

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Cole, 2013 NSSC 446

Date: 20131128

Docket: CRH 417680

Registry: Halifax

Between:

Her Majesty the Queen

v.

Justin Joseph Charles Cole
and
Jonathan David James Murphy

Judge: The Honourable Justice Felix A. Cacchione

Heard: November 18-20, 2013, in Halifax, Nova Scotia

Written Decision: April 16, 2014

Counsel: Melanie Perry, for the Crown
Pavel Boubnov, for the defendant, Justin Cole
Mark Bailey, for the defendant, Jonathan Murphy

By the Court (orally):

[1] The accused, Justin Cole (Cole) and Jonathan Murphy (Murphy), are charged jointly on a 19 count indictment with: attempted murder of Kurt Willner (Willner) contrary to s.239(1)(a) of the **Criminal Code**; using or threatening to use a firearm in committing an assault, s.267(a); break and enter with intent to commit an indictable offence, s. 348(1)(a); using a firearm in the commission of an assault with a weapon, s. 85(1)(a); possession of a weapon for a purpose dangerous to the public peace, s. 88(1); carrying a concealed weapon without a **Firearms Act** authorization, s.90(2)(a); possession of a firearm without a license and registration, s.92(1); possessing a loaded restricted firearm, s.95(2)(a); pointing a firearm at Kurt Willner without lawful excuse, s. 87(1); discharging a firearm with intent to endanger the life of Kurt Willner, s.244; discharging a firearm with intent to endanger the life of Shae DeCoste, s.244.

[2] Cole is also charged with: possessing a firearm while prohibited to do so by an undertaking dated January 16, 2013, s.117.01; possessing a firearm while prohibited to do so by a probation order dated December 8, 2010, s. 117.01; willful failure to comply with a condition of an undertaking dated January 16, 2013 that he keep the peace and be of good behaviour, s.145(3); unlawful failure to comply with a condition of an undertaking dated January 16, 2013 that he not possess a firearm, s. 145(3); failure to comply with a condition of a probation order dated December 8, 2010 that he keep the peace and be of good behaviour, s.733.1(1)(a); and failure to comply with a condition of a probation order dated December 8, 2010 that he not possess or carry a firearm, ammunition or explosive substance, s.733.1(1)(a).

[3] Murphy is also charged on the same indictment with: possessing a firearm, to wit: a 45 calibre Colt semi automatic pistol while prohibited to do so by a prohibition order dated August 26, 2005, s. 117.01(1); and possessing ammunition while prohibited from doing so by a prohibition order dated August 26, 2005, s.117.01(1).

[4] The alleged offences arise from two separate incidents which occurred approximately one hour apart in the late evening of January 25, 2013.

[5] The case against Cole and Murphy is based on the direct evidence of two witnesses, Willner, the alleged victim, and Kelly Cole (Ms. Cole), sister of the accused Cole and, at the time, the common law partner of Willner. The case is also based on the circumstantial evidence of various police officers and the results of forensic testing.

[6] The following admissions were made at the commencement of the trial:

1. That at the time of the alleged offences Murphy was bound by a ten year order of prohibition dated August 26, 2005;
2. That on January 25, 2013 Cole was bound by a probation order dated December 8, 2010 which compelled him to keep the peace, be of good behaviour and to not, possess or carry a weapon, ammunition or explosive substance;
3. That Cole was also bound by an undertaking dated January 16, 2013 which required him to keep the peace, be of good behaviour and not to possess firearms or ammunition;
4. That Murphy was not, at the relevant time, authorized under the **Firearms Act** to carry a concealed weapon and was not the holder of a licence and registration certificate for any firearm;
5. And that Cole was not, at the relevant time, authorized under the **Firearms Act** to carry a concealed weapon and was not the holder of a license and registration certificate for any firearm.

The Evidence

[7] Willner testified about two incidents which occurred at the apartment he shared with Ms. Cole. During the first incident a shot was fired from a pistol. Ms. Cole was not present at the time of the first incident, however she was present for the second and testified about what she saw and heard then. No shots were fired during the second incident.

[8] Willner's evidence was that on January 25, 2013 he was at his residence, a second storey apartment at 55 Prince Albert Road in Dartmouth, with his young son Shae. He was having a regularly scheduled access visit with his son. Shortly after 9:00 p.m., Cole and Murphy entered the apartment through the closed but unlocked entrance door.

[9] Willner admitted that at the time in question he was dealing drugs as a source of income. His evidence was that earlier that day there had been discussions with Cole for the purchase by Cole of a substantial quantity, that is 20 lbs, of marijuana. The drug transaction was to take place earlier on the day of this incident, but did not occur because Cole had not produced the money needed for the purchase. Willner testified that the drugs were not kept at his residence, but rather at that of a friend.

[10] Willner's evidence was that he knew when the two accused arrived at his residence that they wanted him to assist them in meeting and robbing the person who was in possession of the drugs. His testimony was that they wanted him to drive them to where the drugs were being kept so that they could steal the drugs. In other words, to assist in a drug ripoff. Willner refused and an argument ensued between he and Cole in the living room area. Willner's son was playing in the living room area at the time.

[11] Willner testified that Cole then pulled out a 9 mm pistol from under his armpit, struck him on the side of the head with the pistol and then fired the pistol at his head from an arm's length distance away. The bullet penetrated the living room ceiling.

[12] Willner's evidence was that his son Shae was frightened by what happened in his presence. Mr. Willner then attempted to allay his son's fear by telling him that it was just joking around and that the gun was not real.

[13] Both accused left the residence.

[14] Willner testified that he had previously seen the firearm Cole wielded that evening. According to Willner's evidence, Cole had the same pistol at the home of his mother Mia which was where Willner first saw the weapon.

[15] Once Cole and Murphy left the residence Willner called Ms. Cole at her place of employment and asked her to return home. He did not tell her the reason for his request. Ms. Cole left her place of employment and arrived home some 15 to 20 minutes later.

[16] Ms. Cole's evidence was that when she arrived Shae was jumping up and down pointing at the ceiling. He was in an agitated state. Willner appeared to her to be in shock.

[17] Shortly after her arrival she and Willner went to the bathroom to speak privately. Willner advised her of what had occurred before she arrived. They spoke about what should be done.

[18] Ms. Cole knew that Willner had some involvement in the drug trade with her brother, but not with Murphy. She was also aware that some of Willner's income came from selling drugs.

[19] The apartment was described by various witnesses as being an open concept kitchen/living room space with two bedrooms and a bathroom/laundry room. The entrance door to the apartment opened into the kitchen area. Ms. Cole's evidence was that after she and Willner left the bathroom they were in the living room area for approximately five or six minutes when suddenly the locked apartment door was pushed open with such force that the interior door frame was broken. Photographs taken by Detective Johnston, Exhibit 2, show the broken door frame and also that the lock plate was dislodged from its setting and on the floor.

[20] Cole and Murphy then entered the apartment. They both told Ms. Cole to leave the apartment with Willner's dog and his son. Murphy repeatedly told her to take Shae and leave the apartment. Ms. Cole's evidence was that at some point her brother said "Kelly's going to need a new boyfriend". Shae was in a panic. Ms. Cole told Shae to put his boots on, but he was so scared and frantic that he could not even put his boots on.

[21] Ms. Cole's evidence was that she left the apartment approximately five minutes after Cole and Murphy entered. Her evidence was that while she was trying to get Shae's boots on, Willner tried to put his own shoes on at which point Murphy asked him where he was going. When Willner said he was going with his

son, Murphy told him he was not going anywhere. Murphy grabbed Willner and pulled him back. Ms. Cole testified that she then heard her brother say “John” at which point Murphy pulled out a gun from the front of his pants. Ms. Cole had not seen a gun up to this point.

[22] Ms. Cole left the apartment with Shae and the dog. She called a friend at work, but did not call the police. She told her friend to call the police and gave her the address. Her evidence regarding her reason for not calling the police was that she was in shock and did not want to put her brother in jail. She also testified that another reason she herself did not call the police was because Shae was in the car with her and he would hear her conversation. She also stated that she was scared and heartbroken.

[23] Ms. Cole’s evidence was that her brother appeared to have been drinking and also having “something else in his system”. She said his eyes were drowsy and he was not coherent.

[24] Ms. Cole testified that after this incident she and Willner stayed in the apartment for only one night. They then left the province because they were afraid to remain in Nova Scotia.

[25] Her evidence was that, to the best of her knowledge, Cole and Willner had never argued before.

[26] Ms. Cole denied talking to Willner about the incident before giving her statement to the police. Her evidence was that she did tell Willner it was okay for him to tell the police that her brother was involved because she understood that Willner had not been honest with the police about what had happened.

[27] Willner’s testimony was that he gave the police two statements that evening. His evidence was that he said nothing about what had happened in the apartment in the first statement, however in the second statement, given shortly after the first statement, he told the police what he subsequently testified to under oath at trial. He stated that he gave the second statement after reflecting on what occurred in the presence of his son.

[28] Willner's evidence was that after Ms. Cole left with his son, Murphy was waving the gun around and pointing it. All three men were in the kitchen area. They heard noises and people coming up the stairs to the apartment. Willner testified that he was told by the accused to tell the police that nothing had happened and that he was alone in the apartment. Murphy and Cole then went to the bathroom.

[29] Constables Harding, Osmond and Jardine were the first to respond to a weapons complaint at 55 Prince Albert Road, the Willner residence. Constable Harding's evidence was that as he approached the entrance door to the apartment he heard voices coming from inside the apartment and also heard footsteps. He tried to open the door, but it was locked. He announced the police presence, heard someone come to the door and heard footsteps through the wall to his right. He described the other side of the wall through which he heard footsteps as the hall leading from the kitchen to the bathroom. Once he entered he saw Willner in the kitchen area. He described Willner as having a concerned look. He asked Willner if anyone else was in the apartment and Willner replied that he was alone. Constable Harding then noticed Cole and Murphy coming from his right. All three were arrested.

[30] Constable Harding searched Murphy at the scene and found gloves in his front pocket which he placed on the floor. Constable Harding assisted Constable Cooke in searching the apartment for the presence of other occupants. In the bathroom Constable Harding observed a gun in the laundry hamper. This gun, a 45 calibre Colt semi-automatic pistol, exhibit 5, was seized by Constable Cooke.

[31] Constable Harding had minimal contact with Cole at the scene. He did, however, have more involvement with him at the police station where he assisted another officer in subduing Cole after Cole flipped a table over. He described Cole's state at the police station as being extremely agitated.

[32] Constables Osmond and Jardine were with Constable Harding when he entered the apartment. They as well heard footsteps in the apartment when the police presence was announced and before they entered.

[33] Constable Osmond arrested Cole and described him as appearing intoxicated, acting fidgety and seemingly confused.

[34] Constable Jardine's evidence was that Willner looked nervous and shaken. He, as well, heard Willner say that he was alone in the apartment. Constable Jardine also stated that Willner appeared to have fresh bruising on the left side of his face around the area of his eyebrow.

[35] Detective Constable Johnston was the forensics identification officer assigned to this case. She took photographs at the scene and at the police station. She also took samples at the police station from both Cole and Murphy for the presence of gunshot residue. These samples were analysed and particles characteristic of gunshot residue were found on the sampling tubes used to sample Murphy's left hand and the left side of his face. Particles characteristic of gunshot residue were also found on the sampling tubes used to sample Cole's left hand and the left and right sides of his face. DNA swabs were taken from Murphy and swabs were also taken of the 45 calibre pistol (Exhibit 5) seized from the laundry hamper in the Willner residence. An analysis of these swabs revealed the presence of Murphy's DNA on the slide and the hammer of the pistol. The estimated probability of an unrelated individual from the Canadian Caucasian population have the same DNA profile was pegged at one in three million persons.

[36] Detective Johnston also searched for the bullet in the ceiling of Willner's residence but was unable to locate it. She did not find an expended cartridge casing when she was searching and gathering evidence in the apartment.

[37] On March 27, 2013 Detective Johnston seized a cartridge casing found by Mr. Leverman, the property owner. Mr. Leverman had been sweeping up after having repaired the damage caused to the ceiling by the bullet and by the police attempts at retrieving it. While sweeping he noticed the cartridge casing. He put it on top of the refrigerator in the apartment and advised the police of its presence there.

[38] This cartridge casing was sent for analysis. The expended cartridge case found at the scene was analysed and found to have been fired from a 9 mm pistol which was subsequently located after a search of the residence of Mia Cole, mother of the accused Cole.

[39] Constable Hines, an RCMP officer attached to the Integrated Guns and Gangs Unit, testified that on March 21, 2013 he assisted other officers in executing a search warrant issued under the **Controlled Drugs and Substances Act** at 96 True North Crescent, the home Mia Cole. Constable Hines was responsible for seizing any gun found during the search and another officer, Detective Shannon, was responsible for seizing any drugs found. Constable Hines seized, among other weapons found in the house, a 9 mm pistol (Exhibit 13).

[40] Constable Stevens also assisted in the search of the residence and he testified that he searched the dining room area where he found two handguns in a Turtles tin can. One of these was a loaded 9 mm pistol which he then turned over to Constable Hines.

[41] No evidence was called by the defence.

[42] I accept some but not all of Willner's evidence. At times during his testimony Willner appeared to be purposely vague in describing what occurred. The Court can accept all, some, or none of a witness' evidence. I accept Willner's evidence that on the evening of January 25, 2013 Cole and Murphy entered his apartment unannounced on two separate occasions. I also accept that on the first occasion Cole produced a 9 mm pistol which he had concealed on his person.

[43] I do not accept that Willner was struck on the side of his face with that weapon. Surely a blow to the face with a pistol would have left some visible mark. Of all the witnesses who dealt with Willner that evening, including his girlfriend Ms. Cole, Constable Jardine was the only one who noticed "fresh bruising" to his face. No medical attention was requested or sought for this alleged injury. As well, no photographs were taken of this alleged injury.

[44] I accept as credible Willner's evidence that on the first occasion a shot was fired by Cole. I do not, however, accept that it was fired in his direction and aimed at his head. Rather, the inference I draw from the proven facts is that the shot was fired as a threat and not with an intention to kill.

[45] I reach this conclusion based on the fact that according to Willner, Cole was at an arm's length distance away from him when he fired the shot. At such a short distance it is hard to imagine that Cole would have missed if his intent was to kill

or cause grievous bodily harm likely to cause death. As well, the location of the bullet hole in the ceiling and not in a wall supports the finding that the shot was fired in an upward direction and not fired at Willner's head. Moreover, it does not make sense that Cole would have wanted to kill Willner at that point since Willner was the person who knew where the drugs, that Cole wanted to ripoff, were located. Willner was the only one who could lead Cole to the drugs.

[46] I accept Willner's evidence as to his reason for giving a second statement to the police, which was that he had time to reflect on what had occurred and the fact that it had occurred in the presence of his young son.

[47] Ms. Cole was a credible witness. It was obvious that testifying against her brother was a difficult thing for her to do. She was not evasive and answered all questions in a forthright manner. Her evidence was not impeached by showing inconsistencies between her evidence at trial and her statement to the police or her testimony at the Preliminary Inquiry.

[48] Her testimony about the emotional state of the young child upon her arrival and as the events unfolded was very credible and not exaggerated. Similarly convincing was her evidence about why she herself did not call 911 after leaving the apartment, but rather had a co-worker make that call. It was evident that Ms. Cole was truly concerned about the child's well being and did not want to expose him to further distress and trauma by making a 911 call in his presence. I find, as well, that Ms. Cole was torn between her concern for her boyfriend and his son and doing something which might put her brother in jail.

[49] Ms. Cole's evidence corroborated that of Willner in material respects such as: their conversation in the bathroom; the apartment door being forced open unexpectedly; what was said by the two accused; Murphy pulling out a gun from the front of his pants; and Willner trying to leave the apartment at the same time as she and Shae were leaving but being prevented from doing so by Murphy. As well, Ms. Cole's description of her brother's condition and his lack of coherence that evening was in keeping with the observations made by Constables Harding and Osmond.

[50] I accept Ms. Cole's evidence that she did not speak with Willner about what had occurred in her presence at the apartment before she gave her statement to the police.

[51] On the totality of the evidence, I am not satisfied that the Crown has proven beyond a reasonable doubt that either Cole or Murphy intended to cause death or bodily harm that they knew was likely to cause death to Willner. I find them not guilty on the first count in the indictment of attempted murder under s. 239(1)(a) of the **Criminal Code**.

[52] With respect to the second count under s. 267(a), I am satisfied beyond a reasonable doubt that Cole assaulted Willner with a weapon. He committed an assault under s.265(1)(b) when he threatened Willner by discharging a firearm in his presence. Cole had the present ability to effect his purpose which I conclude was to scare Willner into helping him with a drug ripoff. A conviction is entered against Mr. Cole on this count as well as on the count under s.85(1)(a) of the **Criminal Code**, that is of using a firearm while committing the indictable offence of assault with a weapon.

[53] I am not satisfied that Murphy was a party to the offence under s. 267(a) or to the offence under s. 85(1)(a). Murphy did not discharge the firearm and therefore cannot be convicted as a principal. In order to be a party as an aider under s. 21(1)(b) Murphy must be proven to have done something or omitted to do something for the purpose of aiding Cole in committing the offence of assault with a weapon.

[54] In order to be a party under s. 21(1)(c) it must be proven that Murphy encouraged Cole with words or acts and intended to encourage Cole. Mere presence at the scene where someone commits an offence is not sufficient to ground liability. It is not enough that what the aider does or fails to do has the effect of helping the other person commit the offence. It must be proven that the aider intended to help the other person commit the offence.

[55] It would be speculative to conclude that Murphy knew Cole had a firearm and intended to threaten Willner by discharging the firearm in order to scare him. I am not satisfied the Crown has proven beyond a reasonable doubt either that

Murphy intended the offence to be committed or knew that Cole intended to commit the offence and intended to help Cole accomplish his goal.

[56] There is also no evidence that Murphy abetted Cole by encouraging him to commit the offence or that he intended to encourage Cole to commit the offence.

[57] Accordingly I find Murphy not guilty on Counts #2 and #4, that is the offences under ss. 267(a) and 85(1)(a) of the **Criminal Code**.

[58] I am satisfied from the evidence that on the first occasion when Cole and Murphy attended Willner's residence, Cole had a firearm concealed and was not authorized under the **Firearms Act** to carry a concealed weapon. This firearm was pulled out by Cole only after he and Murphy had been in the apartment for some time. As previously stated, I am not satisfied that on the first occasion Murphy knew that Cole had a gun before Cole pulled it out and brandished it.

[59] On the second occasion when Cole and Murphy entered the apartment, Murphy was the one who had the gun concealed. I am satisfied that Cole knew Murphy had a concealed weapon at that time. It was only when Willner tried to leave the apartment and Cole said "John" that Murphy produced the weapon. I infer from this and Cole's words "Kelly's going to need a new boyfriend", that Cole knew Murphy had a weapon.

[60] I am satisfied beyond a reasonable doubt that neither accused was authorized under the **Firearms Act** to carry a concealed weapon and that both did, on separate occasions, attend the residence of Willner while carrying a concealed weapon. On the first occasion Cole had the weapon concealed under his arm in his jacket, and on the second occasion Murphy had the weapon concealed in the front of his pants. A conviction against both is entered on Count #6, for the offence contrary to s.90(2)(a) of the **Criminal Code**.

[61] I accept the evidence of Willner and Ms. Cole that while they were in the apartment the door was forced open causing damage to the door frame as shown in Exhibit 2, the photographs. Constables Harding, Osmond and Jardine corroborated the evidence about the damage. I also accept Willner and Ms. Cole's evidence regarding what was said and done in the apartment. The evidence satisfies me beyond a reasonable doubt that both Cole and Murphy broke into

Willner's residence with an intent to commit an indictable offence. Accordingly, I find both guilty of break and enter with intent to commit an indictable offence contrary to s. 348(1)(a) of the **Criminal Code**.

[62] I am also satisfied beyond a reasonable doubt that at different times that evening both Cole and Murphy possessed a firearm for a purpose dangerous to the public peace. The firearms in question were different on both occasions. On the first Cole possessed a 9 mm pistol, and on the second Murphy possessed a 45 calibre pistol. Accordingly, convictions are entered against both Cole and Murphy on Count #5, the offence under s. 88(1).

[63] I am also satisfied beyond a reasonable doubt that neither accused had a possession license and a registration certificate for either firearm. A conviction against Murphy and Cole is entered on Count #7 for the offence contrary to s. 92(1) of the **Criminal Code**.

[64] The evidence establishes beyond a reasonable doubt that both Cole and Murphy possessed, at different times that evening, a loaded restricted firearm. Accordingly, convictions against both are entered on Count #8 for an offence contrary to s. 95(2)(a) of the **Criminal Code**.

[65] With respect to Count #9, I am not satisfied that a firearm was pointed at Willner on either occasion that evening. I do not accept Willner's evidence on this point and Ms. Cole did not testify that she witnessed a gun in Mr. Murphy's hand being pointed. Accordingly, I find both Cole and Murphy not guilty on Count #9 relating to s. 87(1) of the **Criminal Code**.

[66] With respect to Counts #10 and #11, I am not satisfied that the Crown has proven beyond a reasonable doubt that Cole intended to endanger the life of Willner when he discharged the firearm on the first occasion when he was in the residence. I refer to my previous reasons regarding what occurred in the apartment and the intent of the accused Cole at that time.

[67] No evidence was presented on which a finding could be made that either Cole or Murphy intended to endanger the life of Willner's son Shae DeCoste by discharging a firearm. Accordingly, acquittals are entered for both accused on Counts #10 and #11 relating to s. 244 of the **Criminal Code**.

[68] I am satisfied beyond a reasonable doubt that Cole possessed a firearm while prohibited from doing so by an undertaking dated January 16, 2013 and by a probation order dated December 8, 2010. I am also satisfied that Cole breached his undertaking of January 16, 2013 by failing to keep the peace and by possessing a firearm and also that he breached the probation order of December 8, 2010 by failing to keep the peace and by possessing a firearm. Accordingly, convictions are entered against Cole on Counts #12, #13, #14, #15, #16 and #17 relating to offences under ss. 117.01(1), s. 145(3) and s. 733.1(1)(a) of the **Criminal Code**.

[69] The Crown has also proved beyond a reasonable doubt that Murphy possessed a firearm and ammunition while prohibited from doing so by an order of prohibition issued under s. 109(2) of the **Criminal Code** and dated August 26, 2005. Accordingly, convictions are entered against Murphy on Counts #18 and #19 relating to offences under s. 117.01(1) of the **Criminal Code**.

Cacchione, J.