

Citation: *R. v. T.L.*, 2022 YKTC 3

Date: 20220204
Docket: 20-00545
20-10026
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

T.L.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.5 of the *Criminal Code*.

Appearances:
Megan Seiling
Luke Faught

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): T.L. faces four *Criminal Code* charges. The allegations are of spousal violence, including three incidents in [redacted], namely: an aggravated assault on January 11, 2020; an assault, between September 1 and October 31, 2019; and, an assault causing bodily harm on July 24, 2017. Additionally, he is charged separately with assaulting his spouse in Whitehorse on June 29, 2020. Counsel consented to the two Informations before the court proceeding to trial at the same time.

[2] The Crown led evidence from eight witnesses. T.L. testified in his own defence and called evidence from another witness.

Background

[3] T.L., the accused, and D.M., the complainant lived together in [redacted] for a number of years. They are the parents of two young children.

[4] D.M. testified to the “party scene” that she experienced in [redacted]. It included people using both powder and crack cocaine, as well as drinking to excess. Sometimes people were out of control at these parties; there were conflicts between people; there were verbal, and sometimes, physical confrontations; and there was sometimes property damage. The parties might start in the evening and go well into the early morning hours. She attended some of these parties. D.M. admitted suffering from substance addictions. She mentioned a cocaine addiction, and spoke in her testimony about often drinking alcohol. She has attended treatment for addictions on more than one occasion. She feels that she has made progress in dealing with her addictions.

[5] Similarly, T.L. explained in his testimony that, especially over the last four years, he has dealt with an addiction to crack cocaine. He also used MDMA and magic mushrooms occasionally. Additionally, he stated that both he and D.M. would, at times, drink beer and whiskey heavily. The consumption often occurred together. His crack cocaine addiction was a result of the stress in his and D.M.’s relationship. T.L. explained that they were in a relationship between 2013 and 2020.

[6] He described D.M.'s drug use, specifically crack cocaine, as heavy. According to him, she also drank quite a lot of alcohol frequently. He described finding, at times, drug paraphernalia in the house during the years when he was working. He testified that there were also drug dealers who came to their house. He indicated that he never felt safe.

[7] T.L. explained that he attended drug treatment within the last year.

Summary of the Relevant Facts Regarding the Alleged Offences

[8] In terms of the matters before the Court, I will set out a summary of the evidence for each incident in a chronological fashion.

July 24, 2017

D.M.

[9] At the time that she testified, D.M. was 27 years old. She lived in [redacted] between 2014 and 2020 during which time she was in a long-term relationship with T.L.

[10] D.M. testified that she and T.L. were living together in [redacted] with their daughter, E., on July 24, 2017. My understanding is that E. was under the age of two at that time. D.M. was spending time with A.E. who had two young children. D.M. recalled that she, T.L., and their daughter were at A.E.'s house for a barbeque. The adults were drinking alcohol, but she did not recall drinking a lot of alcohol. In cross-examination, she agreed that she, T.L., and A.E. might have used drugs at the residence. T.L. was mad, as was his habit when he consumed alcohol. The children were sleeping on a mattress in the living room. T.L. decided that he wished to leave and take their

daughter home. D.M. disagreed and an argument and physical altercation ensued. D.M. was holding their young daughter and T.L. attempted to take her away. A.E. and D.M. suggested that they would phone the police if he did so. A.E. intervened to try to stop him from taking the child.

[11] T.L. either punched or struck D.M. in the head with the palm of his hand, resulting in her ear ringing and her having difficulty hearing. He was yelling at A.E. T.L. finally left with their daughter, at which time A.E. phoned the police. T.L. later returned E. to D.M. He was upset, crying, and apologizing for having taken her.

[12] The RCMP also came to the residence to investigate. D.M. told police that T.L. was a great father, and that there should be no conditions imposed to prevent contact between them. D.M. described being taken to the medical centre with her daughter and A.E. in an ambulance. She was subsequently transported to Whitehorse General Hospital (“WGH”) for a CT scan. A condition preventing T.L. and D.M. from having contact was put in place.

[13] D.M. agreed that she told police and a social services worker that T.L. had hit her, but later changed her story. She testified that the reason she changed her story was because she loved him and was scared that he would end up in jail as a result of his abusive behaviour.

A.E.

[14] A.E. was living in [redacted] in 2017. She met D.M. there in or around 2016. She knew T.L., as she attended school with him in [redacted]. She testified that she

remembered some of the events of July 24, 2017. A.E. believed that she held a birthday party for one of her daughters that day. People had come to her house earlier in the day for that occasion.

[15] A.E. testified that she recalled D.M. being at her house that evening visiting with her daughter. She recalled cleaning up from the party and putting the children to bed. A.E. was drinking wine and playing a video game with D.M. A.E. believed that she had drunk three or four glasses of wine, although she agreed that she did not really remember how much. She agreed that later, when police arrived, she told them that she had only drunk one glass of wine. D.M. was consuming alcohol, but A.E. did not recall how much. A.E. testified that she did not consume any other intoxicants that evening. She agreed that she had consumed powder cocaine in the past, but had never taken crack cocaine.

[16] A.E. testified that she had gone to bed, but later awoke to T.L. and D.M. arguing in her bedroom. Their baby daughter, E., was on the bed near A.E. D.M. and her daughter had been on a foam mattress in the living room when A.E. went to bed. After waking up to this argument, she observed T.L. hit D.M., prompting A.E. to get out of bed. T.L. pushed A.E. to the floor. He then took E. and proceeded to the back door of the house. D.M. followed him. D.M., T.L., and E. were in the porch area, when A.E. came around the corner at the entry point to the porch. D.M. was attempting to remove E. from T.L.'s arms. D.M. was holding the top part of E., while T.L. held onto E.'s legs. T.L. struck D.M. with a closed fist to the left side of her head. The force caused D.M. to be pushed back, which, in turn, led to E.'s head striking a wall. A.E. tried to intervene, but T.L. threw her backwards. She fell onto a miniature sized picnic table in the living

room. She got up and pushed T.L., telling him to get out of her house. She ultimately called police, and they attended her residence.

[17] A.E. described T.L. as being very angry during this incident. His face was red and he was shouting. She did not recall if he left the residence with E.

[18] A.E. agreed that she was under the influence of alcohol when she went to bed, and that that makes it more difficult to remember. Additionally, she stated that her memory has faded over time, and that she has tried to forget this incident. She also described the events transpiring in very short order. She did not recall T.L. being at the residence earlier in the evening.

[19] She told the police operator on the morning in question that she did not believe that E. was in danger with T.L. She testified that when she provided an audio-recorded statement to police, within an hour of the incident, that she was in shock due to what had occurred.

Cst. B.D.

[20] Cst. B.D. was working in [redacted] on July 24, 2017. He received a call from dispatch at 6:30 a.m. with respect to a possible domestic and a child welfare concern. Cst. B.D. and another police officer went to the home of A.E.

[21] When the police arrived, A.E. seemed reluctant to answer the door. When she did, she advised that there was no longer a child safety concern as the child in question had been brought back unharmed. A.E. admitted to minor alcohol consumption, but Cst. B.D. believed she had consumed much more. He testified that he believed this to

be the case because of the smell of alcohol emanating from her, and because of her behaviour, specifically her reluctance to answer questions, including questions about her children.

[22] Cst. B.D. spoke briefly to D.M., who he believed was intoxicated. He noted a small scratch on her upper lip, and possibly a swollen cheek.

[23] D.M. and her child were subsequently taken by ambulance to the medical centre. Cst. B.D. drove his partner to the medical centre to be with them. He then returned to A.E.'s residence to take an audio statement from her.

[24] In cross-examination, Cst. B.D. agreed that D.M. advised him that she had no fear of T.L. going forward, and that the incident in question would not have happened if she had not been consuming alcohol. She subsequently advised him that this incident was a confusing time. He also agreed that A.E. had phoned him on July 26, 2017, to determine if she was going to be charged with an offence in regards to the July 24 incident.

T.L.

[25] T.L. testified that on July 23, 2017, A.E. invited him and D.M. to her trailer. They went there at around 6 p.m. with their young daughter, E. They drank some beer and used crack cocaine. A.E. and D.M. left the residence to obtain more alcohol. They returned with whiskey and beer. T.L. drank beer, and not too much whiskey, while A.E. and D.M. drank whiskey. A.E.'s two children went to bed in their separate bedrooms,

while E. slept on a comforter in the living room. He believed the children went to bed around 9:00 or 10:00 p.m.

[26] T.L. recalled that after the children were in bed, the three adults continued to party. At some point, the party moved from the living room to A.E.'s bedroom. They continued to drink and get drunk in that bedroom, while also smoking crack cocaine in the ensuite bathroom. He believed that they moved to that location to avoid the smoke from the crack cocaine bothering the children. T.L. described both A.E. and D.M. as being very intoxicated. He was less intoxicated. Both A.E. and D.M. became aggressive with him, making sexist and racist comments to him, specifically about him being a man and about the colour of his skin. Both were laughing at and mocking him. He asked them, without success, to refrain from doing so. As they continued with their rude and harassing behaviour, he thought that he should leave with E. D.M. did not want him to do so. He stayed a bit longer, but finally decided that he would leave whether D.M. liked it or not. He wanted to take E. because he did not feel she would be safe considering the level of intoxication of D.M. and A.E.

[27] A.E. advised him aggressively that she would phone the police if he took E. with him. D.M. was also in his face and shoving him. He went into the living room and wrapped his daughter in a blanket. He had her in his right arm as he tried to put his shoes on. He was holding her close, but was unable to get his shoes on because A.E. was pushing him from behind, causing him to fall into the wall. Also, D.M. was grabbing E.'s torso while he held her waist. He testified that he hit D.M. in the ear with an open hand, but that it was unintentional. In cross-examination, he stated that he was attempting to fend off D.M. He described the force of the blow as a six on a scale of

zero to 10, with 10 being the hardest. The strike to D.M.'s ear caused her to back off. A.E. stood behind her, and yelled at him that she would call the police.

[28] T.L. recalled taking E. to their house a short distance away. He checked her head and noted a little bump on it. He then decided to go back to A.E.'s in order to return the baby to D.M. He did so because he knew that the police would believe what D.M. and A.E. had to say, since he has a criminal record. He then went to the house of K.S., a friend.

[29] An Agreed Statement of Facts was entered into evidence with respect to the January 11, 2020 incident and this incident (Exhibit 4). In terms of this incident, it reads:

1. On July 24, 2017, D.M. attended the [redacted] for assessment. Redness was noted on her left ear and upper chest.
2. D.M. was immediately referred to Whitehorse for a semi-urgent CT head scan to investigate complaints of hearing loss in her right ear.
3. On July 25, 2017, a CT scan of D.M.'s head was conducted at the Whitehorse General Hospital. The scan revealed no abnormalities.

September 1 to October 31, 2019

D.M.

[30] D.M. detailed an assault that occurred in either the month of September or October 2019 in [redacted]. T.L. arrived home angry because he thought that D.M. was having an affair. T.L. was generally jealous and insecure. On that occasion, he assaulted her by punching and shaking her and pinching her arms. She described T.L. throwing her around, causing her head to hit and penetrate a wall. She stated that he was yelling at her during the assault, which took place over an extended time period.

As a result of the assault, she had swollen eyes and bruised arms. She also believed her nose was broken. She did not seek medical attention.

[31] D.M. took photographs of the bruising of her right eye and right arm. These two photographs became Exhibit 1 at trial. She showed the photographs to her good friend, K.S. She did not report this to the RCMP because she was scared, and she did not want to get T.L. in trouble. The couple's children were not home at the time, as they were with D.M.'s mother.

[32] D.M. testified that a police officer came to perform a wellness check with her after she had sustained these injuries. She told the police officer that a woman had beat her up. She testified that she lied to the police officer because T.L. was home at the time, and she was scared to get him in trouble. She testified at trial that she had never been beat up by a female in [redacted].

T.L.

[33] T.L. remembered D.M. having injuries to her face and arm in September or October 2019. He testified that she became involved in a fight at B.D.'s house during a party. He and D.M. were at B.D.'s duplex drinking alcohol and using crack cocaine. The room where the party took place was upstairs. There were a number of women at the party, which resulted in D.M. becoming jealous. He became uncomfortable at the party because of the tension between D.M., S.M., and B.D. He left the party for a short time to obtain whiskey for D.M. He described D.M. as a bit rude and standoffish. Everybody at the party was intoxicated. He described D.M. as being very intoxicated.

[34] At one point, D.M. went downstairs with S.M. and B.D. When they returned, D.M.'s hair was disheveled and her face red. She was breathing heavily. She would not tell T.L. what happened. S.M. and B.D. returned upstairs around the same time, and both looked angry.

[35] T.L. decided to go downstairs to start the car, and upon his return, he told D.M. that they should leave. She did not acknowledge the suggestion. Even though T.L. continued to attempt to have D.M. leave the party, he was unsuccessful. Soon thereafter, B.D. and S.M. started fighting D.M. S.M. was punching D.M. in the face and pulling her hair. T.L. was able to get in between the women, and was able to remove B.D. and S.M. from the melee. He then carried D.M. down to the vehicle.

[36] After leaving D.M. in the vehicle, T.L. returned inside the residence to obtain her jacket and boots. While he was doing this, D.M. came back inside, and tried to talk to S.M. and B.D. Another fight broke out, with S.M. and B.D. again fighting D.M. D.M. was not really fighting back, as S.M. punched her. T.L. intervened a second time, extricated D.M., and carried her over his shoulder down the stairs to the car. He placed her in the back seat, jumped in the vehicle, and drove home. D.M. was kicking, screaming, and throwing objects in the vehicle during this short drive. He assisted her out of the car when they arrived home. He brought her to a bedroom and she laid on the bed. She fell asleep within five minutes. He noted that D.M.'s injuries included a bloody nose and a swollen eye.

[37] T.L. denied having caused the injuries depicted in the two photographs that became evidence at trial.

S.M.

[38] S.M. has known D.M. since approximately 2012. She also knows T.L. as they grew up together. She considers herself a friend of D.M. and T.L. She is a life-long resident of [redacted]. She testified that she had little memory of the months of September and October 2019. She initially stated that although she had attended parties at the residence of B.D., and may have drunk to excess at some of these, she could not say whether she had been to a party in September or October 2019. In her testimony, she did not initially remember any parties at B.D.'s residence where D.M. and T.L. were also present. She also did not have a memory of ever being in a physical conflict with D.M., although it could have occurred in a state of extreme intoxication. In response to further questioning, S.M. testified that it was very possible that she had been in a physical altercation with D.M. at a party at B.D.'s residence that she then described. She indicated that both T.L. and D.M. were there. T.L. had to remove D.M. from the party by carrying her on his shoulder outside. She was unable to remember when that party occurred.

B.D.

[39] B.D. provided reply evidence for the Crown. She testified from [redacted]. She was a good childhood friend of T.L. She met D.M. when she and T.L. started dating. She did not recall spending much time with them in the fall of 2019. Although she had partied with them on a few occasions, she did not recall hosting a party in September or October 2019. She stated that at some parties she was quite intoxicated, which would affect her memory. She has experienced situations where she did not remember

events from a party due to her alcohol consumption. She did not recall getting into any disagreements with D.M.

January 11, 2020

B.D.

[40] B.D. is a resident of [redacted]. He is a friend of T.L.'s, and he knows the complainant, D.M. B.D. testified that he had a house party on January 11, 2020; however, he does not recall much about that evening, as he was quite intoxicated. He was unable to remember who attended his house party. He testified that when he was later asked by the RCMP about a 911 call made that evening, he denied making the call.

S.M.

[41] S.M. testified that she attended a party at B.D.'s house with D.M. and T.L. on January 11, 2020. She explained that she did not have a good memory of that occasion, due to her intoxicated state. She recalled that she, D.M., and T.L. were drinking, dancing, laughing, and, generally, having a good time.

[42] At some point, T.L. and C.J. became engaged in an argument, leading to a fight or a tussle. As a result of this incident, B.D. called the police. D.M. and T.L. departed the residence after this incident. The police arrived after B.D.'s 911 call. She understood that the police subsequently left to check on D.M. and T.L. She stated that D.M., like herself, was very drunk. She indicated that she did not know the level of

intoxication of T.L. She testified that D.M. was uninjured when she left the party with T.L.

Cst. E.M.

[43] Cst. E.M. is a member of the RCMP who was working in [redacted] on January 11, 2020. At approximately 6:30 a.m., she received a call for service to attend [redacted] regarding a possible domestic violence incident. Upon attendance, she spoke to the complainant, B.D., and to S.M. From the information that she received, she was of the view that she had to find D.M. and T.L. to ensure their safety. Cst. E.M. and her partner left the B.D. residence and travelled to the residence of T.L.'s mother, arriving at approximately 7:20 a.m. The police knocked on the door and T.L. responded. Cst. E.M. asked to speak to D.M.

[44] Cst. E.M. testified that when she spoke to D.M. in the front entry way, she noted that D.M. was very lightly weight bearing on her right leg, that she had swelling and bruising to her left eye, and that there was a small bruise on her right jaw line. She also appeared to be holding onto her stomach area. She told the officer that she did not remember what happened to her. Cst. E.M. suggested to D.M. that she should receive medical attention at the nearby medical centre. D.M. agreed with this suggestion, although she did not want the police to drive her there. She then walked to the medical centre, approximately 100 metres from the house, accompanied by T.L. and his mother. Cst. E.M. also attended the medical centre where she attempted to speak further with D.M. D.M. was subsequently transferred to WGH later that day.

[45] Cst. E.M. described D.M. as being highly intoxicated. The officer detected the smell of alcohol on her breath, and noted that her eyes were bloodshot and dilated. However, she noted that her speech was clear, and that she was calm and polite. Cst. E.M. also described T.L. as being calm and alert.

[46] An Agreed Statement of Facts (Exhibit 4) and hospital records (Exhibits 5 and 6) were filed with respect to this incident. The Agreed Statement of Facts addresses both the 2017 allegation and this matter. Regarding this allegation, it reads as follows:

4. On January 11, 2020, D.M. attended the [redacted] shortly before 8 A.M.
5. She was seen by the attending physician at 8:15 A.M.
6. Upon speaking with D.M., the attending physician included the following notes in his report:
 - a. patient vague on story, states at a party and was hit by a female.
 - b. Won't say how or when, feels she fell on her chest
 - c. on asking about charges she referred to the assailant as a "he and him" denies it was a male that assaulte[d] her
 - d. emesis X 1 a few hours ago prior to assault. +EtOH tonight, last drink around 0600.
7. In respect of her social history, the attending physician noted "smoker, soc EtOH, no drugs".
8. D.M.'s chest was x-rayed at the [redacted]. The x-ray revealed a subtle deformity at the lateral left sixth rib.
9. On January 12, 2020, D.M. attended Whitehorse General Hospital.
10. Another x-ray was performed at the Whitehorse General Hospital, revealing two fractured ribs (5 and 6) on her left side.

11. A CT scan of D.M.'s head identified that her left orbital floor was fractured. It also revealed that she had a slightly impacted, comminuted fracture of her left nasal bone.
12. Her sternum and right calf were tender to palpate.
13. Upon speaking with D.M., the attending physician included the following notes in their report:
 - a. "got into a fight"
 - b. "I got beat up by male assailant"

D.M.

[47] On January 11, 2020, D.M. and T.L. were living at the residence of his mother. Their two children were staying with D.M.'s mother. She and T.L. attended a house party at B.D.'s residence. She testified initially that she was drinking alcohol, but was not drunk. In cross-examination, she also agreed that she consumed crack cocaine with T.L. and another partygoer. During the party, she testified that T.L. started to become angry with her. Another woman, C.V., tried to defend D.M. T.L. became upset with other partygoers, and ended up in an altercation with a male, who she believed to be E.M. D.M. described T.L. screaming, yelling, throwing things around, and pounding his chest.

[48] Due to T.L.'s behaviour, D.M. convinced him to leave the party. As he drove home, he continued to argue with her and yell at her. He then punched her to the left cheek. She did not remember anything after that until T.L. came to tell her that the police were at the door wanting to see her. The police shined a light in her face, and then advised her that she should go to the medical centre across the street. She testified that she ultimately agreed to attend the medical centre, and that T.L. walked

her there. The police were still around at this time, so while walking to the medical centre, she told T.L. that he should “run”, because she did not want him to go to jail, as she still loved him. She falsely reported that a female had injured her. She recalled her face and ribs hurting. After attending the medial centre in [redacted], she recalled going to WGH. She never returned to [redacted].

[49] D.M. also recalled that a female police officer, Kelly, took photographs of her injuries while she was in Whitehorse (Exhibit 8).

[50] D.M. testified that T.L. tried to communicate with her when she was in Whitehorse. She identified text messages that she received from him after this incident that she viewed as apologies for what he had done to her. These text messages became Exhibit 2 at trial.

[51] D.M. described suffering from the injuries that she had sustained.

T.L.

[52] T.L. testified that he and D.M. attended a party at the residence of B.D. on the evening of January 10, 2020. He believed that they arrived there sometime around 9 p.m. or later. He recalled that there were five or six other people in the house, who were drinking whiskey. Both he and D.M. started chatting with the partygoers. He told the Court that he did not have many drinks that evening, as he “wasn’t into it”. D.M. started drinking alcohol.

[53] One of the people at the party, C.J., approached T.L. in a menacing manner. Although nothing further transpired at that time, T.L. decided to leave the party because

he was not enjoying himself. When he requested D.M. to leave with him, she declined. He walked to a friend's house nearby to chat. While he was there, D.M. telephoned him. Although he did not remember the exact reason, he stated that she was upset with him. She also asked him to purchase drugs. He made some calls ultimately securing some crack cocaine.

[54] When he returned to the party, people were very drunk. A three-litre bottle of whiskey that he had observed earlier had much less alcohol in it. T.L., D.M., and another person, whose name he could not remember, consumed the crack cocaine that he had bought.

[55] Some hours later, T.L., who still was not enjoying himself, again asked D.M. to leave. She wanted to stay and drink alcohol. Subsequently, C.J. again approached T.L. in an aggressive manner. They ended up fighting in the corner of the living room. During the fight, T.L. was thrown against the wall causing his head to go through the drywall. Others intervened to break up the fight. T.L. described himself as being upset. He told D.M. that he was leaving. Although she decided to return home with him, she was angry about leaving. He helped her into the vehicle. On the way home, they argued about what had occurred at the party. She was very drunk and yelling at him in the car.

[56] When they arrived home, she exited the vehicle quickly and tried to run up the snow packed stairs to the trailer. She was unsuccessful and fell on the stairs. T.L., who was still in the car, saw her fall on her face. Her face started to bleed. She started screaming and running back and forth on the ground in front of the steps. He exited the

vehicle to try to assist her, but she moved his hand away, and tried to go up the stairs again. On the second attempt, she fell on her side and slid down the steps. He helped her to get up and into the house. She was holding her ribs, and limping. Her nose was bleeding, as well. T.L. explained how he took care of D.M. in the home after she started vomiting. When the police arrived, he woke her up so that she could talk to them. He then accompanied her to the medical centre. He testified that at one point she told him to run, but he replied that he would not run from the police. During cross-examination, he testified that he had misspoken earlier in his testimony, and that he believed D.M. had said during the walk to the medical centre, "Let's run". He thought that she made this suggestion so that it would make him look guilty of something. As a result, he declined to do so.

[57] T.L. testified that he sent text messages to D.M. the following day to apologize for his behaviour at the party and the arguments that they had had. He felt ashamed about his general behaviour, including his use of alcohol and drugs, and for the fact that their children were not living with them at the time. He wanted to make changes to improve himself, including his verbal attacks of D.M.

June 29, 2020

D.M.

[58] D.M. testified that she was at her aunt's residence in the Porter Creek subdivision of Whitehorse on June 29, 2020. She was in an on again, off again relationship with T.L. D.M., her aunt, A.V., and T.L. were drinking alcohol in that

residence. D.M. drank a couple of beers, but was not intoxicated. T.L. had one shot of whiskey.

[59] A physical altercation occurred when D.M. advised T.L. that she did not want him to take her car. He became very upset and broke a glass table in the apartment. He tried to take the car keys, which were on a lanyard that D.M. had around her neck. She described him yelling, shaking her, throwing her around, and trying to get the keys to her car. At one point, he was on top of her on the couch. A.V. retrieved a baseball bat and told him that if he did not leave, she would call the police.

[60] D.M. ended up giving the keys to T.L. because he had been choking her with the lanyard. She followed him downstairs and outside, begging him not to take her car. She was concerned because he was drinking alcohol. She also did not want him to take her only means of transportation.

[61] In cross-examination, she testified that she agreed to drive him home. She also agreed that A.V. was in the back seat of the vehicle. Partway there, T.L. started punching the dash of her car. She stopped the vehicle, jumped out of it and ran. D.M. stated that she phoned 911 at some point during this altercation in the vehicle. She agreed, however, that she lied to the operator by saying that she had made a mistake in calling 911. She testified that she did this because she was scared. She also agreed that she might have been drinking alcohol for days around this time. She did not recall whether she and A.V. were using crack cocaine.

[62] As a result of the altercation, she lost some skin on her ring finger, which had become caught in the lanyard. Police took photographs of the injury that became Exhibit 9 at trial.

T.L.

[63] T.L. testified that D.M. called him close to midnight on June 28, 2020, to return her car. He drove from his residence in Copper Ridge to A.V.'s apartment on Centennial Street. When he arrived, A.V. and D.M. were smoking crack cocaine. He gave the car keys back to D.M. Although he did not want to stay, he agreed to when asked by D.M. Over the next number of hours he consumed alcohol and did some crack cocaine with them. D.M. and A.V. became frustrated when they ran out of crack cocaine. A.V. became rude to him, prompting him to think he should go home. He did not have any money, as he was receiving social assistance, and he thought he could take her car home. He asked for the car keys with the intention of driving home, although he stated to D.M. that he would go and get some cigarettes, and return. She agreed. As he started to drive away, he realized that he risked D.M. calling the police about his taking her vehicle if he did not return. He parked the vehicle and returned to the apartment.

[64] T.L. explained that he stayed at the apartment for a time and had a drink of whiskey. He and A.V. continued to argue at times. He was not enjoying himself, but when he indicated that he wanted to take D.M.'s car and return to his residence, she threatened to call the police. He still had the keys with him. An argument ensued and D.M. tried to rip the keys away from T.L., even though they were on a tether wrapped

around his hands. He was able to get out of the apartment with the keys. He was in the car, collecting his thoughts, when he received a phone call from D.M. and A.V. They advised him that they were the calling police. He ultimately apologized to them by telephone, and requested a drive home. D.M. and A.V. came down to the car. D.M. got into the driver's seat and A.V. entered the back seat. T.L. had moved to the passenger seat.

[65] As they were travelling on the Alaska Highway, a verbal argument occurred. T.L. became upset and punched the dash of the vehicle. D.M. stopped and exited the vehicle, and started to run. He secured the vehicle and then tried to get her to come back, but she entered another vehicle operated by a drug dealer that T.L. knew. T.L. returned to the car but, by this time, A.V. was in the driver's seat. She closed the driver's side door on his fingers and started to drive away. T.L. was able to get the door open, pulled his hand away and landed on the ground. He made the long walk to his residence, which he estimated to be eight kilometres away.

Other Evidence

[66] K.S. is a [redacted] resident who has known T.L. all his life and who was close friends with D.M. for approximately six years when D.M. resided in that community. She recounted a telephone conversation that she had with D.M. in late April or early May 2020. She explained that D.M. told her that if T.L. continued to do well with the children, she would go to the police to bring up previous things. In cross-examination, K.S. stated that D.M. did not say that she would lie to police. D.M. testified that she did

not tell K.S. that she was going to contact police to have T.L. charged because his relationship with their children had changed.

[67] Cpl. Kelly Manweiller initially met D.M. in Whitehorse on January 12, 2020. She took a series of photographs of D.M., which were introduced into evidence (Exhibit 8). She took other photographs of D.M. on August 30, 2020 (Exhibit 9). She testified that she recalled a conversation with D.M. in February 2020 when they discussed the topic of T.L. commencing visitations with his children through Family and Children Services, and how that made D.M. think about her relationship with T.L. In her testimony, D.M. denied that she had said this to Cpl. Manweiller.

Analysis

[68] The Crown has the burden of proving the essential elements of each charge beyond a reasonable doubt. This burden never shifts to the defence. In **R. v. Starr**, 2000 SCC 40, para. 242, the Court held that this burden "...falls much closer to absolute certainty than to proof on a balance of probabilities".

[69] The credibility and reliability of evidence is a central feature in this trial. It must be remembered that this is not a credibility contest between Crown and defence witnesses.

[70] Mr. Justice Vertes considered this issue in **R. v. Campbell**, 2018 YKSC 37, at para. 4, where he instructed himself:

I must remind myself that a criminal trial is not a credibility contest. It is a trial to determine whether the Crown has proved the guilt of the accused on the specific charge alleged beyond a reasonable doubt. Therefore, it is

wrong to decide a criminal case where, as here, there is conflicting evidence simply by deciding which version of events is the preferable one. The decisive question is whether, considering the evidence as a whole, the Crown has proved the guilt of the accused beyond a reasonable doubt.

[71] The Court in **R. v. Wolff**, 2019 SKCA 103, at para. 38, stated:

It is clear that there are two important aspects for a trier of fact to consider in assessing the testimony of witnesses: (i) credibility, and (ii) reliability. Credibility has to do with the veracity of witness's testimony; reliability has to do with its accuracy. A witness who is credible may provide unreliable evidence, because honest witnesses can misperceive events, have poor memory, or just be wrong.

See also **R. v. Sweet**, 2013 YKSC 42, at para. 7.

[72] As T.L. testified, the principles set out in **R. v. W.(D.)**, [1991] 1 S.C.R. 742, apply.

Those principles may be summarized, as follows:

- First, if I believe the evidence of the accused, I must acquit;
- Second, if I do not believe the accused's testimony, but am left in reasonable doubt by it, I must acquit; and
- Third, even if the accused's evidence does not raise a reasonable doubt, I must consider, on the basis of the evidence I do accept, whether I am convinced beyond a reasonable doubt of the accused's guilt.

[73] Therefore, regarding the third step, even if I were to find that T.L.'s evidence does not raise a reasonable doubt, I must still look at all the evidence that I do accept, to determine whether the Crown has proved the allegation beyond a reasonable doubt.

[74] I will first consider the evidence of the complainant, D.M. As outlined above, she testified to four separate incidents of abuse at the hands of T.L. At the time of each of these incidents, she was intoxicated to some degree.

[75] D.M. testified over the course of approximately two days. She was visibly frustrated during parts of the cross-examination process. While being cross-examined, she was, at times, argumentative, and, at other times, evasive or unresponsive. Additionally, cross-examination revealed a number of significant inconsistencies in or additions to her evidence. For example, despite statements to police detailing the allegations, when testifying about the June 29, 2020 incident, D.M. detailed for the first time that T.L. was on top of her on a couch during part of the alleged assault.

[76] Another example came from D.M.'s testimony of being assaulted by T.L. in her car on January 11, 2020. In statements to police, she stated that she had no memory of being beat up. She told police that she did not recall whether she was injured in her car or at T.L.'s mother's residence because the last thing that she remembered was putting on her seatbelt in the car. She advised police that although she assumed T.L. knocked her out in the car, she had no recollection of being assaulted. I should point out that these statements were not taken just after the alleged incident when, in some situations, women who are being abused may attempt to protect the abuser. D.M. provided these statements to police months after the alleged January 2020 incident, when she detailed a number of incidents of spousal assault. However, when testifying, D.M. described having a memory of T.L. punching her in the face in the car. I am of the view that she embellished her recollection of this incident in her evidence at trial.

[77] Finally, D.M. was questioned with respect to a series of text messages between her and T.L. (Exhibit 3). Defence counsel put to her that she had been attempting in this exchange to dissuade T.L. from advising A.V.'s husband that D.M. and A.V. were obtaining drugs. The alleged threat was that if T.L. shared this information, it would have a negative impact on her and T.L.'s relationship. In my view, D.M. made every possible effort on the stand to not respond directly to this question.

[78] Having carefully considered D.M.'s evidence, I find that I must treat her evidence, generally, with caution.

[79] As with other witnesses who testified, T.L. consumed alcohol and drugs, at times heavily, during the period of the alleged offences. He admitted that his consumption had become problematic in the four years leading up to the trial. In fact, in each of the four incidents that he described in his testimony, he was using alcohol and crack cocaine. He testified that in each of these incidents, D.M. and other Crown witnesses were consuming more intoxicants than he was. He referred to a scale of between zero to 10, zero being completely sober and 10 being fully and completely intoxicated. He described himself on some occasions being at a six on that scale (2017 incident) or a seven (the January 2020 incident). In cross-examination, he volunteered that for him, above a five on the scale would entail "staggering, I can't walk, or remember much; maybe hung over the next day". However, when challenged that his memory of some of these incidents was unclear based on his intoxication level being greater than a five on the scale, he rejected that assertion indicating that his memory was "crystal clear".

[80] Indeed, for both the July 2017 and January 2020 incidents, T.L. professed to have a detailed recall as to what transpired. On some issues, however, detail was conveniently lacking. For example, when, on January 11, 2020, he left the party to visit a friend who lived nearby, and who subsequently assisted him in finding crack cocaine, he could not remember his friend's last name.

[81] In terms of his behaviour, T.L. denied having a short temper, and denied that the consumption of alcohol and drugs shortened his temper. At the same time, he admitted to punching the dash of D.M.'s vehicle a few times when D.M. and A.V. were yelling at him as D.M. drove him towards his residence on June 29, 2020.

The January 11, 2020 Incident

[82] Turning to the incident alleged to have occurred on January 11, 2020, T.L. and D.M. left the party after the altercation between T.L. and another man. S.M. testified that the police were called at that time. Cst. E.M. received a call from dispatch at 6:30 a.m. to attend the residence of B.D. The police arrived at the B.D. residence at approximately 7:15 a.m., and subsequently drove to [redacted], where they located T.L. and D.M. at approximately 7:20 a.m. T.L. testified that it takes a few minutes to drive from B.D.'s house to the residence where they were staying. S.M. stated that when D.M. left the B.D. residence, she did not have any injuries.

[83] Considering my earlier comments regarding D.M.'s recollection of the drive home, I accept that she did not recall that drive, and cannot recall how she was injured. At the same time, I am unable to accept T.L.'s version of how D.M. became injured. It is important to note that T.L. testified that he helped D.M. into the vehicle outside of the

B.D. residence. Assisting her in this manner would be consistent with her high level of intoxication, as described by T.L. and S.M. Both testified that D.M. was severely intoxicated. Cst. E.M., who spoke to D.M. at the residence of T.L.'s mother, also described her as being highly intoxicated. Therefore, T.L.'s subsequent description of D.M., a few minutes later, being capable of jumping out of the car and attempting to run up the steps at his mother's house before he could exit the car does not make sense. His description of D.M. getting up from the first fall, where, according to him, she had fallen directly on her face, and screaming and running back and forth in front of the steps, before attempting to unsuccessfully climb the stairs, again, also strains credulity.

[84] Later that day, and early the following day, T.L. sent a series of written messages on Facebook messenger to D.M. that included an apology. It should be noted that T.L. provided detailed testimony as to what had occurred during the party at B.D.'s residence. This included a physical altercation between him and another individual, C.J. As soon as the fight ended, he told D.M. that they were leaving. He described using a rude tone with her at this point. He also used at least one profanity when asking her to leave the party. Additionally, he described D.M. yelling in the vehicle in the short ride home, which led to an argument. Part of the messages T.L. sent to D.M. on the evening of January 11 read, as follows:

baby [I] love you so much I'm so so so sorry baby. I love you with my whole heart. I'm [really] feeling ashamed and broken today. [P]lease call me when you get this. [Please] forgive me [you're] my whole life I [can't] make it without you.

[I]'m going to give everything i have to change for the good [it's] the absolute least [I] can do to make things up to you. [I]f it takes the rest of my life to make that happen [I won't] give up for a second because [you're] the love of my life.

[85] When T.L. testified to the reason that he was apologizing to D.M. by text, he stated that he felt bad about what had happened at the party, including “our arguments, our yelling”, and he later stated that he wanted to make things up to her for being rude to her and calling her down. In his earlier detailed testimony about what had occurred that evening, he had not mentioned anything about “calling her down” at the party. In cross-examination, in fact, he disagreed that he had been giving D.M. a hard time or “talking her down” at the party. When confronted in cross-examination with this omission, he replied, “...we did have an argument in the car, and maybe we did have an argument inside too; I can’t remember the exact things, so I don’t know.”

[86] Considering that T.L. had only argued with D.M. for a few minutes in the car, and was unsure if he had even argued with her at the party, his profuse written apology to her later that day is disproportionate to what he said he was apologizing for.

[87] I also do not accept T.L.’s evidence that his Facebook messenger messages were a response to texts and voicemails that he received from D.M. while she was receiving medial treatment, and which he did not preserve. First, T.L.’s messages reveal nothing to suggest that she had contacted him before his apology. Second, if she had called and texted him a number of times before he woke up, as he claimed, one would have expected her to reply to his January 11 message to call him. There was no indication, either in his testimony, or in his subsequent message to her on January 12, that she had done so.

[88] Additionally, I reject T.L.’s assertion that his messages on January 11 and 12 were his efforts to tell D.M. what she wanted to hear so that he did not risk losing his

children. As already mentioned, I do not accept that D.M. contacted him by text or voicemail on January 11. As such, she did not have occasion to threaten him to change his ways or fear losing his children.

[89] After consideration, the only reasonable inference that I can draw from this circumstantial evidence is that T.L. is asking forgiveness for a serious event, for which he is responsible, that occurred between him and D.M. on January 11. I find that the serious event occurred during a short period of time, when T.L. was arguing with D.M. in her car, or upon arrival at his mother's residence.

[90] Defence counsel submits that even if the Court is satisfied that T.L. applied force to D.M., I should have a reasonable doubt as to whether it was an intentional application of force. The defence contends that T.L.'s messages to her were not an admission of an intentional application of force, and are equally consistent with an apology for a reckless, negligent, or accidental application of force, or any other state of mind falling short of intentionality.

[91] I find that D.M. had no injuries when she left the party with T.L. On the other hand, she sustained serious injuries to different parts of her body, specifically to her orbital bone and nose, as well as to her ribs. I also find that T.L. and D.M. were arguing in the car on the way home. In my view, the physical evidence of injuries to both her facial area and her ribs is circumstantial evidence consistent with an intentional application of force by T.L., and is the only reasonable inference to be drawn.

[92] On the whole of the evidence, I find that the Crown has proved beyond a reasonable doubt that T.L. assaulted D.M. after they left the party together, entered her car and began to argue, or upon arrival at the residence where they were staying.

[93] The defence submitted that if the Court were to find that T.L. intentionally applied force to D.M., it should only convict of the lesser offence of common assault, because the Crown did not establish objective foresight of bodily harm. It is correct that the *mens rea* required for aggravated assault is objective foresight of bodily harm, but the actual injury itself does not need to be intended or subjectively foreseen. As stated in **R. v. Palombi**, 2007 ONCA 486, at para. 38:

...In addition to proof of an intentional application of force to make out the charge of aggravated assault, the Crown also had to establish objective foresight of bodily harm. In other words, the Crown had to show that a reasonable person would foresee that the appellant's actions would result in bodily harm as defined in s. 2 of the *Criminal Code* being "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."

[94] In my view, considering the injuries sustained by D.M., a reasonable person would have foreseen that their actions would result in bodily harm.

[95] It is was not argued otherwise, but based on the medical evidence, the injuries that D.M. sustained resulted in serious bodily harm to her, and clearly meet the threshold of an aggravated assault.

[96] Therefore, I find T.L. guilty of the offence of aggravated assault.

The September 1 - October 31, 2019 Incident

[97] Based on the evidence, I find that D.M. was injured in September or October 2019. The photographs entered as Exhibit 1 clearly show bruising under her right eye. There are two different versions of how D.M. sustained these injuries. As set out earlier, I have found that I must treat D.M.'s evidence with caution. At the same time, I determined that T.L.'s evidence also suffers from reliability and credibility issues. B.D.'s testimony, aside from confirming a "party scene" in [redacted] was unhelpful in determining the issue of T.L.'s innocence or guilt with respect to this allegation.

[98] S.M. testified that she recalled attending parties at the residence of B.D. She also admitted to drinking alcohol to excess, and, at times, to the point of "blacking out", or having little memory of her actions once she became sober. She agreed that although she was not an aggressive person, she had been in physical altercations in the past after consuming alcohol. Although she could not pinpoint the time, she had a recollection of T.L. removing D.M. from a party at B.D.'s residence in a similar fashion to that described by T.L. She agreed that it was very possible that she was in a physical altercation with D.M. on that occasion.

[99] I am mindful that I am not to simply choose between two competing versions of events. Based on the evidence before me, I am left with a reasonable doubt as to whether T.L. assaulted D.M. on this occasion. As such, I find him not guilty of this charge.

The July 24, 2017 Incident

[100] The evidence of D.M., A.E., and T.L. is similar to the extent that T.L. was attempting to remove his and D.M.'s daughter from A.E.'s residence when the alleged assault occurred. According to A.E. and D.M., the incident occurred in the porch area as T.L. was holding his daughter and preparing to leave A.E.'s residence to walk a short distance to his and D.M.'s home.

[101] I accept that this incident occurred quickly and that D.M., A.E., and T.L. had been consuming alcohol and possibly cocaine. I also take into account that this was an emotional incident involving a child, which occurred over four years before trial. The passage of time, the emotional state of the parties at the time, and the consumption of intoxicants affected the quality of the evidence at trial.

[102] According to D.M., she was holding their daughter, E., while T.L. attempted to remove E. from D.M. It was at this time that he struck her in the ear. She also testified that, "...he was grabbing me, pushing me... A.E. jumped in; I know she jumped in. There was a physical altercation; I don't know exactly what happened; it was physical between me and [T.]". At another point in her testimony, she agreed, in regards to the hit, that T.L. was reaching for her, but she did not know what happened or how it happened.

[103] A.E. testified that there was a struggle in the porch area while T.L. was holding the child. After T.L. struck D.M., she became involved in the altercation. She agreed that her memory of the evening was incomplete. Although A.E. did not appear to be

trying to mislead the Court, I find that because of the passage of time and her state of intoxication, her evidence is not completely reliable.

[104] T.L. agreed that he struck D.M. with an open hand to the ear, but that he did so to defend himself and protect his daughter, as he was being assaulted by D.M. and A.E.

[105] The defence submits that the provisions of s. 34 of the *Criminal Code* must be considered in light of the facts alleged. The section reads:

34.(1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior

use or threat of force and the nature of that force or threat;

- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[106] I find that I am unable to reject T.L.'s narrative of events. My findings of fact are that:

1. T.L. was in the porch area holding E. and preparing to leave the house;
2. D.M. was attempting to remove E. from T.L.;
3. A.E. was in close proximity, in physical contact with T.L. while yelling at him;
4. The emotions of the three adults were heightened as a result of E. being involved in this dispute;
5. The incident occurred quickly;
6. T.L. struck D.M. with an open hand to the ear.

[107] I agree that there is evidence that T.L. believed, on reasonable grounds, that his daughter was in need of protection. I am also of the view that there is some evidence that he struck D.M. for the purposes of protecting his daughter. Additionally, I have

considered the factors set out in s. 34(2) of the *Code*. Importantly, T.L.'s decision to take his daughter home can hardly be assailed, based on where the child was sleeping, and the state of affairs in A.E.'s home. When he made an effort to leave with his daughter, the situation deteriorated, with D.M. and A.E. attempting to prevent him and his daughter from leaving the residence. This physical altercation occurred very quickly while he was holding his daughter. I find that the amount of force T.L. used was not disproportionate to the threat to his child.

[108] As a result, I find that the Crown has not proved beyond a reasonable doubt that T.L.'s application of force with an open hand to D.M.'s ear was unreasonable in the circumstances. I find myself having a reasonable doubt on that point. Therefore, I am not satisfied that the Crown has disproved the self-defence claim beyond a reasonable doubt. As a result, I find T.L. not guilty of the assault causing bodily harm charge.

The June 29, 2020 Incident

[109] D.M. testified to being assaulted by T.L. while at the residence of A.V. Although both D.M. and T.L. testified that A.V. was present, she did not testify.

[110] The respective versions of events of D.M. and T.L. have many similarities, including a dispute as to who should hold the keys to D.M.'s vehicle. Although D.M.'s version of events makes more logical sense to me than that of T.L., I must look at the whole of the evidence to determine whether the charge is proved beyond a reasonable doubt.

[111] I have earlier noted the credibility and reliability issues that are present in this case. Even though I prefer D.M.'s evidence with respect to this incident, I am, nonetheless, left with a reasonable doubt as to what occurred. In the result, I find T.L. not guilty of this assault charge.

CHISHOLM T.C.J.