SUPREME COURT OF YUKON

Citation: *R. v. McDiarmid*, 2017 YKSC 15 Date: 20170222
S.C. No. 14-01511B
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

MARK LEE MCDIARMID

Before Mr. Justice M.D. Gates

Appearances:
David A. McWhinnie Counsel for the Crown
No one Appearing for the Defence

REASONS FOR JUDGMENT

[1] GATES J. (Oral): Mark Lee McDiarmid is charged with a number of offences alleged to have taken place on February 7, 2014, including threatening a justice system participant, attempted obstruction of justice, uttering threats, assault, assaulting a peace officer, and resisting a peace officer engaged in the execution of his duty. All of the offences are set forth in an indictment filed March 9, 2016.

[2] The trial of this matter was scheduled to be heard in Whitehorse commencing on February 20, 2017. At the outset of the trial, Mr. McDiarmid challenged the jurisdiction of the Court to hear the trial. As such, he contended that the provisions of s. 598 of the *Criminal Code* had not been complied with in that no hearing had ever taken place to determine whether or not he had lost his right to a jury trial. He advised that he did not

wish to participate in the trial and wanted to be taken back to the Whitehorse Correctional Centre.

[3] Mr. McDiarmid was then arraigned on the charges set out in the indictment. He declined to respond to the Court's inquiries as to whether or not he understood the charges. He also declined to enter pleas to the charges, at which point the Court directed the entry of not guilty pleas to each count.

[4] When the Crown called its first witness, Cpl. Stephen Knaack, Mr. McDiarmid stood up and began challenging Cpl. Knaack, using obscenities and vulgar language in the process. Court security was directed to remove Mr. McDiarmid from the court and proceedings were briefly adjourned to allow Mr. McDiarmid to compose himself. When court reconvened, Mr. McDiarmid refused to leave his cell to attend court.

[5] The Court was informed that Mr. McDiarmid had been advised of the availability of legal counsel while in cells during the adjournment, but had refused this offer. Mr. McDiarmid was then offered the option of returning to the courtroom or to attending one of the witness rooms in the court facility to watch the trial via closed-circuit television. He declined both offers.

[6] At this point, court was adjourned until 1 p.m. to permit Mr. McDiarmid to speak to family members and to reflect on his decision not to attend his trial.

[7] When court resumed at 1 p.m., a member of the local bar, Mr. Bruce Warnsby, advised that he had attended cells during the adjournment with members of Mr. McDiarmid's family. Mr. Warnsby's offer of legal assistance to Mr. McDiarmid was refused.

[8] At the request of the Crown, the Court then made an order pursuant to s. 650(2) of the *Criminal Code*, directing that Mr. McDiarmid was to be kept out of the court as his misconduct by interrupting the proceedings rendered his continued presence to not be feasible. In making the order, it was noted that Mr. McDiarmid had in any event seemingly made the decision not to be present during his trial.

[9] The Crown called two witnesses on the afternoon of February 20, 2017. At the conclusion of each witness, the Court directed that Mr. McDiarmid was to be informed that the Crown's examination of the named witness had been completed and inquiring whether or not Mr. McDiarmid wished to return to the courtroom to cross-examine the witness. In both instances, Mr. McDiarmid declined to participate in the proceedings.

[10] At the conclusion of the proceedings on February 20, 2017, Mr. McDiarmid was remanded in custody to February 21, 2017, and directed to attend court at 10 a.m.

[11] When court resumed on the morning of February 21, 2017, Mr. McDiarmid was not in attendance, having advised the RCMP provost section that he did not wish to attend court. He was advised at that time that he could participate via closed-circuit television from the Whitehorse Correctional Centre, but declined that option as well.

[12] At the request of the Court, the Crown called one further witness, Mr. Antoine Oxford, the supervisor of the cellblock located in the court facility as well as the cells located at the Whitehorse detachment of the RCMP. The Crown then closed its case.

[13] The Court briefly heard from Ms. Brandy Maude, Mr. McDiarmid's mother, who advised that she had spoken to her son the previous evening and earlier that morning. She confirmed that Mr. McDiarmid did not wish to participate in the trial.

[14] At Ms. Maude's request, however, and with the agreement of the Crown, the Court received three transcripts: December 3, 2012; December 20, 2012; and February 7, 2012, the afternoon session before Justice Veale.

[15] Following the receipt of oral submissions from the Crown, the Court reserved its decision until 10 a.m. on February 22, 2017. Mr. McDiarmid was again remanded in custody and directed to attend court at 10 a.m. on today's date.

[16] We have just been advised that, while present in the building, he has again declined to participate in his trial.

THE FACTS

[17] The circumstances giving rise to this alleged incident on February 7, 2014, are all linked to two orders appointing an *amicus curiae* to assist the Court in relation to two prosecutions involving the accused Mark Lee McDiarmid.

[18] The first order was made December 3, 2012, by Gower J. in relation to S.C. No. 12-01507, an eight-count indictment alleging offences said to have been committed on March 22, 2011, though subsequently replaced by an amended order signed on April 4, 2013. The *amicus* was appointed to assist the Court in relation to a jury trial scheduled for Dawson City from April 22 to 26, 2013.

[19] The second order was made on December 20, 2013, by Veale J. in relation to S.C. No. 12-01513, a seven-count indictment alleging offences said to have been committed on October 19 and 20, 2011, a matter also set for trial in Dawson City from March 3 to 28, 2014.

[20] The amended order of April 4, 2013, and the order of December 20, 2013, are virtually identical in form and content and appoint Jennifer Cunningham, a Whitehorse lawyer, as *amicus curiae*. The key terms of the orders are as follows:

a) the *amicus* will act as a friend of the Court and will not act on instructions of the accused;

b) if the accused provides information to the *amicus*, that information will be treated as privileged unless that privilege is expressly waived by the accused or the *amicus* applies to waive the privilege;

c) the *amicus* will be entitled to receive all Crown disclosure provided to the accused;

d) where the *amicus* deems it would provide relevant evidence otherwise lacking, and subject to the objection of the accused, the *amicus* may cross-examine Crown witnesses and call any witnesses for the defence;

e) where the *amicus* deems it would provide a perspective not otherwise given and subject to the objection of the accused, the *amicus* may make applications and make submissions to the judge and to the jury; and finally,

f) upon any objection by the accused, the Court will rule on how the *amicus* may proceed.

[21] On February 7, 2014, Mr. McDiarmid was scheduled to appear before Gower J. at 10 a.m. for the continuation of the sentencing hearing that had continued the previous day. He was also scheduled to appear before Veale J. that same day at 1 p.m. Mr. McDiarmid was in custody on February 7, 2014, and as such was transported from

the Whitehorse Correctional Centre to the Whitehorse courthouse for his court appearances. He was held in a cellblock area consisting of five separate cells.

[22] CCTV video cameras were installed in the cellblock area in April 2013. The cameras have no audio recording capacity. Cameras are located in each of the cells, as well as in the corridors and various stairwells immediately outside of the actual cells. The cameras installed in the cells, as well as the cameras in the corridor giving access to the five cells, all record on a continuous basis. Other cameras in the cellblock area are motion-activated. The CCTV system has a two-year retention period.

[23] Cpl. Knaack testified that the images recorded from the various cameras on February 7, 2014, were downloaded to a CD at some point by Mr. Antoine Oxford, the supervisor of the cellblock area, at the request of Cpl. Knaack. Mr. Oxford gave evidence at the request of the Court and explained the process that he followed in creating the CD that he made, initially for Cpl. Knaack, now Exhibit No. 1 in this trial, and subsequently a second copy for disclosure to Mr. McDiarmid. Mr. Oxford explained that he reviewed the recordings made by all 30 cameras during the relevant times in order to select the video that actually captured the events in question. All such video was downloaded and burned onto a CD. Mr. Oxford testified that the CCTV monitoring system is password protected for security purposes and that only he and the individual who actually installed the system know the password.

[24] Exhibit No. 1 contains 14 different files representing CCTV video clips downloaded to the CD relating to the date of the alleged incident. During the course of Cpl. Knaack's testimony, the Court viewed portions of three different files from Exhibit No. 1: the camera continuously recording from outside cell number two, the "Cell 2

Video"; the cameras continuously recording the corridor/common area outside of the five cells, the "Cell Doors Video"; and a motion-activated camera located in the stairwell leading to courtroom number one, the "Stairwell Camera Video." Cpl. Knaack reviewed all of the contents of the CD created by Mr. Oxford and stated that he believes the video recordings accurately reflect the incident that occurred shortly before 10:00 a.m. on February 7, 2014. He testified that the times recorded on the video recordings themselves are relatively accurate and within a few minutes of his own timepiece. He had no concerns regarding the accuracy or reliability of any of these video recordings.

[25] Cpl. Stephen Knaack was the NCO IC of the Whitehorse provost unit on February 7, 2014, and was on duty and working that morning. He assumed responsibility for the provost section sometime in 2012, though had also done a brief assignment with the unit in 2011. He was stationed in Dawson City, Yukon, as a general duty officer from 2007 to 2010, and was acquainted with Mr. McDiarmid as well as Mr. McDiarmid's mother and sister from that posting. Mr. McDiarmid was in custody in 2012 when Cpl. Knaack took over command of the provost section. As such, he had periodic dealings with Mr. McDiarmid in conjunction with Mr. McDiarmid's various scheduled court appearances. According to Cpl. Knaack, Mr. McDiarmid recalled him from Dawson City. Cpl. Knaack described his professional relationship with Mr. McDiarmid as very cordial and polite. Prior to February 7, 2014, he had never had a physical altercation with Mr. McDiarmid.

[26] Cpl. Knaack's evidence was that Jennifer Cunningham had already been appointed as *amicus* by the time he assumed responsibility for the provost section. Prior to February 7, 2014, he had witnessed numerous interactions between

Ms. Cunningham and Mr. McDiarmid in the cellblock area of the courthouse. His evidence was that Ms. Cunningham, on occasion, spent many hours alone with Mr. McDiarmid in the cellblock area. Cpl. Knaack identified Mr. McDiarmid as the individual who had appeared in court on the morning of February 20, 2017, prior to being removed from the courtroom by the Court.

[27] Jennifer Cunningham also gave evidence for the Crown. She indicated that she was not personally interested in criminal charges being instituted against Mr. McDiarmid in relation to this incident. Ms. Cunningham is a member of the Yukon Law Society and has practised law in Whitehorse since 2006 or 2007. She is also a non-practising member of the Law Society of Upper Canada and the Law Society of British Columbia.

[28] According to Ms. Cunningham, she initially represented Mr. McDiarmid privately on one of the matters in relation to which she was subsequently appointed as *amicus*. Ms. Cunningham identified the two Orders appointing her as *amicus*, Exhibit No. 2 and Exhibit No. 3, and stated that as far as she knew the Orders had never been set aside and were in place on February 7, 2014. Ms. Cunningham stated that as *amicus* she appeared in court when Mr. McDiarmid's matters were spoken to, did research and obtained case law for him, facilitated his access to a cellphone so that he could make telephone calls, and met with him frequently in cells or in court. She confirmed that Mr. McDiarmid had two matters in court on February 7, 2014: the continuation of a sentencing hearing before Justice Gower, and a decision on an adjournment application by Justice Veale.

[29] On February 7, 2014, Mr. McDiarmid was one of three prisoners in the cellblock. He was alone in cell number two with his boxes of disclosure material and other legal

documents. At approximately 9:52 a.m., Ms. Cunningham arrived in the cellblock area with papers in her hand. She was gowned for the 10:00 a.m. scheduled appearance before Gower J. According to Cpl. Knaack, Ms. Cunningham asked him to give some papers to Mr. McDiarmid. Cpl. Knaack declined, mindful of Mr. McDiarmid's mistrust of the police. Instead, he escorted Ms. Cunningham to Mr. McDiarmid's cell to enable her to give the papers directly to Mr. McDiarmid.

[30] At the request of Gower J., conveyed through a court clerk, Ms. Cunningham was asked to speak to Mr. McDiarmid that morning to determine if he was willing to return to court and abide by the directions of the Court. The previous day, Mr. McDiarmid had been removed from the court by Gower J. as a result of his failure to follow the directions of the Court. Ms. Cunningham relayed the message to Mr. McDiarmid and also attempted to provide him with a series of cases that Gower J. had previously asked her to review.

[31] At approximately 9:52 a.m., Cpl. Knaack opened the door to the cell. Mr. McDiarmid, who had previously been pacing back and forth in the cell, approached the open cell door, though remained inside the cell. Ms. Cunningham and Cpl. Knaack stood facing Mr. McDiarmid in the corridor. Ms. Cunningham recalls a brief conversation and that Mr. McDiarmid was upset and did not want her to make submissions on his behalf. While she does not recall the tone of his voice, she testified that he was not shouting and did not appear to be angry.

[32] Given Cpl. Knaack's concern for the privileged nature of the communications between Mr. McDiarmid and Ms. Cunningham, he did not reveal the content of the discussion during the trial. Though he also perceived that the conversation was civil in

tone, he was aware that Mr. McDiarmid was not pleased with what Ms. Cunningham was doing. Cpl. Knaack had experienced other instances when Mr. McDiarmid was not pleased with Ms. Cunningham, but nothing transpired during the brief conversation that morning between them so as to give rise to any concern on the part of Cpl. Knaack regarding Ms. Cunningham's safety. He did, however, note that Mr. McDiarmid initially declined to take the documents from Ms. Cunningham, but later accepted them.

[33] Ms. Cunningham handed Mr. McDiarmid some papers through the open cell door. As Ms. Cunningham appeared to be departing, Mr. McDiarmid lunged toward her. According to Cpl. Knaack, Mr. McDiarmid cocked his fist and charged toward Ms. Cunningham. Cpl. Knaack quickly moved in between Ms. Cunningham and Mr. McDiarmid to block access to Ms. Cunningham. Cpl. Knaack's evidence was that Mr. McDiarmid was attempting to attack Ms. Cunningham and, when Cpl. Knaack intervened, attempting to get at Ms. Cunningham around him. In the process, Mr. McDiarmid struck Cpl. Knaack as he was attempting to get at Ms. Cunningham. Mr. McDiarmid then grabbed Cpl. Knaack by the back of his neck and attempted to pull him around so he could get around and get at Ms. Cunningham. Cpl. Knaack yelled at Mr. McDiarmid to stop.

[34] At this point, Cst. Kingdon came around from the counter area and intervened. Mr. McDiarmid, still struggling and trying to get at Ms. Cunningham, was taken to the floor as the trio moved down the corridor, ending up in front of cell number four, where he was ultimately handcuffed behind his back, placed in leg restraints, and then placed in cell number four. As they were moving down the corridor, Mr. McDiarmid was attempting to get up. He was repeatedly told to both stop and stop resisting, but

continued struggling. He only stopped struggling once both handcuffs were in place behind his back.

[35] While the struggle was taking place, Cpl. Knaack indicated that Mr. McDiarmid repeated several times in a calm voice, "I'm going to get you, Jennie." He made a similar comment once inside cell number four before the door had been closed. Around this time, Cpl. Knaack told Ms. Cunningham to leave the area, getting her attention by snapping his fingers. Once the scuffle had commenced, Ms. Cunningham initially ducked for cover and then retreated down the corridor toward the locked door leading to courtroom number one. Once Mr. McDiarmid was inside cell number four, Ms. Cunningham made her way back down the corridor and out through the door through which she initially entered the cellblock area.

[36] According to Ms. Cunningham, Mr. McDiarmid "somehow tried to assault me" as he emerged from the cell and was coming toward her head and neck area. She stated that she saw some sort of swinging at her head but does not recall if it involved one or both of Mr. McDiarmid's hands and arms. Ms. Cunningham confirmed that Cpl. Knaack stopped Mr. McDiarmid's arm as she ducked and went to another part of the cell area. She does not recall how she felt at the time, but the incident took place without warning and she in no way consented to any form of physical altercation with Mr. McDiarmid. From her vantage point, Ms. Cunningham then witnessed the struggle between Mr. McDiarmid, Cpl. Knaack, and a third person not in police uniform whose name she did not know. She does not recall what Mr. McDiarmid was saying at the time other than "general words of perhaps what he might do if he got away." She recalled that the words were directed toward her and were not friendly in intent.

[37] Later on February 7, 2014, Ms. Cunningham made sentencing submissions before Gower J. in the absence of Mr. McDiarmid. She also appeared with Mr. McDiarmid before Veale J. that afternoon. Approximately two weeks later, she successfully applied to be removed as *amicus*. Ms. Cunningham acknowledged that she viewed the CCTV video of the incident on one occasion subsequent to the event. Ms. Cunningham was questioned by the Court following the conclusion of her direct examination by the Crown. She testified that her relationship with Mr. McDiarmid was mostly cordial and professional.

[38] During the course of their professional relationship, Ms. Cunningham recalled rare occasions when Mr. McDiarmid indicated to her that he was upset with the appointment of an *amicus*. At the time, she believed that this was about the involvement of an *amicus* generally, not her personal involvement in the matters. As a result of her attendance at the preliminary inquiry relative to this matter, she has since come to understand that Mr. McDiarmid was upset with her.

[39] According to Ms. Cunningham, both Gower J. and Mr. McDiarmid appeared to be upset on the afternoon of February 6, 2014. She recalled, without having had an opportunity to review a transcript of the proceedings, that Mr. McDiarmid wanted to make submissions to the Court on the scope of the *amicus* order, and that the judge did not want to hear from him at that time. She also recalled that he was upset that Gower J. was calling on her to make submissions on an issue.

[40] In his evidence, Cpl. Knaack acknowledged that part of his recollection of the events in question is based on memory and part based on a subsequent review of the video recordings.

[41] I have carefully reviewed the video recordings, particularly the Cell Door Video, the Cell 2 Video, and the Stairwell Camera Video. Based on my review of this evidence, I find that the entire incident, from the time Mr. McDiarmid came out of cell number two and lunged toward Ms. Cunningham until he was fully restrained and handcuffed on the floor in front of cell number four lasted 56 seconds, as broken down as follows:

9:51:47 a.m.:	Ms. Cunningham arrives in the cellblock area with papers in her hand.
9:53:15 a.m.:	Ms. Cunningham hands papers to Mr. McDiarmid, then standing in the threshold of the door to cell number two.
9:53:20 a.m.:	Mr. McDiarmid comes out of cell number two and charges toward Ms. Cunningham, his right arm raised and cocked as if preparing to strike a blow.
9:53:26 a.m.:	Cpl. Knaack grabs Mr. McDiarmid. At about the same time, Cst. Kingdon arrives at the scene.
9:53:32 a.m.:	The trio is on the ground outside cell number four. Mr. McDiarmid is still moving and not under police control.
9:53:36 a.m.:	Cpl. Knaack attempts to gain control of Mr. McDiarmid's left arm while Cst. Kingdon attempts to gain control of the right arm.
9:53:39 a.m.:	Mr. McDiarmid is trying to push himself up off the ground with his hands and arms.
9:53:42 a.m.:	Cpl. Knaack succeeds in getting hold of Mr. McDiarmid's left arm.

9:53:50 a.m.:	Cst. Kingdon is gripping Mr. McDiarmid's right wrist.
9:53:57 a.m.:	Cst. Kingdon gains control of Mr. McDiarmid's right arm and is preparing to handcuff him while Cpl. Knaack brings Mr. McDiarmid's left arm behind his back.
9:54:14 a.m.:	Both police officers are on their knees. Cst. Kingdon has Mr. McDiarmid's right arm in cuffs and is moving his left arm into position.
9:54:18 a.m.:	Mr. McDiarmid is in handcuffs and stops moving.

THE LAW

[42] It is a fundamental principle of our criminal law that everyone is presumed innocent until proven guilty. This principle is enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms*. In a criminal prosecution, the onus is on the Crown throughout to prove the guilt of an accused beyond a reasonable doubt.

[43] While there have been many judicial decisions on the concept of proof beyond a reasonable doubt, I will mention only two. In *R. v. Lifchus*, [1997] 3 SCR 320, the Supreme Court held that a reasonable doubt is a doubt based on reason and common sense and not one based on sympathy or prejudice. While more is required than proof that an accused is probably guilty, it is not proof to an absolute certainty, nor is reasonable doubt an imaginary or frivolous doubt. Similarly, in *R. v. Starr*, 2000 SCC 40, the Court held that proof beyond a reasonable doubt falls closer to absolute certainty than to proof on a balance of probabilities.

[44] In this case, Exhibit No. 1, the video, offers a clear view of the events in question and is of good quality. The existence of video evidence of an event is an invaluable

source of reliable information, considered to be more reliable than eyewitness testimony. (see *R. v. Nikolovski*, [2005] O.J. No. 494 (ON CA)) Where there are inconsistencies between the witness evidence and the video in terms of the actual physical event, I prefer the evidence of the video. It is certainly of assistance in establishing a chronology and timing of events. However, I am alive to the frailties of relying on the video evidence alone, and recognize that it does not paint the entire picture of the event in question. I am also cognizant of the fact that it has limitations, notably that there is no audio. Accordingly, it is important to consider the video in conjunction with all the other evidence.

Count #4: The Assault of Jennifer Cunningham

[45] Section 265(1) of the *Criminal Code* defines assault as follows:

> A person commits assault when
>
> a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose . . .

[46] When Mr. McDiarmid emerged from cell number two at 9:53 a.m., I am satisfied beyond a reasonable doubt that he charged in the direction of Jennifer Cunningham with his right arm raised and cocked, prepared to strike a blow.

[47] On the evidence, it is clear that both Ms. Cunningham and Cpl. Knaack perceived that Mr. McDiarmid was about to strike Ms. Cunningham and had the present ability to effect this purpose. But for the physical intervention of Cpl. Knaack, Mr. McDiarmid would have struck Ms. Cunningham in the area of her head. I am

satisfied that Ms. Cunningham's defensive action in crouching down and then moving away signified her reasonably held belief that Mr. McDiarmid was trying to assault her. I am also satisfied that Ms. Cunningham in no way consented to any such physical contact with Mr. McDiarmid.

[48] On the charge of assaulting Jennifer Cunningham, I am satisfied beyond a reasonable doubt of the guilt of the accused and I find him guilty of Count #4.

Count #3: Uttering a Threat to Jennifer Cunningham

[49] In *R. v. McRae*, 2013 SCC 68, the Supreme Court, referring to its earlier decisions in *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Clemente*, [1994] 2 S.C.R. 758; and *R. v. O'Brien*, 2013 SCC 2, confirmed the essential elements of this offence are as follows:

> [9] … (1) The utterance or conveyance of a threat to cause death or bodily harm; and (2) an intent to threaten. …

[50] The Court indicated that the nature of the threat must be viewed objectively, citing the decision of Cory J. in *McCraw* at para. 27:

> The question to be resolved may be put in the following way. Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?

[51] Of importance in this particular case, the Court went on in *McRae* at para. 13 to confirm that the intended recipient of the threat need not be aware of the threat or, if aware, that she or he was intimidated by it or took it seriously.

[52] In this instance, I am satisfied that Mr. McDiarmid stated on several occasions during the scuffle with Cpl. Knaack and Cst. Kingdon that "I'm going to get you, Jennie," the last repetition taking place immediately after he had been handcuffed and placed in

cell number four. Given the very short time frame within which the initial iterations of this statement were made following the assault on Jennifer Cunningham, I am satisfied that these words would convey to a reasonable person a threat of serious bodily harm. As previously indicated, the incident unfolded very rapidly over the span of less than a minute. While these words might not in and of themselves amount to a threat to cause serious bodily harm, the particular context in which they were uttered supports such a finding.

[53] The evidence of the actual words used by Mr. McDiarmid come from Cpl. Knaack. Ms. Cunningham did not hear the actual words uttered, though testified as previously indicated that she heard words directed to her by Mr. McDiarmid that were "general words … what he might do if he got away" and that his words "were not friendly in intent." I accept the evidence of Cpl. Knaack in this regard and find that these words were spoken by Mr. McDiarmid and directed toward Ms. Cunningham. It matters not that the intended recipient of the words did not hear the actual words spoken. Whether she was intimidated by the words or even took them seriously are not matters which the Crown must establish to make out this particular offence. I am satisfied beyond a reasonable doubt that a reasonable person would in all of the circumstances have interpreted the repeated words "I'm going to get you, Jennie" as conveying a threat to cause serious bodily harm.

[54] On the charge of uttering a threat to Jennifer Cunningham to cause bodily harm, I am satisfied beyond a reasonable doubt of the guilt of the accused, and I find him guilty of Count #3.

Count #5: Assault a Peace Officer in the Execution of His Duty

[55] On the evidence before me, I am satisfied beyond a reasonable doubt that Cpl. Knaack, a member of the Royal Canadian Mounted Police, was on duty on February 7, 2014, and was a peace officer within the meaning of s. 2 of the *Criminal Code*. Cpl. Knaack's status as a peace officer would have been well-known to Mr. McDiarmid as a result of his prior dealings with Cpl. Knaack dating back to the officer's posting in Dawson City between 2007 and 2010. Further, he was in police uniform on the date in question as best evidenced by the content of the video, Exhibit No. 1.

[56] The question is whether Cpl. Knaack was acting in the execution of his duty at the time. Based on all of the evidence adduced during this trial, I am satisfied that in his role as the NCO in charge of the RCMP provost section, he was charged with the responsibility for escorting prisoners to and from the courthouse coinciding with their scheduled court appearances. His overall responsibility for the safety and well-being of prisoners in his charge extended to protecting members of the public from the unlawful acts of those prisoners under his control. Moreover, as with all peace officers, he had a general duty to preserve the peace. His actions in not only supervising the interaction between Ms. Cunningham and Mr. McDiarmid but in coming to the aid of Ms. Cunningham when assaulted by Mr. McDiarmid were undertaken as part of his duties as a peace officer. It follows that I am satisfied beyond a reasonable doubt that he was acting in the execution of his duties at the time of this incident.

[57] On the issue of whether or not Mr. McDiarmid assaulted Cpl. Knaack, I would again refer to the definition of assault in s. 265(1) of the *Criminal Code*:

> A person commits assault when
>
> a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose . . .

[58] Having carefully considered the evidence of both Cpl. Knaack and Jennifer Cunningham and also having viewed Exhibit No. 1, I am satisfied that all of Mr. McDiarmid's physical gestures and actions after exiting cell number two were directed toward Ms. Cunningham. According to Cpl. Knaack, Mr. McDiarmid charged toward Ms. Cunningham with an arm raised and cocked fist. Further, Cpl. Knaack stated that he was struck by Mr. McDiarmid as Mr. McDiarmid attempted to get around him and get at Ms. Cunningham. According to Ms. Cunningham, Mr. McDiarmid "somehow tried to assault me" as he exited the cell and moved toward the area of her head and neck.

[59] There is no evidence that Mr. McDiarmid intended to assault Cpl. Knaack during the split seconds during which the initial portion of the incident unfolded. On the contrary, his entire intention was focused on, and directed at, Ms. Cunningham. The blow or blows which may have struck Cpl. Knaack were all intended for Ms. Cunningham. Moreover, the physical acts of Mr. McDiarmid which inadvertently connected with Cpl. Knaack formed part of the acts constituting the assault on Ms. Cunningham.

[60] It follows that I am not satisfied beyond a reasonable doubt that Mr. McDiarmid intentionally applied force to Cpl. Knaack. As such I find him not guilty of Count #5.

Count #6: Resist a Peace Officer in the Execution of His Duty by Fighting

[61] For the reasons outlined above in relation to Count #5, I am satisfied beyond a reasonably doubt that Cpl. Knaack was a peace officer acting in the execution of his duty on February 7, 2014. The issue to be determined relative to this count of the indictment is did Mr. McDiarmid resist Cpl. Knaack by fighting.

[62] I accept Cpl. Knaack's evidence generally, but in particular that he told Mr. McDiarmid to stop and to stop resisting as they moved down the hallway together with Cst. Kingdon. While the entire event lasted a very brief period of time, it is clear that Mr. McDiarmid's actions involved active physical resistance in the face of efforts made by Cpl. Knaack and Cst. Kingdon to bring him under control and place him in handcuffs. Mr. McDiarmid's movements are clearly visible in Exhibit No. 1, both the Cell Door Video recording of the incident and the Stairwell Camera Video recording. At one point, Mr. McDiarmid can clearly be seen trying to push himself up off the floor using his hands and arms. I am also satisfied that the movement of the trio across the corridor toward the counter and then down the hallway to just in front of cell number four was largely the result of Mr. McDiarmid's resistance to the efforts of the two police officers to bring his movements under control.

[63] The essence of an offence under s. 129(a) of the *Criminal Code* is resistance of a peace officer in the execution of his duty. I am satisfied beyond a reasonable doubt that the actions of Mr. McDiarmid amounted to resistance in that through his actions he rendered more difficult the task facing Cpl. Knaack and Cst. Kingdon to bring him under control. I am also satisfied that these actions on the part of Mr. McDiarmid constituted fighting as particularized by the Crown.

[64] It follows that I find him guilty of Count #6, resisting a peace officer in the execution of his duty.

Count #1: Intimidation of a Justice System Participant

[65] This particular count in the indictment charges Mr. McDiarmid with the offence of intending to provoke a state of fear in Jennifer Cunningham, a justice system participant, through violence and threats of violence in order to impede her in the performance of her duties. The term "justice system participant" is defined in the *Criminal Code*, the relevant portions of which read:

> (b) a person who plays a role in the administration of criminal justice including . . . (ii) a prosecutor, a lawyer, a member of the Chambre des notaires du Québec and an officer of [the] court.

[66] On the evidence before me, including the content of Exhibit No. 2 and Exhibit No. 3, the court Orders appointing Ms. Cunningham as *amicus*, I am satisfied that the Crown has established that Ms. Cunningham was a justice system participant. She testified that she was a member of the Yukon Law Society and, as such, a lawyer. While not counsel to Mr. McDiarmid, she had been appointed by the court to perform a function relative to two criminal proceedings instituted against Mr. McDiarmid. The scope of her role as *amicus* was fully set out in the Orders appointing her to that role. These were valid court Orders on February 7, 2014. In my view, this satisfies this particular requirement of the charge. I am also satisfied that Mr. McDiarmid both threatened to use violence and used violence against Ms. Cunningham, a justice system participant. This finding flows from my earlier conclusions finding Mr. McDiarmid guilty of assault and uttering threats to Ms. Cunningham.

[67] The real issue in this case is whether or not the Crown has proven beyond a reasonable doubt that Mr. McDiarmid had the necessary intention to commit the offence. Specifically, has the Crown established that Mr. McDiarmid had an intention to provoke a state of fear in Ms. Cunningham and he did so in order to impede her in the performance of her duties.

[68] This very issue was considered by the British Columbia Supreme Court in *R. v. Bergeron*, 2013 BCSC 443, a decision of Cullen A.C.J. The facts in this case, briefly stated, are that Mr. Bergeron attacked a prosecutor who had previously been involved in criminal charges then facing the accused. The prosecutor was knocked unconscious and suffered several broken facial bones requiring surgery and the insertion of plates, screw, and mesh in his face to stabilize the broken bones. He missed two and a half months of work. The injuries sustained were found to have had ongoing effects impeding him from working at his previous level.

[69] The trial judge found that Mr. Bergeron had acted belligerently in his dealings earlier that same day with employees at the Active Support Against Poverty Housing Society when he damaged property, uttered threats, and assaulted an employee of the society. After he left the society's office, he threw a rock at a passing police vehicle, causing a window to break. He then made his way to the courthouse where he used profane and demeaning language toward the staff, only departing when he learned that the sheriff had been called to respond to the situation. It was at that point that he saw and recognized the prosecutor on the street, whereupon he attacked him and threatened to kill him for convicting him and putting him in jail. He continued to express his hostility toward the prosecutor when he was subsequently apprehended.

[70] The trial judge in *Bergeron* noted the entire episode extended over a period of 15 minutes. He rejected the defence contention that the accused was "lashing out at the world and venting a mindless display of anger" on the basis that "his anger and violence were directed and specifically focused at the courthouse staff and at a person whom he knew to be a prosecutor," all of this at para. 43.

[71] At para. 47 he concluded that "[t]he essence of his conduct was to exact revenge and punish Mr. Schmeisser for being a justice system participant and for the performance of his duties in that role."

[72] At para. 48 he concluded:

> As I see it, however much the accused was engaged in an angry, violent rampage, there is sufficient pattern, direction, and focus to his conduct to establish beyond a reasonable doubt that he was cognizant of the inevitable consequences which it would have upon Mr. Schmeisser, and as such, he intended, at least in the sense contemplated in *Chartrand* and *Armstrong*, . . . to impede him in the performance of his duties.

[73] In my view, the circumstances of this case are quite different. In this instance, the incident took place over a very brief period of time, less than a minute, and involved no rampage. Unlike *Bergeron*, there is no evidence that Mr. McDiarmid's words and actions provoked fear in Ms. Cunningham, nor that he impeded her in the performance of her duties. Ms. Cunningham's evidence was that she did not know how she felt at the time. At no point in her evidence did she express fear. While she did express concern that someone might get hurt during the incident, I am not prepared to infer from such an expression of concern that Mr. McDiarmid's words and actions provoked fear in Ms. Cunningham.

[74] Likewise, I am not prepared to infer fear, as urged upon me by the Crown, by her demeanour as depicted in the video recordings of the event. Moreover, there is no evidence that his words or actions ever impeded her in the performance of her duties. On the contrary, she appeared in court with Mr. McDiarmid a few hours later. Her subsequent application to be removed as *amicus* was, in my view, based entirely on her perception that she could not continue to act in that role once it became clear that the Crown intended to pursue criminal charges against Mr. McDiarmid relative to this incident and that she would be a necessary Crown witness against Mr. McDiarmid.

[75] While I accept the Crown's argument that Ms. Cunningham's lack of fear is not determinative of the issue, her reaction to the words and actions of Mr. McDiarmid are nonetheless relevant in assessing the context in which the words and actions took place. In *R. v. O'Brien*, the accused was charged with uttering a threat to cause death or bodily harm. A majority of the court held that the trial judge had correctly held "that the *mens rea* is that the words are meant [to convey] a threat. In other words they are meant to intimidate," (para. 5). In my view, the reasoning in *O'Brien* is applicable in this instance, and following the decision in *R. v. Clemente*, I can look at the actions of the accused, the words used, the context in which they were spoken, and the person to whom they were directed in determining the issue of intent.

[76] While I accept that it is possible, even perhaps probable, that Mr. McDiarmid intended his words and actions to provoke a state of fear in Ms. Cunningham in order to impede her in the performance of her duties, I am not satisfied beyond a reasonable doubt that this was the case. In my view, there is another reasonable inference to be drawn from the proven facts, namely that Mr. McDiarmid lashed out in a flash of

frustration and anger directed at the judge who had removed him from the courtroom the previous afternoon. Ms. Cunningham's evidence was that she had been sent by the judge to inquire as to whether or not Mr. McDiarmid was willing to return to the courtroom and abide by the directions of the court. Immediately prior to the outburst, Ms. Cunningham handed Mr. McDiarmid cases that the judge wished her to review.

[77] Again, while suspicious as to Mr. McDiarmid's intentions, I have a doubt that his words and actions were intended to provoke a state of fear in Ms. Cunningham in order to impede her in the performance of her duties. Accordingly, I find Mr. McDiarmid not guilty of Count #1.

Count #2: Attempt to Obstruct the Course of Justice

[78] The final count to be considered involves a charge of attempting to obstruct the course of justice by using violence or threats of violence toward Jennifer Cunningham, appointed as *amicus* by previous orders of the Yukon Supreme Court. While the indictment alleges an offence to contrary s. 139(1) of the Code, the language of the count itself leads me to conclude that (2) of s. 139 is in fact the proper charging section.

[79] The essential elements that must be established by the Crown beyond a reasonable doubt are:

a) the existence of ongoing judicial proceedings;

b) the accused did an act that had the risk of obstructing, perverting, or defeating the course of justice;

c) the accused intentionally did the act;

d) the accused knew or was wilfully blind to the consequences of his act in creating the risk.

[80] The Crown alleges that Mr. McDiarmid's use of violence or threats of violence toward Jennifer Cunningham was a wilful attempt on his part to get her off his cases. As I understand the theory of the Crown in this regard, it is alleged that Mr. McDiarmid was unhappy with the way things were proceedings in his cases, specifically the role Ms. Cunningham was playing as *amicus*. Harming or intimidating Ms. Cunningham, according to the Crown, was a means for Mr. McDiarmid to change things in a way that he desired, namely to end her involvement in his criminal matters.

[81] While I accept the Crown's contention that there were ongoing judicial proceedings and that Mr. McDiarmid intentionally assaulted and directed threats toward Ms. Cunningham, I am not persuaded that either act had the risk of obstructing the course of justice. The Crown is, in my view, inviting the Court to speculate about the mere possibility that injuring or intimidating Ms. Cunningham would or could have thereby impeded the justice system. In my view, this risk is simply too remote under all of the circumstances. Moreover, for the reasons stated in relation to Count #1, I am left with a doubt under all of the circumstances as to Mr. McDiarmid's intent relative to his split-second outburst on the date in question. I am simply not satisfied beyond a reasonable doubt that he had the required intent for the offence of attempting to obstruct justice.

[82] With respect to Count #2, I find Mr. McDiarmid not guilty.

[83] So I have found Mr. McDiarmid guilty of Counts 3, 4, and 6.

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GATES J.