COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Theoret, 2018 ONCA 700
DATE: 20180828
DOCKET: C59934

Watt, Huscroft and Fairburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Nichole Theoret

Appellant

Richard Litkowski and Jessica Zita, for the appellant

Katie Doherty, for the respondent

Heard: August 20, 2018

On appeal from the convictions entered by Justice Bruce Durno of the Superior Court of Justice on May 24, 2013.

REASONS FOR DECISION

[1] Following a judge alone trial, the appellant was convicted of a number of offences, including the aggravated assault of her sometimes girlfriend. The appellant's position at trial was that the complainant's head, facial, neck, and body wounds were self-inflicted. Accordingly, the sole issue for resolution in relation to the aggravated assault charge was a simple one: did the Crown prove beyond a reasonable doubt that the appellant caused the complainant's multiple and serious wounds? The trial judge answered that question in the affirmative.

[2] The appellant maintains that the trial judge erred in taking judicial notice of two things: (a) the cause of the complainant's bruising; and (b) the effect of the blood stain close to the complainant's bed. The appeal was dismissed at the conclusion of oral argument with written reasons to follow. These are those reasons.

[3] Context is important.

[4] On the night of the offence, the appellant, the complainant, and the complainant's uncle were drinking together. The complainant fell asleep in her bed. She awoke to find the appellant kneeling over her, expressing concern over the fact that the complainant was not wearing a necklace that the appellant had given to her. The complainant testified that about thirty seconds after she was awoken, the appellant started punching her in the face and head. The appellant grabbed the complainant's hair, arms, neck, and wrists. The appellant was wearing rings at

the time of the alleged assault, one of which was found to have the complainant's blood on it. The assault was said to have lasted for a few minutes, at which time the appellant "bolted" from the home.

[5] The complainant had to spend two or three days in the hospital. Her injuries included several gashes that required stiches to her forehead, her eye area and behind her ear, significant bruising, an edema on her forehead, cuts to her neck, scalp, and face (that did not require stitches), swelling on her scalp, and tenderness in her collarbone area. She also had bruising on her arms and one of her legs, although she could not recall if the leg bruise was caused by the appellant.

[6] The complainant's injuries are captured in colour photographs that were filed as exhibits at trial and available for the trial judge's consideration. If inflicted by the appellant, the seriousness of the complainant's injuries easily fell into the category required for an aggravated assault. This brings us to the question on appeal: did the trial judge err in rejecting the position that the complainant caused her own injuries, instead concluding that they were caused by the appellant?

[7] The appellant maintains that the trial judge erred in taking judicial notice of matters that required expert evidence. In particular, the appellant says that the trial judge erred in drawing inferences from the complainant's bruising and blood splatter evidence. The appellant asserts that the trial judge's conclusions were

beyond what common sense and human experience would permit. Although we agree that trial judges cannot take judicial notice of matters that are properly the subject of expertise, we disagree that the trial judge did so.

[8] In his careful and considered reasons, Durno J. did exactly what is asked of trial judges. His findings involved neither judicial notice, nor subjects invoking a need for expert evidence. He considered the entirety of the evidence before him, and drew inferences from the evidence by applying common sense and human experience. Considered in context, his findings were nothing more than inferences that were available to him on the whole of the evidence. They did not require expert clarification or comment.

[9] In particular, the trial judge gave multiple reasons for why he rejected the suggestion that the complainant had inflicted her own wounds, including that, on this record, “some degree of force” had to have been applied to the complainant’s face. Having regard to the multiple, graphic photographs filed at trial, this does not seem like a controversial proposition. Indeed, the appellant’s trial counsel agreed, noting that some of the facial bruising was caused as a result of force “beyond the cutting.”

[10] Having regard to the totality of the evidence, the trial judge found that the suggestion that the complainant could have caused the injury to herself became “increasingly unlikely.” Based upon the location of the injuries, as depicted in the

photographs, it was open to the trial judge to conclude that the complainant's injuries were consistent with her version of events. Accordingly, and understandably, the trial judge concluded that for the complainant to have done all of that to herself "would have been truly remarkable." Despite the complainant's admission of previous self-harming conduct, this was nothing more than a common sense conclusion. Even assuming that there is an expert who could opine on such matters, in the circumstances of this case, given the multiple cuts, bruises, scratches and wounds, it was unnecessary to have an expert testify.

[11] The same is true of the trial judge's conclusion regarding the evidence of blood. The appellant maintains that the trial judge erred in his conclusion regarding blood stains close to the complainant's bed. The impugned passage in the reasons for judgment reads:

> I also consider photographs 25, 30, and 31 … that shows bloodstains to the right of the bed and the part of the bed that is probably closest to the bathroom. These appear to be droplets of blood, many of which are smeared. While I appreciate again there's no blood splatter expert about the direction of movement or how the stains got there, that some drops of blood are smeared is not inconsistent with [the complainant's] trial evidence, albeit a second version, that she may have crawled over the bed and crawled to the bathroom over that area.

[12] The appellant argues that this conclusion overreached because: (a) it relied on the complainant's evidence, which was of questionable quality; and (b) expert

evidence was required in order to comment on whether the blood stain was consistent or inconsistent with the complainant's movements. We do not agree.

[13] First, the quality of the complainant's evidence was entirely within the domain of the trial judge. His thorough reasons demonstrate that he was alive to the need for caution and he specifically addressed those concerns. Second, the trial judge's comment was rooted in the mere observation that smeared blood was not "inconsistent" with someone having crawled through the blood. It was open to the trial judge to make that observation. He did not go further and suggest that the blood pattern was consistent with the complainant's version of events.

[14] For these reasons, the conviction appeal was dismissed.

"David Watt J.A."
"Grant Huscroft J.A."
"Fairburn J.A."