

Citation: *R. v. Butler*, 2023 YKTC 36

Date: 20230831  
Docket: 22-00049A  
Registry: Whitehorse

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

REX

v.

RANDY WADE BUTLER AND  
RILEY AXEL EDWARD BUTLER

Appearances:  
Peterson Ndlovu and  
Jennifer Crews  
Aya Tubinshlak  
Randy Butler  
J. Robert Dick

Counsel for the Crown  
Counsel for Riley Butler  
Appearing on his own behalf  
Counsel appointed pursuant to  
s. 486.3 of the *Criminal Code*

**REASONS FOR JUDGMENT**

[1] On August 24, 2021, Loretta (who prefers to be known as Tammy) Butler hosted a Christmas Eve dinner for her extended family. A few tables were put together in her living room/dining room to accommodate the large group. The participants sat down to enjoy the meal. The festive celebration did not last long or end well. Police were called and the defendants were arrested and taken into custody. The prisoners were soon released as the officer decided not to lay charges. The complainant did not accept this and pursued the matter with the police. Further investigation led to the charges before

the Court: Randy Butler is charged with assaulting Jeffrey Wolsynuk. Riley Butler is charged with assaulting Jeffrey Wolsynuk, by choking.

[2] The defendants are brothers. They are the sons of Tammy Butler. The complainant is the common law spouse of Tanya Butler, sister to the defendants. Among the other participants at the dinner were these: Leandra Blanchard, daughter to the complainant and Tanya Butler; Jayden Sidney, Ms. Blanchard's (then) partner; Tiarra Clark, the daughter of Tammy Butler and sister to Tanya, Randy, and Riley Butler; Reginald Clark, husband to Tiarra; Zahara Wolsynuk, daughter to the complainant and Tanya Butler; and Maximus (Max) Wolsynuk, son to the complainant and stepson to Tanya Butler.

[3] It is not in dispute that the complainant was cut above his left eye, requiring eight stitches. It is also agreed that the complainant did not report neck pain to the examining doctor and the latter did not note any injuries to the neck.

[4] The Crown called seven witnesses: Jeffrey Wolsynuk, Tiarra Clark, Tanya Butler, Zahara Wolsynuk, Maximus Wolsynuk, Leandra Blanchard, and Cst. Scott Carruthers. Randy Butler called two witnesses: Reginald Clark and Tammy Butler. The evidence of these witnesses is summarized below. Since many witnesses have a common surname, for ease of reference I will sometimes identify them by first name only.

[5] For the reasons that follow, I find both defendants guilty.

## Evidence

[6] The complainant, Jeffrey Wolsynuk, is 44 years old. He arrived at the Christmas dinner around 6:00 or 6:30 p.m. with Tanya Butler and their youngest daughter, Jemma. The complainant had not consumed alcohol before arriving and had only one can of beer before the incident in question.

[7] After carving the turkey, the complainant joined the many guests at the table and sat between Tanya Butler and Max Wolsynuk. Randy Butler was to his right at the end of the table and Riley Butler was at the other end.

[8] During dinner, Randy Butler got up and walked past the complainant to where his daughter, Leandra, was seated. Randy took her face in his hand and licked it from the chin up. This upset her and she went outside with her partner, Jayden Sidney. Tanya Butler yelled at her brother because of what he had done, and she also left the room. Tammy Butler took her son, Randy, to the boot room. This is a room off the side of the stairs on the way to the basement. The complainant saw Randy punch Jayden in the face. The complainant told his son, Max, to stay and he went to the boot room.

[9] When the complainant got to the boot room, he saw Tammy holding Randy back and telling him to stop. The complainant was angry and yelled at both mother and son; he said, "we're done, we're out of here, give us five minutes to get our shit and get out of here". On his return to the living room, he saw that his daughter Zahara was upset because she could not find her young son, Oliver. The complainant returned to the boot room and went down three steps. Randy was trying to prevent people from entering the boot room to get boots and leave. Riley pushed the complainant up against the wall

with one hand on his shoulder and told him to wait. The complainant pushed back and said he was looking for Oliver.

[10] The complainant took one more step down and was punched by Randy Butler with his right hand. He was struck just above his eyebrow. At the same time, Randy grabbed the complainant's hair with his left hand and pulled him back. The complainant grabbed Randy's legs and as both went to the ground, Tammy was ensnared. The complainant landed on top of Randy with Tammy on his side, on top of his right arm. Randy was facing the complainant. The complainant tried to protect himself with his left hand as his hair continued to be pulled and Randy repeatedly punched him in the back of the head. Suddenly, a hand came across the front of his neck and the complainant could hear his spouse, Tanya, yelling at the person to stop. Within a few seconds the complainant experienced trouble breathing, but he was able to "back out of the tangle of people" and stand up. He did not see who had choked him.

[11] The complainant and Tanya went to the kitchen and contacted the police. Later he went to a hospital and the cut above his eye was closed with eight stitches.

[12] When the police arrived, Riley identified himself as Randy. The complainant said, "don't be an idiot" and in directing the police officer's attention to Randy, said, "he did it". The complaint was later told by his spouse and daughter that Riley had choked him.

[13] The complainant admitted he was upset at Randy for licking his daughter's face but denied telling him if he wanted "to fight a real man" and did not say "let's take it outside". He conceded that he may have later told the police he was worried about

going to jail and explained that his statement was “a passionate one” after his efforts over six weeks to persuade the police to lay charges. He added that he did not want to be arrested or jailed for what happened.

[14] The complainant agreed he had told the police that he had “lost consciousness” and was “dead”. He explained he was “rambling” as he tried to “get the police engaged” as he could have died. He also agreed that he did not report neck injuries to the doctor at the hospital or mention being choked in the 911 call. He added, however, that he did have bruises on his neck and that he sent photos of these marks to the police from his phone.

[15] The complainant admits he told the doctor at the hospital that he had “been consuming some drinks”. He explained that he said this to ensure the doctor knew he had been drinking, but insists it was only one beer and that he does not drink “hard liquor”.

[16] When asked if he was in Court to make sure the defendants were convicted, the complainant replied that “I want them to account for what they did”. He added that he wants Randy “to go to jail until his [Randy’s] kids are old enough to carry a weapon, I worry about his kids”.

[17] Tiarra Clark is married to Reginald Clark, and they have four children. She is the daughter of Tammy and sister to the two defendants and Tanya, the complainant’s spouse. She arrived two days before Christmas to help her mother with the preparations. At that dinner the complainant and the defendants had consumed

alcohol. She saw the complainant have more than one beer and also drink a brown liquid. She cannot say what the defendants were drinking.

[18] Near the end of dinner Randy Butler got up from his seat, walked to where Leandra Blanchard was seated, and gave her a kiss on the cheek; “just an I love you kiss”. Leandra was upset by this, and Randy apologized. The complainant called Randy a pervert and said, “do you want to fight a real man”. Randy shouted obscenities at the complainant. Leandra left the table and Tammy Butler took Randy to the boot room.

[19] Tiarra saw a confrontation at the stairs near the boot room. The complainant was “getting aggressive” towards Randy and tried to grab him. He and Randy and Tammy all fell to the floor. Randy was under the complainant and Tammy was at his side. Randy punched the complainant “once or twice”. Riley Butler tried to pull the complainant away. At this point, Max Wolsynuk appeared and punched Riley.

[20] After the complainant disentangled himself, Tiarra saw that he was bleeding from a cut on his forehead. She said, “I don’t know if he hit the wooden shoe box and hit his face”.

[21] Tanya Butler is 43 years old. The complainant is her spouse, and the defendants are her brothers. She did not consume alcohol on the evening in question. The complainant had one beer, a Budweiser. Soon after arrival, she had a bad feeling as her brothers had obviously been drinking alcohol and they were making rude remarks about Jayden. She said that “Randy kept going to my daughter who was 17 and pregnant and then he licked her face”. Leandra was upset by this, and Tanya took her

outside. Randy followed and cursed at Leandra with a vulgar term for a part of the female anatomy. Twila, another sister, and Tiarra came to assist and one of them pushed Randy. Randy punched Jayden. All this happened in the hallway near a bedroom.

[22] During this commotion, Tanya heard the complainant say that they were leaving. Both defendants turned their attention to the complainant and the three men shouted at each other. Zahara began to cry as she could not find her young son, Oliver and the complainant left the table to go to the basement to find the boy. As he reached the top of the stairs, the defendants and Tiarra were in the boot room. Tanya saw Randy grab the complainant as his mother tried to pull Randy away. Somehow Randy, Tammy, and the complainant fell to the ground. Randy and Tammy landed on their backs with the complainant on top of Randy. Randy had his legs wrapped around the complainant and repeatedly punched him in the head. Tanya became even more alarmed when she saw Riley come from behind the complainant and take hold of the front of his throat with one hand. She knelt down in front of Riley and the complainant and tried to pry Riley's hand off. She cried in testifying that "I was begging him to stop". Later she and the complainant went to the kitchen and called the police.

[23] When asked about her prior relationship with Randy, Tanya said she "has had issues with him" and when asked if she loves him, she cried and said, "of course I do". Tanya said the complainant's "eye was slit open" and confirmed that her spouse was hysterical as he spoke to the dispatcher after dialling 911.

[24] Leandra Blanchard is now 19 years old and the mother of one child. At the time of these events, she was four days away from giving birth to this child. The defendants are her uncles. She arrived at the Christmas dinner with her then partner, Jayden Sidney. When Jayden sat at the table with his hat on, he was ordered to remove it by one of the defendants. He did so and apologized. Then Randy and Riley raised their glasses to cheer each other and one of them said, “I got you brother”.

[25] During the dinner, Randy got up, with his baby in hand, and walked to Leandra. He congratulated her and Jayden on her pregnancy. While standing behind and between Leandra and Jayden, he “bumped the baby” on their foreheads and he also kissed Leandra on her forehead. When she told him to stop, Randy licked her forehead and upper part of the left side of her face.

[26] Leandra put her hands on the table and began to tremble. Her mother, Tanya, got up and took her to the bedroom down the hallway. Jayden followed. So did Randy. He punched Jayden in the face. Leandra apologized to him for her uncle’s behaviour. She heard her father say “let’s go” as he directed his family to leave the house. Leandra went to the basement to look for Oliver. She saw the complainant fall from the basement stairs and heard several people screaming. She described the fall as follows: “They [the defendants] were taking him down — I don’t know a better way to describe it”. She estimated that the group was on the floor for “10 to 15 minutes”. When pressed on this estimate, she said it was a guess.

[27] Leandra Blanchard acknowledged that in her statement to police she did not report that Randy Butler pulled the complainant to the ground. She agreed that she did



not see Riley Butler choke the complainant and added that she was focussed on looking for Oliver. She saw her father wiping blood from his face and was present when he called 911. Leandra agreed that before giving her statement to the police, she discussed the “emotional aspects” of the evening with her father and mother. She added that the family “was in shock”.

[28] Zahara Wolsynuk is 24 years old with two children. At the time of the events in question, she had one child, Oliver. She came to the dinner with Oliver and her fiancée, Brandon. She saw the defendants drinking alcohol. She could smell this on their breath and is of the opinion they were intoxicated. On sitting down, Riley Butler “made comments about [Jayden] wearing his hat at the table”. Jayden apologized and Twila scolded Riley. Zahara saw Randy get up and “hold his baby in Leandra’s face and then licked her face”. Leandra was upset by this and asked Randy why he did it.

[29] Zahara saw Leandra go to the boot room and Randy Butler followed her. Randy punched Jayden in the face. Zahara became alarmed about the whereabouts of two-year-old Oliver and the complainant went to the basement stairs to look. As he went into the boot room, Randy ran at her father and “they went down and Riley jumps on top”. Tanya went to assist. Randy was underneath the complainant. Randy had his arms and legs wrapped around the complainant and was pulling his hair. Riley Butler had a “choke hold” on the complainant. She described this as follows: “Riley, from behind the complainant, extended one hand, in a claw motion, to the front of the complainant’s neck”. Zahara believed the complainant had “stopped breathing” and “begged them to let go of my dad”. Somebody helped pull Riley away and the

complainant went to the kitchen. Zahara said the incident lasted 10 to 15 minutes and added that “I didn’t exactly look at a clock.

[30] Maximus Wolsynuk is 19 years old. He arrived at the dinner around 5:30 p.m.. He saw his father carving the turkey and sat at the table. During the meal, Randy Butler came to Leandra Blanchard and Jayden Sidney and congratulated them on the soon to be born baby. Randy took Leandra’s face and licked it. Max said nothing, hoping the moment would pass. Leandra said, “that’s not cool” and left the table to get her coat. Jayden followed, as did the defendants. Randy confronted Jayden in the hallway, between the dining room and kitchen, and punched him in the face. Jayden did not respond. Randy went to the boot room.

[31] Max Wolsynuk’s sister started to cry because she did not know where Oliver was. Max and his father walked to the boot room. The complainant was on his way to the basement to look for his grandson. As he stood at the top of the stairs, he was pushed into the boot room by Riley Butler. The complainant lost his balance and regained it without falling. However, Randy Butler “jumped on him like a monkey”. Max saw Randy on his back pulling his father’s hair and punching him in the head. His father faced Randy on the ground. Riley was on the complainant’s back. He noticed that Randy was “bear hugging my dad — his legs and arms were wrapped around him, and I couldn’t help”. Riley put his hand on the complainant’s neck and “was hitting him”. Max pulled Riley off his father. Somebody punched Max to the side of his head and pushed him aside. Max grabbed his boots and coat and went upstairs. He did not see how his father freed himself from Randy but when he came to the top of the stairs, Max left the

house. He drove to the Superstore parking lot “to calm down”. He telephoned his father and then went home.

[32] Max Wolsynuk is aware that charges were not initially laid by the police and confirmed that in the weeks following this incident, his father asked him and others to prepare statements about the event. The complainant collected these and took them to the police. Max also agreed that the family had discussed the matter before the statements were written. He added that he prepared his statement, without reference to what others had told him. He also agreed his memory of the evening is not good as he tried to forget about it.

[33] Cst. Scott Carruthers responded to the 911 call about a fight in progress. On arrival he found a home with many people inside and much yelling. He learned that there had been a fight between three men and the complainant had been injured. The complainant was angry and shouting with a booming voice that overshadowed that of the others. As the officer collected information, Riley Butler identified himself as Randy Butler.

[34] The officer did not smell alcohol on the complainant’s breath but said that “based on his demeanour and anger, I would say he had been drinking, but I can’t say that for certain on the facts”. He noted that both defendants were intoxicated and angry. He arrested Randy for assault and Riley for mischief. With some difficulty, the officer got the drunken defendants out of the home and transported them to the police station.

[35] Having lodged the defendants in a cell to sober up, Cst. Carruthers returned to the home and spoke with Tammy Butler. She was sober and “the calmest one there”.

He also spoke to another woman whose name he does not recall. The officer was told that after Randy had kissed Leandra Blanchard, the complainant challenged him to a fight and during this encounter the two men, along with Tammy and Riley, became entangled on the floor.

[36] The officer noticed that the complainant had a red mark on the side of his face. He did not observe injuries to his neck. He cannot recall if the complainant told him he had been choked but is aware of this complaint because of statements subsequently received.

[37] Cst. Carruthers concluded that the incident was a consent fight and, after speaking to his superior, declined to lay charges. Some days later, the complainant contacted him. He said the complainant was “extremely upset and crying” over the fact that charges had not been laid. The officer did not receive emails from the complainant with photographs of bruising on his neck.

[38] Charges were subsequently laid by another officer after the receipt of witness statements. Cst. Carruthers conceded that in consulting with the supervisor about not laying charges, he had not spoken at length with the complainant about what had occurred at the Christmas dinner.

[39] Reginald Clark is 30 years old and married to Tiara Clark. When asked if the complainant had been drinking at the Christmas dinner he said, “he was drinking beer, from my experience, he is a drinker and has six to 12 beers each evening”. When asked how many beers he saw the complainant drink, he replied, “I can’t put a number on it, but given his body language he had consumed a fair amount of alcohol, I saw him

have more than one beer “. He added that he could not say if he had “hard liquor, but he might have”. When asked about his own alcohol consumption, the witness replied that “I have been sober for six years”.

[40] Reginald Clark went outside for a cigarette after dinner because he heard Randy Butler and the complainant yelling at each other. The complainant challenged him to a fight by saying, “do you want to be a real man outside”. At the time, Randy was in the boot room with his mother. She had taken him there to calm him down and “not be inappropriate”. Riley had gone to the basement.

[41] While outside Reginald heard a commotion and then a thud or bang. He came back inside and saw Riley come up the stairs from the basement to the boot room and pull the complainant off Randy. Randy was on top of Tammy and the complainant was on top of Randy. The witness did not see either defendant assault the complainant. Max came into the boot room and punched Riley. Riley punched him back. His wife, Tiarra, was in the boot room as well. All this happened in a span of five to ten minutes.

[42] Reginald saw the injury over the complainant’s eye but cannot say how it happened. He was outside when the events in the boot room initially unfolded. He insisted the complainant had challenged Randy to a fight and when pressed on the matter added that Randy “was also challenging him [the complainant] to go outside and fight”.

[43] Reginald said he was not present when Randy “licked Leandra’s face; he said, “I was headed outside [for a cigarette] due to the yelling between the complainant and Randy”. When it was suggested to him that this began after Randy licked Leandra’s

face, the witness replied, “but I could sense the tone”. When pressed on how much alcohol he actually saw the complainant consume, Reginald said it was not his role to keep track of how much everyone was drinking.

[44] Reginald Clark declined to give a statement to the police on the evening in question. He did so four months later. He explained that he did not want to choose sides. He denied that he only did so after speaking to others about what happened. However, he acknowledged that in the written statement he provided, he confirmed that he initially did not want to choose sides and provided a statement after he had confirmed with others his understanding of what had happened.

[45] Loretta (Tammy) Butler is 65 years old. She has nine adult children; three sons and six daughters. She has hosted a Christmas dinner for her family for many years. She did not drink alcohol on the evening in question. She said the “other non-drinkers” were Reginald Clark, Leandra Blanchard, and Zahara Wolsynuk and added that “all the others were drinking”. Tammy saw the complainant have three cans of beer.

[46] During dinner, the complainant and Randy started arguing. Tammy took Randy to the boot room “to split them up” and calm Randy down. The complainant came to the top of the stairs and yelled, “do you want to fight a real man”. Tammy was standing behind Randy as the complainant “came off the stairs and landed on top of us”. She believes the complainant “lunged” at them. All three fell to the floor and Tammy later learned she had torn the muscles on her back. At the time she was weak as she had just undergone radiation for cancer.

[47] Tammy saw that Reginald and Tierra were in the boot room. She did not see Tanya or Zahara. Riley tried to pull her off the floor. The incident lasted two or three minutes. She did not see Riley push the complainant down the stairs. She did not see Randy pull the complainant on top of him and her. She did not see either son punch the complainant. She did not see how the complainant sustained the cut above his eye; she assumes he fell on the shoe box. Tammy reported these observations, and lack of them, to Cst. Carruthers when he arrived.

[48] Tammy heard her son, Riley, identify himself as her other son, Randy to Cst. Carruthers. She also heard the complainant react to this; he shouted, “that is not Randy” and pointing to Randy, said, “he is and he [Riley] had nothing to do with it”.

[49] Tammy did not see Randy kiss Leandra. She saw Leandra in the hallway with Jayden and her parents and heard them yelling at Randy. Randy told them to “fuck off”. When pressed about this, Tammy said she was told after the fact that Randy had kissed Leandra. When pressed further, she said she later heard “someone say it was a lick”. She testified she did not see Randy follow Jayden down the hallway. However, in her statement to police, she reported that “I believe it started when Randy got up from the table and kissed Leandra and she got upset and then Randy went down there [hallway] with Jayden”. Tammy acknowledged she was present in the hallway but did not see Randy punch Jayden.

[50] Tammy saw Randy and Riley pouring themselves a dark alcoholic drink from a 26-ounce bottle. She also saw a case of beer in the kitchen. The complainant did not

bring this case but had three cans from it. The following exchange occurred in cross-examination:

Q: Randy was intoxicated

A: No more than anyone else

Q: He was intoxicated

A: He wasn't stumbling around

[51] Tammy acknowledged that Randy has a history of aggressive behaviour when he drinks alcohol. She physically restrained him in the boot room when the complainant said, "do you want to fight like a real man". She heard Randy reply, "let's take it outside".

[52] Tammy acknowledged her son has a criminal record and that she has acted as surety. However, when Crown counsel suggested that this was proof, she would do anything to keep him out of jail, Tammy rejected this and said, "I was the one who put him back in" (because of a breach allegation).

[53] Tammy acknowledged that she discussed the events with the defendants. When pressed for details, she broke down and tearfully said "I want to forget this, I haven't been able to hug my daughter [Tanya Butler] in two years, this is horrible for me, do you have any idea how this feels for a mother"?

### **Submissions**

[54] Although Riley Butler called evidence, I asked Crown counsel to present submissions first, followed by counsel for Riley Butler. The general comments by



defence counsel about the lack of credibility and reliability of the Crown witnesses apply with respect to Randy Butler as well. Randy Butler made brief submissions after I heard from all counsel in this matter.

[55] Crown counsel argued that the testimony of Tiarra Clark and Regional Clark reflected bias and/or untruthfulness and should be rejected. Tiarra Clark said she knew that the complainant had more than one beer and a brown liquid but could not say what the defendants drank. She described what several others said was a “sloppy lick” on Leandra’s face by Randy, as a “kiss of love”. She said she was in the boot room during the physical encounter between the defendants and complainant but did not see how the complainant’s forehead was cut. Crown counsel suggests that her conclusion that he hit his head on the shoe box is without evidentiary foundation.

[56] Like his wife, Reginald Clark said the complainant had more alcohol than he admitted to. When cross-examined about the matter, it became clear that he did not see what the complainant had to drink and made assumptions based on prior experience. At the same time, while other evidence shows the defendants were intoxicated, he minimized the amount of alcohol they consumed.

[57] Reginald went outside when Randy and the complainant began to shout at each other, but he could only hear what the complainant said. Moreover, he asserted that he did not see Randy lick Leandra’s face even though it is clear this happened before the two men started shouting at each other. Reginald described the injury above the complainant’s eye as a small cut. However, it required eight stitches to close the wound. Reginald declined to give a statement at the scene because he did not want to

choose sides. He did so four months later after confirming his understanding of what had happened with others. In any event, the prior statement given by Reginald is inconsistent with his trial testimony about the reason for the four-month delay.

[58] Crown counsel also submits that Tammy Butler’s testimony must be rejected because “she was clearly out to protect her sons”. To accomplish this, she made assumptions and evaded questions. Like Tiarra and Reginald Clark, she counted the three beers the complainant consumed but could not say how much her sons drank. When asked if Randy was intoxicated, she said not more than anyone else. Tammy Butler did not see her sons push or pull the complainant into the boot room and believes he lunged at her and Randy from the top of the stairs. Like Tiarra Clark, she speculated, that the complainant cut his head on the shoe box.

[59] The Crown suggests that the opinion of Cst. Carruthers that the present charges should not have been laid is uniformed and premature. He acknowledged that it is based primarily on his discussion with Tammy Butler and that he did not interview the complainant.

[60] The Crown argued that the testimony of the remaining five witnesses should not be viewed with suspicion by the fact that the complainant collected and delivered their statements to the police. This had to be done because Cst. Carruthers had advised the complainant that he would not lay charges or interview the witnesses. Counsel reviewed the evidence of each witness, highlighting the fact that they did not speculate, exaggerate, or evade. This evidence, it is said, is credible and reliable and meets the criminal law standard of proof.

[61] The Crown submits that the complainant's testimony about being punched and choked was coherent, internally consistent, and materially confirmed by Tanya Butler, Zahara Wolsynuk, Leandra Blanchard, and Max Wolsynuk. Counsel noted that the complainant was candid about his feelings; he was angry and emotional about what happened to him and wants Randy Butler to go to jail. Tanya's graphic description of "begging [Riley] to stop" choking her spouse, as well as Zahara's plea to "let go of my dad", like Leandra's need to apologize to Jayden for her uncle's conduct, are markers of truth. Zahara and Max did not make assumptions about how the complainant found himself on the floor of the boot room. This, it is said, should give me confidence in their evidence.

[62] Defence counsel provided me helpful caselaw about fundamental principles of our criminal law, including, the presumption of innocence, the burden of proof, assessment of evidence, and collusion among witnesses. I will refer to some of these principles later.

[63] Defence counsel also reviewed the testimony of the nine witnesses submits that the great variation in this evidence explains why the Crown has not met its onus of proof. Indeed, counsel argues that there is reasonable doubt, with respect to both defendants, based on the testimony of the Crown witnesses alone.

[64] It is argued that it would be dangerous to convict on the evidence of the complainant; he was untruthful and exaggerated. He lied about being unconscious due to choking and explained he did so after others told him what they had observed. The complainant told the doctor he had "some drinks" contrary to his trial testimony.

Moreover, he did not report a neck injury to the doctor and no such injuries were seen by the doctor or Cst. Carruthers.

[65] Leandra Blanchard said that the defendants “took [the complainant] down”. In cross-examination she conceded that she told the police she had not been in the boot room at the time and explained she assumed this is what happened based on what her father looked like after the incident.

[66] Similarly, Max Wolsynuk lied about the complainant being pushed down the stairs by Riley. In his statement to the police, he reported that the complainant regained his balance and did not fall because of Riley. Counsel suggests his assertion that his father had only one beer is tainted by collusion. Collusion also explains the testimony by Tanya Butler and Zahara Wolsynuk about the events in the boot room since others cannot confirm they were present. In this regard, Zahara said she saw her father struggling to breathe and go purple, with his face up, in the boot room.

[67] Reginald and Tierra Clarke were sober. Neither saw Riley assault the complainant. Tammy Butler was also sober and did not see either defendant assault the complainant. It is argued that Tammy’s assertions that the complainant had consumed three beers and that he, along with both defendants, were intoxicated was not shaken or undermined. Moreover, Tammy’s willingness to relinquish her role as surety for Randy and report his breach shows that she would not lie for her sons.

[68] Defence counsel argued that Cst. Carruthers is an independent witness provided a balanced account. He described the complaint as upset and aggressive and that he

never received photographs of neck injuries. His decision not to lay charges should be accorded some weight.

[69] Defence counsel concluded, by pointing out, that the medical record does not show injury to the complainant's neck. Defence counsel argues there was no choking. However, should I find that Riley Butler pulled the complainant, I should conclude he did so to help his mother, and that this non-consensual contact is trifling and insignificant and not worthy of criminal law intervention; "*de minimus not curat lex*".

[70] In Randy Butler's submissions, he noted that Tiarra and Reginald Clark live in Teslin and would not have been in Whitehorse "to collude". He reminded me that the complainant did say he (Randy) punched Jayden Sidney and that the Crown, in submissions, had implicitly conceded the complainant had said "let's take it outside" after the incident in the boot room. He concluded his submissions by noting that his mother testified she was distraught and hurt by the events on Christmas Eve and spent two weeks in her bedroom crying.

### **Analysis**

[71] 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).

[72] Probable guilt is not the criminal law standard of proof - it is closer to certainty. A reasonable doubt is a doubt based on reason and common sense which must be logically based on the evidence or lack of evidence (*R. v. Villaroman*, 2016 SCC 33). In applying the standard, I can accept some, part, or none of what a witness states. The testimony of a witness is assessed based on the person's sincerity and accuracy.

[73] Much has been said by counsel in this case about collusion. In *R. v. C.G.*, 2021 ONCA 809, Nordheimer, J.A. for the Court of Appeal for Ontario, said:

[28] As I have intimated, the term "collusion" has been used to describe two different phenomena. The first is deliberate or "advertent collusion", that is, where witnesses get together and fashion their evidence in concert in order to appear to be reciting a consistent and reliable story. The other, commonly referred to as "inadvertent collusion", occurs where one witness discusses the events with another witness with the consequence that the evidence of one or both of them may be altered. Put another way, a witness' evidence may be "inadvertently" impacted by the fact that they have heard the evidence of other witnesses which "can have the effect, whether consciously or unconsciously, of colouring and tailoring their descriptions of the impugned events"...

...

[30] As this case illustrates, it is unfortunate that the term "inadvertent collusion" has been coined. As I will explain, "advertent collusion" affects the credibility of evidence. "Inadvertent collusion", or accidental tainting, does not do so. It affects only the reliability of such evidence. As a result, an entirely different analysis is required in determining the impact that "inadvertent collusion" may have on the evidence in question. Yet the term "inadvertent *collusion*" obscures this because the term "collusion" connotes conspiracy, which is a credibility concern. It would be better if the term "inadvertent collusion" was avoided and replaced by the term "inadvertent tainting. ...

[74] Defence counsel suggested there is a great deal of variation in the testimony of the witnesses. I disagree that there is a great deal of variation in testimony in this case. This incident has split an extended family. On one side is the complainant, Tanya

Butler, Zahara Wolsynuk, Max Wolsynuk and Leandra Blanchard. On the other side is Tammy Butler, Tiarra Clark, and Reginald Clark. I agree with Crown and defence that collusion is an issue to be addressed. I cannot conclude that any of the witnesses conspired to present a singular narrative. The fact that they admitted talking to each other before writing their statements, as well as the variation in the evidence that does exist, defeats the charge of deliberate collusion. There is a danger of inadvertent tainting. I will explain why this does not raise a reasonable doubt in my mind.

[75] For the most part the witnesses are on common ground. All, except Reginald and Tiarra, testified that the defendants were intoxicated. There can be no doubt about this given the observations and actions by Cst. Carruthers. Their intoxication informs the events that followed. All witnesses, except Tammy, Reginald, and Tiarra said that Randy licked Leandra's face. Tammy and Reginald said they did not see this, and Tiarra saw a kiss. All witnesses said that following this incident, the complainant and Randy shouted at each other. All witnesses, except Leandra and Reginald attest to the fact that the complainant, Randy, and Tammy became entangled on the floor of the boot room. Leandra and Reginald said they did not see this. The complainant was cut above the eye and required eight stitches. I accept as fact this common ground.

[76] I also heard evidence that cannot be said to be common ground among all witnesses, but nevertheless is not controversial; that is, it was not seriously or successfully challenged. I find these facts as well: The defendants seemed to enjoy scolding Jayden for wearing his hat at the table; Randy punched Jayden in the face and used a vulgar expression to describe Leandra; the complainant and Randy shouted at each other; the complainant said his family was leaving; Zahara became concerned

about the whereabouts of her son, Oliver; and the complainant went to the basement stairs to look for the young boy.

[77] What is primarily in dispute is how the complainant found himself in the boot room with Randy and Tammy and what happened there. In this regard, I make the following additional findings of fact.

[78] While standing behind and between Leandra and Jayden, Randy “bumped the baby” on their foreheads and kissed Leandra on her forehead. When she told him to stop, he licked the side of her face. Once the complainant went to the basement stairs Riley pushed him up against the wall with one hand on his shoulder and told him to wait. The complainant pushed back and said he was looking for Oliver. The complainant took one more step down and was punched over the eye by Randy causing the wound that later had to be stitched. At the same time, Randy grabbed the complainant’s hair with his left hand and pulled him back.

[79] The complainant landed on top of Randy with Tammy on his side resting on his arm. Randy faced the complainant and while still holding the complainant’s hair repeatedly punched him in the back of the head. Riley came behind the complainant. With one hand he reached forward and grabbed the front of the complainant’s neck in a claw like fashion. The complainant had trouble breathing. Tanya and Zahara begged Riley to stop. The complainant backed out of the tangle of people and stood up.

[80] With respect to the choking incident, I appreciate what Tammy said, that when the police arrived, Riley identified himself as Randy and that she heard the complainant tell the officer: “He is not Randy, that is Randy, and he [Riley] had nothing to do with it”.



I will have more comments about Tammy's testimony. At this juncture, I simply note that this fact was not put to the complainant. Moreover, if he did say Riley had nothing to do with it, it is not clear if it references the struggle in the boot room or Randy's act in licking Leandra's face that started everything. In any event, at the time the complainant may have made the statement, he did not know that Riley was the one who choked him. Accordingly, I am not troubled by this side issue.

[81] In coming to these additional findings of fact, I make the following comments about credibility and reliability.

[82] I accept the arguments by Crown counsel that the evidence given by Tiarra and Reginald Clark be rejected as not credible and unreliable. I highlight these factors: Tiarra saw Randy approach Leandra and give her "an I love you kiss". She saw that Leandra became upset but not Randy's subsequent action in licking her face. This cannot be believed. She was present in the boot room but saw little. Given that three people were entangled on the ground, this also cannot be believed. Reginald asserted that he was not present at the table to avoid being part of an argument but could not satisfactorily explain why he did not see Randy kiss and lick Leandra, which happened before the argument Reginald sought to avoid. Tiarra and Reginald minimized the consumption of alcohol by the defendants. This is significant given that it was obvious the defendants were intoxicated.

[83] Tammy was most uncomfortable in giving evidence. This is not surprising in a trial in which her children and their partners were pitted against each other. She broke down at the end of her testimony in explaining what this incident has done to her. For

two weeks afterward, she cocooned herself in her bedroom. She has suffered much. I sympathize with her but cannot have confidence in her. Tammy's attempt to walk a fine line between candour and evasiveness fails. In saying this I am mindful that the Crown's attempt to discredit Tammy with reference to her role as surety for Randy also fails as Tammy turned her son in.

[84] Tammy tried to minimize the obvious fact that her sons were drunk and, when pressed, would only agree that they were no more drunk than others. It is difficult to believe she did not see her sons scold Jayden for wearing a hat at the table and cheer each other when he apologized. It is inconceivable that Tammy did not see Randy's interaction with Leandra at her dinner table — he stood up from his seat, walked to Leandra with his baby in hand, dangling the infant at the head of Leandra and Jayden, and then kissed and licked Leandra's face. Everyone but Tammy and Reginald admitted to at least this: Randy got up, baby in hand, walked to Leandra, and kissed her. It is significant that Tammy removed Randy to the boot room to, as Reginald Clark put it, "not be inappropriate".

[85] Tammy acknowledged she was present in the hallway, but she did not see Randy punch Jayden. She believes the complainant lunged at them and assumes he cut his forehead on the shoe box. I do not accept this belief and assumption. The evidence is against it.

[86] It cannot be believed that the complainant would lunge at Randy when Tammy beside him causing all to fall to the ground. I accept that the complainant was angry at Randy, but there is nothing to suggest he would potentially harm himself by such an

action, not to mention a frail older woman. While in the boot room, Tammy did not see her sons touch the complainant. This cannot be true.

[87] I have devoted some time in explaining my assessment of Tiarra Clark, Reginald Clark, and Tammy Butler because Crown and defence did so as well. The remaining witnesses are not free from difficulty, especially because there is no doubt they discussed the events among themselves before preparing their statements. However, notwithstanding this and other issues, I have confidence in the truth and accuracy of their accounts. In this regard, I am not troubled by the opinion given by Cst. Carruthers that these charges should not have been laid. There is no dispute that he came to this view after speaking primarily to Tammy Butler and with little input from the complainant. His opinion was without appropriate foundation.

[88] Much evidence concerned whether the complainant had one or three beers. This only matters because the complainant insisted he only had one. There is no suggestion, apart from Tammy, even if he had three beers, that he was intoxicated. I have explained why I cannot rely on Tammy for that opinion. Similarly, I cannot rely on her on the issue of one or three beers. The others, including Reginald, cannot be trusted on this point. The only serious challenge to the complainant's assertion is his statement to the doctor that he had "been consuming some drinks". I accept the complainant's explanation that he simply wanted to convey to the doctor that he had consumed alcohol to the extent this was relevant to any medical procedures.

[89] The complainant was also attacked for exaggerating the effects of being choked. He said he was "unconscious" and "dead". The complainant is clearly not dead. I

accept these statements as descriptive of what he was told by others; that he stopped breathing and turned purple. This does not excuse the exaggeration and I have taken this into account in assessing his credibility. Moreover, I have little doubt that he challenged Randy to a fight and I do not accept the complainant's denial of this. He was understandably upset by the fact that Randy had licked his daughter's face. Reginald Clark noted that his voice was loud. He was described by the officer and others, after the confrontation in the boot room, as being angry and emotional. However, his untruthfulness about this fact, serious as it is, does not, in the circumstances of this case, cause me to disbelieve the rest of his evidence. His testimony otherwise follows logically from the facts that are common ground and not controversial. It is otherwise consistent with the testimony of others, whom I have confidence in, especially his spouse. As an aside, his challenge to Randy is not directly connected to the events in the boot room and does not justify what the defendants did.

[90] Tanya is witness to almost all material events on the evening in question. Her account is consistent with the more limited evidence of others. Like her mother, she did not want to be in the courtroom. Unlike her mother, her testimony was not undermined in cross-examination. Her account was clear, candid, and compelling. She did not embellish or speculate. It's force is not diminished by inadvertent tainting.

[91] In the boot room, Tanya saw Randy grab the complainant as his mother tried to pull Randy away and fall to the ground on top of them. She did not see how the complainant's eye was injured. She did see Randy repeatedly punch the complainant on the back of the head as he held him close with his arms and legs. She became especially alarmed when she saw Riley take hold of the complainant's throat with one

hand. She described how she knelt down in front of Riley (and the complainant) and tried to pry Riley's hand off while begging him to stop. This testimony was difficult for Tanya, accompanied by tears. She was not posturing in the courtroom. She truthfully and accurately recounted a painful memory.

[92] Zahara said she saw her father struggling to breathe in the boot room and go purple as she begged Riley to stop. She said her father was face up. I do not find this inconsistent with other testimony. The manner in which the complainant was being choked can reasonably be described as face up. This little detail — her father was face up — persuades me that she did see the choking and is not the result of inadvertent tainting.

[93] Leandra admitted that she was not in the boot room when her father was assaulted and that she made assumptions about what had happened to him based on how he looked after the attack. That is a matter of concern for me, and I ignore this assumption. However, as explained, there can be no doubt about the balance of her evidence. Again, a little detail, overheard by others, adds to her credibility; she felt the need to apologize to her fiancée for her uncle's behaviour.

[94] The defence asserts Max lied about the complainant being pushed down the stairs by Riley. In his statement to the police, he reported that the complainant regained his balance and did not fall because of Riley. I do not consider these statements to be inconsistent and do not accept the charge of lying. I accept that Max not counting the beers consumed by the complainant and may be reflecting the views of others. I ignore his evidence about the complainant's consumption of alcohol.

[95] The Crown has met its high burden of proof. Randy Butler and Riley Butler are found guilty.

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DE FILIPPIS T.C.J.