COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

49-19-CA

WINTON SAULIS

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Saulis v. R., 2020 NBCA 36

CORAM:
The Honourable Justice Quigg
The Honourable Justice Baird
The Honourable Justice French

Appeal from a decision of the Provincial Court:
March 14, 2019 (conviction and sentencing)

History of Case:

Decision under appeal:
Unreported

Preliminary or incidental proceedings:
None

Appeal heard:
May 20 2020

Judgment rendered:
June 4, 2020

Counsel at hearing:

For the appellant:
Margaret Gallagher, Q.C.

For the respondent:
Patrick McGuinty

WINTON SAULIS

APPELANT

- et -

SA MAJESTÉ LA REINE

INTIMÉE

Saulis c. R., 2020 NBCA 36

CORAM :
l'honorable juge Quigg
l'honorable juge Baird
l'honorable juge French

Appel d'une décision de la provinciale:
le 14 mars 2019 (déclaration de culpabilité et détermination de la peine)

Historique de la cause :

Décision frappée d'appel :
inédite

Procédures préliminaires ou accessoires :
aucune

Appel entendu :
le 20 mai 2020

Jugement rendu :
le 4 juin 2020

Avocats à l'audience :

Pour l'appelant :
Margaret Gallagher, c.r.

Pour l'intimée :
Patrick McGuinty

THE COURT

The appeal is dismissed, the robbery conviction is set aside and a conviction on the charge of assault causing bodily harm is entered. At the conclusion of the hearing, we requested counsel explore the possibility of providing a joint recommendation respecting sentence. In the absence of a joint recommendation, we will require a hearing regarding the sentence to be imposed and will provide additional directions in this regard.

LA COUR

L'appel est rejeté, la condamnation pour vol est annulée et une condamnation pour voies de fait ayant causé des lésions corporelles est consignée. À la conclusion de l'audience, nous avons demandé que la possibilité de fournir une recommandation conjointe quant à la peine soit examinée. En l'absence d'une recommandation conjointe, nous demanderons qu'une audience concernant la peine soit imposée et nous fournirons des directives supplémentaires à cet égard.

The following is the judgment delivered by

THE COURT

## I. Overview

[1] On March 14, 2019, Winton Saulis was convicted by a Provincial Court judge of robbery (s. 344 (1)(b) of the *Criminal Code of Canada*). He was also convicted of uttering threats to cause death or bodily harm (s. 264.1(2)(a) of the *Criminal Code*). Mr. Saulis appeals the robbery conviction.

[2] When Mr. Saulis filed his Notice of Appeal, he was unrepresented. He subsequently retained counsel and filed an Amended Notice of Appeal. He appeals his conviction on the basis there was insufficient evidence to support a finding he committed a robbery. In particular, he says there was no evidence to establish he stole the victim's phone or wallet, or that he was party to the theft. The Crown agrees and says there was evidence at the trial raising the possibility that he committed or was a party to the theft of the victim's cell phone and wallet but there was insufficient evidence to conclude, beyond a reasonable doubt, that Mr. Saulis was guilty of theft and, therefore, robbery.

## II. Analysis

[3] In light of the absence of evidence linking Mr. Saulis to the theft and the Crown's concession, we agree the robbery conviction cannot be supported by the evidence and is therefore an unreasonable verdict under s. 686(1)(a)(i) of the *Criminal Code*.

[4] However, the Crown and Mr. Saulis do not agree on the appropriate disposition of the matter. The Crown submits the appropriate action to be taken by this Court is to dismiss the appeal, set aside the robbery conviction and substitute a conviction on the lesser and included offence of assault causing bodily harm. The Crown also requests the sentence imposed by the trial judge be affirmed.

[5] Mr. Saulis submits the assault did not constitute assault causing bodily harm. Although acknowledging an assault was committed, when he argues it did not reach the level of assault causing bodily harm and, therefore, this Court does substitute a verdict, it should be one of assault. In *R. v. Luckett*, [1980] 1 S.C.R. 1140, [1980] S.C.J. No. 34 (QL), it was determined that assault is a lesser and included offence of robbery.

[6] Pursuant to ss. 686(1)(b)(i) and 686 (3) of the *Criminal Code*, this Court has the jurisdiction to set aside the robbery conviction and substitute a conviction on the lesser and included offence of assault causing bodily harm (see *R. v. Biniaris*, 2000 SCC 15, [2000] 1 SCR 381). The same principles were applied *in Comeau v. R.*, 2008 NBCA 60, 332 NBR (2d) 308, and *Hachey and Wiley v. R.*, 2009 NBCA 21, 343 NBR (2d) 256.

[7] After reviewing the record, we agree that due to the lack of evidence of theft, there exist great concerns respecting the robbery conviction. We have no concerns, however, regarding the evidence establishing a violent assault committed by Mr. Saulis.

[8] The trial judge made a series of findings of fact that the following events occurred on October 6, 2018 at 3:20 a.m.:

a. Mr. Saulis "barged" into Mr. Kirkpatrick's apartment with a group of individuals;

b. Mr. Kirkpatrick recognized and identified Mr. Saulis as one of the intruders;

c. Mr. Saulis entered the apartment with a hand behind his back telling Mr. Kirkpatrick and his roommate to get back or he would shoot;

d. Mr. Saulis then attacked Mr. Kirkpatrick and punched him in the head several times. Once Mr. Kirkpatrick fell to the ground, Mr. Saulis began to kick him in the face; and

e. As a result of these actions, Mr. Kirkpatrick suffered bruising and welts on his face.

[9] The trial judge accepted the evidence of the victim when he described the assault and he was satisfied Mr. Saulis had "severely" assaulted the victim.

[10] Section 2 of the *Criminal Code* defines bodily harm as:

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|---|---|
| ***bodily harm*** means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature[.] | ***lésions corporelles*** Blessure qui nuit à la santé ou au bien-être d'une personne et qui n'est pas de nature passagère ou sans importance. |

[11] Jurisprudence pertaining to assault causing bodily harm interprets s. 2 of the *Criminal Code* as creating a low threshold. In *R. v. Bulldog*, 2015 ABCA 251, [2015] A.J. No. 813, the Alberta Court of Appeal wrote:

> The appellants say that the trial judge erred in law by finding that Keepness's injuries constitute bodily harm. Drawing from section 2 of the *Criminal Code*, they stress that "bodily harm" requires (1) hurt or injury; (2) that interferes with health or causes discomfort; and (3) is not "transient or trifling" (meaning, they say, that it is not of a very short duration or of a very minor degree). The main argument here is that the degree and duration of Keepness's injuries were insufficient to qualify as bodily harm, since the trial judge made no finding about the duration of his injuries, and the injuries were very minor in degree. The appellants also argue that Keepness's injuries cannot qualify without a finding (or evidence) that they interfered with his health or caused him discomfort.
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> The Crown's response to the appellant's main argument is that Keepness's injuries (multiple abrasions, cuts, lacerations, swelling to his cheek), which caused bleeding from the head and neck and necessitated a trip to hospital, the application of Steri-Strips and a tetanus injection, are serious enough to qualify. The Crown also says that there was an implicit durational dimension to the trial judge's findings (since Keepness's injuries lasted at least from the time of his attack to his treatment in hospital). No direct response to the appellants' argument regarding

health/discomfort is offered, and we assume that the Crown's view is that Keepness's discomfort would have been so obvious as not to require an explicit finding by the trial judge.

Section 2's definition of "bodily harm" states a low threshold: *R. v. Dorscheid*, 1994 ABCA 18 at para. 11, [1994] A.J. No. 56 (CA). It means something more than "a very short time period and an injury of very minor degree which results in a very minor degree of distress": *R. v. Dixon* (1988), 42 CCC (3d) 318 at 332, [1988] 5 WWR 577 (Esson J.A., as he then was, concurring). Not surprisingly, then, indisputably minor injuries have been found to constitute "bodily harm": *R. v. Rabieifar*, [2003] O.J. No. 3833 (QL) (CA) (scratches and abrasions of less than one inch on the complainant's body, and some bruising and swelling on her face, thigh and hand); *R. v. C.K.*, 2001 BCCA 379 at para 3, [2001] B.C.J. No. 1119 (QL) (small bruise on the complainant's right calf, a small anal tear, and a deviated septum that resulted in some bruising and swelling, all of which was said by a physician to be "not serious and ... expected to resolve itself within a few days"); R. *v. Moquin*, 2010 MBCA 22 at paras. 32-33, 251 Man R (2d) 160 (several bruises lasting 11 days, a sore hand and a sore throat); and *Dorscheid* (scrapes, lacerations and bruises).

These injuries are variously similar to those sustained by Keepness. The appellants, however, point out that the trial judge had no evidence before her regarding the duration of those injuries. It is not necessary, however, for the Crown to call physicians to testify to an injury's less-than-fleeting effects. In *Dixon* (at 332), Esson J.A. was content to observe that "[f]rom the time of the assault at least until the medical treatment was completed, it is clear that the victim must have been deprived of any sense of comfort which she might have had before being assaulted." That observation is equally apposite here. Nor is it necessary for the Crown to have adduced direct evidence of pain or discomfort from Keepness or from a treating practitioner. It is hardly blazing new territory for a court to infer discomfort from such obvious considerations as the victim's injuries. Again, in *Dixon*, Esson J.A. said (at 332, emphasis added) that "it is clear that the victim must have been deprived of any sense of comfort which she might have had before being assaulted". Similarly, this Court said in *Dorscheid* (at para. 11, emphasis added) that "[s]ignificant bruising will obviously cause discomfort ..."

> In short, we see no error in the trial judge's handling of the question of bodily harm. Keepness was attacked and beaten by three fellow inmates in an exercise yard. His sustained visible wounds clearly constitute "bodily harm", which required treatment at the hospital and post-treatment monitoring and would also obviously have caused discomfort. It would have defied good sense for the trial judge to have concluded otherwise. [paras. 42-46]
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> [Emphasis added.]

[12] The photographs adduced at trial depict a degree of contusions and scrapes. In *R. v. Dorsheid*, 1994 ABCA 18, [1994] A.J. No. 56 (QL), the injuries consisted of scrapes, lacerations and contusions. In *R. v. Grejdos*, 2017 ABCA 227, [2017] A.J. No. 705 (QL), the Court of Appeal describes bodily harm:

> […] s. 2. Bodily harm covers everything from minor injuries that, while neither transient or trifling, resolve relatively quickly, all the way to permanent and life-altering injuries that approach the seriousness of a fatality: *R. v. Bulldog*, 2015 ABCA 251 at para. 44, 22 Alta LR (6th) 27, 606 AR 261. In the case of "bodily harm" closer to the "transient or trifling" minimum standard, a sentence in the intermittent range might still be possible when all of the aggravating and mitigating circumstances are considered. Very severe injuries, such as those in *Dawad*, may well be aggravating, but it was an error to regard the severity of the injuries here as mitigating. The complainant suffered serious, painful, long term physical and psychological damage. [para. 63]
>
> [Emphasis added.]

[13] An offence causing bodily harm can range in degree from minor injuries that may resolve themselves quickly to permanent life-threatening injuries.

[14] In *R. v. Rabieifar*, [2003] O.J. No. 3833 (QL), the Ontario Court of Appeal upheld a trial judge's finding that injuries such as minor scratches, bruising and swelling on a victim's face, hands and thigh amounted to bodily harm.

[15] In this case, the trial judge described the assault and subsequent injuries:

> He noted that Mr. Saulis came to him and would have punched him in the head several times. He fell to the ground then began kicking Mr. Kirkpatrick in the face. He also testified as to the injuries that he sustained as a result of the assault, which were depicted in Exhibit P1, which clearly shows several bruising into his face, welts and so on.
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> So therefore, when I come to the consideration of the case and the evidence before me, when I consider exhibit P1, I clearly accept the testimony of Mr. Kirkpartrick. I believe Mr. Kirkpatrick had described the events which occurred On October the 6th, 2018. That Mr. Saulis did indeed assault him severely, so therefore, when I come – when I consider all of the evidence which was presented at trial, I come to the conclusion that the Crown has proven its case beyond a reasonable doubt on count number one.
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> [Emphasis added.]

[16] Therefore, although the injuries sustained by the victim in this case may be on the low end of the spectrum of bodily harm, they do, in our view, amount to bodily harm. The trial judge's decision reflects this. Mr. Saulis repeatedly punched the victim in the head and when the victim fell to the floor, Mr. Saulis kicked him in the face repeatedly, causing the injuries.

[17] As stated above, Mr. Saulis was charged under s. 344(1)(b) of the *Criminal Code*, robbery, for which assault causing bodily harm is an included offence: see *Luckett*, and *R. v. Horsefall*, [1990] B.C.J. No. 2397 (QL). Mr. Saulis was therefore put on notice that all included offences were in issue. Based on the record before us, and in light of the trial judge's findings, we dismiss the appeal, set aside the robbery conviction and enter a conviction on the charge of assault causing bodily harm.

[18] As a result of substituting a verdict under s. 686(1)(b)(i), we may, under 686 (3) of the *Criminal Code*:

a) Affirm the sentence imposed by the trial judge;

b) Impose a sentence we see fit; or

c) Remit the issue to the trial court and direct the trial court to impose a fit sentence.

[19] At the conclusion of the hearing, we requested counsel explore the possibility of providing a joint recommendation respecting sentence to us once they were made aware of our substitution of the verdict being assault causing bodily harm. Counsel will have 14 days from the date of this decision to file a joint recommendation if they are able to reach one. If a joint recommendation cannot be reached, we request counsel to advise us, at their earliest opportunity. While we have in our possession the pre-sentence report, the waiver of a victim impact statement and the evidentiary record, in the absence of a joint recommendation, we will require a hearing regarding the sentence to be imposed and will provide additional directives in this regard. This matter needs to be expedited because Mr. Saulis is currently incarcerated. As a result, we invoke s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, and direct this decision be published in one official language and, thereafter, at the earliest possible time, in the other official language.