CRIMINAL CONVICTION APPEAL

This case study is of a senior, disabled BC woman who entered a grocery store and was accosted by store staff who attempted to force the defendant to verbally swear she would remain 6 feet apart from other store shoppers.

The defendant had no history of violating the public health orders, nor the store policy. It was unreasonable and inflammatory for the staff to request the defendant make this verbal declaration.

The videos that were in the crown's evidence show a female staff member approach the defendant, there was a short conversation and then the staff member began to follow the defendant. The situation escalated as male staff member met up with the pair. The male staff member grabbed the defendant's cart, and the female staff kicked it with her foot. One of the videos shows 5 staff members following the defendant as she attempted to leave the store. The grocery store staff kicked her cart, blocked her path, and attempted to pull the cart from her hands.

The defendant continued to trial doing self-representation. The defendant made excellent arguments, and in her cross examination and closing argument she was able to expose the discrepancies between the witnesses' written statements and oral statements.

The defendant is appealing the decision, citing the many errors in fact and errors in law in the judge's ruling which you can read below.

1. Kimberly Woolman was charged on Nov 4, 2021, and the incident took place on April 24, 2020, which is 19 months from the date of the incident to when she was charged. Kimberly Woolman put forward a motion to dismiss her case because they missed the 12-month statute of limitation for summary offence, as per section 786(2) of the Criminal Code. Judge Flewelling issued a decision on that motion that the 12-month statute of limitations was satisfied because the crown filed an information within 12-months. The Judge's decision that the proceedings commenced on the date the crown filed the information on March 12, 2021, and therefore they did not exceed the statute of limitation. At trial Kimberly Woolman argued that the court proceedings exceeded the 18-month limit, as per R v Jordan, 2016 and R v Ghraizi, 2022 and in fact it took 36 months to conclude proceedings. In the final verdict the judge stated that crown did not adhere to the 12-month limitation because the police could not locate her after making several attempts to locate her. However, there was no evidence given to support this and there was no reason why the police could not locate Kimberly Woolman as she has an active driver's licence.

2. Judge Flewelling made an error in law by not allowing the defendant to challenge the credibility of the witness's oral testimony by allowing her to compare it with the witnesses written statements (provided by the crown) pursuant to the Canada Evidence Act, section 11.

3. Judge Flewelling made an error in law by stating the Canadian Bill of Rights doesn't apply as it was superseded by the Charter, and she also stated that the Canadian Bill of Rights only applies to federal matters. The Charter of Rights does not supersede the Bill of Rights as stated in the section 26 of the Charter that recognizes all previous existing rights as still being in effect. Many pieces of legislation post Charter mention the Bill of Rights including the Statutory Instruments Act, 1985 and the Emergencies Act, 1985. As well as a multitude of case post Charter which uses the Bill of Rights, for example case law The Queen v. Beauregard, 1986, R. v. Andrew, 1986, and Singh v. Minister of Employment and Immigration, 1985.

4. Judge Flewelling refused to allow Kimberly Woolman to establish her credibility by introducing a character witness. An accused may call witnesses who will testify to his good character as relevant to show the accused is credible or that the accused is unlikely to have committed the offence, R v Tarrant, 1981, R v Elsmori, 1985, R v Kootenay, 1994.

5. Judge Flewelling erred in fact regarding the allegations of coughing as assault.
   1. Video shows that Kimberley used her sleeve to cough.
   2. At no time do you see Kimberley cough other than in her sleeve and Poulton shows no reaction to having been coughed on in the video. At no time do you see Kimberly make any coughing gestures other than into her sleeve.
   3. In none of the videos is Kimberly captured making any gestures of coughing, other than when she coughed into her sleeve.
   4. In the videos that are available it shows that Poulton approached and followed Kimberly alone so there could not be any videos of the alleged coughing. The only video of my coughing shows that I coughed into my sleeve.
   5. Cleaver, McMuldroch, Weiner and Dawson all testified that they saw Kimberley coughing on Poulton, but the videos shows they were not present during the time Poulton said Kimberley coughed on Poulton.

6. Judge Flewelling errored in law by citing the case law R v Pruden which is irrelevant.

Mens Rea was established in R v Pruden because the defendant admitted he indented to cough on the victim. And in all the cited case law in this case the defendants plead guilty.

In Kimberley Woolman's case first it was not established that Kimberley coughed on Poulton in fact the video shows she did not. No evidence of intent was established, and Kimberley pleaded not guilty.

[22] Mr. Pruden concedes in his *viva voce* testimony that there was a verbal dispute with respect to his request that the bar pay his winnings from his VLT game playing. Mr. Pruden agrees that he had been consuming alcohol at the time of these events. Mr. Pruden concedes that during the course of the verbal disagreement with bar staff, that he removed his face mask, and coughed in proximity to Ms. Cossette, a bar employee. Mr. Pruden concedes that he did so in the course of the verbal dispute over the payment of the VLT winnings. He agrees that he challenged Ms. Cossette with respect to the reasons for the failure payout the VLT winnings to him, with the question "What is this? Because of COVID?".

Ms. Cossette, the bar employee, an experienced bartender, that Mr. Pruden was very intoxicated at the time that these events occurred.

[27] The Crown and the Defence in their submissions to the Court informed the Court that they were unable to find any reported trial decisions on the question as to whether a cough per se in a post-pandemic era is capable of constituting an assault pursuant to section 266 of the *Criminal Code of Canada*.

[30] The Crown and Defence agree that while the amount of force is not material, they differ on the question as to whether the act of coughing involves an application of force. Assault under section 266 of the *Criminal Code of Canada* is a general intent offence. The law requires proof on an intentional act only in the sense that the act is not done by accident or through honest mistake. The Crown and Defence agree that the words uttered by the accused do not amount to an assault. The Crown and Defence agree that the offence must be made by the accused's act of coughing, after removing his face mask, in close proximity to the complainant, a bar employee.

In the decision of ***R v Black,*** October 29, 2020; ABPC, unreported; a decision of the Honourable Judge Roy issued October 29, 2020, the accused was charged with an offence under section 73(1) of the *Public Health Act*. He entered a guilty plea to that offence and admitted that he lost his temper at a bus driver, yelled at her that he had COVID, came up to the place where the bus driver was seated, put his head over the plexiglass and coughed.

In the second case, ***R v Topley aka Gray-Szeles***; August 27, 2020; ABPC; unreported; the Honourable Judge Shaigec accepted a guilty plea from the accused on August 27, 2020 in which the accused admitted assaulting a policer officer engaged in the execution of his duty contrary to section 270(1) The accused admitted that he deliberately coughed in the face of the arresting RCMP officer during the period of the COVID pandemic. The accused was displaying symptoms of COVID but testing determined that he was not infected.

In the third case ***R v Tootoosis***, April 7, 2020, ABPC, unreported; the Honourable Judge Andreassen accepted, on April 7, 2020, a guilty plea to a charge of assaulting a police officer. The accused admitted that he coughed in the arresting police officer's face after removing his mask.

7. Judge Flewelling made comments regarding Kimberly's disability, and she felt she was treated unequally and unfairly because the Judge continually made untrue medical opinions on Kimberly's disability without any medical reference to support these statements.

    1. Judge Flewelling made the following statement when she had gone home at a recess to get her pain meds, "if Kimberly could sit in the courtroom at the July appearance without any problem, so I don't see why she can't today." Kimberly did have difficulty in the other court appearance, and some days she cannot function at all. Kimberly was in a car accident on Dec 26, 1989, that left her with the following severe injuries to – list the injuries. The car I was in was hit head on with another vehicle at 80 KM an hour. Kimberly's husband at the time was in a coma for three days, had multiple fractures in his face, and suffered a brain injury that.

    2. Judge Flewelling denied she had disabled, stating "Miss Woolman let go of the cart, chose not to take the empty cart, and walked to her vehicle which was several steps away. The video taken of this part of the incident shows her walking away, with a limp, but without a cart to aid her and with no apparent difficulty."

    Kimberly's disabilities

    3. 1/ **My neck was damaged**, I have pain in my neck all the time and it gets significantly worse by things I do. It affects my hands and back and gives me saver pain in my shoulders. I also get migraines when the pain gets really bad. It also effects half of my hands.
    4. 2/ **I have damaged my right shoulder**, I had to have surgery to shave the rotator cuff and clean it out as I could not use my arm and my children were little and I was a single parent. As I use this arm for my cane and is my dominant hand so the pain changes and can travel down my entire arm. It can also stop me from doing things for the pain gets so bad.
    5. 3**/ I have nerve damage on my entire left side** that intensifies the pain. This damage also will cause my feet to get so cold that they feel like the are frostbitten and I feel that more on the right foot. I will also get times where they burn and I much rather that.
    6. 4/ **I Hurt my thoracic part of my back and have a herniated disc**. This pain also changes from minute to minute. At times I have pain that is a nerve being rubbed at other times like I have a knife jabbing me. This also effects my stomach, and I can't eat. If my back gets cold, I will get an attack that I can't breathe as all the muscles tighten up around my body. The pain is unbearable, and I have to have Tylenol 3 and muscle relaxers on me all the time. This can also just happen, and I do not know what sets it off. I have also burned my back for this damage also causes nerve damage. So, I am in extreme pain and using a heating pad to help relax the muscles can burn at the same time. I can not lay flat as this causes extreme pain and messes with my muscles.
    7. 5/**My pelvis was brock in 4 places and was dislocated permanently**. It took me a long time to be able to walk again and after I was able to transfer to a wheelchair it still took months for me to be able to walk again. This gives me a limp and because of the lime it effects my back and is one of the reasons why I am to use a cane all the time. Because of this damage I have saver pain all the time and is made significantly worse by walking. I am not able to walk far at all even with help and my walker even though I can sit with it. My cane is just for getting to my car or to get a cart or take the garbage out, short distances. If my leg was to go out this is an aid to help me from falling it also helps me from not having as much of a limp. When I do

have to walk, I must plane it out for it can stop me from doing something else that I need to do in that day or the following days. This also changes minute to minute a long with the pain. My leg can also give out at any time, and I have fallen and have hurt my self and have not been able to walk for some time and I have hurt my knee. Falling is a danger for me doing serious damage and never being able to walk again. At any time, I can lose my ability to walk at all and that can be a day or can last for weeks. Because my pelvis is not straight it affects my sciatica nerve and pane goes down my entire leg and that can make any walking cause severe pain. This can also happen at any time. I can also not lay flat as this makes the pain intolerable. I must sleep sitting up.

8. 6**/ I brock my lower left leg** as the motor came into the car and pinned them and burned them. This also caused nerve damage. My leg is permanently swollen, and I get more pain in it from walking. It also swells more by having it down and causes more pain. At home I keep it up to help stop the swelling and pain. If I have it down for a day ore more it can take days to get the extra swelling down and pain to get better.
9. 7/ **I also brock my left foot**. This causes pain when I walk also. They did not know it was broken for a week because of all the pain I had from other things that I had hurt and broken in the car accident. My foot is in pain and is also swollen all the time and having it down makes it worse. At times my foot also can make it so that I can't walk.
10. Because of all this damage I am always in a lot of pain This pain also causes my temperature to go up and I get really hot when I am going through accelerated pain, at times the pain gets so bad that it is hard to want to keep going. I look forwards to sleeping as you don't have pain then. For some one that is able body walking around a barrier is no big deal or walking to a car yet for me it can mean I will not be able to do all I need to that day and even if I push to do it I can pay for days after for doing it.
11. Judge Flewelling making the commit "with no apparent difficulty". She has no idea from seeing a video of what pain I am in or what is going on in my head of the fear for my safety. She has no idea of what I go through every day of my life for 34 years. For her to make this comment was her ignorance and lack of compassion to some one that had told these employees I was disabled more of them once and that I had asthma. I have learned to deal with the pain the best I can and like anyone else that deals with constant pain or other problems you don't complain you just deal with them and get on with living. I learned a valuable lesson when this happened to me for I was complaining about being in a wheelchair and an amazing woman that was in a car accident and was still in the hospital asked me if I was going to be able to walk again? I told her I would. She told me that she will never get out of the chair for her accident made her paralyzed. Her saying that made me realize how blessed I was for I would walk, and my 4-year-old son was alive and just brock a toe and so was my husband at the time. I am on CPPD and PWD Me saying I am disabled should have never been question it should have been enough!

8. Unfair trial/violation of fundamental justice:

In violation of the Canadian Bill of Rights, section 2(e), the right to a fair hearing in accordance with the principles of fundamental justice for their determination of his rights and obligations, Kimberly had an unfair trial that violated the principles of fundamental justice.

1. Judge Flewelling refused to regard statute of limitations in the Criminal Code, section 786(2) and/or regard the maximum time for prosecution established in common law, as per R v Jordan, 2016 and R v Ghraizi, 2022 by refusing to dismiss these charges on these grounds.

2. Judge Flewelling refused to allow Kimberly Woolman to establish her credibility by introducing a character witness. An accused may call witnesses who will testify to his good character as relevant to show the accused is credible or that the accused is unlikely to have committed the offence, R v Tarrant, 1981, R v Elsmori, 1985, R v Kootenay, 1994.

3. Judge Flewelling made an error in law by not allowing the defendant to challenge the credibility of the witness's oral testimony by allowing her to compare it with the witnesses written statements (provided by the crown) pursuant to the Canada Evidence Act, section 11.

4. Judge Flewelling errored in law by citing the case law R v Pruden which is irrelevant.

   Mens Rea was established in R v Pruden because the defendant admitted he indented to cough on the victim. And in all the cited case law in this case the defendants plead guilty.

5. Judge Flewelling erred in fact by using hearsay as evidence against Kimberly.

   In Poulton's testimony she stated that a customer in the store, who appeared on camera, was a witness to my alleged coughing. However, there was no witness statement provided by this woman either at pre-trial or at trial.

   Judge Flewelling's used hearsay in her decision. In all the videos it shows the shoppers were not even attending to the conflict nor is there normal shopping activity impeded. Nevertheless, Judge Flewelling's used hearsay to establish a falsehood.

   In Judge Flewelling's decision, she sated "In cross examination, he [Dawson] said that he did not receive any complaints from customers but were thanked by the way the situation was handled".

   A disturbance must be more than mere emotional upset or annoyance. The disturbance must be foreseeable as a consequence from the act. [1]

   Disturbance can include any "interference with ordinary and customary conduct". It can be something as small as "being distracted from work, but … Must be present and must be extremely manifested."[2]

   The actus reus of the offence involving obscene language requires that the obscene language cause an externally manifested disturbance.[3]

   Shouting does not include amplification by a device such as a megaphone.[4]

   Swearing includes the use of bad, obscene, or offensive language.[5]

   Disturbance requires more than merely an observing crowd or a crowd shouting anti-police sentiment as officers make arrests.[6]

An officer's belief that the accused's language directed at them was vulgar, aggressive, and inappropriate alone is insufficient.[7]

1. *R v Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 SCR 167, *per* McLachlin J
2. ↑ *Lohnes*, *ibid.*
3. ↑ *R v Swinkels*, 2010 ONCA 742 (CanLII), 263 CCC (3d) 49, *per* LaForme JA, at paras 10, 29, 32{{{3}}}
4. ↑ *R v Reed*, 1992 CanLII 6005 (BC CA), 76 CCC 204 (BCCA), *per* Hutcheon JA
5. ↑ *R v Clothier*, (1975) 13 NSR 141 (NSCA)(*no CanLII links)
6. ↑ *Swinkels*, *supra*, at para 28
   R v Osbourne, 2008 ONCJ 134 (CanLII), 78 WCB (2d) 205, *per* Brewer J
7. ↑ *Swinkels*, *supra*, at para 28
   Osbourne, *supra*
8. ↑ *R v Shea*, 2010 NSPC 70 (CanLII), 947 APR 169, *per* Derrick J

Reference Criminal Notebook.

The situation at the Save-on-Foods does not meet the criteria of disturbance under the Criminal Code as the Crown did not establish mens rea and the normal activity to the store was not interrupted or impeded.

The cause for Kimberly's upset was because she was clearly assaulted.

There was no violation of COVID rules or guidelines as confirmed by Poulton's testimony.

6. During the trial the Crown played the videos to try to support the prosecution's witness statements. As self-represented Kimberly wanted to show the many contradictions between the live testimony and the videos in the Crown's evidence. Judge Flewelling refused to allow Kimberly to play the videos and instructed that she must only play the videos to show contradictions in her submission. However, when it came time for Kimberly's submissions the Crown indicated the videos would not play.

7. Kimberly had brought up the BC Security Services Act in her final submission and Judge Flewelling ignored it. Which means that Judge Flewelling ignored the cause for the distress that Kimberly was in which was evident in the videos.

   Every one of these witnesses restrained Kimberly and physically stopped Kimberly from leaving the store as shown in the videos.

   Kimberly's cart was pulled causing Kimberly to lose balance, Kimberly's cart was pushed, Kimberly's cart was kicked, and Kimberly's path was blocked by the witnesses.

   In the BC Security Services Act, Section 27 states that only a licensed security worker should be using force, yet several of these workers were using force on Kimberly.

   > 27. Section Prohibited employment and engagement:
   > A business entity that does not hold a security business licence must not employ or engage an individual to perform any kind of security work unless
   > the individual has a valid security worker licence for that kind of security work,

the individual is exempt by regulation from the requirement to hold a security worker licence, the registrar has determined under section 2 (c) that the security work in which the individual is engaged is incidental to the individual's primary work, or the registrar has granted the individual an exemption under section https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/07030_01

8. Judge Flewelling made comments regarding my disability, and I feel I was treated unfairly because the Judge continually made untrue medical opinions on my disability without any medical reference to support these statements.

    a. Judge Flewelling made the following statement when I had gone home at a recess to get my pain meds, "if Kimberly could sit in the courtroom at the July appearance without any problem, so I don't see why she can't today." Kimberly did have difficulty in the other court appearance, and some days she cannot function at all. Kimberly was in a car accident on Dec 26, 1989, that left her with the following severe injuries to – list the injuries. The car I was in was hit head on with another vehicle at 80 KM an hour. My husband at the time was in a coma for three days, had multiple fractures in his face, and suffered a brain injury that.

    b. Judge Flewelling denied I was disabled, stating "Miss Woolman let go of the cart, chose not to take the empty cart, and walked to her vehicle which was several steps away. The video taken of this part of the incident shows her walking away, with a limp, but without a cart to aid her and with no apparent difficulty."

9. Judge Flewelling erred in law by dismissing R v Swinkel, 2010.

CONCLUSION

Crown does not make their case for any of the charges.

The crown did not establish the necessary conditions for the charges of assault nor for the charge of causing a disturbance.

The charge of assault for coughing had insufficient evidence and the video shows only coughing on defendant's sleeve. Testimony of Poulton was not supported by the other staff because the videos show they were not present when the defendant was supposed to have coughed on Poulton. Poulton testimony was only support by hearsay evidence from other staff.

For the charge of causing a disturbance the crown gives no evidence of mens rea and. Kimberly as shown on the video was there to shop, not violate any covid policies as per the staff testimonies and her being upset is explained by the assault against her by pushing and pulling and kicking the cart also shown on video by the staff which is not permitted under the BC Securities Act.

As well Kimberley did not have a fair trial.

1. Her disabilities were disrespected in the court process.
2. She was not allowed to question the witnesses to show lack of credibility by using their written statement to police of the event found in the crowns evidence contrary to the Canada Evidence Act.
3. She was not allowed to have one character witness who knows her well for many years.
4. False facts were used to support the conviction.