

Citation: *R. v. Butler*, 2024 YKTC 31

Date: 20240823
Docket: 22-00294
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Schneider

REX

v.

RANDY WADE BUTLER

Appearances:
Madeleine Williams
Gregory Johannson-Koptyev

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] SCHNEIDER T.C.J. (Oral): Mr. Butler is charged with one count of aggravated assault, and three counts of assault.

[2] All three sets of allegations arise out of an incident on August 6, 2022, at the local 202 bar (“202”) in the City of Whitehorse. In the early hours of the morning an escalating fight broke out in the parking lot outside of the 202, outside the “off-sales”, and the sidewalk outside of the restaurant, Giorgio’s Cucina.

[3] A total of eight witnesses were heard at Mr. Butler’s trial.

[4] The victim of the aggravated assault allegation, Mr. Mitchell Williams, testified as to the scene immediately before he was struck. He was outside the 202 to say goodbye to his friend, Molly Henderson, who was waiting for a cab. There was a scuffle between two people known to him which had escalated from a heated verbal exchange. He was outside of the 202 for about five minutes before he was struck. He remembers nothing after the incident and for the next three days. He suffered a severe, life threatening, head injury. Though he has no memory of being struck, there is no dispute that Mr. Williams was assaulted. There is no dispute as to the nature of the injuries he sustained. The only issue is with respect to the identity of the perpetrator.

[5] The next witness, Sierra Link, a friend of Mr. Williams remembers being with friends at the 202 dancing. She had exited the 202 in order to wait for her sister to pick her up. She had been drinking that evening and describes her state as “tipsy” but “knew what was going on”. She indicated that Mr. Williams came to the altercation to pull people off of one another, to “intercept”, to calm people down. The fights had grown and were moving toward the street. Then, a man came out of nowhere and punched Mr. Williams in the face. Mr. Williams fell immediately. He appeared to be unconscious prior to hitting the ground. Someone then approached that man and asked why he had done that whereupon the perpetrator punched that person as well.

[6] Ms. Link described the perpetrator as “tall, muscular, short brown hair, late 20s or early 30s, and wearing athletic clothing. He was wearing grey pants. She did not know the colour of his top. She had not seen the perpetrator prior to or after the incident. After the assault the perpetrator ran away.

[7] The third witness, Jedrick Dendys, was also at the scene. He saw Mr. Williams “sucker-punched”. He had been outside having a smoke. He saw the perpetrator walk up to Mr. Williams and punch him. He saw Mr. Williams motionless on the ground. Mr. Williams had struck his head on the concrete sidewalk. The perpetrator apparently threatened to hit Mr. Dendys but backed off. He described the perpetrator as having short hair, 5’10” to 6’, “skinnier than me”, 180 pounds. He had also never met the perpetrator before the incident. He was close to Ms. Henderson who could not see the perpetrator. After Mr. Williams was struck, Mr. Dendys followed three men a short distance whereupon the police arrived. Mr. Dendys was later told by the Lavallee brothers that the person who struck Mr. Williams was Mr. Randy Butler. Mr. Dendys had also been drinking and, on a scale of zero to 10, describes himself as a five. He consumed eight drinks over six hours. He could recognize the perpetrator by his light-coloured shirt, buzz cut, and his build. He could recognize Mr. Butler in the courtroom because he had “the same build”.

[8] Mr. Dendys describes the scene at the 202 as chaotic with lots of people and commotion. It was “a pretty intense situation”. There was a large group of people. A whole slew of fights broke out. There was confusion as to who was involved. Though there were streetlights, it was dark outside. He denies either himself or Mr. E. Lavallee telling P.C. Cook that the perpetrator who was wearing black, believed to be Kadin Kormendy , sucker-punched Mr. Williams and that thereafter a man wearing grey got involved. It was a very confusing situation. A huge group of people were outside the doors of the 202. A lot of activity. It is possible that some details are not as clear to Mr. Dendys now as they were a couple of days after. He did his “own research” as to

who the perpetrator was... what he looked like. "Ethan and Malachi told me who it was." Mr. Dendys concedes he was angry at Mr. Butler. He wants justice for his friend who had been hit and was in the hospital. He wants a conviction for Mr. Butler. Mr. Dendys was also angry at the time because he felt P.C. Cook was not listening to him. P.C. Cook threatened to arrest Mr. Dendys for intoxication.

[9] P.C. Cook, the fourth witness, arrived at the scene very quickly. He had been told in advance that there were a number of fights going on at the 202. He followed three males; the first was between 5'10" and 5'11"; the second, in black, was approximately 5'7"; the third was between 6'1" and 6'2". All said that they were involved. All three were released. He had spoken to Mr. Butler who said that he had only stepped in to help his friends. P.C. Cook felt that there were no grounds to arrest Mr. Butler at the time. P.C. Cook also spoke with Mr. Dendys and Mr. E. Lavallee. They were upset with P.C. Cook because he had let the three go. P.C. Cook went to the hospital and testified that he was told by Mr. Dendys and Mr. E. Lavallee that the person in "all black" had sucker-punched Mr. Williams was believed to be Kadin Kormendy . Another man "TJ" was apparently wearing a black hoodie. Then, another male in grey got involved.

[10] P.C. Cook, in cross-examination, reported that Mr. Butler had apparently no injuries but another man, "TJ", the person in black, had a torn shirt.

[11] The next witness was Ethan Lavallee. He was also part of Mr. Williams' group of friends on scene at the 202. He had at first been in a scuffle with a Fabrizio. Ms. Henderson had told him that it was the guy in the grey shirt who had hit Mr. Williams. He confronted the apparent perpetrator and asked, "Why did you do that?"

whereupon the perpetrator swung at him...then, took off. Mr. E. Lavallee had also been drinking and rated himself as six out of 10 in terms of intoxication. He consumed six or seven drinks over three hours. Mr. E. Lavallee did not know Mr. Butler. He denied telling P.C. Cook that the perpetrator was the “guy in black”. He said he had told P.C. Cook it was the guy in the grey shirt.

[12] The next witness was Malachi Lavallee. He was also part of the same group of friends. He was outside of the 202 having a smoke and noticed his brother, Ethan, in a scuffle with another guy which had settled. Then, he heard a head hit the road.

Mr. Williams and another man were on the ground. The police arrived quickly, and he spoke with a female officer. Mr. M. Lavallee said that the perpetrator came toward him, within five to 10 feet, with a fighting stance, but he put his hands up to indicate that he did not want to fight. He described him as about 6’ tall wearing grey. He had also been drinking and had had about eight drinks from 10:00 p.m. onwards. Mr. M. Lavallee did not know Mr. Butler. His interaction with the perpetrator was very brief. It all happened very quickly. He reports there were multiple altercations. It was a chaotic scene. He next saw three men leaving down the street.

[13] Molly Henderson was the next witness. She was, as well, part of the same group of friends at the 202. She had been drinking and had had a couple of shots plus five or six drinks from 10:30 p.m. onwards. Ms. Henderson said that she was intoxicated but was fully aware of the incident. She had been waiting outside for Mr. Williams. Then, she saw Mr. Williams get hit but she cannot identify the assailant. Once hit, Mr. Williams fell to the ground. She stayed until the ambulance arrived then tended to him the next day with Mr. Dendys.

[14] The final witness was P.C. Koshman. He was not at the scene but conducted an investigation after the fact. He reports that there was no video or closed-circuit television (“CCTV”) of the event that was located. He took a statement from Mr. Dendys. Mr. Dendys said that he and Ms. Henderson had seen what happened. He took statements from the Lavallee brothers and an “EP”, and reviewed video. He believed Mr. Butler was the main suspect. Mr. Butler was contacted by P.C. Cook and arrested a few days later. P.C. Koshman confirmed that it was reported to be a chaotic scene at the 202 with many fights happening. In cross-examination he agreed that there were many other people on scene who were not interviewed. He did not know why statements were not taken from others who were there, including two other bouncers. No photo lineups were conducted. Upon a file review, he had originally thought that it was a Kadin Kormendy who had sucker-punched Mr. Williams. P.C. Koshman did not know if there were other cameras on the other side of 2nd Avenue.

Submissions

[15] Counsel agreed that the central issue in this case is the identity of the perpetrator. It was not contested that Mr. Williams was assaulted. There was no dispute as to the nature of Mr. Williams’ injuries and it was not contested that the injuries resulting from the assault met the threshold for “aggravated assault”. The case of *R. v. Hay*, 2013 SCC 61 is cited by the Crown to support the proposition that notwithstanding the known frailties of eyewitness identification, a properly instructed jury or judge may nevertheless conclude that the evidence is reliable and convict on that basis. The case of *R. v. Gable*, 2020 ABCA 135, is cited with respect to consideration of

the circumstances under which the eyewitness was able to observe what they saw.

Considerations include:

1. How long did the witness have the perpetrator under observation?
2. At what distance?
3. In what light?
4. Was the observation impeded in any way?
5. Had the witness ever seen the perpetrator before?
6. If so, how often?
7. The time elapsed between the initial observation and the identification.
8. Discrepancies between what the witness described and the accused's actual appearance.

[16] The trial judge must be attuned to the inherent frailties of eyewitness identification. That, an honest and confident witness may nonetheless be mistaken. Crown counsel submits that the identity of Mr. Butler as the perpetrator has been established beyond a reasonable doubt albeit entirely on the basis of eyewitness evidence.

[17] Molly Henderson saw someone strike Mr. Williams but she could not tell who or identify the perpetrator as being in the courtroom. Counsel for Mr. Butler agrees that both Mr. Dendys and Ms. Link witnessed the assault upon Mr. Williams. He points out

that the events unfolded extremely quickly, it was dark though there were lights, the situation was “intense”, chaotic, and the descriptions of the perpetrator by these eyewitnesses were not detailed, i.e. 6’ tall, muscular, “skinnier than me”, short brown hair, late 20s or early 30s. Counsel points out that Ms. Henderson, who was as close or closer than either Mr. Dendys or Ms. Link could not get a good view of the perpetrator because of the number of people in the area and the chaos. Ms. Link remembers Mr. Williams as being in the midst of the melee whereas Mr. Dendys remembers him as being on the periphery. Counsel points to other inconsistencies between the evidence of the eyewitnesses. P.C. Cook testified that he had been told at the hospital by Mr. Dendys and Mr. E. Lavallee that the perpetrator was “in black”. Mr. Dendys denies saying this and indicates that the perpetrator was in grey. Mr. Dendys was intoxicated at the time he made these observations.

Conclusion

[18] The case of *Hay* is cited by the Crown to support the proposition that notwithstanding the frailties of eyewitness identification a properly instructed jury or judge may nevertheless conclude that the evidence is reliable and convict on that basis. Real caution must be exercised where this is the only evidence. All civilian witnesses on the scene were intoxicated. While Mr. Dendys stated that he was “100% sure”, we now know from conceded criminal appeals based upon DNA evidence that eyewitnesses who are 100% sure can be very wrong. Here we have five eyewitnesses, all of whom were intoxicated. Mr. Dendys’ identification of the perpetrator was 5’10” with short hair. Ms. Link described the perpetrator as Caucasian, 6’ tall, short hair, muscular, late 20s to early 30s, grey clothing. In short, a very average looking young man. There is no

evidence as to how many of the many others at the 202 melee might have fit the same description. It was dark at the time of the incident but there were streetlights. It all happened very quickly. The scene was chaotic with more than one altercation taking place. Unlike the case of *R. v. Garcia-Archaga*, 1999 BCCA 277 cited by the Crown, in Mr. Butler's case, there is no conspicuous, distinctive clothing that would have clearly separated the perpetrator from the many others at the scene.

[19] P.C. Koshman concedes the investigation could have been better. There were other witnesses who could have been interviewed. There were possibly other CCTV/videos in the vicinity that could have been investigated. There were no photo lineups conducted.

[20] Assessing the totality of the evidence, I am nevertheless reasonably confident that Mr. Butler was indeed the perpetrator. However, that is not enough. I, as the trier of fact, must be convinced that there is no other reasonable explanation that could come from the evidence adduced. The few individuals who witnessed the assault were intoxicated. They may have been mistaken. That is a reasonable alternative explanation.

[21] It is not enough to show that the accused is probably guilty. In order to convict Mr. Butler, I must be satisfied beyond a reasonable doubt. That is, proof that is close to an absolute certainty. This case is based entirely upon the eyewitness reporting of intoxicated witnesses in a chaotic, tense, situation. It was dark, though there were lights, and it all happened very quickly. The descriptions of the perpetrator were not detailed. All in all, while I can find that Mr. Butler is probably the perpetrator, I am not convinced

beyond a reasonable doubt. Accordingly, Mr. Butler will be acquitted in respect of the count of aggravated assault.

[22] With respect to the count of assault against Malachi Lavalée, I agree that mere posturing may constitute an assault. However, in the pandemonium of the scene described, and the potential for misinterpretation, the posturing of this particular person may have been for defensive rather than offensive purposes. It is entirely unclear. Further, once the investigation arrived upon Mr. Butler as the perpetrator in the first assault, it follows that he is the perpetrator in the second assault. For the same reasons, I would acquit Mr. Butler on that count. The Crown is not seeking convictions on either the second or fourth counts. Mr. Butler will, as well, be acquitted on those charges.

SCHNEIDER T.C.J.