

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Denny*, 2015 NSPC 75

Date: 2015-10-28

Docket: 2640827

Registry: Halifax

Between:

Her Majesty the Queen

v.

Kyle Stephen Denny

Judge: The Honourable Judge Timothy Gabriel, J.P.C.

Heard: May 20, 2014; July 22, 2015; and September 18, 2015 in
Dartmouth, Nova Scotia

Oral Decision September 18, 2015

Charge: Section 267(b) of the Criminal Code

Counsel: Cheryl Byard, for the Crown
Brian Newton, Q.C., for the Defence

Gabriel, J.P.C (orally)

A. Introduction:

[1] On July 19th, 2013, Rebecca Harvey, her brother Andrew Harvey and their cousin Royce Embanks, went to a party at 1099 Beaver Bank Road in Sackville, Nova Scotia. The homeowners, Alex MacLean and Janelle Burchell MacLean were having a party for Mr. Embanks' girlfriend, Mandy Cunningham, to celebrate her birthday.

[2] Ms. Harvey and Ms. Cunningham arrived at the party around 9:00 p.m. Ms. Harvey and her brother Andrew (who was visiting from Newfoundland at the time), had been invited to attend by Ms. Cunningham and her boyfriend, Mr. Embanks. Mr. Embanks and Andrew Harvey arrived at the party shortly after the two women.

[3] The celebration was to have a Western theme to it, so people were requested to dress accordingly. There were plenty of plaid shirts, cowboy boots, cowboy hats, and the like. The party was also what is known, colloquially, as a "kegger", featuring a keg or two of beer. There were other intoxicants on fare as well.

[4] Mr. Embanks had some prior acquaintance with the hosts. He considered them friends, although he was better acquainted with Mr. MacLean than his wife.

[5] Mr. Harvey did not know the host, but he and some of the other party attendees had gotten together the day before to go to the beach. In addition to Ms. Harvey and Mr. Embanks, Mandy Cunningham, Michelle Hatter and Jordan Smith, also went to the beach the day before. Ms. Hatter was both a friend of Ms. Cunningham and the ex-girlfriend of Jordan Smith.

[6] On a related theme, Lee Waterhouse, who also attended the party, was a friend of the hosts (in fact he is a cousin of Ms. Burchell MacLean) and was also the ex-boyfriend of Mandy Cunningham (the present girlfriend of Mr. Embanks). Perhaps as a consequence, the hosts themselves, when they testified for the defence, did not appear to be terribly anxious to equate their relationship with Mr. Embanks with one of friendship. They described him as the boyfriend of Mandy Cunningham, and seemed to regard him as an acquaintance, or at least appeared to want to leave the Court with that impression.

[7] The accused, Kyle Denny, was not known to either of the hosts. He is a close friend of Lee Waterhouse, and was invited to the party by Mr. Waterhouse.

[8] Later on in the evening, or in the early morning hours of July 20th, 2013, fights broke out. The first involved Jordan Smith and Andrew Harvey. As that one concluded, the defence contends that a second (consensual) fight broke out between the accused, Kyle Denny and Andrew Harvey.

[9] In the aftermath of those fights, Mr. Harvey was left with a fractured nose, stitches in the side of his head, bruising under the left arm by his ribs and stitches to his head and his left eye swollen shut. He contends that he also lost consciousness after being struck by someone else while wrestling with Mr. Smith. He denies being in a consensual fight with Mr. Denny.

[10] The complainant's sister Rebecca Harvey, says that Mr. Denny came up from the side as Mr. Harvey had Mr. Smith pinned to the ground, and kicked her brother to the head, knocking him unconscious. She says that after having lapsed into unconsciousness, several more kicks and stomps were administered by Denny to her brother's head and shoulder areas. She also said that Lee Waterhouse and Jordan Smith were milling about while Denny was thus engaged, and that Smith also struck Harvey while he was unconscious.

[11] Mr. Denny has been charged with assault causing bodily harm in relation to Andrew Harvey, contrary to section 267(b) of the **Criminal Code**. The Crown

called eight witnesses, namely Rebecca Harvey, Royce Embanks, Andrew Harvey, Renee Pertus, Ryan Shaw, Lee Waterhouse, Constable Matharu and Constable Stanton. The accused called two witnesses: Janelle Burchell MacLean and Alex MacLean. He also elected to testify personally.

B. Evidence in General

[12] Kyle Denny contends that his involvement only came about as a result of an attempt by he and Mr. Waterhouse to break up the fight between Andrew Harvey and Jordan Smith. He states that as he attempted to separate the two (while Mr. Harvey was on top of Mr. Smith), Harvey took exception and challenged him to a fight. He says that Harvey (the complainant) was already cut and bleeding in the facial area at this point (from his interaction with Smith) and that he (Denny) did nothing more than was necessary to defend himself.

[13] Moreover, the accused says that just as he attempted to break up the Harvey/Smith fight, the complainant's sister, Rebecca Harvey, struck him over the head with a bottle. Ms. Harvey (for her part) testified that she jumped on the accused's back in an attempt to protect her brother, and that she hit him with her fists. She denied, however, that she ever struck him with any object, much less a bottle.

[14] I begin then, with the initial altercation involving Andrew Harvey and Jordan Smith. The antecedents to this this fight, and the subsequent altercation between the accused and Mr. Harvey, are multifaceted.

[15] For example, as I listened to the testimony of Lee Waterhouse, Alex MacLean, Janelle MacLean and Kyle Denny, it appeared that Mr. Embanks, Mr. Harvey, and his sister, Rebecca, were regarded as outsiders, people who were “friends of friends”, so to speak. Mr. Harvey was a cousin of Mr. Embanks, brought by him to the party along with Rebecca Harvey. Compounding this, there appeared to have been a subtext of some sort between Mr. Embanks and Mr. Waterhouse, perhaps related to the latter’s (former) involvement with Mr. Embanks’ girlfriend, Mandy Cunningham.

[16] In all, the civilian witnesses, with two exceptions, appeared to fall into two “camps”, based upon friendship and loosely related similarity of evidence. When I say similarity of view or evidence, that is not to say that any two witnesses’ views were identical. Too much alcohol and other intoxicants were consumed at the party for that to be a realistic possibility, even if the Court were dealing with otherwise dispassionate observers.

[17] “Camp” number 1 consisted of Rebecca Harvey, Royce Embanks, and the complainant. “Camp” number 2 consisted of Lee Waterhouse, Alex MacLean, Janelle MacLean, and the accused. Ryan Shaw, although friendly to the second camp, did not really say much, attributing his faulty recollection to significant intoxication at the time that the events were unfolding, rather than reticence. Renee Pertus also did not seem to fit into either “camp”. I deal with her evidence in more detail later on.

[18] Ryan Shaw did, however, say one thing that I found interesting. He said that Mr. Harvey looked “out of place”, not talking to anyone and seeming somewhat uneasy. Witnesses Waterhouse, MacLean, Ms. MacLean and the accused appear to have been inclined to interpret this unease as aloofness, standoffishness and/or the attribute of someone who was “looking for trouble”.

[19] At one point Ms. MacLean testified that Mr. Harvey was literally hanging from the rafters in the ceiling, blocking people who were seeking to get past him. At another point, Mr. Waterhouse testified that he was interrupted by Mr. Harvey as he was discussing a matter with someone else. In the former’s testimony, Mr. Harvey butted in and asked Waterhouse “what is your problem” or “do you have a problem?”

[20] In any event, the departure of Andrew Harvey, Rebecca Harvey, Royce Embanks and Mandy Cunningham (ironically the latter was the reason for the party in the first place) was effected by the four being asked to leave the premises by Ms. MacLean.

[21] Just before this departure, Andrew Harvey had been accused by Jordan Smith of having damaged either his or someone else's vehicle. Harvey had denied responsibility and had been asked to go outside, ostensibly to view the damage. A group of people, including Embanks and the MacLeans, eventually ended up outside with them. Embanks testified that he saw Harvey in an argument with "a tall skinny guy with glasses", which we know (from Harvey's testimony) was Jordan Smith. This was a verbal exchange and it lasted approximately two to three minutes. The discussion was heated in Embanks' view, but no physical contact was made by either Harvey or Smith. The confrontation ended when the complainant, Mr. Embanks, Ms. Cunningham and Ms. Harvey and the MacLeans went back inside.

C. Evidence Related to the Alleged Assault

[22] It was at this point that Ms. MacLean, having witnessed the argument and having been told by her cousin, Lee Waterhouse, that Harvey and Embanks were “looking for trouble”, asked the two of them, as well as Rebecca Harvey and Ms. Cunningham, to leave her premises. Three of the four did so immediately. Mr. Embanks remained behind for a few minutes, expressing regret that things had turned out the way they had.

[23] Meanwhile, what happened simultaneously (according to the complainant) is that a group of people, including Smith, Waterhouse and Denny, were already outside as he exited the premises. As soon as he went down the stairs leading from the deck to the lawn, Mr. Harvey (and Rebecca Harvey) testified that he and Smith engaged in a consensual fight of relatively short duration. Harvey testified that he recalled one rather feeble attempt by Smith to punch him in the face, which he parried successfully. The two wrestled for a short time and Harvey ended up on top of Smith.

[24] Waterhouse and the accused testified that the fight with Smith went somewhat differently. They testified to the effect that Smith landed some shots to Harvey’s head while the two were on their feet. Although (in their view) Smith had the best of him up to the point where the two left their feet, they said that it was

essentially a fair fight, which they observed while looking down on the lawn from the vantage of the deck.

[25] After the two combatants left their feet, Harvey ended up on top and had a clear advantage, in the view of both Waterhouse and Denny. They testified that they decided that the matter had gone on far enough, and say that they went down to break it up.

[26] I will segue at this point to mention that Jordan Smith did not testify. The Crown made the Court aware at the outset of the trial that they had attempted to locate and serve a subpoena. They were unsuccessful. Defence counsel viewed Mr. Smith as “probably the most important witness from our point of view”. That said, the defence had no knowledge of his whereabouts either. I did not draw any adverse inference from the failure of the Crown to produce Mr. Smith. I am satisfied that counsel made reasonable efforts to locate and serve him with a subpoena. Defence counsel indicated at one point that he felt that Mr. Smith was somewhere in Alberta. Efforts made by the Crown to locate and serve him were reasonable under the circumstances.

[27] So, to return to the chronology, while Mr. Embanks lagged behind inside the house speaking with the host, Rebecca Harvey exited the premises along with her

brother. What she recollected of the fight between Harvey and Smith begins as follows “We were on the step... or I just walked out behind my brother. I looked. There were already people on the step. I looked to the right of me, there were people over there smoking. By the time I looked back, Jordan and my brother were fighting on the lawn”.

[28] What she described was a one on one fight which she also described as a fair one. She saw maybe three punches thrown by Smith at her brother but he didn't have a lot of time to throw these punches because the two quickly went to the ground. And after initially ending up on the bottom, Mr. Harvey, as she put it “flipped him (Smith) over pretty quickly.”

[29] From there she describes the complainant as restraining Mr. Smith. She did not seem him punching Smith at that point, although people were passing in front of her from time to time.

[30] She described herself as next making her way down to the lawn from the deck, to attempt to break up the fight. As she was doing so, Ms. Harvey testified that she saw the accused, from somewhere to her right, run straight toward the combatants and, while her brother was holding Mr. Smith down, administer a kick to Mr. Harvey's head that knocked him unconscious. After that, she said “it was

Jordan Smith, Lee Waterhouse and Kyle Denny all on him at once. Jordan was kicking him in the ribs, Kyle Denny was stomping anywhere, there were stomps on his armpit, on his head, on his shoulders, at least ten to fifteen times.” As to Mr. Waterhouse, she said “I can’t recall Lee actually, physically hitting or kicking. He ended up leaving that huddle and fighting, or he was holding my cousin back at one point, Royce.”

[31] It was at this point that Rebecca Harvey testified that she jumped on Mr. Denny’s shoulders. She said that she did it to stop him from inflicting further damage to her brother, who was now unconscious lying on the ground.

[32] Mr. Denny describes it differently. He says that he went down to attempt to break up the fight between Mr. Harvey and Mr. Smith. After touching Mr. Harvey to effect that purpose, he felt something like two punches to the back of his head. He turned around and saw Ms. Harvey behind him with a bottle in her hands. Ms. Harvey denies this but does admit, as I indicated earlier, that she jumped on his shoulders and struck him with her fists.

[33] Returning to Mr. Embanks, Rebecca Harvey recalls that he was being restrained by Lee Waterhouse from coming to the aid of his cousin, while the latter was being kicked and punched by Messrs. Denny and Smith. Embanks, himself,

thought that it was Renee Pertus' boyfriend, Jason Small, and some others, who were restraining him.

[34] Ms. Pertus' testimony was interesting both for what it contained and what it did not contain. She attended with her fiancée, Mr. Small. She recalls everyone having a pretty good time until an altercation broke out on the lawn. She observed two people fighting, Kyle Denny and Royce Embanks' cousin. She was not familiar with either participant, having just met them at the party that evening. She was standing on the front deck, maybe ten to twelve feet away. She did not remember witnessing the initial altercation with Smith. Her back had been turned initially and she felt that she had missed the start of the fight between Denny and Harvey. She saw the two "rolling around on the ground". People kept cutting in front of her, and her view was significantly obstructed at times.

[35] All of a sudden, she observed Denny standing and kicking Mr. Harvey between ten to fifteen times in what appeared to her to be the stomach area. The latter appeared to be on the ground, trying to cover his head and protect himself. She did not see the victim do anything else. Ms. Pertus was uncertain how Denny had managed to get to a standing position.

[36] She also recalled Mr. Denny wearing a torn shirt which was “covered in blood”. When showed the photos of Mr. Denny after the incident taken by the police, she thought that she saw something that might be blood on the shirt. She did acknowledge that the pocket was ripped and one or more buttons were torn off the shirt that Mr. Denny was wearing in the photograph.

[37] Mr. Denny contends that there was no blood on his shirt at all, and the police witnesses testified that they did not see any that evening. One witness, besides Ms. Pertus, thought they saw some blood on Mr. Denny in the photographs. That witness was Royce Embanks, who pointed out that the accused’s footwear appeared to be bloody. No clothing was seized by the police to check for the presence of blood.

[38] After the fight was broken up, Ms. Pertus and Janelle MacLean went in the house to call 911. The latter brought “her friends” inside and locked the door to keep the others out. Although she is a Registered Nurse, she did not offer much (if any) assistance to Mr. Harvey, who was clearly injured and bloody on her lawn. When she called the police once inside, it was to report someone being struck with a weapon or a beer bottle rather than an injured individual.

[39] Ms. MacLean confirmed that she had earlier asked Royce Embanks, Andrew Harvey, Rebecca Harvey and Mandy Cunningham to leave her home after it was reported to her what the two men appeared to be aggressive. The overwhelming bulk of her perceptions in this regard appear to be based upon things that her cousin (Lee Waterhouse) had told her about the two, although she did testify that she had personally observed on one occasion seeing Mr. Harvey “hanging from the rafters”. She went on to say that although she did not know Mr. Denny, he seemed to be a nice guy. She said “I’m sure Lee respects me too much to bring a troublemaker to my house”.

[40] Ms. MacLean’s chief complaint about Rebecca Harvey appeared to be that the latter was dissatisfied with whatever Ms. MacLean had done (or not done) to assist her brother in the aftermath of the fight. Ms. MacLean was never questioned by the Crown or the Defence about what, if anything, she actually did to try to help the injured complainant, although she did make some rather vague reference to offering to help him at one point.

[41] Ms. Harvey, according to Ms. MacLean’s testimony, appeared to have expected more of her given that she is a registered nurse. Ms. MacLean indicated that Ms. Harvey contacted her over the next couple of days to say that she was

considering reporting her to the College of Registered Nurses of Nova Scotia as a result of her actions or inactions that evening.

[42] Ms. Pertus described that the fight ended when Rebecca Harvey, Ryan Shaw and his girlfriend, Jennifer Burke, broke it up. She did not remember seeing Lee Waterhouse trying to break it up, or Jordan Smith nearby either. Waterhouse, himself, described forcibly pulling Denny off of Andrew Harvey while the latter was on the ground saying “Whoa, whoa. This is done.”

[43] Returning to the Waterhouse/Denny narrative, their testimony basically coincides to the point where they say they observed Andrew Harvey roll Jordan Smith over on the ground, ending up on top of him. They then left the veranda, saying that they were intending to break the fight up.

[44] Lee Waterhouse is, as previously noted, a close friend of Kyle Denny. They grew up together. Janelle Burchell MacLean is Mr. Waterhouse’s cousin. Rebecca Harvey and Andrew Harvey as well as Royce Embanks were strangers to him. He knew of Jordan Smith prior to the party, and the only thing he knew of Mr. Embanks was that Mandy Cunningham is his girlfriend.

[45] In Waterhouse’s testimony, the fight between Smith and Harvey had gone on for two to three minutes before he suggested to Denny that they break it up. He

said that Kyle Denny went to pull Harvey off Smith, when all of a sudden Rebecca Harvey got loud and hit Denny in the head with a beer bottle, which didn't break. Waterhouse says he grabbed Rebecca Harvey, and then a fight broke out between the accused and Andrew Harvey.

[46] When asked how the fight between Denny and Harvey started, Mr. Waterhouse paused and said "I think I had my back to it when the fight started". He went on to say that he thinks that they just started swinging. He was occupied with Ms. Harvey, at this point. He conceded on re-direct that it was possible that Denny kicked Andrew Harvey to start the fight while he was occupied with Ms. Harvey, "It's possible. I didn't see it".

[47] He says that he saw Harvey strike Denny and *vice versa*. Once he got focused on the fight, there were three or four hard hits administered, but Harvey did not hit Denny in the face. Then he says he knew it was time to step in and break it up. He testified that it took a lot of force to pry Mr. Denny free from Harvey, since the accused was, "pretty drunk". As Waterhouse pulled him up, he said, as previously noted, "Whoa, whoa, this is done". After he broke the fight up, he says that he cannot remember if he ever saw Smith return and strike Harvey.

[48] Waterhouse acknowledged that there was blood on the ground. “I assumed it was from Harvey’s cut nose”, which (incidentally) both he and Denny indicated was inflicted in the first altercation with Smith.

[49] The accused, Kyle Denny, elected to testify. He presently helps to manage a tile company. He has a high schooleducation and has worked in some other provinces, including a period in Montreal, and also a stint “out west”, where he had his own company for a time.

[50] He was invited to attend the party for Mandy Cunningham (hosted by the MacLeans) by his friend, Lee Waterhouse. He knew no one else at the party, except Mr. Waterhouse.

[51] He arrived between 10 to 10:30 p.m. that evening. He brought eight cans of beer with him and, since he planned to do some drinking, obtained a drive to the party from his father. When he arrived, the party was in full swing. By the time of the incident with Mr. Harvey, he had consumed five to six beers. Although he was having a good time, he says he felt like he was in control.

[52] I have earlier dealt with his stated perception of Embanks and Andrew Harvey. It was the same as that of Mr. Waterhouse. He testified that he felt the two of them staring at him and Waterhouse, whenever he spoke with the latter.

[53] He repeated that he and Waterhouse were outside smoking on the deck when the fight broke out between Smith and Harvey, and that Waterhouse suggested that the two of them go down to break it up.

[54] Mr. Denny stated that as soon as he touched Mr. Harvey he felt what he thought were two punches at the back of his head. He turned around and saw Rebecca Harvey with a bottle in her hand. Others came to help break it up. Then Harvey got up and grabbed a hold of him. Harvey was bleeding from the nose. He took a swing at the accused. Denny stated that he hit back with a right hand, which he thought landed behind the complainant's ear.

[55] Denny testified that they rolled around in the grass throwing punches. He did strike him during this process, but doesn't know where the blows landed, except to say that Harvey kept holding onto his shirt, so he punched him in the lungs to get to him to let go. The accused's shirt pocket was ripped during the process.

[56] He denied kicking Harvey in the head or at all. He also said that he did not kick Harvey in the stomach while the latter was prone on the ground (as maintained by Renee Pertus and others) because "that would be a cheap shot".

[57] Mr. Denny left the scene and was one of the people Janelle MacLean gathered up and locked inside of their house. He denied (when the suggestion was put to him on cross examination) that he washed up while inside the house, during the 10 to 15 minutes or so that it took the police to arrive after 9-1-1 was called. When the police took his picture, (as contained in the packet of photos marked in Exhibit 1) that evening, there was no apparent blood on his shirt, although the pocket was ripped and some buttons were missing. Denny says that, in the aftermath of the fight, that he looked exactly as he appears in those photographs, and that he had no blood on him.

[58] Alex MacLean testified for the Defence. He did not know Andrew or Rebecca Harvey prior to the party. Royce Embanks was known to him as the boyfriend of Mandy Cunningham. Mandy was a friend of his wife. Jordan Smith, he had met a handful of times previously. Ryan Shaw was known to him through work, and Renee Pertus was known to him as the fiancée of his best friend, who was presumably Jason Small. Kyle Denny, he had met a couple of times in the past.

[59] MacLean indicated that it was a cowboy themed party with cowboy hats, plaid shirts and either jeans or shorts as the suggested apparel. He testified that Andrew Harvey was being aggressive all night, hanging in doorways. Mr.

MacLean seemed to attribute it to some bad blood between Embanks, who was Harvey's cousin, and Lee Waterhouse. Embanks and Waterhouse were the present and past boyfriends of Mandy Cunningham, and MacLean seemed to attribute the attitudes of Embanks and Harvey to that circumstance.

[60] MacLean went on to say that the two had cornered Waterhouse about his having contacted Ms. Cunningham recently. This may have been the "what's your problem" conversation referenced by Waterhouse and Denny earlier.

[61] MacLean went on to testify that he did not see the actual altercation between Denny and Harvey, but he did see (when he went out the basement door) Rebecca Harvey on Lee Waterhouse's back. Waterhouse was shouting, "She's hitting me with a beer bottle".

[62] Alex MacLean indicated that he and his wife asked the people that they knew to come inside, ostensibly to split everybody up. By this point, Mr. MacLean had consumed a dozen beer and two marihuana joints.

[63] On direct he testified that when the police arrived, they asked the people inside "who did it" and the accused promptly said "I did" and put his hands out, presumably to be handcuffed. Upon cross-examination, he said that when the

police had arrived the question they asked was, “Who was involved in the fight?”, which is what precipitated Denny’s reaction to stand up and admit involvement.

[64] As previously noted, the Crown called two of the R.C.M.P. officers who attended the scene. The first was Constable Sundith Matharu, who is an R.C.M.P. officer of seventeen years’ experience. On July 20, 2013, he was working in a uniformed capacity at the Lower Sackville detachment. At 1:10 a.m. he received (initially) a complaint of a disturbance at 1099 Beaver Bank Road. While on the way to the scene, he and his partner were told that someone had been struck by a beer bottle and was bleeding at that location. It took them about 10 minutes to reach the scene from that the time they were dispatched.

[65] Upon arrival, Constable Matharu noticed a large quantify of people both inside and outside of the MacLean residence. There was also an injured male on the front lawn. This individual featured a large laceration above his left eye and bruising around his head. These were the injuries that Matharu first noticed.

[66] The officer made note of a large area of blood stained grass together with a blood soaked plaid shirt on the lawn as well. Mr. Harvey was intoxicated, but cooperative. Based upon the description provided to them by both Rebecca Harvey and Renee Pertus, they went into the premises and told the homeowners

that they were looking for an individual who had been involved in an assault. He cannot recall whether he asked anyone about someone being hit with a beer bottle.

[67] Constable Stanton was the second police officer called by the Crown. In his testimony, the police went downstairs in the MacLeans' residence to locate Mr. Denny. He was cooperative, and he was brought outside of the home to Constable Matharu, who completed the process and arrested him.

[68] Constable Matharu also felt that Mr. Denny was cooperative. He recognized Mr. Denny in photo 3 of Exhibit 1 as the man that he arrested that evening, recalling that he was wearing a red plaid shirt as depicted in the photo. He did not make a note of any blood on his clothes, but said he was not really looking for any at that point. He testified that he was not involved in the investigation any further after the arrest was made. From there on the investigation was primarily Constable Stanton's responsibility.

[69] Constable Shawn Stanton is an R.C.M.P. officer and he testified he has six years' experience in that capacity. He was the investigating officer with respect to this matter. On July 20, 2013 he was also working general duty policing at the Lower Sackville detachment. At 1:10 a.m. he testified that he received a report of a physical disturbance at 1099 Beaver Bank Road. He could not recall if the initial

report was one that mentioned a beer bottle or merely that a weapon was involved. It did say that the assault was in progress.

[70] He arrived at the scene at about the same time as Constable Myra Flannigan, and about a half minute after Constable Matharu. Constable Stanton recalls that the area to the right of the driveway was a grassy one and there was a front porch that ran the width of the house. He saw between 10 to 15 people congregated outside, some of whom were on the porch, while some were on the driveway to the side, and some were on the grass.

[71] Stanton walked toward the residence. Constable Matharu was kneeling next to an individual on the grass who had blood all over his shirt and face. This individual was supporting himself in a sitting position with one arm. The officer attempted to determine if there were any other injured people in the vicinity. He found none.

[72] At this point, Constable Brouilliard arrived at the scene. Together, he and Constable Stanton went to the door of the residence. It was locked. After they knocked, Janelle MacLean came to the door and let them in.

[73] They explained that they were looking for the individual who had been fighting with the injured man, Harvey, outside. Constable Stanton had been given

a description of his individual by Constable Matharu who, as previously indicated, had received it from Rebecca Harvey and another witness.

[74] Upon entry, Constable Stanton has noted two or three people in the kitchen and maybe five in the living room. Then he noticed someone come up from the basement, so he and Brouilliard went down the stairs into the basement.

[75] They discovered 25 to 30 people sitting in the basement in the dark. Stanton said, "Who knows what happened?". All were quiet, then two individuals started chirping at the officers to the effect of, "What are you doing? You don't know what you're doing. Get out of the house," and like comments. Then Matharu "aired" to Constable Stanton (over their communication devices) that the suspect was reported to be wearing a red/white checkered shirt.

[76] With the use of a flashlight, Stanton discovered Mr. Denny, dressed accordingly, and sitting on the floor in close proximity to the stairs. His knees were drawn up with his arms resting on top of them, and his head was down.

[77] When Constable Stanton asked him his name, he didn't say anything. The officer brought Denny outside. Denny still didn't say anything. His recollection is that Constable Matharu placed the cuffs on him and arrested him (although Matharu says that he did not place any cuffs on him).

[78] Stanton returned to the basement. Some of the individuals there were still telling the police to get out. By the time he returned outside, the paramedics had arrived. Stanton noted that Matharu was reading Denny his rights and caution at this point.

[79] When he left the scene, Stanton returned to Lower Sackville detachment. He located the accused in the interview room. There was a moderate to strong odour of alcohol on his breath. He didn't speak much.

[80] Within a minute of his arrival, Constable Stanton took the pictures of Denny that appear in Exhibit 1. He noted that the accused's right hand was significantly swollen, compared to his left. He could not recall seeing or making note of any blood on Mr. Denny's clothing. In fact, neither his clothing nor his boots were examined or tested for blood.

[81] Constable Stanton also took the other photos of the victim and the scene within (at most) 72 hours of the incident. He noted that the white portion of the victim's eyes had turned very red, both eyes were significantly swollen, and that he had significant bruising under the arms.

[82] Photographs in Exhibit 1 (page 1) show, among other things, the victim's shirt with blood on it pretty much in the middle of the MacLeans' lawn, as well as

the blood-stained grass. Page 2 shows Mr. Denny with the front of his shirt (and the ripped pocket) and the swelling of his right hand. Also, his boots appear in the very bottom portion of the picture.

[83] Page 3 shows Mr. Denny “head to toe” including a portion of his footwear, while pages 4 and 5 consist of images of Andrew Harvey at the emergency department of the hospital the QEII about three to four hours after the police had received the 9-1-1 call, including the blood on his forehead and hair.

[84] Exhibit 2 consists of the pictures of Mr. Harvey taken about 72 hours later. Page 4 shows pictures of the bruising to Mr. Harvey’s underarm and bicep. Page 5 shows the bruising behind the left ear.

[85] Constable Stanton testified that the injuries to the victim appeared to be mostly from the neck up. Neither he nor Constable Matharu found out about Harvey’s earlier altercation with Smith until sometime thereafter. Neither he or Matharu were made aware of the beer bottle that was said to have been used by Rebecca Harvey (in the evidence of Waterhouse, Denny and MacLean) neither did they observe one in the vicinity. Stanton testified that he saw lots of plastic beer cups on the scene. He did not mention seeing any beer bottles.

D. Analysis

[86] Section 265(1) of the **Criminal Code** tells us that:

265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[87] Section 265(3) talks about consent:

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force to the complainant or to a person other than the complainant;
- (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
- (c) fraud; or
- (d) the exercise of authority.

[88] Section 267(b) states that:

267. Every one who, in committing an assault,

...

(b) causes bodily harm to the complainant,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

The Crown has chosen to proceed in this case by way of indictment.

[89] Bodily harm is defined in Section 2 of the **Code** and consists of:

any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;

[90] The accused is presumptively innocent. The Crown is required to prove its case against him beyond a reasonable doubt. It therefore follows that Mr. Denny is not required to prove or disprove anything. My search, although it is sometimes expressed as a search for the truth is, I think, better described as a search for reasonable doubt. If reasonable doubt exists with respect any element of the offence with which the accused is charged, he is entitled to an acquittal. It's as simple as that.

[91] As the accused has testified and called evidence, one method by which to gauge whether reasonable doubt exists is in the manner set forth in the well-known decision of *R. v. W.(D)*, [1991] 1 S.C.R. 742. This guideline is summarized in Justice Cory's often quoted statement, at pp. 757-758 of *W.(D.)*:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused

[92] I will state at the outset of the *W.(D.)* analysis that I did not believe the evidence of Mr. Denny, Mr. Waterhouse, or Mr. MacLean. Moreover, I found the evidence of Ms. MacLean and Mr. Shaw to be largely unhelpful. I was not left in

any reasonable doubt as to whether their evidence might reasonably be true, in any material respect, and where their evidence conflicted with one or more of the remaining witnesses, I preferred the latter. I will explain my reasons for coming to this conclusion, but first I will outline some of the general principles pertinent to the assessment of witness credibility.

[93] My colleague, Judge Jim Burrill, in the recently released decision of *R. v. J.P.S.*, 2015 NSPC 55, had occasion to comment at length on this issue at paragraphs 9-13 of his decision:

[9] Both counsel have asked me to consider what makes sense in an assessment of that issue of credibility and Mr. Hartlen referred me to the oft-quoted phrase from a case that was decided May 16, 1951, of *Faryna v. Chorny*, [1952] 4 W.W.R. 171 (B.C.C.A.) in a case that wasn't even a criminal case, but it's oft been quoted to assist judges in their decision-making process and assist the public in understanding in how decisions are, or should be made. Paragraph nine of that judgement, I think it bears reading, not only what Mr. Hartlen read, but the paragraph preceding it. It says this:

9. If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility..."

[10] ...

"...A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

[11] Paragraph 10 is the paragraph quoted by Mr. Hartlen:

10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind."

[12] Paragraph 11, and I will read this as the last paragraph:

11 "The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."

[13] From that quote it's clear that the assessment of credibility requires an examination of the facts of the case in the context of the whole of the facts that the court has heard in testimony. As I say, both counsel have asked me to apply common sense in the assessment of credibility and in reality the common sense that I apply to this case must be applied in the context of what so often is the case in cases of domestic violence, and that is, is that what may appear to be common sense to some, is not how incidents play out in the domestic context where one partner is abusive to another.

[94] As Justice Jamie Saunders stated in *R. v. D.D.S.*, 2006 NSCA 34, at page 77, after himself referring to the *Faryna v. Chorny* decision:

[77] Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. **How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?**

[Emphasis Added]

[95] With those principles in mind, I return to my assessment of the credibility of Mr. Denny. My concerns with his credibility (and that of the other witnesses upon whom he relies) mainly arose from the following, which are listed in no particular order:

1. Denny was uncertain where his alleged punches went during the fight with Harvey, but with two very critical exceptions. He purported to recall precisely the punch that connected with the side of Mr. Harvey's head (accounting for the obvious trauma behind the ear) and the punch to the ribcage, ostensibly delivered to try to get Mr. Harvey to release his hold on the former's shirt. As he delivered this evidence, he appeared to be attempting to account for the uncontroverted evidence of trauma in these areas.

2. He denied that there was any blood on his shirt, that there was any blood at all on his clothing, and he also denied that he changed his shirt (post fight) once safely back inside of the MacLean residence, while awaiting for the police. He also said that he did not wash himself at all during that interval.

Yet he claimed that both he and Harvey rolled around on the grass, both swinging at each other while doing so. There is copious evidence of a large area of blood-stained grass in the vicinity in which Mr. Harvey was found along with the shirt. Even Lee Waterhouse confirmed that there was a lot of blood on the ground, as did Renee Pertus and Constable Matharu, the latter of whom characterized it as a large area of blood-stained grass and a blood-soaked plaid shirt proximate to Andrew Harvey, who was bleeding profusely from the head. Waterhouse stated that he felt that the presence of blood on the ground was accounted for by a gash on Harvey's nose that he claims to have noticed after the fight with Smith, but before Denny made contact with him. Denny also contended that Harvey was bleeding from the nose from the outset of his encounter with him, and he, like Waterhouse, attributed this to the fight with Smith.

Then, too, we have the photographs from Exhibit 1 taken by Constable Matharu, which provide graphic evidence of the amount of blood on the ground in the vicinity of the shirt. Harvey is the only one who was bleeding a lot or at all. He bled enough that the patch of ground approximate to him was smeared in it and covered in it. Yet Mr. Denny contends that he got none on him, and none of the other witnesses were able to notice any (excluding Mr. Embanks' reference to the photograph that he was shown on the stand, and also excluding Renee Pertus, whose testimony I will deal with separately).

It is impossible to believe that Mr. Denny engaged with Mr. Harvey in a consensual "one on one" fight in the manner that he described, which involved the two of them rolling around on the grass on the ground, and all the while Harvey was bleeding from the face and bleeding all over the ground, and yet he did not get any blood on him. The apparent absence of blood could only be explained if Mr. Denny had changed his clothing and/or washed while inside, or if he engaged with Mr. Harvey in a manner much different from that to which he testified.

3. I also had some concerns on the basis of the alleged encounter with Rebecca Harvey and the “bottle”. Mr. Denny’s evidence was to the effect that as soon as he touched Mr. Harvey in an attempt to break up the fight and pull him off of Mr. Smith, he “felt something like two punches at the back of my head”. He turned around and there was Rebecca Harvey with a bottle in her hand.

Lee Waterhouse said that Rebecca Harvey got loud and hit the accused in the head with a beer bottle as soon as Denny went to pull Harvey off of Smith. The bottle did not break. Waterhouse said he then just grabbed Harvey to contain her. Ms. Harvey, however, says that she jumped on Denny’s back (not that she struck him with a bottle), and this was because Denny was kicking her prone and unconscious brother.

4. Alex MacLean’s evidence was a hybrid of all three. He claimed to have come out of the house after the fight was over, looked out of his basement door, and that he witnessed Rebecca Harvey on Lee Waterhouse’s back, and that Mr. Waterhouse was yelling loudly, “She’s hitting me with a beer bottle. She’s hitting me with a beer

bottle.” This was very much at odds with what Waterhouse (himself) said.

5. Alex MacLean knows Lee Waterhouse well. The latter was on very familiar terms with the MacLeans, and he is Ms. MacLean’s first cousin. It is extremely unlikely that he could have mistaken someone else (being struck by the bottle) for Waterhouse, and at the same time mistaken the voice, too. It appeared to me that Mr. MacLean was both trying to dissociate himself from anything that had to do with the involvement that Denny had with Harvey (by saying that he didn’t see it) and yet at the same time support Mr. Denny, Waterhouse’s best friend. MacLean simply got the story wrong and had Harvey on Waterhouse’s back, with Waterhouse claiming to be struck by a beer bottle, after the Harvey/Denny involvement had ceased.
6. Another difficulty that I had with Mr. Denny’s credibility was that in the aftermath of the incident (when the police arrived) he was sitting, with some of the other partygoers, in the MacLeans’ basement, in the dark. A few people were upstairs in the kitchen and living room when Officers Stanton and Brouilliard arrived. When someone exited from

the basement, Stanton realized that there were people downstairs, too.

This led him to go downstairs and locate Denny.

The accused was sitting on his behind with his knees drawn up in front of his face, arms resting on top of his knees, and with his head down. His presence, and the fact that he matched the description of the person fighting Harvey, was only discerned by the police after they used their flashlights.

7. This is remarkable behaviour from an accused who had merely participated in a consensual fight with an already cut and bleeding individual. He attempted to explain this by testifying in effect, “Well, I had been hit in the head with a bottle and my head was sore so I had my head down”. But he never mentioned any injury at all to the police. Nor was there any swelling, injury, bruising or cut apparent to the police commensurate with being struck in the manner to which he testified. Moreover, he claimed to be struck by the bottle before he engaged in what he said was the consensual fight with Harvey, yet the alleged blow does not appear to have hampered his participation.
8. Finally, although both officers referred to Denny as being cooperative once arrested, I did not accept Alex MacLean’s testimony that as soon

as the police arrived in the basement, and asked who was involved, Mr. Denny got right up, acknowledged that he was the man, and put his hands out to be cuffed. I accepted Constable Stanton's evidence as to what happened in the basement including the fact that no attempt was made to cuff Mr. Denny in the basement. In fact, Constable Stanton said Denny was cuffed by Matharu, who was outside the residence, and that it was Matharu who was the arresting officer. I accepted Mathura's that Denny was never cuffed at all.

[96] For reasons which included those indicated above, I did not believe the evidence of Waterhouse, Alex MacLean or Denny, and rejected it where it conflicted on a material fact with the evidence of any of the other witnesses.

[97] That brings us to the third part of the *R. v. W.(D.)* test. Has the Crown proven each and every element of the offence with which Mr. Denny is charged beyond a reasonable doubt? This requires some consideration of what the term "reasonable doubt" means. Although the concept has been formulated in many different ways over the centuries, *R. v. Lifchus*, [1997] 3 S.C.R. 320, at paragraph 39, is often quoted in this context:

39 Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression “beyond a reasonable doubt” mean?

The term “beyond a reasonable doubt” has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[98] I accepted the evidence of Rebecca Harvey as to what she witnessed that evening, in particular, her evidence as to the antecedents of the fight between her brother and Smith, and the subsequent attack by Denny, with one proviso that I will mention later.

[99] Like most people, she had consumed alcohol that evening. She had, in her words, “Eight maybe nine cups of beer from the keg and also one jello shot or a

sourpuss shot or something upstairs.” She did not consume marihuana or hash, although some others witnesses testified that they had done so.

[100] Nevertheless, her recollection of what took place was stated with clarity and appeared to coincide with many of the other objective facts, including the testimony of Janelle MacLean that she had asked Ms. Harvey and her friends (including her brother) to leave, and the fact that the initial confrontation between Smith and Andrew Harvey took place during the second (and final) time that they exited the MacLean’s residence.

[101] Ms. Harvey was very critically involved, and observed with acuity what was happening to her brother. She did not know Mr. Denny before the party. She did not know Mr. Smith before the party. She did not and would not have had any reason to gratuitously implicate them in what went on other than describing what she observed that evening.

[102] She also was, I thought, somewhat judicious in her attempt to recollect what she saw that evening. She testified to seeing Denny and Smith (in the aftermath of the initial kick that was delivered by Denny) strike her brother while he was on the ground. Although she observed Waterhouse in the vicinity, she did attempt to

consciously reflect, and concluded that she did not specifically recall seeing Mr. Waterhouse strike any blows after her brother went down.

[103] Critically, Ms. Harvey also testified to seeing the accused punch her brother. Denny is right-handed. The police observed that Mr. Denny's right hand was swollen when they arrested him. Denny tried to explain the swelling by virtue of the fact that when he puts down flooring (during his employment), he must move around on his hands, and sometimes his hands and knuckles become swollen while doing so.

[104] Officer Stanton observed only the accused's right hand being swollen, and from the photograph in Exhibit 1 that would appear to be the case. Moreover (although the police did not examine or test any of Mr. Denny's clothing for the presence of blood) in Exhibit 1, photos number 2 and 3 the accused's footwear appears to be stained or wet, and this was remarked upon by at least one witness, Mr. Embanks. This is consistent with the testimony that Ms. Harvey delivered with respect to the accused's involvement with the victim, and how it occurred.

[105] Royce Embanks testified that his first observations of the altercation were of Harvey lying on his side on the ground (in a fetal position) receiving kicks from Lee Waterhouse to the back, from Jason Smith to the feet and from Denny to the

neck and back. When he attempted to intervene, he said that he was grabbed by “Renee’s (presumably Renee Pertus’) boyfriend” and approximately four others.

[106] He also said this, and I’m quoting from the trial transcript at pages 108 to 109:

Q. So someone’s standing in front of you with their hands out?

A. Yeah, and then two holding my arms.

Q. Okay. And how long did that go on?

A. Probably, like, two minutes, and then Jordan tried to run inside the house. And I asked him, like, why are you doing this? Because, like, I’d known him.

Q. Right.

A. I’d hung out with him prior.

Q. You did what?

A. And ... I’d hung out with him prior, before this.

Q. Right.

A. And he’s, like, I don’t know, and then he hit me in the face.

Q. He hit you in the face. Where in the face?

A. Right, right here, the cheek ...

Q. The right side of your cheek?

A. Yeah.

Q. And then what did you do?

A. Then he ran inside the house.

Q. Did he do anything else besides ... Did he say anything to you at all?

A. No.

Q. Did he do anything towards you besides hitting you in the face?

A. No, that was it.

[107] And later at pages 110 to 112:

- Q. How many times did he, meaning I believe Waterhouse, punch you?
- A. Three
- Q. Three times. And were you still being held?
- A. Yes.
- Q. Okay. And then after he punched you, where did he go?
- A. He ran inside also.
- Q. Okay. And where was Mr. Denny?
- A. He was still down there.
- Q. And were you able to see what he was doing?
- A. Kicking Andrew.
- Q. Kicking Andrew. You could see that?
- A. Yeah.
- Q. Do you know how many times he kicked Andrew?
- A. No.
- Q. Do you know where he kicked Andrew?
- A. Head area.
- Q. And were you able to see that?
- A. I seen it, like, once or twice, yeah.
- Q. And so how long were you held in that position?
- A. I was there for the majority of the time.
- Q. Okay. But, then, how did it stop?
- A. Everyone else ran inside.
- Q. So what happened to the guys that were holding you?
- A. They finally let go, because everyone was inside, and they locked the door.
- Q. Okay. And then what did you do?
- A. I ran down to check my cousin.
- Q. And what was, what was he doing at that point?
- A. He was, like, in and out. He was, like, knocked... like, coming to. He was knocked out.
- Q. Okay. And could you describe what you saw.
- A. There was blood, like, everywhere.

Q. So you ... Blood all on his face or ...

A. Yeah, his eye, he had a big, had a big scar and, like, he was bleeding.

[108] Given his preoccupation with the people holding him, I did not accept his evidence as reliable when he said that he saw Mr. Waterhouse striking the victim. As earlier noted, I did accept the evidence of Rebecca Harvey on that particular point. I did accept, however, that Embanks made an honest attempt to recall what happened that evening.

[109] Indeed, he was in a very intense situation. He was being held by others while attempting to come to the aid of his cousin. He described independently of Ms. Harvey what had occurred and, while his evidence conflicted with hers on the point concerning whether Mr. Waterhouse struck Harvey, it was explicable on the basis that his attention was occupied, to some extent, with the people holding him.

[110] Aside from that one aspect of it, Mr. Embanks', I also accepted his evidence as reliable, notwithstanding his level of intoxication, and notwithstanding the fact that he had his attention (to a limited degree) divided between what was happening to his cousin and what the people holding him were doing.

[111] Renee Pertus gave evidence which corroborates some of what Embanks' and Rebecca Harvey had to say, and contradicts other aspects of it. She, along with Rebecca Harvey, appeared to be the two that provided the police with a description

of the person involved in the altercation with Mr. Harvey, which enabled the police to arrest Mr. Denny.

[112] Ms. Pertus remembers being out on the veranda smoking, and being alerted to the commotion. She recalls seeing Kyle Denny and the complainant on the ground fighting. Although she was only 10 to 12 feet away in her estimation, people kept cutting in front of her and obscuring her vision. I found that her view of the proceeding was fractured and piecemeal. She did not know either Kyle Denny, Andrew Harvey, or Rebecca Harvey, and said that she did not see the earlier fight between Mr. Harvey and Mr. Smith. What she testified was that she saw “Denny and Harvey on the ground”, and then the next thing she knew Denny was standing, (although she’s not sure how he got to his feet) and kicking Andrew Harvey in the stomach area. She did not see Smith or Waterhouse strike Harvey.

[113] Pertus did not see the start of the altercation because her back was turned and in another direction. Because her view of what was unfolding was sporadic and interrupted, I got the impression that she may actually have been watching Harvey and Smith on the ground and mistaken who the combatants were. It appeared that she may have conflated the two altercations into one, because she is suddenly aware of Denny standing over a prone Andrew Harvey and kicking him

multiple times while the latter is on the ground. She unsure how Mr. Denny got to be in a standing position.

[114] For those reasons, and also the fact that her view appeared to have been significantly obscured, I was reluctant to (and indeed did not) place any weight upon her testimony of what she saw that evening other than with respect to the fact that she observed blood all over the ground, which was a point corroborated by a number of other witnesses. For the reasons outlined above, including her apparent confusion which blended the two altercations into one, her fragmented (and often obscured) view, and the quickness with which everything unfolded, I did not place any weight upon her evidence. I did find her to be a witness who appeared to be trying to tell the truth as well as she could recollect it. I also noted that, in addition to consuming alcohol, she had also consumed some marihuana, which may also have inhibited or prevented her from understanding what was unfolding in front of her visually.

[115] I find that the Crown has proven the following facts beyond a reasonable doubt:

1. On July 19th, 2013 the accused (Mr. Denny) and Andrew Harvey were two of the people attending a party at 1099 Beaver Bank Road. The purpose of the party was to celebrate Mandy Cunningham's birthday.

2. From the time Harvey, his cousin Embanks, Rebecca Harvey and Mandy Cunningham arrived at the party, the two men were viewed with a measure of suspicion and hostility by Waterhouse and his friend, Denny. It is not clear to me who was responsible initially for creating this atmosphere. It appeared to be an offshoot of the fact that Mandy Cunningham was Embanks' current (and Waterhouse's former) girlfriend. Regardless of why this hostility existed and who was to blame for it (because it certainly seems that it was reciprocated by both sides) it was undoubtedly present and it intensified as the night wore on, a not uncommon development when increasing amounts of alcohol are being consumed.
3. Sometime after midnight, Jordan Smith began saying provocative things to Harvey about damage to a vehicle. Since no one who testified was aware of any actual damage to anyone's vehicle, I expect that this was a pretext to get Harvey outside and engaged in an altercation. When they met outside for the first time, Harvey and Smith jawed at each other; Smith accusing him and Harvey denying that he had caused damage to any vehicle. What may have prevented the outbreak of a fight on that first occasion was the presence of the

hosts, Alex and Janelle MacLean, who went outside to see what the commotion was about. Andrew Harvey and Embanks *et al* then returned into the house with the MacLeans.

4. Fuelled to a large degree by reports from her cousin, Lee Waterhouse, which were to the effect that Harvey and Embanks were troublemakers, and having witnessed the confrontation outside, Janelle MacLean asked Harvey, Embanks, Rebecca Harvey and Mandy Cunningham to leave. All but Embanks did so immediately. He remained behind for a few minutes to apologize to the hosts whom he considered to be friends. He testified that he felt bad that things had ended like this.
5. The fight between Harvey and Jordan Smith occurred when the former went outside for the second (and final) time. Mr. Smith decided to engage Mr. Harvey on his own, with the others looking on. They exchanged some blows, which were relatively insignificant. I accepted the evidence of Ms. Rebecca Harvey that the combatants were only on their feet for a few moments and then went to the ground. Mr. Harvey was on the bottom initially but, in the words of Rebecca Harvey, her brother “barrel-rolled him” and ended up on top.

6. As soon as this happened, the accused ran in from the area of the veranda, and kicked Harvey in the head as described by Rebecca Harvey.

Lee Waterhouse also came on the scene, but I'm not satisfied (based on Rebecca Harvey's evidence) or convinced (based on what I heard from Embanks' evidence) that he participated in the blows being inflicted upon on the complainant.

7. As Mr. Harvey put it, he was blind-sided. He was knocked unconscious and may have drifted in and out of consciousness for a period of time. During this interval, he may have been able to few feeble gestures, but for the most part he was unconscious and remained on the ground in a pool of blood while Mr. Denny continued to kick him and punch him in the area of the neck and head and also the armpits and the stomach.

The one minor demur or concern that I had with Rebecca Harvey's evidence was that she may have exaggerated somewhat the force with which the subsequent blows (those that occurred after the initial kick to the head) were struck. She described these subsequent blows as constituting "stomping", and although there is evidence that forceful

blows were struck in the ribcage and in the armpit area of Mr. Harvey while he was on the ground (and certainly the damage to Mr. Harvey's facial area and head were consistent with significant blows being struck) I would have expected, had Denny actually been stomping (as opposed to kicking) Mr. Harvey that the injuries, as bad they were, would have been worse. However, to repeat, I am satisfied with her description of the force of the initial blow (the kick to the head) and how it occurred, I have also considered and accepted the evidence of Mr. Embanks in terms of what he saw of the blows being delivered by Mr. Denny, and these were certainly consistent with the damage sustained by the victim to his neck and head.

8. I am satisfied that Smith also got in some quick and fleeting strikes at Harvey while the latter was prone, on the basis of Rebecca Harvey's testimony, but that Smith quickly left the scene after these were delivered. I say this because I accepted Mr. Embanks' testimony that while he was being held, and while Mr. Denny was still in the process of inflicting blows upon Mr. Harvey (who was on the ground) Smith ran up and struck Embanks while he was being held, and then quickly ran into the MacLean's residence. So, too, Mr. Waterhouse himself

also ran into the residence, taking the time to pause on his way and to strike Mr. Embanks while he was still being held by others.

9. Both the initial kick administered by Denny, and the subsequent kicks and punches thrown by him after that, were not, in any respect, part of a consensual fight, nor did Harvey expressly or impliedly consent to same. Denny's strikes were gratuitous and thug-like.
10. The damage to Mr. Harvey's head and in the armpit area of his ribcage were caused by the strikes administered by Mr. Denny. They were the logical outcome of the force applied by the latter. The strikes administered by Mr. Denny were the ones that were applied most forcefully (by far), and were the most significant ones. The injuries in those areas were extremely consistent with what would be expected by blows of that nature.
11. The damage inflicted upon Mr. Harvey, as depicted in the photographs, and the length of time that he spent convalescing, were well beyond the threshold necessary to constitute bodily harm within the context of Section 267(b) (as defined in section 2 of the **Criminal Code**) given that the harm must merely "interfere with bodily comfort

in a manner that is more than trifling and transient.” It is obvious that these injuries well exceeded that standard.

12. The involvement of Smith with Harvey appeared to be a couple of quick blows in the vicinity of the latter’s stomach and lower body. Both he and Waterhouse were gone from the scene so quickly that they were able to gratuitously get a few quick swings at Mr. Embanks (who was being held by others) while en route to the MacLean residence. This occurred while Mr. Denny was still in the process of delivering blows to Mr. Harvey.
13. The assault ended when Rebecca Harvey jumped on Mr. Denny’s shoulders in an attempt to stop him and struck him with her fists. She struck him so hard that her fists were swollen and her wrist was bruised. I accepted her evidence that she did not strike the accused with anything but her fists. Ryan Smith came in at that time and broke up the fight. Unfortunately, Mr. Smith (when he testified) was clearly unwilling to say anything of what he actually saw when he testified. Indeed, he appeared to be deliberately vague, citing his extreme intoxication as the reason why he could not remember anything of importance.

14. The aftermath of the fight saw Jennifer Burke and Mandy Cunningham attending to an injured (and very bloody) Andrew Harvey. They used his plaid shirt, the one featured in Exhibit 1, to attempt to staunch the flow of blood from his head. There was blood everywhere on the grass. This is evident from the police testimony, and from that of Renee Pertus and Royce Embanks, as well as the photograph in Exhibit 1.

[116] In sum, I am satisfied beyond a reasonable doubt that Kyle Denny assaulted Andrew Harvey in the early morning hours of July 20th, 2013, and that, in so doing, he did cause bodily harm to him, contrary to section 267(b) of the **Criminal Code**. The accused is therefore guilty as charged.

Timothy Gabriel, J.P.C.