

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Himmelman*, 2024 NSSC 180

Date: 20240606

Docket: *CRBW*, No. 526841

Registry: Halifax

Between:

His Majesty the King

Plaintiff

v.

Zachary Himmelman

Accused

Judge: The Honourable Justice Diane Rowe

Heard: April 8, 9, and May 21, 2024, in Bridgewater, Nova Scotia

Oral Decision: June 6, 2024

Counsel: Leigh-Ann Bryson, for the Crown
Matthew Fancey, for the Accused

By the Court, orally:

[1] I am rendering this decision orally. Should it be released in written form, I reserve the right to edit it for grammar, structure and organization, as well as to provide complete citations and references, without changing the reasoning or the result.

Overview

[2] Winter was turning to Spring on the South Shore in March, 2023, and a small group of young people were using drugs and alcohol to “party” together on the cold nights. The “party” became volatile and, eventually, violent.

[3] A series of poor decisions were made.

[4] Zachary Himmelman is charged with 5 counts contrary to the *Criminal Code of Canada*, committed against the victim Kaelin Westhaver on or about March 5, 2023, as follows: threatening to use a knife against her contrary to section 267(a); that he committed assault causing bodily harm contrary to s. 267(b); that he committed an assault by choking and strangling her contrary to s. 267(c); that he carried a weapon for the purposes of committing an offence contrary to s. 88; and that he committed an assault contrary to s. 266.

Evidence

[5] The Crown called three witnesses at trial. Jurisdiction of the Court and identity were not at issue in this matter.

[6] The first witness, Constable Dounin, established that he met with Kaelin Westhaver and took her statement on the morning of March 5, 2023. Constable Dounin observed bruising on Ms. Westhaver's face, arm, buttocks and on her neck, and he took photographs of Ms. Westhaver's injuries which were admitted into evidence.

[7] Constable Dounin made contact with Mr. Himmelman on March 8, 2023, after he had made attempts to contact him after speaking with Ms. Westhaver. Mr. Himmelman was taken into custody, and Chartered appropriately.

[8] Constable Dounin's evidence was given in a straightforward manner, and he was credible and reliable. To the extent that there are some differences concerning the manner in which the RCMP was contacted by the complainant, it did not affect the Court's finding concerning his reliability.

[9] The photographs clearly show bruising around Ms. Westhaver's eyes, and her ear, which appears slightly cut. Further, there are multiple bruises on her upper arm and on her neck, that appear consistent with a hand gripping with sufficient

force to cause bruising in a pattern. The large bruise on her buttock area is also apparent.

[10] The next witness, Ms. Jacklyn Dagley, is Ms. Westhaver's mother. She testified that her daughter had returned home on March 5, 2023 and she observed then that her daughter was injured, with bruises.

[11] Her evidence was that Ms. Westhaver told her the cause of the bruising was an assault by Mr. Himmelman. Ms. Dagley stated she encouraged Ms. Westhaver to report to the RCMP and said (as per the transcript of the proceedings, provided at page 8, line 2) "... we called. She agreed and we called." Ms. Dagley did not remember attending the police station or who had made the call.

[12] Ms. Dagley confirmed that her daughter was taking prescription medication for anxiety.

[13] Ms. Westhaver, the complainant, testified she is currently 19 years old. She also stated that she has known Mr. Himmelman for a number of years but began spending more time with him during the winter of 2023. They eventually began an intimate relationship. She acknowledged that during this time she regularly used both prescription and illegal drugs and alcohol recreationally, and she addressed her use at this time as being addictive.

[14] Ms. Westhaver would go to Mr. Himmelman's apartment in Liverpool, Nova Scotia, with friends. They included Mr. Parker Leblanc. They would all hang out and "party" which included playing video games, listening to music and drinking and taking drugs. Mr. Leblanc was staying at Mr. Himmelman's and sleeping on the couch that March.

[15] She, with Mr. Himmelman and Mr. Leblanc, and another friend were at Mr. Himmelman's apartment in March 2, 2023 in the evening when an argument occurred between her and Mr. Himmelman. The verbal argument escalated, and she damaged Mr. Himmelman's belongings and the apartment phone.

[16] Ms. Westhaver stated that day she had gone on a drive with friends and had left Mr. Himmelman asleep at his home. On their return he became angry. Her recollection is that they were sober that evening. She admitted that, in anger, she damaged his wall phone, and had pulled it out of the wall. Her evidence also agreed with the evidence of Mr. Himmelman and Mr. Leblanc that she had "cleared" the coffee table in anger, possibly overturning it and making a mess in Mr. Himmelman's residence.

[17] Ms. Westhaver's recollection was that Mr. Himmelman then assaulted her when he reacted as he took her out of his apartment by forcibly shoving her, and

that she struck her head on the doorframe. She left his apartment building, but then eventually returned to get her car keys.

[18] They were next, again, at Mr. Himmelman's apartment just days later, in the evening of March 4, 2023. It was the next morning of March 5, 2023, that Ms. Westhaver had returned home to her mother Ms. Dagley's house, where she had told her mother she was physically assaulted by Mr. Himmelman.

[19] Ms. Westhaver's evidence was that, during the evening of March 4th into the 5th, they began another argument while they were "partying," one that became violent. It was during the course of this argument that she alleged Mr. Himmelman assaulted her by punching, slapping, kicking and then choking her by grabbing her by the throat and lifting her into the air. She also recalled that Mr. Himmelman had a knife, at one point, that he held toward her after holding it to his neck and threatening his own life.

[20] Her evidence is that this occurred when they were alone together, without their other two friends being present, in Mr. Himmelman's apartment. These two friends had left.

[21] She became unconscious while Mr. Himmelman was assaulting her and she stated she woke up in the bathtub with water being poured on her by Mr.

Himmelman. After she regained consciousness, Ms. Westhaver then left the apartment and, while on the road, met Mr. Leblanc, and stayed in her car until the early morning hours when she went home to Ms. Dagley's.

[22] Ms. Westhaver was frank that she had been drinking alcohol and was taking drugs, both illicitly obtained and her own prescription medications, that night. She stated that, although she was impaired, she was still able to recollect with some clarity the manner and circumstances in which she was punched, kicked and strangled by Mr. Himmelman on the evening of March 4, 2023.

[23] While there appeared to be some confusion concerning how, and in what manner, the RCMP were later contacted by the complainant, as between these two Crown witnesses, this was not material to the Court's consideration of either of Ms. Dagley or Ms. Westhaver's overall respective credibility or reliability concerning Ms. Westhaver's injuries.

[24] Ms. Dagley's evidence was credible and reliable in her observations of Ms. Westhaver's injuries. Further, while Ms. Westhaver did not go to hospital for these injuries, the Court is satisfied on the evidence that was admitted and was credible that she was injured about the face, neck, arms and buttocks contemporaneously at the time of the allegations.

[25] Mr. Himmelman tendered his own witness and testified on his own behalf.

[26] Mr. Parker Leblanc appeared as a witness for the defence. His recollection of the March 2nd incidents corresponded with Ms. Westhaver, with the exception that he observed Ms. Westhaver strike Mr. Himmelman in the face twice that day. His view of the altercation was that Mr. Himmelman had placed his hand on her shoulder and then pushed her out of the apartment and that he thought Ms. Westhaver hit her head as she lost her balance rather than from the push being received.

[27] In regard to the March 4th evening, Mr. Leblanc recalled that “everyone was pretty intoxicated” and drinking as well as doing drugs. His evidence was that they had taken Ativan and cocaine, as well as drinking alcohol. He also stated that he left the apartment that night, and on his return, he heard an argument within but did not hear banging sounds although he heard his name spoken loudly.

[28] He says he did not see any marks on Ms. Westhaver when she picked him up on the road. Further, Mr. Leblanc did not see a yellow jack knife, like the one described by Ms. Westhaver that she saw Mr. Himmelman hold in a threatening gesture against her and himself.

[29] Mr. Himmelman's evidence in reply was that Ms. Westhaver was volatile, due to personal health issues and due to her use of both prescription and illegal drugs, as well as alcohol. His recollection was that her behavior would change drastically.

[30] Mr. Himmelman denied possessing any weapons or knives.

[31] He recalled that on March 2nd, when the argument erupted (which on cross he indicated he did start) that Ms. Westhaver began tipping over the coffee table and ripped the phone off the wall. Mr. Himmelman then stated he put his hand on her back to walk her toward the door and that Ms. Westhaver then punched him "... at least three times in the face". He then, in response, pushed Ms. Westhaver out of the door and he believed she hit her head on the wall on the other side of the hallway. Mr. Himmelman acknowledged that he apologized to Ms. Westhaver and allowed her to stay the night with him.

[32] In regards to the March 4 incident, Mr. Himmelman recalls Ms. Westhaver being very intoxicated. However, it was established that Mr. Himmelman was also very intoxicated and was vomiting as a result, based on the evidence of both Mr. Himmelman and Ms. Westhaver.

[33] His evidence was that he began sobering up and that Ms. Westhaver then instigated a verbal argument and began hitting and slapping him. Mr. Himmelman states he responded by grabbing Ms. Westhaver to try to calm her down and restrain her from hitting him although he did proceed to slap her “... two or three more times...”

[34] After Ms. Westhaver tripped to the floor, Mr. Himmelman testified that she kicked at his knees and then he kicked her back “probably four or five times.” He recalled that she then hyperventilated, went limp, and then he splashed a cup of water from the kitchen sink and threw it in her face to wake up. She then left.

Law

[35] The burden of proof is squarely on the Crown, throughout a criminal proceeding. The standard of proof that the Crown must meet is to prove each element of each offence beyond a reasonable doubt. (*R v Lifchus*, [1997] 3 SCR 320; *R v Starr*, [2000] 2 SCR 144)

[36] As Justice Hunt summarized in *R v Sylliboy* 2022 NSCC 59 at para 17:

[17] The Nova Scotia Court of Appeal and Supreme Court of Canada have expressed the standard in these terms:

- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and

common sense. It is logically derived from the evidence or absence of evidence.

- Even if it is believed the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances the Court must give the benefit of the doubt to the accused and acquit because the Crown has failed to prove the guilt of the accused beyond a reasonable doubt.

- On the other hand, it must be remembered that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

- In short, if based on the evidence before the Court, the trier of fact is sure that the accused committed the offence, then they should convict because this demonstrates the trier is satisfied of his guilt beyond a reasonable doubt.

- It has to be remembered that the burden of proof never shifts to the defendant. This is irrespective of whether the defendant himself gives evidence.

[37] In addition, the three questions in *R v W.(D)*, 1991 CanLII 93 (SCC), [1991]

1 SCR 742, must be considered by this Court as Mr. Himmelman chose to testify.

Evidentiary findings and witness credibility, especially in a case where witnesses

are acknowledging openly some levels of impairment, is key. In *R v W.(D.)* the

Supreme Court of Canada held at para 49 that:

... 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 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] In *R v. S.(D.D.)*, 2006 NSCA 34, the Court of Appeal summarized the

principles governing credibility:

[77] Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with

which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

Assault

[39] Section 265 of the *Code* defines modes of assault. It provides that a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. The section also provides that assault is committed when a person openly wears or carries a weapon and accosts or impedes another person.

[40] Section 265 applies to all forms of assault, including assault causing bodily harm. Further, it provides that there is no consent to assault obtained where the complainant submits or does not resist by reason of the application of force and threats or fear of the application of force.

[41] Section 265(4) provides that where an accused alleges he believed that the complainant consented to the conduct that is the subject matter of the offence, then in the event that the Court is satisfied there is sufficient evidence there shall be a

consideration of whether there is a presence or absence of reasonable grounds for this belief.

[42] Section 267 of the *Criminal Code* comprises assault with a weapon, assault causing bodily harm and assault by choking, suffocating or strangling. A conviction on s. 267 may satisfy the elements of s. 88, although conviction on both counts will be precluded (*Kienapple*).

[43] The Crown directs the Court to consider in regard to the count of assault with a weapon, is that it must establish the date and time of the offence, the carrying of a weapon by the accused; an attempted or threat by intentional act or gesture to apply force to the complainant, and the ability to carry out the application of force.

[44] The Crown must also establish, in relation to the offence of bodily harm the date and time, the intentional application of any degree of force, without consent and that bodily harm was caused by the accused. Bodily harm is more than transient in nature and interferes with the health and comfort of the victim.

[45] The Crown must establish evidence for the offence of common assault that there was an intentional application of any degree of force without consent, in addition to date and time.

Self Defence

[46] Mr. Himmelman has submitted that, while he does not contest he applied force on the two incidents, that he did so in a different manner than alleged in the Crown's evidence and was done so in the nature of self defence.

[47] In the case of *R v Sylliboy, supra*, Hunt, J. observed at paras 130-133 that:

[130] The relevant self-defence provisions of the *Criminal Code* read as follows:

34(1) A person is not guilty of an offence if:

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[131] The Supreme Court of Canada in *R. v. Khill*, 2021 SCC 37 has recently restated and to some extent refocused the assessment of a self-defence claim. This decision asks trial courts

to approach the analysis with a new focus on what has been referred to as three conditions or inquiries derived from the statute; these being (see para 51):

- (i) the catalyst;
- (ii) the motive; and
- (iii) the response.

[132] The Court goes on to describe in detail the required approach to each of the three inquiries.

[133] To summarize, I capture the following from paragraphs 52- 64:

Catalyst

- *Did an accused believe, on reasonable grounds, that force was being used or threatened against them or another person?*
- This element of self-defence considers the accused's state of mind and the perception of events that led them to act.
- The accused's actual belief must be held "on reasonable grounds".
- The accused's beliefs were assessed from the perspective of an ordinary person who shares the attributes, experiences and circumstances of the accused where those characteristics and experiences were relevant to the accused's belief or actions.
- The question is not therefore what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive.

Motive

- *Did an accused do something for the purpose of defending or protecting themselves or another person from a use or threat of force?*
- The second element of self-defence considers the accused's personal purpose in committing the act that constitutes the offence. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears.
- The motive provision ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.

Response

- *Was an accused's conduct reasonable in the circumstances?*
- The trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time.
- The inquiry extends to "how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the Accused": see para 64.
- It is at this stage that we apply the mandatory statutory factors at section 34(2) CCC.

Analysis

[48] Mr. Himmelman, in his written submissions, referenced “consent” as a possible defence to the allegations of assault. As the Court must self instruct on this aspect of his submission, and when considering the totality of the evidence received, the Court does not find that there is sufficient evidence to consider there is a reasonable ground for a belief in there being consent as a possible defence to the allegations of assault, and so ends that inquiry.

[49] Ms. Westhaver’s evidence is that she and Mr. Himmelman regularly argued, however on each of these two occasions that he became aggressive and then physically violent with her. Ms. Westhaver readily agreed that she could also be an “instigator” when she was with him when they argued. She was credible and reliable that she did engage in property destruction at Mr. Himmelman’s residence. The underlying circumstances of each argument was contested by the evidence of each of the witnesses, as being either jealousy or drug seeking, but these aspects were not weighed heavily by the Court.

[50] The Court will analyse the submission concerning Mr. Himmelman’s actions as constituting self defence while noting it is not incumbent on Mr. Himmelman to prove his innocence. It is incumbent on the Crown to disprove the Defence.

[51] To begin with the three part analysis, and address each incident within:

1. Did Mr. Himmelman believe, on reasonable grounds, that force was being used or threatened against him?

[52] On the March 2, 2023 incident the evidence established that there was a verbal argument between Mr. Himmelman and Ms. Westhaver concerning a drive taken with friends while he slept. She admits she threw items around, and pulled the phone out of the wall. It is possible and reasonable that Mr. Himmelman might have believed she would use force against him at this point as the argument had escalated beyond mere words and was directed at him, personally.

[53] In regards to the March 4, 2023 occurrence, the catalyst is not made out. There was suddenly an argument, while both Mr. Himmelman and Ms. Westhaver were impaired, and which Mr. Himmelman attributes to Ms. Westhaver seeking to make him jealous. By his own admission, he was intoxicated and very ill. The Court can't see how he could have formed a reasonable belief that Ms. Westhaver was then threatening force against him, even in the backdrop of their brief and highly argumentative relationship.

2. Did Mr. Himmelman do something to defend or protect himself from the use or threat of force?

[54] In regard to the March 2, 2023 incident, Mr. Leblanc and Mr. Himmelman gave an account of Ms. Westhaver causing damage to the residence. She is also alleged to have slapped Mr. Himmelman in the face. He states that his reaction was to first “guide” her or then to propel her out of the door. This then was his motive in applying force to Ms. Westhaver to get her to leave his residence.

[55] However, on the March 4 incident, Mr. Himmelman indicates that he applied force in response to punches and kicks from Ms. Westhaver although only in a responsive manner, and while restraining her as part of his motive.

3. Was the accused’s conduct reasonable in the circumstances?

[56] At this stage of the analysis the Court must apply the mandatory statutory factors set out at section 34(2).

[57] The Court notes at the outset that Mr. Himmelman appears as a strong and capable young man, who is employed in the fishery, which is a physically demanding occupation. Ms. Westhaver is a slim young woman, who was at the time of the incidents employed at a local grocery store.

[58] In regard to the March 2, 2023 incident, the evidence established that there was a verbal argument and then some property damage created by Ms. Westhaver.

Mr. Leblanc's evidence on this evening was difficult to reconcile as to particulars of whether Mr. Himmelman was "guiding" Ms. Westhaver down the hall or she was being forcefully compelled, although he did state that at the door, there was a "shove", which would imply force, of Ms. Westhaver out the door. Both Mr. Himmelman and Mr. Leblanc were firm that Ms. Westhaver though had slapped or punched Mr. Himmelman.

[59] It was not clear on Mr. Leblanc's evidence whether Ms. Westhaver was facing Mr. Himmelman at the doorway when these strikes were deployed or if the two were reversed at the door, and he could not clarify on cross examination how he saw the altercation occurring. He did, however, corroborate that Ms. Westhaver was propelled with some force out of the apartment and she struck the wall.

[60] Mr. Himmelman admits to pushing Ms. Westhaver, but his evidence is that she tripped and fell over the doorframe, then striking her head on the wall. Ms. Westhaver is clear she struck something after being thrown out of the apartment, and had a sore head that lasted a few days after she was shoved. This would appear to be more force applied by Mr. Himmelman than was required to have Ms. Westhaver leave the apartment that night and was not proportional to the threat that Ms. Westhaver posed. As he had managed to get her to the door, the additional shove by him, as the larger and stronger person with enough force to propel her

outward was , at that point, unnecessary as a response and an unreasonable application of force in the circumstances. She was not attempting to get back in.

[61] The evidence concerning the March 4 into 5, 2023 indicates that, within days of the prior argument, that Mr. Himmelman and Ms. Westhaver were again at odds and this time were very intoxicated. Irrational and heightened responses are that much more likely in such circumstances, as a matter of general human experience. The Court does not require an expert to find that is the case.

[62] Ms. Westhaver's evidence was credible in regard to the physical violence she experienced during this encounter. She had scratches and bruising to her arms, buttock and to her neck consistent with having been restrained, kicked and strangled. These injuries lasted a period of weeks before fading. She took steps to hide them, as they were visible on her face and arms. She appeared to be embarrassed and still emotionally upset as a result of Mr. Himmelman's violent actions toward her that evening.

[63] Mr. Himmelman's evidence in regard to this incident was self serving, as he discounted whether he had noticed such injuries on March 5, 2023 when she went to his apartment to obtain her personal items. He also gave evidence that these were pre-existing injuries. Mr. Leblanc's evidence attempted to corroborate Mr.

Himmelman's on this point, that Ms. Westhaver's injuries were not apparent immediately after this assault. The Court finds both Mr. Himmelman and Mr. Leblanc to not be credible witnesses in regard to Ms. Westhaver's injuries.

[64] Mr. Himmelman, on cross examination, and as stated in the transcript at page 377, lines 1-21, indicated that he reached down toward Ms. Westhaver's legs, after she tripped during their initial slapping or punching, and then she kicked at his knees. He said, in answer to the question posed by Prosecution, "you didn't move away, correct?" with a response, "No, I kicked her back." Then further, in answer to the Crown's question "and you kicked her repeatedly in the buttocks, correct?" he then replied "I kicked her three times, the same amount of times she kicked me."

[65] The Court notes that the photographic evidence, with the *viva voce* evidence, establishes that Ms. Westhaver had deep bruising and experienced pain for a length of time after this kicking.

[66] Ms. Westhaver's evidence concerning being choked was credible. Her injuries are congruent with having been held by the throat with force.

[67] Mr. Himmelman submits that he did try to lift her up, which corresponds to her evidence she was “lifted”. The difference is how and by what means he applied force in doing so.

[68] The evidence establishes that Mr. Himmelman was irritated and that he did kick Ms. Westhaver repeatedly while she was lying on the floor. He could have left the room, and chose not to. There was no corresponding necessity to simply apply repeated force to Ms. Westhaver, and no reasonable basis in the circumstances to continue to do so, or to match this force, in his terms, “blow for blow.”

[69] The burden is on the Crown to disprove beyond a reasonable doubt that the accused was engaged in self-defence. The Court is satisfied that the Crown has met its burden.

[70] Further, as the Court considers the third branch of the *W.D.* test, on the basis of the evidence which the Court does accept, this Court is convinced beyond a reasonable doubt by that evidence of the guilt of the accused in regard to each of the elements for the counts charged concerning assault causing bodily harm, assault by choking or strangling, and common assault.

[71] The Court finds that the Crown’s evidence concerning Mr. Himmelman’s use of a weapon, specifically the yellow knife which Ms. Westhaver attributes that

Mr Himmelman as having held and used to threaten her and his own self in a dramatic fashion is not credible.

[72] At times, the Court did find that Ms. Westhaver's evidence was also difficult to follow. The Court does not find that the Crown established that there was a knife in Mr. Himmelman's possession, and does not find Ms. Westhaver's account of being threatened with a knife, accompanied with Mr. Himmelman's threats to himself, to be credible. There was no "ring of truth" concerning this aspect of her evidence concerning the evening of March 4 to 5, 2023 and nothing that would corroborate or support her evidence concerning this count.

Conclusion

[73] The Court finds that the Crown has proven beyond a reasonable doubt that Mr. Himmelman committed a common assault, contrary to s. 266 of the *Code*, in relation to the incident of March 2, 2023.

[74] The Court further finds Mr. Himmelman is guilty pursuant to section 267, specifically in regard to s. 267(b) and (c) of the *Code*, as the Crown has proven beyond a reasonable doubt that he committed assault causing bodily harm, and assault with choking or strangling in relation to Ms. Westhaver on the evening of March 4 and into March 5, 2023.

[75] The Crown has not established proof beyond a reasonable doubt of the charges laid under s. 88 or s. 267(a) of the *Code* and Mr. Himmelman is not guilty of those charges.

Diane Rowe, J.