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E-File No.: CCP14WAGARALEX3
Appeal No.: 1401-0233 A

IN THE PROVINCIAL COURT OF ALBERTA
JUDICIAL CENTRE OF CALGARY

HER MAJESTY THE QUEEN

v.

ALEXANDER SCOTT WAGAR

Accused

TRIAL

Calgary, Alberta
June 5, 2014
June 6, 2014
June 10, 2014
August 1, 2014
August 6, 2014
September 9, 2014

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1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2 _____

3 June 5, 2014

Morning Session

4

5 The Honourable

Provincial Court

6 Judge Camp

of Alberta

7

8 H. Mograbee

For the Crown

9 P. Flynn

For the Accused

10 R. Hansen

Court Clerk

11 _____

12

13 THE COURT CLERK:

In custody, Alexander Wagar.

14

15 MR. FLYNN:

Thank you, madam clerk.

16

17 THE COURT:

Can I see the Infotillation please, madam clerk?

18 I don't have a copy.

19

20 THE COURT CLERK:

I'm sorry you didn't get one.

21

22 THE COURT:

It doesn't matter. Thank you.

23

24 MR. FLYNN:

Thank you, madam clerk. Good morning, Sir,

25 for the record, Patrick Flynn, Mr. Wagar is present in your courtroom, Sir.

26

27 THE COURT:

Mr. Wagar, you can sit down over there.

28

29 MR. FLYNN:

Sir, we are prepared to proceed to trial today.

30

31 THE COURT:

Very well.

32

33 MR. FLYNN:

We have it set for one day, Sir, my friend and I

34 are a little anxious about that, we may be seeking a further addition to the one day but

35 we're going to play it by ear I believe today and hopefully be able to accomplish it in one

36 day solely, Sir. I'm going to ask the Court's indulgence Sir, that I have my client sign an

37 agreed statement of facts that we will be able to present to the Court, Sir.

38

39 THE COURT:

Carry on.

40

41 MR. FLYNN:

Thank you, Sir. Mr. Wagar, these are the

1 agreed facts that we had looked at previously, I'm just asking to get your signature on
2 these please. There is three copies.
3
4 THE COURT: Thank you, madam clerk.
5
6 MS. MOGRABEE: Sir, we do have an agreed statement of facts to
7 put before you but before I do that, could I have your order excluding any witnesses
8 please?
9
10 THE COURT: No objection, Mr. Flynn?
11
12 MR. FLYNN: No objection, Sir.
13
14 THE COURT: Such an order will issue.
15
16 (WITNESSES EXCLUDED)
17
18 MS. MOGRABEE: Thank you.
19
20 THE COURT: And I rely on counsel to recognize their
21 potential witnesses and tell them to leave.
22
23 MR. FLYNN: Yes, Sir.
24
25 MS. MOGRABEE: Crown has only one witness Sir, I can advise
26 you that it is the complainant.
27
28 THE COURT: All right.
29
30 MS. MOGRABEE: You'll see the Information alleges a single
31 count of sexual assault.
32
33 THE COURT: I don't have the Information and I didn't look,
34 is it coming by indictment or summary?
35
36 MS. MOGRABEE: It is.
37
38 THE COURT: By indictment.
39
40 MS. MOGRABEE: I'd like to make an application to amend the
41 Information at this time and I understand my friend will be consenting to this amendment.

1
2 MR. FLYNN: That's correct, Sir.
3
4 MS. MOGRABEE: The name of the complainant is [REDACTED]
5 as set out in the Information, she also goes by [REDACTED]. So it would now read
6 with the amendment, and this is my application, to add this name, upon [REDACTED]
7 also known as [REDACTED].
8
9 THE COURT: No objection, Mr. Flynn?
10
11 MR. FLYNN: No objection, Sir.
12
13 THE COURT: The amendment is allowed.
14
15 MS. MOGRABEE: Thank you. And [REDACTED] being the common
16 spelling, madam clerk.
17
18 THE COURT CLERK: Thank you.
19
20 MS. MOGRABEE: Now with the agreed statement of facts, I'd like
21 to read that into the record if I may, it's fairly short.
22
23 THE COURT: Thank you.
24
25 Agreed Statement of Fact
26
27 MS. MOGRABEE: The accused was the subject of a DNA warrant,
28 the police took his DNA sample. The police also had a DNA sample from the alleged
29 victim's jeans. I can tell you before I read the agreed statement of facts that all samples
30 were tested, the DNA that was found on [REDACTED] jeans, matched the accused's
31 DNA. So this statement of facts relates primarily to that, as well as to the -- to the fact
32 that the complainant attended the hospital for treatment as a result of this sexual assault
33 allegation.
34
35 So I'll start with reading the agreed statement of facts in now. The accused Alexander
36 Scott Wagar, admits the following facts as truth for the purposes of the trial in which he
37 is alleged to have sexually assaulted [REDACTED] on December 13, 2011, contrary to
38 Section 271 of the *Criminal Code* of Canada. Number one, identification of the accused
39 is admitted.
40
41 Number two, jurisdiction in the City of Calgary in the Province of Alberta is admitted.

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Number three, two forensic science and identification services laboratory reports are admitted for the truth of their contents dated 2012-04-04 and 2013-11-12. The DNA profile taken from [REDACTED] jeans which she was wearing at the time of the allegation matches the accused's DNA. Both reports are admitted by consent as an exhibit in this trial.

Number four, it is agreed that there are no issues with respect to the admissibility and/or continuity of the DNA samples taken from both the accused and the alleged victim's jeans in this case.

Five, it is agreed that both experts who tested the DNA samples in this case, Melanie Green and Peter McLaren, are both forensic specialists and biology reporting scientists who are qualified to give evidence in forensic DNA testing and typing. Their CV's are admitted by consent in this trial.

Six, on December 14, 2011, [REDACTED] (sic) attended the Sheldon Chumir and was examined by Dr. Majabeen (phonetic) Hussein, a medical doctor licenced to practice medicine with a special training in the examination of alleged sexual assault victims. Dr. Hussein noted that [REDACTED] (sic) had two bruises, one in the middle of her back described as a 10 by 2 bruise, brown, tender and another bruise on her skin at the tailbone, 4 by 2 centimetres, red, tender bruise in the centre.

Those are the agreed statement of facts. I'm going to pass up that agreed statement of facts, Sir, now, along with the curriculum vitae's referred to, as well as the two DNA reports. I leave it to you as to whether or not you wish to separate the exhibits or mark it all as one.

THE COURT: Any objection to being made one --

MR. FLYNN: No objection, Sir.

THE COURT: -- one exhibit?

MR. FLYNN: No objection.

THE COURT: All those become Exhibit 1 then, thank you, madam clerk. I've -- I've

MS. MOGRABEE: Thank you.

1 THE COURT: -- listened carefully.
2
3 MS. MOGRABEE: Would you like a copy for yourself, Sir, of the
4 agreed facts?
5
6 THE COURT: I would if possible.
7
8 MS. MOGRABEE: Thank you.
9
10 THE COURT: And that's part of Exhibit 1?
11
12 MS. MOGRABEE: Yes and would you like the exhibits to go with
13 it, or would you just like --
14
15 THE COURT: If you've got copies --
16
17 MS. MOGRABEE: I do have extra copies.
18
19 THE COURT: -- yes please.
20
21 MS. MOGRABEE: Yes.
22
23 THE COURT: So Exhibit 1 is the agreed statement of facts
24 together with the documents referred to therein.
25
26 MS. MOGRABEE: Thank you.
27
28 EXHIBIT 1 - Agreed Statement of Facts with Documents Attached
29
30 MS. MOGRABEE: As I said Sir, the Crown has one witness, that
31 is [REDACTED] who also goes by [REDACTED], she is just outside the courtroom, I will
32 bring her in. I do expect the Crown to complete the Crown's case well within the time
33 that we have today. So if I may be excused I'll bring her in.
34
35 THE COURT: Please do.
36
37 MS. MOGRABEE: Okay.
38
39 [REDACTED], Sworn, Examined by Ms. Mograbee
40
41 THE COURT CLERK: Thank you, and there is water for you.

1
2 THE COURT: Give me a moment please, Ms. Mograbee.
3
4 MS. MOGRABEE: Yes, Sir.
5
6 THE COURT: [REDACTED], have you ever given evidence in
7 court before?
8
9 A No I haven't.
10
11 THE COURT: All right, well I'm sure you've seen --
12
13 A On TV.
14
15 THE COURT: -- TV, yeah it's much like that, except in this
16 court nobody shouts.
17
18 A Okay.
19
20 THE COURT: This lady who is the Crown prosecutor, will ask
21 you questions, then that gentleman who is the accused's lawyer will ask you questions,
22 perhaps harder questions, then this lady is allowed to ask some followup questions and I
23 may ask you some questions if I'm puzzled about something. You have certain rights
24 here too, if you get tired you're allowed to ask for a break, if you need a break, the
25 washroom or you're feeling sugar low, something like that, you're allowed to say you
26 need a break.
27
28 A Okay.
29
30 THE COURT: If you don't understand something, you're
31 allowed to say you don't understand, if you didn't hear properly, you're allowed to say
32 that, very important. If you don't know the answer to a question or if you've forgotten,
33 please say so. All we ask is that you tell us the truth as far as you remember it. You
34 don't get into trouble for forgetting something or not knowing the answer, or not
35 understanding the question.
36
37 A Yes.
38
39 THE COURT: We'll -- unless you need a break, we'll
40 probably go for an hour, an hour and a quarter and then have a coffee break.
41

1 A Okay.

2

3 THE COURT: But as I say, if you need a break you're
4 allowed to say so, and do you have any questions?

5

6 A Not at the moment, Sir.

7

8 THE COURT: Okay carry on then, Ms. Mograbee.

9

10 MS. MOGRABEE: Thank you.

11

12 Q So I'm going to call you [REDACTED] if that's okay with you.

13 A Yes.

14

15 Q And [REDACTED] I'm just going to ask that you speak up because I'm far away from you
16 and I need to hear what you're saying and everybody in the room needs to hear what
17 you're saying, okay? So [REDACTED] how old are you?

18 A I'm 22 years old.

19

20 Q And what year were you born in?

21 A '92. [REDACTED]h.

22

23 Q Okay. And [REDACTED], do you live here in Calgary?

24 A I live in [REDACTED]

25

26 Q Okay and we don't need to know anything more than that. When did you move from
27 Calgary?

28 A In [REDACTED].

29

30 Q Of?

31 A [REDACTED].

32

33 Q Okay. And how long were you living in Calgary for?

34 A I was here for [REDACTED] years.

35

36 Q And what years would those have been?

37 A [REDACTED]?

38

39 Q [REDACTED]?

40 A [REDACTED].

41

1 Q And part of [REDACTED], was that before you moved to [REDACTED] --

2 A Yes.

3

4 Q -- you were here in Calgary? Where did you move from before you -- where were
5 you sorry, before you came to Calgary?

6 A I was in [REDACTED] Alberta.

7

8 Q Is that where you are from, are you from a reserve?

9 A No I just moved there from [REDACTED] so I -- I was there for [REDACTED] months before
10 moving to Calgary.

11

12 Q [REDACTED] [REDACTED]

13 A Yes.

14

15 Q [REDACTED] [REDACTED] [REDACTED]

16 A Yes.

17

18 Q Now when you were living in Calgary, were you living in a house?

19 A I was living in an apartment for a month or two, and I lost that place and then I was
20 in detox and then I was on the street after that.

21

22 Q How long do you think you were on the street for?

23 A Most of my time here in Calgary was staying at the Mustard Seed and the DI. I did
24 have a couple places for like a month or two but it wasn't permanent stay.

25

26 Q How did you feed yourself and clothe yourself while you were living on the streets?

27 A I -- I lived at the Mustard Seed so I got there.

28

29 Q Okay. Did you work at any time you were on the streets?

30 A I did work at [REDACTED] warehouse for -- for a couple weeks, I think almost two months,
31 and then I stopped attending work.

32

33 Q So you said you spent most of your times living on the streets and you would stay at
34 the Mustard Seed and the DI, does the DI refer to the Drop In Centre?

35 A Yes.

36

37 Q Okay. And why were you living on the streets at that time?

38 A I was living on the streets because I could not afford a place, I had drug and alcohol
39 issues, and just no stability kind of, in my life at that point

40

41 Q How does that compare to where you're at today, how are things today?

1 A Right now I have a full time job and going to work. I've cleaned up, I've cleaned up
2 my life, stopped doing hard drugs and drinking excessive amounts, and --

3

4 Q What was the turning point for you in making that change? Can you say?

5 A After -- after another incident --

6

7 Q You don't have to elaborate on that but --

8 A After another incident it was clear that I had a problem with -- with drugs and alcohol
9 and with -- with that it put me in places that -- that was -- was not good for me. So I
10 had to -- I had to change that so I did move and start something new and try -- try
11 something new.

12

13 Q Okay and how long have you been clean for?

14 A From hard drugs? I've been almost a couple months. I still -- I still have -- have
15 like -- I smoke weed and -- and drink occasionally but with -- with other drugs I've --
16 I've stopped.

17

18 Q So I want to go back to the time you were living here in Calgary, back in December
19 of 2011. Can you tell me do you know the accused Alex Wagar?

20 A Do I know him?

21

22 Q Yeah do you know him?

23 A I do know him now.

24

25 Q How do you know him?

26 A I -- I knew him first time I encountered Alex was at the Alex Youth Centre.

27

28 THE COURT: At the which sorry?

29

30 A At the Alex Youth Centre that the --

31

32 THE COURT: Alex Youth Centre.

33

34 A -- the health centre, was when I -- first met him. And then he came back to the house
35 to -- to party.

36

37 Q MS. MOGRABEE: And I'd like -- and we'll get to that as well. So
38 you met him the first time at the Alex Youth Health Centre. And -- and do you know
39 where Alex was living at the time that you met him?

40 A No.

41

1 Q Did he ever talk about where he lived?

2 A I don't recall.

3

4 Q Did you ever see him on the streets during your time in Calgary?

5 A After meeting him, yes.

6

7 Q Okay and what was your understanding in terms of his living situation back in
8 December of 2011?

9 A I believe that he did not have a place and that he was homeless like me.

10

11 Q All right. So take us then to December 2011 around the 13th of December when you
12 have an incident with Alex, can you give us a little background as to how you end up
13 with Alex in the first place? Do you run into him at the Alex Youth Health Centre or
14 do you see him some other place?

15 A It was at the -- the youth centre. We went there, Skylar and -- I think it was Skylar
16 and then we --

17

18 MR. FLYNN: Sir, I apologize, can I just have the witness --

19 I'm sorry, I just can't quite hear you, if you just --

20

21 A Sorry.

22

23 MR. FLYNN: I know it's difficult, just -- thank you.

24

25 A Skylar and I went to the Alex Youth Centre to get -- buy groceries and go back to the
26 house and that's where Alex and Ginger were there and then we were there for a little
27 bit, and then we took the bus back to the house with the groceries and we just started
28 eating food and we decided to go -- go steal liquor.

29

30 Q MS. MOGRABEE: And I'm just going to stop you there okay,

31 [REDACTED]? I want to back up a little bit.

32 A Okay.

33

34 Q When you're talking about the house, whose house are you talking about?

35 A I think it was -- his name was Skinner Mike or something like that.

36

37 Q Is this a -- like what kind of house is this, like --

38 A It was a basement suite.

39

40 Q Do you remember where in Calgary this basement suite was?

41 A It was up past Centre Street.

1

2 Q Okay so was it in the downtown are or outside the downtown area?

3 A It was just past the bridge from Chinatown.

4

5 Q Okay.

6 A So it was close to the Alex Youth Centre.

7

8 Q And before you ran into Alex at the Alex Youth Centre, were you at the house that
9 you say is owned by Mike?

10 A Yes I was.

11

12 Q Okay and how did you end up at that house?

13 A I ended up at that house, I went with Lance, Alex's brother, after we go see a movie
14 and go eat Subway. After that we -- I was going to go back to Foothills, but then he
15 told me that there was a party and just to come along. soI agreed to -- to go.

16

17 Q To the house.

18 A To the house.

19

20 Q And who is Lance?

21 A Lance is Alex's brother.

22

23 Q Okay and is the Alex that you see here sitting in the witness box, his brother? Okay.
24 you're just saying -- the -- the recording doesn't pick up a head nod so I just need you
25 to say yes or no.26 **A Okay.**

27

28 THE COURT: Sorry please clear that up, the witness box.

29

30 MS. MOGRABEE: Yeah.

31

32 THE COURT: Perhaps you could just --

33

34 MS. MOGRABEE: Pardon me, yeah I misspoke, Sir.

35

36 THE COURT: Yeah.

37

38 MS. MOGRABEE: Thank you,

39

40 Q That you see sitting in the prisoner box across the -- the courtroom, is that who you're
41 referring to?

1 A Yeah Alex is Lance's brother.

2

3 Q Okay. And --

4

5 THE COURT: I don't think that identification is an issue,

6 Mr. Flynn?

7

8 MS. MOGRABEE: No it's --

9

10 MR. FLYNN: No Sir, it's not.

11

12 THE COURT: All right.

13

14 Q MS. MOGRABEE: -- it's not. Just in terms of their relationship,
15 you understood them to be brothers?

16 A Yes.

17

18 Q Okay and you say that you ran into Lance at an earlier time, do you remember where
19 you would have run into Lance?

20 A I ran into Lance at Occupy, it was first -- when I first moved to Calgary there was a
21 bunch of tents set up at the OP park and I was with a friend of mine that was from
22 [REDACTED] I met up with her and we were drinking and there was -- there are tents and
23 she knew some of the people that were in the tent, so that's how I met Lance and we
24 were sitting in the tent and that's how I encountered some of the -- the folks that
25 I've -- I've encountered later, like Lance.

26

27 Q Okay. So this Lance then said to you as you were saying before, let's go to the -- the
28 house owned by Mike, do I follow you correctly?

29 A Yes.

30

31 Q And -- and that's how you ended up there?

32 A Yes.

33

34 Q Okay. And then you say that you went with Skylar to the Alex Youth Centre.

35 A Yes.

36

37 Q Where were you coming from when you were with Skylar?

38 A Mike's house.

39

40 Q And what's Skylar's last name, do you know?

41 A Porter -- Porter.

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Q Porter? Okay. And you went to the youth centre to get groceries and you say Alex and Ginger were there.

A Yes.

Q Okay. And what happens then when you run into Alex and Ginger?

A Alex already knew Skylar and Ginger and they were -- they were like just doing their own thing. There is catching up I guess with talking and just fooling around.

Q And then what happens after you run into Alex and Ginger?

A They come back to the house with us.

Q So it's you, Skylar, Alex and Ginger, is there anybody else?

A I don't recall anybody.

Q And do you go back to the house?

A I do.

Q And are they with you?

A Yes.

Q Okay and what happens next?

A We're on the bus, with the food and sitting there. I'm sitting with Skylar on the bus seat. We get off the bus and then we walk back to the house. And it's getting darker and it's evening time. And once -- once we're back at the house, then we just -- we're -- we want a drink so we find ways to get it.

Q Okay and do you guys drink then?

A Not at that time.

Q Okay. All right, so you find ways to drink and then what happens after you find ways to drink?

A We were just chilling, we just -- we're just having a party and we're at the house, there is music and -- and there is like a bunch of other people too. I don't know -- I don't know them.

Q Do you remember their names or did you get introduced to them at all?

A I probably was introduced but I just don't -- I don't recall everybody.

Q And when the partying is going on, where is Alex and Ginger and Skylar?

A Ginger left after he got his alcohol, he wasn't staying so he left. So it's -- it's like

1 me, Dustin, Skylar, Alex, Lance, Mike, and -- I don't know the other people but they
2 were -- were drinking

3

4 Q Who is Dustin?

5 A Dustin, I don't know his last name but he -- he is a guy that I knew from the street
6 too, we've chilled other times.

7

8 Q So how would you describe your relationship with Dustin, if you have --

9 A Our relationship?

10

11 Q -- if you had one yeah.

12 A We were close. We just --

13

14 MR. FLYNN: Sorry what was that?

15

16 A We were close. We just -- we were like friends.

17

18 Q MS. MOGRABEE: When you say there were other people at the
19 house, do you remember approximately how many other people besides you, Dustin,
20 Skylar, Lance, Mike and Alex? Or was Alex --

21 A I believe that there was like a couple other people but they didn't stay.

22

23 Q Was Alex there too?

24 A Yes Alex was there.

25

26 Q All right so you say that there is partying going on. What else is happening, anything
27 else?

28 A What else is happening? Me, Skylar, Dustin are drinking alcohol in the laundry room
29 area, and in the washroom.

30

31 Q Okay. And then what happens?

32 A I get -- I get really drunk because we're drinking straight abstinence (sic) I think it's
33 called and some white rum. And I get drunk, I get -- I get really drunk.

34

35 Q So by this time that you say you're partying and you're drinking there with you,
36 Skylar, Dustin, Alex and Lance and some other people in the house, how many days
37 have you been at that house already?

38 A This is my fourth day.

39

40 Q Now you say you're drinking absinth, rum and was there something else, I think I
41 might have missed it?

1 A Orange juice.

2

3 Q Orange juice, okay. And these drinks that you were drinking, do you remember how
4 much you would have had to drink that night?

5 A I drank most of the -- the mickey of the white rum, and the rest was put in orange
6 juice and put under the bathroom sink which I drank later on that night. And the
7 abstinence (sic) was -- was just chugged by Dustin and me.

8

9 Q Sorry I didn't get that part, was --

10 A I chugged, like it's the bottle was just taking shots.

11

12 Q Okay. Okay. And the bottle of -- of rum that you're talking about, what size is that?

13 A A mickey, it's like a boot, it's like the smaller -- there is like a glass bottle, glass
14 mickey, and then the abstinence (sic) was in a -- was in an either green or blue bottle,
15 it was square and tall.

16

17 Q And what was the size of that bottle?

18 A Like a 2-6 like it -- is what I would call it.

19

20 Q Were other people drinking the rum and the absinth?

21 A No. It was strictly for Dustin and Skylar and me. I don't think any other people
22 would have drank it, we kept it for ourselves.

23

24 Q All right. How about Alex, is he drinking too?

25 A He was not drinking.

26

27 Q How about Lance?

28 A I don't recall.

29

30 Q Can you say how much of the rum and the absinth you would have drank, how many
31 ounces?

32 A 16 ounces.

33

34 Q Total or just at once or both, how do you break that down?

35 A Both. like, I don't know how much I drank. it wasn't much alcohol but --

36

37 Q Because I don't want you to guess, just so you -- so you're aware where my question
38 is coming from. If you able to tell us how much of that you drank, we'd like to
39 know, if you don't know that's fine too.

40 A I don't know how much I drank but I -- I drank most of the mickey, the --

41

1 Q All right. And do you remember about what time this was that you would have been
2 drinking that day?

3 A Like 11, 11:30-ish.

4

5 Q AM or PM?

6 A PM.

7

8 Q And relative to December the 13th, 2011, what day are we talking about here that
9 you're drinking this stuff at 11 PM?

10 A Pardon me?

11

12 Q So -- so if we take December 13 as a marker, 2011, what day are you drinking these --
13 these items? The day of the -- is it the day of the sexual assault allegation or is it a
14 different day?

15 A It's the same day.

16

17 Q Are you eating anything as you're drinking?

18 A I think we were eating noodles and -- and Cheetos mixed together.

19

20 Q Okay. How long were you drinking for, do you think?

21 A Like an hour, hour.

22

23 Q When did you stop drinking'?

24

25 THE COURT: I'm not sure that there is evidence that she did
26 stop, Ms. Mograbee.

27

28 Q MS. MOGRABEE: Thank you, Sir. Did you stop drinking? Okay
29 you just shook your head no?

30 A No.

31

32 Q Okay. All right, and I'll get to the breakdown of that in a minute. But if you could
33 tell me what's happening as you're drinking, at 11 PM, what else is going on?

34 A There is music playing, and Alex is dancing. His dancing was -- I liked his dancing
35 and he seemed like having fun, I danced with him It was like jumping around, like
36 mosh, like head-banging kind of dancing, so it was -- it was fun. And then I go -- I
37 go to the washroom, and in the washroom I -- I was sick and so then I -- I throw up.
38 And then I'm washing -- I'm washing my face and then I unlocked the door and
39 then -- then Alex just kind of comes in, inside.

40

41 Q So when you first went into the washroom, was the door locked or unlocked?

1 A It was locked.

2

3 Q Was there anybody in the washroom with you?

4 A No.

5

6 Q Was there more than one washroom in that suite?

7 A There was just one washroom.

8

9 Q So you go in the washroom, you lock the door, and you say you sit down.

10 A I sit down on the toilet and I'm on my phone. I was in there for -- I was in there for
11 a while, I was just chilling in there just by myself.

12

13 Q Okay. And then you say you threw up?

14 A I did.

15

16 Q And then what did you do after you threw up?

17 A I -- I washed my face and rinsed my mouth.

18

19 Q How were you feeling at that point?

20 A Sick and drunk. I was -- I was drinking water from -- from the faucet.

21

22 Q How many times did you throw up while you were in the bathroom?

23 A I don't recall how many times.

24

25 Q All right, so you say you were drinking water from the faucet and you were also
26 rinsing your mouth, what happened then after that?

27 A I turned around from the counter, the sink, and I unlocked the door and I'm opening it
28 and Alex sneaks in like he just kind of slides ninja's in -- in the door and he closes it
29 behind him

30

31 Q Does he say anything to you?

32 A He is saying -- he is flirting with me.

33

34 Q Do you remember what words he is using --

35 A No.

36

37 Q -- or just generally what he is saying to you?

38 A That he was watching me tonight and he is interested and he was saying nice things to
39 me.

40

41 Q Okay. And -- and what were you thinking in that moment that he was saying nice

1 things to you?

2 A That he is just saying nice things.

3

4 Q Did you say anything back to him?

5 A No.

6

7 Q So what happens after he starts saying these nice things to you?

8 A Then Alex takes my hands and --

9

10 MR. FLYNN: I'm sorry I'm having difficulty hearing you, just
11 a little bit louder please, my apologies.

12

13 A Alex takes my hands, I'm against the -- the counter of the sink, against the veneer so
14 he grabs my pants and pulls it down and when he is pulling it down, my -- my button
15 breaks but it was already broken but this time it's broken all the way and it was my
16 underwear and my boxes and my skinny jeans. Alex picks me up and then there is the
17 sink and then he puts me on the counter and then me against the -- the sink tap,
18 against the mirror. And Alex starts to flick my vagina and at this point I'm just like --
19 I don't say anything, I look at -- I look at Alex and -- and he doesn't ask -- he doesn't
20 ask me he just does. And just because I don't say anything doesn't mean it's okay.

21

22 And like he -- he just -- he's -- he has me there and then he is pushing me against him
23 and he thinks he's -- he's -- he's all -- all that and just like thinks he is so good and --
24 and he is just continuing and he is looking right at me and I'm looking at him but I
25 don't say anything.

26

27 Q Why don't you say anything?

28 A I don't know. I don't know why I don't say anything.

29

30 Q Can we just go back to the part where you described earlier about your pants and him
31 taking off your pants? Can you describe in a little more detail so we can picture it,
32 how it is that he is removing your pants.

33 A In detail?

34

35 Q Please.

36 A I have -- I have a belt, the belt isn't on my pants all the way so it's just the style so
37 it's one belt loop and then just hangs there, pointless. But I have my -- my black --
38 black jeans on but they're not -- they're not like tight, tight so they are easy to just
39 pull off, like the button is like a gem, and -- and then he just grabs it and --

40

41 Q So you just have your hands at your waist here just so I can describe what you're

1 doing

2 A The waist and then he -- he doesn't -- like it's so fast and then just the -- the button
3 pops and then the zipper, it's so -- the small zipper is kind of like -- makes that -- that
4 noise when you rip the zipper, like a snap sound. And then he just picks me up.

5

6 Q Okay. What about the rest of your clothes, what else are you wearing besides the
7 jeans?

8 A I'm wearing a bra and a tank top and a T-shirt.

9

10 Q And what happens with the rest of your clothing in that moment?

11 A Those clothing they stay on at that point.

12

13 Q And when he takes your pants down, do you have anything on, on your -- on your --
14 covering your lower body?

15 A Like underwear?

16

17 Q Yes.

18 A I have a pair of underwear, like panties, and then a pair of guy boxers.

19

20 Q So you have both of those on?

21 A Yes.

22

23 Q And which is -- which is on top of which?

24 A The boxers are over the -- the girl's underwear.

25

26 Q And -- and how -- and what happens with those when the -- when he takes your pants
27 off?

28 A When he is pulling my pants off, they -- they all go inside out so my pants are inside
29 out with the boxers and then the socks too.

30

31 Q And what about your -- your panties?

32 A They are -- they are in my pants and they're out of the pants and then they're on the
33 floor.

34

35 Q How do your underwear come off?

36 A He takes it off with the pants.

37

38 Q So when you described him pulling down, how many pulls were there?

39 A **H**ow many pulls?

40

41 Q Yeah?

1 A I don't know how many pulls.

2

3 Q But everything comes off you say?

4 A Right.

5

6 Q So you're naked from the waist down, do I follow you correctly?

7 A Yeah, and then at first my one pant leg is off and then my other one still has pants on
8 it.

9

10 Q And what are you doing?

11 A I'm sitting on the counter again.

12

13 Q How did you get onto the counter?

14 A He put me on the counter, picks me up, the way and sets me down.

15

16 Q And does he say anything to you in that moment?

17 A I don't -- I don't know.

18

19 Q It's okay if you don't remember the exact words but do you remember generally what
20 he was saying?

21 A That he is going to fuck me?

22

23 Q Whatever it is that you remember him saying, we'd like to know, if you can describe
24 that please.

25 A Describe what he is saying to me?

26

27 Q Yeah, yeah.

28

29 THE COURT: You can use swear words.

30

31 MS. MOGRABEE: Yeah.

32

33 Q It's okay, you can tell us what he said.

34

35 THE COURT: And you don't have to use the exact words, just
36 as much as you can remember, and it doesn't matter if you swear, you must just tell us
37 what, more or less what he said.

38

39 A That--

40

41 THE COURT: There is a tissue box there, or at least there

1 should be.

2

3 A That's fine.

4

5 MS. MOGRABEE: That water is for you too, okay [REDACTED]?

6

7 A He is saying things about my body and my -- my tight little pussy and he is just
8 making all these sexual, like comments and stuff about -- about my body and -- and
9 like how he likes me and he wants to fuck me and sort of -- at one point I -- I believe
10 he was talking about relationships and stuff.

11

12 Q Are you saying anything to him in response to anything he is saying to you?

13 A I don't -- I don't know.

14

15 Q You don't recall? Sorry?

16 A Saying -- saying things to him?

17

18 Q Yeah were you talking to him when he was talking to you?

19 A I told him that I liked him as a friend, I told him that. I told him that that I was gay,
20 and that I liked girls, that -- that I was interested in Skylar, and like he knew that, he
21 knew that.

22

23 Q You told him that?

24 A Yes.

25

26 Q Did you say anything else to him?

27 A That he can't.

28

29 Q Can't what?

30 A That he can't -- can't put his -- his penis inside of me and he said yeah I can. And
31 was like I'll -- I'll pull out before -- before I ejaculate, I do it all the time, I'm clean.

32

33 Q What did you say when he said that?

34 A I said he can't.

35

36 Q I just want to go back to that moment in time if I could, where you say that he is
37 licking your vagina. So if you could take us through sort of exactly as best as you can
38 remember, what happens, as soon as you -- he puts you on the counter, what is the
39 first thing he does to you?

40 A He puts his tongue all over my vagina and his tongue, it's -- it's wet and it's like
41 sliding and he is like -- the way he is licking my vagina is -- is aggressively and just

1 like continuously and he is smiling and then he -- like it's a good time like -- I'm just
2 sitting there with -- with no -- with no -- like no reaction and it's like -- and then he
3 is licking my vagina and he is like, do you like that and --
4

5 Q What did you say?

6 A No.

7

8 MR. FLYNN: Sorry what was that response?

9

10 A No.

11

12 Q MS. MOGRABEE: And what did he do when you said no?

13 A He kept licking my vagina.

14

15 Q Did you say anything else to him?

16

17 THE COURT: ██████████, it's really important that we know what
18 was said at that time. And I promise you we're not just being quizzzy, it's important --

19

20 A I'm trying to --

21

22 THE COURT: -- as a legal matter to -- to know.

23

24 A -- to remember what was said.

25

26 THE COURT: Okay.

27

28 Q MS. MOGRABEE: Okay in that moment --

29 A And I don't.

30

31 Q Okay so you told us --

32 A I remember words.

33

34 Q You told -- he asked you if you liked it while he was licking your vagina, you've been
35 clear in saying you responded no. What happens next?

36 A And then he takes his pants off and then I tried to get off the counter and -- and put
37 my pants on, I thought he was just -- just going to do the -- lick my vagina, then no.
38 He -- he puts his -- his penis inside of me. And yeah he has a big flicking penis.

39

40 Q How do you get to a place where you were trying to put your pants on and he is
41 having sex with you, can you just tell us how that happens?

1 A How it happens?

2

3 Q So you say you tried to put your pants back on.

4 A So I'm getting off the counter and I literally just hop off and trying to put my pants
5 back on and then he -- his pants are just off and then he is like I'm going to fuck you,
6 and I was like you can't without a condom, he is like no, and he --

7

8 THE COURT: Sorry who said without a condom? You said
9 he can't without a condom or did he say he couldn't --

10

11 A I said he can't without a condom, no.

12

13 Q MS. MOGRABEE: And what did he say?

14 A That yeah he can.

15

16 Q And what did you say?

17 A I'm like no and he is like I'll pull out and then he just starts doing it and I'm just --

18

19 Q So how do you get into the position then when he is able to have sex with you?

20 A I'm standing there and then he picks me back -- puts me back on the counter.

21

22 Q How does he do that?

23 A With his hands.

24

25 Q Okay and how does he manoeuver you onto the counter, can you describe a little bit
26 how it is he gets you on the counter?

27 A Like how?

28

29 Q Yeah.

30 A So he -- he picks me up and then he puts me on -- on the side of the counter.

31

32 Q Where does he grab a hold of you to --

33 A My waist. And then he puts himself inside me, and then he is holding on to me, and
34 then he is doing -- doing --

35

36 Q So he grabs hold of you, puts you on the counter.

37 A And he starts putting his penis in and outside of my vagina.

38

39 Q How does --

40 A And like his penis can't even go inside like my fucking vagina, like it's just --

41

1 Q Does he do anything else when he tries to put his penis in your vagina?

2 A Like he is touching me.

3

4 Q Where is he touching you?

5 A He is touching -- like my waist, my body and then giving me like compliments, puts
6 his hand into my shirt sometimes.

7

8 Q All right and when he puts his hand in your shirt, what's touching -- what's he
9 touching then?

10 A My breasts.

11

12 Q Does he get his penis in your vagina?

13 A Yes.

14

15 Q And then what happens then?

16 A Then he -- he is having -- having sex.

17

18 MR. FLYNN: Again I didn't hear that, Sir.

19

20 A He is having sex. And then he -- he pulls out and then he comes on the counter. And
21 then takes my shirt off and then we're in the shower and it switches into the shower
22 right after he has -- he comes on the counter.

23

24 Q MS. MOGRABEE: And I want to go back to the sex for a moment
25 if I can before we get to the shower. And I'm sorry that I have to ask you a few more
26 questions about that, okay? How is it that he is able to get in between your legs to
27 have sex with you? Can you describe what happens?

28 A Like how he gets between my legs?

29

30 Q Yes.

31 A He -- he is standing with me.

32

33 Q How are you positioned on the counter?

34 A I'm laying against the tap, so it's like my body is against the -- the mirror and the tap
35 and then I'm pulling forward.

36

37 Q And where is he in relation to you?

38 A Between my legs like him standing there so it was just him and then my legs are -- are
39 apart and then he is fucking me on the counter.

40

41 Q And you described that he wasn't able to get his penis in your vagina.

- 1 A Not all the way.
2
- 3 Q What was going on there can you say?
4 A Well I -- I didn't want -- I didn't want it inside me, but I didn't -- I pushed -- I
5 pushed where the like -- and his -- his penis is big and so gets some of it but didn't
6 like put it all inside of me.
7
- 8 Q And how were you able to do that?
9 A Pushing him on the shoulders.
10
- 11 Q How did you push him?
12A With my hands.
13
- 14 Q Can you just show us how maybe you -- you remember doing that?
15 A And then with that then my -- my back is pressed against the tap and it bruises and
16 I -- like didn't -- pushing -- I don't know.
17
- 18 Q And when you pushed him where did you push him at?
19 A The shoulders.
20
- 21 Q Okay and you had your hands up like this.
22A Yeah.
23
- 24 MS. MOGRABEE: And for the record I'm just holding my hands
25 up with palms open, how you were describing it.
26
- 27 Q Can you just show us again how you pushed? Okay and what did he do when you
28 pushed?
29 A Pushed forward.
30
- 31 Q And where as his penis in that moment when you pushed him?
32A In my vagina.
33
- 34 Q Did you say anything then? At that point, at that moment?
35 A I wanted to stop.
36
- 37 Q Did you say that?
38 A Like -- like I said it hurt and I wasn't comfortable, I didn't want it him to do that.
39
- 40 Q Did you tell him you were hurting -- you're hurting me?
41 A Yes.

1

2 Q How did you -- what words did you use, do you remember?

3 A I said you're hurting me, you should stop.

4

5 Q Okay and what did he do?

6 A He -- he just -- just laughed and kept going. And he was smiling and he was like --
7 like yeah. I just --

8

9 Q And you describe being the back -- you described your back being against the faucet.

10 A Yes.

11

12 Q Where is the faucet hitting your back?

13 A Right at the bottom of my lower back on my tailbone, and then my upper back.

14

15 Q So what are you feeling as that faucet is pressing against your back?

16 A It's -- it's bruising like it's -- it's like sharp -- it's like the sharp part of the faucet in --
17 in my tailbone pushing -- pushing against it, so it hurt.

18

19 Q What about your upper back, what's that in contact with if anything?

20 A The -- the mirror and a little bit of the faucet too.

21

22 Q And what are you feeling in your -- in your upper back in that moment?

23 A Pain.

24

25 Q So you say he is having sex with you as you're pressed up against the -- the faucet,
26 what -- how long would you say it -- he is having sex with you for? If you're able to
27 say.28 A I -- I don't know how long it was. It seemed -- it seemed like a long time but it could
29 have -- it could have been -- it could have been real fast. And it just -- it just felt a
30 long time I was in the washroom.

31

32 Q And the whole time that he had his penis in your vagina, what were you thinking and
33 feeling in that moment?34 A Is this happening? I felt -- I felt gross, and I'm just like -- and then he just felt -- I
35 felt just violated and like just no respect, no respect. There is no respect at all.

36

37 Q How tall are you?

38 A I'm 5 -- 5-6, 5-5.

39

40Q How much do you weigh now?

41 A 115 pounds.

1

2 Q And back in December 2011, how much did you weigh then?

3 A 100 pounds, so I was smaller, I'm still small but --

4

5 Q How about Alex, could you say how tall he is about?

6 A He is at least 6-1, he's tall about this tall.

7

8 Q And what about his weight, how would you describe his weight and you probably
9 can't give us a number but how did he look to you?

10 A 270? No I'm just kidding, 240.

11

12 Q He looked to you to be about 240?

13

14 THE COURT: This isn't very valuable, Ms. Mograbee.

15

16 MS. MOGRABEE: Sir, I appreciate that we don't have ~~she~~ **didn't**
17 have a scale in the washroom at the time but this is just her sense of his size at the time,
18 and I appreciate the limits of that evidence.

19

20 THE COURT: All right.

21

22 MS. MOGRABEE: Thank you.

23

24 Q All right so -- you say then that he has sex with you and that he ejaculates on the
25 counter.

26 A Yes.

27

28 Q What's the next thing that happens?

29 A It's cleaned up.

30

31 Q Who cleans it up?

32 A Alex does.

33

34 Q And what happens next?

35 A And then the shower.

36

37 Q How do you end up in the shower?

38 A He puts me in the shower.

39

40 Q How does he do that?

41 A He takes my shirt off and my tank top and my bra and then he -- he just puts me in

1 the shower.

2

3 Q So again you know, I just want to make sure we capture what your -- what you're
4 describing, you used your hands, if you could just put some words to exactly where he
5 is touching you and how it is that you're being -- you get into the shower.

6 A So after he cleaned up the counter and stuff, I'm just standing there I'm just standing
7 there in the washroom and then he turns on the shower, the shower is going and he
8 takes off my shirt and he rips it like -- top off --

9

10 Q Rips off whose top?

11 A My top and then my shirts are inside out and in the shower he starts washing --
12 washing my body with soap. He washes everything, he washes me. And then he tells
13 me to wash him and then I'm washing him.

14

15 Q Why do you do that, why do you wash him?

16 A Why?

17

18 Q Yeah.

19 A Because he told me to.

20

21 Q What did you think would happen in your mind, if you didn't do what he told you to
22 do? What were you thinking that way?

23 A Just do -- just do what he wants.

24

25 Q What did you think would happen if you didn't do what he wanted?

26 A I don't know. Like he -- he took control and then I -- and -- so then he -- he had the
27 control. So I did -- I didn't --

28

29 Q I want to go back to that moment in time you say he puts you in the shower because
30 I -- I didn't quite get how it is you ended up in there. Can you just take me through
31 that one more time, I mean where is he --

32 A So it's a standup shower --

33

34 Q Okay.

35 A -- it's one of those small ones that are clear on all the sides in the corner of the
36 washroom beside the toilet, that's beside the counter so there is the sink, toilet and the
37 shower in the corner. And then there is the door across like from the counter, so the
38 light is off. After -- after Alex puts me in the shower I swear to God that he unlocks
39 the door and locks the door because Lance was -- was there staring through -- through
40 the -- through the -- the shower door with a fucked up smile on his face and he says
41 he -- he makes a comment on -- on the way my vagina looks and he is like oh I knew

1 your vagina was -- was shaved or -- in a landing strip or some shit, he keep saying
2 landing strip. And then I tell him to fuck off, I told him to fuck off and Alex was
3 licking my vagina while I'm standing in the shower, he is crouched down in the
4 shower, and then the washroom is dark but then the light is on and I -- I am not
5 looking anywhere and then I turn, glance down to the shower and -- and Lance is right
6 there staring, laughing with -- with Alex.

7

8 Q I'm just going to go back for a moment if I could, about -- at the point in time where
9 you say that he is licking your vagina, this is Alex that's licking your vagina, do I
10 have that right?

11 A Yes.

12

13 Q And where is he positioned and how you are positioned in that moment?

14 A He is crouched down in the small little standup shower he -- he is crouched down and
15 I'm standing there with -- with my legs open and then he -- he is on his -- like his
16 knees and licking my vagina and I'm just standing there.

17

18 Q Do you say anything to him when he is doing that?

19 A I don't.

20

21 Q Okay. Did Lance say or do anything else when he was in the bathroom at this time?

22 A Calls me a little whore and he says he knew what my vagina looked like.

23

24 MR. FLYNN: Sorry what was that last thing?

25

26 A He said he -- he knew exactly how my vagina looked like.

27

28 Q MS. MOGRABEE: Did he say anything else?

29 A That is he going to go tell everybody.

30

31 Q Did he say anything else?

32 A I don't recall.

33

34 Q Okay. What happens next?

35 A Alex just gets out of the shower and just goes --

36

37 Q Sorry Alex is?

38 A Alex gets out of the shower and was -- I -- I tell Lance to fuck off and then Alex
39 leaves the shower and the washroom with Lance.

40

41 Q And then what do you do?

1 A Pardon me?

2

3 Q What do you do next?

4 A I stayed in the shower, I stayed in the washroom.

5

6 Q Any reason why you do that?

7 A Because I didn't want to go outside.

8

9 Q Why didn't you want to go outside?

10 A Because of what just happened and -- and with -- with Alex and Lance saying oh yeah
11 it was -- it was just one -- got laid incident, saying they are going to go tell everybody
12 what just happened, I wasn't -- it wasn't like that.

13

14 Q What do you mean it wasn't like that?

15 A That -- that I was okay for us to have sex, it wasn't okay. And it was -- it was all
16 about just getting laid and then Alex goes and -- and fucks Skylar.

17

18 Q Sorry I didn't catch that?

19 A Alex goes and has sex with Skylar after.

20

21 Q Did you see that yourself?

22 A I did not see that.

23

24 Q Okay. So you're -- you say you're in the shower, what do you do after being in the
25 shower?

26 A I shower, I wash, I wash myself. And I'm just staying in the shower, I don't know
27 how long I was in the shower but I just did not want to leave the washroom. So I
28 just -- I just stay in there. I wait until my hair is a little bit dry because I didn't want
29 them to know. My clothes are -- are wet on the floor because Alex just got out so the
30 floor is wet so some of my clothes got wet. I couldn't put on all my clothes, I didn't
31 want to.

32

33 Q Why didn't you want to put on all your clothes?

34 A Because they were dirty and wet.

35

36 Q How did they get dirty?

37 A They got dirty from the water and from Alex.

38

39 Q How did Alex get them dirty?

40 A By being -- by being sexual with -- with -- with my body and I just didn't want to put
41 on my clothes.

1

2 Q So what did you put on if anything?

3 A I put on my boxers, I didn't put on my underwear. I put back on my skinny jeans and
4 I put on my bra and -- and I think my other T-shirt -- put on my T-shirt instead of my
5 tank top.

6

7 Q And then what did you do?

8 A I chilled, I got drunk more.

9

10 Q Why did you get drunk more?

11 A Why? Because what just happened, I just wanted to be drunk again.

12

13 MR. FLYNN: Sorry what was the comment?

14

15 A I just wanted to be drunk.

16

17 Q MS. MOGRABEE: Why did you just want to be drunk?

18 A I didn't want to think about what just happened.

19

20 Q So did you drink more?

21 A I did finish the -- the orange juice and the rest of that mickey that was mixed under
22 the sink.

23

24 Q Did you tell anybody what had happened?

25 A I did, later on that night I told Dustin what happened.

26

27 Q And did anything come of that, in telling Dustin?

28 A Nothing came out of it.

29

30 MR. FLYNN: Sorry that was?

31

32 A Nothing came out of it.

33

34 Q MS. MOGRABEE: Any reason why nothing came out of it?

35 A I don't know. He tried hooking up with me in the kitchen too but it didn't go
36 anywhere.

37

38 Q Was that before or after you told him what had happened to you?

39 A Before.

40

41 Q What happens after you drink some more?

1 A I pass out in the kitchen with Dustin on couch -- couch cushions, he makes a little
2 camp area by the counter and a couple cupboards so it was right in the corner, so we
3 just slept there for a little bit, passed out and then I woke up at 3, 4:00 in the morning.
4 And tried go sleeping on the bed and then Alex and Lance -- Lance wakes up and he
5 just starts -- he just starts talking to me and then he is saying things like how I'm a
6 slut and he is going to tell everybody and that's going to be a game and that -- that he
7 told Alex to do that.

8

9 Q He told Alex to do what?

10 A To -- to have sex with me.

11

12 Q And did he say anything more about it's a game, other than that?

13 A Pardon me?

14

15 Q When he said to you it's a game --

16 A Yeah it's a game --

17

18 Q -- what game -- did --

19 A -- he just mind fucks -- mind fucks you and plays -- plays with your emotions and he
20 was -- he was saying things to me to get me worked up and he was hurting my -- my
21 feelings and I'm just like, I am hurting and he is saying all this shit and it's like -- it's
22 not even -- it's not even happening like that. And he is like it's not -- not Alex
23 getting laid and shit, it's more than that and I -- I was feeling -- I was feeling like shit
24 because --

25

26 THE COURT: Madam clerk, will you pass me a pen please?

27 Can I use that pen please?

28

29 THE COURT CLERK: I'm sorry?

30

31 THE COURT: Use the pen please. Thanks.

32

33 MS. MOGRABEE: I wonder Sir, if we can take the morning break?

34

35 THE COURT: Yes. Fifteen minutes?

36

37 MS. MOGRABEE: Thank you.

38

39 THE COURT: All right. [REDACTED], it's really important that you
40 don't talk to anybody about the evidence that you've given, and the reason is, we don't
41 want your evidence to be affected by what other people may say to you, why didn't you

1 say that, why did you say this, you should say something else. It's got to be your
2 evidence, do you understand?

3

4 **A Okay.**

5

6 **THE COURT:** So please promise me you won't talk to
7 anybody about the evidence.

8

9 **A I won't.**

10

11 **THE COURT:** Okay and we'll be back in 15 minutes we'll
12 finish this.

13

14 **A All right, Sir.**

15

16 **THE COURT:** Thanks.

17

18 **(ADJOURNMENT)**

19

20 **THE COURT CLERK:** Recalling in custody Alexander Wagar.

21

22 **MR. FLYNN:** Thank you, madam clerk. Good morning, Sir.

23 For the record, Patrick Flynn. Mr. Wagar is present, Sir, we're prepared to proceed.

24

25 **THE COURT:** Thank you.

26

27 **MS. MOGRABEE:** If you can come back over to the witness stand
28 please, ██████, thank you.

29

30 **THE COURT:** ██████, please remember that you are still under
31 oath to tell the truth.

32

33 **A Yes.**

34

35 **THE COURT:** Okay. When you are ready, Ms. Mograbee.

36

37 **MS. MOGRABEE:** Sir, thank you.

38

39 **Q All right, just before the break you say that Alex was telling you -- sorry, Lance,**
40 **pardon me, was saying certain things to you.**

41 **A Yes.**

1

2 Q Where was Alex at this time?

3 A He was in the masters bedroom, I believe fucking Skylar.

4

5 Q Okay, but you didn't see that you were saying before.

6 **A No.**

7

8 Q Okay. So you are in the room and Lance is talking to you and you are talking to him

9 What happens next?

10 A With Lance?

11

12 Q Yeah.

13 A He's videotaping me with his phone. He's laughing and saying he's going to tell

14 everybody to do exactly what Alex did. And I was -- I was a little whore because I

15 was easy.

16

17 Q And then after that, what happens?

18 A I get mad -- I get mad at what Lance is saying to me and I tried to kick the phone out

19 of his hand, and I stand up on -- on the bed and I hit him. And then he gets mad

20 because I hit him. And he tells me to hit him again so I push him. And he says hit

21 me one more time, three times you hit a guy they have the right to -- to hit a girl, beat

22 up a girl. So I don't want to hit him a third time because he's -- he's big and scaring

23 fucking -- so I don't. He pushes me down and he says he's -- he's going to smash my

24 head.

25

26 Q Okay, what do you do?

27 **A What do I do?**

28

29 Q Yes.

30 A I started raising my voice and just get angry at him, and telling him how he can't hit a

31 girl if -- if a girl hits him three times, and --

32

33 Q Have you had anything to drink during this time that this is going on with Lance?

34 **A No.**

35

36 Q And in terms of the timing of this with Lance and what happened in the washroom,

37 how much time is in-between the two?

38 A At least four -- four hours or so.

39

40 Q So why do you react this way to Lance when he's saying these things to you?

41 A Because I am hurt from what Alex did and then I am just trying to defend myself and

1 just --

2

3 Q All right. What happens then after the -- what happens then after you say Alex says I
4 am going to smash your -- pardon me, Lance says I'm going to smash your head in,
5 what -- what do you do?

6 A What do I? I --

7

8 Q Yeah.

9 A -- I just -- I am just there and there's -- there's no point for me to him because like
10 he -- he would totally -- he would just totally beat me up.

11

12 THE COURT: Ms. Mograbee, you know your case of course --

13

14 MS. MOGRABEE: Yeah.

15

16 THE COURT: -- and I don't. Is this relevant to that actus
17 reus?

18

19 MS. MOGRABEE: I am -- I am going to I think answer that
20 shortly.

21

22 THE COURT: All right.

23

24 MS. MOGRABEE: Thank you, if I may.

25

26 Q All right. So do you have any interaction with Alex in the house --

27 A After?

28

29 Q -- at this time?

30 **A No.**

31

32 Q Or after the incident in the washroom?

33 A No, since the incident in the washroom I haven't seen him.

34

35 Q Have you seen him any other place outside the house since the incident in the
36 washroom?

37 A Yes.

38

39 Q When did you see him?

40 A I seen him on the streets.

41

1 Q And I want to get to that in a second, okay, but before I do, how long are you at that
2 house after you have this conversation with Lance?

3 A I leave around 7 -- 6:00 in the morning. I take another shower. Because I leave the
4 room -- I leave the room because I am just sick and tired of -- of Lance and his
5 bullshit talking. He's just saying these things to anger me.

6
7 Q Okay.

8 A So then I just leave. I just leave in the morning. Everybody is sleeping and I just leave
9 in the morning and I walk to the Alex Youth Centre.

10
11 Q Why do you --

12
13 THE COURT: Sorry, you walk to the?

14
15 A Alex Youth -- the health centre.

16
17 THE COURT: Okay.

18
19 A I walked there in the morning time.

20
21 Q MS. MOGRABEE: Okay, and I want to get to that too, but before I
22 do, can I ask you about how you decide when is a good time to leave that house?
23 What is going through your mind?

24 A What's going through my mind?

25
26 Q Yeah, what's going through my (sic) mind, why do you decide -- why do you decide
27 to leave at that time?

28 A Because everyone is sleeping.

29
30 Q And after the incident in the washroom, how come you don't leave then?

31 A It was late because I -- where am I going to -- going to go at that time and I am drunk
32 and it's winter outside, so it's like stay there till the morning time and just avoid --
33 avoid.

34
35 Q Where were you staying at the time that this all happened?

36 A At the Mustard Seed, at the Foothills warehouse.

37
38 Q Okay, and are these places where you can just come and go any time?

39 A Yes.

40
41 Q And where are these different places in terms of distance from the house you are at?

1 A The Foothills warehouse is outside of downtown Calgary so you have to take either
2 the bus from the Mustard Seed to get to the warehouse, or you can take the train to
3 39th Avenue and take a bus or you could walk.

4
5 Q So how long would it take yo approximately to get from the house that you were at to
6 the Foothills Industrial Area?

7 A It would be across the whole city. It would probably take an hour or two, maybe an
8 hour, I'm not sure how long it would take.

9
10 Q And do you know when the buses stop running?

11 A Isn't it like 12, 1:00. Depending on the -- the day of the week.

12
13 Q And that night after this incident in the washroom happened, what time was it about?

14 A It was 12, 11, 12 at night.

15
16 Q Did you have any money on you?

17 **ANo.**

18
19 Q Did you have any access to money?

20 **ANo.**

21
22 Q Did you have a phone?

23 A I did have a phone.

24
25 Q Any reason why you didn't use your phone?

26
27 THE COURT: To call whom, Ms. Mograbee?

28
29 A I didn't know

30
31 MS. MOGRABEE: Pardon me?

32
33 THE COURT: To call whom?

34
35 MS. MOGRABEE: Well --

36
37 A I don't know why I didn't use the phone.

38
39 Q Was your phone working?

40 A Yes, my phone was working and then it died.

41

1 Q Okay.

2 A My phoned died.

3

4 Q It died. When did it die?

5 A In the morning time.

6

7 Q Okay.

8 A Because my phone was on, the battery was dying. I didn't have a charger.

9

10 Q Did you think to call the police after this incident in the washroom happened?

11 A I knew I was going to charge Alex.

12

13 Q You knew at that time that it --

14 A Yes.

15

16 Q Okay.

17 A And with -- with Lance, with his big conversation, bragging, intimidating, and making

18 me feel like it was -- it was okay that I -- that I didn't do anything, that it was okay

19 that I -- I agreed with it, and at that point I knew that it was -- it was wrong and it

20 was not right and I am going to -- to charge.

21

22 Q Can you help ups understand why you don't call the police while you're in the house?

23 A I was scared. I didn't -- I don't know why I didn't call the police at the time.

24

25 Q You say you do leave the house though in the morning?

26 A Yes.

27

28 Q Where do you go from there?

29 A To the Alex Youth Centre.

30

31 Q And what do you do when you get there?

32 A It's not fully open yet but there's people there and they saw me and they knew

33 something was wrong, so then they -- they took me into the -- the side room, there's

34 two chairs. I am sitting with this lady. I forget her name. And then I -- I just cry and I

35 told -- told them what happened, and it was -- it hurt.

36

37 Q And what happened after you told them what happened?

38 A They ask if I wanted to call the police. First I was like no, and then I was like I have

39 to call the police.

40

41 Q Why was your first reaction to say no?

1 A Because no one would believe me because everybody at the house were -- were
2 friends and I was the new person so I felt that no one would -- would believe me.

3

4 Q And then how did the police come to get involved?

5 A I was at the Sheldon Chumir getting the -- the -- what's it called, the rape -- the rape
6 kit and they did that and at that point I said I want the police involved. And then I met
7 with the Detective Hurts (phonetic) and another one, and then I told them the
8 statement.

9

10 Q Do you remember where you would have gone to get assessed for the -- for the rape
11 kit?

12 A At the Sheldon Chumir downtown Calgary, the hospital, the -- what's it called, the
13 CCASA.

14

15 Q And when you were there, how was your -- your back feeling, the parts that you
16 described earlier with the tailbone in the middle of your -- your back?

17 A It was bruised on my lower back and the skin was rubbed against so there was red
18 marks and on my back there was bruising too.

19

20 Q And how did they feel while you were in the hospital?

21 A Sore.

22

23 Q And how did you get to the hospital?

24 A I got a ride from, it was a taxi, I went in a taxi.

25

26 Q Okay, and how was that paid for?

27 A By the Alex with a taxi voucher I believe.

28

29 Q Anything else happen at the hospital?

30 A Not that I recall.

31

32 Q And then you say at some point you talked with the police.

33 A Yes.

34

35 Q And was that before or after you went to the hospital?

36 A After.

37

38 Q Same day or different day?

39 A Same day.

40

41 Q And did you tell them what happened to you in that washroom?

1 A Yes.

2

3 Q And then you said at some point you ran into Alex again.

4 A Numerous times.

5

6 Q Do you remember saying -- numerous times. How long after this incident in the
7 washroom was the first time you ran into him?

8 A The first time was -- after that incident I was scared to be on the street. I didn't want
9 to be on the street because his ex-girlfriend or something was crazy and wanted --
10 wanted to fight me and stab me out because -- cause apparently I slept with Alex.

11

12 Q And how did you know this, that this was happening on the -- that this girlfriend
13 was --

14 A Because people told me and I encountered and she -- she --

15

16 Q You encountered who, sorry?

17 A Alex's ex.

18

19 Q And what's her name, do you know?

20 A She went by the name Karma, but her name was Meghan (phonetic).

21

22 Q And how long after the incident in the washroom would you have run into her?

23 A Just -- just random times. She -- she would like to taunt me and like ride her bike in
24 my view, she just really was angry at me.

25

26 Q And how did she behave towards you then when you ran into her? What did she do?

27 A She was aggressive and she wanted to fight. And then she was saying how Alex
28 didn't do that, that I was a little slut, and -- and she is going to stab me.

29

30 Q And then what happened in that interaction with her, anything?

31 A One time I was going to -- I was going to fight her and then the cops came by and
32 then she put away her knife and drove off with her bike, it was on Stevens (sic) Ave.

33

34 Q And was Alex with her at this time?

35 A No.

36

37 Q Was he with her at any of the times that you ran into her?

38 A No.

39

40 Q And what about running into Alex, when would you have run into him?

41 A Like (INDISCERNIBLE) Centre first time, like they're all there. Like people that I

1 knew from the Mustard Seed and he literally wanted me to give him a hug. He wanted
2 to hug me.

3

4 Q Is that the first time or a different time that you ran into him?

5 A The first time.

6

7 Q Okay, so let's go through the first time.

8 A First time we were standing there, Lance was there to I believe, and -- and then he --

9 it's like they -- they acted like nothing happened and it was like come and give me a

10 hug and like oh -- and it was like nothing and it was stupid. I was --

11

12 THE COURT: Ms. Mograbee, is there terribly much relevance
13 to this evidence?

14

15 MS. MOGRABEE: I am going to get to it, Sir. Sometimes, I'm
16 sorry, things aren't always as efficient as we'd like them to be.

17

18 THE COURT: All right.

19

20 MS. MOGRABEE: If I may.

21

22 Q Did he, Alex, ever talk about what happened in that washroom in those times that you
23 ran into him?

24 A Yes. He told me it was central (sic) because I gave my contacts.

25

26 MR. FLYNN: I'm sorry, what was that?

27

28 Q MS. MOGRABEE: Sorry, he told you --

29 A He told me that it was central (sic) and it was consent, because I made eye contact
30 with him when I was on the counter when he was licking my pussy.

31

32 Q Now you say central (sic), did you --

33 A Yeah.

34

35 Q -- use the word central?

36 A Yeah.

37

38 Q What do you mean by that?

39 A That -- that I wanted -- that I was okay with it, that -- that I was wanting that.

40

41 Q What did you say?

1 A No, it's not central (sic) and like --

2

3 Q In that moment when you are talking to him and he's saying that you consented, did
4 you say anything to him in response to that?

5 A I don't say --

6

7 Q You don't say anything out loud, do you?

8 **A No.**

9

10 Q What are you thinking?

11 A What am I thinking, is why -- why is he trying to give me a hug, why is he trying to
12 hug me --

13

14 Q How come --

15 A -- and be all cute.

16

17 Q How come you don't run away at that point?

18 A At that point I am just standing there, I -- I leave right after because they are all
19 joking around and stuff. I don't -- don't even want to see you, and -- can't explain.

20

21 Q Did you respond to him when he was saying, you know, it was consensual? Did you
22 say anything out loud to him at any time during the time you were talking to him?

23 A I don't recall.

24

25 Q How long was that interaction would you say between you and him?

26 A The first time?

27

28 Q Yeah, the first time.

29 A It was brief. It was brief.

30

31 Q How did that interaction end?

32 **A Me walking away.**

33

34 Q And was there another interaction after that?

35 A Yes.

36

37 Q Okay, and what was that like? What happened there?

38 A There's been -- there's been quite a few, you know. I'd see him on the street.

39

40 Q And was he ever talking about what happened in the washroom during any of those
41 times you would run into him on the street?

1 A One time he -- he told me to -- to stop the charge and that he won't charge me for --
2 for lying cause -- cause it wasn't true, we were smoking meth in a staircase when we
3 had that talk. And I said sure, whatever.

4

5 Q So this -- this is a guy who has sexually assaulted you in the washroom not that long
6 before, do I follow you correctly, and you are smoking meth with him in a stairwell?

7 A Yes.

8

9 Q Can you help us understand what's going on there? What's going through your mind?

10 A He told me --

11

12 Q Why are you wish him?

13 A -- to come talk about this court thing, and just drop it, and like he's -- he's telling me
14 to just stop it, that -- that it's -- that it's fine, it's fine and like we can forget about it.
15 And at this point I'm just -- I am really just tired. I am tired of Alex and Lance, I
16 am tired of them -- them thinking that they can -- they can just talk to me and think
17 nothing happened, and come smoke a bowl and let's talk about this and just -- just
18 drop it. Sure.

19

20 Q Who supplied the drugs during that interaction?

21 A Alex did.

22

23 Q And did he give you some?

24 A Yes.

25

26 Q And what was your addiction like at that time?

27 A My addiction grew from that incident. It was already -- I was already in an active
28 addiction but I -- I went even more.

29

30 Q When he talked to you about you dropping the charges, did you say anything to him in
31 response to that? Did you say anything?

32 A Did I say anything?

33

34 Q Yeah.

35 A I said yeah.

36

37 Q Why did you say that?

38 A Why?

39

40 Q Yeah.

41 A I don't know why I said that. I don't know why I -- I was still being nice to -- to Alex

1 and Lance, even though they were -- they were just disrespectful but I still -- I still
2 have -- have kindness to -- to acknowledge them and like try and -- try and talk to
3 them, and it's like -- it's just -- and it's like sure -- sure Alex is still -- still a person
4 and like -- like do you think this is -- this is easy for -- for me to -- to want to -- to
5 put him in gaol for something he did to me. It's not easy. And sure -- sure, like, you
6 know, he did me wrong but I still -- I still cared -- still care about people and he
7 didn't show any remorse. And I still acknowledged him and like -- and still fucking sit
8 with him and just -- and just be so cool about it, but it's just not cool. It's not cool.
9 And then just like whatever. I just want peace.

10

11 MS. MOGRABEE: Sir, I see that it's 12:00. I would just like an
12 opportunity to read over my notes over the lunch hour if it's acceptable to you, Sir, to
13 have the lunch break at this time. I do expect that if I do have any questions after the
14 lunch break there will only be a couple. I will be very quick and then my friend can start
15 his cross-examination.

16

17 THE COURT: Is that all --

18

19 MR. FLYNN: I have no difficulty --

20

21 THE COURT: -- (INDISCERNIBLE) Mr. Flynn?

22

23 MR. FLYNN: -- with that, Sir.

24

25 THE COURT: All right. So should we start earlier, half past
26 one?

27

28 MS. MOGRABEE: We can do, Sir, if that's --

29

30 THE COURT: Because I'd like to at least finish the evidence.

31

32 THE COURT CLERK: We are assigned at two so it would be great if
33 we started at 1:30.

34

35 THE COURT: 1:30.

36

37 MS. MOGRABEE: Very good.

38

39 THE COURT: 1:30, Mr. Flynn?

40

41 MR. FLYNN: Yes, Sir.

1
2 MS. MOGRABEE: Thank you.

3
4 THE COURT: All right. Now, [REDACTED], I can't ask you not to
5 talk to your friends and your family, that would be impossible, unkind. You obviously
6 need their support. But you must please not talk about the case.

7
8 A I will not talk about the case.

9
10 THE COURT: Because I don't want your evidence to be
11 tainted, contaminated by any suggestions they may make.

12
13 A Okay.

14
15 THE COURT: [REDACTED], why did you say this, [REDACTED] why didn't
16 you say that, [REDACTED] don't you remember something else. And then the next thing it's
17 not your evidence, it's their evidence.

18
19 A Okay.

20
21 THE COURT: You understand?

22
23 A I do.

24
25 THE COURT: And I appeal to your family and friends not to
26 talk about the case. Okay. Half past one.

27
28 MS. MOGRABEE: Sir.

29
30 MR. FLYNN: Sir.

31
32 (WITNESS STANDS DOWN)

33
34 _____
35 PROCEEDINGS ADJOURNED UNTIL 1:30 PM

36 _____
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1 Certificate of Record

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I, Roseanne Hansen, certify that this recording is that of the record made of the evidence in the proceedings in Provincial Court, held in courtroom 1106, in Calgary, Alberta, on the 5th day of June, 2014, and that I was the court official in charge of the sound-recording machine during these proceedings.

1 Certificate of Transcript

2

3 I, Marg Lavay, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record
10 and is transcribed in this transcript.

11

12

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1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2 _____

3 June 5, 2014

Afternoon Session

4

5 The Honourable

Provincial Court

6 Judge Camp

of Alberta

7

8 H. Mograbee

For the Crown

9 P. D. Flynn

For the Accused

10 R. Hansen

Court Clerk

11 _____

12

13 THE COURT:

Please sit down.

14

15 MR. FLYNN:

Sure.

16

17 THE COURT CLERK:

Thank you. In custody, Alexander Wagar.

18

19 [REDACTED] Previously Sworn, Examined by Ms. Mograbee

20

21 THE COURT:

[REDACTED] (phonetic), you're still under oath to tell

22 the truth.

23

24 A Yes, I promise.

25

26 MR. FLYNN:

Thank you, madam clerk. And, Sir, for the

27 record, Patrick Flynn. And Mr. Wagar is present, Sir. We're ready to proceed.

28

29 THE COURT:

You can sit, Mr. Wagar. Carry on,

30 Ms. Mograbee.

31

32 Q MS. MOGRABEE:

Thank you. Just a few more questions for you,

33 [REDACTED] Can I take you back earlier in time, in the evening where you say you were at
34 the house. You said that you were in a laundry room.

35 A Yes.

36

37 Q Do you remember saying that?

38 A Yes.

39

40 Q What was happening in the laundry room?

41 A Laundry room?

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41

Q Yes.

A We were standing there. We were drinking and Alex pulls down his pants, shorts and all. And he's just standing there with his -- with his penis there. And he's like, Check it out. And I was just like -- didn't -- he just pulls down his pants. And I was like, What's that.

Q Did you say anything?

A I looked away. And I turned around and left. And Dustin (phonetic) told him to put it away.

Q And what happened after Dustin said that?

A I think he pulled his pants up.

Q Okay. And what -- what did you see after Dustin said that to him⁹

A Pardon me?

Q What did you see after Dustin said that to Alex?

A He puts his pants on.

Q Anything else go on in the laundry room?

A Just drinking.

Q Is that the same evening that the incident in the washroom happens or is that at a different time?

A The same day.

Q I want to take you back to the washroom for a moment if I could. You said that he put you in the shower?

A Yes.

Q And you described how he did that. That's fine. My question is: Other than your description of him licking your vagina, did he do anything, and washing your body, sorry? Did he do anything else to you?

A Not that I recall.

Q Now, you did talk about going to the Sheldon Chumir and getting seen by a doctor there. Do you remember saying that?

A Yes.

Q Did they give you any medication?

1 A They did give me medication, antibiotics and -- and the pill -- the morning-after pill.

2

3 Q And how did you feel after you took the morning-after pill?

4 A I don't know. Fine, I guess. I don't know.

5

6 Q Did you have any physical health problems after you went to Sheldon Chumir?

7 A Not that I recall.

8

9 Q Do you remember why they gave you antibiotics?

10 A Because if Alex was infected.

11

12 Q So any health problems after the incident in the washrooms in terms of infection or
13 anything like that?

14 ANo.

15

16 Q How about pregnancy? Any concerns after the incident in the washroom? Any
17 pregnancy scares or concerns?

18 ANo.

19

20 MS. MOGRABEE: All right. So, [REDACTED] those are all the
21 questions that I have for you. If you'll just stay where you are and ask -- answer any
22 questions that Mr. Flynn might have for you, okay.

23

24 A Okay.

25

26 Mr. Flynn Cross-examines the Witness

27

28 Q [REDACTED] (phonetic), do you have a criminal record?

29 A I do.

30

31 Q Is that as a youth or as an adult?

32 A Both.

33

34 Q When was your last conviction?

35 A My last conviction was a theft.

36

37 Q And -- and how long ago was that?

38 A I'm not sure how long ago it was.

39

40 Q Okay. How lengthy of a record do you have?

41 A Pardon me?

1

2 Q Do you know how many convictions you have on your record?

3 A I have one count of arson and theft.

4

5 Q And you don't remember when your last conviction was; roughly, six months ago, two
6 years ago, ten years ago?

7 A A year or two.

8

9 Q Okay. That's fine. Just -- just so we have a rough idea --

10 A Okay.

11

12 Q -- [REDACTED]. My understanding, [REDACTED], is that before you moved to Calgary
13 you were living in [REDACTED]. And then you resided in [REDACTED] for a period of
14 time. And then you came to Calgary. Is that fair to say?

15 A Yes.

16

17 Q It's also fair to say that you were having a tough time with it. It sounds like you
18 weren't regularly working. You were more or less living on the street and -- is that
19 fair to say, as well?

20 A Yes.

21

22 Q Okay. And I'm assuming when you live on the street you have to learn to take care
23 of yourself?

24 A Definitely.

25

26 Q Definitely, because if you don't take care of yourself, you're going to be taken
27 advantage of. Isn't that right?

28 A Yes.

29

30 Q And particularly given that you're a female, it's more important that you take care of
31 yourself, isn't it?

32 A Yes.

33

34 Q And -- and, ultimately, you have a lot of experience taking care of yourself, I assume?

35 A I believe so. I do.

36

37 Q You believe so. We'll talk maybe about that in -- in just a bit here, but let's maybe
38 talk a bit more about your -- how we came to be here today --

39 A Okay.

40

41 Q -- [REDACTED] My understanding is you met my client's brother at some point, and

1 his name is Lance (phonetic). Is that right?

2 A Yes.

3

4 Q And through -- and I guess one day you -- and -- and I'm talking a couple days before
5 this incident in the bathroom --

6 A Yeah.

7

8 Q -- okay. My understanding is you spent, you said -- you indicated three or four days
9 you spent at Mike's house?

10 A Three days.

11

12 Q Three days, okay. I'd like to speak with you about that and how you got to Mike's
13 house, okay?

14 A Okay.

15

16 Q And my understanding is you got to Mike's house because Lance invited you over
17 there?

18 A Yes.

19

20 Q Okay. And my understanding is you had spent that -- that day with Lance?

21 A Yes.

22

23 Q And that was at Chinook Mall?

24 A Yes.

25

26 Q And you guys went to Chinook Mall together?

27 A Yes.

28

29 Q And you snuck into some movies without paying?

30 A Yes.

31

32 Q You also were out stealing clothing throughout the day?

33 A Yes.

34

35 Q What other things did you steal that day?

36 A Alcohol.

37

38 Q I'm sorry?

39 A Alcohol.

40

41 Q And alcohol. And then, at some point after this day of thievery, you and Lance then

1 go back to Mike's house. And you -- had you met Mike before?

2 **A No.**

3

4 Q So it's the first time meeting Mike?

5 A Yes.

6

7 Q And there are other people at the house?

8 A Yes.

9

10 Q And my understanding of what you've been telling us here is that it sounded like there
11 was a fair bit of a party going on for several days. Is that somewhat fair to say?

12 A Yes, for three days.

13

14 Q We -- we have, I would say, eight young people more or less drinking, doing drugs,
15 and smoking weed, and playing. Is that fair to say?

16 A Yes.

17

18 Q Okay. My understanding when you met with Mike this first day Mike had suggested
19 that you and Lance could spend a month there. Do you remember that?

20 A I do recall that.

21

22 Q And -- and -- and you remember Mike said something to the effect that he was being
23 kicked out in there, you guys could just stay if you wanted. Do you remember that?

24 A Yes.

25

26 Q I would imagine, given that you were, at the time, homeless and living on the street,
27 the possibility of having this regular residence was attractive to you?

28 A Yes, it --

29

30 Q It would give you a place to put your stuff, shower, maybe cook some food, just do
31 the things that people do?

32 **A M-hm.**

33

34 Q And you were excited about that, weren't you, about that possibility?

35 A Yes.

36

37 Q My understanding, you -- you -- you stayed over that night. But even before you
38 stayed that night did you do any cleaning in that house?

39 A I did, yes.

40

41 Q And do you remember how much cleaning you did?

1 A I cleaned a lot of the garbage in the house.

2

3 Q Do you remember how long you were cleaning for, the length of time?

4 A For two days.

5

6 Q Okay. So over the days you were just cleaning?

7 A Yes, because --

8

9 Q Why were you cleaning?

10 A Because it was messy and his --

11

12 Q It was messy. Was -- if I suggested to you that you were cleaning --

13

14 MS. MOGRABEE: I'm just going to ask for -- I'm just going to
15 ask my friend, he's done it a couple times, the witness didn't quite finish the question
16 before my friend's going on to the next, so I wonder if we could just have a pause so the
17 witness can answer. Thank you.

18

19 THE COURT: Fair enough. Mr. Flynn?

20

21 MR. FLYNN: I will attempt to change that, Sir. I apologize
22 to you, [REDACTED].

23

24 A I accept.

25

26 THE COURT: It was messy.

27

28 Q MR. FLYNN: If I suggested to you, [REDACTED] that you were
29 cleaning the house because you had the motivation of maybe staying there yourself for
30 the rest of the month, would that be fair to say?

31 A Definitely.

32

33 Q So that first day, thi -- this -- let's call this the movie day. The day you guys went to
34 Chinook Mall, we'll call that the movie day. This is your first day you meet Mike.
35 You come to his house. You clean his house for many hours?

36 A I didn't clean that house that day.

37

38 Q Oh, you cleaned the house . . . Okay, well, let's -- let's talk about that day. We'll
39 talk about the cleaning later, okay.

40 A Okay.

41

1 Q So that day, which is the movie day, you go back to Mike's place.

2 A It's trashed.

3

4 Q You -- at some point --

5

6 THE COURT: Sony, you said something?

7

8 A Yeah, the place is partied out trashed. And -- and why would I want to live in a place
9 that's trashed? And so --

10

11 Q MR. FLYNN: So again, you were looking to live there?

12 A Yeah, if -- if he asked me to.

13

14 Q And he did?

15 A Yeah. So why not clean up a place that I want to dwell in --

16

17 Q So I just want to con --

18 A -- because they aren't doing it.

19

20 Q So I just want to confirm that you were motivated to stay there. You wanted to stay
21 there?

22 A I'm motivated?

23

24 Q Yes. The --

25

26 THE COURT: You had a reason to --

27

28 **A Yeah.**

29

30 THE COURT: You had a reason to clean up. You wanted to
31 stay?

32

33 A Yeah.

34

35 THE COURT: Fair enough.

36

37 Q MR. FLYNN: And you stayed that night?

38 A I did.

39

40 Q You stayed that night. And how many people were sleeping over that first night?

41 A There was Dustin and Lance, and I think Skylar was there too.

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Q I'm sorry?

A Skylar was there the first night.

Q I'm sorry, I can't hear you.

A Skylar.

Q Skylar. Did Dustin -- was there anyone else there that night besides --

9A And Mike.

Q And I'm talking whe -- when you're going to sleep. I'm not talking early in the evening. I'm talking -- what time did you go to sleep that night, do you remember?

A I don't remember.

Q You do -- okay. Do you remember if anybody had attempted to hook up with you that night?

MS. MOGRABEE:

I'm -- I'm going to rise, Sir, if I may. Section 276 of the *Criminal Code* governs any questions regarding any previous sexual history. And I'm wondering if my friend is raising issue now, because if he is, then I -- I'd like to address you on it. I don't know if at this point we need to excuse the witness, but I think that that question is inappropriate at this point.

Q MR. FLYNN:

I believe it's my terminology, Sir. If I can just -- and I'm not looking for sexual history or anything along this nature. It's more -- would I suggest if somebody was flirtatious with you?

A Yes, Dustin.

Q Flirtatious?

A Yes.

Q Okay. And so Dustin was flirtatious with you that night?

A Yes.

Q Okay. And did you accept his flirtations or did you decline his flirtation?

A Declined.

Q You declined?

A Yes.

Q Okay. And how did you decline his flirtation? Did you say, No?

1
2 MS. MOGRABEE: Again, Sir, I -- I -- this -- this is still going into
3 this area that I -- I raised this issue about. We're talking about -- we're talking about
4 flirtation. We're talking about embarrassing stuff.

5
6 MR. FLYNN: Well, we're talking flirtation. We're not talking
7 sex here. We're talk --

8
9 MS. MOGRABEE: Could this witness be excused, please, Sir?

10
11 THE COURT: [REDACTED] would you mind waiting in one of those
12 two rooms just outside the glass door. The lawyers is going to talk law for a moment.

13
14 MS. MOGRABEE: Thank you.

15
16 (WITNESS STANDS DOWN)

17
18 MS. MOGRABEE: Sir, I take flirtation to mean an interest, a
19 sexual interest perhaps, unless my friend wants to suggest it's something else. But this --
20 first of all, I raise my objection on that basis, that we're talking about her conduct
21 sexually, whether or not -- you know, regardless of how far something might of went.
22 That's what these questions are geared around, that issue. And that is not evidence that is
23 admissible without a proper application under section 276.

24
25 If my -- and so the --

26
27 THE COURT: Well, le -- let's just take that slowly.

28
29 MS. MOGRABEE: Yeah.

30
31 THE COURT: Sexual activity.

32
33 MS. MOGRABEE: Yes.

34
35 THE COURT: In proceedings with respect of defence under
36 various things --

37
38 MS. MOGRABEE: Yes.

39
40 THE COURT: including the present charge, 271, yes,
41 evidence the complainant has engaged in sexual activity. And so far, there -- there hasn't

1 been a question in that regard. There's been a question as to whether --
2

3 MS. MOGRABEE: Well --
4

5 THE COURT: -- whether she was flirted with and what she
6 did about it.
7

8 MS. MOGRABEE: Right.
9

10 THE COURT: I can understand that it might end there, but
11 right now it's not there yet.
12

13 MS. MOGRABEE: Right. And my concern is that it's going down
14 that line. And I think if we put aside 276 for a moment even because I do still make my
15 objection based on 276, but just put aside. My other objection is that this is not relevant
16 to the sexual assault that would have taken place between this accused as alleged and this
17 complainant. Is the suggestion here somehow that she was flirting with someone else or
18 someone was flirting with her, that that -- that somehow should lead to a thinking or a
19 line of questioning that invites an outdated, antiquated way of thinking that somehow she
20 would have been also interested in the other individuals in the house?
21

22 THE COURT: Well, we're thinking that it's not presently
23 acceptable. Mr. Flynn, why are you asking -- asking the questions?
24

25 MR. FLYNN: Yes, Sir. The reason is, Sir, for the -- for the
26 mens rea of this event, Sir, does my client have the honest belief that this woman is
27 giving him consent to this act. We also, Sir, are not looking beyond --
28

29 THE COURT: But your problem is -- is 276, for better or
30 worse --
31

32 MR. FLYNN: Well --
33

34 THE COURT: -- prevents -- prevents those questions.
35

36 MR. FLYNN: --understand, Sir. And I'm -- and I'm --
37

38 THE COURT: And I recognize that it -- I recognize and I
39 think the framers of the section recognize that it -- it does hamstring the defence.
40

41 MR. FLYNN: It does, Sir. But again, I'm -- I'm not looking

1 at sex acts. I'm looking at talk.

2

3 MS. MOGRABEE: Well, then my --

4

5 MR. FLYNN: I -- I used the word 'flirtation'.

6

7 MS. MOGRABEE: And my friend needs to --

8

9 THE COURT: Ms. -- Ms. Mograbee --

10

11 MS. MOGRABEE: Yeah.

12

13 THE COURT: -- I'll deal with it.

14

15 MS. MOGRABEE: Very good.

16

17 THE COURT: You -- you -- you had your chance.

18

19 MS. MOGRABEE: Thank you.

20

21 THE COURT: Mr. Flynn, I made -- I made the point to

22 Ms. Mograbee that -- that section 276 in the preamble talks about sexual activity. But it
23 does go further to say: (as read)

24

25 By reason of the sexual nature of the complainant is more likely to
26 have consented to the sexual activity that forms the subject matter
27 of the charge or is less worthy of belief.

28

29 So while -- while the preamble talks about sexual activity, and even -- even if sexual
30 activity is limited to the sex act rather than the talk that goes with it --

31

32 MR. FLYNN: Yes, Sir.

33

34 THE COURT: -- and the -- the ruffling of feathers and the
35 showing off that goes with it, still the principle applies. Are your questions likely to give
36 rise to issues of whether or not the complainant was more likely to have consented to sex?

37

38 MR. FLYNN: No, Sir. The purpose of my question, Sir,
39 relates to her efforts or her ability to shrug off unwanted advances, how does a young
40 lady of her age and experience and skill -- how does she disarm an unwanted suitor. And
41 my understanding, Sir, is that she has done this in the past. And that's what I want to

1 just examine very quickly on that issue. It's not the issue of sex, Sir. It's the issue of
2 how does she rebuff someone's advances. And -- and I think that's --

3

4 THE COURT: So you're -- you're saying that it isn't that
5 she's more or less likely to have indulged of sex --

6

7 MR. FLYNN: No, Sir.

8

9 THE COURT: -- but she's more or less likely to have had the
10 ability to --

11

12 MR. FLYNN: To say no. To -- not -- not to say no, Sir,
13 but --

14

15 THE COURT: -- to -- to stop it.

16

17 MR. FLYNN: -- but to stop it. And -- and I think that that's
18 asking -- to put this, I think, bluntly, Sir, it's almost the opposite. I'm asking -- not
19 looking for information about sex. I'm looking for information of how she --

20

21 THE COURT: All right. I think I've got the argument --

22

23 MR. FLYNN: -- the negative of that.

24

25 THE COURT: --and I think Ms. Mograbee has.

26 Ms. Mograbee, it's a subtle argument. What do you say to that?

27

28 MS. MOGRABEE: It's also --

29

30 THE COURT: Bearing in mind that -- that any -- any -- any
31 legislation that prevents an accused from cross-examining fully I think has to be
32 interpreted narrowly.

33

34 MS. MOGRABEE: I say the interpretation has to be narrow, too, to
35 avoid the kind of dangerous thinking that that line of questioning would engender. And I
36 think that what my friend is saying is, Look --

37

38 THE COURT: Well, surely we're -- we're not talking about
39 dangerous thinking, Ms. Mograbee. We're talking about the law.

40

41 MS. MOGRABEE: Yeah. Well, the law -- if you look at the --

1
2 THE COURT: The law doesn't stop people thinking
3
4 MS. MOGRABEE: Well, the law does talk about -- that particular
5 section talks about, you know, a way of thinking that would lead a co -- that would re --
6 that would essentially cause one to conclude that a person was more likely or less likely
7 to consent to activity. And I still think that we're in the ballpark, where you say, Well,
8 she was dealing with this guy this way --
9
10 THE COURT: Yeah.
11
12 MS. MOGRABEE: -- so she had -- she had -- she has to deal with
13 this guy the same way. I mean, I -- I just don't think that that's a fair line of questioning.
14
15 THE COURT: No, I'm not sure that Mr. Flynn's saying that.
16 He's not saying that -- that she should have dealt with this person the same way but that
17 she was able to. She -- she did have the wherewithal. It's much the same kind of
18 argument surely as -- as -- as it's the inverse of your argument when you said to -- when
19 you put to her: How big are you? How big did you think he was?
20
21 Now Mr. Flynn is trying to show, well, it doesn't matter how small you were. You were
22 able to -- to -- to deal with other men. Maybe the other man was even bigger. I don't
23 know. Perhaps Mr. Flynn's going there.
24
25 MS. MOGRABEE: It's still not relevant to how she dealt with this
26 man.
27
28 THE COURT: Well, you raised it.
29
30 MS. MOGRABEE: We don't have any evidence of this person,
31 Dustin, what -- what does flirting mean, what exactly did he say, did he touch her, did he
32 overpower her, did -- I mean, there isn't any of that. It's so vacuous to -- to suggest
33 flirting. It -- it's -- it's dangerous. It just leaves us with all kinds of questions. And I
34 think, if my friend is truly trying to elicit relevant evidence which he's obliged to only do,
35 then I say he needs to be very careful about what's asked. And it's not enough just to
36 say
37
38 THE COURT: Well, you may have another argument then.
39 That's similar fact evidence.
40
41 MS. MOGRABEE: I have an argument in terms of --

1
2 THE COURT: Yeah, you --
3
4 MS. MOGRABEE: -- similar fact in what way?
5
6 THE COURT: -- you may have an argument that similar fact
7 evidence is irrelevant. It doesn't matter what -- what she's done in other cases.
8
9 MS. MOGRABEE: Well, in -- in the case of a sexual assault, it
10 matters not what she did with other men. It matters what she did with this accused.
11
12 THE COURT: Yeah. But it also matters whether she was --
13 whether she was physically able to deal with it. All sorts of circumstances surround the --
14 surround the issue.
15
16 MS. MOGRABEE: The --
17
18 THE COURT: Were there people close by that she could call
19 on for help, did she have a telephone, all those things are permissible. And one of them
20 would be, presumably, in the ordinary course, absent 276 and what you call antiquated
21 thinking or con -- con -- contemporary thinking, would be is she morally, and by
22 'morally', I don't mean in terms of ethic morally but in terms of having the inner
23 strength, or physically strong enough to rebuff men if she feels like it.
24
25 MS. MOGRABEE: I still maintain my objection, Sir. It's not
26 relevant what she did with other men. It's relevant what she did with this accused. And
27 this line of questioning, in my respectful submission, does fall under 276. My other
28 objection is that it's not relevant. And if -- if you certainly permit the -- the questioning,
29 then I -- I'm not in a position to say anything more, Sir, but that's my position.
30
31 THE COURT: Ms. Mograbee, do -- do either of you have any
32 law on this? It can't be the first time this issue has arisen.
33
34 MR. FLYNN: No, Sir, I don't.
35
36 THE COURT: Ms. Mograbee?
37
38 MS. MOGRABEE: Well, section 276 is very plain in terms of --
39
40 THE COURT: Yes, it is. And --
41

- 1 MS. MOGRABEE: It is. And -- and --
2
- 3 THE COURT: And on its -- on its face it doesn't cover what
4 you're saying. You -- you're arguing that, by extension it shouldn't -- it shouldn't be --
5 I -- I have to apply the spirits of 276. And I'm not sure that that's right because it is -- it
6 is very, very incursive legislation. It stops an accused from asking question which would
7 otherwise be permissible because of contemporary thinking.
8
- 9 MS. MOGRABEE: The whole point to section 276 is to give
10 everyone an opportunity to know what kind of evidence we're dealing with so that the
11 proceeding is protected, that the complainant is protected. If my friend wants to pursue
12 this line of questioning, because we're arguing here in a vacuum because we don't know
13 exactly what he's trying to get at, he has to bring an application. There's a notice
14 requirement that he do so. He has to put evidence before the court. And he has to be
15 clear about what evidence he's talking about. That's the whole point, so that you can
16 make a ruling about whether this line of questioning can be - is permissible or not.
17
- 18 THE COURT: Now, but you see, that -- that isn't right either,
19 Ms. Mograbee, because (2) says -- talks about any other sexual activity.
20
- 21 MS. MOGRABEE: Right.
22
- 23 THE COURT: And he's not talking about other sexual
24 activity. He's talking about the opposite of sexual activity. He's talking about her being
25 able to say 'no' to sexual activity.
26
- 27 MS. MOGRABEE: Well, it's still sexual activi
28
- 29 THE COURT: No.
30
- 31 MS. MOGRABEE: -- whether she says 'no' or 'yes'.
32
- 33 THE COURT: No, it's not.
34
- 35 MS. MOGRABEE: Well, that's the --
36
- 37 THE COURT: By -- by definition it's not.
38
- 39 MS. MOGRABEE: That's the Crown position, Sir, respectfully --
40
- 41 THE COURT: All right. Well --

1

2 MS. MOGRABEE: -- that is. And --

3

4 THE COURT: Okay, Ms. Mograbee, I must take -- sorry,
5 finish.

6

7 MS. MOGRABEE: No, that's okay. And I appreciate where you're
8 coming from, Sir. And I know that it is your decision to make. But that's the point of
9 the section, is to allow everyone to fully appreciate what it is that we're dealing with so
10 that the -- the witness is not sort of answering questions and we're trying to argue about
11 some evidence that could -- could go in the way that think it could go.

12

13 THE COURT: All right.

14

15 MS. MOGRABEE: And so that whole application process is there
16 to allow the court to fully appreciate all the circumstances to make a ruling as to whether
17 or not that line of questioning is permissible or not. I say it's not. And the applica -- and
18 the -- and there hasn't been compliance with that section. And so he should be directed
19 to move on from that line of questioning. That's really, in a nutshell, Sir, is my position.

20

21 THE COURT: All right. Ms. Mograbee, I've got to take a
22 decision. And it's the kind of case that I want dealt with, for everybody's sake, as
23 quickly as possible. Accordingly, I'm going to rule that Mr. Flynn can ask these
24 questions. That doesn't prevent you -- that if it -- if -- if the questions turn to matters of
25 actual sexual activity, from immediately rising and complaining. And I -- I'm going to
26 allow him to ask a few more questions to see where he's going.

27

28 Ms. Mograbee, I'm concerned about interfering with -- with a proper defence. And I -- I
29 know what you said about 276. I think it should be read not -- not drastically narrowly,
30 but one has to be careful of how one applies it.

31

32 MS. MOGRABEE: No. And I appreciate that, Sir. And I would
33 just add that, you know, trial fairness is also a two-way street, as it were. And while on
34 the one hand, I -- my intention is not to impair the defence from putting their defence
35 forward. What I'm saying is there's certain rules. You have to comply with them. And
36 I -- I appreciate your ruling. I -- I will sit -- sit and listen. And if there's any other issue
37 I will certainly stand up.

38

39 THE COURT: I -- I know you won't be hesitant to --

40

41 MS. MOGRABEE: Thank you.

1
2 THE COURT: -- to complain, Ms. Mograbee.
3
4 MS. MOGRABEE: Yeah. Thank you.
5
6 THE COURT: Would you mind calling --
7
8 MS. MOGRABEE: I don't mind at all.
9
10 THE COURT: -- calling the witness back, please.
11
12 (WITNESS RE-TAKES THE STAND)
13
14 THE COURT: ████████ Mr. Flynn is going to carry on asking
15 you questions. Please remember you're still under oath to tell the truth.
16
17 A Okay.
18
19 THE COURT: When you're ready, Mr. Flynn.
20
21 Q MR. FLYNN: We were speaking very broadly, ████████,
22 about -- earlier about -- about the difficulties of a young woman, the difficulties of
23 anybody being homeless and having to protect yourself. I was asking you a question
24 back -- to bring your mind back to what we were speaking of, we were speaking
25 about, I think, your first day that you arrived at Mike's house, the day after spending
26 the day at the movies. Do you remember that?
27 A We spent the day at the movies. And then we went to Mike's house that night.
28
29 Q That's right. And my understanding, you slept over at Mike's house that night. Is
30 that right?
31 A Yes.
32
33 Q And my understanding, there were several other people at the house that night, as
34 well?
35 A Yes.
36
37 Q Okay. Did you feel at any time that somebody's attention towards you was -- I -- I --
38 I don't want to say romantic, but you understand, I would hope, that bases of
39 attraction. Some people can be attracted to somebody and other people may not be
40 attracted back to them. Is that fair to say?
41 A Yes.

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Q Okay. And I imagine, as every person does, you -- you've been attracted to people and they haven't been attracted back to and vice versa. Is that fair to say?

A Yes.

Q Okay. And generally, I -- I image you have techniques or things like that that you utilize to be polite. As you say, you seem like a very nice person, to be polite to people if you're not interested. Is that fair?

A Yes.

Q Okay. And did anyone that night attempt to have -- did anyone seem to you that they were being more attentive to you that night in terms of -- I don't want to say romance, but I don't want to say flirtation, but something -- something to the effect that they were chatting you up. Is that fair to say?

A I have no idea.

Q Okay. My understanding, you were at the movies with Lance that day. Is that right?

A Yes.

Q Okay. And -- and did you ever feel that Lance was attracted towards you?

A Definitely.

Q Definitely. And what did you -- how did you gather that Lance was attracted towards you?

A With the things he was saying when we were out at the movies and at Subway. He kept saying I was his girlfriend. I was like: I am not your girlfriend. I'm going out with you to go to the movies because you invited me to --

Q M-hm.

A -- but I'm not going as your girlfriend. And so I told him. And then at the theatres he's on the phone too with -- with however --

Q M-hm.

A -- saying that I'm his girlfriend and, I'm with [REDACTED] my girl, and talking about 6 pounders and drinking at the theatre already. And, yeah, I told him, like, I'm not his girlfriend.

Q Yes. Did he make any efforts to try to be your boyfriend? Did he --

A Efforts?

Q Did he attempt to touch you or did you touch him?

1 ANo.

2

3 MS. MOGRABEE:

I -- I . . .

4

5 MR. FLYNN:

I'll stand the question down, Sir. If I could just

6 have a moment.

7

8 THE COURT:

Take your time, Mr. Flynn.

9

10 Q MR. FLYNN:

It's fair to say that you knew that Lance liked

11 you a lot. Is that fair?

12 A Yes.

13

14 Q Did you encourage Lance in any way?

15 ANo.

16

17 Q Did you attempt to push away Lance in any way?

18 A Yes.

19

20 Q How did you do that?

21 A By telling him I'm not his girlfriend. And I kept telling him: This isn't a date. This

22 is -- this is us chilling. If -- if you can, just chill

23

24 And then -- then . . .

25

26 Q My understanding then, so we're -- we were talking about Sunday. This is the movie

27 day. And then the next day, my understanding is you stayed at the house and you

28 cleaned for a while, didn't you?

29 A Yes.

30

31 Q Okay. And my understanding is that evening people came to the house and there was

32 a more drinking party going on?

33 A Yes.

34

35 Q Okay. And my understanding is you went to bed early that night. Do you remember

36 that?

37 ANo.

38

39 Q Okay. Do you remember drinking that night at the house party?

40 A Yes.

41

- 1 Q Okay. And the next day, my understanding is Mike, the -- the homeowner, he went to
2 work?
- 3 A Yeah.
- 4
- 5 Q Do you remember that?
- 6 A There was -- there was not very many people in the house. I remember that. That's
7 when I started cleaning, because there was no one around, and I was sweeping the
8 floors.
- 9
- 10 Q Okay. Where were you sleeping before Mike went to work?
- 11 A On the floor.
- 12
- 13 Q You were on the floor. And who were you on the floor with?
- 14 A Dustin.
- 15
- 16 Q You and Dustin. And were there other people in the house?
- 17 A Yes.
- 18
- 19 Q Who else was in the house?
- 20 A Lance.
- 21
- 22 Q And anyone else?
- 23 A Skylar.
- 24
- 25 Q And Skylar, okay. Where was -- where were Lance and Skylar sleeping, do you
26 know?
- 27 A On the bed.
- 28
- 29 Q In the bed. In Mike's bed or in another bed?
- 30 A In Mike's bed.
- 31
- 32 Q In Mike's bed. They were sleeping with Mike?
- 33 A I don't think Mike was there.
- 34
- 35 Q Okay. So you weren't sure if Mike was there but you know that Skylar and Lance --
36 oh, sorry, Skylar and Lance were in Mike's bed. Is that right?
- 37 A Yes.
- 38
- 39 Q How do you know Skylar and Lance were in Mike's bed?
- 40 A Because I remember Skylar and Lance and Dustin being there and were chilling in the
41 bedroom.

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Q What do you mean you were chilling in the bedroom?

A We were just hanging out.

Q Who -- who, the four of you?

A Yeah.

Q Okay. My understanding is, later in that day, that you and Skylar decided you were going to get a grocery hamper. Is that right?

A Yes, later in that evening.

Q Later that evening. During the evening or . . .

A It was close to like 5, 6, because it was before the Alex closed. We got groceries, and it was closing time at the Alex.

Q Oh, I see. And you were able to get the food hamper up until closing time and you remember it somewhat being close to closing time that day?

A Yes.

Q Okay. And you then took the -- are -- are -- are you sure about that timing of 6:00, 5:00?

A No.

Q It could be -- it could have been earlier in the day?

A It could have been -- I don't remember the times.

Q At some point, do you remember saying that it was around 2:30?

A No, I don't recall.

Q Okay. So my understanding is that you met up with Ginger (phonetic) and Alex Wagar, my client, and you -- with the food hamper, and you guys all came back to Mike's house. Is that right?

A Yes.

Q And then my understanding is you then went on a thievery spree, you and Ginger. And who else went with you stealing alcohol?

A Dustin. And there was another person, too. I don't remember them.

Q Dustin. But it wasn't Alex. And it --

A No.

1 Q -- wasn't Lance, was it? So you and Ginger and Dustin and somebody else, you guys
2 go and you start -- I think you go to a whole bunch of different liquor stores, don't
3 you?

4 A Yes, we go to a bunch.

5

6 Q I'm sorry?

7 A We go to a bunch of liquor stores.

8

9 Q Why do you go to a whole bunch of different liquor stores.

10 A Because we couldn't get liquor at -- at some of the liquor stores. So we -- we go --
11 we went into the liquor stores, but we didn't have an opportunity to steal alcohol, so
12 then we'd go to -- we'd walk to a different one.

13

14 Q So you would keep going until you were able to steal from somebody?

15 A Yes.

16

17 Q And then you then took the booze and you went back to Mike's place?

18 A Yes.

19

20 Q And my understanding is drinking went on at that point?

21 A Yes.

22

23 Q It was -- there was a party?

24 A Yeah.

25

26 Q It -- it -- it's been a party pretty much the last couple days in that house. Is that fair
27 to say?

28 A Yes.

29

30 Q It's been almost a two-or three-day alcohol and drug binge. Is that fair to say?

31 A Yes.

32

33 Q And my understanding, when you return back to the -- to Mike's house with the
34 alcohol you're -- there's dancing going on? There's music?

35 A After we started drinking

36

37 Q After you started drinking

38 A Yes.

39

40 Q And people are loosening up and -- how many people are at the house at that time, do
41 you remember?

1 A In the bedroom, there were -- there was a lot of other people, but I stayed mostly in
2 the back area.

3

4 Q Okay. Where were you at?

5 **A Me?**

6

7 Q Yes. Do you reme --

8 A I was either in the -- in the laundry room or in the kitchen.

9

10 Q Okay. Well, le -- let's go back a little bit, if we can, [REDACTED].

11 A All right.

12

13 Q You went to steal the liquor. Do you remember what point in the day you went to
14 steal the liquor?

15 A It was evening.

16

17 Q It was evening. Early evening, late evening, mid-evening?

18 A Early evening.

19

20 Q Early evening. So you go back. What time do you think you get back to Mike's
21 house to -- to start to consume the alcohol?

22 A Ten, eleven-ish. I'm not sure what time.

23

24 Q No, that's okay. So you -- you go out in the early evening. And you think you come
25 back later.

26 **A Yeah.**

27

28 Q And you're not quite sure what that time is. Okay. And -- and you start drinking and
29 everybody starts getting friendly and dancing. Is that right?

30 A Not everyone.

31

32 Q Not everybody. Were you dancing?

33 A I was. At one point, I was.

34

35 Q You were at one point. Well, I'm wondering what -- what time frame we're looking
36 at here, [REDACTED], because you come back from the liquor store.

37 A Yes.

38

39 Q And then my un -- my understanding is your allegation against my client is that he
40 assaults you in the bathroom, and I think it's about 11:00 or 11:30. Is -- is -- is that
41 somewhat accurate, from your memory? What time do you think the assault occurred

1 in the bathroom with my client?

2 A Eleven, twelve o'clock.

3

4 Q Eleven, twelve o'clock. Okay, so 11 or 12:00. We know that, right. That's when
5 you're in the bathroom. And that's when the allegation is against my client, right?

6 A Yeah.

7

8 Q And we also know that earlier in the evening you had gone out and stolen alcohol. Is
9 that right?

10 A Yes.

11

12 Q Okay. So I'm just trying to fill in the gaps between stealing that alcohol and being
13 assaulted in the bathroom.

14 A M-hm

15

16 Q Okay. So time frame wise, we now know that the assault in the bathroom is 11,
17 12-ish. You indicated that you went out in the early evening to steal the alcohol. Do
18 you have any better idea what time that could have been?

19 A No.

20

21 Q Okay. And do you have any idea what time you got back to the house after stealing
22 the alcohol?

23 A It was dark out already when we left.

24

25 Q M-hm.

26 A And we walked and walked and walked. And then we walked back. So it wa -- it
27 was a long walk, but I don't know -- I don't know the times.

28

29 Q Okay. How long do you think you were drinking for before the alleged assault?

30 A An hour.

31

32 Q An hour or hours?

33 A I don't think it was hours. It was definitely not hours of drinking.

34

35 Q Well, this is where I'm somewhat surprised, [REDACTED]. You were able to tell us
36 with quite a bit of clarity what alcohol you drank, how much volume you drank, the
37 quantity that you drank. And I'm somewhat surprised you're not able to give us a
38 more better idea of the timing that was involved. Does that seem -- that you're not
39 able to remember properly?

40 A No, I can't remember.

41

1 Q Okay, but you can remember what you drank but you can't remember how long you
2 drank for?

3 A Yes.

4

5 Q So we're in agreement that you were drinking and at some point you were dancing.
6 We're not quite sure how long that was, that period. Would it be fair to say that it
7 was less than four hours and more than an hour?

8 A I don't know.

9

10 Q Okay. Were you dancing with Alex at all, with my client?

11 A I wasn't physically touching him dancing.

12

13 Q M-hm.

14 A I was dancing around the room with him.

15

16 Q You were dancing around the room with him. How long do you think you were
17 dancing around a room with him?

18 A I don't know.

19

20 Q Do you think it was just one song? Do you think it was five songs? Was it a half an
21 hour, an hour, an hour?

22 A I don't know how long.

23

24 Q Was Alex talking to you while you were dancing?

25 A I don't recall.

26

27 Q You don't recall.

28 A I don't --

29

30 Q Could he have been talking to you?

31 A He could have been.

32

33 Q Could he have been flirting with you?

34 A Probably was.

35

36 THE COURT:

Sorry, what is your answer?

37

38 A He probably was.

39

40 Q MR. FLYNN:

Did you ever comment to anybody that you

41 liked Alex's dancing?

1 A Yes.

2

3 Q And who did you say that to?

4 A I don't recall who I said it to.

5

6 Q But you do recall saying that to somebody, don't you?

7 A Yes.

8

9 Q Because you liked his dancing, didn't you?

10 A Yes.

11

12 Q You were attracted to his dancing?

13 A Attracted?

14

15 Q To his dancing. Well --

16 A I -- I admired his dancing.

17

18 Q Okay.

19 A It doesn't mean I was attracted to him dancing.

20

21 Q Okay, why did you admire his dancing?

22 A Because I like to dance.

23

24 Q Okay. You like to dance. And because you like to dance and he was dancing, is that
25 why you admired his dancing?

26 A Yeah, because it's dancing.

27

28 Q I'm sorry?

29 A It's dancing.

30

31 Q He was dancing. And were you -- you were dancing with him, too?

32 A Yes.

33

34 Q Okay. And then my understanding is, while this dancing's going on you're continuing
35 to drink at the party. Is that right?

36 A Yes.

37

38 Q And then my understanding is, at some point, you decide you're going to go into the
39 bathroom?

40 A Yes.

41

1 Q Okay. And my understanding is there's only one bathroom at this home, isn't there?

2 A Yes.

3

4 Q Okay. But do you remember where the light switch was in the bathroom?

5 A The light switch?

6

7 Q Yeah.

8 A Isn't it on the --

9

10 Q Do you remember in the bathroom?

11 A The side.

12

13 Q Was it inside the bathroom or was it outside the bathroom in the hallway?

14 A It was outside.

15

16 Q It was outside in the hallway. Okay. So I imagine when you went into the bathroom
17 you turned the light on?

18 A Yes.

19

20 Q And you went into the bathroom. My understanding is you then were looking at your
21 Facebook?

22 A Yes.

23

24 Q How long do you think you were in the bathroom looking at your Facebook for?

25 A I don't know, like 20 -- 20 minutes or so.

26

27 Q Twenty minutes. Did anybody come pounding on the door?

28 A I don't recall.

29

30 Q You don't recall.

31 A I recall somebody switching the lights at one point.

32

33 Q Somebody flipping those lights on and off. Okay. And how long into your 20
34 minutes of Facebook were the lights being turned on and off? Was it -- was that at
35 the start of your 20-minute Facebook adventure or was that towards the end of your
36 20-minute Facebook adventure?

37 A I don't know.

38

39 Q Okay. That's okay. That's okay, [REDACTED]. We know it's a long time ago.
40 We're -- we're not asking to give us false answers, just the best answers you can.

41

1 THE COURT: So you -- you can't remember at what point the
2 light switched flicked on and off? You can't remember if it was at the beginning of your
3 stay in the bathroom or towards the end?
4

5 Q MR. FLYNN: When the lights went on and off.
6

7 THE COURT: And if you don't know, you're allowed to say
8 so.
9

10 A I don't know.
11

12 THE COURT: Okay.
13

14 Q MR. FLYNN: That's okay, [REDACTED]. If I suggested to you
15 at some point that Alex came into the bathroom but he actually came into the
16 bathroom with two other people, with Skylar and Dustin, would you agree with me or
17 disagree with me?
18

19 A Disagree.
20

21 Q You would disagree with me. If I suggested to you that Skylar, Dustin, and my client
22 came into that bathroom to smoke a marijuana cigarette would you agree with me or
23 disagree with me?
24

25 A Disagree.
26

27 Q Disagree. Do you remember smoking a marijuana cigarette that night at the ba -- in
28 the bathroom?
29

30 A No, I don't.
31

32 Q Okay.
33

34 THE COURT: Are you putting to her that she also --
35

36 MR. FLYNN: I'm sorry, Sir?
37

38 THE COURT: -- that she also smoked marijuana at that point?
39

40 Q MR. FLYNN: If I -- may I suggest to you, [REDACTED], that
41 you consumed the marijuana cigarette with my client and Skylar and Dustin in that
bathroom that evening, would you agree with me or disagree with me?
42

43 A I don't recall.
44

45

1 Q You don't recall.

2 **ANo.**

3

4 Q Could you have done that?

5 A Could I have?

6

7 Q Yes.

8 A Yes, I could have done that.

9

10 Q But you just don't remember?

11 **ANo.**

12

13 Q But it could have happened?

14 A Yes.

15

16 Q Okay. If I suggested to you, [REDACTED], that after consuming this marijuana cigarette
17 Skylar and Dustin exited the bathroom and at this point left you and Alex alone in the
18 bathroom, do you remember that?

19 **ANo.**

20

21 Q Could that have happened?

22 **ANo.**

23

24 Q Then again, you're not -- my understanding is you're not sure whether you smoked a
25 marijuana cigarette?

26 A Yes.

27

28 Q Are -- so you're saying you -- you could or you may have smoked a marijuana
29 cigarette?

30 A I don't know if I did.

31

32 Q Okay, sorry. If I suggested to you that Skylar and Dustin left the room and that that
33 left you and my client alone in the room and, at this point, you and my client started
34 to consensually initiate contact with each other, do you remember that? Do you
35 remember you and -- you and Alex starting to get friendly in the bathroom after Skylar
36 and Dustin had left?

37 **ANo.**

38

39 Q At some point, my understanding is my client is talking with you. He's telling you
40 how beautiful you are, how you're nice looking. Is that right?

41 A I don't know.

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Q I'm sorry?

A I do not know.

Q Sony, did you not give testimony earlier under --

A That -- that he was flirting with me in --

Q No, I'm asking -- I apologize, [REDACTED], I interrupted you. Let me rephrase this and we can -- we can just come back again, okay. My understanding from your testimony that you gave earlier this morning was that when you were in the bathroom with my client he started to say things to you. He started to say things to the effect that you had a good body, that he had seen you dancing. Do you remember saying that to Ms. Mograbee this morning?

MS. MOGRABEE: Your Honour, I'm just going to rise for a moment.

THE COURT: Yeah, Ms. Mograbee.

MS. MOGRABEE: That wasn't her evidence, from what I recall.

THE COURT: Her evidence was that he started sweet talking her when -- when he came in.

MS. MOGRABEE: Yeah, that he was saying nice things to her --

THE COURT: Yeah.

MS. MOGRABEE: -- was the extent of her evidence. But I think if my friend wants to suggest something more than that he needs to put that to her. That wasn't her evidence.

MR. FLYNN: Oh no. I'm quite prepared to leave it at sweet things and . . .

THE COURT: And perhaps -- perhaps there -- there's a confusion here. She didn't answer the -- she didn't talk about -- about admiring the dancing this morning.

MR. FLYNN: Yes, Sir.

1 THE COURT: Perhaps that's your client's version.

2

3 MR. FLYNN: Yes, Sir.

4

5 THE COURT: And you can put it on that basis but not that
6 that was her testimony this morning.

7

8 Q MR. FLYNN: Very good. And to be fair, [REDACTED], I -- I
9 don't want to put words in your mouth, but it's always difficult for us lawyers when
10 we do this because we don't take as good notes as we really should, and, of course,
11 we sometimes say things back improperly. I don't mean to mislead the court or -- or
12 you, so I do apologize to you.

13

14 But I -- I think my understanding of your testimony this morning was that my client
15 was saying sweet things to you. Is that fair to say?

16 A Yes.

17

18 Q Okay. Now, when he's saying these sweet things to you, are saying anything back to
19 him?

20

21 THE COURT: Are you trying to remember?

22

23 A Yes --

24

25 THE COURT: All right.

26

27 A -- I'm trying to.

28

29 Q MR. FLYNN: Maybe let's start back again, [REDACTED]. How
30 long do you remember him telling you sweet things? Was it for five seconds? Was it
31 for two minutes? Was it for 20 minutes?

32 A I don't know the times or like -- or like what -- I'm so lost with -- with your questions
33 right now.

34

35 Q That's --

36 A And it's like --

37

38 Q I don't mean to mislead you. If you want to take a break, [REDACTED], we are able to
39 do that. We're -- we're here not to push you. This is not a beat you down type of
40 exercise, so if you need a break, I'm quite prepared to do that with you. Or if you
41 want to continue, we can do that, as well.

1 A Just continue. But it's like I'm -- I am not on this page . . .

2

3 Q I'm sorry?

4 A I don't know where the question is . . .

5

6 Q What I'm wondering is this, the length of time.

7 A That he was talking to me?

8

9 Q Yes, in the bathroom. He's -- you're saying he's in the bathroom and he's saying
10 sweet things to you. And this is I -- my understanding is, before he pulls your pants
11 down?

12 A Yes.

13

14 Q Okay. What I'm wondering is, how long was he saying sweet things to you for.

15 Was --

16

17 MS. MOGRABEE: Your Honour, I'm just going to rise for a
18 moment, if I may. She's repeated herself a few times that she doesn't remember times,
19 and that was her answer to that question. So I'm not sure what repeating the question is
20 going to accomplish, but --

21

22 THE COURT: Well, she then said she didn't understand the
23 question, so I think Mr. Flynn's giving her another chance. She's entitled to say again
24 that she doesn't remember how long it was.

25

26 Q MR. FLYNN: To be fair, [REDACTED], I understand you may
27 not be able to tell us if it was three and a half minutes or seven and a half minutes,
28 but -- but just a general basis of time. Do you remember it being a very short period
29 of time? Do you remember him -- long? We're just trying to have an idea of what
30 was going on in that bathroom that evening.

31 A There is a brief talking about -- about me, complimenting me and -- and saying things
32 about relationships. And -- and that's all I remember --

33

34 Q Okay. Well, let's talk a little --

35 A -- is him saying things about -- about me, how I was attractive and relationships.

36

37 Q Let's talk a little bit about that relationship matter that you're speaking of. I would
38 like you to focus on what he said about the relationship.

39 A See, that's what I don't know.

40

41 Q I'm sorry?

1 A That's what I don't remember.

2

3 Q Do you just remember the word 'relationship' and nothing else?

4 A I remember bits and pieces in the washroom of hi -- him talking to me, and then him
5 putting me on the counter.

6

7 Q Okay. Okay, well, let's talk then. My understanding is he pulled your pants down
8 before he put you on the counter. Is -- is that right?

9 A Yes.

10

11 Q Okay. And the pants, they got pulled down, but I think from your testimony they --
12 they were really only pulled to your ankles. They -- they weren't physically pulled off
13 at that point, were they?

14 ANo.

15

16 Q Okay. So my understanding is then your -- your pants are down at your ankles --

17 A Yeah.

18

19 Q -- and you're lifted up and placed onto the counter, kitchen -- bathroom counter. Is
20 that right?

21 A Yeah.

22

23 Q Okay. And then -- and then my understanding of your testimony, this -- my client
24 continued to talk to you, or what then happens at that point? He's now lifted you up
25 and put you onto the bathroom counter. What then happens?

26 A He starts to lick my vagina.

27

28 Q He starts to lick your vagina. Does he talk to you at all?

29 A No. He makes sexual moaning noises.

30

31 Q Okay. And did you make any sounds?

32 ANo.

33

34 Q Did you say anything?

35 ANo.

36

37 Q Do you remember saying anything?

38 A I don't remember saying anything.

39

40 Q I'm sorry?

41 A I don't remember saying anything, but --

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Q Could you have said anything?

ANo.

Q You're sure that you never said anything?

A I'm not sure if I said anything.

Q But you could have?

A Could have.

Q So he's licking your vagina. Do you remember how long he was licking your vagina for on the bathroom counter?

ANo.

Q And again, roughly speaking, was this a very short duration? Was this a longer duration? Do you have a rough approximate estimation for us?

A Nineteen, twenty minutes.

Q And again, I'm asking you to be clear. Are you saying it was 15 to 20 minutes of licking your vagina?

THE COURT: Mr. Flynn, it's not very persuasive --

MR. FLYNN: No, Sir. And --

THE COURT: -- any more than 270 --

Q MR. FLYNN: And I -- and I don't consider it of great weight, either. So I'm just trying to have an idea of the length of time of this total incident, Sir, and that's really what I'm trying to accomplish.

My client, my understanding, you had said he was speaking of relationships. And I'm sorry if I'm harping on this, but I'm -- I'm just a little -- I'm a little confused of all that. You say he was speaking of relationship. Was he speaking of relationships both before the oral sex and after or was it just before the oral sex?

A Before.

Q Before. Did he talk to you after the oral sex?

A I don't recall him talking.

Q Okay. But my understanding is, after the oral sex, he then -- he then -- he lifted you

1 down off the counter or -- oh, you -- you slid down the counter, didn't you?

2 A Yes.

3

4 Q Okay. And at that point, my understanding to your testimony to the effect that he then
5 started to disrobe you?

6 A Yes.

7

8 Q He then placed you into the shower?

9 A Yes.

10

11 Q Okay, now -- now, did he turn the shower on before he put you into the shower or
12 of --

13

14 THE COURT: Sony, Mr. Flynn, you've -- you -- you're
15 leaving out a stage, as far as I can make out.

16

17 MR. FLYNN: I'm sorry, Sir?

18

19 THE COURT: You're leaving out a stage if you're putting to
20 her evidence-in-chief.

21

22 MR. FLYNN: I -- I apologize, Sir. I'll --

23

24 THE COURT: You -- **a lot ha -- according to her**
25 evidence-in-chief, a lot happened before the shower.

26

27 Q MR. FLYNN: Oh, yes, Sir. I apologize, Sir. I will -- I will
28 come back. Thank you, Sir. My understanding is, after he's performed oral sex on
29 you, he's li -- licking your vagina, and we don't know the time period, but, at that
30 time, he then moves you towards the shower. Is that right?

31 A Yeah, and intercourse with me after he licked my vagina.

32

33 Q Oh, I -- I apologize, [REDACTED]. Thank you. Okay, after he licks your vagina -- now,
34 let's talk about licking the vagina for a bit. My understanding, your pants are still
35 down at your ankles, aren't they?

36 A Yes.

37

38 Q Okay. You have your buttocks, I'm assuming, on the counter?

39 A Yes.

40

41 Q And your legs are overhanging the counter?

1A What do you mean?

2

3 Q Well, your -- I hate to -- your buttocks on the counter but your legs overhanging the
4 counter. You -- you're sort of sitting on the counter?

5 A Yeah, so my butt and my legs.

6

7 Q Yeah. So -- so, in effect, you're sitting on the counter with your legs overhanging?

8 A Yes.

9

10 Q Okay. And my understanding is, again, your legs are bound at the ankles because you
11 have your pants on, don't you?

12 A Yes.

13

14 Q So, in effect, you have to agree with me your ankles are more or less together.
15 They're -- they're not able to be split apart, are they? They're bound --

16 A Yes.

17

18 Q -- by your pants. At your ankles, your pants are binding your ankles?

19 A Okay.

20

21 Q Is that right? Your pants are still down at your ankles, are they not?

22 A Yes, my pants are at my ankles.

23

24 Q Yes. So you would agree with me, if your pants are down to your ankles, I imagine
25 the -- the height of your pants are maybe 6 or 7 inches? They're all crumpled onto
26 the ground, aren't they?

27 A Yeah.

28

29 Q Okay. So -- and again, so your ankles are bound. What -- what I'm trying to
30 understanding and I'm hoping you can explain to the court is how does my client
31 perform oral sex on you if your ankles are bound. Are you cooperating with him?

32 A No.

33

34 Q Are you attempting to stop him?

35 A No, I just sat there.

36

37 Q I'm sorry?

38 A I just sat there.

39

40 Q You just sat there. Did you have your hands on his shoulders?

41 A Yes.

1
2 Q And you had your hands on his shoulders. May I suggest you had your hands on his
3 shoulders because you were balancing yourself on him?

4 ANo.

5
6 Q May I suggest to you that you were having your hands on his shoulders because you
7 were caressing his -- his shoulders while he was performing sex on you?

8 ANo.

9
10 Q My understanding is you told him you couldn't have sex because he didn't have a
11 condom?

12 A Yes.

13
14 Q And he told you, my understanding, that he would pull out?

15 A Yes.

16
17 Q And then my understanding to your testimony is then he then went ahead and
18 penetrated you?

19 A Yes.

20
21 Q Did you say anything?

22 A I said, It hurts.

23
24 Q You said it hurt. Did you tell him to stop?

25 A At one point, I did.

26
27 Q When did you tell him to stop?

28 A I don't remember when I told him to stop.

29
30 Q Okay, was it at the beginning of the intercourse or was it at the end of the intercourse?

31 A Beginning

32
33 Q Did you attempt in any way to push him or to hit him?

34 A No, I pushed him.

35
36 Q You pushed him. If I suggested to you that you were not pushing him but you were
37 using his shoulders to balance your buttocks on the counter while you were having
38 sexual intercourse with him would you agree with me or disagree?

39 A Disagree.

40
41 Q You agree with me though that you're sitting on a bathroom counter. It appears that

1 you have your tail bone right next to the sink, it looks like the faucet?

2 **A M-hm.**

3

4 **Q** You'd have to agree with me that that's not the most comfortable position, but it's
5 also the most not stable. You're -- you -- as he's thrusting into you your body is
6 bouncing back and forth hitting the back of the mirror, coming off and coming back
7 towards him. Do you agree with me?

8 **A** Yes.

9

10 **Q** You agree with me that when people have intercourse there's thrusting and motion
11 going on and people bounce back and forth. Is that right?

12 **A** Yeah.

13

14 **Q** And at this point, I suggest to you that you were having intercourse with my client and
15 you were holding onto his shoulders for encouragement as well as to balance your own
16 body while you were having sex with him?

17 **A** No.

18

19 **Q** Consensual sex?

20 **A** No, it was not consensual.

21

22 **Q** And my understanding is he did what he said he would do. He pulled out and he
23 ejaculated onto the -- you said, the counter?

24 **A** Yes.

25

26 **Q** Which is what he said he would do, that he would not come inside of you. Is that
27 right?

28 **A** I don't understand.

29

30 **Q** I'm sorry?

31 **A** I don't understand what you're . . .

32

33 **Q** My understanding of testimony earlier is that you told him that he couldn't fuck you
34 because he didn't have a condom.

35 **A** Yeah, so he wouldn't.

36

37 **THE COURT:** Sorry, you don't have to shout.

38

39 **A** Sorry.

40

41 **THE COURT:** We're all trying to -- to --

1
2 A Sorry.

3
4 THE COURT: -- keep our tempers here. I know it's hard.

5
6 Q MR. FLYNN: I apologize.

7
8 MS. MOGRABEE: All right, can she -- can she answer that
9 question, Sir? My friend's question was: He told -- he asked you. You said, No, not
10 without a condom. And -- and then you were answering the question.

11
12 A Yeah. So no means no. No. And he went with it anyways.

13
14 Q MR. FLYNN: And --
15 A And, sure, he said, I'll pull out, but I still said, No.

16
17 Q After he said he would pull out?

18 A Yes.

19
20 Q If I suggest to you that you did not say that, that you agreed with his demands because
21 you wanted to have sex with him'?

22 A No, I did not.

23
24 Q You -- my understanding is that after he had ejaculated onto the counter he then
25 removed the rest of your clothing. Is that right?

26 A Yes.

27
28 Q And then my understanding is that he then put you into the shower. Is that also right?

29 A Yes.

30
31 Q How did he put you in the shower? Did he physically carry you into the shower?

32 A No, he led me.

33
34 Q He -- I'm sorry, you indicated --

35 A So he -- he like showed me the shower. He pointed.

36
37 Q For the record, the -- the complainant is using her two hands in a forward motion. So
38 my understanding is that, at this point, he has taken your clothes off. And my
39 understanding of your testimony is then he then starts to take the rest of his clothes
40 off. Is that also right?

41 A Yes.

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Q And the two of you then enter the shower?

A Yes.

Q Or the two of you were in the shower?

A Yes.

Q Okay. And my understanding is that you then proceed to wash each other?

A Yes.

Q He soaps you up. He washes you down?

A Yes.

Q Is that right? Is that right?

A Yes, he wash --

Q And my understanding is you also soak him up and wash him down. Is that also right?

A Yes.

Q Okay. Did you tell him that you didn't want to be in the shower?

A I did not.

Q Did you tell him that you did not want to wash his body?

A I don't recall.

Q And then my understanding is that in the shower he's caressing you. He's fondling your body. Is that also right?

A Yeah, he's -- he's touching my body.

Q He's touching your body. If I suggest to you that he was touching your body in a compassionate, almost loving way, would you agree with me or disagree with me?

A Disagree.

Q I'm sorry?

A Disagree.

Q If I suggest to you that he thought that you guys were in a relationship and he thought that this was the start of a -- of a couple, would you agree with me or disagree with me?

A Disagree.

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Q My understanding -- or would you agree with me that -- well, I'll move on, Sir. And my understanding from your testimony is at some point you -- you look and you see somebody else is in the bathroom with you. Is that right?

A Yes.

Q Okay. And my understanding, that your testimony that you've given is that my client allegedly unlocked the door?

A Yes.

Q Did you see him unlock the door?

A I did not see him.

Q How do you know that he unlocked the door?

A Because it was locked before.

Q When was it locked before?

A When he came in.

Q So you say that you saw him lock the door when he came in?

A Yes.

Q And again, I suggest to you that he came into that bathroom with both Skylar and Dustin earlier?

A He came in alone.

Q My understanding that you were -- just one second, Sir. My understanding then is that you see this other person in the bathroom with the two of you while you're in the shower?

A Yes.

Q Do you remember how long you were in the shower for with my client?

A I don't know how long.

Q And again, roughly, could you say, was it a short duration, a long duration?

A It seemed like a long time.

Q It seemed like a long time. And then my understanding is this other person who you witnessed, how do you see them for the first time? Where -- where are they in the bathroom to you in the shower?

A They're crouched down like peeking around. There's -- it's all the plastic glass. And

1 then his face is right lower where Alex is -- is crouched down licking my vagina.

2

3 Q I'm sorry, Alex is crouched down?

4 A Alex is crouched down in the shower.

5

6 Q That's right, because Alex is licking your vagina, isn't he?

7 A Yes.

8

9 Q Okay, he's licking your vagina. Are you holding onto Alex while his licking your
10 vagina?

11 A I don't know.

12

13 Q Well, you -- you don't remember holding onto him?

14 A No.

15

16 Q Okay. If I suggest to you that you were holding onto him and caressing him while he
17 was licking your vagina, would you agree with me or disagree with me?

18 A Disagree.

19

20 Q My understanding of your testimony earlier was that the bathroom had a location of
21 such that there was a shower in the corner. And then next to that was a toilet. And
22 then closest to the door was the bathroom counter. Is that fair to say?

23 A Yes.

24

25 Q Okay. If I suggested to you -- oh, well, maybe I'll just restart this. Did you recognize
26 this person who was in the shower looking up at you?

27 A Yes.

28

29 Q And who was this person?

30 A Alex's brother, Lance.

31

32 Q And what was that person's name?

33 A Lance.

34

35 Q Lance. Thank you. How long do you remember Lance being in the bathroom looking
36 at you?

37 A When I looked down I -- I see his face smiling.

38

39 Q And how long was he in the bathroom after you first noticed him?

40 A I don't know how long he was there.

41

1 Q Okay. Now -- and again, your testimony is that this man has un -- has against your
2 consent taken you into this bathroom, against your consent is performing oral sex on
3 you. You have this individual who then comes into the bathroom. And -- if I could
4 just have a moment, Sir. And this person sees you -- sees my client performing oral
5 sex on you. Is that right?

6 A Yes.

7

8 Q Okay. And you just continue to have the oral sex performed on you?

9 A No.

10

11 Q What do you do?

12 A I freak out.

13

14 Q Yeah.

15 A I'm freaking out because --

16

17 Q You're freaking out at who?

18 A Both of them.

19

20 Q Okay, what did you say?

21 A I told -- I told Lance to fuck off

22

23 Q Okay. So you told Lance to fuck off Because I suggest to you, you told him to fuck
24 off because you and my client were consensually having sex in the -- in the shower?

25 A We were not consensually having sex.

26

27 Q Well, what I'm a little surprised about is this, [REDACTED], you have the -- you have
28 the -- the willpower to look down and see Lance.

29

30 MS. MOGRABEE:

I'm just going to object for a moment. And I --
31 and I'm going to say this now because it's happened a few times. When my friend
32 preface -- preface -- prefaces a question with, I'm surprised, that's not appropriate.
33 Those are comments that counsel's making. It is permissible for him, of course, to ask
34 the question. He can suggest to her, to advance his client's interest, the questions that are
35 necessary. I'm not trying to get in the way of that, but those comments are not
36 acceptable. And I'm going to ask, Sir, that you direct my friend to refrain from saying
37 those kinds of things before he asks a question.

38

39 His opinion is not relevant in this proceeding; it's what the evidence is. So I'm going to
40 ask, please, that there be a direction to that end.

41

1 THE COURT: Ms. Mograbee, according to best practices,
2 editorializing should be eschewed. However, I've seen far, far, far worse from top
3 cross-examiners. It is a technique. Mr. Flynn, try and avoid it.

4
5 MR. FLYNN: Most definitely, Sir.

6
7 THE COURT: It's not always possible, Ms. Mograbee, and it
8 certainly hasn't been done excessively in this case. But I'm sure Mr. Flynn will try and
9 limit it.

10
11 Q MR. FLYNN: Most definitely, Sir. So my understanding is,
12 while you're having this unwanted sex act performed on you, you tell the watcher to
13 fuck off, but you don't say anything to the person committing the oral sex on you?

14 A No.

15
16 Q And after you told Lance to fuck off, what then happened?

17 A Alex goes.

18
19 Q Oh, I'm sorry.

20 A Alex goes.

21
22 Q I'm sorry, I missed --

23 A Alex goes. He leaves the shower.

24
25 Q Oh, Alex leaves the shower. Well, my understanding is that he also tried to insert his
26 penis into you in the shower. Is that also right?

27 A Yes, after he -- he washed my body. And then the soap drops. And then he tells me
28 to pick it up. And then I picked it up. And then he puts his penis inside me when
29 I'm bent over.

30
31 Q Okay, so he puts--

32 A And then he keeps me down there and -- and does sex towards me while I'm bent
33 over in the shower.

34
35 Q Okay, I -- I just want to make sure that I'm clear on this, [REDACTED], then. My
36 understanding of your testimony is that he -- he attempted to penetrate you with his
37 penis, and then performed oral sex on you. Is that right? Or was it the other way,
38 that he performed oral sex first in the shower, and then attempted to penetrate you
39 with his penis? I'm not sure. That's why I'm asking.

40 A It was the oral sex and penetration.

41

1 Q Yeah, which came first?

2 A Which came first?

3

4 Q Yes, in the shower. I'm not talking about on the counter. I'm talking in the shower.

5 My understanding, in the shower there was attempted sexual intercourse, and there was
6 also licking your vagina. Is that right?

7 A Yes.

8

9 Q Okay. What I'm asking you is what came first, the attempted intercourse or the
10 licking the vagina?

11 A The licking of the vagina.

12

13 Q Okay. So when you're licking the vagina, this is my understanding, is when Lance is
14 in the bathroom. Is that right?

15 A Yes.

16

17 Q Okay. And Lance is in the bathroom and you told him to fuck off?

18 A Yes.

19

20 Q Right. Does Lance fuck off?

21 A Yeah, he goes.

22

23 Q He goes. So that leaves you and my client in the bathroom in the shower?

24 A Yeah, but Alex goes with Lance. When I notice Lance is there, smiling. And then
25 Alex just goes with his brother.

26

27 Q When did the attempt at sexual intercourse occur then?

28 A I remember washing bodies.

29

30 Q So -- and again, I just want to be clear because my understanding of your testimony
31 earlier was that the oral sex came first. I just want to be clear we're on the same
32 page. The oral sex came first in the shower, and then the attempt at intercourse. Is
33 that right?

34 A Yes.

35

36 Q Okay. And again, I want to be clear here because when the oral sex was being
37 performed on you, this is when you saw Lance?

38 A Yes.

39

40 Q Okay. And now your testimony is, after you told Lance to fuck off he and my client
41 left the bathroom?

1 A Yes.

2

3 Q What I'm asking you, given that testimony, when did the attempt at sexual intercourse
4 occur?

5 A In the beginning.

6

7 Q But you just told us that the licking the vagina came first.

8 A So there's licking of the vagina. And then there's intercourse. And then there's
9 washing bodies. And there's me bent over. And then there's more licking of the
10 vagina.

11

12 Q Okay. What time frame is all this occurring? There appears to be quite a few sex
13 acts. I'm wondering, do you have an idea of how long all these sex acts occur for?
14 Are we talking 2 minutes, 10 minutes, 20 minutes?

15 A Twenty minutes. I don't know.

16

17 Q And again, we're not trying to put answers with you, [REDACTED]. We're -- we're
18 trying to put an understanding. So what I'm trying to understand is you've got a lot
19 of different sex acts going on. I'm just -- and again, we're trying to understand, for
20 the material fact, how long this occurred for so we can have an understanding what --
21 what occurred. And again, your testimony, my understanding, is that it was of a
22 considerable duration. It wasn't very quick? You indicated 20 minutes. I don't want
23 to hold you to that, but is it fair to say that it was a considerable length of time?

24 A I don't know.

25

26 Q Well, let's put it this way, [REDACTED]. You've given earlier testimony that you went
27 into the bathroom initially to chill out and to read your Facebook and things like that.
28 And you've indicated that that took a lengthy period of time. I think you said 20
29 minutes. Is that right?

30 A Yeah.

31

32 Q Okay. Then on top of that then you have a incident that occurs on the bathroom
33 counter, but this takes a fair bit of time, as well, and we don't know exactly how
34 much, but we're going to say, you know, ten minutes. Is that fair to say?

35 A Sure.

36

37 Q Okay. So now we've got almost 30 minutes of activity with you and allegedly my
38 client alone in this bathroom. Then you go into the shower. And now you're saying
39 that the shower activity took also a fair bit of time. And again, I'm not trying to pin
40 you down on the length of time, but, again, it was a considerable length of time, 10
41 minutes, 20 minutes, something to that effect.

1
2 So will you agree with me that the total length of time you spent in that bathroom
3 with yourself and with my client could have been anywhere from 40 to 60 minutes?
4 A I don't know.
5
6 Q When you were in the bathroom in the shower did you see anybody else but Lance
7 and my client in the bathroom with you?
8 A There was just Lance looking through the window.
9
10 Q If I suggested to you that Skidder Mike (phonetic), as you call him, entered the
11 bathroom, saw you having intercourse with my client in the shower, and then left,
12 would you be able to say that happened or do you say that didn't happen?
13
14 MS. MOGRABEE: I'm going to -- I'm going to just rise for a
15 moment, Sir.
16
17 Q MR. FLYNN: Could that have happened?
18
19 MS. MOGRABEE: This witness cannot say what another witness
20 saw, obviously, but she can say what she saw. So I'm going to ask my friend to rephrase
21 the question.
22
23 THE COURT: All right.
24
25 MR. FLYNN: Very good, Sir.
26
27 THE COURT: It's an important issue.
28
29 MR. FLYNN: Well, Sir --
30
31 THE COURT: Just rephrase it to -- to (INDISCERNIBLE)
32 counsel's concerns.
33
34 Q MR. FLYNN: Okay. ██████████, I just want to be clear here.
35 You are suggesting that this unwanted activity went on with my client, and it went on
36 for a lengthy period of time.
37
38 MS. MOGRABEE: I'm going to rise too. That was not her
39 evidence. She didn't use the word 'lengthy'.
40
41 THE COURT: Well, it was in contention of her evidence.

1
2 MS. MOGRABEE: Pardon me?
3
4 THE COURT: It was the in contention of her evidence,
5 Ms. Mograbee.
6
7 MS. MOGRABEE: There were -- there were time frames put to this
8 witness, I appreciate.
9
10 THE COURT: Ms. Mograbee, although 20 minutes -- her 20
11 minutes might not be 20 minutes by the clock, the implication is that it was not a quick
12 matter.
13
14 Q MR. FLYNN: [REDACTED], did you have the opportunity at any
15 time when you were in that bathroom to see any other persons in that bathroom
16 besides you, my client, and my client's brother?
17 A Say it again.
18
19 Q Okay. I'm sorry, I'm not trying to trick you, [REDACTED] Did you see -- did you see
20 Skidder Mike in the bathroom at any point --
21 ANo.
22
23 Q -- during this incident?
24 A I did not.
25
26 Q Did you see Skylar or Dustin in the bathroom at any point during this incident?
27 ANo.
28
29 Q Okay. Now, I'm going to ask this question. And again, I don't -- you're the one
30 who's hoping going to be able to answer for us. Outside --
31
32 THE COURT: Is that one -- a potential witness?
33
34 MR. FLYNN: A potential -- a potential -- potential witness,
35 Sir.
36
37 THE COURT: Thank you.
38
39 MR. FLYNN: What I'm -- I apologize, Sir. I just . . .
40
41 THE COURT: Did -- your question was: Did you see Skylar

1 Or --

2

3 MR. FLYNN: Oh, thank you.

4

5 THE COURT: -- Du -- I believe, Dustin in the . . .

6

7 Q MR. FLYNN: Did -- my understanding of your testimony is
8 that you did not see Skylar or Dustin in the bathroom during this incident?

9 ANo.

10

11 Q My understanding of your testimony is that you did not see Mike?

12 ANo.

13

14 Q Could Mike have entered that bathroom and you have not seen him?

15

16 MS. MOGRABEE: Again --

17

18 MR. FLYNN: Okay, well, I'll put it this way.

19

20 THE COURT: Well, Ms. Mograbee, it's a fair question. The
21 answer could be, I had my eyes closed, I was facing the wall. There are a number of
22 answers to the question. It's a fair question.

23

24 MS. MOGRABEE: Well, she can only say what she saw.

25

26 THE COURT: Yeah, exactly.

27

28 MS. MOGRABEE: And then ask the question, I don't disagree.

29

30 Q MR. FLYNN: [REDACTED], you're having this unwanted sex
31 act, again, to use your allegation. Are you aware of what's going on in the shower
32 while this act is going on?

33 ANo.

34

35 Q You're not aware of anything going on around you?

36 ANo.

37

38 Q So my understanding is then when Lance comes in there and gives his dirty little smile
39 in the -- at you and you tell him to fuck off that you're not aware of what's going on
40 in the bathroom?

41 A I'm aware of the situation that's going on.

1

2 Q And you're aware that there's another person in the bathroom?

3 A Yes.

4

5 Q Okay. Could another person have entered that bathroom and you missed it?

6 A Somebody snuck in?

7

8 Q Sorry?

9 A They snuck in?

10

11 Q I don't know sneaking in. I would assume that it's a -- I assume it's a small
12 bathroom.

13 A Yeah. So how

14

15 Q It's a small --

16 A How am I supposed to --

17

18 Q Well, if somebody would open the door and you see the door open.

19 A Yes.

20

21 Q When you're in the shower can you see the door from the shower?

22 A Yes.

23

24 Q So if somebody opened that door you would see it, wouldn't you?

25 A Yeah.

26

27 Q Given the fact that you don't remember anybody opening the door -- or is it fair to say
28 that you never saw anybody come into the bathroom?

29 A No.

30

31 Q Could somebody have come into the bathroom and you missed them?

32 A Yes.

33

34 Q So my understanding is -- of your testimony is that after this -- you tell Lance to fuck
35 off he and my client then leave the bathroom and you stay in the bathroom for a
36 period of time?

37 A M-hm.

38

39 Q My recollection of your testimony was to the effect that Lance was being extremely
40 rude. He was calling you names?

41 A Oh, it was not rude. It was -- it was beyond rude.

1
2 Q And again, he was offensive to you. He was calling you 'whore'. He was calling you
3 dirty names. He was --

4
5 THE COURT: When was this, Mr. Flynn?

6
7 Q MR. FLYNN: Well, what I'm wondering is, would you agree
8 with me that Lance liked you romantically?

9 A Obviously.

10
11 Q Obviously. Because when -- a couple days before at the movie theatre you knew that
12 he was attracted to you.

13 A It was --

14
15 Q Is that right?

16 A -- beyond that.

17
18 Q I'm sorry?

19 A Beyond that; even before the movie theatre.

20
21 Q So it's fair to say that you were aware that he was attracted to you?

22 A Yes.

23
24 Q Yes, okay. So would you also agree with me that Lance may have been emotionally
25 hurt by seeing you have sex with another person?

26
27 MS. MOGRABEE: I'm going to rise too. I -- I. . .

28
29 A I -- I --

30
31 MS. MOGRABEE: This witness is being --

32
33 THE COURT: And the basis of the objection, Ms. Mograbee?

34
35 MS. MOGRABEE: Pardon me, Sir?

36
37 THE COURT: The basis of the objection?

38
39 MS. MOGRABEE: Yeah, the basis of the objection is how she --
40 how is she supposed to know what another person is feeling? She can tell us, of course,
41 what she heard and what she say, but beyond that, I don't think she can say whether

1 he's -- he's hurt or not. That's something that he can testify to. But again, she can say
2 what she sees and hears.

3

4 MR. FLYNN: I'm prepared to move on to another --

5

6 THE COURT: Well, it hardly requires an expert opinion to say
7 that somebody who's attracted to you is -- is hurt when they see you doing something
8 with somebody else. But it being so obvious, perhaps the question doesn't have to be
9 asked. Are you prepared to move on, Mr. Flynn?

10

11 Q MR. FLYNN: I am. [REDACTED], I'm sure you're like the rest
12 of us. You -- you have your -- your ups and your downs in your life. And I -- I
13 think, like all of us, you've had periods in your life where you've been jealous of
14 another person or you've been hurt by the acts of another person. Is that fair to say?

15 A Obviously.

16

17 Q I'm sorry?

18 A Obviously.

19

20 Q We all have. We all have. Would you agree with me that if a man was interested in
21 a -- sorry, if a man was interested in a woman, the man thought maybe they were
22 going to have a relationship, but at some point this woman turned -- you know, said
23 no to this person, similar to what you did with Lance --

24 A Yeah.

25

26 THE COURT: Ms. Mograbee --

27

28 MR. FLYNN: I see my friend standing.

29

30 THE COURT: Ms. Mograbee -- sit for a moment, Mr. Flynn.

31

32 MR. FLYNN: Certainly.

33

34 MS. MOGRABEE: I -- I just fmd this line of questioning to be
35 odd, to say the least. I know where my friend is going with this. I appreciate that. But I
36 don't think that the line of questioning is either clear or relevant to what happened
37 between her and this accused.

38

39 THE COURT: All right. Well, Ms. Mograbee, I -- I have the
40 following to say. The first is that Mr. Flynn has a very difficult job. The future of a
41 young man depends on his doing his job properly. I've had to do this kind of

1 cross-examination. It is not easy. He has talked temperately. He -- he has -- his natural
2 mannerism is to talk quickly, but he has not raised his voice and he has tried to be
3 courteous to the witness. You've obje -- objected a number of times, largely to a good
4 effect, but a cross-examiner is entitled to ask questions. I was interested when you led the
5 evidence about Lance and what happened after the -- after the incident. I didn't know
6 why it was relevant, but you led the evidence, and I didn't stop you and Mr. Flynn didn't
7 stop you.

8
9 I think it's turn and turnabout. Mr. Flynn is entitled to ask questions in relation to the
10 evidence that you chose to lead.

11
12 MS. MOGRABEE: Right. And the evidence that -- that came out
13 in that regard was certainly less detailed than what we have here, but I appreciate your
14 point. What I'm saying is the evidence relating to that needs to be more pointed. I don't
15 think it's fair to -- for -- for my friend to ask questions about generally the way men and
16 women would respond. I think he can ask particular questions about what was happening
17 in that bathroom. And that's simply my objection, is that he needs to ask questions about
18 that, what she saw, she heard, what he saw -- what she, you know, saw and noticed
19 around her. Those are all fair questions.

20
21 But beyond that, I don't think those are fair -- fair questions to ask.

22
23 THE COURT: All right, well, I'm going to allow the question,
24 Ms. Flynn (sic). Mr. -- Ms. Mograbee, Mr. Flynn must be allowed to develop his lines of
25 questioning. Please repeat the question, that she would accept that men and women get
26 jealous.

27
28 Q MR. FLYNN: Yes. Tha -- thank you, Sir. [REDACTED], I
29 think we were talking earlier that we understand that we're all human beings and we
30 all have jealousies and we all have disappointments romantically. Is that fair?

31 A Yes.

32
33 Q Yes. Would you agree with me potentially that Lance could have had feelings towards
34 you? You -- you've agreed with me that you felt that he had feelings towards you?

35 A But those are not feelings. Those are not feelings.

36
37 Q Okay. But Lance indicated that he wanted you to be his girlfriend, didn't he? He --
38 he was telling people on the phone that you're his girlfriend --

39 A Yeah.

40
41 Q -- wasn't he? So if he's telling people that you're his girlfriend and you end up

1
2 THE COURT: Certainly.
3
4 MS. MOGRABEE: Sir, this witness has been on the stand for a
5 long time.
6
7 THE COURT: Yes.
8
9 MS. MOGRABEE: I wonder if she might be permitted to have a
10 short break.
11
12 THE COURT: I see no reason why not. Mr. --
13
14 MR. FLYNN: No, just --
15
16 THE COURT: Mr. Flynn, how long are you still going to be?
17
18 MR. FLYNN: Sir, I -- I don't think I'm going to be terribly
19 long. I'm going to suggest 15 to 20 minutes at most, Sir. I have --
20
21 THE COURT: Because I -- I think you've covered the
22 important parts.
23
24 MR. FLYNN: I believe so, Sir. Sir, I just want to make sure
25 I've got everything.
26
27 THE COURT: Well, Mr. Flynn, why don't you take the
28 opportunity to see what questions you still really need to answer --
29
30 MR. FLYNN: Yes, Sir.
31
32 THE COURT: -- and that you need to have answered. And
33 I'm going to -- 15-minute break. And I'm going to caution you again. Please don't talk
34 to -- to your friends and family about the evidence.
35
36 A I won't.
37
38 THE COURT: And I know it's hard, but you mustn't, please.
39 Counsel, I'll be back at quarter past 3.
40
41 MR. FLYNN: Very good, Sir.

1
2 MS. MOGRABEE: Thank you.
3
4 THE COURT: And let's hope -- let's hope we can finish by
5 half past 3, Mr. Flynn, with this lady.
6
7 MR. FLYNN: Oh, most definitely, Sir.
8
9 MS. MOGRABEE: Thank you.
10
11 MR. FLYNN: Thank you, Sir.
12
13 (ADJOURNMENT)
14
15 THE COURT CLERK: Recalling, in custody, in person, Alexander
16 Wagar.
17
18 MR. FLYNN: Thank you, madam clerk. Good afternoon, Sir.
19 Flynn, Patrick. Mr. Wagar is present, so we're prepared to proceed on the
20 cross-examination of [REDACTED] (sic).
21
22 Q MR. FLYNN: [REDACTED] (sic), I know it's been a very long
23 day. We're not going to keep you terribly much longer. We're just going to --
24
25 THE COURT: Thank you. Please remember you're still under
26 oath to tell the truth.
27
28 A Yes.
29
30 THE COURT: Okay. Carry on, Mr. Flynn.
31
32 MR. FLYNN: Thanks, Sir.
33
34 Q MR. FLYNN: I know it's been a very long day. We're just
35 going to fol -- follow up with some questions about really the post-activity conduct of
36 everybody that went on after the shower incident, okay?
37 A All right.
38
39 Q Okay. My understanding is you left the bathroom by yourself after Alex and his
40 brother had left earlier. And you stayed in the shower, and then you came out of the
41 shower.

1 A Yes.

2

3 Q And then you -- I -- I don't want to use the word 'partied more', but is that fair to
4 say? You continued to party with everybody.

5 A I continued to drink more.

6

7 Q You continued to drink, and I -- and I think you had some food --

8 A Yes.

9

10 Q -- things along that nature. And then at some point you fell asleep.

11 A Yeah.

12

13 Q And then at some point in the morning, I -- I think around 4:00 or somewhere in that
14 time frame. Do you remember that?

15 A At 3 or 4:00 in the morning.

16

17 Q Sorry?

18 A 3 or 4:00 in the morning.

19

20 Q 3 or 4 in the morning. And my understanding is you woke up and Lance (phonetic)
21 was also awake.

22 A Yes.

23

24 Q And my understanding is Lance was saying some awful things to you.

25 A Two things.

26

27 Q I'm sorry?

28 A He -- he -- he was -- he was saying a bunch of stuff that he -- he told Alex to do that.

29

30 Q He told Alex to do that.

31 A Numerous times actually.

32

33 Q Okay. If I suggested to you that he told you that because he was trying to make you
34 angry because you had hurt his feelings earlier, could you agree with me?

35 A No.

36

37 Q You don't think that he was angry with you, that he was trying to hurt you?

38 A He did.

39

40 Q If I suggest to you that his hurt to you was only of words of post-sexual relations with
41 his brother, but that he made up the story? But then --

1
2 THE COURT: Well, she wouldn't know that, Mr. Flynn.
3
4 MR. FLYNN: Of course, Sir. I apologize.
5
6 Q MR. FLYNN: I apologize, [REDACTED] (sic). Do you
7 remember giving an interview to Detective Paswold (phonetic) on December 15th,
8 2011?
9 A Yes.
10
11 Q Everything you said in that interview with the detective is true, isn't it?
12 A Yeah.
13
14 Q You have no reason to lie to that detective.
15 A No.
16
17 Q You want to be as forthcoming as you can and as honest as you can, don't you?
18 A Yes.
19
20 Q Do you remember saying to the officer that you -- that you woke up with Lance, and
21 Lance was telling you that he was going to tell everyone that you were a dirty little
22 slut, that he was playing with your emotions? Do you remember saying that to the
23 detective?
24 A Yes.
25
26 Q That you were sick of his bullshit talk and his attempt to anger you. Do you
27 remember saying that?
28 A Yeah. He was saying things to anger me.
29
30 Q He was saying things to anger you. And if I suggested to you that he was saying the
31 comment about his brother to anger you, even though it had no basis in fact, would
32 you agree with me or disagree with me?
33 A Disagree.
34
35 Q But you never heard Lance say anything to his brother the act, did you?
36 A No.
37
38 Q So the only thing that you believe is what Lance told you after the fact.
39 A Yes.
40
41 Q And Lance -- and Lance wants to -- wanted to hurt you. He wanted to hurt your

1 feelings.

2 A Yes.

3

4 Q And did you also remember saying in the interview with the police detective: (as read)

5

6 Lance was trashing me. I'm just saying like, yeah, I don't care.

7

8 And in relation to having sex with my client, you said: (as read)

9

10 Yeah, I just wanted to, whatever, that I didn't care when he did
11 that to me. Like I wanted him to do it.

12

13 Do you remember saying that to the detective?

14

15 A Yes.

16

17 MR. FLYNN: If I can have just one moment, Sir.

18

19 Q My understanding is you attempted to tell Dustin after the fact that this incident had
20 occurred. Is that right?

21 A Yes.

22

23 Q What did you say to Dustin?

24 A That Alex raped me.

25

26 Q Okay. And what did Dustin do?

27 A **Nothing**

28

29 Q Did Dustin hear you?

30 A No, because he was probably drunk because we were drinking. So no one cared.

31

32 Q Did you ever say anything to Skylar?

33 A I don't recall.

34

35 Q Did you ever tell Skylar before that you were going to have sex with Alex?

36 A **No.**

37

38 Q Before you went into that bathroom, did you tell Skylar that you were going to have
39 sex with my client?

40 A **No.**

41

1 Q Did you consider Skylar to be your friend?

2 A I just met her.

3

4 Q You just met her. My understanding is, the day before, you wanted to leave the
5 house, but Lance asked you to stay. Do you remember that?

6 A Yes.

7

8 Q And one of the reasons why you stayed was because Lance said Skylar was coming
9 over. Do you remember that?

10 A Yes.

11

12 Q So you suggest to me that Skylar was somebody who you wanted to be friends with.

13 A Yeah.

14

15 Q Was Skylar friends with you? Did -- were you able to talk with her at all? Did you --
16 did you consider yourself to be friends with Skylar?

17 A I tried to flirt with her.

18

19 THE COURT: Sorry?

20

21 Q MR. FLYNN: You tried to flirt with her?

22 A Yes. I -- I was -- I was attracted to Skylar.

23

24 Q You were attracted to Skylar.

25 A Yeah.

26

27 Q Did you feel that you could open up to Skylar?

28 A Maybe.

29

30 Q Okay. And again, could you have told Skylar that you were going to have sex with
31 my client before you had sex with him?

32 A No, because I was trying to sleep with Skylar.

33

34 Q And you're suggesting, because you were sleeping with Skylar, that you would not
35 want to sleep with my client as well?

36 A I did not sleep with Skylar.

37

38 Q No, but you did sleep with my client.

39 A I did not sleep with your client.

40

41 Q You had sex with my client --

1 A I did not have --

2

3 Q -- consensual sex.

4 A No.

5

6 MR. FLYNN:

Sir, those are all my questions. Thank you,

7 [REDACTED] (sic).

8

9 THE COURT:

Thank you. Ms. Mograbee?

10

11 MR. MOGRABEE:

Just a few questions, okay?

12

13 Ms. Mograbee Re-examines the Witness

14

15 MS. MOGRABEE:

[REDACTED] Mr. Flynn asked you about a point in

16 time when you were in the bathroom where you had your hands on --

17

18 A His shoulders.

19

20 Q Alex's shoulders. You remember that part? Can you tell us at what point in time,
21 just so we're clear about when that happened -- what point in time during the incident
22 did you have your hands on his shoulders?

23 A When he had his penis inside me.

24

25 Q Okay. And how were your hands positioned and what were you doing?

26 A I was holding one shoulder with my hand and then back, and then I was trying to
27 move forward. And he kept moving forward, so it was like back and forth.

28

29 Q Okay. So I just want to picture it. So you're on the counter.

30 A Yes.

31

32 Q And he has his penis inside your vagina.

33 A Yes.

34

35 Q Am I right? And you're pressed up against the faucet.

36 A Yes.

37

38 Q And the mirror is behind you as well.

39 A Yes.

40

41 Q Okay. And it's at -- is it at that point then that you have your hand on his shoulder?

1 A Yes.

2

3 Q And which shoulder would that have been? Do you remember?

4 A I -- I --

5

6 Q Just show us with your hands how, just if it helps. Show us with your hands how you
7 have your hands and where they are.

8 A This one was on -- on this -- I don't know. There -- it was one on his shoulder, and
9 then I kept moving my hand back. And then I put my shou -- my other one on his
10 other shoulder.

11

12 Q And what were you trying to do by doing that?

13 A Push him.

14

15 Q How -- were there -- was there any point in other -- in time during the time you were
16 in the washroom when you had your hands on his shoulders?

17 A Not that I recall.

18

19 Q And when you say that you pushed, were you able to push him off of you at all?

20 A No.

21

22 Q Mr. Flynn also asked you about your pants. Do you remember that?

23 A Yes.

24

25 Q How they were around your ankles during the time that Alex was licking your vagina.
26 Do you remember that part?

27 A Yes.

28

29 Q Okay. So can you help us understand if both your ankles are in the bottom of your
30 pants, or is there something else going on?

31 A So he pulls my pants down, and then he has my legs spread --

32

33 Q Okay.

34 A -- on -- on the counter. And then after he's licking my vagina, then he takes my
35 other -- the -- he's inside the pants out, he's insiding it out. And then he -- then the
36 one leg is off, and then that's when he starts doing the intercourse.

37

38 Q So one of your legs is out of the pants --

39 A Yes.

40

41 Q -- when he was --

1 A And then my pants are inside out on the floor.

2

3 Q All right. And when your pants are still around your ankles during the time that he's
4 having the -- that he's performing oral sex on you, how does he get between your
5 legs?

6 A He has -- he opens my legs with his hands.

7

8 Q All right. Now, Mr. Flynn also asked you about Skylar and your relationship to
9 Skylar. Do I follow you correctly when you say that you only met her the night that
10 she ended up at Mike's house?

11 A I might have seen her on the street, but I never talked to her.

12

13 Q What do you know about her relationship to Alex?

14 A They -- they're all -- they're all homies, and I remember that they all have Alex's
15 back, the whole house.

16

17 Q And what made -- makes you think that they have his back?

18 A Because that's how -- how it is.

19

20 Q And when you say, "that's how it is," are you referring to life on the street or are you
21 referring to something else?

22 A Say it again?

23

24 Q When you say they have his back and that's the way it is, why do you say, "that's the
25 way it is"?

26 A Because it's how they work. They -- they have each other's back. For whatever
27 reason, they --

28

29 MR. FLYNN: And again --

30

31 A -- they stand up --

32

33 MR. FLYNN: -- I'm sorry. I have an objection to point, but
34 I'm -- I'm suggesting this lady's not an expert on being homeless. And I think she could
35 give a general, broad approach to it, but --

36

37 THE COURT: Well --

38

39 MR. FLYNN: -- in terms of having her back covered --

40

41 THE COURT: -- I think the (INDISCERNIBLE) is slightly

1 different.

3 MR. FLYNN: Very good, Sir.

4

5 THE COURT: The answer might be they went to school
6 together or they come from the same town, something like that.

7

8 MR. FLYNN: Most definitely, Sir.

9

10 THE COURT: I think that's what Ms. Mograbee is getting at.

11

12 MR. FLYNN: Thank you, Sir.

13

14 Q MS. MOGRABEE: Okay. So you said they have -- they have his
15 back and that's the way it is. And I asked you why, and you were answering that. So
16 could you continue to answer that?

17 A I was the new person in the group. I -- I was the -- the new person, so everybody
18 knew each other. They were all tight. They have their -- their group. And when that
19 incident happened, I remember clearly that everybody has Alex's back, that -- that all
20 of them against me. And that's why I didn't want to -- to charge Alex at first because
21 I thought that -- that there was no point. And I didn't want to, and I thought I -- I
22 was -- that -- that I was mean. And they all said that it was -- that was -- it wasn't
23 the way I say it is.

24

25 Q They told -- who told you that?

26 A Alex, Lance, Skylar.

27

28 Q What did Skylar tell you?

29 A Skylar didn't tell me much.

30

31 Q What did she tell you, though?

32 A She has Alex's back. And Alex said the same thing.

33

34 THE COURT: This is hearsay, and you are --

35

36 MS. MOGRABEE: I'm asking her about her conversation with
37 Skylar.

38

39 THE COURT: Yeah, I -- I understand that --

40

41 MS. MOGRABEE: Yes.

1
2 THE COURT: -- but you're -- you're introducing hearsay
3 evidence, and you are bound by the same rules as you are in-chief.
4
5 MS. MOGRABEE: Right. And to be fair, Your Honour, the -- the
6 defence has raised this issue about the conversation that --
7
8 THE COURT: Doesn't entitle --
9
10 MS. MOGRABEE: -- [REDACTED] --
11
12 THE COURT: -- you to lead hearsay, Ms. Mograbee.
13
14 MS. MOGRABEE: Right. Right. And I -- I'd like to be able to
15 ask her just a few questions about the circumstances under which the conversation was
16 made --
17
18 THE COURT: All right.
19
20 MS. MOGRABEE: -- if I may.
21
22 THE COURT: I'm happy to -- the circumstances that give rise.
23
24 Q MS. MOGRABEE: All right. So you say that you -- you feel that
25 Skylar has his back; that's Alex's back. Can you tell me about why you think that
26 about Skylar?
27 A 'Cause they've had sex before.
28
29 Q Okay. And is that something that you've seen?
30 A I did not see it, but they were -- it was talked about.
31
32 Q Were you there when there was discussion about that?
33 A Yes.
34
35 THE COURT: Mostly sounds like hearsay, but --
36
37 MS. MOGRABEE: Yeah.
38
39 THE COURT: -- neither here nor there.
40
41 MS. MOGRABEE: Yeah.

1
2 THE COURT: Seems pretty clear from the evidence what
3 happened, Ms. Mograbee, in that regard at least.

4
5 Q MS. MOGRABEE: Did you see Skylar after the incident at all?

6 A I don't recall. I didn't -- I don't recall.

7
8 Q And then my friend asked you about you trying to get with Skylar. Do you remember
9 that?

10 A Yeah.

11
12 Q Yeah. Was that before or after the incident in the washroom?

13 A Before.

14
15 Q Did you ever tell Skylar about what happened in the washroom?

16 A Yes.

17
18 Q What did you tell her?

19 A I told her what Alex did.

20
21 Q Did you go into any detail?

22 A No.

23
24 Q Do you remember what words you would have generally used? And I know we're
25 going back to 2011, but can you give us an idea of what -- what you would have said?

26 A Alex took advantage of me, you know.

27
28 MR. FLYNN: I need to hear that, please.

29
30 A Alex took advantage of me.

31
32 Q MS. MOGRABEE: Did you tell her anything else?

33 A I don't recall.

34
35 Q Did she say anything to you?

36 A I don't recall.

37
38 Q You don't remember? Other than, I told her Alex took advantage of me, again, you
39 don't remember if you'd said anything else. Do I follow you right?

40 A (NO VERBAL RESPONSE)

41

1 Q Okay.

2 A Yes.

3

4 Q Did you say anything to Skylar about Alex before you went into the washroom at any
5 time?

6 A I don't recall.

7

8 MS. MOGRABEE: All right. Those are my questions, Sir. Thank
9 you.

10

11 THE COURT: Thank you.

12

13 MR. FLYNN: Just one point in re-exam, Sir.

14

15 THE COURT: Well, I'm not sure you have a chance to
16 re-examine.

17

18 MR. FLYNN: Oh. Well, it's just my friend had brought up
19 a -- an issue, Sir, that I wish -- wish to address here very quickly.

20

21 Mr. Flynn Re-cross-examines the Witness

22

23 Q My understanding of your testimony, is [REDACTED] (sic), is you're saying in effect
24 that Alex's group has his back. That's what you've indicated. Is that right?

25 A Yeah.

26

27 Q And my understanding is you charged Alex with this crime the next morning, didn't
28 you?

29 A Yes.

30

31 Q Did you speak to anybody in this group before you charged him?

32 A Speak--

33

34 Q Well, my -- my point is this, [REDACTED].

35

36 THE COURT: Well, we know that she spoke to Dustin --

37

38 Q MR. FLYNN: You had initially said that the sex --

39

40 THE COURT: -- and to Lance.

41

1 MR. FLYNN:

I'm sorry, Sir?

2

3 THE COURT:

We know that she spoke to Dustin and to

4 Lance.

5

6 Q MR. FLYNN:

You'd allegedly spoken to Dustin. Was there

7 anybody else that you spoke to before you went to the police?

8 A Sandy (phonetic).

9

10 Q I'm sorry, who?

11 A Sandy.

12

13 Q Sun --

14 A Sandy.

15

16 Q Sandy. And Sandy's the worker at the Alex Centre, isn't she?

17 A No. She -- she's a girl that I knew from the Mustard Seed too.

18

19 Q Oh. But she's not in Alex's group. Like you -- you never spoke with anybody from
20 Alex's group but allegedly Dustin, who you say never heard you or never responded to
21 you. So the only person you spoke of this group who you say had his back allegedly
22 is Dustin, who never responded to your comment.

23

24 So what my question is: How do you know that they would have his back if you
25 never spoke to anybody before you charged him?

26 A Because Lance was saying to everybody about what happened, but that -- that twist of
27 getting me angry. So he's saying to the group, and -- and I'm -- and I hear them
28 saying, We have Alex's back.

29

30 Q You're -- so you heard this and you -- and I'm just trying to understand. So you say
31 that this group, are -- are you by yourself when you hear this?

32 A No. I -- I'm there.

33

34 Q You were there. So they were talking right in front of you and saying, We've got
35 Alex's back.

36 A Yeah.

37

38 Q And why would they say that?

39 A Because I'm not a part of their -- I -- they don't know me.

40

41 Q Well, but my question is this, [REDACTED] Why would they tell you they have his

1 back if they do not know about the sex assault?

2 A Because Lance.

3

4 THE COURT: Mr. Flynn, I -- I know that she's becoming
5 heated, but it's easier if you don't --

6

7 MR. FLYNN: Yes, Sir.

8

9 THE COURT: -- don't reciprocate.

10

11 MR. FLYNN: Those are all my questions. Thank you,

12 [REDACTED] (sic).

13

14 The Court Questions the Witness

15

16 Q I've just got a few questions and then -- then it's over. At the party that night, the
17 night of the incident --

18 A Yes.

19

20 Q -- were people taking drugs, marijuana or anything else?

21 A I don't recall any other hard drugs.

22

23 Q Soft drugs, marijuana?

24 A Maybe marijuana, but all I remember is alcohol.

25

26 Q All right. Did you have any marijuana before the incident?

27 A I don't remember.

28

29 Q You don't remember. All right. Now, during the incident, your back was against the
30 faucet.

31 A Yes.

32

33 Q In my experience, there's a counter with a mirror at the back of -- of the counter --

34 A M-hm.

35

36 Q -- and a faucet in front and a basin in front of that, correct?

37 A Yes.

38

39 Q Now, was it a single faucet that you mix the hot and cold with, with a long spout
40 coming out of it to -- a long arm coming -- lever to control the hot and cold, or was it

41 two

1 A There was --

2

3 Q -- two taps?

4 A -- two taps.

5

6 Q All right. And so they were on either side of the basin. Is that right?

7 A Yes.

8

9 Q And the bruise, as I understand it, was in the middle of your back and just above
10 your--

11 A Yes.

12

13 Q -- the tail bone. So you were pressed up against one of the taps on the one side?

14 A Yeah. The -- the faucet part sticking out of the bowl. So there --

15

16 Q Yeah.

17 A -- so there's the -- the bowl and then there's the tap hanging over the bowl. So I'm
18 sitting --

19

20 Q So there are two taps --

21 A -- on the coun --

22

23 Q -- but one -- one spout coming out.

24 A And it's the one spout.

25

26 Q All right. So you were in the middle with your back against the spout.

27 A Yes.

28

29 Q So your buttocks would have been in the basin.

30 A Yes.

31

32 Q All right.

33 A Yeah.

34

35 Q That means your buttocks were lower than your thighs because your bottom was
36 hanging down into the basin.

37 A Yes.

38

39 Q So the lip of the basin would have been between you -- between your vagina and the
40 accused, the accused's penis.

41 A Yeah, but he was licking my vagina --

1

2 Q All right.

3 A -- at that point.

4

5 Q But when -- when he was using -- when he was trying to insert his penis, your bottom
6 was down in the basin. Or am I wrong?7 A My -- my vagina was not in the bowl of the basin when he was having intercourse
8 with me.

9

10 Q All right. Which then leads me to the question: Why not -- why didn't you just sink
11 your bottom down into the basin so he couldn't penetrate you?

12 A I was drunk.

13

14 Q And when your ankles were held together by your jeans, your skinny jeans, why
15 couldn't you just keep your knees together?

16A (NO VERBAL RESPONSE)

17

18 Q You're shaking your head.

19 A I don't know.

20

21 Q Okay. And then you went to sleep on the -- on the floor of the kitchen, I believe, on
22 cushions with your friend Dustin.

23 A Yes.

24

25 Q And then at some point you woke up and you went and got -- you went to the
26 bedroom and slept on the bed.

27 A Yes.

28

29 Q And Lance was on the bed. I'm not suggesting that -- that you touched Lance or that
30 he touched you, but he was in the bed, and you went and slept next to him.

31 A I did not sleep next to him.

32

33 Q What did you do?

34 A I slept on the edge of the bed.

35

36 Q All right. But a bed that he was on.

37 A Yes.

38

39 THE COURT: Thank you. Any questions arising --

40

41 MS. MOGRABEE: No.

1
2 THE COURT: -- Ms. Mograbee?
3
4 MR. FLYNN: None, Sir.
5
6 THE COURT: Mr. Flynn? Thank you very much for your
7 time. You can either go or sit and listen, as you -- as you like. Thank you for your time.
8
9 A Thank you, Judge.
10
11 (WITNESS STANDS DOWN)
12
13 MR. FLYNN: Sir, I have two, I believe, very quick --
14
15 THE COURT: You -- [REDACTED] you can go and sit. And as I
16 say, you can either leave or you can sit and listen. It's your choice.
17
18 MR. FLYNN: Sir, I -- I note the time at about quarter to 4,
19 but I'm -- I'm hopeful, Sir. I have two defence witnesses who are just outside the
20 courtroom, and I'm prepared to examine them this afternoon, Sir.
21
22 THE COURT: I'd like to -- to get them done as soon as
23 possible.
24
25 MR. FLYNN: Most definitely, Sir.
26
27 THE COURT: Tell me -- tell me this, Mr. Flynn.
28
29 MR. FLYNN: Yes, Sir.
30
31 THE COURT: And you don't have to answer the question, but
32 it affects timing.
33
34 MR. FLYNN: Of course, Sir.
35
36 THE COURT: Is your client incarcerated only for this case or
37 for other reasons as well?
38
39 MR. FLYNN: He's incarcerated only on this matter, Sir.
40
41 THE COURT: All right. Well, then, all the more reason.

1 Let's do what we can.
2

3 MR. FLYNN: Yes, Sir. Thank you.
4

5 MS. MOGRABEE: Sir, while my friend is retrieving the witness,
6 may I just have a moment to check a message on my BlackBerry?
7

8 THE COURT: Of course, Ms. Mograbee.
9

10 MS. MOGRABEE: It's pertaining to the case, Sir. I don't --
11

12 THE COURT: That's -- Ms. Mograbee --
13

14 MS. MOGRABEE: -- mean to be rude.
15

16 THE COURT: -- it's the way the world runs these days.
17

18 MS. MOGRABEE: Thank you.
19

20 THE COURT: You don't even have to ask. Sir, is -- is this
21 gentleman going to be a witness, or is he a --
22

23 UNIDENTIFIED SPEAKER: No.
24

25 THE COURT: All right. Well, then, you can sit, sir, if you're
26 not going to be a witness.
27

28 MR. FLYNN: I apologize, Sir.
29

30 THE COURT: He isn't --
31

32 MR. FLYNN: I call Mike Gall -- Gallinger to the stand.
33 Please, Mr. Gallinger.
34

35 MIKE GALLINGER, Sworn, Examined by Mr. Flynn
36

37 THE COURT: Mr. Gallinger, I note you've come here in
38 shorts.
39

40 **A Hm?**
41

1 THE COURT: I note you've come here in shorts, and I note
2 that you've tapped the Bible against your neck, and I note that you've grunted at me.
3 This is a court of law.

4
5 **A Okay.**

6
7 THE COURT: Please regulate your behaviour accordingly.

8
9 **A M-hm.**

10
11 THE COURT: Mr. Gallinger, you've just done it again.

12
13 A Okay. I've been waiting around all day, so let's do this.

14
15 THE COURT: Mr. Flynn --

16
17 MR. FLYNN: Mr. Gallinger --

18
19 THE COURT: -- try and control your witness.

20
21 A I'm here.

22
23 Q MR. FLYNN: Thank you, Mr. Gallinger. We -- we appreciate
24 that you've been waiting all day for us, sir. Unfortunately, because of circumstances,
25 we weren't able to deal with your matter until now. But I'd always ask that you show
26 the proper decorum and respect to this court, sir. Thank you.

27
28 Mr. Gallinger -- Gallinger, is that right, sir?

29 A Yeah.

30
31 Q Thank you. Do you mind if I just call you Mike?

32 A Yeah, that's fine.

33
34 Q Thank you, Mike. Mike, in my understanding, you were living at an address back in
35 December of 2011. Do you remember that?

36 **A Something Beaver Dam Way.**

37
38 Q Something Beaver Dam Way. And do you -- and why we have you here today, sir, is,
39 in effect, Mr. Wagar, who you recognize --

40 A Yeah.

41

1 Q -- I assume, he's been charged with sexual assault against a [REDACTED] (sic), sir
2 My understanding is that this accusation allegedly occurred in your home.

3 A Yeah.

4
5 Q Do you remember that weekend, so to speak, sir, when [REDACTED] spent time at your
6 home?

7 A Yeah, kind of, parts of it.

8
9 Q Parts of it. Of course, I know it was three years ago.

10 A Yeah.

11
12 Q For the purpose of the court, sir, what do you remember about that incident, about that
13 weekend?

14 A Lance bringing her over, and then, I don't know, her and Alex hooked up in the
15 bathroom, I guess. And then -- yeah.

16
17 Q Well -- well, maybe let's start back a little bit here, sir. My understanding is
18 [REDACTED] (sic) came to your house a couple of days before this alleged incident in
19 the bathroom, and she came with Lance.

20 A Yeah.

21
22 Q And my understanding is that you were accommodating and welcomed these two
23 people, and they stayed several days at your house drinking, partying.

24
25 MS. MOGRABEE: I'm just going to interrupt. These are all very
26 leading questions. This is this is my friend's witness, so he needs to have his questions
27 open, rather than suggest certain circumstances to him. And I'm going to --

28
29 THE COURT: Is this contentious?

30
31 MS. MOGRABEE: It could very well be. I don't know. So if he
32 could please --

33
34 THE COURT: All right.

35
36 MS. MOGRABEE: -- just ask --

37
38 THE COURT: You may have to do it the long form,
39 Mr. Flynn.

40
41 MS. MOGRABEE: Thank you. Please.

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MR. FLYNN:

Yes, Sir. If I can have just one moment, Sir.

Q MR. FLYNN:

Mike, do you remember the first time you

meet -- you met [REDACTED] (sic)?

A Like I said, Lance brought her over.

Q Sorry?

A That's all I remember. Lance brought her over, and that's all I remember.

Q Okay. So Lance brings her over and she spends a couple of days at your house. Is that right?

A Yeah.

Q Okay. And at some point, my understanding during the period of time she stayed at your house is there was a lot of drinking going on, a lot of partying, a lot of people at your house. Is that right?

A There was always lots of people there.

Q Okay. My understanding as well -- and -- and I just want to reference this, Mike, to an incident that allegedly occurred, [REDACTED] (sic) alleging that she was being sexual assaulted in your bathroom.

A Yeah.

Q Okay? Can you draw your attention to that time period of when that allegation occurred?

A Kind of.

Q Okay. You're aware that she accused my client of sexual rape --

A Yeah.

Q -- in the --

A Yeah.

Q in your bathroom.

A Yeah.

Q And you know the date and you know the rough time. Is that right?

A I don't know the date.

Q You --

1 A I guess it was in December, yeah.

2

3 Q Okay. Well, do you have any memories of seeing [REDACTED] in your house in your
4 bathroom with my client?

5 A Yeah.

6

7 Q Okay. Let --

8 A I walked in there and they were both in the shower standing up. And I didn't see any
9 sign of struggle or anything, so I left.

10

11 Q Okay. Well, let's talk about that.

12 A I walked out. I didn't know they were in there.

13

14 Q Okay. Did you know that they were in the bathroom together?

15 A Not until I saw them in there.

16

17 Q Okay. You only had one bathroom in your house at the time, didn't you?

18 A Yeah.

19

20 Q Okay. And in my understanding, this was somewhat of a party house, but you weren't
21 drinking, were you? You were sober that day.

22 **A Yeah.**

23

24 Q You -- you were not drinking.

25 A I didn't drink around that time.

26

27 Q You weren't drinking, and you've got a lot of people in your house.

28

29 MS. MOGRABEE: This is all very leading, leading questions.

30 And, Sir, credibility is a live issue here. We're talking about what this witness
31 remembers, et cetera. I want to cross-examine him on what his recollection is, not what
32 my friend suggests to him. So please, those are the rules --

33

34 THE COURT: All right. Please be careful, Mr. --

35

36 MS. MOGRABEE: -- and I'm going to ask that he ask the
37 questions --

38

39 THE COURT: -- Mr. Flynn.

40

41 MS. MOGRABEE: -- properly.

1
2 MR. FLYNN: Very good, Sir. Sorry, sir. I lost my train of
3 thought. I apologize to the court.

4
5 Q MR. FLYNN: Might you -- remember why you went to the
6 bathroom that instant?

7 A I think me and Lance were going in there to talk 'cause it was the only quiet place in
8 the house.

9
10 Q Okay. And is the light switch on the inside or the outside of the bathroom? Do you
11 remember?

12 A I don't remember. I think it was on the inside.

13
14 Q That's okay. So my understanding is -- and -- and it's somewhat of a small bathroom,
15 isn't it?

16 A Yeah. The whole house was small.

17
18 Q Whole house is small. So my understanding is you would open the door to the
19 bathroom and then you would step in, wouldn't you?

20 A Yeah.

21
22 Q And once you stepped in, did you see anything?

23 A Yeah, them in the shower.

24
25 Q Okay. Do you remember how long you were standing in the -- in the bathroom?

26 A I saw them and left right away.

27
28 Q Okay.

29 A It was a couple of seconds.

30
31 Q You saw them and left right away.

32 A Yeah.

33
34 Q Can you please tell the court what you saw, sir.

35 A I saw them standing up in the shower. That's all I saw.

36
37 Q Okay. Well, let's talk. Were they both facing the same way, were they facing each
38 other?

39 A I don't know. I didn't look that closely.

40
41 Q Okay. That's okay. But you felt that this was a consensual matter?

1
2 MS. MOGRABEE: Okay. No. I'm --
3
4 A I think she would have been --
5
6 MS. MOGRABEE: -- I'm --
7
8 A -- screaming or something if it wasn't.
9
10 MS. MOGRABEE: -- I'm going to -- just -- just a moment, please,
11 sir.
12
13 THE COURT: Mr. Flynn, you can ask the question another
14 way more effectively.
15
16 MR. FLYNN: Very good, Sir. I will.
17
18 Q MR. FLYNN: Mike, if you felt that somebody was being
19 sexually assaulted in your house, what would you do?
20 A Beat the shit out of the person doing this whole thing.
21
22 Q Exactly.
23 A Well, that's --
24
25 THE COURT: Son̄y, what did you say?
26
27 A -- what I would have done before, sorry.
28
29 THE COURT: Sorry?
30
31 A That's what I would have done before, sorry.
32
33 THE COURT: You'd have done what?
34
35 A I would have taken care of that person and got them out of my house.
36
37 Q MR. FLYNN: Because you're not going to let somebody be
38 sexually assaulted in your house, are you?
39
40 THE COURT: Now, that's a -- that's a leading question.
41

1 MR. FLYNN:

Okay.

2

3 THE COURT:

It's going to enrage Ms. Mograbee.

4

5 MR. FLYNN:

I apologize, Sir. I apologize, Sir.

6

7 THE COURT:

Anything else, Mr. Flynn?

8

9 Q MR. FLYNN:

Did you have any -- Mike, did you have any

10 fear that, that evening, that anything was wrong in your home?

11 A No, because when they got out of the shower, she was still clinging onto him. So I

12 don't see why --

13

14 Q I'm sorry?

15 A -- she would have been doing that.

16

17 Q What's this?

18 A When they got out of the shower, she was still clinging onto him, so I don't --

19

20 Q What do you mean, she was clinging onto him, sir?

21 A She was following him around like they were having a good time. So I don't see why

22 she would have been doing that if something was wrong.

23

24 Q Okay. Did you see them before they went into the bathroom together?

25 A It's ongoing, yeah. I didn't see them like right before.

26

27 Q But when you saw them in the bathroom having what you thought was sex --

28

29 MS. MOGRABEE:

No, no, no, no, no.

30

31 THE COURT:

No.

32

33 A That's --

34

35 THE COURT:

Yeah, she didn't -- he didn't say that.

36

37 MS. MOGRABEE:

Yeah.

38

39 MR. FLYNN:

I apologize, Sir.

40

41 Q MR. FLYNN:

If you felt that there was something wrong

1 between █████ and Alex, would you have intervened?
2 A Yeah, I would have said something.
3
4 Q And the fact that you didn't intervene, would that indicate to you that you that --
5
6 MS. MOGRABEE: Okay.
7
8 THE COURT: No.
9
10 MS. MOGRABEE: Really leading questions here.
11
12 THE COURT: That is a leading question, and we can draw our
13 conclusions, Mr. Flynn.
14
15 MS. MOGRABEE: Look, I'm not trying to --
16
17 MR. FLYNN: Well, I'll --
18
19 MS. MOGRABEE: -- interfere, Mr. Flynn, in you --
20
21 MR. FLYNN: No, no.
22
23 MS. MOGRABEE: asking this man questions, but there are rules
24 about the way that they need to be asked. And I'd ask that they be respected, please.
25
26 Q MR. FLYNN: Mike, let's just get to what you actually saw,
27 sir. My understanding of your testimony so far is that you saw these two people in
28 the shower?
29 **A Yeah.**
30
31 Q Okay. You saw them after they came out of the shower?
32 **A Yeah.**
33
34 Q Okay. Please describe --
35
36 MS. MOGRABEE: No.
37
38 Q MR. FLYNN: --best--
39
40 MS. MOGRABEE: His evidence wasn't that he saw them come out
41 of the shower.

1
2 THE COURT: He saw them after they came out of the shower
3 is what I heard Mr. Flynn say.
4
5 MS. MOGRABEE: Which is a big difference.
6
7 Q MR. FLYNN: After they came out of the shower, Mike, what
8 did you observe between the two of them?
9 A They were still having a good time, hanging out, and spent the night again.
10
11 Q Did you see them touch each other?
12 A I can't remember.
13
14 Q Did [REDACTED] (sic) ever say anything to you about the alleged incident in the
15 bathroom?
16 A No.
17
18 Q Mike, do you have a criminal record?
19 A Yes.
20
21 Q When was the last time you were convicted of a crime, sir?
22 A A year and a half ago.
23
24 Q What type of crime was that, sir?
25 A Assault.
26
27 Q Assault. Mike, you understand that you're under oath here today?
28 A Yeah.
29
30 Q And you understand that you're to tell the truth?
31 A Yeah.
32
33 Q And that if you do not tell the truth, you're looking at a perjury charge, obstruction?
34 A Yeah.
35
36 Q Are you telling the truth here today, sir?
37 A Yes, I am.
38
39 Q Is there anything else you think you can add to this court, sir, in terms of what you
40 saw that evening between these two people?
41 A No, that's it.

1
2 MR. FLYNN: Those are all my questions.
3
4 THE COURT: Thank you, Mr. Flynn. Ms. Mograbee?
5
6 Ms. Mograbee Cross-examines the Witness
7
8 Q Mr. Gallinger, how old are you?
9 A Twenty-four.
10
11 Q Twenty-four. So back in 2011, you would have been, what, 21.
12 A Twenty-one.
13
14 Q Twenty-one? Yeah? And this house that these people were at back in December
15 2011, this is a house that -- that you rent, I take it.
16 A Yeah.
17
18 Q So it's your place. You don't live with anybody else. Is that right?
19 A Yeah.
20
21 Q And this is a small -- a small basement suite, right?
22 A Yeah, two bedrooms, bathroom, and a kitchen. There is no living room.
23
24 Q How many square feet would you say it is?
25 A I don't know. It was small.
26
27 Q Any idea?
28 A No. I don't really know square feet.
29
30 Q So if I suggested square footage to you, you wouldn't know what I mean.
31 A No.
32
33 Q All right. The bathroom that you've been asked about --
34 A M-hm.
35
36 Q -- okay, did you say the light was on the inside of the bathroom or the outside of the
37 bathroom?
38 A Pretty sure it was the inside.
39
40 Q Are you sure about that, or is it possible it could be on the outside of the bathroom?
41 A It's possible. I don't remember. That was years ago.

1
2 Q So you're just going from your memory, but you're not sure. Could be inside or
3 outside, right?

4 A Yeah.

5
6 Q Okay. And that day that you had a bunch of people over, are these people your
7 friends?

8 A Most of them. I don't know. There was always people hanging out. I don't
9 remember who was there and who wasn't.

10
11 Q So was it common for you to have people that you didn't know come in and out of
12 your house?

13 A Yeah.

14
15 Q And -- and, sir, how does that come to be in your life where you have people --

16 A Friends brought them over.

17
18 Q Friends. So you were pretty hospitable. You would have -- if your friends brought
19 friends, they were your friends. Fair to say?

20 A Yeah.

21
22 Q So you weren't too picky about who came and who went.

23 A As long as they respected the place, I didn't care.

24
25 Q As long as they didn't trash the place, right?

26 A Yeah.

27
28 Q As long as they didn't make any trouble for you. That was the main thing, right?

29 A Yeah.

30
31 Q Okay. And you know Alex Wagar?

32 A Yeah.

33
34 Q How long you known him for?

35 A I knew -- I met him the summer before that, I guess.

36
37 Q Summer before 2011 or some other time?

38 A The summer of 2011.

39
40 Q And have you stayed in contact with him since this incident that he's --

41 A A little bit.

1

2 Q -- been charged with? Yeah?

3 A A little bit, except I don't really talk to anybody right now.

4

5 Q But you have stayed in touch with him a little bit --

6 **A Yeah.**

7

8 Q -- you say, which means that you would have spoken to him a few times, right?

9 **A Yeah.**

10

11 Q And you guys are still friends, right?

12 A Yeah.

13

14 Q And -- and you're friends with Lance, too, right?

15 A Yeah.

16

17 Q And him and Lance are brothers, right?

18 A Yeah.

19

20 Q Yeah. And they came to your house again after this incident, right, both Lance and --
21 and Alex?

22 A Probably.

23

24 Q Do you not remember?

25 A Actually, yeah, because they were staying with me at that place for a little while
26 before I got evicted.

27

28 Q Okay. So 2011 in December, they were staying with you at that time in that house?

29 **A Yeah.**

30

31 Q Okay. How long had they been staying there for?

32 A I don't know. Since they came over.

33

34 Q So -- and --

35 A They were there for like a month, I think.

36

37 Q That's a long time to have friends over, right, a month?

38 A Like I said, there was always people there.

39

40 Q But they were there --

41 A There was people there when I wasn't there.

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Q -- they were there -- you know that the two of them were living there for a month straight, right?

A About that, yeah.

Q And they would have stayed there after December 13th for a little while, too, wouldn't they?

A Yeah.

Q And they weren't paying you any rent, right?

A I think they were buying food and stuff.

Q Well, why do you say, "I think"? Does that mean you're not sure?

A Because it was three years ago. I don't remember.

Q Well, were they buying you food?

A They were buying everybody food. They were buying food for the house.

Q And they paid for that?

A I guess.

Q Was that the bargain between the two of you or the three of you, that they would buy the food and they could stay there?

A They needed somewhere to stay, so I let them stay there. There was no bargain.

Q You cared about these guys. You didn't want them on the street. That's why they stayed at your house?

A Yeah.

Q So you were looking out for them, right?

A M-hm.

Q Is that a 'yes' or a 'no'?

A Yes, sorry.

Q And they didn't have anywhere else to stay, so you took them in, right?

A Yeah.

Q And if they brought friends, you were okay with that.

A M-hm. Yes.

1 Q Yes? All right. So on the day that you see [REDACTED] have you ever met her before?

2 **A** No.

3

4 Q So it's the first time that you ever see her.

5 A Yeah.

6

7 Q And do you remember what day she comes to the house?

8 **A** No.

9

10 Q So for all you know, she could have been there for ten days.

11 A She was there for like three days, I think.

12

13 Q Is that your guess, or you think that's -- that's accurate?

14 A I think that's accurate, but --

15

16 Q You saw her --

17 A -- that was my guess still.

18

19 Q -- you saw her for three days?

20 A I think so, yeah.

21

22 Q And you would have been at home during the time that she would have been there
23 sometimes.

24 A Part of the time. I don't know. I worked, and I was in and out of that house all the
25 time.

26

27 Q And back in -- in around December 13, 12, 11, that would have been the case where
28 you were in and out fairly quickly, right?

29 A Sure.

30

31 Q Well, I'm asking --

32 A I don't know what you mean.

33

34 Q Well, you'd go to work, come home --

35 A Yeah.

36

37 Q -- sleep.

38 A Sometimes I wouldn't even sleep there.

39

40 Q So sometimes you wouldn't even come home.

41 A Yeah.

1
2 Q So you can't really say then for -- for three days straight if she was there if you didn't
3 always come home, can you?

4 A No.

5
6 Q And on December the 13th, when a bunch of people were over, who are those people
7 exactly?

8 A Dustin, Skylar, Lance, Alex --

9

10 Q Do --

11 A -- me. I think --

12

13 Q Anybody else?

14 A -- I think that was it.

15

16 Q Anybody else come out of the house while you were there?

17 A Malory (phonetic) was there at one point. She remembers sort of.

18

19 Q Malory?

20 A Right, yeah, but I'm not allowed to talk to her, so I don't know what her say is on
21 this.

22

23 Q Okay. And these people were all there at the same time that you were there?

24 A Yeah.

25

26 Q And -- and you were -- you were partying with them, I take it.

27 A Yeah.

28

29 Q So you were drinking, right?

30 A No. I didn't drink at the time.

31

32 Q You didn't drink anything at all?

33 A I didn't drink at the time, like that whole time that I was living at that house. I mean,
34 I drank when I first moved in there, but then I stopped.

35

36 Q So that night you didn't drink anything.

37 A No, I don't think so.

38

39 Q Did you take any drugs?

40 A Probably.

41

1 Q Do you remember what you took?

2 A Speed.

3

4 Q You took it that night too?

5 A I was doing it then, so I don't know.

6

7 Q You were doing it pretty regularly?

8 A Yeah.

9

10 Q So probably you were doing it that night too, right?

11 A Probably.

12

13 Q That's something that you regularly did.

14 A Yeah.

15

16 Q And what about marijuana? Were you taking that too?

17 **A No.**

18

19 Q Any other drugs at all?

20 A Nothing else.

21

22 Q Any other -- sorry?

23 A Nothing else.

24

25 Q Nothing else. And when you were partying with them, you were having your own
26 conversations with people, right?

27 **A Yeah.**

28

29 Q You were paying attention to what you were doing, right, not what other people were
30 doing.

31 A Kind of. I mean, I pay attention to other people a little bit. It was in my house.

32

33 Q Okay. Well, you said these people were not trashing your house, were they?

34 A Yeah. Some guys --

35

36 Q They were trashing it or they weren't?

37 A No, they weren't, not that time. It did get trashed, but not when they were there.

38

39 Q So you didn't have any worries that they were trashing your house.

40 A Yeah.

41

1 Q So you weren't watching them for that.

2 A I was still watching.

3

4 Q You'd still watch and see what was going on around on?

5 A Yeah. It was kind of a habit of mine.

6

7 Q Okay.

8 A But like I said, it was three years ago, so I don't remember everything.

9

10 Q Right. And what about Alex? Did you notice him taking any speed or any drugs?

11 A No. He was being sober at the time --

12

13 Q He was sober at this time?

14 A -- as far as I remember, I think.

15

16 Q You think.

17 A Yeah.

18

19 Q What does that mean, you think? That you're not sure?

20 A I don't think he was doing drugs at the time, from what I remember.

21

22 Q And how is it that you remember he wasn't doing drugs at the time?

23 A Because he had just got out of jail and he was trying to be sober.

24

25 Q But did you --

26 A He told me that.

27

28 Q -- watch him --

29 A I remember him talking about that.

30

31 Q -- did you watch him the whole time to see if he'd not taken anything?

32 A No.

33

34 Q So you don't know for sure exactly what he was up to that night, do you?

35 A I don't know for sure about any of this. I've already said that.

36

37 Q Okay. What do you mean, "any of this"?

38 A Anything. It was three years ago. I can give my best assumption, but I don't
39 remember.

40

41 Q Okay. I don't want you to assume, okay? I want you to tell us what you remember.

1 A And that's why I'm here.

2

3 Q Are you just assuming this whole time with all the answers that you've been giving so
4 far?

5 A From what --

6

7 Q You're just assuming?

8 A -- I can remember at my best.

9

10 Q Okay. But I asked you, are you assuming at all?

11 A Not for the answers I'm giving.

12

13 Q You just said, "I'm assuming."

14 A Okay. Can we get on with this? Sony. Can we --

15

16 Q So which parts should I determine, you know, you're assuming on, and which parts do
17 you remember?

18 A I don't know.

19

20 THE COURT:

Ms. Mograbee, perhaps you can move on. I --

21 I've got the point.

22

23 Q MS. MOGRABEE:

All right. So you say that you went into the

24 washroom because you wanted to talk to Lance in private because it was the only

25 quiet room in the house, yeah?

26 A Yeah.

27

28 Q What were you guys talking about?

29 A I don't know.

30

31 Q Why is it necessary for it to be a quiet place?

32 A Because it's loud in the house. That's where we went to talk. That's where people
33 went to talk.

34

35 Q Well, were you talking to other people in the house that night?

36 A Sure. I don't know. I don't remember why we were going to talk in private.

37 Sometimes I talk to people in private.

38

39 Q And you say that you walk into the bathroom. It's a couple of seconds --

40 A Yeah.

41

1 Q -- right? Right?

2 **A Yeah.**

3

4 Q So you're not looking to see exactly what's going on in that shower, are you?

5 **A No.**

6

7 Q And so you -- you come -- walk in. The light's on or off?

8 A I guess it was on probably.

9

10 Q Probably. Again, you're guessing. It could have been off, too, right?

11 A Yeah.

12

13 Q So this stuff about you seeing them in the shower, the light's off, you're not seeing
14 anybody in the shower, are you?

15 A Obviously I would have turned the light on when I walked in there.

16

17 Q Well, did you turn the light on or didn't you?

18 A It was either on or I turned it on. When I saw them in there, it was on.

19

20 Q Before you said you didn't know if it was on or off. Now you're saying you turned it
21 on.

22 A When they were in there --

23

24 **THE COURT:** No, Ms. Mograbee. She said -- he said if it
25 wasn't on, he would have turned it on. There's nothing implausible in that.

26

27 **Q MS. MOGRABEE:** Right. So you turned it on? You remember
28 that?

29 A It was on when I saw them in the shower, yes.

30

31 Q And again, you were not paying attention to what was going on in the shower. You
32 realized --

33 A I saw two people --

34

35 Q -- two people are in the --

36 A -- in the shower standing up --

37

38 Q Okay. Let me finish the question.

39 A -- so I got out.

40

41 Q I'm going to finish the question and you can answer, okay? You walked into the

1 bathroom, you saw the two people in the shower, you walked right back out, right?

2 **A Yeah.**

3

4 Q Is there anything you want to add to that?

5 **A (NO VERBAL RESPONSE)**

6

7 Q Now, you say that they got out of the shower at one point. Remember saying that?

8 A Yeah.

9

10 Q And it's Alex that comes out first, doesn't he?

11 A I don't know who came out first.

12

13 Q So you can't say for sure who came out first?

14 **A No.**

15

16 Q And -- but at some point you say, though, that you saw both of them out of the
17 washroom, right?

18 A Yeah.

19

20 Q You just can't say who came out first, right?

21 A Yeah.

22

23 Q And when [REDACTED] comes out of the washroom, are you paying any attention to what
24 she's doing, or are you partying with other people?

25 A I was partying with her, too. I was partying with everyone.

26

27 Q So it was just your usual party night, right?

28 A Yeah.

29

30 Q You -- you -- you were going on, minding your own business, talking to people
31 around you, right?

32 **A M-hm. Yes.**

33

34 Q Is it yes? And was it -- did you take some more speed around that time, or was that --

35 A Around what time?

36

37 **MR. FLYNN:** Objection. I don't think he said he took speed.

38

39 **Q MS. MOGRABEE:** Did you take --

40

41 **MR. FLYNN:** He says he doesn't remember if he did.

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Q MS. MOGRABEE: Did you take any speed around that time that they were out of the shower?

A I don't know.

Q Could have?

A Yeah, could have.

Q So again, your focus is you're -- you're partying and you're having a good time that night, right?

A Yeah.

Q And anything that has been said about what happened in that bathroom, Alex told you, right?

A He didn't really say anything about it.

Q Alex never told you anything about what happened in that -- in that bathroom?

A Why would he?

Q I'm asking you. You don't get to ask me the questions. He talked to you, didn't he? He told you what happened in that bathroom.

A He told me what she says happens after he found out that -- after detectives came to my house, yeah.

Q So detectives came to your house, talked to you, right?

A Yeah.

Q And then you talked to Alex about what happened in that bathroom, right?

A Maybe. I don't remember.

Q Well, I'm ask -- I'm suggesting you did. Do you agree or disagree?

A I disagree because I don't remember talking to him about it.

Q But you could have talked to him, right?

A Sure.

Q You talked to him about what he says happened in that bathroom, right?

A I don't know.

Q You're not sure?

A No.

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Q You trying to help Alex out by being here today?

A I'm being here because I -- I got a subpoena, and I would have had a warrant if I didn't.

Q You don't really want to be here, do you?

A No, I don't. I got stuff to do.

Q When you say that you saw ██████ following Alex, I'm going to suggest to you that you didn't see that. Alex told you that. Isn't that right?

A What the hell are you talking about? I saw them --

Q Listen to the -- listen --

A -- hanging out and partying together --

Q --look--

A -- afterward.

Q I need to ask you --

A That has nothing to do with what he said.

Q Right. I'm asking you a question, and you can answer it 'yes' or 'no' if you agree or disagree.

A Wasn't that a leading question, what you were talking about before? I'm saying what I saw.

THE COURT: She's allowed to ask you leading questions. It's quite complicated, but she's cross-examining you. I'll -- I'll stop her if she's doing anything offside, I promise you.

A Okay.

THE COURT: And I'll -- I'll also promise you that they're far faster if you just go with the flow and answer the questions. Carry on, Ms. Mograbee.

Q MS. MOGRABEE: Okay. Let's back up a little bit. You're busy, you're partying with the people in the house, right?

A Including her and him.

Q Right.

A So I saw them together.

1

2 Q And when you say you saw them together, I'm suggesting to you -- you can tell me if
3 you agree or disagree -- you were not paying attention to exactly what they were
4 doing, were you?

5 A Probably not.

6

7 Q So when you say you saw them together, you didn't see them together in the sense
8 that they were talking to each other, did you?

9 A No.

10

11 Q In fact, they could have been in separate rooms, right?

12 A No. I remember them being in the same room at one point after all that.

13

14 Q And were you in that same room at that same time?

15 A Yes.

16

17 Q And you were saying that they were together, though. They -- they -- what do you
18 mean by 'together'?

19 A Together in a room, hanging out, having fun.

20

21 Q With other people.

22 A I don't mean -- no, with each other and me and everyone else, yes.

23

24 Q And you said that they were, again to use your words, together again. Did you hear
25 them talking to each other?

26 A Yeah, I remember them talking at one point.

27

28 Q Well, what did they say to each other? What did you hear?

29 A I don't know what the conversation was about. I remember them talking.

30

31 Q You remember everybody talking, though, don't you?

32

33 MR. FLYNN: Sir, to be fair, this was over three years ago.

34 Asking this person about a specific conversation from three years ago is very unfair to
35 this witness, Sir.

36

37 THE COURT: I'm sure Ms. Mograbee's going to end soon.

38

39 MS. MOGRABEE: This whole --

40

41 THE COURT: She's made her point.

1
2 MS. MOGRABEE: -- this whole case is about everything that
3 happened three years ago.
4
5 THE COURT: And that's the problem.
6
7 MS. MOGRABEE: Their -- their -- everybody's going to have to
8 do their best, I think.
9
10 Q MS. MOGRABEE: All right. So you -- you said that everybody
11 was having a good time. You agree with that --
12 A Yeah.
13
14 Q -- still? So again, when you say that they're together, you -- you're referring to the
15 fact that everybody's in -- in a room all at the same time. Is that what I can take from
16 your words 'together' --
17 A In the same room.
18
19 Q -- and what you mean by that?
20 A They're -- they're small rooms. There's people in all sorts of rooms.
21
22 Q Again, you didn't -- you can't say anything more than them being in the same room at
23 the same time, can you?
24 A No.
25
26 Q When you say that she was following him, you can't say that that happened either, can
27 you?
28 A Yeah, I can, because that's what I saw.
29
30 Q You saw. So tell us what exactly do you see in that moment when you say she's
31 following him. What room is -- was this happening in?
32 A Both of the rooms, my bedroom and the room that I used as a living room.
33
34 Q Yeah. Tell us what -- what it is that you see.
35 A I just said.
36
37 Q Okay. Well, I wasn't there so I don't know exactly what you see. So can you tell us
38 exactly what you see?
39 A Having fun, following each other around. I don't know.
40
41 Q What does it mean, 'having fun'? What are they doing?

1 A I don't remember. I don't remember what was going on that night.

2

3 Q So when you say that she was following him, that may not have happened. Am I
4 right?

5 A No.

6

7 Q I'm wrong or I'm right?

8 A You're wrong, because I remember. I have a fucking picture memory, and I
9 remember images, but I don't remember conversations and shit. So I'm saying what I
10 remember from images, and that's it.

11

12 Q Okay. Well, again, you say she was following him. So tell us exactly what's
13 happening.

14 A That is what happens. I can't answer it any more in depth than that.

15

16 Q Well, what room is she following him to?

17 A I said both.

18

19 MR. FLYNN: Sir, objection. I think this witness has given
20 the best clarity that he can on these questions.

21

22 THE COURT: I'm going to let her go just a little longer. I'm
23 sure she's --

24

25 MR. FLYNN: Thank you, Sir.

26

27 THE COURT: -- almost finished this line of questioning,
28 Mr. Flynn. I think he said that he saw them in both rooms, the living room and his
29 bedroom.

30

31 Q MS. MOGRABEE: Then she's -- when you say that he's fo -- that
32 she is following him, what room is that happening in?

33 A Both rooms, back and forth.

34

35 Q All right. And who's leaving the room first?

36 A I don't know.

37

38 THE COURT: Ms. Mograbee, I think you're taking it a bit far
39 now.

40

41 A Yeah.

1

2 THE COURT: It's three years ago.

3

4 MS. MOGRABEE: Well, this is all -- this whole case is about three
5 years ago.

6

7 THE COURT: Yeah, I understand that, but some -- some --
8 some incidents are of a nature that will imprint themselves on the memory, particularly
9 the participants. Some incidents are not.

10

11 Do you remember who was following whom from one room to another?

12

13 A I remember her following him at one point, and I don't think he followed her, though.

14

15 Q MS. MOGRABEE: So you know for when -- for sure one time it
16 happened.

17 A Yes.

18

19 Q And were there other people with her at the time, or was she by herself?

20 A Lance was following her around kind of 'cause he's the one who brought her to the
21 house, so he was trying to make sure she had a good time.

22

23 Q So it was Lance following her most of the time. Is that what you're saying?

24 A No. At one point. I'm not saying most of the time for anything.

25

26 Q You just remember the one time that she followed Alex. Am I following you right?

27 A Yes.

28

29 Q And you don't know if there was anyone else with her when that happened. Did you
30 see

31 A She came with Lance. I don't think she knew anyone else there. Or I think she knew
32 Dustin. I don't know.

33

34 Q Did you see where she went when you say that she followed Alex?

35 A Into the other room where everyone else was.

36

37 Q So there was a group of people in that other room?

38 A Yeah. There was a group of people in all the rooms.

39

40 Q And what made you think that she was following him as opposed to her just going to
41 the other room?

1 A Because -- I don't know. They were talking about something. I don't know.

2

3 Q Oh. So they were talking at the time that she was following him?

4 A I already said that. They were talking at one point.

5

6 Q Right. And -- and I understood that, too, but at what point? Is it during the following
7 or is it at a different time?

8 A Before, during, after. I don't know.

9

10 Q You don't remember.

11 A All of it --

12

13 Q You don't remember.

14 A -- some of it.

15

16 Q During, before, after, some of it. Which is it?

17 A Any of it. I don't know.

18

19 Q You talked to Lance, too, about what happened in the house on that day?

20 A At some point after that. I don't know.

21

22 Q I'm going to suggest that you did --

23 A Yeah, because he's going --

24

25 Q -- and Lance told you what Alex --

26 A Yeah.

27

28 Q -- there was lots of conversation, eh?

29 A I don't know.

30

31 Q Pardon?

32 A And I only remember that because of the statement you showed that I wrote when the
33 detectives came to my house.

34

35 Q I see.

36 A I didn't remember talking to Lance about that.

37

38 Q But you do remember having a conversation with him about that, don't you?

39 A After reading that, yeah.

40

41 Q After reading that. And Lance was probably pretty angry when he was talking to you,

1 wasn't he?

2 A I don't see why he would be. I've never really seen him angry.

3

4 Q I'm just asking -- I'm not asking you why he would be. I'm asking if he appeared
5 angry to you.

6 **ANo.**

7

8 Q Not at all?

9 A Angry about saying that he did that, yeah.

10

11 Q And Lance would have given you details about what he knows happened at that place,
12 too, at your place, right? Right?

13 A Details? Sure.

14

15 Q And I'm going to suggest to you that you're taking some of those details that -- that
16 Lance gave to you to try to remember really what happened in that house.

17 A Those details are in those statement which I haven't said anything about. I'm not
18 using any of those details.

19

20 Q And why is that?

21 A Because I don't remember. I don't know if that's why or not. And like you already
22 said, that was what people said, not what I saw. I'm saying what I saw, not what
23 people said.

24

25 Q Right. So what Lance said to you had no effect on what you saw at the house that
26 night?

27 **ANo.**

28

29 Q And, Mr. Gallinger, you talked about having a record. What's the record for, criminal
30 record?

31 A Domestic assault.

32

33 Q Any other convictions?

34 **ANo.**

35

36 Q Do you know Skylar?

37 A Yeah. I met her that summer, too.

38

39 Q Are you friends with her?

40 A I haven't seen her since then.

41

1 Q Did you get together with Skylar to talk about what happened, too?

2 A No.

3

4 Q You've never talked to Skylar about what happened?

5 A She said something when I was talking to Lance, but I haven't seen her since then.

6

7 Q Okay. About this incident?

8 A Yeah.

9

10 Q She told you some stuff?

11 A I guess. I don't remember what.

12

13 Q You don't remember the details, but she talked to you about it.

14 A Yeah.

15

16 Q And do you know Skylar to be friends with Alex and Lance?

17 A Yeah.

18

19 Q She's not your friend, is she?

20 A Was then. And like I said, I haven't seen her since then.

21

22 Q But that's how you knew her, through them, right, Alex and Lance?

23 A I can't remember. Through friends of friends. I can't remember who.

24

25 Q So when did Lance and Alex stop staying at your house?

26 A When I got evicted.

27

28 Q Which is when?

29 A The end of December, I think

30

31 Q The end of . . . ?

32 A December.

33

34 Q Of 2011 or a different -- different time --

35 A Yeah.

36

37 Q year?

38 A 2011. I didn't live there long.

39

40 Q Now, what's the address of this basement suite that you rented?

41 A Beaver Dam Way. I don't remember what house number it was.

1

2 Q Is it downtown or close to downtown?

3 A No.

4

5 Q Where is it?

6 A Thorncliffe.

7

8 Q Sorry?

9 A Thorncliffe.

10

11 Q Thorncliffe. That's the northeast area, right?

12 A Yeah.

13

14 Q If you wanted to come downtown, it'd take you a long time to walk to downtown,
15 right?

16 A Hour and a half.

17

18 Q And if you -- you'd be better off taking a bus or a car, right?

19 A Yeah.

20

21 MS. MOGRABEE: Right. All right, sir. I don't have any other
22 questions for you unless something comes up. Thank you.

23

24 MR. FLYNN: Nothing, Sir.

25

26 The Court Questions the Witness

27

28 Q Sir, I'd be grateful if you'd just clear up two things for me. When you walked into
29 the bathroom -- and I understand that the light may have been off and you switched it
30 on, or it was on.

31 A Yeah.

32

33 Q And presumably you then simply saw that there were two people in the shower. And
34 maybe the question sounds silly, but I've got to understand it. You saw that there
35 were -- that it was a male and a female.

36 A Yeah.

37

38 Q And then you recognized them as being Alex and [REDACTED]

39 A Kind of.

40

41 Q Well, were you not sure that it was them?

1 A Well, they were the only ones not in the other room, so I knew it was them.

2

3 Q All right. And was the water going in the shower?

4 A Yeah.

5

6 Q And did they have clothes on or not?

7 A Probably not. They were in the shower, and it's --

8

9 Q Well, it's the kind of thing that you'd remember.

10 A I would, yeah, but I can't see through the shower curtain --

11

12 Q There was a shower curtain'?

13 A -- or whatever it was. I don't remember. There was -- no, there was like a glass
14 thing, I think, but it was like -- I don't know. You can't see through it. You can see
15 bodies, but you can't see like details, you know.

16

17 Q All right. So all you could see was -- was outlines, as it were, blurred outline of two
18 figures.

19 A Yeah.

20

21 Q And you couldn't even tell if it was a male and a female or two females or what it
22 was.

23 A Yeah.

24

25 Q Okay. And do you know whether those people knew that you were there? Did either
26 of them see you or exclaim or --

27 A I don't know.

28

29 Q You don't know, eh? And Lance that was with you, did he go in front of you, or was
30 he behind you?

31 A No. He was like right behind me. And then I was like, Oh, shit, and so I kind of
32 pushed him back and closed the door.

33

34 Q Do you -- and did he stay on the outside of the door when you closed the door, or did
35 he go in?

36 A I don't remember.

37

38 Q You don't remember.

39 A I think he stayed out.

40

41 THE COURT:

Okay. Ms. Mograbee, anything arising?

1
2 MS. MOGRABEE: Just, you know, a question about that particular
3 aspect with Lance being in the washroom.
4
5 Ms. Mograbee Re-examines the Witness
6
7 Q You go in, and does he leave with you then right away when you leave?
8 A I can't remember. I remember I like kind of pushed him back and closed the door.
9 But then I went back, and I don't know what he did.
10
11 Q All right. So you don't know if he went back in or not.
12 A Yeah.
13
14 MS. MOGRABEE: Thank you.
15
16 THE COURT: Mr. Flynn?
17
18 MR. FLYNN: Nothing, sir.
19
20 THE COURT: Sir, thank you for your time.
21
22 A Thanks.
23
24 THE COURT: I'm not going to caution the witness. I think
25 it'll probably be an exercise in futility. All right. You -- you're welcome to go, sir.
26 Thank you for your time.
27
28 (WITNESS STANDS DOWN)
29
30 MR. FLYNN: Sir, I have one other witness this afternoon, a
31 Skylar Porter, Sir.
32
33 THE COURT: And I'd rather that we dealt with it straight
34 away.
35
36 MR. FLYNN: Very good, Sir. Immediately.
37
38 THE COURT: If -- do you have time, Ms. Mograbee?
39
40 MS. MOGRABEE: Yes.
41

1 THE COURT: Madam clerk, do you have another half hour?
2 But I recognize it's getting late, so let's try and keep things moving.
3

4 MR. FLYNN: Sir, so Ms. Porter is in the washroom just
5 (INDISCERNIBLE). She just walked in. I'm sorry. Just right there, yes.
6

7 SKYLAR LEE PORTER, Sworn, Examined by Mr. Flynn
8

9 THE COURT: Give me a moment, please, Mr. Flynn.
10

11 MR. FLYNN: Of course, Sir.
12

13 THE COURT: Ms. Porter, have you ever given evidence
14 before in court?
15

16 A No, I have not.
17

18 THE COURT: Well, you've seen courtroom dramas on the
19 television. I'm sure you have.
20

21 A Possibly.
22

23 THE COURT: Well, it's a lot like that, except nobody shouts
24 in this courtroom.
25

26 A M-hm
27

28 THE COURT: And you have rights. If you don't understand a
29 question, you're allowed to say you don't understand.
30

31 A M-hm.
32

33 THE COURT: If you don't hear, you must say it: I couldn't
34 hear you, please repeat it.
35

36 A Okay.
37

38 THE COURT: And most importantly, if you don't know
39 something or you don't remember, you must tell us you don't remember.
40

41 A Okay.

1
2 THE COURT: All we expect is that you tell us the truth as
3 best you remember it. Do you have any questions?

4
5 A No, Your Honour.

6
7 THE COURT: All right. This -- the gentleman there is going
8 to be asking you questions.

9
10 MR. FLYNN: Sir, excuse me, Sir.

11
12 THE COURT: Of course. The gentleman who's just walked
13 up, he's going to ask you questions. And then the lady in the suit there will ask -- she's
14 the government prosecutor.

15
16 A M-hm.

17
18 THE COURT: You can sit if you like, if you need to. She'll
19 ask you some questions. And then I may have some questions, and it should be over
20 quite fast.

21
22 A M-hm.

23
24 THE COURT: All right. So just tell us the truth as best you
25 remember it.

26
27 A Yeah.

28
29 THE COURT: When you're ready, Mr. Flynn.

30
31 MR. FLYNN: Thank you, Sir.

32
33 Q MR. FLYNN: Ms. Porter, we thank you for being here this
34 afternoon. I'm going to ask you just some very broad questions about -- about why
35 you're here today. Do you have an understanding of why you're here today,
36 Ms. Porter?

37 A Yes.

38
39 Q And what is that understanding?

40 A My friend being accused of doing something he didn't do.

41

1 Q Okay. Well, let's talk a bit about that. You understand that you're under oath here
2 today, aren't you?

3 A Yes.

4

5 Q And you're to tell the truth.

6 A Yes.

7

8 Q And are you going to tell the truth today?

9 A Yes.

10

11 Q You understand that if you do not tell the truth, that you're lying and you're looking at
12 a perjury or an obstruction charge --

13 A Yes.

14

15 Q -- and you could be going to jail.

16 A Yes.

17

18 MS. MOGRABEE: Sir, and I -- I'm going to just rise for a
19 moment. It doesn't necessarily follow that that's the case. And I don't think it's fair to
20 the witness --

21

22 THE COURT: No, but she's looking at -- the possibility --

23

24 MS. MOGRABEE: -- to say that, but --

25

26 THE COURT: -- exists.

27

28 MS. MOGRABEE: -- it's simply possibilities. I think it's just
29 important to impress upon her the -- the importance of telling the truth. I don't think we
30 need to get into threats about jail and perjury or obstruction charges.

31

32 THE COURT: Ms. Mograbee --

33

34 MR. FLYNN: I -- I believe it gives the full weight of --

35

36 THE COURT: Yeah. Ms. -- Mr. Flynn, let's just get on with
37 it.

38

39 MR. FLYNN: Very good, Sir.

40

41 Q MR. FLYNN: Ms. Porter, are -- are you familiar with Alex

1 Wagar?

2 A Yes, I am.

3

4 Q And how long have you known Mr. Wagar for?

5 A For four years.

6

7 Q For four years. Are you also familiar with a woman named [REDACTED]?

8 A Vaguely, yeah.

9

10 Q Vaguely. Do you remember meeting [REDACTED]?

11 A Yes.

12

13 Q Can you tell the court how you met [REDACTED]?

14 A Through a friend.

15

16 Q Through a friend. Do you remember when you met [REDACTED]?

17 A No.

18

19 Q Okay. Are you aware of the incidents of why we're here today?

20 A Yes.

21

22 Q That this -- an incident occurred in 2011 --

23 A Yeah.

24

25 Q -- and occurred over a weekend at a -- at a house party?

26 A Yes.

27

28 Q Were you at that house party?

29 A Yes, I was.

30

31 Q Can you please tell the court what you saw at that house party?

32 A At that house party, I seen the accused drink, having like sexual feelings with Alex,
33 and

34

35 MS. MOGRABEE:

Sorry. I'm not hearing.

36

37 THE COURT:

Okay. I'm having --

38

39 A Sorry.

40

41 MS. MOGRABEE:

Is there a reason why this witness -- I'm sorry,

1 Sir. I'm -- I must have missed this.
2
3 THE COURT: Yeah. It's probably better if you stand up
4 because we can't hear you.
5
6 A Oh, yeah. Sony.
7
8 MS. MOGRABEE: I -- I can't --
9
10 THE COURT: And if you could speak loudly, please.
11
12 A Oh, yes, Sir.
13
14 THE COURT: It'll go faster. And I'm sure you want to get
15 out of here, too.
16
17 A Yes.
18
19 THE COURT: Okay. So you said you -- you've seen [REDACTED]
20 having sexual feelings for Alex.
21
22 A Yes.
23
24 THE COURT: That's what I've heard you say. All right.
25 Carry on.
26
27 Q MR. FLYNN: What do you mean by that?
28 A They were flirting and touching
29
30 Q Okay. What did you see them do? You say you saw them touching. What did you
31 see them --
32 A Like--
33
34 Q -- how were they touching? Hands, legs, feet?
35 A Like on their back and they -- I don't know -- shoulders.
36
37 Q Okay. What day was this that you saw them touching each other?
38 A Through the whole weekend.
39
40 Q Through the whole weekend.
41 A Yeah.

2 Q Do you remember the last time that you saw [REDACTED] (sic)?

3 A No.

4

5 MR. FLYNN: If I can have just one moment, Sir.

6

7 Q Do you remember the date of December 11, 2000 -- I'm sorry, I think it's December
8 13, 2011? Do you remember that date?

9  Yeah.

10

11 Q MR. FLYNN: If I refreshed your memory by telling you that
12 you were at a house party at Mike Gallinger's, would that assist your memory.

13 A Yes.

14

15 MS. MOGRABEE: Sorry. A leading question. Pardon me. Give it
16 a moment.

17

18 THE COURT: Are you -- you're objecting to that?

19

20 MS. MOGRABEE: Sir, I don't know what this witness remembers.
21 I'm going to ask that [my](#) friend ask if she recalls being at a house party and sort of go
22 from there.

23

24 MR. FLYNN: Very good.

25

26 THE COURT: Well, that's pretty much what he was doing,
27 Ms. Mograbee. Ms. Mograbee, perhaps you should object --

28

29 MS. MOGRABEE: I get the --

30

31 THE COURT: -- to things that are really --

32

33 MS. MOGRABEE:

34

35 THE COURT: -- objectionable.

36

37 MS. MOGRABEE: -- I get the impression that -- that you're --
38 you're getting tired of me standing up and objecting to certain questions. And I
39 appreciate the court's concerns, and I would like to just express that my objection at this
40 point is that to suggest certain answers to this witness is unfair because she is the defence
41 witness and the question should be open. And -- and there's a reason for that, because I'd

1 like to know what she remembers from her own memory, just the same thing that I asked
2 before.

3

4 THE COURT: All right. Sir, ask the question and leave out
5 December the 11th (sic), because to be sure none of you remembers December the 11th
6 (sic) three years ago. Ask her if she remembers at party at Skinny Mike's (phonetic).

7

8 MR. FLYNN: Okay.

9

10 Q MR. FLYNN: Ms. Porter, do you remember being at a party
11 at Mike's house where both Alex was there as well as [REDACTED]

12 A Yes, I do.

13

14 Q Was -- was there only one time that you were at this type of a party, or was there
15 more than one party that you, [REDACTED] and Alex were there together?

16 A More than one. And I remember smoking a joint with them, Alex and Dustin and
17 [REDACTED]

18

19 Q I'm sorry, what's this?

20 A With -- I just remember smoking a joint with Alex, Dustin, and [REDACTED]

21

22 Q You were smoking a joint. And I'm sorry, it's hard for me to hear this.

23 A In the bathroom. Sorry. My voice is really bad. I'm sick.

24

25 Q Are -- are you -- do you have anything in your mouth, gum or anything?

26 A No.

27

28 Q Oh, I'm sorry. I apologize. You were saying you were smoking --

29 A Marijuana.

30

31 Q With who?

32 A Alex, Dustin, and [REDACTED]

33

34 Q I'm sorry, Alex --

35 A Dustin --

36

37 Q Dustin --

38 A -- and [REDACTED]

39

40 Q -- and [REDACTED] Where were you smoking dope with --

41 A In the bathroom.

1

2 Q In the bathroom.

3 A M-hm.

4

5 Q Why did you go to the bathroom to smoke dope with Alex, Dustin, and [REDACTED]

6 A There's not everybody smoking in the house.

7

8 Q Okay. And what did you do when you went into the bathroom?

9 A We ended up smoking the joint, and then I ended up taking [REDACTED] aside and asking if
10 she was going to have sexual relations with Alex. And she admitted that she was
11 going to.

12

13 Q Did

14 A And then me and Dustin ended up leaving them in the bathroom.

15

16 Q Okay. Now, the four of you were in the bathroom, and at some point you're speaking
17 alone with [REDACTED] Are Alex and Dustin --

18 A No, I said it to her like in front --

19

20 Q I'm sorry?

21 A -- of everybody. I asked her in front like of everybody.

22

23 Q You asked her in front of everybody?

24 A Yeah.

25

26 Q So you asked her in front of everybody --

27 A Yeah.

28

29 Q -- what?

30 A If you was going to have sexual relationships with Alex.

31

32 Q And what did she say?

33 A She said yes.

34

35 Q And what did you then do?

36 A I was like, Okay, and then me and Dustin, we left.

37

38 Q And what did you and Dustin then do?

39 A We went into the kitchen.

40

41 Q Okay. When was the next time you saw Alex and [REDACTED]

1 A Exited the bath --

2

3 Q I'm sorry?

4 A -- the bathroom. When they exited the bathroom.

5

6 Q Do you know how long they were in the bathroom for before they exited?

7 A Approximately like 10, maybe 20 minutes.

8

9 Q Ten, 20 minutes?

10 A Yeah.

11

12 Q Now, I realize this incident was quite a few years ago. When you say 10 to 20
13 minutes, how good is your memory?

14 A Probably not that great.

15

16 Q Not that great.

17 A No.

18

19 Q But my understanding -- and again, I don't want to put words in your mouth here,
20 Ms. Porter, but you see Alex and [REDACTED] after they leave the bathroom?

21 A Yeah.

22

23 Q And what did you observe with Alex and [REDACTED]

24 A That nothing was wrong.

25

26 Q Well --

27 A Like they were still acting warmly towards each other, like --

28

29 Q They were acting what way?

30 A Warmly. Same way.

31

32 Q What do you mean by 'normally'?

33 A Warmly.

34

35 Q Wa

36 A Yeah.

37

38 Q Okay. How were they acting?

39 A Like affectionate.

40

41 Q I'm sorry?

1 A Affectionate.

2

3 Q Affectionately. What were they doing that you felt they were being affectionate?

4 A Just the way they came out. Like he was like holding her hand on her back.

5

6 Q The hand's on the back.

7 A Yeah.

8

9 MR. FLYNN: If I can just have one moment, Sir.

10

11 Q You're not here today to lie to --

12

13 THE COURT: No, Mr. --

14

15 Q MR. FLYNN: -- in efforts to help your friend --

16 ANo.

17

18 Q -- are you?

19

20 THE COURT: Don't. That -- that's a leading question and
21 unhelpful.

22

23 MR. FLYNN: And again, Sir, I will move on from that. I
24 think we've touched that subject already.

25

26 Q MR. FLYNN: Did Ms. -- did [REDACTED] ever say anything to
27 you after this incident?

28 A No, she did not.

29

30 Q Did you ever speak with her after this incident?

31 ANo.

32

33 Q Have you ever seen her after this incident?

34 ANo.

35

36 Q Do you hold any animosity towards [REDACTED] (sic)?

37 ANo.

38

39 Q You're just here today to tell the truth?

40 A Yes.

41

1 MR. FLYNN: Thank you. Those are all my questions, Sir.
2
3 THE COURT: Ms. Mograbee?
4
5 MS. MOGRABEE: Yeah.
6
7 Mr. Mograbee Cross-examines the Witness
8
9 Q Ms. Porter, how old are you?
10 A Twenty-two.
11
12 Q Sorry?
13 A Twenty-two.
14
15 Q Twenty-two. And you have a pretty long criminal record for a bunch of stuff, right --
16 A Well --
17
18 Q -- don't you? Yeah?
19 A Yeah.
20
21 Q Assault police officer, right?
22 A Yes.
23
24 Q Breaches of court orders a bunch of times, right?
25 A Yes.
26
27 Q You ever lied to police?
28 A No.
29
30 Q Do you have any other types of convictions on your record, other than breaches of
31 court orders, assault police officer? How about theft?
32 A Yeah, theft under.
33
34 Q You have a few of those, I take it. Yeah?
35
36 MR. FLYNN: Is that -- is that --
37
38 A Yeah.
39
40 MR. FLYNN: -- a question or is that a statement, Sir?
41

1 THE COURT: Well, there was a question mark after it,

2 Mr. Flynn.

3

4 Q MS. MOGRABEE: Yes, you do --

5 A Yes.

6

7 Q -- have some convictions for theft under?

8 A Yes.

9

10 Q Okay. Anything else?

11 ANo.

12

13 Q Do you live on the street?

14 A No. I actually have my own place.

15

16 Q But you lived on the street back in 2011, right?

17 A Yes.

18

19 Q In other words, you didn't have a place to live, right?

20 ANo.

21

22 Q You were friends with Alex and Lance, right?

23 A Yes.

24

25 Q And you went over to that house because they asked you to come over, right?

26 A Yes.

27

28 Q So your -- your -- and because of your friendship with them, that's how you ended up
29 at the house.

30 A Yes.

31

32 Q And you guys partied together before, right, you and Lance and Alex, right?

33 A Not very many times.

34

35 Q A few times before that, though --

36 A Yeah.

37

38 Q -- right? Yeah?

39 A Yes.

40

41 Q And what I mean by 'partying' is that you're taking drugs and you're drinking, right?

1 A Possibly.

2

3 Q Well, it's usually --

4 A Yeah.

5

6 Q -- what you would do if you were partying with them, right?

7 A Yeah.

8

9 Q And when you were at the house during this house party, you would have been
10 drinking that night, too, right?

11 ANo.

12

13 Q You didn't drink at all?

14 A No, not that night.

15

16 Q Did you drink anything before you got there?

17 ANo.

18

19 Q So you didn't drink anything with -- any of the alcohol that -- that [REDACTED] had?

20 ANo.

21

22 Q Zero?

23 ANo.

24

25 Q And you didn't touch anybody else's alcohol --

26 ANo.

27

28 Q -- that night, did you?

29 ANo.

30

31 Q And drugs? What about that? You said you took some weed. You had some --
32 'dope' --

33 A Yes.

34

35 Q I think was the words you used.

36 A Yeah.

37

38 Q Did you take any other drugs?

39 ANo.

40

41 Q And this was the weed that -- or the dope that you had in the bathroom, you say?

1 A Yeah.

2

3 Q You also said that you have seen Alex and -- or, pardon me, you see -- you'd seen
4 [REDACTED] at the house before. Am I right?

5 A Yeah.

6

7 Q So this is a totally different time that you would have seen her at the house?

8 A Yes.

9

10 Q Like a couple of months before, a year before?

11 A Like a couple of days.

12

13 Q Couple of days before.

14 A Yeah.

15

16 Q And you weren't there when she was there, were you, a couple of days before?

17 A Well, obviously --

18

19 Q Like were you there the whole time?

20 A -- I seen her there then.

21

22 Q Yeah, but did you --

23 A I was there.

24

25 Q -- did you -- did you stay there, too?

26 A Yes.

27

28 Q Is that a place that you were crashing at the time?

29 A Yes.

30

31 Q So you would have been there two days before this incident in the bathroom?

32 A Yes.

33

34 Q And the day before, were you partying then?

35 A Yes.

36

37 Q And the day before that, were you partying as well?

38 A **No.**

39

40 Q And in terms of your idea of partying, when you say you were partying, though, you
41 weren't taking any alcohol that day.

1 ANo.

2

3 Q Any reason why you weren't drinking that day?

4 A Because after I had a bad accident, like, and I just quit drinking. Drinking just turned
5 me off, honestly.

6

7 Q And then, when you were at the house that day, I take it there were several other
8 people there, too, right?

9 A Yes.

10

11 Q So Dustin was there, Lance was there --

12 A Yes.

13

14 Q -- right? [REDACTED] was there, you were there --

15 A Yes.

16

17 Q -- Mike was there.

18 A Yeah.

19

20 Q Anybody else?

21 A Not to my knowledge.

22

23 Q Could -- could there have been other people there --

24 A Possibly.

25

26 Q -- from what you remember? And do you remember what time you arrived at the
27 house that day?

28 A Around like 6.

29

30 Q 6 AM or PM?

31 A PM.

32

33 Q Did you have a job then?

34 ANo.

35

36 Q Sorry?

37 ANo.

38

39 Q And as far as [REDACTED] goes, [REDACTED] is someone that you met through a friend, you said.

40 A Yeah.

41

- 1 Q Which friend is that?
2 A I'm not too sure 'cause I met her at that house.
3
4 Q You met her at the house?
5 A Yeah.
6
7 Q That was the first time you met her?
8 A Yeah.
9
10 Q You'd never met her outside of that house?
11 A No.
12
13 Q And when you say you saw [REDACTED] flirting, can you tell me what you mean by that?
14 A Like just the way she was talking, like suggestions.
15
16 Q Okay. Now, when was this that you saw this?
17 A Like--
18
19 Q What--
20 A -- when I got there.
21
22 Q The day --
23 A Like I was just noticing what it's like.
24
25 Q Is that the day of the incident in the bathroom or a different day?
26 A The day of the incident.
27
28 Q Okay. Are you guessing, or do you remember that?
29 A No, I remember that.
30
31 Q And when you say she's flirting, is she flirting with you or with somebody else?
32 A Oh, somebody else.
33
34 **Q Who?**
35 A Alex.
36
37 Q And what do you see?
38 A Them interacting, touching, I don't know, like being sexual.
39
40 Q Okay. And when you say, "being sexual," can you tell us what you mean by that?
41 A Like -- I don't know. Like touching and everything.

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Q So was -- were they touching each other's hands?

A Not only their hands. Like parts of their bodies like --

Q What parts?

A -- well, the shoulder and the back.

Q How was he touching her shoulder or how was she touching his shoulder?

A Like this and like that.

Q And who was touching who?

A They were like -- like holding --

THE COURT: She'd make stroking motions.

Q MS. MOGRABEE: Who was touching who?

A They were both touching each other.

Q And did you hear what they were saying to -- to each other, if anything?

A No.

Q And what room was this happening in?

A This was happening in the bathroom while we were smoking a joint.

Q While you were smoking a joint --

A Yeah.

Q -- this was happening in the bathroom --

A Yeah.

Q in front of all of you --

A M-hm.

Q -- you and Dustin?

A Yeah.

Q So Dustin -- Dustin was there in this bathroom.

A Yeah.

Q How big is this bathroom, by the way?

A It was pretty big.

1

2 **Q How big?**3 A Well, there was like a shower and then -- I can't really estimate how big it is. Like
4 fairly big size for a bathroom.

5

6 Q And why are you guys in the bathroom all at the same time?

7 A 'Cause we were smoking a joint.

8

9 Q But why in the bathroom?

10 A 'Cause nobody else smoked weed in the house and they didn't like the smell.

11

12 Q Well, the bathroom's inside the house, right?

13 A Yeah.

14

15 Q So where's the thinking there?

16 A I don't know.

17

18 Q What difference is it going to make to smoke the joint in the bathroom as opposed to
19 another room?

20 A I don't know.

21

22 Q You sure you were in the bathroom?

23 A Yes, I'm pretty sure.

24

25 Q Could you have been in another room?

26 A No. No. We were in the bathroom.

27

28 Q So you say this is happening in the bathroom where they're touching each other. Who
29 is touching who exactly?

30 A They're both touching each other.

31

32 Q And you don't hear them say anything to each other. They're just touching each
33 other. Do I have that right?34 **A M-hm.**

35

36 Q Yes?

37 A Well, we're having conversation between all of us is when I asked her if she was
38 going to have sex with Alex.

39

40 Q You asked her that?

41 A She said yes. Yeah.

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Q And why did you ask her that?

A 'Cause I was curious.

Q Why would you care?

A I don't know. I was just curious.

Q Why are you curious?

A I don't know.

Q I'm going to -- I'm going to suggest to you, you didn't ask that, did you?

A I did ask that.

Q Well, you just met her, didn't you?

A Well, when you're like --

Q Just a minute.

A -- stoned, you're curious. You ask -- tend to ask questions.

Q You'd -- you'd just met her, right?

A M-hm.

Q I mean, you haven't known her very long, right?

A M-hm. When I was in the --

Q Pretty personal --

A -- he's my friend, so I was like wondering if she was going to sleep with him.

Q He's your friend.

A M-hm.

Q What kind of friend is he to you?

A Hm?

Q Is he your boyfriend?

A No.

Q Was he ever your boyfriend?

A No.

Q You've never dated him?

1 ANo.
2
3 Q But you were just curious?
4 A Yeah.
5
6 Q He's a good friend of yours, I take it?
7 A Fairly, yes.
8
9 Q Fairly. What do you mean, "fairly"?
10 A Like we knew each other for a long time.
11
12 Q He has your back, you have his back --
13 ANo.
14
15 Q -- right? No?
16 A M-mm.
17
18 Q You wouldn't help him out if he asked you for help?
19 A Depending on the situation.
20
21 Q But you're friends?
22 A Yeah.
23
24 Q You agree to that, right?
25 A Yeah.
26
27 Q And you just ask [REDACTED] if she's going to have sex because you're curious?
28 A Yeah.
29
30 Q Do you ask her anything else?
31 ANo.
32
33 Q Just that?
34 A Yeah, and she admitted she was.
35
36 Q They're just touching each other, you say, right?
37 A M-hm. And then me --
38
39 Q Yeah?
40 A -- and Dustin, we left, yeah.
41

1 Q Yeah? And you say that it was sexual, you said --

2 A Yes.

3

4 Q -- right?

5 A Yeah.

6

7 Q And you say that it was the shoulder and the waist --

8 A M-hm.

9

10 Q -- right?

11 A Yeah.

12

13 Q Were they touching anywhere else?

14 A Not at that moment, no --

15

16 Q Did you see --

17 A -- 'cause me and Dustin, we left after I asked her that question.

18

19 Q You asked her that question. And what did she say to you, by the way?

20 A She said yes.

21

22 Q That was it. You asked her, Are you going to have sex with him? And --

23 A Yeah.

24

25 Q -- she said, Yes.

26 A Yeah.

27

28 Q That was it?

29 A Yeah. And so me and Dustin, we left.

30

31 Q Why did you leave?

32 A Well, we're not going to stand there and watch.

33

34 Q Well, what makes you think that it was going to happen right then and there in front
35 of you?

36 A Because I just asked her.

37

38 Q I'm asking you -- yeah, I know you're -- you just asked her, but why would you
39 assume that it was going to happen in the washroom?

40 A I don't know.

41

1 Q Well, did you see it happen in the washroom?

2 **A No.**

3

4 Q She didn't ask -- you didn't ask her that, though, did you?

5 A I did.

6

7 Q You didn't ask her --

8 A No, I did.

9

10 Q -- if she was going to have sex with him.

11 A I did.

12

13 Q You did because you were curious.

14 A Yeah.

15

16 Q You used the words: (as read)

17

18 I asked her if she was going to have a sexual relationship with

19 Alex, and she said yes.

20

21 That's what you said --

22

23 A Yeah.

24

25 Q -- to Mr. Flynn, right?

26 **A M-hm.**

27

28 Q Did you ask her about when she might have a sexual relationship or any details like
29 that?

30 **A No.**

31

32 Q That's quite different than, Are you going to have sex with him? Would you agree?

33 A It's pretty much like the same.

34

35 Q That's what you were meaning, the same thing?

36 **A Yeah.**

37

38 Q Did you use those words, Are you going to have a sexual relationship with Alex?

39 Were those the words that you used?

40

41 THE COURT:

Miss, you're allowed to use the exact words.

1 You don't have to be frightened.

2

3 A Okay. Well, I said "sex". I didn't say "sexual relations," but . . .

4

5 Q And then she -- you say she said yes, and you left the bathroom right away.

6 A Yeah.

7

8 Q And Dustin was with you, too.

9 A Yeah.

10

11 Q Did you talk to Dustin about leaving the bathroom?

12 A Well, we just assumed and we just left.

13

14 Q Well, I'm not asking you what he -- was in his mind, but --

15 A Yeah.

16

17 Q -- I'm asking if you talked to Dustin about leaving the bathroom.

18 A No.

19

20 Q No. You just say that you -- the two of you left right away.

21 A M-hm. Well, after we finished smoking the joint.

22

23 Q Sorry?

24 A After we finished smoking the joint.

25

26 Q Ah. I take it there are bedrooms in this house, right?

27 A Yes.

28

29 Q And again I'm going to ask you why you assumed the sex was going to happen in the
30 bathroom --

31 A Because --

32

33 Q -- if there's bedrooms in the house.

34 A But it's like a small basement suite. There's only one bedroom, and someone I'm
35 pretty sure was sleeping in that room at that time.

36

37 Q Do you know if someone was sleeping in there?

38 A I'm pretty sure there was.

39

40 Q Who? Who was sleeping in there?

41 A I'm not too sure.

1

2 Q Did you see them sleeping in there?

3 A Yeah.

4

5 Q But you don't know who it was?

6 ANo.

7

8 Q There were two bedrooms, though, in that house, right?

9 A Yes. One was like -- more like a game room.

10

11 Q Sorry?

12 A One was more like a game room.

13

14 Q Did it have a bed in it?

15 ANo.

16

17 Q And you just assumed that it was going to happen right then and there in the
18 bathroom

19 A Yeah.

20

21 Q -- am I right? I mean, being accused of sexual assaulting someone is pretty serious,
22 right?

23 A M-hm.

24

25 Q You agree?

26 A Yes.

27

28 Q Yeah. And, I mean, this guy's your friend and you want to help him out, don't you?

29 A M-hm.

30

31 Q Don't you?

32 A Yeah, but I know --

33

34 Q Hello?

35 A -- he's innocent.

36

37 Q You knew he was innocent. And you knew the police had been investigating, right?

38 You knew that because you talked to Alex about that, didn't you?

39 ANo.

40

41 Q You didn't talk to Alex at all about the fact that he was charged?

1 A No.

2

3 Q No? How did you know then that he was charged?

4 A I just recently learned.

5

6 Q You learned? From Lance?

7 A Yeah.

8

9 Q Yeah. You knew the police were investigating him --

10 A Yes.

11

12 Q -- for sexual assault, right?

13 A Yeah.

14

15 Q You knew he was charged, right?

16 A Yeah.

17

18 Q You know what that means to be charged, because you've been charged with
19 something, too, right?

20 A Yeah.

21

22 Q So you know he has to go to court and he has to answer to what is being alleged
23 against him, right?

24 A Yeah.

25

26 THE COURT: Excuse me, Ms. Mograbee.

27

28 Q MS. MOGRABEE: Because you don't --

29

30 THE COURT: Madam clerk, do you still have time?

31

32 THE COURT CLERK: Oh, yeah.

33

34 THE COURT: Okay. Sony.

35

36 Q MS. MOGRABEE: You don't -- you -- and you're saying you think
37 he's innocent. Those were the words you used, right?

38 A No, he is innocent.

39

40 Q He is innocent.

41 A I know he is.

1

2 Q Yeah. How do you know he is innocent? How do you know that?

3 A Well--

4

5 Q Did he tell you that?

6 A -- because why would she say that when I asked her?

7

8 MR. FLYNN: Please allow the witness to answer the question.

9

10 A Why would like she say yes when I asked her if she was going to have sex with him?

11

12 Q MS. MOGRABEE: So that's what makes you think he's innocent?

13 A Well, it was obviously consensual because she said she was going to do it.

14

15 Q That's why you think he's innocent?

16 A Yeah.

17

18 Q He never told you, Look, I'm -- I'm in trouble here.

19 **ANo.**

20

21 Q Can you come to court?

22 **ANo.**

23

24 Q Never told you that?

25 **ANo.**

26

27 Q Lance never told you that?

28 **ANo.**

29

30 Q But you know that someone's been accused of this, and you don't pick up the phone
31 and tell the police: Look, this guy's innocent. He's been charged. I need to tell you
32 what I saw

33

34 MR. FLYNN: That question's very speculative, asking this
35 person what they could do or should do. I say it's --

36

37 THE COURT: I'm going to allow the question, Mr. Flynn.

38

39 MR. FLYNN: Very good, Sir.

40

41 THE COURT: I -- I suspect that this kind of person doesn't

1 pick up the phone and talk to the police. The question answers itself, but you can ask it.

2

3 Q MS. MOGRABEE: You know what it's like to be accused of
4 something and the police get involved and you get charged. You know what that's
5 like--

6 A Yeah.

7

8 Q -- right? And if a person's innocent, that's really important.

9 A M-hm

10

11 Q Isn't it?

12 A M-hm.

13

14 Q You pick up the phone and tell the police, Look, I've got -- I was there; I've got some
15 information you need to know. But you didn't do that, did you?

16 A No.

17

18 Q Why?

19 A Because I didn't actually think that the charges were going to go through.

20

21 Q Why?

22 A I don't know.

23

24 Q Who told you that? Anyone?

25 A, No.

26

27 Q Then why did you think that?

28 A I don't know.

29

30 Q A guess? You just guessed that's what would happen?

31 A M-hm.

32

33 Q Yes?

34 A Yeah. Like I hadn't been in contact like with them for a while.

35

36 Q Sorry?

37 A I said I haven't been in like contact with any of them in a while, so I didn't know
38 exactly what was going on.

39

40 Q But someone called you to come today, right?

41 A Yes.

1

2 Q Was that Lance that called you to tell you to come today?

3 **ANo.**

4

5 Q No. Who called you to tell you to come today?

6 **A His mom.**

7

8 **Q Who?**

9 **A His mom.**

10

11 Q Whose mom?

12 **A Alex's.**

13

14 Q What did she tell you?

15 **A She didn't tell me much. She just said that he's like being accused of raping** [REDACTED]

16

17 Q M-hm. Did she tell you he didn't do it?

18 **ANo.**

19

20 Q She didn't give you any details?

21 **ANo.**

22

23 Q Did Lance ever give you any details about what happened?

24 **ANo.**

25

26 Q You're friends with all these people. There mu -- there must be a lot of talk about
27 what happened at that house that day between you and them.

28 **ANo.**

29

30 Q No -- no talk at all?

31 **A There was the next -- no, because they were acting warmly towards each other, like
32 affectionate with each other afterwards.**

33

34 Q After this incident, on a different day, a different time, did you talk to anybody about
35 what happened at that house?

36 **ANo.**

37

38 Q You didn't talk to Alex?

39 **ANo.**

40

41 Q Never had a conversation with him?

1 ANo.
2
3 Q Never talked to Lance?
4
5 MR. FLYNN: I don't know how many times --
6
7 ANo.
8
9 MR. FLYNN: -- you have to say 'no' to the same question.
10
11 Q MS. MOGRABEE: Did you talk to Dustin or Mike?
12 ANo.
13
14 Q Did you talk to [REDACTED] at all?
15 ANo.
16
17 MS. MOGRABEE: All right. Thank you, Sir. I have no more
18 questions.
19
20 THE COURT: Re-examination, Mr. Flynn?
21
22 Mr. Flynn Re-examines the Witness
23
24 Q Even though Alex is your friend, you're not going to lie for him today, are you?
25
26 THE COURT: Well, Mr. Flynn, that question has been asked
27 several times.
28
29 MR. FLYNN: Very good, Sir.
30
31 THE COURT: Do you have anything else to ask?
32
33 MR. FLYNN: Nothing, Sir.
34
35 THE COURT: Mr. Flynn, are you calling any other witnesses?
36 The question really is whether I should warn this witness. I'm not sure that it would have
37 any effect, but should I be warning her?
38
39 MR. FLYNN: Potentially, Sir, we may be calling -- we may
40 be called the accused on this matter. Unfortunately, Sir --
41

1 THE COURT: Well, aside from the accused?
2

3 MR. FLYNN: No, Sir.
4

5 THE COURT: All right. Then I'm not going to --
6

7 MR. FLYNN: Oh, no, Sir. Sir, I apologize. No. Sir, we do
8 have one other potential witness. This is the actual brother, Lance.
9

10 THE COURT: Well, then I'll -- I'll -- I will caution her.
11

12 MR. FLYNN: Very good. Thank you, Sir.
13

14 THE COURT: Listen, in Canada we try and keep trials as fair
15 as possible. So that means that you must give evidence just what you remember --
16

17 A M-hm.
18

19 THE COURT: -- not what other people may suggest to you,
20 because they might put ideas in your head.
21

22 A M-hm.
23

24 THE COURT: So I'm going to ask you, and I know it's very
25 hard, but I'm going to ask you not to talk to anybody else about the evidence that you
26 gave, the questions you were asked, the answers you gave, because that might suggest to
27 them things that they should say. They might -- it might affect their memory, anybody
28 who may still come and testify, and we don't want them. We want the -- we don't want
29 that. We want them to give evidence just of what they remember, not of what you
30 suggest to them.
31

32 A M-hm.
33

34 THE COURT: All right.
35

36 A Yeah.
37

38 THE COURT: So you're allowed to talk about what the court
39 looked like, what the judge was like, what the lawyers were like, that sort of thing --
40

41 A M-hm.

1
2 THE COURT: -- but you're not allowed to talk about the
3 evidence.
4
5 A M-hm. All right.
6
7 THE COURT: Would you give me that undertaking?
8
9 A Yes.
10
11 THE COURT: All right. Thank you for your time.
12
13 (WITNESS STANDS DOWN)
14
15 Discussion
16
17 THE COURT: Counsel, it's a great pity that two days weren't
18 booked for this.
19
20 MR. FLYNN: It is unfortunately, Sir. Unfortunately, we --
21 defence witnesses, Sir, were not made available to us until literally yesterday and the day
22 before, Sir. That was the reason why. We were not expecting this volume of defence
23 witnesses, and unfortunately that was very --
24
25 THE COURT: I don't understand. Would -- you thought they
26 might be called by the Crown?
27
28 MR. FLYNN: We were unable to locate these --
29
30 THE COURT: I see.
31
32 MR. FLYNN: -- individuals, Sir.
33
34 THE COURT: I see.
35
36 MR. FLYNN: And we were only recently able to get hold of
37 them through Facebook and things along that nature. Sir, unfortunately, because of the
38 circumstances, we won't be able to finish this matter today, obviously. I believe -- may I
39 suggest, Sir, that we stand this matter down? Perhaps my friend and I can attend at case
40 management.
41

1 MS. MOGRABEE: It won't be open.
2

3 MR. FLYNN: It's closed.
4

5 THE COURT: It's -- you're going to have to put it over to a --
6

7 MR. FLYNN: Acceptable.
8

9 THE COURT: -- to a -- a docket court, and I can excuse the
10 witness's (sic) attendance. I'm sure you don't want him there.
11

12 MR. FLYNN: Yes, Sir.
13

14 THE COURT: And try and arrange it before me as soon as
15 possible --
16

17 MR. FLYNN: Most certainly.
18

19 THE COURT: -- and it looks like for a full day for -- there
20 may be one other witness and the accused, and then argument. And I'd like to give
21 judgment straight away.
22

23 MR. FLYNN: Most definitely, Sir.
24

25 THE COURT: So be prepared to argue, please.
26

27 MR. FLYNN: We will, Sir.
28

29 THE COURT: Thank you, counsel.
30

31 MR. FLYNN: Sir, would you be ordering transcripts on this
32 matter?
33

34 THE COURT: I -- I've taken full notes.
35

36 MR. FLYNN: Very good, Sir.
37

38 THE COURT: And I don't want the -- the matter held up by
39 that. But if -- if counsel feel disadvantaged -- the evidence wasn't complicated. Although
40 there was -- there were a lot questions asked, the evidence is simple But I don't want
41 you to be disadvantaged.

1
2 MR. FLYNN: Oh, no, Sir. Not at all. I -- I -- again, as the
3 court said -- has said, it was straightforward issues on that. May I suggest then, Sir, that
4 we put this matter -- may I suggest tomorrow to courtroom 305 with respect to our
5 suggested next date?

6
7 MS. MOGRABEE: The problem with tomorrow, Sir, is that my
8 dates won't end up there for us to set them. I'm wondering -- do you know what? I'm --
9 I'm going to come down and -- and attend at the counter myself for wherever courtroom
10 it is. And that way I can --

11
12 THE COURT: Tomorrow?

13
14 MS. MOGRABEE: -- move other cases to make room for this one,
15 et cetera.

16
17 THE COURT: I'd -- I'd appreciate that.

18
19 MS. MOGRABEE: Otherwise, I -- if you just have my dates, it
20 won't really help. So it can come back tomorrow, and -- and I'll attend to -- to speak to
21 Mr. Flynn about dates.

22
23 THE COURT: All right. So you want it in 305 tomorrow?

24
25 MS. MOGRABEE: Please.

26
27 MR. FLYNN: Please, Sir.

28
29 MS. MOGRABEE: Yeah.

30
31 THE COURT: And the accused to attend by CCTV or can he
32 be excused?

33
34 MR. FLYNN: By CCTV, please --

35
36 THE COURT: All right.

37
38 MR. FLYNN: -- Sir.

39
40 THE COURT: And you'll explain to your client what's --
41 what's going on?

1
2 MR. FLYNN: Yes, I will, Sir.
3
4 THE COURT: Thank you, sheriff, for sitting late. Thanks to
5 madam clerk.
6
7 MS. MOGRABEE: Thank you.
8
9 THE COURT CLERK: Thank you.
10
11 THE COURT: And try and do it as soon as possible. Thank
12 you, counsel.
13
14 MR. FLYNN: Thank you, Sir.

15
16 _____
17 PROCEEDINGS ADJOURNED UNTIL JUNE 6, 2014

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1 Certificate of Record

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3 I, Rosanne Hansen, certify that this recording is that of the record made of the evidence in
4 the proceedings in Criminal Court, held in courtroom 1106, in Calgary, Alberta, on the
5 5th day of June, 2014, and that I was the court official in charge of the sound --
6 sound-recording machine during the proceedings.

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1 Certificate of Transcript

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3 I, Pam Rusinko, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability, and the foregoing pages are a complete and accurate
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9 (b) the Certificate of Record for these proceedings was included orally on the record
10 and is transcribed in this transcript.

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Pam Rusinko, Transcriber

14

Order No. 6431-14-2

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41

1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2

3 June 6, 2014

Afternoon Session

4

5 The Honourable

The Provincial Court

6 Judge Daniel

of Alberta

7

8 R. Haslam

For the Crown

9 (Duty Counsel)

10 P. D. Flynn

For the Accused

11 S. Raymaakers

Court Clerk

12 M. Chan

Court Clerk

13

14

15 THE COURT CLERK:

Page 8, CCTV, Alexander Scott Wagar. The

16 accused has been ordered detained.

17

18 MR. FLYNN:

Oh, yes, madam clerk, if we could stand that

19 matter down, Your Honour. I need to attend at case management office and get the

20 appropriate date for Mr. Wagar.

21

22 THE COURT:

Okay. What else can I call for you.

23

24 MR. FLYNN:

I'll return to your court, thank you, Your

25 Honour.

26

27 THE COURT:

Okay.

28

29 (OTHER MATTERS SPOKEN TO)

30

31 THE COURT CLERK:

Recalling page 8, on CCTV, Alexander Wagar,

32 ordered detained.

33

34 MR. FLYNN:

Thank you, madam clerk.

35

36 THE COURT:

Sorry, who are we recalling?

37

38 MR. FLYNN:

Wagar, W-A-G-A-R, Your Honour. I believe

39 it's an add on.

40

41 THE COURT:

On page 28, okay.

1
2 Discussion

3
4 MR. FLYNN: Your Honour, this matter was in front of your
5 brother Judge Camp yesterday for a trial. Ms. Mograbee, my friend, (INDISCERNIBLE)
6 assigned prosecutor. Unfortunately, Your Honour, we ran out of time and we're going to
7 have to rebook this.

8
9 THE COURT: Okay.

10
11 MR. FLYNN: Ms. Mograbee doesn't have her available dates
12 today. I'm just putting this matter over to next week.

13
14 MR. HASLAM: Excuse me, madam clerk, Your Honour, what
15 was the name of the --

16
17 THE COURT: Wagar, W-A-G-A-R.

18
19 MR. HASLAM: Okay. There we go.

20
21 THE COURT: So when do you want to put it to?

22
23 MR. FLYNN: I was going to put it over to next Tuesday,
24 Your Honour.

25
26 THE COURT: Okay. The 10th, 9:00 this courtroom.

27
28 MR. FLYNN: Thank you.

29
30 THE COURT: By CCTV.

31
32 MR. HASLAM: Is (INDISCERNIBLE) custody?

33
34 MR. FLYNN: No.

35
36 THE COURT CLERK: And that was your last matter?

37
38 MR. FLYNN: It is. Your Honour, have an enjoyable
39 weekend. And until we

40
41 THE COURT: Am I still getting him? Yeah, okay.

1 Mr. Walgaard (phonetic).

2

3 MR. FLYNN: Thank you. Mr. Wagar is now present by
4 CCTV. Just wait, if you could step back, sir. For the record, Your Honour, Patrick
5 Flynn. As indicated, Your Honour, we're expecting Ms. Mograbee's dates to continue
6 this trial continuation. We'll also be booking a show cause hearing on behalf of my
7 client. But in the meantime we're asking this matter return by CCTV to this court, Your
8 Honour, on Tuesday, June 10th, please.

9

10 THE COURT: Okay. Thank you very much. Nine o'clock,
11 this courtroom by CCTV.

12

13 MR. FLYNN: Your Honour, may I have Mr. Wagar be left
14 and I'll go speak with him?

15

16 THE COURT: Mr. Wagar, your counsel will speak to you in
17 private, okay.

18

19 THE ACCUSED: Okay. I'm --

20

21 THE COURT: He'll explain everything to you.

22

23 MR. FLYNN: Mr. Wagar, please wait until I come speak with
24 you.

25

26 THE ACCUSED: Can we -- can we, please, like not do my trial
27 on CCTV, I'd rather come in person?

28

29 MR. FLYNN: Mr. Wagar, you don't --

30

31 THE COURT: We're not doing your trial on Tuesday, we're
32 just speaking to a new trial date. We have to get the Crown's dates, we don't have them
33 yet. Your counsel will explain this to you, sir. The happy faces aren't going to help
34 anything.

35

36 THE ACCUSED: Okay, Your Honour. Okay.

37

38 THE COURT: Thank you.

39

40 MR. FLYNN: Thank you, Your Honour. Have an enjoyable
41 weekend, as I --

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THE COURT:

Good luck with that.

PROCEEDINGS ADJOURNED UNTIL 9:00 AM, JUNE 10, 2014

1 Certificate of Record

2

3 I, Sylvie Raymaakers, certify that this recording is a record made of the oral evidence of
4 proceedings in the Provincial Criminal Court, held in courtroom 305, Calgary, Alberta, the
5 6th day of June, 2014, myself and Mary Chan were the court officials in charge of the
6 sound-recording machine during the proceedings.

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1 Certificate of Transcript

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3 I, Paige Young, certify that

4

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6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
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9 (b) the Certificate of Record for these proceedings was included orally on the record
10 and is transcribed in this transcript.

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Paige Young, Transcriber

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Order No. 10202-14-1

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41

1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2

3 June 10, 2014

Morning Session

4

5 The Honourable

The Provincial Court

6 Judge Semenuk

of Alberta

7

8 R. Haslam

For the Crown

9 (Duty Counsel)

10 P.D. Flynn

For the Accused

11 S. Raymaakers

Court Clerk

12 L. Moulding

Court Clerk

13

14

15 THE COURT CLERK:

Via CCTV, page 12, Alexander Scott Wagar.

16

17 MR. FLYNN:

Thank you. Good afternoon --

18

19 THE COURT CLERK:

He's been ordered detained. Wagar.

20

21 MR. FLYNN:

Good afternoon, Sir.

22

23 THE COURT:

Mr. Flynn.

24

25 THE COURT CLERK:

Wagar.

26

27 Discussion

28

29 MR. FLYNN:

Sir,(INDISCERNIBLE), I'll just wait for

30 Mr. Wagar to be present, Sir.

31

32 Thank you. Mr. Wagar is now present by CCTV, Sir. For the record, Patrick Flynn. Sir,

33 Mr. Wagar is currently before your brother Judge Camp in trial, Sir. This matter is to

34 return on August 1st, 2014 at 9:00 AM, where one day has been set aside in Provincial

35 Court 1005 for trial continuation, Sir.

36

37 THE COURT:

August 1, 2014, 9:00 in the morning, courtroom

38 1005 for continuation on the trial.

39

40 MR. FLYNN:

Thank you.

41

1 THE COURT: And the accused will appear in person on that
2 date.
3
4 MR. FLYNN: Thank you, Sir.
5
6 THE COURT: Thank you.
7
8 THE ACCUSED: What about my bail, Mr. Flynn?
9
10 MR. FLYNN: Sir, may I speak very briefly with Mr. Wagar?
11
12 THE COURT: Yeah, there's a telephone right over there.
13
14 MR. FLYNN: Yes. Oh, Mr. Wagar, please contact me later,
15 sir.
16
17 THE ACCUSED: Well, what's going on. I thought you were
18 going to get me bail.
19
20 THE COURT: Do you want to speak on the telephone,
21 Mr. Flynn?
22
23 MR. FLYNN: Yes, Sir, if I could. Thank you.
24
25 THE COURT: When the phone rings pick it up, don't pick it
26 up before it rings.
27
28 THE ACCUSED: Yeah. Yeah.
29
30 (OTHER MATTERS SPOKEN TO)
31
32 THE COURT: August 1st, 2014, 9:00 in the morning,
33 courtroom 1005, the accused will appear in person on that date. Thank you.
34
35 MR. FLYNN: Thank you, Sir. And I thank the Court for its
36 indulgence.
37
38 THE COURT: Thank you.
39
40
41

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2 PROCEEDINGS ADJOURNED UNTIL 9:00 AM, AUGUST 1, 2014

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1 Certificate of Record

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I, Sylvie Raymakers, certify that this recording is a record made of the oral evidence of proceedings in the Provincial Criminal Court, held in courtroom 305, Calgary, Alberta, the 10th day of June, 2014, and that myself and Leslie Moulding were the court officials in charge of the sound-recording machine during the proceedings.

1 Certificate of Transcript

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3 I, Paige Young, certify that

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10 and is transcribed in this transcript.

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Paige Young, Transcriber

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Order No. 10202-14-2

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1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2 _____

3 August 1, 2014 Morning Session

4 _____

5 The Honourable Provincial Court
6 Judge Camp of Alberta

7 _____

8 H. Mograbee For the Crown

9 P. D. Flynn For the Accused

10 A. Ubhi Court Clerk

11 _____

12 _____

13 **Ban on Publication**

14 _____

15 THE COURT: Good morning. Please sit down.

16 _____

17 MR. FLYNN: Good morning, Sir.

18 _____

19 THE COURT: Good morning, Ms. Mograbee and Mr. Flynn.

20 I got your authorities. Thanks, Ms. Mograbee.

21 _____

22 MS. MOGRABEE: Thank you.

23 _____

24 THE COURT CLERK: In custody in person, Alexander Wagar.

25 _____

26 MR. FLYNN: Thank you. Mr. Wagar is present, Sir. For the

27 record, Patrick Flynn.

28 _____

29 THE COURT: Good morning, Mr. Wagar.

30 _____

31 **Discussion**

32 _____

33 MR. FLYNN: Sir, we're -- we're prepared to pr -- proceed

34 today on the direct examination and cross-examination of my -- of my client in terms of

35 the -- the -- the defence, Sir. Unfortunately, Sir, we've co -- we've come to a situation

36 which is somewhat embarrassing for myself, Sir.

37 _____

38 Sir, I was -- recently have lost one of my attache cases with my DayTimer and a fair bit

39 of some materials. One of those set of materials I lost, Sir, were my notes from the trial

40 proper that we had conducted in front of yourself in front of Mr. Wagar.

41 _____

1 When I was speaking with my friend this morning, Sir, my friend had advised me that she
2 actually had ordered transcripts for herself. I was not aware of that. Obviously, given the
3 situation of the cross-examination and direct we're not able to take efficient notes, but
4 even those notes that I took would have allowed me to have done a proper closing in
5 front of you.

6

7 My friend and I, Sir, potentially would be seeking an adjournment on this matter to next
8 Wednesday, dependent upon your schedule. I can advise that my friend and I have
9 expectations, with your permission, Sir, of conducting the direct examination and
10 cross-examination of my client this morning.

11

12 And with the approval of yourself, Sir, adjourning this to -- to hopefully next Wednesday
13 for half a day to do our respective closings and hopefully your decision. That's, of
14 course, Sir, all dependent upon your schedule and your approval to -- to do that, Sir.

15

16 THE COURT: All right. Ms. Mograbee?

17

18 MS. MOGRABEE: Yes, Sir. To be fair to Mr. Flynn, I appreciated
19 the situation he's in. I would have liked to have finished the case today, but --

20

21 MR. FLYNN: Yes.

22

23 MS. MOGRABEE: -- such as it is. Upon learning --

24

25 THE COURT: Would you like -- one moment, Ms. Mograbee.

26

27 MR. FLYNN: Ms. Mograbee. Sir --

28

29 THE COURT: Did -- do you have to take instructions quickly?

30 I beg your pardon, Ms. Mograbee.

31

32 MR. FLYNN: And, Sir, if I can just have one second.

33

34 THE ACCUSED: No, let's finish this case, man. I've -- I --

35

36 THE COURT: It'll be easier in the long run, Ms. Mograbee.

37

38 MS. MOGRABEE: Yes. Yes. I know this accused is detained on
39 this charge.

40

41 THE ACCUSED: And it's adjourning again --

1
2 MS. MOGRABEE: And I think he's hearing this for the first time.
3 I know Mr. Flynn would like to speak to him, Sir, before perhaps we close the issue,
4 would be my suggestion.
5
6 THE COURT: Well, should Mr. Flynn talk to him first? Like,
7 it's
8
9 THE ACCUSED: No.
10
11 MS. MOGRABEE: Do you want to speak to him first, Mr. Flynn,
12 before I --
13
14 MR. FLYNN: If I may --
15
16 MS. MOGRABEE: -- I make submissions?
17
18 MR. FLYNN: -- if I may, Sir. He --
19
20 THE COURT: Fine. I'll -- I'll wait outside.
21
22 MR. FLYNN: Thank you, Sir.
23
24 THE COURT: Thank you, Ms. Mograbee.
25
26 MS. MOGRABEE: Thank you, Sir.
27
28 (ADJOURNMENT)
29
30 THE COURT: Please sit down.
31
32 MR. FLYNN: Thank you, Sir.
33
34 THE COURT CLERK: In custody in person, Alexander Wagar. Ban
35 on publication.
36
37 MR. FLYNN: Thank you, madam clerk. Good morning, Sir.
38 For the record, Patrick Flynn. In custody, Mr. Wagar. Sir, if we could call Mr. Wagar to
39 the stand (INDISCERNIBLE) Sir?
40
41 THE COURT: Yes.

1
2 MR. FLYNN: Thank you, Sir. Mr. Wagar
3
4 MS. MOGRABEE: Mr. Flynn, did you want to address the timing
5 issue first, or did you . . .
6
7 MR. FLYNN: Per -- perhaps, yes, just to have a foundation --
8
9 THE COURT: Take a seat, Mr. Wagar.
10
11 MR. FLYNN: -- for the record, Sir.
12
13 THE ACCUSED: Oh.
14
15 MS. MOGRABEE: All right. So I was saying before we broke
16 there that, as I said, up -- upon hearing that Mr. Flynn had lost his bag with his notes, it
17 was then that I offered him the transcript. The Crown is not under any obligation to
18 provide it, but just as a matter --
19
20 THE COURT: Of course.
21
22 MS. MOGRABEE: -- of courtesy and to move the case along, I --
23
24 THE COURT: Much to your credit.
25
26 MS. MOGRABEE: provided it to -- I offered to provide it to
27 him. So it -- it is not a Crown adjournment application, should there be one today. I just
28 want it to be clear for the record.
29
30 THE COURT: Understood.
31
32 MS. MOGRABEE: And either way I'm -- I appreciate the
33 situation. This is not a case that can be rushed, so whatever time is needed I think that
34 that's -- would be only fair, Sir.
35
36 THE COURT: Very well. I should have ordered a transcript,
37 too.
38
39 MS. MOGRABEE: I can provide you with my copy.
40
41 THE COURT: I'd be grateful.

1
2 MS. MOGRABEE: I can send --
3
4 THE COURT: I took -- I took detailed notes, but as this case
5 is now going to be a three-day case, then it's important that I get it absolutely right.
6
7 MS. MOGRABEE: I'll send it to you.
8
9 THE COURT: Thank you.
10
11 MS. MOGRABEE: Thank you.
12
13 THE COURT: When you're ready, Mr. Flynn.
14
15 MS. MOGRABEE: Now -- I'm sorry, Sir. Before we -- I continue,
16 just -- I don't -- I don't mean to interrupt you, but I just have.
17
18 THE COURT: No.
19
20 MS. MOGRABEE: The transcript would only be up until -- the
21 transcript I have is only up until the last date, so it wouldn't cov -- obviously --
22
23 THE COURT: I'll order the -- I'll order the next one.
24
25 MS. MOGRABEE: Just so I'm clear. Thank you.
26
27 THE COURT: Okay.
28
29 MR. FLYNN: Thank you, Sir. What we're hopeful of doing
30 today, of course, Sir, with your permission is continue with the defence case, Sir. And
31 we plan on calling Mr. Wagar to give testimony. We don't expect to have any other
32 testimony after Mr. Wagar, Sir, and we'll be expecting to close our case at that time.
33
34 And again, Sir, we're hopeful of resolving this matter as quickly as possible. My friend
35 is not prepared to reopen bail, Sir, and my client is in custody. And obviously, there's a
36 grave concern of that. But, unfortunately, the matter needs to be resolved properly as
37 well, Sir, and I think that has to take precedent over anything.
38
39 THE COURT: Okay. I'm very aware that Mr. Wagar is in
40 custody, and --
41

1 MR. FLYNN: It's -- it's most unfortunate, Sir.
2

3 THE COURT: -- waiting, yeah.
4

5 MR. FLYNN: And again, Sir, and just so we know where we
6 are. Am -- am I presumptuous to ask if -- if you are available next week, Sir?
7

8 THE COURT: And I just don't know, Mr. Flynn.
9

10 MR. FLYNN: Oh, very good, Sir.
11

12 THE COURT: Actually, I -- I do know. I've been given my --
13 my -- my schedule for next week, and I can check where I am next week.
14

15 MR. FLYNN: Very good, Sir.
16

17 THE COURT: Well, I'll -- at the break I'll bring back my --
18 my schedule and
19

20 MR. FLYNN: Thank you, Sir. And I don't to mean to be --
21 well --
22

23 THE COURT: Not at all, Mr. Flynn.
24

25 MR. FLYNN: -- for -- forward in any ways.
26

27 THE COURT: It's important.
28

29 MR. FLYNN: Sir, we'll be calling Mr. Wagar to the stand.
30

31 ALEXANDER SCOTT WAGAR, Sworn, Examined by Mr. Flynn
32

33 THE COURT: Give me a moment please, Mr. Flynn.
34 Mr. Wagar, you will recall from the last time what I said to the witnesses last time that if
35 you don't understand something, if you don't understand a question, you're allowed to say
36 so. If you don't know an answer or can't remember, please say so.
37

38 A Yes, Sir, I will.
39

40 THE COURT: Carry on, Mr. Flynn.
41

1 Q MR. FLYNN: Okay. Alex -- do -- do you like to be called
2 Alex or Alexander?

3 A Alexander.

4
5 Q Okay, Alexander. Alexander, I'd like to maybe just start off by maybe explaining --
6 having you explain a little bit about yourself to the court. Do you mind giving us a
7 little background of yourself?

8 A I don't really know where to start. But --

9

10 Q Well, how old are you today, sir?

11 A Sorry?

12

13 Q How old are you today?

14 A I'm 26 years old.

15

16 Q Where were born, sir?

17 A Edmonton, Alberta.

18

19 Q At where, sir?

20 A Edmonton, Alberta.

21

22 Q Edmonton, Alberta. How long have you been in Calgary for, sir?

23 A I've been in Calgary since -- since I was about 23, so about three years now.

24

25 Q Three years ago --

26 A Like, I -- I've gone to Saskatchewan. I've, like, done -- like, I've worked with -- did
27 roofing in Saskatchewan for a bit, but I came back after a couple of months of doing
28 that.

29

30 Q Okay. And do you have family in Calgary, sir?

31 A No, no family in Calgary any more. My uncle passed away last year, or about two
32 years ago, sir.

33

34 Q Do you have family in other locations, sir?

35 A Yeah (INDISCERNIBLE) Alberta, I have my mother there. My mom and my little
36 brother. I've got family in Edmonton, Alberta, my aunts and uncles.

37

38 Q Okay. What type of work do you do, sir?

39 A Well, I -- I'm kind of a jack of all trades, master of none. I -- I -- I do drywall. Like,
40 I was doing that for a bit. I do -- I do -- like, I've been into roofing, been doing
41 roofing, like, quite a bit for the last while.

1

2 Q Okay. Okay, sir. Well, let's -- what have you been doing in Calgary in the last three
3 years?

4 A Calgary in the last three years? Not much. Like, for a few -- for a few of those years
5 I've been -- I was struggling with a crystal meth addiction. The -- and well, I've
6 been -- I've been actually -- like, I'm -- I'm getting clean, so. That's -- that's good.
7 But -- like, I don't really plan on staying in Calgary. I -- I'm going out to
8 Saskatchewan to go work. Because, like, Calgary's just a -- it's a bad luck city for
9 me. Like, a lot of, like, bad things have happened to me here, so I just want to leave.

10

11 Q Well, let's talk a bit about that. You -- you -- you have had a past involvement with
12 the police, haven't you, sir?

13 A Yes, sir, I have.

14

15 Q Okay. Well, what is your most recent conviction, sir?

16 A Conviction. Okay.

17

18 Q Or the last time you pled guilty, sir, or the last time you were sentenced.

19 A The last time I pled guilty to anything, I do believe it was a common assault. Like,
20 I -- I was attacked. I defended myself. I pleaded guilty. I was -- I was going to try
21 and fight it, but I had numerous failure to appears. And, like, it's just I -- I had this
22 belief that if I -- like, if I truly felt like I didn't do it, I just wouldn't show up to court.
23 Like, it was -- it was a really stupid way of thinking. That's the truth.

24

25 But I -- I -- so they just refused to let me out unless I -- and so I just pled guilty to
26 get out of jail. It was a stupid move. I don't think I should have done that. It -- I
27 probably shouldn't -- well, it's either that or I sit and, like, wait for trial for six
28 months, or just plead guilty and get out in 45 days.

29

30 Q Let's --

31 A I could have been out in 30 --

32

33 Q Sir, and again, I -- I'd like to speak about your criminal past --

34 A M-hm.

35

36 Q -- not your reasons why you plead guilty or anything of that nature.

37 A Okay.

38

39 Q What -- what type of a record do you have, sir?

40 A Mostly, like, property offences. Like, I had a -- I had a -- I was charged with a break
41 and enter, but it got dropped to a trespassing I believe. And, like, I was -- I was

1 homeless at the time. I -- this is a couple of years ago. I -- it was the middle of
2 winter and I just really didn't want to stay at the DI. I just wanted, like, a warm place
3 to go sleep for the night and that was it.
4

5 Q Okay. Is there anything else you want to talk about in terms of your criminal past?

6 A I -- I don't think that there is anything. If there is, please . .
7

8 Q Well, sir, you've had the advantage of sitting and listening to the testimony of
9 ██████████. You've heard her accusations against you that you sexually assaulted
10 her without -- without her consent, sir. What do you say to those charges?

11 A I say that they're -- it's -- it's false. She -- she's -- she is, unfortunately, lying in this
12 case here. I -- I was let out of jail numerous times. Like, they act like -- they waited
13 a couple -- like a year and a half Like, the police they waited a year and a half to do
14 anything, like, about this matter. Like, I -- and I don't really see why they waited so
15 long, but they did. I was -- I was caught trespassing on a construction site. And
16 that -- then I was apprehended. Then they gave me a failure -- or a -- a promise to
17 appear, and -- and I -- I didn't show up to court for that.
18

19 Q Well, sir, you -- with those criminal records, how come we should believe anything
20 you say today?
21

22 THE COURT: I'm not sure you should be cross-examining
23 your own witness, Mr. Flynn.
24

25 MR. FLYNN: Well, I'm not, Sir, but I'm just --
26

27 THE COURT: I'll allow the question since it isn't objected to,
28 but . .
29

30 A That's --
31

32 MR. FLYNN: I just like to be up front and open, Sir --
33

34 THE COURT: I don't find it terribly persuasive.
35

36 Q MR. FLYNN: with the court. Andand that's fine, Sir.
37 I'll -- I'll move on. In terms of this -- in terms of this event, sir, I'd like to have a
38 little bit of understanding of how you met ██████████ (sic). Do you remember?

39 A Yes, I do remember meeting her. She -- she met with us -- some of my friends that
40 were at Occupy Calgary. And -- and that's, like, then she said when she met Dustin
41 Goodhue (phonetic), Megan Oxley (phonetic), my brother, just a bunch of friends.

1 And then -- and then actually -- we actually met at The Alex youth health centre.
2 And -- and, like, my brother introduced me to her.

3
4 Like, and then -- and then -- and then my brother told me to come with him, because I
5 was staying at the homeless shelter at the time. He's like, Hey, man, I got a place.
6 Let's go. Like, this is the guy -- my friend of mine, Mike, he's got a -- he's got a
7 place and it's cool. We can crash there. So I was like, Okay, cool. So we ended up,
8 like, staying there. It was a total party house, right? Like, we were drinking, and,
9 like, just smoking marijuana.

10
11 And -- and then it's like that's how I pretty much -- then my -- when -- kind of like
12 on the night I met her, it would have been -- she -- her and -- and Travis (phonetic)
13 and a couple of others just had the idea to go to the liquor store and go steal some
14 booze, right? Because that's -- we were -- we were drinking and nobody had any
15 money, so they went out and got some alcohol.

16
17 MS. MOGRABEE: I'm going to have to stop here, Sir, and just
18 object. I -- I don't know if this is something the accused heard about, or whether this is
19 something he saw. Did he go with them --

20
21 A No.

22
23 MS. MOGRABEE: -- or not? If that's the case that's hearsay.

24
25 A Oh, okay.

26
27 THE COURT: Carry on, Mr. Flynn.

28
29 Q MR. FLYNN: Then again, if you --

30
31 THE COURT: It is hearsay.

32
33 Q MR. FLYNN: And, Mr. Wagar, in -- in teens of your
34 testimony, sir, we just want to hear the things that you physically observed yourself or
35 things --

36 A M-bm.

37
38 Q -- that people said to you, not necessarily what other people may have said to other
39 people.

40 A Okay.

41

1 Q Okay. So just keep testimony -- so just please, if you want to continue with your . . .

2 A Okay. So, yeah, like they -- they went to the liquor store and came back with some
3 booze. We -- and we started drinking. And, like, I -- I just got out of jail. I was in
4 for 45 days, right? And --

5

6 Q How -- how many days were you released out of jail, sir?

7 A Oh, I think it was like -- they released me, like, four or five days. And then -- maybe
8 three, I can't remember. And we just -- we got, like, it was pretty much, like, the
9 party was, like, pretty much thrown in my honour, right? Like, my brother missed me,
10 and like this, like, we just got really drunk And we were having, like, a lot of fun.
11 Like, there was music playing. And, like, we were just --

12

13 Q Who was at the party, sir?

14 A There was myself, Michael Gallinger, Skylar Porter, Dustin Goodhue, Lance
15 (phonetic), her me -- my brother, and [REDACTED], or [REDACTED], or
16 whatever her name is. There was -- what was her name? Jesse Finlayson (phonetic),
17 Renee -- Renee Hamilton (phonetic), and that's -- that's all I'm recalling right now,
18 but --

19

20 Q And how long was the party for?

21 A Sorry?

22

23 Q When did the party start?

24 A It was kind of, like, a get together. Like, it's -- like, it was -- it's kind of hard to tell,
25 because it was, like, it seems like -- because it was dark out, but it was the middle of
26 winter, right? So it would -- it might have been like 4 or 5:00-ish, maybe 6.

27

28 Q Okay. How did you end up there?

29 A I ran into my brother and -- and Dustin, and -- and [REDACTED] at The Alex youth
30 health centre. And they -- and my brother invited me out. He was like, Yeah,
31 come -- come to the -- like, I got a place for us. So I'm just like, Okay, cool, right?
32 Just being out of jail, so I thought it'd be good.

33

34 Q And how did you get to the party, sir?

35 A I took the number 3.

36

37 Q Okay. So what happens at the party, sir?

38 A Okay. Well, we get there, like I said. And I can't remember if there was any alcohol
39 when I first got there. I can't quite recall. This is like three years ago. I think there
40 might have been. There might have been a bottle or something, but then -- then it
41 was -- it was empty.

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And then Travis decided to -- he -- he said, Let's go get some booze, right? And I'm like, I'm not going to do that. I -- I -- because I just got out of jail. I'm not going to go steal, right? So he -- he took [REDACTED] or [REDACTED], and Dustin and I can't remember. I think that -- I think that was it. I think it was like three of them, or may -- and there might have been some more people. I'm not -- like, I'm not -- I don't recall perfectly.

Q And then go on with your story, sir.

A Okay. So they -- they leave. They go to the, like, the liquor store. They get -- they come back. They -- they had quite a bit of booze. A couple of 60 pounders, or 40 pounders, and a couple of mickeys. And that was it. Like, I was -- I -- well, I was right there. Everyone was getting drunk, I remember that.

It was actually kind of nice. It was, you know -- and then, like, when [REDACTED] -- or when Travis came back I -- I -- I said something to him and I guess I -- it's kind of a Russian thing. I said, (OTHER LANGUAGE SPOKEN), right? It's like, Your courage is your honour, right? Because, you know, he's putting his freedom on the line to, like, you know, get -- get us drunk, so.

Like, I said that to him, and then he was like, Oh, right on. And then we started -- like, I started drinking Like, we were -- like, we -- we were all drinking. And -- and it was just great. We -- so then the music came on and we -- I started dancing. I -- I was, like, we were all dancing together, just having a really good time.

Like, we were wrestling and shit, me and -- I don't remember which. Me and -- I think it was me and -- oh, me and Tr -- no, me and Mike Gallinger. I put him in a headlock and -- and, like, like, he tried to pick me up, right? And then I -- I remember I fell back into the wall. Like, I -- I put my butt into the wall. And I -- I took a picture with it, right? Because it was a perfect impress -- imp -- imprint of my -- my buttocks, like, in the wall.

And, like, we were -- because we were drunk, right? And so I -- I pulled my pants down and Renee -- and -- and, like, took a picture of it, Renee Hamilton. She took the picture because I was, like, just studying -- studying my handiwork. And then -- and then -- and then, yeah, we -- the party goes on. We're -- we're dancing again, having a good time.

And -- and me -- me and [REDACTED] were dancing together and, like, it was just a good -- there was a good connection. Like, I felt a really good connection with her. And so -- and then I can't remember who had the joint. I think it might have been Skylar. She's like, Hey, let's go smoke a joint, right?

1
2 Because, like, you know, when you -- like, you can't drink too much alcohol, right?
3 Or you just burn out, right? So we decided to go smoke a joint in the bathroom. Me,
4 Skylar, Porter, Dustin Goodhue, and I guess -- I want to call her [REDACTED] because that's
5 her real name. Now, can I do that?
6

7 Q Yes, you can.

8 A Like, she introduced herself as [REDACTED], but I guess, and, you know, I'll use J [REDACTED] -
9 and her. The two, like, it was -- it was couple to couple, right? We went into the
10 bathroom. We smoked the joint, and everything was good. We were sitting there
11 smoking a joint. And then the joint was finished. Skylar and Dustin leave and I
12 stayed behind with [REDACTED], or [REDACTED].
13

14 And -- and I told her, like, I was like, Look I really like you. I think you're, like, a
15 very beautiful girl. You know, and I told her, I was like, I -- like I -- because she's a
16 bit of a tomboy, right? And I said, I kind of like that. Like, you know, it's -- it's
17 kind of, like, you know, her own -- she has kind of like that -- that boy -- like it's a
18 cute and kind of boyish ruggedness, right? And I told her that.
19

20 And I -- and I said that, like, she has -- she's -- like, I really liked her a lot and then --
21 and that I -- yeah. And that I liked her a lot. And she's like, she told me that she
22 liked me, too, right? And then we started kissing, and like we started making out.
23 And we were in the bathroom. And, like, we're -- we're sitting there. And, like,
24 we're making out. And, like, we're -- we're kind of groping with each other.
25

26 And I pulled her pants down. I sat her on the -- on the -- the sink, right, on the
27 counter. And I -- I started -- I started eating her out. Oh, this is really awkward. So
28 I -- yeah, I started eating her out, or I performed oral sex on her. And she -- she, like,
29 yeah, she had her -- she put her, like, leg up on my shoulder and, like, I -- as I was
30 eating her out.
31

32 And then -- and -- and then -- and then I positioned her on the counter a little bit
33 better, like by the sink there. And -- and then I -- well, I pulled my -- down my pants
34 and then we -- we had inter -- intercourse. I started having sex with her. And -- and
35 then -- and then I -- I didn't last very long. I -- I actually -- I -- I probably maybe
36 lasted maybe like -- like two minutes. And then -- and then, like, I -- I came, right?
37

38 And I apologized to her. I was, like, Oh my God, I'm really sorry. It's just -- I --
39 I've been in jail for 45 days and, like, and she's like, Oh, it's okay, hon, right? And,
40 like, like, I came on her stomach and a little bit on the -- on the thing there, right?
41 And I felt -- I was like, Oh my God, I'm so sorry.

1
2 So I -- I took her into the shower with me and -- and that's -- that's when I -- I started
3 washing her. I started, like, I -- like washing her down, right? And then we -- we
4 started making out in the shower. And then we, like, and -- and I -- I can't remember.
5 She said, Hey, it's cold water. I can't remember what she said. Something like cold
6 water.

7
8 And -- because, like, it's -- it's like when -- when you splash cold water on you, when
9 you put cold water on yourself in the shower when you're with somebody. And it's
10 just you feel their body heat. It's, like, it's a little like -- so I can't -- it's something
11 like that. But anyway, we -- we -- we started, like, trying to have sex again. And --
12 and, like, it's a stand up shower, right? So it's like from here to here, right? And,
13 like --

14
15 Q For the record, he's indicating the distance of the witness stand.

16 A Okay. Four feet -- 4 feet by 4 feet, for the record. And -- and -- oh, like, we're
17 sitting down in the shower because we were sort of -- we were really drunk and, like,
18 really high. And she was -- she was riding me now, right? And we were like, we
19 were going for round two.

20
21 And then -- and then Mike came in the shower -- came in the bathroom and he's like,
22 Oh, crap. And then -- then he turned around and he walked out, right? And then my
23 brother came in and, like -- because, like, my brother really wanted this girl bad. And
24 he, like, he was so mad that he didn't get her. So, like, he was sitting there looking
25 and he was, like, and he's all pissed off, right?

26
27 And then we're like making out with each other and she -- she looks up at him. And
28 she screams at him, Get the fuck out, right? And then Lance gets out of the bathroom,
29 right? And he's like, Oh, whatever, right? And then -- and he kind of ruined it.
30 So -- so, like, we -- we -- we -- we went at it for a little bit longer and then it was just
31 like -- like, I was -- I was just -- I was just too -- I was too drunk. I -- I couldn't
32 keep it up.

33
34 So -- so -- so we left the shower and -- and that -- and then, yeah, like we -- we left
35 together. Like, you know, I towelled her off, I towelled off and we -- we left the
36 shower together. And -- and, like, she was holding my hand. I was like -- like this,
37 like, from -- like, I had behind -- she was holding on it, right?

38
39 And, like, it was -- we were -- we were happy. And then, like, we went into the -- I
40 remember, like, we went to the laundry room. And SkylarSkylar and -- Skylar --
41 Skylar and -- and ██████ started making out with each other. And they said -- and --

1 and they said that they wanted to see me and Dustin --

2

3 MS. MOGRABEE: I'm going to -- I'm going to object here, Sir.

4

5 A -- make out --

6

7 MS. MOGRABEE: This is --

8

9 A -- together. And then --

10

11 MS. MOGRABEE: You know, it's relevant what happened in terms
12 of the sexual assault. And then to get into other sexual activity again, we're getting into
13 section 276. This is not a new issue that's been raised in this trial. If it's relevant to the
14 sexual assault and consent, then I'd like to hear how it's connected. If it isn't, then, that
15 needs to -- this witness needs to move on.

16

17 THE COURT: 276 prevents evidence of what exactly?

18

19 MS. MOGRABEE: Other sexual activity. That is, sexual activity
20 outside the sexual assault that is the subject of this trial.

21

22 THE COURT: Would you read the section to me, please?

23

24 MS. MOGRABEE: Yes. Do you wish for this accused to step
25 down, Sir, or . . .

26

27 THE COURT: I don't think it's necessary, no.

28

29 MS. MOGRABEE: Section 276(1), entitled "Evidence
30 Complainant's Sexual Activity:" (as read)

31

32 In a proceeding in respect of an offence under section 151, 152,
33 153, 153.1, 155, or 159(1), 160(2), or (3), or section 170, 171,
34 172, 173, 271, 272, or 273, evidence that the complainant has
35 engaged in sexual activity, whether with the accused or with any
36 other person, is not admissible to support an inference that, by
37 reason of the sexual nature of the activity, the complainant:

38

39 (a) is more likely to have consented to the sexual activity that
40 forms the substance of the -- of the charge; or

41

1 (b) is less worthy of belief;

2
3 (2) In proceedings in respect of an offence referred to in (1), no
4 evidence shall be adduced by or on behalf of the accused that the
5 complainant has engaged in sexual activity other than the sexual
6 activity that forms the subject matter of the charge, whether with
7 the accused or with any other person, unless the judge, Provincial
8 Court judge, or justice determines in accordance with the
9 procedures set out in 276.1 and 276.2 that the evidence:

10
11 (a) is of specific instances of sexual activity;

12
13 (b) is relevant to an issue at trial; and

14
15 (c) has significant probative value that is not substantially
16 outweighed by the dangers of prejudice to the proper
17 administration of justice.

18
19 And then (3) sets out factors that the judge must consider. Do you wish me to read
20 those?

21
22 THE COURT: Thank you, Ms. Mograbee. I don't think it's
23 necessary.

24
25 MS. MOGRABEE: Thank you.

26
27 THE COURT: Mr. Flynn, what do you say?

28
29 MR. FLYNN: And -- and again, Sir, the -- the position we're
30 trying to elicit from -- from my -- from my witness, Sir, is in effect the activities and the
31 conduct of the parties after the alleged event. Wh -- what are they doing? How are they
32 interacting with each other? What's going on with that -- at that party?

33
34 A Yeah.

35
36 MR. FLYNN: It's -- it's not for the act of the sex act itself.
37 It's just more -- more descriptive of the atmosphere and the conduct of the parties --

38
39 A Yeah.

40
41 MR. FLYNN: -- post event.

1
2 THE COURT: Mr. Flynn, I understand that. And I don't think
3 anybody, least of all Ms. Mograbee, would -- would -- would argue that the rape shield
4 law always worked fair -- fairly. But it exists.
5
6 MR. FLYNN: Yes, Sir. And -- and again, Sir, it's -- it's --
7 it's relevance is only more for the conduct of the parties post -- post-event. And -- and
8 there's enough information. I think the court will have a -- an idea of the -- of the
9 principals and how they interacted with each other, Sir.
10
11 THE COURT: I believe so. There was a lot of that from
12 [REDACTED] herself.
13
14 MR. FLYNN: There was, Sir. Sir, it --
15
16 THE COURT: So I'm going to stop that form of evidence at
17 this point, Mr. Flynn.
18
19 MR. FLYNN: I'm sorry, Sir?
20
21 THE COURT: I'm going to stop the evidence at this point --
22
23 MR. FLYNN: Yes, Sir.
24
25 THE COURT: -- of what the complainant did with --
26
27 MR. FLYNN: Oh, most definitely, Sir.
28
29 THE COURT: -- other -- other people, sexually, at that point.
30
31 Q MR. FLYNN: You understand, Mr. Wagar, we're -- we're not
32 prepared to hear evidence about any alleged sexual conduct of [REDACTED] --
33 A Oh, no, no. It's -- it's --
34
35 Q -- with anybody, but yourself, Sir.
36 A Yeah.
37
38 Q So but if you could just describe -- continue with your narrative --
39 A Okay.
40
41 Q -- excluding any mention of [REDACTED] having sex with anybody else.

1 A Well, it wasn't -- like -- like, we were -- we were -- like, it wasn't, like, the nature --

2

3 Q And please speak up, sir.

4 A Sorry, the nature of what we were doing wasn't sexual. Like, they were -- like, they
5 kissed and then they got me and Dustin -- like -- like, Yeah, you guys should kiss.
6 So, like, and it was -- it was nuts. And -- and then me and Dustin kissed. It was -- it
7 was really -- it was bad. But then they laughed. It was -- it was hilarious, say, like,
8 because, like, it was -- it was just really gross, but it was -- like, it was -- it was all
9 laughs after that.

10

11 And then we went back to the party and then, like -- and then I can't remember.
12 Somebody -- somebody might have said something, Oh, you're done already or
13 something, right? And I was like, Oh, whatever. And, like, I can't even -- we just --
14 we -- we drank some more. We were, like, I think I -- I did some more dancing. And
15 it was -- it was -- it was pretty much a blur after that.

16

17 I -- I was -- I was pretty much staggering all over the place. And then Skylar -- well,
18 like, everyone was starting to crash out now. And we -- we went into -- well, like,
19 there was just like a -- it was like a couch futon thing. And there was, like, there was
20 me, Skylar, Dustin, and, like, we -- we all went on the couch and on this futon. And
21 we started to pass out, right?

22

23 And there was a bedroom, too, right? There was a bedroom. There was Mike's
24 bedroom and then he had the, like, the -- the living room which had the futon. And
25 then there was the -- the kitchen, and a -- I'm sorry. I'm -- I'm just kind of going
26 through things so I can remember it. There was, like, a kitchen. Okay. The laundry
27 room is down the hall and then the bathroom and then -- and his bedroom. And then,
28 yeah, we were in the living room.

29

30 And we -- and I -- I passed out. And, like, Skylar was there. She was, like, her
31 and -- and Dustin were -- were kind of sleeping beside each other. And I went and I
32 laid down beside Skylar, right? Like, I -- I kind of like cuddled up with her, right?
33 Because, like, you know, it was like, it was Mike's room, right? It's his room, so I
34 wasn't going to say, like, take over his bed, right?

35

36 So I -- I stayed on the -- I went on -- I went on the futon with them. And I can't
37 remember where [REDACTED] was at this time, but she came in and she saw that I was, like,
38 cuddled up with Skylar. But, like, that wasn't the case. Like, I was just -- I was
39 laying beside her, right?

40

41 And she came -- she came in the room, right? And I guess, like, my brother was, like,

1 badgering her or something in -- in Mike's room. She come -- she comes in and she
2 turned around and I was like, [REDACTED], come -- come crash, right? Or, [REDACTED], I told her
3 to come -- come -- come sleep, right?
4

5 And she left and she went into the -- into Mike's bedroom, and then I guess -- and
6 then that was it. I -- I fell asleep, and then I think -- I can't remember -- like, I -- I
7 think I went to work the next day. I was working at Navajo Metals. I was only doing
8 temp -- temp work there, right?
9

10 I went to work, came back. I -- I saw -- I think I saw [REDACTED] again a couple of
11 times -- a couple of days after. And then -- and that was it. Oh, yeah, and then I
12 actually -- what was it, like, the -- the day after that I -- I went -- like, I was actually
13 thinking about [REDACTED] I -- I wanted to apologize and say, like, Look I'm sorry. I --
14 I -- you came in and you saw me with Skylar.
15

16 And, like, because I actually had intentions of, like, actually dating this girl. Like, I --
17 I liked her, right? And I -- I went down to -- I went down to The Mustard Seed and
18 my buddy Dustin, he -- he was there. And he's like, Look, Alex, man. Like, you've
19 got to get out here, dude. I'm like, Why. And she went around saying -- telling
20 everybody that I raped her, right?
21

22 And I was like, Oh my God, you've got to be fucking kidding me. That was, like, my
23 words exactly, right? He said, No, man, I would not -- I would not lie to you like
24 that, man. Like, this is serious, dude. She's -- she's going around saying that you --
25 you and Lance raped her, right? And I was like, No way, right?
26

27 And then -- and then I think it was, like a -- like a -- a couple of days after that,
28 because I had to go see my probation officer, right? Because I -- that was part of my
29 conditions of my release is I had to see my PO. I -- I -- I went and saw my probation
30 officer and I told her. I'm like, Look, there's -- there's a girl, like, she went around
31 saying, like, she's like went and said -- is saying that I -- I raped her, like this is at a
32 party, right?
33

34 And she was, like, Okay, well thank you for letting me know, right? I'm like, Yeah,
35 but can you, like -- like, I -- I need a -- like, I wanted to, like, talk to somebody about
36 it, right? And I guess a -- a detective came to the house. Like, I can't remember,
37 like, how much longer after that. Like a couple of days, a week.
38

39 And he talked to everybody at the -- at the house, right? And Mike told me. I was,
40 like, because I got there after, like, he left, right? And I was like, Okay, well, what --
41 what's going on, right? And he's like, Oh, yeah, man. The detective was here --

1
2 MS. MOGRABEE: Okay. Again, that's -- that's all -- all
3 hearsay --
4
5 A And I --
6
7 MS. MOGRABEE: -- and I'm just wondering what the point of that
8 is.
9
10 A Okay. It's all hearsay. Okay.
11
12 MR. FLYNN: It's purely used for the narrative, Sir, of --
13
14 A Sure.
15
16 MR. FLYNN: --what's going on with this gentleman
17 post-fact.
18
19 A Yeah, thanks.
20
21 THE COURT: I'm -- I'm not sure that it's terribly relevant.
22
23 MR. FLYNN: He said --
24
25 THE COURT: Perhaps you could guide the witness a little.
26
27 A Okay.
28
29 Q MR. FLYNN: Very good, Sir. It's -- my understanding, then,
30 is at some -- some point later the police -- you became involved with the police. Is
31 that right?
32 A Yeah, this is like a year later. Like, before anything surfaced on this I told my
33 probation officer. I'm like, Look, I've got these allegations against me. Then a
34 detective came to the house. He talked to everybody. Mike told me --
35
36 Q And again, I'm -- I'm not asking what the detective did with other people. We're
37 talking about with you. Did the detective come and speak with you, sir?
38 A No. No, he did not come and talk to me.
39
40 Q Then I don't want to hear about the detective speaking with other people. I want to
41 hear about your --

1 A No, never -- never --

2

3 Q -- your observations, sir.

4 A -- never came and talked to me about this.

5

6 Q Okay. We -- remember, so we want your observations, not other people's
7 observations.

8 A Okay. All right. My observation is that I had people telling me, Mike Gallinger
9 especially, told me --

10

11 Q And again, sir, this is hearsay.

12 A -- that a detective came there. This is what I saw. This is what he said to me.

13

14 Q Okay, sir. So what then -- what then transpired?

15 A Between me and Mike? Okay. He told me that he told the detective what he saw did
16 not look like rape.

17

18 Q No, sir. Like, what then happened?

19 A And then --

20

21 Q Let's move on past Mike telling you about the police coming to his house, sir.

22 A Okay. All right. So --

23

24 THE COURT: Mr. Wagar, I understand that you're confused.
25 Legal rules are very complicated and I can explain to you why -- why the law works this
26 way. But it doesn't really matter. You just aren't allowed to -- to talk about hearsay.
27 And it isn't terribly relevant to what happened on the night in question anyway.

28

29 A Okay.

30

31 THE COURT: So listen to Mr. Flynn. Mr. Flynn is going to
32 ask you questions that'll keep your answers shorter from now on.

33

34 A Okay.

35

36 THE COURT: Okay.

37

38 A I'm just trying to be clear, man.

39

40 THE COURT: I understand.

41

1 A Like -- like I'm --

2

3 Q MR. FLYNN: Okay. Mr. Wagar, let's talk a bit about the
4 timing of this incident.

5 A Yes.

6

7 Q My understanding of your testimony is that the party occurred, I -- I think you said
8 5-ish or something along that nature?

9 A 5, 6, something like that. It was starting to get dark. It's the middle of winter --

10

11 Q That's when you ended up --

12 A -- so it's right -- but right around, like, right before winter solstice, so the days were
13 getting shorter.

14

15 Q Okay. Okay. Well, sir, let's just jump to it then. The party starts at 5. What time do
16 you think you had sex in the bathroom?

17 A Like, probably like, oh, like 10:00, midnight?

18

19 Q Okay. So you're at the party for five -- between 5 and --

20 A Yeah.

21

22 Q -- that period of time?

23 A Well, it wasn't really a party. It was more a get together at first, but then, you know,
24 we cleaned out a bottle, and then -- but it's, like, I was going to get more booze.
25 Alex, let's -- so it's, like, all right. And, like, it was -- it was pretty much, like, it was
26 the party was pretty much thrown in my honour. And, like, it was -- it was good. But
27 that's, you know, hearsay.

28

29 Okay. So you have a -- and then they came back at around 6 or 8, or somewhere
30 around that time. Okay. 8:00 being -- yeah, I'm just going to go with 8. I'm going
31 to say 8. And -- and that's when the party started. And that's when we started, like,
32 drinking and having fun.

33

34 Q Okay. I'd like to be very specific, sir. What's your interaction with [REDACTED]
35 during this party?

36 A [REDACTED], like, I -- I -- I saw that she had no intention of dating my brother. My
37 brother was, like, kind of like, you know, he was -- I could tell he was kind of pissed
38 off, right? But, like, you know, she -- like, she --

39

40 MS. MOGRABEE: I'm going to ask --

41

1 A -- made it very clear that she wasn't

2

3 MS. MOGRABEE: -- ask again. Is this hearsay, or is this --

4

5 A This is --

6

7 MS. MOGRABEE: -- because it is --

8

9 A -- what I observed.

10

11 MS. MOGRABEE: All right. So is he seeing this exchange

12 between his brother and [REDACTED]?

13

14 A Yes.

15

16 MS. MOGRABEE: Or is his brother telling him that this is

17 happening?

18

19 A No.

20

21 THE COURT: I think he said, I saw. He -- he started the

22 sentence with, I saw that.

23

24 MS. MOGRABEE: All right. Thank you.

25

26 A Yeah, like, what I observed and stuff.

27

28 Q MR. FLYNN: Please continue, sir.

29 A The -- the body language. Like, Lance was, like, kind of pissed off. Because it was

30 like, you know, he -- he was trying so hard to get with her, took her out to the movies.

31 Like, and I think he was -- he was -- he was frustrated. And I -- I saw that. And,

32 like, I know everything that happened that -- I was, like, okay. Right.

33

34 And -- and then I saw her sitting beside Dustin, right? And, like, Dustin's sitting on

35 the couch. And she liked Dustin. He's got green eyes, like, he's, you know, he's a

36 good looking guy. And I was, like, Oh. And I kind of saw it as a challenge. I was,

37 like, wow. Okay. So she's -- she's sitting with Dustin, or whatever. And Dustin

38 thinks, like, Yeah, you know, like, I got her. Like, he's -- he's all happy, right?

39

40 And I -- and then that's when I -- I -- I was drinking and I started dancing. And, like,

41 I -- I -- I'm a good dancer, right? And I -- I started dancing with [REDACTED] and, like, I

1 was -- I -- like everybody just, like, was -- that -- that night was for me. That was,
2 like, my night. Like, I -- I got out of jail, and everything, like, everything, you know?

3
4 And it was -- so I was -- I was dancing with her and, like, she -- she -- well, like,
5 where we were, like, God, man, so drunk. We -- we started talking. I can't remember
6 what was said, right? She said, Oh, you're a good dancer. And I remember this
7 music is playing, right? So it's like, Yeah, you're a good dancer, like I like your
8 moves, or whatever. I can't remember what -- exactly what she said.

9
10 But I'm pretty sure she said that, like, in the -- in the statement that she made. If you
11 guys backtrack and look that up, but anyway. So we -- yeah, and -- and that was it.
12 That was -- we were, like -- well, we started talking a little bit. And then Skylar had
13 a little bit of weed, right? A little bit of marijuana, so we decided to go the bathroom
14 and -- and smoke a joint.

15
16 Because I -- I think it was, like, Mike didn't like the smell of it. Like, he smokes --
17 he smokes it, but he doesn't like the smell of it. Like, he doesn't like the smoke
18 getting in -- in the room and stuff, right? So we'd go into the bathroom. Any time
19 anybody smokes cigarettes or anything they'd have to go to the bathroom and turn on
20 the fan, right? And if it's, like, really bad you just turn on the -- the -- the hot water,
21 the shower. And so it kind of -- it cleans it up.

22
23 But anyway that's irrelevant. And then, yeah, we were in the -- in the bathroom and
24 we smoked a joint. It was, like, it was -- it was pretty potent. And -- and then Skylar
25 and Dust -- Dustin left, right? And, like, they -- they left out the door. And as, like,
26 I -- her and Skylar were talking and I -- I couldn't really like --

27
28 Q We don't want to hear what they were saying, sir.

29 A Okay. No, I have no -- I don't even remember what they were saying. But I know
30 what I observed is that they were talking.

31
32 THE COURT: Mr. Flynn, we've been through this -- this
33 evidence before. Do you really want to -- to lead him through it again?

34
35 MR. FLYNN: I'm sorry. No, Sir.

36
37 THE COURT: Perhaps you could highlight just the areas
38 that--

39
40 A It's just --

41

1 MR. FLYNN:

No, Sir.

2

3 THE COURT:

-- that you think are relevant.

4

5 Q MR. FLYNN:

Sir, I -- I really want you to be specific about

6 your interactions.

7 A That was it. Like, we were dancing. We were talking to each other. And she said

8 that I was a good dancer. Okay. I know that for sure, right. And -- -- and then --

9 and then, so we started talking. And -- and then, yeah, like our -- then we smoked a

10 joint together.

11

12 Skylar and Dustin leave the bathroom and then me and -- me and -- me and ██████████

13 stayed behind. And I told her that I liked her. I told her that, like -- like, I said, like,

14 that she kind of had this, like, tomboyish kind of thing about her and I thought it was

15 really cute, right?

16

17 THE COURT:

Mr. Flynn, are we going through the whole

18 story again?

19

20 MR. FLYNN:

No, Sir.

21

22 A No, that's -- that's my interaction with her, though. That's -- I'm . . .

23

24 Q MR. FLYNN:

Very good. If I can, just one second, sir. You

25 had earlier described in your testimony say that -- you're describing ██████████ and

26 Dustin. And you had indicated something of the effect, Got her. What do you mean

27 by that, sir?

28 A Like -- like, she was, like -- I got her. I got, like -- like -- it's like Dustin kind of

29 sco -- like -- like, kind of came in. And she -- she's sort of flirting with Dustin a little

30 bit. But, like, I -- I would say, Okay. You know, I was like, you know what, I

31 wanted her to, like, get, like, want me more, right? So I -- that's when I started

32 dancing with her. And that's how I, like, I attracted her to me, right?

33

34 And then -- because Dustin, he can't dance worth -- very good at all. And -- and

35 that's, like -- that's where I -- I kind of excelled, right? Because, like, she chose --

36 she chose Dustin because, you know, he's got, like, green eyes and he's got, like, nice

37 hair and stuff, right? And then, you know, I -- I decided to one-up that, right, and

38 like, just kind of -- but I was -- I guess, if that makes any sense.

39

40 Q M hm. So I just have a couple of questions to that, sir. In terms of the other people

41 at the party, what -- what would you say as to the levels of sobriety, sir?

1 A Not sober at all.

2

3 Q Does that include everybody, sir?

4 A Pretty much. Well, Skylar was taking it easy on the booze. Me and -- me, Dustin,
5 my brother, Travis or Ginger (phonetic) he goes by. I think (INDISCERNIBLE) was
6 there. I can't remember if she stayed or not. But I think she might have stayed. No,
7 maybe not. Maybe though. Because it was pretty late. I -- I -- I would imagine that
8 she would have stayed, but, like, I -- I can't really recall the memory of her actually
9 being there.

10

11 But I remember her as being there at -- at the beginning of the party. But maybe, like,
12 the only way that she would have left is if she would of had a ride, or somebody come
13 pick her up. Because the buses would have stopped running and it's the middle of
14 winter, so. So she's there, maybe.

15

16 Q Who -- sir, whose suite was it?

17A Who? Whose house?

18

19 Q Whose suite was it? Whose house was it?

20 A Michael Gallinger.

21

22 Q And what was Michael Gallinger's state of sobriety, sir?

23 A He was -- he was pretty sober. He -- he had a few drinks, but he wasn't -- he wasn't,
24 like, going overboard like us, right. Because he's a -- he was a -- he's -- Mike
25 Gallinger is a -- a very responsible young man. Like, he -- he -- he holds down a job.
26 He -- like, it was his place.

27

28 We ended up getting him evicted and I feel really bad for that, actually. Like, that --
29 that was a little nice suite that he had. And Travis, or Ginger, he likes to get really
30 rowdy when he drinks. And he ended up, like -- like -- like, really destroying the
31 house and he got evicted.

32

33 Q Sorry. Let's -- I don't think this is relevant to what's before the court here.

34 A Hearsay. Yes, yes, yes.

35

36 Q In -- in terms of the sobriety of Skylar. What was Skylar's sobriety like, sir?

37 A Her -- Skylar -- Skylar was -- was tipsy, too, but not as -- like, not as much as me and
38 Dustin, Ginger, and [REDACTED]. [REDACTED] was pretty drunk, too. Because she -- she went out
39 and, like, got the booze, so. You know, it was -- she was entitled to it, I guess.

40

41 Q Was -- was she as drunk as you and Dustin?

1 A No, I think -- I think she had her wits about her a little bit more than I did maybe.
2 Like, she was -- no, maybe not. No. I -- I'm thinking about it. It's -- I think -- I -- I
3 can't remember. We -- we passed the bottle around and we were, like, taking shots,
4 right? Like I -- I -- I was taking really big shots, so. You know, maybe she was a
5 little bit more sober than I was actually.

6
7 MR. FLYNN: If I can have just one second, Sir.

8
9 THE COURT: Certainly.

10
11 MR. FLYNN: Those are all my questions, Sir.

12
13 THE COURT: Thank you, Mr. Flynn.

14
15 MR. FLYNN: Mr. Wagar, please answer any questions my
16 friend may ask.

17
18 A Yeah.

19
20 THE COURT: Ms. --

21
22 MS. MOGRABEE: Sir, because -- yes, Sir.

23
24 THE COURT: Yes.

25
26 MS. MOGRABEE: Because I'm hearing this for the first time,
27 wonder if I could have a -- a break just to --

28
29 THE COURT: Of course.

30
31 MS. MOGRABEE: -- think about what's been said and I'd like
32 to --

33
34 THE COURT: Certainly.

35
36 MS. MOGRABEE: -- work on my questions, but --

37
38 THE COURT: Do you -- is it worth my waiting outside, or
39 should I go upstairs? That's my only -- only issue.

40
41 MS. MOGRABEE: I would like half an hour.

1
2 THE COURT: Half an hour?
3
4 MS. MOGRABEE: Please.
5
6 THE COURT: All right. And will you call me when you're
7 ready, Ms. Mograbee?
8
9 MS. MOGRABEE: Yes, Sir. Thank you.
10
11 (ADJOURNMENT)
12
13 THE COURT: Please sit down.
14
15 MR. FLYNN: Thank you.
16
17 MS. MOGRABEE: Thank you. Thank you for the adjournment,
18 Sir.
19
20 THE COURT: Madam clerk, can you message Leah
21 (phonetic)? Would you message her and say, yes, the endorsement must issue?
22
23 THE COURT CLERK: Okay.
24
25 THE COURT: That will solve that problem.
26
27 THE COURT CLERK: Okay.
28
29 THE COURT: Thank you.
30
31 MR. FLYNN: Thank you, madam clerk. Good of -- good
32 morning, Sir. For the record, Patrick Flynn. Mr. Wagar is present. He's just advancing
33 towards the witness box, Sir.
34
35 THE COURT: All right.
36
37 MR. FLYNN: I believe my friend's about to start
38 cross-examination, Sir.
39
40 THE COURT: All right. Well, give me just a moment --
41

1 MS. MOGRABEE: Yes --
2
3 THE COURT: -- please.
4
5 MS. MOGRABEE: -- Sir, go ahead.
6
7 THE COURT: I'll do my best.
8
9 MS. MOGRABEE: No problem.
10
11 THE COURT: Mr. Wagar, first of all, remember you're still
12 under oath to tell the truth.
13
14 A Yes, Sir.
15
16 THE COURT: Okay. Secondly, this lady is now going to ask
17 you questions. It's her job to do that. Don't get angry. You won't do yourself any
18 favours if you get angry or impatient. Answer -- listen very carefully to the questions.
19
20 A All I ask is to be treated fairly.
21
22 THE COURT: Yeah, and you will be. In --
23
24 **A Because**
25
26 THE COURT: Listen to me, Mr. Wagar. In the same way she
27 stood up and sometimes stopped Mr. Flynn from asking questions, Mr. Flynn can stand up
28 and stop and tell me that she's asking unfair questions. And then I'll decide. It's my job
29 to see that it's fair. You may not always understand why I decide one way or -- or
30 another, but I do do my best to make it fair. You must understand that.
31
32 But try and listen very careful -- carefully to the questions she asks and answer just those
33 questions. Don't give long answers as you did to Mr. Flynn which don't really answer
34 the question when you carry on about other stuff. It just takes a long time. So listen to
35 what she's got to say, think about it, and answer that question, okay. Do your best.
36
37 A All right, Your Honour.
38
39 THE COURT: All right, Ms. Mograbee.
40
41 Ms. Mograbee Cross-examines the Witness

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Q Thank you. So, Mr. Wagar, back in 2011 you would have been what, 21, 22?

A It was three years ago. Yeah, about 22, yeah, 22.

Q Twenty-two sound about right?

A Something like that, yeah.

Q And at the time, were you struggling with alcohol and drug addiction, as well?

A No, I was actually going clean, off of everything. Like I -- I got out of jail. Like I -- when I went into jail I was in really bad shape, right, so it was kind of -- I guess I'd take it as divine intervention. But I -- I -- I came out like I would say 20 pounds heavier. I think I was like -- I was just kind of on the straight and narrow. That's where my mind set was. Like I was trying to get working full-time with Navajo. And that was just -- it was a party that -- that I -- that was it, just one party.

Q So you said that just before this incident you had gotten out of jail, right?

A Yes.

Q And you say now that that was a good thing because it allowed you, what, a sober period while you were in jail?

A Oh, yeah. Yeah, it was.

Q And when you got out, your plan was to try to kick the habit, right?

A Yeah, succeed, get a job like, you know.

Q But your addiction was to meth, right?

A Yeah, crystal meth, yes.

Q Cocaine?

A No.

Q Never cocaine?

A Never cocaine.

Q Pot?

A Well, a long time ago like.

Q How about pot?

A I don't really see it as an addiction, but I -- I'd smoke -- yeah, I had -- I had a joint every once in a while.

1 Q Because you don't see it as an addiction, smoking it is, in your mind, if you do it
2 regularly, not a problem, like smoking cigarettes?

3 A Oh, I -- I don't do it regularly, no. Like compared to the other stuff out there, yeah,
4 it's -- it's -- it's minute.

5
6 Q But if you were smoking pot and you --

7
8 MR. FLYNN: Sorry, I -- I don't want to object so early in my
9 friend's cross-examination, but I just wonder about the relevance of this.

10
11 THE COURT: Why don't you give a little chance --

12
13 MR. FLYNN: Very good, Sir.

14
15 THE COURT: -- see where she's going, Mr. Flynn. Carry on,
16 Ms. Mograbee.

17
18 Q MS. MOGRABEE: All right, so your smoking pot at the party, in
19 your mind, wasn't part of your addiction?

20 A Like, yeah, no, it was -- or smoking a joint, kind of mellow out. We were drinking
21 lots; balance.

22
23 Q And the drinking of the alcohol to you wasn't part of your addiction, in your mind,
24 either, was it?

25 A No. I -- I've never had an addiction to alcohol.

26
27 Q So when you say you wanted to kick the habit, you're talking about your habit to --

28 A Crystal meth.

29
30 Q -- taking crystal meth?

31 A Yes.

32
33 Q Right. And you hadn't taken any crystal meth that day, had you, the day of the
34 incident?

35 A No. No. I got -- like a week after, I did, because I'm -- I'm not going to lie, I was --
36 I was extremely stressed out when I heard these allegations against me. Like it really
37 upset me. And in my mind, I was like -- I was thinking like how do I prove my
38 innocence. It's my word against hers. They have my DNA, so it's like what do I do.
39 Like, you know, I was -- I was in a state where I was -- I was -- I -- I was extremely
40 emotionally distraught. I was -- like I -- I -- in my mind, I did everything I could. I
41 told my probation officer -- I'm like, Look these -- there's allegations against me.

1 And she -- she looked into it and, you know, I'm not thinking back, so.

2

3 Q How much do you weigh now, Mr. Wagar?

4 A I'm probably -- like right now, I'm probably about 210 pounds.

5

6 Q And back at the time of the incident in 2011 were you heavier or lighter than you are
7 now?

8 A Oh, I was probably about 5 pounds heavier. I was -- I was -- like I -- I worked out a
9 lot. I -- like I drank lots of water and stuff, right.

10

11 Q So -- and when you were in jail you worked out a lot, too?

12 A Yeah. It's a 22-hour-a-day lockup. There's not really much else to do and you -- you
13 pass the time however you can.

14

15 Q So you're a pretty strong guy after working out, I would imagine?

16 A Yeah, I guess so, healthy.

17

18 Q How about your height? How much are we at with your height?

19 A Six -- six -- about 6'1".

20

21 Q Do you have any health problems that would prevent you from -- you know, you said
22 you're healthy, strong. Was that the case in 2011?

23 A Yeah, I was -- I was trying to be healthy, go on the straight and narrow, yeah.

24

25 Q Now, we -- you've been using the words '██████' and '██████' to refer to the
26 complainant.

27 A Yeah, her -- she introduced herself as ██████, but the name that she was born with is
28 ██████.

29

30Q And how do you know that?

31 A She introduced herself as ██████████ (phonetic) at the party.

32

33 Q And then how do you know that she was born with the name ██████? Is that something
34 you read in the disclosure?

35 A Yeah. After I was -- I was -- I was arrested I was charged with break and enter for
36 breaking into a construction site. It late got dropped to trespassing because I didn't
37 really break anything to enter it. I was just like trying to find a warm, open place,
38 right. When they -- they told me like they're -- tha -- that I had some out --
39 something outstanding for a sexual assault, I -- I -- just my heart sank. I was just like,
40 What, you know. And then they let me out on that -- that day. They -- they took me
41 out. They took me in. Like they actually let me out the following morning, so -- but

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THE COURT: The question was: When did you find out her name was [REDACTED]? Was it in the disclosure?

A That -- that was -- yeah. Yes, yes, that was around that time.

Q MS. MOGRABEE: So it was once you -- you found out about the actual charge, they pick up on something else, and you read the disclosure, you realized she goes by another name, right?

A Yes.

Q She didn't tell you that was her name?

A No, she didn't.

Q Back in -- in that time, in 2011, just after you got out of jail, I take it you -- you didn't have a place to live, right?

A No, I didn't. I didn't have a place to live when I went to jail. I did -- I didn't have one when I got out.

Q And were you on the streets before you went into jail?

A Yes, I was.

Q You were on the streets for quite a while, weren't you?

A It's actually like not even -- not even like three months. I was -- I was -- I was staying with Dave (phonetic) and Shannon Santez (phonetic). I was renting a room off them.

Q How long were you there for?

A I was probably there for about six months.

Q And then before that where were you?

A I had a place out in Bankview. I can't even remember the address. It was -- it was on 16A Street.

Q And how long were you there for?

A I was there for probably eight months.

Q Okay, so it sounds like the pattern is you have a place, you're out on the street maybe for a while but you get another place, out on the street. Is that kind of the way things went for you?

1 A It seems like that, but, no, I got an eviction notice. Like it was an old house and the
2 sound really travelled a lot. And like I -- I would like -- I -- I remember actually what
3 got me kicked out was like the neighbours only talked to me a few times, but then my
4 uncle died. My mom came over. And, you know, like my whole family like came
5 over and we were pretty loud, but it wasn't the music playing or anything like that.

6
7 THE COURT: Mr. Wagar, the question is --

8
9 A Yeah, yeah.

10
11 THE COURT: -- Was that the pattern?

12
13 A It seems like that. But I'm just explaining that, you know, I was in eviction because --
14 due to noise because it was old house, sound travelled. It's not like I -- like I'm an
15 unstable person, per se, but like in the later years I -- I -- after that, I -- I kind of fell
16 apart, yeah.

17
18 Q MS. MOGRAJ3EE: Well, but living out on the street was partly due
19 to this meth addiction that you have, right?

20 A No. Actually, the meth addiction came afterwards.

21
22 Q Did you have another kind of addiction before that?

23 A No.

24
25 Q And how many times would you say you've lived out on the streets prior to 2011?

26 A I actually -- prior to 2011? Okay, let me think here. Well, when I was a kid I -- I
27 stayed on the street a lot. But actually, about five years ago I met Megan Oxley. We
28 ended up moving to Saskatchewan. We stayed there with my parents for a bit. And
29 then like I -- I got -- I got stabilized there. And then, you know, once I had enough
30 money we left Saskatchewan and we bought a car, left Saskatchewan and went to --
31 moved to Ottawa, stayed there for a few years -- or for a year and a -- year and a half,
32 and came down. We had a place here in Calgary. We got a place. We moved into a
33 place in Bankview. That's where we stayed for six or eight months -- eight months.

34
35 And then, from there moved to Dave and Shannon's -- and Shannon Santez's place for
36 about six months. And -- and then, after that, it was -- we -- the house got evic -- like
37 everybody got -- we got evicted from there. And then I was on the street after that for
38 a bit until I went to jail. And then I got out, you know, 45 days later.

39
40 THE COURT: Does that answer your question, Ms. Mograbee?

41

1 A Yeah.

2

3 Q MS. MOGRABEE: Yes. Thank you. All right, so, again, you're
4 out of jail just before this allegation and you're looking for a place to stay, right?

5 A Yeah, I was. I was -- I was working. I was working towards finding a -- like a
6 suitable residence, yes.

7

8 Q And that's one of the reasons why you're at the Alex Youth Centre, right?

9 A Yes. They -- they -- they help out with stuff like that if you need -- they -- they point
10 you in the right direction anyway, yeah.

11

12 Q And that's at the time that you ran into [REDACTED] --

13 A Yes.

14

15 Q -- right? Now, before that you talked about meeting her through your brother, Lance.
16 Do you remember saying that?

17 A I think I -- I -- I saw them briefly, but I don't think we really talked. But I -- I -- I --
18 I actually talked to her for the first time at Alex Youth Health Centre, I believe.

19

20 Q So when you talked about the Occupy --

21 A Occupy. That's where all -- that's where friends of mine met with her.

22

23 Q So you --

24 A I didn't meet her at Occupy myself, no.

25

26 Q Right. So you'd never seen her at that time. You'd ne -- never met her. I follow you
27 correctly?

28 A Oh, I think I seen her. I never met her though. Like I never talked to her. Like I --
29 I -- I seen her, but I -- I had to go do -- I think I went to work that day. It was like
30 early in the morning. But then they -- yeah, she left with my brother and they spent
31 the day together.

32

33 Q Well, earlier you said that you had met her at Occupy Calgary --

34 A No, no.

35

36 Q so --

37 A I met her through friends at Occupy Calgary.

38

39 Q I see. So --

40 A Like I didn't really meet her like, per se. Like I saw her at Occupy. I saw her. Like
41 I made visual contact; that was it.

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Q So in your mind, that's meeting someone?

A Running into them? Yes. That's the first time I ever laid eyes upon them, but I wouldn't really say meeting. It's more -- like I -- I didn't really meet her until we went to the AI -- Alex Youth Health Centre. That's where we officially met.

Q And at that time, she was with Skylar, who you knew, right?

A Yes, Skylar Porter.

Q Right. And -- and you -- we did hear from Skylar in this trial. That's the same Skylar that you're talking about, right?

A Yes.

Q And you've known Skylar for quite some time, I take it.

A I've known her for -- for probably about two -- two years -- no, no, about a year and a bit, I think, so -- so a year -- a year and a half, I'd say.

Q She's a good friend of yours, I take it?

A Yeah, yeah. We actually -- we're -- we're actually better friends now than we were then.

Q You're boyfriend and girlfriend?

A You know, I actually -- I -- I do like Skylar like that, I did, but nothing ever really came of it.

Q And when it came to arranging for her to come to court did you speak to her yourself, Skylar?

A Actually, no, I didn't. I -- I talked to my friend, Collin Williams (phonetic). He was a bald gentleman like wearing the glasses in the back of the courtroom there that day. I talked to him because Skylar, she -- her number changes. Like she's -- you know, like she moves around a lot I guess you could say.

Q And --

A Her --

Q -- you -- sorry, are you done?

A Sorry. Yeah, no, I'm -- yeah, I am done.

Q Did you talk to Skylar about what the accusation was against you on this --

A Yes. Yes, I did. I -- I talked to her about it. I remember the day, the first -- when I had court, like a promise to appear, like that day I was going to get her to come to

1 court with me. And -- and she couldn't -- she couldn't make it, right. She -- she --
2 she was down at -- I think it was The Back Door or the Doorway doing like contracts,
3 like -- like getting money for stuff. But anyway, she was doing that. And I was like,
4 Well, Skylar, you got to hurry, right. She's like, Look, I'm almost done, like, and my
5 bus doesn't get here for another half hour.

6
7 And I -- I thought I could milk it, right, because I guess court for these -- these
8 allegations for charges stops at 3:30. I didn't know that because I've -- I've been to
9 court at like about 4:00, 4:30. Like that's the latest I've ever been in court, right. So
10 I thought, Okay, I'm going to wait. And like I'm waiting for her, waiting for her.
11 She didn't show up. So I -- I came down here, and it was around like 4:00 or 4:45.
12 And -- and that's when I -- the lady at the -- in -- in here told me that -- that I had a
13 warrant for my arrest.

14
15 Q Okay, Mr. Wagar, my question was: Did you talk to Skylar about these allegations?

16 A Yes, I did.

17
18 Q So you talked to her in detail about what was being alleged in your disclosure, right?

19 A Yeah. I told her that I needed her to come to court and say what she saw because she
20 was -- I guess she was one of the people that was interviewed by the detective, so I
21 needed her. I tried to get Dustin Goodhue to come, but he said, Look, I'm a mutual
22 party.

23
24 Q Okay.

25 A And you're my friend and she's my friend, so --

26
27 Q Mr. Wagar, I -- I need you to focus on the question --

28 A Okay.

29
30 Q -- please. Did you talk to her about the details in the disclosure and what people said
31 happened that night?

32 A No, I told her what -- what ██████ said, right.

33
34 Q So you had a discussion with her about what --

35 A Yes, I had a discussion with her about that. I said, Look, Skylar, I need you to come
36 to court and say what you saw.

37
38 Q But you also told her everything that ██████ said happened?

39 A Yeah. I was like: Yeah, ██████ said that I raped her. I need you to come to court.

40
41 That's my words to her exactly.

1

2 Q Did you give her any of the details relating to the case?

3 A No, I didn't.

4

5 Q Yeah.

6 A I -- I told her that I needed her to come to court because I know that she was there.

7 She saw what happened.

8

9 Q And she was willing to help you, according to what she said to you?

10 A Yeah. She was like, Yes, I'll come to court, Alex. But she didn't. She didn't show
11 up. She took too long. And then I ended up getting a warrant. And then I went on
12 the run.

13

14 Q On this charge?

15 A On this charge. On this false charge, yes, or allegation, I guess.

16

17 Q But did she tell you though that she would help you in any way that she could in
18 connection with what she could say about what happened that night?

19 A Not in so many words. She said she would come to court.

20

21 Q That's all she said?

22 A She said, Yes, Alex, I'll come to court, that's it, Al -- Alex, I'll come vouch for you,
23 yes.

24

25 Q Did she say anything else?

26 A No. She said that -- she said that [REDACTED] is, and I quote, a piece of shit. She -- she
27 said that. Those -- those are her words.

28

29 Q So she was angry, as -- as far as what you could see, that you were in this situation?

30 A Yeah. Yeah, she was.

31

32 Q And did she reassure you that, again, she would come to court and --

33

34 MR. FLYNN: And -- and, Sir, I have the objection of how my
35 client would know

36

37 A I -- I see where you're going with this.

38

39 MR. FLYNN: -- she's angry or not. She's -- my friend's
40 asking for my client to give an opinion on somebody else's emotional state. I don't think
41 my client's qualified to do that.

1
2 MS. MOGRABEE: He can tell us what he observed. But I --
3
4 THE COURT: I'm going to allow the question, Mr. Flynn.
5
6 MR. FLYNN: Very good, Sir.
7
8 THE COURT: Atthe moment, Ms. Mograbee must
9 cross-examine the way
10
11 MR. FLYNN: Okay.
12
13 THE COURT: -- she sees fit.
14
15 Q MS. MOGRABEE: Thank you, Sir. All right, so I want to go back
16 to [REDACTED] for a moment. You say that the first time that you meet her is at the Alex
17 Centre, which is what, the day before that you go over to --
18 A The night of.
19
20 Q The night of. So the night of the incident, that day, you met her at the Alex Centre?
21 A Yes.
22
23 Q And it was through Skylar?
24 A I think it was, yeah, through Skylar. And there was some other people with her, too.
25 Maybe like my brother might have been with her, too.
26
27 Q Right.
28 A And she spent the day with my brother. I know that much.
29
30 Q Sorry, she?
31 A She spent the day with my brother.
32
33 Q And how do you know that?
34 A I -- my brother told me. She said it, you know. I asked them, Hey, I'm sorry, what
35 did you guys do today, right. And -- and they're like, We went to a movie and like
36 watched a movie and we like went and got some clothes and did some other stuff. So
37 I was like, Okay, that's cool.
38
39 Q Was he at the Alex Centre, too, your brother, Lance?
40 A Yes, he was.
41

1 Q He is your --

2 A I do believe so. Yes, he's my half brother, the same mom, different dad.

3

4 Q And what time is it then when you were at the Alex Centre? Is it like before noon or
5 afternoon?

6 A It was like around -- it was afternoon for sure. It was right around when it was
7 closing. I -- I think they close at 6 -- 4:30 or 6. I think it's 6:00 that they close at the
8 latest.

9

10 Q Right. So --

11 A I'm not -- I can't really -- don't quote me on that.

12

13 Q And I -- I take it, it takes you some time to get from the Alex Centre back to Mike's
14 house?

15 A No, it's actually --

16

17 Q Can I ju -- can I just stop you for a second.

18 A Sure.

19

20 Q We're overlapping a little bit. And it's hard for the recorder to pick up what each of
21 us are saying if we're overlapping, so if you could just let me finish the question.
22 And then, of course, you can answer.

23 A Okay.

24

25 Q So my question is: It took you some time to get from the Alex Centre to Mike
26 Skinner's house, right?

27 A Mike Skinner? No, Mike -- Mike Gallinger. She just said he introduced himself as
28 Mike -- Skinner Mike.

29

30 Q So you know him as Mike Gallinger?

31 A Yes, Mike Gallinger.

32

33 Q You don't know him as Mike Skinner?

34 A No, no, or Skinner Mike, as she called him.

35

36 Q Do you know if he goes by that name, to your knowledge?

37 A No. No, he does not go by that name.

38

39 Q Do you --

40 A I've never -- I've never heard him being like referred to like that ever.

41

1 Q Do you know this Mike Gallinger?

2 A Yes. Actually, I didn't know him at that point. That is the first time I ever met him
3 was actually when we showed up at his house. And then I introduced myself. I was
4 like, Hey, man, I'm Alex. And he's like: Oh, man, nice to meet you. I'm Mike.

5

6 And -- and what -- what happened now. Yeah, I was -- we met. And then we started
7 drinking together. Like they -- Skylar and Travis took off and went and got some
8 booze. And I sat back, you know, introduced myself to everybody. Like, well, I
9 pretty much knew everybody there.

10

11 THE COURT: Yeah, the question was: Did you know him as
12 Mike Skinner?

13

14 A No, I did not know him as Mike Skinner.

15

16 Q MS. MOGRABEE: And you had met him for the first time when
17 you showed up at his house?

18 A Yes.

19

20 Q And in terms of how long it took you to get from the Alex Centre to Mike's house,
21 we're talking what, like an hour later about, right?

22 A No. I waited for the bus for about 15 minutes. And then it's about like a ten-minute
23 bus ride.

24

25 Q So you meet [REDACTED]

26 A Okay.

27

28 Q Do you get on the bus right away?

29 A No, we sat there for a few minutes talking. And then -- and, hm, what ended up
30 happening. We sat there talking for a bit, asked them about their day. And they told
31 me what they did. I told them what I did. Like it wasn't really interesting, right. So
32 like it was -- like I was sorting scrap all day, that's what I did, right, so. So that -- we
33 didn't really talk too much -- elaborated too much on that, but . . .

34

35 Q It was a short conversation. And then you guys caught the bus?

36 A No, I think we were talking about other stuff I -- I -- I can't really tell you what we
37 were talking about.

38

39 Q It was a group conversation, I take it?

40 A Kind of a group conversation, you know. Like this happened like three years ago,
41 right.

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Q Right. So again, you -- you go from the Alex Centre to Mike's house. You arrive there what, 6, 7 PM?

A Yeah, I would say 7 -- 7 -- 6 to 8 we'll -- we'll go with.

Q And again, this is the same day that we're talking about --

A Yes.

Q -- that the allegation takes place, right?

A Yes.

Q All right. And you say when you first get there you don't think there's any alcohol, right?

A No, like I wasn't really -- yeah, I don't -- I don't think there was like -- well, there -- there was, but I wasn't made aware of it, so. Yeah, no, I was just -- I was just invited over. Like my brother said: No, it's cool. You can come stay. We party a lot.

So that's why I went over there.

Q And then some alcohol showed up later, right?

A Yeah. They made plans to go get alcohol. And they followed through with those plans and came back.

Q And it sounds like there was quite a bit of alcohol, to use your words, or something to that effect --

A Yeah, they -- they came back --

Q -- quite a bit of booze?

A -- with quite a bit.

Q So there was more than enough to go around to everyone that was there, right?

A Absolutely.

Q And you said everyone was getting drunk, right?

A Pretty much everybody, yeah.

Q Including yourself?

A Yes.

Q Right. So you'd been drinking what, from about 8:00 onwards. Does that sound about right?

1 A Yeah, give or take. And they -- they came back maybe around 8:30, 9. But like we
2 started drinking and partying, and like it's really hard to put a timetable on it, right,
3 because it was so long ago, but -- on the time. Sony, I'm really thinking here. Yeah,
4 okay. Yeah, I'd say 8:00. I'd say that.

5

6 Q And the drinking continued throughout the whole evening, right?

7 A Yes.

8

9 Q And you were included in that, as well, then as you were drinking to -- through the
10 whole evening?

11 A Yes.

12

13 Q And how about [REDACTED] She was drinking, too, right?

14 A Absolutely. She went and got the booze, so absolutely. She's entitled to it, man.
15 She --

16

17 Q But did you see her drinking it?

18 A Yes, I did.

19

20 Q And you --

21 A Like we passed the bottle. I'd take a shot, here you go, you know, listen to music.

22

23 Q So you were sharing a bottle at times?

24 A Yeah. Well, we were like -- there was like whiskey. There was vodka. There was --
25 well, there was different kinds of vodka. There was -- maybe there was -- what was
26 that stuff, Polar Ice (phonetic) -- no, Absolut Vodka, I think, maybe, Polar Ice and
27 whiskey, Polar Ice whiskey, some like White -- White Lightning or vel -- I can't
28 remember. But, yeah, there was vodka. There was whiskey. There was like big
29 bottles. And like there was -- there was -- and there were like a couple of big bottles.
30 And then there was a mickey, too, and no beer, no -- to my recollection. There might
31 have been, but I don't -- I don't remember. I don't think that there was.

32

33 Q So you're drinking this straight out -- this hard liquor straight out of the bottle?

34 A Hard liquor straight out of the bottle.

35

36 Q And she's drinking this hard liquor straight out of the bottle?

37 A Absolutely.

38

39 Q And when I say you've been drinking all night, still with the hard liquor straight out
40 of the bottle all night, right?

41 A Yeah. Well, we'd take a couple shots. We'd dance around. We'd socialize, take

1 another shot.

2

3 Q Now, when you say that the music's playing, I take it it's pretty loud in the suite when
4 the party's --

5 A Yeah.

6

7 Q -- going on?

8 A Yeah.

9

10 Q All right, so. And you say there's dancing?

11 A Yeah.

12

13 Q Right. And everybody's drunk at this point in time, right?

14 A M-hrn.

15

16 Q And you include yourself in that. And you include [REDACTED] in that, right?

17 A That is correct, yes.

18

19 Q And this is what, when you're dancing around, 9 PM, 10 PM, 11 PM? What time is
20 it?

21 A Right until midnight. Anyway, but we -- we -- even like afterwards we -- we danced
22 like still but not as hard, right. It was starting to wear out. Like we were -- like --
23 like -- well, it was my first time like getting -- like drinking any alcohol for like two
24 months, right. And like it was a celebration like to my freedom, right.

25

26 Q So you were in a good mood?

27 A Oh, absolutely. Everybody was in a good mood.

28

29 Q And I take it that you wouldn't have really been talking to [REDACTED] much with the
30 drinking and the dancing going all evening, would you?

31 A We did talk. We didn't -- like it was -- yeah, we -- we danced together. We -- we
32 said a few things to each other. And like it was -- we were -- I can't remember what
33 was said. No, she -- she said -- I remember her saying like I -- I like -- that I was
34 good a dancer and she liked my dancing, right.

35

36 Q And that was something she said to you when you were dancing, right?

37 A Yeah.

38

39 Q And that was like --

40 A Like that was like really loud though. It was like, Yeah, you're a really good dancer.

41 Like it was -- it was -- it was like that. It was -- yeah.

1

2 Q And that was kind of the conversa -- type of conversation you had with her then --

3 A Yeah.

4

5 Q -- loud music, sort of a little shouting back and forth to each other --

6 A Yeah.

7

8 Q -- that kind of thing. That was the conversation, right?

9 A Pretty much, yeah.

10

11 Q And that would be the co -- type of conversation you would have had with her all
12 evening, that kind of shouting back and forth, right, before you get into the bathroom?13 A Yeah. Yeah, we were -- well -- well, not -- not -- not completely yelling all evening,
14 but like the music was playing. But then like, you know, we'd dance really hard and
15 be all sweaty. And then we'd go and we'd sit in Mike's room. There would be like
16 me, Skylar, Mike. We'd be sitting there like just -- like talking. Mike was like on his
17 phone. Like he was doing Facebook stuff, right. That's what he likes doing. Like he
18 likes to meet people through Facebook. That's what he does, right, meets -- meets
19 girls through Facebook. And like, you know, that's how he ended up -- I -- I'm pretty
20 sure that's how he ended up dating Mallarie Ross (phonetic). He ended up dating her
21 for a couple years, actually.

22

23 Q So from what you're describing then, you agree that you're having conver -- you
24 might be having some conversation with other people before you go into the
25 washroom, too, right?26 A Well, yeah. Well, we'd go in, we'd -- we'd talk, we'd take a break, then come back
27 to the party. Sony. And then -- yeah, then like we were dancing. And I remember
28 Skylar saying: Anybody want to smoke a joint? Got some weed.

29

30 So I was like, Okay, like, yeah, let's go, right. And she's like, Okay, well, no, just
31 me, you, and [REDACTED] because Skylar liked [REDACTED] and Dustin. So it's me, Dustin,
32 Skylar, and [REDACTED] into the bathroom.

33

34 Q Right. And going back to the dancing for a minute. Was this kind of dancing around
35 the room that was going on?36 A Yeah. It was a square room. I mean, I wouldn't say dancing around the room, but
37 like I was actually -- I was dancing with like -- like a couple of people. It was
38 actually me and Skylar. Like -- well, they -- they were playing like different kinds of
39 music, so like there was some electronica, which is like, you know, when you're --
40 like you're raving really hard. And then like they would play hip-hop. And then
41 that's like -- we had some rap or something, right.

1
2 And as I as saying, I actually starting grinding with Skylar. Me and Skylar were
3 like -- kind of like -- like dancing together and like we were like getting really low.
4 And then -- then -- and then -- yeah, then like, you know, we'd -- we'd pause, you
5 know, take a couple of shots. And then -- and then, yeah, we started dancing again. I
6 was dancing with -- I was dancing with [REDACTED] I remember that, right. After I was
7 da -- I was -- I was dancing with Skylar. And then I started dancing with [REDACTED]

8
9 And then Skylar came up, and I was like, Okay, let's smoke a joint in the bathroom.
10 And that's when we all went to the bathroom.

11
12 Q Okay.

13 A Yes.

14
15 Q So you -- you described grinding with [REDACTED] And the rest of your dancing though
16 was --

17 A No, Skylar, because --

18
19 Q I'm sorry, pardon me, Skylar. The rest of your dancing though was people just sort of
20 dancing freely in a room, right?

21 A Yeah.

22
23 Q And you heard [REDACTED] say that she didn't touch you at that time. That's -- that's
24 what --

25 A No.

26
27 Q -- happened, right?

28 A No, she -- like she didn't like -- like grope me or anything like that at that time, no,
29 not like --

30
31 Q She didn't touch you at all, did she?

32 A No, she did. She -- she -- she -- she -- she --

33
34 Q How's that?

35 A She grabbed my dick like when we were --

36
37 Q Oh, she grabbed your dick.

38 A Yeah--

39
40 Q When was that?

41 A -- my penis, yeah.

1

2 **Q** When was that?

3 **A** Huh?

4

5 Q Oh, did you just remember that?

6 A No. That was --

7

8 Q That's pretty important, don't you think?

9 **A** Yeah.

10

11 Q So where -- where is this that she grabs your dick?

12 A This is like -- this was in the bathroom.

13

14 Q Yeah, I'm not talking about in the bathroom.

15 A Oh.

16

17 Q I'm talking about at the time you're dancing. She doesn't --

18 A Oh, dancing? No, no.

19

20 Q She doesn't touch you?

21 A No. Like we danced together, but we weren't like -- like on each other, no.

22

23 Q And the conversation with her, if I can even call it that, is here just saying that she
24 likes your dancing, right?

25 A Yes.

26

27 Q And you say that you took that as a compliment. You didn't use that word, but what
28 you were describing earlier when you testified, it sounds like you took that as a
29 compliment?

30 A Well, yeah, of course. She -- she said I was good dancer.

31

32 Q And before you started to dance you said that you were thinking that [REDACTED] is an
33 attractive girl, right?

34 A Absolutely.

35

36 Q And you described her as looking kind of tomboyish or boyish and you thought that
37 was attractive?

38 A Yes.

39

40 Q That was what was going on in your mind?

41 A Yeah. Like she -- she has like short hair. She wears like -- she like wears like kind

1 of like a dress shirt and a -- and tie. She wears like, you know, skinny jeans and like
2 she -- she dresses like a -- like a -- like a boy, yeah --

3

4 Q And --

5 A -- a guy.

6

7 Q -- you say -- you say one of your strengths is dancing, yeah?

8 A Yes.

9

10 Q And at the time, you were thinking, Gee, you know, I sure would like to have my
11 chance with [REDACTED] --

12 A M-hm.

13

14 Q -- didn't you? You thought that?

15 A Yes, I -- I -- absolutely I did. I -- I was -- I was attracted to her, yes.

16

17 Q And when you say that she was sitting next to Dustin --

18 A M-hm.

19

20 Q -- who you said is a good looking guy, yeah?

21 A Oh, he is. He's got green eyes and he's -- you know, he's got like -- he's kind of got
22 like a perm a little bit. Like he -- like works out too, so he's -- he's a moderately
23 attractive guy, yes.

24

25 Q You -- so you saw him as a bit of competition, right?

26 A I saw him as a rival, yes.

27

28 Q And you were -- you were in it to win it, weren't you?

29 A Not really. I -- like not -- not in those words. Like I see like where -- where you're
30 kind of going with that. No, that's not really the case where I'd do anything to get
31 what I wanted, no. It was -- I -- I -- like she was -- she was -- like, you know, my
32 brother was attracted to her. She was attracted to Dustin, right. So I thought, Hey,
33 you know what, like I'm -- I'm -- I'm dancing and I'm having a good time, and she
34 was attracted to that, right.

35

36 Q And the -- and the reason why you thought she was attracted to that is because she
37 said she liked your dancing, right?

38 A Yes.

39

40 Q So when you get up to dance you think to yourself, and tell me if I'm wrong, this is
41 maybe a way that I can get her attention, right?

1 A Yeah, absolutely.

2

3 Q Which is why you started dancing, right?

4 A Well, yes and no. Like I -- like the music was playing. And I dance. Naturally,
5 that's what I do, right. But we were sitting down. And like -- but that's kind of what
6 prompted me, yes, but like I -- I -- I would have danced anyway, right. That's just the
7 kind of person I am.

8

9 Q And you said earlier that you felt a connection with [REDACTED]

10 A We did, absolutely, because she was up and dancing with me. And Dustin was like
11 sitting on the couch, and he kind of looked pissed off.

12

13 Q And you felt that was a connection between the two of you then --

14 A Yeah.

15

16 Q -- because she was dancing with you and not somebody else?

17 A Yeah, that was -- that was the case.

18

19 Q And by that, you mean there was no one else dancing in the room except --

20 **A No.**

21

22 Q -- the two of you?

23 A No, no, I was dancing -- like I said, I was dancing with Skylar Porter. I was -- who
24 else was dancing. Mike was -- Mike was -- he had his hoodie up and his sunglasses
25 and he was kind of doing a little waltz. There was other people there, too. I think my
26 brother -- no, I'm not a hundred percent sure. I think my brother was sat on the
27 couch. He was just kind of pissed off because, you know, he -- he -- he tried really
28 hard to -- to -- to woo her, I guess, you know, but everything he tried didn't work.
29 Like he took her to the movies. He took her out. Like, you know, they went out --
30 went -- they went out, I guess, shopping for clothes but, you know, without money.
31 You know, like he spent a day trying, but it didn't -- it didn't work out for him, so.

32

33 Q Is he older or younger than you?

34 A He's five years older than me.

35

36 Q And were you trying to show him a little bit about what you could do, you know, try
37 to get a girl?

38 A No, not really. It was --

39

40 Q No, it was none of that?

41 A It was more like -- it was more like I was attracted to her. She -- she was sitting --

1 like, you know, she was -- she was attracted to Dustin. And I just went -- I just got
2 her attention. That's what I -- I -- I was doing, yes.

3

4 Q Well, you saying that she was attracted to Dustin, that -- that's -- that's your opinion,
5 isn't it?

6 A Body language does say a lot. So I'd say my opinion in this matter is pretty -- pretty
7 valid.

8

9 Q So your thinking was: Gee, you know, maybe I can have her interested in me. She
10 was interested in somebody else. I'm going to take -- take her away from that. It's a
11 challenge.

12

13 You agree?

14 A Yeah, maybe a little bit. It's like -- it's -- it's rivalry like, you know, is the best way I
15 can explain it.

16

17 Q So the dancing is happening. You say she's dancing with you, meaning there are
18 other people in the room but you're facing each other. Is that what you mean by
19 dancing together?

20 A Yeah, we were facing each other. I was dancing with everybody, man. Like me -- me
21 and Mike were like, you know, just having a good time. We're dancing and talking.
22 And I -- I was dancing with Skylar, as well. I was -- like I was all over the place,
23 man. Like I was -- I was like the -- like -- like I said, that was mighty night. Like I
24 was -- I was in the spotlight, you know. It's like -- it was my first night at the house.
25 I just got out of jail. The first time getting drunk in like two months. That was . . .

26

27 Q And so when you say that you felt a connection with ██████ --

28 A Yes.

29

30 Q -- the connection for you came when she said she liked your dancing. Do I have that
31 right?

32 A No, there was like -- there was like a connection before that, like it was starting.
33 She -- she's the one who kind of reached out to me. And that's -- that's how it
34 started. Like it was -- like I was dancing with her, too, being social, being friendly,
35 dancing with Skylar, dancing with my buddies, you know. And then -- and then,
36 yeah, she's like, Yeah, I really like your dancing, you know. And I -- I was like, Oh,
37 thanks, right. And then I -- I'm pretty sure I said that she was really cute. I think I
38 was like, I think you're cute. And she was like, I think -- I like you, too, or
39 something. I can't even remember.

40

41 But we started talking once we got into the bathroom. And then it just -- it just

1 happened. It was . . .

2

3 Q Now, you said everyone was drunk. We've -- we've established that.

4 A Yes. Yes, we have established that numerous times.

5

6 Q And Skylar was -- pardon me, [REDACTED] looks drunk to you, too, doesn't she?

7 A Yeah, like drunk but not inebriated. Like we were -- we were -- like we were
8 partying, yes. We were drinking, yes.

9

10 Q So she --

11 A But she wasn't -- she wasn't like fall over drunk, like nothing like that, no.

12

13 Q Was she slurring her words a little bit?

14 A No, not -- not slurring. Like -- like that's -- that's kind of like at the point of
15 inebriation, right, because like when you're -- when you're like dancing when
16 you're -- you're drinking, it's just you're -- you're -- you have our wits about you a
17 little bit more, right, than when you're sitting and drinking, right, because you bum it
18 off a bit.

19

20 Q But when you say she's drunk, what makes you say she's drunk?

21 A I -- I watched her take a couple of shots, like some like (UNREPORTABLE SOUND)
22 you know. It was her alcohol. She's entitled to it, right. She's --

23

24 Q No. You say she brought it in, right?

25 A She did. It was hers.

26

27 Q And you are no one to tell her what to do with it, right?

28 A Oh, exactly. Like, no, it was like she was grateful that she was getting drunk.

29

30 Q Was there an incident in the laundry room earlier in the evening?

31 A Later in the evening there was.

32

33 Q It was after the incident in the washroom?

34 A Yes.

35

36 Q All right. And I'll get back to that, okay.

37 **A Okay.**

38

39 Q All right, so you're out dancing, if I follow your chronology, and everybody's dancing.

40 Am I right?

41 **A M-hm.**

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41

Q And you are asked by Skylar if you all want to smoke a joint, right?

A Yes.

Q And you -- you say yes, right?

A Of course.

Q Is that a 'yes'?

A Yes. That was . . .

Q And you go into the washroom because, as you described, Mike doesn't like people smoking outside of the washroom, right?

A Correct.

Q Put the fan on, clear some of the smoke out?

A Yes.

Q Right. So you go into the washroom and Skylar goes into the washroom, and Dustin and [REDACTED] four people, right?

A Yes, there's four of us.

Q And it's a pretty small washroom, I take it?

A Yes. It's not -- it's actually a medium size washroom, but it's not like -- there's a hall and like -- it's like -- it's like an average size bathroom.

Q And if you're using say the -- the witness box that you're standing in --

A Okay, from this wall --

Q -- right from -- you know, right -- right from maybe, you know, the whole box itself.

A Okay. Well, let's pretend that this is the door to get in, right. Then there's a wall there --

MR. FLYNN: Perhaps if the witness could just give a size description rather than --

A Okay. Maybe like 10 x 12 feet, maybe like more, maybe less.

Q MR. WAGER: And it's got a standup shower in it?

A It's got a standup shower in it.

Q It's got a toilet in it?

1 A It's got a toilet.
2
3 Q It's got a sink in it?
4 A A sink. It's got a sink. It's just a sink, a counter.
5
6 Q Right. And anything else? Any other parts to go --
7 A A mirror.
8
9 Q Mirror. That's in the usual spot, above the sink?
10 A Yeah.
11
12 Q And the shower doesn't have -- like it's a shower. It doesn't have a tub or anything --
13 A No tub.
14
15 Q attached to it. So you -- you can only shower in it, right?
16 A Yeah.
17
18 Q And when the four of you go in do you all go in at once?
19 A Yes.
20
21 Q And Skylar has the joint?
22 A Yes.
23
24 Q And you described it as pretty potent shit, I think were the words you used, or stuff?
25 A No, it was potent stuff.
26
27 Q Stuff.
28 A It was -- it was really potent was my -- I think what --
29
30 Q And --
31 A -- my quote was.
32
33 Q And by 'potent', meaning it was pretty strong, such that you didn't have to take that
34 many drags to get high. Am I right?
35 A Well, no, it was -- it was -- it was good and the quality was good. But the fact that I
36 was incarcerated for 45 days, it just like brought it out that much more, so.
37
38 Q So it was strong to you?
39 A Oh, it was strong to me. It was normal to everybody else. I think I was -- I was
40 sitting there, Huh, you know.
41

1 Q You hadn't had pot in a while then is your point?

2 A Yeah, exactly that.

3

4 Q And when you say it's potent, you mean that it was very strong when you smoked it,
5 right?

6 A Yes.

7

8 Q And you got high pretty fast?

9 A Yeah.

10

11 Q So do you have alcohol with you in the bathroom when you are -- when you're
12 drinking, too -- sorry.

13 A I'm just trying to think

14

15 Q When you're in the bathroom are you drinking, too?

16 A I'm trying to think. No, I think -- I think -- no, no, █████ put a mickey away for
17 herself. Like that was -- like she was drinking everything else, too, but she had a
18 mickey for -- stashed, right.

19

20 Q You saw that yourself in her pocket?

21 A Yes, I saw that. I saw it's like a little -- I can't remember what it was, Royal Reserve,
22 I believe.

23

24 Q And when you were in the washroom did you see it in her pocket?

25 A No. She was wearing skinny -- just skinny jeans. I remember that. She -- she had it
26 stashed. I think it was in her bag or something.

27

28 Q Did you see her take it out and drink it in the washroom?

29 A I di -- I'd like to say yes, but I -- I don't -- I -- I can't really be too sure on that.

30

31 Q So who lights up the joint then when you're in the washroom?

32 A Skylar.

33

34 Q And does it just get passed around then?

35 A Yeah, it passed around.

36

37 Q Everybody's --

38 A Take a couple -- couple drags and pass it on.

39

40 Q Everybody's smoking it?

41 A Yes.

1

2 Q Is it a average size --

3 A Yeah.

4

5 Q -- joint, the size of a cigarette?

6 A Yeah.

7

8 Q And full of marijuana?

9 A Yeah.

10

11 MR. FLYNN: And again, I don't know if my client knows an
12 average size marijuana cigarette is the size of --

13

14 A This is like -- she asked the same question over and over again.

15

16 Q MS. MOGRABEE: I said, "Size of a cigarette."

17 A M-hm.

18

19 Q The size of a cigarette, right?

20 A Yeah.

21

22 Q And you say that it's passed around. And I take it you see ██████ smoking the
23 marijuana, as well?

24 A Yes.

25

26 Q And how many drags does she have? Does she have more than you, about the same?

27 A The same.

28

29 Q You guys finished the marijuana cigarette in the washroom, right?

30 A Yeah.

31

32 Q Did you guys light up any other marijuana cigarettes in the washroom?

33 A No.

34

35 Q Just the one?

36 A Just the one.

37

38 Q And you guys started it and finished it in the --

39 A It was -- it was loud. But the bathroom's a little bit quieter. But like I -- I remember
40 like we were passing it on. I was talking to Dustin. Skylar was talking to ██████
41 because Skylar and ██████ they -- they liked each other. Like they -- you know,

1 Skylar's bisexual. [REDACTED] like -- like bisexual, as well, you know.

2

3 Q The -- the -- you earlier said that you went into the washroom couple and couple.
4 Remember saying that?

5 A Yeah. It was me and Dustin and -- or sorry, yeah, me and [REDACTED] -- or I think was
6 paired up with -- because I was dancing more with Skylar.

7

8 Q So you -- so did you see Skylar coupled with Dustin then?

9 A Kind of, yeah, but not --

10

11 Q Is that -- is that why --

12 A -- not really. I was -- it was more me and Skylar, and the Dustin and her, kind of
13 Like it kind of seemed like that. But then they left like the bathroom. And then --
14 because Skylar talked to [REDACTED] I don't know what was said between them. They --
15 they were -- they were talking. And then -- then -- and then Dustin and Skylar left.
16 Like they were the first ones to leave, right. And I noticed that she stayed behind.
17 And that's -- like I was like, Really, right. And then she just kind of looked at me
18 and smiled. She's like -- you know. And I was like, you know.

19

20 Q Okay, so --

21 A And then I started saying -- like I started saying that I liked her. That's when I
22 started --

23

24 Q And I -- I want to stop you there because --

25 A Yeah, okay.

26

27 Q I -- I just want to get some of these details right. You guys smoked a joint.
28 Everybody's smoking it in the bathroom, right?

29 A Yeah.

30

31 Q And it's one joint?

32 A One joint.

33

34 Q And --

35 A Passing it around.

36

37 Q -- everybody's high at that point. Am I right?

38 A Yeah.

39

40 MR. FLYNN:

41 able to -- to I don't know if my client would be able to tell what the other peoples'

1 condition was, whether they were high or whether they were not high. He would have no
2 basis to -- to even give that answer, Sir.

3

4 Q MS. MOGRABEE: Did they look high to you?

5 A We smoked a joint together, yes.

6

7 Q And this bathroom, I take it the door is closed, am I right, at this point in your -- in
8 the bathroom with everyone?

9 A Yeah, we had the door closed. Skylar and Dustin open the door and leave and me and
10 [REDACTED] stay behind.

11

12 Q And there's no music going on in the bathroom, I take it?

13 A We can hear the music, but, no, we don't have a stereo in the bathroom, no.

14

15 Q It's quiet in the bathroom?

16 A It's -- it's quieter, yes.

17

18 Q And you can hear what people are saying in that small space, right?

19 A Like if you were -- if you weren't talking, yes.

20

21 Q Okay. And you say you see [REDACTED] and Skylar talking to each other?

22 A Yeah.

23

24 Q And this is in the bathroom?

25 A Yeah, yeah, girl talk, boy talk, right.

26

27 Q So you were talking with Dustin?

28 A I was talking with Dustin, yes. Me and Dustin were friendly.

29

30 Q And she was talking with Skylar?

31 A Yes.

32

33 Q And you don't know what the two of them were saying to each other?

34 A No, I really couldn't tell you, like really.

35

36 Q And then, after that happens, then everybody but [REDACTED] and you leave the bathroom?

37 A Yes.

38

39 Q And it's just you and her in the bathroom?

40 A Yes.

41

1 Q And you lock the door. Is that what --

2 A Yeah.

3

4 Q -- happens next?

5 A Yes.

6

7 Q And you --

8 A Skylar left. I shut the door. I locked the door.

9

10 Q Now, you heard --

11 A I was closest to the door.

12

13 Q You heard █████ say that she went into the washroom and threw up in the washroom?

14 A Yeah. That's -- I heard that, yes.

15

16 Q You did hear that?

17 A Yes.

18

19 Q So you knew she was throwing up when she was in the washroom?

20 A No, she wasn't throwing up in the bathroom.

21

22 Q Well, what was she doing?

23 A We were sitting -- we all left. We went into the bathroom together to smoke a joint together, all four of us. That's what happened.

24

25

26 Q But that -- but that wasn't my question. We've covered that. I'm asking you about
27 this part of █████ story that you heard.

28 A Yes, yes, I heard --

29

30 Q Let me finish.

31 A I heard her lie, yes.

32

33 Q You heard her say that she went into the bathroom to throw up. You heard that, right?

34 A Yes, I heard that.

35

36 Q So she says she went into the bathroom and threw up in the toilet. Do you remember
37 her saying that?

38 A Yes.

39

40 Q Okay. That's something that you knew about at that party, too, didn't you, that she'd
41 thrown up in the bathroom?

1 A No, she was not throwing up in the bathroom.

2

3 Q So you say that never happened at all?

4 A That never happened, no.

5

6 Q So she never went to the washroom to throw up, and then you came in. It was --

7 **A Okay.**

8

9 Q -- you guys were in smoking a joint. That's how you ended up in the washroom?

10 A Yes.

11

12 Q That's your story?

13

14 **MR. FLYNN:** I believe the story was that the four of them
15 went into the bathroom together.

16

17 A The four of us went into the bathroom.

18

19 **Q MS. MOGRABEE:** Right. And then --

20 A You know what, subpoena Dustin Goodhue. He'll -- he'll -- he'll -- he'll -- he'll tell
21 you the same thing.

22

23 Q I'm just asking you. You're here now. I'm asking --

24 **A Yes.**

25

26 Q -- that's how it happened, according to you?

27 A No, that is how it happened, period.

28

29 Q So the throwing up -- [REDACTED] throwing up, you knew nothing about?

30 A That -- that -- that was nonexistent. That was -- that was -- that was fabricated.

31

32 Q Now, when the people you say leave the room, leaving you and [REDACTED] in the
33 bathroom, you say she was just standing there, right?

34 A Yeah, she was -- she was standing there. She stayed behind.

35

36 Q She stayed behind.

37 A She stayed behind.

38

39 Q And --

40 A And then we started talking.

41

1 Q And you started to say to her, you know, I like you?

2 A I like you. You're -- you kind of have this like tomboyish kind of appearance. I --
3 I -- I find you very attra -- I -- I might have like said, You're really cute. And then
4 she said something to me, too, along those lines.

5

6 Q What did she say?

7 A I can't even remember, man. This is like -- this is three years ago. Like she said --
8 she said that -- she -- she said that she liked me. I -- I said a bunch of things to her.
9 Like I -- I -- I told her that she was like really pretty and all this stuff, right. And
10 then -- and then -- and then like I -- I kissed her. I kissed her. She kissed me back.
11 And then we -- we started making out, right. And then I -- I can't -- like -- like we
12 were making out. And -- and she -- this is -- okay, this is -- this is kind of awkward
13 for me, but we -- like I -- I -- she's sitting on the counter like this. Like she's -- like
14 the counter is right here, right. And (INDISCERNIBLE) like this, right. So I'm --
15 I'm kissing her, making out with her. She's kissing me back. She -- she's -- she goes
16 up on the counter like this, right. And I -- I -- I pull her pants down. And I started to
17 perform oral sex on her, right. And like I was -- I -- I told her like -- I said -- I
18 said -- I said that she has a really nice pussy. I remember saying that. Like those are
19 my words to her exactly. This is -- like, again, this is awkward for me. I said that
20 like she had -- it was -- it was really nice, right. And then she's like, Oh, thanks,
21 right. Like she was all smiles.

22

23 And then -- and then like I -- I pull my pants down, right. And she -- that's when she
24 grabbed -- she -- she grabbed my dick, all right. And she -- she said -- she's like, Oh
25 my God, you got a really big dick, right. And I was, Oh. I was like, Thanks, you
26 know, right. And then she -- then she said -- she's like, Oh, shoot, like do -- do you
27 have a condom? And I'm like, No, I don't, but like I'll -- I'll pull out, right. And
28 then she's like, Oh, okay. So that's -- that's what happened.

29

30 And then we -- we -- we started having sex. Like it was -- it was a really awkward
31 position because of the sink, right, like the counter. And so like -- like I -- I had to
32 like lift her legs up. And like it was -- I had to do some manoeuvring. And it was --
33 so we were going at it. And then like I tried to change positions, so I -- I put her --
34 her butt -- like, okay, there's the beginning of the sink right here. And -- and then --
35 and then like there's like the tap. And so she kind of like dipped into the sink a bit.
36 And it's -- the -- the top is like -- like hit her back like, I guess. And then that's --
37 and -- and then like I came shortly after. Like I -- I didn't even last two minutes, you
38 know.

39

40 And I -- I -- I apologized. I said like -- like, Look, I usually last a lot longer, but, you
41 know, it's -- it's been a while, right. And she's like, It's okay, because like I -- I -- I

1 came a lot, I guess. Like I -- I came on the -- on the sink, on the cou -- on the
2 counter top. I came on her stomach. I think I got some on her -- on her leg, too.
3 And I was like, I -- I apolo -- I was like, Oh, I'm so sorry, like because I tried to like,
4 you know, aim it away. And then I accidentally got her.

5
6 So I was like, Oh, God, here, like let me help you out with that, right. And like I
7 took -- I -- I -- I actually washed her. I cleaned her up before I cleaned myself up.
8 Like I took some like toilet paper and I was like, Oh, here, you know. And then --
9 and I was like -- and she -- and then -- and then we ended up in the shower. Like I
10 started washing.

11
12 Q Okay. And I'm going to -- and I'm going to get to the shower.

13 A Okay.

14
15 Q I asked you what it was that you were saying to her in the bathroom when you --

16 A I told you. Like I said that she has --

17

18 Q Yeah, I know that.

19 A Okay.

20

21 Q And I'm not finished asking you questions about that, okay.

22

23 THE COURT: Try and answer just the question that's asked.

24

25 A Okay. All right.

26

27 THE COURT: Listen very carefully to the question. And if
28 you can say 'yes' or 'no', that's also better. And if you can answer it in a sentence,
29 that's better than three minutes' worth.

30

31 A Okay.

32

33 Q MS. MOGRABEE: So I want to understand what you're
34 understanding, too, okay, because I wasn't there. So you are tell -- you're
35 complementing her when you -- when everybody leaves the washroom, right?

36 A Yes.

37

38 Q You're complimenting her, saying how pretty she is, right?

39 A Yes.

40

41 Q You're saying --

1 A I was complimenting her on her appearance, yes.

2

3 Q Right. And she's not saying anything to you in response to that, is she? She's just
4 listening to you?

5 A No. She said -- she said that she liked me, too. I -- I remember that. She -- she -- it
6 was -- it was definitely mutual. It's -- it's mutual, yes. I can't remember what she
7 was saying. Like she was -- she said that I -- like I look good because like, you
8 know, I had my hair done nice and like, you know, I was -- I was -- and then, you
9 know, like I was -- I was -- like I was in like better shape than I am now, right, and
10 like I weighed a little bit more. And like she was -- I'm pretty sure she was
11 complimenting me on that. I'm -- I'm not a hundred percent sure, but like there --
12 there was -- there was words exchanged --

13

14 Q Do you not remember everything that she said because you had been drinking and
15 smoking pot?

16 A Like I -- I do remember pretty much like most of everything that she says, but
17 there's -- there's probably some stuff that is not there because, you know, not just the
18 drinking and the pot alone, but it's like this is three years in the past, you know. Like
19 I am not lying about anything that I'm saying.

20

21 Q You said that she was leaning against the counter when you were saying this?

22 A Yes.

23

24 Q Was it, in your mind, so she could sort of hold herself up because she was --

25 A No.

26

27 Q -- pretty drunk?

28 A No, no. No, no, no. No, she was --

29

30 Q Did it happen like that?

31 A -- was sitting -- it was like this, lounging.

32

33 Q So she was just leaning against the counter, casually --

34 A Yes.

35

36 Q -- lounging, and the two of you were talking to each other?

37 A Yes. She was facing me. And she had her hands on the counter like behind her.

38

39 Q And when you say that it was mutual, in your mind, you felt that she liked you, right?

40 A Yes.

41

1 Q She was interested in you?

2 A Absolutely. She made that very clear.

3

4 Q And she made that clear by saying to you, I like you. Is that right?

5 A Yes. Yes.

6

7 Q And that, in addition to her earlier comment before with the dancing, you took that to
8 mean, well, she must really like me because she also likes my dancing, right?

9 A Yeah.

10

11 Q And I take it you would have still been aware that she had been drinking quite a bit
12 that night in those moments when you were in the washroom with her, right?

13

14 MR. FLYNN: I wonder if that question might be loaded, Sir.

15

16 A We were all drinking, yes.

17

18 MS. MOGRABEE: Nothing wrong --

19

20 MR. FLYNN: I don't know if it was an issue of quite a bit
21 that she had been drinking. I don't know there's any evidence to saying quite a bit, Sir.

22 And I just don't -- I --

23

24 THE COURT: Mr. Flynn, I think it's -- my overriding
25 impression is that everybody had drank a lot.

26

27 MR. FLYNN: Very good then.

28

29 THE COURT: And this has been established a hundred -- 200
30 times so far --

31

32 MR FLYNN: Very good, Sir.

33

34 THE COURT: -- in-chief, by the Crown, by you, and now in
35 cross-examination perhaps several dozen times, too.

36

37 MR. FLYNN: Thank you. I'll withdraw it.

38

39 Q MS. MOGRABEE: So you know that when you're in the washroom
40 in those moments, that she and yourself have had quite a bit to drink and now you just
41 smoked a marijuana joint, right?

1 A Yeah.

2

3 Q And she's telling you that she likes you, right, and she says those words, I like you,
4 too?

5 A Yes.

6

7 Q And she smiles when you're complimenting her, right?

8 A M-hm.

9

10 Q Yes?

11 A Yes.

12

13 Q She told you earlier that she likes your dancing, right?

14 A Regarding to that, yes.

15

16 Q Right. And everybody except you and her have left the washroom, right?

17 A Yes, that is correct. May I ask for like a washroom break? I -- I really --

18

19 THE COURT: Certainly.

20

21 MS. MOGRABEE: That's fine.

22

23 A need to use the bathroom.

24

25 THE COURT: It is -- it's almost time for the lunchbreak

26 anyway.

27

28 MS. MOGRABEE: That's fine.

29

30 THE COURT: Is this an opportune time?

31

32 MS. MOGRABEE: We can do.

33

34 THE COURT: All right. In the circumstances, I needn't warn

35 the witness.

36

37 MR. FLYNN: Of course, Sir.

38

39 THE COURT: Okay. And, Mr. Flynn, my criticism wasn't

40 directed at you.

41

1 MR. FLYNN:

Oh, no, Sir.

2

3 THE COURT:

No, it wasn't directed to you.

4

5 MR. FLYNN:

Oh, no.

6

7 THE COURT:

What time, counsel? Is quarter to 2 a good

8 time?

9

10 MS. MOGRABEE:

It's fine for me.

11

12 MR. FLYNN:

Even maybe 1:30, Sir?

13

14 THE COURT:

One thirty would suit me.

15

16 MS. MOGRABEE:

That's good.

17

18 THE COURT:

All right.

19

20 MS. MOGRABEE:

I'll be here.

21

22 THE COURT:

One thirty. Thank you, Sheriff.

23

24

25 PROCEEDINGS ADJOURNED UNTIL 1:30 PM

26

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1 Certificate of Record

2

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4 proceedings in Provincial Criminal Court held in courtroom 1006 at Calgary, Alberta, on
5 the 1st day of August, 2014, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

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41

1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2

3 August 1, 2014

Afternoon Session

4

5 The Honourable

Provincial Court

6 Judge Camp

of Alberta

7

8 H. Mograbee

For the Crown

9 P. D. Flynn

For the Accused

10 A. Ubhi

Court Clerk

11

12

13 **Ban on Publication**

14

15 MS. MOGRABEE:

Sir . . .

16

17 THE COURT:

Please sit down, counsel.

18

19 MS. MOGRABEE:

Thank you.

20

21 MR. FLYNN:

Sir . . .

22

23 THE COURT CLERK:

In custody in person, Alexander Wagar.

24

25 **Discussion**

26

27 MR. FLYNN:

Thank you, madam clerk.

28

29 MS. MOGRABEE:

Should mister sheriff bring the accused down,

30 Sir?

31

32 THE COURT:

Yes, please.

33

34 THE SHERIFF:

He actually is in transit, Sir.

35

36 MR. FLYNN:

He's --

37

38 THE COURT:

Thank you, sheriff.

39

40 MS. MOGRABEE:

He's in --

41

1 THE SHERIFF: Transit.
2

3 MS. MOGRABEE: Thank you.
4

5 THE COURT: Sheriff, do you have to stand, or can't you get
6 yourself a seat there?
7

8 THE SHERIFF: Absolutely, Sir. Safety wise, absolutely, we're
9 actually supposed to be -- he's in custody and --
10

11 THE COURT: I understand but can't you sit? Do you have to
12 stand the whole time?
13

14 THE SHERIFF: I'm afraid I have to, Sir --
15

16 THE COURT: Okay.
17

18 THE SHERIFF: -- stay standing up.
19

20 THE COURT: All right. But you are certainly allowed to ask
21 for a break if you need one.
22

23 THE SHERIFF: Yeah, sure. No, sure.
24

25 THE COURT: This isn't meant to be an endurance test.
26

27 THE SHERIFF: (INDISCERNIBLE) sitting down --
28

29 THE COURT: Yeah, we can --
30

31 THE SHERIFF: -- safety wise standing, Sir.
32

33 THE COURT: Fair enough.
34

35 THE SHERIFF: Thank you.
36

37 MS. MOGRABEE: Sir, while we're waiting for the accused I can --
38

39 THE COURT: Oh --
40

41 MS. MOGRABEE: -- tell you that I anticipate that I'll be finished

1 this afternoon sometime.
2

3 THE COURT: A surprise ending, Ms. Mograbee. Just when
4 you -- you -- we think you never will you suddenly do.
5

6 MS. MOGRABEE: Finish, you mean? Well, it's got to --
7 everything ends at some point, including when I'm on my feet. In any case, I'm
8 wondering if you might be giving -- be able to give us an idea --
9

10 THE COURT: Yes.
11

12 MS. MOGRABEE: -- of your availability.
13

14 THE COURT: And I was going -- I was going to get my --
15

16 MS. MOGRABEE: Your diary.
17

18 THE COURT: -- my schedule. I'm sorry for --
19

20 MS. MOGRABEE: Did you want me to just finish what I'm doing
21 now and then we could take a break, and -- I -- I leave it to you.
22

23 THE COURT: Ms. Mograbee, let me rush while he's coming
24 down here --
25

26 MS. MOGRABEE: Sure.
27

28 THE COURT: -- and --
29

30 MS. MOGRABEE: Thank you.
31

32 THE COURT: I'll be -- it'll take me two minutes.
33

34 MR. FLYNN: Very good, Sir. Thank you, Sir.
35

36 (ADJOURNMENT)
37

38 THE COURT: Thank you. Please sit down.
39

40 MS. MOGRABEE: Thank you.
41

1 MR. FLYNN: Thank you, Sir.
2
3 THE COURT: And the good news is, I am in assignment court
4 next Wednesday, Thursday, and Friday.
5
6 MS. MOGRABEE: And do you think you may be in a position to
7 render a decision by that time?
8
9 THE COURT: I doubt it.
10
11 MS. MOGRABEE: I mean, that--
12
13 MR. FLYNN: What I -- I assume --
14
15 MS. MOGRABEE: -- that would mean --
16
17 MR. FLYNN: -- we could do our closing.
18
19 MS. MOGRABEE: Are you saying we're going to do our closing
20 at that time?
21
22 MR. FLYNN: Yes.
23
24 THE COURT: That was my understanding.
25
26 MS. MOGRABEE: All right.
27
28 MR. FLYNN: That was -- yes.
29
30 MS. MOGRABEE: Sorry, I skipped over that. Yes, that makes
31 sense.
32
33 THE COURT: Well, look, how about this.
34
35 MR. FLYNN: Yes, Sir?
36
37 THE COURT: If you can give me the skeletons of your
38 anticipated arguments, I can at least ponder and depending on how much more
39 sophisticated the arguments get next week I'll do my best.
40
41 MR. FLYNN: -- I'm prepared to give a summary of my

1 closing, Sir, and allow you to --

2

3 MS. MOGRABEE: The other -- other option, just, you know, to --
4 to try to figure out what might work best here, is for us to give you written argument.
5 That way you have it. And then when we appear in front of you perhaps our appearances
6 would be quite brief, given that it's in writing. That's -- that's another thing I would
7 suggest.

8

9 THE COURT: I don't know if that -- that it's fair to expect
10 counsel to give me written arguments by next Wednesday.

11

12 MR. FLYNN: I -- I don't have the capability, Sir, to -- to
13 provide you with --

14

15 THE COURT: Why -- why don't you give me an
16 (INDISCERNIBLE) argument today without -- in no way binding --

17

18 MS. MOGRABEE: Yes.

19

20 MR. FLYNN: Oh, no, of course.

21

22 THE COURT: -- I mean, it's -- it's -- all right.

23

24 MS. MOGRABEE: All right. We can do that.

25

26 THE COURT: Let --

27

28 MR. FLYNN: I'm very --

29

30 THE COURT: -- let's get ready for the cross-examination.

31

32 MR. FLYNN: -- comfortable with that, Sir.

33

34 THE COURT: Mr. Wagar, back here, and remember you're
35 still under oath.

36

37 ALEXANDER SCOTT WAGAR, Previously Sworn, Cross-examined by Ms. Mograbee

38

39 A Okay.

40

41 THE COURT: Okay. And please remember to listen very

1 carefully to the questions, and try and answer the questions as briefly as you can.

2

3 A Okay.

4

5 THE COURT: Don't answer questions that haven't been
6 asked. Try yes/no, or one sentence answers.

7

8 A I'll do my best, Sir.

9

10 THE COURT: Okay. I know it's hard, it's your first time
11 (INDISCERNIBLE) it's -- it's not something you're very used to.

12

13 MS. MOGRABEE: May I, Sir?

14

15 THE COURT: Whenever you're ready, Ms. Mograbee.

16

17 MS. MOGRABEE: Thank you.

18

19 Q MS. MOGRABEE: All right. So before the break I was asking a
20 question, and I'm going to start from the beginning of that question again, okay?
21 You've already said that you felt a connection with [REDACTED] and this was out when
22 there was dancing going on --

23 A Yes.

24

25 Q -- that you felt that, right? And when you were dancing you say that she was facing
26 you, and she complimented you on your dancing, right?

27 A Yes.

28

29 Q And when you ended up in the washroom with everyone, she also stayed -- and -- and
30 everyone left, she stayed behind with you, right?

31 A Yes, she did.

32

33 Q By the way, did you lock the door when everybody left?

34 A Yes, I did.

35

36 Q And you were complimenting her when you were alone with her in the bathroom,
37 right?

38 A Yes. She was complimenting me, as well.

39

40 Q And when you say that she was complimenting you, the compliment was, I like you,
41 too, right?

1 A Yeah.

2

3 Q That was --

4 A She --

5

6 Q -- what she said.

7 A -- I think she might have said, like, You have nice hair, or something along those
8 lines. I was like bigger, I was like working out, yes.

9

10 Q Right. So she may have said something about your hair.

11 A Yes.

12

13 Q And, I like you, too.

14 A Yes.

15

16 Q And when you were complimenting her as well, she was smiling at you? Did I --

17 **A Yes**

18

19 Q -- understand you correctly?

20 A Yes.

21

22 Q And she was leaning against the bathroom counter?

23 A Yeah, just like this.

24

25 Q Facing you?

26 A Yes.

27

28 Q And this was while you were talking to her, right?

29 A Yes.

30

31 Q Saying -- complimenting her, et cetera, right?

32 A Yes.

33

34 Q And you were moved pretty close to her at that time, right?

35 A Yeah, we moved together, yes.

36

37 Q She moved off the counter, did she?

38 A She did. We were standing facing each other. We started making out.

39

40 Q Right. So she's facing you leaning against the counter, and you're close to each other
41 at that point, right?

1 A Yes.

2

3 Q And again, she's smiling at you.

4 A Like we're -- we're -- we're kissing each other. We're making out now.

5

6 Q And -- and you leaned in to kiss her, right? Is that what happened?

7 A Yes.

8

9 Q And she didn't say anything to you at that point.

10 A She kissed me back.

11

12 Q And then you would have pulled her pants down next, right?

13 A That's after -- yeah, a few more minutes of us making out, yes.

14

15 Q And she had a button on her pants that broke off when you pulled her pants down,
16 right?

17 A Don't recall.

18

19 Q Could have happened?

20 A It's a possibility.

21

22 Q And she's not saying anything to you at that point either, right?

23 A No. She -- she's -- like she's sitting on the counter. I -- I pulled her pants down and
24 I started eating her out. I performed oral sex, and then -- and then it went from there.

25

26 Q But she doesn't say anything to you when you're -- you're eating her out, to use your
27 words, does she?

28 A No, I -- I complimented her. I said she had -- and I quote, and this is really awkward
29 for me, I said that she has a -- I said, You have a nice pussy. Like it's -- like I -- I
30 complimented her on that --

31

32 Q And --

33 A -- and she said, Thank you.

34

35 Q And when you were eating her out, she looked at you in that moment, didn't she?

36 A Oh, absolutely.

37

38 Q Yeah. And you took that as an okay for you to continue, right?

39 A Yes. That was . . .

40

41 Q Now, she described you as putting her onto the bathroom counter by lifting her up

1 onto the bathroom counter. Do you remember her saying that?

2 A Yes, I remember her -- her saying that.

3

4 Q You did that, right?

5 A Yes, I picked her up and put her on the -- the bathroom counter, yes.

6

7 Q And you described moving her legs, as well, over your shoulders. Did you do that,
8 too?

9 A Yeah. Like we were -- we were like trying different positions. That's -- that's what
10 we were trying to do. Like she was on the counter, and then she -- I -- I didn't -- I --
11 I never -- I didn't pull her pants off completely. Like I kind of like stepped inside,
12 and like her pants were still on. And she lifted up her legs, and that's -- that's what
13 we were doing.

14

15 And like the -- the -- it was awkward. Like the counter was a little bit lower, right,
16 and she's like shorter than me, right, and like I'm -- like I said, I'm 6'1", right. So it
17 was like -- we were like manoeuvring around. Like we -- we knocked a bunch of
18 stuff off the -- off the -- off of the counter. Like everything like toothbrushes and
19 stuff were scattered everywhere --

20

21 Q You're--

22 A -- towels.

23

24 Q -- but you're the one taking off her pants, right?

25 A Yes.

26

27 Q And you're the one who lifting -- lifting her on the counter, right?

28 A Yeah, but that's --

29

30 Q Okay.

31 A -- that's after -- like I -- I pulled my pants down as well, and she --

32

33 Q Is that after you pulled her pants down --

34 A Yes.

35

36 Q -- you pulled yours down.

37 A Like I was -- I was eating her out. I was, sorry, performing oral sex on her, and
38 then -- and then I -- I -- I stood up. I -- I pulled my pants off, too, right. She -- she
39 grabbed my penis. She said, Oh my God, you've got a really big dick, as her exact
40 words. And then I was like, Oh thanks, right. And she -- I put her on the counter.
41 Like I -- like 'cause she was over here, right, and like a little bit on the corner. And

1 then I put her like by the -- the sink area.

2

3 Q You say you're putting her. Is that you moving her around?

4 A Yes. She -- she put her arms around me -- around my neck, like around me like this,
5 right. And then I grabbed her legs and I -- I moved her to the sink.

6

7 Q And you're moving her legs, too, right?

8 A Kind of, yeah. Like we're like trying -- like we were trying like different positions to
9 make it work.

10

11 Q But you're not -- you're not saying to her, Can I try this position or that position?

12 You're just moving her, right?

13 A I was like -- trying to think. I was like, Let's move over here, and she's like, Yeah,
14 okay. And then -- yeah, it was like -- it was -- she -- she was -- she was assisting me.
15 She was like -- you know, she was -- you know.

16

17 Q So like I say, you remember she testified in the courtroom and she talked about again
18 the moment in time when she says you were saying things to her before you
19 performed oral sex on her, and during. You remember her saying --

20 A Yeah.

21

22 Q -- thing -- you remember her saying things like, You -- that is, you, Mr. Wager, said
23 that you liked her body and her tight little pussy.

24 A No.

25

26 Q You didn't say that?

27 A I don't think I said that. I might have said that but, no, not like I -- I said that she
28 was cute and that she -- she had like this tomboyish kind of look to her, you know,
29 and I -- I found her attractive. I -- that's -- that's what -- but I -- I did say -- I did -- I
30 did compliment her on her vagina, yes. I gave her some compliment towards that.

31

32 Q And she said to you, Look, I like you as a friend but not like that.

33 A No. She never said that.

34

35 Q Never said that?

36 A Not once.

37

38 Q You never asked her at any point in time in the washroom like, Can I take -- can I
39 kiss you? Can I take your pants down? Anything like that?

40 A No, I -- I -- no, we kissed each other. I might have -- no, I don't think I did. It was
41 just I -- I went over. I kissed her, right, and like I leaned back and she kissed me

1 back. She leaned forward and kissed me, right. And then -- and then like we -- we --
2 we made out for a bit. And -- and then I -- I -- I said like I wanted to -- I told her I
3 wanted to eat her out, and she said okay. She said, Yes.

4
5 She -- like I -- I was like -- I was like, Oh my God, I -- I really want to eat you out.
6 And then she said -- she's -- I'm pretty sure she said, Yes. And then like -- I -- I --
7 like, man, this happened three years ago. This is really hard. She's sitting on the
8 counter. Yeah, and then I told her I wanted to go down on her. She allowed me to
9 do so.

10
11 And like I -- like I performed oral sex on her, and then -- and then -- you know, like
12 my -- pulled my pants down, and -- and then she -- she then grabbed my penis, and
13 she -- she said I had a big dick, and that was --

14
15 Q Now, when you were performing oral sex on her, you asked her if she liked that,
16 didn't you?

17 A May -- maybe. I -- I -- I asked her if -- no, I think I said -- I said more along the
18 lines as like -- like I -- I -- I think -- I think I -- I said that she -- she was --

19

20 THE COURT:

That she what?

21

22 A Like I'm -- I'm trying to think this through. I'm trying to -- like I'm trying to give
23 you an honest answer here. I think I -- don't remember. I ate her out. Okay. I -- I
24 might have.

25

26 Q MS. MOGRABEE: And she said, No.

27 A No. She nev -- she did not say no once.

28

29 Q So you say you might have said, Do you like that? You say you're not sure if you
30 said that, right? Yes?

31 A Yes.

32

33 Q But you are sure --

34 A Sur --

35

36 Q -- that she said no, even though you don't remember the question that you asked.

37 A No. I know for a fact that she didn't say no, 'cause I'm not a rapist. I would never
38 force myself on a girl. Like if she would have said no, I would have stopped right
39 there. That's the kind of person that I am.

40

41 Q She said that you took your pants off. That she tried to get off the counter to put her

1 pants back on. That happened, too, right?

2 ANo.

3

4 Q And she said that you said you were going to lick her vagina. Do you remember that
5 happening?

6 A I remember eating her out. I remember telling her I was going to eat her out but she
7 didn't try to get off the counter, no.

8

9 Q Well, she tried to get off the counter after you were performing oral sex on her, didn't
10 she?

11 A No, she did not.

12

13 Q She said, I was getting off the counter to hop off and put my pants back on. And your
14 pants are just off and you say, I'm going to fuck you.

15 ANo.

16

17 Q You didn't say, I'm going to fuck you?

18 A No, I didn't.

19

20 Q You just went ahead and put your penis --

21 ANo.

22

23 Q -- in her vagina. But you did, right? You did --

24 A I did --

25

26 Q -- put your --

27 A -- I did have sex with her but I didn't -- I didn't -- I'm -- I'm saying, No, to the -- to
28 you saying that -- or to her saying that she tried to get off the counter and get away
29 from me. That's -- that's not -- that's not what happened. That's not the truth.

30

31 Q Did you ever say, I'm going to fuck you?

32 A I -- I asked her -- I -- I -- I asked her if she wanted to fuck, yes.

33

34 Q Oh, that's something new that --

35 A Like--

36

37 Q -- you haven't mentioned before.

38 A Isn't it? Like I'd be start -- like I started eating her out, and then I came up and then

39 I -- I -- I said, yeah, like I -- I can't remember, man. I -- I know I remember -- I
40 remember her complimenting me on -- on -- on the size of my penis. I remember

41 her -- her doing that.

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Q And you took that as a . . .

A She -- she grabbed my -- my -- my penis, and she grabbed it hard. And she's like, Oh my God, and she's looking at it, right. She's like, You've got a -- you -- you've got a -- she said I had a big penis -- big dick, that's -- that's the proper term that she used.

Q And she said to you, You cannot fuck me without a condom.

A No. She said, Do you have a condom? And I said, I don't. And -- and then I -- I said, Hey, I'll pull out early -- I'll pull out right away. And she -- she -- she said, Yes.

Q And she's stand --

A She said, Okay. She said, Okay.

Q And she's standing in the bathroom when -- when you are having this exchange about the condom, right?

A Yeah, she's --

Q She's off the counter --

A -- she's -- she's got her -- she's -- yeah, she was -- she was standing, and then she -- she -- I remember her grabbing me. She -- she -- she's probably -- she was standing, yes.

Q And then you pick her up and put her back on the counter, don't you?

A After she -- after we exchanged words, I said, Yes. Yeah, I -- I think I got her. She put her arms around my -- around my neck like this, like a -- like a -- like a Muay Thai clench, kind of like that, so she's like pulling herself up and then I moved her to the -- to the sink -- or to the counter like in front of the sink. And then we started going, and that's when she -- she fell into the sink.

Q And -- and you put her up into the sink, did you?

A Not deliberately, no.

Q But that's where you placed her nonetheless.

A Like in front of the sink, yes.

Q And then --

A And then --

Q -- and then --

A -- and then as things happened and she -- her butt went into the sink.

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Q And it's true that your penis was not able to go all the way into her vagina, right?

A No, 'cause we were like -- the angles that we were working at, it was -- it was -- it was difficult, yes.

Q And you're touching her at this time, touching her waist, her body, putting your hand into her shirt at this point, right?

A Don't really recall. I remember -- I remember making out with her. I remember kissing her. I remember putting my hands through her hair.

Q And she's not saying anything to you at that point, is she?

A No, not at that point. We were -- we were kissing.

Q And isn't it true that she was pushing you off because you -- she said that you were hurting her because your penis is so big?

A No. She --

Q Never happened.

A Never happened. She never -- she never pushed me off.

Q She never complained about that?

A No, she never did. Not once.

Q And the pushing motion that she described with pushing you at your shoulders, pushing forward, never happened either?

A Never happened.

Q How -- when she went into the sink like you were describing as you were having sex, did you pull her back out of the sink?

A I -- I -- I think we might have like rea -- rearranged our positioning.

Q Was that something that you did yourself? You just moved her?

A Well, yeah. I know her -- her butt was in the sink, and like it was -- I think the top was like digging into her tail bone. I was -- and then -- I mean, 'cause I saw her put her hand back and I'm like, Okay, here, let's go -- let's move this way. So we moved a little bit over to the side, and then I -- I -- I ejaculated shortly thereafter.

Q Before that, for a time she was moving and hitting the faucet -- her lower back was hitting the faucet, right?

A I do believe so, yes. Like her -- her buttocks was in the sink.

1 Q And going back to the -- the whole condom issue, she did say to you, Do you have a
2 condom? You agreed with that, right?

3 A Yeah. I said --

4

5 Q You --

6 A -- No, I don't.

7

8 Q -- you said, No, you don't. And then she said, You can't without a condom --

9 A No --

10

11 Q -- didn't she?

12 A -- she did not say that. She did not say that. I said --

13

14 Q You just said you didn't have a condom and then what, you put your penis --

15 A I said, No, I don't have a condom. I don't --

16

17 Q Yeah.

18 A -- have a condom, I -- and I said, I'll pull out. I will -- I -- I won't -- I won't come
19 inside you.

20

21 Q And then you just put your penis in her vagina.

22 A No. No. She said, Okay.

23

24 Q She said, Okay, to you --

25 A Yes.

26

27 Q -- at that point --

28 A She --

29

30 Q -- in time.

31 A -- she gave me the okay, yes.

32

33 Q And then you say you ejaculated --

34 A On her stomach.

35

36 Q -- on the counter and on --

37 A A little --

38

39 Q -- her stomach.

40 A -- on her stomach. Like I pulled off to the side, and I got her leg, might have got
41 some on her stomach, and I'm -- I'm -- I'm not 100 percent sure but I think she might

1 have accidentally sat in it, right. And then -- then I -- I wiped her off.

2

3 Q You wiped her off.

4 A Yes.

5

6 Q Why did you wipe her off?

7 A Just being common courtesy.

8

9 Q And you cleaned up the counter as well, yourself?

10 A Yeah, it was -- it was my mess, so, yes, I did.

11

12 Q And then she was standing there in the washroom when you were cleaning the
13 counter, right?

14 A No, I actually -- I cleaned her off first. I mean, I got her to stand up, I -- I cleaned
15 her -- like I -- I wiped off her stomach, wiped off her leg, and then I -- I wiped -- like
16 I -- I flipped the toilet paper over, and then I -- I got the -- the counter. And then I
17 threw it in the toilet. And then I was like -- and then we ended up in the shower.

18

19 Q You turned the shower on.

20 A It might have been -- I -- I -- I'm trying to think. I think I did. I think I'm the one
21 who turned on the shower. And then -- then we went in the shower, and I began to
22 like clean her off --

23

24 Q Now, she says that you --

25 A -- and myself, as well.

26

27 Q -- you led her into the shower. Did you do that?

28 A No. We were kissing, and then we both ended up in the shower.

29

30 Q And you did take her shirt off, as well, before going into the shower, didn't you?

31 A Helped her undress, I'm pretty sure I did, yeah.

32

33 Q Pardon me?

34 A I helped her undress probably, yes.

35

36 Q How come you helped her undress?

37 A Common courtesy. She -- she put her hands up like this, and then I -- I pulled her
38 shirt off. And my -- I helped her with her bra.

39

40 Q Were you moving her around, and taking her clothes off --

41 A No. No.

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Q -- because she needed help with you to do that?

A No. She didn't need help. It's just it's more convenient 'cause she -- like I'm just going to demonstrate. She -- she started taking her shirt off like this. She was -- she was like this right here, and then I took the shirt off from -- from there.

Q And when you're in the shower at one point -- and again this is a 4 x 4 shower? You described that earlier.

A Four by four, so.

Q Those are the words you used, 4 x 4.

A Four by four, yeah.

Q So a little bit smaller than --

A I think so.

Q -- the inside of that witness box.

A Yeah, about there.

Q So the circumference --

A In -- in -- inner box, the inner --

Q The inner part of --

A -- square --

Q -- the box.

A -- here, yeah.

Q All right. And you said that the two of you are in the shower at one point --

A Yes.

Q -- and -- and your brother comes in, Lance.

A No. First Michael Gallinger came in. And --

Q Did you see him yourself?

A Yeah, I -- I -- I looked to see like who was -- who was in the bathroom. And he just kind of like, Whoa, and he turned around and he walked out, right.

Q And is this a shower that has glass --

A Glass --

1 Q --doors--

2 A -- yes.

3

4 Q -- that are --

5 A See-through.

6

7 Q -- sort of frosted?

8 A Half frosted, half -- half clear.

9

10 Q Lower half frosted, top half clear, is that right?

11 A I think so. I'm not 100 percent sure but, yeah, I -- I do believe so.

12

13 Q So if two people were sitting in that shower it would be pretty tight to move around,
14 wouldn't it be?

15 A Yes, it was. But like -- like she -- she sat on top of me. I was -- I was sitting down.

16 I had my -- my butt on the -- on the -- like I was --

17

18 Q You were --

19 A -- sitting over the drain, and she was -- like she was -- she -- she straddled me. Like
20 she was on top of me, and like I -- I helped to wash her hair as like -- and we were
21 like kissing, like making out. And -- and, okay, at one -- at one -- at one point there
22 Mike came in, turned around, walked out. And then we're -- we were making out
23 again.

24

25 My brother came in the bathroom, and he -- he looked. Like he was -- he was -- he
26 was -- he was -- I'd have to say he was jealous, and like he -- he was -- he was -- like
27 he looked, right. And he's just like -- he kind of froze there for a minute, right. And
28 then she looked up -- she looked up, saw him. She yelled at him, Get the fuck out,
29 and then we went back to making out --

30

31 Q Did your brother --

32 A--and--

33

34 Q -- look into the shower with a smile on his face, and comment about [REDACTED] vagina,
35 something about a landing strip or it being shaved? Something about a landing strip?

36 A He -- he -- he -- he might have. He might have. I can't really recall the words 'cause
37 I remember -- I remember very clearly her yelling at him to get the fuck out. So he
38 might have said something rude or something stupid like that. My brother's not a very
39 nice guy. Like he's a very rude person.

40

41 Q And it's at this point when all this is happening that you are on your knees, and you're

1 performing oral sex on her.

2 A I think at one point I did perform oral sex on her in the shower, and then she came
3 and sat down on top of me. And then we were like making out again.

4

5 Q So when she says that you told her to pick up the soap and then inserted your penis in
6 her vagina from behind, that didn't happen either, I take it?

7 A I -- no. I don't think so.

8

9 Q It could have happened?

10 A No. No. I --

11

12 Q Didn't happen for sure.

13 A For sure didn't happen. I'm going to have to say that. Like it was -- we were in the
14 shower together. We were -- like we washed each other off. Like I -- I wouldn't -- I
15 wouldn't just do that. I wouldn't be, Oh, you dropped the soap and like -- you know
16 what I mean. Like that's not some -- something I would do.

17

18 Q Was that something that you would do maybe if you were drunk?

19 A No. I'm -- I'm a -- I'm a gentleman. I don't -- I don't do stuff like that.

20

21 Q She doesn't say anything to you when you're in the shower and you're performing oral
22 sex on -- or does she?

23 A No, she -- she -- this -- she decided -- she's like, yeah, let's like -- because the shower
24 was hot. She's like, Here let's -- let's cool it off a bit, right. I was like -- I -- I was
25 extremely intoxicated, and like I -- I -- I -- first like I -- I came like really fast. I
26 apologized to her for that, right. I was like, Usually I last longer.

27

28 And -- and then -- and then I was like -- 'cause I was -- I was extremely intoxicated,
29 she tried to ride me in the shower and then -- then I think we went to oral sex from
30 there. Her -- no, she was like trying to ride me, and then she's like -- she said
31 something about like make the water cooler 'cause it like will -- like will -- she --
32 she -- she turned the water down to make it colder so like it wasn't so hot.

33

34 And then like we were like -- so we'd like feel each other's body heat more, right. So
35 like we were like really close, and then I just -- I -- I couldn't get it up a second time.
36 Like I -- I did but then it kind of went away, and then that's -- that . . .

37

38 Q You didn't tell her to wash you, did you?

39 A I might have got her to wash my back, like -- but, no, we were like washing each
40 other. Like I was washing -- I was -- I washed her back, washed her hair, and like,
41 you know, she -- she washed me, I washed her, you know.

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Q She says that you told her to wash you.

A I'm trying to think. Yeah, I think I -- I think I got her to wash my penis. Like she -- she washed me.

Q And then you washed her.

A Yeah, it might have been at the same time, or we would have like taken turns washing each other. But, yeah, we -- we spent some time in the shower. Like it was -- it was like -- yeah.

Q And then after the incident you do see each other a couple of times, right?

A Yes, we do. We've seen each other a number of times actually.

Q And you see each other out on the street downtown, right?

A Yes. Scotia Centre. I remember that.

Q Just where you usually hang out?

A Not really. I just -- I was walking by, and I saw her. Like she was walking in, she was --

Q Yeah.

A -- going into Scotia Centre and I'm like, [REDACTED] look, you've got to like stop this. I -- like, you know, I -- I -- I -- I told her, I -- like I was really straight up with her, right. I was like, I know why you did what you did but, you know, that was -- that was because -- like that's why -- that was you -- the problem you had with Lance, [REDACTED] And I said, Like you've got to -- please, like stop this, you know.

And then she's like, Yeah, okay, I will. She said -- like she -- she said she was sorry, right. And then I -- I went and I gave her a hug. I said, Look -- look, I forgive you, okay. You know. And I was like, Okay. Like -- Lance -- like Lance was there. Like -- he's like, you know, I'm sorry, you know. I can't remember if she hugged him, too. She -- I think Lance might have like want -- wanted to give her a hug and I was just like, Look, man, everything is in the past, dude. Like just don't. Don't fucking do this to me, you know.

And then she's like -- she -- she said, Yes, like I'm sorry -- sorry, Alex, you know. It's just like she -- she was straight up with me. She's like, Look, your brother has said some really nasty things to me. He was trying to videotape me as he was saying all these nasty things to me --

Q Did you see that?

1 A No. I know what I was told. I remember like -- I ran into her after that 'cause she
2 didn't do anything to stel -- like to quench those like the rumours about me, right.
3 And then I ran into her in like -- like -- what was -- it was like snow was on the
4 ground again, and it was like a year after, maybe a little -- a year and a bit, and -- and
5 I ran into her, right. And I -- I was just -- I was being really straight up with her.

6
7 I was like, Look, [REDACTED] like I need you to stop screwing around, you know. I asked
8 her -- actually, no, she was -- she was drinking with some friends, and then we went
9 into the stairwell in this apartment building, and we sat there and we shared a beer
10 together. And I asked her, I mean, well, do you want to smoke a puddle, right, 'cause
11 that's --that's crystal meth. It like turns into a liquid and whatever, anyway.

12
13 She's like, Yeah, I would love -- I would like that, right. And I'm like, Okay, cool.
14 So we sat there, and we just had a heart-to-heart, right. And I told her -- I'm like,
15 Look, man, like there's -- like these -- these rumours that you started about me are --
16 are really horrible. And I -- like I told her -- I'm like, Look, like just go to court, tell
17 them what really happened, and then -- and then she -- she said, Yes.

18
19 And I was like, Okay, man, [REDACTED], if you don't I'm going to try -- I'm going to come
20 after you -- I'm going to come after you for deformation of character, right, 'cause I --
21 I'm like really big about my name. Like I -- I can't have these like things being said
22 about me, you know.

23
24 Q Well, why? What -- what's your concern?

25 A What's my concern? Okay. First off, I -- I -- this is something I did not do. Second
26 off, I was in jail for something I did not do. I was attacked in jail because of
27 something I didn't do. I was on unit 1. I refused to go to PC because I -- I -- I did
28 not want to do time with like people who touch children. Like I -- I never wanted to
29 be around those people in the firstplace.

30
31 And so I -- I -- I tried -- I fought -- I fought my ass off to stay on unit 1. I got
32 jumped. Like you can look up the medical records, everything. Patrick, you saw me
33 in the -- like in the interview. I -- my -- I -- I had a cracked orbital. I had a broken
34 nose. I had a laceration above my eyebrow. And over something I did not do. That
35 is --

36
37 Q Did you tell people what you did when you were in jail?

38 A I told people what I was charged with, yes. I told them what -- what I did. I told
39 them that -- what happened.

40
41 Q M-hm.

1 A I told them what I didn't do.

2

3 Q And then you got beat up.

4 A No, it lasted -- like 'cause I had people on the unit that know people that were at the
5 party. I -- I stayed on the unit for just over a month before -- before it -- it all came
6 and turned to shit on me.

7

8 Q You -- you -- you did have bail on this though a couple of times, didn't you?

9 A Yeah, I did. One thing --

10

11 Q And you --

12 A -- I -- I really didn't like though is when I go to -- I had to go to court and figure
13 out -- I had to go to the court building and figure out who my probation officer was,
14 right. And then I could just -- I could

15

16 Q Okay, I --

17 A -- I could just --

18

19 Q -- you just -- you're just going on --

20

21 THE COURT: Yeah, Ms. Mograbee --

22

23 MS. MOGRABEE: I'm going to move on --

24

25 THE COURT: --you -- you started this line of

26 cross-examination --

27

28 A (INDISCERNIBLE) let me finish --

29

30 THE COURT: -- I'm not sure it's --

31

32 MS. MOGRABEE: I -- I'm prepared to move on.

33

34 THE COURT: Thank you.

35

36 MS. MOGRABEE: You know, this -- this witness, as you can see,
37 does offer a lot more than what's asked.

38

39 THE COURT: He does.

40

41 A Right.

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Q MS. MOGRABEE: I want to go back to that moment in time where you say that you had a conversation with [REDACTED] about this incident. And, you know, you -- she asked -- you asked her rather, you know, to tell the truth.

A Yes.

Q You remember saying that?

A Yes, I remember saying that.

Q And -- and did -- you said to her, Look, when I was eating you out you made eye contact with me. It was all consensual. Do you remember saying that to her?

A No, I said, What happened between us was consensual, [REDACTED]

Q You -- you told her that.

A I was like, Yeah, that was -- that was 100 percent consensual. And I asked her, I'm like, I -- I -- I told her like numerous times, I'm like, look I know -- and she confessed. Like she -- she told Megan Oxley, right --

Q Okay, I'm not asking you what she told anybody else.

A She -- she --

Q I'm asking you --

A -- told me --

Q -- what she told you.

A -- she told me words from her own mouth is that my brother is a piece of shit, and that's -- this is -- this is what this is all over. She -- she felt used.

Q So she's --

A Lance said that she -- Lance -- my brother -- this is what she said. She said that my brother said that we made this plan. Ah-ha you've been played, bitch, you know. And you -- and he was -- like my brother is not a good person. Like he -- he -- he didn't get -- he didn't get the girl so he turned really, really bitter and he wanted to make her feel like shit for it. That's -- that's what the bottom line is.

And I did not make no freaking plan to do this. Like when we hooked up, it was consensual. Like I was dancing. She was complimenting me on my dancing. We were drinking. It was -- it was a good time, you know. And then like we moved to the bathroom and like the compliments continued, and then we had sex. And she followed me out of the bathroom, and she was holding my hand. I had my arm behind my back like this.

1
2 MS. MOGRABEE: Those are all of the questions, Sir. Okay.
3 Thank you.

4
5 THE COURT: Thank you, Ms. Mograbee. Re-examination,
6 Mr. Flynn?

7
8 MR. FLYNN: Actually there's just a couple questions that I
9 hope will clarify some of the matters that came up during my friend's cross-examination I
10 think that may assist the court.

11
12 Mr. Flynn Re-examines the Witness

13
14 Q You had earlier in your testimony said that you had locked the bathroom door. Is that
15 right, sir?

16 A Yes.

17
18 Q What I'm wondering is, how did Mike get into the bathroom if you had locked the
19 door?

20 A I don't know. I -- I don't -- I -- I think I might have screwed up. I -- like 'cause like
21 I -- I -- you know, I shut the door and I -- I thought maybe it was -- like I locked it
22 and then Mike came in the bathroom. Like it -- it wasn't locked. The door -- like the
23 door wasn't locked.

24
25 Q Why did you attempt to lock the door, sir?

26 A To prevent anybody from coming in. Me and [REDACTED] were -- like we stayed behind. I
27 mean, like we waited for everybody to leave.

28
29 Q My friend had asked you that you were moving the -- I'm sorry, you were moving
30 [REDACTED] -- sorry, [REDACTED] -- that you were moving [REDACTED] on the sink. What was [REDACTED]
31 doing while you were moving her body on the -- on the sink area?

32 A She -- she's pulling on the back of my neck, like for stability. She grabbed me like
33 this, and she pulled herself up and like I kind of moved her like that. Like I grabbed
34 her legs -- she had her legs like somewhat around my -- like around my -- around my
35 waist. She still had her pants on. I didn't completely take her pants off, right, so we
36 kind of had to manoeuver 'cause she's like wearing skinny jeans and it's like, you
37 know . . .

38
39 Q I think my friend earlier in -- in cross-examination of you, sir, had asked why did you
40 want -- well, in -- in essence if you had indicated that you were trying to bring Skylar
41 to court with you. Why were you attempting to bring Skylar to court with you on the

1 first--

2 A 'Cause Skylar's --

3

4 Q -- appearance, sir?

5 A -- a key witness. She was there.

6

7 Q What--

8 A So was -- as was Michael --

9

10 Q -- what were you hoping --

11 A -- Gallinger.

12

13 Q Skylar could do at court, sir?

14 A Sorry?

15

16 Q What were you hoping Skylar would do at the courthouse?

17 A What was I -- what I was hoping is that she would come and tell the truth. Like she
18 would tell them -- everybody exactly what happened --

19

20 Q Sir, you had also --

21 A -- like what she saw.

22

23 Q -- sir, you had also spoken to my friend about -- or my friend had asked you about
24 disclosure. Do you know what disclosure is, sir?

25 A Briefly.

26

27 Q What is disclosure to you, sir?

28 A Disclosure, like the -- the disclosure of like everything that's happening, I guess, like
29 the -- like the documents.

30

31 Q What type of documents, sir?

32 A Like what the detective saw, what the det -- like when the detective came and
33 interviewed everybody, like all that stuff.

34

35 Q Did you ever share your disclosure with Skylar?

36 A Oh, Skylar?

37

38 Q Did you ever -- did you ever talk to Skylar about your disclosure?

39 A No, I didn't. I told -- I just -- I told Skylar straight up just to come to court for me.

40

41 Q Did you ever see --

1 A We --

2

3 Q -- your disclosure, sir?

4 A I -- I saw what I was being charged with. I never saw -- I never saw like what the
5 detectives saw, I never saw what the -- what -- like when he interviewed everybody.

6 I -- I never got to see any of that.

7

8 Q Did you ever see any of the interviews with any of the witnesses?

9 A No.

10

11 Q Did you ever see the statement from the complainant, [REDACTED]

12 A I think I saw it --

13

14 Q When?

15 A -- I -- I'm just not sure. I -- I -- I think this might have been the -- the first time I -- I
16 was given a promise to appear on this. I'm not 100 percent sure 'cause I -- I lost the
17 paperwork.

18

19 Q You had spoken earlier, sir -- you used different terms, and I -- I -- I really think it's
20 important that we have an idea of what you're talking about when you talk about --
21 you've used the word drinking, drunk, blackout drunk, inebriated --

22 A Yeah.

23

24 Q Do those terms all mean the same thing to you, or are there different levels of
25 intoxication?

26 A Those are different levels of intoxication, absolutely.

27

28 Q Okay. If we look at somebody as being sober, as being number 1, and somebody
29 being blackout drunk at number 10, where would you describe yourself during that
30 evening, between 1 and 10? And remember 1 is sober, 10 is blackout drunk.

31 A Well, I'd say that's kind of hard 'cause I was -- I was -- I was pretty -- I was pretty
32 good so I'm going to have to say six or a seven

33

34 Q Okay.

35 A -- six and a half.

36

37 Q And using the same scale of between 1 and 10, where would you say [REDACTED] was in
38 terms of intoxication?

39 A I'm -- I'm going to have to say she was -- she -- she didn't drink as hard as I did.
40 She -- she -- she was kicking back a little bit so I'd have to say she's around a five or
41 a six, five and a half.

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Q And in terms of the other people at the party, was there --

A Oh, Travis would have been like six or seven like myself, maybe a little bit more so 'cause it was his booze so he might have been like an eight.

Q And what was Skylar?

A Skylar, she -- she was kind of taking it easy 'cause she was drinking like a couple of nights before so -- but she still had a few drinks. She was pretty sober. I mean --

Q What was her number?

A -- she was smoking weed. She -- she had joints like --

Q What was her number for inebriation?

A Her number? I'm going to have to say like maybe a three or a four.

Q And what about Mike?

A Gallinger. Hard to say. He was pretty much like on his phone doing Facebook all -- all night. I think he had a few drinks, for sure. It's his house, right. I think -- well, actually you know what, Mike was -- Mike was drunk, too. I think he was about a six.

Q Okay.

A And -- 'cause like I -- I remember dancing with Mike, too. Like we were -- like I was -- we were like dancing together, and like acting stupid.

Q Is that the only indication that you had that Mike was 6 out of 10 -- was drinking

A Yeah.

Q -- because you were dancing with him?

A Yeah.

Q Were there any other signs of Mike being drunk?

A Not really. He -- he kind of holds himself together pretty good. He's a -- he's a quiet person. He's actually very polite, soft spoken.

Q So but for the dancing, what would you say his number would be for inebriation?

A Six, six and -- six and a half. Like there's no way he was as drunk as I was. I was -- I was like -- 'cause I -- I -- I drank -- I remember drinking more than him.

40 MR. FLYNN:

If I could have just one second, Sir? Those are

41 all my questions.

1
2 THE COURT: Thank you --
3
4 MR. FLYNN: Thank you, Sir.
5
6 THE COURT: -- Mr. Flynn. I have no questions. Thank you
7 for your -- for your evidence. You must go and sit back in the box.
8
9 A Thank you, Your Honour.
10
11 (WITNESS STANDS DOWN)
12
13 THE COURT: Is that the case for the defence?
14
15 MR. FLYNN: That is the case for the defence, Sir.
16
17 Discussion
18
19 THE COURT: Thank you. So, counsel, I'm going to ask for a
20 record now. I need only ask for the record of today. I think --
21
22 MR. FLYNN: A transcript, yes, Sir.
23
24 THE COURT: -- Ms. Mograbee, you already have the record,
25 and you've -- you've shared -- shared it with your learned friend, and you've --
26
27 MS. MOGRABEE: Not yet. I have the record up until today
28 started, so I can share that with the court and my friend, and then --
29
30 THE COURT: Would you do that? And I'll order the other
31 record but with the best (INDISCERNIBLE) in the world it's not going to be ready by
32 next Wednesday.
33
34 MR. FLYNN: We have an outside chance of it being available
35 Tuesday afternoon, Sir. And I realize --
36
37 THE COURT: I've heard that.
38
39 MR. FLYNN: -- that's very short.
40
41 THE COURT: It -- it's such a slim chance that there's no

1 point in --

2

3 MR. FLYNN: Yes, Sir.

4

5 THE COURT: -- in relying on that. I can tell you that my
6 notes are pretty comprehensive. My concern is always that they may not be absolutely
7 perfect.

8

9 MR. FLYNN: Yes, Sir.

10

11 THE COURT: So what would you like to do? My suggestion
12 is that you make your skeleton arg -- arguments now so that I -- I know the length of --
13 and the breadth of it.

14

15 MR. FLYNN: And -- and I'm quite prepared to do that, Sir, at
16 this time.

17

18 THE COURT: And then we come back on Wednesday and
19 you can give me proper argument and then when the -- the record comes I can compare
20 the argument to the record and I'll do a judgment soon after.

21

22 MR. FLYNN: Very good. And I'll be prepared on that basis,
23 Sir.

24

25 THE COURT: And if it is that -- that your arguments --
26 there's nothing in your argument which indicates that -- that the three of us have different
27 ideas of -- of what was said, then perhaps we needn't wait for the record. I can give a --

28

29 MR. FLYNN: I -- I don't believe so, Sir.

30

31 THE COURT: -- judgment more quickly. But let's -- let's
32 wait and see how the arguments progress before we commit ourselves on that. Does that
33 make sense, Ms. Mograbee?

34

35 MS. MOGRABEE: Yes, that's fine. The only -- the only thing I
36 would add is that the Crown would like to make full argument. I'm giving you just the --

37

38 THE COURT: Oh --

39

40 MS. MOGRABEE: -- outline.

41

1 THE COURT: -- Ms. Mograbee, fully understood.

2

3 MS. MOGRABEE: Yep.

4

5 MR. FLYNN: Yes, Sir. Generally, Sir, the position of the --
6 of the defence is that this was a consensual sex act between a young lady and a young
7 man. I think we have a fair bit of evidence, independent evidence, from credible
8 witnesses.

9

10 THE COURT: We have independent evidence from witnesses.

11

12 MR. FLYNN: Well, credible witnesses, the landlord Mike, as
13 well as Skylar. Their levels of inebriation have been described as different levels, but
14 generally they were the most sober people at this party. They've given evidence that I
15 think is very clear of the participation and consent by [REDACTED] with my client. Particularly,
16 with Mike being -- indicating that he was quite sober, that he was watching his house.
17 He was monitoring the activities. He didn't feel that there was any sense of danger for --
18 for [REDACTED]

19

20 He -- he indicates that he had gone into the -- into the bathroom and witnessed the
21 consensual sex act between the two parties in the shower and determined that everything
22 was proper and then left. We even have the young lady herself confirming that another
23 person had entered the -- the shower; this is the brother. And with corroboration by my
24 client, that she had started screaming at the brother to -- to get out. And -- and -- and I'll
25 stress, Sir, that at this point in the relationship with the brother and with [REDACTED] that they
26 have spent the day together, that they're -- the brother may have been having -- wanting
27 to connect up with [REDACTED] but there was nothing ari -- arose from that. But there was no
28 reason for [REDACTED] to have such animosity or such hatred towards the brother.

29

30 She makes accusations that later in the evening after the sex assault some comments are
31 made towards her. So when the youn -- the brother is in the shower there's no reason for
32 animosity on behalf of [REDACTED] but yet she -- she yells, Get the fuck out of here. And I
33 indicate, Sir, that that's a very positive sign that she was in a consensual sex act in the
34 shower and she really had no interest -- that it was not a -- it was not an assault against
35 her body, because she would have told the brother.

36

37 But the -- the fact that she asked -- demanded the brother to leave, I think, indicates a
38 very strong positive evidence, Sir, that this was a consensual act. We also have even the
39 conduct of the young lady after the fact, Sir. She continues to party. She con -- she --
40 she spends the night there. Only the next day after she leaves and she goes back to the --
41 to the -- to the -- to the Alex Program, or to the youth home, that she decides that she

1 was raped.

2

3 And I suggest that there was no evidence of that. I think that the -- I think the story that
4 my client has said on the stand I think is credible. I -- I think the idea of this young
5 woman being attracted to him, in this environment, with these type of social interactions
6 going on between this group of young people, I think it was reasonable in all the
7 circumstances that this young lady was attracted to him. There was foreplay that had
8 gone on previously.

9

10 It was very quick, Sir, I -- I acknowledge it's not similar to what I would consider to be
11 social standards of dating and copulating, but we -- we live in a different world and
12 young people have their own different styles than I did back in the '60s. Ultimately,
13 the -- the evidence, I think, that a lot of these witnesses have given is that these young
14 people were dancing. There was a -- a closeness about the group. We have the evidence
15 of both my client and Skylar saying that they all four of them went back to the bathroom
16 together to smoke this marijuana. It was sort of a couple thing Skylar had indicated.

17

18 Skylar indicated that she saw that these two were getting kind of friendly. So her and
19 Dustin leave the room and they leave these two together. My client's testimony is that
20 they -- they start to participate into a consensual make-out session. The make-out session
21 escalates quickly. My client performs oral sex on the girl with her cooperation. Then
22 further, with her cooperation they have sexual intercourse on the sink. They finish the sex
23 on the sink and then they then go to the shower and continue this sexual activity.

24

25 And then we have these two males come in and we have the testimony from Mike the
26 landlord saying he came in and there was no difficulties.

27

28 THE COURT: Mike had -- he says had speed that night.

29

30 MR. FLYNN: I'm sorry?

31

32 THE COURT: Mike said that he probably took speed that
33 night.

34

35 MR. FLYNN: And again, Sir --

36

37 THE COURT: So while he might not have --

38

39 MR. FLYNN: -- I don't know.

40

41 THE COURT: -- drunk that much . . .

1
2 MR. FLYNN: And again, Sir, I don't know how that would
3 necessarily of -- affect his testimony. And again, we don't know what type of speed. We
4 don't know even the effect of speed on --
5
6 THE COURT: Well, you made the point that he was one of
7 the soberer people at the party.
8
9 MR. FLYNN: He -- yes.
10
11 THE COURT: Maybe in terms of liquor, but if he's had speed
12 then he's perhaps not so reliable.
13
14 MR. FLYNN: Well, again, I'm -- and I don't know what the
15 effects of speed would be on an individual, Sir. There -- it --
16
17 THE COURT: Well, I'm -- I'm not -- I have no personal
18 knowledge.
19
20 MR. FLYNN: No, no, of course not, Sir.
21
22 THE COURT: But I'm assuming it doesn't make him more
23 acute.
24
25 MR. FLYNN: Well, no, Sir, but I -- my understanding, and
26 again, I don't know myself, Sir, but I understand that speed would be like a amphetamine,
27 like a caffeine, something to the effect of -- of a large --
28
29 THE COURT: So just like a Starbucks?
30
31 MR. FLYNN: I'm sorry?
32
33 THE COURT: Just like a Starbucks. I'm being facetious.
34
35 MR. FLYNN: Oh, sorry, Sir, I have (INDISCERNIBLE). To
36 the effect, Sir, again, the witness, I think, was very credible. He came to -- he -- he came
37 here. He was -- and this would be a Crown witness, Sir. They weren't able to locate
38 him. We were able to locate him and bring him in here as our own witness. I think he
39 was very credible. Saying, Yeah, it was at my house; I was sober. He said he may have,
40 Sir; he didn't indicate that he did. And I suggest, Sir, that his conduct here indicated that
41 he pretty well may not have. And again, I don't -- I don't want to speculate.

1
2 THE COURT: He may -- very well may not have what,
3 Mr. Flynn?
4
5 MR. FLYNN: Well, taken speed. He said that he may have
6 taken speed, Sir. He never said that he did.
7
8 THE COURT: Well, he said, Probably. He said, I probably
9 took speed. That was the modifier used.
10
11 MR. FLYNN: Well, and again, I -- I think it was the
12 indication -- well, and again, I -- I'm not familiar with the testimony.
13
14 THE COURT: But I'll give you -- I'll grant you this, he didn't
15 want to be here.
16
17 MR. FLYNN: Yes, Sir.
18
19 THE COURT: He was very obstinate and very unhappy at
20 being here.
21
22 MR. FLYNN: Yes, Sir.
23
24 THE COURT: He wasn't a -- a volunteer witness.
25
26 MR. FLYNN: No, Sir. But -- but again, I think that actually
27 adds to his credibility in the sense that he didn't want to be here, but he came here just to
28 tell his story. And his story -- and I think it was credible. I think it was credible even on
29 the face of maybe--
30
31 THE COURT: Well, what did he add to it? He -- he saw two
32 people -- he couldn't really see, he didn't look. He doesn't know whether the light was
33 on or off and --
34
35 MR. FLYNN: Well, I --
36
37 THE COURT: -- the glass was blurred. He --
38
39 MR. FLYNN: -- I -- I think he looked in --
40
41 THE COURT: -- what does he add to it?

1
2 MR. FLYNN: Well, Sir, I think he looked in and his first
3 issue, of course, was, you know, was -- is this something that's appropriate? Is this
4 something that's going on in my -- in my -- in my bathroom? Is this something that I
5 should be aware of? Is this -- is there even a sense of danger for the -- for the people
6 involved? It's his house. He goes in and he sees people having consensual sex. He said
7 himself --

8
9 THE COURT: No, he sees people having sex.

10
11 MR. FLYNN: He sees people having sex.

12
13 THE COURT: They don't -- the young lady doesn't even
14 know that he came in apparently.

15
16 MR. FLYNN: But he --

17
18 THE COURT: So she couldn't have appealed to him.

19
20 MR. FLYNN: She --

21
22 THE COURT: And he walks out.

23
24 MR. FLYNN: Well, he indicated as well, Sir, that he had seen
25 nothing in the conduct of the people having sex whereby his opinion that he -- it was
26 unconsensual. In his opinion it was consensual sex. He realized he was disturbing them
27 and he quietly exited, Sir. I think that his -- he -- he visually saw what -- what was going
28 on. It was a consensual sex act between two adults. He, at the height of discretion,
29 exited. He very well probably exited and I think the brother, being kind of a jerk, then
30 came in very shortly afterwards, realizing these two people were having sex in the
31 shower.

32
33 So he comes in, he looks in the shower, the -- the young lady sees him and doesn't
34 scream anything about, Oh, God, help me. It's, Get the fuck out of here.

35
36 THE COURT: I've got that point, Mr. Flynn.

37
38 MR. FLYNN: And I think that's very -- that's very telling,
39 Sir, particularly because remember, she had spent the whole day with this gentleman and
40 it wasn't a matter where this gentleman had -- had upset her in any way. He -- he had
41 made a -- a -- slight advances, you know, he had taken her to a movie, they had gone

1 clothes shopping, things along that, but it wasn't --

2

3 THE COURT: Well, not clothes shopping and he didn't take
4 her --

5

6 MR. FLYNN: Shoplifting. They went shoplifting. Yeah, I
7 hate to say it, they had indicated they went clothes shopping without money and I hate to
8 be -- to say that, Sir, but they were shoplifting. They were out --

9

10 THE COURT: And -- and they went to the movie without
11 paying.

12

13 MR. FLYNN: Without paying. They're -- and they're --

14

15 THE COURT: And the liquor that's -- was re -- regarded as
16 hers was stolen.

17

18 MR. FLYNN: I'm sorry, Sir?

19

20 THE COURT: The liquor --

21

22 MR. FLYNN: The liquor, yes.

23

24 THE COURT: -- that was regarded as hers by your client --

25

26 MR. FLYNN: Yes, and she opted to speak to that.

27

28 THE COURT: -- was actually stolen. It wasn't hers at all.

29

30 MR. FLYNN: She had spent the entire weekend, Sir, basically
31 enjoying a -- a party weekend, you know, stealing, going into stores stealing what they
32 want, walk into movies do what they want, steal alcohol. She was having a -- a party
33 weekend, Sir. And I think the evidence supports that, even her own evidence that she
34 was there for several days, she was partying it up with these people. I -- I think the
35 evidence is clear that this was a consensual act between two adults, Sir. I -- I -- I think
36 the -- I think there was enough consent that my client -- there's an air of reality to what
37 he perceived as this young lady had found him attractive on the dance floor. They had
38 seen each other previously. They had not communicated by any great level, but they had
39 an attraction to each other.

40

41 She indicated that she liked him. He indicated that he liked her. Things escalated

1 quickly. It's no presuppose, Sir, that I -- I think there's a definite air of reality to the
2 entire testimony that my client has given.

3
4 THE COURT: Mr. Flynn, do I have to accept his entire
5 version, or her entire version?

6
7 MR. FLYNN: No, Sir.

8
9 THE COURT: How -- how -- how does that work?

10
11 MR. FLYNN: And, again, it's always difficult, Sir, especially
12 with *R. v. W. (D.)*. You -- obviously the first test, I believe, is if -- if you don't -- if you
13 don't believe my client and you believe the comcom -- I'm sorry, Sir, I'm -- I'm --
14 I'm misstating it.

15
16 THE COURT: Well, if -- if I contradict his version --

17
18 MR. FLYNN: Yes, Sir.

19
20 THE COURT: -- is there sufficient in his version to exclude --
21 to allow me to accept that he was reasonable, that he had reasonable grounds for
22 accepting -- for believing that there was consent?

23
24 MR. FLYNN: I would say so, yes, Sir. I would say so.

25
26 THE COURT: And is there another test that I should be
27 applying? And I'm I'm sure Ms. Mograbee is going to be addressing me on that.

28
29 MR. FLYNN: Yes, Sir.

30
31 THE COURT: But how do you think I should approach this
32 thing?

33
34 MR. FLYNN: I think you need to -- with respect, Sir, I think
35 the trier of facts needs to ultimately look at all of these witnesses, determine the
36 credibility of each witness, and in an attempt try to take all of that information together
37 and make a conative story that makes sense of all of the factors. And -- and that this
38 one -- I think it's -- I think the evidence has been very strong, Sir, to indicate that there
39 was a mutual party going on, there was a -- an attraction between some young people,
40 the -- the -- Skylar says that her and her boyfriend go back into the -- to the bathroom
41 with these two other young people. They start to get frisky, they leave. That's pretty

1 strong evidence there. Then we have the evidence, again, of the -- of Mike.

2

3 And again, I -- I don't want to put too much onto whether Mike took speed or not. The
4 court has indicated that he said he probably did, but that doesn't mean that he did. And I
5 just say, with respect, that that could be taken -- taken with the -- the -- the weight of
6 that, Sir. If he had said he had taken speed then I say, Well, absolutely he did. If he had
7 said, No, I never did, then we could say that, but this is somewhere in between. And I
8 think it just has to be weighted as to his credibility on the stand.

9

10 THE COURT: Well, his credibility doesn't really enter into it.
11 She didn't see him come in or go out. The accused did and they say the same thing, he
12 came in, he was surprised, he exclaimed, and he walked out.

13

14 MR. FLYNN: Yes, Sir.

15

16 THE COURT: So it doesn't look like his credibility is -- or at
17 least his version is in doubt.

18

19 MR FLYNN: No, but -- but he --

20

21 THE COURT: It hasn't been put -- put into doubt by -- by the
22 Crown, I don't believe.

23

24 MR. FLYNN: And, yet, Sir, I don't have the advantage of
25 the -- of the dis -- of the transcript here, but if I remember, there was some type of a --
26 where we had spoken with him and I think it was somewhat of a -- there was questions
27 by myself, you know, It -- it was your house, you know, you're there to protect people or
28 if you had seen any danger you would have reacted. And I think he reacted very
29 positively --

30

31 THE COURT: Yes.

32

33 MR. FLYNN: -- saying, Oh, God, I would have done --

34

35 THE COURT: He did say that. I would have -- if -- if I'd
36 seen anything that I thought was untoward, I would have done something about it.

37

38 MR. FLYNN: Yes, exactly. And -- and I think in the absence
39 of that type of conduct we can speculate that there was nothing wrong going on. If there
40 was something wrong going on Mike would have dealt with it. The fact that Mike didn't
41 have to deal with it in the case that Mike never saw anything wrong --

1
2 THE COURT: That -- that doesn't affect the consensual
3 element of the sex except by implication.

4
5 MR. FLYNN: I'm sorry, Sir?

6
7 THE COURT: That doesn't affect the consensual element of
8 the sex except by implication. Now, you've got noncontinuing sex.

9
10 MR. FLYNN: It is, Sir, and I think this also goes to the
11 conduct of the young lady herself You know, this -- we're not talking a very short
12 period of time. We're talking -- the -- the -- the gentleman indicated that they -- that they
13 were fooling around and there was an issue of oral sex, and there was this issue of the
14 copulation on the sink, then there's the issue of them disrobing, going into the shower,
15 again, more foreplay, and again, I think another attempt at intercourse.

16
17 So it's just -- there's a -- there's a large amount of time there, Sir, which I think goes a
18 lot towards the conduct -- or the -- the -- the mental state of -- of -- of ██████████ And --
19 and again, I -- and I stress this, after the event itself, Sir, the -- the alleged assault occurs,
20 I think, between 10 or 11, somewhere in that time frame, but then -- then she goes back
21 out, she continues to drink. They continue to socialize, dance, and she continues with this
22 activity, then drinks more, then passes out in the morning, and then goes -- leaves the
23 next day. So I think her conduct, post the event, shows a lot of what her mind-set was,
24 that -- that she was not physically assaulted. That she was actually in a consensual sex
25 act and she continued her -- her ways at the party.

26
27 And again, we have the same type of evidence from Skylar as well, Sir, the female, when
28 she's asked whether there was any type of danger or any type of, you know, creepiness
29 going on, so to speak. She indicated, No, that everything was fine. Everything was
30 consensual from her perspective. She didn't see anything out of the ordinary. And if she
31 had seen something out of the ordinary she would have reacted as such. And I think she
32 was very firm in that testimony as well, Sir.

33
34 And again, we have the testimony, again, of this young lady, who again was initially a
35 Crown witness. The Crown was not able to locate her; we were. And we were able to
36 bring her in, in the afternoon. And again, she was a reluctant witness, Sir. She didn't
37 want to be here either, but again, her testimony, I think, was credible. I think it -- I think
38 it -- I think the young lady expressed herself very well. I think the idea that --
39 particularly of strength for my client is that she corroborates his -- his story that the four
40 of them had gone in together into the bathroom to smoke this marijuana.

41

1 And I -- and this flies directly in the face of what the -- ██████ is saying. And ██████ in
2 effect is saying, Oh, well, no, I went in to throw up and I'm -- and I'm reading my
3 Facebook for 20 minutes and then as I'm about to leave Alex comes in and shoves me
4 into the bathroom, and then closes the door, and then starts to attack me. That doesn't
5 make sense on the face of it, Sir, just because of the length of time.

6
7 This is the only bathroom at a party. She's --

8
9 THE COURT: Well, I don't believe there's any talk of an
10 attack really. There was --

11
12 MR. FLYNN: Well, he comes in --

13
14 THE COURT: -- instance.

15
16 MR. FLYNN: -- he comes in and he basically sexually
17 assaults her is what she's saying. She's saying that against her will he then takes down
18 her pants and while her pants are still on her legs starts to perform oral sex on her. And
19 then -- and then at some point he -- he then puts her -- rearranges her on the -- on the --
20 on the sink counter and starts to have intercourse with her. And ultimately, Sir, I just --
21 sorry, Sir, I lost my train of thought. I apologize to the court.

22
23 THE COURT: Mr. Flynn, what do I do with Skylar Porter's
24 evidence that she spoke to ██████ and asked her if she was going to have sex with Alex
25 and Alex said, Yes. Now, your learned friend said that -- I seem to recall that you
26 objected to that on the -- the -- the rape shield basis. What do you say about that?
27 Sho -- am I allowed to -- to take that into account? And I'm going to listen to
28 Ms. Mograbee in due course about that.

29
30 MR. FLYNN: I would suggest so, Sir, yes. I -- I suggest it
31 goes to the intent of the young lady. Intent to -- I think it also goes to the credibility of
32 the young lady particularly. If the young lady has -- and -- and again, based on what my
33 client has been saying, based upon what Skylar has said, based upon what Mike has said,
34 from my perspective, with respect, it appears to be a consensual sex activity between
35 ██████ and my client.

36
37 And in terms of Skylar's testimony, I -- I think it's very strong, Sir, part -- particularly
38 about her interaction with the young lady. So what the young lady is telling her that, Oh,
39 I like that guy. I could -- I could see me having sex with him. I think it's relevant, Sir.
40 I -- I think it's relevant as to the intent of the young lady, but also more so to her -- to
41 her -- to her lack of credibility, particularly because she is now very in

1 cross-examination she was saying, No, there was nothing consensual about it. He came in
2 and I didn't want him there and I tried to force him off me and he wouldn't listen to me.
3 But -- but the length of this alleged assault, which I could say was the length of the time
4 consensual sex assault, was of a -- was of -- was of a lengthy period of time, Sir.

5
6 And I just -- I will get more into that in my actual closing when I'm able to use the
7 transcript, but -- but I just suggest, Sir, that --

8
9 THE COURT: All right.

10
11 MR. FLYNN: Skylar's testimony ev -- with the adducement
12 of the intent of the young lady to potentially have sex with my client, I think it's very
13 relevant, Sir. And I think it is necessary.

14
15 THE COURT: Well, it's relevant. Whether or not -- there's a
16 lot of stuff --

17
18 MR. FLYNN: Oh, but -- but I think it's --

19
20 THE COURT: -- excluded by the rape shield provision --

21
22 MR. FLYNN: -- I -- I -- I think --

23
24 THE COURT: -- that is relevant.

25
26 MR. FLYNN: -- it's a very strong weight, Sir. I think the
27 weight of that evidence --

28
29 THE COURT: Yes, but am I allowed to look at it is the
30 question?

31
32 MR. FLYNN: Yes, Sir. In my --

33
34 THE COURT: What?

35
36 MR. FLYNN: The -- the evidence was -- and again, this is
37 what -- the evidence of the witness Skylar is saying what somebody said to her. This
38 isn't hearsay by any method, Sir. It's what was said to her for the purposes of laying the
39 basis.

40
41 THE COURT: Yeah, but it's -- it -- it has to do with sexual

1 conduct, evidence of sexual conduct.

2

3 MR. FLYNN: And again, Sir, there's a fine line, I think,
4 between sexual contact -- or sexual contact and liking somebody and moving in that
5 direction of a relationship. By this girl saying that she likes somebody, or wants to sleep
6 with him, that doesn't necessarily mean they're going to have sex with the person. It just
7 means that they like them, they're attracted to them, something could potentially arr --
8 derive from that.

9

10 Ultimately, Sir, I suggest that it's a -- it's a strong weight and I'm suggesting you can use
11 that evidence.

12

13 THE COURT: Thank you, Mr. Flynn.

14

15 MR. FLYNN: Thank you, Sir.

16

17 THE COURT: I have an idea of -- of what you're going to
18 argue more fully in due course.

19

20 MR. FLYNN: And, Sir, I hope that assists you.

21

22 THE COURT: Counsel?

23

24 MS. MOGRABEE: Yes, Sir. Since my -- my friend left off on that
25 issue with respect to Skylar's evidence, the Crown would respectfully submit that that
26 evidence is also hearsay. That wasn't evidence that was adopted or accepted by the --

27

28 THE COURT: Well, it wasn't -- it wasn't --

29

30 MS. MOGRABEE: -- complainant herself.

31

32 THE COURT: -- put to the complainant, that's true.

33

34 MS. MOGRABEE: And it wasn't put to the complainant. So that
35 evidence is problematic as well for that reason. So the Crown would submit that that is
36 not appropriate. In addition, the -- for you to rely on it. In addition, I would say that
37 even if that were true, and you have no basis to say that it is based on the way the
38 evidence came up, but just for argument sake, if you assume for a moment that that was
39 said, the fact of the matter is that a woman can change her mind at any point in time
40 during the sexual contact. So if --

41

1 THE COURT: Oh --
2

3 MS. MOGRABEE: -- one moment she said that --
4

5 THE COURT: -- granted.
6

7 MS. MOGRABEE: -- to someone then what happens when the door
8 is closed, that's the real relevant evidence that you need to look at.
9

10 THE COURT: Yeah.
11

12 MS. MOGRABEE: What other people say that they saw, that is
13 Skylar's evidence, that is Mike's evidence, what they say they saw before that bathroom
14 door was closed and the two of them were in there alone is not relevant to what happened
15 in the bathroom. That's the Crown's position, that it doesn't follow -- and this is -- this
16 is confirmed in the case law that if friendly behaviour or -- or what is perceived as
17 sexualized behaviour is taking place at an earlier time between the accused and the
18 complainant, that it doesn't follow that she would have been more likely to consent when
19 the sexual assault is alleged to have taken place. That is, thinking that is not permitted by
20 the law and --
21

22 THE COURT: Sorry, there -- there's authority, you say, for the
23 proposition that flirting sexual conduct before the -- the alleged assault is irrelevant?
24

25 MS. MOGRABEE: So number one, it's covered by section 276 and
26 that hasn't --
27

28 THE COURT: So you say it's --
29

30 MS. MOGRABEE: -- been properly addressed.
31

32 THE COURT: Well --
33

34 MS. MOGRABEE: So that's the -- that's the first thing that I
35 would say.
36

37 THE COURT: So you -- you -- you also say that 276 applies?
38

39 MS. MOGRABEE: Right.
40

41 THE COURT: Do you have authority for that proposition?

1
2 MS. MOGRABEE: I do. And I --
3
4 THE COURT: Thank you.
5
6 MS. MOGRABEE: -- I provided that --
7
8 THE COURT: I'd be grate --
9
10 MS. MOGRABEE: -- in the materials as well.
11
12 THE COURT: Oh, I -- I --
13
14 MS. MOGRABEE: So if you read those. What I did try to do --
15
16 THE COURT: Which -- which case deals with that?
17
18 MS. MOGRABEE: Well, Sir, you -- it -- it's really is --
19
20 THE COURT: I'll look for it.
21
22 MS. MOGRABEE: -- is -- it really is covered off in various cases
23 that you have there in the sense that there is reference to, Sir, previous sexual contact with
24 regard --
25
26 THE COURT: Oh, that's clear.
27
28 MS. MOGRABEE: -- other -- other individuals.
29
30 THE COURT: Clear. But we're not talking about that here.
31 We're talking here about a conversation between two young women about what one of
32 them is going to do shortly afterwards.
33
34 MS. MOGRABEE: Right. So in respect of that the Crown would
35 submit that that's potentially falling under section 276.
36
37 THE COURT: Well --
38
39 MS. MOGRABEE: But --
40
41 THE COURT: Okay. Let's just stop there for a moment.

1
2 MS. MOGRABEE: Right.
3
4 THE COURT: I'd -- I'd like to have authority, if -- if you can
5 provide it, for whether it does or doesn't fall under 276.
6
7 MS. MOGRABEE: Well, and in -- in that regard I would submit
8 that just the wording of section 276 discusses --
9
10 THE COURT: No you've got no --
11
12 MS. MOGRABEE: -- that.
13
14 THE COURT: -- direct authority? I'd have to --
15
16 MS. MOGRABEE: I can have a look to see if --
17
18 THE COURT: -- take the decision?
19
20 MS. MOGRABEE: -- I can find --
21
22 THE COURT: I'd be grateful.
23
24 MS. MOGRABEE: -- a conversation between two individuals.
25
26 THE COURT: I'd be grateful.
27
28 MS. MOGRABEE: I'll see if there's something more specific on
29 that. But the Crown would submit that that aside --
30
31 THE COURT: Aside from that you say that there's authority
32 for the proposition that looking at the conduct of the parties, flirting and touching before
33 the incident --
34
35 MS. MOGRABEE: Which the complainant denies, by the way.
36
37 THE COURT: Yeah, to be sure.
38
39 MS. MOGRABEE: Yeah.
40
41 THE COURT: But I -- I have to deal with W.(D).

1
2 MS. MOGRABEE: You do.
3
4 THE COURT: So let's just leave that aside for a moment. I'm
5 interested in the principle. You say that evidence of what happens before, never mind --
6
7 MS. MOGRABEE: Yes.
8
9 THE COURT: -- what one party says, but evidence of how
10 they touch each other, treat each other before is irrelevant?
11
12 MS. MOGRABEE: From those individuals, yes. From the
13 accused's perspective in terms of an assessment of what it is that happened --
14
15 THE COURT: Yeah.
16
17 MS. MOGRABEE: -- that -- that -- that's relevant because it goes
18 to his state of mind, which -- which is relevant to an assessment of whether the accused
19 can raise the defence of mistake in -- honest mistake in belief.
20
21 THE COURT: Sor -- sorry. So -- so it isn't -- it isn't
22 irrelevant. I must take notice of it for the purposes only of --
23
24 MS. MOGRABEE: Not what other --
25
26 THE COURT: -- honest belief?
27
28 MS. MOGRABEE: -- people say, but what the accused says
29 happened before.
30
31 THE COURT: But surely it's corroboration -- what he says can be
32 corroborated by other people? Let's assume he --
33
34 MS. MOGRABEE: Well --
35
36 THE COURT: -- says it and everybody else says, No, it didn't
37 happen. Then what do I do then? In this case other people say it did happen. But --
38
39 MS. MOGRABEE: Right.
40
41 THE COURT: -- what do -- what do I do if -- if they --

1
2 MS. MOGRABEE: It's wh --
3
4 THE COURT: -- surely I've got to look at what other people
5 say?
6
7 MS. MOGRABEE: Well, it's a bit complicated. It's a bit
8 complicated in terms of people's observations as to the friendliness between the two of
9 them.
10
11 THE COURT: M-hm.
12
13 MS. MOGRABEE: You know, you can -- you -- what I'm saying is
14 you can't take that and use that as a way to conclude that she was more likely to have
15 consented to the sexual activity later. That's the Crown's position.
16
17 THE COURT: Because she can change her mind?
18
19 MS. MOGRABEE: Right, she can change her mind.
20
21 THE COURT: But from his point of view it -- it lends an air
22 of -- of reality, perhaps. It -- it's --
23
24 MS. MOGRABEE: Right. In terms of what he says she was doing,
25 that is the complainant.
26
27 THE COURT: Yeah.
28
29 MS. MOGRABEE: You have to look at that to determine whether
30 that raises the defence of mistake in belief and consent.
31
32 THE COURT: And I can look at other people whether they
33 corroborate or contradict what he says in that regard, because if they contradict it
34 then his credibility --
35
36 MS. MOGRABEE: But not in --
37
38 THE COURT: -- his shot.
39
40 MS. MOGRABEE: But not what Skylar says, because that's
41 hearsay.

1
2 THE COURT: Yeah, I'm now talking about --
3
4 MS. MOGRABEE: And not adopted by --
5
6 THE COURT: -- the touching and the --
7
8 MS. MOGRABEE: Right.
9
10 THE COURT: -- the flirting and the --
11
12 MS. MOGRABEE: And I will break it down a little more for you
13 when I --
14
15 THE COURT: All right.
16
17 MS. MOGRABEE: -- come before you again. But you have to
18 look at what the acc -- the most important evidence is what the accused says he saw and
19 he experienced as it relates to an honest mistake in belief and consent as -- in other
20 words, as to his mind-set.
21
22 THE COURT: **And while we're dealing with this,**
23 Ms. Mograbee, can I look at what people say happened afterwards, affection shown
24 afterwards? Never mind whether she abused the first opportunity to report. I understand
25 that that is --
26
27 MS. MOGRABEE: Right.
28
29 THE COURT: -- no longer contemporarily relevant. But am I
30 allowed to look at the evidence of third parties and the accused who say she seemed
31 affectionate?
32
33 MS. MOGRABEE: Right.
34
35 THE COURT: She was following him around. She was
36 touching him.
37
38 MS. MOGRABEE: Right. Well, again, I don't know if it was
39 friendly touching or if it was, you know, was it holding of the hand. I know the accused
40 said she was holding his hand. I think you can look at that.
41

1 THE COURT: And Porter said -- said afterwards acting
2 warmly affectionate to each other.
3
4 MS. MOGRABEE: Oh, sorry, who said that, Skylar Porter?
5
6 THE COURT: Skylar.
7
8 MR. FLYNN: Skylar, I believe.
9
10 MS. MOGRABEE: Yeah.
11
12 THE COURT: Yeah, Skylar Porter.
13
14 MS. MOGRABEE: Right.
15
16 THE COURT: And Mike -- Skinner Mike said, Hanging out
17 with each other having fun -- sorry. Saw her following him into the livingroom and the
18 bedroom. I remember her following him and Lance was following her. I don't remember
19 Alex following her.
20
21 MS. MOGRABEE: Right. And -- and then there was further
22 cross-examination on that point where he conceded that he wasn't really sure exactly what
23 was happening. He recall -- he said that it -- he wasn't sure if it was just her going to
24 another room or if she was following her (sic) -- him rather. So -- and I'll go through
25 that --
26
27 THE COURT: All right.
28
29 MS. MOGRABEE: in more detail and properly in my -- in my
30 argument. The answer to your question is, can you look at that conduct? You can look --
31 you can look at all the evidence that you've heard.
32
33 THE COURT: Well, except --
34
35 MS. MOGRABEE: It's what you do with it that's relevant.
36
37 THE COURT: -- except the -- except the section 276.
38
39 MS. MOGRABEE: Right.
40
41 THE COURT: That -- that makes life very difficult for --

1
2 MS. MOGRABEE: If you use that particular evidence to conclude
3 that it's more likely that she consented to the sexual activity then that line of reasoning is
4 not permissible, because it is -- it -- because it is not indicative of what happened in that
5 room necessarily. And t here is a case --
6
7 THE COURT: So it -- it's useful -- sorry to interrupt you.
8
9 MS. MOGRABEE: It's okay.
10
11 THE COURT: Just so I understand. So it's -- I can use it for
12 his state of mind but not for the probabilities. That's what you're saying?
13
14 MS. MOGRABEE: Not for his state of mind as to the act that
15 took -- took place before that.
16
17 THE COURT: For the mistake in belief?
18
19 MS. MOGRABEE: No, you cannot. You have to look at his state
20 of mind before the sexual activity --
21
22 THE COURT: Okay. And the fact --
23
24 MS. MOGRABEE: -- not after.
25
26 THE COURT: -- and the fact that she's affectionate afterwards,
27 does that undermine her credibility?
28
29 MS. MOGRABEE: Not in the Crown's respectful submission. I
30 mean, you're -- you're now getting into thinking about ways that you would expect a
31 person to act after they've been sexually assaulted. And that -- that -- that can be a
32 dangerous --
33
34 THE COURT: All right. What --
35
36 MS. MOGRABEE: -- approach, because there isn't a way that
37 people are expected to act after something like that. And the --
38
39 THE COURT: Geez, well, that's what probabilities are.
40 Probabilities very often don't absolutely align with facts because human nature is infinite.
41 But you have to deal with probabilities all the time.

1
2 MS. MOGRABEE: Well, and -- and --
3
4 THE COURT: Chance is infinite.
5
6 MS. MOGRABEE: -- it really depends on how it is that you -- you
7 assess the evidence and -- and on what basis you make your findings. And -- and what
8 happens at the end has to be considered in light of everything when you're looking at --
9
10 THE COURT: Well, Ms. Mograbee --
11
12 MS. MOGRABEE: -- the defence at the end of the day.
13
14 THE COURT: -- do you have authority for the proposition that
15 I can't look at what happened afterwards? Do --
16
17 MS. MOGRABEE: Well, I'm not saying that you can't look at it.
18 I'm saying that you can't look at it to say that it's likely that she consented because she
19 was, you know, warm towards him.
20
21 THE COURT: Do you proposition for that?
22
23 MS. MOGRABEE: I can find it for you.
24
25 THE COURT: I'd be grateful, because it -- it seems --
26
27 MS. MOGRABEE: I can find it for you.
28
29 THE COURT: -- counterintuitive.
30
31 MS. MOGRABEE: You do have a case where -- and I can't
32 remember it off the top of my head, you do have a case where there was a -- a young
33 lady who was sexually assaulted and she, you know, she had been drinking, she was out
34 late, she --
35
36 THE COURT: Yeah, this was the --
37
38 MS. MOGRABEE: Right.
39
40 THE COURT: -- the 15-year-old.
41

1 MS. MOGRABEE:

I mean -- right. And -- and --

2

3 THE COURT:

Yeah.

4

5 MS. MOGRABEE:

-- and the court was very clear in saying, Look,

6 that's not a basis for -- for which to consider whether a person that is a complainant

7 consented to the sexual activity. And the -- the court went on to say that look, you have

8 to look at the totality of the evidence whether it makes sense in the circumstances that

9 you're dealing with. And, you know, bad behaviour or -- I won't call it bad behaviour,

10 because that's what -- a term of argument in this business, but if you look at, you know,

11 partying behaviour and -- and -- and people sort of acting, you know, in a certain way

12 because they -- they're in a party atmosphere and they -- they've been drinking, you have

13 to be able to look at the full circumstances of what you're dealing with. And particularly,

14 the fact that these individuals did not know each other.

15

16 THE COURT:

I think you're talking about --

17

18 MS. MOGRABEE:

That's the one.

19

20 THE COURT:

Yeah.

21

22 MS. MOGRABEE:

Yeah. You have to look at the fact that you

23 know, these individuals do not know each other. There's really not a lot of conversation

24 that's happening between the two of them the whole time that they're in the house

25 together. And it's very unlikely, the Crown would submit, in the circumstances that she

26 would have consented to -- to the -- the sex in that --

27

28 THE COURT:

Now you're arguing --

29

30 MS. MOGRABEE:

-- in that--

31

32 THE COURT:

-- now you're arguing --

33

34 MS. MOGRABEE:

-- bathroom.

35

36 THE COURT:

-- now you're arguing on the basis of -- of the

37 probabilities, which you said I shouldn't -- I shouldn't apply a moment ago.

38

39 MS. MOGRABEE:

Well, it's not probabilities. You -- it's not that

40 standard that you're applying here. You're -- you're looking at whether there is a

41 mistake, which clearly there is, because he testified that he understood --

1
2 THE COURT: So you're saying that there is no reasonable --
3 he shouldn't have reason -- he wasn't -- he wasn't of the reasonable belief that she was
4 consenting because he'd known her for a very short time?
5

6 MS. MOGRABEE: No, what I'm saying is that in order for an
7 accused to raise the defence that he was mistaken in his belief that she consented, it is not
8 enough for him to simply say, She consented. There has to be evidence that supports
9 his -- supports his contention that there is a reasonable -- sorry, that there is a -- an honest
10 mistake in belief in consent.
11

12 THE COURT: I understand that, but how -- how does -- how
13 does -- that's -- that's the easy part. The trickier part is how does your submission that
14 they'd only known each other for a short time play into that?
15

16 MS. MOGRABEE: Well, it's very strange that these individuals
17 would have been in the same house together and had very little conversation and then
18 ended up in the bathroom having sex together.
19

20 THE COURT: But this happens all the time, I'm afraid.

21
22 MS. MOGRABEE: Particularly when she says --
23

24 THE COURT: People get drunk. Young people's -- the morals
25 today are different from Victorian times. Aren't you stuck with antiquated thinking,
26 Ms. Mograbee.
27

28 MS. MOGRABEE: Well, certainly the evidence establishes that
29 they didn't have a lot of conversation prior to get -- prior to getting into that --
30

31 THE COURT: Sure.
32

33 MS. MOGRABEE: -- washroom.
34

35 THE COURT: Why --
36

37 MS. MOGRABEE: The accused had said, Look, I -- I -- I -- I saw
38 it as a challenge. And he was very clear in saying that. He said, I thought she was
39 attractive. I was interested in her. He said, I thought, you know, I was going to
40 essentially be destined to the -- to the job, as it were.
41

1 THE COURT: M-hm.
2

3 MS. MOGRABEE: He didn't use those words, but that's certainly
4 the message that he gave.
5

6 THE COURT: Very common -- very common in court.
7

8 MS. MOGRABEE: And he pursued her and he pursued her, I
9 would submit, very aggressively, right at that point in time when he decided to impress
10 her with his dancing. And he says that he understood that she was interested in him
11 because she complimented him on his dancing. Well, how is that -- how -- when
12 someone compliments you on your dancing, how is that an invitation to -- to engage in
13 sexual contact?
14

15 The same thing applies with the other behaviours, that she was smiling at him, that she,
16 you know, said, I like you too. I mean, how is that all a green light to engage in sexual
17 contact?
18

19 THE COURT: Do you -- do you regard the kissing as sexual
20 contact? Then should he not have kissed her?
21

22 MS. MOGRABEE: Kissing is sexual contact as well.
23

24 THE COURT: So he shouldn't have kissed her?
25

26 MS. MOGRABEE: She denies that that happened. She denies
27 that--
28

29 THE COURT: Well, from his version, should he not have --
30

31 MS. MOGRABEE: -- on --
32

33 THE COURT: -- kissed her?
34

35 MS. MOGRABEE: Right, but you -- you -- he says that she -- she
36 and him mutually kissed each other. That was his evidence.
37

38 THE COURT: Yeah.
39

40 MS. MOGRABEE: She's saying that never happened.
41

1 THE COURT: And is that -- is that improper? It happens all
2 the time even for -- for youngsters who have known each other only for a few hours. At
3 parties it happens all the time. Goodness, it happened in my days in the '60s. It's not
4 unlikely.
5

6 MS. MOGRABEE: Well, I wish we were dealing with just a case
7 of kissing, but --
8

9 THE COURT: No, I understand it, but --
10

11 MS. MOGRABEE: -- we go from kissing to him putting his penis
12 in her vagina.
13

14 THE COURT: I understand that, but a man is not going to get
15 into trouble just for kissing a girl. On his version you say it's sexual -- it's -- it's -- is it
16 sexually reprehensible to kiss a girl?
17

18 MS. MOGRABEE: Well, the Crown would submit that the -- the
19 cases are pretty clear in saying that if you're kissing someone on the lips, and I took that
20 to mean --
21

22 THE COURT: M-hm.
23

24 MS. MOGRABEE: -- that's what he meant --
25

26 THE COURT: Yeah, that's what I was talking about.
27

28 MS. MOGRABEE: -- that could be construed as a sexual assault.
29 But really the bigger is that whether or not he would have, you know, been able to go
30 from that to performing oral sex on her and then penetrating her with his penis. And we
31 get quite the progression there.
32

33 THE COURT: Aren't -- aren't you getting -- making this too
34 complicated? If I believe his version, or if I'm incapable of rejecting his version, then on
35 his version it was consensual sex.
36

37 MS. MOGRABEE: It's not enough for you to make conclusions
38 based on his bare assertion that it was consensual. There has to be a -- an evidentiary
39 basis for him to successfully raise that defence. And it's only if there's an evidentiary
40 basis upon which you can --
41

1 THE COURT: Well, there is -- there is an evidentiary basis.
2

3 MS. MOGRABEE: Well -- but it's not enough for him to say --
4 there's no one else in the room.
5

6 THE COURT: Yeah.
7

8 MS. MOGRABEE: It's not enough for him to say, Well, it was
9 consensual. There has to be some evidence of that.
10

11 THE COURT: Well, his version is it was consensual. He goes
12 through it; he explains what happened. They started kissing --
13

14 MS. MOGRABEE: Right, and there has to be an air of reality to
15 that as well.
16

17 THE COURT: Well --

18

19 MS. MOGRABEE: And you're saying that --

20

21 THE COURT: -- if -- if I accept his version and -- if I can't
22 reject it, then I have to go into the air of reality. Is it -- is it unreal for me to accept that
23 a young man and a young woman -- young woman want to have sex, particularly if
24 they're drunk?
25

26 MS. MOGRABEE: Well, you're dealing with two different versions
27 of events here, essentially, right.
28

29 THE COURT: Yeah. Well, just let's --

30

31 MS. MOGRABEE: You're dealing with --

32

33 THE COURT: -- stick to his, if I can't reject his. And I'm not
34 sure why I should reject his. You haven't actually got that to me.
35

36 MS. MOGRABEE: Well, I will address you fully on argument.
37

38 THE COURT: All right.

39

40 MS. MOGRABEE: I mean, now I'm just trying to give you my
41 framework.

1
2 THE COURT: Okay.
3
4 MS. MOGRABEE: You know, and I would say to you that a bare
5 assertion is not enough. His explanation is not enough to get you to that defence in a
6 nutshell is -- is what I'm saying. Her behaviour as seen by other people prior to is not
7 relevant to what happened in that room. And the same applies with what happened after.
8 I would say that it doesn't necessarily follow -- that her behaviour -- that is the
9 complainant's behaviour after indicates that she was more likely to consent when that
10 door was closed and the two of them were in the bathroom.
11
12 So that's sort of it in a nutshell.
13
14 THE COURT: Okay. Ms. Mograbee, well, I understand that's
15 your argument. My problem with it is that it seems to be -- it's a one-way valve. You --
16 you say that I'm not allowed to look at this, I'm not allowed to look at that, but you want
17 me to take into account the fact that they knew each other for a very -- very short time.
18
19 MS. MOGRABEE: I'm -- I'm not saying that you're not allowed to
20 look at it.
21
22 THE COURT: Yeah.
23
24 MS. MOGRABEE: You have that evidence before you.
25
26 THE COURT: Yeah.
27
28 MS. MOGRABEE: But what I'm saying is you can't use it to
29 conclude --
30
31 THE COURT: So I can't use it to conclude, so --
32
33 MS. MOGRABEE: That's --
34
35 THE COURT: -- why must I use -- why must I use in any way
36 at all the fact that they hardly knew each other? What's sauce for the goose is sauce for
37 the gander.
38
39 MS. MOGRABEE: Well, they -- they both say that.
40
41 THE COURT: Yeah.

1
2 MS. MOGRABEE: They're both -- they're both --
3
4 THE COURT: I believe --
5
6 MS. MOGRABEE: -- consistent on that.
7
8 THE COURT: Yeah, but how does that play into -- into the
9 likelihood of consent or the air of reality to the consent belief?
10
11 MS. MOGRABEE: Well, I would submit that on the basis of that
12 background and what the complainant says is consistent.
13
14 THE COURT: All right.
15
16 MS. MOGRABEE: But I will -- I will flush it out a lot more for
17 you.
18
19 THE COURT: Thank you.
20
21 MS. MOGRABEE: And point you to those pieces of evidence so
22 that you're able to fully appreciate my argument.
23
24 THE COURT: All right.
25
26 MS. MOGRABEE: And of course I'll attach the case law to that
27 and organize it for you. But the cases that you have cover the main areas --
28
29 THE COURT: Thank you, Ms. Mograbee.
30
31 MS. MOGRABEE: -- consent, the honest but mistaken belief in
32 consent, reasonable steps as well, and there was one more area which escapes me at the
33 moment, but it's outlined for you. And I've organized in the front of the -- the case book
34 for you so that you can see. There is some overlap in all of the areas.
35
36 THE COURT: Yes. Air of reality, reasonable steps, meaning
37 of consent, apprehended consent, yes.
38
39 MS. MOGRABEE: Yeah. Right.
40
41 THE COURT: Thank you.

- 1
2 MS. MOGRABEE: And then I'll direct you to section 273.2 which
3 sets out where belief and consent is not a defence. Excuse me. And then there's another
4 section which you'll need to know about, which is the meaning of consent, 273.1(1) and
5 particularly (2) for no consent obtained.
6
- 7 MR. FLYNN: Sorry, what were those two sections, my friend?
8
- 9 MS. MOGRABEE: 273.1 and 273.2.
10
- 11 MR. FLYNN: 273.2.
12
- 13 MS. MOGRABEE: The other thing that I'll just add here at the end
14 is that where you have a -- an individual -- and we're talking about, well, how can I
15 accept -- you know, why shouldn't I accept that this is possible when, you know, there's
16 other -- you know, other behaviour that makes sense as to how they would have ended up
17 in the bathroom and did what they did.
18
- 19 I would say not only do you have -- you have -- you have the fact that they didn't know
20 each other. You also have a lot of drinking go on. By this accused's admission he was
21 drunk. The complainant was drunk. He knew she had been drinking. The Crown
22 submits that it's incumbent on him to take reasonable steps to ensure that consent is
23 obtained. That's the other important argument the Crown will be making in this case.
24
- 25 So it's not just that they knew each oth --
26
- 27 THE COURT: You're saying that it -- that it -- a drunk man
28 has a higher standard, or the fact that he knew she was drunk places a higher standard on
29 **him?**
30
- 31 MS. MOGRABEE: He doesn't know her and she's drunk.
32
- 33 THE COURT: So he had --
34
- 35 MS. MOGRABEE: Therefore, he must take reasonable steps.
36
- 37 THE COURT: He must be doubly careful.
38
- 39 MS. MOGRABEE: Pardon me?
40
- 41 THE COURT: He must be doubly careful?

1
2 MS. MOGRABEE: Yes, he better be careful.
3
4 THE COURT: She knew she was drunk?
5
6 MS. MOGRABEE: Well, he said she did.
7
8 THE COURT: She knew she was drunk.
9
10 MS. MOGRABEE: He -- he --
11
12 THE COURT: Is not an onus on her to be more careful?
13
14 MS. MOGRABEE: No, the onus is not on her. The onus is on him
15 to ensure that she consents, not that she says she doesn't consent.
16
17 THE COURT: No, but to make it clear that she's not
18 consenting. Is there no --
19
20 MS. MOGRABEE: There's no obligation in the law. In fact, the
21 cases --
22
23 THE COURT: There's -- there's no -- there's no higher on --
24 there's -- there's not an equal onus on a drunk woman as on a drunk man?
25
26 MS. MOGRABEE: No, there is not. In fact, the onus is more on
27 him.
28
29 THE COURT: All right. Well --
30
31 MS. MOGRABEE: And you'll see that in the cases --
32
33 THE COURT: -- you might --
34
35 MS. MOGRABEE: -- that you have.
36
37 THE COURT: Okay. Thank you, Ms. Mograbee.
38
39 MS. MOGRABEE: Thank you, Sir.
40
41 MR. FLYNN: Just to end this on a facetious note, Sir, I would

1 expect with two drunk people they would both have to respect the other to get consent,
2 but I'll leave it at that.
3
4 THE COURT: No (INDISCERNIBLE)?
5
6 MR. FLYNN: No, Sir.
7
8 MS. MOGRABEE: So did we decide on a date then?
9
10 THE COURT: No, we didn't. Is -- is next Wednesday
11 available?
12
13 MR. FLYNN: I -- I believe that -- I believe -- my -- my friend
14 and I are both available, Sir. It's really --
15
16 THE COURT: And I'm -- I'm in triI'm in trial court and I
17 don't have anything else set down for that time. If you can arrange it, so be it.
18
19 MS. MOGRABEE: I don't know if the trial coordinator would be
20 able to arrange something like that. I see that it is 3:00. CMO is open right now.
21
22 MR. FLYNN: Oh, yes.
23
24 THE COURT: Do you want to rush down to CMO and come
25 back?
26
27 MS. MOGRABEE: Could we go down to see --
28
29 MR. FLYNN: Quickly, Sir.
30
31 MS. MOGRABEE: -- what the --
32
33 THE COURT: Yeah.
34
35 MS. MOGRABEE: -- situation is there and then we can come
36 back?
37
38 THE COURT: Sheriff, can he stay here, because --
39
40 THE SHERIFF: Sure.
41

1 THE COURT: -- this will take five minutes. I'll be out there.
2
3 THE SHERIFF: Yep.
4
5 MR. FLYNN: Thank you, Sir.
6
7 THE COURT: Thank you. Call me when you get that.
8
9 MR. FLYNN: Thank you, Sir.
10
11 (ADJOURNMENT)
12
13 THE COURT: Counsel. Ms. Mograbee?
14
15 MS. MOGRABEE: Sir, before the accused comes in --
16
17 THE COURT: Yes?
18
19 MS. MOGRABEE: -- can I send you a copy of the transcript
20 electronically?
21
22 THE COURT: Yes, you can. Thank you.
23
24 MS. MOGRABEE: May I have your email, please?
25
26 THE COURT: Yes, robin.camp, R-O-B-I-N, Camp with a 'C',
27 galbertacourts.ca.
28
29 MS. MOGRABEE: Albertacourts.ca, one word?
30
31 THE COURT: Yes. One word, Ms. Mograbee.
32
33 MS. MOGRABEE: Thank you. And I hope you don't mind, it'll
34 be informal, Sir, in the sense that there's no letter or anything --
35
36 THE COURT: Oh, Ms. Mograbee, of course I don't mind.
37
38 MS. MOGRABEE: -- attached to it.
39
40 THE COURT: Of course I don't mind
41

1 MS. MOGRABEE: Thank you.
2
3 THE COURT: I'm only too grateful to get it.
4
5 MS. MOGRABEE: I'll send that to you right away. Thank you.
6
7 THE COURT: Why are we waiting? Are we on record?
8
9 THE COURT CLERK: Yeah.
10
11 THE COURT: Okay.
12
13 MS. MOGRABEE: Yes.
14
15 THE COURT: We'll -- we'll wait until after --
16
17 MS. MOGRABEE: All right.
18
19 MR. FLYNN: If I can say, Sir, I -- we got very lucky, Sir.
20 We have the time. We're coming back on Wednesday.
21
22 THE COURT: Wednesday, good. Excellent.
23
24 MR. FLYNN: So we were very fortunate, Sir. Thank you,
25 madam clerk. Mr. Wagar is now present. As I indicated, Sir --
26
27 THE COURT: Sit, Mr. Wagar.
28
29 MR. FLYNN: -- we were very fortunate -- we were fortunate,
30 Sir, case management were able to assist us by having this matter return on August 6th, at
31 9 AM, in Provincial Court, 1005. Our understanding, Sir, is you are the assignment judge
32 that day and we have set the whole side in -- aside for -- for that day with you, Sir.
33
34 THE COURT: Good. Excellent.
35
36 MS. MOGRABEE: And, Sir, since you are going to be dealing with
37 other cases, at least to deal with them quickly, but nonetheless, you'll probably --
38
39 THE COURT: Ten o'clock?
40
41 MS. MOGRABEE: -- do quite a bit. I wonder if -- if Mr. Flynn

1 and I could be permitted to come just a little bit later so you can --
2
3 THE COURT: Ten o'clock?
4
5 MS. MOGRABEE: -- clear the courtroom? I was going to suggest
6 10:00.
7
8 THE COURT: All right. Ten o'clock.
9
10 MR. FLYNN: We thought that would --
11
12 MS. MOGRABEE: And if we need to go in the afternoon then we
13 can always come back too.
14
15 THE COURT: Yes, exactly. **I -- I think we may,**
16 Ms. Mograbee.
17
18 MS. MOGRABEE: Sorry, Sir?
19
20 THE COURT: We may have to -- we might take longer than
21 two and a half hours.
22
23 MS. MOGRABEE: I -- I -- I said to Mr. Flynn that we would need
24 a full half day, so --
25
26 THE COURT: Yeah.
27
28 MS. MOGRABEE: -- it's possible.
29
30 THE COURT: All right.
31
32 MS. MOGRABEE: Yeah.
33
34 THE COURT: So I'll see you next -- next Wednesday.
35
36 MS. MOGRABEE: And did you want to order any transcript of
37 today's proceedings as well?
38
39 THE COURT: I do, but I'm I'm not prepared to do it on the
40 short basis because that just never works. So I'm going to ask for a ten-day turnaround.
41

1 MR. FLYNN: Yes, Sir.
2

3 THE COURT: And you can use it to -- to clear up -- if it turns
4 up an argument that we disagree with each other, any one of us has a -- a different
5 recollection --
6

7 MR. FLYNN: Yes, Sir.
8

9 THE COURT: -- then you can send me written adjustments to
10 arguments afterwards.
11

12 MR. FLYNN: That sounds very fair, Sir.
13

14 THE COURT: Does that make sense?
15

16 MR. FLYNN: Most definitely.
17

18 MS. MOGRABEE: That would be fine.
19

20 THE COURT: I'm also always loathed to -- to overburden the
21 typing facilities here.
22

23 MR. FLYNN: Yes, Sir. I -- I think we're in agreement, Sir.
24 I've been speaking with my friend and I think we're all in agreement about Mr. Wagar's
25 testimony. I don't think there will be great discrepancies between --
26

27 THE COURT: All right.
28

29 MR. FLYNN: -- what we've all heard today.
30

31 THE COURT: So thank you, counsel.
32

33 MS. MOGRABEE: Thank you.
34

35 MR. FLYNN: Sir, could I just ask for an order that I be able
36 to speak with my client for a brief moment?
37

38 THE COURT: Yes. Sheriff, would you keep Mr. Wagar --
39

40 MR. SHERIFF: Yes --
41

1 THE COURT: -- to speak to his counsel? Thank you. Sheriff,
2 thank you for your trouble. Good day.

3

4

5 PROCEEDINGS ADJOURNED UNTIL 10:00 AM, AUGUST 6, 2014

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1 Certificate of Record

2

3 I, Anita Ubhi, certify that this recording is the record made of the evidence in the
4 proceedings in Provincial Criminal Court, held in courtroom 1006, at Calgary, Alberta, on
5 the 1st day of August, 2014, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

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1 Certificate of Transcript

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I, Shari Yawn, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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41

1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta
2 _____
3 August 6, 2014 Morning Session
4
5 The Honourable The Provincial Court
6 Judge Camp of Alberta
7
8 M. Mograbee For the Crown
9 P. D. Flynn For the Accused
10 V. Le Court Clerk
11 _____
12
13 THE COURT CLERK: Alexander Wagar.
14
15 MR. FLYNN: Thank you, madam clerk.
16
17 MS. MOGRABEE: Hyatt Mograbee appearing for the Crown.
18
19 THE COURT: Good morning, Ms. Mograbee.
20
21 MS. MOGRABEE: Good morning.
22
23 THE COURT: Good morning, Mr. Flynn.
24
25 MR. FLYNN: Good morning, Sir. My computer has broken
26 this weekend, Sir, so I've gone back to pad and paper.
27
28 THE COURT: Sorry, say that again? Your computer is
29 broken?
30
31 MR. FLYNN: My word processor was broken this weekend so
32 I've gone back to pen and paper for the --
33
34 THE COURT: Oh, that's fine.
35
36 MR. FLYNN: Good morning, Sir, for the record, Patrick
37 Flynn.
38
39 THE COURT: Good morning, Mr. Wagar, please sit down.
40
41 THE ACCUSED: Good morning. Morning.

1
2 MR. FLYNN: Mr. Wagar is now present, Sir. We are
3 prepared to proceed, Sir.

4
5 THE COURT: Very well. When you're ready, Mr. Flynn?

6
7 MR. FLYNN: Thank you, Sir.

8
9 **Ban on Publication - Identity of the Complainant**

10
11 **Final Submissions by Mr. Flynn**

12
13 MR. FLYNN: Sir, (INDISCERNIBLE) this has been a lengthy
14 trial. There's been a fair bit of evidence that's been presented in front of you, Sir. We
15 take the position, Sir, on this as defence counsel for Mr. Wagar, that in effect this was a
16 consensual act between two consenting adults. I will speak more of that, Sir.

17
18 If the Court does not consider this to have been a consensual act between two willing
19 participants, then I would ask the Court to consider whether this was an honest but
20 mistaken belief in consent by Mr. Wagar. And again, I suggest that the air of reality has
21 been met by the evidence, but again, I will speak to that later, Sir.

22
23 And then finally, Sir, I of course rely upon *R. v. W.D.*, where the Court upon hearing the
24 evidence of the accused, as well as the complainant, is in the best position to, as trier of
25 fact, to consider the credibility issues and ultimately we would rely upon *R. v. W.D.*, Sir.

26
27 I would like to start, Sir, in effect examining the witnesses that came before you.
28 Particularly, Sir, the -- what I consider to be the two independent witnesses, this of course
29 is Mike and Skylar (phonetic). I think Mike, in effect, he was here throughout the day.
30 He was -- he wasn't happy to be here. I think he was --

31
32 THE COURT: No, he was very bloody minded.

33
34 MR. FLYNN: No, he -- he didn't want to be here and I think
35 that was a -- I think that was just his way of being honest with us, Sir. He was -- he
36 wasn't here to deceive us, he wasn't here to -- for his own agenda, he was in here to tell
37 the truth. He was inconvenienced by doing it, but he --

38
39 THE COURT: But all he saw was two people having --
40 through a -- a font piece of glass, as I understand it, for an instance he saw two people
41 having sex.

1
2 MR. FLYNN: He does, Sir, but he also has other points as
3 well, of evidence, that I think are vital. Particularly they help, I think, fill in a lot of the
4 blanks that the Court may have in terms of the facts or evidence from the witnesses. And
5 one of the ones that comes to my mind, Sir, is Mike in his testimony says that he and
6 Lance both went to the bathroom. And at this point Mike observes the two people in the
7 shower and he says he pushes Lance out and he closes the door behind him. And then
8 we have the testimony of the complainant and she says at some point she -- she looks
9 down and she -- she sees Lance leering at her, or something to that effect; and then she
10 (INDISCERNIBLE) tells him to fuck off. Those two instances I think are collaborated,
11 not coil -- corroborated, Sir, between Mike's testimony of him and Lance going to the
12 bathroom and Lance somehow ending up in the bathroom with the complainant testifying
13 that she sees him.

14
15 So I -- I think Mike's testimony adds even more air of reality. It -- it connects up a lot of
16 the evidence, Sir, and I think that's important because I think in terms of Mike, he also --
17 if I can have just one second, Sir. Mike also talks about Alex's behaviour that night as
18 well that in his opinion Alex was sob -- sorry, if I can just have one second, Sir, to check
19 my note. I don't want to mislead the Court, Sir.

20
21 I'm sorry, I don't think Mike makes a determination on the sobriety. Just one second,
22 Sir. He mentions in his testimony that -- that my client is not doing drugs, Sir.

23
24 So I think his evidence is actually very supportive, Sir, of my client, but I think it actually
25 connects up a lot of those lose ends, as I've said, particularly with the issue of the
26 bathroom and with Lance. But also, Sir, in terms of the conduct of the party, this
27 person's evidence was such that he had offered the -- the complainant that she could stay
28 at his place and she was -- she cleaned up the house for that purpose because she was
29 going to stay there. It was a place that he was monitoring. He didn't want to be kicked
30 out. He -- he was already to be evicted, he didn't want more trouble from them so he
31 was keeping an eye on the place. He said that he -- he wasn't consuming alcohol. He --
32 he felt that he was sober. Upon questioning by the Court he said that he may have
33 done -- I think he said the word probably, speed, he said he was doing speed at that time.

34
35 But -- but again, I'll draw the jud -- the judicial notice, Your Honour, of speed in itself,
36 speed was used by jet pilots as -- as late the 19 -- the late seventies. It -- it's an
37 amphetamine, Sir. It's to speed up the process. It's -- but I don't want to say caffeine,
38 it's a little over -- over simplification of it, Sir. But it's not a hallucinogenic. It's not --
39 it won't show you visions or it won't give you audio or hallucinatory type of effect, Sir.
40 It's -- it's not that type of drug.

41

1 So, I think Mike's evidence is -- is -- it's certainly very strong. I -- I think it connects up
2 a lot of the factors that we talked about earlier. And then we also have Skylar's
3 testimony as well. I think that adds to the overall texture of this event and I think her
4 testimony itself was very thorough. She was very adamant of what her feelings were
5 under cross-examination of my friend she -- she was adamant that she had not discussed
6 this case with anybody. She was very -- and I don't think she wanted to be here either.
7 But you know, she was contacted by the mother of my client and she came to court
8 because she wanted to tell the truth. She -- she -- she didn't want any -- and -- and the
9 justice to be performed.

10
11 And I think again, her testimony was very credible, Sir. Again, very independent, very
12 credible. If I can just have one moment, Sir.

13
14 Maybe if I can just step back, Sir, from Skylar and I'll just go back to Mike for a little
15 bit. I'd like to spend a little bit more time on Mike and why I think his evidence I think
16 is crucial to this matter.

17
18 As the Court has indicated, he initially walks in, he sees two people standing and he sort
19 of gathers no more information that there's no -- no security issue. And he -- and he --
20 he didn't know who was in there. He says he was sober all day. He was going to the
21 bathroom with Lance because it was quiet and they needed a place to talk. They were in
22 there for a couple seconds. He talks about the post conduct, Your Honour, of how after
23 the shower the complainant was clinging onto my client. That she was following him
24 around, that she was having a good time. And I think this goes a lot to her credibility,
25 Sir. And again to the air of reality that this was a boy and a girl who were enjoying each
26 other's company.

27
28 He again talks about Heather's having a good time, stating they'd like to get together.
29 We also understand, Sir, that he, under the direction of the Court, he said that he was
30 taking speed but then he also admits very shortly as well, Sir, that he was watching
31 everything that was going on. He -- he was in effect ensuring good conduct. He -- he
32 didn't want more troubles. And I think that's --

33
34 THE COURT: Well that tells me a little bit because I -- I seem
35 to recall that the complainant said that the party was because he had been kicked out.

36
37 MR. FLYNN: Well my understanding is as well, sir, is that
38 she had just cleaned the place.

39
40 THE COURT: M-hm.

41

1 MR. FLYNN:

2 The place has just been cleaned and they
3 were -- they were able to stay there until at least the end of the month. And so it was a
4 matter, Sir, that he didn't want his house destroyed, that the place was clean, plus also
5 there's immediate -- where he could be immediately evicted, Sir, rather than giving the
6 notice. So there -- there's a real issue, as anybody who's rented in Calgary, you know the
7 story (INDISCERNIBLE) rental accommodation, there -- there was a -- there was a
8 definite harm if there was more trouble, Sir. And I think just -- I just ask that for jud --
9 jud -- judicial notice, Sir, in effect, that he was trying to keep this place clean. He knew
10 he was going to be there to the end of the month, he didn't want any more trouble, and he
11 wanted to abide by his time.

12 And then he indicates again that my client was not doing drugs. He talks about going to
13 the bathroom with Lance that I had mentioned earlier. But then, Sir, he states that he
14 could have done drugs but everybody was more or less drinking and I think he was the
15 only one who had maybe consumed drugs, but he doesn't know for sure, he only reflects
16 back that he was doing drugs at that time in his life. He very well may not have been
17 doing drugs that night, Sir. But he talks about what I thought was very -- a -- a very
18 truthful thing, Sir, in telms that you know, he -- he -- he didn't remember specific words,
19 he didn't remember conversations, but he remembered very clear images. And I think this
20 is what memory is, Sir, particularly after several years. You don't remember exact
21 details, but you remember the emotion. You -- you remember the feeling, you remember
22 a snapshot. And his snapshot was very clear that this was a comfortable outing, that
23 people were having fun, that these two kids were enjoying each other's company. And I
24 think that's very important, Sir. Particularly as I said, when we looked at what he saw
25 the -- the post conduct, that she was following him around, that they were talking, that
26 she was

27
28 And -- and again, his testimony that he says what he saw, not what people said. So
29 again, Sir, very strong independent witness. He's not here to -- to make friends, he's not
30 here to -- again, he's totally independent.

31
32 And again, Sir, just to reiterate the issue about Lance, because we -- we hear about Lance,
33 we hear about Lance from the complainant, we hear about Lance from the -- from Mike
34 as well. And he says that Lance was right behind him, he kind of pushes Lance back and
35 he closed the door. And we can only assume, Sir, that Lance must have reopened the
36 door and gone back in very quickly after that, Sir. So again, I think his testimony is
37 very -- very credible, Sir. Very credible.

38
39 Then we're left with Skylar, Sir. And again, this is the young lady who I don't think
40 wanted to be here. In effect, Sir, she has been -- this is I think the first time that she had
41 met the -- the complainant, Sir, to her effect I think the complainant has said that she had

1 seen Skylar before, limited effect. I think Skylar's important -- testimony as well, Sir,
2 because she corroborates again what my client is saying, you know, that -- that the -- he
3 went into the bathroom with the -- the four of them to smoke this marijuana cigarette and
4 then they started getting more frisky in the -- in the bathroom and then the fact that this
5 consensual sex act then -- then proceeded. But she also backs that up, Sir, you know,
6 saying that you know, they were all dancing and drinking beforehand and that they were
7 enjoying each other's company. That even that -- even that this -- the woman had -- that
8 the complainant had -- had testified that the victim she -- she was going to have sex with
9 my client and we asked her, well why would you ask that because this is somebody you
10 just knew, and she said well she was curious. An unusual question and unusual, Sir, but
11 it's -- it's hard to reflect values on what people are doing when they do it. It may seem
12 silly to us but it very well could be a very credible question that another young lady asked
13 another, particularly given the situation that they're in a small bathroom, the four of them,
14 up next to each other smoking dope and -- and enjoying the drinking -- drinking night. It
15 very well is credible that that -- that that was asked.

16

17 We have, Sir, the testimony of Skylar continues that she had taken Jane aside and asked,
18 did they have sex and Jane said she was going to. That we had -- that at a certain point
19 Skylar and Dustin, which is another individual who we -- who we hear about but never
20 gives testimony is that they leave the bathroom for the kitchen. And my understanding is
21 Skylar indicates she's in the bathroom for about 20 minutes with Dustin and -- and the
22 complainant and my client smoking this marijuana and doing what young people do.

23

24 And then she talks later about the post conduct again, Sir. And this again that air of
25 reality that these people were enjoying each other's company beforehand, as well as after
26 hand. In effect I think Skylar had indicated that, yeah, she was -- she as physically hands
27 on the back. I'm not sure if she said holding hands, but it was -- they were -- they were
28 physically interacting with each other, Sir, not just casual touch of a stranger, but they
29 were actually intimate, intimate touches between them.

30

31 She indicates that she did not drink that night. The complainant was saying that she was
32 drinking And again, I -- I don't think there's a -- a great deal from that. My client had
33 indicated in his testimony that he I think was the drunkest of the group. And I think the
34 others, from his position, were drunk. And I think he had said five or six out of 10. I
35 don't quite remember, but I remember that he was higher and he considered his
36 (INDISCERNIBLE).

37

38 And again I don't take a lot from that, Sir. I think the issue quite honestly with Skylar's
39 testimony I think is credible on the face of it. Nobody has said that in any way that she
40 was like a falling down drunk and that her testimony should not be believed. I think it's
41 very believable and I think she comes before you with very clean hands.

1
2 She said that there was no other drugs consumed by herself that night but marijuana and
3 she'd indicated, well that she too was looking to crash at Mike's place as well. So it -- it
4 sounds like it was going to be quite a -- a house party that it was continuing because they
5 were there for several days, the complainant's party. I think she was there for three or
6 four days just continued to enjoy this type of a lifestyle, Sir.

7
8 This was her first time, Skylar's first time meeting the accused, as indicated. She also
9 indicated, Sir, again, that they were flirting and touching between my client and the
10 complainant. And -- and not only hands, but parts of the body. So again, Sir, very
11 intimate type of talking.

12
13 She had indicated then -- and again, I won't rehash what I've mentioned earlier, Sir. And
14 she'd asked, well why did she leave with Dustin, Sir. And she indicated that she wasn't
15 going to stay and watch. She knew that these people were about to -- about to -- about to
16 engage in some form of sexual activity and she says, we're not going to stay and watch.
17 And they go. They leave to the kitchen.

18
19 And again her -- her conduct -- her issues about post conduct that they were affectionate.
20 Affectionate with each other, Sir. So again it just goes to that air of reality and to what I
21 consider to be a -- a consensual act between two individuals.

22
23 If I can just have one second, Sir. We're then left, Sir, with -- and I'll speak I think a
24 little bit about the -- about this Lance, because I think Lance is important, Sir, I think for
25 a lot of reasons. If we remember the history of the -- of Sky -- of Sky -- not Skylar, of
26 the complainant, Sir. She testifies that she spends the day with this guy who she's met.
27 They go to the meetings, they steal clothing, I think food, they go get food, they're
28 hanging out, they're spending the whole day together. And I suggest that it was in a
29 friendly way, Sir. He was obviously -- he was trying to court her. I think she -- she
30 acknowledged that, that he was you know, hopeful of being her boyfriend and I think that
31 it was an act of courting that was going on throughout the day.

32
33 What I find of interest, Sir, particularly, is she acknowledges that Lance comes into the
34 bathroom and she yells at him and I'll speak to that stuff again later, but is -- the idea is
35 to me, Sir, is Lance himself is somebody that she's friendly with. Somebody that she
36 spent the day with. There was nothing about animosity between these two individuals.
37 Her only animosity towards Lance that she indicates was post the sexual assault --the --
38 the alleg -- the -- I think the first time she says that the issue about Lance is in the
39 negative is when she sees his face, his leering face outside the shower and he says
40 something, oh I knew it was shaved or it was a -- whatever he had indicated, Sir, some
41 vulgarity. And in effect, I -- I look at that and I'm going well this is someone she's just

1 spent the whole day with, why would she treat it in such a way. If this was somebody --
2 and again, I'll speak to that matter again later. So I just leave that for your attention why
3 I think Lance is important.

4
5 And then we have Dustin. And again Dustin is another individual who did not give
6 testimony before today and he was only sort of the -- the -- the second boyfriend, the --
7 the fourth guy. There was indication that the complainant was -- may have been attracted
8 to him at some point. There was a indication that he was with Skylar. There's nothing
9 really relevant, Sir, about him, he's just sort of -- he's just one more of the big players of
10 this very large weekend party, so to speak.

11
12 The complainant herself, Sir. I'd suggest -- or she admits -- she acknowledges, herself,
13 Sir, that she doesn't have a good memory of the event. She acknowledges that things
14 come in and out. But her testimony was I suggest lacking credibility, Sir. There were
15 multiple instances where she would say things and then she would contradict herself in a
16 very serious manner later, Sir. And I'll -- and I'll get to those contradictions in a minute
17 here.

18
19 But I just suggest, Sir, that this is a young lady who -- who I'd suggest, Sir, her testimony
20 should be taken with the tier of fact understanding that this was several years ago, there
21 was alcohol consumed and that we have other independent witnesses who I think give a
22 stronger and more credible version of what transpired, particularly when their versions of
23 events co -- coordinate with my client's retelling of the story of that evening.

24
25 And I'll start with the testimony of the -- of the complainant, Sir. She indicated this was
26 her first time she had met -- Alex was at the -- my client was at the (INDISCERNIBLE)
27 Centre. She indicates that she was stealing liquor that evening, she had stolen liquor that
28 they were -- groceries, and again, Sir, just more towards the type of weekend she was
29 enjoying. It was a weekend of thievery and of promiscuous activity.

30
31 Dustin she felt was like a friend to her. She -- she had talked earlier, Sir, that her and
32 Skylar and Dustin were in the laundry room drinking, I think. And that -- and they were
33 drinking alcohol. And then at a -- at a later point she indicates that she was in drinking
34 alcohol and I think my client, you know, takes down his pants and he's drinking with
35 Dustin. I'll -- I'll be able to show you exactly where those are, Sir.

36
37 But she says, Sir, that she -- she got really drunk, she was drinking Absinth straight. It
38 was her fourth day at the house party. She -- she was -- she actually even hid booze, Sir.
39 She indicated that she -- she had hid liquor and then she had gone back and drank that
40 liquor later on in the morning after this event.

41

1 She indicates that my client was not drinking And again we have testimony from my
2 client as well as from other people that he was celebrating his -- his release from custody.

3
4 She indicated in her testimony that she had liked my client's dancing, that she had
5 commented on this to Skylar that she liked my client's dancing. That she liked his
6 moves, that she liked the groove going on. That she was having a good time. She
7 acknowledges that -- that my client was flirting with her in the bathroom. She was
8 having fun. It was fun.

9
10 It's -- a lot of inconsistencies in her statements of what goes on within the -- the
11 bathroom with just the two of them, Sir. The Court, I think run out a point of its own
12 when it was examining the -- not examining, but it was questioning the complainant and it
13 was about her body position, of -- of how her sexual organs are within the sink itself and
14 for her to -- to have sex done on her or to participate in sex acts, both oral sex as well as
15 intercourse, vagina intercourse is she would physically have to lift her hips up. She --
16 she -- she would -- she would physically have to participate. She -- she could not be an
17 inactive participant.

18
19 And again, nothing in itself goes on that, but I think it goes towards the conduct, Sir, that
20 she was -- she was consenting, that it wasn't a non-consensual event. But even when she
21 talks about that when she's being lifted up on the counter, when she's having oral sex, is
22 again that she's not talking too well. She -- she indicated several times that she's not
23 saying anything, she's just thinking in her mind, no. But then at some point she talks
24 about how my client's talking to her about, oh, you've got a nice body, she -- she
25 indicates that -- that he likes her. My client indicated he liked her. That -- that he
26 wanted to fuck her. And -- and she indicated that he's talking about relationships with
27 her. Which again I think, Sir, goes to what was going on, that my client's a young man,
28 here's a nice young lady that he's attracted to and he's thinking this is a relationship. But
29 the idea, Sir, is that it's a long way from her to say that she wasn't saying anything when
30 it appears that there's a type of a conversation going on.

31
32 So it's just that type of credibility in her story, because she says herself, Sir, in her own
33 testimony that she told him she liked him as a friend. She told him I'm gay. She told
34 him of her interest in Skylar. This is a conversation that's going on. And -- and it
35 indicates, Sir, that -- and again, that they were in that bathroom for a long period of time.
36 So even if you (INDISCERNIBLE) on the face value of these, which aren't in any way
37 complimentary to my client, they don't assist him per se, but I think they go towards her
38 credibility that there's this conversation that's going on between them. There's this banter
39 that's going on between young people and I suggest that ultimately she did consent to my
40 client. And -- and they did perform this sex act consensually between them.

41

1 She talks about how he picks her up and how his penis is so large. And at this point I
2 think she says, no. But he says, oh, no, it'll -- it'll be okay, I'll come on top of you.
3 And again, my client -- she doesn't say anything. My client takes her physical interaction
4 with him, the kissing with him, the holding him closer by the shoulders that she's
5 consenting to the sex act. So he performs the intercourse on her again, Sir.

6
7 Just one second, Sir. She -- she tells him, your penis is too big, it hurts, and so he
8 doesn't go all the way in. They -- they consensually continue. He then cleans up. But
9 then what's interesting, Sir, is that he -- he cleans up, he spends some time to clean this
10 up. But then she's really almost fully clothed. We -- we had talked about the pants and
11 how the pants are down literally at her ankles, which in effect binds the ankles together,
12 which goes again that she would have to physically participate in the oral sex, Sir, by
13 spreading her legs apart and by lifting her -- her buttocks up into the air to allow for the
14 oral sex to continue. But even when this oral sex is over and the vagina sex is over, he's
15 now taking her into the shower. So he -- he takes off her shirt, and he takes off her tank
16 top, then he takes off her bra, then they go into the shower. This is a lovemaking. This
17 is a -- this is a two young people having fun. This is -- this is not a -- a rape. This is
18 not a wham barn, by any means. This is a loving person who thinks he's in a
19 relationship. Or not a relationship, Sir, I should say the potential relationship. I think
20 that's more of a -- a fair colouring of the story between them, Sir.

21
22 She talks about her animosity towards Lance. And this is after the fact, that Lance is
23 going to tell everybody. That -- that Lance is going to tell everybody and it's all going to
24 be spread about how she's easy and how he's going to have sex with her and I think this
25 may go towards her own motivation of why these charges were laid at a later date, Sir, is
26 for her -- and again, I -- I hate speculating and I won't do that, Sir. But she did say that
27 after the -- after the sex, and my understanding again after the shower, after she -- after
28 she tells Lance to leave, Lance leaves. But her testimony is my client then leaves too.
29 So he leaves at the same time as his brother, or in effect very quickly (INDISCERNIBLE)
30 and she stays back in the shower room and -- and in effect dries off her wet -- one of her
31 wet pieces of clothing and then -- and then leaves.

32
33 And then she says that she just chills out and she continues to drink throughout the night
34 and continues to party. She says, well I drank because I was upset. I suggest, no, Sir, it
35 was more that she was just continuing in the party mode. We have testimony from Skylar
36 saying that she was very affectionate. My client indicates that they were fairly
37 affectionate. He -- the -- my understanding even at the end of the -- end of the night she
38 goes on and sleeps on the same bed where my client is sleeping. You know, they're not
39 necessarily right next to each other but my understanding is they're on the same bed.

40
41 So again this type of a romantic fling between young adults, it continues on. So I don't

1 understand how on one hand she says -- says sexual assault but then treat him in such a
2 friendly manner.

3
4 She indicated that she tried to hook up with Dustin but it didn't go anywhere. And I
5 apologize, Sir. So Dustin -- so and again the inconsistency. She says, well I'm interested
6 in Skylar, I'm gay, but then in effect, well I'm going to hook up with Dustin. So the fact
7 that she says she's gay when she's talking to my client I don't think could be given a lot
8 of great weight because the -- the problem in saying well she's a lesbian and my client
9 would never be able to have sex with her willingly because she's a lesbian. Well I
10 suggest, no. She says herself that she was going to try to hook up with Dustin who's a
11 male. So I don't think (INDISCERNIBLE) weight, and that's why I bring it up, Sir.

12
13 And again Lance is saying oh, that she's going to talk about how she's a slut, he's going
14 to tell everybody. So this is her motivation to get angry. And then she says later that,
15 and I think it's (INDISCERNIBLE) that my client's having sex with Skylar. And she
16 gets mad about this. And she's angry.

17
18 And then we talk about the post conduct between herself and my client. And -- and
19 again, this indicates a very willing participant, Sir. Even a participant who's still
20 continuing a relationship as such, that it was at this level, that they get together and they
21 smoke meth together. In effect -- and I often -- she says, well, no, I was -- because I just
22 wanted to do the meth and I told him whatever he wanted to say. Well his testimony
23 himself he says, you know, yeah, I just want her to tell the truth, you know. You're
24 saying I raped you, you know I didn't do it, why don't you tell the truth. And when
25 she's with him she says, yeah, yeah, I'll tell the truth, don't worry I'll tell you the truth.
26 Can I have another hit off the pipe? And again I think it goes to her credibility, Sir.
27 She's -- I think she's a young lady who's quite honestly willing to deceive others. I think
28 she's even willing to deceive herself. And I think that's a sad case about what happened
29 that evening, Sir.

30
31 She -- she indicates that she's -- she's drinking in the laundry room with my client and
32 Dustin and at this point my client takes down his pants, his underwear, so there's that
33 flirtation thing that continues throughout the -- throughout the evening, the dancing the --
34 the drinking, the showing your penis. She indicates that -- under cross-examination by
35 my friend that she can take care of herself, that she's been homeless. She's no shrinking
36 violet by any means. And that this was a three day party. This was an offer by Mike I
37 think that she's indicated months. So I think there was a possibility that Mike was
38 potentially maybe staying longer than towards the end of that month to month lease, Sir.
39 She indicated that she cleans the house with the intention to stay. She indicates that, you
40 know, there was a three day party, she was shoplifting liquor. They -- they go to multiple
41 stores to try to steal as much as they can I assume. She admits that she's dancing with

1 my client, that they're moving around a room, that they're talking. She acknowledges
2 that my client is talking and flirting with her prior to the sex assault. She tells someone
3 that she likes my client and I suggest that she told Skylar that she liked my client's
4 dancing.

5

6 She said she could have smoked dope with my client and with Skylar and with Dustin in
7 the bathroom, which again validates what Skylar said and validates again what my client
8 said. That the four of them went into the bathroom, consensual adults, the two of them
9 stayed and engaged in sexual acts. And again, she -- she says, yeah, it could have
10 happened. I suggest that it did happen, Sir.

11

12 And then again my client's in the bathroom and he's in a relationship, he's complimented
13 her, they're talking about a relationship, he's complimented her body. The complainant
14 she says, yes, she remembers bits and pieces. She remembers the oral sex on the counter.
15 She could have spoken but then she said she didn't. She -- she wasn't sure if she did.
16 And again, those things (INDISCERNIBLE) and I suggest she was. This was a banter
17 that was going on between two people who were enjoying sex for the first time with each
18 other.

19

20 And again, Sir, I indicated that she had again and you know, on page 91 of her transcript,
21 you know, indicates that, yeah, she told Lance to fuck off. And -- and I had spoken about
22 that earlier, Sir. That there was no bad blood between these people. And -- and in the --
23 the -- and I think when you take the term fuck off, there's so many different uses of it,
24 Sir. But I think in this instance when -- when you think about what is being said, fuck
25 off, it's get out of here.

26

27 THE COURT:

Well, isn't that what she said, get the fuck out

28 of here?

29

30 MR. FLYNN:

Something to that effect, Sir. Or fuck off. I'm

31 not quite sure myself. I could -- I'll -- I'll find it for you if you wish, Sir. But -- but in
32 effect, I suggest that that's what it was. It was you know, get the fuck out of here, leave
33 us alone. And I'll speak to that again later, Sir, but that just -- it troubles me completely
34 that here's somebody who she's been very friendly with throughout the day, she tells him
35 get the fuck out of here. Not in effect, oh my God I'm being raped, I'm being sexually
36 assaulted. And that's just troub -- troubling, Sir, just on the face of that alone, let alone
37 all of the other evidence that supports my client's position that this was a consensual sex
38 act, Sir.

39

40 She indicates as well, Sir, that somebody else may have ventured or could have ventured.
41 I say may, somebody else could have ventured. At -- at the end of her testimony she says

1 that in effect if someone -- she's asked whether someone could have entered the shower
2 without her seeing it and she said, yes. She confirmed that. And I think that ties in with
3 what Mike was saying earlier. That he had gone in there but she didn't see him and then
4 she sees Lance. So it all fits together, Sir. It -- it's -- it's a puzzle that all the pieces are
5 right before us.

6
7 And -- and again the complainant, you know, she admits that, yeah, she was flirting with
8 Skylar. So there was that type of activity going on, Sir. She's -- she's flirting with
9 Skylar, she's looking to hook up with Dustin, and I'd suggest that the hookup with my
10 client was equally as mutual and equally as consensual by its very nature.

11
12 Just one sec, Sir. And again I spoke about the post conduct of sleeping on the same bed
13 with my client. My client's testimony, Sir, I think it started off as a very self serving,
14 very lacking I think in focus. I think as my client went on in his testimony I think his
15 story took shape and I think his story is that he would have relied upon the facts. He
16 wasn't able -- he -- he wasn't -- wasn't spec -- speculating. He wasn't trying to recall
17 something, he was able just to recall the facts. And I think he was very clear in those,
18 Sir.

19
20 He indicated that, yes, that he was a young man that in effect that these two young people
21 had been dancing and flirting during the evening. That they in effect had been eyeing
22 each other, so to speak, as -- as young people do. And ultimately they -- and again, the
23 testimony you know, that they were drinking earlier together, he had dropped his pants.
24 And she indicated that again in her testimony that she was -- liked his dancing. So these
25 four people end up going to the bathroom to have a marijuana cigarette.

26
27 Skylar witnesses the mutual attraction between these two and she figures out very quickly
28 that the -- these two are interested in each other. They finished the marijuana cigarette
29 after about 20 minutes of talk and smoke, I assume, and then it's at that point her and
30 Dustin decide they're going to leave because they're not -- they're -- they're not going to
31 watch, they know what's going to happen. These two are going to engage in consensual
32 sex.

33
34 And then my client goes on to explain the -- the sex acts and the sex acts are credible.
35 The sex acts are credible. The -- the -- the mutual grabbing of each other, the kissing, the
36 propping up --

37
38 THE COURT: Mr. Flynn, it was credible. My concern is that
39 deep in cross-examination, for the very first time --

40
41 MR. FLYNN: Yes, Sir.

1
2 THE COURT: Not mentioned in-chief, not mentioned in
3 cross-examination, although he went over the same ground many, many times. That was
4 his way of answering the questions.

5
6 MR. FLYNN: Yes, Sir.

7
8 THE COURT: For **the very first time, deep in**
9 cross-examination, he said that he'd -- his words were, I asked her if she wanted to fuck.

10
11 MR. FLYNN: Yes, Sir.

12
13 THE COURT: Why did we only get that right at the end of his
14 testimony? That he'd actually asked for permission?

15
16 MR. FLYNN: Well, I think that was the issue, Sir, on whether
17 the relationship was going to progress particularly that quickly. I think that they had
18 started off having oral sex and I think -- and again I -- I hate to speculate, Sir, not being a
19 young person, but -- but I know for a fact in my generation, oral sex was considered to be
20 somewhat of a taboo thing or very risqué.

21
22 THE COURT: I'm sorry, I'm asking different questions.

23
24 MR. FLYNN: Oh, I'm sorry, Sir.

25
26 THE COURT: My question is, if he had asked for permission
27 why didn't he say that right at the beginning? Why indeed when you're in a position that
28 he would have given you to put that to the accused -- to the complainant? It was the kind
29 of thing that competent counsel would have put to -- to a complainant?

30
31 MR. FLYNN: Sir, I -- I was not aware of that, but and again,
32 my client has been very clear in his instructions that this was a mutual --

33
34 THE COURT: To be sure. But it takes it just a step further to
35 say I actually asked for permission. That's a crucial, crucial issue.

36
37 MR. FLYNN: And again, Sir, it is a shame that that was not
38 followed up by either myself or my friend because I think elaboration perhaps would have
39 given greater context to what he --

40
41 THE COURT: Well my concern is that -- that it looks to me

1 as if he was being self serving when he said that. He was being questioned in
2 cross-examination so he came up with something --

3

4 MR. FLYNN: And --

5

6 THE COURT: -- that he hadn't said before.

7

8 MR. FLYNN: -- and there were aspects of his testimony, Sir,
9 that I did find you know, to be and I think your word is self serving, Sir. And I --and I
10 agree there were parts of that. But I think what -- what -- what's the major difference,
11 Sir, is that it's just not my client saying this story, but it's other people saying the same
12 story. Even the complainant in -- in her story has very many of the same similarities.

13

14 THE COURT: Well, I'll grant you that, her evidence was by
15 no means perfect. I'll grant that at once. I'm -- I'm interested in why this important
16 point was raised only deep in cross-examination?

17

18 MR. FLYNN: And, Sir, I was not aware of that -- of that
19 specific phrase being -- being said by my client, Sir.

20

21 THE COURT: All right.

22

23 MR. FLYNN: I'd like to speak for a little bit, Sir, about the
24 sobriety level of these individuals and the

25

26 THE COURT: Well, Mr. Flynn, I don't think much turns on
27 that.

28

29 MR. FLYNN: Oh very good, Sir.

30

31 THE COURT: They're young people, they're drunk.

32

33 MR. FLYNN: I'll move on from that, Sir.

34

35 THE COURT: And to measure how drunk they were, one
36 drunk person measuring how drunk another drunk person is.

37

38 MR. FLYNN: It becomes a lesson in drunk -- yes, Sir. I
39 agree completely.

40

41 The next issue, Sir, for me then was the consistency of the evidence. I think I've -- I

1 think I've established a fair bit of that already, Sir, in terms of the collaboration between
2 Skylar and my client as to the -- as to the bathroom, as to the marijuana cigarette and the
3 collaboration between Mike and the complainant as to the entering of the shower. The
4 collaboration I think of -- of Skylar and my client and Mike as to the conduct of the
5 complainant, both before and after the alleged sex assault. We also have, what I would
6 say quite honestly, Sir, is the -- the evidence itself even by the complainant, Sir, and we
7 had touched on it briefly the idea that she would tell somebody in effect to leave us alone
8 while she's being sexually assaulted, flies in the face of --

9

10 THE COURT: I've got -- I've got that point, Mr. Flynn.

11

12 MR. FLYNN: Very good, Sir, I won't re-harp on it, Sir. I am
13 saying again, Sir, we take it from three perspectives, Sir, I'm actually almost done. We
14 take it from three perspectives, Sir, as I started off. We suggest that this was a
15 consensual sex act between two young people. If the Court does not consider that I
16 would suggest that there's a -- a true air of reality as to my client having a mistaken
17 belief that this woman was giving consent, particularly given the conduct of the young
18 lady. The conduct of the yong lady during the sex act itself, the --

19

20 THE COURT: Well, at oneon one at one point she seems
21 to have demurred and that was when she asked him whether he had a condom.

22

23 MR. FLYNN: Yes, Sir.

24

25 THE COURT: What -- what were her words? Do you have a
26 condom? That seems to indicate con -- qualified consent.

27

28 MR. FLYNN: Or was it in effect -- and again I want to be fair
29 to the testimony, Sir, it very well may have been --

30

31 THE COURT: Well, I'm asking for you to -

32

33 MR. FLYNN: -- to the effect that --

34

35 THE COURT: -- to take me to that because --

36

37 MR. FLYNN: Oh very good, Sir. I will, Sir.

38

39 THE COURT: -- it's -- I think it's seminal.

40

41 MR. FLYNN: Oh very good, Sir, I will do that immediately.

1
2 THE COURT: On her version. Look at page 21.
3
4 MR. FLYNN: Yes, Sir.
5
6 THE COURT: (As read)
7
8 I said that he can't, he can't put his penis inside me. Then he
9 said, yeah, he could. He said he'd pull out before he ejaculated.
10
11 MR. FLYNN: Yeah, it indicates then, Sir, in further
12 questioning that -- that he can't and it's asked, He can't what? And then she replies that:
13 (as read)
14
15 He can't. He can't put his -- his penis inside of me and he said,
16 yeah, I can. And it was like I'll -- I'll pull it out before -- before
17 I ejaculate. I do it all the time.
18
19 I think she had also commented, Sir, about the size of his penis.
20
21 THE COURT: Yes. I'm interested in the moment in -- in what
22 happened around the question of his having a condom. Because asking him whether he
23 has a condom indicates to me that there's some kind of consent, if only qualified.
24
25 MR. FLYNN: Oh. Yes, Sir, it appears to be on page 20 -- 23,
26 Sir, line -- line 11. And I have it here, Sir. The Court on line 8: (as read)
27
28 THE COURT: Sony, who said without a condom? You said, you
29 can't without a condom? Or did he say he couldn't?
30
31 A I said he can't without a condom. No.
32
33 So she's saying you can't do this without a condom. And then I think he in effect
34 convinces her to -- to consent with the promise that he will not ejaculate on -- inside of
35 her, which he does. He -- he pulls out and he has sex on her stomach, which in effect
36 confirms what I suggest was the implicit -- not implicit, the consensual contract between
37 these two young people. That they would have the intercourse and he would not ejaculate
38 inside of her.
39
40 THE COURT: Well, you said he kept his end of the bargain.
41 The question is, whether the bargain was struck in the first place.

1
2 MR. FLYNN: I'm sorry, Sir?
3
4 THE COURT: The question is whether the bargain was struck
5 in the first place. She says I said, no, and he carried on. He said that he'd pull out.
6
7 MR. FLYNN: And -- and he indicated, Sir, that she had -- that
8 her conduct was such of -- of the kissing of the hands on the shoulder, that she was
9 consenting to the act. I -- I think he was very clear, my client, in his testimony that there
10 was a fair bit of kissing going on between them at this time, particularly after the oral sex.
11 There was this kissing and then was the discussion about the actual sex. Well are -- are
12 we going to fuck, do you want to fuck? And well, we -- we can't unless you have a
13 condom, well I don't have a condom but I'll pull out before hand. And I think it fits, Sir.
14 It flows with the -- with the events that have gone on between these people and I suggest
15 the -- it was a natural progression of that evening and of the conduct that these people had
16 initiated back on the dance floor.
17
18 And again, Sir, I've suggested that the three levels of our defence, the consent between
19 parties, the mistaken belief and --
20
21 THE COURT: Mr. Flynn, I think -- just wait, madam clerk is
22 dealing with an issue here. I'm not sure what -- madam clerk is dealing with something.
23
24 MR. FLYNN: Oh.
25
26 THE COURT: And I think that she -- she --
27
28 MR. FLYNN: Oh very good, Sir. I'll just -- I'll just wait, Sir.
29
30 THE COURT: -- should be here just -- just to make sure that
31 the recording keeps going.
32
33 Everything all right, madam clerk?
34
35 THE COURT CLERK: No. Yes, it was the (INDISCERNIBLE) earlier
36 matter she was
37
38 THE COURT: I see. Thank you. Thanks --
39
40 THE COURT CLERK: -- it was -- it was --
41

1 THE COURT: -- for -- for --
2
3 THE COURT CLERK: -- I didn't want (INDISCERNIBLE).
4
5 THE COURT: Carry on, Mr. Flynn.
6
7 MR. FLYNN: Oh, thank you, Sir. In effect, Sir, I think the --
8 the evidence shows a definitive reasonable doubt. I don't -- I don't think the Crown has
9 shown beyond a reasonable doubt that this matter has been adequately adduced before
10 you, the evidence to support this. I think the evidence adduced shows a consensual act.
11
12 THE COURT: So, you're saying that in terms of *W.D.*, if I
13 believe the accused
14
15 MR. FLYNN: Yes, Sir.
16
17 THE COURT: -- all right --
18
19 MR. FLYNN: Then -- then it's an automatic acquittal.
20
21 THE COURT: It's an automatic acquittal. I think
22 Ms. Mograbee says it's more complicated than that.
23
24 MR. FLYNN: Well -- well it is, Sir. It -- and again I think
25 my --
26
27 THE COURT: And you don't need to argue her case for her
28 I'm going to get her to ventilate it thoroughly so I fully understand it. If I don't know
29 who to believe, and this is really what worries me. What we have are four witnesses and
30 they were all unsavoury witnesses, in my view. Mike perhaps the most savoury, the least
31 unsavoury, but certainly the complainant and the accused are amoral people. I get the
32 sense is the truth is what they can get others to believe.
33
34 MR. FLYNN: Well --
35
36 THE COURT: They -- there is no right, there is no wrong.
37 They don't pay for things, they take them and they think that's clever and they give
38 honour to people who steal. That -- that to my mind is indicative of a person who -- to
39 whom the truth has little value.
40
41 MR. FLYNN: Limited value, Sir.

1
2 THE COURT: And the complainant, if anything, was as bad.
3
4 MR. FLYNN: And, Sir, I agree. These -- these are people
5 who come before you without clean hands, so to speak, but again I stress that the two
6 independent witnesses, I think were the most independent of all. I think -- and again, as
7 you've said, my client's testimony was self -- was at points self serving. I think the -- but
8 I think the complainant's testimony, Sir, was -- was extremely lacking in credibility.
9
10 THE COURT: Well, her (INDISCERNIBLE) were hard to
11 understand.
12
13 MR. FLYNN: Well, Sir, I'll -- I'll leave you with these last
14 two thoughts, sorry. Particularly about the idea of rape, and I know these are somewhat
15 sound-bite like, Sir, but I think they -- they go I think to -- to the real core of this. If a
16 woman is being --
17
18 THE COURT: Sorry, Mr. Flynn, my question was what
19 happens if I can't believe anybody?
20
21 MR. FLYNN: Well then I don't think there's any evidence
22 before you that supports the -- the facts, Sir.
23
24 THE COURT: Thank you.
25
26 MR. FLYNN: Thank you. I -- I'll leave with these two sort
27 of sound-bite like things, Sir, but I -- I often think about a woman does not have to yell
28 rape while being raped, you know, she -- she doesn't have to. But I think if the woman
29 is being raped she's not supposed to yell, leave us the fuck alone, get out of here. That's
30 improper.
31
32 THE COURT: Well, even -- even -- even a woman who's
33 being raped is entitled to modesty.
34
35 MR. FLYNN: But -- but again, Sir, while being raped --
36
37 THE COURT: It -- it's unlikely, I'll grant you that. But the
38 argument, and I'm sure Ms. Mograbee will make it, is she didn't want it to be happening
39 but while it was happening she didn't want other people to watch her.
40
41 MR. FLYNN: Well, and again, and particularly, Sir, with the

1 individual who was watching her who was someone who she was friendly with throughout
2 the day, who she knew likes -- liked her, so it's more than just a complete stranger, it's
3 someone who she knew liked her. And if she was in danger or -- or any sense of this,
4 this is an individual who I think she would have reached out to immediately, particularly
5 as she said, she didn't really know anybody there. This was really the -- the one person
6 who she really knew because she had spent the last two days with him.

7

8 So -- and again, Sir, and again I'll leave with the -- the last though, Sir, and I know it's
9 a -- antiquated (INDISCERNIBLE) but the reality is in our judicial system it's -- it's
10 better for 99 guilty people to be set free than for one innocent man to be gaoled. And I
11 leave it at that, Sir.

12

13 THE COURT: Thank you, Mr. Flynn.

14

15 MR. FLYNN: Thank you.

16

17 MS. MOGRABEE: Sir, I'm wondering --

18

19 THE COURT: Are you ready?

20

21 MS. MOGRABEE: Yes, I'm going to be on my feet for probably at
22 least a half an hour, Sir.

23

24 THE COURT: Do you want a quick break?

25

26 MS. MOGRABEE: Please may I?

27

28 THE COURT: Well, you're going to be longer than that you're
29 going to have to help me a lot, Ms. Mograbee.

30

31 MS. MOGRABEE: I'll help you as much as I can, Sir.

32

33 THE COURT: And if you get tired you can sit down and talk.

34

35 MS. MOGRABEE: I appreciate that.

36

37 THE COURT: So a quick adjournment?

38

39 MS. MOGRABEE: Please.

40

41 THE COURT: All right. I'll be waiting out there.

1
2 MS. MOGRABEE: Five minutes, thank you.
3
4 THE COURT CLERK: Order in court, rise. Court stands adjourned for
5 a brief period of time.
6
7 (ADJOURNMENT)
8
9 THE COURT CLERK: Order in court, all rise.
10
11 MS. MOGRABEE: Thank you for the break, Sir.
12
13 THE COURT: Well, I needed it too, Ms. Mograbee.
14
15 MR. FLYNN: The -- the Sheriffs just getting Mr. Wagar, Sir.
16
17 THE COURT: Thank you, Mr. Flynn.
18
19 THE COURT CLERK: Recalling the matter Alexander Scott Wagar,
20 accused is in custody in person. There's a ban on publication on the identity of the
21 complainant.
22
23 THE COURT: Please sit, Mr. Wagar.
24
25 MS. MOGRABEE: Sir.
26
27 THE COURT: Ms. Mograbee, I -- I hope you have the sense
28 that I'm lost on the facts.
29
30 MS. MOGRABEE: Yes.
31
32 THE COURT: What -- what I need your help with is the law
33 and how I apply the facts to the law.
34
35 MS. MOGRABEE: Yes.
36
37 Final Submissions by Ms. Mograbee
38
39 MS. MOGRABEE: And I'd like to address you on how the facts fit
40 the law as well.
41

1 THE COURT: That's -- that's exactly what I'm saying.
2

3 MS. MOGRABEE: And I'll try to focus on, obviously, the relevant
4 facts. And I'd like to be able to also reply to the defence argument as well.
5

6 THE COURT: To be sure.
7

8 MS. MOGRABEE: Yes.
9

10 THE COURT: Ms. Mograbee, you're obliged and we've got
11 all day.
12

13 MS. MOGRABEE: Thank you.
14

15 THE COURT: But I -- I just wanted you to know what I feel I
16 need help with.
17

18 MS. MOGRABEE: Fair enough, Sir, and I -- I do have an outline
19 of the law for you and a position on how you're to apply it.
20

21 THE COURT: Thank you.
22

23 MS. MOGRABEE: So, you have a case where the accused has
24 testified, asserting that the complainant consented to the sexual touching. That is to say,
25 according to him, that she leaned in to him in the bathroom. That they were groping each
26 other and she grabbed his penis. He also testified that there was some conduct prior to,
27 that is that she complimented his dancing and that he felt that they had a connection is --
28 is the reason in his mind as to why this was all a consensual situation.
29

30 He also said that they were both drunk. He also said they had no conversation together.
31 That is him and the complainant about what he had in mind in terms of what was to
32 happen in the washroom. The Crown argues that in these circumstances no consent can
33 be found. And there are a number of reasons for that.
34

35 The complainant's version is she didn't want it. She told him to stop. She tried to push
36 him off without success. She said she didn't yell out because he was in control and that
37 she was scared.
38

39 Now keeping in mind that we have an individual here, that is the accused, who is
40 significantly larger than the complainant, which is a relevant fact. His testimony is that
41 he is over 6 feet tall and that he weighed over 210 pounds at the time of the incident and

1 was in healthy condition and had just gotten out of gaol and was in -- was feeling very
2 strong physically, because he worked out a lot while spending his time in custody.

3

4 THE COURT: He's much bigger than she is, I'll grant you
5 that.

6

7 MS. MOGRABEE: Pardon me?

8

9 THE COURT: He's much bigger than she is.

10

11 MS. MOGRABEE: Yes. And you'll recall that she said she was a
12 100 pounds at the time.

13

14 THE COURT: She is a slight woman. Yes.

15

16 MS. MOGRABEE: She's about 5 foot 6 was her evidence as well.

17 And in -- in the context of everything that's important. In addition, what's important is
18 that they don't know each other. She's just met him at the Alex Youth Centre earlier on
19 in the evening. There's really very little conversation that happens, according to both
20 their evidence, as to what's said at the Alex Centre. It appears to be some situation where
21 they were just invited to go to this house party. So there was no personal conversation
22 that came out in the evidence in terms of them having any kind of relationship of any
23 kind. Again, these are two people who don't know each other. But yet the accused says
24 that he feels a connection. And the Crown respectfully submits that this is completely
25 unreasonable in the circumstances, and in giving reasons for why he feels that there's a
26 connection or felt at the time, in cross-examination, he said that she smiled at him, that
27 he -- she's complimentary about his dancing, that she was facing him when he was
28 dancing. That he said he liked her, that she said she liked him too. That does not equate
29 to consent in any way.

30

31 Now he also says that he sees her as a challenge. And it is in the context of everything
32 that that's important as well. Again, going to the circumstances upon which the sexual
33 contact takes place. He said he wanted her to want me more than Dustin. And dancing is
34 how I attracted her to me. But again, there's no evidence that she was attracted to him
35 other than this conduct that he says he felt indicated an attraction. But it's not what's in
36 the accused's mind that's relevant to consent. It is what is in the complainant's mind and
37 the law is very clear on that.

38

39 You heard from two other defence witnesses, Mike and Skylar. Both were party goers at
40 the house. The Crown submits that there is nothing in their evidence that turns on the
41 issue of consent. The Crown acknowledges that they both said that nothing seemed out of

1 place and that the accused and the complainant were friendly to each other. But again
2 that does not turn on the issue of consent.

3
4 Again, Mike testified that he walked in the bathroom to see two people in the shower, but
5 he couldn't say what was going on. He also says that the accused was sober, but the
6 accused said he was drunk. So we have some contradiction there. He also said that he's
7 not sure, "about any of this." So he waffled quite a bit in his evidence about what he
8 recalled and what he said he could recall unequivocally isn't relevant to any issue of
9 consent that we're dealing with here. He also says that he may have taken speed that
10 night.

11
12 And then we have the evidence of Skylar who said she wasn't drinking but had
13 marijuana. The accused said Skylar was drinking. So we have a contradiction there. But
14 again, nothing that Skylar says, likewise -- similar to what Mike says, there's nothing in
15 her evidence that is relevant to whether there was a consensual act of sex in this
16 circumstance. Her comment that she asked the complainant about whether she was going
17 to have sex with the accused is hearsay.

18
19 THE COURT: Well, no. It falls under the exception of saying
20 something that an accused can -- that -- that a witness can -- can again say, surely. Now
21 I know she said it afterwards, after the complainant had testified and the complainant
22 wasn't given an opportunity to deal with it.

23
24 MS. MOGRABEE: Yes. Which is also relevant in your assessment
25 of whether you should give any weight to that.

26
27 THE COURT: And -- and it will be.

28
29 MS. MOGRABEE: But it's also inadmiss

30
31 THE COURT: And yet it seems to -- it -- it has a ring of truth
32 it's something she -- it's the kind of thing that young women will talk about, particularly
33 if they're both interested in the same man.

34
35 MS. MOGRABEE: Well, they didn't know each other either,
36 remember her evidence was that they had just met as well. So how reasonable is it that
37 someone would say that when they don't know the person. It's a very personal thing to
38 say. It's an odd thing to ask, quite frankly, but over and above that --

39
40 THE COURT: In that context --

41

1 MS. MOGRABEE: -- it's still hearsay. It's still hearsay. It is
2 inadmissible evidence because it's an out of court statement that is potentially being
3 tendered for the truth of its content. And that is not permissible.
4

5 THE COURT: Well, it is permissible, in my view, if the
6 accused has had a chance to deal with it. Because that's the reason for -- for the
7 inadmissibil inadmiss -- inadmissibility of the hearsay, is because it can't be tested.
8 And that's why, for example, a complainant can say the accused said such and such.
9

10 MS. MOGRABEE: It's different for --

11
12 THE COURT: Because --

13

14 MS. MOGRABEE: -- when the accused says something it's -- it's
15 not -- it's treated in the law the same as when somebody else says something. And
16 there's a whole --

17

18 THE COURT: Well, I don't believe that to be the case, but the
19 problem that I have is that the complainant couldn't deal with it because I assume
20 Mr. Flynn hadn't had time to take proper instructions from his client, so he wasn't in a
21 position to put that to the accused.

22

23 MS. MOGRABEE: Well, and he -- he must put that to the accused
24 and he must also put it to the complainant and she denied that.

25

26 THE COURT: To -- sorry, put it to the complainant.

27

28 MS. MOGRABEE: Yeah.

29

30 THE COURT: I said the accused. Put it to the complainant.

31

32 MS. MOGRABEE: Yeah. And --

33

34 THE COURT: So, my problem is that even if it's admissible
35 it's just -- because it was never tested there's very little I can do with it.

36

37 MS. MOGRABEE: Well, and the accused doesn't even know about
38 this, if you even assume that it was done. That it was said.

39

40 THE COURT: On the other hand, as I said, it's seductive for
41 me to -- to give credence to it because it -- it just has the ring of truth.

1
2 MS. MOGRABEE: Well, the Crown will respect --
3
4 THE COURT: But I -- I'm very conscious --
5
6 MS. MOGRABEE: Yes.
7
8 THE COURT: -- and I'm going to think about it very hard,
9 Ms. Mograbee, that I have to be very careful.
10
11 MS. MOGRABEE: In --
12
13 THE COURT: And let's leave that there, I'm going to go away
14 and think about it.
15
16 MS. MOGRABEE: All right. If -- if you do consider it to be
17 admissible evidence, the Crown would submit that it is still not relevant to the issue of
18 consent because --
19
20 THE COURT: Thank you.
21
22 MS. MOGRABEE: -- when that door closes the complainant at any
23 time, as with any person who is in that situation, is or has the right to change their
24 mind --
25
26 THE COURT: Of course they do.
27
28 MS. MOGRABEE: -- at any time. So if you even accept it to be
29 true, which I'm not --
30
31 THE COURT: Would you say the same --
32
33 MS. MOGRABEE: -- conceding you should. But if you do --
34
35 THE COURT: Okay.
36
37 MS. MOGRABEE: -- it still doesn't close the issue.
38
39 THE COURT: It doesn't close the issue. Oh, I grant you that,
40 it doesn't close the issue. But it -- it does affect the issue. For example, if the evidence
41 had been in your favour, the Crown's favour, to the effect, I asked -- Skylar says, I asked

1 [REDACTED] and she said, no, she didn't want to, she hated him and she found him very
2 unattractive, you wouldn't have said the same thing presumably?

3

4 MS. MOGRABEE: Well, she did -- she did say that in her
5 testimony already.

6

7 THE COURT: Yeah, maybe but now there's somebody else --
8 if somebody else had said that.

9

10 MS. MOGRABEE: Right.

11

12 THE COURT: You wouldn't have said that it's inadmissible.
13 Hearsay to one side, you wouldn't have said that I mustn't listen to it because it -- it
14 predated the events?

15

16 MS. MOGRABEE: Well, I wouldn't be tendering it for the truth of
17 its content unless I went through the usual application

18

19 THE COURT: No, and -- and --

20

21 MS. MOGRABEE: --for admissibility. **So it's not that**
22 straightforward.

23

24 THE COURT: -- I've got that.

25

26 MS. MOGRABEE: Number one. Number two. If I were tendering
27 it, it wouldn't be for the truth of its content, that issue aside of admissibility, I'd be
28 tendering it for the fact that they had a conversation and the complainant would need to
29 testify as to the content of that conversation.

30

31 THE COURT: All right. Now --

32

33 MS. MOGRABEE: It's her evidence that's relevant to the issue of
34 consent, not what somebody else says on the issue of consent.

35

36 THE COURT: Yes, it's -- it's a pity it worked out this way but
37 that's where we are now. What I am interested in though is what Skylar said about when
38 and why she left the bathroom with -- with Dustin?

39

40 MS. MOGRABEE: Well, she -- she --

41

1 THE COURT: Please remind me what that evidence is?
2

3 MS. MOGRABEE: --her evidence was simply, from my
4 recollection, is that it's -- this is Skylar's evidence only because you haven't heard from
5 Dustin obviously. Her evidence is that it's after she asks this question that she leaves the
6 bathroom with Dustin.
7

8 THE COURT: Well, then it's not hearsay, that's -- I -- I left
9 for a reason. And the reason was implicitly, these people were going to become intimate.
10

11 MS. MOGRABEE: If you accept her evidence that's what she said.
12 Now that's the reason that she gave for leaving and we can only speculate about what --
13 why Dustin left. Now, if you -- if you couple that with the accused's evidence, he
14 doesn't even talk about that. He just says that they left.
15

16 THE COURT: He does, but then he doesn't -- he doesn't know
17 what -- he says the girls were talking --
18

19 MS. MOGRABEE: He doesn't know why they leave, they just
20 leave.
21

22 THE COURT: -- he -- he says the girls were talking girl stuff,
23 he was talking to Dustin. They leave.
24

25 MS. MOGRABEE: He doesn't know what they said to each other.
26 Yeah.
27

28 THE COURT: And I think both parties say that he locked the
29 door. It seems he didn't lock it properly, but he locked the door.
30

31 MS. MOGRABEE: At -- at what point?
32

33 THE COURT: Well, after the other two had left.
34

35 MS. MOGRABEE: That's her evidence, yes.
36

37 THE COURT: Yeah.
38

39 MS. MOGRABEE: And that was his evidence too.
40

41 THE COURT: He stood up and locked the door. What did she

1 do at that --
2
3 MS. MOGRABEE: Yes.
4
5 THE COURT: -- point when she saw a man much larger than
6 she was locking the door?
7
8 MS. MOGRABEE: There's no evidence that she did anything other
9 than say nothing.
10
11 THE COURT: No. Well, what do I -- what do I take from
12 that?
13
14 MS. MOGRABEE: That doesn't equal consent is what you should
15 take from that.
16
17 THE COURT: It doesn't equal consent.
18
19 MS. MOGRABEE: She has no obligation to cry out
20
21 THE COURT: It doesn't --
22
23 MS. MOGRABEE: She has no obligation to make inquiries herself.
24
25 THE COURT: But it doesn't equal -- it doesn't equal lack of
26 consent.
27
28 MS. MOGRABEE: It does.
29
30 THE COURT: Does it?
31
32 MS. MOGRABEE: And I'll get to that, if I may.
33
34 THE COURT: Well gees.
35
36 MS. MOGRABEE: If you'll indulge me.
37
38 THE COURT: Of course you can --
39
40 MS. MOGRABEE: Thank you.
41

1 THE COURT: --eventually you're going to give -- say
2 everything you want to, Ms. Mograbee.
3
4 MS. MOGRABEE: I'm going to get -- I'm going to get through it
5 all I hope. All right. May I continue, Sir?
6
7 THE COURT: Please.
8
9 MS. MOGRABEE: Yes. So again, going to Mike's evidence.
10 There was a contradiction in -- in -- in terms of how it compares to Skylar's evidence that
11 Mike doesn't say anything about individuals going into the washroom for the smoke. I
12 mean he's at his house. He says that he is paying attention to what's going on and
13 essentially the whole party, but for Lance, go into the washroom. And he gives no
14 evidence as to that.
15
16 THE COURT: And yet he did go. There's no question that --
17
18 MS. MOGRABEE: The complainant --
19
20 THE COURT: -- four people went into the washroom --
21
22 MS. MOGRABEE: Well, I don't know if that's --
23
24 THE COURT: -- (INDISCERNIBLE) the complainant says so.
25
26 MS. MOGRABEE: -- true or not if you accept Skylar's evidence
27 and the accused's evidence then, yes, that -- that's what happened.
28
29 THE COURT: But doesn't the complainant say that too?
30
31 MS. MOGRABEE: She does not. She says that --
32
33 THE COURT: Oh of course --
34
35 MS. MOGRABEE: -- she doesn't recall that --
36
37 THE COURT: -- I beg your pardon.
38
39 MS. MOGRABEE: -- part.
40
41 THE COURT: Sorry.

1
2 MS. MOGRABEE: Yeah.
3
4 THE COURT: Mind went blank for a moment.
5
6 MS. MOGRABEE: Crown respectfully submits that Skylar's
7 evidence and the accused's evidence is self serving in that way.
8
9 THE COURT: Yeah.
10
11 MS. MOGRABEE: Make it look like it was all set up for consent
12 when really that's not the case, the Crown would submit.
13
14 THE COURT: Well, Ms. Mograbee, I don't know that you can
15 go that far. There's -- there's no basis for the proposition that the three of them got
16 together and came up with this story. Being Skylar --
17
18 MS. MOGRABEE: Well, they did. There was evidence --
19
20 THE COURT: -- Mike and --
21
22 MS. MOGRABEE: -- there was evidence that there was a
23 discussion about what had happened in that house.
24
25 THE COURT: And that they'd come -- that they've got to --
26
27 MS. MOGRABEE: Mike --
28
29 THE COURT: -- come up with this story?
30
31 MS. MOGRABEE: Well, there was some discussion about the
32 incident. Skylar testified that she'd spoken to -- to Lance. She said she'd spoken to the
33 accused as well. Mike said the same thing.
34
35 THE COURT: All right.
36
37 MS. MOGRABEE: So you have to weigh that evidence in light of
38 that. Skylar does say that the accused was drinking, which is of assistance. And she also
39 says though that she saw the accused touching the complainant, it was a mutual touching.
40 Again the accused does not say that in his evidence, so if you accept that that's a
41 problem. He says nothing about them touching each other at any time in his

1 examination-in-chief or in his cross-examination. He just doesn't mention it at all, which
2 the Crown would submit is pretty important when you're talking about how the events
3 unfold. He -- he -- rather she, even though she says that, is again in no position to give
4 any evidence about whether this is a consensual situation. Again, even if you accepted
5 that that were true, when that door closes it's what happens in that -- in that bathroom
6 that is the most important. One can't look at those kinds of behaviours and say that one
7 was more likely to consent because of that. That would be erroneous thinking in the
8 Crown's respectful submission, because again at any time a person in that situation should
9 be able to make decisions throughout the -- the situation they find themselves in, for
10 whatever reason.

11
12 So I'd like to -- sir, that's the -- the outline of the evidence. I will get more into
13 specifics. But I'd like to turn to the components of the sexual assault and what the
14 Crown needs to prove.

15
16 THE COURT: Please, Ms. Mograbee, can I ask you to go
17 through the -- the legislation first.

18
19 MS. MOGRABEE: Yes.
20

21 THE COURT: So the starting point in terms of the -- the
22 information is 271.

23
24 MS. MOGRABEE: Yes.
25

26 THE COURT: Everyone who commits a sexual assault is
27 guilty of an indictable offence and is liable to imprisonment for a term, et cetera. Now,
28 what other sections play into this section?

29
30 MS. MOGRABEE: The other sections that play into this are section
31 273.2, where belief in consent is not a defence.

32
33 THE COURT: 273.2.
34

35 MS. MOGRABEE: And I will be referring to that as well. Also
36 what is relevant --
37

38 THE COURT: So that's aggravated sexual assault?
39

40 MS. MOGRABEE: No, sorry, 273.2, where belief in consent is not
41 a defence.

1
2 THE COURT: To -- where no consent is obtained. All right.
3
4 MS. MOGRABEE: Yes.
5
6 THE COURT: Meaning of consent.
7
8 MS. MOGRABEE: That's relevant as well. Also relevant is section
9 275.
10
11 THE COURT: Yeah.
12
13 MS. MOGRABEE: Rules respecting recent complaint abrogated.
14 And I will be referring to that as well. And obviously 271 is relevant because that's the
15 section that sets out what sexual assault is.
16
17 THE COURT: Well, it doesn't really.
18
19 MS. MOGRABEE: Well --
20
21 THE COURT: It says--
22
23 MS. MOGRABEE: -- I will get into the --
24
25 THE COURT: -- everyone is guilty of a sexual assault --
26
27 MS. MOGRABEE: Yes. Yes.
28
29 THE COURT: -- who commits a sexual assault is -- but --
30
31 MS. MOGRABEE: And I'll -- and I'll break it down for you.
32
33 THE COURT: Okay.
34
35 MS. MOGRABEE: I know that that's not particularly helpful, but I
36 can break it down for you if I may. But those are all the relevant sections
37
38 THE COURT: Thank you, Ms. Mograbee.
39
40 MS. MOGRABEE: -- that you need to deal with.
41

1 THE COURT: That's what I needed.

2

3 MS. MOGRABEE: All right. So, for a conviction the Crown is
4 required to prove beyond a reasonable doubt that the accused committed the actus reus
5 and that he had the necessary mens rea. So I'll break that down for you.

6

7 The actus reas of the assault is the unwanted sexual touching and the mens rea is the
8 intention to touch, knowing of or being reckless or wilfully blind to, a lack of consent by
9 either words or actions from the person being touched.

10

11 THE COURT: Being wilfully blind to either by way of --

12

13 MS. MOGRABEE: Yes.

14

15 THE COURT: -- words or actions?

16

17 MS. MOGRABEE: Yes. From the person being touched. And
18 again that's directly in correlation with section 275 that talks about consent, where no
19 consent is to be -- is where no consent is obtained.

20

21 THE COURT: All right.

22

23 MS. MOGRABEE: So the first two -- so let me back up. The actus
24 reas is established by again, proof of touching. The sexual nature of the contact and the
25 absence of consent. The first two elements, that is the proof of the touching in the sexual
26 nature are objective. And I don't think that's an issue here that we have proof of
27 touching and that it's sexual in nature. It's the third element that's a live issue here, that
28 is the absence of consent and that is subjective.

29

30 And determined by reference to the complainant's subjective internal state of mind. And
31 that is a proposition set out in *R. v. Park*, which you have, 2 SCC, 836.

32

33 THE COURT: Please repeat. Deteiinined by?

34

35 MS. MOGRABEE: Reference to the complainant's subjective
36 internal state of mind. *R. v. Park*, 2 SCC, 836.

37

38 That is to say that only her state of mind is determinative on this issue that is her
39 perspective.

40

41 THE COURT: All right. Well, that seems pretty obvious.

1
2 MS. MOGRABEE: Right. So it's hers -- right.
3
4 THE COURT: And since this is a one way -- it's a one way --
5
6 MS. MOGRABEE: It's a one way. Right. But again I -- in
7 spelling out the law I just want to be clear.
8
9 THE COURT: Thank you. Ms. Mograbee, I'm -- I'm
10 concentrating very hard on this, it's important.
11
12 MS. MOGRABEE: I appreciate that.
13
14 THE COURT: So take your time, go in as much detail as you
15 want.
16
17 MS. MOGRABEE: You did ask me the other day about W.D. and
18 how you apply it.
19
20 THE COURT: Yeah.
21
22 MS. MOGRABEE: You don't assess consent and apply the facts to
23 that and then do a separate test under WD. You don't do that.
24
25 THE COURT: Say that again? You don't assess consent?
26
27 MS. MOGRABEE: You don't assess the issue of consent --
28
29 THE COURT: Yeah.
30
31 MS. MOGRABEE: -- based on what everyone said and then do a
32 separate assessment for *W.D.* You don't do that. What you do is you look at all of the
33 evidence and in considering all of the evidence you're entitled to believe all, some or
34 none of each witness's evidence.
35
36 Also in that assessment you assess the evidence of the accused. And the whole point
37 behind *W.D.* is to ensure a proper balance -- balanced assessment to avoid, you know,
38 considering the evidence of the accused first. In this way what I'm saying is look at all
39 the evidence.
40
41 THE COURT: So are you saying that in -- in sexual assault

1 cases *W.D.* is applied on a -- not applied at all or applied and qualified?
2

3 MS. MOGRABEE: No, it's applied. It's applied. It's just not
4 applied as a separate assessment to the issues of consent --
5

6 THE COURT: All right, well what case tells me that?
7

8 MS. MOGRABEE: -- when you're dealing with it. What issue --
9

10 THE COURT: What case tells me that?
11

12 MS. MOGRABEE: There is no particular case. If you -- you read
13 all the cases the courts will review testimony of the accused and will apply *W.D.* You
14 must apply *W.D.*, there's no question about that. The issue is how you apply it.
15

16 THE COURT: Yes.
17

18 MS. MOGRABEE: And you apply it in --
19

20 THE COURT: Is there any case that tells me this is how you
21 apply *W.D.* in the way that you've just told me?
22

23 MS. MOGRABEE: Just -- Sir, just from what I see in the cases, my
24 everyday practice and what I understand the law to be. If you want I can provide you
25 with a case where the court does apply *W.D.*
26

27 THE COURT: I -- I'd be grateful for that, yes.
28

29 MS. MOGRABEE: And how it applies *W.D.*
30

31 THE COURT: I'd be grateful. Yes.
32

33 MS. MOGRABEE: Just so you can see how it's done.
34

35 THE COURT: Yes.
36

37 MS. MOGRABEE: That's not a problem. I can provide that. I
38 might even have one for you here.
39

40 THE COURT: I -- that's what I really need, Ms. Mograbee.
41

1 MS. MOGRABEE: All right. So you assess the evidence of the
2 accused, as I say, and you are entitled to consider it in -- in the context of all of the
3 evidence. In the context of a typical he said, she said, which is what you have here, in
4 the context of course of a sexual assault case. We're not talking about any case here.
5 *W.D.* prohibits you from concluding that the Crown has met its burden simply because
6 you decide to prefer the evidence of -- of the complainant say to the accused.

7

8 THE COURT: M-hm.

9

10 MS. MOGRABEE: You must consider all of the evidence. It's not
11 a credibility contest of you believe one version over the other. You must consider all of
12 the evidence. And again, you're entitled to believe all, some or none of each witness'
13 evidence in making an assessment.

14

15 And the Crown would say that when you are assessing that evidence at a whole -- as a
16 whole, you -- you should compare the evidence of each of them. And you must be
17 satisfied beyond a reasonable doubt on all the evidence that the accused sexually assaulted
18 the complainant before you can find him guilty.

19

20 And now I'm just going to get into some argument. That's sort of the overview of the
21 law and I will get back to some parts of the law more specifically as they connect to the
22 facts. You can't find the complainant did not want -- want the sexual touching and find
23 that a reasonable doubt exists on the issue of consent.

24

25 THE COURT: Sorry, let me write this down.

26

27 MS. MOGRABEE: Yeah. You cannot find that the complainant
28 did not want the sexual touching and also find that a reasonable doubt exists on the issue
29 of consent. If you accept her evidence and the Crown says that you should regarding her
30 state of mind, there can be no consent.

31

32 THE COURT: Sorry, Ms. Mograbee, I'm -- I'm writing this
33 down. If you could give me a chance --

34

35 MS. MOGRABEE: Oh, did you want me to slow down --

36

37 THE COURT: -- because I'm going to have to come back --

38

39 MS. MOGRABEE: -- a little bit?

40

41 THE COURT: -- and read this again.

1
2 MS. MOGRABEE: Fair enough. Where are you at then?
3
4 THE COURT: Can't find that the complainant does not want
5 sexual touching and at the same time --
6
7 MS. MOGRABEE: And find that a reasonable doubt exists on the
8 issue of consent. If you accept her evidence and the Crown says you should regarding
9 her state of mind --
10
11 THE COURT: Yes.
12
13 MS. MOGRABEE: There can be no consent and you must find the
14 accused guilty.
15
16 THE COURT: Well that's fair enough. That follows
17 (INDISCERNIBLE) today.
18
19 MS. MOGRABEE: Now again I'm mindful that the -- the accused
20 has testified in this case and the Crown would submit that a bold denial that she
21 consented is insufficient to raise a reasonable doubt. He cannot claim that he was
22 mistaken in his belief because in his evidence he said that she said unequivocally that he
23 could engage in the sexual touching at the time when there was a discussion about the
24 condom.
25
26 So when you have an accused who testifies and says that the complainant is unequivocal
27 in her consent that is to say she consented and communicated that consent, which is
28 required under the law. He's telling you he's not mistaken as to his belief in her consent.
29 Again this is his own evidence, that is to say he is unequivocal in saying that she consents
30 because of what she says to him That essentially negates the defence, it's not available
31 to him.
32
33 THE COURT: Well, he could say, I was mistaken in what she
34 said. I misunderstood her words, but that isn't his evidence.
35
36 MS. MOGRABEE: He's saying he -- she's very clear at that point
37 in time.
38
39 THE COURT: Yeah.
40
41 MS. MOGRABEE: Now there -- there's another part to the -- the --

1 the assessment that is what happens before that, that I'll address you on. But in terms of
2 that aspect --

3

4 THE COURT: Right. What's the case that says this?

5

6 MS. MOGRABEE: That once you --

7

8 THE COURT: It sounds right, but what's the case?

9

10 MS. MOGRABEE: Right. You can't impute the defence of
11 mistaken belief when the accused has not raised it by his own evidence. That is *Flaviano*,
12 which you have in front of you. That is an Alberta Court of Appeal decision that also
13 went to the Supreme Court, which upheld the Alberta Court of Appeal decision.

14

15 THE COURT: Thank you.

16

17 MS. MOGRABEE: And that is -- that is the proposition that comes
18 out of that case. Then you have another part of the assessment, which is what happens up
19 until that point. That is when the accused and the complainant find themselves in the
20 washroom, what's going on there? What do you make of that evidence? The Crown
21 respectfully submits that you don't have consent there either. Why is that? Because she
22 says and he says there's no discussion about what's to take place. Absolutely none.

23

24 THE COURT: All right. Look that's fine as far as it goes, but
25 there's other evidence too. They were flirting, they were dancing. They --

26

27 MS. MOGRABEE: Well --

28

29 THE COURT: -- she did tell him she --

30

31 MS. MOGRABEE: Yeah.

32

33 THE COURT: -- found him attractive, he was sweet talking
34 her. Am I allowed to look at that, regardless of what she said to -- to Skylar? Am I
35 allowed to look at that?

36

37 MS. MOGRABEE: You cannot find consent on the basis of just
38 flirting.

39

40 THE COURT: No, I can't find consent --

41

1 MS. MOGRABEE: And you can't find --
2
3 THE COURT: -- but if it --
4
5 MS. MOGRABEE: -- but if you --
6
7 THE COURT: -- points in that direction --
8
9 MS. MOGRABEE: well the --
10
11 THE COURT: -- whereas if she -- if she'd said I hate you and
12 I find you extremely unattractive it would point in the other direction.
13
14 MS. MOGRABEE: She's not required to say those things, first of
15 all.
16
17 THE COURT: No, she isn't required to say anything.
18
19 MS. MOGRABEE: Not under the law.
20
21 THE COURT: I've got that.
22
23 MS. MOGRABEE: And she does not have to repel what she thinks
24 could be coming In her mind she didn't know it was coming, but how can she possibly
25 say those things?
26
27 THE COURT: Well, she doesn't have to do any of these
28 things. She doesn't have to say don't lock the door. She can take her chances. Foolishly
29 she could do that. If she sees the door being locked, she's not a complete idiot, she
30 knows what's coming next.
31
32 In our law she doesn't have to say unlock the door I'm getting out. She can take her
33 chances, perhaps in the hope of getting him into trouble. Who knows what
34 (INDISCERNIBLE) would be in those circumstances. But am I not, as a guide to
35 answering the question in general, not as a final answer, but as part of the answer --
36
37 MS. MOGRABEE: Well --
38
39 THE COURT: -- allowed to take that into account?
40
41 MS. MOGRABEE: -- let's break that -- let's -- let's the take the

1 flirting, for example, and breaking that down. The complainant says there was no such
2 thing happening.

3

4 THE COURT: Yeah.

5

6 MS. MOGRABEE: The accused says I can't even say that based on
7 his evidence it's flirting. It's a house party, they're dancing in the room, they're not even
8 touching each other by his own --

9

10 THE COURT: Ms. Mograbee, are you telling me that it's weak
11 evidence or that it's -- it's controverted evidence, I've got that. The question is on the
12 facts that I do find, can I take them into account?

13

14 MS. MOGRABEE: Well, if you find --

15

16 THE COURT: Not -- not as the final answer to the question
17 but as support for a final answer, as background.

18

19 MS. MOGRABEE: If you -- all right. So if I follow you correctly
20 you're saying, if you find as a fact that there was flirting prior to the incident in the
21 washroom, is --

22

23 THE COURT: Yeah.

24

25 MS. MOGRABEE: -- that your question? Can you use that?

26

27 THE COURT: And flirting on the dance floor.

28

29 MS. MOGRABEE: Can you use that --

30

31 THE COURT: As part of the --

32

33 MS. MOGRABEE: -- to find that she was likely to have consented
34 when that door in the bathroom was closed, is that your question?

35

36 THE COURT: And the fact that she didn't complain about the
37 door being closed, the fact that she -- the other two people walked out, that she must have
38 realized that something was coming down the track. Does that play into the final
39 consent? Obviously she can change her mind, she can say -- or she can say this -- she
40 can show it was an incorrect signal. But those are signals, do I ignore them?

41

1 MS. MOGRABEE: If you take the case law that you have before
2 you --
3

4 THE COURT: Yeah.
5

6 MS. MOGRABEE: -- it is very clear in saying that flirting or
7 licentious behaviour, if I can even call it that --
8

9 THE COURT: Yes.
10

11 MS. MOGRABEE: -- even a conversation under the case of *J & A*
12 which is a Supreme Court of Canada decision where you have a conversation between the
13 accused and the complainant about sex ahead of time, isn't enough to -- to ground
14 consent.
15

16 THE COURT: And I've -- I've got that. The question --
17

18 MS. MOGRABEE: Right.
19

20 THE COURT: -- is, is it something that goes into the -- into
21 the pot? Is it part of the recipe? Perhaps not an important part, but a -- but a part?
22

23 MS. MOGRABEE: Well, if you -- if you find there was flirting,
24 and I'm not conceding that there was.
25

26 THE COURT: I know.
27

28 MS. MOGRABEE: But if you find that, it does not follow that
29 consent was more likely. What you have to look at is what happened in that bathroom
30 and what was said by both parties.
31

32 THE COURT: Well, contrariwise, if -- if -- and as I postulated
33 earlier, the evidence was that she'd said I think you're ugly and I don't find you attractive
34 at all, would you say that that should be thrown into the mix?
35

36 MS. MOGRABEE: Well, she did say I like you as a friend and I --
37

38 THE COURT: Well, and so should that be thrown --
39

40 MS. MOGRABEE: -- don't want to do that. I mean she did
41 communicate that so --

1
2 THE COURT: Should that be thrown into the mix?
3
4 MS. MOGRABEE: -- different words -- yes, it should be thrown in
5 because that's what was said. We're not speculating about what she could have said.
6
7 THE COURT: All right. So --
8
9 MS. MOGRABEE: You can only assess what she did say.
10
11 THE COURT: What -- well what she said she said.
12
13 MS. MOGRABEE: Yes, and what the accused said when that
14 bathroom door --
15
16 THE COURT: Right. So what I find they said before does go
17 into the -- does go into the mix?
18
19 MS. MOGRABEE: You can assess that evidence however you wish
20 to assess it. What I'm saying is it is wrong in law to use that evidence to ground consent.
21
22 THE COURT: But you're asking me to use the evidence
23 that -- that you say I should accept as part of the absence of consent. As an indication of
24 absence of consent?
25
26 MS. MOGRABEE: That's a -- that's a different argument.
27
28 THE COURT: But surely it's -- it's -- it's the other -- it's the
29 other side of the valve. You're asking for the water to flow only one way through the
30 valve and I'm saying that that doesn't seem right.
31
32 MS. MOGRABEE: Well, you have to assess -- you have to assess
33 everything on a step by step basis and --
34
35 THE COURT: Yes.
36
37 MS. MOGRABEE: -- then consider it in its totality. But when
38 you're looking at consent it doesn't follow that she was flirting, therefore she was likely
39 to have consented in that washroom.
40
41 THE COURT: And --

1
2 MS. MOGRABEE: Because that's what we're talking about here
3 isn't it? I mean we're talking --
4
5 THE COURT: Well --
6
7 MS. MOGRABEE: -- about that conduct prior to that moment in
8 time when they were in the washroom.
9
10 THE COURT: -- it makes it less unlikely that she's -- that she
11 would say, no.
12
13 MS. MOGRABEE: It's equally plausible that flirting doesn't mean
14 that you're consenting too. I mean there's -- that -- that -- that is a real stretch. If the
15 law is clear in saying you must communicate very clearly that you are consenting and
16 flirting is not equal to consent in that regard.
17
18 THE COURT: That -- Ms. Mograbee, you keep saying that
19 and, please, believe me I understand that. I've got it. The question is, do I take it as part
20 of the mix? Not the final answer. She can change her mind at any -- at any point. But
21 the indication she gives the -- the signal she sends beforehand, positive or negative,
22 remembering that even negative signals can be changed, a woman can say, no, and change
23 her mind and it becomes, yes. But that isn't the evidence here, but in theory that's
24 possible. In other scenarios that that happens probably thousands of times a day across
25 the world. Do I -- do I exclude that evidence or do I at least take some not of it?
26
27 MS. MOGRABEE: Again, it depends on what you use it for. Like
28 any piece of evidence.
29
30 The only person that talks about the flirting is --
31
32 THE COURT: Well, either it's admissible or it isn't.
33
34 MS. MOGRABEE: The only person that talks about the flirting is
35 Skylar. The accused doesn't talk about flirting. I would not call it that on the evidence.
36 You've got to have
37
38 THE COURT: Well, I think that there may be --
39
40 MS. MOGRABEE: -- the evidence to do that.
41

1 THE COURT: -- he gives evidence of -- of signals being sent
2 by the accused -- by the complainant, sure he does.
3

4 MS. MOGRABEE: The Crown would submit that those are not --
5 those are not signals that can -- that can ground consent either.
6

7 THE COURT: Well, you use the word ground consent. They
8 are the first steps on the part to a possible consent. Grounding --
9

10 MS. MOGRABEE: That may be for --
11

12 THE COURT: -- you don't ground consent, consent is -- is an
13 absolute. Yes or no.
14

15 MS. MOGRABEE: Right.
16

17 THE COURT: It isn't grounded in anything but there is certain
18 indicia of cons -- of the possibility of future consent and I think Mr. Flynn is arguing that
19 those indicia are clear here, whereas there are no indicia except for one, which you've
20 pointed out, of a lack of -- a lack of -- of future consent, and that is that she said that she
21 was gay and that she didn't want to have it, which is a strong indicator and you've asked
22 me to take that into account.
23

24 MS. MOGRABEE: And I'm not asking you to take -- I know the
25 defence said that I should --
26

27 THE COURT: All right.
28

29 MS. MOGRABEE: -- I should -- that the Crown is arguing that she
30 was gay, she shouldn't have consented. The Crown is not making that argument.
31

32 THE COURT: Oh, because?
33

34 MS. MOGRABEE: Because the converse could be true. It doesn't
35 necessarily follow that someone who's gay wouldn't have sex with him.
36

37 THE COURT: Okay, all right. But now -- now you've --
38

39 MS. MOGRABEE: Right. I mean --
40

41 THE COURT: -- now you're arguing it on -- on -- on a

1 different basis. You're saying it doesn't follow logically. You're not telling me that I
2 have -- I'm not allowed in law to take it into account?
3

4 MS. MOGRABEE: Sexual orientation, I don't see any authority in
5 the law where you can rely on that as a basis for her lack of consent.
6

7 THE COURT: Not even as a first step? A confirmed --
8

9 MS. MOGRABEE: Not that --
10

11 THE COURT: -- lesbian is less likely to -- to consent to --
12

13 MS. MOGRABEE: -- not that I can see.
14

15 THE COURT: --to heterosexual sex than -- than a
16 heterosexual woman?
17

18 MS. MOGRABEE: No.
19

20 THE COURT: Not?
21

22 MS. MOGRABEE: I don't see any basis for that in the law and I
23 did look for that issue.
24

25 THE COURT: But isn't -- as a -- as a matter of everyday
26 logic, doesn't it follow?
27

28 MS. MOGRABEE: Not necessarily. We don't have any evidence
29 on which to determine whether there was a time in her life where say she -- she -- she
30 changed her orientation nor whether she is specific about whether she would ever stray
31 from that particular orientation. I mean it's just a minefield. But you can't rely on that
32 because you don't have that evidence. Now she said, you know, I -- I -- I told him I was
33 gay. Now if you accept that and you want to rely on that as what she said to him then
34 the Crown would submit that just on the face of it that would have given him an
35 indication that she was not interested in him
36

37 THE COURT: Well, that's -- that's the point I'm making.
38

39 MS. MOGRABEE: And you can't --
40

41 THE COURT: If I accept that evidence.

1
2 MS. MOGRABEE: -- you -- you -- you -- if you choose to see that
3 evidence that way you can, but the Crown is not saying that you should.
4
5 THE COURT: All right. Now answer my question then, am I
6 at least allowed to look at such evidence as I find acceptable?
7
8 MS. MOGRABEE: I'm not in a position -- as the Crown my job is
9 to say how I think that you should review the evidence and how you should attach the
10 law to the facts.
11
12 THE COURT: Well, and I'm asking you to tell me how the
13 law applies.
14
15 MS. MOGRABEE: Right.
16
17 THE COURT: I'm asking in law am I allowed to look at that
18 evidence, for what it's worth?
19
20 MS. MOGRABEE: The -- which -- which part are we -- on the
21 flirting still or are we on the gay part?
22
23 THE COURT: Both, because --
24
25 MS. MOGRABEE: All right.
26
27 THE COURT: -- one's before you one's against.
28
29 MS. MOGRABEE: The Crown --
30
31 THE COURT: One's for the Crown, one's against the Crown.
32
33 MS. MOGRABEE: The -- the -- the Crown's position on the
34 flirting is it wasn't flirting. It's not made --
35
36 THE COURT: I've got that.
37
38 MS. MOGRABEE: -- out. It's not made out on his evidence --
39
40 THE COURT: Thank you.
41

1 MS. MOGRABEE: -- that is the accused or the complainant's
2 evidence.

3

4 THE COURT: Okay.

5

6 MS. MOGRABEE: The -- what -- what Skylar says is -- is -- is
7 odd to say the least, given the fact that these individuals, both of them, don't say anything
8 about that. The accused and the complainant talk about dancing in the room, it's a house
9 party, they're dancing around the room, the music's on, there are other people in the
10 room. The fact that she's facing him doesn't equal that they're flirting. She says she
11 doesn't touch him. The accused says the same thing. He doesn't touch her, she doesn't
12 touch him. They don't have a conversation about them as a couple, whether you know,
13 just for a moment or -- or for long term. There's -- there's no conversation at all, other
14 than she says she admires his dancing. Now she's not sure about whether she says that to
15 him or whether she says that to someone else, but she does say that she admires his
16 dancing, the -- the accused takes that as a -- a queue for him, in the context of I see it as
17 a challenge for me to stick -- to get her, you know, to get her as my girl. That is his
18 evidence. So, it's in the context of that that you have to look at that. So again the
19 Crown would say that's not flirting. If you were to find it flirting, again it doesn't -- it
20 should not factor into the assessment of whether there was consent in that bathroom.
21 What happens in that bathroom is -- it needs to be assessed on its own.

22

23 If, however, you want to -- to consider that evidence as part of the consent assessment,
24 the Crown would submit that there is nothing about that, that would indicate consent.
25 Flirting doesn't mean I'm giving you the green light to -- to pull down my pants and
26 perform oral sex on me, let alone put your penis in my vagina, it's just not acceptable
27 under the law. So, that's the Crown's position in a nutshell on that issue.

28

29 THE COURT: Okay.

30

31 MS. MOGRABEE: If I can just have a moment to see where I left
32 off. Thank you. All right, so the last thing I think I said before we were covering off
33 other issues is that the accused cannot rely on the defence of mistaken belief at the
34 moment in time when he -- there's a discussion about the condom because he is very
35 clear in his evidence in saying we don't have a condom, I go ahead anyway. And the
36 reason I go ahead is because I ask her. I can't remember the exact words. My notes say,
37 I -- I want to fuck you or is it okay if I fuck you and she said, yes. And that is
38 unequivocal. That is clear. And that is his evidence is saying she consented and it was
39 unequivocal. So if you take that then he cannot rely on the mistaken belief in consent, it
40 doesn't come up. And again, that's the proposition in *Flaviano*. But if you take the
41 conduct prior to that. That is they end up in the bathroom, the accused locks the door,

1 they're alone and he says that in his evidence that she's leaning against the counter and
2 that they start kissing each other and groping each other. Her evidence is that -- that that
3 never happened. Her evidence is that he took control and pulled down her pants in the
4 manner she described where that is pulling off the -- the pants and -- and taking off the
5 underwear, that there were two pairs, there was a -- a boxer pair and a -- and a -- and a
6 pair of panties underneath that. It sounds pretty aggressive if that's the case, that he
7 would have torn those -- those -- the lower part of her clothing off at that time and again,
8 there's no discussion about what's to happen. And the Crown would submit that the
9 accused must take reasonable steps in those circumstances to ascertain consent and he
10 failed to do that. And the -- the *Criminal Code* is very clear when you look at section
11 273.2, where you're talking about belief in consent not a defence. Subsection B indicates:
12 (as read)

13

14 The accused did not take reasonable steps in the circumstances
15 known to the accused at the time to ascertain that the complainant
16 was consenting.

17

18 Consent must be communicated. You cannot rely on she -- she kisses you so I'm going
19 to test the waters and go further. The accused has an obligation under the law to ensure
20 that she is communicating consent.

21

22 THE COURT: Well, tell me about that. Must he ask?

23

24 MS. MOGRABEE: He must ask. And the Crown would submit
25 that there's a heightened sense of -- of a responsibility in that way.

26

27 THE COURT: Are there any particular words you must use
28 like the marriage ceremony?

29

30 MS. MOGRABEE: Yes, he must say -- oh he could say a number
31 of different things, but he must ask if she is willing to engage in the sexual activity

32

33 THE COURT: He must ask to go that far?

34

35 MS. MOGRABEE: -- he has -- he must ask.

36

37 THE COURT: Where is that written?

38

39 MS. MOGRABEE: It's in the case -- all the case law that you have
40 before you that sex -- that --

41

1 THE COURT: Are children taught this at school? Do they
2 pass tests like driver's licenses? It seems a little extreme?
3

4 MS. MOGRABEE: The state of the law is at is, Sir. It's all set out
5 in the case law.
6

7 THE COURT: Well can you show me one of these places it
8 says that there's a some kind of incantation that has to be gone through? Because it's not
9 the way of the birds and the bees.
10

11 MS. MOGRABEE: Well again, Sir, you have an individual who
12 had just met the complainant. She doesn't know --
13

14 THE COURT: No.
15

16 MS. MOGRABEE: -- him he doesn't know her.
17

18 THE COURT: And maybe they're both terribly promiscuous.
19

20 MS. MOGRABEE: By his -- by his own -- by his own evidence
21 and her own evidence they are drinking. There's a lot of --
22

23 THE COURT: Yes.
24

25 MS. MOGRABEE: -- drinking going on and he describes himself
26 as drunk --
27

28 THE COURT: Yes.
29

30 MS. MOGRABEE: -- he describes her as drunk. He says that he
31 sees her drinking The Crown would submit he has an elevated sense of responsibility in
32 that way. And that the burden is on him to ascertain consent in those circumstances.
33

34 THE COURT: So, there's a -- there's a higher -- there's a
35 higher burden on a drunk man than on a drunk woman? That doesn't seem right.
36

37 MS. MOGRABEE: When he knows the circumstances to him,
38 which is the wording of that section, which is that they were drinking, but he didn't --
39

40 THE COURT: Section -- the section we were reading from
41 was?

1
2 MS. MOGRABEE: 273.2(b). When he knows the circumstances
3 that he's dealing with and he does, because that was his evidence.
4

5 THE COURT: Well, do you have a case that says that, that the
6 drunk man has a higher -- higher obligation than a sober man?
7

8 MS. MOGRABEE: It -- it's a matter of common sense, Sir, those
9 are the -- those are the circumstances known to him that are reasonable.
10

11 THE COURT: Well, this -- this can't be the first time that --
12 that a drunk man and a drunk woman have had sex. There's got to be a case that says
13 what you're submitting, Ms. Mograbee?
14

15 MS. MOGRABEE: Well, if you take the case of even just *J.A.*
16 which is the case you have before you --
17

18 THE COURT: Yeah.
19

20 MS. MOGRABEE: -- where the complainant communicated consent
21 and became unconscious during the sexual activity due to asphyxia, which she also agreed
22 to engage in, it follows that if a man is drinking and knows the comp -- is -- and the
23 complainant is -- is drinking and -- and describes her as drunk and himself drunk, then it
24 follows that he must communicate in a way such that it's clear that this is what he has in
25 mind and that she's willing to engage in it. The law is clear on that. It's in all the cases
26 you have in front of you.
27

28 THE COURT: Well, I'd be grateful if you'd just show me --
29

30 MS. MOGRABEE: And then --
31

32 THE COURT: -- show me a passage that says that.
33

34 MS. MOGRABEE: -- in the case of *Dippel* for example, where
35 the --
36

37 THE COURT: M-hm.
38

39 MS. MOGRABEE: -- individuals did not know each other the
40 Court does very clearly say, and that's an Alberta Court of Appeal decision.
41

1 THE COURT: Do I have that?
2

3 MS. MOGRABEE: Yes, you do.
4

5 THE COURT: Thank you: (as read)
6

7 When the circumstances preceding the sexual activity call out for
8 the accused to take positive steps to assure himself the
9 complainant is not only consented -- consenting to that activity,
10 the burden lies . . .
11

12 THE COURT: Sorry, you're reading from what -- what
13 paragraph in *Dippel*?
14

15 MS. MOGRABEE: I'm reading from *Dippel* --
16

17 THE COURT: Yeah, which paragraph?
18

19 MS. MOGRABEE: but I don't have the actual paragraph
20 outlined, Sir, but it is in *Dippel*: (as read)
21

22 The burden lies on the accused to take reasonable steps to
23 determine consent, not the . . .
24

25 THE COURT: Well, I've got that, but that's slightly different
26 from saying that -- that a drunk man has a -- has a higher obligation than the woman
27 who's drunk, than the woman has. That for some reason --
28

29 MS. MOGRABEE: It's not the accused who's -- of saying he was
30 sexually assaulted it's the complainant, so it's --
31

32 THE COURT: Got it.
33

34 MS. MOGRABEE: -- it's -- you -- it's with that in mind that we're
35 dealing with the facts here. There's -- there's no burden on her to communicate a lack of
36 consent.
37

38 THE COURT: No, I've got that but --
39

40 MS. MOGRABEE: The burden is on him to ensure that she does
41 communicate consent. And that section 273.2(b) imposes an objective standard: (as read)

1
2 The issue is whether the accused is aware of the circumstances
3 which would lead a reasonable man to inquire further into the
4 issue of consent.

5
6 That is set out, that particular proposition is in the *Malcolm* case which you also have
7 before you. And so what I'm saying is that when you put all that together where you
8 have circumstances of strangers, which is the case -- was the case in *Dippel*.

9
10 THE COURT: Yes.

11
12 MS. MOGRABEE: There is a -- an elevated responsibility on the
13 accused to ascertain consent. They don't know each other. Add to that, she's drinking
14 and he's drinking. It's reasonable that he should ascertain consent even more. It becomes
15 more elevated. It follows that on the law when we're arguing facts here that that fits into
16 the circumstances that we're dealing with here.

17
18 So, what constitutes -- constitutes reasonable steps will depend on the context, and again
19 I'm talking quite a bit about context because it's very important here. And again,
20 considering that he said it was a challenge to him, it was -- sounded to me like a bit of a
21 game based on his evidence. It wasn't what she thought, it was what he wanted.

22
23 Again, that section, section 273.2(b) clearly creates a proportionate relationship between
24 what would be required in the way of reasonable steps by an accused to ascertain that the
25 complainant was consenting and the circumstances known to him

26
27 The Crown submits that nothing short of an unequivocal indication of consent from the
28 complainant will suffice to meet that test.

29
30 THE COURT: And does it have to be in words?

31
32 MS. MOGRABEE: Yes.

33
34 THE COURT: Why do you say that?

35
36 MS. MOGRABEE: Because it's in the case law. The complainant
37 has to communicate that consent. That is --

38
39 THE COURT: Well, yeah, but there's also --

40
41 MS. MOGRABEE: -- *R. v. J.A.*

1
2 THE COURT: -- does it say communicate in words?
3
4 MS. MOGRABEE: It -- it has to be communicated in words and/or
5 conduct.
6
7 THE COURT: Oh.
8
9 MS. MOGRABEE: And you have to look at all the circumstances.
10
11 THE COURT: I mean I think you'll agree with me that some
12 people are more vocal than others, particularly in intimate situations and some times
13 conduct, movement is -- is
14
15 MS. MOGRABEE: Well, they don't know each other --
16
17 THE COURT: -- either more -- more explicit than -- than
18 words.
19
20 MS. MOGRABEE: Well, they don't know each other.
21
22 THE COURT: No.
23
24 MS. MOGRABEE: So he has to ask, that's the bottom line. They
25 don't know each other. She's been drinking, he's been drinking. He doesn't take any
26 reasonable steps, on his evidence, if you accept it, on his evidence. Not even looking at
27 her evidence, he doesn't take any reasonable steps. In addition to that, again you have
28 a -- scenario where he said that there was no conversation and he just takes previous
29 queues, which the Crown submits were not appropriate -- an appropriate basis for -- for
30 him to find consent, then the behaviour sort of escalates from there.
31
32 So, the Crown would submit again that he did not take reasonable steps and therefore
33 can't rely on this -- this defence of consent, it's in the section.
34
35 Now again, when it comes to a stranger the threshold for communication in that
36 circumstance must be unequivocal, and I'm repeating myself now, but that is in the case
37 before you.
38
39 So, the issue is then, did the complainant, in her mind, want the sexual activity? This is
40 where the Court has to again assess the totality of the evidence and again what he thought
41 in -- that she had in her mind is irrelevant to that assessment. The Crown would submit

1 that her -- her version of events was credible. It is -- it is a case where she gives
2 evidence under oath. She never says yes to the accused, by her evidence. And most
3 importantly, the accused even says she doesn't say yes, up to the point in time where
4 there is a condom discussion. And again, if we accept any -- and I say you should, the
5 law which is very clear in saying consent must be unequivocal. There's no consent here
6 on his evidence and that matches up with her evidence on that issue.

7
8 So again, another reason to -- to believe her. That is to say again she never said yes, and
9 there was no evidence that she said no, again, up until the point of the conversation about
10 the -- the condom.

11
12 Now, with respect to that particular aspect of the evidence where there's the accused's
13 version and the complainant's version differ as to what's said, you can't prefer one over
14 the other, you have to look at the full circumstances. And it would seem to me that if
15 you find there's no consent in the first part of the -- or in the activity leading up to that,
16 and I say you can't find consent because it's not unequivocal, then surely you can't find
17 consent in that circumstance on the complainant's evidence. It doesn't make any sense.

18
19 THE COURT: Well --

20
21 MS. MOGRABEE: They do match up in the sense that he says
22 he -- there was a conversation about a condom, he's --

23
24 THE COURT: Doesn't it indicate that up until that point it was
25 consensual?

26
27 MS. MOGRABEE: No --

28
29 THE COURT: Why not?

30
31 MS. MOGRABEE: -- I don't concede --

32
33 THE COURT: How do I -- how do I --

34
35 MS. MOGRABEE: -- I don't concede that it was --

36
37 THE COURT: --how do I escape that conclusion,
38 Ms. Mograbee?

39
40 MS. MOGRABEE: Well because when that door closes she's very
41 clear in saying to him, I'm not interested in you. She doesn't use those words. She said,

1 I like you as a friend --
2
3 THE COURT: Well, that's what she says.
4
5 MS. MOGRABEE: Yes.
6
7 THE COURT: But her conduct even on her version doesn't
8 endorse that version. She --
9
10 MS. MOGRABEE: How so?
11
12 THE COURT: -- well she allows him to kiss her. She --
13
14 MS. MOGRABEE: She -- she says that that never happened.
15
16 THE COURT: Well, somehow or another it got to the point
17 that he -- she says to him, you can do it, but you've got to have a condom. And I'm
18 putting it the other way around.
19
20 MS. MOGRABEE: Okay, but well --
21
22 THE COURT: Now, that indicates to me that she's willing to
23 do it on certain conditions.
24
25 MS. MOGRABEE: She said you can't without a condom.
26
27 THE COURT: Yeah, she's willing to do it though, if there's a
28 condom.
29
30 MS. MOGRABEE: I don't think that you can conclude that if she
31 says you can't without a condom.
32
33 THE COURT: How -- how do I -- how do I --
34
35 MS. MOGRABEE: Well, he didn't have a condom so --
36
37 THE COURT: If he -- let's assume he said I have a condom,
38 then everything would have been all right.
39
40 MS. MOGRABEE: I don't know what the evidence would have
41 been and we can't speculate.

1
2 THE COURT: All right. No, but you can, it's -- it's an either
3 or situation. She's saying do you have a condom? That it's an inescapable conclusion is
4 if you have one I'm happy to have sex with you.

5
6 MS. MOGRABEE: Well, that's not what happened. You can
7 only --

8
9 THE COURT: Yeah, well it is what happened.

10
11 MS. MOGRABEE: -- assess what happened and that --

12
13 THE COURT: What happened was she said, do you have a
14 condom? That can I -- on what basis can I reach another conclusion that but that she
15 would have had sex if he'd said, yes, I've got a condom, hold on, I'm going to tear the
16 package open?

17
18 MS. MOGRABEE: Well, with respect, Sir, I don't think that you
19 can make that assessment when that's not the evidence. You have to ground any
20 assessment --

21
22 THE COURT: Well --

23
24 MS. MOGRABEE: -- in what the evidence is.

25
26 THE COURT: -- what else would she -- if she had said,
27 please, Ms. Mograbee, we're grown ups here. If -- if he had said, yes, I've got one or I'll
28 go next door and fetch one, is it plausible, is there any prospect that she'd have said, well
29 I've changed my mind in the last nano second?

30
31 MS. MOGRABEE: She can --

32
33 THE COURT: Or would she have said, go and get the
34 condom?

35
36 MS. MOGRABEE: In that scenario where you're talking about
37 what could have happened and the way that you're describing it, where there's a
38 conversation that is very clear about what's about to happen. They're clear about what's
39 going on, they're clear about -- she's clear about what she's willing to do, what she's not
40 willing to do.

41

1 THE COURT: Yeah.
2

3 MS. MOGRABEE: She's very clear about that.
4

5 THE COURT: Yeah.
6

7 MS. MOGRABEE: I don't have an issue with that. A woman
8 can --
9

10 THE COURT: So up until that point it seems there's consent?
11

12 MS. MOGRABEE: In that scenario, yes.
13

14 THE COURT: Yeah, well that was the scenario from both their
15 versions.
16

17 MS. MOGRABEE: Well, the --
18

19 THE COURT: They both -- they're -- the one thing they're --
20 they're ad item about, at one about, is that at some point she says, do you have a
21 condom? And he says, no.
22

23 MS. MOGRABEE: Her evidence from -- and I'll look it up for
24 you. But her evidence is not, do you have a condom? Her evidence is you can't without
25 a condom.
26

27 THE COURT: Well -- well, even stronger, that -- that's an
28 even stronger argument. The evidence is -- the implication of that is you can if you have
29 a condom. Which indicates -- it indicates that she wants to have sex, but only if he's got
30 a condom. So which is a slightly different -- now we're -- now we're dealing with
31 something else.
32

33 If up until that point there's consent and I have a hard -- it's hard for me to -- to see how
34 you get beyond that, but perhaps you can. Now the argument is what happens in these --
35 after he says I don't have one?
36

37 MS. MOGRABEE: Right.
38

39 THE COURT: But I'll pull out.
40

41 MS. MOGRABEE: That's why you have to look at everything and

1 that's what I'm saying is, you have to look at she says you can't without a condom, he
2 says -- he then proceeds to put his penis in her vagina. That's what happens, by both
3 their version of events.

4
5 THE COURT: Yes.

6
7 MS. MOGRABEE: He says, I'm clean, I'll ejaculate on the
8 counter. By both their evidence that's exactly what happened.

9
10 THE COURT: And -- and remind me, is it her evidence to the
11 effect that she says, no, or that she moves away. Remember she's still got her pants on.
12 So her legs can't open very widely, she's sitting in an uncomfortable -- uncomfortable
13 position. If she skews her pelvis slightly she can avoid him. Does -- or is there -- does
14 she help him?

15
16 MS. MOGRABEE: Well, in her -- in her evidence she talks about
17 the pants being at her ankles.

18
19 THE COURT: Yeah.

20
21 MS. MOGRABEE: And she also talks about at some point the
22 pants being only on one ankle So that would make sense that -- that those are the
23 circumstances in which the sexual touching takes place, that she's -- her legs are not
24 bound together. She's got one pant --

25
26 THE COURT: Well --

27
28 MS. MOGRABEE: -- leg on. But she's not under any obligation to
29 move out of the way. Again, invoking section 275 where the Court talks about you
30 know -- sorry, the *Criminal Code* talks about rules respecting complaint abrogated,
31 there's -- there's a reason for why that was abrogated, it's to get away from thinking
32 about what you -- you think, or anyone would think a -- a person in that situation should
33 do. How they should act.

34
35 THE COURT: Well, the recent complaint doctrine was that
36 you -- and it was followed by every civilized legal system in the world for thousands of
37 years, was that as soon as you can you should complain to somebody in authority or
38 somebody close to your family. It had its reasons. At the moment it's not the law. It
39 does go so far -- the recent complainant, as I understand it, didn't include the proposition
40 that -- that you -- that the complainant didn't have to indicate no in some way. Now
41 that's a different rule.

1
2 MS. MOGRABEE: That's a different rule. I'm just saying that,
3 you know, it -- it follows that -- that antiquated way of thinking has been set by the
4 wayside, for a reason. It's the same thinking --
5
6 THE COURT: I hope you don't live too long, Ms. Mograbee.
7
8 MS. MOGRABEE: It's the same line of thinking that would be
9 required to find that because she didn't act a certain way she would have consented. And
10 again, not everybody's going to act
11
12 THE COURT: Some people are terrified, some people aren't
13 assertive, I'll grant you all that.
14
15 MS. MOGRABEE: -- she said -- right. And she -- she was much
16 smaller than him, she didn't know him, she said she was afraid.
17
18 THE COURT: Is there any -- well is there any evidence that --
19 that he frightened her. She -- she said she was smaller than him and that she was
20 frightened.
21
22 MS. MOGRABEE: She said she was scared. That -- that was her
23 evidence.
24
25 THE COURT: But did he threaten her at all? Is there any
26 basis for her fear? I don't recall any evidence to that effect?
27
28 MS. MOGRABEE: Well, the circumstances --
29
30 THE COURT: Any threats?
31
32 MS. MOGRABEE: -- I would submit are reasonable, such that --
33
34 THE COURT: Why?
35
36 MS. MOGRABEE: -- if you find that -- you could find that and it
37 makes sense that --
38
39 THE COURT: Did he have a weapon?
40
41 MS. MOGRABEE: -- she was scared because he's a stranger to her,

1 she's locked in the bathroom with him, she is much smaller
2

3 THE COURT: A locking that she -- that she made no
4 complaint about.
5

6 MS. MOGRABEE: Again, she's not required to do that.
7

8 THE COURT: Well, if she's frightened you'd think she
9 would. Did she get up, did she -- did she shout?
10

11 MS. MOGRABEE: If you look at *Livermore*, which is another case
12 that--
13

14 THE COURT: Yeah.
15

16 MS. MOGRABEE: -- you have before you, it's on that point.
17

18 THE COURT: Well --
19

20 MS. MOGRABEE: There are many --
21

22 THE COURT: -- do I -- do I test her fear? It's easy for her to
23 say it, but are there any -- any reasons for it and are there -- did she show any signs of it?
24 And did she do anything about it? Or do I look at those and say, listen, you say you're
25 frightened but I just don't see -- see that it's true. If you were --
26

27 MS. MOGRABEE: Well, you can find --
28

29 THE COURT: -- frightened you could have screamed.
30

31 MS. MOGRABEE: -- you can find that, but I would say that the
32 law doesn't require you to -- it -- it -- it would be an error in law for you to say that she
33 should have done these things and didn't, and therefore like -- was likely to have
34 consented.
35

36 THE COURT: No. Well, I'm dealing just with the fear now.
37

38 MS. MOGRABEE: Yeah.
39

40 THE COURT: Was there any reason for her to be frightened
41 and is there any indication that she was frightened?

1
2 MS. MOGRABEE: She said that she was afraid so there's some
3 evidence there, and the circumstances under which this takes place.
4
5 THE COURT: Well what were the circumstances?
6
7 MS. MOGRABEE: The Crown would submit -- well --
8
9 THE COURT: There were people 10 feet away.
10
11 MS. MOGRABEE: -- she's in the bathroom, the door is locked and
12 like I say.
13
14 THE COURT: So she screams.
15
16 MS. MOGRABEE: She didn't do that.
17
18 THE COURT: No, I know. So --
19
20 MS. MOGRABEE: She's not required to do that.
21
22 THE COURT: No, she's not required to but if she claims fear,
23 she's got to -- surely I'm -- I'm entitled to test that proposition?
24
25 MS. MOGRABEE: Well again, if you look at *Livermore* --
26
27 THE COURT: Yeah.
28
29 MS. MOGRABEE: -- where you have a similar situation, where
30 there was not all these things, there wasn't you know, this cry and hue that -- that you're
31 referring to, you know, crying out for help. The law is very clear in saying that that is
32 not a basis upon which to find that the complainant consented. And again you'll see that
33 throughout the case law and particularly in those circumstances you'll see it in *Livermore*.
34
35 THE COURT: Well *Livermore* was very different. She said
36 that she struggled and fought -- fought him away.
37
38 MS. MOGRABEE: Yes, but there was conduct afterwards as well.
39
40 THE COURT: Well we haven't got to the conduct afterwards
41 just yet.

1
2 MS. MOGRABEE: No, in *Livermore*.
3
4 THE COURT: And we will.
5
6 MS. MOGRABEE: In *Livermore*.
7
8 THE COURT: Yeah, well in our case there was also conduct
9 afterwards.
10
11 MS. MOGRABEE: Yeah. Yeah. Well and -- and I would say that
12 the conduct in *Livermore*, yes, is different in the sense that she -- she vehemently
13 struggled in -- in *Livermore*, which is not what we have here.
14
15 THE COURT: Just --
16
17 MS. MOGRABEE: But she says she pushed him off. She says that
18 she told him no repeatedly. She told him several times he was hurt -- she said -- not
19 several times, but she told him he was hurting her. I mean, how does that not --
20
21 THE COURT: Well, let's -- do -- do --
22
23 MS. MOGRABEE: -- not ground a basis in fear?
24
25 THE COURT: -- you have -- do you have the references for
26 that?
27
28 MS. MOGRABEE: I don't have the exact references but I will go
29 through -- I did go through the transcript and I pulled out all the aspects that you need to
30 look at in the Crown's respectful submission, to find that she was also frightened by the
31 way that the -- the -- the Cod is very clear in saying that if -- if she submits by reason of
32 fear then as well there's no consent. And that's under --
33
34 THE COURT: Oh, to be sure. Oh, if -- if I find --
35
36 MS. MOGRABEE: -- 273.1 as well.
37
38 THE COURT: -- that she did it because of fear --
39
40 MS. MOGRABEE: Yeah. Yeah.
41

1 THE COURT: -- that -- all right, page 25, I pushed him --
2 pushed him on the shoulders.

3

4 MS. MOGRABEE: Yes, she pushed him -- so she pushed him on
5 the shoulders she said, after he performed oral sex on her, that she went to go put her
6 pants on, that she thought he was finished. She says he then took her by the waist, lifted
7 her up on the counter, that he took control and that -- and then again that was after he
8 tore her pants off. There's a size differential between them as well and she's -- she is --
9 the way that she describes it, it's -- it's -- she is surprised by everything that's happening

10

11 THE COURT: Well, so that's page 25 and 26.

12

13 MS. MOGRABEE: Right. Going to the complainant's evidence I
14 would just say a few things about her evidence before I go into some of the details. She
15 is consistent, she's clear, she was not challenged on cross-examination. She firmly
16 maintained her version of events and denied any suggestion that she may have consented
17 to the sexual touching in any way. She was candid, very candid. She was not evasive,
18 she answered the questions as was required. The fact that she did not cry out or stayed in
19 the house after the incident cannot be evidence that diminishes her evidence that she did
20 not consent. And why is that? We covered some of those aspects off. But also she
21 talked about why she stayed there. And in the Crown's respectful submission those
22 reasons are also plausible. She was living out on the street, she had no place to go, she
23 was too drunk, it was late, it was dark out at night and it was winter. And she had no
24 money. So she said, I just started drinking more to forget, was essentially her evidence.

25

26 To draw an inference as to her credibility on this evidence as to what she should have
27 done, that is cry out, leave, go to the police, et cetera, right away. To draw an adverse
28 inference on that evidence is contrary to again, section 275, which is the old law that sets
29 out that the complainant is less worthy of belief unless she makes a hue and cry
30 immediately after herself has been discredited.

31

32 THE COURT: No, Ms. Mograbee, I'm -- I'm not going to find
33 that. But I -- I do have difficulty with the evidence that she was -- well two things. One
34 that -- well a number of things, that immediately after the sex the accused was tender to
35 her and she accepted the tenderness.

36

37 MS. MOGRABEE: Well, not on their evidence, not on the
38 accused's evidence and not on her evidence.

39

40 THE COURT: Well, on her evidence he -- he wiped her, they
41 got into the shower together, he washed her and they had sex again.

1
2 MS. MOGRABEE: Well, as can be --
3
4 THE COURT: This time it seems far more consensual.
5
6 MS. MOGRABEE: Well, the way that she describes it that he's just
7 doing as he pleases. Her -- her evidence is that --
8
9 THE COURT: Well, it's still very tender --
10
11 MS. MOGRABEE: -- he's removing her --
12
13 THE COURT: -- and he doesn't -- she doesn't stop it.
14
15 MS. MOGRABEE: -- how is it tender when she's -- he's pulling
16 her pants off and telling her that he wants to fuck her and she's not responding to that?
17
18 THE COURT: Well, this is now afterwards. This is now
19 afterwards. He now wipes her, he takes her to the shower, he washes her, he washes her
20 hair, he asks her to wash him She does all these things. That seems to me to be
21 post-coital tenderness.
22
23 MS. MOGRABEE: Her evidence --
24
25 THE COURT: Intimacy.
26
27 MS. MOGRABEE: -- is not that that's the way it happened. Her
28 evidence is that he tell -- he takes her to the shower, that he washes her as she's standing
29 there, she's not saying anything. She says then he crouches down and performs oral sex
30 on her. Again she doesn't say anything. She also says that then he tells her -- those are
31 her words, to wash him, which she then does. So the -- the circumstances, in the Crown's
32 respectful submission on her evidence, do not indicate a tender situation. That is
33 indicative that she would have consented to the sexual touching.
34
35 THE COURT: Well, from his view he's being tender. And
36 does that not indicate that he sees it in a certain way? He thinks that she's enjoyed
37 herself, that they've had a tender, intimate time?
38
39 MS. MOGRABEE: That the sexual -- that the -- that that mind set
40 is not relevant to an assessment of consent, it's what's in her mind, not what's in his
41 mind.

1
2 THE COURT: Ms. Mograbee, and then the evidence of two
3 other people is that afterwards when they left the -- the bathroom, she was -- she followed
4 him around, she touched him. Now hue and cry is one thing, I don't expect that. But a
5 woman who has been violated, is it the Stockholm Syndrome playing out, what -- what
6 would explain that?
7
8 MS. MOGRABEE: The only evidence that you have on that issue
9 is from Skylar, not from the accused and not from the complainant.
10
11 THE COURT: And from Mike. And from Mike.
12
13 MS. MOGRABEE: No, Mike says that he -- nothing seems out of
14 place. He says --
15
16 THE COURT: Yes.
17
18 MS. MOGRABEE: -- when I asked him in cross-examination --
19
20 THE COURT: He said she was following him around.
21
22 MS. MOGRABEE: Well, and then in cross-examination he -- he
23 backed away from that, when I suggested to him that she was going from, you know,
24 there were other people in the room that she could have been going from one room to
25 another. He didn't object to that particular suggestion. He said, look, I remember one
26 time they were -- they appeared to be talking to each other, I don't know what they said,
27 and he said, I remember one time when he went into a room and she went in after him.
28 To say that he saw her following him the way that is suggested when you use that term in
29 this context is not --
30
31 THE COURT: Well, the way that Mike used the term.
32
33 MS. MOGRABEE: -- borne out by the evidence.
34
35 THE COURT: All right.
36
37 MS. MOGRABEE: So, going to [REDACTED] evidence, you know that
38 she was living on the streets at the time and struggled with an addiction. That she met
39 the accused on the day in question. And this was through Skylar who's with her at the
40 Alex Youth Centre. She was invited to Mike's house and made her -- made her way
41 over. Prior to this again she did not know the accused at all, this was the first time she

1 met him and he met her.

2

3 She says when she arrived at the home there were a number of individuals, all included
4 Skylar, Dustin, Alex, Mike and Lance. She says she started to consume alcohol as does
5 Skylar and Dustin. She says she's drinking for about an hour straight. She doesn't know
6 anyone in the house. And again I think that also goes to her mind set as to why she
7 didn't say anything. She said in her evidence that she didn't know any of them. They
8 were all friends to each other. And she also said that after the sexual assault she told
9 Dustin and he did nothing. That was her evidence as well.

10

11 So again, all plausible in the circumstances, as to why she behaved the way that she did.
12 So in any event, backing up now, she says everyone was friends there. That she was the
13 odd person out, that there was music playing and Alex was dancing, that she danced too.
14 That they were jumping around and it was a lot of fun. She says that the drinking
15 continued at this time and at no time did she touch Alex during the dancing. She
16 described it as them dancing around the room. She admired his dancing. And then she
17 went to the bathroom to throw up. That was her evidence. And on that point it seems
18 improbable that someone who's just thrown up is going to want to have sex with someone
19 she doesn't know. It's very odd. And if you accept her evidence on that point that
20 doesn't line up that she was not feeling well and it doesn't follow then in those
21 circumstances, and everything else, that she would have consented to the sexual activity.
22 She says she was washing her face and unlocked the door when the accused came inside
23 and locked the door behind him.

24

25 THE COURT: Can we pause just there?

26

27 MS. MOGRABEE: Yes.

28

29 THE COURT: Isn't it a -- to use Occam's Razor --

30

31 MS. MOGRABEE: Pardon me?

32

33 THE COURT: Occam's Razor, the simplest solution. The
34 accused's version is that they went, four people, the accused and -- and Skylar's versions
35 are that four people went into the washroom to smoke marijuana. The reason they gave is
36 because the washroom has a fan and that sucks out the bad smell. Seems reasonable. I'm
37 sure it's done over the city many times a day.

38

39 Her version is diametrically different. She went into the washroom to throw up, she'd
40 been drinking a lot including Absinth and he came in and misbehaved. Those are two
41 diametrically opposed versions and his version cannot live with hers, hers cannot live with

1 his. Her version is unsubstantiated by anybody else.

2

3 MS. MOGRABEE: On that point.

4

5 THE COURT: On that point.

6

7 MS. MOGRABEE: Yes.

8

9 THE COURT: But that -- that is seminal because if she's lying
10 about that, then it follows that she's lying about everything else. It's unavoidable, I -- I
11 can't sit back and avoid that -- that conclusion. If he's lying about it then he's lying
12 about everything else too, that he followed her in -- into the bathroom when she was
13 vomiting or after she vomited then he's lying about everything else too. How do I accept
14 her version and reject his?

15

16 MS. MOGRABEE: You can accept some parts of the evidence or
17 none--

18

19 THE COURT: Well, I don't -- I don't --

20

21 MS. MOGRABEE: -- of it.

22

23 THE COURT: -- think that it's the kind of situation where you
24 can. These -- these are such diametrically different versions that I either accept that she
25 went into the bathroom, which is a version only she gives and she is an unsavoury
26 witness. He is equally unsavoury. Morality is not fundamental to his makeup. The truth
27 is I believe what he can make others believe. But his version is corroborated. But even
28 if it wasn't, it's not implausible, given that these people do smoke marijuana, how do I
29 reject his version -- in terms of W.D. how do I reject his version? And if I can't reject
30 his version, how do I accept bits of her version?

31

32 MS. MOGRABEE: It happens every day in these courts where you
33 make a decision on how you want to assess the evidence. What I say to you as the -- as
34 the Crown, looking at her evidence, the evidence of Skylar on that point is -- is not
35 determinative of the issue of whether there was consent because there's no question that
36 there was sex that happened in that washroom and you have to look at the evidence on
37 that.

38

39 THE COURT: Yeah. But it certainly --

40

41 MS. MOGRABEE: In terms of that --

1
2 THE COURT: -- undermines your -- your point. Sorry to
3 interrupt you. But it interrupts your -- it -- it underiiiiines your point that she wouldn't
4 have had sex ifif she had just vomited, which is a good point, if I accept that she'd
5 just vomited, but I can't see how I can reject his version of how they got into the
6 bathroom.

7
8 MS. MOGRABEE: Well I --
9

10 THE COURT: In terms of *W.D.*, how can I reject it?

11
12 MS. MOGRABEE: Right. So the evidence on that issue is that she
13 says I go into the bathroom to vomit and then the accused comes in. Skylar's version is,
14 we all go into the bathroom to smoke a joint, she doesn't talk about the complainant
15 vomiting, she doesn't talk about the complainant being in the washroom on her own. I
16 would submit that there's nothing in the evidence that would preclude that from
17 happening at a later time and an earlier time. I -- I don't know, there seems to be a gap
18 there.

19
20 THE COURT: No, the two versions can't live together,
21 Ms. Mograbee.

22
23 MS. MOGRABEE: But you certainly can find that you have a -- a
24 problem or a question about that particular aspect of that evidence, based on Skylar's
25 evidence, if you choose to do that. And you -- but it doesn't follow that you would reject
26 everybody else's evidence. I mean that -- that line of thinking would follow with -- with
27 respect to Skylar's evidence about her saying that she wasn't -- hadn't consumed any --
28 any alcohol or drugs and then later saying that she'd consumed marijuana. Or that she --
29 you know, or that she -- there was some other aspect of her evidence that just escapes me,
30 where she talks about --

31
32 THE COURT: Ms. Mograbee, you don't have to push me --

33
34 MS. MOGRABEE: -- an aspect that is not corroborated --

35
36 THE COURT: -- that Skylar --

37
38 MS. MOGRABEE: -- by other people.

39
40 THE COURT: -- that Skylar is not a good witness. You don't
41 have to -- you don't have to persuade me of that. But something as fundamental as -- as

1 where the four of them went into the -- into the washroom, and your best answer, I
2 suppose, is that it's -- it -- it was fabricated evidence, three friends got together.

3
4 MS. MOGRABEE: She says -- Skylar says she doesn't remember
5 smoking a marijuana joint with everyone. So she doesn't say it didn't happen, she's just
6 saying she can't recall if that happened.

7
8 THE COURT: And that doesn't surprise me after three years,
9 people who smoke marijuana regularly, they probably smoke everyday when -- or a
10 couple of times a week, whenever they can get it. Any more than you might remember
11 when you had a glass of wine, or I would remember when I had a donut, it's --

12
13 MS. MOGRABEE: So may I continue with the rest of the --

14
15 THE COURT: Please, Ms. Mograbee.

16
17 MS. MOGRABEE: Thank you. So again going back to where I left
18 off about the -- the dancing, the complainant's evidence is that the accused comes inside
19 the washroom. And in terms of what happens when that door is closed is consistent
20 between the two of them in that she says and he says, there is a discussion or an
21 exchange where he says he was watching her tonight and that he's interested. That's
22 what she says, which is not contradicted by the accused. She says he was also saying
23 nice things to her and she did not say anything in return. Also uncontradicted by the
24 accused.

25
26 She says he then takes her hand while she's against the counter of the sink, grabs her
27 pants and pulls them down and her underwear were taken off with the pants. The accused
28 then picked her up, put her on the counter against the sink and started to lick her vagina.
29 She said she didn't say anything to him, that she looked at him and again this is
30 consistent with the accused's evidence in that there's no conversation at this point in time,
31 that is she's not saying anything, but he's talking, according to her. He then asks her if
32 she likes it and she says, no. But he continued. He doesn't ask her she says, he just
33 does. She gives details about her pants being removed. Again very detailed evidence.
34 How she ends up naked from the waist down. She says her button pops off and the
35 accused picks her up and puts her on the counter and again describes how one leg is still
36 in the pant, or one ankle.

37
38 She says at some point before the accused put his penis inside her he told her that he is
39 going to fuck her. He said things about her body and her tight pussy, to use her words,
40 and how he likes her and wants her. She says she liked him as a friend and she told him,
41 you cannot without a condom. There was no condom. The accused then proceeded to

1 insert his penis in her vagina. But that was of course after he took his pants off. She
2 says that she tried at that moment to get off the counter to put her pants on, thinking that
3 he was just going to do what he did and finish, that is lick her vagina and finish. But the
4 accused said he was going to fuck her and she said again, repeating, he could not without
5 a condom and he said, according to her, that he could.

6
7 She said she was standing there in that moment. That he put her back on the counter and
8 put his penis in her vagina but was only able to insert it part way. She said her back was
9 pushing against the faucet as this was going on and that she was in pain as a result. And
10 the pain, the Crown would submit, is also contributing to the fear, it would be reasonable,
11 she's in pain, he has no regard for -- for her pain. She says he's hurting her. She has
12 bruising on the lower part of her back and that's corroborated by the medical evidence
13 that you have before you where she does have bruising against her -- her lower back in
14 the spot where she's pushing against her -- she's pushing against the -- the sink.

15
16 She described in her evidence this as very painful. She said he had a large penis, that he
17 wasn't able to insert it. She also described the act of him -- the act of her, rather, trying
18 to push him away in that moment. She says that she was pushing on his shoulders and
19 again telling him that he was hurting her and that he should stop, but he didn't stop.

20
21 During the intercourse the accused, according to her, also touched her waist, her body, put
22 his hand into her shirt, touching her breasts, ejaculating on the counter and then cleaning
23 it up. She said she is just standing there and the accused turns on the shower, rips off her
24 shirt, those are the words she used, and puts her in the shower. That he washed her, told
25 her to wash him, which she did because she said he took control and had the control.

26
27 At no time in the shower she says did she say anything to the accused, and both of them
28 say that at that point when they're in the shower the accused's brother, Lance, comes in
29 the washroom. That he looks in the shower while the accused was performing oral sex on
30 her. She said that both Alex and Lance laughed at this time. That Lance made a
31 comment about her -- how her vagina looked and she told him to fuck off. She says,
32 Alex, the accused, then left the shower and she stayed in the washroom. That she stayed
33 inside because of what happened, that she let her hair dry a bit, put her shirt, her bra,
34 boxers and pants on, leaving her boxer shorts there because of what happened she did not
35 want them. And then she went out to drink some more because she didn't want to think
36 about what had happened.

37
38 She says that she passed out and woke up at 3 or 4 AM to Lance telling her that what
39 happened was a game and that Alex told her -- told -- sorry, Lance told Alex that he
40 should have sex with her, that she's easy and a little whore was her evidence. She said
41 that this upset her and that she left as soon as she was able, around 6 AM when the light

1 was out and she walked to the Alex Centre.

2

3 THE COURT: Is -- isn't that the first time that she mentions
4 that she was upset?

5

6 MS. MOGRABEE: She mentioned that she is upset through the
7 whole incident. She says he's hurting --

8

9 THE COURT: Does -- does --

10

11 MS. MOGRABEE: -- he's --

12

13 THE COURT: -- no, does she say I was upset, I was unhappy,
14 about when I felt dirty when it was finished. The first time she says that she was --
15 that -- that she suffered a negative emotion is after Lance insults her the next morning
16 I -- do I make anything of that?

17

18 MS. MOGRABEE: Well, that's the first sort of big outward
19 expression you have of anger based on the evidence.

20

21 THE COURT: Well, the first -- the first time I'm told of how
22 she feels.

23

24 MS. MOGRABEE: Well, when she told through -- throughout her
25 evidence that she felt horrible during the -- the sexual touching, that she was in pain. She
26 was in pain because --

27

28 THE COURT: No, this pain, you know, but that sex and pain
29 sometimes go together, that -- that's not necessarily a bad thing. I -- I'll grant you that --
30 that the implication from her was that she wasn't enjoying the pain, I'll grant you that.
31 But did she ever say I was feeling horrible? She might well have and I've -- I've missed
32 it?

33

34 MS. MOGRABEE: She -- she did, she talked about him violating
35 her. She talked about how awful she felt, she talked about drinking more to forget it.
36 She talked about --

37

38 THE COURT: Okay.

39

40 MS. MOGRABEE: -- wanting to leave but not being able to leave
41 because of the circumstances she was in. She talked about going and reporting it as soon

1 as she was out, which she says she did do, which then of course involved the police.
2 There's evidence she went to the hospital and was assessed. I mean, all of that is
3 indicative of -- of what, in her mind, had happened and how she felt about it.

4

5 She also said that she was worried no one would believe her because everyone at the
6 house party was friends and that she was the new person. Again she told Dustin, but he
7 did nothing.

8

9 THE COURT: Well, let's look at page 30.

10

11 MS. MOGRABEE: Page 30?

12

13 THE COURT: Yeah. She says: (as read)

14

15 A I stayed in the shower, I stayed in the washroom.

16

17 Q Any reason?

18 A Because I didn't want to go outside.

19

20 All right, I'll grant you that that lends itself to the inference that she was unhappy: (as
21 read)

22

23 Q Why didn't you want to go outside?

24 A Because of just what happened with Alex and Lance saying
25 that they're going to tell everyone what happened.

26

27 Q What do you mean?

28 A It wasn't like that. That it was okay for us
29 (INDISCERNIBLE) and it was just about getting laid and then
30 Alex goes and fucks Skylar. Alex goes and fucks Skylar.

31

32 Then she goes on to say she doesn't know how long she was in the shower, she didn't
33 want to leave. She says she just wanted to be drunk. And you asked, why? I didn't
34 want to think about what had just happened. So that's (INDISCERNIBLE).

35

36 MS. MOGRABEE: Right. And again, when she's asked about
37 why -- you know, when you put -- there isn't sort of one area in her evidence where she
38 covers that whole thing. They're all different. There are several different parts where we
39 put those things together, right where she talks about, I'm living on the streets, I've been
40 drinking, it's winter, it's late at night. I don't know these people, they're strangers to me.
41 I've told someone, they do nothing. So you put all those pieces together and again, it's

1 after -- and then as soon as she leaves she goes right to the Alex Centre and that's where
2 she discloses the incident. And then the next thing she's at the hospital and then the
3 police are involved.

4
5 Again, and -- and when I talk about the hospital, again there's some corroboration as to
6 the injuries which is -- lends more validity to what she says happened. She says that after
7 the incident she ran into the accused on the street. He told her that because she had made
8 eye contact with him when he was performing oral sex on her that she'd consented. She
9 says I walked away. That there was a second time that she ran into him on the street.
10 Again, these are people who live on the street. The suggestion here by -- by all the
11 evidence is that it's not unusual that they would run into each other once they -- when
12 they -- once they met each other. She says at that time, the second time, he told her to
13 "stop the charge" while they were smoking meth. She says her addiction became worse
14 after the incident. And that she told him he would stop the charge but she wasn't sure
15 why she said that to him. I mean it's -- it's not unusual in the case law that you have
16 even before you, where the complainant is told to tell it in a way that matches the
17 accused's version and the complainant does say that she will. That does not result in a --
18 in a conclusion that she's just a liar. And I would say that that's true about all the
19 evidence is there's nothing in there that would suggest in any way that she's not being
20 forthcoming or truthful about what truly happened. And you contrast her evidence with
21 the accused's evidence, where he just totally glossed over many aspects of his really
22 important evidence. Particularly when he said in cross-examination that -- that he says
23 that she said, yes, when he said he wanted to fuck her. That's pretty important evidence.

24
25 In addition, he said in cross-examination, that she grabbed hold of his penis before the --
26 these -- the oral sex. Again totally self serving, didn't come out in examination-in-chief
27 at all when you look at his evidence. Also problematic in his evidence is that aspect
28 about the cond -- the condom. His evidence is that -- the defence, rather, says that --
29 that -- that the evidence discloses that he convinces her somehow. Well there's no
30 evidence of that. Her -- the evidence is they don't have a condom, she says, you can't
31 without a condom and based on everything else that happened before, he decides that he
32 has implied consent and there's no basis for implied consent here. And implied consent is
33 not permissible when you're talking about sexual assault. There's no indication,
34 according to her version, that -- that -- that she is clear in saying he can insert his penis in
35 her vagina.

36
37 And again you can't find implied --

38

39 THE COURT:

When you talk about --

40

41 MS. MOGRABEE:

-- consent from her --

1
2 THE COURT: -- implied consent --
3
4 MS. MOGRABEE: -- prior conduct. Pardon me?
5
6 THE COURT: When you talk about implied consent --
7
8 MS. MOGRABEE: Yes. Yes.
9
10 THE COURT: -- you're not talking about non-verbal consent,
11 because --
12
13 MS. MOGRABEE: No.
14
15 THE COURT: -- consent can be given very clearly and very
16 often in sex is given through actions.
17
18 MS. MOGRABEE: Right. Well the implied consent here would be
19 her conduct prior to that.
20
21 THE COURT: Yeah, all right.
22
23 MS. MOGRABEE: Right.
24
25 THE COURT: But if her conduct subsequently, if she assists
26 him, for example, where he says that she hooked her hands behind his neck, that she
27 moved her hips. She moved her buttocks into positions more favourable for herself and
28 for him That is not implied consent in the sense that you're using it, that's sig -- that's a
29 signal of real consent?
30
31 MS. MOGRABEE: Well again you're getting into the accused's
32 version of events
33
34 THE COURT: Yeah.
35
36 MS. MOGRABEE: -- and if you accept his version of events then I
37 think it --
38
39 THE COURT: Well, my problem is that *W.D.* cannot reject his
40 version.
41

1 MS. MOGRABEE: You can reject his version. You can reject
2 anyone's version in whole --
3
4 THE COURT: Yeah, I understand that but --
5
6 MS. MOGRABEE: -- or in part.
7
8 THE COURT: -- why must I in this case? Is -- is his version
9 that much less plausible than hers?
10
11 MS. MOGRABEE: Well, there's a couple of ways you can look at
12 it. I think his evidence is self serving, he doesn't say --
13
14 THE COURT: I --
15
16 MS. MOGRABEE: -- really important things.
17
18 THE COURT: -- sure. There are holes in it.
19
20 MS. MOGRABEE: Also it's -- it's this evidence of this challenge
21 that's a problem -- that's problematic
22
23 THE COURT: Oh, right.
24
25 MS. MOGRABEE: -- in my respectful submission that she is --
26
27 THE COURT: I know, Ms. Mograbee, you -- I -- I saw you
28 concentrating on that. But that is very much the way -- the way of the maid and the
29 white, to quote Houseman, men do react to challenges and women give challenges.
30 The -- the there's nothing necessarily malign in that.
31
32 MS. MOGRABEE: Well, it is when you --
33
34 THE COURT: Sex is very often a challenge.
35
36 MS. MOGRABEE: It is when you're considering the context of
37 what she says unfolded. It is all relevant to that assessment. If you accept his evidence
38 on that point then you must consider how the sexual assault unfolds.
39
40 THE COURT: Well, the challenge -- he can -- he can acquit
41 himself of the challenge by force or by trump, sweet talking her. The -- the challenge

1 doesn't necessarily lead to force.

2

3 MS. MOGRABEE: If you -- let's just say you accept his evidence
4 that he believed in her consent, that it was honest and that it was reasonable. Sorry, that
5 it doesn't need to be reasonable, that it was -- it was grounded in the evidence.

6

7 THE COURT: M-hm.

8

9 MS. MOGRABEE: The Crown would submit on his own
10 evidence --

11

12 THE COURT: Yes.

13

14 MS. MOGRABEE: -- there's a problem.

15

16 THE COURT: Okay.

17

18 MS. MOGRABEE: There's a problem because he doesn't take
19 reasonable steps and he can't use the defence of mistaken belief at the point in time where
20 there's this exchange about the condom, because he says he's not mistaken that she says,
21 yes. So you have to -- you have to look at all that too.

22

23 Look, I'll -- I'll tell you this is --

24

25 THE COURT: Well, the reasonable steps he says she touched
26 my penis, she said, yes. That's reasonable steps I would have thought. The question is,
27 can I believe him?

28

29 MS. MOGRABEE: Right.

30

31 THE COURT: Particularly since it only came out in
32 cross-examination.

33

34 MS. MOGRABEE: Right.

35

36 THE COURT: Isn't that really your strongest argument,
37 Ms. Mograbee?

38

39 MS. MOGRABEE: I think it's a good argument. I think it's
40 supported by the evidence. I -- I don't know. I think there are a lot of good arguments
41 from the Crown's perspective, but certainly that evidence is supported by the -- sorry, that

1 finding is supported by the evidence.

2

3 I'd like to be able to also reply to some of the points made by the defence, if I may?

4

5 THE COURT: Please do.

6

7 MS. MOGRABEE: The defence talked about Mike's evidence and
8 that how -- and how Mike's evidence connects the evidence that I -- I do, with respect,
9 fail to see how. He says that -- that somehow the evidence confirms Lance was in the
10 washroom. Well I don't think anything really turns on that in any way. The -- this
11 particular witness said not that Lance was in the washroom, but that he quickly came in
12 and he was essentially directed out very quickly. And then what happens after that he
13 says he doesn't know.

14

15 In terms of Mike's evidence as well, again I'll just remind the Court that there was some
16 discussion about the incident, which certainly undermines his version of events and the
17 weight to be given to his -- his evidence. In addition; he says he was not drinking.
18 The -- and that he was sober, but then he said he probably took speed, which is a
19 problem.

20

21 And then the accused said everyone was drunk. So that doesn't line up either. So the --
22 the Crown would submit that his evidence is problematic. In addition again on that point
23 of following her around. He says at one point he says they spoke, that's the complainant
24 and the accused, he did not hear what was being said, that it was a small house. Again I
25 don't think that that's particularly helpful evidence on the issue of consent in any way,
26 and I've already said that. But again just to be clear about what his evidence is, it's not
27 that she was -- the image I get is sort of her just following him around from room to
28 room. That's not at all his evidence.

29

30 THE COURT: Mary's little lamb.

31

32 MS. MOGRABEE: That's not at all --

33

34 THE COURT: All right.

35

36 MS. MOGRABEE: -- his evidence. That's not all the evidence.

37

38 And I've talked about Skylar's evidence, I won't go over that and I think we're in
39 agreement as to what she said took place.

40

41 In terms of other evidence regarding the complainant, I've already said this about her

1 ankles that her -- they were not bound. She testified that one ankle was in one leg pant.
2 The defence also said that the accused thought that they were in sort of a relationship and
3 that - and that -- that it was loving. And again, that is not borne out by the evidence. I
4 mean I suppose if the Court wants to determine that his acts were loving the Crown --
5

6 THE COURT: Ms. Mograbee, can I interrupt you and put this
7 to you?
8

9 MS. MOGRABEE: Yes.
10

11 THE COURT: Is there not a possibility that a very unhappy
12 thing happened here. Two young people made love, and somebody came afterwards and
13 poisoned the girl's mind And the young man would happily have continued with the
14 relationship and the young woman wanted that. But in the way that these things do work,
15 she was told that he had gone straight off and made love to somebody else and that he'd
16 said ugly things about her and her mind was poisoned and what could have been a
17 promising happy relationship, just never took place. Instead of which she reacted. Is
18 there not a possibility that that happened?
19

20 MS. MOGRABEE: There's no evidence of that.
21

22 THE COURT: Well, there's a lot of indicia of it.
23

24 MS. MOGRABEE: Well, I -- I would submit that there isn't.
25 The -- th evidence that -- that the accused had sex with Skylar, the complainant said that
26 she did not see that.
27

28 THE COURT: No, but she was told about it and she seems to
29 have believed it.
30

31 MS. MOGRABEE: That's what she said but she didn't see it.
32

33 THE COURT: Yeah, but she believed it.
34

35 MS. MOGRABEE: But again --
36

37 THE COURT: And she certainly was -- she certainly was
38 insulted. Nobody -- the -- and she was hurt by that.
39

40 MS. MOGRABEE: She didn't testify that she was hurt by that.
41

1 THE COURT: Oh, it was clear that she was, Ms. Mograbee.
2 Lance said ugly things had been said about her and it was after that that she -- that her --
3 without question, her conduct was anti the accused. Before that it's equivocal.
4
5 MS. MOGRABEE: She --
6
7 THE COURT: Perhaps it was because it was cold, perhaps
8 because she had nowhere else to go, but --
9
10 MS. MOGRABEE: Well --
11
12 THE COURT: -- her conduct was equivocal until that point.
13
14 MS. MOGRABEE: -- it was equally -- it's equally plausible that
15 she had been raped, as she says she was and that to add insult to injury then she finds out
16 that the -- she has to deal with the accused's brother, who she says is now insulting her.
17 And that's not what happened.
18
19 THE COURT: Well but, Ms. Mograbee, I'll grant you that it's
20 equally plausible. I -- I said is it not possible that --
21
22 MS. MOGRABEE: Not on the evidence, Sir, is the Crown's
23 respectful submission.
24
25 THE COURT: All right.
26
27 MS. MOGRABEE: The -- the rest I think I've covered off.
28
29 In -- in my closing, Sir, I would submit that there is more than enough evidence for you
30 to find him guilty and I -- I won't rehash any more of why the Crown thinks that's the
31 case. But subject to any more questions you might have, those are the Crown's
32 submissions.
33
34 THE COURT: I've asked you lots of questions, Ms. Mograbee.
35
36 MS. MOGRABEE: You -- certainly I can answer any more that
37 you might have, Sir.
38
39 THE COURT: Ms. Mograbee, I am very grateful for your
40 patience. It's been very helpful. Mr. Flynn, do you wish to say anything?
41

1 MR. FLYNN: Sir, I just have two very quick points, Sir.

2

3 THE COURT: All right. Because I -- as I recall, we agreed
4 last time, we've ordered the record and I'm going to anyway have to go away and -- and
5 do a reasoned judgment. And I -- I know that the accused is in gaol and I'll try and do it
6 as quickly as possible. You can try and get a date and we can set it this afternoon. But
7 when you get the record you may want to make some written submissions on top of
8 whatever you've said already.

9

10 MS. MOGRABEE: Yes, I -- I would like to.

11

12 THE COURT: So, Mr. Flynn, if you want to talk now?

13

14 MR. FLYNN: Just two very quick points, Sir.

15

16 THE COURT: Sure.

17

18 **Final Submissions by Mr. Flynn (Reply)**

19

20 MR. FLYNN: I just -- in terms of my friend talking about the
21 circumstances call out for further inquiry to affirm consent. The Court has acknowledged
22 there, the circumstances by themselves, there are different levels of communication.
23 The -- the -- the express oral confirmation of acceptance of consent is not necessary. You
24 look at the totality of everything that's going on in terms of -- in terms of the
25 circumstances between the two people.

26

27 And the second last point, Sir, is I remembered the testimony of the young lady is that
28 from her testimony she had gone into the bathroom to throw up and she also spent 20
29 minutes on her phone dealing with Facebook. So in terms of this lady having no other
30 access to leave or even to call for help, she literally was on Facebook just prior to this
31 incident. I think she'd indicated that maybe her batteries were low, or something to that
32 effect. And again, I'd say that that -- that would be a self serving statement by the -- by
33 the complainant, given the nature that you would expect that she would have called for
34 assistance from her friends, from the police, from anybody, given that she was saying oh,
35 I'm scared and I only stayed here because it was dark and I had no other place to go to.
36 She did have other places to go to, Sir. She had Face book friends and she could have
37 contacted the police.

38

39 Those are my submissions, Sir.

40

41 THE COURT: Thank you.

1
2 THE COURT: Counsel?
3
4 MS. MOGRABEE: Well, we're in your hands, Sir. I certainly
5 would like the opportunity to review the transcript of --
6
7 THE COURT: Yes.
8
9 MS. MOGRABEE: -- of the accused's evidence.
10
11 THE COURT: Well, we must.
12
13 MS. MOGRABEE: And perhaps, Sir --
14
15 THE COURT: But what are we going to do today, right now?
16
17 MS. MOGRABEE: Is just --
18
19 THE COURT: Do you want -- do you want to go and get a
20 date now or be -- be back here at half past 1 and give me a date?
21
22 MS. MOGRABEE: It's up to you, Sir. I -- I'm in your hands. I --
23 I just wanted to inquire though what you were thinking in terms of time lines, how much
24 time you might need to -- to make a decision?
25
26 THE COURT: Well listen, I'm going to start writing my
27 judgment, but it won't be final until I've got the -- I've read the rest of the transcript and
28 until I've seen anything you've got to give me.
29
30 MS. MOGRABEE: Right.
31
32 THE COURT: So I -- I'd say --
33
34 MS. MOGRABEE: So --
35
36 THE COURT: -- another month from today.
37
38 MS. MOGRABEE: -- can we set a time line by which we're to
39 reply to --
40
41 THE COURT: Well, a lot depends on when we get --

1
2 MS. MOGRABEE: Right. So can we say within, you know, a -- a
3 week of -- of receipt of the transcript that we're to provide you with a written -- written
4 submissions, if there are -- if there are any additions.
5
6 THE COURT: We ordered the transcript for 10 days, I believe.
7
8 MS. MOGRABEE: We did.
9
10 THE COURT: So, it should be in another week.
11
12 MR. FLYNN: Well, we can ask that -- that it be expedited,
13 Sir. We can ask that it go great --
14
15 THE COURT: No, Mr. Flynn, it doesn't -- it just --
16
17 MS. MOGRABEE: It just --
18
19 THE COURT: -- doesn't work like that. You ask for it and it
20 doesn't happen.
21
22 MS. MOGRABEE: -- probably --
23
24 MR. FLYNN: The -- the difficulty I have, Sir, as always, is
25 you -- my client's in custody on this matter
26
27 THE COURT: I know.
28
29 MR. FLYNN: -- my friend is not agreeable to re -- to
30 re-opening bail. And -- and because of those circumstances, Sir, we've gone in front of
31 Queen's Bench, the Queen's Bench doesn't feel they have the jurisdiction to deal with it
32 and my friend is not prepared to re-open bail at the Provincial level, so my client is stuck
33 in custody, Sir, until this decision is written.
34
35 THE COURT: Mr. Flynn , I'm very aware of that. The
36 trouble is if I don't give a -- a reasoned judgment, a sensible judgment, if I shoot from the
37 hip it becomes appealable and your client's worse off.
38
39 MR. FLYNN: Most definitely, Sir.
40
41 THE COURT: Well, it's appealable in any event, but it

1 becomes more vulnerable.

2

3 MS. MOGRABEE: The other option, Sir, I'm -- I'm just trying to
4 figure out what might work if you'll give me that opportunity to inquire further. Could
5 we -- would you consider setting it in front of you in say two weeks time to see whether
6 we've reviewed the transcript and whether there's anything in addition, and then that way
7 you can gauge how much time you might need to make your decision.

8

9 MR. FLYNN: Actually it's a very sensible suggestion by my
10 friend, Sir.

11

12 THE COURT: I -- I like that, but I'm not sure that you're
13 going to get me in two weeks, and the three of us will be available and we were very
14 lucky this time.

15

16 MR. FLYNN: We were, Sir. We were very fortunate to have
17 this so quickly.

18

19 THE COURT: So look, counsel --

20

21 MR. FLYNN: Perhaps my friend and I --

22

23 THE COURT: -- may -- may I suggest the following?

24

25 MS. MOGRABEE: Yes.

26

27 THE COURT: Let's get back here at half past one and try
28 and -- try and get a date that the three of us are available in three weeks time or as soon
29 thereafter as is possible, because --

30

-31 MS. MOGRABEE: We can do that.

32

33 THE COURT: -- then you'll have a chance to read the record,
34 make your submissions and I can make adjustments to my judgment. But if we do it in
35 two weeks there won't be enough time.

36

37 MR. FLYNN: Sir, may I ask with respect, because of the
38 circumstances, Sir, I have another matter that I had planned for this afternoon. I was
39 hoping that my friend and I may attend right now, Sir, to case management to get those
40 dates.

41

1 THE COURT: All right. If you can go quickly.
2
3 MR. FLYNN: If we could.
4
5 MS. MOGRABEE: That would be fine. I'll go right away and --
6
7 THE COURT: I'll wait out there.
8
9 MS. MOGRABEE: -- I'm sorry, I know it's lunch time, madam
10 clerk --
11
12 MR. FLYNN: Yes, Sir.
13
14 MS. MOGRABEE: -- if -- sorry to inconvenience you --
15
16 THE COURT CLERK: It's okay.
17
18 MS. MOGRABEE: -- but we'll be right back.
19
20 THE COURT CLERK: Yeah. No, that's fine.
21
22 MR. FLYNN: Thank you, Sir.
23
24 THE COURT: All right. I'll wait out back.
25
26 THE COURT CLERK: All right, Your Honour.
27
28 THE COURT: Mr. Flynn, please explain to your client that --
29
30 MR. FLYNN: Yes, Your Honour --
31
32 THE COURT: -- the realities of life.
33
34 MR. FLYNN: -- my friend and I will -- given the -- given the
35 time sequence, Sir, my friend and I will go up to case management, I will speak to my
36 client when I return, Sir.
37
38 THE COURT: Good.
39
40 THE COURT CLERK: Please order in court, all rise. This court stands
41 adjourned briefly.

1
2 (ADJOURNMENT)
3
4 THE COURT CLERK: Going on record.
5
6 MR. FLYNN: He's -- he's out of control now, guys, so the
7 judge will want him out to hear the date.
8
9 THE SHERIFF: Okay, (INDISCERNIBLE)?
10
11 MR. FLYNN: Yeah, yeah, the judge is just right back here.
12 Thank you.
13
14 MS. MOGRABEE: I gave you the sheet.
15
16 MR. FLYNN: Oh, yes, we've got it right here. Thank you.
17
18 MS. MOGRABEE: No worries.
19
20 THE COURT CLERK: Order in court, all rise.
21
22 MR. FLYNN: I'm just waiting for Mr. Wagar, Sir. I
23 apologize for Mr. Wagar's disruption earlier, Sir. I've spoken with --
24
25 THE COURT: I believe that Ms. Mograbee must be apologized
26 to.
27
28 MR. FLYNN: Yes, Sir.
29
30 THE COURT: Right.
31
32 MR. FLYNN: He's under -- he understands his position, Sir,
33 and he's prepared to --
34
35 THE COURT CLERK: In custody, Alexander Wagar.
36
37 MR. FLYNN: Thank you. Thank you, madam clerk, Sir, for
38 the record, Patrick Flynn. Sir, unfortunately the first available date with your schedule,
39 Sir, is September 9th, 2014 at 9:30 AM in Provincial Court 506. And we have set aside,
40 I believe, one-half hour.
41

1 MS. MOGRABEE: Right.
2

3 MR. FLYNN: And the expectation, Sir, is dependent upon
4 what happens, Ms. Mograbee I believe is in course that week, is that correct?
5

6 MS. MOGRABEE: No, I'm -- I'll be done that course by that time,
7 Sir.
8

9 MR. FLYNN: Okay.
10

11 MS. MOGRABEE: So it's not a problem.
12

13 MR. FLYNN: Oh, it's not a problem then, both parties will be
14 present, Sir.
15

16 THE COURT: All right.
17

18 MS. MOGRABEE: Yeah. Thank you.
19

20 THE COURT: Very well. Matter goes over to the 9th of
21 September, this year, 9:30, courtroom 506.
22

23 MR. FLYNN: Thank you, Sir.
24

25 MS. MOGRABEE: Thank you.
26

27 THE COURT: Thank you, counsel.
28

29 THE COURT CLERK: And that's in person, Sir?
30

31 THE COURT: In person.
32

33 MR. FLYNN: Yes.
34

35 THE COURT CLERK: Thank you.
36

37 THE COURT: Thank you, madam clerk. Thanks, Sheriffs.
38

39 THE COURT CLERK: Order in court, all rise. This court stands
40 adjourned.
41

1 _____
2 PROCEEDINGS ADJOURNED UNTIL 9:30 AM, SEPTEMBER 9, 2014
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1 Certificate of Record

2

3 I, Jeanie Vermeer, certify that this recording is the record made of the evidence in the
4 proceedings in the Provincial Court, Criminal Court, held in courtroom 1005, at Calgary,
5 Alberta, on the 6th day of August, 2014 and that myself and Venus Le were the court
6 officials in charge of the sound-recording machine during the proceedings.

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1 Certificate of Transcript

2

3 I, Paige Young, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record
10 and is transcribed in this transcript.

11

12

13

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14

Paige Young, Transcriber

15

Order No. 10202-14-3

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35 Pages: 93

36 Lines: 3939

37 Characters: 134046

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39 File Locator: ca04dacc66a611e49ebc0017a4770810

40 Digital Fingerprint: 11052e3c62d77bd7b6fb2756f064bf42ff9bce9471e9f8872de714373074ffa8

41

1 Proceedings taken in the Provincial Court of Alberta, Calgary Courts Centre, Calgary, Alberta

2

3 September 9, 2014

Morning Session

4

5 The Honourable Judge Camp

Provincial Court of Alberta

6

7 S. E. Clive

For the Crown

8 (Agent for H. Mograbee)

9 P. D. Flynn

For the Accused

10 L. Chernichko

Court Clerk

11

12

13 **Ban on Publication**

14

15 MR. FLYNN:

Good morning, Sir. I thank mister clerk. For

16 the record, Patrick Flynn. Mr. Wagar is present, Sir. We are here today to -- for your

17 decision on behalf of the trial matter, Sir.

18

19 THE COURT:

Thank you, Mr. Flynn.

20

21 THE COURT CLERK:

Just for the record, calling Alexander Scott

22 Wagar.

23

24 MR. FLYNN:

Thank you, mister clerk. My apologies.

25

26 THE COURT CLERK:

There is a -- there is a ban on publication and

27 he's in custody.

28

29 THE COURT:

Thank you.

30

31 THE COURT CLERK:

And it's for a decision.

32

33 **Reasons for Judgment**

34

35 THE COURT:

Mr. Wagar, please stand.

36

37 THE ACCUSED:

Oh, yeah.

38

39 THE COURT:

I'm going to give a long decision, but you've

40 been waiting for a long time, so I'm going to tell you straight away that I'm finding you

41 not guilty.

1
2 THE ACCUSED: Thank you.
3
4 THE COURT: But now you must sit there quietly and try and
5 listen and understand what I'm going to be saying.
6
7 THE ACCUSED: Okay.
8
9 THE COURT: A lot of it is really important. And -- just sit
10 for now.
11
12 THE ACCUSED: Oh.
13
14 THE COURT: I'm going to be talking for probably
15 three-quarters of an hour.
16
17 THE ACCUSED: Yeah.
18
19 THE COURT: And I don't expect you to concentrate the
20 whole time, but I want you to listen very carefully to what I'm saying right at the
21 beginning. The law and the way that people approach sexual activity has changed in the
22 last 30 years. I want you to tell your friends, your male friends, that they have to be far
23 more gentle with women. They have to be far more patient. And they have to be very
24 careful. To protect themselves, they have to be very careful.
25
26 The law in Canada today is that you have to be very sure before you engage in any form
27 of sexual activity with a woman. Not just sex, not just oral sex, not even just touching a
28 personal part of a girl's body, but just touching at all. You've got to be very sure that the
29 girl wants you to do it. Please tell your friends that so that they don't upset women and
30 so that they don't get into trouble.
31
32 We're far more protective of women -- young women and older women -- than we used
33 to be and that's the way it should be. So after this, I'm going to be talking in more
34 technical terms, but that's the message I want you to take away and tell your friends.
35 And, of course, it's far more difficult if you're high or if you're drunk and if she's high
36 and drunk. You've got to be really sure that she's saying yes. Her keeping quiet isn't
37 enough. That's not necessarily a sign of saying yes. So remind yourself every time that
38 you get involved with a girl from now on and tell your friends. Okay?
39
40 THE ACCUSED: Yes, Your Honour.
41

1 THE COURT:

I'll tell you how I'm going to deal with this.

2 I'm going to tell you what the charge was. You know what it is, but for the record I'm
3 going to do it again. I'm going to read out the law and in a complicated way I'm going
4 to tell you what I've just told you. I'm then going to go through the arguments that the
5 Crown made. You heard them, but I'm going to list them again for the record. I'm then
6 going to go through the evidence of the complainant [REDACTED] also known as [REDACTED]
7 (phonetic), and of Skylar, and of Mike Skinner (phonetic), and then your evidence.

8

9 And going through it, and that's going to take a long time because there was a lot of
10 evidence, I'm going to comment on why I find certain things believable, plausible, or
11 improbable, or convincing. And then arising out of that I will then explain why I reached
12 the decision that you're not guilty.

13

14 So starting with the charge, you were charged, Mr. Wagar, the -- the 13th of December,
15 three years ago, 2011. Here in Calgary, you unlawfully committed a sexual assault upon
16 [REDACTED], also known as [REDACTED]. The law is set out in many cases. Perhaps the most
17 instructive case for the present purposes was provided to me by the Crown. And I'll
18 pause here to say that both counsel worked very hard in this case. And Crown counsel
19 particularly argued strongly, cross-examined professionally and at length, and provided
20 and argued the law in a very professional fashion. She, it was, Ms. Mograbee, that
21 provided me with the *Ewanchuk* case, Supreme Court of Canada 1999 Carswell Alta 99.

22

23 It -- this case was heard in 1998. I'll start reading at paragraph 25. And now I'm going
24 to get technical, but I've told you, in essence, what this case says: (as read)

25

26 The actus reus of sexual assault is established by the proof of
27 three elements: touching, the sexual nature of the contact, and the
28 absence of consent. The first two of these elements are objective.
29 It is sufficient for the Crown to prove that the accused's actions
30 were voluntary. The sexual nature of the assault is determined
31 objectively; the Crown need not prove that the accused had any
32 mens rea with respect to the sexual nature of his or her behaviour.

33

34 The absence of consent, however, is subjective and determined by
35 reference to the complainant's subjective internal state of mind
36 towards the touching, at the time it occurred. Confusion has
37 arisen from time to time on the meaning of consent as an element
38 of the actus reus of sexual assault. Some of this confusion has
39 been caused by the word 'consent' itself. A number of
40 commentators have observed that the notion of consent connotes --
41 connotes active behaviour. While this may be true in the general

1 use of the word, for the purposes of determining the absence of
2 consent as an element of the -- of the actus reus, the actual state of
3 mind of the complainant is determinative. At this point, the trier
4 of fact is only concerned with the complainant's perspective.

5
6 The approach is purely subjective. The rationale underlying --
7 underlying the criminalization of assault explains this. Society is
8 committed to protecting the personal integrity, both physical and
9 psychological, of every individual. Having control over who
10 touches one's body, and how, lies at the core of human dignity
11 and autonomy. The inclusion of assault and sexual assault in the
12 *Code* expresses society's determination to protect the security of
13 the person from any non-consensual contact or threats of force.
14 While the complainant's testimony is the only source of direct
15 evidence as to her state of mind, credibility must still be assessed
16 by the trial judge.

17
18 And you will see that I will go through the evidence in some detail to try and establish
19 her credibility. In the light of all the evidence. And you will see, Mr. Wagar, that I will
20 deal with the evidence of all the people as they testified about what happened before,
21 during, and after the event. (as read)

22
23 It is open to the accused to claim that the complainant's words and
24 actions, before and during the incident, raise a reasonable doubt
25 against her assertion that she, in her mind, did not want the sexual
26 touching to take place.

27
28 I pause here to point out that although the court doesn't say this, presumably implicit is
29 this, that her behaviour after the incident is also of some importance. I'm not talking here
30 of the requirement not accepted in contemporary thinking that she has to make a
31 complaint to a person in authority within a reasonable time or as soon as possible, but her
32 other behaviour. (as read)

33
34 While the complainant's words and actions, before and during the
35 incident, raise a reasonable doubt against her assertion that she, in
36 her mind, did not want the sexual touching to take place. If,
37 however, as occurred in this case, [being the *Ewanchuk* case] the
38 trial judge believes the complainant that she subjectively did not
39 consent, the Crown has discharged its obligation to prove the
40 absence of consent. The complainant's statement that she did not
41 consent is a matter of credibility to be weighed in light of all the

1 evidence including any ambiguous conduct.

2
3 And once again, I assume, although it isn't absolutely necessary that ambiguous conduct
4 includes conduct after the event, in my estimation, and I make the point now, her conduct
5 before and during the -- the incident is sufficient for me to arrive at the conclusion. I say
6 that not on the basis of her evidence, which I don't accept, but on the basis of all the
7 evidence. So not so much in the context of ambiguous conduct, but in the context of
8 conduct. (as read)

9
10 The question at this stage is purely one of credibility, and whether
11 the totality of the complainant's conduct [and I emphasize the
12 word 'totality'] is consistent.

13
14 And here I deal with conduct and the totality of conduct as distinct from her version given
15 in court. (as read)

16
17 Is consistent with her claim of non-consent. The accused's
18 perception of the complainant's state of mind is not relevant. That
19 perception only arises when a defence of honest but mistaken
20 belief in consent is raised in the mens rea stage of the inquiry.

21
22 The judgment goes on to deal with implied consent, which is not, in my estimation, an
23 issue in this case.

24
25 I turn now to another case provided by Mr. Mograbee, the *Carson Livermore* (phonetic)
26 case, also Supreme Court of Canada 1995 reported in 1995 CarswellOnt 982. And I read
27 from page -- the top paragraph on page 3 of that judgment, the last sentence of that
28 paragraph, And this deals, I recognize, with mistaken belief, which isn't at issue at this
29 case. But it states that: (as read)

30
31 The circumstances surrounding the essentials of the alleged assault
32 can be looked at.

33
34 And that is something that I have done in this case. The sentence reads: (as read)

35
36 In order for the belief to be honestly held, the accused cannot have
37 been willfully blind nor reckless about whether consent was given.
38 While the belief may not be reasonable, there must be something
39 in the evidence of the circumstances surrounding the alleged
40 assault which lends an air of reality to an honest belief in consent.

41

1
2 What I've taken from that is that I'm entitled to look at the circumstances, including the
3 conduct, of the accused. From that, Mr. Wagar, arises the proposition that you are still
4 innocent until proven guilty, that your guilt has to be proved beyond a reasonable doubt
5 and that this is not a crime of -- that requires no intent. There are some crimes that
6 whether or not you mean to commit them or whether or not you have a guilty state of
7 mind, you're guilty. This is not one of them.

8
9 I'm going to deal now with the -- with Ms. Mograbee's arguments. She made the
10 following submissions. That the accused must take reasonable steps to ensure consent. I
11 accept that proposition. That nothing short of unequivocal consent is sufficient. That
12 seems fair. That the accused did not take reasonable steps. In my estimation, as will
13 appear, it was reasonably clear to the accused that consent was unequivocally given and
14 that the accused can't say -- say he was mistaken, as in this case his version is that she
15 indicated consent positively. That proposition is correct.

16
17 Ms. Mograbee then said that the complainant is credible. I don't believe that the
18 complainant is credible, given the surrounding circumstances. I also understand that it's
19 not a credibility contest between the complainant's version and the accused's version.
20 And even if the complainant's version is credible, *W.D.* (INDISCERNIBLE) posits that I
21 have to look at the accused's version.

22
23 I record that all the witnesses were, in a sense, unsavoury witness, unsatisfactory
24 witnesses. Three of them lived on the street. They didn't hold down jobs. All of them
25 had criminal records. All of them were drunk. All of them seems to -- seemed to have in
26 fact conceded that they had addiction problems. Their morality -- and I'm leaving sexual
27 morality aside, but their morality, in general -- and for the moment I'll leave Mike
28 Skinner to one side, and Skylar, because apart from criminal convictions, we know little
29 about her morality. Certainly the complainant and the accused's morality, their sense of
30 values, leaves a lot to be desired.

31
32 The complainant, as will appear from the evidence, had spent the day in question sneaking
33 into the movies without paying. I suppose many young people do that. That isn't the end
34 of the world. However, she'd also spent a considerable amount of time stealing clothes,
35 and then went on to steal a consider -- considerable amount of liquor. It didn't cross her
36 mind that she should work to earn money to buy those things.

37
38 The accused did not seem to find any of that reprehensible and indeed was impressed and
39 respected one of his friends who had been part of the liquor stealing. However, I have to
40 deal with their evidence. And in truth, their evidence was typical of evidence in cases
41 such as this. None of it was truly bizarre. I just think that one version is more credible

1 than the other. And leaving that to one side because it's not a competition, I'm not in a
2 position to reject the accused's version. On the accused's version, he received positive
3 indications from the complainant that she wanted to have sex with him.

4
5 I note that just because the accused -- the complainant has a criminal record and addiction
6 problems and is dishonest does not mean that she is not entitled to the full protection of
7 the law in every respect. And perhaps because she is vulnerable and lives on the streets,
8 or at least at that time lived on the streets, she is entitled to the authorities looking very
9 closely and trying to protect her as best they can against abuse.

10
11 But by the same token, the accused, although he has addiction problems and although he
12 has a criminal record and although he is a man who respects people who steal, he is also
13 entitled to the benefit of the doubt and for his guilt to have to be established beyond a
14 reasonable doubt.

15
16 I will turn now to the evidence, and this is going to take some time. The accused (sic)
17 goes by two names, [REDACTED] and [REDACTED]. She testified that at the time of the occurrence,
18 three years ago, she was some 19 years old. She had been living in Calgary for about
19 two years. She lived in an apartment for a month or two. But after that, she lived on the
20 street, taking advantage of transitional housing, the Mustard Seed and the Drop-In Centre.
21 She fed and clothed herself -- herself through these charitable organizations. She
22 worked at a warehouse for a few weeks. And then she stopped attending work.

23
24 She says that by the time that she testified, some months ago, she had stopped doing hard
25 drugs and stopped drinking in excessive amounts and she'd been clean from hard drugs
26 for a couple of months, but she still smoked marijuana and still drank alcohol. She says
27 that on the day of the occurrence under consideration, that is the 13th of December, 2011,
28 she went to the Alex Youth Centre with Skylar to get groceries. And then she and some
29 other people took the bus back to the house, which turns out to be a basement suite
30 occupied by Mike Skinner, also known as Skinner Mike.

31
32 When they got there they started eating food and they decided to go and steal liquor. She
33 said that earlier in the day she'd been with the accused's brother, Lance (phonetic), to go
34 and see a movie. She says that travelling back from the Alex Youth Centre, where she'd
35 got the groceries, to Skinner Mike's basement suite she was sitting with Skylar on the
36 bus. And I pause to point out that her evidence is shot through with the fact that she and
37 Skylar had some kind of connection and that Skylar was, if not her friend, at least starting
38 to become her friend. This is important because later on her evidence is to the effect that,
39 for some reason, Skylar/Skylar sides with the accused.

40
41 After they had been to steal liquor, she got really drunk in the laundry room and in the

1 washroom of the basement suite because she was drinking what she called abstinence,
2 ironically, but was absinthe and white rum. She said she'd been staying at the house for
3 three days before that. She said that, surprising enough, in her opinion, Alex, the accused,
4 was not drinking. She went on to testify that music was playing. Alex was dancing. She
5 liked his dancing. He was having fun and she danced with him. She said she then went
6 to the washroom and she threw up. She washed her face. She unlocked the door and
7 Alex came in.

8
9 In this -- her first version of what happened in the washroom she makes no mention of
10 being on Facebook. She said she went to the washroom to throw up. And I pause to
11 make the point that it would be surprising if her evidence was perfect and that if, as
12 happened, she had to go through it several times in-chief and in cross-examination and
13 re -- re-examination, it was absolutely consistent each time. She was, of course, drunk at
14 the time. She may have been smo -- smoking marijuana. And it was three years earlier.
15 It would be astonishing if her evidence was perfect. And I don't make too much of these
16 inconsistencies.

17
18 So to return to her evidence, however -- sorry, to return to the point I was making, for the
19 same reason, I don't make too much of this kind of inconsistency on the part of the
20 accused, or indeed the other witnesses. There was a lot of drink that night. It was a long
21 time ago. And there were drugs involved. So to return to her evidence, after he's come
22 into the washroom she says: (as read)

23
24 Alex takes my hands. I'm against the counter of the sink, against
25 the veneer. So he grabbed my pants and pulled it down, and when
26 he's pulling it down my button breaks, but it had already broken.
27 Alex picks me up and he puts me on the counter. And then he
28 gets (INDISCERNIBLE) up against the mirror. He starts to flick
29 my vagina at this point. And I'm just -- like, I don't say anything.
30 I look at -- I look at Alex, and he doesn't ask -- he doesn't ask
31 me, he just does. And just because I don't say anything doesn't
32 mean it's okay.

33
34 I pause to note that, and this is perhaps more significant than other relatively trivial
35 inconsistencies, one of her versions is that she says nothing to him. (as read)

36
37 A And he just, like, thinks he's so good. And he's just
38 continuing. And he's looking right at me. And I'm looking at
39 him, but I don't say anything

40
41 Q Why don't you say anything?

1 A I don't know. I don't know why I don't say anything.

2

3 I beg your pardon. She had said earlier that when she went to the washroom -- oh, no,
4 she said she threw up. She didn't say it this time, that she was on her -- that she was on
5 her Facebook. She was asked: (as read)

6

7 Q How many times did you throw up when you were in the
8 bathroom?

9 A I don't recall how many times. I turned around from the
10 counter and the sink. I unlocked the door and I'm opening.
11 And Alex sneaks in. Like, he slides in like a ninja. He closes
12 the door behind him.

13

14 Q Did he say anything to you?

15 A He's flirting with me. He said that he was watching me
16 tonight, he's interested, and he was saying nice things to me.
17 When he's pulling my pants off they all go inside out, so my
18 pants were inside out with the boxers, and the socks, too.

19

20 Q What about your panties?

21 A They're in my pants and they're out of the pants, and then
22 they're on the floor.

23

24 Q But everything comes off, you say?

25 A Right.

26

27 I pause to note that this is also an initial version that her pants and panties were
28 completely off and on the floor. Then she says: (as read)

29

30 Q So you were naked from the waist down. Do I follow you
31 correctly?

32 A Yeah. And then, at first, my one pant leg is off, and then my
33 other one still has pants on it.

34

35 So now the version is that her pants are around one ankle. (as read)

36

37 A And he's saying things about my body and my tight little
38 pussy. And he's just making all these sexual-like comments
39 and how he likes me and he wants to fuck me. And at one
40 point, I believe he was talking about relationships.

41

1 Q Are you saying anything to him?

2 A I don't know.

3

4 So this is now the second version. (as read)

5

6 A I told him that I liked him as a friend. I told him that. I told
7 him that I was gay. That I liked girls. That I was interested in
8 Skylar. And he knew that. He knew that.

9

10 Q Did you say anything else to him?

11 A That he can't.

12

13 Q Can't what?

14 A That he can't put his penis inside of me. And he said: Yeah, I
15 can. And I (sic) was like, I'll pull out before -- before I
16 ejaculate. I do it all the time. I'm clean.

17

18 Q What did you say when he said that?

19 A I said he can't.

20

21 This is now a third version on a Seminal matter. (as read)

22

23 A And then he's licking my vagina. And he's like, Do you like
24 that.

25

26 Q What do you say?

27 A No.

28

29 This is now a fourth version. (as read)

30

31 Q What did he do when you said, No?

32 A He kept licking my vagina.

33

34 Q Did you say anything else to him?

35

36 And then the question is continued. (as read)

37

38 Q He asked you if you liked it while he was licking your vagina.
39 And you've been clear in saying [says Ms. Mograbee] that you
40 responded, No. What happened next?

41 A And then he takes my pants off. And then I try to get off the

1 counter and put my pants on. I thought he was just going to
2 lick my vagina. And then, no, he puts his penis inside of me.
3 And, yeah, he has a fucking big penis. So I'm getting off the
4 counter and I literally hop off and try to put my pants back on.
5 And then he -- his pants are just off and he's like, I'm going to
6 fuck you. And I was like, You can't without a condom. And
7 he's like, No.

8
9 And this is now yet another version. I also pause to make the point that one version is
10 that she's unequivocally against having sex. It can't live with the version that she doesn't
11 want sex unless there's a condom involved. I understand that one can say, I don't want
12 sex without a condom, and then, if the man insists, that is unwanted sex. My point is a
13 different one. That her evidence sometimes is that she didn't want sex at all. And then it
14 changes to she was prepared to have sex as long as there was a condom. (as read)

15
16 A I'm standing there and he picks me back -- puts me back on
17 the counter. I didn't want it inside me; I didn't. I pushed -- I
18 pushed like -- I was pushing him on the shoulders.

19
20 Q How did you push him?

21 A With my hands.

22
23 I said, It hurts, and I wasn't comfortable. I didn't want him to do
24 that.

25
26 Q Did you tell him you -- tell him you were hurting him (sic)?

27 A Yes. I said, You're hurting me. You should stop. But he just
28 laughed and he kept going.

29
30 There's then cross-examination on the relative sizes of the two parties, and it is clear that
31 the complainant is a slight young woman, while the accused is a much bigger, powerful
32 young man. The scene then changes. She says: (as read)

33
34 He puts me in the shower. He takes my shirt off and my tank top
35 and my bra, and then he puts me in the shower. My top and then
36 my shirt's inside out. And in the shower he starts washing --
37 washing my body with soap. He washes everything. He washes
38 me. And then he tells me to wash him, and I'm washing him

39 Q Why did you wash him?

40 A Because he told me to.

41

1 Q What do you think would happen if you didn't do what he
2 wanted?

3 A I don't know. Like he took control and then I -- and he had
4 control. So I did . . .

5

6 I pause here to make the point that although the Crown established what was quite clear,
7 that the accused is much bigger than the complainant, there's no talk of real force here.
8 There's no talk of fear. That doesn't mean that there's consent. It just means that the
9 accused (sic) hasn't explained why she allowed the sex to happen if she didn't want it.
10 She certainly wasn't frightened, and as appears later in the evidence, she was quite
11 capable of asserting herself with other men when they did things she didn't like.

12

13 She then went on to say: (as read)

14

15 Suddenly Lance was there staring through . . .

16

17 And Lance, it will be recorded, is the accused's brother, who had spent the day
18 entertaining her: (as read)

19

20 Lance was there staring through the shower door with a fucked-up
21 smile on his face, and he says -- he makes a comment on the way
22 my vagina looks.

23

24 And he then made certain comments about -- about her vagina: (as read)

25

26 I told him to fuck off And Alex was licking my vagina while I
27 was standing in the shower. I glanced down, and Lance is right
28 there staring, laughing with Alex. I tell Lance to fuck off, and
29 then Alex leaves the shower and the washroom with Lance. I
30 stayed in the shower. I stayed in the washroom. I didn't want to
31 go outside. And then Alex goes and fucks Skylar.

32

33 In fact, that full quote is: (as read)

34

35 It wasn't okay for us to have sex. It was just all about getting
36 laid, and then Alex goes and fucks Skylar. I shower, I wash
37 myself -- I wash myself, and I'm staying in the shower. I don't
38 know how long I was in the shower, but I just did not want to
39 leave the washroom, so I just stayed in there. I waited until my
40 hair was -- was a little bit dry because I didn't want them to
41 know. Q What did you do after that?

1 A I chilled. I got drunk more. Later that night, I told Dustin
2 (phonetic) what happened. I passed out in the kitchen with
3 Dustin on the couch. I woke up at 3 or 4:00 in the morning. I
4 tried to go sleeping on the bed with Alex and Lance. Lance
5 wakes up and he starts talking to me, and he's saying things
6 like how I'm a slut and he's going to tell everybody and it's
7 going to be a game, and that he told Alex to do that.

8
9 And I point out that, despite her version of events, when she woke up in the middle of the
10 night, she wanted to sleep on the bed apparently with both the accused and certainly with
11 Lance, who she'd taken exception to. She goes on to say, talking about Lance: (as read)

12
13 He was saying things to get me worked up and he was hurting my
14 feelings. And I'm like hurting, and he's saying all this shit like

15
16
17 To my mind, it appeared that she emphasized far more the fact that Lance was hurting her
18 feelings and humiliating her than that she felt bad about what she said was unwanted sex.
19 The question was asked: (as read)

20
21 Q Where was Alex at this time?

22 A He was in the master bedroom, I believe spucki -- fucking
23 Skylar.

24
25 Q What happens next?

26 A Lance, he's videotaping me with his phone. He's laughing and
27 saying he's going to tell everybody to do exactly what Alex
28 did, and that I was a little whore because I was easy. I get
29 mad. I get mad at Lance. He's saying to me -- and I tried to
30 kick the phone out of his hand and I hit him.

31
32 Seems to me incongruous that she would have the courage to kick out and hit somebody
33 who was videotaping her, but not the accused in the shower. She says that, after the
34 incident in the washroom, she didn't seem him -- see Alex again that evening. She said
35 she left at around 6:00 in the morning. She said: (as read)

36
37 I left because I was sick and tired of Lance and his bullshit
38 talking. He was just saying those things to anger me.

39
40 I once again point out that it's incongruous that she left because of the brother talking and
41 teasing her and insulting her rather than what would be the far more important matter, the

1 matter of being sexual assaulted the previous evening.

2

3 She goes on to say that she smoked meth with the accused after this. I don't make much
4 of that. It was argued by the defence that this shows that she had no ill feelings towards
5 him. I think that her explanation that she was an addict and that it fed her addiction is
6 plausible, so I don't make much of that fact.

7

8 She was then cross-examined. She conceded that she had convictions for arson and theft.
9 She said that she had spent three days, the previous three days, at Mike's house, that
10 she'd snuck into movies without paying, that she'd stolen clothing throughout the day,
11 and that she'd stolen alcohol that evening She says that Mike had said to her that she
12 could spend a month in his flat.

13

14 She says that she had spent two days cleaning the house. It seems to me that her
15 relationship with Mike was closer than Mike's relationship with the accused.

16

17 She then said that, during that day when she and Lance were at the movies and at
18 Subway, he'd tried to chat her up. And she had put him straight and told him that she
19 was not going to be his girlfriend, and that she had in fact rejected him.

20

21 She said that that evening, when Alex was dancing, when she was dancing, she had told
22 somebody, she couldn't remember who, that she was attracted to his dancing.

23

24 She was then asked about what happened in the bathroom. She said that in the bathroom
25 she was looking at Facebook, and she might have been doing that for 20 minutes. Earlier,
26 she'd said she'd gone to the bathroom to throw up. It's possible that she threw up and
27 then went onto Facebook, but that isn't what she said, and besides which all she had was
28 a hand phone, as far as I could tell. She certainly didn't -- there's no talk about a laptop.
29 And the idea of a person who's so drunk that they throw up, they don't know how -- how
30 often, being able to spend 20 minutes on Facebook seems implausible. And so there's yet
31 another question mark around her version of how she ended up in the washroom.

32

33 She was then asked, Is it possible that she -- she had a marijuana cigarette with Skylar
34 and Dustin in the bathroom that evening? And she said that she doesn't recall. And she
35 says, yes, she could have done that. Now, that doesn't tie in with the rest of her
36 evidence, and certainly not with the evidence led in-chief.

37

38 She then conceded that when she was put onto the counter in the bathroom by the
39 accused, her pants were only pulled down to her ankles. They weren't totally pulled off.
40 And the implication of that, of course, is that it would have been very difficult for them to
41 have had oral sex at that time if her version is correct that she wasn't cooperating. And it

1 is one other small inconsistency.

2

3 She then went back to her first version that, during oral sex, she doesn't remember saying
4 anything. She was asked, Could you have said anything? No. She was then asked: (as
5 read)

6

7 Q Are you sure that you never said anything?

8 A I'm not sure I said anything.

9

10 So she's now gone back to her original version that she said nothing, in contradiction to
11 her intermediate version that she'd told him to stop.

12

13 She was then asked: (as read)

14

15 Q After he licks your vagina, in my understanding your pants are
16 still around your ankles.

17 A Yes.

18

19 Q Your buttocks on the counter?

20 A Yes.

21

22 Q Your legs are overhanging the counter. Your legs are bound at
23 the ankles because you have your pants on?

24 A Yes.

25

26 Q So in effect, you agree with me that your ankles are more or
27 less together. They're not able to split apart. They're bound.

28 A Yes.

29

30 Q By your pants at your ankles, and your pants are binding your
31 ankles. Okay.

32 A Yes, my pants are at my ankles.

33

34 Q Can you explain to the court how it is that my client can
35 perform oral sex if your ankles are bound? Are you
36 cooperating?

37 A No.

38

39 Q Are you attempting to stop him?

40 A No. I just sat there.

41

1 Q Did you have your hands on his shoulders?

2 A Yes.

3

4 Q My understanding is you told him you couldn't have sex
5 because he didn't have a condom.

6 A Yes.

7

8 Q Then my understanding to your testimony is then that he went
9 in and penetrated you.

10 A Yes.

11

12 Q Did you say anything?

13 A I said, It hurts.

14

15 Now, that also leaves out her intermediate version that she told him to stop: (as read)

16

17 Q You said it hurt. Did you tell him to stop?

18 A At one point I did.

19

20 Q When did you tell him to stop?

21 A I don't remember when I told him to stop.

22

23 So this moves away from the proposition that she had told him before he started to stop,
24 or indeed that he couldn't have sex without a condom. Then she's asked: (as read)

25

26 Q Was it at the beginning of the intercourse or was it at the end?

27 A At the beginning.

28

29 Q Did you attempt to push him or to hit him?

30 A No. I pushed him.

31

32 Then the question is asked: (as read)

33

34 Q Did he physically carry you to the shower?

35 A No, he led me. He showed me the shower. He pointed.

36

37 Q He soaps you, he washes you down?

38 A Yes.

39

40 Q My understanding is also you soap him and wash him down.

41 Is that also right?

1 A Yes.

2

3 Q Did you tell him you want to be in the shower?

4 A I did not.

5

6 Q Did you tell him that you did not want to wash his body?

7 A I don't recall.

8

9 Q My understanding is, in the shower he's caressing you, he's
10 fondling you.

11 A Yes, he's touching my body.

12

13 Q My understanding is that, while you're having this unwanted
14 sex in the shower, you tell the watcher [that's Lance] to fuck
15 off, but you don't say anything to the person committing the
16 oral sex on you.

17 A No.

18

19 She was then asked about an interview with the police. And Mr. Flynn, counsel for the
20 defence, read from the interview: (as read)

21

22 Lance was trashing me. I'm saying, like, yeah, I don't care.

23

24 Let me rather read the whole question. Mr. Flynn says to the accu -- to the complainant:
25 (as read)

26

27 Q And did you also remember saying in the interview with the
28 police detective, "Lance was trashing me."

29

30 I'm saying, like, yeah, I don't care.

31

32 And in relation to having sex with my client, you said:

33

34 Yeah, I just wanted to, whatever. I don't care when he did
35 that to me. Like I wanted him to do it.

36

37 Do you remember saying that to the detective?

38

39 A Yes.

40

41 This is a piece of evidence that I cannot ignore. Mr. Flynn then started questioning the
accused (sic) about Skylar. He said: (as read)

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41

Before you entered the bathroom, did you tell Skylar that you were going to have sex with my client?

A No.

So it was put to the accused (sic) that Skylar had a version in this regard. It's true that it was slightly inconsistent. Skylar's evidence was that this happened in the bathroom, not before they went into the bathroom.

She was asked: (as read)

Q Did you feel you could open up with Skylar?

A Maybe.

She mentions that she was trying to sleep with Skylar. She was then asked how she was positioned when she was sitting on the basin and counter. She says: (as read)

I was holding one shoulder with my hand and then back, and I was trying to move forward. And he kept moving forward, so it was like back and forth.

That doesn't smack to me of somebody who's pushing somebody away or somebody who is not cooperating: (as read)

Q Show us with your hands, if it helps.

A This one was on. I don't know. This one was on his shoulder, and I kept moving my hand back. And then I put my other one on his shoulder.

Then the question was asked: (as read)

Q Why are you trying to do -- what were you trying to do by that?

A [And she says] Push him.

Sounds like a very ineffectual attempt at a push. Then Mr. Flynn asked against about the pants: (as read)

Q How -- they were around your ankles during the time that Alex was licking your vagina. Do you remember that part?

A Yes. [Then she goes on to say] And then he -- then the one

1 leg is off, and that's when he starts doing intercourse.

2
3 Q So one of your legs is out of the pants?

4 A Yes. And then my pants are on the floor.

5
6 She was then asked: (as read)

7
8 Q Can you tell me what you think about Skylar?

9 A [And she says] 'Cause they had sex before.

10
11 Sony. "Why do you think "The issue was whether Skylar was siding with the
12 accused, and Mr. Flynn asks: (as read)

13
14 Q Can you tell me why you think that about Skylar?

15 A [And she said] Because they had sex before.

16
17 Then Mr. Flynn again asked: (as read)

18
19 Q Did you say anything to Skylar about Alex before you went
20 into the washroom?

21 A [She says] I don't recall.

22.....
23 Q [Mr. Flynn asks] Did you have marijuana before the incident?

24 A [She says] I don't remember.

25
26 Q [Mr. Flynn says] So your buttocks would have been in the
27 basin.

28 A Yes.

29
30 Q That means your buttocks were lower than your thighs because
31 your basin -- your bottom was hanging down into the basin.

32
33 I beg your pardon. This is me asking the questions. "You had marijuana before the
34 incident?" She says she doesn't remember. I said: (as read)

35
36 Q So your buttocks would have been in the basin?

37 A Yes.

38
39 Q That means your buttocks were lower than your thighs because
40 your bottom was hanging down in the basin.

41 A Yes.

1
2 Q So the lip of the basin would have been between your vagina
3 and the accused's penis.

4 A Yeah, but he was licking my vagina.

5
6 Q [I say] But he was trying to insert his penis, your bottom was
7 down in the basin, or am I wrong?

8 A My vagina was not in the bowl of the basin when he was
9 having intercourse with me.

10
11 Q Right, which leads me to the question: Why not? Why didn't
12 you just sink your bottom down into the basin so he couldn't
13 penetrate you?

14 A [The answer was] I was drunk.

15
16 Q [And I said] And when your ankles were held together by your
17 jeans, your skinny jeans, why couldn't you just keep your
18 knees together?

19 A [Answer was] I don't know.

20

21 The next witness was Mike Gallinger, also known as Skinner Mike, who was the tenant of
22 the basement suite. She (sic) says that at one point he walked into the shower, and she
23 (sic) saw the complainant clinging to the accused. She said -- he said that, after they
24 came out of the shower: (as read)

25

26 She was following him around like they were having a good time.
27 I don't see why she would have done that [said Mike Skinner] if
28 something was wrong.

29

30 I pause to say that Mike Skinner was an obstinate witness. He clearly did not want to be
31 here. He was impertinent and it doesn't seem to me that he was here to do anybody any
32 favours. He was forced to be here. I did not get the impression that he was the accused's
33 friend, and indeed it's clear that he -- his previous relationship had been with the
34 complainant, who had been staying at his house for three days and cleaned his house. He
35 had met the accused that day, that evening in fact.

36

37 Mike Skinner said: (as read)

38

39 I'm here because I've got a subpoena. And I would have had a
40 warrant if I didn't come. I don't want to be here. I've got stuff
41 to do.

1
2 He was then asked by the Crown: (as read)

3
4 Q And when you say you saw [REDACTED] following Alex, I'm going
5 to suggest to you that you didn't see that. Alex told you that.
6 Isn't that right?

7 A What the hell are you talking about? I saw them hanging out
8 and partying together afterward.

9
10 He said that he saw them together in a room hanging out, having fun. The Crown then
11 asks: (as read)

12
13 Q So when you say that she was following him that may not have happened. Am I
14 right?

15 A No.

16
17 Q Am I right? Am I wrong or am I right?

18 A You're wrong, because I remember. I have a fucking picture memory and I remember
19 images. I don't remember conversations and shit, so I'm saying what I remember
20 from images and that's it.

21
22 Q Do you remember who was following whom from one room to another?

23 A I remember her following him at one point. I don't think he followed her, though.
24 They were talking about something. I don't know.

25
26 Q Oh, so they were talking at some time when she was following him?

27 A I already said that. They were talking at one point.

28
29 Q Right. And I understand that, too, but at what point -- but at what point? Is it during
30 the following or is it at a different time?

31 A Before, during, after, I don't know. I don't remember all of it.

32
33 Q During, before, or after some of it. Which is it?

34 A Any of it. I don't know.

35
36 So he isn't sure whether they were talking before, during, or after the following. But
37 he seems pretty clear that they were happy with each other and together after he had
38 seen them together in the bathroom.

39
40 The next witness was Skylar Porter, also a young woman. She said that she saw the
41 accused drink and having, like, sexual feelings for Alex. She said that before they

1 went into the bathroom they were flirting and touching. She said she remembers
2 smoking a joint with them -- Alex, and Dustin, and [REDACTED] -- in the bathroom.

3
4 She said: (as read)

5
6 We ended up smoking the joint and I ended up taking [REDACTED] aside
7 and asking if she was going to have sexual relations with Alex.
8 And she adm -- and she admitted she was going to. And then me
9 and Dustin ended up leaving them in the bathroom. I asked her in
10 front of everybody and she -- Q What did she say?

11 A She said, Yes. I was, like, okay, and then me and Dustin left.
12 We went into the kitchen.

13
14 Q How long were they in the bathroom before they exited?

15 A Approximately, like, 10 or maybe 20 minutes.

16
17 Q Did you see them after they left the bathroom?

18 A Yeah.

19
20 Q What did you observe with Alex and [REDACTED]?

21 A That nothing was wrong. Like, they were acting warmly to
22 each other, like affection.

23
24 I turn now to the accused's evidence. He started off in-chief by saying:

25
26 She introduced herself as [REDACTED]. We went into the bathroom.
27 We smoke a joint. Everything was good. We were sitting there
28 smoking a joint and then the joint was finished. Skylar and
29 Dustin leave and I stayed behind with [REDACTED] or [REDACTED]. And I said
30 that I really liked her a lot. She's told me she liked me, too, and
31 we started kissing and then we started making out.

32
33 And we were in the bathroom and then we were sitting together.
34 And, like, we were making out. And we were kind of groping
35 each other. And I pulled her pants down. I sat her on the sink,
36 right on the counter. I started eating her out. She put her leg up
37 on my shoulder and I was eating her out.

38
39 And then I positioned her on the counter a little bit better, like by
40 the sink there, and then I pulled down my pants and we had
41 intercourse. I started having sex with her. I didn't last very long.

1 I lasted, like, two minutes. I apologized to her. I was, like, Oh,
2 my God, I'm really sorry. It's just I've been in jail for 45 days.
3 And she laughs and sa -- and she's like, Oh, it's okay, hon. And I
4 came on her stomach.

5
6 And I took her to the shower and that's when I started washing
7 her. I washed her down, right, and we started making out in the
8 shower. And then she said, Hey, it's cold water. I remember
9 what she said because it's like when you splash cold water on you
10 and you put cold water on yourself in the shower and you're with
11 somebody. And it's just, you feel their body heat.

12
13 Then Mike came in the shower. Came in the bathroom, and he's
14 like, Oh, crap, and then he turned around and walked out. And
15 then my brother came. And, like, my brother really wanted this
16 girl bad. And he was so mad he didn't get her. And then we
17 were making out with each other and she looks up at him and she
18 screams at it, at him, Get the fuck out, right?

19
20 And then Lance gets out of the bathroom, and he kind of ruined it.
21 And we went at it a bit longer and then I was too drunk. I
22 couldn't keep up. So we left the shower together. I towelled her
23 off. We left the shower together. She was holding my hand and
24 we were happy. We went to the laundry room.

25
26 And then he talks about what happened there subsequently. And the accused was then
27 cross-examined by the Crown. And in cross-examination he had this to say: (as read)

28
29 I said a bunch of things to her. I told her she was, like, really
30 pretty and all that stuff. And then I kissed her. She kissed me
31 back. We started making out. She's sitting on the counter. I'm
32 kissing her, making out with her. She's kissing me back.

33
34 I pull her pants down. I start to perform oral sex on her, and I
35 told her she had a really nice pussy. And she's, like, Oh, thanks.
36 She was all smiles. Then I pulled my pants down and that's when
37 she grabbed my dick and she's, like, Oh, my God, it's a really big
38 dick, and I was, like, Thanks. And then she said, Oh, shoot, do
39 you have a condom? And I'm like, No, I don't, but I'll pull out,
40 right? And then she's, like, Okay. And that's what happened.
41 And then we started having sex.

1
2 And I pause here to make the point that the one flaw in the accused's version is that it's
3 only at this point in cross-examination that he says that he discussed the matter with her
4 and that she said it was all right to have sex. In-chief he didn't say that she had grabbed
5 his penis. He did say that she comment on -- commented on his size, but not that he had
6 grabbed her (sic).

7
8 The difference between her version and his in regard to the condom is that she said he
9 couldn't have sex without a condom. His version is she asked him about a condom and
10 then said it was all right when he said that he was -- it was all right to have sex when he
11 said that he would pull out.

12
13 He then went on to say that it was uncomfortable up against the tap on the basin and so
14 they, together, moved around to try different positions and she was assisting him to try
15 different positions. She was then cross-exam -- he was then cross-examined as follows:
16 (as read)

17
18 Q Well, she tried to get off the counter after you -- performing
19 oral sex, didn't she?

20 A No, she did not.

21
22 Q She said, I was getting off the counter to hop off and put my
23 pants back on. And you say, I'm going to fuck you.

24 A No.

25
26 Q You didn't say, I'm going to fuck you?

27 A No, I didn't.

28
29 Q You just went ahead and put your penis --

30 A No.

31
32 Q in her vagina? But you did. You did.

33 A I did -- I did have sex with her, but I didn't -- I'm saying no
34 the -- to your saying that, or that she tried to get off the
35 counter and get away from me. That's not what happened.
36 That's not the truth.

37
38 Q Did you ever say, I'm going to fuck you?

39 A I asked her if she wanted to fuck, yes.

40
41 Q Oh, that's something new that you haven't mentioned before.

1 Isn't it?

2 A Like, I start eating her out and then I came up and I said,
3 Yeah. I can't remember, ma'am.

4
5 Q And she said to you, You cannot fuck me without a condom.

6 A No, she didn't. She said, Do you have a condom, and I said, I
7 don't. And then I said, Hey, I'll pull out early, I'll pull out
8 right away. And she said, Yes.

9
10 Q She said okay?

11 A She said okay.

12
13 That was something new and it does some violence to the accused's version. He then
14 deals with the shower. He says: (as read)

15
16 We were kissing and we both ended up in the shower. I helped
17 her undress. Q Just common courtesy?

18 A She put her hands up like this and I pulled her shirt off and I
19 helped her with her bra.

20
21 He went on to say: (as read)

22
23 My brother came to the room. I have to say he was jealous. He
24 kind of froze there for a minute and she looked up and she saw
25 him. And she yelled at him, Get the fuck out. And we went back
26 to making up -- making out.

27
28 So on the basis of the remarks I made during a recitation of the evidence, I come to the
29 following conclusions. The accused's (sic) version is open to question. She certainly had
30 the ability, perhaps learnt from her experience on the streets, to tell me to fuck off.

31
32 MS. CLIVE: Sorry, Sir. You started with the 'accused
33 version'. Do you mean the complainant's?

34
35 THE COURT: I -- I beg your pardon. Thank you. Thank you.

36
37 MS. CLIVE: Sorry for the interruption.

38
39 THE COURT: I meant the --

40
41 MR. FLYNN: The complainant.

1
2 THE COURT: -- the complainant's version. She certainly had
3 the ability to swear at men. For a person who didn't want have sex, she spends a long
4 time in the shower with the accused and went through a variety of sexual activities.

5
6 I cannot discard Skylar's testimony that she said that she was going to have sex with the
7 accused. I cannot discard the fact, the very important fact, that she told the police that
8 she wanted to have sex with the accused. I cannot discard the fact that she only really
9 seemed to get angry when the brother humiliated her, and she seemed far more upset
10 about that and reacted to that, whereas it doesn't seem that she reacted at all after the
11 accused had had, on her version, unwanted sex with her.

12
13 Then, to apply the W.D. test, the accused's version is believable. It is subject to one
14 criticism. He, for the first time deep in cross-examination, mentioned that she took hold
15 of his penis and deep in cross-examination said that they had had a detailed discussion --
16 not a detailed discussion, but more of a discussion about what was going to happen and
17 that she had given permission.

18
19 From the start, however, his evidence was that they had discussed a condom. And she
20 hadn't made it a condition precedent to having sex. She had accepted it when he had said
21 he would pull out, which indeed he did do.

22
23 His evidence is endorsed in material respects by Skylar, who says that they -- Dustin, the
24 complainant, the accused, and her -- went into the bathroom to smoke a joint and she and
25 Dustin left, leaving the two protagonists behind. His evidence is underscored by Mike
26 Skinner, who says that he came in and saw them embracing each other.

27
28 In all the circumstances, despite the one criticism of the accused's version, I cannot reject
29 his evidence. On his evidence it was consensual sex, indeed it was even tender sex. It
30 lasted a long time, and although he couldn't perform because he was drunk and had been
31 in prison for a long time, it seems that they enjoyed it.

32
33 What went wrong is that the brother came and spoiled things. And that subsequently the
34 accused (sic) was upset because she thought that he had slept with Skylar. And upset, I
35 assume on two bases, because she wanted to sleep with Skylar and because she had just
36 slept with the accused.

37
38 Indeed if the accused's brother hadn't come into the shower and if she hadn't -- if the
39 complainant hadn't seen the accused with Skylar subsequently, who knows how
40 differently all this would have turned out? In all those circumstances, therefore, you are
41 found not guilty, Mr. Wagar.

1
2 THE ACCUSED: Thank you, Your Honour.
3
4 MR. FLYNN: Sir, on behalf of my client, I thank you for your
5 very thoughtful consideration of the evidence, Sir.
6
7 THE COURT: Thank you, Mr. Flynn.
8
9 THE ACCUSED: Sir, I have one question. I lost nine months of
10 my life to this. I had my name slandered. Is -- what happens to her? What -- what does
11 she get for ruining my life and, like, tainting my name?
12
13 THE COURT: Mr. Flynn will answer that for you.
14
15 MR. FLYNN: And -- and I have spoken with you about this
16 numerous times, Mr. Wagar. Sir, we have one outstanding matter before your court.
17 There's a breach of conditions, Sir, of release.
18
19 THE COURT: Yes.
20
21 MR. FLYNN: I believe we'll be dealing with that. If I could
22 just have one moment with my friend, Sir?
23
24 THE COURT: Do you want me to stand down?
25
26 MS. CLIVE: Yes, please.
27
28 THE COURT: All right.
29
30 MR. FLYNN: Just --
31
32 THE COURT: I'll wait outside.
33
34 MR. FLYNN: Thank you, Sir.
35
36 MS. CLIVE: Thank you.
37
38 (ADJOURNMENT)
39
40 MR. FLYNN: Sir, can I -- thank you, Your Honour.
41

1 THE COURT:

Please sit down.

2

3 THE COURT CLERK:

Recalling the matter of Alexander Scott Wagar.

4

5 Plea

6

7 MR. FLYNN:

Thank you. Sir, there's a matter before the

8 court here that's still outstanding. There's an Infounation ending 381, Sir. This is a fail

9 to comply with release conditions. I've received instructions from my client, Sir, to

10 resolve that matter this morning by a guilty plea.

11

12 I canvassed -- can -- can advise that I canvassed 606, Sir. He understands my friend is

13 seeking a substantial custodial sentence. There -- there is a -- also a substantial amount of

14 pretrial custody my client has, Sir. So it's not an issue of -- of any more time or

15 (INDISCERNIBLE). It's just -- just the quantum. My friend and I disagree on to that,

16 Sir. But I can advise that we are prepared to plead guilty on that.

17

18 MS. CLIVE:

When you're ready, Sir.

19

20 THE COURT:

As soon as you like.

21

22 Particulars

23

24 MS. CLIVE:

Thank you. Sir, the situation essentially is this.

25 On November 18th, 2013, the accused was released on recognizance. Part of that

26 recognizance required to him -- him to report to probation. He was made aware of those

27 types of conditions. He was supposed to attend -- so he was released on November 18th,

28 2013.

29

30 A phone conversation took place between him and his probation officer on December 2nd,

31 advising him to attend personally for the first time on December 19th to report to

32 probation. He didn't do that. He didn't report in any way, shape, or form until a

33 report -- a warrant was issued on January 16th, 2014.

34

35 And I can advise that he was picked up on February 10th, 2014, in relation to this

36 warrant. So he does have a significant amount of pretrial custody, but for the purposes of

37 the guilty plea those are the particulars.

38

39 MR. FLYNN:

Are those facts admitted?

40

41 THE ACCUSED:

Yes, sir.

1
2 MR. FLYNN: Thank you.
3
4 THE COURT: All right. I'm finding you guilty, then, of
5 breach of a rec -- a condition of your recognizance.
6
7 MS. CLIVE: Sir, I have a criminal record that I've shown to
8 my friend.
9
10 MR. FLYNN: The criminal record is admitted, Sir.
11
12 MS. CLIVE: There are some handwritten additions on the
13 back.
14
15 THE COURT: Thank you.
16
17 MS. CLIVE: When you're ready.
18
19 THE COURT: Exhibit 1 in the sentencing, mister clerk.
20
21 EXHIBIT S-1 - Criminal Record of Wagar, Alex Scott; Wagar, Alexander Scott
22
23 Submissions by Ms. Clive (Sentence)
24
25 MS. CLIVE: Thank you, Sir. Sir, the Crown's respectful
26 submission is this. This is a situation where you have an accused who is a relatively
27 young person with 16 convictions for breaches of court orders.
28
29 For those reasons, and I appreciate he has a significant amount of pretrial custody, the
30 Crown is suggesting 60 days of pretrial custody be attributed to this charge, one day, no
31 warrant of committal. The reason the Crown is seeking 60 days, Your Honour, is he's
32 already receive between 30 and 50 days for a variety of different types of charges that are
33 similar to this.
34
35 THE COURT: Yes.
36
37 MS. CLIVE: I think 60 days is appropriate. There is no real
38 aggravating circumstances in the sense that the failing to report was not in relation to any
39 trials or anything like that, but it should be noted that he was released and didn't report to
40 probation while he was undergoing a significant charge before the court.
41

1 THE COURT: Yes.
2

3 MS. CLIVE: Unless you have specific questions, Your
4 Honour, those are my submissions.
5

6 THE COURT: No. Thank you, Ms. Clive.
7

8 Submissions by Mr. Flynn (Sentence)
9

10 MR. FLYNN: Sir, as -- as my friend has indicated he is a
11 young--
12

13 THE COURT: You -- if it's more comfortable for you to sit,
14 please do, Mr. Flynn.
15

16 MR. FLYNN: Oh, no, Sir. It -- it's actually more comfortable
17 to stand, Sir.
18

19 THE COURT: Oh, well, then stand all -- as much as you want.
20

21 MR. FLYNN: Oh, thank you, Sir. Sir, as -- as my friend has
22 indicated, he is a young man and there is a substantial record before you. As the court
23 had heard, just from the young man's circumstances at the time of this offence, was he
24 was homeless. He was homeless for a large period of time here in Calgary, Sir. He had
25 difficulty getting back and forth to the probation office.
26

27 I agree that a substantial sentence is appropriate, Sir, but I -- I disagree that a 60-day
28 sentence is appropriate. I think ultimately we -- we -- we don't want to be carried away
29 with the issue of stare decisis when we no longer look at the relevant criminality of the
30 offence.
31

32 And I suggest that a 60-day incarceration period, Sir, for a simple single breach of
33 probation, which with this case was a failure to report, while I agree that a subst -- it -- it
34 is substantive in its nature, I don't -- I disagree that it's warranted for 60 days. I would
35 suggest that a 30 to 45-day sentence, Sir, would be more reflective of both his
36 responsibility to the court system to abide by those conditions, but also the -- the crime
37 itself, Sir.
38

39 The -- this is not a -- a crime where he was out committing a new offence. He -- he
40 was -- he didn't report. And that's -- I think that's reflected in a 30 to 45 day sentence,
41 Your Honour.

1
2 THE COURT: Meanwhile, he's got 180 days' pretrial custody
3 by now.
4
5 MR. FLYNN: Oh, he does, Sir. He -- he -- he does have a
6 substantial amount. It's not a matter of --
7
8 THE COURT: So -- so really what we're -- what we're talking
9 about is setting a benchmark for next time.
10
11 MR. FLYNN: For the next precedent. For the next time.
12
13 THE COURT: But there isn't going to be a next time, is there,
14 Mr. Flynn?
15
16 MR. FLYNN: I -- I don't believe there will be, Sir. I think
17 this young man has spent a substantial amount of time in custody and I think he's going
18 to do his very best to never be in that situation again. And I think the court -- we --
19 we -- even when we look at his record, Sir, it -- it's a record that you would see from a
20 lot of homeless people. The -- the -- the -- it's the mischief charge, the -- the theft
21 charge, the failure to report --
22
23 THE COURT: The robberies and assault?
24
25 MR. FLYNN: And, again, that was a -- a -- as a earlier
26 appearance.
27
28 THE COURT: I'm more interested in the 16 breaches,
29 Mr. Flynn.
30
31 MR. FLYNN: A substantial amount, Sir. But, again, I -- I
32 look at it in terms of a reflection of what the actual charge is, and I don't think we should
33 blindly go --
34
35 THE COURT: Well, the substantive charge, that was a very,
36 very serious one.
37
38 MR. FLYNN: Most definitely, Sir.
39
40 THE COURT: And he's been complaining vociferously that
41 he's been in jail all this time. It's his own fault.

1
2 MR. FLYNN: I agree with you, Sir.
3
4 THE COURT: He was given the bail.
5
6 MR. FLYNN: And -- and -- and it's difficult for a young man
7 to understand that the responsibility ought to be relying on himself to comply with the
8 conditions for release.
9
10 THE COURT: Well, if you don't understand that, Mr. Flynn --
11 the -- really, he's -- I've -- I've listened to him He's not a -- he's not a foolish man.
12
13 MR. FLYNN: No.
14
15 THE COURT: Well, foolish, but he's not stupid.
16
17 MR. FLYNN: No, Sir.
18
19 THE COURT: He understands that if he would have obeyed
20 his probation obligations, he wouldn't have been picked up.
21
22 MR. FLYNN: Yes, Sir. I -- I think -- I think this has been a
23 very ma -- maturing aspect of his life, Sir. I think he's probably taking that step towards
24 a self-sufficient, criminal free --
25
26 THE COURT: Well, I'm not sure that he has. Because the last
27 thing he said to me was, I've been in jail all this time. He doesn't realize it's his own
28 fault. He had bail.
29
30 MR. FLYNN: Yes, Sir.
31
32 THE COURT: Mr. Flynn, I'm not arguing with you.
33
34 MR. FLYNN: Oh, no. Oh, no.
35
36 THE COURT: I'm -- I'm not -- I'm not angry with you.
37 You're doing your job.
38
39 MR. FLYNN: Oh, no. I appreciate that, Sir.
40
41 THE COURT: I'm -- I'm trying to make a point to him. I

1 hope he's listening.
2

3 MR. FLYNN: And -- and -- and I do as well, Sir. Thank you.
4

5 THE COURT: Mr. Flynn, does he wish to say anything?
6

7 MR. FLYNN: Mr. Wagar, do you wish to say anything to His
8 Honour before sentence on this matter?
9

10 THE ACCUSED: It's much -- is that -- is that, like, the reason
11 why I didn't show up for this, right? It's because, like, I went to go get my -- my --
12

13 MR. FLYNN: Just speak a little louder --
14

15 THE ACCUSED: -- my -- sorry. I went to go over to find out
16 where my probation officers were, like, office-wise, right? I went to the -- the court
17 building downstairs, right? And I figured that out, and then it's just the way the girl
18 looked at me when she was looking at my charge, right? And, like, just -- just being,
19 like, branded as such, like, have people judge me like that.
20

21 I just -- I -- the idea of seeing a probation officer for something I clearly did not do, I -- I
22 just -- it -- it didn't -- it didn't -- it didn't appeal to me, you know? Like, I do realize
23 that, you know, I do realize that, you know, I should have went.
24

25 THE COURT: So you walked away?
26

27 THE ACCUSED: I walked away. I was -- I was not going to
28 skip out on court. That's why I was on probation in the first place. I was not going to
29 miss another court date. I just didn't want -- feel the need to -- to go and have somebody
30 think, like, these things about me, you know.
31

32 THE COURT: That sounds like a rationalization to me,
33 Mr. Wagar. Do you know what a rationalization is? Making an excuse for your conduct,
34 and a badly founded excuse for your conduct.
35

36 THE ACCUSED: M-hm.
37

38 THE COURT: Mr. Wagar, you've spent a lot of time in jail.
39 You've spent a lot of time here listening to me.
40

41 THE ACCUSED: M.hm.

1
2 THE COURT: The truth is, if this was the first time you did it,
3 you'd have been let off with a slap on the wrist. But it's not. This is -- you've done it
4 16 times already. Mr. Wagar, you are a young man. I've listened to you. You're
5 intelligent. I have no idea why you don't get a job and keep -- you do have an addiction
6 problem, so I understand that. But you've got to beat them.

7
8 You're strong, you're intelligent. You can become a normal, functioning human being if
9 you stop making excuses for yourself. Get a job. Pay tax. Get a proper girlfriend. Have
10 children. Watch hockey with your friends in the pub. Do the things that normal people
11 do. You can do it. I've seen you now. I've listened to you. You're not stupid. You are
12 strong. You can do all this.

13
14 But you've got to stop making excuses for yourself. Just listening to you is a little
15 embarrassing. I didn't do it because the -- the way the girl looked at me. No. Now, a
16 lot of this is academic because whether I give you 10 days or 110 days really makes no
17 difference. You've been in jail so long that I've got to give you credit for that. So
18 you're not going to sit for five months longer. It's just that it sets the measure for next
19 time.

20
21 THE ACCUSED: Yes, Sir.

22
23 Sentence

24
25 THE COURT: All right. So taking into account that you had
26 no reason to breach, I -- I feel inclined to give you the 60 days. But there's -- there's an
27 absurdity involved in this. Because you were so silly, you've now spent six months in
28 jail.

29
30 And you're now blaming that on [REDACTED] No, it's your fault. You were given bail. It's
31 [REDACTED] fault, perhaps, for bringing the -- the charge. But it's your fault that you sat in
32 jail. Some Crown, some judge, Mr. Flynn helping you perhaps, gave you bail. You
33 screwed it up. You've only yourself to blame.

34
35 But I'm going to give you a credit because you were just so stupid, so jackass stupid.
36 I'm going to give you just 45 days with one day, no warrant of committal. Which means
37 that you're going to be out as soon as you would otherwise. So I'm giving you 15 days'
38 credit because you've paid. By golly, you've paid by sitting in jail now for six months
39 that you needn't have been in jail.

40
41 And the reason I'm giving you 45 days is that if you screw up again, if you do this again,

1 and you somehow or other you get into trouble with the police again -- and I hope you
2 don't -- and you get let out on bail or you get given parole conditions or something, and
3 for some reason you decide that you're not going to do what you're supposed to do, the
4 next judge must -- must know that 45 days is the minimum. It's got to go up from there.
5 Do you -- do you follow that?

6

7 THE ACCUSED: Yes, Sir.

8

9 THE COURT: All right. Now -- no, that -- that's it,
10 Mr. Wagar. Forty-five days. How many days has he been --

11

12 MR. FLYNN: I think -- I think it's before the victim fine
13 surcharge came into effect.

14

15 THE COURT: No, it's not, I'm afraid.

16

17 MS. CLIVE: No.

18

19 MR. FLYNN: Well, it's --

20

21 THE COURT: I'm going to --

22

23 MS. CLIVE: December of 2013.

24

25 MR. FLYNN: Oh.

26

27 THE COURT: Or I'm going to give him no time to pay one
28 day in -- one day in lieu of, to be served -- to have been served concurrently.

29

30 MR. FLYNN: Thank you, Sir.

31

32 THE COURT: He's been in jail for a very long time,
33 Ms. Clive. I -- it's time for him to start behaving like a normal human being.

34

35 MS. CLIVE: Yes, Sir.

36

37 MR. FLYNN: I thank you, Sir.

38

39 THE COURT: All right. Does that make sense to you, mister
40 clerk?

41

1 THE COURT CLERK: Your Honour, so the originating sentence is 45
2 days times --
3
4 THE COURT: Yeah.
5
6 THE COURT CLERK: -- spent in custody is 45 days? And then the
7 rest of the time --
8
9 THE COURT: The time for him in custody is -- is --
10
11 THE COURT: -- is 45 days?
12
13 THE COURT: No, the time for him in custody is nearer 180
14 days.
15
16 MR. FLYNN: Yes, Sir. At -- at minimum he's got 180 days,
17 Sir.
18
19 THE COURT: All right. Let's call it 180 days. It doesn't
20 matter.
21
22 THE COURT CLERK: So . . .
23
24 MS. CLIVE: Well --
25
26 THE COURT: Sorry.
27
28 MS. CLIVE: -- if I can just assist, Your Honour.
29
30 THE COURT: Yes, please do.
31
32 MS. CLIVE: Here is the concern that I, as a defence counsel,
33 would have.
34
35 THE COURT: Yeah.
36
37 MS. CLIVE: If you have it noted that he's served 180 days,
38 then a judge might look at that and suggest that you considered that as part of the
39 sentence. So what I would suggest is
40
41 THE COURT: M-hm.

1
2 THE COURT: -- that JOIN be noted. One day, no warrant of
3 committal taking into account 45 days of pretrial custody. I believe that was your --
4
5 THE COURT: Some -- somebody just -- and not note that he's
6 been there a lot longer than that. All right.
7
8 MS. CLIVE: Yes.
9
10 THE COURT: I'm -- I'm very -- very grateful for the --
11
12 MS. CLIVE: I -- I think that -- to be fair to your client --
13
14 MR. FLYNN: In fairness, yes --
15
16 MS. CLIVE: -- I think that would be the better way to go.
17
18 THE COURT: I'm grateful for the --
19
20 MR. FLYNN: My friend is correct. Thank you, Sir.
21
22 THE COURT: -- for the advice.
23
24 THE COURT CLERK: So the -- then it is one day jail, no warrant, and
25 time in custody 45 days, time in custody noted, correct?
26
27 THE COURT: No, 45 days time in custody.
28
29 THE COURT CLERK: Forty-five days.
30
31 THE COURT: Time in custody.
32
33 MR. FLYNN: Yes.
34
35 MS. CLIVE: Yes.
36
37 THE COURT: So no warrant of committal.
38
39 MS. CLIVE: Thank you.
40
41 THE COURT: One day, no warrant of committal. And as far

1 as the victim fine surcharge is concerned, no time to pay, one day in -- in default to be
2 se -- to have been served concurrently with the 45 days.

3

4 MR. FLYNN: Thank you, Sir.

5

6 THE ACCUSED: Thanks.

7

8 THE COURT: All right. Now, Mr. Wagar, you've listened to
9 my voice for a long time. I want you to listen for another 20 seconds. Mr. Wagar,
10 there's a sheriff there, and at the back you know there are a whole bunch of sheriffs.
11 There's a Crown here, and you know Ms. Mograbee, the other Crown. You've met other
12 Crowns as well.

13

14 There's a clerk, there's me. You've seen all the police in the streets. The government's
15 powers are enormous. You know that the police have computers. They know exactly
16 who you are. They punch in your name and up comes all the infottnation. They know
17 where to find you. You'll never be able to disappear for long.

18

19 What I'm saying to you is that you'll just get ground up. You'll waste your life in petty
20 crime and drugs and you'll spend more and more time in jail. I don't want that for you.
21 Nobody here does. If only because I'm a taxpayer and my tax money goes on keeping
22 you fed in jail. Whereas, I don't believe you've paid much tax in your life.

23

24 You have to help keep the country going for the next generation, and you can do it. But
25 if you don't do it you're going to get ground up by the sheriffs, and the police, and the
26 Mounties, and the court clerks, and the lawyers, and the judges. You've got to see that.
27 You've been through the system so often you've got to know how strong it is. You can't
28 be -- okay?

29

30 THE ACCUSED: Okay.

31

32 THE COURT: Good luck.

33

34 THE ACCUSED: Okay. Thank you, Your Honour.

35

36 THE COURT CLERK: I -- I think the court has to have a dollar
37 amount on that then. So it would be \$200, then, because that's a indictable offence.

38

39 MS. CLIVE: Well --

40

41 THE COURT CLERK: And then it would be no time to pay --

1
2 MS. CLIVE: No.
3
4 THE COURT CLERK: -- one day in default?
5
6 MS. CLIVE: Sorry. The failure -- or the 145(c)(3), did we
7 elect indictable?
8
9 THE COURT CLERK: Oh, let me just see.
10
11 MS. CLIVE: Because we're not doing the 271.
12
13 THE COURT CLERK: Let me just see.
14
15 MS. CLIVE: We're doing the 145(3).
16
17 THE COURT CLERK: I believe --
18
19 MS. CLIVE: In which case I think it would be \$100.
20
21 THE COURT CLERK: Summary. Oh, it was summary. So it would
22 be \$100 then.
23
24 MS. CLIVE: Yes, please.
25
26 THE COURT CLERK: The amount would be \$100.
27
28 MS. CLIVE: Yes, please.
29
30 MR. FLYNN: Thank you, mister clerk.
31
32 THE COURT CLERK: No time to pay, one day in default.
33
34 MR. FLYNN: That's correct.
35
36 THE COURT CLERK: Okay.
37
38 MR. FLYNN: That's my understanding.
39
40 THE COURT CLERK: All right.
41

1 THE COURT:

Thank you, counsel. Thanks for your advice.

2

3 MR. FLYNN:

Thank you, Sir.

4

5 THE SHERIFF:

Okay, Wagar, let's go.

6

7 THE ACCUSED:

Thank you, Your Honour.

8

9

10 PROCEEDINGS CONCLUDED

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1 Certificate of Record

2

3 I, Len Chernichko, certify that this recording is the record made of the evidence in the
4 proceedings in Provincial Court Criminal Division, held in courtroom 506, at Calgary,
5 Alberta, on the 9th day of September, 2014, and that I was the court official in charge of
6 the sound-recording machine during the proceedings in the morning.

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1 Certificate of Transcript

2

3 I, Jodi Follett, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of
7 the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.

11

12

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13

Jodi Follett, Transcriber

14

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40 Digital Fingerprint: 5d08ef069e50adb18dab9079a99a5920eae8bd88a61e27e5af9cab445453e55

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ToC Pages:	
Transcript Pages:	467
Total Pages:	471
Line Statistics	
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ToC Lines:	63
Transcript Lines:	19833 I
Total Lines:	19954
Visible Character Count Statistics	
Title Page Characters:	544
ToC Characters:	1666
Transcript Characters:	569773
Total Billable Characters:	571983