

Citation: *R. v. Green*, 2009 YKTC 119

Date: 20091030
Docket: 09-00130B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

Regina

v.

Michael John Green

Appearances:
Kevin Komosky
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

Overview

[1] Mr. Green was acquitted after trial on a charge of having committed an assault against Monique Martin (“Ms. Martin”) contrary to s. 266 of the *Criminal Code*. Reasons for the acquittal were reserved at the time. Mr. Green was also tried on a s. 145(2)(b) charge of failing to attend court when required to do so, and three s. 145(3) charges for breaching the terms of his Recognizance.

[2] Mr. Green is not disputing his guilt on the s. 145(3) charge dated May 22, 2009 for failing to comply with the requirement of his probation order that he abstain from the possession of alcohol. At Crown counsel’s request, I dismissed the s. 145(2)(b) charge that Mr. Green failed to attend court on September 10, 2008. The two remaining s. 145(3) charges have been adjourned for further argument on the issue of who bears the evidentiary burden in regard to the

applicability of permission exceptions contained within the terms of a Recognizance.

[3] These are my reasons for acquitting Mr. Green on the s. 266 charge.

Evidence

[4] In my Ruling on Voir Dire, I covered the evidence of Ernest and Wendy Martin, Sharon Kerr and Constables Faulkner and McCarty. I will therefore not review their evidence in detail in this judgment.

[5] The facts which I find are not in dispute to any extent are that Ms. Martin was alone in the residence of Janice Dubois in Burwash Landing, Yukon, on the morning of May 17, 2009. She was on the telephone speaking with her brother, Ernest Martin, and his wife, Wendy Martin, (they have married since the date of the alleged assault).

[6] While Ms. Martin was on the phone, Mr. Green and Mark Profeit came to the Dubois' residence. They entered the residence and a disturbance took place that involved a confrontation of some sort between Mr. Green and Ms. Martin. Mr. Green, Ms. Martin and Mr. Profeit then left the residence together. While they were driving in Mr. Profeit's car, Ms. Martin jumped out of the moving vehicle and returned to the vicinity of the Dubois' residence.

[7] In the interim, Ernest and Wendy Martin, being concerned as a result of what they heard on the telephone, drove over to the area of the Dubois' residence to check on Ms. Martin. Ms. Martin received medical attention at the Destruction Bay Health Centre, where bruising to her upper torso was noted. Some of this bruising occurred during the time she was with, or in the presence of, Mr. Green and Mr. Profeit.

Statement of Ms. Martin

[8] Ms. Martin, although issued a subpoena, did not attend at trial to provide evidence. At the conclusion of a *voir dire* I allowed into evidence at trial the statement she provided to Cst. Faulkner within hours of the alleged assault.

[9] In her statement, Ms. Martin said that Mr. Green and Mr. Profeit pulled up at the Dubois' residence while she was on the telephone with Ernest and Wendy Martin. This was at approximately 11:00 a.m on May 17, 2009.

[10] Mr. Green began to bang on the windows and doors. Mr. Green got into the residence and began to hit and punch her on the back and the top of her head. He pulled her hair and dragged her around by it, kicking and stomping her. He held her down on the floor, choking her with one hand, not, however, in an attempt to "kill her", and, when she told him she couldn't breathe, responded "that's the point", hitting her a couple more times. He also pushed the palm of his hand forcefully into her nose several times.

[11] Mr. Profeit then entered the bedroom, where this assault was apparently happening, and told her and Mr. Green to get into his car so they could return to his house. All three got into Mr. Profeit's car and headed out of the area. Ms. Martin jumped out of the moving car, and ran over to the residence of "Sam and Marianne", which is situated close to both Ms. Martin's and the Dubois' residences. Mr. Green followed Ms. Martin into Sam and Marianne's residence, sat down on the couch and then left again, stating that he was going to take Ms. Martin's car and "wrap it around the Duke River bridge".

[12] After Mr. Green left, Ernest and Wendy Martin arrived at the Dubois' residence and then came over to Sam and Marianne's residence, where they sat around a bit with Ms. Martin, before going over to Ms. Martin's residence. Ms. Martin's front door was locked by a chair against the doorknob, so Ernest Martin entered the residence through the rear door and removed the chair from the front door. As Ms. Martin was walking down the hallway, Mr. Green came out of the

spare bedroom. Ms. Martin then left the residence and returned to Ernest and Wendy Martin's residence.

Ernest and Wendy Martin

[13] There is little in the evidence of Ernest Martin that coincides with the statement of Ms. Martin, other than the evidence that they were speaking on the telephone when the disturbance occurred at the Dubois' residence, that he and Wendy Martin drove over to the area of the Dubois' residence, and that at some point Ms. Martin came over to his and Wendy Martin's residence.

[14] According to Mr. Martin's evidence, while he and Wendy Martin were driving over to the Dubois' residence, they observed Ms. Martin and Mr. Green driving past them in a car, at which point he and Wendy Martin returned to their residence. Ms. Martin then showed up at his residence approximately 25 minutes after the initial telephone call. His evidence contradicts those portions of Ms. Martin's statement that place Ernest Martin at Sam and Marianne's residence and the Dubois' residence.

[15] Wendy Martin's evidence, while placing herself and Ernest Martin in Sam and Marianne's yard speaking to Ms. Martin, does not include any references to them being inside a residence there. Her evidence that Mr. Green was driving away in Ms. Martin's car and waving as they were pulling up to Sam and Marianne's residence, does coincide to some extent with the statement of Ms. Martin that Mr. Green first left at about the same time Ernest and Wendy Martin arrived.

[16] Wendy Martin also made reference to Ms. Martin showing her a cut on her elbow. This cut is not mentioned in the statement of Ms. Martin or in the evidence of Ms. Kerr.

Nurse Sharon Kerr

[17] Ms. Kerr testified that the injuries received by Ms. Martin are consistent with either her being assaulted or her jumping out of a moving car. She did not make any mention of having noted an injury to Ms. Martin's elbow.

Constables Faulkner and McCarty

[18] The evidence provided by the police officers is not inconsistent with the statement of Ms. Martin. Their observations of her actions, demeanour and injuries, throughout her interactions with them, cause no concerns about her statement being reliable.

[19] Cst. Faulkner and Cst. McCarty located Ms. Martin's vehicle that day, parked haphazardly in the driveway of the Bucyk' residence, although they were unable to confirm with certainty who drove it there. That is potentially consistent, however, with Mr. Green having driven away with Ms. Martin's vehicle.

[20] Cst. Faulkner did not observe any signs of a physical struggle in the Dubois' residence, however, there is no indication in the statement of Ms. Martin that any such signs should have necessarily been present.

Mark Profeit

[21] Mr. Profeit testified that sometime before noon on May 17, 2009, Mr. Green asked him for a ride to Ms. Martin's residence. Mr. Green knocked at the locked front door, but nobody answered. They went over to the Dubois' residence, where Ms. Martin's car was. Mr. Profeit was at the front door. Through the picture window, Mr. Profeit saw Mr. Green kicking and knocking at the back door and banging on windows. Mr. Profeit saw someone getting dressed inside, at which point Mr. Green ran to the front door. The person who was getting dressed then ran out the back door, carrying his clothes.

[22] Mr. Profeit and Mr. Green entered the residence and went to the bedroom where Ms. Martin was sitting on the bed naked and talking on the telephone. Mr.

Green was “pissed off” and asking Ms. Martin what she was doing and who the guy was. Ms. Martin was not upset, and was making comments on the phone like “ow, ow”.

[23] Mr. Profeit went to the bathroom but left the door open. Mr. Green was still standing by the door frame. Mr. Green told Ms. Martin to get dressed so they could go and Ms. Martin kicked Mr. Green in the crotch. Ms. Martin got dressed and they all left the Dubois’ residence in Mr. Profeit’s car. While they were driving, Ms. Martin jumped out of the backseat of the car, which was going approximately 30 km/hr at the time. Mr. Profeit and Mr. Green were in the front seat. Mr. Profeit stopped the car and Mr. Green went to look for Ms. Martin, but was unable to find her. He then drove Mr. Green to a friend’s residence.

[24] Mr. Profeit stated that Ms. Martin and Mr. Greene were not out of his sight at any time. He testified that he never saw any physical contact by Mr. Green towards Ms. Martin. Mr. Profeit spoke to the RCMP shortly after the incident and provided them with his version of events.

Findings

[25] This is a case where I find the evidence of all the civilian witnesses to be somewhat unsatisfactory. The many differences in the evidence of Ernest and Wendy Martin, both when compared to each other and to the statement of Ms. Martin, may perhaps be the result of a lack of attention to detail when recalling the events. It is clear that something happened between Mr. Green and Ms. Martin that caused Ernest and Wendy Martin to attend the Dubois residence. Beyond that, however, their evidence is of little assistance, other than perhaps potentially undermining to some extent the overall reliability of the version of events provided by Ms. Martin in her statement.

[26] The evidence of Mr. Profeit is also somewhat unconvincing. The reaction, or perhaps the lack of reaction, Mr. Profeit attributes to Mr. Green to the observations of Ms. Martin and the unidentified stranger, is not persuasive. I also

find it somewhat difficult to accept that Mr. Profeit maintained continual observation of Mr. Green and Ms. Martin despite going to the bathroom. I find it much more likely that Mr. Profeit was not a witness to all of the interaction between Mr. Green and Ms. Martin, allowing, therefore, the opportunity for an unobserved assault to have occurred. There was also time between the alleged assault and Mr. Profeit speaking to the RCMP for he and Mr. Green to have concocted a story.

[27] The statement of Ms. Martin is, of course, untested by cross-examination. The ultimate reliability of this statement must be considered within the context of the whole of the evidence. As stated earlier, I consider the evidence of Ernest and Wendy Martin, beyond the acceptance of the concern raised by the phone call and Wendy Martin's evidence of seeing Mr. Green waving as he left, incapable of contributing positively in any significant way to the reliability of the version of events Ms. Martin's statement sets out. This said, I do not, however, find Ernest and Wendy Martin's testimony to necessarily detract in any significant way from Ms. Martin's version of events.

[28] I also do not consider the evidence of Ms. Kerr or of the RCMP officers to be of particular assistance in determining the ultimate reliability of Ms. Martin's version of events. Their testimony is certainly not inconsistent with Ms. Martin's version of events.

[29] While I find the evidence of Mr. Profeit to be somewhat suspect in regard to certain aspects, when I consider its impact within the context of the whole of the evidence, I simply find that, while it is possible and perhaps even probable, I am unable to be satisfied beyond a reasonable doubt that Mr. Green assaulted Ms. Martin as described in her statement. As such, Mr. Green is acquitted of the charge of assault.