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WARNING

The court hearing this matter directs that the following notice be attached to the file:

This is a case under the *Young Offenders Act* and is subject to subsection 38(1) of the Act. This subsection and subsection 38(2) of the *Young Offenders Act,* which deals with the consequences of failure to comply with subsection 38(1), read as follows:

> **38. IDENTITY NOT TO BE PUBLISHED —**(1) Subject to this section, no person shall publish by any means any report
>
> (*a*) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
>
> (*b*) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence
>
> in which the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.
>
> . . .
>
> (2) **CONTRAVENTION —** Every one who contravenes subsection (1), . . .
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

DATE: 2018 12 14
COURT FILE No.: Ottawa 18-RY1156

Sitting as a youth court under the *Young Offenders Act*, R.S.C. 1985, c Y-1;

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

D.R., a young person

Before Justice P. K. Doody
Heard on October 19, 2018
Reasons for Judgment released on December 14, 2018

Tara Dobec .... counsel for the Crown
Joshua Clarke .... counsel for the defendant

DOODY J.:

Overview

[1] D.R., a young person 16 years of age, was a resident at a group home in Navan, a rural community just outside Ottawa. He is charged with

(a) willfully and without lawful excuse killing a rabbit kept for a lawful purpose contrary to s. 445(2) of the *Criminal Code*;

(b) wilfully causing unnecessary injury to a rabbit contrary to s. 445.1 of the *Criminal Code*;

(c) wilfully destroying or damaging property of the rabbit's owner by killing it, contrary to s. 430(4) of the *Criminal Code*;

(d) breaching a bail undertaking contrary to s. 145(3) of the *Criminal Code* by failing to abide by the routine and discipline of the group home, and

NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.

(e) uttering a threat to cause death to Matias de la Fuente, another resident of the group home.

[2] The following facts have clearly been established beyond a reasonable doubt. The defendant left his room in the group home early in the morning of March 17, 2018. He got in an argument with Jason Turcotte, a staff member. He went outside, climbed into an enclosure in which rabbits were kept, and removed one rabbit. He returned to the house and stood in front of a sliding glass door holding the rabbit. Mr. Turcotte did not let him into the home. He ran against the door a number of times, shaking it in its frame. Mr. Turcotte continued to refuse to let him in. The defendant then killed the rabbit by strangling it.

Preliminary issue with respect to wording of count 3

[3] Count 3 charges that the defendant:

> ... did wilfully cause injury to an animal, namely a rabbit, contrary to Section 445.1, subsection (2) of the Criminal Code of Canada.

[4] Section 445.1 of the *Criminal Code* provides:

> (1) Every one commits an offence who
>
> (a) Wilfully causes ... unnecessary ... injury to an animal ...

[5] The count does not use the word "unnecessary". Nor does it refer to paragraph (a) of subsection (1). Furthermore, s. 445.1(2) is the provision which sets out the penalty for one of the 5 offences set out in s. 445.1(1).

[6] After completion of the trial, while I was considering my decision, I wrote to counsel asking for submissions as to what, if anything, arose from the omission of the word "unnecessary" and the lack of reference to s. 445.1(1)(a).

[7] I received a response from Mr. Clarke, counsel for the defendant. He submitted that the wording did not raise any issues. Sub-section 581(2) of the *Criminal Code* permits a charge to be worded in popular language without technical averments or in words that are sufficient to give the accused notice of the offence with which he is charged. Sub-section 581(3) requires that a charge only contain sufficient detail of the circumstances of the alleged offence to give the defendant reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to. Sub-section 581(5) provides that a charge may refer to any section, sub-section, paragraph or sub-paragraph of the enactment that creates the offence alleged.

[8] Mr. Clarke submitted that count 3 met these requirements. He cited *R. v. Lessard*, [1972] 2 O.R. (2d) 329, in which the Court of Appeal held that the failure to include the words "willfully" and "in the execution of his duties" was not fatal to the sufficiency of the count which charged obstruction of a peace officer. Chief Justice Gale noted, in his brief reasons, that the specific sub-section was cited in the count. Furthermore, no motion was brought to quash the count. In the case before me, while the specific sub-section defining

the offence was not cited, the section was, and it would have been obvious to anyone reading that section which offence was being charged. And no motion was brought to quash.

[9] I agree with Mr. Clarke's concession. There is no fatal defect in the wording of count 3.

Breach of undertaking charge

[10] The defendant admits that he was on bail on an undertaking which contained a condition which required that he abide by the routine and discipline of the group home. He acknowledges, through his counsel, that the evidence establishes that he breached that condition when he was out of his room before 9 a.m. on March 17, and when he yelled and screamed at staff and therefore failed to be respectful, and that the defendant was aware that the rule of the home prohibited such behaviour.

[11] I find him guilty of breach of his undertaking of bail.

Charges related to the killing of the rabbit

(a) The defence of necessity

[12] The defence advanced for the three charges relating to the killing of the rabbit relies on me accepting the defendant's evidence that he killed the rabbit because it was very cold and the group home staff would not let him in the home with the rabbit to allow it to warm up.

[13] Defence counsel submits that this evidence, if accepted by me as truthful, supports a defence of necessity. The defence of necessity was most recently dealt with by the Supreme Court of Canada in *R. v. Latimer,* 2001 SCC 1. It applies to all three charges arising out of the rabbit's death, since it is a common law defence applicable to all charges.

[14] As the Court explained in that case, the defence of necessity is restricted to those rare cases in which true involuntariness is present. Citing the majority reasons of Dickson J. in *R. v. Perka*, [1984] 2 S.C.R. 232, the Court held that the defence must be "strictly controlled and scrupulously limited". It has three elements: there must be imminent peril, the accused must have had no reasonable legal alternative to the course of action he or she undertook, and there must be proportionality between the harm inflicted and the harm avoided.

[15] The first requirement of imminent peril requires that disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur.

[16] The second requirement of necessity requires that there must be no reasonable legal alternative to breaking the law. If an alternative to breaking the law exists, the defence of necessity fails. As Dickson J. put it in *Perka*, "given that the accused had to

act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? Was there a legal way out?"

[17] The third requirement of proportionality requires that the harm avoided must be either comparable to, or clearly greater than, the harm inflicted.

[18] The first two requirements of imminent peril and no reasonable legal alternative are assessed on what the Supreme Court in *Latimer* called a modified objective standard. The accused person must honestly believe that he faces a situation of imminent peril that leaves no reasonable legal alternative open, but there must be a reasonable basis for that belief. In determining whether there is a reasonable basis, it is proper to take into account circumstances that legitimately affect the accused's ability to evaluate his situation.

[19] The third requirement of proportionality is assessed on a purely objective standard.

[20] The defence of necessity does not have to be considered by the trier of fact unless there is an air of reality to it. Just as there was no air of reality to the defence of necessity in *Latimer*, there is none in this case.

[21] Although the defendant testified that the rabbit was freezing cold, he did not testify that the rabbit's death was certain to occur imminently. Nor does his evidence that he had no reasonable legal alternative have an air of reality. He had a number of reasonable legal alternatives. He could have wrapped the rabbit in his coat and left him outside, asked to be let into the house without the rabbit, and attempted to convince Mr. Turcotte to provide some alternative for warming the rabbit. Something could have been done, even if the defendant's evidence was correct that the other rabbit was preventing the rabbit that the defendant killed from getting close to the heat lamp in the pen. It is not reasonable that the only alternative to the rabbit freezing to death was to kill it.

[22] Finally, the evidence of the defendant, even if honest, does not meet the proportionality test, which is determined on a purely objective basis. The harm avoided – the rabbit's continued suffering by being cold – does not outweigh the harm inflicted – the animal's death. On an objective basis it does not do so because there were reasonable alternatives to killing it which could have alleviated its suffering.

(b) The requirement for the s. 445.1(1) charge that the killing of the rabbit have been unnecessary

[23] Crown counsel submitted that a different standard – one more favourable to the defence - applies to the charge of injuring the rabbit under s. 445.1. That section of the *Criminal Code* requires that the injuring be "unnecessary". It reads:

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

[24] Not all injury to or killings of animals are criminal. Animals are frequently killed for food, or to humanely put them out of their misery when severely ill or injured. Only unnecessary pain, suffering or injury is criminal.

[25] The Quebec Court of Appeal discussed the elements of the s. 445.1 offence in *R. v. Menard* (1978), 43 C.C.C. (2d) 458. In that case, the Court of Appeal restored the defendant's conviction for having wilfully caused unnecessary pain and suffering to animals. The Summary Conviction Appeal Court had entered an acquittal after the trial judge had convicted. All three judges of the Court of Appeal held that in order to determine whether pain and suffering were "unnecessary" (or, as the French text says, "sans necessité") a proportionality test should be determined.

[26] The majority opinion written by Lamer J.A. (as he then was) adopted the following passage from the reasons of Hawkins J. in *Ford v. Wiley* (1889), 23 Q.B.D. 203 at p. 220:

> The legality of a painful operation must be governed by the necessity for it, and even where a desirable and legitimate object is sought to be attained, the magnitude of the operation and the pain caused thereby must not so far outbalance the importance of the end as to make it clear to any reasonable person that it is preferable the object should be abandoned rather than that disproportionate suffering should be inflicted.

[27] Lajoie J.A. adopted the following passages at pages 218 and 219 of the same case:

> To support a conviction then, two things must be proved – first, that pain or suffering has been inflicted in fact. Secondly that it was inflicted cruelly, that is, without necessity, or, in other words, without good reason.
>
> ...
>
> In each case, however, the beneficial or useful end sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist.

[28] The Quebec Court of Appeal was dealing with a charge of unnecessary pain and suffering, not unnecessary injury, which is the charge before me. In my view, however, the same considerations apply. In order to convict, I must be satisfied beyond a reasonable doubt that the injury was unnecessary. In making that determination, I must compare the end sought to be attained – in this case, if the defendant's evidence is accepted, to end the rabbit's suffering as a result of being cold – with the injury being inflicted – in this case, the animal's death.

[29] I must be satisfied beyond a reasonable doubt that the death of the rabbit was not preferable to it being permitted to continue to live in the circumstances it was in. That determination is, at least in this case, much the same as the third element of the defence of necessity, the proportionality test.

[30] I have concluded that there is no air of reality to the submission that the killing of the rabbit was "necessary". Just as I have concluded that there is no reasonable basis to conclude that the defendant had no reasonable legal alternative to killing the rabbit, and the rabbit's death was not proportional to the harm caused by its being cold, I conclude that there is no reasonable basis to conclude that the killing of the rabbit was necessary. Even if the defendant's evidence is truthful and he believes that he killed the rabbit to put it out of its misery, that was not a reasonable decision. As I have said in paragraph 21, he had reasonable options to alleviate the animal's suffering. I am satisfied beyond a reasonable doubt that its killing was not necessary.

(c) The requirement that the defendant have acted wilfully

[31] As Crown counsel points out, the prosecution must prove, for each of the three counts arising out of the killing of the rabbit, that the defendant acted "wilfully". Section 429 provides:

> 429 (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.
>
> (2) No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

[32] In *R. v. Gamey*, [1993] M.J. No. 130, the Manitoba Court of Appeal suggested that the reverse onus provision in s. 429(2) probably offended s. 11(d) of the Charter or Rights and Freedoms, but found it unnecessary to determine the point.

[33] The Supreme Court of Canada dealt with the issue of colour of right in *R. v. Simpson*, a case arising out of charges under sections 267, 270, and 348 of the Criminal Code and charges of drug possession under the *Controlled Drugs and Substances Act*. Sub-section 429(2), by its own terms, does not apply to any of those sections. The Supreme Court, however, held at paragraph 31 that the colour of right issue applied to all property-related charges, and that the principles set out by Martin J.A. in *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 applied. In that case, Martin J.A. wrote at page 372:

> One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact: *Regina v. Howson*, [1966] 2 O.R. 63, 47 C.R. 322, [1966] 3 C.C.C. 348, 55 D.L.R. (2d) 582 (C.A.). The term "colour of right" is also used to denote an honest belief in a state of facts which if it actually existed would at law justify or excuse the act done: *Regina v. Howson*, *supra*. The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact.

[34] Moldaver, J. wrote at paragraph 32 of *DeMarco*:

> To put the defence of colour of right into play, an accused bears the onus of showing that there is an "air of reality" to the asserted defence — i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right: *R. v.*

> *Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3 (S.C.C.), at paras. 49-53 and 83. Once this hurdle is met, the burden falls on the Crown to disprove the defence beyond a reasonable doubt. Applying these principles here, the respondents bore the burden of pointing to some evidence upon which a trier of fact could be left in a state of reasonable doubt about the respondents' asserted claim of a colour of right to occupy the commercial space.

[35] In my view, this applies to any colour of right "defence", whether it is one to which s. 429 explicitly applies or not. In this case, the defendant has testified that he believed that if he did not kill the rabbit, it would continue to suffer by reason of its being extremely cold – that he had no option but to kill it. I have concluded that, even if he did believe that to be true, there was no air of reality to the defence of necessity to the charges of killing the rabbit contrary to s. 445(2) or wilfully destroying the property of the rabbit's owner by killing it, contrary to s. 430(4).

[36] The question of whether there was a way to warm the rabbit is a question of fact. The defendant has testified that he believed that there was no way to warm the rabbit. If there was indeed no way to warm the rabbit, the killing of the rabbit may not have been unnecessary under s. 445.1(1)(a). It is hard to reconcile this with an objective test to the determination of necessity for the purpose of a charge under s. 445.1(1)(a). But if the defendant did in fact hold that belief, there may be an air of reality to the issue of whether the defendant had a colour of right to killing the rabbit.

[37] I have analyzed the evidence in this case to determine whether the Crown has proven beyond a reasonable doubt that the defendant killed the rabbit for a reason other than to protect it from further suffering. In doing so, I have applied the *R. v. W.(D.)* analysis.

[38] I have determined that I do not believe the defendant when he testified that he killed the rabbit to save it from further suffering. Nor am I left in a reasonable doubt on that issue. I have reached those conclusions for the following reasons.

[39] The defendant was evasive. He frequently did not answer the question asked, instead taking his testimony in a completely different direction.

[40] By his own admission, the defendant was very angry that morning. He woke up around 7:30 a.m. and was hungry. He believed that he was entitled to get food before 9 a.m., unlike the other residents. Mr. Turcotte refused to let him have any food. The defendant testified that he argued with Mr. Turcotte for five to ten minutes. When this did not result in him getting food, he pounded on the cupboard with his fist 5 or 6 times.

[41] He testified that his voice was raised. He said "I was in the middle of being angry and royally pissed off." He explained that when he is "royally pissed off" he does not know what he is doing. He describes himself as being a "ball of rage" when this happens. He said that at such times he wanders around, punching and breaking stuff. He said that he was acting that way that morning and was angry and in a "completely blind rage".

[42] He testified that he had been outside in the chicken coop at 1:00 a.m. that night and had heard whimpering coming from the rabbit pen. He testified that after his argument

with Mr. Turcotte about food, he decided to go outside to check to see if the rabbit was okay. He testified that there was nothing other than his memory of the whimpering that caused him to completely change gears from blind rage to concern for the rabbit. This seems very unlikely.

[43] His evidence was inherently incredible. He testified that he did not put the rabbit under the heat lamp in the pen because the black rabbit was bullying it and forcing the rabbit he killed out of the pen. It is difficult to believe that a 16 year old boy the size of the defendant could not deal with the other rabbit, or seek help to do so.

[44] He testified that he did not tell Mr. Turcotte that he was going outside or that he was doing so in order to check on the rabbit. He explained that he did not do so because he was afraid that Mr. Turcotte would not let him outside. He was unable to give any explanation for why he had come to that conclusion.

[45] His testimony was contradictory. He testified in his examination in chief that he did not put it into his coat because the coat was thin and the rabbit was freezing his skin. Later in his examination in chief he said that his jacket did not have a zipper. In cross-examination he testified that he did put the rabbit into his coat and held it there, under his coat, for five minutes, but that this did not make the rabbit any warmer.

[46] His testimony was, in key aspects, contradicted by others. The defendant testified that he told Mr. Turcotte that he wanted to bring the rabbit in the house because it was freezing to death. Mr. Turcotte testified that the defendant told him that he wanted to bring the rabbit in because it was cute and it was cold out.

[47] His evidence about his behaviour while he was outside describes a person who is still in the blind rage he admitted to having been in earlier that morning. He testified that he ran at the glass sliding door of the house 7 to 10 times, so hard that he bounced back off the door. This is not the behaviour of someone who is reasonably weighing the alternative ways in which to deal with an animal in distress.

[48] He denied being in a rage at this time, but then testified that if he had been in a blind rage, he would have already killed the rabbit.

[49] Another resident of the group home testified that he saw the defendant strangle the rabbit while looking out the window of his room some 15 to 20 feet away. He heard a lot of yelling from outside just before that happened. He described the sounds he heard as "total chaos".

[50] After the defendant killed the rabbit, Devin Knox, another staff member, arrived at the house. Mr. Knox testified that when he arrived at the home, the defendant was walking toward him with the rabbit in his arms. When he got closer, he realized that the rabbit was dead. The defendant told Mr. Knox that the rabbit was already dead. The defendant admitted, consistent with Mr. Knox's evidence, that he showed no emotion when he told him that. I would have expected that, if the defendant was as upset and feeling guilty about killing the rabbit as he testified to, he would have shown some emotion.

[51] Mr. Knox testified that the defendant said that they may as well eat it for dinner. The defendant admitted suggesting that they could eat the rabbit, but said that this was inappropriate humour on his part. It is difficult to believe that the defendant would have been joking about killing the rabbit if he was as upset about having to do so as he testified to.

[52] The defendant did not, by his own evidence and that of Mr. Knox, say at the time that he had had no choice but to kill the rabbit. Mr. Knox testified that he asked the defendant what had happened and the defendant said that he had gone to get some food and was told that he could not eat until 9:00. The defendant told Mr. Knox that he got upset because he could not have a snack and that he went over to the rabbit pen, picked a rabbit, and strangled it because staff would not let him in the house. I accept Mr. Knox's evidence.

[53] The defendant testified in response to a direct question in cross-examination that he had told Mr. Knox that he had killed the rabbit because it was cold. Mr. Knox testified that he asked the defendant what had happened and that the defendant gave him the answer I have set out, which did not include any reference to the rabbit being cold or the defendant feeling he had no choice. Mr. Knox was not asked in cross-examination whether the defendant had said anything about the rabbit being cold. Given my other concerns about the credibility of the defendant's evidence, I cannot find that he did, in fact, tell Mr. Knox that he had killed the rabbit because it was cold.

[54] Mr. Knox testified, and I accept, that he asked the defendant if he really felt any remorse, or words to that effect, and the defendant replied that he did not. If the decision to kill the rabbit had been a result of a difficult moral dilemma, I would have expected the defendant to explain that to Mr. Knox.

[55] The defendant's evidence that he had no options is inherently incredible. He could have continued to wrap it in his coat, as he had testified he had done. A picture of the defendant holding the rabbit while wearing the coat was entered into evidence. The coat appears to be quite suitable for mid-March weather in Ottawa. Even if the zipper was broken, he could have held the rabbit under it. Or he could have put the rabbit down briefly, gone in the house, and spoken with the staff member to let him know his concerns. Or he could have attempted to put it back under the heat lamp and deal with the other rabbit. If he was truly worried about the rabbit's well-being, he would have done those things. Yet he did none of them.

[56] I do not believe the defendant's evidence about why he killed the rabbit. Nor, as a result of considering all the evidence, am I left in a state of reasonable doubt about that issue.

[57] I conclude on the basis of all the evidence, including the admissions of the defendant and the evidence of the other witnesses set out above, that the Crown has proven beyond a reasonable doubt that the defendant killed the rabbit because he was in a rage about not being fed before the other residents and not being let back in the house with the rabbit. In coming to that conclusion, I have not considered the fact that I do not accept the defendant's evidence that he killed the rabbit because it was cold and he had no choice.

[58] It is admitted that the rabbit was kept for a lawful purpose and was the property of Mary Descoeurs. The Crown has proven beyond a reasonable doubt that the defendant did, wilfully and without lawful excuse, kill the rabbit.

[59] I find the defendant guilty of count 2, contrary to s. 445(1)(a) of the *Criminal Code*.

[60] The Crown has proven beyond a reasonable doubt that the defendant did wilfully cause unnecessary injury to the rabbit.

[61] I find the defendant guilty of count 3, contrary to s. 445.1(1)(a) of the *Criminal Code*.

[62] The Crown has proven beyond a reasonable doubt that the defendant did willfully destroy the rabbit, the property of Mary Descoeurs.

[63] I find the defendant guilty of count 4, contrary to s. 430(1)(a) of the *Criminal Code*.

Charge of uttering death threat

[64] The complainant, another resident of the group home, testified that the defendant threatened him a number of times. He testified that he threatened to shoot him in the head, to slit his throat, and to choke him in his sleep. Then he testified that he could only remember the choking threat, although he also testified that he could remember the circumstances but not exactly what was said. Then he testified that the threat was made after he and another resident had just started to play a video game after the defendant had been playing it for 6 straight hours. He said that the defendant was upset that he was not allowed to continue to play the game. It was the complainant's evidence that the defendant yelled the threat to choke him in his sleep and was loud enough that it echoed through the house.

[65] The defendant admitted to being upset that the complainant was allowed to take his place at the video game. He admitted to threatening him but testified that he never threatened to choke him in his sleep. He did admit to being very angry at the time but said that when he threatens someone he is much more direct than to threaten to attack them at some later point in time.

[66] I do not believe the defendant's evidence that he did not threaten to choke the complainant in his sleep. As I have indicated, he is not a believable witness. His answers were evasive and indirect. He did admit to threatening the complainant. I believe that he did do so.

[67] I cannot, however, conclude that I am satisfied that the Crown has proven beyond a reasonable doubt that he threatened the complainant with death. The complainant is, himself, not firm in his evidence. He initially testified to three specific threats, but then backed off and said he could only be sure of one. He testified that the threat was made in a loud voice so that staff would have heard it. Yet there was no evidence from staff.

[68] I conclude that I have a reasonable doubt as to whether the defendant made a death threat to the complainant. Count 5 is dismissed.

Released: December 14, 2018

Signed: Justice P. K. Doody