement,

sexual assault using a weapon, assault causing bodily harm, and being a party to a sexual assault. Initially, they were to be tried jointly, but when P.S. changed counsel, his charges were severed. The appellant and Mr. Goulding proceeded to trial together, while P.S. was to be tried later.

[10] S.L. testified. On her account, shortly before the assault, she ran into an acquaintance named Cody, near College Park. While the two were together drinking coffee, Mr. Goulding and two other men, one of whom she identified as the appellant, approached them. She knew who they were from seeing them around but she did not know them well. Mr. Goulding began screaming and yelling, and he claimed that S.L. was his girlfriend (which according to S.L. was untrue). Cody ran off, while Mr. Goulding suddenly attacked her. S.L. testified that Mr. Goulding, the appellant and the third man dragged her into the abandoned shed where they assaulted her with bricks and sticks and took turns sexually assaulting her. S.L. was able to provide only limited details about what happened during the sexual assault. She was eventually able to escape after her assailants took a break to smoke crystal meth.

[11] S.L. returned to the shelter where she was staying, where a shelter worker noticed her condition. S.L. reported the assault to the police, who documented her injuries. She also underwent an examination by a sexual assault nurse, who took samples for DNA testing. A DNA expert testified that there were at least three contributors of DNA found in the DNA samples: one was likely S.L., one was Mr. Goulding, and a third sample – which she opined was likely male – was unsuitable for comparison.

[12] S.L.'s blood was also tested, revealing the presence of low levels of methamphetamine. S.L., who had a history of drug use, denied having consumed any drugs in the months leading up to the assault.

[13] Mr. Goulding testified that he sold drugs, and that the appellant helped him in this pursuit. He testified that he and S.L. had a relationship, and that he would give her drugs in exchange for sexual services. Mr. Goulding testified that he had confronted Cody over a drug debt, and later the same day he and the appellant had run into S.L. and Cody at a coffee shop. He testified that he, S.L. and the appellant went together to a woman's shelter where they were consuming drugs. Mr. Goulding testified that he provided drugs to S.L. in exchange for sex. While they were there, a fire alarm went off. Thereafter, the three went to College Park, where they continued to smoke crystal meth in the abandoned shed. Mr. Goulding denied assaulting or sexually assaulting S.L.; he testified that he left the shed at some point, and that when he returned the appellant and S.L. were still there.

[14] An expert witness called by the Crown testified about alternative ways that drugs could have ended up in S.L.'s system, assuming she did not intentionally ingest them. The first was through second-hand smoke, by being in a confined space with others who were smoking methamphetamines. The expert however considered this method to be inconsistent with the levels detected in S.L.'s blood. Second, if methamphetamines touched a highly vascularized area of the body, such as the nose, mouth, vagina or anus, they could enter a person's blood stream. The expert was also asked whether methamphetamines could transfer through semen. She was not aware of any literature on the subject and could not say whether this was possible.

[15] The jury found the appellant and his co-accused not guilty of sexual assault and unlawful confinement, but guilty of assault causing bodily harm and assault *simpliciter*.

(2) Objections to the Crown's Closing at Trial

[16] The Crown addressed the jury last. Immediately after her closing submissions, both defence counsel raised a number of objections. These included that:

- the Crown invited the jury to engage in propensity reasoning based on evidence about the bad character of the two accused; in particular, linking their exploitation of drug addicts to their exploitation of S.L.;

- the Crown provided "commentary" about how the act was brutal, and "something no mother, sister, or friend should experience";

- the Crown gave her personal endorsement of the complainant's credibility;

- the Crown submitted that the complainant was able to convince the sexual assault nurse of her story and relied on this to bolster the complainant's credibility;

- the Crown submitted that Mr. Goulding's account of a fire alarm was not credible because he did not mention the firefighters who attended the scene, when there was no evidence led about when the firefighters arrived or where they went; and

- the Crown gave evidence by talking about her personal experience dropping a brick.[1]

[17] Defence counsel did not move for a mistrial; instead, they asked the trial judge to provide a corrective instruction to the jury.

(3) Discussions with Counsel

[18] The trial judge received submissions on the alleged problems with the Crown's closing. Since it was already late in the day, and anticipating that her discussions with counsel would take some time, the trial judge released the jury until 11:30 a.m. the following day. Defence counsel raised a considerable number of objections, some more significant than others. The trial judge worked with counsel to sort through which of the many objections she would address with the jury.

[19] Early on the trial judge expressed her concern that the Crown's closing submissions had crossed a line, and she admonished the Crown as follows:

> I do think, though, that just as a matter of practice I think the Crown has to be particularly careful, you're not an advocate like defence counsel. You're not pulling out all the stops and I think Crown counsel should be very, very cognizant that you do have a different role. You are the, you know, an officer of the court and an official of the state, and I think to be, to be, you know, blunt about it, your, your charge was a little extreme in the sense that you were pulling out all the stops, and I think you should be careful. You're Crown counsel, you're not a lawyer for defence counsel, and you know, inviting speculation on some issues and things, honestly, I had some concerns listening to that.

[20] With respect to the specific issues raised by defence counsel, the trial judge agreed that the Crown's personal endorsement of S.L.'s credibility was improper, and she indicated that she would instruct the jury to disregard the personal opinions of counsel. The trial judge outlined some proposed language, including: "[t]he Crown made some personal opinions about her views of the evidence. We shouldn't be providing personal opinions and you should, to the extent that personal opinions are offered, you should disregard them." (Ultimately the corrective instruction given by the trial judge was more general; it referred to the personal opinions of all counsel, not just the Crown.)

[21] The trial judge also identified an issue with the Crown's submissions about how the drugs could have ended up in S.L.'s system. She was concerned that the Crown had invited speculation by suggesting that there could have been drug residue on the accused's hands that could have transferred to S.L.'s vagina or

rectum. She was unsure whether she needed to address this point specifically with the jury.

[22] As for defence counsel's concern about the Crown's invitation to the jury to engage in propensity reasoning, and her use of inflammatory language (described by defence counsel as "personal commentary"), the trial judge observed that the defence had also used lots of "commentary" in their closing arguments, and that they had invited the jury to engage in propensity reasoning by suggesting that S.L. was a liar. The trial judge indicated that she would caution the jury against speculation and propensity reasoning, and in response to a request by the appellant's counsel that she explain propensity reasoning to the jury, the trial judge said that she would use clear language and tell the jury that they were not there to decide whether they liked the accused or the complainant or their lifestyles.

[23] The trial judge did not provide counsel with a draft of her corrective instruction, although, as already noted, she referred to the type of instructions she would give.

(4) The Trial Judge's Corrective Instruction

[24] The day after the Crown's closing submissions, and immediately before she delivered her charge, the trial judge provided the following instruction to the jury:

> Before I begin with my jury charge there are a couple of brief comments that I wish to make about the closing submissions that you heard yesterday. First of all, you heard some information about some evidence adduced at a Barrie court proceeding. That was not evidence that came from [S.L.] herself so I'm going to ask you to disregard that.[2] Secondly, insofar as they talked about firefighters, there was a fire at what has been referred to as the Native Women's shelter. There were 17 firefighters that arrived but there is no evidence as to when and how many came at any one time. I also, and I will be reminding you of this in my charge as well, that to the extent that counsel have made comments or personal opinions about the evidence that is not something that you need to consider. The only thing that you need to consider is after hearing and seeing all of the evidence adduced in this proceeding whether you are satisfied that the Crown has proven the case against one or both of the accused beyond a reasonable doubt. And you are the judges of the facts, the only judges of the facts, and you alone are going to be assessing the credibility of

> witnesses and the reliability of their testimony. And lastly, I'm also going to remind you, as I will in my charge, about the dangers of propensity reasoning. And what I mean by that is you're not here to judge whether you like somebody's lifestyle or you like the kind of person that they are. What you're here to decide is whether an offence or offences were committed on a given day at a certain place, based on the evidence, all of the evidence that you saw and heard in this proceeding.

[25] There was no objection to this instruction or to the relevant portions of the trial judge's charge to the jury.

C. ISSUES

[26] The sole issue in this appeal is whether there were serious improprieties in the Crown's closing submissions that were not effectively addressed by the trial judge, such that the appellant had an unfair trial.

[27] The appellant relies on the following:

1. the invitation that the jury engage in propensity reasoning;

2. the invitation that the jury decide the case based on sympathy for the complainant, by using inflammatory language;

3. the improper attempts to bolster the complainant's credibility, by:

a. suggesting that the complainant had stood up to cross-examination in prior proceedings; and

b. submitting that the complainant had "convinced" the sexual assault nurse of the truth of her allegations;

4. the invitation that the jury engage in speculation, including by:

a. offering unfounded theories for how drugs might have gotten into the complainant's system; and

b. claiming that the appellant's DNA was present in the samples taken from the complainant;

5. the reference to facts not in evidence, including:

a. the number of firefighters present during a fire alarm and the actions taken by those firefighters;

b. whether a person familiar with the streets would “rat” on someone; and

c. an explanation for why the Crown did not call certain evidence; and

6. her improper reliance on personal observations not founded in the evidence.

[28] The appellant asserts that he received an unfair trial: the cumulative effect of the various improprieties in the Crown’s closing address and its overall tone were prejudicial to him, and the corrective instruction was insufficient to alleviate the prejudice.

[29] The respondent accepts that the Crown’s closing address was problematic in many respects, but argues that the corrective instruction, together with the jury charge, adequately responded to the problems. The respondent submits that deference is owed to the trial judge who was well-placed to decide on an appropriate response. The respondent also relies on the fact that defence counsel did not take issue with the corrective instruction or the relevant passages in the charge, which suggests that their concerns were adequately addressed.

[30] With respect to several of the alleged improprieties, the respondent relies on the fact that the appellant was acquitted on the sexual assault counts. The acquittals demonstrate that the jury was not swayed by the trial Crown’s improper submissions and was able to make an impartial and objective decision based on the evidence.

D. APPLICABLE LEGAL PRINCIPLES

[31] We begin by setting out the legal framework and principles that apply to the determination of this appeal.

(1) The Two-Part Test

[32] When improper comments by Crown counsel are sufficiently prejudicial, a trial judge has a duty to intervene, and a failure to do so will constitute an error of law: *R. v. T.(A.)*, 2015 ONCA 65, 124 O.R. (3d) 161, at para. 29, citing *R. v. Romeo*, [1991] 1 S.C.R. 86, at p. 95 and *R. v. Michaud*, [1996] 2 S.C.R. 458, at para. 2.

[33] The analysis of a claim on appeal that Crown counsel crossed the line in closing submissions to a jury proceeds in two stages: the court must first determine whether the Crown’s conduct was improper; and if so, “whether, considered in the

context of the trial as a whole, including the evidence adduced and the positions advanced, the substance or manner of the Crown's closing address has caused a substantial wrong or miscarriage of justice, including by prejudicing the accused's right to a fair trial": *R. v. McGregor*, 2019 ONCA 307, 145 O.R. (3d) 641, at para. 184.

[34] With respect to the first stage of the analysis – whether the Crown's conduct was improper – the limits imposed on Crown counsel are well-established. These include:

- "The Crown occupies a special position in the prosecution of criminal offences, which 'excludes any notion of winning or losing' and 'must always be characterized by moderation and impartiality'": *T.(A.)*, at para. 26, citing *R. v. Boucher*, [1955] S.C.R. 16, at pp. 21, 24.

- The Crown should not "engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness": *R. v. Mallory*, 2007 ONCA 46, 217 C.C.C. (3d) 266, at para. 340;

- The Crown must not "express personal opinions about either the evidence or the veracity of a witness": *R. v. Boudreau*, 2012 ONCA 830, at para. 16, leave to appeal refused, [2013] S.C.C.A. No. 330; *Boucher*, at p. 26. The Crown must not invite speculation by the jury: *McGregor*, at para. 179, or rely on anything within their personal experience or observations that is not in the evidence: *R. v. Pisani*, [1971] S.C.R. 738, at p. 740;

- The Crown must not "invite the jury to use an item of evidence in reaching its verdict for a purpose other than that for which it was admitted and the law permits": *McGregor*, at para. 180; and

- The Crown must not misstate the evidence or the law: *Boudreau*, at para. 16.

[35] There is no question that the Crown is entitled to make forceful and effective closing submissions: *McGregor*, at para. 181. Both Crown and defence counsel are entitled to latitude in their closing addresses. However, as Deschamps J. wrote for the majority in *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 79:

> Crown counsel are expected to present, fully and diligently, all the material facts that have evidentiary value, as well as all the proper inferences that may reasonably be drawn from those facts. However, it is not the Crown's function "to

> persuade a jury to convict other than by reason": *R. v. Proctor* (1992), 11 C.R. (4th) 200 (Man. C.A.), at para. 59. Rhetorical techniques that distort the fact-finding process, and misleading and highly prejudicial statements, have no place in a criminal prosecution. [Emphasis added.]

[36] With respect to the second stage of the analysis – whether a substantial wrong or miscarriage of justice has resulted from the Crown's conduct – there is no "unyielding rule" mandating that improper Crown closing submissions require a new trial. The test is whether the closing address "was unfair in such a way that it might have affected the decision of the jury": *R. v. Grover* (1990), 56 C.C.C. (3d) 532 (Ont. C.A.), at p. 537; reversed on appeal, but not on this point [1991] 3 S.C.R. 387. See also *Pisani*, at para. 5, where the court concluded that improprieties in the Crown's closing address bore so directly on the actual issue in the case and were so prejudicial in respect of that issue and of the related question of credibility as to deprive the appellant of a fair trial.

[37] While each case falls to be decided on its own facts, a non-exhaustive list of factors to be considered includes: (i) the seriousness of the improper comments; (ii) the context in which the comments were made; (iii) the presence or absence of objection by defence counsel; and (iv) any remedial steps taken by the trial judge following the address or in the final instructions to the jury: *R. v. Taylor*, 2015 ONCA 448, 325 C.C.C. (3d) 413, at para. 128, per Watt J.A.

(2) Deference to the Trial Judge

[38] Substantial deference is owed to the trial judge's response to alleged improprieties in a Crown's closing address. In *McGregor*, at para. 182, Watt J.A. explained the rationale for such deference:

> None can gainsay that the trial judge is in the best position to gauge the impact of closing submissions made by either counsel. The trial judge can take the temperature of the trial. As an eye and ear witness to the entire proceedings, including both jury addresses. In that position the trial judge can assess the apparent significance or otherwise of the impugned remarks, and determine whether and to what extent correction or other remedial action may be required [citations omitted]. We accord substantial deference to the trial judge's conclusions on these issues. This is as it should be.

[39] Of course, deference to the trial judge does not eliminate the trial judge's duty to adequately redress any prejudice that is caused by the Crown's closing address. As the Supreme Court held in *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 127:

> [The] trial judge is best able to assess the impact that improper remarks will have on a jury and to determine whether remedial steps are necessary. However, where the trial judge fails to redress properly the harm caused by a clearly inflammatory, unfair or significantly inaccurate jury address, a new trial could well be ordered. It is not only appropriate for a trial judge, in the charge to the jury, to undertake to remedy any improper address by counsel, but it is the duty of the trial judge to do so when it is required.

[40] A timely and focused correction by a trial judge of deficiencies in a Crown's closing address may be sufficient to alleviate any prejudice to an appellant's fair trial rights: *Boudreau*, at para. 20. "Clarity, specificity and, forcefulness are the three qualities appellate courts usually look at in considering the adequacy of the correction": Robert J. Frater, *Prosecutorial Misconduct*, 2nd ed. (Toronto: Carswell 2017), at p. 283. In cases where this court has found potentially prejudicial Crown misconduct, but deferred to the trial judge's remedial approach, the court has described the corrective instruction as "blunt", "strong", "strongly-worded", "firm and clear" or "pointed", observing that the trial judge explicitly identified the problematic areas and told the jury to disregard them: see, e.g., *Boudreau*, at para. 19; *R. v. John*, 2016 ONCA 615, 133 O.R. (3d) 360, at para. 64; *R. v. Osborne*, 2017 ONCA 129, 134 O.R. (3d) 561, at para. 85; *R. v. Howley*, 2021 ONCA 386, at para. 49.

[41] In most cases, what is required is a sharp correction, as soon as possible after the words are spoken: *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.). In that case the Crown's closing, which was immediately before the lunch recess, contained improper submissions. Immediately upon resuming the judge gave his charge to the jury in which very early on he spoke about the Crown's address, identified the specific comments that were improper and why that was the case, and instructed the jury more than once to "banish those comments from [their] mind". This court accepted that this "very clear and forceful direction" that was given shortly after the Crown's address was sufficient to nullify the unfortunate effect of the Crown's address: at p. 471. See also *Howley*, at paras. 41-42.

[42] A caution with precise examples is preferable to a general appeal to the jury to be dispassionate: *Melanson v. R.*, 2007 NBCA 94, 230 C.C.C. (3d) 40, at para. 75. Judges should identify clear improprieties to the jury and provide "an

unambiguous direction that they are to be disregarded as irrelevant": *Fiddler v. Chiavetti*, 2010 ONCA 210, 317 D.L.R. (4th) 385, at para. 18. In *R. v. Copp*, 2009 NBCA 16, 342 N.B.R. (2d) 323, for example, the trial judge told the jury to disregard Crown counsel's personal opinions and rhetorical excesses, repeating the specific remarks the jury was to disregard, and explaining why. The appellate court, in dismissing that ground of appeal, said that there was "nothing equivocal" in the corrective instruction, that it was quite forceful, that the jury was provided with examples of the types of inappropriate comments that were to be "absolutely" ignored and that the trial judge characterized Crown counsel's conduct as "getting carried away, inappropriate and excessive": at para. 25.

(3) The Failure to Object at Trial

[43] Defence counsel's failure to object or to seek a mistrial is relevant at both stages of the analysis. At the first stage, the failure of defence counsel to object may indicate that the Crown's conduct was not viewed as improper at the time: see, e.g., *Taylor*, at para. 135. At the second stage, counsel's failure to object "can sometimes indicate that the impact of the comment, in the circumstances, was not so prejudicial as to render the trial unfair": *T.(A.)*, at para. 41. Counsel's failure to object may be particularly relevant "where defence counsel is experienced, or the decision not to intervene can be described as 'tactical' rather than a mere 'lapse'": *T.(A.)*, at para. 41.

[44] That said, defence counsel's failure to object is a factor to consider in assessing this ground of appeal but not an "unscalable barrier to appellate success": *R. v. Manasseri*, 2016 ONCA 703, 132 O.R. (3d) 401, at para. 107.

E. ANALYSIS

[45] We will now address each of the alleged improprieties in the Crown's closing submissions. We have concluded that some of the alleged improprieties are not borne out on the record, and in respect of others, we would defer to the trial judge's approach in handling these issues. As already stated, it is our view that the cumulative effect of certain problems with the Crown's closing address rendered the appellant's trial unfair. We will explain why we have reached this decision, and why in our opinion, the trial judge's corrective instruction and the aspects of the jury charge relied on by the respondent on appeal were inadequate to remedy the resulting harm.

(1) The Invitation to Engage in Propensity Reasoning

[46] The most significant impropriety in the Crown's closing submissions was the express and pervasive appeal to propensity reasoning.

[47] The trial Crown repeatedly invited the jury to engage in propensity reasoning based on the discreditable conduct of the two accused. In particular, the Crown emphasized that the appellant and his co-accused preyed on vulnerable people like S.L. when they sold them drugs, and she invited the jury to reason that they had preyed on S.L. in committing the alleged offences. These submissions also encouraged the jury to despise the appellant and his co-accused and to sympathize with the complainant. In order to appreciate the significance of these submissions and their centrality in the Crown's overall theme, it is necessary to set out what the Crown said in some detail.

[48] The Crown commenced her closing address by arguing that the appellant and his co-accused worked together to prey on vulnerable people like the complainant:

> Mr. Goulding and Mr. Clyke were well versed in taking advantage of people however they could, whenever they could, for their own gain, vulnerable people, drug addicts. If it was 4:00 a.m. and Mr. Goulding was the only one around with drugs to sell the prices shot up for the addicts. They would come banging at times. He explained himself to you how it worked. At times Mr. Clyke connected him with the addicts, told him who used what drugs, and in return, Mr. Clyke would benefit from his teamwork, if you want to call it that. Mr. Goulding would give him drugs for helping him out.
>
> It wasn't a particularly sophisticated kind of teamwork. Opportunities arose within the scene we've all heard so much about, and when they did Mr. Goulding and Mr. Clyke knew they could work together and both benefit from the vulnerabilities of others. I'm not suggesting that they were partners in drug dealing, I think it's clear that Mr. Goulding was the dealer, but they had a system that seemed to work out for the benefit of both of them.
>
> [S.L.] was 20 years old in April of 2015. She was young and vulnerable, small in stature, had recently moved to Toronto from up north with a boyfriend. He was in jail, she was on her own. She had gotten herself into some trouble with the law, recently had a baby, she was living in a shelter. She had a history of struggling with drugs. She knew Mr. Goulding and Mr. Clyke from the drug scene. She didn't know them well, nor did they know her well but it wasn't hard for anyone to see that she was a young girl who was in a

> vulnerable place easy to take advantage of for one's own benefit.
>
> On the morning of April 22nd, 2015 when Mr. Goulding and Mr. Clyke encountered [S.L.] behind College Park they did exactly that.

[49] Throughout her closing, the Crown returned to the theme that the appellant and Mr. Goulding were bad people who took advantage of those who were vulnerable. She concluded her submissions in a similar vein, repeating much of what she said when she began her submissions, and drawing the link between the appellant and his co-accused's approach to selling drugs to desperate people and their commission of the alleged offences:

> And by his own accord Derrick Goulding was at the height of his addiction and drug use. Behind the College Park building he encountered [S.L.] who was sitting, drinking coffee and talking with another male. A male they could get rid of pretty easily, leaving [S.L.] powerless. What followed was an opportunity for Mr. Goulding and Mr. Clyke, and [P.S.] to take advantage of a very young and vulnerable girl who they could do whatever they wanted to in a nearby abandoned building that Mr. Goulding was so familiar with.
>
> He went there often and there was [S.L.] meters away from the door. It didn't take much to put the plan together. Nothing about this is sophisticated. Not much about how Mr. Goulding and Mr. Clyke operated together was sophisticated. They'd walk around looking for people on the streets to sell drugs to. If, by chance, they met, they ran into an addict, they'd sell to the addict. That addict might be begging for drugs. The price might shoot up, and it was by chance that they ran into [S.L.] that morning and they weren't going to let that opportunity pass without benefiting from it, taking advantage of her, getting what they wanted from someone in a vulnerable position.
>
> Once Derrick Goulding, Shawn Clyke and [P.S.] got her into that building they could do whatever they wanted to, to her, and they did.

[50] The respondent acknowledges that the propensity reasoning invoked by the trial Crown is one of the most problematic aspects of her closing submissions.

However, the respondent contends that the invitation to engage in propensity reasoning applied mainly to Mr. Goulding, because there was more evidence of his involvement in dealing drugs, and that it did not prejudice the appellant's fair trial rights.

[51] We disagree. The thrust of the Crown's submissions was to paint the two accused with the same brush: they worked together to prey on vulnerable people. The fact that there was more evidence about Mr. Goulding's involvement in drug dealing does not reduce the impact of the Crown's invitation to engage in propensity reasoning with respect to both accused.

[52] The respondent's main submission is that the trial judge's corrective instruction, together with her jury charge, adequately addressed the potential harm arising from the Crown's appeal to propensity reasoning. The respondent relies on the part of the corrective instruction where the trial judge said:

> And lastly, I'm also going to remind you, as I will in my charge, about the dangers of propensity reasoning. And what I mean by that is you're not here to judge whether you like somebody's lifestyle or you like the kind of person that they are. What you're here to decide is whether an offence or offences were committed on a given day at a certain place, based on the evidence, all of the evidence that you saw and heard in this proceeding.

[53] The respondent also relies on the part of the charge dealing with how the jury could use evidence of Mr. Goulding's criminal record. The trial judge stated:

> MR. GOULDING'S CRIMINAL RECORD: Mr. Goulding has a criminal record. You may not use the fact that an accused committed offences in the past, or the number or nature of the offences committed, or when those offences were committed, as evidence that he committed the offences charged or, that he is the sort of person who would commit the offences charged.

She went on to explain, using the standard jury charge wording, the permitted and prohibited uses of Mr. Goulding's criminal record in the jury's assessment of his evidence. She concluded by saying:

> You must not use the fact, number or nature of the prior convictions to decide, or help you decide, that an accused is the sort of person who would commit the offences

> charged (or, is a person of bad character and thus likely to have committed the offences charged).

[54] While acknowledging that the corrective instruction about propensity reasoning could have been stronger and more complete, the respondent submits that it was nonetheless sufficient, considering that the evidence about the accused's involvement in dealing drugs was relevant as part of the narrative. The respondent underlines that the Crown made these comments in the context of a hard-fought proceeding. The respondent submits that the trial Crown's invitation to propensity reasoning did not render the appellant's trial unfair, given the relevance of the evidence, the lesser impact of the evidence on the appellant, the corrective instruction, and the passage above from the charge to the jury (which, although directed to Mr. Goulding's criminal record, reminded the jury to avoid propensity reasoning).

[55] We agree with the appellant that the Crown's direct invitation to the jury to engage in propensity reasoning was highly improper. The potential prejudice arising from evidence of an accused's extrinsic misconduct is well-established. There is "moral prejudice" – the risk that the jury may reason that the accused is a bad person who is likely to have committed the offence with which he is charged. There is also a risk of "reasoning prejudice", which diverts the jury from its task. An example of reasoning prejudice arises where "the evidence awakens in the jury sentiments of revulsion and condemnation that deflect them from 'the rational, dispassionate analysis upon which the criminal process should rest'": *R. v. C. (Z.W.)*, 2021 ONCA 116, 155 O.R. (3d) 129, at paras. 101-103, citing Martin J. (dissenting in part, but not on this point) in *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 176, 180.

[56] The trial Crown's submissions in this case gave rise to both moral prejudice and reasoning prejudice. She invited the jury to conclude that the accused were bad, predatory people who, therefore, were likely to have committed the offences charged, and she invited the jury to detest the accused, potentially diverting the jurors from their task.

[57] Evidence of the accused's drug dealing was admissible and relevant as part of the narrative (at the very least it provided the necessary context for Mr. Goulding's testimony). That said, even when evidence of prior misconduct is admissible as part of the narrative, "it is incumbent on the trial judge to clearly instruct the jury on exactly how the evidence is to be used": *C. (Z.W.)*, at para. 132. A trial judge's instruction "should identify the evidence in question, and explain the permitted and prohibited uses of the evidence": *C. (Z.W.)*, at para. 109.

[58] While the admission of the drug-dealing evidence without a specific instruction about its use may not have amounted to reversible error in this case, particularly given that there was no objection to the charge on this basis, the problem here is the Crown's use of the evidence.

[59] The Crown's remarks were serious. They were repeated and explicit. The invitation to propensity reasoning was the main theme of the Crown's submissions. The Crown began her closing on this note, and she ended it the same way. It was reflected in her treatment of the evidence. Mr. Goulding and the appellant were predatory drug dealers. S.L. was a vulnerable young woman. S.L.'s friend, A.V., was characterized in contrast to the appellant and Mr. Goulding, as "a different kind of drug dealer" who protected her from unscrupulous people in the drug scene. The invitation to propensity reasoning was not a mere passing reference. It was the organizing principle for the Crown's theory of the case.

[60] Unfortunately, the trial judge's corrective instruction did not adequately respond to the Crown's improper appeal to propensity reasoning.

[61] First, the instruction was insufficiently specific or focused: it did not identify for the jury that it related to what the Crown had said in her closing submissions, nor did it include an example of prohibited propensity reasoning. The trial judge ought to have specifically identified the improper invitation to propensity reasoning and then instructed the jury about the permissible and prohibited uses of the evidence about the accused's drug-selling behaviour.

[62] Second, although the trial judge addressed in general terms the "moral prejudice" aspect of propensity reasoning – instructing the jury not to "judge whether you like somebody's lifestyle or you like the kind of person they are" – she did not address the key problem, which was the Crown's urging the jury to reason that because the accused were predatory people who targeted vulnerable individuals, they had committed the offences. The corrective instruction did not explain to the jury that they were prohibited from reasoning in this way, and did not instruct the jurors to disregard the Crown's invitation to do so.

[63] The absence of an effective corrective instruction was compounded by passages in the jury charge. In summarizing the position of Crown counsel, the trial judge repeated the main theme of the Crown's closing: that the accused were opportunists who took advantage of the vulnerable complainant, just as they took advantage of vulnerable drug users. The summary of the Crown's position reinforced the overarching theme of the Crown's closing, which was based on prohibited propensity reasoning.

[64] Nor did the passage from the charge relied on by the respondent bring home any corrective message with respect to propensity reasoning in relation to the appellant. In fact, it may have inadvertently compounded the problem. Because the only reference in the charge to propensity reasoning was directed at Mr. Goulding's criminal record, it is quite possible that the jury would have understood that the earlier instruction, that was stated in general terms, related to the same issue. Instead of the corrective instruction and the charge working together to resolve the issues in the Crown's closing, this would have left the impugned passages in the Crown's closing completely unaddressed.

[65] This case is similar in some respects to two other decisions from our court, where the Crown's theory of the case, as put to the jury, turned on impermissible reasoning. In *R. v. Precup*, 2013 ONCA 411, 116 O.R. (3d) 22, this court ordered a new trial after Crown counsel improperly referred to hearsay notations in the appellant's medical records for the truth of their contents, inviting the jury to use them as evidence of the appellant's disposition for violence, and hence as indicative of his guilt. The Crown suggested that the appellant was an angry and volatile person, and therefore more likely to have committed the offences charged. The Crown's statements "were tantamount to encouraging the jury to engage in impermissible propensity reasoning. They cried out for an explicit, remedial instruction or, alternatively, a clear instruction on the limited use of [the] evidence about the Prior Incidents": at para. 65. The absence of such instructions required a new trial.

[66] Similarly, in *T.(A.)*, the trial Crown's theory of the case turned on impermissible reasoning: that the appellant was a religious zealot and therefore more likely to have committed the offences charged: at para. 40. The appeal was allowed and a new trial was ordered notwithstanding the failure by defence counsel to object to Crown counsel's comments. This court concluded that the remarks were so prejudicial that the trial judge had a duty to remedy the potential trial unfairness: at para. 42.

[67] Here, the impermissible reasoning was that the accused were predatory people, in the habit of taking advantage of vulnerable people however they could, and therefore more likely to have committed the offences charged. This impermissible reasoning flowed throughout the Crown's closing submissions and was inadvertently reinforced by the trial judge.

[68] Unlike in *T.(A.),* the trial judge gave the jury some guidance on how to deal with this evidence, however the corrective instruction did not address the impermissible reasoning advanced by the Crown. As in *Precup*, we do not consider defence counsel's failure to renew her objection following the corrective instruction as determinative. The appellant's counsel forcefully objected to this aspect of the

Crown's closing, referring to both aspects of prejudice that would follow the appeal to propensity reasoning. She specifically asked the trial judge to explain propensity reasoning to the jury. There was no strategic benefit to the defence for not renewing the objection, for example, by drawing further attention to the bad character evidence. The evidence that was the subject of the invitation to propensity reasoning – drug dealing on the part of both accused – was front and centre in both the Crown and defence cases. Specific instructions about the proper and improper uses of this evidence would not have harmed, and could only have benefited, the defence.

[69] It is unnecessary to decide whether, standing alone, the Crown's appeal to propensity reasoning would warrant a new trial given the cumulative effect of the improprieties in the Crown's closing submissions, discussed further below.

(2) Crown Counsel's Inflammatory Language

[70] The appellant submits that the trial Crown used inflammatory language to describe the assault and the effect it had on the complainant. She described the assault as "a horrendous, brutal attack that no girl, no woman, no mother, no sister, no daughter, no friend should ever have to experience in their lives". She suggested that the complainant's demeanour while testifying was "consistent with someone who is reliving a horrible, degrading, violent, traumatizing event. One that [she] may never forget and perhaps never move beyond".

[71] The appellant also points to a passage in the trial Crown's closing where she expressed her personal view that the complainant had been traumatized:

> [S.L.] was injured and she was traumatized.
>
> Now, I'm not giving medical evidence when I say this, and I'm not an expert in trauma, or anything medically related, but I'm a person with common sense, I think, and [S.L.] is still pretty traumatized, not in a medical diagnosis kind of way because again I can't tell you that. But as a person with various life experiences, the same way all 11 of you have, that you'll bring to the table in your discussions, I'm just telling you how I saw it, and how I think it may have appeared to some of you.

[72] The appellant submits that in these passages, the Crown attempted to pull at the heartstrings of the jurors and invite them to sympathize with S.L. as they would with their mother, daughter or sister. There was no evidence that S.L. was traumatized or might never forget or move on. It was improper for Crown counsel

to present her own musings about S.L.'s mental state to the jury in order to evoke their sympathy.

[73] The respondent acknowledges that the inflammatory language used by the trial Crown amounted to "rhetorical excess". However, the respondent contends that such language was directed to the sexual offences, and that the acquittal of the appellant and his co-accused for such offences indicates that the jury was not swayed by it. Further, the respondent points to the detailed instructions in the jury charge on how to assess credibility. In outlining the factors relevant to assessing credibility, the trial judge told the jurors to "consider the evidence and make [their] decision without sympathy, prejudice or fear". She advised the jury not to be influenced by public opinion, and to conduct an impartial assessment of the evidence.

[74] In our view, the Crown improperly and directly sought to "inflame the passions" of the jury, appealing to their emotions, by inviting sympathy for S.L. and revulsion toward the accused. The inflammatory rhetoric used by the trial Crown worked together with her invitation to the jury to engage in propensity reasoning.

[75] As in the case of the invitation to propensity reasoning, and for the same reasons, the Crown's use of inflammatory language should have been the subject of an explicit and unequivocal corrective instruction. The standard instruction to the jury not to decide the case based on sympathy or prejudice was insufficient, given that both sympathy and prejudice were the main themes in the Crown's closing.

[76] It appears from the transcript of her discussions with counsel, that the trial judge may have decided not to provide a corrective instruction on this point because defence counsel had also resorted to what counsel described as "commentary". With respect, even if defence counsel went too far in their submissions about the complainant – and we note that the Crown did not object to the defence closing on this basis – an explicit corrective instruction was nevertheless required. "An inflammatory closing is not justified even where preceded by defence counsel's own excesses. Ethical duties do not recede in proportion to the improprieties of opposing counsel": David Layton and Hon. Michel Proulx, *Ethics and Criminal Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 648-649. "Emotions tend to run high in jury trials dealing with serious crimes… Crown counsel is expected to behave in a dispassionate and impartial manner to reduce the emotional level and foster a rational process": *R. v. R.B.B.*, 2001 BCCA 14, 152 C.C.C. (3d) 437, at para. 15.

[77] Finally, we do not accept the respondent's argument that the Crown's inflammatory remarks related only to the sexual assault charges. The Crown was

referring to the entire attack on the complainant, not just to the alleged sexual assault. In our view, it is not possible to parse the Crown's comments in the manner suggested by the respondent.

(3) Comments Designed to Bolster the Complainant's Credibility

[78] The appellant refers to two passages in the Crown's closing submissions where she is alleged to have made improper comments that were designed to bolster the complainant's credibility.

[79] First, the appellant contends that the Crown attempted to enhance S.L.'s credibility by improperly referring to the preliminary inquiry in this matter and the preliminary inquiry for the third co-accused, and suggesting that S.L.'s account had stood up to cross-examination in such prior proceedings. It is unnecessary to address this argument. In the context of this trial, the references to the prior proceedings were not problematic. And, in our view, the passage relied on by the appellant would not reasonably bear the interpretation advanced by the appellant.

[80] Second, the appellant submits that the trial Crown improperly suggested that S.L. was credible because she underwent a full examination and "convinced" an expert (the sexual assault nurse), when it was not the nurse's role to challenge S.L.'s account, but only to gather information. In this regard, the Crown stated:

> In [the sexual assault nurse's] expert opinion, [S.L.'s] version of what happened to her was consistent with the results of her examination and assessment. This is evidence I hope you take to the forefront of your discussions. No one challenged [the nurse's] expertise. Both the Crown and defence agreed she was an expert in the area to what she testified.
>
> If [S.L.] wanted to make up this whole story and falsely implicate Mr. Goulding and Mr. Clyke, she successfully managed to convince a qualified expert who examined her that same day, that her made up version was consistent with [the nurse's] assessment and [the nurse's] opinion.
>
> If you believe that she's lying that's rather impressing, impressive, for lying [S.L.] that the medical findings of her sexual assault examination are consistent with her lies.

[81] The appellant also notes that the Crown personally endorsed the complainant's credibility. The Crown concluded her closing address with such an endorsement:

> But if in fact, [S.L.] was making all this up and managed to put all of the other supporting pieces of evidence in place, she's a young girl capable of accomplishing amazing things, and I wish she was. I wish I believed that she made this all up and [S.L.] would one day conquer the world.

[82] The respondent acknowledges that the Crown's reliance on the sexual assault nurse to bolster S.L.'s credibility, and her personal endorsement of S.L.'s credibility, were improper. However, the respondent contends that certain aspects of the charge effectively prevented the jury from relying on these submissions in their assessment of S.L.'s evidence.

[83] If these had been the only improper submissions in the Crown's closing, we might have deferred to the trial judge's decision not to address them specifically. What she said in the jury charge went some way to remedying the potential prejudice. The trial judge accurately summarized the evidence of the sexual assault nurse, including that the presence or absence of injuries was not determinative of whether an assault occurred. She reminded the jury that the opinions of counsel were not evidence. And she instructed the jury that it was their task alone to assess the credibility of witnesses, providing the usual detailed instruction to the jury on how to go about this task. The jury was thus equipped with many of the necessary tools to decide this issue without relying on the Crown's improper attempts to bolster the complainant's credibility. In our view however, when these problems are considered together with the trial Crown's invitation to engage in propensity reasoning, the use of inflammatory language, and the other problematic issues related to S.L.'s credibility discussed below, the absence of a specific correction resulted in an unfair trial.

[84] The respondent also suggests that the trial Crown's submission about the sexual assault nurse related only to the sexual assault offences, and since the jury found the accused not guilty of sexual assault, it had no impact on their reasoning. We do not accept this argument. The injuries observed by the sexual assault nurse were not limited to injuries sustained in the alleged sexual assault. Moreover, in making her submissions about this evidence, and in encouraging the jury's use of it to enhance S.L.'s credibility, the Crown did not distinguish between the alleged sexual assault and the other aspects of the attack.

(4) Invitations to Speculation

[85] The appellant submits that the trial Crown improperly invited the jury to engage in speculation in two ways: first, in discussing ways that drugs might have gotten into S.L.'s system by including a theory that was not supported by the evidence, and second, by claiming that the appellant's DNA was present in the DNA samples, when the evidence did not support this conclusion.

(a) Speculation About Why S.L. Had Drugs in Her System

[86] First, the appellant contends that the trial Crown relied on baseless theories to explain away the evidence that S.L.'s blood tested positive for methamphetamines. The evidence of drugs in S.L.'s system was important because it was potentially inconsistent with her evidence that she had not been using drugs in the months leading up to the events in question. The appellant submits that this was an improper attempt by the Crown to rehabilitate S.L.'s credibility.

[87] The respondent acknowledges that, given the limited details in S.L.'s evidence about the sexual assault, the trial Crown likely crossed a line when she submitted that the assailants "[p]resumably… were all touching every part of [S.L.'s] naked body", and in implicitly relying on semen as a possible method of transmission, when the expert evidence did not support this theory. However, the respondent submits that this did not cause any unfairness because this evidence related to the sexual assault allegation. The only way the jury could have accepted the Crown's submissions on how the drugs came to be in S.L.'s system was if they also accepted that the sexual assault occurred. Moreover, in her charge the trial judge correctly summarized the evidence on how methamphetamine can enter a person's system, as well as the defence position that the Crown's suggestion that crystal meth may have passed through the vaginal or anal cavity was at odds with her testimony that she only saw the three males smoking the meth, not stuffing the pipe or snorting the meth. Finally, the trial judge instructed the jury to decide the facts based on the evidence and cautioned them against speculation.

[88] We agree with the respondent's concession that the Crown's submissions stretched the evidence about drug transfer beyond its limits. The trial judge appreciated the problematic nature of the Crown's submissions. Recall that this was an issue that she raised on her own initiative after the Crown's closing, and she said she would consider it. In the end, she decided not to give a corrective instruction on this issue. Instead, the trial judge correctly summarized the evidence, and defence counsel's position on it, in her charge to the jury. She also correctly instructed the jury on the principles for dealing with expert evidence.

[89] In our view a more specific caution would have been preferable, because the Crown's implicit submission that the jury could find that methamphetamine was

transferred to S.L. through semen was particularly improper – there was simply no evidence to support such a finding. The trial judge could have pointed to this example in her caution against speculation. As with the Crown's submissions about the sexual assault nurse and her personal endorsement of the complainant's credibility, if this had been the only error in the Crown's submissions, we might well have deferred to the trial judge's decision not to give a specific correction. However, given that it was accompanied by multiple problematic submissions from the Crown relating to the important issue of S.L.'s credibility, it ought to have been addressed.

[90] Nor do we accept the respondent's argument that no prejudice resulted from the Crown's remarks. As noted above, the evidence was significant to the jury's assessment of the complainant's credibility. It was also potentially consistent with Mr. Goulding's evidence that she had used drugs with him that day. While this evidence may be less significant given the acquittals for the sexual offences, in a case that turned to a great extent on credibility, we cannot know the role it might have played in finding the appellant guilty on the assault charges.

(b) Speculation About the Appellant as the Third DNA Contributor

[91] The appellant also submits that it was wrong for the trial Crown to submit to the jury that the third DNA contributor was the appellant. While it was open to the Crown to say that the appellant was one of the parties involved in the incident, the Crown crossed the line by relating him to the DNA evidence when the expert testified that the third sample was unsuitable for comparison and could not be connected to the appellant. Although the DNA evidence arguably related only to the sexual offences, the appellant submits that the Crown's submission on this point could have been relied on by the jury to identify the appellant as one of the complainant's assailants.

[92] It is unnecessary to address this submission in great detail. We accept that the trial Crown may have gone too far in submitting that the appellant was the third DNA contributor, given that the forensic analyst testified that the sample was not suitable for comparison. That said, in our view the jury would have understood the limits of the DNA evidence. Immediately before stating her position that the third sample came from the appellant, the Crown reminded the jury that the sample was unsuitable for comparison. The trial judge correctly summarized the expert's evidence, as did defence counsel. She also accurately summarized the appellant's position that the DNA evidence did not assist in identifying S.L.'s assailants. In the circumstances, despite the fact that the Crown's submissions may have crossed the line in suggesting that the third sample was of the appellant's DNA, the jury would have understood that the DNA evidence did not identify the appellant.

[93] In our view, given the repeated, correct summaries of the DNA evidence, the trial judge did not err in failing to correct this aspect of the Crown's submissions.

(5) References to Facts Not in Evidence

[94] The appellant submits that the trial Crown wrongly referred to certain facts that were not in evidence: first, in giving her own opinion about what the scene looked like at the time the fire alarm went off, and referring to actions taken by the firefighters present during the fire alarm; second, in inviting the jury to conclude that Mr. Goulding had not implicated the appellant because this would lead to consequences for him "on the streets"; and third, in providing an explanation for the Crown's failure to call S.L.'s grandmother as a witness.

[95] While some of these remarks were improper, in our view they were either adequately corrected by the trial judge or relatively insignificant. To the extent the trial judge declined to correct the remarks we defer to her decision.

[96] First, while the Crown's submission about the firefighters tended to stretch the available evidence and could have been misleading, the trial judge's corrective instruction expressly referred to the fact that there had been submissions about this evidence. She correctly summarized the evidence about the firefighters, including its limits. Nothing further was required to address this point.

[97] Second, the Crown arguably crossed the line in submitting that someone familiar with the streets would not "rat" on someone else. There does not appear to be any evidentiary support for this submission. However, this was a brief comment, made in passing. It was not the focus of the Crown's submissions. We defer to the trial judge's decision not to correct this remark. A correction would only have drawn the jury's attention to what was otherwise a minor point in the Crown's lengthy closing.

[98] Finally, whether or not the Crown was entitled to provide an explanation for not calling S.L.'s grandmother as a witness, this comment would not have occasioned any significant prejudice. As the respondent pointed out, the Crown's comment that she felt the grandmother's evidence was unnecessary was made in response to the suggestion by counsel for the appellant that the Crown ought to have called the grandmother to corroborate the complainant's account of where she was the night before. In any event, the jury was told that counsel's submissions are not evidence, and they must decide the case based only on the evidence, and, in the context of this case, even if the Crown's explanation was inappropriate, it could not have occasioned much prejudice given the insignificance of any evidence the grandmother might have given.

(6) Reliance on Personal Observations Not in Evidence

[99] The appellant submits that the trial Crown referred to personal observations not in evidence, including that the Crown had dropped bricks on the floor and had not observed scuff marks. This comment was in response to the reliance by the defence on the absence of any indicia of a struggle in the shed – including scuff marks made by bricks – to suggest that the incident could not have transpired as described by S.L. The appellant concedes that this was a relatively minor issue.

[100] In our view, while the Crown's comment was likely improper, it was also trivial. Given the trial judge's corrective instruction and charge, the jury would have understood that counsel's submissions were not evidence, and that they were to decide the case based only on the evidence. This was a passing remark in the context of lengthy closing submissions, and it was within the trial judge's discretion to decide not to correct this explicitly.

F. CONCLUSION ON THE CUMULATIVE EFFECT OF THE CROWN'S IMPROPER SUBMISSIONS

[101] In our view, the trial Crown made improper closing submissions that prejudiced the appellant's right to a fair trial. The main problems were the Crown's repeated invitations to the jury to engage in prohibited propensity reasoning and her use of inflammatory language inviting the jury to detest the accused and to sympathize with the complainant.

[102] As we have explained, in her closing submissions the Crown also attempted to bolster the complainant's credibility in multiple improper ways. As already indicated, had these improper attempts to bolster the complainant's credibility been the only improprieties in the Crown's submissions, we might have deferred to the trial judge's decision not to give an explicit correction, and instead to rely on the more general language in the corrective instruction and jury charge to equip the jury to deal with these issues.

[103] In determining whether trial unfairness resulted from the Crown's improprieties in her closing address, the strength of the Crown's case is a relevant consideration. The Crown did not have an overwhelming case. There were credibility and reliability concerns with the complainant's evidence, much as there were with the evidence of Mr. Goulding. In this context, it was important that Crown counsel approach the evidence fairly and dispassionately. She did not do so; instead, she attempted to prop up her case by inviting the jury to feel revulsion for the accused and compassion for the complainant, and by bolstering the complainant's credibility in improper ways. Given the challenges in the Crown's

case, a more explicit corrective instruction was required to address the resulting prejudice to the appellant's right to a fair trial.

[104] When, as here, Crown counsel has overstepped the bounds of proper submissions to the extent that an accused's fair trial rights are jeopardized, there is typically no reason for the trial judge to avoid pointing out specifically what is being corrected, and there is every reason to do so. In this case the most egregious remarks were deliberate and part of the Crown's overriding theme. It was appropriate and indeed necessary for the trial judge to "single out" the Crown in her remarks. The failure to do so risked a corrective instruction that was ineffective.

[105] Depending on the nature of the impropriety, there may be a concern about repeating references that are prejudicial to the accused. This is one reason why it can be beneficial for a trial judge not only to discuss the appropriate response with counsel (as the trial judge did in this case), but also to provide them with proposed wording for their consideration and input: see, e.g., *Howley*, at para. 41; *R. v. Herron*, 2019 SKCA 138, at para. 89; *R. v. Badgerow*, 2019 ONCA 374, at paras. 44-47; *R. v. Gager*, 2020 ONCA 274, at para. 57. Crown counsel can play an important role in ensuring that an effective and appropriate corrective instruction has been given. See, e.g., *Melanson*, at para. 79, and *Howley*, at paras. 40-42.

[106] While Crown counsel at trial, for the most part, did not accept that she had done anything wrong, the respondent on appeal acknowledges that there were several significant improprieties in the trial Crown's closing submissions. The resulting prejudice to the appellant's fair trial rights was not effectively remedied. The corrective instruction did not bring home to the jury what was specifically said that they needed to disregard. It would not have been clear: (1) what parts of the Crown's closing submissions were problematic; and (2) that the jury was to disregard entirely certain parts of the Crown's submissions.

[107] As already noted, the failure of defence counsel, who protested vigorously after the Crown's closing address, to object to the corrective instruction and the relevant portions of the jury charge, is not determinative. There was no apparent tactical reason for the defence failure to object, nor can we take the failure to object as "an indication that the impact of the comment, in the circumstances, was not so prejudicial as to render the trial unfair" (*T.(A.)*, at para. 41). Where, as here, the main problem with the Crown's closing was her repeated invitation to the jury to engage in propensity reasoning, and the invitation to propensity reasoning formed the central theme of the Crown's closing submissions, there was a real danger that the jury would have been misled and would not have properly assessed the evidence.

G. DISPOSITION

[108] For these reasons we allow the appeal, quash the appellant's convictions, and remit the matter to the Superior Court of Justice for a new trial on the charges of assault and assault causing bodily harm.

Released: November 16, 2021 "P.R."

"Paul Rouleau J.A."

"K. van Rensburg J.A."

"Grant Huscroft J.A."

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[1] There were other objections to the trial Crown's closing submissions that are not listed here, as they were pertinent only to Mr. Goulding.

[2] The trial judge's reference to the Barrie proceedings was not directed at the Crown's closing submissions. Rather, it was intended to correct a suggestion made by defence counsel about unrelated family law proceedings.