Citation: *R. v. B.A.A.B.*, 2022 YKTC 28

Date: 20220506
Docket: 21-00681
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Seidemann III

REGINA

v.

B.A.A.B.

Appearances:
Nicolas Mercier — Counsel for the Crown
Joseph Doyle — Counsel for the Defence

REASONS FOR JUDGMENT

[1] SEIDEMANN III T.C.J. (Oral): B.A.A.B is charged with two counts of what is referred to as harassment, contrary to s. 264(2)(d) of the *Criminal Code*; and one count of mischief, pursuant to s. 430(4) of the *Criminal Code*.

[2] The real issue in this case, for the most part, is whether or not the evidence discloses an objective basis for the fear which the complainants refer to in their evidence.

[3] As several of the people have the same last name, I am going to give an introduction of the participants in this proceeding. B.A.A.B. I will refer to normally as

either “B.A.B.” or the “defendant”. One of the complainants is C.B., his spouse, and I will refer to her normally as “C.B.” The other complainant is K.W., that is, the mother of C.B., and I will refer to her throughout as “K.W.” The defendant and C.B. have a child, M., and he will be referred to when required as “M.”

[4] The defendant and C.B. married in 2017. They lived in Whitehorse in a house that C.B. had owned before they got together. K.W. had lived with C.B. and she moved out to her own home in 2018. The child, M., was born in 2019.

[5] The first incident that anyone describes between the defendant and C.B. occurred in May 2020. C.B. says that the defendant was asking her baiting questions, asking her to acknowledge that she was not a good mother. She became aware that he was recording the conversation on his phone in his shirt pocket. She says she asked him what he was doing and requested that he stop recording. He refused. She says she grabbed the phone from his pocket, went to the living room, went towards the patio door, and threw the phone out that door onto the deck. She says that when she did that, while she was in the doorway, that the defendant tackled her to the ground. She says he was on top of her, pinning her arms down to the deck.

[6] The defendant says that C.B. grabbed the phone from his pocket, ran to the deck, and in his words “spiked it” to the deck, obviously intending to damage it. He says that they both then bent down to the phone, collided, and fell to the deck. He denies tackling or otherwise causing C.B. to fall. C.B. says that this was the first physical violence between them.

[7] The police were called by C.B. They came, checked with the neighbours, and there were no independent witnesses. The defendant was asked to leave to de-escalate the situation, and he did.

[8] B.A.B. returned a week later and they remained together until July 2021. There was conflict off and on between that time but no physical conflict.

[9] On July 8, 2021, C.B. sent the defendant a text that she wanted him out. She said either he had to leave or she would force him out.

[10] On July 21, 2021, the defendant called the RCMP ostensibly to complain that C.B. was driving dangerously with their child unsecured in the vehicle. She says that they were arguing. She asked him to leave and he would not, so she took the child and went to her mother's house.

[11] C.B. applied for an Emergency Intervention Order ("EIO"), a court order giving her exclusive occupancy of the house, which was granted. It was served on the defendant and when she returned to the house — I understood it to be several days later — he was gone. The defendant took only some of his belongings with him and is obviously still upset that he has not obtained all of his belongings.

[12] The EIO was confirmed on August 4, 2021, to expire October 4, 2021, and it then set out specific parenting time for the defendant with the child, M. Some at least of these parenting times were supervised by K.W.

[13] On August 10, 2021, although the EIO gave exclusive use of the home to C.B., the defendant requested to have the parenting visit occur in the house where M. could

watch cartoons. K.W. agreed and permitted this. This resulted in an incident between K.W. and the defendant. K.W. says that she provided snacks and a water bottle for M. The defendant wanted to go in the kitchen to get him a glass of water. K.W. told him not to. The defendant went to the kitchen and opened a cupboard door. K.W. says she tried to prevent that and the defendant slammed the cupboard door against her arm. The defendant says that K.W. was assaulting him, trying to prevent him from going into the cupboard.

[14] The defendant audio recorded some or all of this visit and a portion of this recording was tendered by the defendant. In it, the defendant can be heard saying, “Why are you assaulting me?” and K.W. can be heard saying that M. already has a water bottle and the defendant does not need to get a glass.

[15] Both C.B. and K.W. say that they observed the defendant’s truck to drive by their residence on multiple occasions. When driving downtown, they would see his truck and thought that he was following them. The defendant denies that.

[16] In September 2021, the defendant was served with papers for C.B.’s application for divorce. The defendant says that at that point he realized that, in his words, “It was a lost cause."

[17] On September 9, 2021, C.B., K.W., and M. went to the Real Canadian Superstore in Whitehorse. They parked and C.B. and M. went into the store, leaving K.W. in the vehicle. This was several days after the vehicle had been vandalized by scratching the paint while parked at C.B.’s home overnight.

[18] Shortly after C.B. went in the store, K.W. observed the defendant's truck pull in and park a short distance away. She saw the defendant approaching the vehicle with his phone held out in a way that she interpreted as the defendant recording video of the vehicle. She moved and the defendant became aware of her presence and turned and returned to his truck and left. The defendant says he was talking on the phone to his lawyer at the time, not recording. He says it is purely coincidence that he came at the same time and parked close to C.B.'s vehicle. He says that, as soon as he was aware C.B.'s vehicle was there, he left immediately and returned to where he was then living, some 40 minutes out of Whitehorse.

[19] On September 29, 2021, C.B. texted to the defendant that there was a concern that M. had contracted COVID and that they would be getting him tested. An appointment was made at the only location in Whitehorse where tests could be conducted, which were only available by appointment. Just after parking at that location, the defendant drove by in his truck. The defendant explains that by saying that he had been a short distance away when he got the text and determined to go by the test centre to get an appointment, as he had had contact with M. in a parenting visit days earlier. He says that when he saw C.B.'s vehicle there, he continued on without stopping. There is no evidence that he ever did get either an appointment or a test.

[20] On October 5, 2021, the day after the EIO had expired, the defendant went to the house. C.B. was working at home because she was ill. The defendant knocked and C.B., without thinking or enquiring, opened the door, saw that it was the defendant, and slammed it shut. The defendant remained at the door, knocking and ringing the doorbell, then walked around the side of the house, returned, and knocked again. C.B.

texted three times for him to leave or she would call the police. She did call the police but the defendant had left before they arrived.

[21] On October 22, 2021, C.B. had received numerous texts and emails from the defendant that she was ignoring. She took the afternoon off from work and went home. She put M. down for his nap and left him with K.W. while she went out to do some errands. One of the texts, which she did not see until later, was a text where the defendant said that if she did not respond, he would send the RCMP for a wellness check and then come to the house. The defendant did call the RCMP and requested a wellness check on M.

[22] Cst. Hoidas came to the house. He found K.W. there, they got M. up from his nap, and Cst. Hoidas found that everything was calm and M. appeared to be well cared for. He said he would so advise the defendant. K.W., in her evidence, said she told the officer that the defendant would not like that. Cst. Hoidas later called to confirm that he had told the defendant that there were no issues with M.

[23] At approximately 3:15 that afternoon, the defendant came to the house. The front gate was padlocked. He walked along the fence and climbed over it onto the front porch. He rang the doorbell numerous times and knocked on the door. He was standing on the front porch holding his phone out as if he was recording. The defendant left the porch and went around to the back of the house. He stepped over to the neighbour's yard. He returned to the front door and rang and knocked again. By this time, the RCMP had been called but he left again before they arrived.

[24] After he returned to the front porch, on this occasion, the defendant took hold of the doorbell, which incorporates a camera, and pulled it loose from the wall. He then attempted to stick it back on the wall. When C.B. returned to the house, the wires to the doorbell, which run up the wall inside the doorway and through a hole in the wall to the doorbell, were disconnected from the doorbell and had fallen back through the hole in the wall. It is this action which is the basis of the mischief charge.

[25] The doorbell was not permanently damaged. It was repaired by putting the wires back through the wall, reconnecting them, and refastening the doorbell to the wall. The doorbell was clearly temporarily damaged, which could be sufficient to support the charge.

[26] K.W. also detailed behaviour of the defendant during an access visit on August 12, 2021. This was when the EIO was in effect. On that occasion, K.W. was supervising the visit at the park across the street from the house. The defendant wanted to go in the house. He picked up M. and went to the house and tried to enter it, but it was locked. He wanted K.W. to open it. She refused. He put M. in his truck, then a few minutes later drove off with him. K.W. called the RCMP. As the RCMP arrived, K.W. heard the defendant's truck in the backyard of the house and got a text that he was there. When she went to get M., the defendant video recorded her.

[27] C.B. refers to several occasions when access visits were scheduled and the defendant would show up and park outside the house 20 or more minutes early. He would just sit in his truck. She says she felt freaked out by this and requested that he not do it, but he continued. She says that the exchange of M. was to occur at the front

gate and the EIO provided that their communication regarding access was to occur by text or email, but the defendant would try to engage her in discussion about access where and when the exchange occurred. She also says that on several occasions, when the defendant was told that M. was sick and access could not occur, the defendant showed up and waited outside the house anyway.

[28] The defendant has testified. He has denied any intention to cause any fear. In his version of events, in many cases, he disagrees with the descriptions of C.B. and K.W. His explanation of all of the various appearances simultaneously with C.B. and K.W. is that those are purely coincidence and he denies following them around the City of Whitehorse on any occasion.

[29] When a defendant testifies, the test that I am to apply is that set out in the case from the Supreme Court of Canada which is commonly referred to as "*W.(D.)*" (*R. v. W.(D.)*, [1991] 1 S.C.R. 742), that is, if a defendant testifies or calls evidence on his behalf, I must consider whether I except that evidence; and if I accept it, I should give effect to it which, in most cases, would result in an acquittal. If I do not accept it, I have to consider whether it can give rise to a reasonable doubt. Even if I do not necessarily believe it, it would normally give rise to a reasonable doubt unless I can say that I can affirmatively reject it, that I definitely believe it to be false. Even if I believe it to be false, I have to go on to consider whether or not the evidence called on behalf of the Crown establishes the case beyond a reasonable doubt.

[30] In this case, counsel for B.A.B. says that, even if I reject his evidence, the evidence called by the Crown is not sufficient to make out the case beyond a

reasonable doubt. That is why I indicated at the outset that the real issue in this case is whether or not there is a reasonable basis for the fear which both K.W. and C.B. have testified to.

[31] In this case, I can say I do not believe the defendant. Where there are differences between C.B. and the defendant, or between K.W. and the defendant, I reject his evidence.

[32] The cases are very clear. I cannot do that simply because I find one person or the other to be more believable. Before I can say that I reject the evidence of the defendant, I must have a very clear reason. I find that in a number of areas.

[33] On August 10, 2021, the defendant's own recording has K.W. clearly telling him that there is already a water bottle there for M. It is clear to me that what is happening is that the defendant is not going to permit K.W. to tell him what he can and cannot do in what he, several times in that recording, refers to as "the marital home."

[34] At the Real Canadian Superstore, he says that he had gone to that particular location to buy things in large bulk quantities because he was living some distance out of Whitehorse. That was his explanation for why he did not just go to another store after he saw C.B.'s car there. But when he does see K.W. and C.B.'s vehicle, he says he leaves and he drives to where he says he was then staying, 40 minutes out of Whitehorse, rather than simply waiting a short time for C.B. to finish shopping and leave.

[35] What is most significant is the evidence regarding October 22, 2021. The defendant denies that he requested a wellness check. He says that what he requested was for the police to accompany him to the home so he could get his belongings. He did not know why they actually did a wellness check.

[36] The evidence of Cst. Hoidas is that he spoke to the defendant, who specifically requested a wellness check of M. The officer and K.W, actually got M. up from his nap for that purpose. The reason given to the officer by the defendant was that he had not heard from C.B. or the child in a while. The term Cst. Hoidas attributed to the defendant was that there had been “radio silence” with C.B. According to Cst. Hoidas, the first mention of B.A.B. going to the house was when the officer told B.A.B. that he had checked and everything was okay. The defendant then wanted to know if it was okay to go to the house. The officer told him, after checking, that the EIO had expired and it was not illegal.

[37] In addition, C.B., as I previously referred to, had received a text threatening to request a wellness check. It is abundantly clear to me that that was exactly — what the RCMP officer testified to — is what occurred and what B.A.B. testified to in court was his attempt to minimize this event.

[38] The defendant’s explanation for appearing at the COVID test site at the same time as C.B. and K.W. is just not credible. It is totally unbelievable, sir.

[39] C.B. says that on that date, she had texted the defendant to say that M. was sick and there could be no access visit. She says despite this, the defendant came to the house and sat outside in his truck for 40 minutes. She says she advised the defendant

that they had booked a test but did not tell him the time. Nonetheless, he managed to be there at exactly the same time as C.B.

[40] I simply do not believe him.

[41] C.B. and K.W. say that they have seen the defendant's truck drive by their residences both in person and in review of recordings from cameras that they have now installed. They say they have seen it in their vicinity in downtown Whitehorse and believe the defendant has, on occasion, been following them. Defence counsel suggests that there are many white trucks in Whitehorse and that what they see and attribute to the defendant is not really the defendant.

[42] C.B. and K.W. say there are distinguishing features that permit them to recognize the defendant's truck. They acknowledge, particularly with the recordings, that there are some times when all they can say is that it is a white truck similar to the defendant's. However, they say there are multiple occasions when they can identify the defendant's truck.

[43] I accept their evidence.

[44] Defence counsel says that, even if I accept C.B. and K.W.s evidence and reject the defendant's evidence, the evidence is not sufficient to make out the offences charged. The reason for that is his position that, notwithstanding the presence of a subjective fear of the defendant by C.B. and K.W., there is no objectively reasonable basis for that fear.

[45] The essential elements of the offence of criminal harassment defence set out in s. 264 of the *Criminal Code* are identified in *R. v. Sanchez*, 2012 BCCA 469, at para. 54. They are:

> 1) It must be established that the accused has [without lawful authority] engaged in the conduct set out in s. 264(2) (a), (b), (c), or (d) of the *Criminal Code*.
>
> 2) It must be established that the complainant was harassed [by the conduct].
>
> 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
>
> 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
>
> 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable.

[46] In this case, the conduct alleged is “threatening conduct." That has been defined in the cases and, most particularly, *R. v. George*, 2002 YKCA 2, has:

> 36 …
>
> > …a tool of intimidation which is designed to instill a sense of fear in its recipient. …

[47] In this case, the threatening conduct is alleged to be the repeated unwanted attendance at the house, driving by the house, attending the location where C.B. or K.W. then were, or following them around.

[48] I am satisfied that the defendant did all of these things. He came early for access and sat outside the house. He came to the house on occasions when he knew

there was no access scheduled and he was unwanted.

[49] I am satisfied that he was observed driving by or in the vicinity of the house when there was no legitimate reason for so doing.

[50] I am satisfied that B.A.B.'s attendance at locations where C.B. or K.W. were located were not accidental but intentional and likely a result of following them.

[51] In one of the Ian Fleming *James Bond* novels, one of the villains comments on Bond's third apparently innocuous interference with his plans with the statements:

> Once is happenstance. Twice is coincidence. The third time it's enemy action.

[52] This is not a statement of law but it is a statement of a reasonable general principle and, in this case, we have far more than three times.

[53] The defendant would have me believe that it is all coincidence, but I do not. I believe it was deliberate, purposeful, and was threatening conduct.

[54] Both C.B. and K.W. say that they have changed how they now carry out their lives as a result of that conduct. They were harassed by it.

[55] The defendant does not dispute that both C.B. and K.W. feared for their safety. What he does dispute is whether that fear is, in all the circumstances, reasonable.

[56] The answer to that question is, to my mind, very much linked to the question of whether the defendant knew that they were harassed or was reckless or wilfully blind to it. I do not think I can say that it has been established beyond a reasonable doubt that

the defendant intended to cause fear in the complainants. What I think has been established beyond doubt is that the defendant gave no consideration whatsoever to whether or not his conduct would cause fear in the complainants.

[57] The house was C.B.'s house well before the defendant came on the scene. It is still C.B.'s house. The defendant does not see it that way. In his mind, it is "the marital home." He has referred to that a number of times in giving his evidence. It may be that, at some point, a court may determine that he has an interest in it or is entitled to compensation for a share in it — but unless and until that occurs, it is her house.

[58] The defendant has still not obtained all of his personal property. He is clearly frustrated by that. That is a legitimate frustration. The earlier those issues can be resolved, the better for all of these persons. But at the relevant times, the defendant was acting on the basis that he would do what he wanted, acting on his beliefs that this was the marital home, and with no concern or consideration for C.B. or K.W. Their positions were irrelevant.

[59] That attitude is exemplified by the access visit on August 12, 2021, when he demanded to be allowed in the house, despite the EIO.

[60] It is exemplified by his behaviour on August 10, 2021, when he was allowed in the house and would not comply with restrictions by K.W. because it was the "marital home", despite the EIO.

[61] It is exemplified by his consistent knocking and ringing of the doorbell when not admitted on October 5 and 22, 2021.

[62] It is exemplified by B.A.B. jumping the fence to come to the house when stopped by a locked gate. Nothing was going to stop him.

[63] The fact is he thinks he can do what he wants. For someone who has experienced that behaviour to feel fear is entirely reasonable in the circumstances. That they would worry about what he might choose to do next is completely understandable. B.A.B. has given no thought to whether his actions might cause fear. It is the epitome of reckless or wilful blindness. The very fact of that wilful blindness makes the fear more reasonable.

[64] The defendant says that he simply was "playing" with the doorbell and it came off. He says it was not his intention to destroy it.

[65] I accept that B.A.B. may not have intended to destroy it. He had no right to do anything to it but push the button. He says he intended to "play with it" and had the effect of breaking it. He intended to do what he did. He may not have intended the result but he bears the responsibility for that result. It is another example of him doing what he wants without worrying about the result. In this case, the result was damage.

[66] I am satisfied the fear experienced by these women was reasonable. They were harassed. The conduct was threatening. This was criminal harassment. This was damage for which there is no legal excuse, and I find the defendant guilty of all counts.

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SEIDEMANN III T.C.J.