

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GARY ERNEST VITTRKWA

REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at: Fort McPherson, Northwest Territories

Date of Decision: February 26, 2015

Date of Trial: November 26 and 27, 2014

Counsel for the Crown: Wendy Miller (at trial); Morgan Fane (for decision)

Counsel for the Accused: Charles Davison (at trial); Alanhea Vogt (for decision)

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A. INTRODUCTION

A.1 Charges

[1] Gary Vittrekwa is charged that:

- (a) On or about the 11th day of August, 2013 at or near the Hamlet of Fort McPherson in the Northwest Territories, he did assault Cst. Todd Glemser, a peace officer engaged in the execution of his duty and did cause bodily harm contrary to section 270.01(1)(b) of the *Criminal Code*;
- (b) On or about the 11th day of August, 2013 at or near the Hamlet of Fort McPherson in the Northwest Territories, he did assault Cst. Wood with intent to resist the lawful arrest of himself contrary to section 270(1)(b) of the *Criminal Code*; and
- (c) On or about the 11th day of August, 2013 at or near the Hamlet of Fort McPherson in the Northwest Territories, he did commit mischief by wilfully damaging without legal justification or excuse and without colour of right property to wit the window of Cheryl Stewart's residence the value of which did not exceed five thousand dollars contrary to Section 430(4) of the *Criminal Code*.

[2] The trial for these three charges was held in Fort McPherson on November 26th and 27th, 2014. The Crown called three witnesses: Cheryl Lisa Stewart, Cst. Todd Glemser and Cst. Bradley Wood. A booklet of 12 photographs was introduced as an exhibit. The accused did not call any evidence.

[3] In the decision that follows, a reference to a section number without reference to specific legislation is a reference to the *Criminal Code of Canada*.

A.2 Circumstances

[4] The basic facts surrounding the incident of August 11, 2013 are not in dispute. What is in dispute is the legal characterization of these facts. Essentially, what happened is as follows. Constables Glemser and Wood, members of the RCMP, responded to a telephone complaint by Cheryl Stewart that her spouse, Gary Vittrekwa, was intoxicated and being verbally abusive to her. When the officers arrived at the jointly-owned residence, Ms. Stewart was outside on the stairs and the accused was inside the house with the 5 year old daughter. The daughter could be heard to be crying. The accused refused to unlock the door and told the police to leave.

[5] The police kicked open the door. Cst. Glemser told Mr. Vittrekwa that he was under arrest and grabbed the child from his arms, taking her to put her on couch. The accused charged and tackled Cst. Wood, who, as a result, was pushed backwards into the coffee table and onto the couch. Cst. Glemser went to assist Cst. Wood by grabbing Gary Vittrekwa around the head. Gary Vittrekwa bit Cst. Glemser on the arm. As a result of the bite injury, Cst. Glemser had to be treated at the health centre and was put on a regime of antibiotics.

[6] Cst. Glemser and Cst. Wood were able to get Gary Vittrekwa under control. He was handcuffed and was escorted out of the residence. As they were leaving, Mr. Vittrekwa jumped up with both feet and kicked in a window, breaking the window.

A.3 Position of Crown and Defence

Crown Position

[7] The Crown submits that even if the police did not have permission to enter the house, there were exigent circumstances which allowed them to kick in the door and enter the house. There was an intoxicated person inside the house who had verbally abused Cheryl Stewart, who was yelling and swearing at the police and whose young daughter was crying.

[8] The arrest of Mr. Vittrekwa was lawful because he was in the process of committing mischief by interfering with Cheryl Stewart's lawful enjoyment of the jointly-held property. This interference was a result of him being intoxicated, verbally abusive and locking Cheryl Stewart out of the house.

[9] When the accused charged Cst. Wood, he was resisting a legal arrest. When the accused bit Cst. Glemser, it caused bodily harm and was an assault on Cst. Glemser while Cst. Glemser was in the execution of his duties as a police officer.

Defence Position

[10] Counsel for Mr. Vittrekwa agrees that the police had the authority to enter the house to check on the safety of the daughter. However, Mr. Vittrekwa's physical actions were not in response to the entry of the police into the house. They were in response to the police telling him that he was under arrest.

[11] The two police officers said that their reasons for arresting Gary Vittrekwa were his intoxication and verbal abuse of Cheryl Stewart. They did not state that his locking of the door was a ground for arrest. The defence submits that "being intoxicated" and being "verbally abusive" in one's own home are not adequate and sufficient grounds for an arrest. Therefore the arrest was not lawful.

[12] If the arrest of Mr. Vittrekwa was not legal, then it was not unreasonable for Mr. Vittrekwa to resist the arrest by charging Cst. Wood, who would be trying to remove him from his house. Similarly, when Cst. Glemser had his arm around Mr. Vittrekwa's head, the accused had the right to defend himself. Given how he was being held by the officer, Mr. Vittrekwa's action in biting Cst. Glemser's arm was not unreasonable.

[13] Finally, if the arrest was not legal, as Mr. Vittrekwa was being dragged out, he had the legal right to resist. Since his feet were the only free part of his body, he tried to do so. That his feet would break a window while he was resisting does not support the charge of mischief.

[14] The defence concedes that it is not a defence to the charge of mischief that the window was property jointly held by the accused with Ms. Stewart.

B. ISSUES

[15] In the following analysis, there is one factual issue and a number of legal issues:

- (a) Did Gary Vittrekwa lock the door of the residence to keep his common-law out or to keep the police out?
- (b) When the police kicked in the door to enter the residence, was this a lawful entry?

- (c) When Cst. Glemser told Gary Vittrekwa that he was under arrest, was this arrest of the accused lawful?
- (d) If the arrest of Gary Vittrekwa was not lawful, were the physical acts of Gary Vittrekwa against Cst. Wood and Cst. Glemser justifiable responses?

C. ANALYSIS

C.1 Did Gary Vittrekwa lock the door on Cheryl Stewart?

[16] If Gary Vittrekwa locked the door of the house to keep Cheryl Stewart from entering, there is an argument that this act would constitute mischief since it would be interference with her lawful enjoyment of their jointly-held property. This was not cited by the officers as one of the grounds for the arrest of Mr. Vittrekwa; however, if it was true, it could be a valid ground for his arrest.

[17] Cst. Glemser testified that as the police vehicle was pulling into the driveway of the residence, he observed Cheryl Stewart come out of the door of the residence. The door closed behind her. She turned around to try and open the door and it was locked.

[18] Cst. Wood said that when the police got to the residence, Cheryl Stewart was standing outside and the door was locked. Cst. Wood stated, “She got locked outside of the house by Mr. Vittrekwa.”

[19] Cheryl Stewart said that she had left the house through the back door and called the police from the next-door neighbour’s. She was waiting for the police to arrive. With respect to the locking of the door, Ms. Stewart testified as follows:

Q. Okay. And so what happened when the police got there?

A. Well, I was waiting outside. He locked the door and had my daughter, the youngest one, inside with him.

...

Q. So what happened when you got back to the house?

A. I waited outside for the RCMP, and in the meantime he had locked the door. And when the RCMP arrived, he, like, wouldn’t open the door for them, and I was standing there, like, watching and waiting. And they had asked him to open the door and he wouldn’t but he was responding to them on the other side. And then they just kicked the door open. It’s the only way they got in.

[20] From the testimony of the three witnesses, it appears that Ms. Stewart intended to wait for the police to arrive before she went back in the house. Mr. Vittrekwa seems to have been aware that the police were coming and did not want

them in his house. I cannot say beyond a reasonable doubt that his reason for locking the door was to keep Ms. Stewart out. Rather, it is more likely, that he locked the door to keep the police out since Ms. Stewart had no intention of going back in before the police arrived.

[21] If Mr. Vittrekwa's intent was to keep the police out of his residence, it cannot be said that by locking the door he was intentionally interfering with Ms. Stewart's lawful enjoyment of the property.

C.2 Was the police entry into the residence lawful?

[22] Both Crown and defence agree that the entry into the residence was lawful. The basis for this position is that there were exigent circumstances which justified the entry into the house without a warrant. The explanation of the legal basis of this position was provided by the Nunavut Court of Justice in a case which involves a similar set of facts.

[23] In *R. v. Noah*, 2010 NUCJ 25, Justice Johnson of the Nunavut Court of Justice dealt with two warrantless entries into a dwelling house by the police. He found that the first entry was lawful and the second one was not.

[24] In *Noah*, the police received a complaint from the accused's common law spouse. She said she left their home after a fight with the accused; that the accused was intoxicated; that he had rifles in the home; that he said, "call the cops, I'll be ready for them" and that the accused's 14 year old daughter was possibly with him. The Court found that these were exigent circumstances which justified the entry into the townhouse by the police without a warrant.

[25] The Court reviewed *R. v. Feeney*, [1997] 2 S.C.R. 13 and the subsequent amendments to the *Criminal Code* which created Feeney warrants (section 529.1) and defined the exigent circumstances exception to obtaining a warrant (section 529.3). The Court also adopted the statement in *R. v. Sanderson* regarding police response to domestic violence situations:

17 In the more recent case of *R. v. Sanderson*, [2003] O.J. No. 1481, 57 W.C.B. (2d) 301, Macpherson J. noted the change in public attitude about the police response in domestic violence situations stating:

[45] There have been significant and commendable changes in recent years in the response of Canadian police to domestic violence situations. There is now a much greater recognition by the police of both the extent and the seriousness of the problem, and the consequences for victims in the community, when the police fail to respond. Police officers are often the first persons called to respond in situations of domestic violence. In my view, it is very much in the public interest that the police, in the discharge of their public duties, be willing and able to assist victims of domestic violence with leaving their relationships

and their residences safely and with their belongings. That is precisely what the police did in the present case.

[26] In addition to *Sanderson, supra*, the Court also reviewed the case of *R. v. Cooper*, [2009] Nu.J. No. 27, 2009 NUCJ 25 and confirmed that the police had a duty to investigate to ensure that the daughter was safe. In the context of the intoxication and the firearms, this was an exigent circumstance justifying the entrance into the townhouse without a warrant.

[27] To summarize then, I agree that the entry by Cst. Glemser and Cst. Wood into the house was lawful.

C.3 Was the arrest of Gary Vittrekwa for mischief lawful?

[28] Both officers stated that they arrested Gary Vittrekwa for mischief. Was this a lawful arrest?

[29] With respect to Cst. Glemser, he testified:

Q. And I'm going to suggest to you that you had not at that point received any allegation that he was interfering with anybody's lawful or quiet enjoyment of the property. Is that safe to say as well?

A. No, I wouldn't say that's safe to say. I believe that he was obstructing the lawful enjoyment of a property by being intoxicated and by being verbally abusive to Ms. Stewart –

Q. So that's why –

A. -- in a domestic situation.

Q. That's why you purported to arrest him for mischief?

A. Yes.

Q. Because you had the report that he was intoxicated and because you had the report that he was being verbally abusive.

A. Yes.

[30] With respect to Cst. Wood, he testified:

A. . . . And then after speaking with her and getting some more information there, we had to go inside and ensure the safety of their daughter and go and arrest Gary just based on the information that Cheryl provided us.

Q. What were you arresting him for?

A. We were going to arrest him for mischief at that point just based on the fact that he was intoxicated. He was being verbally abusive towards Cheryl and the concern over

the child and her welfare and then – so we were just going to go in there and basically prevent anything further from happening. So we were going to stop – hopefully just to prevent anything else from happening is what our plan was.

[31] Counsel for Mr. Vittrekwa submits that being “verbally abusive” and “intoxicated” are, without further clarification, insufficient grounds for an officer to have reasonable and probable grounds that someone is committing the offence of mischief. There are levels of intoxication. For someone to be intoxicated in their own home may or may not reach the level of interfering with the lawful enjoyment by their spouse of the home. Similarly, for someone to be verbally abusive in their home may or may not reach the level of interfering with the lawful enjoyment by their spouse of the home. The officers had made no independent assessment of Mr. Vittrekwa’s level of intoxication; nor had they investigated the verbal abusiveness.

[32] In this case, the officers had made the decision to arrest Gary Vittrekwa before they went into the residence based on the “report that he was intoxicated” and the “report that he was being verbally abusive”.

[33] Although the officers may have had the subjective belief that they had reasonable and probable grounds to arrest Mr. Vittrekwa, the objective grounds for the arrest did not exist. The definition of objective grounds comes from the Supreme Court of Canada in *R. v. Storrey*, [1980] 1 S.C.R. 241 at p.250:

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.

[34] In my view, Cst. Glemser did not have the legal authority to place the accused under arrest for mischief upon entering the residence.

C.4 Were the physical acts of the accused lawful?

[35] After Cst. Glemser, kicked the door twice, it opened. He described Mr. Vittrekwa as standing near the front entrance holding the five year old daughter. Cst. Glemser approached Gary Vittrekwa and advised him that he was under arrest for mischief. Cst. Glemser picked up the child from Mr. Vittrekwa and put her on the couch.

[36] Cst. Glemser turned around and could see Gary Vittrekwa pushing Cst. Wood toward Cst. Glemser.

[37] Cst. Wood testified that after Cst. Glemser took the child out of Gary Vittrekwa's arms, Gary Vittrekwa charged Cst. Wood and tackled him.

[38] At this point, the two police officers had entered the residence lawfully. Gary Vittrekwa had no legal authority to remove them by force.

[39] Cst. Glemser advised Mr. Vittrekwa that he was under arrest. As stated earlier, there was no legal authority for this arrest. Had either Cst. Glemser or Cst. Wood taken action to physically restrain him, Mr. Vittrekwa could have lawfully resisted their actions. This is not what happened. Instead, Gary Vittrekwa charged Cst. Wood and tackled him. This act by Mr. Vittrekwa was not to resist arrest. It was an unprovoked and pre-emptive assault on Cst. Wood.

[40] At law, given this assault, Cst. Wood could fight back and Cst. Glemser could assist Cst. Wood in subduing Mr. Vittrekwa, who was in the process of assaulting a police officer who was performing his police functions. At the point where Gary Vittrekwa charged Cst. Wood, he was arrestable for an assault on a police officer. When Gary Vittrekwa bit the arm of Cst. Glemser, the accused was assaulting a police officer in the line of duty. The officers had placed Mr. Vittrekwa under arrest for the mischief. Although this was not a valid arrest, it became a lawful arrest after Mr. Vittrekwa had assaulted the two officers.

[41] He was under arrest when the two officers were removing him from the house. As Cst. Woods testified, "And as we were walking out, he jumped up, and he was able to kick the window out in the front room." This was not a reflexive action, nor was it Mr. Vittrekwa's resistance to an illegal arrest. The action was deliberate and the arrest, at that point, was lawful.

[42] Had Mr. Vittrekwa's actions been to resist Cst. Glemser and Cst. Woods as they arrested him for mischief, I would likely have found that this resistance was lawful, given that the arrest was unlawful. This situation would be similar to the fact scenario in *R. v. Jamieson*, 2009 ONCJ 577, where the accused was acquitted for biting a police officer's finger in the course of an unlawful arrest for mischief.

[43] This is not what happened. Mr. Vittrekwa was not reacting to force. He initiated an assault against Cst. Woods. Cst. Glemser came to assist Cst. Woods and he too was assaulted.

D. CONCLUSION

[44] With respect to the three counts on the Information, I find Mr. Vittekwa:

- (a) Guilty of assaulting Cst. Todd Glemser, a peace officer engaged in the execution of his duty and causing bodily harm contrary to section 270.01(1)(b);
- (b) Not guilty of the section 270(1)(b) offence involving Cst. Wood but guilty of the included offence of assaulting Cst. Wood contrary to section 266; and
- (c) Guilty of committing mischief by damaging the window contrary to section 430(4).

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 26th day of
February, 2015.

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[Sections 270.01(1)(b), 270(1)(b) and 430(4)
of the *Criminal Code*]