

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Ward*, 2024 NSPC 8

Date: 20240130

Docket: 8623899

Registry: Kentville

Between:

His Majesty the King

v.

Marcus Ward

DECISION

Judge: The Honourable Judge Ronda van der Hoek

Heard: January 4 and 24, 2024, in Kentville, Nova Scotia

Decision: January 30, 2024, in Kentville, Nova Scotia

Charges: Section 266 of the *Criminal Code of Canada*

Counsel: Nathan MacLean, for the Crown
Lauren Haas, for the defence

By the Court:

Introduction

[1] At a large street party in the town of Wolfville during Acadia University “HoCo”, homecoming, it is alleged Mr. Marcus Ward grabbed Ms. Burgess by the arm, put her into a head lock, whereupon she fell to the ground, and he proceeded to drag her across the street where police promptly interceded. He is charged with a single count of assault contrary to section 266 of the *Criminal Code of Canada*. Admissions at trial included identity, jurisdiction, and date of the offence - October 15, 2022.

[2] The only issue is whether the Crown proved the case to the criminal standard. I find it did so.

Burden of proof in a criminal trial:

[3] In a criminal trial the Crown bears the burden to prove the elements of the offence charged beyond a reasonable doubt. The Court listens carefully to the testimony of all the witnesses, applies even scrutiny, and makes findings of fact. In doing so, the Court can accept some, none, or all of what any witness says, and no witness, regardless of their station in life, is presumed to provide reliable and credible evidence. All human beings are fallible, as are their memories. That is why a police investigation regularly commences by taking witness statements, thus ensuring a close in time recollection is recorded before the passage of time affects

ability to recall. Doing so also permits a witness to refresh memory before testifying and affords defence counsel an opportunity to cross examine by comparing direct evidence to the earlier statement. Given the reality matters rarely reach the trial stage until a year or so has passed since the taking of a statement, doing so also benefits the overall process.

[4] In assessing reliability and credibility of witness testimony the Court considers whether the testimony was intrinsically consistent, things were said differently at different times, was it plausible, balanced, or affected by a possible interest, was the witness able to recall and communicate what was observed, and was that ability impacted by such things as the passage of time, emotion, impairment by alcohol, or other factors. I also considered whether a witness was being sincere, candid, biased, reticent and/or evasive during testimony.

The evidence and findings of fact:

[5] Ms. Emma Burgess was a shy, demure, and nervous witness. She smiled and giggled awkwardly during the initial part of her direct examination. Later, as questioning continued, she became more comfortable, the smiling stopped, and her demeanor took on a sad and resigned affect. My sense, she was embarrassed that the situation occurred, and she now finds herself testifying in a criminal court. She frankly acknowledged her memory was affected by the passage of time, emotion, and the consumption of alcohol. She also did not benefit from the ability to have her

memory refreshed prior to testifying due to her decision not to provide a statement to police until the day before trial.

[6] Ms. Burgess testified that she and her boyfriend of four years, Marcus Ward, attended a large outdoor “HoCo” party on Summer Street. She felt tipsy after consuming three or four Blackfly alcoholic beverages, noting this amount of alcohol was not out of the ordinary. She told Mr. Ward, who seemed to be having fun at the party, that she and some friends were going into a nearby house to use the washroom. Once inside the group found a long line, so it took some time before they returned to the party.

[7] When Ms. Burgess finally rejoined Mr. Ward, he asked her where she had been and told her “we’re leaving”. She says they were standing on a front lawn, and while she did not really want to leave, did not want to upset him. Ms. Burgess qualified her testimony adding, “I don’t really remember the conversation” or whether she replied, but when Mr. Ward spoke those words, he roughly clasped or grabbed her closest forearm. Ms. Burgess explained that her steps “were stumbling”, she fell over on the lawn, and landed on the ground on her side. On cross examination she would not blame him for the fall, instead cautioning that she was not suggesting he pushed her down, noting her sneakers were old and worn.

[8] Ms. Burgess testified that she remembered continuing to get dragged, but “it gets a little blurry at this point”. She says Mr. Ward picked her up by her ankles, or

“I think” one hand on an ankle, and dragged/heaved her across the street. She says it “gets a little blurry” at this point and she “feels like a lot of crying happened”, but she did not consent to any of the touching.

[9] Asked if she sustained any injuries, Ms. Burgess testified that her head hurt “that’s all”, suggesting it hit the ground, but that was not made particularly clear. The responding officer says, without specificity, that he observed injuries on Ms. Burgess.

[10] Ms. Burgess explained that she was very emotional when the police approached her and, after speaking to them, she rejoined her friends. She remained upset and distraught, and the rest of the night is blurry.

[11] Ms. Burgess confirmed that she provided a statement to police the night before the trial, and on cross-examination explained that she did not realize she needed to do so earlier, confirmed she told an officer a few days later that she did not remember much because she was drunk, and conceded police also left her voicemails. Perhaps not surprisingly, she was unable to recall some details such as the house number or the time of day when she started drinking, other than to say the afternoon. When challenged as to whether the incident actually occurred, Ms. Burgess testified she was “most certain it happened”. She conceded emotion affects her ability to recall everything, but disagreed that she was influenced to testify by her stepdad.

[12] Ultimately cross examination revealed a few issues of concern: whether she was dragged by her ankle, initially fell on grass or the road, and whether not providing an earlier statement represented an effort to evade police. Ultimately, I was not overly troubled by those reliability issues, Ms. Burgess allowed of a blurry memory, acknowledged her emotional state and the consumption of alcohol, and also acknowledged an imperfect memory of all that occurred. The reliability concerns were, in large part, ameliorated by the testimony of Cst. Roy. It is useful to consider his testimony at this point.

Cst. Roy's testimony:

[13] Cst. Roy was a straightforward and fair witness who readily conceded on cross examination possible alternative explanations for what he observed from his relatively unobstructed vantage point some fifty feet from the parties where he saw Ms. Burgess in a headlock. I have no concerns about his credibility, he was relatively close to the incident, covered the distance in three seconds, appeared to be trying to tell the truth, and was sincere and candid when providing his evidence.

[14] Cst. Roy testified that he was on foot patrol on Summer Street when off in the distance, approximately fifty feet away, he saw Ms. Burgess and Mr. Ward who appeared to be stumbling away from the party. There were very few people obscuring his vision because the party was largely located behind him.

[15] Cst. Roy explained that he initially saw Mr. Ward holding Ms. Burgess in a headlock, and it looked as though she was trying to pull away, then he “kind of took her down”/ “pulled her to the ground”, also described as a “jerk pull across” with “I believe” his left arm. Cst. Roy struggled a bit to describe exactly what he saw, but settled on “it looked like one arm over the side and a pull down to the ground”. He then saw Mr. Ward drag Ms. Burgess across the street four or five feet, “it looked like a drag to me”, noting her lower half was on the ground. On cross-examination he agreed that he could not say if Ms. Burgess stumbled and Mr. Ward was holding her up, and while denying he saw him drag her by an ankle, added “it did not look like helping but dragging”. He also testified that Ms. Burgess’ legs were not under her “at all”, her feet were not gripping the street.

[16] Cst. Roy decided to get involved when he saw the headlock and quickly ran fifty feet in 30 seconds to arrive at the spot where Ms. Burgess was kneeling on the ground crying. He does not recall how she came to be in the kneeling position, noted she was injured, although he could not recall specific injuries – “she had some”. Her friends gathered around her, and after confirming her identity, he left her in the care of two female police officers who quickly joined him at the scene. While the women spoke to Ms. Burgess, Cst. Roy tried to speak to Mr. Ward who ignored him and ran away dropping various items on the ground.

[17] On cross-examination, Cst. Roy confirmed that from his initial vantage point he could not see the parties' faces and denied hearing any conversation between them. He also denied seeing Mr. Ward's arm around Ms. Burgess' shoulder, but conceded it was possible she tripped, adding "yes, but it did not look that way to me".

[18] Cst. Roy says he eventually located Mr. Ward in a backyard and radioed other officers to assist in an arrest. Mr. Burgess jumped the fence but was eventually taken into custody where he was belligerent and aggressive, fighting and kicking in the back of the police car.

[19] Just as was the case with Ms. Burgess, Cst. Roy's cross examination revealed some minor inconsistencies: did he initially see them from the back or the side, what was the reason he reacted when at the same time saying the take down to the ground was not aggressive.

Position of the parties:

[20] The Crown readily concedes that the Court should not accept as reliable all of Ms. Burgess' evidence. He acknowledges her police statement was provided only the day before trial and not close in time to the incident. That said, even if all the details were not entirely clear, the Crown proved the elements of an assault. Mr. Ward grabbed her forearm, and dragging her across the street, whether by ankle or not, was done without her consent. Where Cst. Roy's evidence differs from that of

Ms. Burgess, the Court is asked to accept the evidence of the officer. His evidence was reliable and credible, and while maintaining the perception of an assault when Ms. Burgess was in the headlock and dragged, he readily conceded what he did not see. He also perceived her effort to get away and reacted. The Court is told, if it accepts the evidence of Ms. Burgess that she was grabbed and dragged, an assault is made out when combined with her lack of consent to the touching. That aspect of her evidence was without controversy; she did not want the contact with Mr. Ward. The drag, observed by the officer, even if not in the manner testified to by Ms. Burgess, is also sound and combined with Ms. Burgess' crying supports the offence, even allowing some of her answers put her reliability on some points into issue.

[21] Defence counsel says Ms. Burgess was an inconsistent witness. Questions arise from her inaccurate testimony: Did she fall on the grass and was she dragged onto the street? Did she stumble when Mr. Ward touched her arm? Did he cause her to fall?

[22] Defence counsel concedes Cst. Roy's evidence was better, obviously it was not impacted by alcohol as was the case with Ms. Burgess. However, counsel notes his observation commenced from a distance when the parties were in the street. The Court should not discount the headlock was actually an effort to stop Ms. Burgess falling to the ground.

[23] Defence counsel asked the Court to note that Cst. Roy initially saw the two walking in the street, which is inconsistent with Ms. Burgess evidence that she was immediately grabbed, fell, and was dragged by her ankle from the lawn. Ms. Burgess' evidence should not be accepted as credible and reliable given the fact that she did not provide a statement despite the police asking her for one. Counsel also says there is a doubt Ms. Burgess was dragged, instead offering she was helped after stumbling.

Analysis:

[24] As I said, Ms. Burgess's evidence was not reliable on all points. She was however credible and reliable with respect to her surprise at being grabbed by the arm when Mr. Ward decided they were leaving the party. She did not consent to the touch. She was also quite fair in her testimony that Mr. Ward did not push her to the ground, instead she allowed for stumbling. I did note, as I carefully reviewed her testimony, that the stumbling did not appear to have occurred immediately which allowed for stepping some distance before she stumbled to the ground. Perhaps that is the point where the officer first saw the two, and Mr. Ward was reacting to the stumble. I do not, however, accept Ms. Burgess testimony that she fell on the lawn, rather I accept Cst. Roy's evidence that she fell in the street.

[25] It is clear from the testimony of both Crown witnesses that she was dragged across the street. I do not accept her evidence that she was dragged by her ankle,

although I suppose it cannot be ruled out that Mr. Ward reached for her ankle while she was in the “headlock”, but that was not clear to the Court.

[26] The officer ran to the couple upon seeing the headlock and perceiving Ms. Burgess was trying to get a way. I find, Mr. Ward did have Ms. Burgess in a headlock of some sort, although that may have consisted of simply holding her body as she stumbled. But he was already engaged in touching without her consent and that touching simply continued in a different but continuous manner as he moved her across the street.

[27] The officer found Ms. Burgess crying on her knees. It should not be surprising that in her state of emotional upset, and being affected by alcohol, that she would not be accurate on the finer points of whether she was on grass or asphalt when she was grabbed, but it must be the case that she is simply wrong about being dragged by her ankle. I find that did not occur. This is a useful reminder that taking a witness statement close in time to an event is the best tool to record memory. To the Crown’s benefit the responding officer testified at the trial and his account, I conclude, is more reliable where her testimony is not.

[28] So, I find Mr. Ward grabbed Ms. Burgess by the arm because he wanted to leave the party, she was pulled along until she stumbled and fell. He put his body around hers in such a manner that it could be perceived from a distance as a headlock, and proceeded to drag her across the street while her lower body was not supporting

her weight. Police responded promptly, putting an end to the assault. Ms. Burgess did not consent to the touching.

[29] Having proven all the elements of the offence beyond a reasonable doubt, the Crown will have a conviction.

[30] Judgment accordingly.

van der Hoek PCJ