

# ONTARIO COURT OF JUSTICE

CITATION: *R. v. Kyle*, 2015 ONCJ 375  
DATE: 2015-07-08  
COURT FILE No.: Peterborough 14-2321

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**— AND —**

**ANDREW KYLE**

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Before Justice S. W. Konyer  
Heard on March 9 and June 29, 2015  
Reasons for Judgment released on July 8, 2015

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Ms. K. Eberhard ..... counsel for the Crown  
Mr. D. McFadden ..... counsel for the defendant Andrew Kyle

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**KONYER J.:**

[1] Andrew Kyle was tried before me on allegations arising out of a domestic context. He is charged with assaulting his former spouse, Amanda Kyle, on October 16, 2014, and with causing unnecessary pain to a family dog by punching and kicking it on October 25, 2014, contrary to sections 266 and 445.1(1)(a) of the *Criminal Code*. The Crown called the complainant, Amanda Kyle, as well as her mother, Kathleen Mooney. Mr. Kyle testified in his own defence and denied committing either of the offences.

[2] In order for me to determine whether the Crown has proven the charges against Mr. Kyle beyond reasonable doubt, I must assess the credibility of the witnesses who testified at trial. Since Mr. Kyle has testified in an exculpatory manner, I must apply the well-known principles set down by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. That is, if I believe the testimony of Mr. Kyle, I must find him not guilty. Further, even if I do not believe his evidence, if it raises a reasonable doubt in my mind, I must find him not guilty. Finally, even if his evidence

does not raise a reasonable doubt, I must consider whether the Crown has proven the case against him beyond reasonable doubt on the basis of the evidence that I do accept.

[3] In making these determinations, I must of course consider all of the evidence, and I must also bear in mind that the incidents giving rise to these charges occurred in a domestic context. This means that the nature of the relationship between the parties is a relevant consideration, which includes the existence of any imbalance of power between the complainant and accused, as well as the existence of any animosity between them.

[4] It is conceded by the defence that the offences are made out if I am satisfied beyond reasonable doubt that events occurred in the manner described by the complainant and her mother. Therefore, the only issue that I need to determine is one of credibility. In order to do so, it will be necessary to review the facts in some detail, which I will do in chronological order.

#### **Count 1 – assault on Amanda Kyle on Oct. 16, 2014**

[5] By the fall of 2014, Amanda and Andrew Kyle had been in a relationship for 14 years, had lived together for 12 years, and had been married for 10 years. For ease of reference, I shall refer to them as Amanda and Andrew throughout the balance of these reasons. They have two children – Ethan, aged 8, and Kaylan, aged 7. The relationship between Amanda and Andrew Kyle was troubled by the summer and fall of 2014. They were living separate within the same home by October 2014, and Amanda moved out permanently with the children on or about November 30, 2014.

[6] As would be expected, there were disagreements between Amanda and Andrew in the months leading up to their final separation over a variety of issues. On October 16, 2014, a Thursday, they agree that Andrew took their son Ethan to a Peterborough Pete's hockey game after work. This was a regular occurrence, and they each recall a telephone conversation where the last-minute arrangements were made for Andrew to pick up Ethan from his own hockey game, where Amanda had brought him earlier.

[7] It is agreed that Ethan and Andrew attended the Pete's game, and that they would have arrived home at about 10:00 p.m. Amanda alleges that Andrew had a shower while Ethan came to her room and cuddled with her on her bed. By this time Andrew was sleeping in the basement of the home. Ethan's bedroom was also in the basement. Amanda testified that while Andrew was showering, Ethan told her of events that occurred at the Pete's game which had upset him, including that his father had been yelling at security guards over a lack of parking spots.

[8] When Andrew came out of the shower, Amanda said that he was enraged,

and began yelling at her for unknown reasons. He was standing over her and Ethan in the bed, screaming. He then left, telling her that he was going to the garage to hang himself. Apparently, this sort of statement from him was not uncommon. He returned to the bedroom a short time later, still yelling, asking Amanda to accompany him to the garage to talk. She refused initially, but relented after he calmed down. She left Ethan, who was still awake and quite upset and scared, in her bed while she went to the garage with Andrew. Once in the garage, Andrew began yelling at her again, and she left and returned to her bedroom, where she comforted Ethan.

**[9]** According to her testimony, Andrew returned to the bedroom again. Again he was enraged, and stood over the bed while yelling at her, demanding that she accompany him outside to talk. After he calmed down once again, she did accompany him outside, but she stayed on the porch and refused his demands to enter the garage. She told him that she did not deserve to be yelled at in this manner. At this point, Andrew raised his clenched fists and jumped towards her. He reached back with his right fist and swung it in front of Amanda's face, stopping inches from the brick wall on the side of the house. He swung his fist hard, with what she described as a look of rage on his face. His fist did not make contact with her, but came within a few inches of her face. After this occurred, she went inside and lay down on her bed with Ethan, while Andrew remained outside.

**[10]** Amanda estimates that Andrew re-entered her bedroom about an hour and a half later, much calmer, and asked her to come to the garage once again. This time she did. In the garage, he told her that he would make an appointment with a doctor to seek help for his anger and depression. After this conversation, Amanda returned to her bed where she slept that night with Ethan. The following day, Andrew went to work as usual, nothing was said about this incident and the matter was left at that until Amanda went to the police on November 27, 2014. The circumstances of her police report will be outlined below.

**[11]** With respect to this incident, Andrew agreed that he took Ethan to a Pete's game on October 16<sup>th</sup>. He denied that he had any issues with security at the game. When he and Ethan arrived home, he said that Amanda was already in bed, but that Ethan's pajamas were laid out on the living room couch. Amanda came out of her bedroom to greet them. Andrew tucked Ethan in his bed in the basement, went out to the garage to smoke a cigarette, came back inside and went to bed. He denied that there was any angry discussion with Amanda or that he threatened to kill himself. He never asked Amanda to step out to the garage, nor did she come out to the porch. He never took a swing at her that night or on any other occasion. He acknowledges that he sought medical help in 2013 for anxiety, but denies that he ever suffered from depression or anger management problems, or that he ever discussed getting help for such issues with Amanda. In short, he denies that the October 16<sup>th</sup> assault ever occurred.

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## Count 2 – kicking and punching an animal on October 25, 2014

[12] The Kyle family owned two dogs in the fall of 2014 – a golden retriever named Zoe and a Basset hound pup named Charlie. Zoe, the older dog, was apparently able to open the front door of the residence by herself by standing on her back paws and depressing the latch. Charlie was still being trained, and often had to be restrained during feedings so that she would not eat the food for both dogs. Amanda agreed in cross-examination that they would sometimes tie Charlie to a banister to prevent her from eating Zoe’s food.

[13] Amanda and Andrew hosted a late Thanksgiving dinner on October 25, 2014. Members of Amanda’s family, including her mother, brother and his children attended. Andrew spent most of the day working outdoors on the property. Amanda attributed this to Andrew being in a “foul mood” and seeking to avoid contact with her family, while Andrew maintained that there was nothing at all unusual about him doing jobs that needed to be done around the house on a weekend.

[14] Amanda’s mother, Kathleen Mooney, also testified. She described the mood at her daughter’s residence as “extremely awkward” and tense. She was also put off by the fact that Andrew spent the bulk of the time working alone outside while family was visiting. It is, perhaps, unsurprising that Andrew would have wanted to keep his distance from Amanda’s family members, given that he and Amanda were living separate within the family home by this time. In those circumstances, tension and awkwardness within the home during a family visit would not be unexpected.

[15] Amanda and her mother testified that the tension continued when the meal was served, and both felt that Andrew was “picking on” Ethan by pouring him less juice than the other children, and by sending Ethan away from the table at one point. Andrew, on the other hand, testified that Ethan was behaving poorly by slouching, not eating, and coughing without covering his mouth. He denies providing Ethan with any less juice than the other children, but agrees that he told Ethan to go to his room until he could behave properly. He followed Ethan to his room a short time later and had a talk with him about his poor manners. Both returned to the table.

[16] Everyone agrees that at some point, the dogs, who had been left outside, entered the house. Presumably, Zoe opened the front door as was her habit. Everyone also agrees that Charlie, the Basset hound pup, got into the kitchen. Andrew testified that he heard noises from the kitchen and investigated. He found Charlie standing with her front paws on the kitchen counter, attempting to eat some food that had been left on the counter. He testified that he grabbed her by the collar, pulled her down from the counter, gave her a “swat” in the nose with his hand, walked her to the door and put her outside. He described the force used in swatting Charlie as minimal force that was applied as a means of discipline. He agreed that she yelped when swatted. He testified that no one else got up from the table that he was aware of, that the kitchen is small and that he would have noticed if anyone else was in the kitchen at the time he was dealing with the dog.

[17] Ms. Mooney testified that she followed Andrew to the kitchen as she was intending to serve dessert. She said that Andrew grabbed Charlie by the collar, pulled her off the counter, then punched her in the back. While still holding the dog's collar, he kicked her in the rear end and threw her towards the door. She says Amanda got up from the table at this point and confronted Andrew.

[18] Amanda testified that she saw, from her seat at the dining room table, the dog being flung backward by Andrew. She saw him punch Charlie in the back and kick her in the rear. She got up and ran to the dog, and she and Andrew had a verbal disagreement over his treatment of Charlie. Amanda said that Andrew punched and kicked the dog forcefully, causing her to yelp and put her tail between her legs.

[19] Both Amanda and her mother testified that Andrew went outside after the incident with Charlie. Andrew testified that he returned to the table, that there was no discussion about the dog, and that the meal carried on as normal.

[20] The various witnesses disagreed about whether anyone could have seen the interaction between Andrew and the dog from the dining room table. Amanda drew a diagram of the layout of the two rooms, and photos of the dining room and kitchen were filed as exhibits. The dining room and kitchen are adjoining and are connected by an open entranceway that appears to be the width of a normal door. Everyone agrees that people were seated in the dining room around a long harvest table. Eight people would have been seated at this table, each of whom would have had different lines of sight through the entranceway into the kitchen. Depending on seating position, one's view into the kitchen would vary in terms of degree and angle. And of course, if Ms. Mooney did follow Andrew into the kitchen, she would have had an unobstructed view of his actions towards the dog Charlie.

### **The history of the police complaint**

[21] Neither of the incidents described above, which form the subject matter of the charges against Andrew Kyle, were reported to the police until November 27, 2014. It is certainly not unusual, in the context of domestic violence complaints, for allegations of violence to go unreported for significant lengths of time for a variety of reasons. It would be an error, in my view, to consider the lack of a timely report in and of itself to be a matter fatal to the credibility of a domestic complaint.

[22] In this case, there are competing theories as to the timing of the police complaint. The Crown argues that the complaint was triggered by yet another assault, which occurred on the night of November 26, prompting Amanda to go to the police the following day. According to her, Andrew was very upset that evening because he believed that she was going to "take the kids away from him." He kept yelling, getting in her face and began poking her repeatedly in the ribs with his index finger. He used a lot of force and she said it hurt. There are no charges before me arising out of this incident.

[23] For his part, Andrew denies any such assault on November 26. The defence theory is that Amanda reported false allegations of assault to the police on November 27 in response to Andrew's actions in getting a lawyer involved to fight for access rights to the children. As mentioned previously, Andrew and Amanda had been living separately under the same roof for a number of months. Andrew claims that they had informally discussed separation, and had an understanding that if this occurred that Amanda would have custody of the children with generous and regular access by Andrew.

[24] Amanda agreed that she and her mother drafted a written separation agreement on or about November 18, which provided for access but no overnight visits. Andrew responded by retaining counsel, who drafted a different separation agreement spelling out access on alternate weekends and some weekdays, with both including overnight access. Andrew provided this document to Amanda on November 25, and they had a discussion about this proposal on November 26. Amanda agreed that she and Andrew argued over his rights of access to the children on this date. The following day, Thursday, November 27, 2014, Andrew was arrested and charged with these matters.

[25] On Friday, November 28, Andrew and Ethan left for a previously scheduled hockey tournament in Niagara. While they were away, Amanda moved out of the house. Initially, Andrew was prohibited as a condition of his release from returning to the house, but this condition was varied after Amanda moved out. The defence argues that Amanda had a motive to fabricate allegations of abuse in order to gain an advantage in a custody and access dispute, since Andrew had refused to agree to her demands and had hired a lawyer instead. It is argued that the timing of the police complaint, following immediately upon Andrew's hiring of a lawyer to assert his rights with respect to the children, is telling.

### **Analysis**

[26] As in every criminal case, the Crown must prove the case beyond reasonable doubt. If the evidence, or lack of evidence, raises a real doubt in my mind, a doubt that is not frivolous or fanciful, then I must acquit. Where there are two competing versions of events that arise from the evidence, I am not obligated to choose between them. If, after considering the evidence, I am simply unsure as to where the truth lies, then I must acquit.

[27] That is the case here. There is nothing I can point to in the evidence of Andrew Kyle that would render it so implausible that I could, on a principled basis, reject it. Nor is there anything about the manner in which he testified that would lead me to reject his evidence. This is not to say that I firmly believe his evidence, but it raises a reasonable doubt in my mind that he assaulted Amanda Kyle on October 14, or that he caused injury to the dog Charlie on October 25.

**[28]** In reaching this conclusion I have considered all of the evidence. I have taken into account the fact that Amanda Kyle reported these matters to the police immediately following Andrew Kyle’s refusal to accept her terms with respect to access to the children for their impending separation. Although delay in reporting violence in domestic relationships may be due to other legitimate reasons, in this case I cannot discount the possibility that the triggering event for this complaint was the custody impasse. Nor can I ignore the fact that Ms. Mooney did not make any statement to the police about her observations bearing upon charges to which she claims to have been an eyewitness until the eve of trial. She is far from an impartial witness – her involvement in drafting the initial separation agreement shows that she is closely aligned with her daughter. The circumstances of her coming forward are such that I cannot ignore the real possibility of collusion between them.

**[29]** At the end of the day, it may very well be that Andrew Kyle committed these offences as alleged. But I cannot discount the very real possibility that he did not. Accordingly, he is found not guilty of both offences.

**Released: July 8, 2015**

Signed: “Justice S. W. Konyer”