SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. R.W.L.*, 2017 NSSC 111

Date: 2017-04-21
Docket: CRY No. 444275
Registry: Yarmouth

Between:

Her Majesty the Queen

v.

R.W.L.

Restriction on Publication: s. 486(4) C.C.

Judge:	The Honourable Justice James L. Chipman
Heard:	January 31 – February 3, 2017, in Yarmouth, Nova Scotia
Counsel:	Josie L. McKinney, for the Crown Raymond B. Jacquard, for R.W.L.

Orally by the Court:

Introduction

[1] During the early morning hours of August 11, 2015, a fire erupted at the home where R.W.L., his twin sons and family dog lived in Shelburne County. The fire reduced the home to rubble and the dog died. R.W.L. was soon arrested and charged with arson and killing the dog.

[2] As a result of the RCMP's investigation, numerous other charges were laid against R.W.L., primarily related to allegations that he assaulted and sexually assaulted his (estranged) wife in the lead up to the fire.

[3] After a four day trial in Yarmouth earlier this year, I reserved my decision until today.

[4] R.W.L. initially pled not-guilty to all charges in relation to this trial. By oral decision rendered in the midst of the trial on February 2, I granted R.W.L.'s motion for a directed verdict in respect of count 5, which reads:

> That he, on or about the 11th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did intentionally cause damage by fire to a dwelling house owned by […], situated at […], Municipality of Barrington, Shelburne County, Nova Scotia, which fire destroyed the dwelling house owned by […] situated at […], Municipality of Barrington, Shelburne County, Nova Scotia, contrary to Section 434.1 of the *Criminal Code*.

[5] I granted the non-suit motion because the Crown failed to establish the house was owned by the accused and his wife. Rather, the evidence revealed […] to be owned by the Estate of R.W.L.'s father.

[6] On the last day of trial and before he made his election whether to call evidence, R.W.L. changed his pleas in respect of all but one of the remaining counts referable to August 11, 2015. In particular, R.W.L. pled guilty to these counts:

> That he, on or about the 11th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did:
>
> 6. By word of mouth knowingly utter a threat to B.L. to cause death to B.L., contrary to Section 264.1(1) of the *Criminal Code*;

7. Commit Assault on B.L., contrary to Section 266 of the *Criminal Code*;

8. By word of mouth knowingly convey a threat to B.L. to cause death to T.N., contrary to Section 264.1(1) of the *Criminal Code*;

9. By word of mouth knowingly convey a threat to B.L. to cause death to I.C., contrary to Section 264.1(1) of the *Criminal Code*;

10. By word of mouth knowingly convey a threat to B.L. to cause death to N.L., contrary to Section 264.1(1) of the *Criminal Code*;

11. By word of mouth knowingly convey a threat to B.L. to cause death to D.L.C., contrary to Section 264.1(1) of the *Criminal Code*;

13. Being at large on his undertaking entered into before a Judge and being bound to comply with a condition of the undertaking, to wit: Keep the peace and be of good behaviour without lawful excuse failed to comply with that condition, contrary to Section 145(3) of the *Criminal Code.*

[7] In the result, I am left to determine whether or not R.W.L. is guilty of these remaining five counts:

That he, between the 1st day of January, 2009, and the 31st day of December, 2009, at, or near, Villagedale, Shelburne County, Nova Scotia, did:

1. Commit a sexual assault on D.L.C., contrary to Section 271(a) of the *Criminal Code*;

That he, between the 1st day of August, 2014, and the 31st day of August, 2014, at, or near, Villagedale, Shelburne County, Nova Scotia, did:

2. Commit an assault on D.L.C., contrary to Section 266 of the *Criminal Code*;

That he, between the 28th day of July, 2015, and the 11th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did:

3. Commit a sexual assault on D.L.C., contrary to Section 271 of the *Criminal Code*;

That he, on or about the 9th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did:

4. By word of mouth knowingly utter a threat to D.L.C. to cause death or serious bodily harm to D.L.C., contrary to Section 264.1(1) of the *Criminal Code*;

That he, on or about the 11th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did:

12. Wilfully and without lawful excuse kill a dog the property of D.L.C., that was kept for a lawful purpose, contrary to Section 445[.1(1)](a) of the *Criminal Code*.

Evidence Called

[8] The Crown called four RCMP officers, six lay witnesses and one expert witness. The accused gave evidence on his own behalf. In all, 14 exhibits were entered by consent.

Evidence With Respect to Count 12 – The he, on or about the 11th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did wilfully and without lawful excuse kill a dog the property of D.L.C., that was kept for a lawful purpose, contrary to Section 445[.1(1)](a) of the *Criminal Code*.

Cst. Philip Sauer

[9] RCMP Cst. Sauer worked out of the Barrington detachment at the time of the August 11, 2015 fire. He was working with Cst. Trites and received a call that the […] house was on fire. Shortly after he arrived at the home at close to 1:00 a.m., Cst. Sauer put R.W.L. in handcuffs and arrested him.

[10] It was Cst. Sauer's impression that R.W.L. had consumed a few drinks. He noted there were empty beer cans located around the lobster pots where R.W.L. was standing when the officers arrived on the scene.

[11] Cst. Sauer took note of what R.W.L. was wearing but made no further observations in respect of his clothes.

[12] The officer left the scene to transport R.W.L. to the Shelburne lockup. He then returned to the scene a second time and stayed until about 5:00 a.m. When he came back the second time, he said the fire was largely extinguished.

Cst. Jason Trites

[13] Cst. Trites confirmed he was on duty with Cst. Sauer on August 11, 2015, and that they received a call shortly before 1:00 a.m. He noted a 911 call had been

received from R.W.L.. When they arrived at […], there were several fire trucks on site.

[14] Cst. Trites called R.W.L.'s estranged wife, D.L.C., to advise her that the house was on fire. At the time, she was staying at a relative's residence in […]. She was asked to meet other police officers at Clyde River.

[15] Cst. Trites spoke with R.W.L. and formed the impression he was intoxicated, but not "grossly" intoxicated. In this regard, the officer noted R.W.L. was not slurring his words and did not emit an odor of alcohol. He described R.W.L.'s demeanor as shifting back and forth from calm to agitated. He noted R.W.L. had no signs of injuries.

[16] After Cst. Trites returned to the scene from transporting R.W.L. to Shelburne, he noted it was daylight and that the house had been reduced to rubble.

[17] On cross-examination, the officer was shown the prisoner report (exhibit 2) in respect of R.W.L.. He acknowledged there was circled, "odor of liquor", and that by the word "balance", Cst. Trites had circled "fair". By "speech", he circled "slurred". The officer then added, R.W.L. was "not staggering, but not sure of balance". Further, he circled "depressed" by the words "state of mind" and "alert" by the word "consciousness". Referring to R.W.L., Cst. Trites said he had "some issue with his sobriety".

Cpl. Michael O'Callaghan

[18] It was Cpl. O'Callaghan's day off when he was called to investigate the fire scene. He arrived at 3:00 a.m. and noted a number of emergency vehicles on the road. As part of his briefing, he learned there had been no loss of life or injuries. He said the fire was under control with small flames, smoke and steam from the water used to extinguish the fire.

[19] Cpl. O'Callaghan stayed at the site until the deputy fire marshal, Ronald Thibeau, arrived at the scene. He recalled Mr. Thibeau arriving perhaps two hours after sunrise.

[20] Cpl. O'Callaghan said he seized beer cans and the remnants of a 12-gauge shotgun found in the basement of the home. He said there was a barn next to the house and believed there to be three empty gas jugs located there. He thought they were each 20 litres in capacity. He noted there was a truck on the property between

the barn and house and that when a light was shone on the truck, oxen gear and tack were detected in the back of the cab.

[21] Exhibit 3, consisting of nine photographs of the scene, were introduced through Cpl. O'Callaghan and he referred to the ladder shown in a couple of the photographs. It was his belief that R.W.L. tried to get back in the home with the ladder in an attempt to rescue a pet.

[22] On cross-examination, Cpl. O'Callaghan confirmed that all three gas jugs were empty and that one had a spout in it, but he could not be sure about the other two jugs. He agreed he did not check to see if the stopper was still in the jug with the spout. He confirmed that the jugs were not seized.

Ronald Thibeau

[23] Mr. Thibeau was qualified by consent to give expert evidence as follows:

> Deputy fire marshal and qualified to give expert opinion evidence in determining cause of fire, detecting points of origin with respect to fire, identification of burn patterns, fire development and spread, and burn times.

[24] Mr. Thibeau spoke to his experience and expertise and his *curriculum vitae* was entered as exhibit 5. He noted that the fire damage was such that he could not do a complete investigation; in his words, "there was basically nothing I could do, it was impossible to do a cause and origin because there was so much damage."

[25] Mr. Thibeau said the fire had been called in at 12:23 a.m. and that the fire service arrived 12 minutes later. From the reports of damage at this point, he thought the fire had been burning a lot longer than what the times dictated. Asked about the use of an accelerant, the deputy fire marshal said he was not able to comment. He said there was no evidence of any spalding marks, which would be indicative of an ignitable liquid. Further, because the wires were consumed in the fire, Mr. Thibeau could not say whether it might have been an electrical fire. As to the possibility of televisions or gaming systems causing the fire, the deputy fire marshal thought this to be a rare possibility. He added that explosions are typically not a result of malfunctioning televisions or gaming systems but that electrical fires could cause explosions. Mr. Thibeau stated gasoline may be used as an accelerant. He noted if gasoline were to be used on one floor only, it may not result in a complete burn.

[26] On cross-examination, Mr. Thibeau agreed a number of factors may contribute to the rate of burn. These would include the presence of combustibles such as firewood, as well as the type of home construction. Further, he agreed weather conditions including wind strength affect the speed of fires.

D.L.C.

[27] D.L.C. has worked as a licensed practical nurse since 1993. She has three children, 16 year-old twins B.L. and N.L. (by R.W.L.) and a 20 year-old son, D.C. D.L.C. was married to R.W.L. for approximately 18 years. D.L.C. said they have been separated for about a year and a half and, "are in the process of a divorce".

[28] At the time of the fire, the family had two dogs, a six year old chocolate Labrador Retriever (A.) and a small dog described as a Yorkie (B.), which R.W.L. had given to the family as a Christmas present.

[29] D.L.C. was asked about the circumstances leading up to the events of August 11, 2015. She said she and her husband were not getting along well and that their relationship had gone downhill. She had recently moved out to her late grandmother's residence in […]. At the time of the fire, she was living in this residence with her friend, T.N.. She thought the two became "romantic" a couple of months later. At the time of the fire, the twin boys were living with their father.

[30] Upon learning of the fire, D.L.C. described her state of mind as "shocked and overwhelmed". To compound things, she did not initially know the whereabouts of her son, N.L..

[31] D.L.C. testified that on the early morning of the fire she received texts from R.W.L.. With the aid of exhibit 6, and given the Admissions (exhibit 1), D.L.C. confirmed texts received from R.W.L. as follows:

> 12:16:59 u try burn me out
>
> 12:26:29 u bastard i match bali die
>
> 12:27:02 Watch

[32] In response to these texts, at 12:28:25 D.L.C. responded with, "Stop it". R.W.L. then responded:

> 12:28:58 u Guy Burt me out ffs

[33] On the basis of these texts, D.L.C. said she thought R.W.L. was blaming her for burning the house. She said she then shut her phone off because she did not want to hear anything further from him. She thought the reference to “bali” was the family’s dog, B.. She added that this dog was little and always stayed in the house. She said that the dog was never found after the fire.

[34] On cross-examination, D.L.C. agreed, “Robert’s texts don’t make a lot of sense.” She agreed he had difficulty spelling and putting coherent sentences together, that it was “an art” to figure out what he was trying to say. As for the ownership of the house, she categorically stated that […] was in the name of the Estate.

[35] D.L.C. said that she complied with the police request to meet them at the station. She confirmed that once at the station she spoke with Sgt. Deluco and provided a statement.

D.C.

[36] D.C. is 20 years of age. He is a full-time fisherman. He moved out of the […] address at age 17 or 18.

[37] D.C. recalled having contact with his stepfather on the day of the fire. They were aboard R.W.L.’s boat, located at […], and he was helping his stepfather work on the hoist. He said his stepfather was not drinking during the time he was with him.

[38] Later in the evening, D.C. was drinking at a neighbour’s home in […]. With the aid of a screen shot of his phone (exhibit 14), D.C. recalled receiving a text at close to 9:00 p.m. when R.W.L. asked him what he was drinking, to which he replied (at 10:56 p.m.) “budweiser”. The next text is from D.C. to his stepfather at 12:28 a.m. reads “is your fucking house on fire for fuck sakes”. The response at 12:29:30 (time taken from exhibit 1) from R.W.L. reads “Yes I burt”. This is the last text received by D.C. from his stepfather at the material time.

[39] On direct examination, D.C. said that he texted his father right away after he learned of the fire. On cross-examination, D.C. agreed it is “an art” to try to figure out what R.W.L. is trying to say in his texts. He agreed that his stepfather often misspells words and his phrases are incomplete.

J.L.

[40] J.L. is the accused's brother. He recalled being asleep on his couch when he learned of the fire. He said that he and his common-law wife heard a banging on their door and it was B.L. who informed them of the fire. He could not recall what time this was other than it was after dark.

[41] J.L. took B.L. to his mother's home and then went to the fire scene. By this time, there was nothing left of the home but a few flames. He noted that the house had been located on, "my father's Estate property".

R.W.L.

[42] For the past 16 months R.W.L. has lived at […]. He is a 49 year-old lobster fisherman and marine plant harvester. R.W.L. was married to D.L.C. for 18 years and during their marriage they resided at […], Barrington, Shelburne County, Nova Scotia.

[43] R.W.L. said that he spent August 10, 2015 rock weeding and working on his lobster gear. He recalled going out to get his sons McDonalds for lunch and again going out over the supper hour to get Subway. He did not go to the liquor store, as he had 12 cans of Budweiser in his barn. During the evening he said his sons were playing on their X-boxes. He was out in his barn having a "few beer" and working on his lobster gear and sharpening his weeding rake. At some point R.W.L. recalled N.L. and a friend going into the woods on N.L.'s 4-wheeler.

[44] As it was starting to get dark, perhaps around 8:00 p.m., R.W.L. moved from working on his lobster gear in his barn (where there were no lights) to his basement. At some point he asked B.L. to unload the dishwasher, to which he says his son responded, "no, do it yourself". He again asked B.L. to unload the dishwasher; this time he says his request was met with, "no, you go fuck yourself". By way of response, R.W.L. says, "I just lost it. I said things to him I shouldn't have. I rambled on a bunch of stuff – I'm not sure what I said – I just lost it." Asked if he would have threatened to burn the house down, R.W.L. specifically denied saying such words.

[45] During the evening of August 10, R.W.L. said he had "just a buzz on". He thought he could have legally driven a vehicle. In addition to saying things to his son, R.W.L. admitted to throwing a box which hit his son. R.W.L. then had a shower, dried himself off, and laid on the couch. He said he dozed off and at some

point heard a bang, “I don’t know what it was”. He got up, went outside and discovered his house was on fire. He then attempted to return through the basement door but the smoke was overwhelming. Next, he tried the front door, but again the smoke was too much so he could not enter. At this point, he realized the small dog, B. (which he specifically denied killing), was in the house so he got his ladder and put it up to a window. He pushed his fist through the screen but could not get to the dog. Indeed, he said he felt his face and hands burn from the heat. At this point, R.W.L. said he was, “all panicky so I called 911 to report the fire”. He could not be sure how long it was before the police arrived. Specifically asked whether he lit his house on fire, R.W.L. responded, “no, I did not”.

[46] R.W.L. was asked about the three empty gas jugs found in the area of the barn. He said that one of the jugs had the spout sticking upright but the stopper was still in. He said there was no gas in any of the jugs and that the jugs had come from his father and that he did not use them. He noted that his regular gas jug for rock weeding was kept in his boat.

[47] On cross-examination, R.W.L. agreed he “went rattling on and didn’t know what I was saying at the time”. He added, “I was probably not clear about all I said”. He added, “I know I didn’t threaten to burn the house down, cause I know”. Asked why he threw a box (with knives inside) at B.L., he answered, “because I just… it just happened.”

[48] He said he heard a bang, but did not know where the noise came from. He described his response as a “spur of the moment thing – I looked around and the 4-wheeler was gone”. On cross-examination he said he heard the dog whimpering on the couch.

[49] R.W.L. was referred to his statement to Cst. Trites where he stated the bang came from a backroom in the house and that a window made a “poof” noise. After initially denying he said these things (but after listening to his previous statement when the videotape was played), he acknowledged this earlier evidence to be correct. He said he did not grab the dog when he left the house (after hearing the bang) because he had been asleep.

[50] On cross-examination, he acknowledged texting D.L.C. before calling 911. He agreed it did not make sense to send a text message to her before calling in the emergency. Asked about the text message, “yes I burt”, R.W.L. said this meant, “Yes, I’m burned”.

[51] R.W.L. said he lost approximately $20,000 worth of oxen gear in the fire.

Evidence With Respect to Count 3 – That he, between the 28th day of July, 2015, and the 11th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did commit a sexual assault on D.L.C., contrary to Section 271 of the *Criminal Code*.

D.L.C.

[52] During examination-in-chief, D.L.C. recalled having surgery to remove an ovary in July, 2015. When she returned home from hospital in Bridgewater, she recalled an incident when her husband wanted to have sex. She declined, explaining that she could not on account of her recent surgery. She said R.W.L. told her he needed "some relief" and asked about oral sex and, "I proceeded to perform oral sex. I felt obligated, I didn't know." She elaborated that he took his clothes off and, "I proceeded to give him oral sex, a blow job, I put his penis in my mouth." She added, "I was tired but I felt a husband should be pleased, I don't know." Directly asked if she wanted to give him oral sex, D.L.C. responded, "not at first but after I did."

[53] Later in her testimony she said, "eventually I did want to give the blow job." On cross-examination, D.L.C. agreed that she agreed to perform oral sex on R.W.L..

R.W.L.

[54] R.W.L. was asked about the sexual assault alleged to have taken place following his wife's release from hospital. He said he returned home from rock weeding and went out to plow with his cattle. He made soup and crackers for D.L.C. and took them to her in bed. He recalled the two lying in bed and talking. He had not been drinking. R.W.L. was asked about his words to the effect that he needed some relief, to which he responded, "probably so, I don't remember such words". He said that he understood his wife could not have sex (she was still recovering from surgery) so he asked for a blow job. He recalls that she said she did not feel good but that he brought it up again and received the same response. He was persistent and asked a third time, at which time she said, 'ok'. He added, "I said please, kind of help me out here, and she said ok I will and I took off my clothes and got on my knees. She took my penis and put it in her mouth. I didn't

force her to put my penis in her mouth." Asked if he threatened his wife at this time, he responded, "no, I did not".

[55] On cross-examination, R.W.L. said that D.L.C. did not say "no", but rather, "I don't feel good" and, "I took it to mean she still might want to have sex because she did before." R.W.L. agreed that even though she said no a second time, he still wanted to have sex. R.W.L. was asked why he kept asking, to which he responded, "I guess to satisfy my needs."

Evidence With Respect to Count 2 – The he, between the 1st day of August, 2014, and the 31st day of August, 2014, at, or near, Villagedale, Shelburne County, Nova Scotia, did commit an assault on D.L., contrary to Section 266 of the *Criminal Code*.

D.L.C.

[56] D.L.C. was asked about an August, 2014 altercation. She said that after she and her husband returned from the exhibition in Shelburne, "alcohol was involved, we got to the house and kind of got in an argument. He was on his computer, I got mad at him for talking to someone… I pushed him. He pushed me." On cross-examination, she agreed the two, "got in a pushing match". She added, "I don't recall him grabbing my hair."

[57] D.L.C. then stated that R.W.L. pulled her hair, pulled a door off of its hinges, and (in the process of the door frame being broken) a piece of the wood struck her leg. Having said this, she repeated that she initially pushed her husband. As to why she did not tell the officer (during her statements) about pushing R.W.L., she thought her memory was better today because she was not under the influence of any medication. On cross-examination she agreed that at the time she gave her statements she was using marihuana but, "I'm not going to tell the officer I'm using marihuana".

R.W.L.

[58] R.W.L. was asked about the incident of August, 2014. He said that D.L.C. arrived at the exhibition with B.L. and N.L. and asked him to come home. After initially resisting, he agreed to go home with them. R.W.L. acknowledged he was drinking beer and had a "buzz on" from drinking 6, 7 or 8 beer. He said he could not drive and was a passenger on the drive home.

[59] Once home, R.W.L. said his wife, “started in on me about some girl”. He was upset so, “I hauled my computer down on the pellet stove and broke it in two”. He said one thing led to another and he was near the doorway of his sons’ bedroom when D.L.C. stood in the middle of the doorway, blocking it. On account of claustrophobia, he said he felt “cornered”, with no way out. He recalled, “I was likely pushing her and I ripped the door off its hinges but nothing hit her.” He denied grabbing his wife by the hair. After things settled down, he thought that he probably, “lay on the couch and went to sleep”.

[60] On cross-examination, R.W.L. acknowledged he is 6’2 tall and a “physically strong man”. As for D.L.C., he said he was not exactly sure of her height but estimated D.L.C. to be perhaps 5’5 or 5’6. As to her strength, “she’s quite a strong girl”, albeit acknowledging she is not as strong as him.

[61] R.W.L. agreed during cross-examination that things became physical when his wife would not let him out of the doorway. He agreed he broke the computer because, “she kept badgering me and pissed me off”. He denied being out of control or in a rage. He admitted to “lightly” pushing her and “I went over by her and ripped the door off and at the same time I went by her.” He agreed to breaking the door casing but did not see a piece of the casing hit D.L.C..

Evidence With Respect to Count 4 – The he, on or about the 9th day of August, 2015, at, or near, Villagedale, Shelburne County, Nova Scotia, did by word of mouth knowingly utter a threat to D.L.C. to cause death or serious bodily harm to D.L.C., contrary to Section 264.1(1) of the *Criminal Code*.

D.L.C.

[62] D.L.C. recalled an incident which occurred a couple of days before the housefire. She said she was with her friend, T.N., in his vehicle parked in Barrington. She said R.W.L. drove by and through the truck window said words to the effect that he could not believe she would do that to him (i.e., be with someone else). She said R.W.L. drove away and came back a second time, perhaps 20 minutes later. This time, he had their twins with him and D.L.C. thought he said something to them like, “this is what your mother’s done”. As to R.W.L.’s demeanor, “he was actually pretty calm. He was glad it came out and he shook T.N.’s hand.”

[63] D.L.C. was asked about an utterance to the effect that R.W.L. told her to move out of the way or he would run her down. She responded, “this happened the

second time and he was actually pretty cool when he made that comment." She added, "I really didn't think he was going to do it."

B.L.

[64] B.L. is presently living with his brother at their mother's home in […]. Although he said he did not remember the night of August 11, 2015 today, shown his statement, he recalled giving it and telling the truth.

[65] With respect to the time leading up to the fire, B.L. acknowledged, "there was a lot going on". In his words, "my head was ringing. I couldn't believe everything happened so quick. Everything was confusing to me. It was stressful but when I was sitting in the chair, it was just spinning." He added that he assumed at the time, referring to the fire, "my dad did it".

[66] During cross-examination, B.L. said that he thought his father said to his mother, "I should run you over." He recalled his father backing up and that they left the scene. On balance, he agreed, "I don't think he was trying to run her over."

T.N.

[67] T.N. has been a fisherman for 35 years. He has known D.L.C. since their school days.

[68] T.N. recalled the circumstances of August 9, 2015. He and D.L.C. were texting and agreed to meet at the exhibition grounds in Barrington. Once there, the two were sitting in T.N.'s truck when R.W.L. drove by. T.N. thought that R.W.L. came by a second time, perhaps five or ten minutes later. On this occasion, he recalled R.W.L. and D.L.C. having a discussion. He said that R.W.L. then left and came back with B.L. (and perhaps N.L.) in the truck. On that occasion he recalled R.W.L. throwing D.L.C.'s stuff from his truck on the ground. T.N. said that R.W.L. then, "called me over, shook my hand and told me I could have her."

[69] T.N. was not certain, but thought R.W.L. could have returned a fourth time with more of D.L.C.'s things. On one occasion, T.N. thought R.W.L., "spun his tires a little bit".

[70] On cross-examination, T.N. agreed that when he heard R.W.L. and D.L.C. speaking, "no threats were made". He acknowledged the fourth visit – this was the time R.W.L. shook his hand – that "he had cooled down quite a bit by then". At no

time did T.N. believe R.W.L. was driving so as to put D.L.C. (or anyone else) in danger.

R.W.L.

[71] R.W.L. acknowledged seeing his wife at the Shelburne exhibition grounds with T.N.. The first time, he drove by and saw the two sitting in T.N.'s truck with his wife's van parked nearby. He said this was confirmation of his suspicion that his wife was "running around" on him. He decided to go back home and get his two boys to show them it was not just him who was running around (this is what he said his wife had told the children). Upon returning with B.L. and N.L., he parked next to the van. On this occasion, R.W.L. said that nothing was said between himself and D.L.C.. He left the scene and returned for a third time, this time with B.L. and a load of his wife's belongings. He left the belongings on the side of the lot where the van was parked and, on this occasion, he was not sure if D.L.C. got out of the truck. On the final visit, R.W.L. returned on his own and said both D.L.C. and T.N. got out of the truck. Asked whether he said words to the effect of "I should run her over", R.W.L. first said "no" followed by "I don't recall". He explained she came over by his truck window, "I did say just move out of the way so I don't run you over – she didn't move – so I cut the wheels the other way, backed up and left." He added that he did not attempt to run over or threaten to run D.L.C. over.

[72] On cross-examination, R.W.L. denied getting upset, referring to the whole incident as "closure for me". He said D.L.C. was standing in front of his big mirror, "rattling on… I told her to move out of the way so I didn't run her over."

Evidence With Respect to Count 1 – The he, between the 1st day of January, 2009, and the 31st day of December, 2009, at, or near, Villagedale, Shelburne County, Nova Scotia, did commit a sexual assault on D.L.C., contrary to Section 271(a) of the *Criminal Code*.

D.L.C.

[73] D.L.C. was asked about an earlier sexual assault which may have been witnessed by her son, B.L.. She noted that B.L. is, "very protective of me… he didn't like R.W.L. touching me." Upon further questioning, D.L.C. acknowledged she did not think it was appropriate to have sex when her children were around and, referring to R.W.L., "I think I told him." She was asked if she wanted the sex

to occur to which she responded, “not at first but after I did things that happen between a man and a woman… I don’t recall if I told him I wanted it to happen. I didn’t say anything then wanting to have sex or not. I was thinking we shouldn’t be having sex around the kids but I didn’t say stop or go away.” On cross-examination, she added “I don’t remember why I said in the statement he made me. We had sex doggy-style but he didn’t make me.”

B.L.

[74] B.L.’s memory was refreshed by way of an August 17, 2015 audio statement he provided to Cst. Sauer. He recalled being, “really little” when he witnessed his father rip his mother’s pants off. He said he observed this through the “not clear glass” in the door of the living room and saw what “looked like pants flying or whatever”. He saw his parents around the couch but did not know how they were positioned. He did not recall hearing anything. He said that he ran to drink a large amount of milk so as to become sick and distract his parents. At the time, B.L. said he thought his father was hurting his mother but added, “maybe he wasn’t”. B.L. agreed that he told the officer that he heard his father yelling and his mother saying stop; however, today he has no memory of what he may have heard then.

[75] On cross-examination, B.L. agreed he was “way too young. I might not have really seen what happened anyway.” He said that the window through which he saw this, “looks like wax paper”. He said that he did not see any struggle.

R.W.L.

[76] During his direct examination, R.W.L. recalled being in the living room with his wife. He said the two decided to watch a movie and they were laying on the couch, “I was just jumping around with her and asked her to have sex but she said she did not feel good.” He said that he kept “teasing her and she said yeah ok so I shut the door, locked it and turned the TV up.” He said he had not been drinking. He noted that nothing could be visible through the door which was comprised of wood and solid glass with a plastic coating. Asked to elaborate about the window, “you might see an object, you can’t see through it, make out a face, it’s like church glass, you can’t see through it.” He said he proceeded to take D.L.C. clothes off and she took his clothes off. He said they, “continued to have sex and B.L. was at the door, I could see his shadow.” R.W.L. said he ejaculated and eventually opened the door. He said he had no recollection of B.L. drinking milk to try to become

sick. He said that at no time did he feel he was forcing his wife to have sexual relations when she did not want to. He noted that he did not hold her down.

[77] On cross-examination, R.W.L. said that even though he could not see B.L. outside the door, it must have been him because he caught him listening in before. Accordingly, he said he assumed it was B.L..

D.L.C.'s Statements

Sgt. Mary Jo Deluco

[78] Sgt. Deluco said she was called by operations on the early morning of August 11, 2015. She became aware of a fire at the L. residence, a home which she regarded as a "situation of high-risk domestic violence". Given that she had previous involvement with D.L.C. (relating to a prior investigation), Sgt. Deluco wanted to interview her.

[79] Sgt. Deluco provided background with respect to the interview. She said that before the interview started, sexual assault and simple assault were "not on the table". Sgt. Deluco testified regarding the background leading to the second statement (a KGB statement) taken on August 17, 2015.

[80] On cross-examination, Sgt. Deluco agreed D.L.C. became tearful during several points during both statements. She did not think D.L.C. became confused. Sgt. Deluco said D.L.C. was on medication on account of her recent surgery; however, she did not ask her specifically what medication she was taking. She also did not inquire regarding any illicit drugs.

D.L.C.

[81] After D.L.C. was shown her videotaped statements, she testified:

> I added a few things. I wanted him to suffer for how our life had turned into the last few months… I felt I was being pushed to say a few things because B.L. had told things [to the RCMP].

[82] On cross-examination, D.L.C. acknowledged that at the time she gave her statements, she was on prescription medication; namely, Ativan, Dilaudid, and morphine. She also admitted to being "into drugs" at the time, which involved smoking marihuana perhaps every couple of hours. As to her state of mind, she

said she was blocking everything out, that she was confused and emotional. With respect to her first statement, D.L.C. agreed she was at times pushed to say things. In her words, “I felt like I was supposed to tell something about R.W.L. at times. I was upset at R.W.L. and wanted him to hurt. I was very angry at R.W.L..” She elaborated that she said things that may not have been true but that she wanted to hurt R.W.L.. Later, in the context of the alleged sexual assaults, D.L.C. agreed she should not have used the word force but, “I wanted him to feel what I felt.”

Theories of the Case

Crown

[83] The Crown emphasizes that the Court must consider the charged offences, not in isolation, but rather, contextually. The Crown relies on *R. v. Eisnor*, 2015 NSCA 64, and in particular, Justice Beveridge’s words at paras. 171-174. While acknowledging that a *voir dire* was not held in this case regarding the admissibility of the accused’s prior behaviour, the Crown nevertheless submits the Court must be cognizant of the evidence of the domestic situation.

[84] The Crown emphasizes that the video/audio statements provided by R.W.L.’s wife and children should be considered reliable evidence. The Crown submits that the witnesses had no opportunity to fabricate or concoct. On balance, it is the prosecution’s submission that the family’s evidence must be regarded as straightforward and internally consistent. Indeed, the Crown points out that D.L.C.’s second statement (August 17, 2015) is remarkably consistent with her first recorded statement taken during the early hours of August 11, 2015. It is the position of the Crown that it was the arson that, “opened the floodgates of truth for this family”.

[85] In contrast to D.L.C., B.L. and N.L., the Crown argues that the accused provided un-credible and internally inconsistent evidence. By way of example, she points to cross-examination wherein R.W.L. admitted he lied to the police about threatening various individuals.

[86] The Crown argues that the accused flew into a rage on August 11 and that he had already exhibited signs of being out of control in the days leading up to the fire.

[87] The Crown points out that once R.W.L. observed the house burning, he did not immediately call 911, but rather chose to text his wife and stepson. Rather than

carrying out an elaborate plan, the Crown argues scrutiny of the evidence demonstrates that R.W.L. was out of control and in a rage. Indeed, their position is that no other reasonable or realistic explanation for the fire exists, other than that R.W.L. lit the house on fire in a fit of rage. He did this, they say, knowing that the family's dog was inside. To the extent he may have later tried to rescue the dog, it was a belated effort as he realized the error of his ways.

[88] With respect to the alleged sexual assaults, the Crown emphasizes *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, in reminding the Court that the absence of consent is a subjective determination. There is no implied consent. "No" means "no" and only "yes" means "yes". If the complainant testifies she did not consent and this is accepted as true, absence of consent is established.

[89] The Crown focuses on D.L.C.'s videotaped statements, submitting her emotion is compelling and that she is being truthful when she discusses the sexual assaults.

Defence

[90] With respect to count 1, the Defence argues that notwithstanding the wide time period in question (January 1, 2009 – December 31, 2009), the Crown has not proven its case. The Defence submits that B.L.'s evidence on this count is completely unreliable and he was obviously not seven years of age (as he testified) in 2009.

[91] With respect to the complainant's evidence, the Defence points out that her videotaped statements, while admitted by the Court for the truth of their contents, are of questionable reliability. In this regard, he points to *R. v. Khelawon,* 2006 SCC 57, at para. 50:

> As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a

> distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*.

[92] The Defence submits that when one considers D.L.C.'s trial evidence, it is essentially the opposite of what she said in her earlier statements as it points to consensual sexual activity. The Defence argues that this recantation is not coming from someone who wishes to get back together with her spouse. Rather, the accused submits the evidence shows that both he and D.L.C. have moved on. For example, the Defence notes that D.L.C. testified that she will soon file divorce documents.

[93] The Defence argues that D.L.C.'s memory should be considered better now than it was in August of 2015, due to a number of then stressors, and the fact that she was taking drugs. Furthermore, the Defence emphasizes D.L.C.'s *viva voce* evidence to the effect that she wanted R.W.L. to "hurt like she was hurting".

[94] In all of the circumstances, the Defence says that while there may be some evidence of suspicion, there is simply not enough to prove beyond a reasonable doubt the alleged sexual assaults.

[95] With respect to count 2, the Defence points to R.W.L.'s evidence to the effect that the two were "jostling" back and forth. If not regarded as a consensual fight, the Defence takes the position that D.L.C. started it and the accused has available to him the defence of self-defence.

[96] Concerning count 4, the Defence characterizes the evidence as confusing at best. They point out that T.N.'s evidence is very difficult to follow and, in any event, when one considers the whole of the evidence, it cannot be proven beyond a reasonable doubt.

[97] With respect to count 12, the Defence argues the Crown must prove that R.W.L. intentionally set the home on fire and, by so doing, put the dog's life in danger. They take the position that the texts should not be considered damning evidence because they are ambiguous on account of the accused's poor spelling and "disjointed" structure. The Defence submits Cpl. O'Callaghan's testimony bolsters their argument that R.W.L. tried to rescue the dog.

[98] The Defence invites scrutiny of the forensics evidence and, in particular, exhibit 7. They point out there is no evidence to the effect that R.W.L.'s clothes had accelerant remnants on them. As for the deputy fire marshal's evidence, the

Defence emphasizes that Mr. Thibeau could not say what caused the fire and, overall, his evidence was inconclusive. At the end of the day, the Defence questions how it can be said R.W.L. had motive to burn the house down when he was the one who suffered the most. In this regard, the Defence says D.L.C. had moved out and did not have any items of value left in the home. By contrast, the Defence points to R.W.L.'s testimony that he lost in the order of $20,000 worth of oxen gear, along with guns of sentimental value.

Governing Principles

[99] My determination of the credibility and reliability of evidence is relevant to all five counts. Furthermore, notwithstanding that I have grouped the evidence under each count, I have considered the charged offences and all of the evidence, not in isolation, but rather, contextually.

[100] In coming to my decision, I have considered and applied the below principles.

[101] R.W.L. enters this trial presumed to be innocent. That presumption of innocence remains throughout the case unless the Crown has, based on the evidence, satisfied me beyond a reasonable doubt that the accused is guilty (*R. v. Lifchus*, [1997] 3 SCR 320).

[102] A reasonable doubt is not an imaginary or frivolous doubt. It is not based upon sympathy or prejudice. It is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[103] Even if I believe the accused is likely guilty, that is not sufficient. In such circumstances, I must give the benefit of the doubt to R.W.L. and acquit because the Crown has failed to satisfy me of the guilt of the accused beyond a reasonable doubt.

[104] On the other hand, it is virtually impossible to prove anything with absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

[105] In coming to my decision, I have considered all the evidence presented during the trial. I have chosen how much or how little I believed and relied upon each witness.

[106] In assessing reliability and credibility, I have considered the factors recently outlined by Justice Warner in *R. v. Domoslai*, 2016 NSSC 344 at paras. 26 and 27:

> [26] ...
>
> a) Honesty;
> b) Interest (not status);
> c) Accuracy and completeness of observations;
> d) Circumstances of the observations;
> e) Memory;
> f) Availability of other sources of information;
> g) Inherent reasonableness of the testimony;
> h) Internal consistency, including consistency with other evidence; and,
> i) Demeanour, but with caution.
>
> [27] Because the accused presented evidence, I have considered *W(D)*, which sets out the following principles:
>
> a) If I believe the evidence of the accused, I must acquit;
> b) If I do not believe the evidence of the accused, but I am left with a reasonable doubt by his evidence, I must acquit; and,
> c) If I do not believe (but *not* left in a reasonable doubt) by the evidence of the accused, I must consider, based on the evidence which I do accept, whether I am convinced beyond a reasonable doubt of the accused's guilt.

[107] In *R. v. Mah*, 2002 NSCA 99, Justice Cromwell explains how *W.D.* applies to credibility assessments:

> 41 The W.D. principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: see *R. v. Avetysan*, [2000] 2 S.C.R. 745; [2000] S.C.J. No. 57 (Q.L.) at 756. <u>As Binnie, J. put it in Sheppard, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.</u>
>
> [emphasis added]

Counts 1 and 3

[108] Counts 1 and 3 deal with allegations of sexual assault. Given that consent is the issue, s. 265 is applicable and reads:

> **265 (1)** A person commits an assault when
>
> > **(a)** without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
> >
> > **(b)** he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
> >
> > **(c)** while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> **(2)** 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.
>
> **(3)** For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> > **(a)** the application of force to the complainant or to a person other than the complainant;
> >
> > **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
> >
> > **(c)** fraud; or
> >
> > **(d)** the exercise of authority.
>
> **(4)** 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.

[109] Sections 273.1 and 273.2 are also of application and read:

> **273.1 (1)** Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> **(2)** No consent is obtained, for the purposes of sections 271, 272 and 273, where

> **(a)** the agreement is expressed by the words or conduct of a person other than the complainant;
>
> **(b)** the complainant is incapable of consenting to the activity;
>
> **(c)** the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> **(d)** the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> **(e)** the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> **(3)** Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.
>
> **273.2** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> **(a)** the accused's belief arose from the accused's
>
> **(i)** self-induced intoxication, or
>
> **(ii)** recklessness or wilful blindness; or
>
> **(b)** the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[110] In *Ewanchuk*, Justice Major defined the elements of sexual assault at paras. 23, 25-26:

> 23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.
>
> …
>
> 25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour: see *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *R. v. Chase*, [1987] 2 S.C.R. 293.

> 26 The absence of consent, however, is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred: see *R. v. Jensen* (1996), 106 C.C.C. (3d) 430 (Ont. C.A.), at pp. 437-38, aff'd [1997] 1 S.C.R. 304, *R. v. Park*, [1995] 2 S.C.R. 836, at p. 850, *per* L'Heureux-Dubé J., and D. Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p. 513.
>
> [emphasis added]

[111] When I examine the totality of the evidence, I am not satisfied beyond a reasonable doubt that with respect to the sexual assault counts that the third element has been satisfied. In my view, the Crown has failed to prove an absence of consent. In this respect, I have scrutinized the statements of D.L.C. and in isolation I accept the Crown's argument that they demonstrate a lack of consent. However, I must be mindful of the totality of the evidence as well as its reliability. With respect to the former, while I do not accept all of R.W.L.'s evidence, I am left with a reasonable doubt by it. I would add that D.L.C.'s *viva voce* evidence amounts to a recantation of her earlier statements. I am particularly mindful of this given the context that she and R.W.L. are no longer a couple and that there is no evidence that they have reconciled. Furthermore, with regard to reliability, I am left with many concerns about D.L.C.'s August statements as the evidence demonstrates she was experiencing stress and was under the influence as at the time. In particular, the evidence reveals that:

- both her mother and grandmother had recently died
- she underwent surgery in late July and was still on prescription medication, including Dilaudid, morphine and an antidepressant
- she was going through a break-up with R.W.L.
- she had just begun a new relationship with T.N.
- she was smoking marihuana, by her own admission, roughly every couple of hours

[112] Furthermore, during her trial testimony D.L.C. stated that at the time she gave her statements, she wanted R.W.L. to "hurt like she was hurting". In the result, I find that the statements do not constitute reliable or credible evidence such

that the Crown has failed to prove beyond a reasonable doubt that R.W.L. is guilty of counts 1 and 3.

Count 2

[113] Count 2 deals with assault as defined in the above quoted s. 265(1)(a). When I consider the evidence, it is apparent that R.W.L. did not expressly intend to cause force to be applied to his wife. Accordingly, my decision about what R.W.L. intended is determined by what inferences may be drawn from the circumstances. The common sense inference that a person intends the natural and probable consequences from his or her actions was described in *R. v. MacKinley* (1986), 28 C.C.C. (3d) 306 (Ont. C.A.) by Justice Martin at p. 318:

> There is no legal presumption that a person intends the natural and probable consequences of his acts. The so-called presumption is merely a permissive inference based on the common sense proposition that since people are usually able to foresee the consequences of their acts, if a person does an act likely to produce certain consequences, it is, in general, reasonable to assume that the accused also foresaw the probable consequences of his act and if he, nevertheless, acted so as to produce those consequences, that he intended them. The greater the likelihood of the relevant consequences ensuing from the accused's act, the easier it is to draw the inference that he intended those consequences. <u>The purpose of this process, however, is to determine what the particular accused in fact intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances.</u>
>
> [emphasis added]

[114] In deciding whether or not to infer intent from R.W.L.'s behaviour, I must consider any explanation that might cast doubt on whether the inference should be drawn (*R. v. Theroux*, [1993] 2 S.C.R. 5).

[115] Here there is evidence that D.L.C. provoked R.W.L.. This is a relevant consideration on the issue of intent. Indeed, it is my determination that D.L.C.'s provocative conduct supports my conclusion that R.W.L. acted impulsively, without regard for consequences. To the extent D.L.C. may have been pushed (after she initially pushed R.W.L.) and may have been grazed by a piece of the door frame when it broke away, I am not satisfied beyond a reasonable doubt that the Crown has made a case against R.W.L.. In this regard I do not believe the evidence demonstrates R.W.L. intended to apply force to D.L.C.. In my view, he damaged property and his actions were bourne out of frustration.

Count 4

[116] Count 4 is concerned with uttering a threat and is set out in s. 264.1(1)(a) of the *Criminal Code*:

> **264.1 (1)** Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> **(a)** to cause death or bodily harm to any person;

[117] In *R. v. McRae*, 2013 SCC 68, the Supreme Court of Canada clarified the elements of this offence. These elements are (1) the utterance or conveyance of a threat to cause death or bodily harm; and (2) an intent to threaten.

[118] As for the first element, the *actus reus*, the question of whether the words used constitute a threat is a question of law to be decided on the objective standard. In other words, the legal question of whether the accused uttered a threat of death or bodily harm turns solely on the meaning that a reasonable person would attach to the words, viewed in the circumstances in which they were uttered and conveyed (*McRae*, para. 13).

[119] Accordingly, I must apply an objective test to the words spoken by R.W.L. to D.L.C. on August 9, 2015. When I do so I find that the *actus reus* of the offence has been proven beyond a reasonable doubt. In this respect, I have no doubt on the basis of the evidence of D.L.C., B.L. and the accused that R.W.L. told D.L.C. to move or he would run her over.

[120] I must now examine the second element of the offence, the existence of an intent to threaten (*mens rea*). In *McRae*, the Supreme Court of Canada noted as follows at para. 19:

> The fault element here is subjective; what matters is what the accused actually intended. However, as is generally the case, the decision about what the accused actually intended may depend on inferences drawn from all of the circumstances (see, e.g., *McCraw*, at p. 82). Drawing these inferences is not a departure from the subjective standard of fault. In *R. v. Hundal*, 1993 CanLII 120 (SCC), [1993] 1 S.C.R. 867, Justice Cory cites the following words from Professor Stuart which explain this point:
>
> > In trying to ascertain what was going on in the accused's mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused's actions or words at the time of his act or

> in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused "must" have thought in the penalized way is no departure from the subjective substantive standard. Resort to an objective substantive standard would only occur if the reasoning became that the accused "must have realized it if he had thought about it".

[emphasis in original]

[121] Given the above, determining R.W.L.'s *mens rea* requires me to consider whether his words that he would run D.L.C. over were intended by him to mean just that. When he was in the witness box, I found R.W.L. very credible when he explained that he did not intend to run D.L.C. over, nor did he intend his words to mean that he would do so. Furthermore, I have assessed the evidence of the other three individuals present at the time – D.L.C., T.N. and B.L. – and I find their testimony helpful to the accused. For example, their collective evidence is consistent in that they did not believe R.W.L. was serious about running over D.L.C.

[122] In conclusion on this count, when I examine the evidence of all present on August 9, 2015, I am left to conclude the Crown has failed to prove beyond a reasonable doubt the *mens rea* of this offence.

Count 12

[123] R.W.L. has been charged under s. 445.1(1)(a) which reads:

> 445.1 (1) Every one commits an offence who
>
> > (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal …

[124] The test to apply is objective, with a subjective element. As Justice Chiasson wrote in *R. v. Gerling*, 2016 BCCA 72 at para. 27:

> In my view, where there is no evidence to the contrary, the test under s. 445.1(1)(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful conduct and s. 429(1) of the *Criminal Code* applies. It engages a subjective element: "knowing that the act or omission

> will probably cause the occurrence of the event and being reckless whether the event occurs or not".
>
> [emphasis added]

[125] The question arises as to whether R.W.L. intended to harm the family dog, B., which he specifically denies.

[126] Although I found R.W.L. truthful in many aspects of his testimony, some of his assertions cannot be accepted. For example, when it comes to the alleged attempt to rescue B., recall he said he burned his hands and face attempting to get in through the window. This evidence is at complete odds with the testimony of all of the officers who stated R.W.L. had no injuries. Furthermore, R.W.L. was not treated for injuries (there was no evidence of paramedic or hospital treatment) and exhibit 2, the Prisoner Report, confirms under "Injuries", "none noted". Further, I do not find Cpl. O'Callaghan's testimony that he thought the ladder may have been placed where it was by R.W.L. in an attempt to rescue the dog persuasive. In this regard, it amounts to after-the-fact speculation and is not founded in anything the officer observed at the material time.

[127] In a similar vein, I dismiss R.W.L.'s evidence that he heard B. whimpering when he was outside the burning home as un-credible. Further, I do not find his explanation that he left the house without the dog because he had been asleep as plausible. By his own admission the dog was beside him on the couch. It would seem a natural reaction that, if startled by a noise, he would have picked up the small dog as he left the house. R.W.L. did nothing of the kind. Rather, it is my finding on all of the evidence that he intentionally left the dog behind, knowing that there was a fire and that the dog would die in the fire.

[128] When I examine the totality of the evidence, it is clear to me that R.W.L. acted out of spite when he intentionally left the dog to die in what he knew to be an emerging fire. In this regard, I have carefully reviewed the testimony of R.W.L., D.L.C. and their twin sons. The evidence makes it clear that R.W.L. and D.L.C. were going through a rough time on August 11, 2015. In addition to choosing to leave the family dog behind in what he knew to be an emerging fire and giving incredible evidence regarding a failed attempt to rescue B., I find R.W.L.'s texts to D.L.C. and D.C. the morning of the fire to be most incriminating. Indeed, the evidence discloses that rather than initially calling 911, R.W.L. chose to text his wife and stepson and included within his texts to his wife he stated, "i match bali die", which I take to read, "I watched B. die". On balance, when I consider all of

the evidence, I regard this text to be a taunt by R.W.L. to D.L.C.. In this regard, there was evidence led that B. was the family dog, a Christmas present from R.W.L. to his wife and children.

[129] In all of the circumstances, I find on the evidence that the Crown has proven beyond a reasonable doubt that R.W.L. killed B. the dog. There is no justification or defence to the killing.

Conclusion

[130] Based on all of the evidence and law, I find R.W.L. beyond a reasonable doubt guilty of count 12 and not guilty in respect of counts 1, 2, 3 and 4.

Chipman, J.