

SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacDonald, 2010 NSSC 280

Date: 20100604
Docket: CRH 327153
Registry: Halifax

Between:

The Queen

and

Graham Keith MacDonald

Judge: The Honourable Justice C. Richard Coughlan

Heard: May 19 and 20, June 1, 2010 in Halifax, Nova Scotia

Decision: June 4, 2010 (Orally)

**Written Release
of Decision:** July 20, 2010

Counsel: Timothy S. O'Leary, for the Crown
Roger A. Burrill, for the Accused

Coughlan, J.: (Orally)

[1] Graham Keith MacDonald is charged that on or about February 13, 2010, he did unlawfully wound, maim, disfigure or endanger the life of Anna Barreiro, thereby committing an aggravated assault, contrary to s. 268(1) of the *Criminal Code*.

[2] Anna Maria Barreiro testified, now 18, she was 17 on February 13, 2010. At that time she was living on the street, panhandling in Halifax, Nova Scotia. At approximately 9:00 a.m. on February 13, 2010, she was panhandling on Spring Garden Road, Halifax, Nova Scotia, with a friend, John Graves Smith. Mr. Smith was standing outside Tim Hortons and Ms. Barreiro was sitting beside him on the sidewalk, cross-legged, on her backpack. Graham Keith MacDonald came up and was speaking to Mr. Smith. Mr. MacDonald said he needed to make \$5.00 for his pill. He was yelling and really aggressive. Mr. Smith said he was not giving up the spot and Mr. MacDonald continued to demand the spot. Tim Hortons is a good spot for panhandling on Spring Garden Road.

[3] Ms. Barreiro told Mr. MacDonald to leave. She and Mr. Smith were there first and needed to make money. There was no agreement as to how much money they needed to make. Mr. MacDonald raised his voice. Mr. MacDonald knelt down close to Ms. Barreiro's face. Ms. Barreiro told Mr. MacDonald to get the fuck out of here. Mr. MacDonald told Ms. Barreiro to fucking hit me. Ms. Barreiro shoved Mr. MacDonald with her opened right hand - she is not sure where she shoved him. She connected with clothing, not skin. Mr. MacDonald stood up and "cracked" her in the jaw. The hit hurt. She blacked out and the next thing she remembered is walking into Tim Hortons. At Tim Hortons they gave her an Ibuprofen and bus fare. She went to the hospital. Her jaw was broken in two places. She had surgery. Plates and screws were inserted to deal with the fractures. She could not chew for a month and a half. She has permanent nerve damage.

[4] Ms. Barreiro testified a push means just get away and is not an invitation to fight. She denied saying to Mr. MacDonald "get away or I will punch you in the face". She did not want to fight Mr. MacDonald. She wanted him to leave Mr. Smith and her alone.

[5] Ms. Barreiro agreed on cross-examination she had no knowledge of any conversation between Mr. Smith and Mr. MacDonald which might have taken place before she arrived that morning, or while she was away from the spot for ten or fifteen minutes.

[6] Suzanne Reid is an employee of Shoppers Drug Mart on Spring Garden Road, Halifax, Nova Scotia. On February 13, 2010 she had worked from midnight to 8:00 a.m. At approximately 9:00 a.m. she was outside Shoppers Drug Mart smoking a cigarette. She heard yelling. She looked toward Tim Hortons, which was across Spring Garden Road and west of Shoppers Drug Mart. The yelling was coming from in front of Tim Hortons. Ms. Reid could not hear what was being said, but heard a man's voice. She saw a lady sitting cross-legged on the ground. A man with a yellow jacket standing beside her and a taller man in a black jacket facing them and Spring Garden Road. The man in the black jacket was standing and yelling at the girl. On cross-examination, she agreed all three individuals could be yelling. The man bent down as if he was talking down to someone. The man in the black jacket hit the girl in the face with a forceful blow hard enough to put her whole body into the street. The girl was sitting the whole time. Ms. Reid did not see a backpack. She saw the blow to the face of the woman. She said she heard the impact of the punch from where she was standing. She testified the girl was hit with a closed fist uppercut, but agreed on cross-examination she did not actually see a closed fist. Ms. Reid saw the man take a step toward the girl after he hit her - Ms. Reid assumed the man kicked the girl - and told the police the man had kicked her, but on cross-examination stated she did not see the man kick the girl.

[7] After being hit, the girl got up and went into Tim Hortons and then the girl and the man in the yellow jacket left, and the man in the black jacket continued to panhandle in front of Tim Hortons.

[8] Ms. Reid called the police and upon arrival of a police officer identified the man in the black jacket as the man who hit the girl.

[9] Graham Keith MacDonald testified. He is 38 years of age, with a grade ten education. On February 13, 2010, he was living at Metro Turning Point, at Halifax, Nova Scotia. At the time he had been panhandling in Halifax for three or four weeks in the Spring Garden Road area. He said the Tim Hortons is the best location for panhandling on Spring Garden Road.

[10] At the time he was addicted to Dilaudid. Prior to the incident on February 13 with Ms. Barreiro, he had last had a Dilaudid at approximately 5:00 to 6:00 p.m. on February 12, 2010. He liked taking Dilaudid pills about eight hours apart. The longer he goes without a pill after eight hours, the more he feels the symptoms of withdrawal, which include: cramps, chills, headaches, diarrhea and nausea. Mr. MacDonald did not like the feeling, stating a person gets pretty desperate sometimes. Around 9:00 a.m. on February 13, 2010, he was in withdrawal and desperate to get pills. He testified the withdrawal was getting worse as time went by.

[11] On February 13, 2010, he got up and was out the door of Metro Turning Point to panhandle to get money for a pill. He went to Spring Garden Road, arriving at the Tim Hortons location around 8:00 a.m. He saw a man in a yellow jacket panhandling in front of Tim Hortons. Mr. MacDonald wanted that spot. Mr. MacDonald spoke to the man. The man said he needed to make \$3.00. Mr. MacDonald thought it would take the man 10 to 15 minutes to make the \$3.00. Mr. MacDonald walked away.

[12] After about 45 minutes Mr. MacDonald returned. The man in the yellow jacket was no longer alone, there was a girl sitting on a book bag beside the man. Mr. MacDonald asked if he could have his turn. The man said no, although the man had made the \$3.00 he wanted, he was going to stay to make another \$20.00 for his friend - the girl. Mr. MacDonald testified it could take another hour or two for the man to make \$20.00. The conversation with the man was civil. Mr. MacDonald never raised his voice. He did not yell or scream.

[13] The man in the yellow jacket broke the deal between himself and Mr. MacDonald that he would leave after he made his \$3.00. Mr. MacDonald wanted the spot. The girl started to swear at Mr. MacDonald. She told Mr. MacDonald to fuck off down the road or she will punch him in the face. The girl was sitting in front of Mr. MacDonald on her backpack. Mr. MacDonald bent down and got in the girl's face and asked her to hit him. The girl punched Mr. MacDonald in his lower lip. Mr. MacDonald spit up blood. The girl did not hit Mr. MacDonald hard enough to make him back up. Mr. MacDonald threw a left hook, hitting the girl in the face with the closed fist of his left hand, knocking her off her backpack into Spring Garden Road - Ms. Barreiro's back was on Spring Garden Road with her legs in the air. Mr. MacDonald was thinking this is not good. Mr. MacDonald testified he had no intention of hurting Ms. Barreiro. He did not think he did

anything wrong. Although stating he probably hit her hard, he could not judge how hard he hit her. During the whole incident up to the punch by Mr. MacDonald, Ms. Barreiro remained seated on her backpack. After the punch by Mr. MacDonald, he watched Ms. Barreiro get up off the ground and walk into Tim Hortons.

[14] The test as to how to deal with credibility in a situation in which an accused person testifies is set out by Cory, J., giving the majority opinion in *D.W. v. The Queen* (1991), 63 C.C.C. (3d) 397 (S.C.C.) at p. 409 as follows:

... A trial judge might well instruct the jury on the question of credibility along these lines:

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

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

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

[15] I have problems with the evidence given by Mr. MacDonald. Examples of problem areas include:

1) Mr. MacDonald testified he never raised his voice. However, Ms. Reid testified he was yelling. The yelling drew Ms. Reid's attention to the incident. Ms. Barreiro testified Mr. MacDonald was yelling and really aggressive. Mr. MacDonald was in withdrawal from his last Dilaudid pill which he took the previous evening. Mr. MacDonald testified he was getting upset Mr. Smith was not honouring their deal about the panhandling location. I accept Ms. Reid's and Ms. Barreiro's evidence that Mr. MacDonald was yelling.

2) Mr. MacDonald testified Ms. Barreiro punched him in his lower lip, causing him to spit blood. However, Constable Jeff Pulsifer, who spoke to Mr.

MacDonald after the incident observed that Mr. MacDonald did not have any injuries.

3) Mr. MacDonald testified he did not think he did anything wrong, yet he also testified thinking this was not good (referring to his punching Ms. Barreiro).

[16] I find the facts of the case are as follows:

[17] On February 13, 2010, Anna Maria Barreiro and John Graves Smith were panhandling in front of Tim Hortons on Spring Garden Road, in Halifax, Nova Scotia. Mr. Smith was standing and Ms. Barreiro was sitting beside him, cross-legged on her backpack. Just before 9:00 a.m. the accused, Graham Keith MacDonald, approached them, wanting them to leave so he could panhandle in front of Tim Hortons. Tim Hortons is one of the best spots to panhandle on Spring Garden Road.

[18] Mr. MacDonald wanted to panhandle to get money to buy a Dilaudid pill. Mr. MacDonald was addicted to Dilaudid. He had last had a pill at 5:00 or 6:00 p.m. on February 12, 2010 and was experiencing withdrawal symptoms, and was desperate to get money to buy a pill. The withdrawal symptoms were getting worse as time went by. Mr. MacDonald was upset and yelling. Mr. Smith and Ms. Barreiro may have been yelling. Ms. Barreiro told Mr. MacDonald to leave - to get the fuck out of here. Mr. MacDonald bent down toward Ms. Barreiro who remained seated. Mr. MacDonald got close to Ms. Barreiro's face and told her to hit him. Ms. Barreiro pushed Mr. MacDonald away. Mr. MacDonald hit Ms. Barreiro in the face with a left hook, the closed fist of his left hand, with enough force to knock the sitting Ms. Barreiro off the backpack into Spring Garden Road on her back with her legs in the air. Mr. MacDonald knew he hit Ms. Barreiro hard. Ms. Barreiro remained seated cross-legged on her backpack throughout the whole incident until hit by Mr. MacDonald.

[19] The next thing Ms. Barreiro remembers after the punch by Mr. MacDonald was walking into Tim Hortons. As a result of the punch by Mr. MacDonald, Ms. Barreiro's jaw was fractured in two places, requiring surgery. Plates and screws were used in dealing with the fractures. She could not chew for a month and a half.

[20] Mr. MacDonald admits Ms. Barreiro suffered a broken jaw in two places on February 13, 2010, a right parasymphysis mandible fracture and a left angle mandible fracture.

[21] The relevant sections of the *Criminal Code* are:

265. (1) Assault - A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

....

(2) **Application** - This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

....

(4) **Accused's belief as to consent** - Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

....

268. (1) Aggravated assault - Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

[22] The burden is on the Crown to prove all elements of the offence beyond a reasonable doubt.

[23] There is no doubt Mr. MacDonald applied force to Ms. Barreiro by striking her on the jaw on February 13, 2010 at Spring Garden Road, Halifax, Nova Scotia. He admitted it.

[24] Did Ms. Barreiro consent to the application of force by Mr. MacDonald?

[25] Mr. MacDonald submits Ms. Barreiro consented to the fight. She was the first person to introduce a physical aspect to the situation, as he says, by punching him in the mouth. That his hitting Ms. Barreiro was one blow in reaction to her hitting Mr. MacDonald. Mr. MacDonald remained on the scene panhandling showing he did not think he had done anything wrong, and it is unknown how much force it would take to break Ms. Barreiro's jaw.

[26] I find Ms. Barreiro did not consent to the application of force by Mr. MacDonald.

[27] Ms. Barreiro remained seated cross-legged on her backpack throughout the incident. She pushed Mr. MacDonald away when he got in her face. If Ms. Barreiro was consenting to fight with Mr. MacDonald, she would not have remained seated, vulnerable to the type of assault from Mr. MacDonald she suffered. Mr. MacDonald testified he thought it was not good (referring to his punching Ms. Barreiro). He also thought he hit her hard. I found Ms. Barreiro pushed Mr. MacDonald. Considering all of the evidence, it is clear there was nothing which occurred which would cause Mr. MacDonald to reasonably believe Ms. Barreiro consented to the assault by him.

[28] As a result of the assault by Mr. MacDonald, Ms. Barreiro suffered her jaw broken in two places. She required surgery. Screws and plates were used to repair her broken jaw. She could not chew for a month and a half. She suffered permanent nerve damage.

[29] The Shorter Oxford dictionary, 5th ed., Oxford University Press, defines "wound" as follows:

Wound - noun - An injury to body tissue caused by a cut, blow, hard or sharp impact, etc., esp. one in which the skin is cut or broken; an external injury.

Verb - Of a person, weapon, etc.; inflict a wound or physical injury on (a person, the body, etc.)

[30] "Maim" is defined as:

Maim - disable, wound, cause bodily hurt or disfigurement to. Now, deprive of (the use of) a limb etc.; mutilate, cripple; *fig.* render powerless or essentially incomplete.

[31] On the evidence, it is clear Ms. Barreiro was wounded or maimed by Mr. MacDonald.

[32] I find the Crown has proved all the essential elements of the offence of aggravated assault beyond a reasonable doubt, and I find Mr. MacDonald guilty of the charge pursuant to s. 268 of the *Criminal Code*.

Coughlan, J.