

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Gough, 2012 NSPC 49

Date: 20120203

Docket: 2185774

Registry: Halifax

Between:

Her Majesty the Queen

v.

Michael Gough

Judge: The Honourable Judge Theodore K. Tax

Heard: December 6 & 15, 2011

Oral Decision: February 3, 2012, in Dartmouth, Nova Scotia

Written decision: June 19, 2012

Charge: On or about May 15, 2010 at, or near Westphal, Nova Scotia, did unlawfully assault Tanya Rodgers, contrary to Section 266 of the Criminal Code

Counsel: Michelle James, for the Crown
Trevor McGuigan, for the Defence

By the Court:

INTRODUCTION:

[1] Mr. Michael Gough is charged with the assault of his former common-law partner, Tanya Rodgers on or about May 15, 2010 at Westphal, Nova Scotia. Mr. Gough and Ms. Rodgers had been arguing that evening. Their verbal altercation became physical and the police were called after he punched her in the face.

[2] The issue is whether the Crown has established all of the essential elements of an assault charge beyond a reasonable doubt or whether Mr. Gough hit Ms. Rodgers as an immediate reflex action without the required intent to assault her. If the court concludes that the Crown has established all of the essential elements of an assault charge, then in the alternative, the issue to determine is whether Mr. Gough acted in self-defence.

POSITIONS OF THE PARTIES:

[3] It is the position of the Crown that since Ms. Rodgers and Mr. Gough related slightly different versions of the events on or about May 15, 2010, the Court must apply the principles of **R. v. W.(D)**. The Crown submits that they have established all of the essential elements of an assault charge beyond a reasonable doubt. As a result, the Crown submits that the court should reject the Defence position that Mr. Gough only struck Ms. Rodgers as a reflex reaction and not with the intent to assault her, and also find that his actions were not justified in his self-defence.

[4] Defence Counsel submits that when the court assesses the credibility of the witnesses and applies the principles in **R. v. W. (D)**, Mr. Gough's evidence should be accepted. While Mr. Gough acknowledges that he hit Ms. Rodgers, it is the position of the Defence that he did so immediately, as a reflex action without any thought, and therefore lacked the *mens rea* to commit an assault. Defence Counsel relies upon the case of **R. v. Wolfe**, [1974] O.J. No.868 (Ont. C.A.) in support of that proposition. In the alternative, if the Court finds that Mr. Gough had the *mens rea* to strike Ms. Rodgers, then Defence Counsel submits that Mr. Gough acted in self-defence under section 34(1) or 37 of the **Criminal Code**.

TRIAL EVIDENCE:

[5] Ms. Tanya Rodgers is 29 years old and on May 15, 2010, she was living with Mr. Gough in a common-law relationship at 12 Panavista Drive in Dartmouth, Nova Scotia. She met Mr. Michael Gough in September, 2009 and moved in with him in January, 2010. After the incident on the morning of May 15, 2010, they remained in an on and off relationship until they finally split as a couple in October, 2011.

[6] On the evening of the May 14, 2010, Mr. Gough was working at a local bar as a DJ and performing karaoke. On that evening, Ms. Rodgers accompanied Mr. Gough and sat in the audience while he was on the stage. She estimates that they arrived at the bar after 8 PM and left at approximately 2 AM on May 15, 2010. While they were at the bar, Ms. Rodgers and Mr. Gough got into an argument about her past relationship with an ex-boyfriend. Ms. Rodgers stated that both she and Mr. Gough had been drinking alcohol that evening.

[7] When they got home, Ms. Rodgers said that the argument continued in their bedroom. Mr. Gough was angry and yelling at her. At one point she tried to leave the bedroom, but he was standing at the door and pushed her back towards the bed.

She pushed him and they both engaged in some pushing and shoving. Ms. Rodgers said that Mr. Gough started the pushing and he used both of his hands to push her chest area. She pushed him back in the same way on his chest area. The exchange of pushes and shoves happened another two times, and then Ms. Rodgers decided to get into the bed and suggested that they talk in the morning.

[8] However, Ms. Rodgers said that Mr. Gough came over to the bed, pulled the blankets off and threw them down by the door to the room. She got up to leave, but he shoved her back onto the bed, got on top of her, straddled her and punched her in the mouth. She stated that Mr. Gough punched the left side of her mouth with a closed fist. After hitting her, Mr. Gough said “oh shit” and left the room. He went down to the main level of the house and said something to her brother.

[9] Ms. Rodgers did not immediately notice the blood on her face, but saw blood in the sink in the bathroom. She was not sure where the blood was coming from until she cleaned her face up and saw that her lower lip on the left side had been cut. The police were called and they took photographs of her. She did not require any medical treatment, but her lips were bruised for a week or so.

[10] On cross examination, Ms. Rodgers confirmed that the pushing and shoving occurred while they were both standing near the bedroom door. She did not say much to Mr. Gough and so she did not recall any conversation. She agreed with Defence Counsel that, in her statement made to the police in the early morning hours of May 15, 2010, she did not tell the police that she got up, he pushed her down and then he jumped on top of her. She agreed that she was adding more details at the trial than she had provided to the police in her statement. She said that, although the incident was “fresh” at that time, she was “confused and very upset,” but now her memory of the incident is better.

[11] Furthermore, she also agreed with Defence Counsel that she had told the police that Mr. Gough had taken the blankets off her and “with him”, but during her direct examination, she had stated he threw the blankets by the door. She also agreed that she had told the police she was laying sideways on the bed when this happened, but during her direct examination, she said she was lying on her back. She agreed with the Defence Counsel that her memory of the events of that evening had changed. Furthermore, she stated that when she was punched in the mouth, the argument was over and that Mr. Gough punched her “out of the blue” after pulling the blankets off her.

[12] During the cross examination, Ms. Rodgers confirmed that she had consumed three pitchers of beer, which is the equivalent to 12 glasses of beer, while she was at the bar with Mr. Gough. Ms. Rodgers added that she probably drank one or two shots or shooters of the hard liquor and agreed with Defence Counsel that she was drunk. She also agreed that being drunk would generally affect one's memory.

[13] Ms. Rodgers did recall that she and Mr. Gough had argued that evening about a past relationship she had with another man and about Mr. Gough going through her purse. She agreed that she was "agitated" about that, because Mr. Gough had no right to go through her purse. Ms. Rodgers agreed with Defence Counsel that the arguments about these subjects had continued in the cab on the way home. When they arrived home, she agreed that she went in through the back door and that she was "upset" because she thought Mr. Gough had locked the front door after he entered the house. Ms. Rodgers "assumes" that the argument continued at home although she did not recall arguing about her brother having to leave the house or Mr. Gough wanting to sleep in the basement. She did "not recall" whether she had shoved or punched him before he hit her. She added that

she did not recall some of the specific details of what happened that evening because of the quantity of alcohol she had consumed.

[14] Finally, Ms. Rodgers agreed with Defence Counsel that she had hit Mr. Gough in the past, but she did “not recall” whether she had punched him before he hit her, because of the amount of alcohol she had consumed that evening. She also agreed with Defence Counsel that, as result of other incidents when she was drunk and argumentative, she has been barred for one year from the bar where Mr. Gough works and another bar in the Dartmouth area.

[15] Mr. Brian Rodgers testified that on May 15, 2010, he was temporarily living with his sister, Ms. Tanya Rodgers, at the house that she shared with Mr. Gough. That evening, he was babysitting his two young nephews and he recalled that Ms. Rodgers and Mr. Gough came home around 2:30 AM. He believes that they both entered through the back door to the house. When his sister entered the house, Mr. Rodgers felt she was “annoyed” and that Mr. Gough was “irritated.” He added that, on many occasions, they were like that when they came home.

[16] Mr. Rodgers was playing a computer game on the main floor when his sister and Mr. Gough came home. While they were around him, they were “calm and civil.” He did not hear or see anything that occurred upstairs, but when Mr. Gough came downstairs, he said “you are my witness, I hit Tanya, but she hit me first.” Mr. Rodgers stated that Mr. Gough was “upset and hyper” at that time. Mr. Gough then went to the basement and Ms. Rodgers came downstairs. She had blood on her face and was “crying hysterically.” He observed that his sister had a cut on the left side of her lip, but he did not see any marks or scratches on Mr. Gough.

[17] Constable Jonathan Fraser of the RCMP responded to the call made by Mr. Rodgers on behalf of his sister. He arrived at the house shortly after 3 AM on May 15, 2010. When he arrived at the house, Ms. Rodgers was sitting on the front step with her brother. Cst. Fraser noticed that there was blood on her hands, some blood on her lip and that her lip was swollen. Ms. Rodgers told him that she had been punched by Mr. Gough and that Mr. Gough was in the basement of the house.

[18] When Constable Fraser interviewed Ms. Rodgers and took the pictures of her, her bedroom and the bathroom sink, he said that she was “quite emotional.” The photograph of Ms. Rodgers’ face was taken around 3:30 AM, and after that,

Cst. Fraser obtained a statement from Ms. Rodgers. Around 4:15 AM on May 15, 2010, he took photographs of the bathroom and bedroom. The four pictures taken by Constable Fraser were marked as Exhibit 1.

[19] On cross examination, Constable Fraser confirmed that the photographs of the bedroom confirmed that the blankets were next to and actually touching the bed, and not by the door. He also confirmed that there was no blood on the carpet in the bedroom or on the bed sheets.

[20] Constable Christopher Pilon arrived at the residence with Cst. Fraser. After he heard what Ms. Rodgers told him coupled with the fact that he saw blood around her mouth, Cst. Pilon believed that Mr. Gough had assaulted Ms. Rodgers. He went to the basement of the house and arrested Mr. Gough. Mr. Gough cooperated fully. Cst. Pilon did not make any observations in the house.

[21] Mr. Michael Gough testified that on Friday, May 14, 2010 he went to the bar where he worked as a DJ and karaoke performer. That evening, Ms. Rodgers joined him at the bar. They arrived between 8 and 9 PM, as he had to get his equipment ready for the evening's show. During the course of the evening until the

bar closed around 2 AM, he drank a total of four draft beers. In his opinion, he was sober while at work and when he went home.

[22] Mr. Gough said that during the course of that evening, he and Ms. Rodgers got into an argument over a few issues. First, they had an argument over an ex-boyfriend of hers who happened to be in the bar that night, but stayed in a back room. Mr. Gough saw Ms. Rodgers go to the other room a couple of times and he wanted her and the ex-boyfriend to sit at a table near the stage. The ex-boyfriend did not wish to come into the main room. Secondly, later that evening, Mr. Gough “lost track” of Ms. Rodgers, but he noticed that she had left her purse and sweater at the table near the stage. When he found out she was outside, he took her purse and sweater onto the stage. As the bar was closing, he made sure that her wallet was still in the purse. When she came back in the bar, Ms. Rodgers was “agitated” and blew up at him saying that he had no right to go through her purse.

[23] When the bar closed at 2 AM, Mr. Gough started to pack up his equipment. Prior to leaving, Ms. Rodgers wanted to finish a glass of beer that she had left on the table. Mr. Gough said that Ms. Rodgers was drunk and that she began yelling

and arguing with him at the bar. They continued arguing in the cab on their way home about the purse and the ex-boyfriend.

[24] In addition, prior to this evening, Mr. Gough said that there had also been an argument with Ms. Rodgers about whether her brother could stay at their house. At that time, Brian Rodgers did not have a place to stay and was unemployed. Ms. Rodgers had invited him to sleep on the couch in their house. Mr. Gough was concerned that there was not enough room, because he and Ms. Rodgers already had one bedroom and they also had four children living with them. Mr. Gough wanted Mr. Rodgers to leave that weekend, however, Ms. Rodgers insisted that her brother could stay. This argument occurred in the cab on the way home from the bar, and at home, this argument continued, upstairs in their bedroom.

[25] Mr. Gough stated that it was not uncommon for him and Ms. Rodgers to argue after they had returned from the bar. On this occasion, he decided not to stay in the bedroom, so he took some blankets and went to sleep on the couch in the basement. However, he did not have his pajamas so he went back to the bedroom to get them. When he got to the door, Ms. Rodgers jumped off the bed and stood in front of him, started pushing him and said “you can’t hit me.” He told her to get

out of his way and she said “what you going to do, hit me? You can’t touch me.” he told her to get out of his way again and she pushed him in the chest a second time. At that point, Mr. Gough pushed her and this pushing or shoving went back and forth a couple of times.

[26] Since Ms. Rodgers was between Mr. Gough and the bedroom door, he said that he lowered his shoulder, put his right hand down close to her hip and tried to move around her to the left. As he did that, he said that she used her right hand to punch him with a closed fist on his cheek. He felt that she intended to hurt him, as this was not “a playful pat.” When asked what he did next, Mr. Gough answered:

“As soon as she hit my face, it was like a reflex, I just popped out my fist because it was a shock to me. I did not even realize I was doing it. We have gone through our issues where she would push and shove and play when she was drinking, but that was the very first time she ever purposely punched me in the face.”

[27] Mr. Gough added that Ms. Rodgers had never hit him in the face before and when she did it this time, “it surprised me.” After he punched her in the face, she started crying and he said “oh dear jeez” or something along that line and then

went down to the main level. He went over to where Mr. Rodgers was sitting and said: “she hit me, I hit her back, I hope you are happy now.”

[28] On cross examination, the Crown Attorney questioned Mr. Gough about his criminal record as she submitted that his record would be relevant to assessing his credibility and the weight to be given to his evidence. He confirmed that on June 24, 2011, as a result of an assault conviction he was placed on probation for a period of 18 months. In addition, he was also put on probation for breach of an undertaking contrary to section 145 of the **Code** and fined in July, 2007 for a failure to stop at the scene of an accident contrary to section 252 of the **Code**.

[29] On the evening of May 14-15, 2010, Mr. Gough stated that he was “upset” and “frustrated” with Ms. Rodgers but he was not angry. When they got home that morning, he did not recall where he got the blankets from to take to the basement. He did not remember taking the blankets off the bed, but agreed that it was possible that he did that.

[30] During his direct testimony Mr. Gough had confirmed that he is 46 years old and that Ms. Rogers is 29 years old. On cross examination, he confirmed that he is

about 6'2" tall and that at the time of this incident, he weighed about 210 pounds. He estimated that Ms. Rodgers weighed about 140 pounds and came up to his shoulders. He agreed that she is much smaller than him.

[31] Mr. Gough told the Crown Attorney that when Ms. Rodgers punched him, it hurt, although there was no cut, bruising or any injury. He stated that he did not intentionally hit her, but conceded that when he did hit her, it might possibly have been with a closed fist. He added that he did not hit her "hard" when he "went at her with his fist."

[32] On cross examination, Mr. Gough confirmed the sequence of events which occurred in the bedroom and culminated with him hitting Ms. Rodgers in the face. He said that after she jumped off the bed and got in front of him, they got into a verbal altercation and then she pushed him. She was still blocking the doorway and when she pushed him the second time, then he pushed her back and then they pushed and shoved each other a couple of times. As he tried to go by her, she punched him in the face with her right hand. Asked by the Court to clarify if this was the point when he hit Ms. Rodgers with his right hand, Mr. Gough replied:

“Yes, I stumbled back a bit and just lashed out.”

[33] Mr. Gough maintained that he did not punch Ms. Rodgers out of anger, as it was very common in their relationship to argue on a regular basis after returning from the bar. Although Ms. Rodgers had pushed and slapped him in the past, he stated that her punch took him by surprise. He added that this was the first time he had hit her and also the first time that she had hit him, in anger, with a punch.

ANALYSIS:

[34] In a criminal trial, the Crown must prove all of the essential elements of the offence beyond a reasonable doubt. Reasonable doubt has been defined by the Supreme Court of Canada in **R. v. Lifchus**, [1997] 3 S.C.R. 320 and in **R. v. Starr**, [2000] 2 SCR 144. In **Starr**, *supra*, the Court indicated that the burden of proof on the Crown lies “much closer to absolute certainty than to a balance of probabilities.” Whether there is a reasonable doubt must normally be decided on the basis of the totality of the evidence. A reasonable doubt can arise solely on the consideration of the Crown’s evidence or the absence of the Crown’s evidence, or it can also arise from the consideration of Defence evidence.

[35] In **R. V. Mah**, 2002 NSCA 99 at para. 41, Cromwell J.A. (as he then was) reminded trial Judges that they are not to choose between alternate versions and convict if the complainant's version is preferred. In a criminal trial, the trial Judge is not trying to resolve the broad factual question of what happened. The Judge's function is to decide whether all of the essential elements of the charge(s) have been proved beyond a reasonable doubt.

[36] Where credibility is the key issue of the case, then reasonable doubt will also apply to that issue. In **R. v. W.(D.)**, [1991] 1 SCR 742, the court formulated a three step analysis for the trier of fact regarding the issue of reasonable doubt. If the Trial Judge believes the evidence of the accused, then the accused must be acquitted. If the Trial Judge does not believe the testimony of the accused, but is left in reasonable doubt by it, then the accused must be acquitted. Finally, even if the Trial Judge is not left in doubt by the evidence of the accused, the Judge must still determine, on the basis of the evidence which has been accepted, whether the Judge is convinced beyond a reasonable doubt by that evidence of the guilt of the accused person.

[37] In this case, the identification of the accused was not an issue, nor was the date, time and place of these events. The issues do, however, require an assessment of the credibility of testimony, taken in the context of all of the evidence adduced at trial, as well as reasonable inferences from proven facts to determine whether I am convinced beyond a reasonable doubt of the guilt of the accused person. In considering the evidence adduced at trial, I may believe all, some or none of the evidence of a witness or accept parts of a witness's evidence and reject other parts.

[38] There are many tools for assessing credibility of testimony. First, there is the ability to consider inconsistencies or weaknesses in the evidence of witnesses, including internal inconsistencies (that is, whether the testimony changed while on the stand), prior inconsistent statements, and external inconsistencies (that is, whether the evidence of the witness is inconsistent with independent evidence which has been accepted by me). Second, I can assess the attitude and demeanour of the witness, for example were they evasive, sincere or belligerent and also assess their ability to observe and recall events in responding to questions. Third, I can assess whether the witness has a motive to fabricate evidence or to mislead the court, but I disregard this factor if an accused person testifies as it affects every accused in an obvious way. Finally, I can consider the overall sense of the evidence

and when common sense is applied to the testimony, whether it suggests that the evidence is impossible or highly improbable.

Has the Crown established all of the essential elements of an assault charge?

[39] Mr. Michael Gough is charged with assault contrary to section 266 of the **Criminal Code**. Based upon the facts of this case, Section 265(1)(a) of the **Code** defines the essential elements of this offence, and states that a person commits an assault when he or she applies force intentionally to another person, directly or indirectly, without the consent of that other person.

[40] After carefully reviewing and analyzing the evidence, I find that there is substantial agreement between the versions of events related by Ms. Rodgers and Mr. Gough. In terms of the background and context to this case, I find that Mr. Gough and Ms. Rodgers were living in a common-law relationship, that arguments between them were a common occurrence especially after being at the bar, and that on the evening in question, they had argued about Ms. Rodgers seeing her ex-boyfriend, Mr. Gough going through her purse without her permission and whether her brother would have to leave the house. Those arguments began at the bar where

Mr. Gough worked, continued in the cab ride on the way home and after they got to the house, in the bedroom of their house.

[41] I find that the evidence established that Mr. Gough is 6' 2" tall and weighed about 210 pounds at the time of this incident. Ms. Rodgers, on the other hand, was about 140 pounds and came up to Mr. Gough's shoulders. There is no doubt that she is much smaller than Mr. Gough. In terms of their sobriety, I find that Ms. Rodgers had consumed a substantial quantity of alcohol during the evening and was drunk. I also find that the alcohol had an effect on her ability to recall some of the details of the evening in question. On the other hand, Mr. Gough was working that evening and I accept his evidence that he had only consumed four glasses of draft beer during the work hours and that he was sober.

[42] There is no dispute that after arriving home on May 15, 2010, Ms. Rodgers and Mr. Gough went up to their bedroom, and around 2:30 AM, they continued their verbal altercation about various issues. Looking at the context in which the verbal altercation was occurring, I find that both parties became more frustrated, agitated and angry with each other. I find that, as their verbal altercation continued and their emotions intensified, Ms. Rodgers and Mr. Gough were standing face to

face with each other when their altercation became physical and both of them used their hands to push and shove the other person on a couple of occasions. I find that this physical exchange occurred by the door to the bedroom. Furthermore, I find that neither one of them expressed any consent to these direct and intentional applications of force to the body of the other person.

[43] Looking at the totality of the evidence and the context in which this pushing and shoving incident occurred, I conclude that it was Ms. Rodgers who started this physical altercation. In making this finding, I accept Mr. Gough's evidence that Ms. Rodgers provoked the incident by making verbal taunts such as "you can't touch me" which accompanied her first push and shove at him. I find that he recalled and related a coherent narrative regarding this aspect of the altercation. On the other hand, I find that Ms. Rodgers downplayed her level of agitation and anger in her evidence to portray herself in a more favorable light. I also find that her level of intoxication clearly affected her ability to recall and relate to crucial points in issue. Furthermore, I found that her concession to Defence Counsel that she becomes argumentative when she is drunk and her admission on cross examination that she had struck Mr. Gough in the past was consistent with the version of events related by Mr. Gough.

[44] Although I have found that Ms. Rodgers commenced the physical altercation between herself and Mr. Gough, based upon Mr. Gough's own evidence, he did not merely fend off her pushes and shoves or leave the bedroom. Mr. Gough's own evidence confirmed that he became engaged in a physical altercation with Ms. Rodgers by using both of his hands to push and shove at her upper body. I find that Mr. Gough downplayed his level of frustration, agitation and anger at this point and when this became a physical altercation, I find that he intentionally pushed and shoved her on a couple of occasions.

[45] During their submissions, both counsel commented that Mr. Gough and Ms. Rodgers became engaged in pushing and shoving at each other, prior to Mr. Gough punching Ms. Rodgers in the face. The main focus of their submissions related to Mr. Gough's punch to Ms. Rodgers' face and whether that punch was intentional or a reflex action without intent or in self-defence. However, I am satisfied beyond a reasonable doubt that the pushes and shoves by Mr. Gough on the upper body area of Ms. Rodgers were intentional applications of force, without her consent, and as such, they constitute the essential elements of an assault.

Was Mr. Gough's punch an unintentional reflex action?

[46] Looking at the background and context in which the punch was thrown by Mr. Gough, I have found that there was a heated argument between the parties over several issues for an extended period of time. I have found that their argument commenced at the bar, continued in the cab on the way home and then resumed in their bedroom. I have found that, in the bedroom, the emotions around the verbal argument intensified as a result of verbal taunts by Ms. Rodgers which coincided with both Ms. Rodgers and Mr. Gough pushing and shoving each other while they were standing face to face. There is no dispute in the evidence that, on May 15, 2010, the physical altercation between the parties ended when Mr. Gough threw one punch with his right hand and hit Ms. Rodgers on the left side of her mouth.

[47] Since the Defence position is that Mr. Gough's punch of Ms. Rodgers was an unintentional "reflex action," it seems clear if that position is accepted, then the sequence of events would require that the complainant initiate the exchange by some physical act or gesture which triggered a reflex action on the part of the accused. There is a conflict in the evidence on the issue of whether Ms. Rodgers

threw the first punch and he reacted or Mr. Gough's punch came "out of the blue" after he pushed her back onto the bed.

[48] Ms. Rodgers does "not recall" throwing a punch at Mr. Gough due to her level of intoxication. However, she does recall that after some pushing and shoving, Mr. Gough pushed her back onto the bed, straddled her and punched her in the face. For his part, Mr. Gough says that after the pushing and shoving by the door to the bedroom, Ms. Rodgers "surprised" him and threw the first punch, hitting him in the area of his cheek. He immediately responded in a reflex action, punched her once in the mouth and then left the bedroom. According to his account of what transpired, he and Ms. Rodgers were face to face with each other near the bedroom door when the exchange of punches took place.

[49] After considering the totality of the evidence and the context in which these events occurred, I conclude that Ms. Rodgers threw the first punch at Mr. Gough and that he responded with his punch to her face. I accept Mr. Gough's evidence that Ms. Rodgers escalated the heated argument through her verbal taunts which were accompanied by pushes and shoves, and culminated with her punching him in the cheek. I find that Mr. Gough's ability to recall and relate events, was not

affected by alcohol, and for the most part, his narrative was consistent with Ms. Rodgers' account of what transpired during the early morning hours of May 15, 2010.

[50] However, I reject Mr. Gough's evidence that he was merely "upset" and "frustrated" with Ms. Rodgers during their verbal and physical altercation. I find that Mr. Gough was involved in a series of heated arguments at the bar, in the cab on the way home and again in the bedroom of their house. I find that Mr. Gough downplayed his level of agitation and anger in order to portray himself in the best possible light. In terms of the initial arguments at the bar, I find that Mr. Gough's words and actions portrayed a domineering nature while being highly suspicious of Ms. Rodgers' activities relating to the ex-boyfriend. As for the argument regarding her brother remaining in the house, Mr. Gough's views with respect to that issue were firm and entrenched, and they were completely contrary to the position adopted by Ms. Rodgers. Moreover, it was Mr. Gough's view that Brian Rodgers had to leave their house that weekend. Given the heated nature of those arguments and the often stormy nature of their relationship, I cannot accept that Mr. Gough was just "upset" and "frustrated."

[51] As for Ms. Rodger's version of the events leading up to her being struck in the face by Mr. Gough, I do not accept her evidence on these points. In coming to that conclusion, I have found that she downplayed her level of agitation and anger in her evidence in order to portray herself in a most favorable light. I have also found that her level of intoxication clearly affected her ability to recall and relate details of crucial points in issue. For example, when asked if she had punched Mr. Gough before he struck her, she simply indicated that she did "not recall" that happening due to amount of alcohol she had consumed that evening. As I stated previously, I found that her agreement with Defence Counsel that she becomes argumentative when drunk, has been barred from pubs due to that behavior and that she had previously struck Mr. Gough are all supportive of his version of events. In addition, I find that the physical evidence in the house as shown in the photographs, provides no support for Ms. Rodgers' version of what transpired. For example, I find that there is no sign of any blood on the bed sheets where she says that Mr. Gough punched her, nor are the bed sheets located by the bedroom door where she said he had thrown them before punching her.

[52] For all of the foregoing reasons, I have concluded that Ms. Rodgers did not provide credible or reliable evidence in terms of her actions and the sequence of

events leading up to her being punched in the face. I have concluded that her credibility and reliability was undermined by her attempts to portray herself in the best light, by being evasive in responding to certain questions by stating that the consumption of alcohol had affected her ability to recall events, while at the same time claiming that her memory had improved with the passage of time and that she was now able to add details which she had never related to the police immediately after the incident.

[53] In his submissions, Defence Counsel relied on the case of **R. v. Wolfe**, *supra*, in support of the proposition that if the court was to conclude that the punch thrown by Mr. Gough was a reflex action, without the necessary intention to commit an assault, then his client should be found not guilty.

[54] In the **Wolfe** decision, Chief Justice Gale in delivering a brief oral judgment on behalf of the Ontario Court of Appeal stated in paragraph 3: In giving judgment, the learned trial judge said:

“Now, there is evidence that Mr. Brown-Keay hit the accused Mr. Wolfe and then in a reflex action

(if you can call it that) Mr. Wolfe, who was calling the police, hit Mr. Brown-Keay on the forehead and caused a four-inch cut on his forehead.”

If, as it would seem to us, the trial Judge regarded the action by the accused as being the result of a reflex action, then no offence was committed because some intent is a necessary ingredient in an assault causing bodily harm.

[55] Since the **Wolfe** decision, there have been numerous cases where courts have considered the phrase “reflex action” and either applied the concept or found that it was not applicable on the facts of the case. Counsel provided a few of those decisions, for example, **R. v. Veinot**, [1999] N.S.J. No. 412 (NSPC) - not applied; **R. v. Mullin** (1990) 56 CCC (3rd) 476 (PEICA) - not applied; **R. v. Pawliw**, [2010] SJ No. 470 (Sask PC) - not applied; **R. v. H.(B)**, [1987] O.J. No. 1855 (Ont. PC) - reflex action applied, accused found not guilty; and **R. v. Taylor**, [2000] Y.J. No. 163 (YKTC) - reasonable doubt as to whether reflex action, accused found not guilty.

[56] In many of the cases where the **Wolfe** decision has been cited, the court does not refer to a legal or dictionary definition of the phrase “reflex action.” In looking

at the **Canadian Oxford Dictionary**, Oxford University Press Canada, 2001, the phrase “reflex action” means “independent of the will, as an automatic response to the stimulation of nerve [e.g. a sneeze].” As such, I conclude that a “reflex action” for the purpose of applying the **Wolfe** decision requires an involuntary and unthinking response or reaction to the stimulation of nerve or a body part.

[57] In the circumstances of this case, I have previously found that Ms. Rodgers threw the first punch and struck Mr. Gough in his cheek, and he immediately reacted and threw one punch which hit her on the left side of her face. However, the simple fact that his response was immediate, does not necessarily mean that it was involuntary or unthinking in the context of a so-called “reflex action.”

[58] In order to determine whether Mr. Gough’s punch leaves me in reasonable doubt regarding the issue of whether he had the necessary intent to strike Ms. Rodgers, it is important to remember the context in which the exchange of punches took place. I have previously found that there was an ongoing argument over several issues that evening, the verbal altercation became more heated, leading to a physical altercation which involved several pushes and shoves by both Ms. Rodgers and Mr. Gough. Ms. Rodgers’ pushes and shoves were coupled with verbal taunts

by her while the parties were standing face to face with each other and culminated in an exchange of punches. In these circumstances and from those proven facts, I conclude that the punch thrown by Mr. Gough was not a reflex action at all, but rather an intentional act, in retaliation for her punch at him.

[59] In coming to this conclusion, I am satisfied beyond a reasonable doubt and I find that when Mr. Gough punched Ms. Rodgers, he did so in anger and not as an involuntary or unthinking act. I find that there was no “reflex action” by Mr. Gough that was “caused an automatic response to nerve stimulation” as defined in the **Canadian Oxford Dictionary**. I find that the punch thrown by Mr. Gough was not an uncontrolled reflex, but rather, an intentional application of force, aimed at her face and thrown in anger when he lost control of his temper.

[60] During Mr. Gough’s direct examination, he said that “as soon as she hit my face, it was like a reflex, I just popped out my fist because it was a shock to me.” However, Mr. Gough’s own testimony confirmed that he and Ms. Rodgers had engaged in physical altercations of pushing and shoving in the past when she was “drinking.” The testimony of both Ms. Rodgers and Mr. Gough confirmed that she had hit him in the past, and when I consider that together with his knowledge of her

argumentative and feisty nature when intoxicated by alcohol, I reject his assertion that her actions on May 15, 2010 were either a “shock” or a “surprise” to him. In fact, I find that, by all accounts, their arguments and physical altercations were a fairly common occurrence in their relationship.

[61] Furthermore, in response to a question during his cross examination by the Crown Attorney, Mr. Gough was not sure how he hit Ms. Rodgers but conceded that “it might possibly have been with a closed fist” when he “went at her with his fist.” Later, in response to a question of clarification from the Court as to the sequence of events, Mr. Gough replied that after Ms. Rodgers punched him in the face, “I stumbled back a bit and just lashed out.” While he may not have had a lot of time to think about his own actions, I find that when Mr. Gough “went at her with his fist” and “lashed out” in retaliation for Ms. Rodgers’ punch, it was not an involuntary reflex action. Instead, I am satisfied beyond a reasonable doubt that he punched her intentionally and in anger because he lost control of his temper.

[62] In view of these findings of fact, I conclude that the Crown has established, beyond a reasonable doubt, that when Mr. Gough punched Ms. Rodgers in the face, he had the requisite *mens rea* or intention to apply direct force to Ms. Rodgers’s

face without her consent. Furthermore, I also conclude that, given my findings of fact and the background and context in which Mr. Gough punched Ms. Rodgers in the face, this is not one of those situations where the so-called “reflex action” as mentioned in the **Wolfe** decision is applicable.

Is Mr. Gough’s punch justified as being in self defence?

[63] In the event that the court found that Mr. Gough had the requisite *mens rea* when he punched Ms. Rodgers in the face, then Defence Counsel submitted, in the alternative, that Mr. Gough’s actions could be justified under the self-defence provisions of sections 34(1) or 37 of the **Criminal Code**. Self-defence against an unprovoked assault is set out in Section 34(1) of the **Criminal Code** as follows:

“34(1) Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.”

The use of force in preventing an assault is set out in section 37:

“37(1) Every one is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

37(2) Nothing in this section shall be deemed to justify the willful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.”

[64] In **R. v. Paice**, [2005] 1 SCR 339, the Supreme Court of Canada had occasion to review the self-defence provisions of section 34(1) of the **Criminal Code**. The case involved a consensual fight outside a bar following a scuffle inside the bar and in a unanimous decision (Fish J. concurred with separate reasons), Madam Justice Charron stated at paragraph 20:

“The second error in the trial judge’s analysis on the section 34(1) is the following: The trial judge did not address the question of provocation. An accused can only rely on section 34(1) if he was unlawfully assaulted “without having provoked the assault.” Under section 36 of the **Criminal Code**, provocation includes “provocation by blows, words or gestures.” The defence of self-defence under section 34(1) is expansive and allows a person to repel force by force as is necessary to enable him to defend himself without the necessity of the apprehension of death or grievous bodily harm. So

long as the force used is not itself intended to cause death or grievous bodily harm, the conduct will be justified. Section 34(1) is only available where the accused is an innocent victim who has been assaulted without having provoked the assault.”

[65] Therefore, I conclude that in order for a section 34(1) **Code** self defence justification to be maintained, the court must find that: (1) the accused was “unlawfully assaulted” by the victim, in the sense that he or she did not consent to the application of that force ; (2) the accused person did not “provoke” the assault (as defined in section 36 of the **Code**), (3) the force used by the accused was not intended to cause death or grievous bodily harm; and (4) the force used by the accused was no more than was necessary to enable him to defend himself.

[66] In **R. v. McIntosh**, 1995 CanLii 124 (SCC), the Supreme Court of Canada, in considering section 37 of the **Criminal Code**, held at paragraph 44 that section 37 makes “the self-defence justification available to an accused in any circumstance where the force used by that accused was (I) necessary, and (ii) proportionate.”

[67] When the Defence raises an argument that the accused’s actions are justified as being in his or her self-defence, and there is evidence that provides an “air of

reality” to each element of the defence, then the burden of proof in relation to this self-defence justification is on the Crown, who must prove beyond a reasonable doubt that the defence does not apply: see **R. v. Cinous**, 2002 SCC 29 (CanLii). If the Crown proves, beyond a reasonable doubt, that any one of the essential elements of a self-defence justification is lacking, then the justification of acting in self-defence, will not be available to an accused person.

[68] In **R. v. Szczerbaniwicz**, 2010 SCC 15 (CanLii), the Supreme Court of Canada stated, at paragraph 20 and 21, that a trial judge assessing the reasonableness or proportionality of force used pursuant to a justification must determine,

“whether the force used was ‘reasonable in all the circumstances’... The reasonableness of ‘all the circumstances’ necessarily includes the accused’s subjective belief as to the nature of the danger or harm, but the objective component of the defence is also required.”

[69] In applying the air of reality test to each of the essential elements of the self-defence justifications relied upon by Mr. Gough, I am not satisfied that there was sufficient direct evidence in Mr. Gough’s testimony to establish a subjective belief that he had to punch Ms. Rodgers in the face to defend himself or that there was an

objective basis to conclude that punching her in the face was reasonable in all of the facts and circumstances of this case. As such, I am not satisfied that there is an “air of reality” to the Defence position that Mr. Gough’s punch was justified under sections 34(1) or 37 of the **Criminal Code**.

[70] After reviewing “all of the circumstances” of this case, it bears repeating that Mr. Gough is 6' 2" tall and weighs approximately 210 pounds, while Ms. Rodgers is significantly shorter and was estimated to weigh about 140 pounds. In addition to the significant size and weight differential, Mr. Gough was sober, while Ms. Rodgers was “drunk,” having consumed a significant quantity of alcohol during the course of the evening. It must also be remembered that the parties engaged in a heated argument, which escalated into the direct application of force to each other in the form of several of pushes and shoves. I find that both parties engaged in acts which constitute provocation in the sense that they each engaged in words and blows, prior to their exchange of punches.

[71] Finally, I find that there was no testimony from Mr. Gough that he had, at any time, concerns for his own safety and under these circumstances, I cannot conclude that the force used by him was “any more than was necessary to defend

himself.” Once again, looking at “all of the circumstances” that existed at the time of this incident, I have previously found that Mr. Gough lost his self-control and in his own words, he intentionally “lashed out” and “went at” Ms. Rodgers and that he punched her in anger. I am satisfied beyond a reasonable doubt that his punch had nothing to do with his self defence.

[72] In any event, even if I had found that there was an “air of reality” to Mr. Gough’s reliance on the self-defence justifications found in sections 34(1) and 37 of the **Criminal Code**, after considering all of the circumstances, I am also satisfied beyond a reasonable doubt that the punch thrown by Mr. Gough was an excessive use of force. As such, I would have reached the same conclusion and found that Mr. Gough could not rely upon either of the self-defence justifications found in sections 34(1) or 37 of the **Code**.

CONCLUSION:

[73] In conclusion, I find Mr. Gough guilty of assaulting Ms. Tanya Rodgers on May 15, 2010, contrary to section 266 of the **Criminal Code**. In making this finding, I have concluded that when Mr. Gough punched Ms. Rodgers, he did so intentionally with the requisite *mens rea* and not as a “reflex action.” I have also concluded that Mr. Gough’s punch was not justified as being an act done in self defence.