

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RICHARD ALBERTA

Corrected judgment: A corrigendum was issued on October 24, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Heard at: Norman Wells and Yellowknife,
Northwest Territories

Date of Decision: September 16, 2016

Date of Trial: April 25th and 26th, 2016,
August 24th, 2016

Counsel for the Crown: Brendan Green

Counsel for the Accused: Jay Bran

[Section 267(b) of the *Criminal Code* x 2]

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RICHARD ALBERTA

A. INTRODUCTION

A.1 Charges

[1] Richard Alberta is charged with assaulting and thereby causing bodily harm to Cody Wheeler and Venessa Tobac. Mr. Alberta had been jointly charged with Robert Delayer. Prior to the commencement of the trial on April 25, 2016 and with the consent of the Crown, Mr. Delayer entered guilty pleas to the included offences of assault pursuant to section 266 of the *Criminal Code*. Mr. Delayer has waived his charges to British Columbia and he has yet to be sentenced.

A.2 Background

[2] On April 25, 2015, during the day, Richard Alberta and his wife held a children's party at their residence in the DOT area of Norman Wells. Cody Wheeler brought one of his children to the party. After the children had been picked up and taken home, there was an adult party - some drinking and food around a bonfire in the back yard of the Alberta residence. Cody Wheeler and his partner, Venessa Tobac came to the party. Richard Alberta's brother, Robert Delayer was also there.

[3] At one point in the evening, Robert Delayer asked Cody Wheeler to come to the front yard with him. Cody Wheeler did. Robert Delayer struck Cody Wheeler in the face. Richard Alberta intervened. There was an interaction between Richard Alberta and Cody Wheeler and Venessa Tobac. Venessa Tobac called the police. As a result of their interactions with Robert Delayer and Richard Alberta, both Cody Wheeler and Venessa Tobac sustained significant injuries.

[4] Cody Wheeler and Venessa Tobac say that Richard Alberta caused most, if not all of the injuries to them. Richard Alberta says that he struck Cody Wheeler once, but only after Cody Wheeler struck him first. Richard Alberta says that he did not touch Venessa Tobac.

A.3 Conduct of the Trial

[5] The trial began on April 25, 2016 in Norman Wells. It continued on August 24, 2016 in Yellowknife and was adjourned for my decision. At the commencement of the trial, five photographs of Cody Wheeler and Venessa Tobac were entered on consent of counsel. These are photographs taken by the RCMP on April 25, 2015 at the health centre in Norman Wells.

[6] In addition, the following facts were admitted:

- (a) Cody Wheeler sustained a fractured left cheek bone. More specifically, a displaced zygomatic arch and an undisplaced coronoid process. He had to seek further medical care in Yellowknife and in Edmonton.
- (b) On April 28, 2015, Cody Wheeler was fitted for a knee brace. There was no acute bone abnormality but there was a swelling of the knee joint.
- (c) On April 29, 2015, Cody Wheeler was admitted to the Royal Alexander Hospital in Edmonton where the bone indicated in (a) above was set. He was discharged on May 4, 2015.

[7] The witnesses for the Crown were Cst. Reg Kraeker, Cst. Joe Miller, Jill Brown, Jean Pierre Bernarde, Cody Wheeler and Venessa Tobac. The Defence called Richard Alberta and Jacklyn McDonald.

[8] During the testimony of Venessa Tobac, two transcripts were entered as exhibits 3 and 4. These were transcripts of the two telephone calls that Venessa Tobac made to the RCMP telecommunications operator on the evening of April 25, 2015. The Court allowed the Crown to enter them as evidence to rebut an allegation that Ms. Tobac had fabricated her testimony regarding the involvement of Richard Alberta sometime after the events of April 25, 2015.

B. EVIDENCE OF THE WITNESSES

B.1 Description

[9] As will be discussed later, the central issue in this trial is the credibility of certain of the witnesses. The assessment of their credibility will require, among other things, a review of these witnesses' testimony in the context of all of the evidence. For this reason, the evidence of each of the witnesses will be presented in some detail.

B.2 Reg Kraeker

[10] Cst. Kraeker is a member of the RCMP who has been stationed in Norman Wells since July of 2014. On April 25, 2015, the RCMP received a complaint of an assault in progress at Richard Alberta's residence in the DOT area in Norman Wells. Cst. Kraeker and Cst. Joe Miller drove to the residence and as they pulled in, they observed three people in and around the driveway: Venessa Tobac on the left of the driveway speaking on a cellphone; Cody Wheeler on the right side of the driveway, sitting and half lying; and J. P. Bernarde walking in and around the area.

[11] Cst. Kraeker spoke to Venessa Tobac. Her pants were covered in dirt. He could smell the odour of alcohol on her breath. She was very agitated and hysterical. She was very emotional, very upset and very loud. She was not listening to Cst. Kraeker and would cut him off when he was trying to explain things to her. She was being uncooperative. Cst. Kraeker believed her to be under the influence of alcohol.

[12] Cody Wheeler's clothing was covered in mud or dirt and he had possible bruising or swelling to his left cheek. There was some blood on his face and he was complaining that his left leg was hurt. Mr. Wheeler appeared to be confused or distracted. Cst. Kraeker believed him to be under the influence of alcohol.

[13] After Cst. Kraeker spoke with Ms. Tobac and Mr. Wheeler, the police had them sit in the back of the police truck. The police spoke briefly to Richard Alberta's wife, Dorothy at the front of the house and then Cst. Kraeker went to the back of the house where he spoke to other witnesses who were sitting around a bonfire. Richard Alberta was one of the people at the back of the house.

[14] Cst. Kraeker observed Mr. Alberta to be very loud and upset and kind of mad. He was swaying a little bit back and forth with his eyes half shut. Cst. Kraeker believed him to be drunk by alcohol. Cst. Kraeker interacted with Mr. Alberta for about 5 minutes.

[15] After speaking to witnesses in the back of the house, Cst. Kraeker and Cst. Miller drove Cody Wheeler and Venessa Tobac to the medical clinic.

[16] Cst. Kraeker decided to not ask for statements from Ms. Tobac and Mr. Wheeler that evening because they had both consumed alcohol; Venessa Tobac's emotions were running high and Cody Wheeler seemed to be distracted and not processing questions.

B.3 Joe Miller

[17] Cst. Miller has been stationed in Norman Wells since August, 2014. He participated in the investigation on April 25, 2015. He and Cst. Kraeker received a complaint of a fight in progress at a birthday party out at the Alberta residence in an area called DOT. They immediately went to that area. Cst. Miller was driving.

[18] Cst. Miller observed three people in the driveway: Venessa Tobac, Cody Wheeler and J. P. Bernarde. Cst. Kraeker interacted with Ms. Tobac. Cst. Miller observed her to be very upset and near hysterical. She was dishevelled in her appearance and had mud on her clothing. She was crying and very loud. She was not cooperative with the police.

[19] Mr. Wheeler was sitting on the ground behind Ms. Tobac. He seemed flushed, dishevelled, covered in dirt and he was holding the left side of his face. He remained seated until the police asked him and Ms. Tobac to go to their police vehicle. After Mr. Wheeler and Ms. Tobac were in the police truck, the two officers went to the rear of the house to speak to Richard Alberta.

[20] Cst. Miller was of the impression that Richard Alberta had been drinking. He had beer in his hand. There was beer in and around where he was sitting. He was very loud, boisterous and obnoxious in his tone and some of his words.

[21] Cst. Kraeker spoke to Mr. Alberta. Later, they took Mr. Wheeler and Ms. Tobac to the nursing station. Cst. Miller was of the impression that both were under the influence of alcohol and that Ms. Tobac was perhaps under the influence of marijuana. Cst. Miller had this impression due to the smell of alcohol off their persons and the smell of marijuana from Ms. Tobac.

B.4 Jill Brown

[22] Ms. Brown went to the party in April at Richard and Dorothy Alberta's house with her boyfriend, J. P. Bernarde. She drank about a bottle of red wine that night. Mr. Bernarde might have had one glass of wine. He was driving that night. Ms. Brown remembers the following people being present at the party: Richard

and Dorothy Alberta; Jackie McDonald, Venessa Tobac, Cody Wheeler and Richard Alberta's brother. Richard Alberta and his brother were drinking beer that night. So were Cody Wheeler and Venessa Tobac.

[23] Ms. Brown was sitting in the back of the house at the bonfire with J. P. Bernarde. Mr. Bernarde got up and went to the front of the house because they had heard some sort of commotion. After a period of time, Richard Alberta, the RCMP and Mr. Bernarde returned to the back of the house.

[24] At some point, Ms. Brown recalls Richard Alberta saying to Jackie McDonald, "Why did you bring my brother back here?" referring to Richard Alberta's brother, Rob Delayer.

[25] Ms. Brown recalls a group of four or five people, including Cody Wheeler and Venessa Tobac, smoking pot.

B.5 Jean Paul Bernarde

[26] Mr. Bernarde has lived in Norman Wells since January of 2011. He arrived at the party in April at around 6 p.m. He drank one glass of wine because he was driving. He recalls the following people being at the party: Richard Alberta, Mr. Alberta's brother, Rob, Venessa Tobac, Cody Wheeler, and Jackie McDonald. In total, Mr. Bernarde estimates there to have been 15 or 20 people at the party.

[27] Mr. Bernarde observed Mr. Alberta and his brother each drinking a few beer. He did not see Venessa Tobac or Cody Wheeler drinking.

[28] In the early part of April, 2015, Mr. Bernarde had undergone medical tests and as a result of the tests, his cardiologist was concerned that Mr. Bernarde could have a heart attack. Mr. Bernarde was prescribed beta blockers and told that he could not do any physical activity. He was taking this prescribed medicine at the time of the party.

[29] At some point in the evening, Mr. Bernarde left the back yard to go to the front yard after hearing a commotion. He observed Richard Alberta and Cody Wheeler standing toe to toe with another man sort of between them but off to the side. This other man's name was Bob. The two men were arguing or there seemed to be some tension between the two. Mr. Bernarde went up to diffuse the situation. He saw Richard Alberta with his hand on the shoulder of Cody Wheeler and a thumb around the clavicle area but does not remember what happened after that.

[30] Mr. Bernarde remembers following Richard Alberta as he walked toward the house next to the truck. Mr. Bernarde was trying to keep him from going any

further. Mr. Alberta got to Cody Wheeler on the ground and he kicked him in the back of the leg. Mr. Bernarde does not recall Cody Wheeler striking Richard Alberta or seeing Venessa Tobac getting involved.

[31] At some point, Mr. Bernarde asked Cody Wheeler if he wanted a ride home because he was favouring his leg. Mr. Wheeler asked Mr. Bernarde to get his backpack in the back yard and that is when Mr. Bernarde believes that the police arrived.

[32] Mr. Bernarde testified that there were a lot of gaps in his recollection of the events of that night.

B.6 Cody Wheeler

[33] Mr. Wheeler is Venessa Tobac's partner of three years. He brought one of his two children to Richard Alberta's house earlier in the day for a birthday party. He came back to pick the child up and was invited to return and enjoy the fire later that evening. He returned around 9:20 p.m. Before arriving at the party, he had drank one beer. At the party, he opened 4 beers, finished three, may have opened another one and had two Jell-O shots.

[34] Mr. Wheeler observed the following people at the party: Norm McDonald, Richard Alberta, Rob Delayer, Jackie McDonald, her daughter, a daughter's friend, his boss' daughter; J. P. Bernarde and Jill Brown. At the time, Mr. Wheeler thought Rob Delayer was Richard Alberta's employee.

[35] At some point in the evening, Rob Delayer was talking to Venessa Tobac and made a hand gesture to the top of her head and her glasses fell off to the ground. Ms. Tobac was annoyed at this and told Rob Delayer to get out of her personal bubble. Mr. Delayer apologized to Venessa Tobac and to Cody Wheeler. Venessa Tobac and Cody Wheeler went off to the side of the house to smoke a joint. Jackie McDonald came up and suggested that they smoke with her daughter and her friend. They came over and they smoked a joint; then went back to the fire.

[36] Rob Delayer went inside to lay down and Cody Wheeler asked Richard Alberta for some tissue for Venessa Tobac. Richard Alberta brought Mr. Wheeler inside; got some tissue and was talking about his plans for a building on the lot next door. Mr. Wheeler brought the tissue back to Ms. Tobac. When he got back to the bonfire, most everyone was leaving with Alexis, who had come back to pick up a group of people.

[37] An hour later, Mr. Wheeler was talking with Mr. Alberta while Venessa Tobac went inside to use the bathroom. Ms. Tobac come out with a bunch of food. They ate and Rob Delayer came up to Cody Wheeler and said, "Come here. I am going to show you something." Mr. Wheeler went with Mr. Delayer to the side of house. Mr. Alberta came and stopped his brother and was talking to him. Mr. Delayer told Mr. Alberta that he and Mr. Wheeler were going out to the driveway to talk it out and if they cannot talk it out, they were going to fight.

[38] Mr. Wheeler was shocked to hear this since he was not thinking about fighting nor did he want to fight Mr. Delayer. Richard Alberta and Rob Delayer were yelling back and forth. Richard Alberta was on Mr. Wheeler's left. Rob Delayer was on Mr. Wheeler's right. Mr. Wheeler waved his arm out and said to Rob Delayer, "Fuck. Don't talk like that." Mr. Wheeler looked at Richard Alberta and then he saw stars because Rob Delayer had punched him in the forehead. Mr. Wheeler stumbled back and then there was a barrage of attacks from Mr. Delayer. Mr. Alberta was trying to stop Rob Delayer.

[39] Mr. Wheeler was knocked to the ground. He noticed Jackie McDonald running towards them. Richard Alberta was standing in front of him. Mr. Delayer stopped when Mr. Wheeler was on the ground. Rob Delayer walked around the vehicles up to the steps of the house.

[40] Mr. Wheeler got up and was standing. He saw Venessa Tobac say something like "What the fuck's happening?" to Rob Delayer on the deck. Rob Delayer walked up to her and punched her in the face and she fell to the ground. Ms. Tobac asked for somebody to call the RCMP. She wanted a phone. She got up and Richard Alberta, who was standing in front of her, started yelling at her.

[41] Mr. Wheeler gave her his phone. As she was phoning the RCMP, Rob Delayer ran away. Richard Alberta came up to Mr. Wheeler as if he was going to fight him. Mr. Alberta was swinging Mr. Wheeler around as Mr. Wheeler tried to keep his balance but his leg went sideways and he went down. Then Mr. Alberta went back to Venessa Tobac. He then came back and started kicking and punching Mr. Wheeler. Mr. Wheeler remembers getting kicked really hard including a boot to his left cheek. Mr. Wheeler was hit over 20 times by Richard Alberta. Mr. Wheeler believes that Mr. Alberta's kick to his cheek broke his cheekbone. While this was happening, Venessa Tobac had the cellphone and was over Mr. Wheeler defending against further hits.

[42] As a result of the hits of Mr. Alberta and Mr. Delayer, Mr. Wheeler had two fractures on his lower left jaw and cheekbone. The ligaments in his knee are still stretched and he is going to be sent to a pain specialist. He had surgery eight days

after the incident in Edmonton for his face and required a knee brace for two months. He has a scar above his left sideburn.

B.7 Venessa Tobac

[43] Ms. Tobac has lived in Norman Wells for almost four years. She went to a kid's birthday party and a cookout and adult gathering at Richard Alberta's place out by DOT at the end of the road in Norman Wells in April 2015. She and Cody Wheeler brought a mickey, a bottle of wine and a 15 pack of beer.

[44] At about 9:30 p.m., she arrived at the house with her partner, Cody Wheeler and Alexis, the person driving. Ms. Tobac had nothing to drink before the party. At the party she drank no less than three beer, no more than five beer and two Jell-O shooters. She recalls the following people at the party: Jackie McDonald, her daughter, Laurel McDonald's daughter, Randy Rose's daughter, Sarah, Ray Sinclair, Robert Delayer, Richard Alberta, his wife, Dorothy, Jill and Laurie Hickley. They were sitting in the back yard by the fire on a chair beside the scaffolding.

[45] When Ms. Tobac first got to the Alberta residence, she noticed Rob Delayer sitting on a chair, looking at her up and down and saying, "Oh, nice glasses, you, girl; you got yourself some Versace's." Ms. Tobac said that they were just \$12 Walmart glasses and Rob Delayer kept touching her head. He did this four times. Ms. Tobac stood up and said, "Can you please stop touching me; you're crossing my body boundaries." And that he was acting like an asshole. At one point, he knocked her glasses off her head.

[46] Ms. Tobac was part of a group that smoked a joint of marijuana. She had two drags off a joint between the four of them.

[47] At some point about an hour and a half after Ms. Tobac got to the party, Rob Delayer asked Cody Wheeler to come with him and that he wanted to show him something. Ms. Tobac was at the fire and saw the two men walking from the fire and Richard Alberta walking fast after them. Then she saw Jackie McDonald and another older man coming around the corner on the side of the house.

[48] Ms. Tobac sat at the fire for about five minutes after the men left and then heard some kind of odd noise. Then she saw Jackie McDonald running and that same noise so Ms. Tobac jumped and ran toward the front of the house. When she turned the corner, she saw Cody Wheeler getting off the ground with one knee on the ground. She saw Richard Alberta and Jackie McDonald standing in front of Cody Wheeler trying to stop Rob Delayer from beating him up.

[49] Ms. Tobac saw Rob Delayer look at her with smile on his face. She asked him, “What is wrong with you?” and how would he like it if somebody did that to him and that he was a loser and an idiot. He said, “Oh yeah?” and started walking back towards Ms. Tobac and punched her in the left cheek. Ms. Tobac fell to the ground. Ms. Tobac got up and asked people to call the police and if she could use their cellphones. Richard Alberta asked her not to phone the police; that they will fix things. Then Richard Alberta started yelling at her, “Do you know who the fuck I am? Do you know who the fuck this is? Do you know what we can do to you? I could end your life.” At this point Rob Delayer left.

[50] Ms. Tobac went to Cody Wheeler to get the cellphone and she was walking back to the car with it and Richard Alberta was wrestling with her for the phone. Cody Wheeler was behind Ms. Tobac. Richard Alberta attacked Cody Wheeler and Mr. Wheeler was on the ground. Then Richard Alberta came after Ms. Tobac and threatened her life and said something about BC. Mr. Alberta was going between Cody Wheeler and Ms. Tobac. Mr. Alberta kicked Cody Wheeler in the side of his head. Mr. Alberta stepped back. Mr. Alberta was swearing. He punched Cody Wheeler. Then he kicked him on the side of the face. He came back and tried to punch Ms. Tobac but she stepped back. Then he kicked Cody Wheeler again in the head.

[51] Mr. Alberta kicked Cody Wheeler again and then grabbed Ms. Tobac by the throat. Then he started kicking Cody Wheeler all over the body and right above the butt. Ms. Tobac covered Cody Wheeler so Richard Alberta grabbed her and dragged her on the ground and started punching her head as she was on the phone with the RCMP dispatcher.

[52] As a result of the altercation, Ms. Tobac suffered post-traumatic stress disorder and whiplash. She had to get back injections and see a chiropractor. She had road rash all the way up her back. She had a sprained finger. She also needed medication.

B.8 Richard Alberta

[53] Richard Alberta is 41 years old and in April of 2015, had been living in Norman Wells for five years. He owned his own contracting company which did maintenance on houses for Esso, the Government of the Northwest Territories and the town of Norman Wells. He also had a contract with Manitoulin Transport.

[54] Mr. Alberta was married to his wife, Dorothy. They have four children. On April 25, 2015, during the day, Mr. and Mrs. Alberta hosted a party for children at their acreage between 11 a.m. and 5 p.m. The parents of some of the children were invited back to the acreage in the evening to have a bonfire and drinks. Mr.

Alberta arranged for a driver from SRP Petroleum to drive people home. Her name was Alexis.

[55] Mr. Alberta had formally met Cody Wheeler when Mr. Alberta was doing a job at the Manitoulin warehouse a few days before the party although he had seen him around town before. Mr. Alberta knew Cody Wheeler's ex-wife Roberta. Mr. Wheeler asked if he could bring his little girl to the children's party and Mr. Alberta agreed. Cody Wheeler and Venessa Tobac showed up at the adult's party around 8 p.m. or 9 p.m. Mr. Alberta remembers them arriving. He had not invited them. He greeted them and they sat down around the fire pit with others that they knew.

[56] Mr. Alberta did not talk to Cody Wheeler or Venessa Tobac again until his brother, Rob Delayer returned to the party. Mr. Wheeler and Ms. Tobac arrived at the party just as Rob Delayer was leaving with the designated driver. Mr. Alberta was unaware of any interaction between Rob Delayer and Mr. Wheeler or Ms. Tobac.

[57] Mr. Alberta saw his brother walking on the trail that comes onto his property near the green house. Mr. Alberta thought to himself, "Oh, you made it back." Mr. Delayer did not appear happy. Mr. Delayer asked Cody Wheeler if he could talk to him. This caught Mr. Alberta's attention as the two men walked to the side so Mr. Alberta walked with them.

[58] The two men got to the front of the driveway. Mr. Delayer extended his hand and said to Cody Wheeler, "I will give you one more chance. I'm going to put my hand out and say sorry one last time and if you slap my hand away again, we're going to have a problem."

[59] Rob Delayer put out his hand. Cody Wheeler slapped his hand away. Right away, Rob Delayer punched Cody Wheeler in the face, Cody Wheeler grabbed Rob Delayer and then they were wrestling on the ground. Mr. Alberta picked his brother up, slammed him to the ground and yelled at him to get out of here. Mr. Alberta was helping Cody Wheeler, when he saw Venessa Tobac kick Rob Delayer as Mr. Delayer was getting up off the ground. Mr. Alberta does not know what happened after that between Ms. Tobac and Mr. Delayer. Mr. Alberta was trying to hold Cody Wheeler. Mr. Wheeler was trying to be aggressive.

[60] Then Cody Wheeler punched Mr. Alberta in the face. Mr. Alberta immediately punched Cody Wheeler in the jaw. Cody Wheeler hit the ground. He was knocked out before he hit the ground. He just went limp. All of this happened in front of the garage which is depicted in the fifth photograph of Exhibit 5.

[61] Venessa Tobac said she wanted to call the cops. Richard Alberta said, “Call whoever you want. Do it out of my yard.”

[62] After Richard Alberta hit Cody Wheeler in the face, he did not kick or punch him again. J. P. Bernarde and Robert Dixon grabbed him and pulled him away from Cody Wheeler.

[63] Richard Alberta never went near Venessa Tobac. He never touched her. Not once. He yelled at her to get out of his yard and had a few choice words for her. When she said that she was on the phone with the cops, he said, “I don’t care who you are on the phone with. Do it at the end of the driveway.” Mr. Alberta went to the back of the house after his wife and her sister came out. His last observation was of Cody Wheeler sitting on the side of the driveway and of Venessa Tobac on the telephone trying to count how many people were attacking her at the party.

[64] In Mr. Alberta’s opinion, the whole incident lasted two minutes. During the evening prior to the incident, he had drank 8 beer and a couple of Jell-O shooters.

[65] Richard Alberta said that Jacklyn McDonald works for SRP Petroleum and that he dealt with her all the time because SRP Petroleum did his fuel delivery. He said that Jacklyn McDonald and Robert Delayer were friends.

B.9 Jacklyn May McDonald

[66] In April of 2015, Ms. McDonald was living in Norman Wells. Richard Alberta is a friend of hers that she met in Norman Wells. She was at Richard Alberta’s place in the back yard in the evening. She was drinking alcohol but does not remember how much.

[67] She knew Cody Wheeler prior to April of 2015. She had worked with him at her present job. She had met Venessa Tobac. She was in a relationship with Rob Delayer at the time of this incident. After Rob Delayer had been arrested in relation to these charges, she had agreed to be a surety for him and when that did not happen, she arranged for her aunt to be his surety and for him to stay with her aunt.

[68] Ms. McDonald refused to give a statement to the RCMP or to the Crown.

[69] Ms. McDonald saw Cody Wheeler and Venessa Tobac venture off to the front of the house at one point. She did not go with them. They were standing with others. Towards the end of the evening, Ms. McDonald saw Richard Alberta pull Rob Delayer and Cody Wheeler apart. Rob Delayer was walking towards the

back of her truck, which was 10' away. She was talking to Rob Delayer by her truck and out of the corner of her eye, she saw Cody Wheeler hit Richard Alberta and Richard Alberta hit him back. Ms. McDonald saw Venessa Tobac come behind Rob Delayer and kick him from behind in the balls. Mr. Delayer turned around and hit Venessa Tobac in the face with one punch. Somebody was holding Richard Alberta after he hit Cody Wheeler.

C. CREDIBILITY

C.1 The Test

[70] The issue in this trial is that of credibility. There are certain facts which are not in issue. There was a party on the evening of April 25th, 2015 at the residence of Richard Alberta. Cody Wheeler, Venessa Tobac, Richard Alberta and Robert Delayer were at the party. At some point in the evening, Robert Delayer asked Cody Wheeler to go with him to the front of the house. At the front of the house, Robert Delayer struck Cody Wheeler. Richard Alberta intervened to stop the interaction. Jean Paul Bernarde and Robert Dixon were there. Venessa Tobac made two phone calls to the RCMP. Venessa Tobac and Cody Wheeler sustained serious injuries that night.

[71] The burden is on the Crown to prove that Richard Alberta assaulted Cody Wheeler and Venessa Tobac and that in committing these assaults, caused bodily harm. The Crown must prove the elements of these offences beyond a reasonable doubt.

[72] The Supreme Court of Canada has provided direction to the Court with respect to how to deal with assessing credibility when the accused testifies or calls evidence. The test is set out in *R. v. W.D.*, [1991] 1 SCR 742, which was modified by the BC Court of Appeal in *R. v. H. (C.W.)* (1991), 68 CCC (3d) 146:

- (a) If I believe the accused and he convinces me he is not guilty, then it follows that the Crown has not proved the case beyond a reasonable doubt and Richard Alberta must be acquitted;
- (b) If I do not know whether to believe the accused or the complainants, then I must acquit;
- (c) It may be that I do not believe everything that the accused has said, but his evidence denying the assaults at least raises a reasonable doubt and, if so, I must give him the benefit of that doubt;

- (d) And, finally, if I do not believe the accused and his evidence does not raise a reasonable doubt, then I must still consider all of the evidence which I heard and which I do believe, to determine if the Crown has proven beyond a reasonable doubt the case against Richard Alberta.

[73] Let me start first with my assessment of the testimony of Richard Alberta.

C.2 Richard Alberta

[74] I do not believe Richard Alberta's description of his interaction with Cody Wheeler and Venessa Tobac. The reasons for this rejection are stated briefly as follows and then expanded later:

- (a) inconsistency in Richard Alberta's description of what happened and the injuries sustained by Cody Wheeler and Venessa Tobac;
- (b) Richard Alberta's changing testimony with respect to the involvement of J. P. Bernarde and Robert Dixon;
- (c) Richard Alberta's minimization of the actions of himself and his brother;
- (d) the personal interest in the proceedings of Jacklyn McDonald;
- (e) the inconsistency between Richard Alberta's description of what happened and what he did after the police were called.

[75] One important aspect of assessing credibility is that of consistency. First, is the witness consistent in his telling of what happened? This can be a comparison to what was said on previous occasions or earlier in his testimony. Second, is his testimony of what happened consistent with other independent objective evidence known to be true?

[76] I found Mr. Alberta's evidence to be inconsistent in two aspects. First, his description of events did not account for the injuries of Cody Wheeler and Venessa Tobac. Second, his testimony changed with respect to the involvement of J. P. Bernarde and Robert Dixon.

[77] Cody Wheeler sustained a fractured left cheek bone and lower left jaw. His left knee was injured such that it was swollen. The front of his face and the area above and below his eyes were red and scraped. Venessa Tobac had redness to her face including her left lower cheek. She had injuries to the inside of her left cheek and scrapes to her lower right side, her back and her legs.

[78] Mr. Alberta testified that his brother, Rob Delayer, punched Cody Wheeler in the face and then they fell to the ground wrestling. According to Richard Alberta, he hit Cody Wheeler once in the jaw and Mr. Wheeler fell to the ground unconscious. Conceivably, the knee injury could have occurred in the fall or the wrestling. However, neither of these blows explain the fractured cheekbone.

[79] With respect to Ms. Tobac's injuries, Mr. Alberta says that he did not touch Ms. Tobac. Mr. Alberta claims to have seen Rob Delayer hit her once. There is nothing to account for her other injuries.

[80] Let me be clear. As an accused, Richard Alberta does not have to "explain" anything and therefore there is no obligation that he explain how Ms. Tobac and Mr. Wheeler got injured. However, he has chosen to testify and his oral evidence is inconsistent with the physical evidence of injuries.

[81] The second inconsistency involves Mr. Alberta's description of what others did after he punched Mr. Wheeler. Mr. Alberta stated that Mr. Wheeler punched him and he "returned the favour", that is, Mr. Alberta punched Cody Wheeler once in the jaw and he fell to the ground "limp". As far as Mr. Alberta was concerned, the fight was over. It would make no sense that others were trying to hold Mr. Alberta back, unless he was still trying to get at Mr. Cody and the fight was not over. In describing the involvement of J. P. Bernarde and Robert Dixon, Richard Alberta's testimony changed as he tried to lessen their involvement:

A. I had two grown men on me. Like they were standing right on me.

...

Q. Like, they – J. P. and Rob, they actually put hands on you?

A. Yeah, yeah.

Q. They're holding you back?

A. Well, they just grabbed me like this and pulled me away.

...

A. J.P. just grabbed me from behind, told me to calm down, yeah.

Q. Yeah.

A. Robert was standing in front of me.

[82] In his testimony, Mr. Alberta was careful to minimize his actions and those of his brother. Mr. Alberta hit Cody Wheeler only once, and that was only after being hit first. Mr. Alberta saw Venessa Tobac kick Rob Delayer, but did not see any reaction by Rob Delayer. He just saw Rob Delayer leaving.

[83] Defence argues that the testimony of Richard Alberta is corroborated by Jacklyn McDonald. I distrust the testimony of Jacklyn McDonald where she deals with Richard Alberta and Rob Delayer and their interactions with Cody Wheeler and Venessa Tobac. Jacklyn McDonald testified that Cody Wheeler struck Richard Alberta first and that Venessa Tobac kicked Rob Delayer first.

[84] My first concern is with respect to the way that each of Richard Alberta and Jacklyn McDonald described each other in their respective testimonies. It was clear to me that Mr. Alberta was trying to portray Ms. McDonald as an independent witness with no interest in the proceedings when, in fact, she was not independent and she had been in a relationship with Rob Delayer. When first asked about Jacklyn McDonald, Richard Alberta described her by saying, “She works at SRP and so I deal with ... so I was in contact with her for fuel deliveries to my house.” When asked about Ms. McDonald and Mr. Delayer, Richard Alberta described them as “friends”.

[85] When asked about Richard Alberta and Rob Delayer, Jacklyn McDonald described the relationships in less distant terms. She said that Richard Alberta was a “friend that I met up here in Norman Wells.” She admitted to have been in a relationship with Rob Delayer and to have offered to act as his surety after his arrest.

[86] That Ms. McDonald was trying to minimize the involvement of Rob Delayer was apparent in her reference to him during her testimony as “another fellow”:

A. there was a bit of an altercation going on between Mr. Wheeler and – and *another fellow*, and Rich came to the front of the house there and pulled them apart . . . and then I was talking to this *other fellow* there, towards the back of my truck . . . And then I was standing at the back of my vehicle talking to the – this *other fellow* that Venessa come up and kicked him from behind and hit him in the balls and – and then – and then we left. [*emphasis added*]

[87] It is only later in her testimony that Ms. McDonald states that the “other fellow” was Rob Delayer and that he turned around and hit Ms. Tobac in the face before they left. The fact that Ms. McDonald refused to give a statement to the RCMP is also troubling. She did not provide a reasonable explanation for this refusal during her testimony. Given Ms. McDonald’s personal involvement with Rob Delayer and with Richard Alberta, I give her testimony limited weight.

[88] Further, on her own assessment, Ms. McDonald’s opportunity to observe was limited. Ms. McDonald admits that she saw the interaction between Richard Alberta and Cody Wheeler “out of the corner of my eye” and did not see anything else after Richard Alberta hit Cody Wheeler.

[89] In my view, Richard Alberta’s actions after the interaction with Cody Wheeler and Venessa Tobac were inconsistent with his testimony. According to Mr. Alberta, he was angry with Cody Wheeler, Venessa Tobac and Rob Delayer for wrecking the mood of the party. Everyone was having a good time until these three fought. According to Mr. Alberta, he had hit Cody Wheeler once, in self-defence and had never touched Venessa Tobac. His brother, Rob Delayer had left

after the fight. He knew that the police had been called. He was angry with Venessa Tobac and Cody Wheeler and wanted them off his property. Yet, he left the front yard and went to the back yard. I would have expected him to wait for the police so that he could get rid of the troublemakers, including Cody Wheeler who had struck him.

[90] Instead when the police arrived, he was in the back yard. Cst. Miller described Mr. Alberta as having been drinking, very loud, boisterous and obnoxious in his tone and some of his words. Cst. Kraeker observed him to be very loud and upset and kind of mad. Cst. Kraeker believed him to be drunk by alcohol.

[91] Counsel for the accused argues that it makes no sense that, other than the first punch struck in self-defence, Mr. Alberta would assault Cody Wheeler and Venessa Tobac. It is submitted by Defence that Mr. Alberta was happy that everyone was enjoying themselves at his party and he came to the defence of Cody Wheeler when Rob Delayer was fighting him. Why would Mr. Alberta then turn on Cody Wheeler and Venessa Tobac? In my view, the answer is simple. Venessa Tobac was trying to phone the police. Ms. Tobac's testimony is clear that Mr. Alberta reacted strongly to the possibility of the police being called.

And he followed me to Cody to get the cellphone, and I walked back to the car, and Rich was wrestling with me with – for the phone. And I was hanging on to it for, like, dear life with both of my hands. And he – tried to hang up the phone. And Cody was behind me by then. And he just went Ah, and he attacked Cody. And Cody was on the ground.

[92] For these reasons, I do not accept the testimony of Richard Alberta and Jacklyn McDonald with respect to Mr. Alberta's interaction with Cody Wheeler and Venessa Tobac.

C.3 Alcohol and Perception

[93] Venessa Tobac said that she had nothing to drink before the party and drank no less than three beer and no more than five beer at the party. She also had two Jell-O shots. Cody Wheeler said that he had drank one beer before arriving at the party; that he had three beer and may have opened a fourth at the party; and had two Jell-O shots. Both Ms. Tobac and Mr. Wheeler shared a marijuana joint with two others. Richard Alberta testified that prior to this incident, he had drank eight beer and a couple of Jell-O shots.

[94] The police officers described Cody Wheeler and Venessa Tobac as being under the influence of alcohol. Cst. Miller thought, due to the odour, that Venessa Tobac may have consumed marijuana. The police decided not to take statements

from Ms. Tobac and Mr. Wheeler that night because they had both consumed alcohol. Cst. Kraeker believed Richard Alberta to be drunk by alcohol.

[95] I caution myself that all three of these witnesses were under the influence of alcohol at the time of the incident. This may have affected their perception and their emotions at the time. At the very least, I remind myself that these three witnesses who testified sober in Court may have presented differently while under the influence of alcohol on April 25, 2015.

[96] The Crown submitted that the Court should draw certain conclusions from the evidence that Richard Alberta yelled at Jacklyn McDonald after the incident, “Why did you bring my brother back here?” In particular, it is submitted that this is an indication that Richard Alberta knew that his brother, Robert Delayer, was going to cause trouble if he returned to the party. I am not able to draw that inference. Mr. Alberta explained that he was angry at Ms. McDonald for bringing Robert Delayer back to the party because she would have known that Mr. Delayer was going to confront Cody Wheeler.

C.4 Cody Wheeler

[97] Cody Wheeler was a calm witness who appeared to have no animosity against the accused. He explained what happened in un-embellished terms. He admitted that he had consumed alcohol and that he had shared one joint of marijuana.

[98] His description of the blows he received from Richard Alberta and Rob Delayer are consistent with the injuries that he sustained. On cross-examination, his reaction to the suggestion that he had struck Richard Alberta first, or at all, was one of disbelief. In fact, he stated that he felt that Richard Alberta had been trying to help him.

[99] Both he and Venessa Tobac were cross-examined on the fact that they delayed giving their statements to the RCMP. The implication in the cross examination was that they “wanted to get their stories straight”. Mr. Wheeler gave an explanation that accounted for why they did not give their statements to the police in Norman Wells. It dealt with him being transported south for treatment of his injuries.

[100] Mr. Wheeler was clear as to the blow that fractured his cheek.

Q. Now, the - - - the boot to the cheek, do you know who threw that?

A. Yeah, it was Rich. He was standing right there. He was the only person moving or doing – everybody else is stunned just looking.

- Q. That kick to the cheek, how did that compare to the other hits that you had absorbed that day?
- A. I believe that's the one that had broken my cheekbone . . . and it was the most devostory [sic] one.

[101] I recognize that Mr. Wheeler is not a medical professional but I accept that he is able to assess which blow to his cheek was the one that broke his cheekbone.

C.5 Venessa Tobac

[102] Venessa Tobac was an emotional and assertive witness. She clearly had issues with respect to how the police handled her complaint of the assaults and was cross-examined on her dealings with the RCMP.

[103] She admitted her past criminal history and the use of alcohol and marijuana that night without hesitation. She was outraged that the police did not arrest Richard Alberta on the night of April 25, 2015.

[104] Ms. Tobac was not caught in any inconsistencies that would have me doubt her testimony. I did not notice similarities in the testimony of Venessa Tobac and Cody Wheeler such that I would suspect that they had collaborated on their testimony. When it was suggested that they deliberately did not give a statement to the RCMP until a later date so that they could get their stories straight, Ms. Tobac gave a believable explanation for the delay. Further, the transcripts of her calls to the RCMP confirm that her accusations of Richard Alberta assaulting her and Mr. Wheeler were made on April 25, 2015 while she was at the Alberta residence.

[105] With respect to the use of these transcripts, I acknowledge that the statements made by Ms. Tobac on April 25, 2015 are not being admitted as evidence for the truth of their contents. I accept that the proper use of these statements is as explained by Rosenberg, J.A. in *R. v. Curto*, 2008 ONCA 161 at para. 35:

35 The cases make it clear, however, that when prior consistent statements are admitted, the contents of those statements are not admissible for their truth. This limitation on the use of the prior statements helps to balance the probative value and prejudicial effect of the evidence. The probative value lies in the fact that the statement was made. The contents of the statement itself do not add to the probative value because, as I have said, mere repetition of a story on a prior occasion does not generally make the in-court description of the events any more credible or reliable. This limit on the use of prior consistent statements has been applied with particular rigour in jury trials, where it has been held to be reversible error for a trial judge not to warn the jury on the limited use of narrative statements. ...

[106] In this case, these prior consistent statements simply show that Ms. Tobac did not fabricate the allegations against the accused at a later date.

C.6 Jean Paul Bernarde

[107] I place significant weight on J. P. Bernarde's testimony that he saw Richard Alberta kicking Cody Wheeler.

[108] My observations of Mr. Bernarde are that he was a reluctant witness who was only willing to say what he was sure of. He stated that he had one glass of wine on the evening of April 25, 2015; that as of April 25, 2015, he had recently been prescribed beta blockers; and that he was driving that evening.

[109] It was clear that his relatively minor consumption of alcohol was not enough to account for the gaps or blurs in his memory. They may be a result of his reluctance to testify or the prescription medicine that he was taking. With respect to Mr. Bernarde, however, there was no evidence to show that he was not independent of the accused and the two complainants. I accept his testimony on those aspects that he was clear on.

D. CONCLUSION

[110] I do not believe the evidence of Richard Alberta and Jacklyn McDonald in respect to Mr. Alberta's physical interaction with Cody Wheeler and Venessa Tobac; nor does their testimony leave me with a reasonable doubt. I am satisfied beyond a reasonable doubt, based on all of the evidence, that Richard Alberta assaulted Cody Wheeler and Venessa Tobac. With respect to Mr. Wheeler, there were a number of punches and kicks. With respect to Ms. Tobac, there were punches and dragging.

[111] I do not consider the defence of self-defence to have any application in this case. First, I do not accept Mr. Alberta's assertion that he was struck first by Cody Wheeler. Second, even if I am wrong on this finding and Cody Wheeler struck the first blow, Mr. Alberta's response was disproportionate to Mr. Wheeler's single blow.

[112] On the issues of injuries, I find that the fracture to Cody Wheeler's cheek bone was caused by the assault of Richard Alberta. With respect to Venessa Tobac's injuries, I am not able to find that the assault by Richard Alberta caused "bodily harm" as that term is used in the *Criminal Code*. First, the evidence of the injuries themselves do not justify a finding of "bodily harm." Second, I am unable to determine what injuries were caused by Richard Alberta and which were caused by Rob Delayer.

[113] Richard Alberta is guilty of the offence of assaulting Cody Wheeler causing bodily harm pursuant to section 267(b) of the *Criminal Code* and of assaulting Venessa Tobac pursuant to section 266 of the *Criminal Code*.

[114] The Information in this matter refers to an assault on “Vanessa” Tobac. The evidence disclosed at trial indicates her name to be “Venessa” Tobac. The Information shall be amended to conform to the evidence at trial.

“Garth Malakoe”

Garth Malakoe
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 16th day of
September, 2016.

**Corrigendum of the Reasons for Decision
of
The Honourable Judge Garth Malakoe**

1. An error occurred in Paragraph 112. The wording of the sentence contains an error. Paragraph 112 reads:

[115] On the issues of injuries, I find that the fracture to Cody Wheeler’s **jaw** was caused by the assault of Richard Alberta. With respect to Venessa Tobac’s injuries, I am not able to find that the assault by Richard Alberta caused “bodily harm” as that term is used in the *Criminal Code*. First, the evidence of the injuries themselves do not justify a finding of “bodily harm.” Second, I am unable to determine what injuries were caused by Richard Alberta and which were caused by Rob Delayer.

Paragraph 112 has been corrected to read:

[116] On the issues of injuries, I find that the fracture to Cody Wheeler’s **cheek bone** was caused by the assault of Richard Alberta. With respect to Venessa Tobac’s injuries, I am not able to find that the assault by Richard Alberta caused “bodily harm” as that term is used in the *Criminal Code*. First, the evidence of the injuries themselves do not justify a finding of “bodily harm.” Second, I am unable to determine what injuries were caused by Richard Alberta and which were caused by Rob Delayer.

2. The citation has been amended to read:

Citation: *R. v. Richard Alberta*, 2016 NWTTC 13.cor 1

Date: 2016 09 16
File: T1-CR-2015-001490

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

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RICHARD ALBERTA

<p>Corrected judgment: A corrigendum was issued on October 24, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.</p>
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REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE

[Section 267(b) of the *Criminal Code* x 2]