Citation: *R. v. Lilley*, 2016 YKTC 56

Date: 20161019
Docket: 16-00283
16-00283A
16-00284
16-00285
16-00285A
16-00285B
15-11015
15-11015A
15-00540
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JAMES AARON LILLEY

Appearances:
Eric Marcoux — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR SENTENCE

[1] James Lilley has entered guilty pleas to having committed the following offences:

Information # 16-00283

Count #1: On or about the 2nd day of December, A.D. 2014, at or near the Town of Barrhead, in the Province of Alberta, did commit an assault upon Angela Johnston, contrary to Section 266 of the *Criminal Code*.

Information # 16-00284

Count 1: On or about the 16th day of December, 2014 at or near Edmonton, Alberta, did unlawfully assault Angela Angel Johnston, contrary to section 266 of the *Criminal Code* of Canada.

Count 3: On or about the 16th day of December, 2014, at or near Edmonton, Alberta, being at large on his recognizance entered into before a Justice and being bound to comply with a condition of that recognizance requiring him to have no contact or communication, court attendances or in the presence of legal counsel, did fail without lawful excuse, to comply with that condition, contrary to section 145(3) of the *Criminal Code* of Canada.

Count 5: On or about the 16th day of December, 2014, at or near Edmonton, Alberta, being at large on his recognizance entered into before a Justice and being bound to comply with a condition of that recognizance requiring him to refrain from the purchase, possession, use or consumption of alcohol, other intoxicating substances, or any non-prescribed illegal drugs. You shall not attend at or enter any licensed premise of which its primary business is the sale of alcohol, did fail without lawful excuse, to comply with that condition, contrary to section 145(3) of the *Criminal Code* of Canada.

Information # 16-00283A

Count 1: On or about the 10th day of March, 2015, at or near Barrhead, Alberta, having appeared before a court, Justice or Judge, failed without lawful excuse to attend court as thereafter required by the court, Justice or Judge, contrary to section 145(2)(b) of the *Criminal Code* of Canada.

Information # 16-00285

Court 1: On or about the 2nd day of March, 2015, at or near Edmonton, Alberta, did unlawfully assault Angela Angel Johnston, contrary to section 266 of the *Criminal Code* of Canada.

Count 3: On or about the 2nd day of March, 2015, at or near Edmonton, Alberta, did, without lawful authority, confine Angela Angel Johnston, contrary to section 279(2) of the *Criminal Code* of Canada.

Count 6: On or about the 2nd day of March, 2015, at or near Edmonton, Alberta, being at large on his recognizance entered into before a Justice and being bound to comply with a condition of that recognizance requiring him to have no contact or communication, directly or indirectly, with Angela Johnston except for necessary court attendances or in the presence of legal counsel, did fail without lawful excuse, to comply with that condition, contrary to section 145(3) of the Criminal Code of Canada.

Count 7: On or about the 2nd day of March, 2015, at or near Edmonton Alberta, being at large on his recognizance entered into before a Justice and being bound to comply with a condition of that recognizance requiring him to refrain from the purchase, possession, use or consumption of alcohol, other intoxicating substances, or any non-prescribed illegal drugs, did fail without lawful excuse, to comply with that condition, contrary to section 145(3) of the *Criminal Code* of Canada.

Information # 16-00285A

Count 1: Between the 13th day of March, 2015, and the 13th day of April, 2015, both dates inclusive, at or near Edmonton, Alberta, being at large on his recognizance entered into before a Justice and being bound to comply with a condition of that recognizance requiring him to report in person to a bail supervisor within 2 working days of release and thereafter as required and in the manner directed by your supervisor, did fail without lawful excuse, to comply with that condition, contrary to section 145(3) of the *Criminal Code* of Canada.

Information #16-00285B

Count 1: On or about the 9th day of April, 2015, at or near Edmonton, Alberta, being at large on his recognizance entered into before a Justice, did fail, without lawful excuse, to attend court in accordance therewith, contrary to section 145(2)(a) of the *Criminal Code* of Canada.

Information #15-11015

Count #3: On the 18th day of June 2015 at Dawson City, Yukon Territory, being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance directed by the said justice fail without lawful excuse to comply with that condition to wit: You shall have no contact or communication, directly or indirectly with: Angela Johnston contrary to section 145(3) of the *Criminal Code*.

Count #4: On the 18th day of June 2015 at Dawson City, Yukon Territory, being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance directed by the said justice fail without lawful excuse to comply with that condition to wit: You shall refrain from the purchase, possession, use or consumption alcohol, other intoxicating substances, or any non-prescribed illegal drugs contrary to section 145(3) of the *Criminal Code*.

Count #6: On the 18th day of June 2015 at Dawson City, Yukon Territory, being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance directed by the said justice fail without lawful excuse to comply with that condition to wit: You

shall abide by a curfew and remain in your residence between the hours of 10:00 pm and 6:00 am contrary to section 145(3) of the *Criminal Code*.

Count #8: On or between the 14th day of June and the 18th day of June 2015 at Dawson City, Yukon Territory, did commit an assault on Angela Johnston contrary to Section 266 of the Criminal Code.

Information #15-11015A

Count 1: that James Aaron Lilley on or about the 18th day of July in the year 2015 at the city of Whitehorse in the said Region, did being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance not to communicate with Angela Johnston without lawful excuse failed to comply with that condition by being with Angela Johnston contrary to Section 145(3) of the *Criminal Code*.

Count 3: that James Aaron Lilley on or about the 18th day of July in the year 2015 at the city of Whitehorse in the said Region, did being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance abide by a curfew of 11:00 pm to 6:00 am without lawful excuse failed to comply with that condition by being outside of his residence between 11:00 pm and 6:00 am contrary to Section 145(3) of the *Criminal Code*.

Information #15-00540

Count #1: On or about the 18th day of November in the year 2015 at the City of Whitehorse in the Yukon Territory, did in committing an assault upon Angela Johnston cause bodily harm to her, contrary to Section 267(b) of the *Criminal Code*.

Count #2: On or about the 18th day of November in the year 2015 at the City of Whitehorse in the Yukon Territory, did being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance without lawful excuse failed to comply with that condition, to wit: Not possess or consume alcohol, contrary to Section 145(3) of the *Criminal Code*.

Count #3: On or about the 18th day of November in the year 2015 at the City of Whitehorse in the Yukon Territory, did being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance without lawful excuse failed to comply with that condition, to wit: Abide by a curfew by being inside your residence or on your property between 9:00 pm and 6:00 am daily, contrary to Section 145(3) of the *Criminal Code*.

> Count #4: On or about the 18th day of November in the year 2015 at the City of Whitehorse in the Yukon Territory, did being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance without lawful excuse failed to comply with that condition, to wit: Have no contact directly or indirectly or communication in any way with Angela Johnston, contrary to Section 145(3) of the *Criminal Code*.

[2] The Crown has elected to proceed by way of summary election on all counts. An Agreed Statement of Facts has been filed:

> **CF 16-283**; GP to s. 266:
>
> 1. On December 2nd, 2014, members of the Barrhead, Alberta, RCMP were called around 22h48 hrs to a domestic dispute which was reported by a neighbor. Police spoke with the victim, Angela JOHNSTON and she reported that she had been strangled by her common law partner, the accused, James LILLEY.
>
> 2. She also described that he had thrown her toward a dresser where she hit her head and that he strangled her so hard that she blacked out.
>
> 3. Police noted that JOHNSTON had scratch marks all over her neck, a bruise just under her left eye and a red mark under her right eye. Pictures were taken of her injuries and are filed here as exhibit 2.
>
> 4. Both the accused and the victim were extremely intoxicated at the time of the event. There were three kids under 18 years old in the house that the couple was babysitting.
>
> 5. The accused was released on a recognizance by a justice of the peace the next day including conditions not to have any contact with JOHNSTON, not attend her residence, abstain from the possession or consumption of alcohol and not attend any licensed premise of which its primary business is the sale of alcohol.
>
> [It was acknowledged at the hearing that what Ms. Johnston told the RCMP was true]
>
> **CF 16-00284**; GP to count 1 s. 266, count 3 s. 145(3) no contact and count 5 s. 145(3) abstain.
>
> 6. On December 16, 2014, around 23h20 hrs Angela JOHNSTON returned to her residence in Edmonton, Alberta. Upon arriving, the

accused began making allegations that she was being unfaithful and an argument ensued.

7. The argument escalated until the accused cornered JOHNSTON in the kitchen and pushed her into the counter with his right arm into her upper chest. She attempted to defend herself by striking the accused in the face and scratching his neck, the accused ceased his assault, spit in her face and walked away. She then ran into the bathroom and called police.

8. The accused was arrested the same night and police found a small bottle of vodka in the front left pocket of his jeans. He admitted that he had been consuming alcohol and showed signs of intoxication. Police noted that he had a cut on his lip (not bleeding) and light scratches on his neck.

9. The accused was held in custody overnight pending a bail hearing and was remanded on consent until January 7th, 2015 at which time he was released on a recognizance with conditions including to report to a bail supervisor within 2 working days, remain within the province of Alberta, attend treatment, abstain from possession or consumption of alcohol, not possess firearms and not attend Ms. JOHNSTON residence.

   [It was agreed at the hearing that that he was still bound by the terms of the recognizance]

CF 16-283A; GP to count 1 s. 145(2)(b) FTA in Barrhead, Alberta

10. The accused attended Court in Barrhead, Alberta on his s. 266 charge on January 13th, 2015 and February 10th, 2015. On that last date, he reserved his plea to March 10th, 2015 and then failed without lawful excuse to attend Court on that date.

11. As a result, on March 10th, 2015 an unendorsed warrant for his arrest was issued for his pending s. 266 charge in Barrhead, Alberta based on reasonable grounds to believe that the accused has contravened the recognizance upon which he was released.

12. The accused was charged with the failure to appear on March 29th, 2015 and another unendorsed warrant was issued for his arrest the same day.

CF 16-00285; GP to count 1 s. 266, count 3 s. 279(2), count 6 s. 145(3) no contact and count 7 s. 145(3) abstain

13. On March 2nd, 2015, members of the Edmonton, Alberta RCMP were called at 22h50 hrs to the Jockey Motel for someone who was cut or injured.

14. Upon arrival, member met with Angela JOHNSTON who was visibly upset. She advised the member that she was 5 months pregnant with the accused being the father and just gotten into a physical altercation with him.

15. The officer observed bruising on her right temple area, scrapes and redness around her neck, scrapes on her forearm and she showed the officer a bite mark from the accused on her left calf. She had blood on her shirt and stated that it was from the accused.

16. Both were intoxicated and started an argument about their financial situation. They have no fix address and were renting the hotel room for the week.

17. Ms. JOHNSTON explained that the red marks around her neck came from the accused choking her with both his hands around her neck. She did not lose consciousness and used her fake plastic finger to scratch the accused under his left eye in self-defence.

18. The accused then threw her to the bed, took her cell phone away and prevented her from leaving the unit and proceeded to bite her twice while on the bed, once on the left calf (visible bruising and teeth marks observed by the officer) and once in the right arm string (she would not show that injury to the officer).

19. The scratch marks of 1 to 2 inches observed by the officer on her right forearm were obtained at some point during the altercation with the accused.

20. The accused was arrested that evening and it was decided that he needed to go to the hospital due to his level of intoxication and having consumed drugs.

21. He was released the next day by a justice of the peace on a recognizance with conditions including a $600 cash deposit, report to a bail supervisor, abide by a curfew, have no contact with Angela JOHNSTON and not attend her residence, not possess any weapons and to carry a copy of the release conditions and produce them upon request. He was able to provide the cash deposit on March 10th, 2015.

CF 16-00285A; GP to count 1 s. 145(3) FTR March 13-April 13, 2015

22. On March 10th, 2015, the accused was released on a recognizance with a condition to report within 2 working days. He failed to report as required and on April 13th, 2015 he still had not reported, a breach charge was laid and another unendorsed warrant for his arrest was issued on June 2nd, 2015.

CF 16-00285B; GP to count 1 s. 145(2) (A) FTA

23. On April 9th, 2015, the accused failed to attend court in Edmonton, Alberta without lawful excuse as required and an unendorsed warrant for his arrest was issued on April 15th, 2015.

CF 15-11015, GP count 3 s. 145(3) no contact, count 4 s. 145(3) abstain, count 6 s. 145(3) curfew and amended count 8 s. 266 June 14-18, 2015.

24. At around 00h44 hrs on June 18th, 2015, Dawson City RCMP responded to a 911 call made by Angela JOHNSTON reporting that her intoxicated boyfriend, the accused, had assaulted her.

25. Ms. JOHNSTON explained that she was pregnant with the accused and that he had bit her thumb after an argument, that she also slapped the accused in the face and that she called the police because she believed that things were escalating and she did not want them to get out of hand like they did the other night when they were celebrating his birthday.

26. On that previous date, June 14th, 2015, the accused hit her on the left temple near her airline. When Ms. JOHNSTON pulled her hair back the officer could see a slight yellowish bruise.

27. The accused was arrested that same night and police observed that he had a black eye and some scratches on his face. The officer could smell liquor on his breath but no other signs of impairment.

28. Upon verifying the accused's identity, the officer noted that the accused was on two recognizances and was wanted on at least two unendorsed warrants (in fact all his Alberta files were now on warrant status and totalled ten).

29. The accused said to the officer that he was aware of his outstanding charges and warrants.

30. The accused was released by this Court after a contested bail hearing in the afternoon of June 18th, 2015 on a recognizance with conditions including to report, abide by a curfew, have no contact with Angela JOHNSTON and not attend her residence.

    [it was agreed at the hearing that he was outside of his residence at an hour contrary to the curfew requirements of his recognizance]

CF 15-11015A; GP to count 1 s. 145(3) no contact and count 2 [*changed to count #3 at the sentencing hearing rather than count 2*] s. 145(3) curfew

31. On July 18th, 2015, at around 2h45 am the accused called the Whitehorse RCMP to report a domestic assault. While enroute, dispatch confirmed the identity of the accused as well as his release conditions.

32. When RCMP attended the premises, the officer noted that the accused was intoxicated, had smell of liquor on his breath, both blood shot eyes and slightly slurred speech. The accused was also in the presence of Angela JOHNSTON and was not abiding by his curfew at his residence.

33. The accused appeared in Court later that day and the Crown's application to revoke his June 18th release process was granted pursuant to s. 524.

34. The accused consented to remain in custody until July 30th, 2015 when he was released again after a contested show cause by a justice of the peace on a recognizance in the amount of $500 cash deposit with one surety namely, Diane LILLEY, $500 no deposit with 8 conditions including a curfew of 9:00 p.m. and 6:00 a.m. daily, not to possess or consume alcohol, no contact directly or indirectly with Angela JOHNSTON and not to attend at her residence.

35. On November 2nd, 2015, the accused was found to be suitable for the DVTO program and he entered a guilty plea to one of the Dawson City assault charge on November 16th, 2015.

CF 15-00540: GP to count 1 s. 267(b), count 2 s. 145(3) no contact, count 3 s. 145(3) abstain and count 4 s. 145(3) curfew.

36. On November 19, 2015, at 1:00 a.m., Whitehorse RCMP received a 911 call from Ms. JOHNSTON indicating that the accused was at her door banging on it and trying to get in.

37. RCMP performed CPIC checks on the accused and determined he was on conditions, and had outstanding warrants from Alberta.

38. RCMP attended the residence and located the accused outside of her apartment. He was arrested, chartered, and warned for breaching and escorted to the police vehicle. The member noted an odour of liquor on him, and he displayed indicia of consumption of alcohol.

39. RCMP then attended at Ms. JOHNSTON's apartment and spoke with her. She also displayed indicia of intoxication. In addition, the member noted that she had dried blood under her nose and by her ear, as well as significant bruising on her neck. (Pictures filed as Exhibit 3)

40. The apartment was in disarray and there was blood noted on the kitchen floor. Located in the bedroom was their 3 month old child who was sleeping. There was evidence of a struggle in this room as well. (See Exhibit 3)

41. Ms. JOHNSTON advised the member that the accused had come over earlier in the evening and she had prepared some food, he then left for a while and came back and they started arguing when he then assaulted her including choking her until she passed out. He also bit her hand, and nose and was trying to bite her ear. She indicated that she gave him an upper cut to get him to stop, and tricked him into thinking his mother was outside so he would leave.

42. Once at APU, the member noted that the accused had injuries including at least one bite mark on his arm, and that he had blood on his face, photos were obtained (filed as Exhibit 4). He advised the member that Ms. JOHNSTON had been responsible for the injuries but would not provide a statement.

43. After Children and Family Services arrived to take the infant, JOHNSTON was arrested for assaulting the accused and taken to APU. No information was sworn as a result of this arrest.

    [It was agreed at the hearing that the curfew hours he was bound by were between 9 pm and 6 am]

44. The accused has been in custody since that date and been consenting to his remand.

45. On November 27th, 2015, the Crown made an application to revoke his previous release process pursuant to s. 524. That application was

adjourned by the Court until December 9th, 2015 when it was granted. The Crown also learned around that date that the Alberta RCMP were interested in extending their warrants in order to deal with their pending charges and there is a mention by counsel for the accused, Mr. Nils Clarke, of possibly waiving the Alberta matters to the Yukon.

46. On February 8th, 2016, a Community Wellness Court suitability assessment is ordered and the accused was accepted in that program on February 12th, 2016.

47. On February 23rd, 2016, his counsel, Mr. Clarke sent a fax to Edmonton General Prosecutions requesting a waiver of the accused's Alberta matters.

48. On March 1st, 2016, the author of the suitability assessment report asked to reconsider his opinion since he recently became aware of additional charges from Alberta that were not on his system. Mr. Clarke advised the same day that he still have to make contact with the designated Alberta Crown with respect to a potential or likely waiver.

49. In early April, 2016 Mr. Clarke had medical complications and Mr. Vincent Larochelle was designated counsel shortly after.

50. On May 16th, 2016, Mr. Larochelle requested the waiver of the accused's Alberta matters to Yukon.

51. On July 14th, 2016, Yukon PPSC received the Alberta matters.

52. On August 2nd, 2016, the author of the CWC suitability assessment report found that the accused was now unsuitable for CWC since he had lied in the first report about not having any pending warrants or charges and no longer appeared motivated to change or take responsibility for his actions.

53. On September 9th, 2016, Mr. Larochelle asked to have this case re-considered by the CWC, ultimately this failed and the case was adjourned outside of CWC on September 19th.

[3] Photographs were filed of the December 2, 2014 assault. These photographs show bruising to Ms. Johnston and some small nicks and/or abrasions.

[4] Photographs of both Mr. Lilley and Ms. Johnston were filed showing injuries each received from the November 18, 2015 assault causing bodily harm.

[5] These photographs show significant bruising to Ms. Johnston's neck, along with other facial bruising, abrasions and nicks, as well as a visible bite mark to her hand.

[6] The charges on Informations 16-00283, 283A, 284, 285 and 285A and B were waived in from Alberta.

[7] Crown counsel submits that an appropriate global disposition is one of two-years-less-one-day of custody to be followed by two years of probation. This amount could be reduced by the credit of 13.5 months allowable for Mr. Lilley's time in custody on remand. This is a reduction from the 25 - 31 months custody that counsel submits would otherwise be appropriate, based on the principle of totality.

[8] In addition Crown counsel seeks a s. 110 firearms prohibition and a DNA order.

[9] Counsel submits that the following mitigating factors are present:

- the absence of a criminal record; and
- guilty pleas to all the offences which demonstrate Mr. Lilley's remorse and acceptance of responsibility, as well as sparing the victim from testifying.

[10] As aggravating features, counsel points to:

- the breach of trust;
- the number of assaults that occurred over a period of less than one year,

- all of the assaults after the first one were in breach of the bail conditions he was placed on for the initial assault;
- Ms. Johnston was pregnant for two of the assaults; and
- their three-month-old son was present for the last assault.

[11] Defence counsel submits that a sentence of between 11 – 13.5 months time served would be an appropriate disposition, to be followed by a period of probation.

[12] Counsel takes no issue with a s. 110 firearms prohibition or the DNA order.

[13] Counsel says that specific and general deterrence are also accomplished through the "loss" of just over five months credit, as a result of the commission of further offences that made Mr. Lilley subject to a s. 524(8) application, which eliminates his ability to seek remand credit any greater than that of a 1:1 ratio.

Victim Impact

[14] There is no victim impact statement from Ms. Johnston or other related information. I understand from my discussion with Crown counsel that no victim impact information is forthcoming.

Circumstances of Mr. Lilley

[15] Mr. Lilley is 33 years of age. He is a member of the Little Salmon Carmacks First Nation. He has no criminal record.

[16] I note that much of the following information was provided by counsel for Mr. Lilley and was derived from Mr. Lilley himself. It was not confirmed by information that

could be acquired through collateral sources, such as is more usually the case if the information is provided by the author of a pre-sentence report or ***Gladue*** report (see ***R.*** v. ***Gladue***, [1999] 1 S.C.R. 688). This said, I see nothing in the information provided that would cause me concerns about the reliability of this information. There are circumstances in which it is not practical or possible to obtain either a pre-sentence or a ***Gladue*** report. I am satisfied with the reliability of the information before me.

[17] His mother, Diane Lilley, attended residential school as a child. She was removed from her home while a child and adopted by a family in the United States. I do not know whether this was an Aboriginal family or not.

[18] Ms. Lilley returned on her own to the Yukon as a teenager where she lived on the streets for a period of time. Mr. Lilley's father met his mother in the Yukon when he moved here from Ontario for work. His parents separated when Mr. Lilley was five. His mother was struggling with her addiction to alcohol and drugs.

[19] His father also struggled with alcohol abuse.

[20] While his parents initially shared joint custody of Mr. Lilley and his sister, Judith, his father, without his mother's consent, moved back to Ontario with both children shortly after the divorce.

[21] It was not until seven years later that Mr. Lilley's mother was able to achieve sobriety and contact the children's father in Ontario. He then moved back to the Yukon with both children. His new spouse also returned with them. She was verbally abusive

to Mr. Lilley and would slap him and throw coffee mugs in his direction. She apparently was not similarly abusive to Mr. Lilley's sister.

[22] At the age of 13 - 15, Mr. Lilley struggled somewhat and came to the attention of the authorities, however there is no youth record that I am aware of. I also have no information before me that would indicate he was charged with having committed any offence.

[23] At the age of 15 he was sent to live with his sister, who was married to Ray Webb.

[24] Mr. Lilley was able to attend high school through his Grade 12 year but not did not obtain a diploma. He has dyslexia which leaves him struggling with respect to reading and writing. As I understand it, Mr. Lilley has never received any formal assistance in learning how to deal with his dyslexia.

[25] At the age of 18, Mr. Lilley met Cheryl Gladue, a member of the Carcross Tagish First Nation. They have two children together.

[26] Mr. Lilley and Ms. Gladue resided in Edmonton where Mr. Lilley had employment as an oil-line insulator. They rented a townhouse and owned vehicles. By all accounts this was a stable relationship and Mr. Lilley was a good provider and father. Mr. Lilley lived a sober lifestyle between the ages of 18 – 28. Unfortunately, Ms. Gladue became involved in a partying lifestyle and the relationship broke down. Ms. Gladue, with Mr. Lilley's permission, took the children to the Yukon for a visit but did not return with them.

[27] This was a turning point in Mr. Lilley's life. He met Ms. Johnston and together they were involved in a drug- and alcohol-fueled relationship. This continued while Ms. Johnston was pregnant. Mr. Lilley stated that one of the reasons for disputes between himself and Ms. Johnston was her use of drugs and alcohol while she was pregnant. While this may be true, it would seem that if Mr. Lilley had been serious about Ms. Johnston maintaining a sober lifestyle while pregnant, he may have then chosen to maintain sobriety himself. This he did not do.

[28] The relationship between Mr. Lilley and Ms. Johnston is apparently over and counsel indicates that Mr. Lilley has no wish or intention of renewing this relationship and that there is no prospect of reconciliation.

[29] Currently their son is in the care of the Director of Family and Children's Services. The plan is to have a family contract arrangement whereby he will be placed in Mr. Lilley's sister's home and she will have custody of him. The long-term goal is for him to return to live with Mr. Lilley once he is considered to be in a position to assume parental responsibility.

[30] Mr. Lilley will reside at his mother's residence in Marsh Lake. Ms. Lilley has maintained her sobriety for the past 16 years. Ms. Johnston is not allowed at Ms. Lilley's residence. This has been a requirement by Ms. Lilley previously and she has enforced this requirement.

[31] Mr. Webb is self-employed as a contractor and he has indicated that he is able to employ Mr. Lilley once he is released.

[32] Mr. Lilley states that he wants to live a sober lifestyle and put himself in a position where he is able to have his son return to live with him.

[33] He is prepared to seek any counselling that will help him do so, including residential treatment.

[34] Mr. Lilley states that while in custody at the Whitehorse Correctional Centre ("WCC"), he has been an active participant in Alcoholic's Anonymous meetings and attended church services.

[35] He states that he has requested on numerous occasions to participate in the Substance Abuse Management programming offered at WCC but he has not been able to. He states that, as he is in custody on remand, priority is given to serving inmates and therefore the program has not been available to him. He states that he has also requested other programming which has been denied him on the same basis. He did participate in a beading program as this was a program that had space for him.

[36] He has been employed as a janitorial worker while in custody.

[37] Mr. Lilley hopes to take such courses as are required in order to obtain a trade, likely in the field of carpentry. He recognizes that he needs to address his struggles with dyslexia in order to do so, and expressed his willingness to do so.

Analysis

[38] This case is somewhat unusual. Mr. Lilley is an Aboriginal individual from a somewhat dysfunctional background. Certainly ***Gladue*** factors are present. His mother attended residential school, was removed from her home and struggled with alcohol and

drug addiction issues for many years. It would seem quite logical to conclude that this contributed to the displacement Mr. Lilley had in his own life.

[39] Notwithstanding Mr. Lilley's fractured home life as a child and youth, and his struggles with education related to his dyslexia, he remained without any criminal convictions, obtained solid employment and maintained a sober lifestyle until the breakdown of his relationship with Ms. Gladue.

[40] The criminal behaviour all took place within less than a year in a dysfunctional relationship fueled by alcohol and drugs. There is sufficient information in the Agreed Statement of Facts to lend some credence to the destructive role that drugs and alcohol played in Mr. Lilley's and Ms. Johnston's relationship. I wish to make it clear that I am not casting any blame on Ms. Johnston when I say this. She is not present and participating in this sentencing hearing and I am not making any assumptions that would deflect blame and responsibility from Mr. Lilley to Ms. Johnston.

[41] While each assault was a separate incident and needs to be treated as such, the close proximity of time in which these assaults occurred, nonetheless connect them in space and time in a manner that allows me to view them as, while not a single transaction, a continuing pattern of conduct during a period of time distinct from Mr. Lilley's life outside of this period. In that way, these assaults can be viewed as being somewhat out-of-character, although certainly not in the same way as a single assault would be. These were not out of-character for Mr. Lilley within that particular time frame.

[42] The number of assaults and the severity of these assaults, in particular the choking and strangling of Ms. Johnston on at least two occasions to the point of her losing consciousness, raises significant concerns about the risk of harm Mr. Lilley poses to others that he may be in an intimate relationship with.

[43] Frankly, Mr. Lilley could easily have found himself facing more serious indictable charges.

[44] This said, there is not information before me that would indicate that Mr. Lilley was violent or assaultive in his relationship with Ms. Gladue.

[45] It is difficult to assess what risk Mr. Lilley poses for causing harm in a future intimate relationship. In this regard there needs to be some assessment in order to determine Mr. Lilley's risk factors, and treatment and counselling to address these concerns.

[46] Sections 718 - 718.2 of the *Criminal Code* read, in part, as follows:

> 718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;

> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> ...

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common law partner
>
> ...
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[47] In respect of how the notion of a range of sentence should be considered in sentencing an offender, I repeat the comments of the Yukon Court of Appeal in paras. 37 – 40 of ***R.** v. **Charlie**,* 2015 YKCA 3:

> 37 There is little doubt that the sentence imposed in this case is beyond the low end of range of sentences imposed on similar offenders for similar offences. However, as has been repeatedly said, sentencing ranges are merely guidelines.
>
> 38 In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92, the Supreme Court of Canada explained the underlying justification for the reliance on sentencing ranges, which is to "minimiz[e] the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed..." (Emphasis added). The Supreme Court discussed the relationship between the wide discretion granted to sentencing judges and the range of sentences for particular offences in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44:
>
> > [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred. [Emphasis added.]
>
> 39 A sentencing judge does not commit an error in principle simply by crafting a sentence that falls outside of the typical range for a particular offence. The appropriate sentence is determined by the circumstances of the offender and the offence, whether aggravating or mitigating. It is for this reason that, as the Supreme Court explains in *C.A.M.* at para. 92, "a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from sentences customarily imposed for similar offenders committing similar crimes..." (Emphasis added).

[48] In paras. 37 and 38 of ***R. v. Ipeelee***, 2012 SCC 13, the Supreme Court of Canada explained the broad discretion extended to sentencing judges as follows:

> [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing --the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J expressed in her concurring judgment in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 533:
>
> > It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.
>
> [38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter* scrutiny, a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this discretion and granted considerable deference to a judge's choice of sentence. ...

[49] In the end, a fit sentence is one which properly considers, balances and applies the relevant purposes, objectives and principles of sentencing, as set out in ss. 718-

718.2, to the particular circumstances of the offence and the offender. This includes, of course, the impact on any victim of the offence. This is a factor that can be taken into account based upon the materials before the sentencing judge, and common sense and experience, regardless of whether a Victim Impact Statement has been filed, so long as care is taken not to presume impacts beyond that which could generally be presumed to be present on the face of the evidence.

[50] Mr. Lilley is an Aboriginal offender. As such, in accordance with s. 718.2(e), I must pay particular attention to his circumstances in deciding an appropriate sentence. I am required to look to all reasonable alternatives that are available other than imprisonment. This is also a consideration when determining the length of imprisonment that is required, in light of what reasonable options other than imprisonment are available.

[51] It is important to consider the purpose behind s. 718.2(e). In ***Ipeelee***, the Court stated in paras. 59, 60 and 75:

> 59 The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges

may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

…

60 Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. …

…

75 Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

Appropriate Sentence

[52] These offences occurred within a period of less than one year and involved the same victim. There are six assaultive acts, with the last one causing bodily harm. There was also an unlawful confinement.

[53] On the first and last assaults the victim, Mr. Lilley's domestic partner, was choked to the point of unconsciousness. This is very aggravating.

[54] Denunciation and deterrence, both general and specific, are significant sentencing purposes in this case.

[55] Mr. Lilley has accepted responsibility for his actions, as evidenced by his guilty pleas and acceptance of the facts. While stating that these offences occurred in a relationship that was marked by substance and alcohol abuse on the part of both himself and Ms. Johnston, and perhaps some violence on her part, I do not see Mr. Lilley as blaming Ms. Johnston for what he has done.

[56] He is an Aboriginal individual from a background marred by drug and alcohol abuse, as is so often the case of offenders before the courts whose backgrounds are marked by the consequences of the residential school system and other governmental policies and treatment of Aboriginal peoples in Canada.

[57] He has been in custody continuously since his arrest on November 19, 2015.

[58] He is limited to a credit of 1:1 for his time in custody on consent remand since the Crown's application under s. 524(8) was granted. Had no s. 524(8) application been

made, Mr. Lilley would have been entitled to just over an additional five months credit for his time in remand custody.

[59] This is time that, of course, he cannot be credited for and time for which his overall sentence cannot be reduced (see ***R.*** v. ***Chambers***, 2014 YKCA 13). This loss of remission time does, however, in my opinion serve to allow for consideration to be given to the need for Mr. Lilley to be specifically deterred from the commission of further offences in the future. This is time in actual incarceration, and for an individual who has never been incarcerated as a result of a sentence imposed for the commission of a criminal offence or offences, the impact of this jail time should not be underestimated.

[60] Mr. Lilley has taken steps while in custody to seek help for his substance abuse issues. He expresses a willingness to continue doing so upon his release from custody.

[61] He has the support of his family, in more than just a general way, and the motivational factor to be a good father to his son. Given the information before me as to his prior ability to be a good father from his relationship with Ms. Gladue, I find that there is merit and substance in the notion that the restoration of this father and son relationship may be a positive motivational factor. It could also be hoped that he would be able to restore the relationship he once had with his other two children, who now also reside in the Yukon.

[62] I am satisfied that all of these offences took place in a particular set of circumstances within a relatively short time frame, given Mr. Lilley's age and other circumstances, in a manner which allows me to view them as somewhat out-of-character. I say this, however, recognizing that the nature and extent of the violence is

such that it is not to be presumed that there is no longer any risk of Mr. Lilley committing future acts of violence in future within the context of a domestic relationship. There is much that obviously needs to be addressed through assessment, counseling and treatment in order to ensure Mr. Lilley gets the help he needs to avoid committing any further criminal acts in the future.

[63] Mr. Lilley's risk for the commission of further criminal acts in the future is unknown. This risk, however, must be considered in light of his history prior to the commission of these offences. There is some mitigation in this consideration.

[64] In the end, I am satisfied that in the somewhat unusual circumstances of this case, and being mindful of the purpose, objectives and principles of sentencing, and the need to balance and apply them properly, and the jurisprudence, that a further period of custody is not necessary in this case.

[65] The sentences for the various offences will, at times, be noted as being served concurrently whereas in the normal course they would have been imposed consecutively. This is in accord with the principle of totality, as was also a consideration in determining the total sentence to be imposed.

[66] With respect to the s. 266 offence on Information 16-00283 the sentence will be 90 days time served.

[67] With respect to the s. 145(2)(b) offence on Information 16-00283A, the sentence will be 15 days time served concurrent.

[68] With respect to the s. 266 offence on Information 16-00284 the sentence will be 30 days times served consecutive.

[69] With respect to the two s. 145(3) offences on the same Information the sentence will be 30 days time served on each concurrent to each other and to the 30 days for the s. 266 offence.

[70] With respect to the s. 266 offence on Information 16-00285 the sentence will be 75 days time served consecutive.

[71] With respect to the s. 279(2) offence on the same Information the sentence will be 60 days time served concurrent.

[72] With respect to the two s. 145(3) offences on the same Information the sentence will be 30 days time served on each, concurrent to each other and concurrent to the s. 279 and 266 offences.

[73] With respect to the s. 145(3) offence on Information 16-00285A, in light of the impact of the Victim Surcharges in this case, and while recognizing the position of the Alberta Crown with respect to sentence, there will be a $100.00 fine and a $30.00 fine surcharge.

[74] With respect to the 145(2)(a) offence on Information 16-00285B Information there will be a $100.00 fine and a $30.00 fine surcharge.

[75] With respect to the s. 266 offence on Information 15-00115 the sentence will be 90 days time served consecutive.

[76] With respect to the s. 145(3) offence on the same Information for the breach of the no-contact condition the sentence will be 45 days time served concurrent.

[77] With respect to the two remaining s. 145(3) offences on the same Information there will be a $30.00 fine and a $9.00 fine surcharge on each.

[78] With respect to the s. 145(3) offence on Information 15-00115A for the breach of the no-contact provision the sentence will be 60 days time served concurrent to the 90 days time served on Information 15-00115.

[79] With respect to the remaining s. 145(3) on the same Information there will be a $30.00 fine and $9.00 fine surcharge.

[80] With respect to the s. 267(b) offence on Information 15-00540 the sentence will be four months time served.

[81] With respect to the s. 145(3) offence on the same Information for the breach of the no-contact condition there will be a sentence of 60 days time served concurrent to the four months on the s. 267(b) offence.

[82] With respect to the two remaining s. 145(3) offences on the same Information there will be a $30.00 fine and a $9.00 fine surcharge on each.

[83] The total of these sentences is 13 and one-half months custody time served.

[84] There will be $1,400.00 victim surcharges on all the offences for which fines were not imposed. There will be two years to pay the victim surcharges.

[85] There will be a probation order for a period of two years that will attach to all the offences other than the s. 145 offences.

[86] The terms of the probation order will be as follows:

(1) Keep the peace and be of good behaviour.

(2) Appear before the court when required to do so by the court.

(3) Notify the Probation Officer in advance of any change of name or address and promptly of any change in employment or occupation.

(4) Have no contact directly or indirectly or communication in any way with Angela Johnston expect with the prior written permission of your Probation Officer for purposes connected to court or directly related to the custody and access of [redacted].

(5) Not go to any known place of residence, employment or education of Angela Johnston except with the prior written permission of your Probation Officer for purposes connected to court or directly related to the custody and access of [redacted].

(6) Remain within the Yukon unless you receive the prior written permission of your Probation Officer or the Court.

(7) Report to a Probation Officer within 24 hours of your release from custody and thereafter when and in the manner directed by the Probation Officer.

(8) Reside at the residence of your mother, Diane Lilley at Marsh Lake, Yukon, abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer.

(9) For the first six months of this order you will abide by a curfew by being inside your residence between the hours of 11:00 p.m. and 6:00 a.m. daily except with the prior written permission of your Probation Officer or except in the actual presence of Diane Lilley, Judith Lilley, Raymond Webb or another responsible adult approved in advance by your Probation Officer. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition.

(10) Not possess or consume alcohol or controlled drugs and substances that have not been prescribed for you by a medical doctor.

(11) Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub.

(12) Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer for the following issues: substance abuse, alcohol abuse, spousal violence and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this program.

(13) Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition.

(14) Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

(15) Not possess any firearm, ammunition, explosive substance or any weapon as defined by the Criminal Code.

[87] There will be a s. 110 firearms prohibition order. This will be for a period of five years. This will attach itself to all the s. 266 offences as well as to the s. 279(2) and s. 267(b) offences.

[88] There will be an order that you provide a sample of your DNA, as the s. 267(b) offence is a primary designated offence. As such I will not make a discretionary DNA order with respect to the remaining offences.

_____

COZENS T.C.J.