

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Weare*, 2019 NSSC 400

Date: 20190425

Docket: CRH 473277

Registry: Halifax

Between:

Her Majesty the Queen

v.

Theodore Floyd Weare

TRIAL DECISION

PUBLICATION BAN: s. 517(1) and s. 539(1) of the *Criminal Code*

Judge: The Honourable Justice Jamie Campbell

Heard: April 23, 24, and 25, 2019, in Halifax, Nova Scotia

Oral Decision: April 25, 2019

Written Decision: February 19, 2020

Counsel: Rick Woodburn, for the Crown
David Hirtle, for the Defence

By the Court (orally):

[1] Theodore Weare has been charged with committing an indecent act in a public place and with a breach of the conditions of his probation. The breach charge is related to the indecent act charge so that if Mr. Weare is found guilty of the indecent act charge he would be guilty of the other. The Crown proved the underlying probation order. The Crown did not seek conviction if Mr. Weare were to be found not guilty of the other charge.

[2] The Crown alleges that on August 29, 2017 Mr. Weare was masturbating in his car, while driving on a public street near Bedford Commons. The person who reported that was Ms. M.A.

[3] This of course is a criminal trial. The Crown is required to prove each element of the offence beyond a reasonable doubt. Mr. Weare is not required to prove anything. It is important to note that the case is not resolved as a contest of credibility between M.A. and Mr. Weare. It is not a matter of whether one is more reliable or more credible than the other. It is whether the Crown has proven the case beyond a reasonable doubt. That reasonable doubt can be found in any of the evidence or in the lack of evidence. Mr. Weare gave evidence and having been tested against the other evidence in the case, if it raises a reasonable doubt, he should be acquitted. It does not have to be believed in its entirety or entirely believed. It need only raise a reasonable doubt. If reasonable doubt is found in any of the other evidence he should be acquitted. He can be convicted only if having regard to all of the evidence, each of the essential elements of the offence has been proven beyond a reasonable doubt.

[4] At the outset there were two primary evidentiary issues. The first was whether the person seen by M.A. was Mr. Weare. That is not contentious. While Mr. Weare cannot say who it was that M.A. observed, he does not contest that he was driving in the area close to her on the date and time in question and was doing something with his hands that might be consistent with what M.A. observed. The evidence clearly establishes that it was Mr. Weare driving his 2007 black Honda Civic who was seen by M.A., giving rise to the complaint.

[5] The second and real issue is whether Mr. Weare was performing an indecent act in a public place when she saw him. That second issue involves both legal and evidentiary findings.

[6] There is no question that masturbating in a public place is an indecent act. The question is whether masturbating in one's car is an indecent act. A public place is a place to which the public have access by right, or invitation, express or implied.

[7] A private place that is exposed to the public is not a public place. For example, a person who does something in his own home but can be observed from outside is not performing that act in a public place. His home is a private place.

[8] Performing the indecent act in a vehicle involves a consideration of the context. The vehicle is not the place in which the act was done. If a person performs an act within a vehicle at a crosswalk on a busy street, he cannot be said to be performing that act in the privacy of his own car. It is a public place. A person performing an act in a car that is located in a secluded place may not be performing that act in a public place.

[9] Context clearly matters.

[10] When a person masturbates on a public highway, it would not matter if he were standing on the street or visible from within a car. The act is being performed in a public place, the highway. People driving vehicles can be seen by the other people in vehicles travelling along that public highway. The vehicle must have a windshield that allows people to see through it.

[11] There are some expectations of privacy in a vehicle but in this context an act performed by the driver of a vehicle travelling along a public highway in full view of the occupants of other vehicles travelling on that public highway is an act that is performed in a public place.

[12] The issue is whether the Crown has proven beyond a reasonable doubt that Mr. Weare was doing what he is alleged to have done.

[13] M.A. described leaving her dentist's office that morning. She got the date wrong. It is clear however that the events happened on August 29, 2017. She sat in her car and applied her makeup. She noticed a car that was parked in the lot with its rear end facing her car. It caught her attention because she believed that it had one tail light out. Whether it did or did not is not material. Mr. Weare says that his car has a special tint on the tail lights that make them difficult to see in the sunlight. It is reasonable that M.A. took note of what she believed at the time to have been a burned-out headlight.

[14] When she left the small black car left at exactly the same time. That too caught her attention. The video evidence shows Mr. Weare's car driving across the parking spots in the most direct route to the exit and keeping fairly close to M.A.'s car. Mr. Weare's car did not leave the parking lot in a way that was strikingly unusual. It would be fair to say that it was abrupt. Having the black car follow her out in that way alerted M.A. to the presence of the car and heightened her concern. She did not accept that she was paranoid about it. She had a heightened concern and awareness of the car. That is not unreasonable.

[15] When M.A. got onto Damascus Road she drove in the direction of the intersection with Duke Street. That was the only direction that a vehicle could take. Having someone take that same direction would not be a cause of any concern. But the timing and manner of departure caused her to take notice.

[16] Mr. Weare had just been to see his probation officer in Bedford. He was supposed to be going directly to his work site, on John Savage Drive. He says that he had just gone to the Tim Hortons and bought a hot chocolate. His console was filled with change, garbage and power cords, so he placed the hot chocolate between his legs. He drove to the Subway, parked, and put the hot chocolate on the dashboard of the car. He went in and got a sandwich. There was no question as to why he went from one shop to the other rather than just buying a sandwich at the Tim Hortons, especially when he was concerned about getting to work more or less on time.

[17] He got back into the car, ate half the sub, and placed the hot chocolate between his legs. His car was a manual transmission. He maintained that having the hot chocolate between his legs was not a cause of concern. Even though he had to use the brake, accelerator and clutch pedals to drive the car he said he believed he could do that safely. He said that emptying out the junk and change in the console with the cup holders would have taken a few minutes. First, he said 5 to 8, then maybe 3 to 5 minutes. Scooping out half a cup holder of change to put it in another cup holder, tossing the power cords on the seat along with some wrappers realistically would have taken a moment. That seems to have been an odd choice.

[18] Mr. Weare said that he drove away without noticing the blue car that M.A. was driving. He went to some lengths to say that he had not noticed it. He is seen on a video walked out of the Subway shop. The bright blue Subaru was parked behind him and he walked past it. It just happened that he finished his sub and headed out at exactly the same time as the blue Subaru. He took a very direct route

in following that car to the exit and drove at a rate of speed that while not excessive was at least noteworthy. It looks like Mr. Weare was intentionally following M.A. but the video is not conclusive evidence of that.

[19] The two cars then turned right on Damascus Road in adjacent lanes. Both lanes turn left onto Duke Street. M.A. was planning to drive to the next intersection where she would take the highway that leads to the airport. Mr. Weare says that he was heading out to a job site on John Savage Drive and taking Duke Street to take him in that direction.

[20] This was the first time that Mr. Weare had driven his car in some months. He was not permitted to drive. He was not familiar with the streets in the area, despite working for Dexter Construction for 9 ½ years. But he was going to make his way out to the work site, on his own, driving a car that he should not have been driving. He was not going to the Dexter office, where his apartment was located and from which he eventually caught a lift to work. It isn't clear why he was prepared to take the risk of driving to the job site in that car rather than going to the Dexter office. It does play into his narrative though.

[21] M.A. says that Mr. Weare's car got in the lane next to her but stayed back, not coming entirely parallel with her vehicle when they stopped at the lights at the intersection. That made her uncomfortable. Mr. Weare says that staying back from the stop line at an intersection is a habit he has. Larger vehicles have trouble making the turn when drivers crowd that stop line. In this case, no larger vehicle would be assisted. There is a concrete barrier separating the lanes of traffic going in each direction. Even at that though, he says it's a habit.

[22] M.A. turned left onto Duke Street heading toward the 102 Highway. Mr. Weare says that he did the same.

[23] It is at the moment of the turn that Mr. Weare says his hot chocolate spilled. He says that it spilled out of the cup as he shifted gears in the course of making the turn. At some point, as he started to come out of the turn, he reached down to pick up the cup and when his fingers touched it the lid came off and it spilled all over him. He reached into the back seat and got a black hoodie which he began to use to clean up the mess. He was rubbing the black hoodie all over the lower front part of his body to clean up the spilled hot chocolate. All the while he was perhaps dealing with shifting gears and was aware of other traffic in the area. He did not consider the prospect of just pulling off the street to clean up but instead continued driving and wiping his front.

[24] The speed limit on Duke Street in that direction of travel increases from 50 km per hour to 70 km per hour. M.A. was aware that the vehicle in the lane next to her was still keeping pace with her but not overtaking her. It was keeping back in the next lane. She decreased her speed so that car would just go by her. It did not. It kept pace.

[25] Mr. Weare says that he decreased his speed when the vehicle in front of him, and one lane over, which we know to be M.A.'s, slowed down dramatically. She slowed down to get the car to go by her. That's understandable. Mr. Weare says that he was concerned that something was in front of the other car. Mr. Weare said that while he was making the turn to go up Duke Street, he was aware of a truck waiting at the light to his right, to follow him up Duke Street. Yet, he still slowed quickly when the car in the lane next to him slowed down. But he says, he still had not taken any notice of the blue Subaru. He said that when the car slowed down, he didn't look inside. He just looked in front. He did not look into the car, just in front of it to see if anything was blocking it. He did not even glance at that car.

[26] It is at this point that M.A. says she looked across and saw the young white male in the black car. That was Mr. Weare. She saw him in the car and was able to identify what he was wearing. It was the same clothing he'd been wearing in the subway shop as seen on the video.

[27] She said that she saw him holding onto his penis and moving his hand in an up and down motion. She said that she was clearly able to see into his car given the angle. She said that she had no doubt about what she saw. It was as she said phallic in shape and skin tone in colour. She was able to observe this over some seconds but could not quantify how many seconds. It was seconds, not minutes. It was not characterized by her as a fleeting glimpse or a glance. She said that she saw the man looking directly at her.

[28] Mr. Weare argues that what to M.A. may have looked like a penis was not. The gearshift of his car was originally grey plastic. The grey had been worn off and the knob of the gearshift had taken on what he called a peachy colour. Mr. Weare was however not moving his hand in an up and down stroking motion on the gearshift. Nor was the gearshift in the area near his groin or crotch. What she says she saw was centred in relation to his body. The clothing that he was wearing was not skin tone and the hoody that he says he was using to clean up the spilled hot chocolate was black.

[29] M.A. says that she stopped her car. She saw the black car make a u-turn. She saw the license plate number and called it in to 911.

[30] Mr. Weare kept on going. He says that he made the u-turn at the intersection further up the street. While he had been in a bit of a hurry to get to work, and was concerned about being on time, he said that he was not rushing around. He turned around and went to the Dexter Construction site on Rocky Lake Road. He had an apartment there. He changed his clothes to get out of the pants and shirt that had hot chocolate on them. He backed his car into the back of the parking lot and got a lift to work with one of the company trucks. He said it was faster to wait for them than to take his own car because they went right into the work site. He also acknowledged that he was not supposed to be driving at all because he had no insurance. He would have had good reason to avoid the police.

[31] His post offence conduct as he described it, is consistent with his version of events. That kind of evidence must be carefully considered because it can be consistent with an innocent explanation or at least one that is not inculpatory of the offence charged. If a person spilled hot chocolate on his clothes he might well want to change. If he wanted to avoid being seen driving his car because he was not supposed to be driving, his actions would be consistent with that as well. His behaviour is also consistent with the actions of someone who had been seen committing an indecent act and wanted to get rid of the clothes he had been wearing and get out of the car. That evidence cuts both ways.

[32] Mr. Weare was arrested that day at the work site. He was told that one of the charges was that he had committed an indecent act. Yet his clothing, which would have had the evidence of the spilled hot chocolate were destroyed by his family. Of course, he is not required to prove anything, but he did fail to secure evidence that could have been helpful in establishing the truth of his narrative.

[33] So, there is a fair bit of commonality on the evidence. Mr. Weare was driving alongside M.A. at one point. She says that she saw him stroking his penis. He says that he was cleaning up spilled hot chocolate. Again, it is not a matter of which one is more credible or more reliable or even more effective and articulate as a witness. It is whether the Crown has eliminated any reasonable doubt as to Mr. Weare's guilt.

[34] A person's confidence in their observations is not indicative of their accuracy. People make incorrect observations of which they are entirely confident. Sometimes it can be said that the more confident the less reliable. Even smart and

well-meaning people do that. But they don't always. Sometimes, what people see is real. Sometimes they know it's real. They are confident because they know what they saw. Observations are not infallible, but they are not worthless either. They have to be considered having regard to the context in which they were made and the people making them.

[35] M.A. was a disinterested witness. She did not know Mr. Weare and had had no previous interactions with him. She would have no motive to draw him into a case such as this, and no motive has been suggested for why she would want to drag herself into it either.

[36] M.A. was a precise and careful witness. She was prepared to say what she believed she had seen but would go no further. She would not estimate times or distances. She could not say whether there was a person in the front passenger's seat. She did not see a person in that seat, but she could not say definitively whether or not there was a person in the seat. She did say that her view was not obstructed. She was not the kind of confident witness who says that they have complete recollection of everything observed and who pretends to have observed everything.

[37] She was a witness who was very careful about not saying what she could not know or could not remember. I accept her evidence that her observations were made when she was alert to her surroundings. She felt that something strange was going on. When she slowed down and the black Honda Civic kept pace with her, she would have every reason then to be aware and watchful. She was not a casual observer.

[38] She looked into the car because she was concerned. She was looking in a purposeful way.

[39] She had an unobstructed view. The windows of the vehicle may have had what is referred to as a factory tint that was not enough to obstruct a person from seeing inside the car. M.A. could see into Mr. Weare's car for a matter of seconds, enough to make such an observation. It was not speeding past her. She was able to describe the clothing the person was wearing.

[40] When Mr. Weare turned the vehicle around, M.A. was able to accurately get his license plate number. She immediately called 911. This was not a situation in which minutes or hours later she spoke with someone and eventually made a report. She reported what she saw immediately. She did not spend time

reconstructing what she had seen in her mind to determine what it was. She knew right away what it was.

[41] Mr. Weare has suggested that she might have seen something that she believed was a penis. Nothing was noted as being in the front seat of the car that was flesh coloured except the peachy coloured gearshift handle. There was no stroking up and down of that. The hoodie that Mr. Weare says he used to wipe up the mess was black. Moving that around could hardly be mistaken for a white flesh coloured penis.

[42] M.A. as an observer was highly credible and highly reliable. She was careful not to overstate things. As an observer she had an opportunity to see what she says she saw. It was not a fleeting glimpse but a matter of seconds. It was not in the distance but in reasonably close proximity. She was not called upon to distinguish one penis from another or one face from another. She was identifying a body part in a place where there is no evidence of anything else that could be reasonably mistaken for that part given that it was being stroked in an up and down motion.

[43] Mr. Weare does not have to disprove anything. He is not required to respond to M.A.'s evidence in the sense of proving it to be wrong. He need only raise a reasonable doubt.

[44] His own evidence does not do that. Mr. Weare has a criminal record. It is extensive and involves breaches of various kinds. It must be stated that it also contains convictions for committing indecent acts. The circumstances of those convictions are not known and, in any event, they have no bearing on this matter. A judge, like a jury, must be careful about not using propensity reasoning and that is a dangerous potential where a similar offence is noted in the record. Those convictions cannot and should not play any part in the determination of this matter. Had this matter been before a jury they would have been removed from any mention of his record.

[45] Mr. Weare's record does speak to his credibility. He has not had numerous offences of dishonesty, like theft and fraud. There is one theft charge. The presence of breaches suggests that he does not feel bound by his own word or by orders of the court. That record does not detract from Mr. Weare's credibility in any substantial or significant way.

[46] The problem is with Mr. Weare's story.

[47] Mr. Weare's evidence requires that an implausible series of circumstances have taken place.

[48] He said that he didn't notice M.A.'s car. It would be hard to miss. He drove out behind it. But he insisted that he had taken no notice of it, despite taking notice of other vehicles.

[49] He says that he was not following M.A. out of the parking lot but it did appear that way. It would be highly coincidental that he finished his sub at the exact same time she finished applying make-up. His speed leaving the lot suggests strongly that he had an interest in keeping up to that blue Subaru.

[50] He drove off with a hot chocolate between his legs, driving a standard shift car. That would not be a sensible thing to do but it might be understandable if a person bought a hot drink in a drive through and then noticed that the cup holders were full. In Mr. Weare's case he went from Tim Hortons where he had bought a drink and no food, to Subway, where he bought food and no drink. He had time then, lots of time, to empty the cup holder and put the hot chocolate in it. He didn't think of that he said. It would take a moment to empty out one cup holder.

[51] When the cars got to the intersection of Duke and Damascus Road, he stayed back of the stop line at the intersection, even though doing that had no benefit for anyone. It might be a habit but at an intersection like that one it made no sense. There would be no reason at all to do it.

[52] Mr. Weare says that he spilled the hot chocolate while making the turn and shifting gears. He maintained that he was aware of other traffic. He knew he was on a busy street. He didn't know his way around the city very well. So, the reasonable thing to do would be to pull off the street. He didn't. He kept going. What was worse was that he then says he reached into the back seat and got a hoodie to try to clean himself up. The hoodie wasn't absorbing the hot chocolate. So, he's driving down a busy street, shifting gears and furiously wiping with the hoodie. By this point it would be safe to say that any damage in terms of being burned would have been done. This is not to criticize his driving behaviour. It points to whether a person would behave in that way, making that behaviour more or less likely.

[53] It just happened that while he was doing that, he also noted M.A.'s car slowing down so he slowed down. That car was not directly in front of him. There was nothing impeding his forward progress. Driving by at normal speed would

have been entirely justifiable driving behaviour. Instead, he says he slowed down to see what was in front of the car in the adjacent lane, of which until that time he had taken no note at all. He was adamant in saying that he didn't look into the car as he passed it. Given that the person had just slowed suddenly, it would be a reasonable reaction to glance at the other car to see what caused the slow down.

[54] So, from the point of leaving Tim Hortons to the time when the cars were adjacent to each other on Duke Street, and not having regard to the post offence conduct, Mr. Weare's version of events relies on a series of unusual events and behaviours. One or two of those might make for a strange story. The combination here makes for a narrative that is in itself not reasonable and is in fact so unreasonable that it cannot be said to raise a reasonable doubt.

[55] When confronted in cross-examination Mr. Weare often said that he was confused. There may indeed have been some confusing lines of questioning but there were also times when he confidently stated details at one time only to walk them back later.

[56] Mr. Weare was neither a reliable nor a credible witness.

[57] Human observations are notoriously imperfect. People believe they have seen things that they have not and fail to see things that are obvious. That concern has to be considered with the other evidence to determine whether there is a reasonable doubt. In this case, the circumstances of the observation made by M.A. act as guarantors of reliability. Her evidence was highly credible and highly reliable. No reasonable doubt arises from her evidence. Mr. Weare's evidence was not reliable and not credible. It did not raise a reasonable doubt.

[58] I find Mr. Weare guilty of both counts on the indictment.

Campbell, J.