

Citation: *R. v. J.D.O.*, 2009 YKYC 4

Date: 20090918
Docket: 09-03527B
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

J.D.O.

Publication of identifying information is prohibited by s. 110(1) of the *Youth Criminal Justice Act*.

Appearances:

Judy Bielefeld

Karen Wenckebach

Appearing for the Crown
Appearing for the Defence

REASONS FOR JUDGMENT

[1] COZENS T.C.J. (Oral): J.O. has been charged with having committed the offence of break and enter and commit theft, as well as a breach of a *Youth Justice* probation order for failing to keep the peace and be of good behaviour.

[2] The circumstances giving rise to the charge are as follows, that on June 18, 2009, at approximately 12:00 noon, a Ms. Asther Gayangos was sleeping in her bedroom at 3 Zircon Lane in Whitehorse. She had just returned from work. She heard her doorbell ring. She testified that she checked the door and no one was there. In cross-examination her prior statement was put to her, in which she had stated that she

paid no attention at all to the doorbell. She agreed that she had said this earlier, but reaffirmed that she had woken up and checked the door.

[3] Approximately ten minutes later she was in her bed and heard a voice say, "She's sleeping." She did not say how loud the voice spoke. She thought that this was her brother speaking to her nephew. She turned over towards her bedroom door, and noticed a male standing about eight to ten feet away. She yelled, "What the fuck are you doing?" The male appeared scared, as was she, and he ran out of the house through the kitchen door, with Ms. Gayangos chasing him to the porch.

[4] She identified the male as wearing a bright yellow shirt, jeans, as being between five-nine and six feet in height, having short black hair and slightly balding. She was not able to get a good look at his face. She stated that it was dark in the room, although there was some light. She testified that she is not very good with math or distances. Ms. Gayangos was too nervous to make any other observations of this male.

[5] She did not see anyone else. She saw that the kitchen window was open and that a skateboard was outside. The skateboard was not identified as belonging to anyone in particular. She did not notice until the next day that her laptop computer had been taken from her kitchen table.

[6] RCMP were contacted by Ms. Gayangos at the time of the incident. Corporal Pelletier and Constable Fradette responded within minutes, and were passing Elijah Smith School on their way up from downtown. The Elijah Smith School is approximately one kilometre from 3 Zircon Lane. Corporal Pelletier saw two males on the school ground, one with a blue-black hoodie and the other with a yellow shirt. The officers

returned to the school grounds a couple of minutes later, after being able to turn around. Corporal Pelletier managed to grab the male in the blue-black hoodie, identified as Steven Jones, as he was starting to run away. Constable Fradette arrested the male in the yellow T-shirt, who is the accused, J.O. J.O. was on the other side of the school ground at this time. Corporal Pelletier could not say whether J.O. was trying to run away when arrested.

[7] The following day, a third male, a B.W., provided his father information which resulted in the laptop computer being located in the vicinity of Elijah Smith School, in a tree fort, and returned to the RCMP. B.W. testified that he had received this information from Mr. Jones while corresponding with him through computer the next day.

[8] Ms. Gayangos testified that a password had been added and some of the financial files of Ms. Gayangos had been deleted. When B.W. spoke to Mr. Jones the next day, B.W. states that Mr. Jones told him the laptop came from a car. B.W. had not seen it in the garbage bag. The comments which B.W. states were made to him by Mr. Jones were hearsay and Mr. Jones was not questioned about whether he had made these comments during his testimony. B.W. pled guilty to possession of stolen property, for the laptop, at the commencement of the trial and a sentencing hearing was conducted. B.W. had been scheduled to stand trial on the same charge as J.O. with respect to the break and enter.

[9] Both B.W. and Mr. Jones testified as Crown witnesses. Their evidence places themselves, as well as J.O., at 3 Zircon Lane at the time Ms. Gayangos observed the male in the yellow shirt in her bedroom. Their evidence is in agreement that Mr. Jones

slit open the kitchen window screen with his knife in order to gain access to the residence through the window and that someone entered the residence. However, their evidence differs as to who entered the residence and what the intent of the parties was.

[10] B.W. states that the three of them went to the residence, at Mr. Jones' suggestion, in order to obtain some personal possessions of Mr. Jones. Mr. Jones had lived in the residence prior, but had not resided there for approximately three months. B.W. states that when no one answered the doorbell and knocks on the door, they all went to the back of the residence, which is where Mr. Jones entered into the residence. He and J.O. waited outside in the porch. Only Mr. Jones entered the residence. At most, J.O. stood outside the kitchen door and leaned in.

[11] B.W. testified that Mr. Jones tried his key in the backdoor first, but Mr. Jones stated that he had no key. B.W. heard screaming, and Mr. Jones ran out of the house with a dark garbage bag with clothes in it. He ran somewhat slowly behind Mr. Jones, with J.O. behind him. They separated, with J.O. going with Mr. Jones.

[12] Mr. Jones testified that he had asked B.W. to come to the residence with him to help him get his television and alarm clock. J.O. asked if he could come also and was told he could by Mr. Jones. Mr. Jones stated that somewhere the idea changed to committing a break and enter at the residence. He was unsure whose idea it was to commit the break and enter.

[13] Mr. Jones stated that after they cut the screen, B.W. went through the window and unlocked the kitchen door. J.O. then went inside. Mr. Jones stated that he waited outside with one foot in the doorway. He stated that J.O. was standing at the bedroom

door which, it appears from the photographs filed, would be somewhat difficult to observe, due to the bend in the short hallway leading to the bedroom, if in fact Mr. Jones was not further inside the residence. That said, Mr. Jones would likely have been able to see J.O. at the top of the short hallway.

[14] Mr. Jones heard a scream, followed by words to the effect of, "Get out of my house," and that they all ran. Mr. Jones denies taking the laptop or stashing it but did not testify as to whether he knew who did so.

[15] The RCMP provided Mr. Jones a photo line-up in which B.W. was pictured. Mr. Jones did not identify B.W. as a participant as he wanted to keep B.W. out of it, given that the RCMP had only arrested himself and J.O. at Elijah Smith School and he thought B.W. had eluded detection.

[16] There was evidence that put J.O.'s height at approximately five foot four or five foot five. He currently has a full head of somewhat shorter, dark blonde hair. B.W. and Corporal Pelletier state that J.O. looks similar now as to the time of his arrest. B.W. is taller, with darker hair, and Mr. Jones is the tallest of the three, with blonde hair. At the time of his arrest, J.O. was wearing a bright yellow T-shirt with a large decal on the front. Mr. Jones was wearing two hoodies, both of which appear to have zippered fronts. There was no evidence as to what colour shirt B.W. was wearing on that date, or Mr. Jones.

[17] There is no question that the three males were at the residence and there is no question that at least one of the three went into the residence and removed the laptop computer. A reasonable inference could be drawn, and Crown asked me to draw it, that

two individuals went into the residence based upon the words, "She's sleeping" heard by Ms. Gayangos, although it is not out of the realm of possibility that someone was outside or at least further away from the bedroom when these words were spoken. It would appear highly unlikely that these words would have been spoken loudly, as that could have the effect, of course, of waking Ms. Gayangos if she was sleeping. As such, it seems more logical there would have been someone else in the residence.

[18] There is direct evidence from Mr. Jones that J.O. was in the house. This evidence is contradicted by B.W. I accept Ms. Gayangos' evidence. I find her description of the male in her bedroom could be somewhat off, given the lack of light, the surprise, shock or fear she felt in her initial horizontal position on the bed when seeing the male. Also, I note her difficulty she expressed with respect to math and distances.

[19] I note on June 18th it would not likely have been dark in the kitchen, however, but there is no evidence as to whether Ms. Gayangos actually observed the male outside the bedroom. I note that none of the three males was slightly balding and there was no evidence of a fourth male being present.

[20] The fact that Ms. Gayangos did not see anyone else also would lead to the inference that the other two individuals had fled the scene before the male with the yellow shirt. If J.O. was the male in the bedroom, this inference is consistent with B.W.'s evidence that Mr. Jones ran away first, followed by B.W. and then J.O. It is also consistent with Mr. Jones' evidence on this point.

[21] B.W.'s evidence, however, somehow does not make sense when he states that Mr. Jones ran out of the house first with the others following, as B.W. and J.O. were not seen by Ms. Gayangos, who went out to the deck after pursuing the male who had been in the bedroom. I would have expected Ms. Gayangos to have seen one or both of them, had they delayed their departure until after Mr. Jones left the residence.

[22] There was nothing in the demeanour of B.W. or Mr. Jones that I consider to be of great significance when weighing their testimony. B.W. had no difficulty giving his testimony, contrary to Mr. Jones, however, who was reluctant to face anyone unless directed to do so, and who had to be reminded several times to speak up. I consider Mr. Jones' demeanour in testifying to be also consistent with someone who simply does not want to be in court at all, and to give evidence. I also note that Mr. Jones' testimony is contrary to self-interest and he makes himself a participant in the break and enter. That said, I do not know what legal consequences Mr. Jones has suffered already or is perhaps currently facing.

[23] Mr. Jones staying outside Ms. Gayangos' residence is also logical, as he is the only one the complainant would likely be in a position to recognize, although it appears that the three believed no one was in the residence, based on the lack of response to the doorbell and knocking. Mr. Jones being the first to leave the scene is also consistent with him being the furthest away from the bedroom door. I have some concern about the fact that B.W. was convicted of possession of stolen property only in regard to the laptop because, on the evidence of Mr. Jones, who the Crown asked me to believe, B.W. was also involved in the offence of break and enter. This concern, however, does not impact upon Mr. Jones and his credibility. In the end, I find that I

prefer the evidence of Mr. Jones over that of B.W. where the evidence is in contradiction.

[24] This case is a blend of circumstantial and direct evidence. I find that the only logical conclusion that can be drawn on a consideration of the whole of the evidence is that J.O. was in the bedroom and committed the offence of break and enter as charged, and I find him guilty of that offence.

[25] I also find him guilty of the breach of the youth probation order that he was on that required him to keep the peace and be of good behaviour.

COZENS T.C.J.