ONTARIO COURT OF JUSTICE

CITATION:
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B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Benoit Lortie

Before Justice G. Sparrow
Reasons for Judgment released on January 7, 2014

Ms. Mareike Newhouse ..... counsel for the Crown
Mr. Luc LeClair ..... counsel for the defendant Mr. Lortie

G. Sparrow J.:

The Facts

Testimony of JB

[1] The accused is charged with nine counts of what is commonly referred to as domestic violence between April 3 and August 31, 2011, the alleged victim being his former girlfriend JB. Specifically, he is charged with two counts of assault in the apartment on April 3 in their shared apartment in Toronto, 2 counts of assault between July 15 and July 30 while on a camping trip, one count of assault between June 1 and August 31 in the apartment and two counts of assault and sexual assault on August 31, the day she moved out. He is also charged with stealing $2200 from her that day.

[2] Certain facts are not in dispute. The couple met in the summer of 2010, while working together in the Ottawa area. They moved to Oakville, Ontario, in Sep-

tember 2010, so that JB could enroll in a media program at a nearby college; the accused found a job in Toronto.

[3] On April 2, 2010, they moved to 310 Pacific Avenue in Toronto, a house with two apartments, following a series of problems with their landlord in Oakville. They agreed to split expenses in both locations, although there were frequent arguments about who should pay for what.

Counts 1 and 2

[4] It is agreed that after moving into the apartment on April 2nd, the two went out to dinner. JB testified that he yelled at her in the restaurant for not cashing a check he had given to her, this upset her. She left, and went to a friend's home; he texted and called her, telling her to come home. She testified that she returned and found herself locked out, so she went back to stay with her friend. She testified that when she returned to the apartment at 7:30 a.m. on September 3, he grabbed her and threw her against a book case, causing the top half to fall on her. He then threw her on the ground a second time. He then grabbed her arm, threw her out of the apartment, threw a suitcase of her clothes at her and said "it's over". She said that she was slightly bruised from the incident, but that she didn't call police because she was still in love with him.

[5] She testified that she returned to the apartment that afternoon and resumed the relationship. She tried to persuade him to go to therapy to deal with his childhood problems.

Counts 3 and 4

[6] JB then testified at length about a camping trip the two took to a campground on Lake Erie in late July. She said that at that point they were fighting regularly, and the accused was easily angered.

[7] She testified specifically that she "seemed to remember' two incidents on the trip, but went on to describe three incidents: 1) the accused becoming angry about something and trying to tear down the tent while she was in it, 2)the accused throwing a cereal bowl at her while they were eating breakfast at a picnic table, then grabbing her arm, and 3)the accused sitting her on the passenger seat of her car, where she had gone to think about their relationship. She thought that he did this because he was concerned that she was going to leave. It made her anxious and uncomfortable. The trip to another campsite and cottage continued without incident, although she said that she was thinking of leaving because of his angry behaviour.

[8] The Crown specified that counts 3 and 4 related to incidents 1) and 2) referred to in paragraph 7 above.

Count 5

[9] JB testified that one day in July, the accused came in while she was writing an email; he became angry because she wasn't getting ready for a bike ride, and threw a book at her head. Although she was not hit, the incident, and other angry behaviour that day, caused her to think about ending the relationship. The accused told her that she was rejecting him.

Count 6

[10] JB testified that both were busy with work throughout the summer - she selling food at various city events, including one called Buskerfest, in late August. The accused worked at that event too. She also got a job at furniture workshop around the corner at the end of August.

[11] On August 31 she left that job in the late afternoon, and joined the accused at Buskerfest. When she told their boss that she wanted to start work late again the next day, the accused yelled at her in front of him for not telling him of her plans first. She got angry with him for doing so; he stormed off with her purse and keys in his knapsack, and ultimately threw them on the ground.

[12] She testified that the two met up at the bus station; she put her bike on a rack on the bus, ignored him during the ride to avoid a fight, got off and rode the bike home. He was on foot, and she wanted to get into the apartment before he could lock her out. She testified that he caught up to her near the house, and grabbed the chain of a bike lock which was wrapped around her torso. She said she slammed on the brakes, and "we kind of fell into each other". At one point she said" if he had grabbed that chain... I would have gone flying". She then told him "it's over,", although they spent the night in the apartment.

Counts 7, 8, 9 and 10

[13] JB testified that she stayed in the apartment for another couple days, but that "we were breaking up" and she was seriously considering leaving. On the morning of September 2nd, he woke her up and tried to "be intimate" with her; she said “no I don't want to have sex with you." He got angry and said "what do you think I am going to do, rape you?" and "he kind of gyrated a bit and gestured a rape and grabbed my vagina at the same time" She said that it was very quick; he was

on top of her, and they were both wearing pyjamas.

[14] She testified that she tried to hide in the bathroom; he blocked the door. She eventually packed up her things, and took them to the car; during the process the accused took her car keys, her computer and $2200 from her wallet. He ultimately gave the computer back. Before she left he slapped her twice, once on the face and once on her bottom. She said that the slaps did not leave bruises, but that he grabbed her arms and wrists to restrain her, and left bruises on the back of her arms.

[15] JB testified that heated conversations and emails ensued over the next few weeks, while she was living with friends. One day they exchanged belongings. One day he came up to her on the street and hugged her. She said that she considered getting a restraining order. One day, acknowledged to be September 27th, she saw two officers talking with the accused in front of the house; she stopped to talk to them, and one told her he had been called about getting a restraining order against her. She testified that she told him about "her situation"; another officer ultimately called her to ask her if she wanted to report domestic abuse. After considering the matter for several weeks, on November 1 she gave a statement which ultimately led to these charges.

[16] Ultimately the contents of various email and facebook conversations were filed on consent. She confirmed that in an email chat on September 2, she said that she was "still bruised"; he responded "how much, both arms?" She replied "three on one arm and one is quite big." She testified that she was referring to the bruises he left on her arms the day she left the apartment.

[17] JB confirmed that in an email conversation on September 6, at 10:49 pm, she asked "does he know that you hit me?", referring to the landlord Carlo. The accused replied “sort of. Carlo asked me if I'd do this again, what I did to you”. She then asked "what does he know exactly, that it was physical?"; the accused responded "He knows how hurt I am, you are...he knows I was physical and I regret all of it." She testified that she asked because she wanted to know if the landlord knew what had occurred.

[18] JB also confirmed a conversation of September 9, at 12:45 am, in which she referred to the accused chasing her on her bike, fake raping her, slapping her face and leaving bruises; the accused responded by stating that she was supposed to join him in therapy.

Cross Examination of JB

[19] In cross examination defence counsel showed JB a photograph of her hold-

ing a gun; she explained that the gun was a prop used on the set of a film where she had worked. She denied ever threatening to shoot the accused. When asked about a discussion with the accused about her financial indebtedness to him, she acknowledged that she owed him rent money for August, but said that he owed her money for a cell phone bill.

[20] With respect to count two, the fight which allegedly took place after he locked her out of the apartment, she confirmed that when he let her in the next morning he pushed her to the ground, and ultimately threw her and a bag of her clothes out the door. She denied pushing him into the bookcase, or pushing him at all.

[21] With respect to the alleged assaults while they were camping, she said that he was angry at her for sleeping in the car. She denied that the cereal bowl flipped over, onto her when she got up from the picnic bench, and confirmed her testimony that he threw it at her.

[22] With respect to count six, the bicycle incident, she maintained that she did not run into him, or almost do so, and that he did not lift his injured bandaged hand to protect himself.

[23] With respect to the incidents of August 31, she denied that the accused calmly helped her pack, and find her missing telephone. She also denied knowing that he had $900 in the apartment earned at Buskerfest.

[24] In lengthy cross examination about why she continued to park her car on Pacific Avenue, even in front of the house after she left, she said that she did so because it was convenient for getting to work at the furniture workshop which was nearby. Counsel filed a map showing that the furniture shop was several blocks away. She said that her parking permit limited the streets on which she could park, and that at his request she started to park both her car and her bike on a cross street.

[25] She confirmed that she first spoke to police about their relationship when she saw them on the porch of the house in late September.

Testimony of Accused

[26] Early in his testimony, the accused identified several messages received on his computer during the trial from JB. The messages invited him to join her on “Linkedin”. When asked if the messages could have been generated by Linkedin itself, rather than JB herself, he was unsure but said he knew that accounts had to be managed. He pointed out that one message appeared to come directly from her

g-mail address. Defence counsel would not agree to the filing of a document issued by Linkedin about the generation of messages without accompanying testimony.

Counts 1 and 2

[27] The accused testified that he is now 47, has no criminal record and has been employed by several enterprises including his current employer Music Marketing in Toronto.

[28] In the early part of his testimony the accused stated that JB scared him on a few occasions when they were living together in Oakville. In February 2011, after a dispute about a document, she said "I am going to get a gun and shoot you in the head." He was afraid because he had seen the image of her holding a gun, identified by her earlier as a prop from a film. He testified that she issued the same threat shortly after she moved out of their joint home in September 2011 and returned to start a dispute on the street.

[29] With respect to count one, he testified that after dining out the day of the move, she dropped him off and went out with friends. He had the only set of keys, so he texted her to say that he would leave the door to the apartment unlocked. They lived on the top floor of a house at 310 Pacific Avenue. When he woke up early the next morning to go to a new job she had not returned. Just before he left she arrived in an angry state, knocked on the door and accused him of locking her out, slapped him and pushed him twice, causing him to fall and hit a bookshelf. He fell to the ground; the top half of the bookshelf fell on his shoulder and head, causing him to "see stars." He said that he emailed his boss to say he could not come to work that day because of pain. He also said that he was alarmed because he had seen her behave aggressively before.

Counts 3 and 4

[30] With respect to the allegations at the campground, the accused testified that he was concerned that she had spent the first night under a blue covering in the car, as sleeping in the tent had brought on her asthma. As they were sitting at a picnic table eating cereal the next morning, he told her it was dangerous to sleep under the cover; she reacted by getting up suddenly, causing the table to tip in his direction. He jumped up, holding his cereal bowl, but eventually dropped it, causing part of its contents to land on her shoulder.

[31] The accused testified that on August 22, he asked her why she had not paid her share of the rent since April; a dispute began and she ultimately told him that she never loved him and that it had all been "just a fake". The accused recorded those remarks on his phone, and they were played in court.

COUNT 5

[32] With respect to count 6, he denied throwing a book at her at any time. He had no recollection of the incident she mentioned.

Count 6

[33] With respect to count 6, the accused, like JB, testified that on the weekend of August 27 - 29 he and JB were supposed to work at a street festival known as Buskerfest. She told their boss and him that she would arrive late on the Saturday as she had just obtained a job at the furniture workshop.

[34] He testified that she arrived at the food kiosque, where he was already working, covered in sawdust, and fatigued. When she asked if she could arrive late the next day, he told her in front of the boss that she was causing problems. She left at about 11 pm on her bicycle; he took the subway to Keele Street, where they both intended to get the bus to their street. When he saw her at the station he saw her putting her bike on a rack on the bus. When they got off the bus, he walked home quickly. She rode up to him in front of the house, and almost hit him. He put his hand on the bike, and told her to calm down, as she was very frustrated with her work.

Counts 7, 8, 9 and 10

[35] With respect to these counts, the accused testified that in the early morning hours of August 31, he tried to wake JB up to have a conversation and made an affectionate gesture; she said "fuck off" and that she wanted to sleep. Ultimately she got up, told him that they "were through"', and started packing her bags and taking them to the car. He said that he helped her by putting things in bags and taking them downstairs to her car. He put things on the bed for her, and emptied one bag to look for her missing telephone. He denied taking any cash from her, and said that in fact he did not know that she had any cash. He also denied having any physical contact with her, including slapping her, grabbing her crotch or having simulated sex.

E-mail and Facebook

[36] Counsel then asked the accused questions about the series of conversa-

tions, or chats, by e-mail and facebook, which were filed on consent.

[37] With respect to the chat of September 2 concerning the bruised arms, counsel asked the accused why he said "how are your arms?"; the accused responded that he was surprised that she mentioned bruises on both arms, because in a previous telephone conversation she had mentioned bruises on one arm only. He said that he was surprised to hear about any bruises, because they had had no physical contact, and that he thought that they must have occurred at the furniture workshop. Ultimately he added that during the phone conversation he asked her if they had occurred at the workshop; she replied "no you did that".

[38] In somewhat confusing testimony in cross examination he also stated that he asked if she was bruised on two arms because he wanted to see if she would change her earlier remark that she was bruised on one arm.

[39] Counsel also asked him why he asked "what did you tell Valentina?". Valentina, he explained, is the then three year old child of JB's stepbrother, who had given her a place to stay. He ultimately answered by saying that the question had been stupid. He then testified that when he saw JB three days later he did not see any bruises on her arms. When he asked her about them she said nothing.

[40] The accused then testified about an email chat of September 6, in which JB referred to Carlo, the landlord who lived in the apartment on the lower floor. She asked "does he know that you hit me?" He responded "sort of". JB asked what he knew exactly; he responded "it was physical", "I regret all of it", and twice more that "it was physical". He also said that Carlos knew "what I did to you" and that he had hurt her too much. When she again accused him of hitting her and throwing things at her he replied that he had just touched her head and referred to a “warm touch”. She again accused him of taking $2200 from her.

[41] When asked by counsel what he had meant when he said "it was physical", he said that he was referring to being physically exhausted. He said that his reference to hurting her too much had just been written badly. He also said that he referred to touching her head because she had been there earlier to pick up his cat and he touched her to warn her not to let the cat escape through the open door.

[42] The accused also testified that he asked her if she was going to give him back some cash because she owed him money; she said it "was not the full amount you took". In an e-chat of September 13, she again insisted that he owed her money, but acknowledged owing him five or six months of rent money.

[43] The accused was then shown an e-chat of September 9, in which JB stated "I have been afraid of you many times; I never locked you out, damaged your things, left bruises." He responded by accusing her of ignoring him and being "passive aggressive”. Counsel then showed him a section of chat in which he complained that

she would not go to couples therapy with him; she replied "I was going to go last week and then you chased me down the street on my bike, yelled at me in front of my boss, grabbed my crotch HARD, fake raped me, slapped my ass, slapped me in the face and left bruises:". He responded to the question by referring to certain passive aggressive behaviours of hers which offended him.

[44] The accused also testified again that JB harassed him after moving out by parking and walking in front of the house, telephoning him constantly and threatening him constantly, even with a gun.

Cross Examination

[45] In cross examination the accused maintained his denials of all of the allegations made by JB, and asserted that events transpired as he described them in examination in chief. Furthermore, he denied being angry at her during any of the alleged events. He testified that he was surprised that she did not come home the first night after the move to Toronto and surprised that she suddenly decided to move out in August, but he was not frustrated or angry with her. He was not angry about the cereal bowl incident, or that she nearly hit him with her bike the night they came home from Buskerfest. He was disappointed, but not angry that she would not attend couples therapy with him. He denied going to see a therapist or "consultant" on his own because he was angry and depressed; rather, he went to discuss other problems. He said that he was surprised when she decided to leave on September 2nd, but calm and not angry.

[46] In lengthy cross examination about the email chat in which he discussed the alleged bruises on JB's arms, he stated that he first thought they had been suffered at the furniture workshop. Later he testified that he thought that she was blaming him. He said that in the email he mentioned bruises on "her arms", to see if she would "confirm" her first remark that the bruises were on one arm, or exaggerate and say that both arms were bruised. He also said that he did not ask her how it had happened because there had been no physical altercation between them.

[47] When cross examined about the email of September 6 concerning the accused's conversation with Carlo the landlord, he maintained that when he referred to discussing "what I did to you" he was referring to their relationship in general. He claimed that the response "sort of" to JB's question "does he know you hit me" was an e chat response to her earlier question "he knows?", and that he never answered the second question. He again maintained that his reference to being "physical" meant that he was exhausted. He also said that when he responded to her allegation of being controlling and abusive by saying that he would discuss it with his therapist, he was not admitting to any physical abuse.

[48] With respect to the email conversation of September 9, he testified that when he acknowledged her suggestion that he had "anger and abuse", he meant to

say the English word for "angoisse" - “anguish”. When she continued to refer to his physical abuse - hitting, throwing and leaving bruises - he said that she repeated these allegations like a tape, he avoided them and instead referred to her passive forms of abuse. He also said that later in the conversation, when he responded "blah blah blah" to her allegations of abuse, it was his way of denying it.

[49] When cross examined about an email conversation of September 13 - specifically a remark "don't hit people" by JB , and his response that he told his therapist he needed to stop it - he claimed that the emails were not synchronized and that he was referring to an earlier comment. He stated that his remark "I will never do anything like this" refers to her earlier allegation of hitting, and that when he said "I blame you and me" he was not referring to physical abuse. When he responded 'I guess selon toi I will never change" in response to yet another remark about physical abuse, he said that that his response was his way of denying it.

[50] When questioned about his response to another allegation of violence - namely "you have yourself to blame" - he said that he did not type out a specific denial as she knew it wasn't true and he had denied it in a personal conversation.

[51] When confronted with a facebook conversation of September 25, in which he did not deny alleged aggressive behaviour, or having “been physical” he said that at that point he wanted to keep his distance and avoid going back and forth.

[52] In final testimony, he confirmed that he called police about getting a restraining order because he genuinely feared her, given that she was harassing him and had a gun.

[53] He also clarified that in the email exchange of September 2, when asked if Carlo knew he had been physical, he stated that he was tired, speaking generally and had used that phrase before.

Character Witnesses

[54] Two character witnesses testified on behalf of the accused. Ray Williams, his boss at Music Marketing at the time of the allegations who he has known since 1991 described him as easy to get along with, calm, cerebral, and popular at work. He said that the accused tends to think before he speaks, and that it is hard to ruffle him.

[55] Another long-time friend, Robert Chrétien, provided a similar character endorsement.

Analysis

[56] Defence counsel submits, in a nutshell, that JB's version of events should not be accepted. With respect to counts one and two, he submits that she was clearly angry as she thought that she had been locked out, and therefore had a motive to lie; likewise, with respect to the bicycle incident, count six, she also had a motive to lie as she was admittedly angry at the accused for yelling at her in front of her boss.

[57] He submits that with respect to count three, the cereal bowl incident could reasonably have occurred as explained by the accused, and misinterpreted by her. He argues that she was too vague about the alleged book throwing incident for a finding of proof beyond a reasonable doubt on count five.

[58] With respect to counts seven to ten, he submits that his client did not adopt any of JB's allegations in the gmail or facebook conversations, and that they therefore cannot be considered for their truth. Nor can they be used to corroborate her version of events: see R v Dinardo 2008 1 S.C.R. 788 at paragraph 36.

[59] He submits that his client's testimony is credible, particularly in light of the character evidence, and should at least raise a reasonable doubt pursuant to the second step of the test in *R. v. D.W.* 1991 S.C.R. 742.

[60] In lengthy submissions, the Crown argues that JB's testimony was credible and unshaken on all counts. She submits that the accused undermined his own credibility by contradicting himself, demonstrating anger at her in certain email and facebook conversations – particularly one in which he called her a “selfish bitch” who “pisses me off” - while falsely trying to portray himself as always calm and never angry at her. She submitted that he exhibited certain strange behaviour, particularly recording one of their conversations, he grossly exaggerated his fear of her including fear of her shooting him, and that he called police about a restraining order to forestall her going to the police first.

[61] She also argued that in certain gmail conversations the accused adopted JB's allegations that he caused bruises and hit her on August 31 by inexplicably not responding, and that all of her allegations on facebook and gmail of physical abuse are admissible under the recent fabrication exception to the rule against prior consistent statements.

[62] In analyzing the testimony and documents in this case, in order to assess

credibility, it is clear that the couple's relationship deteriorated significantly in the month of August. The emails relied on by the Crown, and the testimony about them generally refer to counts seven through ten. Counts one through six will therefore be analyzed separately.

[63] With respect to all counts, however, it should be noted that the recording of the conversation and the receipt of the Linkedin messages by the accused will be given little consideration. The facts surrounding these issues, are simply too unclear to render the relevant, even to credibility.

Counts 1 - 6

[64] With respect to counts one and two, defence counsel emphasized JB's motive to lie - namely her anger at being locked out of the apartment. In my view, her anger was not in dispute; she was indeed upset and frustrated at being locked out, and was upset that he had yelled at her in the restaurant. As submitted by the Crown, she was unshaken in her testimony about the related events.

[65] The Crown's submission concerning the accused's credibility - that it is unbelievable that he was not also annoyed at being left alone the night after their move, and at not getting a call or text explaining her whereabouts, has merit. However, he was also unshaken in his version of the events, namely that she burst in, was furious at not being able to open the door and pushed him, causing the bookcase to fall on him. His testimony that he was afraid of her because he had seen a photo of her holding a gun is somewhat difficult to accept, given her explanation that it was a film prop, and his seeming failure to determine what it represented. However he maintained repeatedly that she had exhibited aggressive and frightening behaviour since the move to Toronto; in other words, his claim that she caused him alarm was consistent.

[66] In my view, the accused's evidence was sufficiently credible to raise a reasonable doubt as to whether he assaulted her in the apartment the morning after the move, and he will be acquitted on counts one and two on this basis.

[67] With respect to the incident at the campground involving the cereal bowl, once again the accused was unshaken in his version of the events. He acknowledged that he provoked her by telling her that she should not have slept under the cover in the car, prompting her to jump up suddenly and cause the cereal bowl to overturn. She was unshaken in maintaining that it did not happen that way - that he threw the bowl at her.

[68] In my view, it is reasonably possible that the events happened as described by the accused, and that JB simply misinterpreted what caused the bowl to flip over in the heat of another moment of anger. The Crown's general submission about the

accused always pretending in testimony to have been calm is somewhat relevant on this count, as both JB and the accused acknowledged being annoyed with each other. Ultimately however, I am left in a state of reasonable doubt as to whether the incident was an accident or an assault, and the accused will be acquitted on count 3.

[69] With respect to the allegation that the accused sat on JB in the car, again both were unshaken in their versions of the events. He maintained that it simply did not happen. Again, both were clearly annoyed with each other at this point. As with the incident involving the cereal bowl I am left in a state of reasonable doubt and the accused will be acquitted on count four.

[70] With respect to count five, JB again was unshaken in her testimony that the accused assaulted her, by throwing a book at her. She acknowledged that she had annoyed him by not getting up from her computer when he wanted to speak to her about their bike trip.

[71] JB was quite uncertain as to when this happened, and could be no more precise than saying that it was in July. She was not specific about how close the book came to her, or where it landed. I note that in a few of the gmail conversations she referred to the accused throwing things at her; however these remarks are not specific enough to be considered admissible and relevant under any hearsay exceptions.

[72] The accused was unshaken in his denial of this event. When considered in the context of the problems with JB's evidence noted above I am left in a state of reasonable doubt as to whether an assault by throwing a book occurred. The accused will be acquitted on count five.

[73] With respect to count six, JB was at first unclear as to exactly how the accident happened. She stated that she would have gone flying if he grabbed the lock while she was biking, but ultimately maintained that he grabbed it, causing some sort of fall. There was no allegation that an injury occurred. In the e-chat of September 9th, she alleges that he chased her on her bike, but there is no mention of assault, or the time of the incident. Again it will not be used for any purpose, such as bolstering credibility.

[74] The accused's version of the events is somewhat hard to understand – how he got home on foot before she got there on her bike, exactly how she almost hit him. His denial of anger at almost being hit is hard to understand, especially given his annoyance that she had asked the boss if she could arrive late the next day. However, his evidence, examined in the context of the somewhat unclear nature of her testimony about this event, raises a reasonable doubt and he will be acquitted on count six.

Counts 7 – 10

[75] With respect to counts 7, 8 and 10, reference to certain principles of evidence and relevant jurisprudence is necessary. However, count 9 – the allegation that the accused stole $2200 – is a question of fact.

[76] Ultimately the Crown acknowledged that count 9 does not contain one of the strongest, or most important allegations. In short, JB maintained that the accused took the cash from her wallet; he steadfastly denied it. As stated above, in email conversations on September 6 and 13, JB clearly admitted owing the accused money for several months' rent, and on all of the evidence there were debts between them that were not clear. Given the accused's unshaken position that he did not steal, and the unclear nature of the evidence concerning debts for household expenses, I am left in a state of reasonable doubt as to whether the accused took money from JB without colour of right. He will be acquitted on count 9.

[77] With respect to counts 7, 8 and 10, JB's allegations in certain key emails referred to in paragraphs 16, 17, 18, 37 42, 47, 48, 49 and 51 above are very relevant. The Crown submits that they are admissible 1) to bolster JB's general credibility, pursuant to the recent fabrication exception to the rule against prior consistent statements, and 2) for the truth of their contents, as an admission pursuant to the rule of "adoption by silence".

[78] Ultimately, Crown and defence agreed that prior consistent statements cannot as a general rule be admitted because they lack probative value, and are hearsay if adduced for the truth of their contents: see R. v. Dinardo 2008 1 S.C.R. 788. However, the Supreme Court of Canada clarified the purpose for which they can be used in R. v. Stirling 2008 1 S.C.R. 272 at paragraphs 5 and 10:

> **(5) Il n'est pas non plus nécessaire que la fabrication soit particulièrement <<récente>>, puisque ce n'est pas son caractère récent qui importe, mais plutôt la question de savoir si le témoin a inventé une histoire à un moment quelconque, après l' éventement au sujet duquel il témoigne** (R. c. O'Connor (1995), 100 C.C.C. (3d) 285 (C.A. Ont.), p. 294-295). Les déclarations antérieures compatibles ont une valeur probante dans ce contexte, lorsqu' **elles peuvent démontrer que le témoin a donné une version identique des faits même avant d'avoir une raison d'inventer une histoire.** …….. (10) les **déclarations antérieures compatibles ont pour effet d'éliminer une raison potentielle de mentir et le juge du procès a le droit de prendre en considération l'élimination de cette raison lorsqu'il apprécie la crédibilité du témoin.**

[79] In my view, the following email allegations of JB's are admissible under the recent fabrication exception: 1) her statement that she had three bruises on one arm, in response to his question "are you still bruised": see paragraph 16 above and

2)her remark on September 9 in which she accused the accused of “fake raping” her, slapping her and leaving bruises (see paragraph 13 above). It is clear from Stirling, supra, at paragraph 5 that an allegation of recent fabrication need not be expressly made – it can be apparent that the opposing party is suggesting a prior contrivance. In this case, defence counsel is clearly submitting that JB invented the story of the assaults of September 2 when she gave a statement to police, and the Crown is arguing that the prior emails show a lack of motive to fabricate and thereby bolster credibility.

[80] Ultimately, in my view the emails referred to above are admissible to demonstrate that the allegations of the assaults of September 2 were not fabricated for the purpose of provoking criminal charges. The email allegations were made within a couple of days of the events, in a private conversation, and were not reported to police until weeks later. Furthermore, it should be noted that police involvement was initiated by the accused, not JB, and that she did not give a full statement until November. The emails referred to only bolster JB’s credibility in the sense that they demonstrate a lack of intent to fabricate allegations to provoke the laying of charges. However, in rebutting any suggestion of fabrication, they are not of great assistance in answering the ultimate question of whether the court should have a reasonable doubt as to whether the assaults took place.

[81] The more significant evidentiary question is whether the email exchanges of September 2, 6, 9 and 13, and specifically the accused’s responses, or non-responses, constitute adoption of JB’s allegations.

[82] The law with respect to this issue was addressed recently in R. v. Robinson 2014 O.J. No. 272 (O.C.A.), in which the accused was convicted of being a party to a murder, partly on the basis of a conversation between two other people about why one of them had committed the murder. The trial judge allowed the jury to use the statement for its truth against Robinson if they were satisfied that it was likely that Robinson would have voiced disappointment if he had disagreed.

[83] In ruling that the trial judge had erred in allowing the statement to be considered against Robinson, the court relied on Watt’s Manual of Evidence at paragraphs 36:04

> David Watt, *Watt’s Manual of Criminal Evidence* (Toronto: Thomson Carswell, 2013), at para. 36.04 sets out the general principles relating to adoptive admissions by silence, in part, as follows:
>
> > An adoptive admission is a statement made by a third party in the presence of and adopted by D. There is only adoption to the extent that D assents to the truth of the statement expressly or impliedly. Assent may be inferred from D’s
> >
> > i. words;
> >
> > ii. actions;
> >
> > iii. conduct; or

iv. demeanour

> Assent may also be inferred from D's silence, or an equivocal or evasive denial. Where the circumstances give rise to a reasonable expectation of reply, silence may constitute an adoptive admission.

[84] In warning of the need for caution, the court states at paragraph 58:

> Finally, I note that in S. Casey Hill, David M. Tanovich & Louise P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed., looseleaf (Toronto: Canada Law Book, 2013), the authors recommend a cautionary approach to the doctrine of adoption by silence at p. 7-137:
>
> > One must approach adoption by silence with great care. In many cases the inference of adoption is based on perceptions of how the accused should respond in what are often extreme and unusual situations. Jury suppositions about how an accused "should" behave in such circumstances may be inaccurate. They should be cautioned to use care before finding that an accused has implicitly adopted a statement by virtue of his failure to respond in a particular way. [Citations omitted.]

[85] With respect to counts 8 and 10, I must consider whether JB's allegations of the accused bruising her arms and slapping her as she tried to leave have been proved beyond a reasonable doubt. In doing so, in my view the accused's question "how are your arms" on September 2 and her response "how much, both arms" to his remark "still bruised" are admissible to show that he was aware that her arm, or arms had been bruised. He initiated the discussion, so he was obviously aware. When she said "still bruised" he asked for details – clearly an acknowledgement that bruising has occurred. In my view, his knowledge is apparent without strict application of the adoption by silence rule.

[86] In my view, the accused's response "sort of" to JB's question about whether Carlo the landlord knew that he hit her is also admissible for the truth of its contents. As stated in Robinson, supra, caution is required in analyzing conversational responses; however, the accused's acknowledgement that the landlord "sort of" knows about "hitting", followed directly by the accused's acknowledgement that Carlo knew that he was "physical" and "what I did to you" constitutes an admission that hitting occurred. His words did not amount to what is described in Watt's manual as an "evasive denial". They, in my view, taken in the context of the entire conversation, which began with the accused himself raising the subject of Carlo's question about whether he would do this again, constitute an admission.

[87] With respect to count 10, in analyzing the email of September 9, the "adoption by silence" rule is particularly significant. JB accused him of two slaps, leaving bruises, "fake raping" her, and grabbing her crotch; the accused responded by complaining that JB would not go to therapy. In my view, the accused did not adopt her remarks by silence; he simply ignored them, and continued to discuss therapy, the

initial topic of conversation. I agree with the Crown that it is suspicious that he did not deny such serious allegations; however, he testified that in effect he simply avoided allegations that went on like a recording. In my view, the fact that he ignored the allegations cannot be taken as an adoption.

[88] In analyzing the email of September 13, in which JB accused him of “hitting people” and he responded that he would not do so, it would in my view again be dangerous to consider his remark an adoption; he claimed that the responses were unsynchronized, it is not clear exactly which incidents she was referring to and the conversation was well after the events of August 31. It is not admissible for the truth of its contents. The facebook conversation of September 25 must be analyzed similarly – it is a very general allegation of “being physical”, and again he testified that he wanted to keep a distance.

[89] It should be noted again that other email and facebook conversations filed contain similar allegations that the accused was “violent” or “physical” or “hitting” at unspecified times; however again given the vague nature of the remarks, and the fact that they were not clearly related to a specific allegation, they cannot be considered to have been adopted.

[90] Ultimately the Crown has proved beyond a reasonable doubt that the accused grabbed JB's arms and bruised them as she was leaving. In my view the accused's testimony does not raise a reasonable doubt. His testimony summarized in paragraphs 37, 38, 46 and 47 above was confusing and contradictory; in chief he stated that he asked her on the telephone if the bruises happened at the workshop, and she blamed him instead; months later, in cross-examination he stated that he did not ask how it happened and "suspected" it happened at the workshop. His testimony that he did not pursue the subject of what happened because there was no physical altercation was evasive and hard to understand, particularly given that he raised the topic of the bruises himself in the September 2 email in order to see if she would exaggerate. It should be noted that in her response she does not say if the bruises are on one or two arms; however despite having posed the question to see what she would say he did not pursue an informative response.

[91] The accused's testimony that he was not angry that she was trying to leave, despite his calm nature as described by himself and witness Williams, also strains credulity. Her departure was a dramatic response to his attempt to be affectionate. Given this questionable denial of emotion in the face of the fact that JB was trying to leave after a year of cohabitation, and more importantly the incredible nature of his testimony about the email references to the bruises, I cannot find that his testimony raises a reasonable doubt.

[92] JB was unshaken in her testimony that he grabbed her arms and bruised her. She did not contradict herself about whether one or two arms were bruised. Her testimony that he acted angrily to her departure was credible. The accused will

be found guilty of assaulting her by grabbing and bruising her arms, although to an uncertain degree.

[93] With respect to the allegations of hitting or slapping, again the accused's testimony does not raise a reasonable doubt. As stated in paragraph 86, in my view the accused admitted hitting her in the September email, in the discussion of his conversation with Carlo. His testimony that his statement that he had been "physical" meant that he was tired simply did not make sense. Again, JB was unshaken in her testimony that he slapped her twice. The accused will be found guilty of slapping JB, although the slaps left no bruises.

[94] It should be noted that the accused's question "what did you tell Valentina" in the September 2 email is not relied upon in either finding of guilt as it was too vague to be relied on.

[95] With respect to count 7, the alleged sexual assault, the accused was firm in his denial that it simply did not occur. As stated in paragraph 87, he did not adopt her allegations in the email of September 9 or elsewhere. Any acknowledgement of being "physical" cannot be found to be linked to the specific allegation of sexual assault. Even when considered in the light of strong Crown evidence on this count, his testimony raises a reasonable doubt. He will be acquitted on count 7.

[96] The accused will therefore be convicted on counts 8 and 10< of simple assault, and acquitted on all other counts.

Released: January 7, 2014

Signed: “Justice G. Sparrow”