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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).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that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. J.C., 2021 ONCA 787

DATE: 20211105

DOCKET: C66566

Fairburn A.C.J.O., Doherty and Sossin JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

J.C.

Appellant

Mark Sandler and Wayne Cunningham, for the appellant

Christine Bartlett-Hughes, for the respondent

Heard: April 15, 2021 by video conference

On appeal from the convictions entered by Justice Paul R. Sweeny of the Superior Court of Justice, sitting with a jury, on December 18, 2018.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] The appellant's and complainants' families had a very close bond. They travelled together and spent a great deal of time with one another. The appellant is not related to the complainants, but they viewed one another as family.

[2] The two complainants are brothers, about two years apart in age. K.M. was born in 1995 and C.M. was born in 1993. In 2016, K.M. and C.M. disclosed to the police that they had been repeatedly sexually assaulted by the appellant over about a five-year period, ranging from 2006 to 2011. The appellant was charged with one count of sexual assault, one count of sexual interference, and one count of invitation to sexual touching with respect to K.M.; and a second count of sexual assault with respect to C.M.

[3] In the fall of 2018, shortly before the appellant's trial started, the appellant's nephew C.Y., who was born in 1999, also alleged that he had been sexually assaulted by the appellant over a lengthy period of time, ranging from about 2007

to 2013. The Crown successfully brought a pre-trial application to admit C.Y.'s similar act evidence.

[4] The appellant testified at trial. While he admitted that he had engaged in "awful, embarrassing[, and] shameful" sexualized communications with K.M., he denied that he ever committed the assaults being alleged. Therefore, as the trial judge put it in his charge to the jury, "The real issue in this case [was] whether the events alleged to form the basis of the crime(s) charged ever took place."

[5] Ultimately, the jury found the appellant guilty of all three counts related to K.M. and found the appellant not guilty of the one count related to C.M.

[6] The appellant appeals his convictions. This appeal requires the court to answer the following four questions:

(1) Did the trial judge err in allowing C.Y. to testify as a similar act witness?

(2) Did the trial judge err in permitting the jury to consider cross-count similar act evidence as between K.M. and C.M.?

(3) Did the trial judge err in failing to instruct the jury on the prohibited use of bad character evidence arising from the Facebook communications between K.M. and the appellant?

(4) Did the trial judge err in refusing to permit a challenge for cause during the jury selection process?

[7] The answer to each of these questions is no.

B. BRIEF BACKGROUND: THE CHARGES

(1) C.M.: Sexual Assault, from September 1, 2006 to June 30, 2010

[8] C.M. was born in 1993. He is K.M.'s older brother. He alleged that the appellant touched him inappropriately between about 2006 and 2010, when he was in grades 8 through 11. He alleged that the appellant had kissed him on the cheeks and hugged him prior to 2006, but that the appellant's actions then progressed to touching C.M.'s buttocks (described as a "grab and lift"), kissing his lips, and touching his genital area over and later under his clothes.

[9] C.M. testified about five specific incidents involving the touching of his genitals and buttocks over and under his clothes. He said that someone was either present on the premises or close by when each touching occurred. He also testified that the appellant would make sexualized jokes as he touched C.M.'s testicles,

such as commenting on whether C.M.'s pubic hair was "groomed" or "ungroomed"; asking C.M., "How is it hanging?"; commenting that C.M.'s testicles were hanging "like a little to the left"; and questioning whether C.M. was circumcised. The appellant also shared with C.M. that he would trim his own pubic hair while sitting on the side of the bathtub.

[10] C.M. testified that, at the time that the acts were taking place, he did not consider the touching to be sexual in nature. Indeed, he agreed during cross-examination that he perceived the touching to be a joke. The jury was instructed to take C.M.'s perceptions about the acts into account when determining whether the touching occurred in circumstances of a sexual nature. The jury found the appellant not guilty of the single count of sexual assault.

(2) K.M.: Sexual Assault, Sexual Interference, and Invitation to Sexual Touching, from March 1, 2010 to March 31, 2011

[11] K.M. was born in 1995. He is a couple years younger than C.M.

[12] K.M. testified that the appellant started hugging him and kissing him on the cheeks when he was in grade four or five. That conduct progressed to kissing on the lips, to "bum taps", to "bum grabbing during hugs", to the appellant's "hand wrapping around to … grab [K.M.'s] … private area." K.M. testified that, because of the progression over time, it all became somewhat "blurred". K.M. recalled numerous sexualized conversations with the appellant, including the appellant speaking about sexual matters involving his wife and sharing a sexual fantasy he had involving K.M.

[13] Eventually the touching progressed to the appellant's hands being under K.M.'s clothes. Like C.M., K.M. testified that the appellant would make jokes while engaged in the touching, such as commenting upon K.M.'s penis size, the shape of K.M.'s genitals, and K.M.'s romantic relationships and interests. K.M. testified that the behaviour became almost normal, that he became "quite used to" it.

[14] After K.M. turned 14 years of age, the touching progressed to other activities. He testified about ten specific incidents that occurred in different locations, including at K.M.'s home; at the appellant's home, cottage, and Florida condominium; and at a rented chalet in British Columbia.

[15] The first incident was at the appellant's condominium in Florida, a trip that the two families took together in March of 2010. K.M. and one of the appellant's children were in a bedroom when the appellant came in and started to tickle K.M. When K.M. fell between the bed and the wall, the appellant fondled him. K.M. recalls that he got an erection.

[16] The appellant's child was present for this tickling episode, yet he testified about seeing nothing inappropriate. And, as with all of the alleged incidents, the appellant denied that the fondling occurred.

[17] Over the following nine incidents, the conduct progressed from fondling to mutual touching, mutual masturbation, and mutual oral sex. K.M. testified that he and the appellant would often ejaculate into tissues and then dispose of them.

[18] K.M. testified that he knew or believed that at least one other person was nearby for all of the incidents, with the exception of one incident (a mutual masturbation that began in the appellant's living room then moved upstairs to the appellant's bedroom).

[19] In March of 2011, when K.M. was 16 years of age and in grade 10, he participated in an academic exchange program. While abroad, K.M. and the appellant stayed in touch via Facebook communication. One day, after a conversation about the appellant's sexual encounter with his wife, K.M. confronted the appellant and asked if they could stop "doing 'stuff'" when he returned to Canada. The appellant agreed and said there would be "no more talk about it":

> Appellant: hope you have as good a time in bed as i did!
>
> haha
>
> K.M.: ahahah!
>
> im sure!
>
> what was going on this morning?
>
> Appellant: just a real good one last night with the [nickname for the appellant's wife]
>
> K.M.: yeah!? i bet!
>
> any more details?
>
> what happened?
>
> Appellant: dangerous to share over the net but from one side of the bed to the other - making me ready again just thinking about it

K.M.: what do you mean “one side of the bed to the other”? can you just expand a little? [winking emoticon]

Appellant: different positions - up -down, sideways, standing etc yahoo

you’re back - you in bed yet

K.M.: sorry! ahah

and sweeet!

i need to tell you something also!

Appellant: go for itr

K.M.: i know i shouldnt be saying this over net... but as you know! i’ve matured alot since ive been here! and learned many things! and one is that i shouldnt be doing “stuff” with you. So i wanted to say if it could stop, please. And if we could just [have a] normal [relationship]?

does that sound alright?

Appellant: sounds perfect !!

K.M.: alright! great!

so when I come back we cant do it anymore

ok?

Appellant: ok, of course ,

K.M.: ok! great !

thanks for understanding !

Appellant: no more talk about it at all

[Emphasis added.]

[20] A little over five years after that Facebook communication, in the summer of 2016, K.M. reported the assaults to the police. He explained that his decision to

disclose the allegations was triggered by two factors. First, he was in medical school. During a rotation in psychiatry, he was exposed to the serious effects of sexual abuse on children, at which point he knew that this was something that he "wanted to finally address". Second, he was concerned that others may still be at risk.

C. ANALYSIS

(1) Did the Trial Judge Err in Allowing C.Y. to Testify as a Similar Act Witness?

(a) Overview

[21] As his primary ground of appeal, the appellant raises concerns over the admission of extraneous similar act evidence, namely C.Y.'s evidence.

[22] I will start by summarizing C.Y.'s *voir dire* evidence, followed by a discussion of the general framework for the admission of similar act evidence. I will then discuss each of the alleged errors as they pertain to the C.Y. similar act ruling.

(b) C.Y.'s *Voir Dire* Evidence

[23] C.Y. was born in 1999. He is the appellant's nephew by marriage. C.Y.'s family and the appellant's family were very close. Like the complainants' family, C.Y.'s family saw the appellant's family quite often: they travelled, socialized, and attended cottages together.

[24] After the appellant was charged in 2016, C.Y.'s parents asked C.Y. and his sibling whether the appellant had ever done anything sexually inappropriate to them. They both denied that anything untoward had ever occurred.

[25] Two years later, shortly before the appellant's trial was set to commence, C.Y. disclosed to his parents that he had also been sexually assaulted by the appellant. C.Y. then disclosed to the police. Charges were laid.[1]

[26] As the impugned ruling rests on C.Y.'s *voir dire* evidence, it is there that I focus my attention.

[27] C.Y. claimed that he was touched by the appellant from about the ages of 7 to 15 years old. He testified about being "groped" by the appellant whenever the families got together. He further testified about four specific incidents that stuck out in his mind. They each occurred in different locations: at C.Y.'s home; and at the appellant's home, cottage, and Florida condominium.

[28] C.Y. was not sure about the precise order of incidents. He explained that it was “difficult” to recall because they occurred “so frequent[ly]”. He knew that the Florida and cottage incidents were chronologically third and fourth but could not recall which of the other two incidents occurred first.

[29] The first three incidents occurred temporally close together. C.Y. believes he was around ten years old during the first incident. C.Y. was seated on a couch in the “piano room” at the appellant’s home. The appellant entered, sat next to C.Y., and touched C.Y.’s genitals over his pants. C.Y. believes the conduct stopped when his sibling walked into the room. C.Y. does not remember thinking that the conduct was wrong.

[30] The next incident was around the same time or maybe about one year later. This incident occurred in C.Y.’s own home. The appellant and his family were over for dinner. C.Y. had retreated to his bedroom following dinner. The appellant entered C.Y.’s room and touched C.Y.’s genitals over his clothing. Their families remained downstairs during the incident.

[31] The third incident occurred about one year later when C.Y. was around 11 years of age. C.Y. was alone in the appellant’s Florida condominium while everyone else was at the beach. The appellant walked in and suggested that C.Y. was masturbating, which C.Y. denied. The appellant then pinned him onto the bed, took off C.Y.’s pants and underwear, and touched him on his genitals. C.Y. struggled and told the appellant to stop. The incident lasted about five minutes. C.Y. thinks the conduct stopped when someone walked into the condominium, but it is possible that the conduct just stopped on its own.

[32] The final incident that C.Y. could recall occurred at the appellant’s cottage. C.Y. thought this happened when he was around 13 years of age. The appellant spoke to C.Y. about “sexual experiences” as they drove to the cottage, which made him “uncomfortable” because of “the gap between [their] ages”. C.Y. expected the appellant’s wife would be at the cottage when they arrived. She was not present upon arrival, but C.Y. knew that she would be returning. While C.Y. and the appellant were still alone, the appellant pinned him onto the couch, pulled C.Y.’s pants and underwear off, and touched him on his genitals. C.Y. asked the appellant to stop. The incident lasted five to ten minutes. During the incident, the appellant was “poking fun at the fact that [C.Y.] was growing pubic hair”.

(c) Applicable Legal Principles for Admitting Similar Act Evidence

[33] Similar act evidence is presumptively inadmissible. This exclusionary rule is rooted in a general prohibition against the admission of bad character evidence. To rebut this presumption, the Crown must satisfy the court on a balance of

probabilities that the probative value of the evidence in relation to a particular issue or issues at trial outweighs its prejudicial effect: *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 55; *R. v. R.C.*, 2020 ONCA 159, at para. 54.

[34] Determining the admissibility of similar act evidence involves a three-step inquiry.

[35] First, the court considers the probative value arising from the evidence. Probative value is derived from the "objective improbability of coincidence that more than one person (acting independently) would coincidentally give the same type of evidence": *R. v. Norris*, 2020 ONCA 847, at para. 17, referring to *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 48; *Handy*, at paras. 76, 110; and *R. v. Durant*, 2019 ONCA 74, 144 O.R. (3d) 465, at para. 87. Despite the prejudicial quality of similar act evidence, its probative value will overtake that prejudice where it would be an "affront to common sense to suggest that the similarities were due to coincidence": *Handy*, at para. 41, citing *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 751.

[36] As a pre-condition to the assessment of probative value, the trial judge must consider whether there exist any alternative explanations for the evidence, such as whether it is tainted by collusion or otherwise. If this is the case, the foundation upon which the admissibility of similar act evidence rests – the objective improbability of coincidence – evaporates. Therefore, if there is an air of reality to the allegation of collusion, the Crown bears the onus of disproving collusion on a balance of probabilities: *Handy*, at paras. 99, 104, and 112.

[37] If the court is satisfied that the integrity of the similar act evidence has not been undermined by collusion, then the trial judge must calculate the probative value of that evidence. This is not a theoretical exercise. It must be understood in relation to the specific issue(s) at trial which the evidence is elicited to address: *Handy*, at para. 69; *B. (C.R.)*, at p. 732. Determining the issue(s) to which the evidence relates is key to understanding the "drivers of cogency in relation to the desired inferences": *Handy*, at para. 78.

[38] The court in *Handy* set out a helpful, non-exhaustive list of factors at para. 82, which assist in determining the cogency between the proffered similar act evidence and the circumstances set out in the charges: proximity in time, similarity in detail, number of occurrences, surrounding circumstances, distinctive features, intervening acts, and any other factors supporting or rebutting the "underlying unity of the similar acts."

[39] Second, the court considers the prejudice that would result from introducing the evidence into the trial. There are two aspects to this inquiry: moral prejudice and reasoning prejudice.

[40] Both forms of prejudice may cause the trier of fact to stray from its proper focus. Moral prejudice arises from concerns that the trier of fact may decide a case based on the perceived bad character of the accused: *Handy*, at paras. 31, 36; *R. v. Lo*, 2020 ONCA 622, 393 C.C.C. (3d) 543, at para. 110. Reasoning prejudice considers whether the trier of fact "may become confused by the multiplicity of incidents, and become distracted by the cumulative force of so many allegations": *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 68. A further detrimental consequence flowing from reasoning prejudice is the potential lengthening of criminal trials.

[41] In the final stage of the analysis, the court weighs the probative value of the evidence against its prejudicial effect. The trial judge's decision to admit the evidence "is entitled to substantial deference" when it comes to where that balance lies: *Handy*, at para. 153; see also *Shearing*, at para. 73; *B. (C.R.)*, at pp. 733, 739. This is so because trial judges are best positioned to consider the overall context of the trial, taking into account all factors in determining whether they should exercise their discretion in favour of admission.

[42] The appellant argues that the trial judge erred in each of his three tasks: (1) he erroneously overestimated the probative value of the evidence; (2) he erroneously underestimated the prejudicial effect of the evidence; and (3) he failed in his balancing exercise.

[43] Despite the very capable submissions advanced by the appellant, and as will become clear when addressing many of the objections on appeal, they largely distill into a request for this court to consider the matter afresh. It is not the role of this court to do so.

(d) The Alleged Errors Relating to Probative Value

(i) Collusion

[44] As set out above, the existence of collusion will rebut the very foundation on which similar act evidence is predicated: the improbability of coincidence. The trial judge rejected the suggestion that C.Y.'s evidence was tainted by collusion, finding that C.Y. "had not spoken with either KM or CM in several years" and that there was "no evidence" they had ever discussed the allegations.

[45] The appellant argues that the trial judge misapprehended the defence position on this point. The appellant suggests that there was compelling support for a finding of collusion, not because C.Y. had colluded with the complainants to fabricate his allegations, but because C.Y.'s parents spoke to him about the charges which inadvertently tainted his evidence.

[46] As the appellant correctly notes, if a complainant's allegations are shared with a purported similar act witness before that witness makes their accusation, then the similar act witness's evidence may become tainted: *R. v. Dorsey*, 2012 ONCA 185, 289 O.A.C. 118, at paras. 29-31.

[47] While I accept that the evidence of a similar act witness can be inadvertently tainted through third-party discussions, I do not agree that the trial judge erred in his approach to this issue in this case.

[48] The trial judge was factually right to note that the complainants and C.Y. had not spoken in several years. Therefore, C.Y.'s parents were the only source of potential collusion or tainting. Yet this argument was not advanced before the trial judge. He cannot be faulted for failing to respond to arguments that were not made.

[49] In any event, nothing in the record supports the suggestion that C.Y.'s parents had tainted his evidence. For one thing, C.Y.'s father testified, yet he was not asked about his knowledge of the allegations or what he told C.Y. about them.

[50] As for C.Y., he was not asked at the *voir dire* if he had discussed the details of the sexual assaults with his family. When asked that question at the trial proper, C.Y. said that his parents told him what they knew about the charges, which he did not "think was a whole lot." When his parents first approached him, shortly after the charges had been laid, C.Y. testified that he only knew that the complainants were boys. He only later came to learn that they were C.M. and K.M., whom he had met on previous occasions.

[51] Therefore, if there was any inadvertent tainting by C.Y.'s family (which is not at all evident on the *voir dire* evidence), it was not of the nature that would lead to a denial of admission of the evidence. There was nothing in the defence position that could not be handled through jury deliberations, assisted by a clear instruction: *Shearing*, at paras. 43-45; *Dorsey*, at para. 29. And, in fact, such an instruction was given in this case.

(ii) The "Issue(s) in Dispute"

[52] The appellant claims that the trial judge erred in how he described the issues which C.Y.'s evidence was tendered to prove, which were, as he put it: "(1) the

complainants' credibility; (2) addressing a defence of impossibility or the risk of discovery because others were alleged to be around at the time of the incidents; and (3) the existence of a propensity for a specific type of victim and grooming behaviour."

[53] The appellant argues that the trial judge erred with respect to each of the identified issues in question.

[54] First, the appellant contends that the trial judge erred when he described the "complainants' credibility" as constituting one of the issues in question. The appellant argues that credibility cannot constitute a specific issue that overcomes the general exclusionary rule. In support of this position, the appellant relies upon *Handy*, at para. 115, where Binnie J. warned that defining the issue as "the credibility of the complainant" would require "some refinement" given that it is "too broad a gateway for the admission of propensity evidence".

[55] I agree that identifying the issue in question as one of credibility can risk admitting similar act evidence on the basis of nothing more than general disposition because "[a]nything that blackens the character of an accused may, as a by-product, enhance the credibility of a complainant": *Handy*, at para. 116.

[56] Even so, that is not what happened here. While the trial judge spoke in brief compass about the "complainants' credibility", read contextually, the evidence was admitted, in part, to support the complainants' versions as to the *actus reus* of the assaults. This was a live issue at trial – indeed, it was the only issue at trial – and there is nothing that precludes the admission of similar act evidence to prove that fact. This was an entirely appropriate purpose and the mere imprecision around describing the issue in dispute does not constitute reversible error: *Handy*, at para. 120; *Shearing*, at para. 46; and *R. v. J.H.*, 2018 ONCA 245, at para. 14.

[57] Second, the appellant claims that the trial judge erred in concluding that C.Y.'s evidence was capable of addressing the defence of impossibility or risk of discovery because others were alleged to be around at the time of the incidents. The appellant contends that only two of the four incidents described by C.Y. carried the risk of discovery, while almost every incident described by K.M. and C.M. had people close by or present during the alleged acts. Therefore, C.Y.'s evidence is said to carry little probative value on this issue.

[58] There is no error in the trial judge's conclusion on this point.

[59] In each of the incidents described by C.Y., there was a risk of discovery, in the sense that there was a person present or very close by or expected to arrive. For instance: (1) C.Y.'s sibling was said to have walked into the piano room during

the assault; (2) C.Y.'s family and the appellant's family were downstairs in C.Y.'s home when the assault was said to have occurred in C.Y.'s bedroom; (3) while C.Y. said that he and the appellant were initially alone during the Florida assault, C.Y. thought that someone walked into the condominium during the assault; and (4) while the appellant's wife was unexpectedly absent from the cottage when C.Y. and the appellant arrived, C.Y. expected her to return.

[60] Finally, the appellant claims that the trial judge misapprehended C.Y.'s evidence and therefore erred in his conclusion that it was capable of demonstrating the appellant's "propensity for a specific type of victim and grooming behaviour." Unlike K.M.'s evidence, which showed an escalation in conduct from fondling to mutual masturbation, oral sex, and ejaculation, the appellant says that C.Y. testified about forced sexual abuse. The differences between K.M.'s and C.Y.'s scenarios are said to be so profound as to rob the purported similar act evidence of any probative value.

[61] I do not agree with this characterization of C.Y.'s evidence. First, the trial judge did not misapprehend the nature of C.Y.'s evidence. To the contrary, he specifically addressed the fact that the appellant was said to have applied physical force to C.Y., a factor that did not feature into either C.M.'s or K.M.'s evidence.

[62] Even so, the trial judge specifically noted that C.Y.'s evidence stretched well beyond the four incidents testified to, covering many other acts that were said to have "occurred on each interaction [C.Y.] had with the [appellant]", meaning that there was not necessarily physical force every time they interacted. Accordingly, with two exceptions, this brought C.Y.'s evidence closer to that of C.M. and K.M. It is against that context that the trial judge concluded that "the additional application of force" on two occasions did "not make the acts significantly different." It was open to the trial judge to come to that conclusion.

[63] The fact that two acts involved physical force does not undermine the trial judge's conclusion that C.Y.'s evidence showed strong similarities between "specific type[s] of victim[s] and grooming behaviour." In particular, C.Y.'s evidence was capable of supporting the suggestion that the appellant would create opportunities for himself to be around young boys with whom he was in a familial relationship (C.Y.) or a familial-like relationship (K.M. and C.M.). As I will discuss further, C.Y.'s evidence supported the inference that this was precisely the appellant's *modus operandi*. All of the boys testified to similar experiences, including inappropriate sexual conversations. And, importantly, C.Y.'s evidence clearly demonstrated an escalation in behaviour, with the cottage incident being the last and most serious one.

[64] Accordingly, I do not accept that the trial judge erred in his determination of the issues in question.

(iii) Similarities and Differences

[65] The appellant also argues that there are flaws in the trial judge's assessment of the similarities and differences among the accounts of C.Y. and the complainants.

[66] First, the appellant focuses upon what are said to be extreme dissimilarities between C.Y.'s and the complainants' accounts, particularly as they relate to C.Y. being physically dominated by the appellant. In support of this proposition, the appellant points to the following paragraph in the trial judge's reasons:

> The respondent points out the difference in behaviour. Specifically, CY spoke of two occasions where physical force was being applied—the respondent pinning him down. The evidence that inappropriate behaviour occurred on each interaction CY had with the respondent I take to mean that physical force was not applied on all occasions. In any event, the additional application of force does not make the acts significantly different. There was no assertion of any physical injury as a result of the application of force.

[67] The appellant claims that the trial judge erred in: (1) undervaluing what is said to be a strong difference arising from the fact that C.Y. testified about two acts involving the use of force yet K.M. testified about mutuality in conduct; (2) emphasizing the irrelevant fact that there was no physical injury accompanying the assaults on C.Y.; and (3) relying on the fact that physical force was not used on every occasion.

[68] The appellant suggests that the trial judge further erred in using what is described as largely "generic" aspects of the alleged acts from which to draw similarities. For instance, the trial judge identified the similarities between the ages of C.Y. and the complainants, the locations of the assaults, the extended period of time over which the incidents occurred, and the close relationships between the appellant and each of the complainants and C.Y.

[69] The trial judge approached this matter correctly. In *Shearing*, at para. 60, the court warned trial judges not to address similar act evidence applications in an "excessively mechanical" manner:

> The judge's task is not to add up similarities and dissimilarities and then, like an accountant, derive a net balance. At microscopic levels of detail, dissimilarities can always be exaggerated and multiplied. This may result in distortion: *Litchfield*, *supra.* At an excessively macroscopic level of generality, on the other hand, the drawing of similarities may be too facile. Where to draw the balance is a matter of judgment. [Emphasis added.]

[70] Similarity does not necessarily have to lie in the precise physical acts themselves. Some can be more serious than others. Sometimes, the thread of similarity will lie in the perpetrator's *modus operandi*. In the context of child sexual assaults, that *modus operandi* may well be reflected in the very creation of sexual opportunities and the progression over time toward more serious acts: *Shearing*, at para. 52; *R.C.*, at para. 62.

[71] While the trial judge did not express himself exactly in this way, that is the effect of the similarities he found. He was entitled to find C.Y.'s evidence as similar to the complainants' evidence and to discount the force applied to C.Y. on two of those occasions. I agree with the respondent that the distinction is not meaningful as between a young boy having his genitals touched while being hugged versus being pinned down.

[72] All three boys shared similar stories from the perspective of the appellant's alleged *modus operandi*: connecting with young boys with whom he shared a close familial or quasi-familial relationship and exploiting that relationship in a way that carried some particular characteristics. These characteristics included: starting with touching over clothing and progressing from there; making sexual comments in connection with the touching; doing the touching in the presence of others, or at least close by, so there is a risk of discovery; and committing these acts with young boys who were part of the family or in a family-like relationship.

(iv) The Strength of the Similar Act Evidence in Light of Delay

[73] The appellant objects to the trial judge's finding that C.Y.'s delay in reporting had "no impact on the probative value of the evidence."

[74] The appellant says that the trial judge misapprehended the defence position. The defence was not suggesting that C.Y.'s credibility was diminished simply by virtue of his delayed reporting. Rather, the defence position was that C.Y.'s credibility was adversely impacted by the fact that: (1) he disclosed right before the appellant's trial; and (2) he denied the inappropriate conduct when first asked about it by his parents in 2016. The appellant argues that it was inevitable that the

strength of C.Y.'s evidence would be seriously damaged as a result of these factors.

[75] While the trial judge did not specifically address the fact that C.Y. denied being assaulted by the appellant when his parents addressed the issue with him in 2016, this did not change how the issue had to be approached. In my view, it was not at all inevitable that the strength of C.Y.'s evidence would be diminished by either the delayed disclosure or the initial denial. This was a matter for the jury's determination and the trial judge was right to leave the issue with the jurors.

(e) The Alleged Errors Relating to Prejudicial Effect

[76] The appellant also argues that the trial judge erred when he concluded that the prejudicial effect arising from C.Y.'s evidence was "modest". The appellant asserts that there is an inherent and well-known prejudice arising from this type of evidence; in particular, that the "poisonous potential of similar fact evidence cannot be doubted": *Handy*, at para. 138. Therefore, according to the appellant, no similar act evidence is of modest prejudicial effect, and the trial judge's observation to the contrary is said to reflect error.

[77] I would not accede to this submission.

[78] The trial judge's reasons demonstrate that he was well-versed in the legal underpinnings for approaching prejudice in the context of a similar act evidence inquiry. He specifically addressed both moral and reasoning prejudice.

[79] Despite C.Y.'s evidence about having been pinned down on two occasions while being sexually assaulted – a very serious matter indeed – K.M.'s evidence exceeded C.Y.'s in terms of the sheer number of serious sexual assaults, invitations to sexual touching, and sexual interferences, ranging all the way from fondling to mutual oral sex and ejaculation.

[80] In these circumstances, it was open to the trial judge to conclude that the prejudicial effect of C.Y.'s evidence was "modest" in the sense that, relative to all the evidence already before the jury, accompanied by proper instructions, it was not likely to "run a risk of inflaming the jury, causing them to give the similar fact evidence more weight than it deserved": *R. v. Bent*, 2016 ONCA 651, 342 C.C.C. (3d) 343, at para. 74, supplementary reasons at 2016 ONCA 722.

(2) Did the Trial Judge Err in Permitting the Jury to Consider Cross-Count Similar Act Evidence as Between K.M. and C.M.?

[81] The Crown successfully applied to have the evidence of K.M. and C.M. considered across all counts. During oral submissions on appeal, the appellant advanced the argument that the trial judge erred by failing to appreciate that the strength of C.M.'s evidence was significantly reduced for two reasons: (1) the circumstances under which he disclosed; and (2) the fundamental differences between his and his brother's allegations.

[82] As for the circumstances under which C.M. disclosed, it is uncontroverted that he did so after K.M. told him the details of what the appellant had done to him. This is really a suggestion of inadvertent tainting.

[83] The trial judge squarely addressed this defence suggestion and dismissed it. He acknowledged that there was evidence of communication between the brothers. Even so, after reviewing the whole record and assessing the credibility and reliability of both K.M. and C.M., the trial judge was satisfied on a balance of probabilities that the evidence was "not tainted with collusion", either conscious or unconscious in nature. I see no error in how the trial judge came to this conclusion.

[84] The appellant also asserts that fundamental differences in the brothers' accounts fatally undermined the utility of their evidence as similar acts.

[85] I do not agree. The trial judge was very much alive to the differences in accounts, most significantly that the acts relating to K.M. progressed well beyond the genital touching experienced by C.M.

[86] Even so, the trial judge clearly expressed what he saw as the similarities in accounts. I have already reviewed those similarities in relation to C.Y., including: the boys' ages at the time; their close relationships with the appellant; the locations of the acts; the joking behaviour attendant to the crimes; the similarity in jokes, including about pubic hair; and the fact that others were or may have been close by. As I concluded with respect to C.Y., the similarities defied coincidence.

(3) Did the Trial Judge Err in Failing to Instruct the Jury on the Prohibited Use of Bad Character Evidence Arising from the Facebook Communications Between K.M. and the Appellant?

[87] The appellant claims that the trial judge erred in failing to instruct the jury about the danger of propensity reasoning arising from the sexualized Facebook communications between K.M. and the appellant.

[88] Most of the content of that communication was set out earlier in these reasons. In short, the appellant described to K.M. a recent sexual encounter he had with his wife. Then K.M. said that he had come to realize that he "shouldn[']t be

doing 'stuff'" with the appellant and that he wanted "it" to stop. The appellant replied with "sounds perfect", "of course", and "no more talk about it at all".

[89] K.M. testified that the "stuff" and the "it" were the sexual acts. In contrast, the appellant said the "stuff" and the "it" referred to nothing more than the sexualized conversations.

[90] The sole question on appeal is whether the jury should have received an instruction to avoid using these sexualized communications to infer that the appellant was of bad character or disposition and, therefore, would be the type of person to have committed the crimes with which he was charged. The appellant says it was incumbent on the trial judge to provide that instruction.

[91] For a number of reasons, I do not agree.

[92] When deciding whether a non-direction gives rise to a misdirection, the evidence said to pose the risk of propensity reasoning must be considered within its proper context, including the other instructions given and the parties' positions taken at trial: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 11, 15-18.

[93] I start by observing that there was no objection taken to the absence of the instruction, notwithstanding the fact that defence counsel reviewed the proposed charge ahead of delivery.

[94] While I accept that there was no strategic reason to have failed to request the instruction or to have objected in the face of the charge, counsel were undoubtedly in the best position to determine whether such an instruction was necessary. While not determinative of the result, the failure to object is relevant to determining the seriousness of any alleged omission.

[95] The likely reason there was no objection is that the similar act evidence instructions filled any potential void that may have arisen from not specifically instructing the jury as to the use of the sexualized communications for propensity reasoning purposes. The jury was instructed as follows:

> If you conclude that [the appellant] likely committed the other acts, this may suggest to you that he has a general disposition or character to do bad things. <u>However, you must not infer from [the appellant's] general character or disposition that he is more likely to have committed the offences charged</u>. Remember that [the appellant] is on trial only for the charges set out in the Indictment. It would be

> unfair to find someone guilty simply on the basis of a general disposition or character, since general disposition or character does not tell you anything useful about what happened on the specific occasions charged in the Indictment. [Emphasis added.]

[96] Although given in the context of instructions on how to approach similar act evidence, this instruction provided the jurors with robust guidance about avoiding inappropriate propensity reasoning. To repeat that instruction in relation to the Facebook communication would have added little to the jury's understanding of its task.

[97] In any event, had the trial judge been asked to provide an instruction on prohibited propensity reasoning as it related to the Facebook communication, he would have also had to provide a clear instruction regarding how the jury could use that communication. The trial Crown relied upon the messages as a reflection of the appellant's ongoing grooming behaviour. To highlight that position for the jury's attention would not have inured to the benefit of the appellant.

(4) Did the Trial Judge Err in Refusing to Permit a Challenge for Cause During the Jury Selection Process?

[98] The appellant argues that the trial judge erred in refusing to permit the defence to bring a challenge for cause. The appellant wanted to ask prospective jurors: (1) whether they had been exposed to any form of media about the case; if so, (2) based on what they had heard, read, or seen, whether they had formed views about the appellant's guilt or innocence; and, if so, (3) whether they could set aside those opinions and decide the case based only the evidence heard in court and the instructions given by the trial judge.

[99] The evidence filed in support of the application included 18 articles in local and regional newspapers. The first article was published at the time that the charges were laid and the final one was published about a year before the trial commenced. The online articles contained comments from members of the public who had read them.

[100] While the appellant acknowledges that the articles themselves were factual in nature, he emphasizes that the comments posted online in response to those articles were "overwhelmingly vitriolic" and should have resulted in the requested challenge for cause being permitted. These comments included disparaging remarks calling for extreme punishment, expressing general disdain about the alleged acts and the appellant, and using vulgar language.

[101] The trial judge denied the request for a challenge for cause. He characterized the appellant's application as akin to an "offence based" challenge. The trial judge observed that, "in the absence of evidence, it is highly speculative to suggest that emotions surrounding sexual crimes will lead to prejudicial and unfair jury behaviour."

[102] The appellant argues that the trial judge erred in two ways. First, by mischaracterizing the application as an offence-based challenge. Rather, this was a challenge based upon extreme views expressed and disseminated about the appellant, a prominent member of his community.

[103] Second, by misdirecting himself as to the appellant's primary concern. It was not the specific crimes nor the content of the articles with which the appellant took issue. According to the appellant, the danger was that the publicity had generated vitriol in the form of comments posted online, some of which were directed at the appellant as the person identified in those articles.

[104] I start with the observation that deciding whether to permit a challenge for cause engages an exercise of judicial discretion: *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at p. 336, leave to appeal refused, [1993] S.C.C.A. No. 481. Therefore, an appellate court's function is a narrow one, confined to inquiring into whether the decision demonstrates an error in principle or caused a miscarriage of justice: *R. v. Merz* (1999), 46 O.R. (3d) 161 (C.A.), at para. 31, leave to appeal refused, [2000] S.C.C.A. No. 240.

[105] A challenge for cause may be made under s. 638(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46, on the ground that "a juror is not impartial", and that they will be unable to set aside their state of partiality so that they can decide the case fairly: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at paras. 30-31. Partiality reflects a "predisposed state of mind inclining a juror prejudicially and unfairly toward a certain party or conclusion": *Find*, at para. 30, referring to *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 9.

[106] In order to demonstrate a realistic potential for juror partiality, the two factors laid out by the court in *Find* must be satisfied: (1) that there exists a widespread bias in the community; and (2) that, despite trial safeguards, including jury instructions, some jurors will not be able to set aside that bias.

[107] The trial judge's reasons demonstrate that he understood and applied this legal test appropriately and within the bounds of his discretion. He acknowledged that the comments made online were "intemperate, inflammatory, [and] ignorant" in nature, but concluded that they did not establish a widespread bias in the

community, and that any offence-related biases could be addressed through the safeguards in place at trial.

[108] The trial judge also understood precisely what drove the appellant's concern: "The applicant's real issue is the comments that were posted online after two articles were published." This was a fair observation, particularly since the appellant conceded that the articles themselves were fair and representative. Moreover, the coverage was at best sporadic and had ended almost a year before the trial.

[109] I accept the appellant's submission that, given the online nature of the articles, they remained ever-present and accessible. At the same time, though, during his very first encounter with the jury pool, the trial judge instructed them that "[a]n impartial juror is one who will approach the trial with an open mind" and "decide the case based on the evidence given at trial, the instructions on the law from the trial judge, … and on nothing else" (emphasis added). He also told the jury not to do any external research, including using the internet, consulting with other people, or seeking out any sources of information, printed or electronic. He further warned them not to read, post, or discuss anything about the trial. As he put it, "You must decide the case solely on the basis of the evidence you hear in the courtroom."

[110] Not only did the trial judge instruct the jury pool at the very outset of the trial, but he also provided careful instructions in his final charge. Here, the trial judge provided the jury with multiple instructions to safeguard it from taking improper considerations into account. These included explicit instructions to "not be influenced by public opinion", to "disregard completely any information from" various media sources, to "consider only the evidence presented in [the] courtroom", and to decide the case only on the basis of such evidence.

[111] The trial judge's discretionary refusal to permit a challenge for cause demonstrated no error in principle and did not result in a miscarriage of justice in this case.

D. CONCLUSION

[112] I would dismiss the appeal.

Released: "November 5, 2021 JMF"

"Fairburn A.C.J.O."

"I agree Doherty J.A."

"I agree. Sossin J.A."

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[1] There is a reference in the appellant's factum to these charges being stayed on a later occasion. The record is silent as to the reason(s) for the stay of proceedings.