

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

MARK AUSTIN

**REASONS FOR DECISION
of the
HONOURABLE JUDGE B. E. SCHMALTZ**

Heard at: Yellowknife, Northwest Territories
September 29, 2006

Reasons: October 26, 2006

Counsel for the Crown: D. Mahoney

Counsel for the Defendant: J. Mahon

(Charged under s. 349(1) *Criminal Code*)

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

MARK AUSTIN

[1] Mark Austin is charged that on March 30th, 2006, here in Yellowknife, he entered a dwelling house without lawful excuse, with the intent to commit an indictable offence therein, contrary to s. 349(1) of the Criminal Code.

[2] The facts of this offence are in essence undisputed. On March 30th, the 18 year old complainant was babysitting for the Enns; she was looking after their two children, who were 10 and 4 at the time. The complainant arrived to baby-sit at about 8:30 or 9:00 in the evening, she put the oldest child to bed, and about 11:00 p.m., the complainant fell asleep on the couch in the living room. Sometime later she heard someone come in, and at the time thought it was the owners coming home. She got up, and saw the accused in the living room. The complainant did not know Austin at the time, had not seen him before, and had never met him – this was a stranger in the home. The time was sometime after 2:00 a.m.

[3] The complainant asked Austin why he was there and asked him to leave; he asked the complainant to call him a cab. She said she would call him a cab, but he would have to leave. Austin would not leave. Austin came further into the

house, towards the complainant; she continually told him to leave, but he would not. The complainant told Austin she was going to call “the cops”, to which he replied he didn’t “fucking care”. The complainant then went to the bedroom and Austin chased after her; she closed the door, and he shook the door handle trying to get in. The complainant continued to try to get the door completely closed such that she would be able to lock it, which she did, and Austin then began pounding on the door calling the complainant names such as “pussy, bitch, and whore.” The two children were in another bedroom at this time. The complainant did call the police. When everything seemed quiet she came out of the bedroom and Austin came after her again. The police arrived, found Austin in the living room, where he was arrested and taken into custody.

[4] The complainant testified that Austin did “seem like” he had been drinking; she said she could tell by his attitude and the way he talked, his speech was slurred “a little bit”.

[5] The complainant was worried about the two young children in the house; I accept that the complainant was terrified while Austin was in the house, and understandably so. The fear and emotional upset suffered by the complainant over this ordeal came through very evidently while she testified.

[6] Cst. Lang was on duty on March 30th; he and Cst. Organ either received or were advised of a call from the babysitter at a home here in Yellowknife. Cst. Lang with Cst. Organ arrived at the home shortly after receiving the call, at about 2:45 or 2:50 a.m. When Cst. Lang went into the home, he found Austin in the living room, and told Austin to lie on his stomach; Austin went down onto his knees and Cst. Lang forced him down and handcuffed him. Cst. Organ then took Austin out of the house to the police vehicle. Cst. Lang testified that Austin was loud and belligerent; he believed Austin was intoxicated due to the smell of liquor and his eyes were red and bloodshot, though Cst. Lang did not believe that Austin was “falling down drunk”, Austin was able to stand upright.

[7] When Cst. Lang spoke to Austin, Austin appeared to Cst. Lang to understand what Cst. Lang was saying, Austin's responses were appropriate in the context of what was being said to him; Austin was coherent, and Cst. Lang was able to understand Austin's answers. Cst. Lang returned to the detachment with Cst. Organ and Austin. In the police vehicle, Austin, who had been handcuffed with his hands behind his back, was able to maneuver his hands to the front. Austin continued to have a belligerent attitude, he was kicking at the "silent patrol" that separates the front and back of the police vehicle, and was not cooperative. At the detachment, Austin was able to walk on his own, he was placed in cells, and released some time later.

[8] Cst. Lang spoke to Austin about calling a lawyer, and Austin advised that his brother-in-law was a lawyer. It came out in Austin's evidence that he does not have a brother-in-law who is a lawyer, but does have a cousin who is a lawyer.

[9] Mark Austin testified on his own behalf. Mark Austin testified that he has, or had, a problem with alcohol, he drinks too much, he has blackouts, and when he has blackouts, he cannot recall anything he does during the period he is blacked out.

[10] On March 30th, Austin went out with friends about 7:00 p.m.; he and his friends were at the Black Knight, a bar here in Yellowknife and had "wings" and a couple of "pints", I take it of beer, and a "shooter". The group then went to Harley's, another bar here in Yellowknife, and Austin had a couple more beer and 3 or 4 "Jack & Jill shooters", being shooters of Jack Daniels and peach schnapps. The group was at Harley's for about 1 hour, leaving there to go to the Raven, another bar. Austin then has no memory of anything until waking up in RCMP cells the next morning.

[11] In cross-examination, Austin admitted that he had a brother-in-law, though his brother-in-law worked for Ghost Rider Motor Sports; Austin then, I find quite reluctantly, did state that he had a first cousin who was a lawyer. In cross, Austin said he had been kicked out of the Raven and went back to Harley's, but then said he knew that because someone told him that. Toni Enns, the owner of the home that Austin was arrested in, was the bartender at the Raven at the time. I asked Austin if Ms. Enns had been working that night to which he replied "I believe so", I then asked him why he believed this, to which he answered, "she told me she was working that night." Austin was asked if the three women he was with were also kicked out of the Raven, and he answered "no".

[12] Daniel Graham was the second witness called by defence. Mr. Graham was working at Harley's on March 30th. Mr. Graham knows Austin, and recalled seeing Austin at Harley's on March 30th. He served Austin and his friends for about half an hour. Austin and his friends seemed sober and were having a good time. The group left, but Austin returned about an hour or an hour and a half later. Mr. Graham was outside having a cigarette when Austin returned. Austin was intoxicated when he returned. Mr. Graham said "he [Austin] wasn't there", but he was walking and talking. Mr. Graham told Austin he would call him a cab, and Austin could go home and sleep it off. A cab showed up and Austin got in it. Mr. Graham did not tell the cab driver where to take Austin, and nor was he aware at the time of where Austin lived. Mr. Graham was not aware of whether or not Austin had any money with him to pay for the cab. Mr. Graham has seen Austin drunk before and said he is a totally different person when he is drunk. Mr. Graham admitted that Austin was cooperative in getting in the cab, and seemed to understand what was going on.

[13] The only issue on this trial is whether or not the crown has proven beyond a reasonable doubt the mens rea required for this offence, that is whether or not Austin had the specific intent to commit an indictable offence in the Enns' home, having entered the home without lawful excuse on March 30.

[14] The offence of unlawfully in a dwelling house is a specific intent offence. The Crown must *prove beyond a reasonable doubt* that the accused formed the specific intent requisite for the offence, that is that Austin was in the house with the intent to commit an indictable offence therein. If I find that Austin was incapable of forming the intent to commit an indictable offence, or I have a reasonable doubt on that issue, then I cannot find Austin guilty of this offence.

[15] A person's intent can be very difficult to prove. This is because we cannot see into a person's mind to determine what their intent is at any given time. Intent can sometimes be obvious, especially if a person says what his or her intent is, e.g. if a person says I am going to break into that house and then does break into the house, it is obvious that the person had the intent to break into the house. Most criminal cases are not nearly this simple in determining intent.

[16] Intent may be inferred from an accused's conduct, from his or her actions as well as words. Intent is generally internal to an accused, but when an accused's conduct and words make sense from the external indicia of intent the inference that an accused's intends the natural consequences of his or her act may be easier to draw.

[17] In this case, Austin says I have no memory of what happened from after leaving Harley's to waking up in cells the next day. He does not deny he had the intent necessary, he does not admit it. His evidence is unhelpful in determining what his intent was, though it is relevant to whether or not he was capable of forming any intent. If I am to determine what, if any, intent Austin had, I must do so from the surrounding circumstances.

[18] Counsel for Austin says as Austin has no memory, he could not have formed the specific intent that the crown must prove beyond a reasonable doubt in this case. I do not find it is nearly as clear as this. Even if I did accept that

Austin has no memory of events after leaving Harley's, I do not find that I would necessarily have to find that he could not have formed the specific intent to commit an indictable offence on entering the Enns' home on March 30. The inference that a person intends the natural consequence of his actions must be assessed in light of all the evidence, including the consumption of alcohol. I can only draw this inference after considering all of the relevant evidence relating the Austin's state of mind at the time he entered the home including, but not limited to, the consumption of alcohol; if I have a reasonable doubt about Austin's intent upon that consideration, then I cannot draw the inference.

[19] The evidence relevant to intent is: Austin walked into the Enns' house, Toni Enns was a bar-tender at the Raven at the time, and I will refer to this further on. When Austin was told to leave, he asked complainant to call him a cab – his request makes sense in the context. Austin would not leave and when the complainant told him she was going to call the police, he said he didn't care – again it would appear that Austin understood what the complainant said or was talking about. When the complainant attempted to go to one of the bedrooms, Austin chased after her and then further tried to prevent her from locking the door and then continued to pound on it and yell profanities at the complainant – these are not random or crazy actions, but actions that make sense in the context of what is happening, or the situation. Austin again went after the complainant when she came out of the bedroom – again an action that appears consistent and makes sense in the context of the situation. Austin responded to the commands of the Cst. Lang, that is he went down to his knees when he was told to lie down on his stomach; though Austin did not lie on his stomach, he went down. Cst. Lang found that Austin's responses to questions and conversation made sense in the context – no statements of Austin were entered on this trial, but Cst. Lang was under the impression that Austin appeared to understand what was going on, though he believed Austin was intoxicated, but not "falling down drunk". Austin was uncooperative and belligerent with the police, and in the police vehicle, Austin kicked at the "silent patrol" and was able to maneuver his

arms to the front of his body while handcuffed – these actions indicate to me that Austin appeared to understand what was going on and was not happy about it and attempting to perhaps to put it mildly change the situation. Again, his actions make sense in the context of what is going on. At the detachment, when being given his rights to counsel, he said his brother-in-law was a lawyer – his response whether right or not, appears to indicate he understood what was being said to him, he understood the subject.

[20] I also consider the observations of all three of the witnesses who saw Austin at or around the relevant time. All three witnesses describe Austin as intoxicated. The complainant said she could tell this by his attitude, the smell of liquor, and his speech was a little bit slurred. Cst. Lang also noted signs of intoxication, Austin was belligerent and uncooperative, but not “falling down drunk”. Mr. Graham, who knew Austin at the time, said “he [Austin] was not there”, but he was cooperative in getting in the cab, he appeared to understand what was happening. Mr. Graham, a friend, must have been confident that Austin knew where he wanted to go, and would be able to pay for a cab.

[21] The evidence that may go to lack of intent, or raise a reasonable doubt such that I should not apply the inference that Austin intended the natural consequences of his actions is: his evidence that he has no memory after leaving Harley’s that he was blacked out. This goes to his level of intoxication. The evidence of Mr. Graham that Austin “was not there”. This evidence is somewhat inconsistent with Mr. Graham’s evidence that Austin was cooperative and appeared to understand when he was getting into the cab. Mr. Graham did testify that Austin is a different person when he is drunk, and perhaps this is what Mr. Graham was referring to in testifying that Austin “was not there”. Perhaps the indication at the detachment about Austin’s brother-in-law being a lawyer, though I find this very weak evidence in suggesting or supporting a reasonable doubt, that Austin could not form the necessary intent. Especially considering Austin’s testimony on cross, given somewhat reluctantly and perhaps sheepishly, that his

first cousin was a lawyer. I also have considered that Austin did not leave the house once the complainant locked herself in the bedroom, but I find this evidence fairly neutral in that it could be considered as unusual that he was still in the house when the police arrived, but it could also show his persistence especially after twice going after or chasing the complainant.

[22] With respect to Austin's inability to remember what happened that night, even if I did accept that, I would not find that that, in and of itself, requires me to conclude that he was not able to form the necessary intent for this crime. Austin's "alcoholic amnesia" is but one factor for me to consider in assessing the evidence that goes to whether or not the Crown has proven beyond a reasonable doubt that Austin had the intent to commit an indictable offence having unlawfully entered the Enns' home.

[23] I have also considered the amount that Austin testified to have drunk that night; the amount testified to was "enough", but certainly not extraordinary or unusually excessive. I recognize that Austin could not testify to the amount he drank at the Raven, but I expect that his drinking continued on there. I accept that Austin drank enough to get intoxicated.

[24] While intoxication short of passing out or automatism may incapacitate an accused from forming an intent to commit a specific intent crime, it would still be a high degree of intoxication to provide such a defence.

[25] I do have some difficulty with Austin's evidence as to his complete lack of memory of the night in question. Whereas I do accept that there certainly are parts of the evening that Austin has no memory at all of, I also find that in his evidence he attempted to exaggerate this lack of memory. As I said earlier, Austin's reluctant and somewhat sheepish admission that his first cousin was a lawyer caused me some concern, especially in watching him make this admission. Austin advising that he had been kicked out of the Raven and then

gone back to Harley's at first caused me concern, in that on his earlier testimony he should not have had any memory of this; Austin then said someone had told him that. This may well be true, but his statement about being kicked out seemed to me spontaneous and truthful; his statement about being told this by someone came across to me as someone attempting to cover up a slip. When asked if the three "girls" he was with were also kicked out of the Raven, Austin said "no" – how would he know this? I asked Austin if Toni Enns was working at the Raven; his response was that he believed so, and explained that she had told him that.

[26] Lastly, I find the fact that, for some reason Austin leaves the Raven without his friends, I do not know whether or not he had been kicked out, but he returned to Harley's on his own. And then sometime shortly after goes to the Raven bartender's home and terrorizes the babysitter there. I find that fact very compelling in considering whether or not Austin was capable of forming the intent necessary. To suggest that this was a mere coincidence is I find a completely implausible, if not far-fetched position to maintain.

[27] In considering all the evidence on this trial, especially having carefully reviewed and considered the evidence relating to Austin's state of mind, I find: first, that Austin's evidence of his alcoholic amnesia is exaggerated though I do accept that there are parts of the evening that he has no memory of; second, in considering all the circumstances, I have no reasonable doubt that, whether or not he has a memory of it, Austin was *capable* of forming the intent necessary to prove this offence; and, third, I do draw the inference that Austin did intend the natural consequences of his actions that night, and on entering the Enns' home on March 30, and terrorizing the babysitter there, he did have the intent to commit an indictable offence therein.

[28] The only issue on this trial having been whether or not the Crown had proved beyond a reasonable doubt the specific intent required, Mark Austin will be convicted of the offence as charged.

B.E. Schmaltz
Territorial Court Judge

Dated this 26th day of October, 2006
at the city of Yellowknife, Northwest Territories

R. v. Mark Austin

2006 NWTTC 19
T-1-CR-2006000638

**IN THE TERRITORIAL COURT OF THE
NORTHWEST TERRITORIES**

IN THE MATTER OF

HER MAJESTY THE QUEEN

- and -

MARK AUSTIN

**REASONS FOR DECISION
of the
HONOURABLE JUDGE B. E. SCHMALTZ**
