

Citation: *R. v. T.C.M.*, 2017 YKTC 32

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Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Cozens

REGINA

v.

T.C.M.

Appearances:  
Ludovic Gouaillier  
Lynn MacDiarmid

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCE**

[1] On May 23, 2017 I provided abbreviated oral reasons for sentence in this matter and indicated that more complete written reasons would follow. These are those reasons.

[2] T.M. has entered guilty pleas to having committed the following offences:

- 348(1)(b): Break and enter and did commit theft
- 145(1)(a): Escape lawful custody;
- 430(3): Mischief under \$5,000.00;
- 264.1(1)(a): Utter a threat;

- 129(a): Resist a peace officer;
- 344(1)(b): Robbery.

[3] Crown counsel has elected to proceed by summary election on those offences that are not indictable by law.

[4] As T.M. was a young person at the time the ss. 348(1)(b) and 145(1)(a) offences were committed, I am also sitting as a Youth Justice Court judge at this time.

[5] The facts are set out in Agreed Statement of Facts as follows:

1. The Defendant T.M.'s date of birth is May 23, 1998.
2. On May 21, 2016, the Defendant was serving an open custody disposition at YOF [Young Offenders Facility] when he left without authorization. He was observed moving down Mountain View drive and near the Walmart store near downtown Whitehorse, and was seen wading in water in the Yukon River going to an island close to shore. His arrest required the intervention of a boat and helicopter unit of the RCMP. The Defendant was speaking of wanting to end his life and threw rocks at the helicopter which shuttled the members to the island.
3. On May 30<sup>th</sup>, 2016. The Defendant was at YOF when he got in an altercation with staff, acting aggressively which led staff members Amy O'Rourke, Wilfred Jerome and Adam Thompson to place themselves in a secure room. The Defendant broke a table leg and caused damage to the premises attempting to get to the staff members who had locked themselves away from the Defendant. He surrendered after having been pepper sprayed by the RCMP who had been called to the scene. During the incident, the Defendant discharged a fire extinguisher and sprayed staff member Thompson in the face through a hole in a door, and made threats to kill all staff members involved. Cst. Bray, who pepper sprayed the defendant through a broken glass panel suffered a cut to one of his finger[s] as a result.
4. On September 4, 2016, the Defendant was subject to an undertaking requiring him to abide by a curfew set out by his youth probation supervisor, who had directed the Defendant to be under the direct supervision of his father D.M. at all times if not on his property. That day D.M. reported to the bail supervisor that the Defendant had absconded and that D.M. did not know where the Defendant was.

5. On September 21, 2016, shortly after 4 am, three suspects entered the Petro Canada station located on 4<sup>th</sup> Avenue in downtown Whitehorse wearing masks and demanded money and cigarettes from the clerk, Umakanth Burra, who was alone at the time on the premises. The clerk, who told the police that he was frightened during the incident and was afraid that he was going to be hurt, gave the suspects \$150 to \$160 in cash and multiple cartons of cigarettes, after which they left. One of the suspects was carrying a baseball bat that he smashed repeatedly on the counter during the incident. He was later identified as the Defendant from surveillance footage and further investigation into the case. He told the clerk not to call the police as he left.
6. On September 16, 2016, shortly after 10:30 pm, Whitehorse RCMP located the Defendant in downtown Whitehorse while they were investigating an unrelated matter. The Defendant ignored directions from the police, to stop, who did not know if he was connected to the investigated matter, and ran away from the scene telling attending members that he was not “the one they were looking for”.
7. On April 18, 2016, the Defendant broke into the residence of his sister, M.T., by punching through a glass pane, which cost \$651.90 to replace, and stole a computer tablet worth approximately \$80.

[6] The facts in relation to the breach of an undertaking given to a judge on September 4, 2016 were read in pursuant to s. 725(1)(b.1).

### **Positions of Counsel**

[7] Crown counsel submits that an appropriate disposition is a global sentence of three years' custody, less credit for T.M.'s time in remand, to be followed by a period of probation of two to three years.

[8] T.M. has a total of 312 days of pre-trial custody for which he is entitled to a credit of 468 days against any sentence which is to be imposed.

[9] At the outset of providing my oral reasons for sentence, as a preliminary matter, I enquired of counsel whether there was any concern about my assigning credit for time

in remand custody to any of the offences for which T.M. was being sentenced. This included with respect to assigning credit for remand time to an offence that had occurred after the remand time had accrued. No concern was raised at that time.

[10] Counsel for T.M. submits, given T.M.'s cognitive limitations and diminished moral blameworthiness, that a sentence of 15 to 18 months, followed by a period of probation, would be appropriate.

### **Circumstances of T.M.**

[11] T.M. is a 19-year-old Aboriginal offender. He turned 19 on May 23, 2017.

[12] Due to the cognitive difficulties T.M. struggles with, on July 29, 2016, pursuant to s. 672.11, the Court made an Order for Assessment and Report. The Order is dated August 9, 2016. The assessment Order was for a 60-day period.

[13] A second Order for Assessment and Report was issued on October 14, 2016.

[14] Dr. Lohrasbe completed a psychiatric assessment of T.M. He provided an assessment Report (the "Report") dated November 9, 2016. The Report was not placed before the Court until January 27, 2017. Dr. Lohrasbe concluded in the Report that T.M. was fit to stand trial and that he did not suffer from a mental disorder that caused him to be unfit to stand trial. He also found that T.M. did not suffer from a mental disorder such that he should be found to be exempt from criminal responsibility for his offences.

[15] In preparing the Report, Dr. Lohrasbe reviewed a Psychosocial History Report dated September 16, 2015 (the “Psychosocial Report”), and a Youth Forensic Psychiatric Services Psychology Report dated September 17, 2015 (the “Psychology Report”).

[16] Dr. Lohrasbe noted that T.M. presented as less cognitively/intellectually challenged than he had expected from the documentation he had read. He noted him to be somewhat tense, anxious and “on guard”. He was restless and became somewhat irritable as the interview progressed. Dr. Lohrasbe stated that a “true rapport” was unable to be established, not because T.M. was hostile, but because he remained guarded and mistrustful. This is somewhat consistent with what was noted in the Psychology Report with respect to T.M.’s underlying tension and guardedness during that interview process and noted frustration as the interview progressed.

[17] With respect to T.M.’s personal circumstances, Dr. Lohrasbe quotes at great length from the Psychosocial Report and the Psychology Report. I also was provided with a Pre-Sentence Report (the “PSR”) prepared for an October 19, 2015 sentencing date for T.M.’s first offences, that contained much information about his personal circumstances.

[18] T.M.’s birth mother used alcohol and cocaine during her pregnancy with him. She was reported to have a longstanding history of mental illness, including features of paranoia. He was abandoned by his birth mother five days after his birth, into the care of a grandparent who took him to a receiving home. There is no information available in regard to who may be T.M.’s biological father.

[19] He was born suffering the symptoms of withdrawal. He was formally diagnosed in 2005 with Fetal Alcohol Spectrum Disorder (“FASD”).

[20] Foster parents, D.M and S.M., took T.M. into their care at the age of seven weeks and adopted him when he was seven years old. As of the date of the Psychosocial Report, the M.’s had three adult biological children, as well as two adopted 18-year-old boys and a 10-year-old adopted son, with all the adopted children having special needs. The M.’s have often provided emergency foster care to numerous special-needs children over the years.

[21] T.M.’s developmental milestones were all delayed, including speech and language comprehension, and he struggled with learning to walk due to issues related to physical development that were impacted by stunted growth.

[22] He struggled in his early elementary years. He was diagnosed with Disruptive Behaviour Disorder (not otherwise specified) in 2004 as well as Attention Deficit Hyperactivity Disorder (“ADHD”). In 2009 he was diagnosed with Oppositional Defiant Disorder (“ODD”), Anxiety Disorder, Learning Disabilities and possible Pervasive Development Disorder. Although initially suspected, T.M. was diagnosed as not meeting the requirement for Autism Spectrum Disorder.

[23] The last Inpatient Assessment at British Columbia Children’s Hospital listed his discharge diagnosis as ADHD on history, ODD on history, Generalized Anxiety Disorder (GAD), Social Anxiety Disorder, Mild Mental Retardation and FASD.

[24] He was referred to the Maples Adolescent Treatment Centre but the referral was rejected because of his intellectual disability.

[25] The author of the Psychology Report stated:

Cognitive testing indicated that T. is functioning in the Extremely Low range of intellectual ability, consistent with a diagnosis of Mild/Moderate Intellectual Disability. T. will require significant supports with acquiring the skills of independent daily living as he approaches adulthood. While some of his academic abilities are stronger than would be expected, likely due to his interest in reading and academic supports, efforts should be directed at developing hands-on trades skills rather than traditional educational pursuits.

[26] T.M. has been treated with medication at times. The results have been both positive and negative.

[27] From grade 5 until grade 9, T.M. was provided with a full-time dedicated Educational Assistant. T.M. functioned below grade level in writing, spelling and math. He was at grade level in reading. He was noted to be capable of being friendly, cooperative and wanting to please. He could also be neat and persistent in asking for help, although easily annoyed by younger children, and he had a good sense of humour. In grade 9 he did very well in the outdoor programming at [redacted]. He obtained a scholarship as a result of his good grades.

[28] In grade 10, however, he was unable to have an Educational Assistant. He started skipping classes and having difficulties associated with alcohol, drugs and hanging out with others also involved in a negative lifestyle. He was involved in fights with teachers and others in his peer group. He was noted to become more paranoid in

his thinking at this time. Although removed from high school to study at home, he began to leave home to hitchhike into Whitehorse to hang out with his friends.

[29] It is noted that T.M. indicated to Dr. Lohrasbe that he had used crack cocaine and alcohol on a daily basis once he had left his parents' home. He stated that he liked the effects of cocaine, in particular crack cocaine.

[30] Contrary to the terms of the recognizance he was bound by, he absconded from his parents' home on September 30, 2016.

[31] T.M. acknowledged that "...he had caused much distress to his parents and other members of his family...and stated that he would like to live at home and '*not upset them anymore*'. This is consistent with prior observations in the Psychosocial Report that as a child he could be caring and able to show remorse at times.

[32] Noting some limitations on the information available to him, some by his own choice for therapeutic reasons, Dr. Lohrasbe stated as follows:

1. It is highly likely that T.M. has significant neuropsychiatric deficits, beginning in utero, based on his history. The only reason 'highly likely' cannot be replaced at this time by 'certain' is that we do not have relevant neuroimaging.
2. These deficits interact with environmental and situational factors and manifest functionally as a range of dysfunctions encompassing the realms of emotions, cognitions, behaviours, and relationships. He is 'challenged' across most aspects of everyday functioning. Hence a range of diagnoses, which are largely descriptive appellations, have been applied to him. They are likely to evolve over time.



3. Among the dysfunctional behaviours are impulsivity and aggression, which have in recent years been manifest as criminal and violent behaviours.
4. Such impulsivity, aggression, criminal and violent behaviours are likely to emerge more readily when T.M. is intoxicated with alcohol or drugs.

It is of great concern that his violence has involved weapons. In addition to the presence of weapons posing heightened risk to others, his spontaneous disclosure that a firearm has been discharged with him being the target illustrates just how rapidly this young man has been, when on his own, immersed in a subculture that brings together substance abuse, criminality, and violence.

[33] At the time of the Psychosocial Report, T.M. was considered by his mother to have a “love/hate” relationship with his adoptive family. She felt that T.M. acted this way at times because he felt “safe”. The M.s had expended considerable effort to finding ways to manage T.M.’s “escalating anger, rage and aggressive behaviours” in the home. It was noted that they had, at times, found it necessary to restrain him in order to avoid serious harm. T.M. was noted to blame others and not be accountable for his own actions. To some extent, I have no reason to believe that the “love/hate” relationship as described has necessarily changed. Neither, I expect, has the M.s’ residence become anything other than a safe place for T.M.

[34] It was also noted in the Psychosocial Report that T.M. had responded well in the past when in a suitable environment:

T. has responded well in the past to a very structured, supported and well supervised environment. He thrived in the [redacted] as his strengths and interests lay in the outdoors. T. enjoys longboarding, skateboarding, snowboarding, skiing, hockey and fishing. He can be creative and likes to build. T. can be a hard worker and has good intentions. If these strengths can be tapped into and focused in a meaningful manner he would be more likely to find some measure of success in the future.

...T. demonstrates poor insight into his own difficulties and inability (or unwillingness) to acknowledge any significant psychological behavioral [sic] problems. He shows a tendency toward impulsive, irresponsible behavior [sic] that seeks to fulfill his own desires for pleasure, and fails to appreciate the impact of his negative behavior [sic] on others. He demonstrates a superficial likability but eventually reveals tendencies toward irritability and hostility when challenged or when his personal goals are seemingly thwarted.

Given his cognitive limitations, T. is an inappropriate candidate for traditional talk therapy, though he may benefit from behavioral [sic] therapy interventions aimed at strengthening habits of appropriate affect management. T. will likely be best supported by development of connections to prosocial activities and responsibilities, which will help limit his exposure to negative peer influence and reinforce positive habits and abilities.

### **Plans for Future**

[35] T.M. wishes to return to his home with the M.s on the [redacted].

[36] The M.s have agreed that T.M. can live with them and they will continue to support him, as they always have, with the support of the rest of T.M.'s family.

[37] The Fetal Alcohol Syndrome Society Yukon ("FASSY") provided a letter dated May 8, 2017 in which they have indicated their support for T.M.

[38] T.M. referred himself to FASSY on March 3, 2017, with the help of his parents, and has been supported as a FASSY client in the Whitehorse Correctional Centre ("WCC") since then.

[39] FASSY indicated their intention to assist T.M. with a referral to Services for People with Disabilities (SPD) when he turned 19. SPD will work to assist T.M. in living in the M.'s home or, if considered appropriate in future, in a semi-dependent living situation within Whitehorse.

[40] They will also facilitate T.M. obtaining an adult FASD assessment that will provide better information about the support he requires.

[41] They will assist him in finding suitable employment.

[42] They will support and assist him in attending all legal appointments, including with transportation, and with probation condition reminders.

[43] They will assist him, now that he is 19, with obtaining his First Nation status card.

[44] They will assist him in joining and participating in positive extra-curricular activities, including providing him with reminders and transportation.

[45] T.M.'s former Educational Assistant, C.R., who is also a close friend of T.M.'s family, provided a letter in which she reiterated the many positive aspects of her interactions with T.M. over the years that she worked closely with him. She noted his compassion with regard to bullies and animals. She found him to be a hard worker, especially when engaged in an intensely physical job, with a mostly pleasant attitude.

[46] She also noted T.M.'s drive for peer acceptance and the problems that have resulted from his association with the wrong peer group. She stresses the importance of "Proper supports for this young man, in the form of physical labour, positive peer groups, and ongoing mental health appraisals and medications [as being] some of the **keys** needed for successful long-term integration into society" [her emphasis].

## Analysis

[47] T.M. has been found guilty as a youth for two counts of assault and an assault with a weapon on October, 19, 2015. He received a sentence of four months deferred custody and supervision on these charges. On December 10, 2015 he received a reprimand for an assault on a peace officer. On February 4, 2016 he received a sentence of two months open custody with one month community supervision for a second assault on a peace officer. On May 5, 2016, he received a sentence of 30 days open custody and 15 days community supervision for an assault with a weapon and 20 days open custody and 10 days community supervision for a conviction for uttering threats. He also has a finding of guilt for failing to comply with conditions of an undertaking and for escaping lawful custody.

[48] He is now being sentenced for two further offences of violence, one of which was a robbery armed with a baseball bat and for uttering threats, in addition to several other charges, including a break and enter and theft in regard to a residential home. The uttering threats occurred in aggravating circumstances taking into account the whole of the events.

[49] It is clear from the information provided that T.M. is an individual indeed quite capable of committing acts of violence against others. While I do not have a risk assessment before me to assess the likelihood of T.M. committing further acts of violence in future and the likely severity of any such acts of violence, I am quite cognizant of the escalating nature of T.M.'s propensity to act out in a violent manner. I have no difficulty finding that, if T.M. continues to consume alcohol, use drugs and

associate with an anti-social and criminally-minded peer group, he will commit further acts of violence and find himself facing further criminal charges and, potentially, substantial periods of imprisonment. I also recognize that there is a very real risk that he may inflict significant harm on others.

[50] The robbery conviction alone, was of such a serious nature that it would normally attract a lengthy period of imprisonment, even if it were a first offence of violence. In T.M.'s case, he brings an unenviable history of violence to this offence, and to the other offences for which he is being sentenced today.

[51] I have been provided a number of cases by counsel.

[52] In the case of *R. v. Firth*, 2012 YKTC 116, 18 months was imposed on a robbery conviction consecutive to 18 months for a number of thefts, breaches of court orders, failure to appear in court, assault with weapon on a peace officer, and break and enter. Ms. Firth was an Aboriginal woman with 48 prior adult convictions and numerous youth findings of guilt. She had a troubled background. *Gladue* factors were very much at play.

[53] In *R. v. Beattie*, 2015 BCCA 335, the Court imposed a three and one-half year sentence on a 22-year-old offender who was convicted of an attempted robbery on a convenience store using a sawed-off shotgun, in addition to six months consecutive for possessing a weapon while prohibited. The offender was from a troubled background, was addicted to alcohol and had significant cognitive challenges. The Court stated the importance of rehabilitation. He had 26 prior convictions, including one for robbery.

The sentence of 3 and one-half years for the robbery was considered to be at the low end of the range.

[54] In *R. v. Alexander*, 2016 YKTC 38, on a joint submission, I imposed a sentence of 42 months on Mr. Alexander for the robbery of a convenience store using a lit blowtorch as a weapon. He had two prior convictions for robbery and five other offences of violence and uttering threats, as well as approximately 20 other convictions. He was 34 years old and of Aboriginal ancestry. He had a rather traumatic childhood and I found that *Gladue* factors were of significance.

[55] Of the cases filed by counsel for T.M., the more recent case of *R. v. Harper*, 2009 YKTC 18, and *R. v. Charlie*, 2015 YKCA 3, both at the trial and appeal level, are of particular relevance to the circumstances of the case before me.

[56] In *Harper*, Lilles J. was sentencing an offender for ss. 151(a) and 145(3) offences. While the circumstances of the offences are not comparable, Lilles J. made a number of comments about the relevance of a diagnosis of FASD in determining an appropriate sentence for an offender. After a lengthy review of research into FASD and the purpose, principles and objectives of sentencing, he stated in paras. 37-39 that:

**37** FASD has specifically been recognized as a factor that affects an offender's degree of responsibility so as to reduce the severity of a just sentence. Indeed, it may well be the "main criminogenic factor" in an offender's life (*R. v. Gray*, 2002 BCPC 58, at para. 53).

**38** Where FASD is diagnosed, failing to take it into account during sentencing works an injustice to both the offender and society at large. The offender is failed because he is being held to a standard that he cannot possibly attain, given his impairments. As noted by Judge Barry Stuart in *R. v. Sam*, [1993] Y.J. No. 112 (T.C.), FASD takes away someone's "ability ... to act within the norms expected by society" (para.

17), and it is manifestly unfair to make an individual pay for their disability with their freedom. Society is failed because a sentence calculated for a "normal" offender cannot serve the same ends when imposed on an offender with FASD; it will not contribute to respect for the law, and neither will it contribute to the maintenance of a just, peaceful and safe society.

**39** The calculus of sentencing the average offender simply does not apply to an offender with FASD. Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD.

[57] After considering, in paras. 40 and 41, the comments of Ruddy T.C.J. in **R. v.**

**Sam**, [1993] Y.J. No. 112 (T.C) in regard to s. 718.1, Lilles J. stated in paras. 42 and 43

that:

**42** Despite the objective seriousness of his offence, taking into account Mr. Harper's reduced personal responsibility due to his serious cognitive disabilities, I conclude that a just sentence should result in a substantial reduction in the sanction imposed by this court.

**43** There are additional sentencing principles that call for a reduction of Mr. Harper's sentence. The role of specific deterrence in sentencing FASD-affected offenders decreases in proportion to the severity of the offender's cognitive deficits. Specific deterrence presupposes that an offender can make the connection between the sanction imposed by the court and the wrongful act, remember that connection, and then generalize the probability of punishment to other unlawful acts. The assessment report by Medigene Services suggests that Mr. Harper's cognitive deficits are severe enough to limit or even preclude the brain functions inherent in the operation of specific deterrence.

[58] In paras. 47 and 48, Lilles J. states his concerns about the incarceration of FASD

offenders:

**47** ...As stated in *R. v. Abou*, [1995] B.C.J. No. 1096 (Prov. Ct.), "it is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person".

...

48 ...I am of the opinion that separation (where necessary for the protection of society) and rehabilitation should be the primary focus of judges involved in sentencing FASD-affected offenders. Separation does not equate with jail, however. Separation can and should be achieved in a secure community setting in most instances. We do not jail children under the age of 12 in Canada and when they are under the age of 18 years, they are detained separately from adults. FASD-affected individuals who function at the level of children should only be placed in jail as a last resort and then in a facility separate from adults in order to avoid the victimization experienced by Mr. Harper when he was in custody. Similarly, rehabilitation for Mr. Harper must accommodate his cognitive disabilities and can not be achieved through typical offender programming. It must involve individualized supports and a focus on improving his life skills through repetitive tasks done under supervision. Mr. Harper is capable of learning and developing, but he needs to be guided and supported in a manner that takes into account his limitations.

[59] The rationale of Lilles J., in stating that FASD offenders are less morally blameworthy than non-cognitively impaired offenders, and thus a proportional sentence is generally going to be a lower one, has been followed in the Yukon in many cases.

[60] One such case is my decision in *R. v. Charlie*, 2014 YKTC 17. Mr. Charlie was convicted on a guilty plea of committing robbery by entering a residence without consent in the company of two others, either pushing or being a party to the pushing to the ground of the 71-year-old resident and also to breaking into the bedroom and stealing a significant amount of money as well as some alcohol, medication and the resident's jacket and wallet.

[61] Mr. Charlie, an Aboriginal individual who was 29 years of age, had an extensive criminal record, including, in particular, a prior s. 344 offence for which he had been



sentenced in 2011 to a period of imprisonment of two years and three months. (The facts of the prior robbery conviction are set out in paras. 19 - 20 of **Charlie**).

[62] Mr. Charlie was assessed by Dr. Lohrasbe and a psychiatric assessment was provided. Dr. Lohrasbe noted that Mr. Charlie appeared to function at a higher cognitive level than would have been indicated by the reports Dr. Lohrasbe had reviewed, including a comprehensive FASD assessment.

[63] I also was provided two **Gladue** Reports in addition to a Fetal Alcohol Syndrome ("FAS") evaluation, the Medi-Gene FASD report and the psychiatric assessment.

[64] It was apparent that there was some divergence of opinion on the functioning capabilities of Mr. Charlie and the extent to which he required support and supervision.

[65] Mr. Charlie was diagnosed with FASD. In paras. 67 – 77, I referred to the principles, purposes and objectives of sentencing and the case of **R. v. Ramsay**, 2012 ABCA 257 as follows:

**67** The purpose and principles of sentencing are set out in s. 718 to 718.2 of the *Code*. I do not intend to repeat them at length here, but reserve the right to insert them in any written decision.

**68** Applying these purposes and principles in sentencing an FASD offender such as Mr. Charlie, however, requires additional considerations in how these purposes and principles are to be applied.

**69** Denunciation and deterrence, generally leading objectives when dealing with offences of violence, are less applicable to individuals such as Mr. Charlie (*R. v. Harper*, 2009 YKTC 18, Lilles J. decision in *Charlie*, paras 43 to 47).

**70** Offenders suffering from the effects of FASD can be viewed as having a lesser degree of moral culpability, and thus their sentences should be reduced in accordance with s. 718.1, which reads that "A

sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." This has been noted in cases such as *Harper* and *Quash*.

**71** The Alberta Court of Appeal in *R. v. Ramsay*, 2012 ABCA 257, stated the following with respect to the sentencing of individuals suffering from Fetal Alcohol Spectrum Disorder:

15 FASD has been described as "a non-clinical umbrella term that refers to a range of cognitive deficits associated with disabilities incurred when a mother uses alcohol during her pregnancy. Such disabilities are permanent and can result in a range of symptoms including poor memory, impulsiveness, [and] inability to appreciate fully the consequences of one's actions"...

16 Crafting a fit sentence for an offender with the cognitive deficits associated with FASD presents at least two identifiable challenges: accurately assessing the moral blameworthiness of the offender in light of the adverse cognitive effects of FASD; and balancing protection of the public against the feasibility of reintegrating the offender into the community through a structured program under adequate supervision. Medical reports assessing the prospect of the offender's rehabilitation and reintegration into the community are essential to the task and must be carefully analyzed.

**72** This notion is concisely captured by Roach and Bailey, in "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing", (2009) 42 U.B.C. L. Rev. 1, as quoted by the Court of Appeal,

The determination of an appropriate sentence for the FASD offender is a challenging task for courts. Although it is increasingly recognized that FASD is a disability that can have a profound impact on the level of an offender's moral culpability, the mitigation that this consideration would normally have on the length of a sentence is frequently tempered by the practical need to protect the community. [Yet often] the programming available to an FASD-affected offender is inadequate and the resources to support and monitor such an individual in the community are severely lacking ...

**73** The Court of Appeal goes on to state, at paragraph 18, that:

18 These challenges must be placed within the principles and objectives of sentencing. The fundamental principle of sentencing is proportionality: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

19 Further, s. 718.2(a) of the *Criminal Code* requires that a sentence should be increased or reduced to account for any relevant aggravating or mitigating factors relating to the offence or the offender. Therefore, to the extent that FASD is demonstrated to have attenuated or diminished the moral blameworthiness of the offender, it must be taken into account.

20 Moreover, sentencing is an individualized process and courts should craft sentences for FASD-affected offenders with awareness of their unique neurological deficits and abilities. ... Courts in dealings with persons with cognitive defects in the spectrum will encounter a "wide range of effects resulting from prenatal alcohol exposure"... This broad diversity in the severity of impairments accounts for the marked disparity in IQ and other quantifiable indicia of cognitive ability among persons diagnosed with FASD, which should in turn alert courts to the "danger of ignoring differences that may be relevant to the appropriate policies applied in each case".

21 Accordingly, in assessing the offender's moral culpability, the sentencing judge must have regard to the cognitive deficit of the particular offender. This is consistent with the approach of this court in sentencing offenders suffering from a mental disability. Ordinarily, "where an offender is found to be criminally responsible, but suffering from a serious mental illness, a more lenient disposition reflective of the offender's diminished responsibility is called for" ... Mental disorder can also be, on much less frequent occasions, a factor that may escalate the objective of protection of the public, but in such cases Parliament and the common law require strict proof and clear fact finding. (*R. v. Arcand*, 2010 ABCA 363, 499 AR 1, para. 164)

22 A diagnosis of FASD also affects the principles of denunciation and deterrence (both specific and general).

**74** The submission of the appellant in *Ramsay* was that it was:

22 ... inappropriate to emphasize deterrence when Dr. Yee's assessment indicates that specific deterrence is lost on the appellant. Moreover, the importance of general deterrence ought to be diminished where an offender's cognitive abilities undermine his capacity to restrain antisocial impulses and to understand why his behaviours have brought him into contact with the criminal justice system. The appellant also says that denunciation should not be paramount where an offender is of reduced moral culpability.

**75** The Court considered how other courts have dealt with a submission in this nature and stated:

23 Other courts, and in particular the Yukon Territorial Court, have addressed this issue. In *R v Harper*, the court observed that "[t]he role of specific deterrence in sentencing FASD-affected offenders decreases in proportion to the severity of the offender's cognitive deficits" (at para 43). In *R v Quash*, 2009 YKTC 54 at para 70, [2009] YJ No 72 the Yukon Territorial Court noted that "[t]he greater the cognitive deficits of the offender, the less role specific deterrence should play".

24 Where the cognitive deficits experienced by the offender significantly undermine the capacity to restrain urges and impulses, to appreciate that his acts were morally wrong, and to comprehend the causal link between the punishment imposed by the court and the crime for which he has been convicted, the imperative for both general deterrence and denunciation will be greatly mitigated (*Quash* at para 71; *Harper* at para 47).

**76** The Court of Appeal goes on to say:

24 ... We agree with the observation of the court in *Quash* that:

That is not to say that the principles of general deterrence and denunciation have no place in sentencing FASD offenders. In certain cases there may be a role, depending on the nature of the offence and the degree of moral culpability of

the offender, based upon the extent of his or her cognitive difficulties" (at para 72).

**77** Finally the Court of Appeal stated that:

25 The degree of moral blameworthiness must therefore be commensurate with the magnitude of the cognitive deficits attributable to FASD. The more acute these are shown to be, the greater their importance as mitigating factors and the less weight is to be accorded to deterrence and denunciation, all of which will serve to "push the sentence ... down the scale of appropriate sentences for similar offences" (for the careful application of this sliding scale to an especially severe case of FASD, see R v FC, 2012 YKTC 5 at paras 24-29, 38-43.

[66] After considering the circumstances of Mr. Charlie and of the offence he committed, I sentenced him to nine weeks custody after crediting him 14 months custody for his time on remand.

[67] In *R. v. Charlie*, 2015 YKCA 3, the Yukon Court of Appeal dismissed a Crown appeal of the sentence I imposed on Mr. Charlie. The Court stated in paras. 37 and 38 that:

**37** There is little doubt that the sentence imposed in this case is beyond the low end of range of sentences imposed on similar offenders for similar offences. However, as has been repeatedly said, sentencing ranges are merely guidelines.

**38** In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92, the Supreme Court of Canada explained the underlying justification for the reliance on sentencing ranges, which is to "minimiz[e] the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed..." (Emphasis added). The Supreme Court discussed the relationship between the wide discretion granted to sentencing judges and the range of sentences for particular offences in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44:

[44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down,

in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.  
[Emphasis added.]

[68] The Court further stated in para. 42 that:

**42** Mr. Charlie presents a serious challenge to the sentencing process. He is seriously compromised, but has the potential to do well in a controlled community environment. Although he is the author of his misdeeds, they flow from his inability to control himself when he consumes alcohol or drugs. This inability derives from his FAS, which, in turn, originated from problems flowing from his Aboriginal background. Without rehabilitation, his pattern of offending clearly will continue. With rehabilitation, he has a chance to lead an effective life. Society is best served if that were to occur.

[69] I consider that what was stated by the Court of Appeal in para. 42 with respect to Mr. Charlie to be equally applicable to T.M.

### **Application to T.M.**

[70] T.M. is a young Aboriginal offender from a dysfunctional background. While I do not have much before me in the way of background as to the actual tangible link between T.M.'s Aboriginal ancestry and the impact of this ancestry, such as whether there was any residential school attendance by his parents or grandparents, and the impacts of any such attendance, I have no difficulty accepting that it is quite possible,

even likely, that the difficulties his mother struggled with and that directly impacted him in utero and after he was born require that the principles in **Gladue** be applied.

[71] When I say that T.M.'s background was dysfunctional, I am of course not referring to his time with the M.s during which they provided him with a loving and supportive environment.

[72] I find that, even though T.M. certainly has some positive strengths, his FASD diagnosis and other cognitive deficits clearly place him in a position where the principle of proportionality with respect to the severity of the offences and the diminished moral blameworthiness of T.M. require that the sentence to be imposed be less than would be imposed on a non-cognitively impaired offender.

[73] I consider that the 312 days of pre-trial custody T.M. has served, at such a young age and in light of his cognitive limitations, has been difficult and has had a significant impact upon him. I accept that he is remorseful for his actions and that he has a better understanding of the negative impact of his choices to engage in a criminal lifestyle. To the extent that specific deterrence has any role to play in sentencing T.M., I am satisfied that his time in custody has more than dealt with this.

[74] I also agree, as per the comments of Lilles J. in **Harper**, that denunciation and general deterrence are not significant factors in the particular circumstances of T.M.

[75] T.M. made his own choices and these led him to where he is today. However, he made these choices from a very different place than some of the other individuals who have committed similar offences. This does not amount to an excuse for T.M.'s actions,

indeed he needs to be held accountable for his actions. However, the extent to which he needs to be held accountable must take into account the limitations he struggles with; limitations the root of which were imposed upon him before he even took a breath in this world.

[76] The focus of this sentencing must be upon the rehabilitation of T.M. To this end, I am satisfied that he does not need to serve any further time in WCC. Frankly, given the personal circumstances of T.M., a further period of actual incarceration would be counterproductive and would not accord with the interests of society. There is a support network set up for him upon his release. The involvement of FASSY and T.M.'s family, and the supports available to T.M., now that he is 19, provide reasonable prospects for a successful rehabilitation, thus reducing the risk T.M. poses to society for the commission of further offences.

[77] The spring and summer work season is here now. T.M. needs to be given the opportunity to reconnect with his family and put his hand to the positive things he has shown he is capable of doing, at a time when the best opportunity to do so presents itself. In my opinion, that is now.

[78] This said, I certainly have concerns about the extent to which T.M. poses a risk of committing further acts of violence and the potential risk of harm to others that could result from any such acts of violence. I do not, however, consider that the uncertainty as to T.M.'s risk factors requires him to be separated from society for a further period of time to provide society further protection. It does, however, require T.M. to be on a stricter level of supervision in order to allow for him to be monitored and be required to



comply with supervision. T.M. must not place himself in a situation where he drinks alcohol or uses illegal drugs. If he does so, he will in all likelihood find himself back before the Court.

[79] The circumstances of this offence of robbery are more aggravating than those that existed in the **Charlie** case. This said, the personal circumstances of T.M. are more mitigating, or less aggravating, than in **Charlie**, subject to the question of the lesser known risk factors associated with T.M. As stated earlier, the circumstances of the threat and mischief charges are more aggravating than often seen in similar charges.

[80] Therefore the sentences to be imposed will be as follows:

[81] For the s. 344 conviction the sentence will be 12 months' time served. To be clear, in imposing this sentence I am aware that T.M. has just under three and one-half months of time in remand for which he is not entitled to receive credit against the robbery conviction. In determining a fit sentence for T.M., as stated above, I consider that the time he has spent in actual custody at WCC to be sufficient and that no more time in actual custody is required.

[82] On the s. 264.1(1)(a) conviction the sentence will be six months consecutive to be served conditionally in the community;

[83] For the s. 430(3) offence the sentence will be 60 days to be served conditionally in the community and concurrent to the sentence for the s. 264.1(1)(a) offence; and

[84] For the s. 129(a) offence the sentence will be 30 days' time served concurrent;

[85] For the ss. 344 and 264.1(1) offences there will also be a period of probation of two years.

[86] For the s. 348(1)(b) offence committed while T.M. was a youth, pursuant to s. 42(2)(h) of the *Youth Criminal Justice Act* (“YCJA”), T.M. will be required to compensate his sister, M.T., in kind or by way of personal services at a time and on the terms that the Court may fix for any loss, damage or injury that has been suffered by M.T. As the monetary costs have been calculated as \$651.90 for the broken window and approximately \$80.00 for the computer tablet, T.M. will pay M.T. this amount unless M.T. and T.M. agree to a different amount or resolution.

[87] For the s. 145(1)(a) offence, pursuant to s. 42(2)(i) he will perform 30 hours of community work service as directed by his youth probation officer or such other person who may be designated by the youth probation officer.

[88] With respect to both youth offences, T.M. will be required to report to a youth probation officer in order to ensure that he is in compliance with the terms of these sentences. The time frame for completion of the compensation under s. 42(2)(h) and community work service under sub. (i) will be eight months.

[89] The terms of the conditional sentence order will be as follows:

1. You will keep the peace and be of good behaviour.
2. You will appear before the court when required to do so by the court.

3. You will report to a Supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in the manner directed by the Supervisor.
4. You will remain within the Yukon unless you have written permission from your Supervisor.
5. You will notify your Supervisor in advance of any change of name or address and promptly of any change of employment or occupation.

[90] Noting that the victims of these offences did not file Victim Impact Statements or otherwise request no-contact and not-attend at specified location restrictions on T.M., but rather simply wanted to put these offences behind them, I decline to make such orders, other than as follows:

6. You will not go to the Petro-Canada gas station on 4th Avenue in Whitehorse, Yukon.
7. You will reside at the residence of D.M. and S.M., abide by the rules of that residence and not change that residence without the prior written permission of your Supervisor.
8. At all times you are to remain inside your residence or on your property except in the immediate company of D.M. and/or S.M. or any other responsible adult approved in writing in advance by your Supervisor or except otherwise with the prior written permission of your Supervisor. You must

- answer the door or telephone to ensure you are in compliance with this condition. Failure to do so will be a presumptive breach of this condition.
9. You will not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor.
  10. You will not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off-sales, bar, pub, tavern, lounge or nightclub.
  11. You will attend and actively participate in all assessment and counselling programs as directed by your Supervisor and complete them to the satisfaction of your Supervisor for the following issues: alcohol abuse, substance abuse, psychological issues, and any other issues identified by your Supervisor, and provide consents to your Supervisor to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this condition.
  12. You will participate in such educational or life skills programming as directed by your Supervisor and provide your Supervisor with consents to release information in relation to your participation in any program you have been directed to do pursuant to this condition.
  13. You will make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts.

14. You will not possess any firearm, ammunition or explosive substance or any weapon as defined by the *Criminal Code*.

[91] The terms of the probation order will be as follows:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;
4. Do not go to Petro Canada on 4<sup>th</sup> Avenue, Whitehorse, YT;
5. Remain within the Yukon unless you obtain written permission from your Probation Officer or the court;
6. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter, when and in the manner directed by the Probation Officer;
7. Reside as directed by your Probation Officer, abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer;
8. For the first four months of this order abide by a curfew by being inside your residence between 10:00 p.m. and 6:00 a.m. daily except with the prior written permission of your Probation Officer or except in the actual presence of D.M. or S.M. or another responsible adult approved in advance by your

- Probation Officer. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;
9. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;
  10. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
  11. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: substance abuse, alcohol abuse, psychological issues, and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;
  12. Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;
  13. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

14. Not possess any firearm, ammunition, explosive substance or any weapon as defined by the *Criminal Code*.

[92] As a result of the s. 344 conviction you will be subject to a firearms prohibition for a period of ten years.

[93] As the s. 344 conviction is for a primary designated offence you will provide a sample of your DNA pursuant to s. 487.051.

[94] The Victim Surcharge is a total of \$500.00. You will have 30 months' time to pay.

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COZENS T.C.J.