

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

RYAN CHRISTOPHER HERRON

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

Heard at: Hay River, Northwest Territories
November 5 & 7, 2013

Reasons filed: January 13, 2014

Counsel for the Crown: C. Bastedo

Counsel for the Defendant: L. Stevens

(Charged under s. 267(a) & 267(b) of the *Criminal Code*)

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I. INTRODUCTION

[1] Ryan Herron is charged with assault with a weapon and assault causing bodily harm. Mr. Herron's trial was held on November 5 and 7, 2013, after which I reserved my decision. For the reasons set out below, I find Ryan Herron not guilty of both charges.

[2] At Mr. Herron's trial the Crown called five witnesses: Cst. Hammond, Cst. Gagnon, Rowan Cardinal, Travis Farnsworth, and Cameron Bernard. Ryan Herron also testified. After the trial it was clear that there was no issue that on May 18, 2013, Ryan Herron had used a knife in a confrontation with Robert Richardson, resulting in Richardson being stabbed twice in the torso area. The only issue in this case is whether or not Ryan Herron had acted in self-defence.

II. FACTS

a) Testimony

[3] On May 18, 2013, Ryan Herron who was 35 years old, was with his two younger cousins, Cameron Bernard, 18 years old, and Wade Fabian, who was younger than Cameron, but close to the same age as Cameron. Mr. Herron and his cousins had left

Mr. Herron's residence around 12:30 a.m. as Wade and Cameron were going to go to a party; the three of them were on bicycles. Around 2:45 a.m., the three were on their way back to Mr. Herron's house and stopped at the CIBC to get some money at the cash machine, but were not able to. They then stopped at the Rooster grocery store and gas station; it was about 2:45 a.m. Mr. Herron was going to try the cash machine at the Rooster as they wanted to get some drinks.

[4] Outside the Rooster, they met up with Robert Richardson, who was with Travis Farnsworth, Rowan Cardinal, and perhaps two other people – Paul and Jonah. There was a confrontation between Ryan Herron and Robert Richardson, and Ryan Herron stabbed Richardson twice, once near his belt line in the kidney area, and once in the rib area towards the back. From the evidence that much was clear and uncontroverted.

[5] I accept the evidence of Cst. Hammond and Cst. Gagnon who attended the scene after the fact. They attended the area around the Rooster at 3:45 a.m. on May 18, 2013, by which time Robert Richardson was inside the Rooster. Richardson was "covered in blood", and had two stab wounds. Cst. Hammond took photographs of the stab wounds (Exhibits 1 and 2), and an ambulance attended and took Richardson to the hospital.

[6] After speaking to people at the scene the officers attended a residence in Hay River where they believed Ryan Herron was. Upon arriving, Cst. Gagnon saw an individual that Cst. Gagnon did not know at the time but whom he determined was Ryan Herron sitting at the picnic table in the back yard, slumped over, and crying. Cst. Gagnon arrested Ryan Herron for attempted murder and handcuffed Ryan Herron; Cst. Gagnon then did a 'pat down' search of Ryan Herron and found a knife in the front pocket of Ryan Herron's hoodie, at which point Ryan Herron said "it's the knife". Cst. Gagnon seized the knife and photographs of the knife were entered on the trial (Exhibits 3, 4, and 5).

[7] Rowan Cardinal testified that the incident happened around 8 or 9 or 10 p.m. Mr. Cardinal met up with Robert Richardson and Travis Farnsworth near the Rooster. He testified that Richardson was very intoxicated and belligerent. Rowan Cardinal said

that a person with a trucker hat and a pony tail “called him out”, “him” being Richardson. Richardson went towards that person, who from all the evidence was Ryan Herron. Rowan Cardinal saw Ryan Herron “leaning in” and said Ryan Herron made a weird movement, and Richardson started screaming. Rowan Cardinal was not close enough to see what Ryan Herron was holding. Rowan Cardinal testified that Richardson had three, four, or five stab wounds. In cross examination, Rowan Cardinal testified that he was “buzzed” but not “totally wasted”. He testified that when this incident took place the sun “was in the process of setting”.

[8] Travis Farnsworth testified that on May 18, he was with Jonah, Rowan [Cardinal], Paul, and Robert [Richardson] at the Rooster around 11 or 12:00 p.m. or 1:00 a.m. when “one of my boys got jigged up.” Mr. Farnsworth testified that Jonah was “a drunk ass and useless” that night. Mr. Farnsworth testified that there was an incident between Richardson and Ryan Herron, whom he did not know at the time, and that “Paul” tried to diffuse the situation. He testified that in the “other group”, i.e. the group including Ryan Herron, there were three or four people and he had “no clue what they looked like.” Then there was a “thrill moment” which was when Richardson and Ryan Herron “were into each other’s faces.” Mr. Farnsworth testified that Ryan Herron had a “small little knife” and stabbed Richardson four times: in the leg (thigh), in the calf, in the shoulder, and the ribs, which all happened in one swift movement. Before the stabbing Mr. Farnsworth said there was no contact between Richardson and Ryan Herron. He believed that he and the others he was with were going to get into a brawl. Mr. Farnsworth testified that Jonah “wussed out”. Travis Farnsworth said he did not see anything in Richardson’s hand as Richardson approached Ryan Herron. A number of times during his testimony Travis Farnsworth referred to “our group” and “the other group”.

[9] In direct examination Mr. Farnsworth testified that he had not been drinking that night; it was put to him in cross examination that in the statement he gave to the police he had said he was really inebriated. He then testified that he was “a good solid 7”, like a “coke and marijuana high at the same time”.

[10] Cameron Bernard testified that he, Wade Fabian and Ryan Herron were riding around on their bikes that night; in the area of the Rooster, Richardson was belligerent and “calling us on”, and his cousin, Ryan Herron “snapped”. He testified that Richardson was with a group of people and they were walking towards him, Wade Fabian and Ryan Herron. Cameron Bernard testified that Richardson threw the first punch, punching Ryan Herron in the head; he then saw Ryan Herron punch back and heard Richardson say “I just got stabbed.” Ryan Herron had told Cameron Bernard and Wade Fabian to stay back, and they did stay back.

[11] After the altercation, Cameron Bernard, Wade Fabian and Ryan Herron returned to Chris Herron’s (Ryan Herron’s father) house, and the police arrived approximately ten to fifteen minutes later. Cameron Bernard testified that he, Ryan Herron and Wade Fabian had drank two cases (twelve) Corona beer earlier in the evening, and that at the time of the altercation Ryan Herron appeared “pretty sober”; Mr. Cameron described his own condition as “having a buzz on but sobering up”.

[12] The last witness on this trial was Ryan Herron. Ryan Herron described the events leading up to the altercation in a fair amount of detail. He, Cameron Bernard and Wade Fabian had drank beer earlier in the evening (May 17); between 6:00 p.m. and 8:30 p.m. Ryan Herron had four beers. At approximately 12:30/45 a.m. he agreed to escort “the boys” (Bernard and Fabian) to a party; the party was a fair distance away, and the three of them set out on their bicycles. Ryan Herron testified that his cousin Wade Fabian had been beat up a few nights before this and he did not think “the boys” would be safe going on their own. For some reason, they did not go to a party, but after cycling to the other side of town were headed back to Herron’s house. They stopped at the CIBC as Ryan Herron wanted to get some money so they could stop at the Rooster and get something to drink. Mr. Herron was not able to get any money out of the CIBC bank machine, but they still decided to go on to the Rooster as there was a bank machine there.

[13] Outside of the Rooster, or in that area, at approximately 2:45 a.m., they encountered Richardson and the people with Richardson. Ryan Herron testified that Richardson said to him: “Nice ponytail fag” and continued with other remarks in that

vein; Ryan Herron responded “Fuck you”, Cameron and Wade also joined in making similar remarks back to Richardson. Ryan Herron testified that almost all the insults from Richardson were of the nature of “faggot” and geared towards his sexual orientation. Richardson and the others with him were approximately fifteen feet away from Ryan Herron, Wade Fabian and Cameron Bernard and it did not appear to Ryan Herron at that point that anyone had any weapons. Richardson and another individual began walking towards Ryan Herron – Richardson had a closed fist and Ryan Herron believed Richardson had something in his fist, as he kept punching his fist into his other hand; the other individual appeared to be carrying something that looked like a rock or a piece of cement.

[14] As Richardson and the other individual walked towards Ryan Herron, Richardson said “we’re going to kick the shit out of you faggot”, and both Richardson and the other individual were “grinning”. Ryan Herron testified that at that point he “did not expect to make it home that night.” Ryan Herron testified that he said: “We don’t want to fight”; Richardson said “You started it”; and Ryan Herron said “We don’t want any trouble.” As Richardson was getting closer, Ryan Herron told Richardson “stop, that’s far enough – I have a knife.” Ryan Herron testified that Richardson continued towards him and then punched him twice in the head. Ryan Herron testified that he had never been hit that hard in his life and that the hit “flashed my eyes”.

[15] That night Ryan Herron had a knife in his pocket; he had had the knife for ten years and always carried it with him as he used it for his employment in the oilfield. Pictures of the knife are in evidence. Closed, the knife appears to be approximately five inches long; it has to be manually opened, and when opened the blade is approximately four inches long.

[16] After being punched in the head, Ryan Herron hit back; he had his knife in his hand. Ryan Herron thought he had only hit Richardson once, but accepted that because Richardson had two stab wounds that he must have hit Richardson twice with the knife. Ryan Herron testified that when he hit back at Richardson he felt his life was in danger.

[17] In cross-examination, Ryan Herron testified that upon Richardson first calling him on, or insulting him, he did not leave as he had to protect Wade Fabian and Cameron Bernard. Ryan Herron did not believe the three of them would be able to get away or escape the situation as they were on BMX bicycles.

b) Findings of Fact

[18] Robert Richardson was stabbed – that fact is beyond doubt. With respect to exactly how or why that occurred, there were three people in the immediate vicinity who would best know what happened or be able to describe what happened and what was said: the victim, Robert Richardson; the accused, Ryan Herron; and “Paul” (I believe that is the name of the individual who was with Richardson). I have only heard from one of them, Ryan Herron. I do not know why the victim, Robert Richardson, was not called as a witness, nor do I know why “Paul” was not called.

[19] I recognize that clearly the Crown has discretion as to which witnesses it calls on a trial, and the Crown need not call all witnesses to the unfolding of the narrative of the crime in question¹. Further the Crown is not obliged to call even the victim of the crime as a witness, where it is able to prove its case through other witnesses.

[20] That being said, I also keep in mind the comments of the Supreme Court of Canada in *Cook*²:

Where the Crown adduces nothing at all from the complainant or victim in a given case, it goes without saying that the Crown will need some other evidence of a compelling nature to establish the accused's guilt beyond a reasonable doubt. This burden will be even more difficult to overcome where there appears to be no good reason for refusing to call the witness. I would think that, in many situations, legitimate questions would arise in the minds of the trier of fact where a victim was willing and able to testify, yet without any explanation, was not called on behalf of the Crown. Indeed, in a situation where the failure of the complainant or victim to testify was completely unexplained, I would think that it would be open to the trial judge if he or she so chose, to instruct the members of the jury that they could adversely consider this absence of testimony in deciding

¹ *R. v. Lemay*, [1952] 1 S.C.R. 232, *R. v. Caccamo*, [1976] 1 S.C.R. 786, *R. v. Cook*, [1997] 1 S.C.R. 1113

² *Cook*, *supra*, para. 51

upon whether or not the Crown had proved its case. I wish to make it clear, however, that this would not be the case where the Crown satisfies the trial judge that the complainant or victim is unavailable to testify for legitimate reasons.

[21] I do not know whether or not Robert Richardson and/or "Paul" were willing and able to testify in this case. There is no explanation as to why neither one were called as a witness. I do not know whether their evidence would have made my decision easier or harder, but I have to say it leaves me perplexed. I would have thought these two witnesses for the Crown would have the most compelling and forceful evidence on this case. Indeed, considering the defence in this case I would even be tempted to say essential evidence.

[22] I found Ryan Herron's evidence credible and reliable. He was a careful witness, and certainly appeared to appreciate the seriousness of this proceeding.

[23] In contrast I found neither Rowan Cardinal nor Travis Farnsworth impressive witnesses.

[24] Rowan Cardinal testified that this incident happened around 8 or 9 or 10 p.m., when the sun was in the process of setting. From all of the other evidence on this trial the incident took place sometime between 2 and 3:30 a.m. Rowan Cardinal testified that Richardson had three or four or five stab wounds; Richardson had two stab wounds. Rowan Cardinal testified that he was about fifteen metres away when he saw all this, and from his testimony there may well have been a fence blocking his view. Rowan Cardinal has either reconstructed what he thinks may have happened with no thought to when it happened, or perhaps he has talked to Travis Farnsworth and both of them have collaborated in an attempt to make their evidence consistent.

[25] Travis Farnsworth testified that he saw Richardson get stabbed four times, said exactly where Richardson was stabbed. Robert Richardson did not get stabbed in the calf or in the thigh or in the shoulder as Travis Farnsworth testified. I do not find that this was an honest mistake on the part of Travis Farnsworth; Mr. Farnsworth was either lying when he testified to this, or he had fabricated this evidence to accord with Rowan Cardinal's evidence. From watching and listening to Mr. Farnsworth as he testified, it

was clear to me that he had no appreciation at all of the seriousness of this situation and was testifying as to what he may have thought likely happened or to some fiction that he came up with in his mind.

[26] Mr. Farnsworth testified that he had not been drinking that night, though he had told the police in his statement taken at the time that he was really inebriated. Having testified in direct to not drinking, he then said in cross that he was “a good solid 7” on a scale of 1 to 10, I find this was likely because he had been using cocaine and marijuana that night, and that in telling the police that he was “really inebriated”, this was likely due to illicit drugs he had used that night. I give no weight to Travis Farnsworth’s testimony.

[27] I am suspicious that Travis Farnsworth and Rowan Cardinal collaborated in an attempt to offer consistent testimony. It may be that neither one of them recalls what happened, or it may be that neither one of them actually saw what happened; neither one of them testified truthfully about what they saw or heard. Suffice it to say that I do not accept or rely on their evidence.

[28] I am left then with the evidence of Cameron Bernard and Ryan Herron with respect to what happened that led to Robert Richardson being stabbed twice. Cameron Bernard’s evidence was fairly consistent with Ryan Herron’s. Both Cameron Bernard and Ryan Herron appeared to be testifying honestly, without exaggerating or minimizing what happened. I accept and rely on the evidence of both of them.

[29] On that evidence, I find that there was an unpleasant verbal exchange started by Robert Richardson making offensive remarks to Ryan Herron. Richardson and another individual, “Paul”, then approached Ryan Herron, while Cameron Bernard and Wade Fabian ‘stayed back’ as Ryan Herron had told them to. Richardson likely had something hard in his fist and “Paul” had either a piece of cement or a rock in his hand, as both of them approached Ryan Herron, with Richardson saying to Ryan Herron “we’re going to beat the shit out of you faggot”. Ryan Herron told Richardson that they [Herron, Bernard and Fabian] did not want to fight, and that they did not want any trouble. Richardson continued towards Ryan Herron and Ryan Herron told him to stop

as he had a knife. Richardson then punched Ryan Herron twice in the head hard enough to cause Ryan Herron to what is sometimes referred to as 'to see stars', and Ryan Herron then hit Robert Richardson twice in the torso area. Ryan Herron had a knife in his hand at the time which resulted in Ryan Herron stabbing Richardson in the rib area towards his back and in the kidney area near his belt line. I believe Ryan Herron feared for his life at the time, and I find that his reaction to hit Richardson was done for the purpose of defending himself from Richardson.

III. SELF DEFENCE

[30] The issue on this trial is whether or not in these circumstances Ryan Herron can rely on section 34 of the *Criminal Code* which sets out the defence of self-defence.

Section 34(1) states:

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.

[31] Ryan Herron had just been told that he was going to have the "shit" beat out of him and two individuals approached him, one of them with a rock or a piece of cement in his hand, the other Ryan Herron believed with something in his fist. Ryan Herron told them he did not want to fight, he did not want any trouble, and even told them to stop as he had a knife. They both continued, grinning, and then Richardson punched Ryan Herron twice in the head so hard that Ryan Herron saw stars. I find that Ryan Herron had reasonable grounds to believe that force was being used against him, and that when he hit Richardson in response to being punched in the head it was for the purpose of defending himself.

[32] The issue then is was Ryan Herron's response reasonable in the circumstances.

Section 34(2) states:

(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.

[33] In considering the nature of the threat made, i.e. to "beat the shit" out of Ryan Herron, in the context of the insulting offensive remarks made implying that Richardson believed Ryan Herron was gay and that is why he was going to beat him, and that Richardson was accompanied by Paul who had a weapon in his hand, and Richardson was aggressive, drunk, and belligerent, I find it reasonable that Ryan Herron feared for his life and did not think he would "make it home that night".

[34] The force first threatened to be used and then used was significant. Ryan Herron did try to resort to other means, he did tell Richardson that he did not want to fight, that he did not want any trouble, and even told Richardson to stop as Herron had a knife. Should he have run, left, never taken the knife out of his pocket and simply hit back with his fist?

[35] Ryan Herron could see that one of the people approaching him had a weapon, and from the actions of Richardson, he believed Richardson did too. To think that he could have or should have stopped these two men, whom he believed both had weapons, with just his fists is not realistic or reasonable. Perhaps it could have been done, but I cannot find that it was unreasonable to respond in kind, that is with a weapon.

[36] Was it reasonable that Ryan Herron was concerned that this group of what appeared to be drunken, aggressive belligerent men may harm his young cousins? Ryan Herron believed that his younger cousin Wade had been beat up a few nights before. In all the circumstances, I find Ryan Herron's concern for his cousins was reasonable.

[37] Ryan Herron was not the instigator of this altercation, and nor was he responsible for the escalation of it. It was Richardson who started the insulting and offensive remarks, it was Richardson and "Paul" who approached Ryan Herron with at least "Paul" having a weapon and likely Richardson having one as well, and it was Richardson who threatened Ryan Herron.

[38] With respect to the physical capabilities of the parties, I have considered that Ryan Herron had his two younger cousins with him whom he had told to stay back. There were two men approaching him, both of whom he believed were armed, and there were three other men in the vicinity that it would not be unreasonable for Ryan Herron to believe could also pose a threat to him and his cousins.

[39] Subsections (f), (f.1), and (h) are not applicable in this case. There was no evidence of any prior incidents or history or interaction between Ryan Herron and Richardson. Both the threats made by Richardson and the two punches Richardson inflicted on Ryan Herron were unlawful.

[40] It is difficult to imagine that the use of a knife in response to a punch could be proportional. And yet, in the circumstances of this case, it is also difficult to conceive of a clearly more appropriate course of action. I cannot ignore the fact that "Paul" had a

weapon in his hand, and Ryan Herron reasonably believed that Richardson also had a weapon.

[41] This is a very difficult and a sad case. The circumstances are disturbing in that there appeared to be some element of what could be interpreted as hate towards an identifiable group. There is no evidence on this trial of anyone's sexual orientation, but certainly the comments made by Robert Richardson, and perhaps others in "the group" he was with, towards Ryan Herron are disturbing. Ryan Herron testified that all of the slurs or insults yelled at him were to do with sexual orientation. This is the kind of incident that we read about in the papers, or hear about on the news, that usually ends badly as it did here, or all too often even tragically as it so easily could have here.

IV. CONCLUSION

[42] I am cognizant that my decision today could lead people to believe they should arm themselves, put a knife in their pocket and believe that should they have to defend themselves there is nothing wrong with using a knife to repel any attacker. That is not what I am saying or trying to convey here, and nor do I believe that. My decision in this case is confined to the facts of this case. It will be a rare case where stabbing someone is an appropriate and proportional response.

[43] Ryan Herron was approached by two people, both of whom he believed were carrying weapons, he was threatened, and then punched twice in the head. He reacted, and hit back – he too had a weapon, a knife in his hand, that he had warned his attackers of as they came towards him. When he hit Richardson, Richardson suffered two stab wounds to his torso area. Ryan Herron was with his two cousins, whom he had told to stay back.

[44] Ryan Herron's actions went only so far as to defend or protect himself, and his cousins. The physical confrontation was brief, and ended after Richardson had been stabbed. Ryan Herron went no further than necessary to protect himself. Having carefully considered all of the circumstances of this case, I cannot say that Ryan Herron's actions were not reasonable in the circumstances. As such I find him not guilty of both assault with a weapon and assault causing bodily harm.

Bernadette E. Schmaltz
Territorial Court Judge

Dated this 13th day of January, 2014
at Hay River, Northwest Territories

R. v. Ryan Christopher HERRON

2014 NWTTC 02

Date: 2014 01 13

File: T2 CR 2012 000681

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