Citation: *R. v. D.G.*, 2008 YKYC 7

Date: 20080902
Docket: 08-03513
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Cozens

R e g i n a

v.

D.G.

Publication of identifying information is prohibited by section 110(1) or 111(1) of the *Youth Criminal Justice Act*.

Appearances:
Eric Marcoux — Counsel for Crown
Nils Clarke — Counsel for Defence

REASONS FOR JUDGMENT

[1] D.G. is charged with having committed the offence of robbery contrary to s. 344(b) of the *Criminal Code of Canada* and an offence contrary to s. 137 of the *Youth Criminal Justice Act* for failing to keep the peace and be of good behaviour. This matter proceeded to trial on July 29th, 2008.

Overview

[2] The undisputed facts are that T.S. and three friends were in the vicinity of Mic Mac Motors the evening of June 14, 2008 when they were accosted by two males and a female. The taller of the males asked or told T.S. to give him his (T.S.'s) IPod. He then punched T.S. on his left eyebrow and obtained the IPod from T.S. as a result. T.S.'s hat was taken from the ground where it fell by the

second male. T.S. went to the nearby Titan gaming store and then to the hospital where he was given four stitches for the injury he received as a result of this punch. Based upon a description provided to an employee of Titan, D.G. was identified and arrested in front of the Gold Rush Inn, which is in the general vicinity of Mic Mac Motors, shortly after the incident.

Issue

[3] T.S. was unquestionably the victim of a robbery that evening. The issue to be decided in this case is whether D.G. was the individual who robbed T.S..

Evidence

T.P.

[4] T.P., who is 15 years old, stated at trial that he was not in court providing evidence of his own free will. He appeared because he had been told he would be arrested if he did not show up and testify.

[5] His evidence was that he, T.S. and a couple of other friends were walking by the car dealership at the end of Main Street when a tall male in the company of a shorter male and a female asked what they were doing on the sidewalk. The tall male got angry, shook T.S., causing his hat to fall off, and then punched T.S. and took his IPod.

[6] He provides little in the way of assistance, however, in providing a description of the assailant. He acknowledges having told a police officer at the hospital that evening that the assailant was wearing a jacket, but was unable to clearly describe the jacket in court. He was provided a copy of his statement to the RCMP in order to refresh his memory as to the description of the jacket he provided on June 14, but testified that reviewing the statement did not assist him in recalling what the jacket looked like. In his evidence he was uncertain whether the assailant was native or not, but remembers that he was wearing a normal jacket and jeans. The jacket may have been brown but T.P. did not really

remember. He stated that he did not really look at the assailant but was focused on T.S..

[7] T.P. said that he had trouble remembering because the incident happened a long time ago, although in reality it was approximately six weeks prior to his giving evidence. He could not identify Mr. G. as the individual who assaulted T.S..

[8] For the most part, T.P.'s evidence was fairly straightforward and non-evasive. I find, however, that he was somewhat disinterested in attempting to recall or provide any significant detail regarding the description of the males involved in the robbery. I will comment more on this later.

Kevin Olsen

[9] The second Crown witness was Kevin Olsen, who works at Titan. He testified that T.S. came into the store on June 14th with a cut over his eye. T.S. told him that he had been assaulted and had his hat and IPod stolen. Mr. Olsen asked for a description in order to see if he could find the assailants and call the police. T.S. told him that two individuals were involved. The first was a taller white guy wearing a dark hat and a white jacket with a fur rim. The second individual was a shorter native "guy" wearing dark clothes. Mr. Olsen also asked for the location where the incident occurred and T.S. told him that it happened by the Toyota dealership.

[10] Mr. Olsen was walking down Main Street towards Mic Mac Motors when he saw two individuals matching the description provided by T.S. in front of the Gold Rush Inn. One individual was a white "guy" approximately 6' 1" wearing a dark hat and a white jacket with a fur rim. He was subsequently identified as Mr. G.. The other individual was a shorter native "guy". The white "guy" was in an altercation with a third individual, a much larger native "guy". This altercation involved words and shoving, and it appeared that the white "guy" wanted to fight

the larger native “guy”. There was a girl present who was with the larger native “guy” and telling him not to get involved.

[11] The smaller native “guy” was trying to get the white “guy” to leave, stating “Dude we gotta go, we gotta get out of here”. The white “guy” said “Why, what’s the problem” and the smaller native “guy” said “because people probably already called the cops about what happened earlier”. The white “guy” said “What do you mean, the stuff we took from the kid”. The white “guy” then produced a white or cream coloured IPod. Mr. Olsen could not tell whether it was nano or video. At this time, Mr. Olsen was approximately no further away from the white “guy” as he was from defense counsel when he was testifying. From my vantage point on the bench I estimated this distance as approximately 15 feet.

[12] Mr. Olsen then went into the Gold Rush Inn to call the police. The girl who was with the larger native “guy” came into the Gold Rush Inn and told Mr. Olsen that the white “guy” was D.G.. Mr. Olsen then relayed this information to the police along with what T.S. had told him regarding the robbery. The smaller native “guy” came into the Gold Rush Inn, apparently saw Mr. Olsen on the telephone, and left.

[13] Mr. Olsen testified that Mr. G. stayed around the front of the Gold Rush Inn trying to get cigarettes from two older “guy”s. Four or five girls also hung around with Mr. G. until the RCMP arrived and arrested him. Mr. Olsen was sitting on a bench approximately 50 feet away from Mr. G. at the time Mr. G. was arrested.

[14] Mr. Olsen testified that Mr. G. had been in his store approximately one-half hour earlier that day getting food.

[15] In cross-examination Mr. Olsen agreed that he provided the RCMP less detail in his verbal statement than he did in court. Specifically, his description of

the person who committed the robbery was more vague and he did not mention the fact that Mr. G. had been in his store earlier that day. His explanation was that the RCMP did not ask for much in the way of detail so he did not offer it.

[16] However, he testified that his memory now is the same as it was on the date of the incident and that he remembers the events very well.

[17] In court, Mr. Olsen identified D.G. as the taller white guy wearing the white coat he observed on June 14th.

Cpl. Pelletier, Cst. Greer, Cst. Terleski

[18] The evidence of the three RCMP members called as witnesses establishes that the call regarding the robbery was received at approximately 8:37 p.m. The assailant was identified as being D.G. and described as wearing a white, hooded parka jacket. Cpl. Pelletier arrived at the Gold Rush Inn approximately three minutes after the call and arrested Mr. G., who was dressed as described. Mr. G. was searched at the time of arrest, but no IPod was located on him. Mr. G. was compliant with the RCMP. Cst. Greer testified that the coat Mr. G. was wearing was a white, down parka and was distinctive in that it was not a cool night.

[19] There was no evidence that there was any search conducted by the RCMP in the area of the Gold Rush Inn or elsewhere to try to locate the IPod. Approximately an hour and a half later, T.S.'s ball cap was found in the possession of a B.C. who was arrested for possession of stolen property but not subsequently charged. The IPod was never located.

[20] Mr. G. was booked into RCMP cells and, by an agreed admission of facts at the conclusion of the Crown's case, was noted to have in his possession a coat, belt, keys, hat, cigarettes and a lighter.

[21] None of the witnesses participated in any form of lineup for the purposes of identifying Mr. G. as the person who committed the robbery.

T.S.

[22] T.S. is 14 years old and was only in court to testify pursuant to a warrant issued at the commencement of the trial and executed during it. He provided a version of the robbery and the events subsequent to it that was essentially consistent with the evidence of T.P. and the RCMP officers, and with the physical evidence of the injuries he incurred as a result of the robbery. His evidence was also consistent with that of Mr. Olsen with the possible exception of the description of his assailant as wearing a hoodie/sweater and no hat.

[23] Notwithstanding T.S.'s initial unwillingness to be present, he was not hostile or evasive when examined by Crown and defense counsel and, by all appearances, was direct and forthright in providing his version of events.

[24] On the issue of the identification of his assailant, T.S. stated that on June 14, 2008 he was confronted by Mr. G. and a few of his friends. When asked what "they" did, he went on and described the robbery that occurred stating: "he saw that I had an IPod cord and he asked for my IPod…he then pushed me against the car and punched me in the face." T.S. then gave him his IPod. Although T.S. did not further specify that the "he" referred to is Mr. G., in the context of the questions asked, and taking into account the descriptions provided by both T.P. and T.S. as to the relative heights of the male individuals present at the time of the robbery and their respective involvement, it is the only logical conclusion to be reached.

[25] T.S. was asked by Crown counsel to describe what D.G. looked like on June 14. He was not separately asked to describe what his assailant looked like. He stated that he could not really remember other than that Mr. G. was about 6 feet tall, and wearing a hoodie.

[26] In cross-examination, he was asked whether he recalled answering a question by the Crown about the person who hit him and responding that he did not remember what he looked like. He responded that he was tall and wearing a hoodie, which he also described as a sweater, but that he did not really remember anything else. He stated that he could not really remember the features of the person who hit him. The person who hit him was not wearing a hat and he could not remember if the hoodie was up.

[27] He testified that he did not really know Mr. G. personally but that he knew him from working at the woodshop at the YAC, (Youth Achievement Centre).

[28] He was asked whether he would be able to identify D.G. in court and he pointed out the accused.

[29] T.S. was not asked whether he had described his assailant to Mr. Olsen and did not provide any evidence in this regard. He was also not asked and did not otherwise provide any colour or further description for the hoodie/sweater.

D.G.

[30] Mr. G. testified in his own defence. He said that he is six feet two inches. He stated that he was at the Elijah Smith Building (which I note is across the street from Titans) at approximately 8:00 p.m. Several other individuals asked if he wanted to go to the end of Main Street to drink with them. He responded that he would but that he had to go to Lil's Place first for something to eat. He had previously worked at Lil's Place. He then went there for take out fries which took approximately five minutes until 8:15 p.m. He then continued walking by himself down towards the end of Main Street.

[31] When Mr. G. was by the Gold Rush Inn, three girls asked him for a smoke. He said he did not have one but that he would try to get one. He then backed up

and asked two older males for a smoke which they gave him. The girls were walking away by this time. He continued walking towards the end of Main Street, a point which is past Mic Mac Motors, when the RCMP pulled up and arrested him by the parking lot at the end of the Gold Rush Inn. He said that he was at the Gold Rush Inn for approximately five minutes prior to being arrested. He was wearing a white coat with fur on the hood and a green hat at the time.

[32] He testified that he never saw T.S. or T.P. that evening, that he had nothing to do with them and that he had not committed an assault or stolen an IPod or a hat from T.S.. He had seen T.S. before June 14th at the woodworking shop at the Youth Achievement Center.

[33] In cross-examination he stated that he did not go to Titans and "grab a bite" that day.

[34] There was nothing in the manner in which Mr. G. provided his evidence or his demeanour that raises any concerns as to his credibility.

Other evidence

[35] I was asked to take judicial notice of the fact that the Gold Rush Inn is not directly across from Mic Mac Motors on Main Street and I do so.

[36] Without being specifically asked to do so, but in the same vein, I also take judicial notice of the following:

- Lil's Place is situated on the city block immediately east of Titan
- Titan stands for Titan Gaming and Collectibles
- Titan is directly across the Street from the Elijah Smith Building
- Titan is situated on the city block immediately east of the Gold Rush Inn
- The Gold Rush Inn is on the city block immediately east of the Toyota Dealership known as Mic Mac Motors. The Gold Rush Inn is on the south side of Main Street between 4th and 5th Avenue

- Mic Mac Motors is on the north side of Main Street between 5th and 6th Avenue
- 5th avenue does not intersect the south side of Main Street where the Gold Rush Inn is located.
- The Gold Rush Inn parking lot is on the west side of the Gold Rush Inn and extends to a point ½ way between 5th and 6th Avenue

Analysis

Testimony of the accused

[37] When an accused person testifies, the rule as set out in ***R.*** v. ***W.D.***, [1991] 1 S.C.R. 742 at p. 758 applies:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[38] This has been elaborated upon in the case of ***R.*** v. ***Ay*** (1995), 93 C.C.C. (3d) 456 (B.C.C.A.) at p. 460 as follows:

> If you do not know whether you believe the accused or the complainant, you must acquit.
>
> If you do not reject the evidence of the accused you must acquit.

[39] It is clear in law that this type of case is not to be viewed as a credibility contest between the complainant and the accused. Finding one witness credible does not mean that there is a coincidental finding that the other witness is not credible. A number of factors are involved in assessing the credibility of a

witness, including, but not limited to, independent evidence of other witnesses, prior statements, the physical, mental or emotional state of the witness at the time of the occurrence of events being testified to and the witness' demeanour on the stand. It is an error to make a credibility finding solely on the basis of the demeanour of a witness as it is only one factor to be considered in the context of a cumulative assessment of all the evidence: ***R.*** v. ***Powell***, [2007] O.J. No. 4196 (S.C.J.) at paras. 9, 10.

[40] Mr. G. is 17 years of age and has a considerable criminal history which includes six prior convictions for failures to comply with undertakings and court orders, one for being unlawfully at large, five for property offences of mischief, attempt theft and break and enter and six for offences of violence.

[41] As stated in R***.*** v. ***Corbett*** (1988), 41 C.C.C. (3d) 385 (S.C.C.) at p. 396:

> Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness.

[42] In ***R.*** v. ***Fengstad*** (1998), 117 B.C.A.C. 95 (B.C.C.A.), on charges of robbery, the Crown was permitted to cross-examine the accuseds on their prior records which included three convictions for robbery, as well as break and enter, theft, possession of narcotics for the purpose of trafficking, possession of an unregistered firearm, and escaping lawful custody. In upholding the trial judge's exercise of his discretion, Ryan J.A. stated at para. 27:

> In the context of this case, the evidence of the appellants' record, which demonstrated a persistent involvement in serious crimes, would properly alert the jury to the fact that these men had an abiding and repeated contempt for the laws of this land, a fact which the jury were entitled to consider in assessing the credibility of the appellants.

[43] It goes without saying, but will be said regardless, that the prior history of offences of violence, either considered separately or in conjunction with the history of property offences, cannot be considered in any way to be indicative of a likelihood of guilt in regard to the present offence of robbery. Such propensity reasoning is forbidden. While Mr. G.'s criminal record reveals a historical lack of respect for court orders and the person and property of individuals, it is only one factor amongst many that must be considered.

[44] Mr. G.'s testimony stands at points in contrast to that of Mr. Olson, who is an independent witness with no apparent vested interest in this proceeding. For example, he denies being in Titan's that day, albeit in the context of being asked whether he "grabbed a bite there". One could perhaps consider that if he had simply been asked whether he was at Titans that day for some other purpose he may have answered differently, but that would be speculation. As Mr. Olsen's testimony in this regard was prior to Mr. G. testifying, in the absence of any clarification I find that Mr. G.'s evidence was that he was not in Titans that day.

[45] More importantly, Mr. G. also makes no reference to having an altercation with a larger native male. While he was not specifically asked about this incident, and thus not in a position of having denied its occurrence before the court, he fails to mention it in his complete account of the events leading up to his arrest.

[46] I also note that Mr. G. makes no mention of walking with, or otherwise being with or in a conversation with the smaller native male described by Mr. Olsen.

[47] Mr. Olsen's testimony was that he observed Mr. G., went inside the Gold Rush Inn and phoned the RCMP, and then came back out and watched Mr. G. for the approximately three minutes between the time of his telephone call to the RCMP and their subsequent arrival at the Gold Rush Inn. According to Mr. Olsen, it was during these three minutes that he saw Mr. G. trying to obtain

cigarettes from the two older males and in the company of four or five girls he had seen before at Titans. I infer that from the fact that Mr. Olsen does not mention the presence of the larger native male, the girl that was with him or the smaller native male, that they were no longer at the scene.

[48] In contrast, Mr. G.'s evidence was that after obtaining the cigarette from the older males he walked off alone towards the end of Main Street when he was stopped and arrested by the RCMP. His evidence is that he was essentially alone from the time he left the Elijah Smith building with the exception of brief conversations with three girls and two older males about cigarettes, lasting no more than five minutes. Mr. Olson's evidence was that Mr. G. was still in front of the Gold Rush Inn when the RCMP arrived, not walking away.

[49] I take into account that Mr. G. said he was arrested at the end of the Gold Rush Inn, so his evidence is not necessarily in conflict with the evidence of Mr. Olsen as to his location at the time of his arrest, although it appears to be in conflict with respect to what he was doing at the time of his arrest.

[50] In addition, Mr. G.'s timeline is somewhat inconsistent with the evidence of the RCMP. He says that he left Lil's Place at 8:15, walked down towards the end of Main Street and was in front of the Gold Rush Inn for approximately five minutes. This would have him arrested at 8:30 even allowing for ten minutes to have elapsed from the time he left Lil's to arriving in front of the Gold Rush Inn approximately two blocks away. I point out this discrepancy in time taking into account that, unless there is a specific reference point to establish time with certainty, time estimates can be somewhat unreliable.

[51] In consideration of all the above factors, I consider Mr. G.'s evidence to be unreliable and am not left in a reasonable doubt by it. To the extent that he denies having been present at and participating in the robbery of T.S., I reject his

evidence, as I do at all points where it contradicts or is not in accord with the evidence of Mr. Olsen, whose evidence I do accept.

[52] That, however, is not the conclusion of the matter. The rejection of Mr. G.'s evidence does not equate to a finding that he was present at and participated in the robbery of T.S.. I must be satisfied on the evidence that I do accept that Mr. G. has been identified as T.S.'s assailant beyond a reasonable doubt.

[53] In the present case, the issue is not so much the credibility of the Crown witnesses but rather the reliability of T.S.'s identification of Mr. G. as his assailant.

Identification evidence

[54] The inherent frailty of eyewitness identification evidence has been the subject of much judicial comment. In ***R.*** v. ***Burke*** (1996), 105 C.C.C. (3d) 205 (S.C.C.) at 224, Sopinka J. stated:

> The cases are replete with warnings about the casual acceptance of identification evidence even when such identification evidence is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailities of identification evidence arising from the psychological fact of the unreliability of human observation and recollection": R. v. Sutton, [1970] 2 O.R. 358 (C.A.) at p. 368: In R. v. Spatola, [1970] 3 O.R. 74 (C.A.), Laskin J.A. (as he then was) made the following observation about identification evidence:
>
> > Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of the powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be

> erroneous… . The very question of admissibility of identification evidence in some of its aspects has caused sufficient apprehension in some jurisdictions to give pause to uncritical reliance on such evidence, when admitted, as the basis for conviction… .

[55] Particular comment has been made with respect to what is termed as "in-dock" identification. In ***R.*** v. ***Hibbert*** (2002), 163 C.C.C. (3d) 129 (S.C.C.) at pp. 147, 148 Arbour J. stated that in-dock identification is almost totally unreliable and the link between the confidence of the identifying witness and the accuracy of the witness is very weak. The in-dock identification by a witness must be examined in consideration "…of the totality of the circumstances which give rise to their identification in order to determine the reliability of that evidence": ***R.*** v. ***Powell***, [2007] O.J. No. 4196 (Ont. Sup. C.J.) at para. 15.

[56] In the same paragraph in ***Powell***, the court considered, albeit in more detail, the following factors to be useful in assessing the value of identification evidence:

1. the time between the identification and the events being described by the witness;
2. is the witness identifying someone they know or someone they have never seen before;
3. what were the physical circumstances at the time of the sighting such as distance, sight line and lighting;
4. the duration of the sighting;
5. the emotional state of the witness at the time of the sighting;
6. the quality of the witness' description of the person;
7. the similarity or difference between the witness' description and that of other witnesses;
8. exposure of the witness to other images of the person being identified such as composite drawings, photos or video clips;
9. any pre-trial identification process that the witness participated in;

10. any influence upon the witness' identification by other witnesses;
11. how does the witness' identification of the person compare to the actual appearance of the person at the time of the incident;
12. is the identification cross-racial in nature; and
13. is there any other reliable circumstantial evidence capable of confirming or supporting the identification evidence.

[57] The considerations most applicable in the present case are those listed as 2, 4, 5, 6, 7, 11 and 13.

T.P.

[58] The lack of identification of Mr. G. by T.P. is not particularly relevant in that I consider T.P.'s evidence as to the description of the assailant as being deliberately vague and almost entirely unreliable. This includes the description of the assailant wearing a jacket that may have been brown. The only evidence of identification that I will consider reliable and accept is his description of one male being taller and the other shorter, with the taller one being the assailant.

Mr. Olsen

[59] The in-dock identification of Mr. G. by Mr. Olsen serves only to identify Mr. G. as the person that he identified following a description given to him by T.S., and as the person arrested by the police based upon his subsequent phone call.

RCMP

[60] The RCMP in-dock identification only serves to identify Mr. G. as the person arrested by Cpl. Pelletier outside the Gold Rush Inn.

[61] As I see it, this case turns on the issue of the sufficiency of T.S.'s identification of D.G. as his assailant.

[62] I will turn now to consideration of some of the factors enumerated in ***Powell*** and how they apply to the facts of this case and a consideration of the strength or weakness of T.S.'s identification evidence.

Prior knowledge

[63] T.S. and Mr. G. knew of each other from working in the woodshop at the Youth Achievement Centre, although not personally. T.S. testified that Mr. G. was the person who accosted him at the time of the incident and, inferentially, as the "he" who punched and robbed him. I am prepared to draw this inference for the reasons given earlier.

[64] As such, T.S.'s in-dock identification of Mr. G., constructed logically, is an identification of the person who robbed him. T.S. was not hesitant in his identification of Mr. G. as his assailant.

[65] T.S.'s prior knowledge of Mr. G. is a factor that should support the reliability of his identification of Mr. G. in court as the person who robbed him.

Duration of the sighting

[66] This is not a case of a fleeting glance, nor is it a case of a drawn out interchange. T.S. had some time throughout the entirety of the incident, albeit relatively brief, in which to observe his assailant. In these circumstances, there is a reasonable expectation that T.S. would have been able to make some observations about his assailant.

Emotional circumstances

[67] T.S.'s emotional state at the time of the robbery could objectively be considered to be somewhat stressful and thus provide allowances for a lack of specific detail in respect of his observations of his assailant. That said, T.S. did not provide any subjective evidence of his emotional state at the time, and his

subsequent actions on the evidence I do have are not characterized by any indicators of any particular emotional distress.

Quality of the description

[68] The description T.S. provided of his assailant at trial was minimal. He was fairly nondescript with respect to the clothing worn and, other than height, was also unable to identify the features of his assailant. However, given the context in which he was asked the question, in that he was originally asked what Mr. G. was wearing and then cross-examined about the clothing and features about the person Crown counsel had asked him about, as well as the lack of any specifics as to what was meant by "features" – such as race, eye colour etc. - , and taking into account his age, I do not consider that much can be made of this aspect of his evidence. The description he provided Mr. Olsen was somewhat more detailed and will be discussed in the following portion of this decision.

Similarity/difference of the description

[69] When T.S.'s description of the person who robbed him is compared to that of other witnesses, little evidence exists by which to make a comparison. I have already discounted the evidence of T.P. in this regard other than the evidence that the assailant was tall. There is no other eyewitness evidence to compare T.S.'s description to.

[70] There is one other witness who provides a description of the assailant. Mr. Olsen testified that T.S. provided him certain details about what his assailant was wearing. During closing submissions, I enquired of counsel what their respective positions were as to the use I could make of Mr. Olson's testimony that T.S. had told him his assailant was wearing a white coat with fur on the hood and a hat. Crown counsel's position was that the court could not use this evidence for the truth of its contents; it simply explained what Mr. Olsen did and why he did it. Defense counsel made no direct submissions on this point. No case law was provided at that time. Submissions were concluded and my

decision reserved for two days. There was no direction given to counsel to conduct research or to make any further submissions on this point. A secondary issue arises, however, from this aspect of the case, which issue I will deal with here.

The filing of case law by Crown counsel after closing submissions

[71] On the morning of the day following the trial, Crown counsel provided the Court with two cases on the issue of "prior identification evidence". In the accompanying letter, Crown counsel stated:

> During our submissions at the trial of the matter on July 29th, the court raised the issue of the legal use of the prior description of the assailant made by the complainant, T.S., to Mr. Kevin Olsen in his business. I found a case that might be of some assistance to the court on that particular issue.
>
> *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.)
>
> In that decision, Doherty J.A., writing for the court, expressed the following after a review of the applicable case law:
>
> > If a witness identifies an accused at trial, evidence of previous identifications made and descriptions given is admissible to allow the trier of fact to make an informed determination of the probative value of the purported identification.
>
> He further stated that evidence that the witness previously gave a description which matched the accused is a factor that will assist the trier of fact in weighing the witness' in-court testimony (on identification). (para. 39)

> That approach to evidence of prior descriptions or identification was recently followed by the B.C. Court of Appeal in *R. v. Campbell*, 2006 BCCA 109 (paras. 86, 88 & 91 – 93)
>
> Please find both cases attached to this letter.

[72] Crown counsel also provided defence counsel with copies of the letter and accompanying case law at the same time. I note this is through being cc'd to defense counsel's office.

[73] Later in the morning on the July 31st date set for the giving of judgment, I had the trial coordinator contact counsel and advise them that I would not be in a position to provide my decision at 12:30 p.m. but that I would entertain any further submissions counsel may have on the issue of prior identification evidence in light of the case law provided. The provision of this case law by Crown counsel was not a contributing factor in the delay for judgment to be given.

[74] At the 12:30 p.m. appearance, defence counsel objected to the manner in which these cases had been provided to the court and Crown counsel's actions in not discussing the issue with him prior to forwarding them. Defence counsel's position was that the case had been concluded on July 28th and no further cases should have been filed or submissions made. Defense counsel's objection was based, as I perceived it, on what he considered to be a generally understood protocol in the Yukon which involves consultation between counsel and agreement before cases are filed with the court after a hearing is otherwise concluded.

[75] Crown counsel apologized for any error he may have made in not consulting with defense counsel prior to providing these cases to the court. He explained that he was simply trying to assist the court with the question raised by

the court during submissions and to do so quickly given the limited time before decision was to be rendered.

[76] As conceded by defense counsel, all that was provided was case law and the law itself was not obscure, ***Tat***, for example, being cited favourably on this issue in *obiter dicta* in the Supreme Court of Canada in ***R.*** v. ***Starr***, [2000] 2 S.C.R. 144 at para. 221. Nothing in the way of further evidence or submissions was provided by Crown counsel. I consider the case law provided as being representative of the application of general and well known principles of law. In any event, I expect that my own research into the issue would have uncovered these cases and would have resulted in the application of these general principles to the facts of this case. It is how the facts of this case fit into the law that governs the issue that is determinative.

[77] At that time I accepted the proposition that there was a breach of protocol by Crown counsel, and dealt with it as being minor, inadvertent and not in any way prejudicial to Mr. G.. I did not understand there to be any serious request for a remedy to be granted as a result of this breach, and none was given.

[78] After further consideration, I resile from my earlier position and do not now agree that Crown counsel breached any protocol, be it informal, written or unwritten.

[79] At this point, I note that defense counsel at the commencement of the proceedings today addressed the court and indicated that the word “protocol” may have been not the appropriate word to use and he apologized for any issue that may have arisen as a result of the use of that word. Rather, he said, the convention and understanding in the Yukon is that there is prior discussion between counsel prior to cases being forwarded to the court closing submissions are made. Inasmuch as he used the word “protocol” what he really meant was a convention or an understanding but not a formal protocol per se. He used the

word “courtesy” which is a word that, as will be seen shortly, is a word that my own reconsideration has come up with.

[80] What is required by Crown or defense counsel in circumstances such as this, where submissions have been concluded and the court reserves its decision, is to provide notice to opposing counsel of any case law it is filing with the court on any issue raised during trial, including sentencing, which may affect the outcome of the trial or sentencing. Counsel should then be given the opportunity by the Court to make any further submissions it wishes that arise from the case law filed.

[81] A protocol which requires consent from opposing counsel before case law is filed, in circumstances such we have here today or in this case, could lead to an injustice. The court should not be placed in a position where, through a lack of consent by counsel, it could be deprived of relevant case law that could potentially impact the decision the court is required to make. One need only imagine the unfairness that could result if defence counsel, after the conclusion of submissions, were to find a recent persuasive or binding appellate or Supreme Court of Canada decision that is directly on point on a fundamental aspect of the Crown’s case and would likely lead to an acquittal if applied, only to be denied the opportunity to present this case to the court due to Crown counsel failing to provide consent. A right of appeal does not in any way overcome this unfairness to an accused or, for that matter, the justice system in the larger sense in the unnecessary expenditure of human and financial resources.

[82] I say this noting that what defence counsel has said in his submissions today is that it is not necessarily consent that is required, rather it is communication. I refer to “consent”, however, which in some cases could be perceived as being what is required or the impression that could have been left at the conclusion of the July 31 hearing. Defence counsel has clarified his position on this issue today.

[83] At most, consultation with opposing counsel before filing case law with the court after submissions are concluded is a courtesy that has often and perhaps, in the experience of some counsel in the Yukon, usually been extended. It is not required, however, and, in particular, when timelines are tight, as was the situation in this case, the significance of any such courtesy is even further lessened. What is critical is that early notice be given, and that the materials filed be limited to case law without submissions, both of which were complied with in this case by Crown counsel. Either counsel is able to request the court for opportunity to make further submissions arising from the case law filed and the court should be proactive in inviting such submissions.

[84] I conclude that the earlier apology offered to the court by Crown counsel in this case was unnecessary in that Crown counsel's act of filing case law after submissions was not in violation of any protocol or expectations of the court.

[85] I will leave it to Crown and defence counsel to work out between themselves the way in which matters such as this should be best dealt with and the kind of communication which they would each wish and expect of each other.

[86] Returning to the issue of the description provided to Mr. Olsen, in the ***Campbell*** case, the victim of a robbery identified Mr. Campbell in court as the man who robbed her. She said that his appearance had changed since the offence date. At trial she stated that the man who had robbed her had no facial hair and wore a pink visor. However, a police officer testified that the victim had given her a description of the robber shortly after the robbery that included the assailant as having a goatee and a grey visor. The victim testified that the description that she gave to the police officer was true and accurate. During her examination and cross-examination, the victim was not shown a copy of the

police officer's notes regarding the description she provided the officer, nor were these notes read to her.

[87] About a month after the robbery, the victim recognized Mr. Campbell in a mall as the man who had robbed her. She testified that he looked the same that day as on the day he had robbed her. She remembered the hat he was wearing and that his face looked the same. She also recognized his voice as he was escorted from the mall as being that of the robber with whom she had spoken for some minutes the day of the robbery.

[88] One argument on appeal was that the trial judge erred by admitting the description provided by the victim to the police for the truth of its contents insofar as it provided a description of the robber. The appellant argued that the evidence was hearsay, was not adopted in the victim's testimony and should not have been used to corrobate the evidence relied upon to establish identification of Mr. Campbell as the robber. Rather, this description should only have been a factor in assessing the credibility of the victim.

[89] As in the present case, defence counsel in ***Campbell*** did not object to another individual testifying as to the description of the robber given to this individual by the victim. Relying on ***Tat***, the Court held that this hearsay evidence could only be admissible on three bases: the first being for the truth of its contents as past recollection recorded, the second as a principled exception to the hearsay rule, and the third for the purpose of assessing the weight of the in-court identification.

[90] The majority of the Court of Appeal found that the trial judge erred in admitting the prior description for the truth of its contents with respect to the identification of Mr. Campbell as the robber. The Court's opinion was that in these circumstances the evidence should only have been admitted for assessing

the probative value of the in-court identification. The Court stated at para. 91 that:

> …a close reading of Tat makes it clear that prior statements of identification by a witness who identifies the accused at trial, while admissible for a limited purpose, are not admissible as substantive evidence of identity.

[91] The Court, in para. 92, considered the statement of Doherty J.A. in ***Tat*** that:

> Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose.

[92] In the present case the description given to Mr. Olsen by T.S. describing his assailant as wearing a white coat with fur lining on the hood and a hat is not admissible as past recollection recorded as T.S. was never asked in direct or cross-examination whether he gave a description of his assailant to Mr. Olsen nor was this description put to him.

[93] The description given to Mr. Olsen is also not admissible as as a principled exception to the hearsay rule as T.S. testified and, in his testimony, provided a description of his assailant. T.S. did not testify that his memory of the events was less clear at the time of trial than at the time of the events and the reliability of his earlier description has not been sufficiently tested.

[94] Therefore, the description of the assailant provided by T.S. to Mr. Olsen is not evidence constituting a description of the assailant's clothing and has a very limited application to this case on the issue of identification. Its probative value on the credibility of T.S. on the issue of identification is more limited than in the ***Campbell*** case, because T.S., unlike the victim in ***Campbell***, never gave any evidence that he had provided a prior description to anyone.

Comparison to Mr. G.'s appearance at the time

[95] T.S.'s evidence is accurate with respect to Mr. G. being tall, however, this is not particularly distinctive and of limited probative value.

[96] His description of Mr. G.'s clothing given at trial is not particularly consistent with what Mr. G. was in fact wearing. The evidence of Mr. Olsen, the RCMP witnesses and Mr. G., was that Mr. G. was wearing a white hooded parka with fur trim and a hat. T.S.'s testimony that Mr. G. was wearing a hoodie/sweater and no hat is not quite the same. It is true that a hoodie may not be different than a jacket with a hood but the evidence that it was a down jacket and intended for warmer weather than the night in question, as testified to by Cst. Greer, adds another aspect to a consideration of this evidence. T.S.'s description of what Mr. G. was wearing at the time of the offence is either wrong, or it is an incomplete but not necessarily contradictory description, other than the evidence of T.S. at trial that Mr. G. was not wearing a hat.

Other circumstantial evidence

[97] The circumstantial evidence consists primarily of Mr. Olsen's actions in leaving Titans shortly after the robbery and locating Mr. G. in the general vicinity of the robbery, identifying him as matching the description he received from T.S., and overhearing the exchange between Mr. G. and the smaller native guy which involved the production of the IPod by Mr. G.. I accept the evidence of Mr. Olsen regarding this conversation. As noted earlier, the conversation is as follows:

Native "guy":	"Dude we gotta go, we gotta get out of here"
Mr. G.:	"Why, what's the problem"
Native "guy":	"Because people probably already called the cops about what happened earlier"
Mr. G.:	"What do you mean, the stuff we took from the kid".

[98] Mr. G.'s statement about "the stuff we took from the kid" is admissible as an admission against interest.

[99] The words attributed to the smaller native male constitute hearsay evidence. During the submissions of counsel I enquired as to the use I would be able to make of this evidence. Crown counsel's position was that these statements were made in the presence of the accused and were responded to by Mr. G. and as such are evidence. Defence counsel made no submissions directly on this issue, but rather focused argument on Mr. Olsen's actual proximity to Mr. G. during the general time period of the events in front of the Gold Rush Inn, including this conversation.

[100] Statements made in the presence of an accused can be admissible for the truth of their contents as an adoptive admission by conduct of the accused as a traditional exception to the hearsay rule. It is not enough, however, that a statement be made in the presence of the accused. There are additional criteria before allowing such a statement to be accepted for the truth of its content as follows: "… that the circumstances were such that the appellant was in a situation where he would be expected to respond, that he adopted the utterance by his silence or other actions, and that the probative value of the evidence outweighed its prejudicial effect": ***R.*** v. ***Henry***, [2006] O.J. No. 4167 (Sup. Ct. Jus) at para 27.

[101] The evidence of Mr. Olsen of the previous conversation and Mr. G.'s actions satisfythe above criteria for the statements of the smaller native male to be admitted for the truth of their contents as an adoptive admission. These statements were clearly made in Mr. G.'s presence and, while not necessarily statements made in circumstances in which a response would be expected, the responses of Mr. G. and his actions in producing what Mr. Olsen clearly identified as a white or cream coloured IPod put the statements of the smaller native male in a context in which they can be accepted as being true. The probative value of these statements, in this context and in consideration of the surrounding

circumstances, outweighs any prejudicial effect their admission would have on Mr. G..

[102] I note, although it has no bearing on this case given my decision on the traditional exception to the hearsay rule, that even if a statement made in the presence of an accused is not admissible as a traditional exception to the hearsay rule, the statement may be admissible on a principled exception to the hearsay rule. This requires that the statement be considered to be necessary and reliable. Although I am not required to decide this issue on this point, I consider the lack of any evidence of RCMP attempts to identify this smaller native male, in particular given the arrest of an individual later that same day in possession of T.S.'s hat, as not allowing the necessity aspect of the principled exception to the hearsay rule to be met and would not have allowed the statements in for the truth of their contents. That is not to say that the RCMP made no such efforts; there is simply insufficient evidence on this aspect.

[103] There is other circumstantial evidence. This consists of the lack of any IPod on Mr. G.'s person at the time he was arrested and searched. While the time between Mr. Olsen's telephone call to the RCMP and their arrival at the scene and their arrest of Mr. G. is only a matter of perhaps three minutes, it was fairly conceded by defence counsel that there may have been some limited opportunity for Mr. G. to have disposed of an IPod, had he been carrying one. Mr. G. denied possessing any IPod that day or other similar device. The lack of any evidence of an RCMP search of the immediate area in these circumstances may well support defence counsel's submission that Mr. G. was a "target" of the RCMP. That said, given that the RCMP were told by Mr. Olsen it was Mr. G. who had committed the robbery, this is a case of arresting a previously identified suspect and not simply choosing Mr. G. because he appeared to match a description.

Conclusion

[104] At the end and simply stated, the question is whether T.S. has clearly identified Mr. G. as the person who robbed him on June 14, 2008. T.S. has identified Mr. G. as his assailant in court and had prior knowledge of him from the Youth Achievement Centre workshop. Mr. Olson went out shortly after the incident and, based upon a description provided to him by T.S., located Mr. G. and a smaller native male in the general area where the offence occurred. He overheard an exchange between Mr. G. and the smaller native male and saw Mr. G. display something that appeared to be consistent with Mr. G. having been recently involved in taking an IPod from a kid.

[105] T.S. provided a description of Mr. G.'s clothing at the time of the offence that is not particularly consistent with what Mr. G. was wearing based upon other witness evidence. That said, I find that T.S.'s identification was not based upon linking Mr. G. to the offence through the clothing Mr. G. was wearing, but through his prior knowledge of him. T.S. was 14 years of age and the victim of a robbery. I take this into account when considering the weight I give to the description of Mr. G.'s clothing provided by T.S., when taken in the context of a consideration of all the remaining evidence.

[106] After considering the evidence presented in this case, I find that the Crown has proved beyond a reasonable doubt that Mr. G. robbed T.S. on June 14, 2008. For clarity, in closing submissions I commented that there was nothing directly linking Mr. G. to the taking of the hat from T.S. and counsel provided little in the way of submissions based, I expect, upon this. That said, however, I find that the hat was taken from T.S. as a result of the actions of Mr. G. and, as such, constitutes part of the offence of robbery.

[107] The Crown did not tender the underlying probation order giving rise to the s. 733.1(1) charge, likely, I assume, on the basis that this charge would have been conditionally stayed in the event of a conviction on the s. 344 charge as per ***R.*** v. ***Kienapple***, [1975] 1 S.C.R. 729. As such, this charge is dismissed.

Cozens T.C.J.