

**WARNING**

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

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

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

(i) if it occurred on or after that day; or

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

(2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph

(1)(a) or (b), the presiding judge or justice shall

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

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

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
HIS MAJESTY THE KING ) *Leanne Guzzo, for the Crown*  
 )  
- and - )  
 )  
FZ ) *Joseph Neuberger, for the Accused*  
Accused )  
 )  
 ) **HEARD:** April 11, 12, 13, 19,  
 ) & May 19, 2023.

**A. J. O'MARRA J.**

**REASONS FOR JUDGMENT**

[1] FZ is charged with two counts of sexual assault alleged to have been committed against his wife WLM. It is alleged that FZ engaged in sexual intercourse with WLM without her consent on January 5, 2019. Further, it is alleged that on June 6, 2020 FZ put his hand on WLM's breast without her consent.

[2] After WLM separated from FZ in December 2020 she went to the police on January 4, 2021 and reported the allegations of sexual assault.

[3] FZ and WLM met and dated in 2016, then subsequently moved into FZ's condo apartment in 2017. They married July 22, 2018. They are both university educated. FZ works in financial services of a bank and WLM, as a social worker worked in a shelter for women experiencing domestic violence.

[4] WLM was the sole witness called by the Crown on the prosecution. The defence called the evidence of FZ and Dr. Julian Gojer, a forensic psychiatrist who spoke about the assessment of mental disorders arising from domestic violence, both physical and psychological abuse, and its impact on the subject of the abuse.

[5] Both parties introduced electronic messaging chats/texts that characterized their marital relationship and personal characteristics from their respective perspectives.

[6] WLM testified that when she met and dated FZ he was nice and respectful toward her. She disclosed to him that she had been sexually assaulted in a previous relationship and that as a result FZ was respectful of her sexual boundaries. However, after they married, she said he changed,

“like something switched” and he became controlling. She described him as having a “typical Chinese male mindset” that he was the husband and should be able to dictate every aspect of her life. WLM also testified that she had no issues with FZ being respectful of her sexual boundaries before January 5, 2019.

[7] FZ testified that early in their relationship WLM told him about having been sexually assaulted previously. As a result, he told her that he wanted her to inform him of anything he did during sexual intimacy that made her uncomfortable. He said that he was cautious and vigilant about verbal and non-verbal cues to ensure her consent to the sexual activity. He said he would regularly “check in” to read her body language to ensure that she was enjoying the intimacy and not being “triggered” from her past trauma.

***January 5, 2019, Incident***

[8] WLM testified that on January 5, 2019, she and FZ went to a friend’s home for dinner. It was a pleasant evening. FZ had a couple of glasses of wine. She had none. WLM drove home afterwards. During the drive WLM said that FZ began to pester her for sex by saying things like, “we can have fun tonight” and “it would be fun”. Her response to him was that she was tired and not in the mood.

[9] When they arrived home, in order to deter FZ from pursuing sex with her that night she went directly to the washroom and showered. After she walked into the bedroom naked to get her pajamas from the closet, she said FZ suddenly approached her from behind, held her at the waist. She could feel his erect penis. She said “no”. He moved to her side and moved her toward the bed. Then, with his body weight he pinned her on the bed. He began vaginal intercourse and she did not move. She stated she was frozen and asked herself, “why is he doing this”. After a few minutes, he pulled his penis out. She curled up instantly onto her side and began to cry. FZ apologized and said to her that he thought she wanted it. She said she did not want to have sex and had told him “no” earlier in the night. She got dressed and left the apartment followed by FZ. After a short walk outside they both returned to the apartment.

[10] FZ testified that on the night of January 5, 2019, he had already been in the bedroom when WLM entered into it naked after her shower. He testified that she approached him and they started to kiss. After kissing and hugging each other they both moved to the bed and got on to the bed themselves. He testified that WLM asked him to “kiss me all over”, which was her verbal code for him to give her oral sex.

[11] He testified that after complying with the request for oral sex he moved to the bedside table to put on a condom as WLM watched him. He testified he walked back toward WLM on the bed and that she grabbed his hips and pulled him toward her opening her legs. She touched his penis indicating to him that she was consenting to engage in vaginal intercourse. They engaged in vaginal intercourse. He said she reciprocated with her body movements at the beginning of the intercourse. She appeared to enjoy their intimacy for a couple of minutes and then she stopped moving suddenly. She became “blank”, as he described it. He removed himself from her and asked her

what had happened. She replied he had only given her “grade 2 oral sex” and that he should have noticed by her body that she did not want intercourse. She cried, then got dressed and left the apartment. FZ followed her because it was late at night, and he was concerned for her safety. They returned after a short distance.

[12] They both testified that in the days following there was discussion of what had happened. FZ testified that he tried to explain from his perspective, but he did not have the words. He just gave up because he could not understand why she suddenly stopped. Sometime later, WLM began to use the word “rape” to describe what had happened.

*i) January – February 2019 Chat Messages*

[13] When WLM went to police on January 4, 2021, two years later, she gave them copies of Google Hangout chat messages with FZ from January 10 and February 19, 2020, she claimed related to the sexual assault she alleged had occurred on January 5, 2019. In the text of the January 10, 2019, message from FZ it reads:

Good morning love. I am sorry for last night. I understand the word that I chose trigger your anger and I get that. I apologize for that. But I still believe I shouldn't never ever forced (sic) to do anything that you don't want to do, whether or not I say it out loud or not. I'm not sure if you want to talk about it tonight or whether or not you even want to have a conversation with me again around this issue. Let me know if you want to talk. I am patiently waiting and I will be ready for listening. Again, I'm sorry and have a great day at work. Love you Bear.

[14] WLM testified that the text was about their having argued about the sexual assault incident “the night before” and that FZ was speaking of that matter. FZ, however testified that the argument was in reference to a concern about their household income if WLM commenced a Master's degree program without taking a part-time job. Otherwise, he would be the sole income for them. The word that he was referring to that “triggered” her anger was when he spoke of her “role” in helping to support their family. When he said he should never “force” WLM to do anything it was in the context of words spoken about her contributing to the family finances. It was in no way an admission to having physically forced sexually intercourse on WLM, January 5, 2019.

[15] WLM in cross-examination acknowledged she could not remember the exact context of the argument on January 9<sup>th</sup> or the word that had triggered her anger referred to in the message, but that they had many arguments in two weeks following the “rape incident”, as she described it.

[16] In the February 19, 2019, chat which was about a discussion about gender equality, WLM wrote at one point, “so it's gender equality for you to rape your wife?”

[17] FZ testified the argument had been about his comment about the type of gift to buy for a friend's newborn infant, based on the gender. He said he did not want to get into a discussion about gender issues while they were in a public place knowing that it would trigger her anger. WLM accused him of trying to “shut her up about her views and thoughts”. When he apologized for

making her feel that way, she responded, “if you were sorry, you wouldn’t have made me feel that way in the first place”.

[18] Further, he testified that he did not respond to her rape comment as he had failed earlier in trying to explain himself, so he gave up.

### ***June 6, 2020, Incident***

[19] WLM testified that on the morning of June 6, 2020, she and FZ were lying in bed when FZ put his hand on her breast from behind as she lay on her side. She described feeling his palm on her rib cage and his fingers on her breast over her pajamas. She stated that she told him to take his hand off her breast, but he refused to move his hand. She had to forcibly remove his hand from her breast.

[20] FZ testified that when WLM said his hand was on her breast his immediate response was his hand was on her stomach not on her breast. He removed his hand.

[21] He testified that he had placed his hand on her stomach, not her breast and that her reaction caused him to stop “cuddling or spooning” with WLM in the mornings. He said that she had turned a nice morning into a horrible experience, and it effected the way they interacted in the future. It was the last time he touched her affectionately in bed.

[22] As in the majority of sexual assault prosecutions they turn on the evidence of the two principals, the complainant, and the accused (see *R. v. N.S.*, [2001] OJ No. 3944 (SCJ) at para. 56). Credibility is a central issue in this case and in which the considerations as set out in *R. v. W.D* (1991), 63 CCC 3<sup>rd</sup> 397 (SCC) at p. 409 per Cory J. apply to the assessment of the evidence:

1. If the evidence of the accused or evidence he relies on in support is believed he must be acquitted.
2. Even if the evidence of the accused or evidence relied on raises a reasonable doubt he must be acquitted.
3. Even if his testimony or the evidence relied on does not raise a reasonable doubt the finding of guilt can only be made if the rest of the evidence accepted proves beyond a reasonable doubt his guilt, and conviction the result.

### ***Nature of the Relationship***

#### *ii) The Rules*

[23] Contrary to WLM’s assertion that FZ tried to control every aspect of her life the defence introduced a series of additional chat messages between FZ and WLM which suggest otherwise. Rather, they show that she controlled his activities and he acquiesced passively.

[24] They lived in a small one-bedroom condo apartment. She set the rule that FZ was required to leave the condo when she had internet meetings which she described as being “confidential”.

[25] If she was using the computer, he was not to interrupt her and to communicate with her only by text messages.

[26] She set the rules in terms of access to the washroom. If she was in the washroom he was not to knock on the door or to speak to her through it. At times, when he had to use the washroom, he was required to leave the apartment and go down 26-storeys to the gym in the building, to use the facilities there.

[27] He was required to report his daily activities by text to her. He was required to communicate with her if he was going to use the last item of something in the refrigerator. In one instance, he texted as to whether she wished to split the last egg with him.

[28] He sought her approval to buy an expensive Japanese whiskey.

[29] She informed him by text that she had donated some of his clothing and that several of his t-shirts were going to be cut up for use in a charity project.

iii) *The Lie and Banishment*

[30] In many of the texts FZ apologized for having said or done something. In one instance, where FZ had been communicating over the internet with his parents in China. He was using earphones. WLM entered into the room and overheard him say her name. She wanted to know what he had been saying to his parents about her. Initially, he said that they had not been talking about her and then said that they had been talking about buying her a gift as a surprise. She became extremely angry with him because in her view what he had told her initially was a lie. As a result, she kicked him out of the apartment.

[31] On July 31, 2020, FZ wrote in a chat exchange:

Hi Bear, I thought alot last night. Let me know if you want me to come home.

[32] The next morning, he wrote: ...“or we can talk somewhere outside in the car.”

WLM: “what exactly did you think about.”

FZ: Under no circumstances should I lie to you. I deeply sorry about that. I want to talk to you about my thought process and what I will be doing going forward.

WLM: Can you meet me at 5:00 p.m. by the benches by the BMO under the building?

FZ: Sure.

[33] A week later on August 7, 2020, FZ wrote:

Bear, am I allowed to come home this weekend?

WLM: "I think we should talk.

FZ: Do you prefer on the phone or face-to-face?

WLM: In person.

FZ: When would you like to talk?

WLM: When are you free?

FZ: Any time.

WLM: Then now.

[34] Later at 9:21 p.m. that day WLM wrote: "I just realized we never set a date for you coming back. How does Sunday afternoon feel for you?"

[35] FZ had been banished from the apartment for approximately a week. Thereafter, on his return to the apartment he slept on the couch.

[36] FZ continued to report daily activities and to provide appointments in their shared calendars. WLM agreed in cross-examination that FZ often failed to input matters into the calendar and that she would get angry at him for not doing so.

[37] In one instance, WLM became enraged with FZ because he swapped their key fobs when he went to deliver food to her brother who resided in another building. She testified that her anger was justified, as without the fob she felt trapped in the apartment even though FZ's own keys which had been left by him gave her access to the condo unit. The following chat conversation is illustrative of their relationship:

FZ: Hi Bear, I'm thinking to bring some beef to Will, not going to see him face-to-face, but just leave the food outside his door. What do you think?

WLM: You should ask him.

FZ: Yeah I will, thought to talk to you first.

WLM: WTF? Did you take my fucking keys?

FZ: Sorry yes, it has Will's fob on it. My key is on the table. Do you need anything?

WLM: Why didn't you ask for my permission. You can't just take stuff that don't belong to you or without consent for it. Why do you even need Will's fob to drop something off? Seriously WTF?

FZ: I'm sorry, I needed his fob because I can leave the food outside of his door. Sorry I should have asked before I took your key.

WLM: You could have buzzed in at the intercom. That's no (sic) even a valid excuse to take my keys without permission. You don't need the fob to be let into the building or get to his unit. You can't just assume that everything belongs to you and not ask for permission and assume that it is going to be okay or that you'll just make some weak ass excuse and everything will just blow over. Seriously the amount of entitlement that you have is outrageous.

FZ: Thanks for taking the time to talk to me. Sorry that I took a huge chunk of your night.

WLM: Bear, I am so sorry for what I did yesterday. When are you ready to talk/if you want to talk, I'd like to apologize to you face-to-face. Please ignore the two messages I accidentally sent to you last night, sorry. I'm going over to mom and dad's to work in case you need some space.

[38] WLM acknowledged that at times she became so angry that on two or three occasions she smashed glasses on the floor.

[39] FZ testified that he came to believe that the problems in their marriage was due to his lack of intelligence or poor English skills and comments by WLM about his being of low class due to his birth in mainland China, whereas her family were Hong Kong Chinese. WLM having convinced him that he had behavioural deficits he agreed to see a therapist. The therapist recommended couples counselling, but WLM declined.

[40] After WLM suggested he was "dismissive avoidant" and sent him a link to learn about his problems he bought a book she referenced, Concerning Attachment Styles in her text.

[41] FZ testified that in his marriage from his perspective, it was like "walking on egg-shells" trying to avoid triggering her wrath.

*iv) The Separation*

[42] WLM testified that on December 4, 2020, she had a confidential interview which required FZ to leave the apartment. Afterwards when they drove to Scarborough for an ice cream dessert. She testified that FZ asked her about the details of the confidential interview and when she would not share the details, she said he became angry and started to drive erratically into oncoming traffic.



[43] In cross-examination she acknowledged that he drove into oncoming traffic while making a left turn while a car was driving towards them in the opposite direction. However, she claimed that FZ had been nonchalant about his driving, which scared her. It was at that point she decided that she must leave him.

[44] FZ testified that he had no discussion with WLM about her interview, such matters were of no interest to him. With respect to his driving, it was, as acknowledged by WLM in cross-examination, a left-hand turn at an intersection with an approaching motor vehicle travelling through without incident.

[45] WLM left the condominium and the marriage on December 7, 2020, when she removed her possessions. She also took a number of important documents of FZ, such as his immigration related documents, permanent residency and citizenship certificate, tax documentation and his framed degree from the University of Toronto.

v) *Financial Issues*

[46] FZ's parents, who resided in China in 2020 transferred \$500,000.00 to FZ and WLM to be used by them to purchase a house in which they would all reside on his parents coming to Canada. Some of the loan in the amount of \$38,000.00 had been used to pay for WLM's school loans and credit card debt. FZ testified that he had been attempting to have discussions with WLM about the repayment of the debt but found she kept avoiding it. With respect to her claim that he had been driving dangerously on December 4, 2020, he testified that when he wanted to speak with her about the replenishment of the \$38,000.00 WLM got upset and did not want to talk about the money and in his view used the accusation of dangerous driving to distract from the issue.

[47] On the morning of December 7, 2020 FZ had sent WLM an email which stated:

I'm trying to initiate a conversation with you about our family finance and my expected income but it seems that you are not in the mood to talk so I am sending you this email to give you a heads up. When I had a chat with my parents last time they asked about our plan for purchasing a home. I told them that we are not in a position to buy a place at this moment. They want me to transfer the \$500,000.00 that they gave us to purchase a home back to their account and they might want to do some short term investment. I didn't tell them about us having been taking money to cover short term Visa bills and your student loan. When I looked at it we have taken out just over \$38,000.00 since August/September. As per their request for their desire to invest I moved \$460,000.00 back to their account for now. Since I haven't told them about us owing them money, maybe we can have a chat in the near future about a plan to replenish that amount and have a new plan for our family budget given we don't have access to our money as a backup for Visa debt.

[48] That afternoon and evening when FZ was not at the condo WLM and her friends removed her possessions and his documentation.

[49] WLM sent an email to FZ on December 10, 2020, stating that she had left him on Sunday, December 6, 2020, and noted she had retained a lawyer.

[50] On December 11, 2020, FZ sent WLM an email thanking her for her email and requested that they “please send me separation agreement. I will have my lawyer review and we’ll be in touch as soon as possible”.

*vi) Reporting the Allegations*

[51] On January 4, 2021, WLM went to the police and reported her allegations of sexual assault on January 5, 2019, and June 6, 2020. She testified she had not reported either incident earlier because she knew it would end their relationship which she had not been ready to end and had been hopeful that the relationship would work and that in her view FZ would change.

[52] Further, she testified that she decided to report to police only after their separation because she was worried that FZ would do it to someone else. In cross-examination she said she went to the police on January 4, 2021 because once she had time to adjust to the separation she was “fairly certain these events would happen again to someone else”. It was her duty, her moral obligation to bring forth these alleged sexual crimes to assist other potential victims.

*vii) Psychological Profile - Complex Trauma*

[53] Dr. Julien Gojer, a forensic psychiatrist was qualified to give expert evidence on the assessment and treatment of mental disorders in general and forensic settings including the areas of assessment of mental disorders arising from domestic violence both physical and psychological abuse and its impact on the subject of the abuse.

[54] Dr. Gojer on review of the Crown materials, statement of the complainant, the text messages introduced into evidence, his several interviews with FZ and observations made in group therapy, a psychological assessment conducted by Dr. Monik Kalie, information from the pre-charge therapy sessions attended by FZ and FZ’s evidence given on the trial was of the opinion, FZ exhibited “complex trauma”. In addition to diagnosing FZ as having complex trauma it also included depression and anxiety.

[55] The impact of complex trauma can cause a person to become passive and compliant, while internalizing fault. The person could also exhibit hypervigilance, feeling “like walking on eggshells”, and the need to avoid conflict in a relationship and to become overly apologetic.

[56] In reference to the text base messages between WLM and FZ, Dr. Gojer noted that FZ engaged in placating behaviour despite the harsh responses he received from WLM, exchanges consistent with what he would expect to see from a person being subject to domestic violence or battered person syndrome.

[57] Dr. Gojer observed that FZ exhibited a pattern of behaviours, such as being passive, avoiding conflict, exhibiting “learned helplessness”, being apologetic and engaging in self-blame

without the displaying an ability to challenge the perpetrator of the abuse. The situation he found himself in was akin to that of a battered spouse.

***Assessment***

*viii) Summary of the Allegations*

[58] WLM described what happened to her on January 5, 2019, as rape. FZ came up from behind her, turned her around, forced her on to the bed, pinned her and engaged in vaginal intercourse for two or three minutes as she lay frozen on the bed.

[59] FZ described the situation as consensual, initially involving kissing and hugging, then on the bed WLM's use of her verbal code for oral sex, "kiss me all over" in which he engaged. Then he went to a night table and placed a condom on his penis and moved back to the bed to engage in vaginal intercourse during which WLM indicated willing participation by her body movement. However, she stopped suddenly, which alerted to FZ that something was wrong.

[60] WLM testified that up to that time FZ had been respectful of her saying "no" and he had been extremely cautious in touching her in any physical or sexual way up to January 5, 2019. However, she also testified that after they married FZ, became controlling and by implication committed the "rape" because he wanted sex and felt entitled.

*ix) Credibility assessment*

[61] There are a number of areas in which I found WLM's evidence to have been disingenuous attempts to mislead the court that affect her credibility.

[62] First, I found WLM's description of FZ as being controlling and entitled person to have been disingenuous and incongruent in face of the numerous texts which displayed his passive apologetic personality, a person who was trying continuously to avoid conflict.

[63] I accept the evidence of Dr. Gojer that FZ displayed the characteristics of a person with complex trauma - a hypervigilant, passive, and apologetic person who sought to please WLM to avoid her anger, which appeared easily triggered.

[64] Second, WLM stated, she was not sure that FZ would be charged as a result of her going to the police January 4, 2021 and told them that he had "raped" her. I found her assertion highly implausible given her background and knowledge as a domestic violence support person. Further, she specially referenced the criminal allegations in negotiations in the family court matter following separation. In a note to her family law lawyer, she stated:

It is important to note that in January 2019, my then husband, FZ, raped me in our matrimonial home. FZ continued to abuse me, sexually assaulted me again in June of 2020, until I was able to safely flee from him in December of 2020. He has been

charged with the Toronto Police Service with two counts of sexual assault against me, and his case is currently being processed through the criminal court system.

[65] The criminal allegation was used in a claim in which she sought “maximum support and payment from FZ”. WLM claimed that her work with victims of abuse and trauma, including “matrimonial rape” had been triggering which caused her health to decline significantly and that she had to leave her work at the shelter in late May 2021 “due to the trauma, pain and suffering caused by FZ’s sexual assaults and abuse”. The claim was not a condition in the finalized separation agreement.

[66] Third, when WLM sought to corroborate her accusation, she produced for the police two text exchanges with FZ, the first of which she claimed to have been an argument about the “rape”. However, in cross-examination she could not recall what the specific argument had been about or the word that triggered her anger.

[67] Fourth, I find from the note quoted above in which she stated was “able to safely flee from him in December of 2020”, a person acutely acquiescent to her wishes, at a time almost two years after the January 2019 alleged rape, six months after the alleged sexual touching in June 2020, and 5 months after she banished him from the apartment at the end of July 2020 for a week, an inflammatory exaggeration that simply does not align with the events and their roles in the relationship.

[68] I do not accept that there was a sudden personality change, “like something switched” as suggested by WLM, but then him reverting to being passive and acquiescent as reflected in the text messages and his psychological profile relied on by the defence.

[69] On January 5, 2019, when WLM froze, he testified he stopped the sexual activity. Similarly, on June 6, 2020, when WLM claimed he touched her breast, which he denied, he removed his hand from where it had been placed.

[70] The description of events on both January 5, 2019, and those of June 6, 2020, described by FZ are consistent with the description of his personality characteristics and evidence that he was sensitive and alert to her becoming triggered.

[71] I am unable to reconcile the contrasting versions of events as testified to by WLM and FZ.

[72] On all of the evidence, I am not satisfied beyond a reasonable doubt that FZ sexually assaulted WLM on January 5, 2019, and June 6, 2020.

[73] The charges are dismissed.



A.J. O'Marra J.

**CITATION:** R. v. FZ, 2023 ONSC 3159  
**COURT FILE NO.:** CR-21-40000401  
**DATE:** 20230519

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

HIS MAJESTY THE KING

**- and -**

FZ

Accused

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**REASONS FOR JUDGMENT**

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A.J. O'Marra J.

**Released:** May 19, 2023