

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Lilles

REGINA

v.

DARREN MURPHY

Appearances:
Leo Lane
Melissa D. Atkinson

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] LILLES J. (Oral): Mr. Darren Murphy was charged as follows:

Count #1: On or about the 16th day of March in the year 2016 at or near the City of Whitehorse in the Yukon Territory, did in committing an assault on Trevor TESSIER use a weapon to wit: Pepper Spray, contrary to Section 267(a) of the *Criminal Code*;

Count #2: On or about the 16th day of March in the year 2016 at or near the City of Whitehorse in the Yukon Territory, did commit mischief by wilfully damaging without justification or excuse and without colour of right property to wit: windows of Trevor TESSIER, the value of which did not exceed five thousand dollars, contrary to Section 430(4) of the *Criminal Code*.

Facts

[2] Trevor Tessier is a 34-year-old man, who was living in a trailer on

Squatters Row, Whitehorse, with his girlfriend, Rebecca Carlberg, on March 16, 2016.

[3] On that day, he was awakened around 8 a.m. by the sound of glass breaking. Mr. Tessier and Ms. Carlberg were sleeping on a bed immediately adjacent to and slightly below a long window consisting of three frames. He saw a hand in the broken window pulling the plastic covering away and then he felt something hit him as if something had been thrown at him. Although he did not see the can, he realized that he had been sprayed with bear spray at close range and under high pressure. As he was only wearing shorts, he could feel the spray on his chest, face, and hands. He could hear Rebecca on the bed coughing. Startled, and he claimed now fully awake, he ran out of the trailer and, as he admitted on the witness stand, he was "going to kill someone."

[4] Upon exiting the house in his underwear and bare feet, Mr. Tessier spotted someone running away and gave chase. As he got close, the individual turned to the side, twisting his body, and raised his left arm and then used his right hand to spray Mr. Tessier again. Mr. Tessier said he could see the side of this individual's face and also said he believed that person had facial hair.

[5] Mr. Tessier said that there was quite a bit of light at that time in the morning and while he could feel the burn of the bear spray, it was not affecting his vision.

[6] The individual ran up to the passenger side of a waiting vehicle, which Mr. Tessier described as a Jeep, jumped in and closed the door and locked it before Mr. Tessier could grasp him.

[7] Mr. Tessier guessed that the door must have been open, because he was surprised at how quickly that individual got in and locked the door.

[8] Mr. Tessier saw another person in the driver's seat and heard the person he was chasing yell at the driver to go. When looking in the passenger window, Mr. Tessier was able to observe the individual's shoulder and the side of his face.

[9] Mr. Tessier grabbed onto the side of the hood and, partially straddling the hood, started hitting the windshield with his other fist. At this point, he was staring directly at the face of the individual in the passenger seat. The individual was slapping the dashboard of the vehicle, yelling, "Go, go, go."

[10] The driver accelerated the Jeep, spinning its tires and fishtailing the vehicle in an attempt to shake Mr. Tessier off the vehicle. Mr. Tessier was thrown off the vehicle at a speed that he estimated to be between 30 and 40 km/h. He landed on the side of the road and slid along the snowbank for some distance.

[11] Mr. Tessier received a road rash on his chest, many bruises, and an injured knee. He was unable to return to work for several months.

[12] Cst. Joseph Benedet attended the scene within 30 minutes of the incident. The constable observed that Mr. Tessier appeared to have been sprayed with bear spray and appeared to be in considerable pain. According to the constable, Mr. Tessier appeared to have been sprayed more on the body than the face, as Mr. Tessier was able to navigate from his trailer to his father's nearby trailer without difficulty.

[13] Cst. Benedet identified a number of photographs taken at the scene. Of particular relevance were the photographs of the broken window adjacent to the bed where Trevor Tessier and Rebecca Carlberg were sleeping: photos 4, 5, 7, 17, 18, and

19; and those of a large patch of orange coloured snow on the driveway: photos 20 to 23.

[14] I understood the latter photos were intended to show the location where Mr. Tessier was sprayed with the bear spray when chasing the individual from the trailer to the truck.

[15] The truck was described to the police as a Jeep Wrangler, initially, grey or tan in colour. The exact colouring was difficult to determine in part because of the early morning light, just before sunrise, and the fact that it was dirty and muddy.

Identification

[16] Initially, Trevor Tessier did not know or suspect who broke the window on his trailer and pepper sprayed him. But as he was chasing the individual and that person twisted around to pepper spray him again, Mr. Tessier saw the side of his face and recognized him as Darren Murphy, the accused.

[17] Similarly, when Mr. Tessier ran up to the passenger side of the vehicle and looked in, he could see the other side of Mr. Murphy's face. When he was holding on to the hood and the vehicle was spinning its wheels and fishtailing, he was staring directly through the windshield at Darren Murphy's face.

[18] I infer from the distance travelled before Mr. Tessier was thrown off the vehicle that he had four to five seconds to look straight at and identify Mr. Murphy.

[19] Mr. Tessier knew Mr. Murphy very well, having met him in May 2015. For three weeks, Mr. Murphy worked for Mr. Tessier in his painting business. Mr. Tessier described Mr. Murphy as hard-working and diligent. When Mr. Murphy failed to show up for a job, Mr. Tessier no longer employed him. They continued to see each other socially a couple of times a month, he estimated, and Mr. Tessier even visited him at Mr. Murphy's father's house three or four times.

[20] Sometime around February 2016, Mr. Tessier saw Mr. Murphy at a pub in Riverdale with a vehicle. Mr. Tessier claims to know cars and described it as a 1998-1999 Jeep Cherokee tan or beige in color. It was a four-door SUV with the back three windows tinted. I believe Mr. Tessier said that he actually sat in Mr. Murphy's vehicle. Mr. Tessier now identifies that vehicle as the one involved in the March 16 incident. Mr. Tessier said he had seen Mr. Murphy in that vehicle several times around town.

[21] A motor vehicle search revealed that a green Jeep Cherokee was registered to Mr. Darren Murphy. The grey or tan color that was reported by Mr. Tessier may be because the vehicle was dirty or perhaps because it had been repainted. It is also possible that the vehicle observed by Mr. Tessier on March 16 belonged to someone else, perhaps the unidentified driver of the vehicle, as it left Mr. Tessier's property after the March 16 incident.

[22] Ownership of the vehicle will be of little importance if the identification of the assailant is sound.

[23] Mr. Tessier reported attending the Big Bear Donair & Offsales in July or August of 2016. He was positive it was during summer. At the time, he did not know that

Mr. Murphy was working there. Mr. Tessier was not antagonistic towards Mr. Murphy and reported saying, "Hey, I'm not going to punch you. Let's go out for a smoke." According to Mr. Tessier, they did and a conversation ensued. Mr. Tessier said something like, "Well, what you did was very stupid." Mr. Tessier stated that Mr. Murphy replied, "Yeah, I know." Mr. Tessier told him he could not work for a while because of what he (Mr. Murphy) did. Mr. Tessier also said that Mr. Murphy asked him if he could drop the charges. Mr. Tessier stated that he said it was out of his control.

Possible motive

[24] Shortly after Mr. Tessier met Mr. Murphy, Mr. Murphy began dating Rebecca Carlberg. That relationship ended later in 2015, after Mr. Tessier disclosed to her that Mr. Murphy had been cheating on her. Mr. Tessier said that he had disclosed this fact to Mr. Murphy and that Mr. Murphy had been upset at the time, but they still continued to see each other socially.

[25] Around early November, Mr. Tessier began dating Rebecca Carlberg and, as reported earlier, they were living together on March 16, 2016, when this incident occurred.

[26] Mr. Tessier did not know whether Mr. Murphy knew this, that is to say, that they were living together, as he never reported that to Mr. Murphy.

[27] About three weeks prior to the March 16, 2016 incident, Mr. Tessier encountered Mr. Murphy at the pub. In greeting, Mr. Tessier patted Mr. Murphy on the back and, according to Mr. Tessier, Mr. Murphy freaked out and left the pub. Clearly, something

had changed in the relationship between Mr. Murphy and Mr. Tessier. Although unexplained, it is possible that it had something to do with Rebecca Carlberg leaving Mr. Murphy and moving in with Mr. Tessier.

Defence case

[28] The defence did not call any evidence.

The law

[29] I have reviewed a number of cases while considering the law applicable to the facts of this case, two of which are *R. v. Virk*, 2015 BCSC 981, and *R. v. Arseneault*, 2016 NBCA 47.

[30] In *R. v. Virk*, at para. 108, the Court quoted Monnin J.A. at para. 25 in *R. v. Perrone*, 2014 MBCA 74:

[25] Jurisprudence recognizes that there is a difference between credibility and reliability. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. wrote (at p. 526):

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not

credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

[31] In *R. v. H.C.*, 2009 ONCA 56, an Ontario Court of Appeal decision, Watt J.A. described the difference between credibility and reliability at para. 41, stating:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

- i. observe;
- ii. recall; and
- iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[32] Essentially, the fact that a witness may be found to be credible does not resolve the question of whether the evidence provided is reliable.

[33] There is a line of cases that suggests that stranger identification evidence is less reliable than recognition identification evidence, that is, where the person is known to the witness.

[34] The Court in *Virk* also quoted the reasoning of Nielson J.A. in *R. v. Smith*, 2011 BCCA 362:

[30] ... In *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), aff'd [1996] 2 S.C.R. 461, 107 C.C.C. (3d) 194, Mr. Justice Wood, while dissenting in the result, provided this useful and accurate description of the role of recognition in cases where the identity of the accused is at issue:

[102] With respect, I am of the view that there is no legal distinction between eye-witness identification cases on the one hand, and so-called "recognition" cases on the other. In both, the identification of the accused is based on the evidence of one or more witnesses who offer the opinion: "That is the person who I saw." Where it is a factor, recognition is a circumstance which does no more than enhance the weight to be attributed to that opinion by the trier of fact.

...

[106] As suggested in the *McIsaac* case, where recognition is a factor, considerable weight may attach to the opinion of an eye-witness, depending on the intimacy of the relationship between that witness and the accused and the length of time it has subsisted. Indeed, the nature of the relationship may be such as to obviate the need for all but the most cursory of cautions. On the other hand, where the "recognition" is based on a casual relationship characterized by infrequent contact, the potential weight of the opinion may not be much greater than that offered by a complete stranger. ...

[31] Thus, recognition evidence is not a distinct category. The concept of recognition in the context of eyewitness identification simply intimates the witness's evidence is based in part on his or her dealings with the accused before the crimes were committed. The extent and quality of these encounters is but one factor to be considered in weighing a witness's evidence.

[35] As noted in the *Arseneault* decision:

[10] There is no shortage of statements in trial and appellate decisions and in academic writing warning against the frailties of eyewitness identification. ...

[36] And later in the decision at para. 11, quoting Rosenberg J.A. in *R. v. Hanemaayer*, 2008 ONCA 580 at para. 29: "... Mistaken eyewitness identification is the overwhelming factor leading to wrongful convictions."

Findings

[37] This was not a situation of one fleeting glimpse of someone. It is true that the observation of Mr. Murphy, when he twisted and sprayed Mr. Tessier as he was running towards his vehicle, was fleeting, and involved only one side of his face. Similarly, Mr. Tessier's view of Mr. Murphy through the side window of the SUV, while not fleeting, was not lengthy and also was limited to the side of his face.

[38] On the other hand, Mr. Tessier had a direct view of the front of Mr. Murphy's face for four or five seconds from a distance of a few feet while holding on to the hood of the escaping vehicle.

[39] I am satisfied by the evidence that the lighting was sufficient for Mr. Tessier to identify Mr. Murphy. Although the sun was not up yet, the early dawn lighting was ample for the observations made by Mr. Tessier. Moreover, Mr. Murphy was not wearing a hoodie or other head covering that would have restricted Mr. Tessier's observations.

[40] Mr. Murphy, as indicated earlier, is well-known to Mr. Tessier. This is a case where the nature of their previous relationship is such as to "obviate the need for all but the most cursory of cautions."

[41] While Mr. Tessier had been pepper sprayed, it appeared to the attending officer that this had primarily affected Mr. Tessier's body, less his face and eyes. His ability to chase and catch up to Mr. Murphy is consistent with this evidence. And although his eyes were affected, his ability to recognize Mr. Murphy appeared not to be significantly impaired.

[42] There was no time elapsed between the incident and the subsequent identification of Mr. Murphy that could have resulted in memory impairment, tainting, or contamination through discussion with others. Mr. Tessier was certain of his identification from the very beginning. He said he was one hundred percent certain.

[43] While not conclusive, the similarity of the vehicle that was used on March 16 to the vehicle registered to Mr. Murphy serves as independent evidence supporting the eyewitness identification.

[44] There is also the encounter between Mr. Tessier and Mr. Murphy at the Big Bear Donair & Offsales in the summer of 2016. Notwithstanding defence counsel's suggestion that the exchange between them referred to an event other than the March 16 incident, I am satisfied that Mr. Murphy was referring to that morning when he acknowledged that what he did was stupid and asked Mr. Tessier if he could drop the charges. This exchange stands as strong, confirmatory evidence.

[45] Mr. Tessier was cross-examined with respect to a video that shows him entering the Big Bear Donair & Offsales on November 3, 2016. Clearly in that video, the two of them do not go outside for a smoke and a discussion.

[46] I accept that the meeting that Mr. Tessier referred to occurred in the summer of 2016 and occurred earlier and was not that depicted in the November 3 video.

[47] Defence counsel did an admirable job in identifying a number of minor discrepancies between the two statements given by Mr. Tessier to the police, and also between the statements and his evidence in court.

[48] I observe that the discrepancies were minor and did not at all affect the substantive evidence before the Court, nor do I find that it affected Mr. Tessier's credibility. I would have been more concerned if there were no discrepancies.

[49] Secondly, as Mr. Tessier pointed out, he was still recovering from and affected by the bear spray attack when he gave his first statement.

[50] Thirdly, many of the challenges by defence counsel related to things that Mr. Tessier did not tell the police. His answer, and this often applies to most witnesses, was that he did not consider those matters to be important at the time.

[51] Police do not usually prompt witnesses. They ask open-ended questions, such as what happened? Lay witnesses with no or little experience with the courts often do not appreciate the relevance of minor details and therefore do not disclose them.

[52] In conclusion, I am satisfied beyond a reasonable doubt that Mr. Murphy used pepper spray to assault Mr. Tessier on March 16, 2016. It is also evident that he broke several windows in the residence in the process, an offence contrary to s. 430(4). I find Mr. Murphy guilty on both counts before the Court.

LILLES T.C.J.