

CITATION: R. v. Foster, 2018 ONSC 4353
COURT FILE NO.: 17-30000442-0000
DATE: 20180712

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
HER MAJESTY THE QUEEN) *Jason Gorda*, for the Crown
– and –)
ADRIAN FOSTER) *Sarah Shartal*, for the Accused
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)
) **HEARD:** July 9-11, 2018
)

THORBURN J.

REASONS FOR JUDGMENT

OVERVIEW

[1] Adrian Foster is charged with willfully and without lawful excuse killing a dog kept for a lawful purpose, contrary to section 445(1) of the *Criminal Code*, and willfully causing unnecessary suffering to the dog, contrary to section 445.1 of the *Criminal Code*.

[2] Both charges stem from an incident that took place on November 7, 2016.

[3] Mr. Foster lived in a one-room bachelor apartment in Unit 711, 40 Fir Valley at Warden south of St. Clair Avenue in Scarborough. His unit has a small balcony. This is a high rise building with 168 units. Mr. Foster lived alone with his dog. He had lived there since May or June of 2016.

[4] Mr. Foster's dog died as a result of falling from the seventh floor balcony of his bachelor apartment.

[5] The question is whether it was an accident, as Mr. Foster alleges, or whether Mr. Foster deliberately threw his dog over the balcony to his death, as alleged by the Crown.

THE EVIDENCE

[6] The evidence is circumstantial as no one saw Mr. Foster throw the dog over the balcony.

[7] The Crown called three civilian witnesses and two police officers who attended the scene. The Defence called Mr. Foster.

[8] Photographs and video of the apartment complex, Mr. Foster's one-room unit and balcony, and the dog, were also introduced into evidence. The balcony is small with a few milk crates leaning against the back wall away from the balcony. Mr. Foster says there was also a stool on the balcony. There is a solid enclosure three to four feet high beginning eight centimetres off the ground, to prevent persons on the balcony from falling.

The Testimony of the Crown Witnesses

[9] David Nippard lived two floors directly below Mr. Foster in Unit 511 at 40 Fir Valley. He claims he had some difficulty with Mr. Foster in the past as Mr. Foster allowed his dog to defecate on the balcony and then washed off the feces which fell onto his balcony.

[10] On November 7, 2016 (the day of the incident), he was watching television in his unit. He heard a commotion outside so he went to the balcony and saw a dog on the ground and people yelling. The dog was Mr. Foster's dog. He'd seen Mr. Foster walk the dog many times. He sometimes dragged the dog along as it was trying to defecate.

[11] Later that day, Mr. Nippard looked up to Unit 711 and saw Mr. Foster's hands over the balcony. Mr. Nippard said, "What the hell is going on?" Mr. Foster then threw a bag of dog food over the balcony. Mr. Foster went downstairs to the main floor, got into an argument with one of the tenants and ran back up to his unit.

[12] Patricia Grayson says she lived in Unit 1305 of the building. She'd seen Mr. Foster a few times prior to that incident. She had spoken to him once before when he was walking his dog and their dogs socialized for a few minutes.

[13] On the day in question, her son told her that someone threw a dog over the balcony, the dog was dying and he did not know what to do. They both ran outside and saw Mr. Foster's dog on the ground "all mangled up" and barely breathing.

[14] She looked up and saw Mr. Foster. He had a blank look on his face exhibiting no emotion. He was just staring out at them. His hands were apart, shoulder length with his palms facing the side.

[15] She called 911. Her son screamed at Mr. Foster who was still on the balcony. Mr. Foster disappeared for a moment, returned and threw a bag of dog food and the dog's bowl out the window. Mr. Foster came downstairs. He did not go near the dog. Her son accused Mr. Foster of throwing the dog out the window and Mr. Foster replied, "What are you going to do about it?" He then said, "Yah, I killed the dog what are you going to do about it?" Her son made homophobic remarks calling Mr. Foster a "faggot" and a "batti boy". Mr. Foster shouted verbal abuse at her son also.

[16] Mr. Foster went back upstairs and stood on the balcony watching everyone. He had no shirt on and he was glistening as he had put baby oil on his skin and was massaging his chest.

He was smiling like nothing had happened. The police arrived a little time after and arrested Mr. Foster.

[17] Brian Hack was the Senior Superintendent of the building. He says he knew Mr. Foster because he was a resident of the building and he had had interactions with him. Mr. Hack was told of the feces on Mr. Foster's building that landed on his neighbour's balcony.

[18] On the day in question, the dog jumped toward a public health officer as Mr. Foster and his dog were leaving the building. The dog was then pulled back by Mr. Foster. He reported this to building security. At 9:53 a.m. building security video shows Mr. Foster leaving the building with his dog. At 9:56:37 a.m. he returned to the building without his dog. Mr. Hack asked him to keep the dog on a leash. Mr. Foster was angry and at 9:57:29 a.m., he left the building looking for the dog. At 10:11:47 a.m. Mr. Foster returned with the dog.

[19] Later that day, Mr. Hack got a call from a coworker. He ran outside and saw a large crowd of onlookers on the lawn of the front of the building and some were on the sidewalk. People were screaming and crying and looking up at the balcony to the seventh floor. Mr. Hack saw Mr. Foster on his balcony. He recognized the dog as Mr. Foster's dog. Things were very hectic and all kinds of conversations were happening at the same time. He was told things had been thrown off the balcony.

[20] Officer Terence Ko was one of the police officers who attended the scene. He testified that he saw a dog that looked like a mixed beagle cocker spaniel lying beside a bag of dog food. He and Officer Omar went to the 7th floor. There was no answer at Units 710 and 712.

[21] They went to Unit 711 and Mr. Foster answered the door. No one else was in the unit. They told him they were there because there was a dead dog on the ground. Mr. Foster was cautioned. This was confirmed by Officer Omar who also attended the unit and it was recorded in Officer Ko's notebook. Police then asked for Mr. Foster's identification and date of birth.

[22] Mr. Foster said he owned the dog that was dead on the grass. Officer Ko asked if he threw the dog off the balcony. He said, "What do you mean?" Officer Ko replied, "It's a simple yes or no question." He said, "I threw the dog food off the balcony." Officer Ko again asked him if he threw his dog off the balcony and again Mr. Foster responded that he threw the dog food off the balcony and said he was lying in his bed with his dog. He then said, "My metaphysical body threw the dog off the balcony."

[23] Officer Omar asked Mr. Foster if he was taking medication for his mental state. He says he did so because Mr. Foster was not responding to questions, was evasive and had made a comment about his metaphysical body. Police told Mr. Foster that he might be taken to the hospital as it is not normal to throw a dog off a balcony. Mr. Foster got upset and Officer Ko decided to arrest him.

[24] Mr. Foster was told to turn around and put his hands behind his back. He clenched his fist. He contracted his muscles and Officer Ko could see them stiffening up. The officers took him to the ground. He refused instructions and put his arms and fist close to his chest tucking

them in. They told him not to resist. Eventually they got both arms behind his back and handcuffed him to the rear. He was arrested and cautioned again.

Mr. Foster's Evidence

[25] Adrian Foster testified that he has been homeless and involuntarily hospitalized for mental health issues. No evidence was lead as to the nature of his mental health challenges.

[26] He said he owned a dog in the past but at some point, things did not go well for him so he left the dog with his former partner.

[27] In May or June of 2016, Mr. Foster moved into a bachelor apartment at 40 Firvalley Court, Unit 711. Shortly after he moved into the apartment, he got his dog. The dog was small and, when on four legs, reached somewhere between his shin and his knee. He could lift it easily.

[28] He said his relations with the people in the building were fine. Mr. Foster denies there was a confrontation about washing down the balcony after the dog defecated on the balcony or that his neighbour or anyone from management approached him about this.

[29] On the morning of November 7, 2016, he came down the elevator with his dog and the dog "may have gone up to someone". The person was startled. He proceeded out the door to take the dog for a walk. When he came back without the dog, carrying only the leash, the Superintendent told him to go out and get the dog. He said he was confused about the randomness of the act of telling him to put the dog on the leash. He pushed the doors rather than pushing the button to open the doors. He came back minutes later with the dog on the leash and went up to his apartment at Unit 711.

[30] He intended to clean his room and give the dog a bath. Instead he lay down and was emotional but not really paying attention to anything. He took off all his clothes. He heard yelling outside.

[31] In examination in chief he said he heard people say, "It's the faggot, the battu man". In cross examination he said he does not recall any argument before he threw the dog food down.

[32] He got up and saw a lady and his neighbour bent over his dog on the ground in front of the building. He saw the dog was alive and moving. It looked up at him. He does not remember what he was thinking.

[33] Mr. Foster admits that the dog died as a result of the fall from his seventh floor balcony and that his paws were broken, he looked hurt and this would have caused a lot of suffering. When he saw the dog suffering and in a lot of pain, his first thought was the dog must be hungry so he threw food off the balcony. He thought that if the dog could eat he would be ok.

[34] He then called 911 and spoke with someone. He let them know what happened. He said the dog went over the balcony and he needed help. He was told to call 311. However, he had no credit on his phone so the call to 311 could not go through and he became more upset. He hung up the phone and went downstairs.

[35] When he went down, everyone was yelling at him and he did not know why. They started coming at him and he yelled back. He saw that the dog's legs were bent and broken. It was "not looking good".

[36] Mr. Foster denies his neighbor Ms. Grayson's evidence that he said, "Yah. I killed the dog. What are you going to do?" He says he said, "And if I did it what are you going to do about it?" What he was getting at was what are you going to do: kill me for a dog?

[37] He went back upstairs.

[38] The police knocked on the door of his apartment. The first thing they asked was, "Can we come in?" He said no. They said, "We are here to ask about the dog. Do you know anything?" He said, "Yes. It's my dog."

[39] Mr. Foster says he does not think he was ever cautioned by police. He says that had he been cautioned, he would not have said anything as when he's been cautioned he doesn't talk to people.

[40] They asked his name and asked several times whether he threw the dog off the balcony. The way they were asking him got him upset. Mr. Foster did not answer that question but said he threw the dog food down. One of the officers started talking about hospitalization and mental health and he said he was fine.

[41] He eventually said: "My metaphysical body threw the dog off the balcony." He said this, not because he did it but because he was being sarcastic because they kept asking him if he did it. They had already decided he had thrown the dog off the balcony.

[42] After that, they said they were going to arrest him. He does not think he really resisted. The police were standing by the door. They came toward him slowly. According to Mr. Foster it was "a gentle arrest." He moved away from them when they were trying to arrest him as he did not know what was going on.

[43] Mr. Foster testified that he has never initiated fights with others or intentionally hurt someone. He has been convicted of carrying a concealed knife while he was homeless. On cross-examination he admitted that he has been charged with resisting arrest and threatening people and was convicted in 2012 of assault with the intent to resist arrest.

[44] Mr. Foster said he did not throw the dog over the balcony and does not know how the dog got over the balcony.

ANALYSIS AND CONCLUSION

[45] Since Mr. Foster chose to testify, I must consider his exculpatory evidence in light of the principles in *R. v. W. (D.)* 1991 CanLII 93 (SCC), [1991] S.C.J. No. 26. If I believe his evidence I must acquit. If I don't believe his evidence, but it leaves me with a reasonable doubt, I must acquit. Even if Mr. Foster's evidence leaves me with no reasonable doubt as to his guilt, I

must decide whether the Crown has proven its case beyond a reasonable doubt on the totality of the evidence.

[46] A conviction based on circumstantial evidence requires the trier of fact to be satisfied beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the proven facts. (See *R. v. John* (1970), 1970 CanLII 199 (SCC), 2 C.C.C. (2d) 157 (S.C.C.) 166 and *R. v. Cooper* (1977), 1977 CanLII 11 (SCC), 34 C.C.C. (2d) 18 (S.C.C.).)

[47] Circumstantial evidence is to be considered in context, not in isolation. The strength of the inference to be drawn from an item of circumstantial evidence depends upon its relationship to the rest of the evidence. (See *R. v. White* (1996), 1996 CanLII 3013 (ON CA), 108 C.C.C. (3d) 1 (Ont. C.A.) and *R. v. Uhrig*, 2012 ONCA 470 (CanLII).)

[48] There is no direct evidence that Mr. Foster threw his dog over the balcony.

[49] Defence counsel points out that there were four empty milk crates stacked on the back wall of the balcony and Mr. Foster said there was a stool on the balcony. No measurements were taken to accurately assess the size of the dog, the measurements of the balcony, or the size and placement of the stool or milk crates. As such, there was no investigation to rule out the possibility that this was an accident.

[50] Moreover, Mr. Foster’s “admission” that his metaphysical body threw the dog over the balcony carries little weight as Officer Ko must have cautioned Mr. Foster twice because he did not think that Mr. Foster understood the caution the first time it was given. The statement about his metaphysical body was made before the second caution was given.

[51] For these reasons, she suggests there is a reasonable doubt as to Mr. Foster’s guilt.

[52] I do not understand why no measurements were taken and/or put into evidence by the Crown.

[53] While this is troubling, for the reasons that follow, I nonetheless find that Mr. Foster’s statement that he did not throw his dog off the balcony is not believable nor does his evidence leave me with any reasonable doubt when looked at in the context of the evidence taken as a whole, that he threw his dog off the balcony.

[54] Mr. Foster testified that he was in a small room with the door open to the balcony lying down with the dog. He was unable to account for what happened to the dog or how or why the dog left his side, went to the balcony and fell to its death. He says he heard nothing before the crowd made noises below.

[55] The circumstances of the fall are such that it is almost impossible for the dog to have accidentally fallen from the balcony. The parties agree and it is apparent from the photographs that the metal enclosure surrounding the open area was solid metal, three to four feet high. It is also apparent from the photographs that the milk crates are at the other end of the balcony. The dog was a small dog as evidenced from the photograph, the video of the dog, and the evidence of Mr. Foster himself. It would therefore have been highly unlikely if not impossible for this small

dog to jump to the top of the four empty crates without knocking them over, and or to jump from the ground or a stool over the three to four foot metal barrier.

[56] Mr. Foster's reaction to the discovery of his seriously injured dog was troubling and highly unusual: he showed no sadness, only anger at those gathered below. Instead of rushing to help the dog, he threw a bag of dog food toward his seriously injured dog who had fallen from a seventh story balcony to the ground. He made no attempt to help the dog.

[57] Moreover, Mr. Foster's evidence is at odds with the evidence of several Crown witnesses on issues that are material to this trial. For example:

- a. He denies Ms. Grayson's assertion that he said, "Yah, I killed the dog what are you going to do about it?";
- b. He denies Mr. Nippard's assertion that he had had difficulties with Mr. Foster in the past (as Mr. Foster allowed his dog to defecate on his balcony which then landed on his balcony two stories below);
- c. He denies Superintendent Hack's assertion that he got upset when the Superintendent confronted him about allowing his dog off his leash and told him to retrieve the dog earlier on the day the dog fell from the balcony;
- d. He denies both police officers' testimony and Officer Ko's notes that he was cautioned upon arrival of the police to the unit;
- e. He minimized the officers' assertion that he resisted arrest; and
- f. He said he had never initiated fights with others or intentionally hurt someone but on cross-examination conceded that he has been convicted of assault.

[58] Ms. Grayson was a credible and honest witness with no ill-will toward Mr. Foster. Her only prior encounter with him was when their dogs socialized once before. She was clear in her evidence that Mr. Foster admitted he threw his dog off his balcony. She was also candid in presenting a less than flattering image of her own son during his verbal fight with Mr. Foster. The evidence of Mr. Nippard, Superintendent Hack, and the two officers too was straightforward, clear and credible.

[59] Moreover, Mr. Foster's own assertion as to what he said to Ms. Grayson's son is troublesome. Instead of denying that he had thrown his dog over the balcony, he says he told him: "And if I did it, what are you going to do about it?"

[60] Mr. Foster never denied throwing the dog off the balcony. In fact, he told police that his "metaphysical self" threw the dog off the balcony. This is an admission of guilt that was given after he had been cautioned. As one who had been cautioned before, he says he knew the implications of speaking after being cautioned.

[61] Mr. Foster has some mental health issues. I was not told what they are or how they affect his behaviour or his understanding of what is happening. I appreciate that he may have had difficulty coping with stress, and a diminished understanding of what was happening. However, I was provided with no evidence to allow me to conclude that his statement admitting that his “metaphysical self” had thrown the dog off the balcony, was involuntary or that he had no appreciation of the situation more generally.

[62] This is a tragic event that resulted in suffering and the death of Mr. Foster’s dog. Mr. Foster has had a hard life and is not well. However, I have no evidence before me to enable me to find that Mr. Foster did not intend to throw the dog off the balcony and/or did not understand the consequences of his actions.

[63] For these reasons, on the basis of the circumstantial evidence before me, there is no other reasonable inference to be drawn than that Mr. Foster threw his dog off the balcony resulting in its suffering and death. I find Mr. Foster guilty on both counts.

Thorburn J.

Released: July 12, 2018

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