

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Greek*, 2019 NSPC 50

Date: 20190710

Docket: 8247853-60

Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Lucas Greek

Judge: The Honourable Judge Ronda van der Hoek

Heard: May 13 and June 20, 2019 in Bridgewater, Nova Scotia

Decision July 10, 2019

Charge: Sections 266 x 2, 264.1, 145(3), 733.1 x 2, 129(a), 270(2) of the *Criminal Code of Canada*

Counsel: Emma Baasch, for the crown

Scott Brownell, for the defence

By the Court:

Introduction:

[1] After taking complaints from a 911 caller located some distance down the road from Curtis Greek's house, officers deemed him "arrestable" and attended the house where Mr. Greek presented himself at the door. Cpl. Baker told Mr. Greek he was under arrest. His mother, who was also at the door, told the officer he needed a warrant and she, along with her son, closed the door on the officer, trapping him in the doorjamb. Cst. Giffin assisted Cpl. Baker by pushing the door open whereupon they entered the house and took Mr. Greek into custody. The ensuing scuffle inside the house continued onto the front porch where Mr. Greek, who was by that time handcuffed, bit Cst. Giffin. As a result, Mr. Greek is charged with resisting arrest by blocking the door (s. 129(a) CC), assaulting Cst. Giffin who was engaged in the execution of his duty (s. 270(2) CC) and other offences arising from the 911 call (breaching a recognizance condition - keep the peace and be of good behaviour (s. 145(3)), uttering a threat to Jessica Corkum (s. 264.1(1) CC) and assaulting Jessica Corkum and Curtis Zyderveld (two counts of s. 266(b)).

[2] Mr. Greek argues the arrest in his residence violated his **Charter** rights under sections 8 and 9 because the police failed to obtain a *Feeney*¹ arrest warrant allowing them to lawfully enter his house, and neither hot pursuit nor exigent circumstances justified their entry. As a result, he argues the arrest in his house was a flagrant disregard of his **Charter** protected rights and a stay of proceedings pursuant to s. 24(1) of the **Charter** is the appropriate remedy for the s. 129 and s. 270 CC offences.

Decision:

[3] With concurrence of counsel, to avoid duplicative testimony, the Court granted leave allowing all evidence led in the **Charter** *voir dire* to be read into the trial. After hearing the evidence and making findings of fact, I concluded both **Charter** sections were breached, and the appropriate remedy is a stay of s. 270(2) CC. Since I also found the arrest unlawful, Mr. Greek's actions in assisting his mother to push the door closed did not represent resisting arrest and he is found not guilty of s. 129(a) CC.

¹ [1997] 2 S.C.R. 13

[4] Hearing no evidence of a threat, I granted a directed verdict motion on the s. 264.1(1)(a) CC charge involving Jessica Corkum. The Crown invited dismissal of two s. 733.1(1) CC charges which I also granted. Finally, the Crown proved the case of assault upon Curtis Zyderveld, and by virtue of that finding, Mr. Greek is guilty of breaching a recognizance condition to keep the peace and be of good behaviour. The Crown failed to prove the charge of assault upon Jessica Corkum.

[5] Before explaining my reasons for reaching these conclusions, I will detail the legal parameters that guided my analysis of the issues.

General Legal Principles:

[6] As a starting point, everyone charged with a criminal offence is presumed innocent and that presumption remains firmly in place throughout the whole of the trial unless and until the court is satisfied the charge has been proven beyond a reasonable doubt. The onus in a criminal trial is of course firmly on the Crown to prove Mr. Greek's guilt, and the burden of proof never shifts asking him to instead prove that he is not guilty.

[7] If after considering all the evidence, I am not satisfied that the Crown has discharged its burden to prove all the elements of the offence beyond a reasonable doubt, Mr. Greek will be found not guilty.

[8] I also instruct myself that a reasonable doubt is not an imaginary or frivolous doubt. Rather, it is based upon reason and common sense and logically derives from the evidence or lack of evidence adduced at trial. Likely or even probable guilt does not reach the high criminal standard, while at the same time proof to an absolute certainty is neither applicable nor realistic.

[9] Instead, proof beyond a reasonable doubt lies much closer to absolute certainty than it does to the civil standard of proof on a balance of probabilities: see *R. v. Starr*, [2000] S.C.J. No. 40 at para. 242. If after considering all the admissible evidence, I am sure that Mr. Greek committed an offence I must convict him, since this demonstrates my satisfaction of his guilt beyond a reasonable doubt. Alternatively, if after considering all the evidence I am not sure and I have a reasonable doubt and cannot convict him.

[10] In determining who or what to believe, I have considered the general capacity of each witness to make their observations, to recall what they perceived, and their ability to accurately testify to their recollections.

[11] In assessing credibility, it is necessary to determine whether the witness was trying to tell the truth and whether the witness was sincere, candid, biased, reticent, and/or evasive. A valuable means of doing so is to examine the consistency between what the witness said at trial and what the witness has said on other occasions, for example in a statement to police.

[12] I must also avoid assessing evidence in isolation, instead considering what is testified to in the context of all the evidence in the case. Inconsistencies must be assessed as inconsequential or significant to the case, and with regard to the latter I must pay careful attention to that inconsistency when I consider the reliability of the witness' testimony. In doing so, I have assessed each witness' testimony for intrinsic and extrinsic consistency, plausibility, balance, possible interest, and the ability to observe, recall, and communicate.

The Evidence:

[13] The Crown called Jessica Corkum and Curtis Zyderveld, who were present at the Greek residence during the incidents that led to Mr. Zyderveld's 911 call. The Crown also called four RCMP witnesses, Constables Sean Scott, Gordon Giffin, Simon Blouin and Corporal Baker.

Assault and Threat- Dana Clattenberg:

[14] Charges arising from the incident at the trailer are best addressed first. Jessica Corkum testified that she and Lucas Greek were in an "on again/off again" relationship. She was at the Greek property planning to stay overnight in the house with her infant who was in the care of Mr. Greek's mother. She says Mr. Greek allowed her friends Dana Clattenburg and Curtis Zyderveld to come over to "hang out at the trailer". It was there she began to suspect Mr. Zyderveld liked her, and she believes jealousy motivated what happened next.

[15] Ms. Corkum testified that she was sitting on a bed in the camper bedroom with Ms. Clattenburg and Mr. Greek. Then, correcting herself, said she could not actually recall if she was sitting on the bed at the time, explaining it was difficult for her to remember "because all this happened a year ago". Later, on cross-examination she was able to elaborate testifying that she extended her hand for Mr. Greek to pick her up and Ms. Clattenburg was joking around laughing and trying to pull her back down. She says Mr. Greek's actions were playful, they did not concern her, and she was neither injured nor was she assaulted by him.

[16] She testified on direct that Mr. Zyderveld, who was outside the bedroom door in the hallway, “thought Lucas was trying to be rough or mad with me”. She says, “Curtis yelled something at Lucas like don’t manhandle me or something”, and “they both got into it with each other”. She testified, “I didn’t really see what happened”, “I’m so short, it was in a camper, so I don’t really know”. She left the camper trailer and ran to the house to get Mr. Greek’s mother who arrived asking Mr. Zyderveld to leave. Curiously for the first time on cross-examination she told the court Mr. Greek had asked Mr. Zyderveld to leave several times before this, but he would not go. Only upon finding his glasses, did he leave.

[17] Ms. Corkum testified that she then went to bed in the living room of the Greek main house, and she does not recall speaking to police who attended there later that night. She denies consuming drugs or alcohol that day, accepting on cross-examination that Ms. Clattenburg had been drinking, although Ms. Corkum did not know how much was consumed or where the alcohol came from.

[18] Asked on cross-examination about a series of text messages she sent to Mr. Zyderveld following the incident, she agreed she texted him asking him to “tell the truth about Lucas Greek” not hurting her that night. When shown a text wherein she conveys her perception that Mr. Greek was defending himself from Mr. Zyderveld, she confirmed that was her perception. To her benefit she maintained, as she testified on direct, that she did not see the assault.

[19] In assessing the testimony of Ms. Corkum, I may of course accept some, none, or all of it. I find her evidence concerning and lacking credibility. My impression, she was prepared to say whatever was necessary to ensure Mr. Greek was cast in a positive light. Her contradictory testimony of not seeing who initiated the assault that must have happened right in front of her, yet maintaining during cross-examination that Mr. Greek was defending himself, is troublesome.

[20] Her credibility also suffers by denying alcohol consumption that night. Officers who woke her after loudly arresting Mr. Greek a few feet away confirmed, and I accept, she smelled of alcohol and was intoxicated. That she does not even recall interacting with the officers and was not awoken in an otherwise quiet house after 2 am by loud screaming and unrest, also impacts her credibility. But it also impacts her reliability.

[21] She was unable to accurately recall on direct examination where she was sitting/standing just before the assault, yet she provided clear recall on cross-examination. My sense, she was seeking clues as to what to say to assist Mr.

Greek. That is likely why she added for the first time on cross-examination that Mr. Greek had asked Mr. Zyderveld to leave several times prior to his expressed concern for her. She is an interested, unreliable witness who frankly testified that she does not remember much from a year ago. Her memory, I find, was impacted by drink as well as her concern for Mr. Greek.

[22] That said, without her testimony supporting a non-consensual touching of her person, there is insufficient evidence of an assault. Likewise, there was no testimony at all regarding a threat to her and that matter was dismissed on a motion for directed verdict.

[23] Finally, her impairment coupled with her interest rendered her testimony lacking in credibility, and unreliable such that I reject it except where it accords with evidence that I accept from other witnesses.

[24] I accept the following:

- She held an expressed intention to spend the night at the Greek residence.
- Both she and Ms. Clattenburg had consumed alcohol.
- The infant was not present in the trailer.
- She heard Mr. Zyderveld tell Mr. Greek to stop manhandling her.
- A physical altercation occurred involving Mr. Greek and Mr. Zyderveld, and she quickly left to find Mrs. Greek.
- She was passed out or asleep, with her infant, when the police came to the house. They spoke to her, she slurred her words, and she smelled of alcohol. She was intoxicated.

Assault on Curtis Zyderveld:

[25] Mr. Zyderveld testified confirming he and Ms. Clattenburg attended the Greek residence at the invitation of Ms. Corkum, a friend of a few short months for whom he held affection. He had never been there before and had never met Mr. Greek. He estimates that he was in the trailer for “not even an hour or so”.

[26] He did not recall anyone drinking although he fairly added that he would not rule it out. The girls he says, “were goofing off and Lucas did not seem to like me being there”. He explained that Mr. Greek started getting rough with the girls,

pulling their hair, pulling Jessica across the couch and Dana across the floor. He says he could tell Jessica did not like it, so he told Lucas politely to “be more, gentle”, adding “I told him to chill out a bit”. He denied getting closer to Mr. Greek when he said that, instead testifying that he was standing beside the couch where he had been sitting, agreeing the couch was at the other end of the trailer.

[27] Asked on cross-examination if he described Mr. Greek’s actions to police as “manhandling” and whether it was playful, he agreed he did both. He explained that at the beginning it looked as though Ms. Corkum was fine with it, but then “it seemed like she was not”, describing such as, “I want you to stop doing all this”. Asked if he could have misinterpreted what was going on between Mr. Greek and Ms. Corkum, he agreed it was possible. He also fairly agreed that a stressful situation a few days earlier at the fire department could have caused him to overreact to the situation.

[28] Asked on cross-examination if it was possible Ms. Corkum and Ms. Clattenburg were slouched in the back of the trailer on the floor, and Mr. Greek was trying to pick Ms. Corkum up while Ms. Clattenburg was attempting to pull her back down, he agreed it was possible. Asked if this was an example of being playful, he agreed it was, but did not agree it was the situation he described as the “manhandling” that caused him concern. He clarified the manhandling occurred when Mr. Greek pulled Ms. Corkum up onto the bed and Ms. Clattenburg was trying to pull her back down with her, adding “from my perspective, from where I was sitting, it appeared that he was basically doing what he could to get her away from Dana”. Asked if Ms. Corkum seemed distressed by this, he said “she did a little bit”. Finally, asked if this was the point when he was upset about what was going on, he agreed it was.

[29] Mr. Zyderveld testified on direct that Mr. Greek tackled him onto the couch and started hitting him in the face with a fist at least half a dozen times, resulting in two black eyes. Under cross-examination he denied taking a first swing at Mr. Greek, instead testifying he never swung at all.

[30] Mr. Zyderveld testified that while trying to leave the trailer upon finding his glasses, he was attacked again. He elaborated saying Mr. Greek assaulted him, threw him around, resulting in his glasses being hit off his face and while trying to find them he was hit again from the back.

[31] Asked on cross-examination why he testified that he was attacked *again* upon finding his glasses and why he did not tell this to the police, he clarified that

the second attack was meant to be in reference to Mr. Greek's father and not to Mr. Greek. I concluded from his testimony that the assault involving Mr. Greek was continuous until Mr. Zyderveld left the trailer, at which time Mr. Greek's father engaged with him.

[32] On cross-examination, challenged about meeting Mr. Greek on another occasion, he was given his police statement to review. In that statement he told police, "this was only the *second* time" he has "ever *seen* the guy". He testified that he never met him, does not recall saying this to police and knows for a fact that he had never met Mr. Greek before the night he was assaulted. Asked about seeing Mr. Greek at a specific party at a specific house, he replied it is possible, but he does not remember.

[33] It is not necessary to fully canvass the evidence with respect to how Mr. Zyderveld and Mr. Greek's father interacted outside the trailer, except to say that eventually Mr. Zyderveld left calling 911 from a phone he found in his car. He was also unclear as to who owned the phone, testifying that it was not his own as he has not seen his phone or fire department pager since that night. He does not recall how the phone he used was returned to its owner but does believe that happened. Interestingly, Ms. Corkum's text messages to him appeared to shed light on this issue as she asks him to return a phone.

[34] Mr. Zyderveld testified that he and Ms. Clattenburg left the area and waited for police whereupon he provided a summary of events to Cst. Scott, agreeing on cross-examination that he did not tell the police that Ms. Corkum was hurt, confirming that he just wanted her out of there "just because he was concerned". While not able to recall exactly what he told the police, he agreed he "probably did not tell them she was at risk", adding Ms. Clattenburg was also not in danger.

[35] In assessing the evidence of Mr. Zyderveld, I was impressed with his sincerity. He was consistently frank when he was unable to recall detail, and while some details evaded him, his capacity to make observations with respect to an assault committed upon him was clear. He was prepared to admit that he may have misunderstood the physical interaction between Mr. Greek and Ms. Corkum, however, the words of concern he uttered to Mr. Greek were not in any way capable of being construed as an invitation to fight. I find that he was telling the truth in a candid sincere manner when he testified that he was repeatedly punched in the face receiving black eyes that he testified the police photographed.

[36] His testimony also accords with Ms. Corkum's testimony confirming a physical altercation between the two men. His was also consistent with the testimony of Ms. Corkum who indicates that he was looking for his glasses, knocked off he says when he was punched by Mr. Greek.

[37] I did not discern an interest in this matter such that Mr. Zyderveld was concocting a story. He was clear, he was assaulted and maintained a concern for the safety of Ms. Corkum.

[38] I was also not concerned that his description of the assault location somehow undermined his credibility. My sense of the evidence is that the bedroom area was located directly across from the couch in the small holiday trailer. The couch area was visible from the bedroom, allowing him to observe the interaction that caused him to come to the bedroom door. Rising from the couch and approaching the bedroom door does not rule out an assault by Mr. Greek wherein Mr. Zyderveld landed in the couch area where the assault continued.

[39] The events that followed the assault were clearly dramatic, bat chasing and car stealing, and obviously stressful for this young person. He reacted appropriately by calling 911 to report the assault upon him by both Mr. Greek and his father. That he expressed concern for Ms. Corkum was not surprising, and I accept his evidence that he did not report that Ms. Corkum was injured or harmed as a result of the minor assault he witnessed. I find that he did not exaggerate the nature of that situation. I did not accept the evidence of Ms. Corkum, where it conflicted with that of Mr. Zyderveld, and I find he did not initiate nor did he consent to this shocking and unexpected assault committed upon him by a virtual stranger who he believes he never met before this day.

[40] I find Mr. Zyderveld was subjected to an unprovoked attack involving punches to his face delivered by Mr. Greek that was motivated by Mr. Zyderveld's verbal intervention into what he perceived to be unwanted touching of Ms. Corkum by Mr. Greek. The Crown has proven the case with respect to this charge and as a result he is also found guilty of s. 145(3) CC- breach a condition of his recognizance by failing to keep the peace and be of good behaviour. As this offence occurred prior to the arrest of Mr. Greek, I dispense with the need to consider a **Charter** remedy if in fact one was sought.

The Charter Applications:

(i) *Grounds for Arrest:*

[41] Cst. Sean Scott testified that he and Cst. Simon Blouin responded to Mr. Zyderveld's 12:30 am 911 call and met Mr. Zyderveld and Ms. Clattenberg at a remote roadside location where they took statements until 1:33 am. The contents of those statements were admitted in the trial for narrative and to establish the foundation for the officers' beliefs that guided their decision to attend the Greek residence.

[42] From Ms. Clattenberg's statement Cst. Blouin testified that he generally understood the following:

Ms. Clattenberg was impaired by alcohol. A baby was present during the assault on Mr. Zyderveld. Ms. Clattenberg did not express concern about others, but concern for herself after being chased by Mr. Greek's father. On cross-examination he testified that Ms. Clattenberg was also concerned about Curtis Zyderveld, noting that he was scared. Her main concern was to make sure things were fine at the house.

[43] After taking the statement, Cst. Blouin says he had grounds to arrest Mr. Greek for breach of recognizance and assault, noting his father was also "arrestable" for assault.

[44] Cst. Scott took Mr. Zyderveld's statement and discerned the following:

In a trailer located behind the Greek household, Mr. Greek argued with Ms. Corkum and manhandled her. Mr. Zyderveld intervened, and Mr. Greek assaulted him. While trying to leave the property, Mr. Zyderveld was chased by Mr. Greek's father who brandished a bat, forced Mr. Zyderveld from his car and took it. The car was returned to him, and he and Ms. Clattenberg left the area. Mr. Zyderveld called 911, expressing concern about his friend Ms. Corkum who had stayed behind.

[45] Cst. Scott's "take away"- there was one victim, possibly more, alcohol was involved, and an infant may be present at the Greek residence.

[46] On cross-examination defence counsel carefully probed whether Cst. Scott asked Mr. Zyderveld to clarify what he meant by "manhandling", and Cst. Scott agreed Mr. Zyderveld suggested it could have been playful. He also confirmed that Mr. Zyderveld just wanted to get his friend out of there, so he could leave. Cst. Scott also agreed there was no mention of either the infant or Ms. Corkum being harmed or in imminent danger.

[47] After receiving the statements, Cst. Scott testified that he and Cst. Blouin compared them and called for backup. On cross-examination, Cst. Scott was asked about his conversation with Cst. Blouin, and in particular whether he was advised the infant was with Mr. Greek's mother. Cst. Scott could not recall that, however, did agree he was advised that Ms. Corkum wanted to stay at the Greek residence.

[48] They contacted supervisor Cpl. Baker, and Cst. Gordon Giffin met them at the roadside.

[49] Cpl. Baker testified he was the in-charge watch supervisor at 1:30 am when Cst. Scott contacted him conveying the information received from the statements, including the presence of an underage female under the influence of alcohol. On cross-examination he confirmed there was no suggestion she was injured in the altercation.

[50] Cst. Scott told Cpl. Baker that Mr. Greek was "arrestable" for assault and they were going to be attending his residence to effect an arrest. Cpl. Baker concluded he was comfortable with the plan to arrest Mr. Greek and check on the underage female. Cpl. Baker contacted Cst. Giffin asking him to attend the Greek residence, testifying, "When I asked Giffin to assist, he told me the last time he went there, Greek fled the residence, so I asked if there were police dog services available", however none were available.

[51] Cpl. Baker testified the officers arrived at the house, where Csts. Scott and Giffin went to the back and he and Cst. Blouin went to the front, explaining that "with the condition of the female inside the house being unknown, and understanding that she was present for the earlier alleged assault and possibly intoxicated, he believed he had exigent circumstances so there was no discussion of a *Feeney* warrant". Based on that evidence and the following evidence of all the officers, I find none considered the appropriateness of obtaining a *Feeney* warrant. Likewise, they did not consider staking out the house to await Mr. Greek's exit.

[52] Cst. Scott testified confirming that prior to attending the residence he provided Cpl. Baker and Cst. Giffin information from Mr. Zyderveld's statement. In his opinion the plan was to attend the residence to check on the well-being of the infant child, to check the safety of everyone there, and to make contact with Mr. Greek and his father to investigate the assault and assault with weapon allegations. This of course differs from the testimony of Cpl. Baker who understood that Cst. Scott considered Mr. Greek "arrestable". On the other hand, Cst. Blouin testified, "we did not really have a plan" and "we were going there to

check on Lucas Greek who was on recognizance”. Cst. Giffin testified confirming his belief that they were attending the residence to possibly arrest Mr. Greek. I conclude that arrest was foremost in the officers’ minds and that certainly was the case for Cpl. Baker who attended at the door.

(ii) *Resist Arrest:*

[53] Cpl. Baker testified that he knocked on the door, Mr. Greek’s mother answered saying “stop knocking so loud because there is a baby inside”, and she told him that the people who were at the back of her property (Csts. Giffin and Scott) had to leave because they needed a warrant.

[54] Asked if Lucas was home, Mrs. Greek called out to him and he appeared five to eight feet from the front door. Cpl. Baker testified that “it seemed as though she thought I was there to check on Lucas’s recognizance conditions”... “[s]o, I asked him to step outside, and his mother said ‘no, he’s not stepping outside. You can check him from there’”. As a result, Cpl. Baker told Mr. Greek he was under arrest for assault and had to come with them.

[55] This is when, he says on cross-examination, chaos erupted. Mrs. Greek started to close the door while screaming that the police needed a warrant. At this point Cpl. Baker says he held the door open and was halfway through the door with his arm and shoulder, when the door somewhat closed on him. He could see Mr. Greek behind the door pushing it with his body while Mrs. Greek was pushing it with her hand while screaming “you need a warrant” and “call David Hirtle!”. Cpl. Baker testified that he was trying to advise them he did not need a warrant because of exigent circumstances, and that they were not only there to arrest the two men, but also to check on the condition of the underage female allegedly inside, however concedes there was a lot of screaming going on and he could not get any of this out.

[56] At that point Cst. Giffin arrived helping to push the door open and the officers entered the house where they physically restrained Mr. Greek by placing him in handcuffs. Cpl. Baker noted a sleeping female on a couch and a baby on the other, but his priority, he said, was to control Mr. Greek because of the chaos that erupted and once that was done, he would check on the female.

[57] On cross-examination Cpl. Baker agreed when Mrs. Greek opened the house door there was no sign of distress or commotion. He also agreed he was not invited into the house. So, without apparent distress in the house he was asked:

why not get a *Feeney* warrant? Cpl. Baker testified, “In my experience with people underaged and under the influence of alcohol, it was my concern to get Mr. Greek under control because of the incident that occurred earlier and with his background, and with the female inside possibly intoxicated, I did not feel at that time that we had enough time to back off and get a *Feeney* warrant which in my experience can take anywhere between 2 to 4 hours going through the JP Centre”. He testified, “I had exigent circumstances to effect an arrest and check on the female”, agreeing that he understood exigent circumstances would mean he did not need a *Feeney* warrant. He also agreed that he knew Mr. Greek was on conditions to remain in the residence.

[58] Cpl. Baker also agreed on cross-examination that he did not ask Mrs. Greek to present the underage female, did not ask her about the condition of the female and did not explain to her that he was there to check on the condition of the female. He said, “given Mr. Greek’s previous history with the police, I wanted to make sure he was under control before we started making inquiries.” He agreed that Mr. Greek was not acting out when he presented himself six to eight feet from the door.

[59] On cross-examination asked: why step in the house when not invited? He said he was stopping Mrs. Greek from closing the door and continuing to effect the arrest that he had just announced to Mr. Greek.

[60] Cpl. Baker says once the officers were fully inside the residence, he believes he took one of Mr. Greek’s arms and Cst. Giffin took the other. He believes Cst. Giffin placed handcuffs on Mr. Greek, adding that he was not sure because there was a lot of commotion. Asked if it was done inside the residence, he said he could not recall but believes it was, adding Cst. Giffin then brought Mr. Greek out onto the porch.

[61] Cst. Simon Blouin testified largely confirming the testimony of Cpl. Baker. He added, “When I finally made my way inside the house, Cst. Giffin had a “iron bar” on Lucas Greek against the wall and was in the middle of arresting him”. While he saw the struggle to take Mr. Greek outside the house, he was not sure if this was the point where Mr. Greek was handcuffed.

[62] On cross-examination he confirmed that Cpl. Baker did not ask Mrs. Greek about Ms. Corkum, advising “things unfolded fast”.

[63] Cst. Giffin, who had been at the Greek residence on another occasion, testified that he was aware of trailers in the back and that is why he and Cst. Scott

initially went there to locate Mr. Greek, confirming they did not locate anyone in those trailers where the 911 related offences were said to have occurred. Returning to the front of the house, Cst. Giffin saw Cpl. Baker in the doorway and somebody obviously on the other side attempting to close the door on him. Noting Cpl. Baker was actually stuck between the doorjamb, Cst. Giffin concluded Cpl. Baker was trying to force his way in or trying to get out, “So, I, by force went over Cpl. Baker and physically pushed the door inward so whoever was on the back side of the door, I was pushing in”. He says he was able to overpower whoever it was on the back side of the door, and gain entry. He says at that point, Cpl. Baker advised Mr. Greek he was under arrest. Mr. Greek tried to pull away, and Cst. Giffin says, “by force I was able to overpower him and put him in handcuffs... there were a number of people in the residence, mother, father, female on a couch; once I had Greek in cuffs I proceeded to remove him from the residence”.

[64] Cst. Scott testified while returning from the back of the house with Cst. Giffin, he noticed lights from inside the house and heard a commotion. He explained there was some yelling and he was in the position of not knowing exactly what was happening. He says it is hard to accurately describe because the scene was chaotic with yelling and screaming. The light from the doorway made visible the silhouette of a crowd of people and it turned out contact was made with Mr. Greek.

[65] Cst. Scott says he was on the ground below the veranda and an arrest had not yet been made. He testified that above him was a “small area with so many people in it, it’s hard to describe”. At some point, Cpl. Baker was somehow trapped at or in the door casing, in a position where he could not move. Cst. Giffin, he believes, assisted by forcing the door open to effect an arrest of Mr. Greek. While Cst. Giffin and Cpl. Baker were dealing with Mr. Greek, Cst. Scott explained that he and Cst. Blouin also entered the residence.

[66] On cross-examination Cst. Scott answered yes, when asked if Cpl. Baker was already in the open doorframe when he came around the house. Asked if the officers went inside and arrested Mr. Greek, he answered “no, I believe he was arrested shortly after the door was forced opened.”

[67] Expanding upon his testimony, Cst. Scott explained that outside the door Cpl. Baker and Cst. Giffin, he thought, were trying to communicate with the residents inside. He believes a demand for Mr. Greek to present himself was made at the door, the door had been opened at some point, and there was yelling. Mr.

Greek was arrested by Cst. Giffin, there was some resistance and at some point, Cst. Giffin had to take him to the ground.

[68] Cst. Scott testified that the entire interaction from officers arriving, arresting, and leaving the Greek property was approximately 20 minutes. He estimated 15 to 30 seconds of interaction occurred at the door before it was forced open. The time between that and Mr. Greek's father's arrest was also within 15 to 30 seconds. All the officers agreed, and I find, the events unfolded with alacrity.

(iii) *Assault Cst. Giffin:*

[69] Cst. Giffin testified that he transported Mr. Greek outside to the veranda while screaming continued. Cpl. Baker testified that while assisting Cst. Blouin with the arrest of the father, he saw Mr. Greek put down on the veranda by Cst. Giffin who he recalls yelled something like, "Greek had bitten him or tried to bite him", adding that while he could see them through the doorway out of the corner of his eye on the porch, he could not see how the altercation unfolded. He denied seeing a wrestling-style move used by Cst. Giffin to bring Mr. Greek down to the ground nor did he see Mr. Greek's head hit the veranda railing because his focus at the time was on the father.

[70] Out on the deck Cst. Giffin says Mr. Greek was still resisting, and so he had him bent over on the deck trying to get him to calm down. Hearing a commotion relating to the father's arrest behind him, and while Mr. Greek was bent over, Cst. Giffin felt something on his left arm and realized very quickly that Mr. Greek was attempting to bite him, and actually did bite his left forearm. Cst. Giffin testified he was able to drive his left forearm down and away from Mr. Greek's mouth and eliminate his ability to puncture the skin. Mr. Greek was taken to the floor of the deck and pushed down while there were at least six people on the small deck area.

[71] Cst. Scott was asked if the arrest occurred inside the residence, he said "I recall Cst. Giffin on the veranda on top of Mr. Greek and that is where the arrest took place". He did not see and does not know when Mr. Greek was handcuffed but did see Mr. Greek face down on the veranda with Cst. Giffin sitting on top of him.

[72] Cst. Scott further testified that Mr. Greek's father came onto the deck and began arguing with the police, yelling, not listening to their commands and using a cell phone to document the situation until such time as he was arrested.

(iv) *After Arrest:*

[73] Asked about what occurred after the arrest, Cst. Scott testified that most of the plan had been carried out, so he had to check on the child. He entered the open concept house and found Ms. Corkum sleeping in the living room 15 feet from the front door with the child next to her. He tried to rouse her and determined she was intoxicated based on her slurred speech and the smell of alcohol. Cst. Scott formed the opinion that he had no concerns for her after talking to her.

Findings:

[74] Cpl. Baker was informed and agreed Mr. Greek was “arrestable”. The primary reason he went to the door was to effect the arrest. Cpl. Baker’s recollection of this I accept; I do not find that Cst. Scott informed Cpl. Baker differently.

[75] The second reason Cpl. Baker attended Mr. Greek’s residence was to determine the condition of Ms. Corkum. Cst. Giffin told Cpl. Baker about a previous attempt to flee from police leading to the dog inquiry. Cst. Giffin had that previous flight in mind when he attended the house, where he understood they would possibly arrest Mr. Greek. Cpl. Baker already believed he had exigent circumstances to effect a warrantless arrest when he arrived at the house, incorrectly basing this conclusion on Ms. Corkum being an underage female who may be impaired by alcohol as well as her earlier involvement in what was best described as a minor assault. Such was confirmed by his testimony that Mr. Greek’s mother seemed to think officers were there to check on the recognizance and not to effect an arrest.

[76] I accept the testimony of Cst. Blouin about a lack of plan, and his awareness that Mr. Greek was on recognizance. I find Cpl. Baker was in the doorway when he told Mr. Greek he was under arrest, and over the threshold of the doorway by the time they tried to close it. He and Cst. Giffin, propelled by Cst. Giffin pushing the door resulted in them landing inside the residence where they put Mr. Greek to the wall and cuffed him.

[77] I find Cpl. Baker’s primary objective was effecting a warrantless arrest of Mr. Greek in the house should he not exit it. The secondary concern for checking Ms. Corkum was not significant as I find Cpl. Baker failed to initially address the state of Ms. Corkum with Mrs. Greek, his answer that he stepped into the house to

stop Mrs. Greek from closing the door and his efforts to continue the arrest support my conclusion.

[78] I find on the evidence of Cpl. Baker and Cst. Giffin that Mr. Greek was handcuffed inside the house. As a result, he continued to be restrained while on the small veranda where Cst. Giffin bent him over trying to calm him down. I find Cst. Scott's evidence unreliable and where it differs from that of the officers whose evidence I accept, I reject it. His ability to see the events unfolding on the deck was impaired by confusion about what he was seeing. For example, he described a crowd on the deck when only Cpl. Baker and Cst. Blouin were standing on it speaking to Mrs. Greek. He testified that he believed a demand to present was given to Mr. Greek, yet that occurred before any screaming or yelling and occurred when only two officers would have been visible to him on the veranda.

[79] I also discerned a real difficulty on his part to recall what he saw. His testimony was punctuated by long pauses and bewilderment.

[80] His testimony does however confirm how quickly all the events unfolded. I find on his evidence that 15 to 30 seconds of interaction at the door, followed by the door being forced open and an additional 5 to 30 seconds resulted in Mr. Greek's father being arrested. I accept that Ms. Corkum was found impaired inside the residence and that she likely slept through all the commotion.

The Law:

[81] It is non-contentious between the parties that the police conducted a warrantless arrest of Mr. Greek in his home. I find they did not have permission to enter the residence, and defence counsel says Mrs. Greek was quite correct when she told officers they required a warrant. The question of course is whether they had exigent circumstances rendering entry lawful.

[82] The Supreme Court of Canada in *Feeney, supra*, definitively stated that warrantless arrests in dwelling houses are prohibited. Following that decision, Parliament codified in section 529.1 a process for obtaining a warrant to arrest an individual in his house. Section 529.3 codified what constitutes exigent circumstances providing an exception to obtaining such a warrant. Exigent circumstances include:

529.3(2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer (a) has reasonable grounds to suspect that entry into the dwelling house is necessary to prevent imminent bodily harm

or death to any person; or (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling house and that entry into the dwelling house is necessary to prevent the imminent loss or imminent destruction of the evidence.

[83] The defence is quite correct, the information provided to police did not support a suspicion on the part of the officers that entry into the house was necessary to prevent imminent bodily harm to Ms. Corkum. Rather, it was clear Ms. Corkum was minimally manhandled by Mr. Greek and furthermore she wished to stay in that residence. This does not downplay the seriousness of the assault committed upon Mr. Zyderveld, but he was not in the residence and therefore was not at risk of harm. And while Ms. Clattenburg's witness statement suggested an infant was present at the time of the assaults, it did not suggest the child was at risk of imminent harm.

[84] Addressing s. 529.3(2)(b), there was no suggestion by any officer that they had reasonable grounds to believe evidence relating to the commission of an indictable offence was present in the dwelling house, and that entry was necessary to prevent the imminent loss or destruction of such evidence. The statements that were taken from the witnesses were sufficient to establish grounds to believe an offence had been committed involving Ms. Corkum and Mr. Zyderveld, however there was no evidence to collect other than possibly statements from Mr. Greek and his father. It should go without saying that a desire to complete an investigation by taking statements does not represent exigent circumstances.

[85] That officers suspected Ms. Corkum was intoxicated did not create exigent circumstances such that officers could lawfully enter the residence to effect an arrest of Mr. Greek. Rather, they were well within their powers to knock upon that door to ascertain the condition of Ms. Corkum and perhaps even the child. However, determining that a warrantless arrest of Mr. Greek was first necessary in order to carry out the secondary purpose is not supported by the facts and is not sufficient to rise to the level of exigent circumstances.

[86] Cpl. Baker's explanation that he needed to address chaos arising from Mr. Greek before addressing the issue of the underage female, I do not accept as reasonable in the circumstances. While the officers appear to have reached the conclusion that Mr. Greek was *likely* to cause chaos, no doubt forming the foundation for why Cpl. Baker inquired into the availability of police dogs, the officers were required to deal with the situation they found themselves in. That

situation, I found as fact, was a compliant Mr. Greek, roused in the middle of the night, in a quiet dark house, who presented himself at the door of his residence in accordance with conditions of his recognizance. While his mother pointed out the necessity for a warrant, Mr. Greek did not interact at all with the police until such time as he stepped forward to assist his mother who was closing the house door. Mr. Greek was well within his rights to do so given the fact that the words of arrest, spoken outside the door or alternatively while the officer was in the door well, did not create a situation in law wherein it was necessary for him to leave his residence and submit to custody.

[87] I do not accept that exigent circumstances existed in this case. Rather, the officers should have, but did not turn their minds to obtaining a *Feeney* warrant. In all likelihood such a warrant could have been easily obtained and in short order given the fact the officers were aware Mr. Greek was in his residence subject to a recognizance requiring him to be there. That, combined with the statements of the witnesses, made obtaining a *Feeney* warrant the appropriate and correct course of action on these facts. I will add, in all likelihood the section 129 and 270 offences would not have occurred given Mrs. Greek's correct knowledge, and clear indication to the officers and her son, that a warrant was necessary to enter the house and effect an arrest upon her son.

[88] I must also address the failure of the officers to consider staking out the residence to await Mr. Greek's eventual exit. Such a stake out could have resulted in his lawful arrest outside his residence or facilitated the opportunity to await the arrival of a *Feeney* warrant. The evidence was clear, as I found, the officers did not turn their minds to either consideration.

[89] Finally, I must conclude that both Cst. Scott and Cpl. Baker were incorrect in reaching the conclusion that Mr. Greek was "arrestable", that amorphous term led them to reach the conclusion entry into the dwelling house due to the presence of an intoxicated underage female, without first obtaining a warrant, rendered an arrest therein lawful. I will also point out that it was clear from the beginning, despite contradictory evidence from the officers regarding their intention when attending the property, Cpl. Baker's understanding supported by the report of Cst. Scott was that Mr. Greek was "arrestable", and their purpose in attending was throughout effecting an arrest of Mr. Greek even if that meant entering the residence.

[90] While not seriously argued, I do not find the officers were in “hot pursuit” as discussed in *R. v. Ballegeer*². The offences were complete an hour and a half earlier, the house was in darkness and all was peaceful when Mr. Greek presented himself the door. Likewise, this was not a *Godoy*³ search. Every 911 call does not automatically render police entry into a dwelling house lawful. Such always turns on its facts, and in this case the 911 caller was outside the residence where he provided a statement. As a result, I do not find the Crown has proven beyond a reasonable doubt the s. 129(a) offence – resist arrest.

Charter Breaches:

[91] The onus is on the *Charter* applicant to establish, on a balance of probabilities, that a breach of his *Charter* right has occurred and that a stay of proceedings is the appropriate remedy for the breach.⁴ Section 8 of the **Charter** provides, “everyone has the right to be secure against unreasonable search or seizure”. Section 9 of the **Charter** provides, “everyone has the right not to be arbitrarily detained or imprisoned”. Having found the police unlawfully breached the sanctity of Mr. Greek’s house grabbing his person and placing him in handcuffs, I have found breaches of both sections 8 and 9. Where there has been a breach and there is no evidence to be excluded, a stay can be an appropriate remedy.⁵

[92] Defence counsel asked the court to consider cases such as *R. v. Meier* (No. 3)⁶ wherein warrantless entries into dwelling houses to effect arrests were successfully challenged and resulted in section 24(1) stays of proceedings. Those decisions consider the circumstances known to the officers at the time they attended dwelling houses and assess the appropriateness of entry to effect the arrest.

² 2013 ABPC 128.

³ [1999] 1 SCR 311 at paras. 11 and 22.

⁴ *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091 at para. 19)

⁵ In *R. v. Pan* 2012 ONCA 581 (OCA) the court held at paragraph 49 in granting a 24(1) remedy:

“In ordering a stay of the charges against Pan for abuse of process, the trial judge relied on this court's decision in *R. v. Tran*, 2010 ONCA 471, 103 O.R. (3d) 131. He held, correctly, that under s. 24(1) of the *Charter*, the court retains discretion to stay proceedings “where to do otherwise would amount to a judicial condonation of unacceptable practices.” This discretion is to be exercised in exceptional circumstances. It may be exercised even where abusive police conduct does not affect trial fairness if the abuse is so “egregious that the mere fact of going forward in the light of it will be offensive”. In those exceptional circumstances, a stay under s. 24(1) is an “appropriate and just” remedy: see *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Regan*.”

⁶ 2009 SKPC 30.

[93] In *Babos*⁷ the Supreme Court of Canada considered the test for a stay in the two categories concluding it is basically the same, helpfully setting out a test at para. 32:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*ibid.*, at para. 57).

[94] The question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system.

[95] Under the residual category, cases attaining the level requiring a stay of proceedings will be "exceptional" and "very rare".⁸

[96] It is only where the "affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases" that a stay is warranted.⁹

[97] I find on these facts that this is one of those "clearest of cases" justifying the granting of a stay. I find that this is a serious remedy to provide on a **Charter** breach however, I am mindful that intrusion into a darkened dwelling-house at 2 am without thought to the need to obtain a *Feeney* warrant is extremely serious. Despite the fact the police had already formed the intention to arrest Mr. Greek, before arriving at the residence, it was incumbent on them to continually reassess the situation and determine proper procedures. Once Mrs. Greek pointed out the need for a warrant, that should have given the officers pause. Yet despite this clear direction from the property owner Cpl. Baker insinuated himself into the home.

⁷ 2014 SCC 16 at para 32.

⁸ Canada (Minister of Citizenship and Immigration) v. Tobias [1997] 3 S.C.R. 391 at para. 91.

⁹ *R. v. Conway*, [1989] 1 S.C.R. 1659 at para 1667.

That another officer not fully aware of what was happening at the door immediately pushed the door open, created a chaotic and dangerous situation that demonstrates a theme - lack of consideration for lawful authority.

[98] I conclude the actions of the police following up on what must be said to be a rather minor concern for an underage female cannot support this unlawful incursion into the Greek dwelling house.

[99] Privacy interests in dwelling houses are among the highest we hold in our society, and therefore the *Criminal Code* directs police officers to obtain warrants before entering one. This court cannot condone this type of intrusion by allowing the s. 270 charge to stand. Doing so risks sending a message to enforcement officers that an incursion of this nature could occur and not result in harm to a charge that arises when a person quite rightfully refuses to go along peacefully.

[100] I must also reject the Crown's argument that people in such circumstances as Mr. Greek might resort to using firearms to avoid an unlawful arrest if I find a **Charter** breach occurred and impose a stay. That is not the situation before me.

[101] In considering other options that may be available, as the court did in *Meier*, *supra*, at paragraph 38, I also accept that a stay is really the only suitable remedy.

One available option would be to allow the matter to proceed, and if Mr. Meier was found guilty of resisting arrest, reduce the penalty he may otherwise face. However, notwithstanding the later chase, this charge that Mr. Meier faces is based entirely on the events of that night. That is, had the police not forced their way into his house, Mr. Meier would not be charged with resisting lawful arrest, nor would he have been in a position of running away... In any event, but for the occurrences of that night, there would be no criminal charge. I hesitate to force Mr. Meier to continue to defend himself against this charge of resisting arrest, in the circumstances.

While Mr. Greek should not have bitten the officer, I recognize that he had just been unlawfully arrested and was being held down on the small deck while chaos was erupting behind him. It was a somewhat extreme reaction however I cannot allow the s. 270 charge to proceed because the message I would send suggests approval of the officer's actions in unlawfully arresting Mr. Greek in his home approximately 30 seconds earlier. I cannot attach judicial sanction to those actions of the police. This is one of the clearest of cases in which a stay is appropriate and

I impose that on the s. 270 charge, and should I be incorrect in this decision, I also could find on these facts that Mr. Greek acted in self defence when he bit Cst. Giffin after being swiftly, forcefully and unlawfully arrested and dragged to the small deck where he was forced down.

Judge Ronda van der Hoek