Citation: *R. v. Leschart,* 2022 YKTC 45

Date: 20221109
Docket: 21-00235
21-00235A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge De Filippis

REX

v.

JORDAN EDWARD LESCHART

Appearances:
Peterson Ndlovu — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR JUDGMENT

Introduction

[1] Danielle De Gagne is 34 years old and the mother of two children: XX (11 years old) and YY (2 years old). She suffers from a medical condition that entitles her to disability payments. Jordan Leschart is 39 years old and employed. Ms. De Gagne and Mr. Jordan met in the winter of 2017. YY is their son. The parents separated in 2019, before he was born. The parties experienced financial pressure after the separation. During the events in question, the complainant had custody of YY, but there was no formal agreement with respect to support, custody, and access.

[2] The family disputes eventually engaged the criminal process. The defendant was initially charged with these four offences:

- Threatening death to Danielle De Gagne between January 1 to 31, 2021 (264.1(1)(a));

- Being unlawfully in the dwelling of Danielle De Gagne at [redacted] with intent to commit indictable offence on May 7, 2021 (349(1));

- Assault on Danielle De Gagne on May 7, 2021 (266); and

- Harassing Danielle De Gagne by repeated phone calls and texts between May 7 to 13, 2021 (372(3)).

[3] The defendant was recently charged with these two additional offences:

- Failure to comply with an undertaking by contact with Danielle De Gagne and not for the permissible purpose of making child care arrangements, on September 9, 2022; and

- Failure to comply with an undertaking by going to the home of Danielle De Gagne, and not for the permissible purpose of picking up or dropping the child, on September 9, 2022.

[4] At the conclusion of the evidence, the Crown stated he would not pursue the recent breach charges. These reasons explain why the remaining charges are also dismissed.

Evidence

[5] Ms. De Gagne testified that in January 2021, the defendant threatened to kill her. By this time, the parties had known each other for five years and were separated. They had been discussing access to, and support for, YY. She said that "he put his hands around my throat and said if I take him to court, he would kill me". This frightened her. The complainant reported the incident to the police several months later. In cross-examination, she acknowledged that following this event, she allowed the defendant to stay over at her home on several occasions and that she also spent at least one night at his home.

[6] The complainant testified that in May 2021, the defendant came to her home uninvited. Earlier that day, she had taken YY to the defendant's place of business to discuss child support and to allow him to see his son. The defendant gave the complainant $200 and drove her and their son home. She told him she was "emotionally done that day and did not want him in the house". He ignored this and entered. The complainant asked her roommate – he had been living at the home for one month – to take YY upstairs. The defendant wanted to know if the roommate was her new boyfriend. The complainant testified that he pushed her away and she fell backward into the stairs as he went up the stairs. The complainant reported this unlawful entry and assault to the police.

[7] In cross-examination, the complainant confirmed that after leaving the defendant's place of business, the defendant drove her and YY to a grocery store. She could not recall if he purchased diapers and baby formula. The defendant drove them to her

home. On arrival, she told him she did not want him in her home, and they began to argue. The complainant denied that the defendant made two trips into the home before going upstairs – first, to bring the YY (who was in a baby car seat) into the entrance and then to retrieve a stroller from his truck. She denied the argument started once the defendant saw her roommate. She also rejected the suggestion that he inadvertently bumped into her as he ran upstairs.

[8] On the following morning, the defendant repeatedly called and texted the complainant. The call log and text messages are in evidence before me. The exhibit filed with respect to the text messages is somewhat garbled; there is some repetition, and the sequence is sometimes out of sync. This is a representative sample of the conversation:

> Defendant ("D"): How cud you do that. And then call the cops
>
> Complainant ("C"): Stop please
>
> D: How would you feel if some strange lady grabbed YY. You think about that. Really hard. Have a good night. How would you feel?
>
> C: I get it but I feel like you don't understand where I'm coming from or respect me enough to hear me when I talk
>
> D: You should have let me play with him. I don't care. They can attest [sic] me. Your Messed up. This is too much.

C: Can't even have space and you can't respect that. Like I'm drained from you wanna barge into my home. And refuse to leave.

D: Some strange person just grabbed my kid. Why wud you think I wud be ok with that. I wanted to play with my son. Hello. How could you do that. Are you with that guy now. Why is he handling my son.

[9] The complainant explained the communication as follows: "Jordan was persistent in his entitlement to come over to my home. He wanted to be allowed into the home to see YY. I told him to stop. She conceded that before the formal co-parenting arrangements, she would threaten to withhold access to YY when she became frustrated in arguments with the defendant.

[10] Several months later, in September 2022, the complainant agreed to help the defendant on a job site as she needed money. The defendant picked her up. She testified she felt uncomfortable going with him "into the bush" [the job site] but she did so anyway and spent the night at his home because "he was calm until the next day". The complainant was aware that currently there was a court order prohibiting contact between the parties "except for communication about YY". She explained that this is why she went to the defendant's residence. The complainant added that it was easier to stay over rather than endure his text messages. The next day the parties argued, and the complainant called the police. He was charged with breaching his release conditions.

[11] The complainant provided two statements to the police. The first was after the May 2021 incidents and the second after the argument in September 2022. With

respect to the latter, she conceded that she did not tell the police that she had spent the night at the defendant's home. She explained that she did not mention it as "the fighting did not start until YY was dropped off [at daycare the following day]". When it was pointed out that at the conclusion of the police interview, she was asked if she had anything to add, the complainant explained her answer "no" as follows: "I am not subject to conditions, he is, and I told the officer what was relevant".

[12] The complainant noted that "co-parenting arrangements are now in place", as arranged by lawyers, and a family court hearing is pending. However, at the time of the events in question, there was nothing in place governing support, custody, and access. The complainant said the defendant, "showed up when he wanted and I was expected to agree to this, there was no set schedule". Sometimes the defendant came to her home to visit with their son and on other occasions she went to his home for this purpose.

[13] The complainant acknowledged that she spent the night at the defendant's home in September 2022, notwithstanding her allegation that he had threated to kill her, while putting his hands on her neck, the previous January. She explained that she was with him to "find common ground to co-parent".

[14] Defence counsel produced these text messages between the parties about the September meeting:

> C: We need to talk tonight. I'll bring YY over to you're [sic] place if that's easier.

D: I don't have any money.

C: We need to talk about moving forward and that type of responses aren't it...seriously you need to start talking seriously.

D: I am taking it seriously.

C: It be nice to come there tonight...can me and YY come there...bringing YY to come chat. We need to move forward.

D: I don't think that is a good idea. I don't have any money.

C: Well we need to have a chat sorry.

D: I don't feel comfortable.

C: Ok then don't complain to me about you're [sic] lawyer bill when you have zero interest to work together.

D: And we aren't gonna agree.

C: No but I'm sure we can come to a compromise. Headed over.

[15] The complainant rejected the suggestion that the argument the following day "was all about money" and stated, "it was about this trial and how I caused it. She repeated that the defendant was calm the night before and she reported the breach the next day – not, as suggested by counsel, because "he was not nice" but because "he was abusive".

[16] Megan Braybrook lived on the same street as the complainant. She testified that in June 2021, between 6:00 p.m. and 8:00 p.m., she was in her living room when she heard “a ruckus”. Ms. Braybrook looked outside and saw the defendant and complainant arguing. They were at the front door of the complainant’s home. She heard the complainant say, “I don’t want you in my home”. The defendant said “who is that” and pushed the complainant aside as he ran into the house. The complainant “fell over, got up and said, ‘I will call the police if you do not leave’”.

[17] Ms. Braybrook described the complainant as one of her best friends. With respect to the defendant she said, “the vibe I get from him is not a good one”. Ms. Braybrook was questioned about the date of the incident and said she is “pretty sure it was the beginning of June”.

[18] The defendant testified that before the recent formal arrangement was in place for custody, access, and support, he transferred money to the complainant each month and occasionally bought groceries and supplies for the child. He added that sometimes the complainant asked for additional support and if he did not pay, she would not allow him to see YY.

[19] The defendant denied threatening to kill the complainant or grabbing her by the throat during their argument in January 2021. He said he would do anything to protect his son. In cross-examination he conceded that he may have said he “would kill for YY”.

[20] The defendant said he continued to see the complainant and YY after January 2021. However, they were not getting along. The defendant explained that the

complainant continued to withhold access to YY over support arguments. Shortly before the May 2021 incident, the defendant told her that he "had some cash – I got paid". She brought YY to his shop, and he gave her money, and he spent time with his son. He drove them to a grocery store and then to the complainant's home. He testified that he brought his son into her home in the car seat and then went back to his truck to get the stroller. When he returned to the entrance of the home, he saw a man carrying his son up the stairs. The complainant witnessed this and said, "you have to leave now". He ignored this and ran upstairs to check on his son. He said: "I did not intentionally push her. I was up those stairs fast, that was my priority. I was concerned. I didn't know who that was, It didn't seem right". He found his son in the car seat at the top of the stairs and the man was not there. The defendant picked up his son and brought him to the coffee table. He left when the complainant said she was calling the police. In cross-examination, the defendant contradicted himself and denied there was any contact with the complainant as he entered the home.

[21] The defendant admitted that the next day he sent numerous text messages to the complainant and that she told him "many times" to stop. His explanation for the repeated communication is that he was "traumatized" - "I didn't know who that man was. I knew there were incidents about drugs in that building and people in that building that I didn't want my son around".

[22] With respect to the September 2022 incident, the defendant confirmed that the complainant contacted him and asked to visit, as set out in the text messages referenced above. She arrived with YY and spent the night at his home. The next morning, he drove his son to daycare and he and the complainant went to the job site.

They “hauled gravel, dumped the load”, and went to his shop. By the time they arrived they were arguing over their family law issues. The defendant told the complainant that he was under financial pressure because he was paying a criminal lawyer in addition to support payments. He testified that he eventually told the complainant to leave his vehicle and he was later arrested for breaching conditions of his release order by being in contact with her.

Submissions

[23] Defence counsel argues that whatever findings I make about the credibility of the complainant, the defendant has, at least, raised a reasonable doubt about all charges. Counsel adds that the complainant’s role in the breach allegations, and her testimony about it, undermines her credibility with respect to all charges.

[24] The defence argues the complainant was not candid in her testimony about the alleged threat in January 2021. Months later she had an ulterior motive for contacting the police and alleging she was threatened.

[25] Defence counsel submits that the defendant’s testimony about being unlawfully in a dwelling should be accepted and is a justification for entering the home. The defendant made two trips from his vehicle to the complainant’s home, once to bring in the child and then to bring the stroller. On the return trip, he saw a strange man holding his child. The defendant demanded to know who the man was, ran into the home, bumping into the complainant, to ensure his son was safe. Having done so, he left as demanded by the complainant. It is argued that an acquittal should follow as this happened quickly and the contact with the complainant was unintentional and

insignificant. Defence counsel maintains that the subsequent communication by the defendant was not intended to harass the complainant but to express his frustration that he did not play with his son in the house, as expected, and because a stranger took the child upstairs.

[26] The Crown states that it is not in dispute that in January 2021, the complainant allowed the defendant to be in her home, that they argued over support payments, and the defendant said he would kill for his son. Counsel argues that against this background, the complainant's account of the events should be accepted - that she was frightened that the defendant had threatened to kill her.

[27] The Crown states that it is not in dispute that the defendant entered the complainant's home after being told he was not welcome and that he knocked or pushed her aside as he ran up the stairs. This was witnessed by Ms. Braybrook. Counsel adds that the defendant's innocent explanation for the contact with the complainant, in testimony in chief, should be disbelieved as he contradicted himself in cross-examination by stating there had been no contact with the complainant. The Crown argues that the assault is the indictable offence required for the offence of being unlawfully in a dwelling. Counsel also relies on the presumption in s. 249(2) of the *Criminal Code.* In the alternative, the Crown argues that if there is no proof the defendant was unlawfully in the dwelling, that he committed mischief.

[28] The Crown states that it is not in dispute that the defendant repeatedly contacted the complainant following the previous incident, that she repeatedly told him to stop, and that she felt harassed.

Analysis

[29] The Crown carries the burden of proving guilt beyond a reasonable doubt. This fundamental principle of law means that if the defendant has called evidence, there must be an acquittal where the testimony is believed or where the testimony is not believed but raises a reasonable doubt. An acquittal will follow even if the defence evidence is rejected, but the remaining evidence fails to convince, beyond reasonable doubt, that the defendant is guilty: *R. v. W.D.*, [1991] 1 S.C.R. 742.

[30] In this case, a matter that affects the credibility of both parties is their meeting in September 2022. As noted, the defendant was charged with failing to comply with his release order by (1) communicating with the complainant outside of the exception with respect to making childcare arrangements for YY and (2) attending at her residence. There is no evidence of the latter. However, although the complainant testified their overnight meeting was to make childcare arrangements for YY, this is not true. As the text messages make clear, the meeting was to discuss their outstanding family law dispute. To the extent the defendant is guilty of the breach, the complainant is a party to it. Indeed, she initiated the meeting and went to the defendant's home notwithstanding his expressed reluctance for her to do so. I assume it is for this reason that the Crown elected not to pursue the charge. That is a fair concession. That said, I take into account the fact that both parties ignored a court order.

[31] There is another troubling fact about the September 2022 meeting that impacts the credibility of the complainant. After spending the night together, the parties argued, and she called the police to report the breach. She did not tell the officer that she had spent

the night with the defendant. I do not accept her testimony that she failed to disclose this because she felt it was not relevant. It is a material fact that the police should have known about it in deciding if, and who, to charge for the offence.

[32] The complainant's failure to report the fact she spent the night at the defendant's home supports the defence argument that her late report, after the May 2021 incidents, of the threat in January 2021, reflects an "ulterior motive" and I should not be confident in her account of that threat. In any event, there is no reason to reject the defendant's denial of her account. Moreover, assuming the defendant said, on this occasion, that he would kill for his son, I would not take up the Crown's invitation to conclude this was a threat against the boy's mother.

[33] Section 349 of the *Criminal Code* provides as follows:

> (1) Every person who, without lawful excuse, enters or is in a dwelling-house with intent to commit an indictable offence in it is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or of an offence punishable on summary conviction.
>
> (2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

[34] The complainant and defendant agree that he entered her home after or while she told him he was not welcome to do so. He ignored her. However, the defendant did not enter the home for the purpose of committing an indicatable offence, as required s. 349(1) and I find he has displaced the presumption in subsection (2). Apart from any concerns about the complainant's credibility, I accept his testimony that he went inside the residence because a stranger, in a building of concern to him, had taken his infant

son upstairs. Having returned the child downstairs to his mother, who had called the police, he left. In this regard, I cannot reject the defendant's evidence that he did not intend to knock or push the complainant in his rush up the stairs. In all the circumstances, the inconsistency on point between his testimony in chief and in cross-examination does not trouble me. Finally, I do not agree with the Crown submission that this is a case of mischief.

[35] I am mindful of the testimony of Ms. Braybrook. The fact that she identified the May 2021 incident as having occurred in June is a harmless error. She is a best friend of the complainant and does not think much of the defendant. She impressed me as a truthful witness. However, leaving aside issues of unconscious bias, her evidence does not persuade me about the defendant's intent.

[36] Following the incident at the complainant's home on May 7, 2021, the defendant and complainant exchanged numerous messages about the matter. The complainant told the defendant several times that she did not want to talk to him. This is the basis of the harassment charge.

[37] To harass is to "annoy". The offence is made out if the complainant was annoyed by the repeated communication and the defendant intended to harass her. Assuming the complainant felt harassed, I am not convinced the defendant intended that result. The communication must be considered with the events at the complainant's home when, after the defendant was unexpectedly told he would not be allowed to enter and play with his son, he saw a strange man take the baby away, all this in a building with people of concern to him. The conversation between the parties is about his shock and

reaction. That the defendant kept expressing his frustration and hurt may have annoyed the complainant, but I conclude that was not his intent.

Conclusion

[38] I cannot reject the defendant's evidence about the charges of threatening and assault. In any event, I treat the complainant's testimony about these matters with caution and would not find the defendant guilty solely on her testimony. I accept the defendant's testimony about the charges of being unlawfully in the complainant's home and harassing her.

[39] All charges are dismissed.

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DE FILIPPIS T.C.J.