

Information No. 998-10-21686
Citation: R. v. [REDACTED], 2011 ONCJ 261

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

[REDACTED]

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE MISTER JUSTICE P.C. WEST
on APRIL 29, 2011, at OSHAWA, Ontario

APPEARANCES:

T. Boodoosingh

Counsel for the Crown

A. Stastny

Counsel for [REDACTED]

FRIDAY, APRIL 29, 2011

R E A S O N S F O R J U D G M E N T

5 WEST, J. (Orally):

[1] [REDACTED] is charged that on or about August the 5th, 2010 he assaulted [REDACTED], contrary to s. 266 of the *Criminal Code*. He entered a plea of not guilty to this charge.

10 [2] The crown's case consisted of the evidence of the complainant, [REDACTED], and her friend [REDACTED]. Mr. [REDACTED] elected to testify on his own behalf and did not call any additional witnesses.

15 [3] I have carefully reviewed my notes of the evidence of the witnesses and the submissions made, as well as the exhibits that were filed.

20 Factual Background

25 [4] Ms. [REDACTED] and Mr. [REDACTED] were in a romantic relationship from August 2009 until December 18th, 2010. Ms. [REDACTED] has a son, [REDACTED], who is five years old. Mr. [REDACTED] is not the father.

30 [5] On August the 6th, 2010, Ms. [REDACTED] went camping with her son, [REDACTED], Mr. [REDACTED], and her friends [REDACTED] and [REDACTED], whose last name she could not recall. They went to a campsite at Darlingview [sic], which is

somewhere off the 401 eastbound.

[6] The camping trip was boring, so Ms. [REDACTED], [REDACTED], [REDACTED], and [REDACTED] decided to go to the Travelodge Hotel in Pickering or Whitby the next morning, August 7th, 2010, around 11:00 a.m. Mr. [REDACTED] remained at the campsite and came to the hotel in the afternoon around 3:00 or 4:00 p.m. They were all staying in one room.

[7] When Mr. [REDACTED] arrived, he and Ms. [REDACTED] had a "confrontation". Mr. [REDACTED] was going to throw Ms. [REDACTED] laptop outside the hotel room which was on the first floor with a patio. Ms. [REDACTED] was trying to reach for her laptop, and she described that the two of them "bumped and collided" into each other. The laptop ended up on the bed instead of being thrown outside.

[8] The confrontation was "just a jealous rage over - foolishness, really...A lot of insinuations back and forth. A lot of assuming back and forth, and it led us into...an assault." They were both jealous, carrying on about documents that were in Ms. [REDACTED] laptop. The argument started in the parking lot and then moved inside the hotel room.

[9] It was Ms. [REDACTED] evidence that Mr. [REDACTED] knew that by going into the hotel room where her son was, she would get angry and it would cause her mental abuse, which would follow through

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Reasons for Judgment - West, J.

with an assault. Mr. [REDACTED] apparently had her truck keys, and she was trying to take them from him. In the hotel room, Ms. [REDACTED] was struggling with Mr. [REDACTED] to get back her truck keys. She described the struggle as a wrestling match between the two of them. Mr. [REDACTED] was trying to push her away. It was at this point that he went for the laptop.

[10] Ms. [REDACTED] testified that it was Mr. [REDACTED] "mission" to go into the hotel room to get the laptop. During the struggle to get the laptop, they bumped together and the laptop fell on the bed. Apparently Mr. [REDACTED] also had Ms. [REDACTED] telephone.

[11] During the struggle, Mr. [REDACTED], according to Ms. [REDACTED], decided to bite her head, which he did. Something then hit her in the back of the head; she did not know exactly what it was, whether it was an elbow or a fist.

[12] Ms. [REDACTED] testified, as she touched the top of her head, that there was nowhere that someone could actually take a picture for proof that he bit her, but there was a bump. She did not know if the bump was from an elbow or a fist. This all happened during the wrestling match. She was unable to point to exactly where on her head Mr. [REDACTED] bit her. She testified that Mr. [REDACTED] has bit her before and he "does this so he can't leave any marks". After he bit

her, it was sore and it hurt. She testified that Mr. [REDACTED] was on top of her, but she could not describe his position.

5 [13] [REDACTED] had to come and pull Mr. [REDACTED] off of Ms. [REDACTED]. Ms. [REDACTED] then described that Mr. [REDACTED] had also grabbed her by her throat. This was part of the same assault, but she did not know if it was before or after the bite. He was grabbing her by her oesophagus and was holding very tightly. She was told by the police that the area where Mr. [REDACTED] had grabbed her was called the "oesophagus". He grabbed her by her throat, and "squeezed really, really tight, like, hard, really, really." He did this with one or two hands. He was choking her. She did not know how long he did this, but it was long enough that her throat was sore and tender for a "good three, four, or five days".

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20 [14] She also described that during the struggle, Mr. [REDACTED] twisted her arm. Her arm is still sore to this day. While all of this was going on, [REDACTED] was present in the room. He got Mr. [REDACTED] off Ms. [REDACTED].

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30 [15] Ms. Morden then described how they were back out in the parking lot and she was threatening to call the police and 911. Mr. Powell threw her phone away and Mr. Senechal had to retrieve it. Ms. Morden ran back into the room to call 911 and when she pushed "9", it

went straight to the front desk. She did not make any complaint to the person on the front desk.

5 [16] She went back outside. She managed to get the truck key but does not recall how, whether Mr. [REDACTED] left it behind, or [REDACTED] got it from him. At that point Mr. [REDACTED] was gone. Ms. [REDACTED] then went back into the hotel room to see her son. Everybody then went to the hotel's hot tub. It was Ms. [REDACTED] evidence that she was not going to let this incident ruin what was the purpose of going to the hotel room with her son. While in the hot tub, they all talked about what happened.

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15 [17] The bite to Ms. [REDACTED] head did not require any medical attention. The only medical attention that she is still going through is with respect to her arm, from her elbow to her upper arm, this was her right arm. Her doctor told her to come back after the trial was over and she would start doing some nerve testing because Ms. [REDACTED] was getting carpal tunnel. Other than that she had mostly bruising.

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30 [18] Ms. [REDACTED] was shown a photograph that was taken three or four days after the incident at the Travelodge. This photograph, Exhibit 1A, shows Ms. [REDACTED] left arm. She testified it was a lot worse than what that photo depicted as it had calmed down.

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[19] A second photo, Exhibit 1B, was shown to Ms. [REDACTED], which showed the bruising to her left arm. Exhibit 1C is a further photo which shows bruising to Ms. [REDACTED] right arm. Exhibit 1D is a photo of Ms. [REDACTED] right hand, which she testified shows bruising to her ring finger.

[20] The altercation between Ms. [REDACTED] and Mr. [REDACTED] started very shortly after his arrival at the hotel and lasted for 20 to 25 minutes. The photos were taken by the police three days after the incident, when Ms. [REDACTED] first reported the assault. She testified that she did not attend the police station right after the incident because she was extremely intimidated by Mr. [REDACTED]. She testified Mr. [REDACTED] is a large man, very fearful when he's angry, and very unpredictable. She described being caught up in an abusive cycle, which she did not know how to deal with at that time.

[21] Ms. [REDACTED] testified that she did not attend the hospital for her injuries. She is not being treated for any of her injuries. She will be receiving treatment for her right arm after the trial.

[22] Ms. [REDACTED] testified that she lived with Mr. [REDACTED] from August 2009 until March 2010, and then from October 13th, 2010 until December

18th, 2010.

[23] During the altercation, Ms. ██████ admitted that she punched Mr. ██████ in the hotel room. She punched him at the beginning of the wrestling match when they were struggling for the keys.

[24] In cross-examination Ms. ██████ agreed that she told the police in her statement that her contact with Mr. ██████ began on the day of his court appearance, on August 4th, 2010, in respect of another person. She attended court for Mr. ██████ sentencing. At this court hearing, she spoke to Mr. ██████ about their exchanging each other's belongings which they each still had possession of. In her statement, she said that after Mr. ██████ court hearing she and her friends went camping. It rained, it was not fun. Mr. ██████ called her about exchanging their belongings, and she arranged to meet him at the Travelodge Hotel to do the exchange. She told the police she had no idea how Mr. ██████ got to the hotel.

[25] She agreed that this was a lie. Her statement to the police was under oath, and she agreed that she was probably cautioned about not telling the truth to the police. In fact, she had been seeing Mr. ██████ for a considerable period of time. She did go to court to see what sentence Mr. ██████ received. Her explanation

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for lying to the officer was because she "was under a lot of stress, severe stress." She did not realize what she would be facing with the officer. She volunteered to give a statement. She didn't have to. When he asked the question of how ██████ got to the hotel, she was "confused," she felt caught in a cycle that she did not want to be in. She did not know how to answer the question. She said what she said; she should not have said it. She just did not know how to be honest at that time.

[26] She did not say Mr. ██████ was with her because she thought she was going to get into trouble. Mr. ██████ also gave a statement, and she did not coach him.

[27] Ms. ██████ agreed that she had gone to the police at some point and told them that she saw Mr. ██████ with a gun at his mother's house. She is aware that the police got a search warrant and searched his mother's house and found nothing. She recalled Mr. ██████ having an MSN conversation with her about why she told the police he had a gun when it was not true. She testified that she had seen something that "possibly could've been a gun, because there were most certainly bullets." She then testified that she did not remember having the MSN conversation with Mr. Powell. When defence counsel suggested he could show her the MSN history, she then changed her evidence again and

testified it was very possible she did have such a conversation with him.

[28] When she was asked whether there was any sort of agreement to provide certain information to the police when she went with ██████ to the police station, she testified, "No, I do not believe so." She said that she and ██████ did talk about what had taken place, but she did not coach or manipulate ██████ as to what he was supposed to say. If ██████ left out the fact that ██████ was on the camping trip, that was just a coincidence.

[29] When she left the campsite, ██████ was with ██████ dog. She was not concerned about what he was doing. Ms. ██████ testified that ██████ and ██████ went back to the campsite to pick up Mr. ██████ and bring him back to the hotel. They picked him up in her truck.

[30] She met Mr. ██████ in the parking lot. He knew how to get under her skin; he did these things on purpose to get her angry. She testified he had read stuff on her laptop and on her cell phone, and he was in a jealous rage. When she was asked how Mr. ██████ could have gone through her laptop when it was in the room, and the argument started when he arrived in the parking lot, Ms. ██████ testified, for the first time, that it was a previous argument and confrontation which had started at the campsite

and was the reason she had left the campsite that morning.

[31] The argument started in the parking lot. Ms. ██████ testified Mr. ██████ knew that if he went into the hotel room that she would get angry. She agreed that in the hotel room she punched him in the mouth and knocked out one of his teeth. She denied punching out two teeth. She saw him spit out the tooth and he told her that he was going to collect it for evidence. She did not know if already had a front tooth missing, but his teeth were rotted so she really did not know.

[32] She disagreed with defence counsel that the injury to her right hand was caused by her punching Mr. ██████ in the mouth and knocking out at least one tooth. She finally agreed it "could've been from [her] giving him one shot to house mouth. [She's] not a weak girl. [She's] very strong and if someone is going to attack [her], [she's] going to make sure [she] defend[s] [herself]."

[33] She agreed that when he was trying to get into the hotel room that she jumped on him and started attacking him outside the hotel room. It was like "who was going to get into the hotel room first." She tried to get him out of the way. According to Ms. ██████, Mr. ██████ knew what he was going to do; he was going into that

room to cause her a problem in front of her child. He was going into the room to tear up that room, to get her laptop, to take her cell phone, and probably take her money, too.

[34] After reporting Mr. [REDACTED] to the police on August 9th, 2010, Ms. [REDACTED] began calling him in September 2010. She spoke to Mr. [REDACTED] about her paying for his lawyer. She disagreed that she was going to get him a lawyer because she felt that she was the aggressor at the Travelodge Hotel. She was aware that there was a warrant for his arrest after she went to the police on August 9th, 2010. She contacted him in September because she thought he was going to go for therapy and counselling. She was weak and vulnerable, and she was manipulated by Mr. [REDACTED], and she still loved him at that point.

[35] [REDACTED] testified that he went camping with [REDACTED], her son, [REDACTED], [REDACTED], [REDACTED], who he knew as [REDACTED], and his friend, [REDACTED]. They went camping on a Wednesday, right after the court hearing. They arrived at the campsite late at night. It was very stressful trying to put up the tent. No one knew what to do. The next morning everyone was saying how horrible camping was, and that they should go to a hotel. They had seen a Travelodge Hotel when they were driving on the highway, with a saltwater pool and a hot tub. They left for the hotel and arrived around 12-noon to two. Everything was

5 fine at the campsite, there were no arguments, no fighting, no nothing. The only tension was the previous night when they were trying to put up the tent, pieces were missing, and no one knew what they were doing.

10 [36] He has known ██████████ for about a year. They were close friends in the summer of 2010, but are no longer close friends. He met ██████████ at the same time he first met ██████████. ██████████ and ██████████ were dating.

15 [37] Everyone left for the hotel except ██████████. He thought ██████████ had gone off for a walk. He was not there when they left the campsite. He did not know if ██████████ knew they were going to go to the hotel. Mr. ██████████ could not recall how ██████████ got to the hotel.

20 [38] Mr. Powell arrived at the hotel a couple of hours after everyone else got there. When ██████████ arrived, Mr. ██████████ had no concerns. He heard an argument start outside of the hotel room between ██████████ and ██████████. He assumes that the altercation started outside, but he did not see it. When they came into the room, they were fighting. ██████████ was against the wall, and was getting hit. He recalled ██████████ saying, "Don't do this in front of my son."

25 [39] When Mr. ██████████ was asked how Mr. ██████████ was hitting Ms. ██████████, he responded: "I don't.

I'm not, he was hitting her, like, pushing her, shoving her, and like, punching her, but I don't know more than that. Like, I don't know..."

5 [40] He could not remember how many times Mr. ██████ hit Ms. ██████. All he could say was "numerous". He knows there was force being used. He also knew that during the scuffle, Mr. ██████ tooth was knocked out, but he did not see it happen, so he did not know when it happened. He heard Mr. ██████ say to Ms. ██████, "You knocked out my tooth." He either told them to go outside, or he pushed them outside. He was not sure.

10 15 [41] When they were outside, Mr. ██████ had Ms. ██████ up against the wall and was holding her by the neck somehow. Mr. ██████ slapped and punched Mr. ██████ a couple of times on his back. He does not know exactly where.

20 25 [42] Mr. ██████ threw Ms. ██████ phone into a field by the hotel. Mr. ██████ had to retrieve it. There was no damage to the cell phone. Mr. ██████ also had Ms. ██████ truck keys. He gave them to Mr. ██████ just before he left.

30 [43] In cross-examination, Mr. ██████ testified that he and ██████ were very close friends at the time. At that time, ██████ was staying at Mr. ██████ apartment.

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[44] Sometime after the incident, he and Ms. [REDACTED] drove to the Durham police in Pickering and provided statements. Mr. [REDACTED] believed he told the police that [REDACTED] was on the camping trip, but if he did not, then it was only an omission. He denied lying to the police about this. The video statement was then played in court, and it is quite obvious that Mr. [REDACTED] did not tell the police that Mr. [REDACTED] was on the camping trip. He agreed that he told the police that he did not know how Mr. [REDACTED] got to the hotel, and he did not say anything about him being on the camping trip.

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[45] Mr. [REDACTED] denied picking up Mr. [REDACTED] at the campsite with [REDACTED] and bringing him back to the hotel. He and [REDACTED] do not drive. He was unsure whether his dog was left with Mr. [REDACTED] at the campsite. He did not know if Ms. [REDACTED] picked Mr. [REDACTED] up. He did not know how Mr. [REDACTED] got to the hotel.

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[46] When Mr. [REDACTED] was asked whether or not Ms. [REDACTED] had asked him to fabricate anything in his statement, he responded that he did not have any recollection, and if she did, the reason it was left out about Mr. [REDACTED] being on the camping trip had nothing to do with her.

[47] He agreed that he never saw how the altercation stated. He knew about Mr. [REDACTED]

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teeth being knocked out, but he did not see the connecting punch. He agreed that [REDACTED] was probably strong. He was sure she can be verbally aggressive when she gets upset. He said he had never seen her physically aggressive.

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[48] After cross-examination was completed, the crown had no further questions in re-examination. I then had the following exchange with Mr. [REDACTED] to clarify some of his answers:

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The Court: I'm trying to understand what you mean by, "...to your recollection, [REDACTED] didn't tell you to lie."

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The Witness: Because I don't remember her tellin' me to lie. But I don't remember her not tellin' me to lie, so I'm just not gonna' say in any way. I don't think she did, so, I can say, no, but, tryin' to word it...

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The Court: Did you talk to her before...

The Witness: Well, I mean, we were together.

The Court: ...you went to the police?

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The Witness: No, we didn't coach a story. We said what we saw happen and then that's what I told the police.

The Court: That was not my question. Did you talk to her before you went to the police?

The Witness: Yeah, we were, we hung out for a couple of days after that, so, there was conversation after, yes.

The Court: Did you talk to her about what had happened?

The Witness: I asked her what started it, and I don't remember what she told me started it, and I told her what I saw, and then we're just like, "Well, that was crazy. Can't imagine that happening."

[49] Mr. ██████ testified he never saw Mr. ██████ on top of Ms. ██████ on the ground. He never saw Ms. ██████ hunched over with Mr. ██████ on top of her when he had her against the wall. He did not see any biting. He heard her talk about it afterward. He saw a mark on her head that she showed him which he thought looked like a bite. It was a red mark; he could not see any teeth marks. He saw evidence of trauma to her head. The whole incident happened so fast, it happened within 10 minutes, if not less.

[50] Mr. ██████ testified that he met Ms. ██████ online. He agreed that he was on a no contact order with Ms. ██████ since May 2010. In July

2010, he and Ms. [REDACTED] had begun to communicate with each other. Ms. [REDACTED] had come with him to see his probation officer concerning his term that he was to have no contact with Ms. [REDACTED]. It was his understanding that after this meeting, that it was up to Ms. [REDACTED] whether she wanted to have contact with him. Ms. [REDACTED] did come to his court case on August the 4th, 2010. By then they had become romantically involved again.

[51] The day after the court hearing he went with Ms. [REDACTED], her son, [REDACTED], [REDACTED], [REDACTED], and [REDACTED] dog camping. Everything was fine at the campsite initially, but after they got back from getting some firewood at a gas station, [REDACTED] got mad because they were having trouble putting the tent up. She was drinking and calling them all idiots.

[52] They finally got the tent up, and everyone went to bed. The next morning, Mr. [REDACTED] got up before everyone else. They were close to the water, so he took the dog for a walk. When he returned, they were all gone. [REDACTED] and [REDACTED] eventually came back for him, and they packed up all the stuff. [REDACTED] told him that [REDACTED] was mad. They told him that they had a hotel room in Oshawa, and they drove him to the hotel. As they were driving back to the hotel, Mr. [REDACTED] told Elijah not to say anything to [REDACTED] because she was mad.

[53] When they got back to the hotel, he went to the store with [REDACTED] to buy cigarettes. He was then outside the room, smoking a cigarette.

[REDACTED] came outside and was upset with him that he had been talking to [REDACTED] about her. They got into an argument over this, and [REDACTED] started poking Mr. [REDACTED] on his chest. Mr. [REDACTED] then said he was going to leave, and was going to go into the hotel room to get his money. As he went to go into the sliding doors, [REDACTED] jumped onto his back and began to punch him.

[54] After he got inside the room, [REDACTED] jumped off of him. He went into the bathroom to get his money. There was no pushing or shoving going on inside the room. [REDACTED] was beside [REDACTED]. As he came out of the bathroom, [REDACTED] "sucker" punched him in the mouth. He spit his teeth into his hand and said to her, "This is what I gotta keep for evidence to say that I didn't even touch you." He then left the room.

[55] [REDACTED] ran after him and jumped him again when he was outside. He never had [REDACTED] in a choke hold. He grabbed her arm to pull her off of his back. [REDACTED] put him in a bear hug and Mr. [REDACTED] told him to let go as he was leaving. He never had the truck keys because he left them in the truck. [REDACTED] was telling Mindy to "Let him go, let him go." The bruises she had on her

arms were caused by Mr. [REDACTED] trying to get her off of him. He never threw any punches at her. It was his position that if he had punched her, it would have really injured her because he is a big man. He did not bite her. He could not bite her because she knocked out his teeth and his whole mouth was numb and bleeding. He got on a GO bus and went home.

[56] Throughout that weekend, Ms. [REDACTED] was calling his cell phone and leaving messages for him. Mr. [REDACTED] kept her voicemails. The recordings were played in court, and the CD was filed as Exhibit 2. Ms. [REDACTED], in these calls, was asking Mr. [REDACTED] to call her, there were two calls on August 7th, a call on August the 8th, 2010 all asking Mr. [REDACTED] to call her, that she knows he is receiving her text messages. She does not sound upset. She does not complain that he assaulted her at the hotel. These calls were made before she went to the police with Mr. [REDACTED]. There were several additional calls made by Ms. [REDACTED] to Mr. [REDACTED] in September where she is telling him how much she loves him and misses him.

[57] Mr. [REDACTED] went and retrieved his belongings from Ms. [REDACTED] place after he left the hotel.

Analysis

[58] As in any criminal case, Mr. [REDACTED] is presumed innocent until proven guilty. I have reminded myself that I need not firmly believe or disbelieve any witness, and that I can accept all, some, or none of a witness' testimony. I have also reminded myself that the crown must prove the essential elements of the offence beyond a reasonable doubt, as this term has been defined and explained by the Supreme Court of Canada in *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.), *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 (S.C.C.), and *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.). Proof of a probability of guilt does not amount to proof of guilt beyond a reasonable doubt. Proof of guilt to a near certainty is required in criminal proceedings.

[59] I recognize that the rule of reasonable doubt applies to the issue of credibility. Accordingly, I must acquit the defendant if I accept his evidence, or if it raises a reasonable doubt after considering it in the context of the evidence as a whole. If I reject his evidence, or it does not leave me with a reasonable doubt, I must go on to ask whether the evidence that I do accept convinces me of the guilt of the defendant beyond a reasonable doubt.

[60] While to lawyers this may all sound familiar, it is important that the parties

5 understand that this is not a civil case where
the result may be determined on the basis of
which the two competing versions of events I
prefer, or which is more probable, or which of
the two essential witnesses appears more
credible. As the Ontario Court of Appeal in *R.*
10 *v. Hull*, [2006] O.J. No. 311 at para 5 noted
recently: "*W. (D.)* and other authorities prohibit
triers of fact from treating the standard of
proof as a credibility contest. Put another
way, they prohibit the trier of fact from
concluding that the standard of proof has been
met simply because the trier of fact prefers the
evidence of crown witnesses to that of defence
witnesses."

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[61] I must assess the evidence of the
complainant and the defendant in light of the
totality of the evidence, which includes and
permits comparing and contrasting the evidence
of those witnesses. The Court of Appeal in *Hull*
continued: "However, such authorities do not
prohibit the trier of fact from assessing an
accused's testimony in light of the whole
evidence, including the testimony of the
complainant, and in so doing comparing the
evidence of the witnesses. On the contrary,
triers of fact have a positive duty to carry out
such an assessment recognizing that one possible
outcome of the assessment is that the trier of
fact may be left with a reasonable doubt
concerning the guilt of the accused."

5 [62] Proof beyond a reasonable doubt means what it says. There is thus nothing illogical in rejecting the defendant's evidence but still not being sufficiently satisfied by the complainant's evidence to find that the case has been proven. A state of uncertainty at a trial like this, where the court has heard two conflicting versions from the two parties involved, is not uncommon. Ultimately, if I have a reasonable doubt on the whole of the case that arises from the evidence of the crown's witnesses, the evidence of the accused, or the evidence of any other defence witness, or the absence of evidence, the charge must be dismissed. That is *R. v. Lifchus*.

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20 [63] In applying these principles to the case at bar, I must assess the evidence of Mr. ██████ in light of the totality of the evidence, including the evidence of the complainant and Mr. ██████, as well as any exhibits filed.

25 [64] The crown points to the photographs as corroborating Ms. ██████ evidence. There is no doubt that Ms. ██████ has bruises in some of the areas she testified that she was assaulted. He also points to the evidence of Elijah Senechal, who in some respects supports the version of events provided by Ms. ██████.

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[65] The defence argues that I should accept Mr.

5 [REDACTED] evidence, and that I should reject the evidence of Ms. [REDACTED] and Mr. [REDACTED] because they both have admitted to lying under oath, and they are not credible or reliable witnesses. The injuries depicted in the photographs could very easily have been caused innocently during Mr. [REDACTED] attempts to get Ms. [REDACTED] off his back, or in fending off her punches.

10 [66] Having observed Ms. [REDACTED] testify, and in reviewing her testimony, I found that there were a number of areas in her evidence that raise concerns about her veracity, and which I believe are of considerable significance in determining whether her evidence is sufficiently reliable and credible to find beyond a reasonable doubt the guilt of Mr. [REDACTED]. In my view, Ms. [REDACTED] evidence is not sufficiently reliable or credible to find that the crown has met its burden and its onus. Mr. [REDACTED] evidence has similar deficiencies to that of Ms. [REDACTED]. Finally, it is my view that the bruises seen in Exhibits 1A to 1C could have been caused by Mr. [REDACTED] in the manner described; namely, his attempting to stop Ms. [REDACTED] from assaulting him. The bruise to Ms. [REDACTED] right fingers, which is seen in Exhibit 1D, in my opinion, was most likely caused when she punched him in the mouth, knocking out his teeth. Let me explain my decision.

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[67] I find that a number of areas of Ms.

5 [REDACTED] evidence either do not make logical sense, or they contain inconsistencies between what she said in-chief, and in cross-examination. I have set out below what I consider to be the most significant inconsistencies in her evidence, and those areas that raise concerns about her veracity and credibility. I am not including all of my concerns.

10 [68] First, Ms. [REDACTED] lied to the police about the fact that Mr. [REDACTED] was on the camping trip with she and her friends. In her statement, which was given under oath on August 9th, 2010, she was asked repeatedly by the officer how Mr. [REDACTED] got to the hotel, and she responded that she had no idea how he got there, maybe by a car, maybe by an associate. This was a lie. She also told the officer that Mr. [REDACTED] was not on the camping trip, which is also a lie.

15 [69] Ms. Morden lied to the police in her statement about seeing Mr. [REDACTED] at his sentencing on August 4th, 2010, and then receiving a call from him about exchanging belongings they each still had of each other. She made an arrangement to meet him at the Travelodge Hotel. In fact, she had been seeing Mr. [REDACTED] in an intimate relationship for some period of time prior to the court appearance. She made it seem to the officer that she just met him. This was also a lie.

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5 [70] Coincidentally, Mr. ██████ also left out that Mr. ██████ was on the camping trip. When confronted as to whether Ms. ██████ had told him to lie about Mr. ██████ being on the camping trip, his response was, to his recollection ██████ did not tell him to lie. When I asked him to clarify what he meant by that answer, he said that he could not remember ██████ telling him to lie, but he also could not remember ██████ telling him not to lie. He admitted that they talked about the incident for the couple of days before they went to the police, they said what they saw happen, and that is what they told the police.

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20 [71] In my view, it is an extremely serious matter when a witness can be shown, or admits to lying previously under oath. An admitted lie is a serious matter, but lying under oath directly impacts the truth-seeking function of the court. This type of lie raises serious concerns about how the trier of fact can accept anything said by such a witness. I recognize that I can accept all, some, or none of a witness' testimony; however, a proven or admitted falsehood made under oath, in my view, seriously undermines a witness' overall credibility.

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30 [72] Ms. ██████ described a vicious, violent assault that included Mr. ██████ punching her on the arms, causing bruising, biting her head, and

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choking her by grabbing her throat (her oesophagus), and squeezing it very hard. She described an assault that lasted 20 to 25 minutes in length that started outside the hotel room, continued inside the hotel room, and then continued back outside. Yet after Mr. ██████ left, Ms. ██████ took her son and went with ██████ and ██████ and had a hot tub and a swim. In my view, this is not consistent with the brutal assault described by Ms. ██████.

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[73] A serious inconsistency between the evidence of Ms. ██████ and Mr. ██████ is where they each say the assault occurred. Ms. ██████ says that Mr. ██████ punched her, bit her head, and choked her by grabbing her throat in the hotel room. Mr. ██████ testified that there was some hitting in the hotel room, he did not see a bite, but heard about it from Ms. ██████ later. The strangling or choking occurred outside the hotel room when Mr. ██████ had Ms. ██████ pushed up against a wall of the hotel, according to Mr. ██████. This is a serious inconsistency which I must take into account in assessing their reliability.

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[74] Ms. ██████ did not report the assault to the police for three days. This is a feature of many domestic violence cases, where the victim of the assaultive behaviour is afraid of retribution or is conflicted by her feelings for her partner. There is an added feature to this

5 case which is quite troubling, and calls into serious question Ms. [REDACTED] veracity. This is her voicemail messages to Mr. [REDACTED] on August 7th and 8th, after he is supposed to have assaulted her. She is not upset in those messages; rather, she is annoyed with Mr. [REDACTED] because he has not returned her numerous text messages, which she says she knows he has received. She even jokes about her phone being "wacked", and wants to know if he has missed her calls because he has been asleep. These are not the actions of someone who has been brutally assaulted.

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15 [75] She told the police in her statement that Mr. [REDACTED] had come by the house where she was living and picked up some of his belongings, and she was upset by this because he knows that he is not supposed to be in contact with her, or attending her residence. In my view, this may be the reason why Ms. [REDACTED] went to the police to accuse Mr. [REDACTED] of assault. He was not answering her voicemails and texts, and he picked up his belongings. Further, this is another example of Ms. [REDACTED] lying under oath to the police about her relationship with Mr. [REDACTED]. His clothes were at her residence because they were back in a relationship, yet she feigns upset with Mr. [REDACTED] because he is breaching the conditions of his probation to stay away from her.

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[76] The later voicemails in September are also troubling because they demonstrate that it was Ms. [REDACTED] who initiated contact with Mr. [REDACTED] after she had gone to the police and ultimately convinced him to resume cohabitating with her from October to December 2010, knowing there was a warrant out for his arrest as a result of her attendance at the police. Further, she was aware that he was not to have any contact with her, or attend where she was living, yet she is the one who pursued him. Again, this behaviour is not consistent with someone who has been brutally assaulted as described by Ms. [REDACTED]. Mr. [REDACTED] has admitted that he was in breach of his probation order by being in contact with Ms. [REDACTED]. Given these voicemails, it is clear that Ms. [REDACTED] is also committing the offence of counselling Mr. [REDACTED] to breach his probationary terms. These voicemails also provide corroboration of Mr. [REDACTED] evidence that it was Ms. [REDACTED] who pursued him and wanted the relationship to continue despite the probation terms. As an aside, I do not accept Mr. [REDACTED] evidence that he was "forced" to go on the camping trip with Ms. [REDACTED]. In my view, he was a willing participant.

[77] My general observations of Ms. Morden when she testified were that she was often evasive in the answers she gave. She often would not answer the question that was being asked. In my view, particularly in cross-examination, she was

attempting to anticipate where the questions were going because she had a very specific agenda. At times it seemed as if she was making up her evidence as she was saying it.

[78] She also exaggerated her evidence. An example of this was with respect to the injury she says Mr. [REDACTED] caused to her right arm. She never sought medical attention for her right arm, nor did she attend the hospital. She said her arm was still sore six months after the assault, yet she testified that her doctor told her to come back to her office after the trial, when the doctor would do some nerve testing because Ms. [REDACTED] was apparently experiencing carpal tunnel. Why would she have to wait until after the trial? In my view, her evidence on this issue does not accord with common sense.

[79] Another instance where Ms. [REDACTED] evidence changed as she gave it had to do with her telling the police that Mr. [REDACTED] had a gun at his mother's house where he was living. She was aware that the police executed a search warrant at the mother's house, but did not discover a gun. Initially, she agreed that Mr. [REDACTED] had sent her an MSN message complaining about why she would tell this to the police when she knew it was a lie. A few questions later, Ms. [REDACTED] testified that she did not receive such an MSN message from Mr. [REDACTED]. When defence counsel advised her he could show her

the string of MSN messages which contained this conversation, she reverted back to agreeing that possibly Mr. ██████ did send her such a message.

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[80] When she initially was describing how the altercation or argument arose, she said that Mr. ██████ had found some documents on her laptop and on her phone which made him upset and jealous. This was why he ran into the hotel room, according to Ms. ██████, he was on a "mission" to get her computer and was trying to throw it outside to damage it. When she was questioned about this in cross-examination, as to how Mr. ██████ would have known about these documents on her laptop if he had just arrived and was still in the parking lot, she testified for the first time that Mr. ██████ had found these documents when they were camping and they first started to argue about this at the campsite. This evidence does not accord with Mr. ██████ evidence that the only tension or stress at the campsite was over the putting up of the tent. There were no arguments, no fights, nothing whatsoever that happened between ██████ and ██████, according to Mr. ██████.

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[81] On Ms. ██████ own evidence, she was the initiator of the physical altercation between herself and Mr. ██████. It should be noted that she did not provide this evidence in-chief. It was in cross-examination, she testified that she knew that Mr. ██████ was going to the hotel room

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to cause a disturbance in front of her son, and that he knew this would cause her to be angry, so she attacked him outside of the hotel room's sliding door and tried to prevent him from entering. In her evidence in-chief, when she was asked about how the argument proceeded into the hotel room, she testified, "I don't really recall exactly what transpired. All I know is I remember us going into the hotel room, and I was tryin' to get him, oh, he had my truck keys...I don't know when he took the truck keys. He must've just, I don't know." She does not say anything about jumping on Mr. [REDACTED] back to try to prevent him from entering the room. In my view, her memory of events throughout her evidence was selective in respect of her own actions.

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[82] Ms. [REDACTED] initially indicated that she and Mr. [REDACTED] only argued outside, there was no physical altercation, but in cross-examination, she admitted that she was the one who jumped Mr. [REDACTED] when he went to go into the hotel room through the sliding door. She was trying to prevent him from going in the room. At the end of evidence in-chief, she admitted that she punched Mr. [REDACTED] in his mouth while they were wrestling in the hotel room. It did not come out that she had actually knocked out Mr. [REDACTED] front tooth until cross-examination. She testified she only knocked out one of his teeth. It was Mr. [REDACTED] evidence that Ms.

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[REDACTED] knocked out two of his top front teeth. During his testimony, he opened his mouth and I was able to observe that he was missing two front teeth on the right side at the top. I accept Mr. [REDACTED] evidence over that of Ms. [REDACTED] on this issue.

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[83] This evidence is significant because this assault by Ms. [REDACTED] occurred in the hotel room in the "middle" of the assault prior to her allegation that Mr. [REDACTED] had bitten her on her head. Mr. [REDACTED] denies biting Ms. Morden and says he could not have bitten her because she had already knocked out his teeth. Ms. [REDACTED] also indicated that there was no way for a photograph to be taken of the area where she alleged Mr. [REDACTED] bit her. She was unable to say where he bit her. I do not accept her evidence on this issue, in my view, given the injury to Mr. [REDACTED] mouth and teeth, it would have been difficult, if not impossible, for him to bite Ms. [REDACTED] head. I accept Mr. [REDACTED] evidence on this issue. Further, Ms. [REDACTED] left out the fact that she had knocked out Mr. [REDACTED] teeth when she punched him.

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[84] Mr. [REDACTED] testified that Ms. [REDACTED] told him that Mr. [REDACTED] had bitten her head, and he had looked at her head and saw a reddish mark. If that were true, when Ms. [REDACTED] went to the police, she would have shown them where this red mark was, and the police would have taken a

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photograph of the injury. There was no photograph filed, and Ms. ██████ made a point of explaining why there was no photograph by testifying that Mr. ██████ would bite her because he knew it did not leave any marks. This explanation does not accord with common sense.

[85] The defence took the position that Ms. ██████ and Mr. ██████ collaborated on the statements they were going to provide to the police. It is interesting that when each of them was confronted on this issue, they both responded by saying they had no recollection of that, or they could not remember having such a conversation. This is not the response one would expect if there was no collusion. What is significant is that they both told the police that they did not know how Mr. ██████ got to the Travelodge, and in the case of Ms. ██████, she told the officer that Mr. ██████ was not camping with them, and Mr. ██████ omitted advising the police that Mr. ██████ had been with them camping. In my view, this was not a coincidence. Both Ms. ██████ and Mr. ██████ agree that Mr. ██████ picked Mr. ██████ up at the campground to bring him to the hotel. I further find that Mr. ██████ lied when he testified that he did not know how Mr. ██████ got from the campsite to the hotel. He knew how Mr. ██████ got to the hotel because he was the one who drove him.

5 [86] Initially, Ms. ██████ was not prepared to concede that the injury from her hand could have been caused by her punching Mr. ██████ in the mouth and knocking out his teeth. It was only after being pressed in cross-examination that she finally agreed that this was a possible explanation as to how the injury to her hand was caused.

10 [87] With respect to exhibits 1A to 1C, and the bruising to Ms. ██████ arms, it is her position that the bruising was caused by Mr. ██████ punching her arms. Ms. ██████ also describes a wrestling match between herself and Mr. ██████, and it is conceivable that these bruises could have been caused by the two of them wrestling and grappling with each other. She acknowledged that she was the first one to engage in assaultive behaviour when she jumped Mr. ██████ to prevent him from entering the hotel room. She was then struggling with him for her laptop and the truck keys. This is similar to Mr. ██████ testimony with the exception that it was his position that Ms. ██████ jumped him on two occasions. Ms. ██████ described herself as not a weak woman, she is very strong. Mr. ██████ testified that the bruises on her arms were likely caused when he grabbed her by the arms to pull her off his back when she jumped him and she was punching him. In my view, there are innocent explanations

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available on the evidence for how the bruises to
Ms. [REDACTED] arms occurred, and I am not
satisfied beyond a reasonable doubt that Mr.
[REDACTED] caused these injuries in the manner
described by Ms. [REDACTED].

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[88] As I have indicated, Ms. [REDACTED] and Mr.
[REDACTED] evidence is not sufficiently reliable
or credible to find that the crown has met its
burden of beyond a reasonable doubt and its
onus.

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[89] In light of this finding, I need only
comment briefly on Mr. [REDACTED] evidence. While
I might have difficulty with some elements of
his testimony, in general, it was not so
implausible when taken as a whole that I could
reject it.

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[90] Considering all of the evidence therefore,
I am not satisfied beyond a reasonable doubt of
Mr. [REDACTED] guilt. Consequently, he will be
acquitted of the charge of assault.

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M A T T E R A D J O U R N E D

FORM 2
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))
Evidence Act

I, Jessica Sabiston, certify that this document is a true and accurate transcript of the recording of R. v. [REDACTED] in the Ontario Court of Justice, held at 150 Bond Street East, Oshawa, Ontario, taken from Recording No. 2811-103-400732-20110429-090857.dcr, which has been certified in Form 1.

April 30, 2011

Date

"Signed by Jessica Sabiston"

Jessica Sabiston, Court Reporter

Certificate of Transcript (rev. 03/04)

* This certification does not apply to the (Rulings, Reasons, charge) which was/were judicially edited.

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