

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Tarr, 2008 NSPC 70

Date: October 7, 2008

Docket: 1617887 and 1617890

Registry: Sydney

Her Majesty the Queen

v.

James Franklin Tarr

DECISION ON THE FACTS

Judge: The Honourable Judge Anne S. Derrick

Heard: July 22 and October 7, 2008

Decision: October 7, 2008

Charges: *Criminal Code* section 268 x 2

Counsel: John MacDonald for the Crown
David Iannetti for the Defence

By the Court:Introduction

[1] On April 7, 2008, James Tarr pleaded guilty to the aggravated assault of James MacDonald and Tracey Ryan. The charges arose out of an incident at Mr. MacDonald's home around midnight on February 4, 2006. As the facts of what occurred are in dispute evidence was called at a hearing on July 22, 2008. Mr. Tarr is claiming that provocation played a role in his altercation with Mr. MacDonald and Ms. Ryan. The Crown and Defence have agreed that until the facts of what happened on February 4, 2006 have been judicially determined they cannot advance their submissions on sentence.

[2] The hearing on the facts at sentencing is governed by sections 723 and 724 of the *Criminal Code*. The sentencing court is required to hear any relevant evidence presented by the Crown or the offender and may admit hearsay evidence. The court may, on its own motion, require the production of evidence that will assist in determining the appropriate sentence. In this case, on July 22, I directed counsel to provide me with the medical reports of the victims' injuries and reports concerning the medications Mr. Tarr received prior to his interview with police, and their effect.

[3] On September 5, 2008, Defence provided me with Mr. Tarr's medical records relating to his hospitalization at the Cape Breton Regional Hospital from February 7 - 9, 2006. I also received letters dated September 15 and October 6, 2008 from Mr.

Tarr's psychiatrist, Dr. Sher Baz Khan, and a letter dated September 29, 2008 from Dr. Robert Pottle, a psychiatrist with the East Coast Forensic Hospital. Dr. Pottle's letter was obtained by the Crown and redacted by consent of Defence to remove all irrelevant and inadmissible information.

The Evidence of Tracey Ryan and James MacDonald

[4] On February 4, 2006, Mr. MacDonald's residence was a house on Colby Street in Sydney. He lived there on his own although his girlfriend Tracey Ryan was a frequent visitor. They both knew James Tarr, through a mutual friend, Glen Tutty. Mr. MacDonald vigorously denied the suggestion that he supplied drugs to Mr. Tarr and that this explained their acquaintance.

[5] Around midnight on February 4, 2006, while Ms. Ryan was visiting Mr. MacDonald there was a knock on the back door off the kitchen. Ms. Ryan was in the kitchen when Mr. MacDonald answered the door and let Mr. Tarr in. After a brief inquiry of Mr. Tarr about school, Ms. Ryan says she went back into the living room and sat on a sofa. Hearing a chair fall over, she walked around the futon in the living room (photograph #25 in Exhibit 2, booklet of photographs taken by police on February 4, 2006) and into the kitchen where she saw Mr. Tarr hitting Mr. MacDonald with a tire iron. Mr. Tarr then turned and hit Ms. Ryan in the head. He continued to attack her as she tried to take refuge in the living room. When Ms. Ryan put her arms over her head to protect herself, one of the blows from the tire iron broke her arm. It was at this point that she recalls Mr. MacDonald threw a deep fryer at Mr. Tarr which gave her the chance to escape. The deep fryer, which was not plugged in at the time

and had not been in use, contained fat at room temperature.

[6] Ms. Ryan ran to the across-the-street neighbour who called 911. Watching from the neighbour's front step, Ms. Ryan was able to see into the living room through the open front door. She witnessed Mr. Tarr take a knife and stab Mr. MacDonald. It was her evidence that Mr. Tarr had choked Mr. MacDonald up against the wall by the stove after which Mr. MacDonald fell into the living room bleeding from the head. Ms. Ryan testified that Mr. Tarr began stabbing Mr. MacDonald as he lay on his side on the floor. She then saw the sensor light in the back yard come on and Mr. Tarr running through the graveyard behind the house.

[7] When Ms. Ryan ran back to the house she thought Mr. MacDonald was dead. He had a steak knife in his side and another knife stuck in his neck. She and Mr. MacDonald were taken to the hospital where they underwent surgery. Ms. Ryan had a large plate inserted in her arm, stitches to close the lacerations in her head and treatment for a broken finger.

[8] It was Ms. Ryan's evidence that she and Mr. MacDonald had not been drinking or doing any drugs before the attack by Mr. Tarr. She did not know of any weapons being in the house and had no idea where Mr. Tarr would have got the tire iron. She said: "We don't have any vehicles so we have no use for a tire iron." Describing the attack, Ms. Ryan testified that she thought Mr. Tarr was "on pills" when he arrived at the house. His eyes were "bugged out" and he did not say anything according to Ms. Ryan. He sat at the kitchen table for "5 or 10 minutes" in a chair pictured in photograph #30 (Exhibit 2). According to Ms. Ryan there was no discussion about

purchasing marijuana or previous purchases. It was her evidence that Mr. MacDonald does not sell marijuana “to her knowledge.”

[9] Mr. MacDonald also described a peaceful domestic scene before Mr. Tarr’s arrival at the back door around quarter past twelve. Mr. MacDonald testified that he was fixing a hot water bottle for Ms. Ryan’s sore back when he let Mr. Tarr in to the kitchen. Mr. MacDonald confirmed that he had met Mr. Tarr through a friend, Glen Tutty, but repeatedly denied supplying Mr. Tarr with marijuana. Mr. MacDonald was unequivocal: “I don’t sell marijuana” he said. When asked whether the purpose of Mr. Tarr’s visit was to buy marijuana, he said if it was he had come to the wrong place. Mr. MacDonald testified that he had no recollection of why Mr. Tarr, whom he claimed to have met only 4 - 5 times previously, would have come to the house at such a late hour. It was Mr. MacDonald’s evidence that he opened the back door in response to Mr. Tarr’s knock and he just came in. Mr. MacDonald testified that he said nothing to Mr. Tarr, that an open-door policy was his custom: “I open the door, they come in”, he said. “I’d do the same to this day.”

[10] It was Mr. MacDonald’s evidence that Mr. Tarr sat down, having said nothing more than “hello or something.” Mr. MacDonald did not recall any conversation while Mr. Tarr sat at the kitchen table. According to Mr. MacDonald, when he had his back turned pouring water from the kettle into the hot water bottle, Mr. Tarr attacked him with a tire iron, hitting him on the head. Mr. MacDonald testified that there was a struggle over the tire iron. He said he succeeded in wresting the tire iron away from Mr. Tarr and hitting him several times over the head with it. Mr. Tarr grabbed the tire iron back and tried to kick Mr. MacDonald’s leg out from under him. They got

“tangled up” and Mr. Tarr forced Mr. MacDonald up against the wall and was choking him.

[11] At one point, Mr. Tarr went after Ms. Ryan who had come into the kitchen. Mr. MacDonald threw the deep fryer at him to save her and Mr. Tarr resumed his assault on Mr. MacDonald. Mr. MacDonald could not recall how he ended up in the living room where he was stabbed by Mr. Tarr in the side. Mr. MacDonald does not remember the struggle with Mr. Tarr ending up in the living room and testified that Mr. Tarr was only in the living room when he pushed Ms. Ryan toward the front door. Mr. MacDonald testified that he did not punch Mr. Tarr in the face at any point, nor did he have possession of the knife first.

[12] It was Mr. MacDonald’s evidence that there was no reason for the attack, that Mr. Tarr had no grounds to be angry with him, there was no money owing and no previous altercations between them.

[13] Mr. MacDonald, at first denying that he kept any weapons at his home, was obliged to admit that he concealed a loaded sawed-off single-barrel shotgun in his sofa. He testified it was there because: “You never know what is going to happen.” Although initially he said it was possible the tire iron was his, Mr. MacDonald subsequently testified he did not think he had a tire iron in the house and did not “carry things for protection.” He went on to testify that: “I had the shotgun for protection, not my protection, for my girlfriend...” Mr. MacDonald testified that he was not expecting to be attacked, he had the shotgun “just in case.” When I asked him about the tire iron his response became more certain again: “There was no tire iron in

the house [before Mr. Tarr arrived.]”

The Evidence of James Tarr

[14] James Tarr testified that he had spent February 4, 2006 uneventfully, writing an exam and hanging out with his girlfriend, Mallory. He was a regular marijuana user and had been prescribed Effexor for anxiety, although he had not smoked any marijuana or taken his medication before going to Mr. MacDonald’s house.

[15] Mr. Tarr knew Mr. MacDonald because Mr. MacDonald supplied him with marijuana. The introduction had been made by Glen Tutty. Mr. Tarr bought two to three grams of marijuana at a time from Mr. MacDonald at a cost of ten dollars a gram. He testified that he would make these purchases twice a week.

[16] On February 4, Mr. Tarr told his girlfriend he was going to buy “weed” and had her drop him off on her way home. Mallory’s driving license required her to be home by midnight so Mr. Tarr arrived at Colby Street around 11:50 p.m. As was the custom, Mr. Tarr went up to Mr. MacDonald’s back door and knocked. Mr. MacDonald let him in and asked him what he was looking for. Mr. Tarr testified that Mr. MacDonald had been drinking: there was a smell of alcohol and his speech was slurred.

[17] It was Mr. Tarr’s evidence that upon entering the kitchen he sat at the table and rolled a joint with the marijuana he had left over from the last purchase. He says he did not share the joint with Mr. MacDonald. The single joint got him stoned. Mr. MacDonald, who was cooking something in a deep fryer, informed Mr. Tarr that he

owed ten dollars which was news to Mr. Tarr. Mr. Tarr gave Mr. MacDonald ten dollars “on a promise to give me weed” but Mr. MacDonald pocketed the money saying he was keeping it to pay the debt that was owing. Mr. Tarr said Mr. MacDonald was belligerent about the issue, telling him: “I’ll do what I want, you punk.”

[18] Mr. Tarr’s evidence was that he responded by reaching into Mr. MacDonald’s pants to retrieve the money Mr. MacDonald had tucked away. Mr. MacDonald reacted to this by punching Mr. Tarr in the head and Mr. Tarr retaliated by punching him back. Mr. MacDonald fell to the floor, clutching his chin. Mr. Tarr says Mr. MacDonald cursed at him saying something like: “Fuck, my face...you little bastard.”

[19] It was then says Mr. Tarr that Ms. Ryan came into the kitchen, encountering him near the doorway to the living room where she saw him standing over Mr. MacDonald. She asked Mr. Tarr: “What did you do? What happened here?” Mr. Tarr told her that Mr. MacDonald had “swung a punch” at him. She said she would give him the marijuana. On cross-examination Mr. Tarr testified that Ms. Ryan had said she would give him “a refund.” Mr. Tarr, trusting her, followed her into the living room. He had his back to Mr. MacDonald at this point: “I turned and he had thrown the deep fryer at me, it didn’t reach me, I was scared. I could have been burned badly.” He testified that he saw Mr. MacDonald looking very angry and bleeding from his mouth. On cross-examination, Mr. Tarr said that Mr. MacDonald was laughing and giggling when he threw the fryer. In Mr. Tarr’s assessment the situation was getting violent and to make matters worse, Mr. MacDonald grabbed a knife.

[20] Confronted by Mr. MacDonald advancing on him with the knife, Mr. Tarr began backing through the living room toward the front of the house. Ms. Ryan was screaming at Mr. MacDonald to put the knife down. Mr. Tarr testified that he went around the futon which was pulled out in the living room (photograph #25, Exhibit 2) and felt something hard under his socked feet. It was a tire iron, one that Mr. Tarr says Mr. MacDonald used when he and Glen Tutty fixed four-wheelers.

[21] Although Mr. Tarr says he did not think the tire iron would do much good as it was not very big, he brandished it at Mr. MacDonald telling him to back off. Mr. Tarr testified he told Mr. MacDonald: "It doesn't have to get this ugly, you can keep the ten dollars." He says Mr. MacDonald responded by saying: "I am going to poke you full of holes: as soon as you turn around you are going to get it in the back."

[22] Mr. Tarr testified to his feelings at that moment: "I felt absolute terror. He looked absolutely enraged. I was horrified. I felt so terrified and full of adrenalin I hit him with the tire iron." Mr. MacDonald's blood spurted all over Mr. Tarr's face and hands. As Mr. MacDonald came at Mr. Tarr with the knife, Ms. Ryan, who was screaming hysterically, tried to get between the two men. Mr. Tarr just kept swinging at Mr. MacDonald and broke Ms. Ryan's arm.

[23] Mr. Tarr testified that he was so "scared and hyped up by the situation" that he flailed Mr. MacDonald "probably fifteen times" with the tire iron. Mr. Tarr noted that he was stoned as well. He began to weaken as he kept hitting Mr. MacDonald and when Mr. MacDonald tried to disarm him, Mr. Tarr kicked at his leg. Mr. Tarr punched Mr. MacDonald with his fists; Mr. MacDonald tried to bite Mr. Tarr on the

throat and Mr. Tarr choked him. The struggle ended up back in the kitchen. At some point, a butchers' block was knocked over on to the floor.

[24] According to Mr. Tarr, once back in the kitchen, Mr. MacDonald grabbed another knife. Mr. Tarr took it away from Mr. MacDonald and stabbed him in the side. Mr. MacDonald stumbled into the living room and collapsed. Mr. Tarr says he grabbed his shoes and jacket and ran out the back door all the way home. He thought he might have killed Mr. MacDonald and felt "his life was over."

[25] On cross-examination, when describing the first blows with the tire iron, Mr. Tarr said that Mr. MacDonald was holding the knife at eye level so Mr. Tarr hit him once. When Mr. MacDonald turned his head, Mr. Tarr hit him on the back of the head. At no time did Mr. MacDonald land a blow on Mr. Tarr with the tire iron.

[26] On February 7, 2006, Mr. Tarr was admitted to the mental health unit of the Cape Breton Regional Hospital. He claims to have been heavily sedated when, on February 8, he made a 911 call from the hospital. In the call he admitted to "stabbing two people." He says he has no recollection of making the call other than feeling a need to confess because he was overwhelmed with guilt for what had happened. Late on February 8 Mr. Tarr was arrested at the hospital and the next day gave a statement to police. (Exhibit 4, Statement of James Tarr, page 4)

[27] On cross-examination it was pointed out to Mr. Tarr that his testimony contained significant details not provided in his statement to police. Mr. Tarr said that when he spoke to police he was under the influence of the medication he had been

receiving in hospital. “When I got off [prescription] drugs I started to remember things” is how Mr. Tarr explained the differences between his evidence and his police statement. Mr. Tarr also said that he had tried to “push away” the gruesome details with it taking “a long time for it to sink into my head that it happened.”

[28] When conducting the interview with Mr. Tarr on February 9, Sgt. O’Neill of the Cape Breton Regional Police did not note anything of concern relating to his mental state. Sgt. O’Neill testified that had there been, the interview would have been stopped. Mr. Tarr’s statement to police was admitted into evidence before me without the requirement of a *voir dire* as the Defence indicated there was no issue being raised concerning the admissibility of the statement on any grounds.

The 911 Call

[29] In the 911 call on February 8, 2006, Mr. Tarr advised the dispatcher that he wanted to speak “a detective” to confess to “a double stabbing of James MacDonald and his girlfriend.” He was oriented enough to describe the incident as having happened on the previous Friday night. In fact it occurred just past midnight in the early hours of February 4, a Saturday. Mr. Tarr told the dispatcher that he “just pulled a tire iron out and...started smashing them.” He said he stabbed “them” after that but could not say how many times. “I don’t remember. I don’t even really remember being there. Ah I just remember some parts. And walked home covered in blood.” Otherwise he said, he had just been hanging out with his girlfriend.

James Tarr's Statement to Police

[30] At the start of his interview with Sgt. O'Neill on February 9, after he was Chartered and cautioned, Mr. Tarr said: "I honestly do not remember the past four days." He was then given the opportunity to speak to duty counsel, following which the interview continued. He was asked about "last Friday" and said he had been having a good time with his girlfriend. "Everything was happy." (page 5, Exhibit 4)

[31] Mr. Tarr had gone to Mr. MacDonald's house to buy a gram of marijuana. He described to Sgt. O'Neill what he recalled. "And I remember screaming. And then I remember walking home and going into my porch and there's blood on my socks. And it scared the fuck out of me." Mr. Tarr acknowledged knowing Mr. MacDonald as a "marijuana dude" and told Sgt. O'Neill that just before the incident, he was having "a good talk" with "Jim." He thought he might have smoked some "weed" with Mr. MacDonald. (Page 10, Exhibit 4) He went on to say: "And for some reason I had a tire iron in my pocket. I don't even know where it came from. And ah I just started laughing. And...and I remember just going crazy and smashing around. I could see and I just went blank from there." (page 6, Exhibit 4)

[32] Mr. Tarr admitted to hitting Mr. MacDonald with the tire iron and possibly "stomping" on him. "Think I choked him too", Mr. Tarr recalled. He said he did not remember ever hitting Ms. Ryan but acknowledged that she might have "got in the way or something." (page 7, Exhibit 4)

[33] When asked what Mr. MacDonald did in response, Mr. Tarr told Sgt. O'Neill

that he “pulled a knife and tried to stab me.” He described his state at Colby Street: “I couldn’t even control myself... I was like I was inside this person...watching them what they were doing and I couldn’t put a stop to it.” He described laughing going on inside his head. Mr. Tarr said he was “scared to death when he got home.” (page 7, Exhibit 4) “It wasn’t sinking in that it was me. I thought I dreamt it... it’s a nightmare.” (page 8, Exhibit 4)

[34] Mr. Tarr told Sgt. O’Neill the attack on Mr. MacDonald and Ms. Ryan was not planned. He said he did not know how he had got to Colby Street. He could not say where he had got the tire iron; “Maybe it came from my barn. Maybe it came from Jim’s house.” He described the attack again: “...it was like you got to do something about this. Like in my head saying that you got to fuckin show who the hell this guy is. And ah picked up whatever the hell I had. A tire iron, a crowbar. And I smashed him right in the back of the head. At that point I was like I woke up and the reality. I was like what the fuck am I doing?” (pages 10 and 14, Exhibit 4) Mr. Tarr told Sgt. O’Neill he did not recall stabbing Mr. MacDonald. “I just had a tire iron.” (page 15, Exhibit 4)

The Evidence of the Victims’ Injuries

[35] The photographs of Mr. MacDonald (photographs 70 through 81, Exhibit 2) show him to have wounds and abrasions to the crown of his head, his neck, his left ear and his left shoulder area. The Discharge Summary for Mr. MacDonald describes his admission to Emergency on February 4, 2006 with a large knife embedded in his side, multiple simple and complex wounds of his scalp (five - six in total), two wounds on

his neck and one on his left shoulder. The neck and shoulder wounds are indicated to have been superficial. Mr. MacDonald was sent for surgery for the stab wound and skin clips (staples) were used to close his scalp, neck and shoulder wounds. Mr MacDonald had no injuries to the front of his scalp or his face, including his mouth.

[36] Ms. Ryan was also found to have scalp wounds (photographs 86 through 89, Exhibit 2) as well as a broken right arm with an open wound. Her left ring finger and right baby finger were fractured. The finger on her left hand had to be surgically repaired. Ms. Ryan had a tibial plate inserted during surgery to her arm which was screwed into place along the bone.

Was James Tarr Subject to An Unprovoked Assault?

[37] The central question I have to determine at this stage of the sentencing process in this case is what happened at 55 Colby Street around midnight on February 4, 2006? Mr. Tarr is claiming that his bludgeoning of Mr. MacDonald and Ms. Ryan, and the stabbing of Mr. MacDonald occurred because he was confronted by a hostile Mr. MacDonald wielding a knife. I understand Mr. Tarr to be saying that he started out defending himself against Mr. MacDonald's unprovoked assault, the punch in the head, but went too far and used excessive force thereby losing the protection offered by section 34 of the *Criminal Code*. Proof that Mr. MacDonald provoked a violent confrontation with Mr. Tarr would be relevant to the determination of sentence.

[38] Mr. Tarr carries the burden of proving, on a balance of probabilities, that Mr. MacDonald was aggressive toward him at the start of the altercation between them.

(section 724(3)(b) and (d) of the Criminal Code)) The Crown has submitted that Mr. Tarr initiated the attack and that Mr. MacDonald neither punched him nor threatened him with a knife beforehand.

The Credibility of the Victims and James Tarr

[39] I must assess the credibility of all the witnesses to determine whether Mr. MacDonald ignited the violent confrontation with Mr. Tarr. I have serious reservations about the credibility of both Mr. MacDonald and Mr. Tarr, for reasons I will now discuss.

James MacDonald

[40] Mr. MacDonald's denials under oath of drug dealing and, initially, possession of the shotgun, rang hollow. Not only was I unconvinced by Mr. MacDonald's responses about drug selling, Sgt. Ken O'Neill, in answering questions on cross-examination by Mr. Tarr's counsel, confirmed that the Cape Breton Regional Police have "credible information" James MacDonald is a marijuana dealer. That evidence left me with no doubt that Mr. MacDonald does sell drugs which Mr. Tarr indicated was the basis for his acquaintance with him. Mr. MacDonald also claimed to keep no weapons in his house but found himself having to admit, when cross-examined specifically about the presence of a shotgun, that he had one loaded and hidden in his sofa. The hidden loaded sawed-off shotgun, which Mr. MacDonald testified he had for protection, also points to him being a drug dealer. Notwithstanding the fact that Mr. MacDonald took the witness stand under oath to tell the truth, I find that he lied

about his involvement in the drug trade and tried to lie about the shotgun.

[41] I am also of the opinion that Ms. Ryan was not telling the truth when she testified that Mr. MacDonald does not sell drugs. She qualified her answer by saying Mr. MacDonald does not sell marijuana “to my knowledge.” Possibly she was not aware of Mr. MacDonald’s activities in this regard, although I think that is very unlikely. I think it is more probable that Ms. Ryan was covering for Mr. MacDonald and being careful not to incriminate him.

[42] To maintain his facade of not being in the drug trade, Mr. MacDonald had to advance a completely unbelievable description of Mr. Tarr’s arrival at the Colby Street residence. He testified that he had no idea why Mr. Tarr came to his house so late at night but nevertheless, he had opened the door and let Mr. Tarr in. It was his evidence that he never asked Mr. Tarr what he wanted and there was no conversation. I simply do not believe this evidence.

[43] The certain deception by Mr. MacDonald of the court about his drug business and the probable collusion in that deception by Ms. Ryan, undermines their evidence about the events at Colby Street on February 4. There is also the denial by Mr. MacDonald that he had been drinking on the night of February 4. Dr. Gowan who assessed Mr. MacDonald in Emergency stated in his report that Mr. MacDonald’s speech was “a bit slurred” and he could smell alcohol on his breath. This contradicts Mr. MacDonald’s evidence that he had not been drinking.

[44] I also find that Mr. MacDonald invented the scenario of getting the tire iron out

of Mr. Tarr's hands and hitting him over the head with it "several times". Mr. Tarr's head was examined closely on February 9, 2006 by Sgt. O'Neill and no marks were found. If Mr. MacDonald had bludgeoned Mr. Tarr on the head with the tire iron several times on February 4 there would have been some indication of this when the police examined him for injuries five days later. It is quite likely in any event that tire iron blows would have required medical treatment, as was the case with Mr. MacDonald and Ms. Ryan. It is to be noted that Mr. Tarr testified that he had not been hit in the head with the tire iron.

[45] My analysis on the credibility issue does not end with my assessment of Mr. MacDonald's and Ms. Ryan's testimonies. As I have indicated, Mr. Tarr bears the burden of proving that Mr. MacDonald perpetrated an unprovoked assault and I have significant problems with Mr. Tarr's credibility as well.

[46] Before me are Mr. Tarr's two versions of the Colby Street events: the version in his statement to police on February 9, 2006 and his testimony of July 22, 2008. Mr. Tarr is seeking to have me accept his July 22 testimony as to what happened at Colby Street, indicating that the spottier recollection he provided to the police in his statement was a result of being medicated at the time. He says that once his head cleared from the medications, he was able to remember more details. The Crown submits that Mr. Tarr is embroidering a story to benefit him in relation to sentence.

[47] Mr. Tarr's descriptions of the events at Colby Street have a common thread. They both involve displacing responsibility for the attack on to someone else, either a malignant version of himself that he could not control, or Mr. MacDonald. In his

police statement Mr. Tarr seems to have been describing himself as possessed when he was attacking Mr. MacDonald and Ms. Ryan. He talked about “just going crazy” (page 6, Exhibit 4); “I was like inside this person watching them what they were doing and I couldn’t put a stop to it” (page 7, Exhibit 4); “This is someone... lives inside James’ head. And he likes to hurt things.” (page 12, Exhibit 4)

[48] However Mr. Tarr’s actions and words indicate he was aware of what he had done and its consequences. He discarded his bloody clothes. Four days later he made the 911 call. During the statement-taking, when Sgt. O’Neill, sensing Mr. Tarr’s anxiety during the interview, reassured him that he was safe with the police and would come to no harm in their custody, Mr. Tarr responded quite rationally by saying: “I’m not worried about that, I’m worried about all...my whole future ahead.” (page 9, Exhibit 4) This does not dispose of the issue of Mr. Tarr’s improving memory, but it does suggest a consciousness about the jeopardy he was in, which may have influenced how he presented the events when he gave his statement and how he is presenting them now.

[49] There are also some specific examples in Mr. Tarr’s testimony that have cast a doubt in my mind about his credibility concerning the events at Colby Street. I will discuss these now.

The Deep Fryer

[50] If Mr. MacDonald had thrown a deep fryer full of hot grease at Mr. Tarr, as Mr. Tarr claims, there should have been some signs of this when the police photographed

the scene on February 4. It is apparent the photographs of the Colby Street residence were taken at night, therefore quite soon after the incident at the house. Some evidence of recently spilled hot grease on the walls or floor should have been obvious. Hot grease would have been in a liquified form and would have slopped out of the fryer. There are no signs of this in the photographs.

[51] I am prepared to accept that Mr. MacDonald threw a fryer at Mr. Tarr at some point even though it is not apparent in the photographs. Both Mr. MacDonald and Mr. Tarr say a fryer was thrown. It is possible that it rolled or slid out of sight or was overlooked but, in my opinion, the police would have noticed the grease as it would have been slick on the floor which was a focal point for the investigators due to the amount of blood and other marks, including footprints, as shown in the photographs. Mr. MacDonald may well have thrown a fryer at Mr. Tarr, but I do not accept that it had just been in use and was full of hot grease.

The Punching of Mr. MacDonald in the Mouth

[52] Mr. Tarr claims to have punched Mr. MacDonald in the mouth in response to Mr. MacDonald punching him when Mr. Tarr went to retrieve his ten dollars. Mr. Tarr testified that Mr. MacDonald was bleeding from the cut inflicted by the punch. A cut of this nature, even if small, would have been evident when Mr. MacDonald was seen in Emergency. However, an examination of the photographs of Mr. MacDonald where his face and mouth are clearly visible (photographs 70, 73 and 74, Exhibit 2) show no marks on Mr. MacDonald's face at all. The medical records also do not document any such injury. I do not believe that Mr. MacDonald was punched in the mouth by Mr.

Tarr, and Mr. Tarr's claim to have done so throws into question his description of how the altercation with Mr. MacDonald got started.

The Injuries to Tracey Ryan

[53] Mr. Tarr testified that Ms. Ryan was injured in the melee with Mr. MacDonald because she "tried to get in the middle of it", putting out her arm and getting it broken when Mr. Tarr was swinging the tire iron at Mr. MacDonald. That could explain how Ms. Ryan's left arm was broken although it leaves a nagging question about how Ms. Ryan sustained the rest of her injuries. She had head injuries and injuries to her right hand. The injuries to Ms. Ryan's head had to have been caused by Mr. Tarr wielding the tire iron. The photographs (photographs 86 - 89, Exhibit 2) show wounds to the top and side of Ms. Ryan's head. Ms. Ryan described Mr. Tarr attacking her with the tire iron by hitting her on the head with her arm getting broken when she tried to protect herself. Her description of trying to cover her head with her arms as Mr. Tarr attacked her is consistent with the pattern of her wounds - gashes on her head and the injuries to her arm and hand. The objective medical evidence is more consistent with Ms. Ryan's explanation for how she got injured than Mr. Tarr's.

The Tire Iron

[54] Mr. Tarr testified that he grabbed up the tire iron to use defensively after he felt it under his socked feet when he was in the living room and Mr. MacDonald was coming after him with a knife. He also testified that when he fled the house he grabbed up his shoes and jacket, suggesting he had removed them when he first came

in. However the photographs indicate a sneaker print in the blood found in the Colby Street kitchen: it is the print of an Air Walk shoe. (photograph 98, Exhibit 2) Two pairs of Air Walk sneakers were seized by police from Mr. Tarr. (See reference to photographs 94 - 104 in Exhibit 2) The police did test impressions on the seized footwear (photographs 96 and 100, Exhibit 2) and the bloody footprint on the vinyl kitchen floor. (photograph 98, Exhibit 2) The match between the seized footwear and the bloody footprint indicate that at some point, after the assaults on Mr. MacDonald and Ms. Ryan, Mr. Tarr was wearing his shoes in the kitchen. While this could be consistent with him having been in socked feet and then putting on his shoes to flee, it does not make sense to me that Mr. Tarr, who came to the house to buy marijuana, would have removed his shoes when he went in. Mr. Tarr testified that he did not like to be around Mr. MacDonald who was a drug supplier more than a friend: I do not find it plausible that he would have taken his shoes off for the purchase of marijuana from someone he had apprehensions about. I therefore think it is very unlikely that he was in his socked feet in the living room feeling a tire iron under his toes.

[55] I find it is most likely that Mr. Tarr brought the tire iron with him to Mr. MacDonald's. Mr. MacDonald did not have need for an inferior weapon like a tire iron when he had a loaded sawed-off shotgun for protection. Furthermore, according to Mr. Tarr, the tire iron was on the floor of the living room: I would think if Mr. MacDonald had it in the house to use as a weapon he would have hidden it, as he had the shotgun, and not just left it lying around.

Has James Tarr Shown that He Was Probably Subjected to an Unprovoked

Assault by James MacDonald?

[56] It is very difficult to sort out what Mr. Tarr may have had in mind when he went to Colby Street around midnight on February 4, 2006. I think it is probable he had armed himself with a tire iron before going there. Did he have a sinister purpose or was the tire iron a little insurance against Mr. MacDonald whom Mr. Tarr testified was “always going on about how people shouldn’t mess with him” and whom he did not like to be around? If, as he claims, Mr. Tarr simply went to Colby Street to buy a gram of marijuana off Mr. MacDonald, why did a violent altercation occur?

[57] As I have already set out in these reasons, Mr. Tarr’s explanation that Mr. MacDonald set off the violence forcing Mr. Tarr to defend himself is significantly undermined by his evidence of the events: his claims that he punched Mr. MacDonald in self-defence, his assertion that Ms. Ryan was hurt when she got in the middle of his struggle with Mr. MacDonald, and his claim about happening upon the tire iron.

[58] I have substantial problems with the credibility of both Mr. MacDonald and Mr. Tarr, and have provided the reasons for my jaundiced view of their truthfulness. I do not think that either of them told me “the truth, the whole truth and nothing but the truth” as they swore to do. While I believe that Ms. Ryan also shaded the truth when she denied knowledge of Mr. MacDonald’s drug dealing, I find that she was, on the whole, more truthful about what happened at Colby Street. Her version of the events is also more consistent with the objective evidence that is available, e.g. the medical evidence of her injuries and those of Mr. MacDonald. For example, Ms. Ryan testified she observed Mr. Tarr choking Mr. MacDonald at one point and the hospital records and photographs (photograph 73, Exhibit 2, in particular) indicate abrasions on Mr.

MacDonald's neck.

[59] The evidence indicates that Mr. Tarr was unscathed, despite his claims that he was involved in a violent, terrifying struggle with Mr. MacDonald where he had to defend himself. Sgt. O'Neill noted in his testimony that a thorough body search of Mr. Tarr on February 9 revealed "no current injuries to suggest a recent incident."

[60] As I have indicated, there is good reason for my scepticism about Mr. Tarr's version of the events at Colby Street on February 4, 2006. However, in assessing his evidence I must also consider the differences in detail between his statement to the police on February 9, 2006 and what he said under oath in court on July 22, 2008. Do I accept that Mr. Tarr's claim that when he spoke with police his memory of the events of February 4, 2006 was affected by the medically prescribed drugs he had been taking while hospitalized?

Was Mr. Tarr's Memory Affected By Medications Administered During His Hospitalization?

[61] As I noted earlier, Mr. Tarr's testimony contained much greater detail of the events of February 4 than he had told the police on February 9. He explained this discrepancy by saying that had he not been under the influence of prescription medication from his hospital stay he would "probably have been able to remember more." Mr. Tarr testified: "When I got off drugs I started to remember things."

[62] In order to examine Mr. Tarr's claim of having a medication-suppressed memory of the Colby Street events, I requested and received from Defence medical

records and opinions relating to Mr. Tarr's hospitalization following the attack on Mr. MacDonald and Ms. Ryan.

[63] On February 7, 2006, at 1:57 p.m., Mr. Tarr, accompanied by his father, presented himself at the Emergency Department of the Cape Breton Regional Hospital. He advised that he had a history of depression and was under the care of a psychiatrist in private practice, Dr. Khan. Dr. Khan had prescribed Effexor SR 75 mgs. daily and Mr. Tarr reported doing well on the medication at first but suffering a deterioration of his mood with worsening thoughts of violence toward himself and others over the previous one to two months. Dr. Julie Curwin, who dealt with Mr. Tarr at Emergency, noted in Mr. Tarr's "History and Physical" that he also reported a "daily use of marijuana." A Nursing History and Assessment for February 7, 2006 records that Mr. Tarr indicated he had last used marijuana three days before.

[64] Dr. Curwin admitted Mr. Tarr to hospital under Dr. Khan's care with close observation. and started him on a small dose of Risperidone at night. She ordered some medications to be administered as needed for agitation and aggression and for sleep. An Emergency Crisis Service Mental Health Assessment prepared on February 7, 2006 at 4:10 p.m. indicates that Mr. Tarr showed "good interaction" and had "clear and coherent" speech. He was noted to be oriented and logical.

[65] Mr. Tarr remained in hospital until February 9, 2006. Nurses' Notes for February 8, 2006 indicate that Mr. Tarr stated that he would "always be violent, it doesn't matter what the Dr. says." At 2:30 p.m. as he was threatening to leave the unit and seemed agitated, Mr. Tarr was given 2 mgs of Ativan and 5 mgs of Zydys.

[66] Late in the day on February 8, Cape Breton Regional Police came to the hospital and arrested Mr. Tarr as a result of his telephone call to 911. Mr. Tarr was transferred to a different unit and at 5:20 p.m. he was given 2 mgs. of Ativan and 5 mgs of Zydys. The Nurses' Notes record that Cape Breton Regional Police requested notification prior to any change in Mr. Tarr's admission status and that he be released from hospital into their custody. Dr. Ali, a psychiatrist, attended to assess Mr. Tarr's status and he increased the Risperidone originally prescribed by Dr. Curwin from .5 mgs. at night to .5 mgs. in the morning and at night. Dr. Ali noted that Mr. Tarr "did not manifest any cognitive deficit" and "had full insight into his condition." He was diagnosed as having a major depression with psychotic features and a cannabis induced mood disorder.

[67] In the Physicians' Progress Notes for February 9, 2006, it is recorded that Mr. Tarr who had "assaulted two individuals in the community" showed "no evidence of overt psychosis although he claims he doesn't remember anything." Nurses' Notes for February 9 indicate that Mr. Tarr was very upset about the criminal charges he was facing and stated that although he recalled "calling the police and confessing" [the 911 call], he did not recall "committing the crime." He told one of the unit nurses that he had known the victims and used a tire iron and a knife.

[68] Mr. Tarr was discharged from hospital on February 9, 2006. Dr. Khan saw him in the morning of February 9 and at 11:00 a.m. he left the hospital in police custody. His statement to police started at 12:14 p.m.

[69] The medical records disclose that Mr. Tarr was in a poor mental state when he presented at the hospital on February 7, 2006. Subsequent correspondence to Mr. Tarr's lawyer from Dr. Khan in March and October 2006 indicate the improvement in Mr. Tarr's psychological state and functioning once he abstained from the drugs he had been using illegally for some period of time leading up to February 4, 2006.

[70] In his testimony, Mr. Tarr blamed his patchy memory of the Colby Street events at the time of his police statement on the medications he received when hospitalized. I note a couple of important details with respect to that claim. Mr. Tarr was in hospital for less than 48 hours and received very little in the way of medication while there. And although the medical records of his stay indicate several instances when Mr. Tarr mentioned not being able to remember what had happened, he did indicate to nursing staff when asked what weapons he used that he had a tire iron and a knife. He had also mentioned stabbing his victims when he called 911 on February 8.

[71] There has been a dramatic improvement in Mr. Tarr's memory. For example, in his February 9 statement to Sgt. O'Neill, Mr. Tarr did not recall where the tire iron came from or having stabbed Mr. MacDonald. He also told Sgt. O'Neill when asked if he had stabbed Mr. MacDonald, "Not that I remember. I just had a tire iron." However, in his testimony, Mr. Tarr described discovering the tire iron underfoot in the Colby Street living room and provided a detailed explanation for how he ended up sticking a knife into Mr. MacDonald's side. As I just noted above, on February 8 Mr. Tarr told the 911 dispatcher and a nurse in the hospital that he had used a knife and a tire iron on the victims.

Medical Opinions Concerning The Effect of Medications on Mr. Tarr's Memory

[72] I have reviewed two letters prepared by Dr. Khan, dated September 15 and October 6, 2008 respectively. These letters, which are essentially the same, briefly outline Mr. Tarr's stay at the Cape Breton Regional Hospital from February 7 - 9, 2006. On the issue of the medications Mr. Tarr was administered while in hospital, Dr. Khan states: "I believe that some of the medication he was on would have an impact on his memory and ability to give information to the police." No elaboration of this opinion was provided. I raised with counsel through email the issue that Dr. Khan's opinion did not address which medications may have had an impact on Mr. Tarr's ability to give information to the police or how the medications would have affected him. I advised that I was unable to conclude much from Dr. Khan's letter of September 15. Defence counsel indicated to me on October 7 that when my queries were provided to Dr. Khan he responded by submitting the October 6 letter that repeated the same statement as noted above.

[73] While Dr. Khan's opinion is of little assistance to me, the opinion of Dr. Pottle, obtained by the Crown, provides a more comprehensive analysis of the issue of whether Mr. Tarr's memory was impaired by medication in February 2006. Dr. Pottle reviewed Mr. Tarr's medical records and notes that Mr. Tarr continued to receive Effexor while at the East Coast Forensic Hospital (where he was remanded for assessment after being charged) "with no evidence of an amnestic problem." Dr. Pottle states the following about Risperidone: "Acute memory deficits are not mentioned as a potential adverse effect in the product monograph on Risperidal (trade name) in the CPS 2008 (Compendium of Pharmaceuticals and Specialties)." Dr. Pottle provides his

opinion that the low Risperidone dosages received by Mr. Tarr at the Cape Breton Regional Hospital created “no possibility” of rendering Mr. Tarr amnesic. Mr. Tarr was not administered Risperidone at the East Coast Forensic Hospital because there were no signs of a psychotic illness.

Conclusion

[74] The important question for me to resolve is whether Mr. Tarr experienced an unprovoked attack by Mr. MacDonald causing him to fight back. I do not accept that this is what occurred and to the extent that Mr. Tarr’s testimony describes that scenario, I reject it. I also reject Mr. Tarr’s claim that his memory of the Colby Street events was suppressed by medications he received during his hospitalization from February 7 - 9, 2006. Consequently, and for the reasons I already gave based on my examination of all of the evidence, I find that Mr. Tarr’s description, in his testimony on July 22, 2008, of an unprovoked attack by Mr. MacDonald is not credible.

[75] Although in my opinion the evidence does not prove that Mr. Tarr went to Colby Street intending to attack the occupants, I find that he did bring a tire iron with him for reasons that remain obscure. It may be that Mr. Tarr saw Mr. MacDonald as a menacing character and, knowing he had a weapon, wanted some assurance he could protect himself if Mr. MacDonald became hostile. Why Mr. Tarr would have been anticipating this possibility when the purpose of his visit was a routine purchase of marijuana is hard to fathom. While my suspicions about Mr. Tarr’s intentions are aroused, I am unable to conclude on the evidence that Mr. Tarr went to Colby Street on February 4 with a plan to beat Mr. MacDonald up. What has been established is

that there was a frenzied attack that left Mr. MacDonald and Ms. Ryan badly injured. There is no credible evidence that Mr. MacDonald provoked the violence. I do not accept the elaborate description Mr. Tarr offered in his testimony for what occurred at Colby Street. I do not believe that Mr. Tarr's memory of the events as detailed by him on July 22 is a truthful version of the incident. I am not persuaded that Mr. Tarr's failure to provide these details to the police in February 2006 was due to his memory being obscured by medication or drugs. There is no credible evidence to explain why Mr. Tarr did not mention to Sgt. O'Neill what he now claims to be the case, that he had to fight back after Mr. MacDonald attacked him. On all of the evidence I have reviewed, including that relating to the injuries to Ms. Ryan, Mr. Tarr's assertion that he punched Mr. MacDonald in the mouth, and the provenance of the tire iron, I do not find Mr. Tarr's claim that Mr. MacDonald initiated the violence to be credible.

Anne S. Derrick

Judge of the Provincial Court of Nova Scotia