

Citation: *R. v. Taylor*, 2005 YKTC 75

Date: 20051110
Docket: T.C. 04-00513
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

GARTH WILLIAM TAYLOR

Appearances:
Noel Sinclair
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Garth Taylor stands charged with an assault with a weapon contrary to s. 267(a) of the *Criminal Code*, and uttering a threat contrary to s. 264.1(1)(a).

[2] The trial consisted of *viva voce* evidence from three witnesses and the filing of two agreed statements of fact regarding injuries suffered by both the complainant and the accused. Crown called the complainant, Kurt Trussert, and the investigating officer, Constable Gabriel. Mr. Taylor testified in his own defence.

[3] What is clear from all of the evidence is that Mr. Trussert was struck on the back of the head with a bottle causing significant bleeding and injuries. What is unclear are the circumstances giving rise to the blow. Mr. Trussert and Mr. Taylor have provided opposing accounts of the events of November 23, 2004. Mr. Trussert says that both he and Mr. Taylor were at Mr. Trussert's residence drinking and talking. He maintained that both he and Mr. Taylor were intoxicated. Mr. Trussert made Mr. Taylor some food and while Mr. Taylor was eating, Mr. Trussert, out of concern, asked after the health of Mr. Taylor's mother. According to Mr. Trussert, Mr. Taylor became enraged at the question, jumped up and started screaming at Mr. Trussert. Mr. Trussert asked Mr. Taylor to leave the residence but Mr. Taylor refused.

[4] Mr. Trussert was standing in front of the middle of the couch, facing the wall, and when he turned slightly, he was clubbed on the back of the head, below his left ear with the bottle. Mr. Trussert further testified that they must have tussled some more in the kitchen and that Mr. Taylor put the broken bottle to his neck and said something to the effect of, "Don't fuck with martial arts because I could kill you." Mr. Trussert went to the bathroom and saw how badly he was bleeding. He called 9-1-1 and waited at the front door for the ambulance to arrive.

[5] Mr. Trussert's injuries are set out in the first agreed statement of facts and included a cut behind his left ear, a cut to the top back of his head, a cut on the front left side of his neck, a cut on the tip of his right ear, and a bleeding wound on the left side of his upper lip, penetrating through to the inside of his lip. Both staples and sutures were required to treat the injuries. Mr. Trussert indicated that he never put his hands on Mr. Taylor at any time during the course of the assault.

[6] Mr. Taylor tells a quite different version of the events. He agrees that both were at Mr. Trussert's residence and that Mr. Trussert was drinking heavily but that he, Mr. Taylor, was not. Mr. Trussert offered him food, which Mr. Taylor declined. Mr. Trussert prepared the food for him anyway and proceeded to spill both the food and alcohol on Mr. Taylor when attempting to serve him. Mr. Taylor went into the kitchen to clean up. He said that Mr. Trussert became verbally abusive, calling down Mr. Taylor's friends. Mr. Trussert then spoke about Mr. Taylor's mother, who has cancer, pretending to care about her, but almost making fun by saying things such as, "Do you think she'll make it another week?"

[7] Mr. Taylor returned to sit in the easy chair in the living room and responded, "At least my mom's alive." Mr. Trussert then went ballistic, punching Mr. Taylor about the head and body and pulling his hair. Mr. Trussert then began to choke Mr. Taylor with one hand while continuing to punch him with the other.

[8] Mr. Taylor said he believed he was going to die. He reached down beside the chair and grabbed the bottle, which was the first thing that came to hand, and struck Mr. Taylor on the left back of his head. Mr. Trussert let him go. At this point, Mr. Taylor became concerned about the extent of Mr. Trussert's injuries, located the telephone, called 9-1-1 and handed the phone to Mr. Trussert. Mr. Taylor suffered some injuries, including bruising and soreness, chipped and broken teeth, and others detailed in the second agreed statement of facts.

[9] After his arrest, Mr. Taylor demanded to provide breath samples, blood samples, and to have pictures taken of his injuries. Breath samples were taken with the reading of 0 mg. percent.

[10] The only issue for this court is the issue of credibility. If I accept Mr. Trussert's version, both offences are made out. If I accept Mr. Taylor's version, I must be left with a reasonable doubt. In assessing credibility, I must apply the test set out by the Supreme Court of Canada in the *R. v. W.(D.)* case, [1991] 1 S.C.R. 742. If I believe the accused, I must acquit. If I do not believe the accused but his evidence leaves me with a reasonable doubt, I must acquit, and even if I do not believe the accused and his evidence does not leave me with a reasonable doubt, I must ask myself whether, on the basis of the evidence which I do accept, I am satisfied beyond a reasonable doubt.

[11] Looking at the first branch of the test, I find there to be serious problems with Mr. Taylor's credibility. He was given to extreme exaggeration and embellishment. He referred on a number of occasions to blacking out or losing consciousness when being choked, but when pressed on cross, amended his statement to say that he almost but did not quite lose consciousness. In describing his injuries he referred to a broken nose, broken ribs and two cracked bones in his trachea. He described extreme injuries which would have required medical care, though none was sought or received. Furthermore, while the nurse's examination supports some of his described injuries, it does not reflect injuries to the extreme extent testified to by Mr. Taylor.

[12] Secondly, Mr. Taylor's description is unbelievable in a number of respects. For instance, he described Mr. Trussert standing before him between his legs and leaning

over him in the chair assaulting him. When Mr. Trussert begins choking him, Mr. Taylor said that Mr. Trussert, in so doing, pushed the recliner and Mr. Taylor backwards so that the footstool of the recliner came up and he was unable to get sufficient leverage to push Mr. Trussert off of him. If the events happened as described by Mr. Taylor, the foot stool would have struck Mr. Trussert in the legs, which would have either have halted the progression of the recliner, or would have forced Mr. Trussert to move out of the way. Neither was described as having happened.

[13] Similarly, Mr. Taylor described being choked to the point he lost control over his limbs and they began to shake uncontrollably as if he were experiencing a seizure. He further said his limbs continued to shake in this manner for some time after Mr. Trussert let him go, and it was a while before he was able regain control. If this were indeed the case, I am hard pressed to see where he would have been able to summon the necessary control required to grab the bottle and strike Mr. Trussert.

[14] Thirdly, Mr. Taylor's evidence suffered from several inconsistencies. Of note, he referred to showering and changing after the incident for several reasons, including the fact that Mr. Trussert has spilled alcohol on him. Yet later, Mr. Taylor said that he demanded to provide breath samples as all of the RCMP officers at the detachment were accusing him of being drunk because he smelled of booze, a fact which is contradicted by Constable Gabriel, who testified that he did not smell any alcohol on Mr. Taylor, and one which would have been impossible if Mr. Taylor had indeed showered and changed, as he earlier testified.

[15] The combination of these frailties of Mr. Taylor's evidence is such that I find that I do not believe his version of events. This, however, does not end the matter. I must still address the remaining two branches at the *W.D.* test.

[16] On the second branch of the test, there is some potential for doubt to be raised by Mr. Taylor's evidence, notwithstanding I do not believe him. For example, his account of defensive injuries is to some extent corroborated by the nurse's examination, and the breathalyzer test clearly establishes Mr. Taylor's sobriety. However, this doubt is dependant on viewing certain elements of his testimony within the context of the evidence as a whole as opposed to in isolation, so it is really the third branch of the *W.D.* test which I find to be determinative in this particular case.

[17] Looking at the evidence as a whole, I find that I also have serious concerns about the credibility of Mr. Trussert. Mr. Trussert was adamant that Mr. Taylor was not only drinking but that he was intoxicated at the time of the incident. This fact is independently contradicted by Constable Gabriel's evidence that he did not smell alcohol on Mr. Taylor, and by the breath test, which clearly demonstrated that Mr. Taylor had not been drinking. Mr. Trussert testified that the only alcohol in the house were his two mickies of Alpine Bitters, of which he consumed a mickey and a half, and Mr. Taylor's Bacardi Breezers. Yet the bottle used to hit Mr. Trussert was Lemon Hart Rum.

[18] Mr. Trussert maintained that he did not lay a hand on Mr. Taylor during the incident, yet, as noted, the nurse's examination provides some corroboration of Mr. Taylor's injuries. I should make note that Constable Gabriel, who testified in a very thorough and credible manner, did not observe any fresh injuries on Mr. Taylor on the

night of his arrest. However, it is not unusual for bruising to take some time to materialize.

[19] Next, Mr. Trussert has no recollection of meeting up with two women and taking them to the liquor store before he and Mr. Taylor returned to his home, a factor which Mr. Taylor would have no reason to lie about it, as absolutely nothing turns on it. When confronted on the issue, Mr. Trussert seemed to have at least some recollection, but dismissed his lack of memory by saying that such a fact would have not been important enough for him to remember.

[20] Also of concern is the fact that Mr. Trussert provided a statement to the police on the night in question, advising them, amongst other things, that he had not been drinking that evening and that he had been hit with the bottle in the kitchen, not the living room. He then viewed that statement several months later and decided that it bore absolutely no resemblance to his current recollection of the offence and provided a different statement to the police in April of 2005.

[21] This case turns on the reliability of Mr. Trussert's memory. His admitted significant alcohol consumption, his inconsistent statements, his memory gaps and factors in his evidence contradicted by independent objective evidence, all combine to raise serious concerns about Mr. Trussert's reliability as a witness. I come to the inescapable conclusion that it would simply be unsafe to convict Mr. Taylor on the basis of Mr. Trussert's evidence. As the only evidence of uttering a threat comes from Mr. Trussert, whom I found to be unreliable, I find that I am left with reasonable doubt as to Count 2, and when I consider the unreliability of Mr. Trussert's evidence in conjunction

with the injuries observed on Mr. Taylor by the nurse, which could be seen as consistent with defensive wounds, I cannot dismiss the possibility that the blow with the bottle was struck in self defence.

[22] Accordingly, I am left with a reasonable doubt on Count 1, the assault with a weapon, as well, and both counts are hereby dismissed. Thank you.

RUDDY T.C.J.