

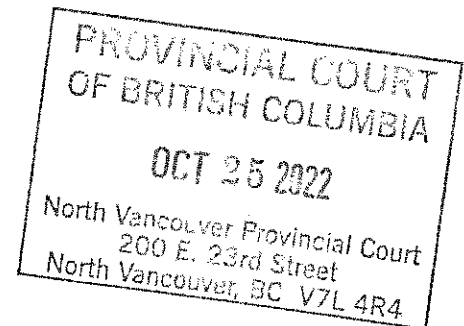
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Date: ☀
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Registry: North Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REX

v.



CODY JAMIE ERIC NELSON

**REASONS FOR SENTENCE
OF THE
HONOURABLE JUDGE P. BOND**

Counsel for the Crown:	M. Donnelly
Counsel for the Defendant:	K. Kirkpatrick
Place of Hearing:	North Vancouver, B.C.
Dates of Hearing:	October 6, 8, 2020; March 31, September 8, 9, December 10, 15, 2021; February 18, April 25, July 14 and August 29, 2022
Date of Judgment:	September 29, 2022

[1] I convicted Mr. Nelson on June 25, 2020, of one count of aggravated assault of Jayme Schmetterling on October 15, 2018, in Squamish, B.C.

A. CIRCUMSTANCES OF THE OFFENCE

[2] Mr. Nelson encountered Ms. Schmetterling as she was arriving at her work at the Dollar Tree in Squamish. After either exchanging words or a look, which communicated to Ms. Schmetterling that he disapproved of her, Ms. Schmetterling responded with some choice words. When Mr. Nelson continued to walk away from her, she approached him and tugged at his pants, which he was apparently wearing low on his hips.

[3] Mr. Nelson responded by punching Ms. Schmetterling in the face two times, knocking her backwards. Ms. Schmetterling suffered significant injuries, including broken bones in her face and a life altering brain injury. I found her injuries resulted from the punches to her face.

B. CIRCUMSTANCES OF THE ACCUSED

a. Generally

[4] Mr. Nelson is 29 years old.

[5] The *Gladue* and Pre Sentence Reports detail that his parents separated when he was one, and from the age of two to 16, Mr. Nelson was in and out of foster care. His recollection is that he was in 53 different foster placements due to his behavioural and anger problems. He admits he would sabotage the placements.

[6] Mr. Nelson's behavioural and anger problems no doubt arose from his upbringing. His mother admits to using drugs and alcohol during her pregnancy with Mr. Nelson. In addition, Mr. Nelson's father recalled that Mr. Nelson had a severe blow to the head at the age of three, for which he did not receive medical treatment. There is also a history of family violence perpetrated by his father against his mother and against Mr. Nelson.

[7] Mr. Nelson managed to complete Grade 11, but his school experience was difficult as he attended many different schools. He reports that he was always in trouble and experienced bullying.

[8] Since he left school, Mr. Nelson has worked for many different construction companies, on call. The information before me about his work over the last two years is inconsistent. He reported that he missed appointments with the Pre-Sentence Report Writer because he was working hard to provide for his family, in case he is sentenced to jail. He also reported that he has not worked steadily for the last two years, in part because he was designated a person with disabilities in 2018, and in part because of the pandemic. He also said that he has been doing odd jobs for neighbours from time to time, and his counsel submitted that he is working for two concrete companies. I note that it is evident from the reports that Mr. Nelson has been struggling with the prospect of the Court imposing a jail sentence, which may explain his recent inconsistent work history.

[9] Mr. Nelson has been in a common law relationship for 12 years. I am advised by his counsel that he no longer has contact with his partner, Ms. Burton. They have four children together.

[10] Mr. Nelson underwent a Forensic Youth Assessment on March 23, 2010, when Mr. Nelson would have been 18. The examining psychiatrist noted a previous diagnosis of PTSD but did not support that diagnosis at the time. The psychiatrist diagnosed Reactive Attachment Disorder, Conduct Disorder, and Narcissistic Personality Disorder traits.

[11] The Forensics Services report prepared for this matter, dated September 7, 2021, provides the following diagnoses: Attention Deficit/Hyperactivity Disorder, Combined Presentation, Severe, Post Traumatic Stress Disorder and Unspecified Personality Disorder. The report records that Mr. Nelson presents with both borderline and antisocial personality features. The writer opines that the possible presence of a Bipolar Mood Disorder should be a focus of future investigation and monitoring.

[12] The *Gladue* Report states that Mr. Nelson said he was diagnosed with FASD at an early age. This is not surprising, given his mother's admissions.

[13] Mr. Nelson is on anti-depressants and uses marijuana to calm himself. He acknowledges he struggles with anger issues arising from his past. He says he does not drink excessively. His Youth Worker reported that Mr. Nelson required constant reminders regarding his behaviour and attitude. His current Probation Officer reported no breaches of the protection condition, but notes that Mr. Nelson's frustration level is so low that if he does not get through to his supervisor on the first call, he leaves angry messages full of profanity and accusations, which is a challenge for the Probation Officer to deal with. Nonetheless, Mr. Nelson has indicated he is prepared to work with a Probation Officer if given a chance to serve his sentence in the community.

[14] Mr. Nelson missed six scheduled interviews with the Pre-Sentence Report writer. He initially missed his appointment with Forensic Services, however, ultimately, he did attend and, as noted above, we have the benefit of that report. I agree with Crown's submissions that given Mr. Nelson's mental health challenges and the anxiety that he has acknowledged over the results of this sentencing, the Court should place limited emphasis on his hesitant participation to date.

b. Risk Assessment

[15] Dr. Burnett, who conducted the September 7, 2021, Forensic Services Report, concluded that Mr. Nelson is at a moderate to high risk of violent recidivism due to his mood instability/dysregulation and persistent impulsivity. The Doctor notes, "his limited ability to manage/regulate anger has featured prominently in much of his offending behaviour" (p. 8).

[16] During the sentencing hearing, it became clear that there was an inadvertent error in the criminal record submitted to Dr. Burnett. The Crown consequently followed up with Dr. Burnett and clarified that the corrected record did not affect his opinion as to the level of risk. The doctor noted that Mr. Nelson had met the violence threshold even

with the correction and that the dynamics of offending were more significant than the number of convictions.

[17] Dr. Burnett recommended:

1. Ongoing psychiatric care.
2. An intensive course of individual psychotherapy focused on emotional regulation with strong emphasis on anger management.
3. Treatment and/or supervision strategies should be trauma-informed and tailored specifically to his mental health profile.

[18] Mr. Nelson indicated to Dr. Burnett a strong desire to participate in psychiatric/psychological treatment. Although he reported that he was not prescribed psychotropic medication at the time he was interviewed, he reported that such medications have been “helpful” in the past.

c. *Gladue* Considerations

[19] The *Gladue* Report details that Mr. Nelson’s mother is Caucasian and grew up in B.C. She struggled with substance abuse issues during Mr. Nelson’s youth, which resulted in considerable disruption in his life. He has since reconnected with her, as she is in recovery.

[20] Mr. Nelson’s paternal grandfather was born on the Ojibwa Reservation in the Turtle Mountain region of North Dakota. His family then immigrated to The Pas, Manitoba to network with extended family for better work opportunities. Mr. Nelson’s father, Carlos, was born in The Pas, but his mother brought him to B.C. at an early age. Both Mr. Nelson and his father know very little family history other than this. Neither have any knowledge of their language or culture, or whether any of their family ever attended a Residential School.

[21] The report details a number of facts and events that would have had a significant impact on Mr. Nelson. As noted above, his mother admits to abusing drugs and alcohol during her pregnancy. His parents separated when he was just one, and he was back and forth between them and various foster homes from the age of two to 16. His father

reports that Mr. Nelson's mother neglected to provide any birthday or Christmas presents for him. He also reported that at the age of three Mr. Nelson was traumatized by being circumcised, and that he suffered a severe blow to the head from a fall.

[22] Mr. Nelson reports being locked in a bedroom without food, water or access to the bathroom while his mother partied. He recalls that at the age of six he would climb out the window to collect bottles so he could buy food for his sister and himself.

[23] He also recalls that at the age of eight his mother abandoned him when his sister suffered a ruptured appendix. His sister was placed in foster care and he was collected by an aunt and taken to his father's, then back into foster care.

[24] I note that the *Gladue* Report makes no mention of Mr. Nelson's father abusing him, however, the Pre-Sentence Report details the following:

- That Mr. Nelson witnessed violence against his mother by his father and her other partners.
- The MCFD records confirm the violence and eleven child protection reports from 1996, when Mr. Nelson was four years old, to 2001 when he was nine.
- The MCFD records also detail that when Mr. Nelson was at his Aunt's home at the age of eight, he witnessed his father strangling his Aunt. His father was in custody for about a month and Mr. Nelson went into foster care before returning to his father's care.
- A Youth PSR report details that after returning to his father's care, Mr. Nelson "got into fights with [his] dad". He reported that at one point, as a punishment, he was forced to watch his father kill his pet chickens. Mr. Nelson reported that he would run away only to have his father catch him and the violence continued. The Ministry removed Mr. Nelson from his father's care when Mr. Nelson was nine years old. They obtained a permanent order in October 2002 (Mr. Nelson would have been 10 years old at the time).

[25] The *Gladue* Report details that at the age of 16, Mr. Nelson left the foster care system. Apparently, while living on his own, he was the victim of a home invasion and was badly beaten. His father reports that he heard Mr. Nelson was in the hospital. Mr. Nelson, Sr. picked up his son and got him work in construction.

[26] The Pre-Sentence Report, however, includes reference to a Pre-Sentence Report written in January of 2009 when Mr. Nelson was 16, indicating that Mr. Nelson returned to Salmon Arm for one month to assist his father, who had been injured in a car accident. The report states that Mr. Nelson said that during this time, his father became angry, punched Mr. Nelson and spit in his face. His father then tried to strangle Mr. Nelson. His father was charged and pled guilty to this offence.

[27] The *Gladue* writer concludes that based on the articles about intergenerational trauma, the trauma inflicted on Mr. Nelson's father and his father's extended family have affected Mr. Nelson. This is despite the fact that Mr. Nelson identifies as Caucasian and has no knowledge or understanding of his First Nations language, culture or family history.

[28] The *Gladue* Report records that Mr. Nelson would like steady, full-time, work at a place where he can complete a mental health treatment program while working and living close to his wife and children. It also states that he knows he needs to stay away from Vancouver because he always gets into trouble there.

[29] Counsel for Mr. Nelson provided an update as to Mr. Nelson's circumstances as submissions on this matter were made in December 2021. Mr. Nelson is no longer residing with Ms. Burton and has no contact with her. He is no longer residing with his mother. He is residing in Winfield, with a friend. His sister in Pemberton and Grandmother in Ontario remain supportive of him.

d. Criminal Record

[30] Mr. Nelson has a significant Criminal Record, including assault convictions in 2009 and 2010 as well as possessing a weapon for a dangerous purpose in 2011 and two convictions for failure to comply - all as a youth.

[31] His adult record includes assault convictions in 2012, and 2013 when he was approximately 20 and 21. He also has five breaches of probation orders/or failures to comply ranging from late 2011 through 2012. I note that his most recent violent offence

was an assault in October 2013, for which he received a suspended sentence. Prior to that, he served the following jail sentences:

- For possession of a weapon in 2011 he served 4.5 months plus one year probation;
- For two failures to comply he served 14 days plus one year probation;
- For the assault in March 2012, he served 61 days in custody (60 days pre-sentence) and one year probation;
- For two failures to comply in 2012, he served 19 days (14 days pre-sentence); and
- For the assault in October 2013, he received a suspended sentence and probation for 18 months.¹

[32] There has been a significant gap of five years in Mr. Nelson's record between 2013 and the date of this offence in 2018. He has been on bail conditions since, which include terms that he report to a probation officer, have no contact with the victim and other named individuals or attend their residences, place of work, education or place of worship, including the Dollar Tree; and not possess any weapons. As noted above, Mr. Nelson has not breached these conditions.

C. CIRCUMSTANCES OF THE VICTIM

[33] Ms. Schmetterling sustained a significant injury in the assault. Her occipital bone was broken in two places and she suffered substantial brain bleeding and swelling resulting in hospitalization for 10 days and many months of recovery. She sustained permanent brain damage, and she suffers from PTSD and anxiety, which have worsened since the assault and require medications.

[34] Her brain injury has taken away her ability to work; has compromised her social life, her capacity for intellectual discussion, and her capacity to manage interpersonal

¹ Mr. Nelson reported to the *Gladue* Report writer that he spent six months in remand and served an 18-month conditional sentence in 2014. I assume this refers to the suspended sentence, which did not include or reference a custodial sentence.

interactions as she once did. She suffers constant headaches and sleep disruptions, due to nightmares and night terrors.

[35] Ms. Schmetterling's disability income does not cover all of her expenses. There was an indication in her Victim Impact Statement that she may have been forced to move as a result.

[36] Clearly, this event has had a devastating impact on her life and has had negative financial as well as personal consequences for her.

D. SUBMISSIONS OF CROWN

[37] The Crown notes that the maximum penalty for aggravated assault is 14 years. Ms. Donnelly takes the position that the Court should impose a sentence of 4 – 5 years.

[38] The Crown also seeks:

- a DNA order, as this is a Primary Designated offence;
- a firearms order; and
- a stand alone restitution order.

E. SUBMISSIONS OF DEFENCE

[39] Defence takes the position that a conditional sentence is appropriate.

F. SENTENCING PRINCIPLES

a. Generally

[40] The fundamental purpose of sentencing, set out in s. 718 of the *Criminal Code* is:

...to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;

- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[41] In each case, “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. Further, the Court should consider the moral blameworthiness of the offender and those causing harm intentionally should be punished more severely than those causing harm unintentionally².

[42] The objectives of prevention, deterrence, retribution and rehabilitation are all relevant considerations in the process of sentencing. In *R. v. Miloszewski*, [1999] BCJ No. 2710, the Court cites the Chief Justice of Canada in the Supreme Court of Canada decision of *R. v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327, as follows:

Retribution...represents an objective, reasoned and measured determination of an appropriate punishment, which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[43] The Crown submits that in assessing the degree of Mr. Nelson's responsibility the Court must take into consideration the following factors:

- a) The intentional risk taking implicit in the offence;
- b) The dramatic disproportion between Ms. Schmetterling tugging at his pants and his response, and the many alternative options available to Mr. Nelson;
- c) Mr. Nelson's apparent bias or prejudice towards Ms. Schmetterling;
- d) The degree of violence; and

² *R. v. Miloszewski* [1999] B.C.J. No. 2710 at para 130.

e) The seriousness of the resulting injury.

[44] Counsel for Mr. Nelson argues that he was provoked and responded. In essence, he argues, this fight got out of hand.

[45] Furthermore, defence counsel points out that Mr. Nelson took steps after the offence to assist Ms. Schmetterling by calling 911 and flagging down a police vehicle, which he argues demonstrates that this was not a hate crime, or motivated by bias or prejudice.

b. Aggravating or Mitigating Circumstances

[46] Section 718.2(a) states that the Court shall take into consideration that a sentence should be increased or reduced to account for aggravating or mitigating circumstances relating to the offence or the offender.

i. Offence Motivated by Bias, Prejudice or Hate

[47] Section 718.2(a)(i) states that evidence that the offence was motivated by a number of stated factors, including sexual orientation or gender identity or expression, or any other similar factor, **relating to the complainant** is aggravating.

[48] The Crown relies on *R. v. Kandola*, 2010 BCJ No. 1160; 2010 BCSC 841, in which Mr. Kandola sucker punched Mr. Smith, knocking him out and breaking his jaw, in response to seeing Mr. Smith holding hands with another man.

[49] The sentencing judge stated at para. 27 that this section of the *Criminal Code* is an “expression of Canadian social values which include a respect for diversity and is a direction from Parliament that sentencing judges ought to give substantial weight to this aggravating factor.” Even before this section was enacted, the courts had determined that offences motivated by prejudice or hate are “particularly heinous and the sentence imposed in such circumstances must be one which expresses the public’s abhorrence for such conduct and their refusal to countenance it.”

[50] Justice Groves stated that deterrence is particularly crucial when the Crown has proven beyond a reasonable doubt that hatred is a motivation in the crime. He found that a significant period of additional incarceration is necessary for such an accused (*Kandola*, p. 10 para. 39 and 40).

[51] In *R. v. Miloszewski*, the Provincial Court found that the major sentencing objectives in hate-motivated crimes are denunciation and general deterrence. This has translated into custodial sentences, which appeal courts have upheld, and even increased. (*R. v. Ingram and Grimsdale* (1977), 35 C.C.C. (2d) 376, and *R. v. Lelas* (1990), 58 C.C.C. (3d) 568, both of the Ontario Court of Appeal).

[52] In my reasons for Judgment, I found that while Ms. Schmetterling's injuries compromised her memory of the events, I accepted her evidence that the exchange began when Mr. Nelson either said something to her in the parking lot or exchanged a look that communicated to her that he disapproved of her, even though they did not know each other. She responded verbally and Mr. Nelson walked away from her.

[53] Ms. Schmetterling felt his response was disrespectful and voluntarily entered into a physical altercation with Mr. Nelson when she tugged at his pants. Her actions were inappropriate and humiliating. I found that they constituted provocation. However, I also found that Mr. Nelson's response – two swift punches to the face - was unmeasured, disproportionate and unreasonable in the circumstances. I found that this was by no means a consensual fight.

[54] After the assault, a witness overheard Mr. Nelson stating, "I just beat the shit out of the tranny from the Dollar Tree" and that the attending police "laughed about it and went on with their day". In addition, Mr. Nelson admitted that he sent two texts to a Mr. Cannon stating:

- i) "Right after I left ur place I knocked out a fag dt [downtown] read the paper"; and
- ii) "I knoed [knocked] the fag out legally because it smacked my ass. Not just because it was gay".

[55] I note the evidence does not support Mr. Nelson's suggestion that Ms. Schmetterling smacked him as he suggested in the text, however, she did tug at his pants. The independent witness testified that Mr. Nelson was facing Ms. Schmetterling when she did this.

[56] I concluded that the overheard comments and texts convey disrespect and even disgust towards Ms. Schmetterling as a transgendered person. The depersonalization is consistent with the disparaging comments or attitude alleged by Ms. Schmetterling and suggest that Mr. Nelson held her in contempt. From all of the circumstances, I concluded that Mr. Nelson intended to cause serious bodily harm to Ms. Schmetterling.

[57] Mr. Nelson did not testify at his trial. For the purposes of the sentencing hearing, he specifically denies that he used the word "tranny" in reference to the victim. I note that he does not deny that he was sharing publicly about having beat up Ms. Schmetterling, nor does he deny that he characterized the police as laughing about it.

[58] He says that he regrets his choice of words in the texts to Mr. Cannon. He explained that he did not know how to refer to Ms. Schmetterling. He said the texts were in the context of an exchange in which Mr. Cannon referred to Mr. Nelson as the product of incest, and that Mr. Cannon was withholding a cheque for work performed by Mr. Nelson.

[59] While I appreciate the heated context of the text exchange, I find it difficult to accept the explanation that the references to Ms. Schmetterling as "it" were solely the result of a limited vocabulary. I note that the words overheard in the Cannabis store were not issued in the context of a heated interaction. Nevertheless, they were of a similar character and were disrespectful of the victim.

[60] As noted above, counsel for Mr. Nelson rightly points out that unlike cases such as *Kandola*, *R. v. Wright*, 2021 BCSC 2066, and *R. v. Richter*, [2013] BCJ 664 BCSC, after the assault, Mr. Nelson called 911 for assistance, flagged down a passing police

officer and offered to assist the victim. Mr. Forsyth argues that this supports Mr. Nelson's assertion that this was not a hate crime.

[61] The Crown points out that it is not necessary to conclude that Mr. Nelson holds a bias, prejudice or hate towards transgendered individuals, in general. Section 718.2 (a)(i) provides that if Mr. Nelson was motivated by bias or prejudice based on sexual orientation or gender identity or expression in committing this offence, it is an aggravating factor to be taken into account.

[62] The Crown submits that I should find Mr. Nelson was motivated by a bias against Ms. Schmetterling, based on all of the circumstances, including the depersonalization of Ms. Schmetterling in his comments.

[63] I have no difficulty finding that Mr. Nelson's initial response to Ms. Schmetterling was fueled in part by a reaction to her as she presented to him that day. However, the actual assault was also fueled by the intervening actions of Ms. Schmetterling tugging at his pants after Mr. Nelson walked away from her. While it is difficult to tease apart the initial exchange from the assault, given how close they occurred in time and how disproportionate Mr. Nelson's reaction was to Ms. Schmetterling tugging at his pants, I cannot ignore the fact that Mr. Nelson chose to walk away after the initial interaction.

[64] I find that this situation is fundamentally different from cases like *Kandola*, *Wright*, and *Richter*. In those cases, the accused persons specifically targeted the victims for an assault because they disapproved of them. The accused continued to curse the victims after viciously assaulting them, and/or failed to assist or obtain help for the injured victims, putting them in further peril. It was clear the accused in those cases had no regard for the victim's lives.

[65] Mr. Nelson's mental health challenges complicate the issue because they make him prone to over respond or react with uncontrolled anger. While I find that Mr. Nelson was motivated in the initial exchange by a bias against Ms. Schmetterling because of the way she looked to him; I cannot say beyond a reasonable doubt that his overreaction to her tugging at his pants was motivated by that bias. It might well be that

it was simply the product of the nature of the provocation and his uncontrolled anger issues.

[66] In the result, I cannot find that Mr. Nelson's apparent bias was an aggravating factor.

ii. Nature of the Assault

[67] The Crown argues that I should find the nature of this assault to be an aggravating circumstance. In particular, they point to the following:

- a. that Mr. Nelson did not give Ms. Schmetterling a warning or time to bring her hands up to protect herself;
- b. it was inherently risky to strike Ms. Schmetterling in the face; and
- c. that I found Mr. Nelson's response was unmeasured, disproportionate and unreasonable in the circumstances.

[68] I note that to some extent, each of these were considerations in determining that this was an aggravated assault, in the first place. I am not convinced that I can tease out to what extent they go to Mr. Nelson's objective foresight of bodily harm, which is an element of the offence, or whether any of these points go beyond that to constitute a further aggravating factor.

[69] I do accept the fact that the independent witness described Ms. Schmetterling as a fragile older woman compared to the young and fit Mr. Nelson, is aggravating. Mr. Nelson had the face-to-face encounter with Ms. Schmetterling moments before the assault and could see and assess that she was not a physical threat to him, just as the independent witness did in that moment.

iii. Criminal History

[70] Mr. Nelson's criminal history is an aggravating factor. He has three prior violence related convictions as an adult and one as a youth. I do note that there has been a significant gap of five years between offences. However, Mr. Nelson's record suggests

that his uncontrolled anger has consistently been at the root of his offending, and he has yet to address this issue.

[71] Dr. Burnett comments as follows:

Indeed, mood instability/dysregulation and persistent impulsivity appear to be central to his history of anger and aggression. His limited ability to manage/regulate anger has featured prominently in much of his offending behaviour. The effective management of Mr. Nelson's mental health condition would be expected to lower his overall likelihood of violent reoffending. (p. 8, para. 8.03).

iv. Impact on Ms. Schmetterling

[72] Section 718.2(a) (iii.1) specifically requires the Court to consider that evidence that the offence had a significant impact on the victim is an aggravating factor, taking into consideration the victim's age and other personal circumstances, including their health and financial situation.

[73] As I noted earlier, this offence has had a devastating impact on Ms. Schmetterling. The course of her life has been changed dramatically by the brain injury she sustained.

d. Gladue Factors and Moral Culpability

[74] Section 718.2(e) requires the Court to consider broad systemic and background factors affecting Indigenous people generally. Case specific information about the accused's heritage helps to assess whether the systemic background factors have affected the appellant's own life experiences. If so, the Judge must consider whether they "illuminate the offender's level of moral blameworthiness" or disclose the sentencing objectives the Court should prioritize.

[75] Crown counsel argues that I should see this case as similar to *R. v. Taylor*, 2021 BCCA 283. In *Taylor*, while the accused's paternal grandfather identified as Métis, her parents separated when she was three and she had minimal contact with her biological father throughout her upbringing. In addition to exposure to her mother's struggles with

alcohol, Ms. Taylor experienced sexual violence, intimate partner violence and substance abuse.

[76] The BCCA found that while there is often a link between these circumstances and the displacement and general mistreatment of Indigenous persons, such circumstances are also regrettably common outside of this context. There was nothing, however in the Pre-Sentence Report to suggest a relationship between these circumstances and Ms. Taylor's Métis heritage as opposed to other factors. Nevertheless, the BCCA held that the trial judge was alive to these factors and considered some of them in mitigating the sentence.

[77] I find that Mr. Nelson's situation differs in that not only did Mr. Nelson face the challenges of a mother struggling with alcoholism, and years in and out of the foster care system; but he also witnessed violence between his parents for years after their separation and personally experienced his father violently assaulting him.

[78] Both counsel acknowledge that I must have regard for the reality noted in *R. v. Ipeelee*, 2012 SCC 13, which is quoted at para. 37 of *R. v. Hansen*, as follows:

In *Ipeelee*, the Court noted that it would be difficult, if not impossible, for an Aboriginal offender to establish a direct causal link between his or her circumstances and his or her offending. At para. 83, the Court emphasized:

...Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence.

[79] I find that Mr. Nelson's personal challenges, his family history of violence, substance abuse and Ministry intervention are all consistent with the results of colonization of Indigenous people. I am prepared to accept that the *Gladue* Report provides a factual link between Mr. Nelson's family history and the effects of colonization, even though the breakdown in family and cultural ties has deprived Mr. Nelson of access to information about whether his relatives experienced the Residential School system.

[80] I also find that the fact that Mr. Nelson identifies as Caucasian, in his particular circumstances, does not diminish or protect him from the negative intergenerational effects of colonization, but rather, is itself likely a demonstrated effect of this history. Likewise, where the effects of colonization result in estrangement from one's family history and a loss of direct cultural connection, again, the individual may still be exposed to the intergenerational effects through family members, and their resulting challenges.

[81] In this case, we cannot say whether the family violence was a direct result of colonization. We can say that certain disadvantages fell to Mr. Nelson because of his Caucasian mother's alcoholism and neglect, and his Indigenous father's violence. Nonetheless, it is well understood that the effects of colonization have robbed many Indigenous individuals and families of the skills, foundation and community necessary to deal with such challenges in the family context effectively. It has also deprived them of the skills and supports necessary to protect their children from the impact of parental violence and substance abuse.

[82] Given that so many of the classic indicators of the effects of colonization are present in Mr. Nelson's life, and given his family history, I am prepared to accept that he is entitled to receive the benefit of the *Gladue* factors in sentencing. I accept that his unique circumstances bear directly on his moral culpability for the offence.

[83] In any event, even outside the context of the effects of colonization on Indigenous people, as noted in *Taylor*, a family and educational history of this nature, as well as the mental health challenges Mr. Nelson faces must be taken into consideration in any sentencing hearing. Even without considering *Gladue*, they will affect the Court's assessment of the moral blameworthiness of the conduct in question.

g. Range

[84] Notwithstanding the fact that the maximum sentence is 14 years, in *Wright* Mr. Justice Taylor notes that the range of sentences for aggravated assault is between sixteen months and six years (para. 74). Madame Justice Prowse commented on the range of sentence as follows:

Sentences at the lower end of the range tend to be imposed in “fight” situations in which the altercation escalates and results in injuries to the victim. Sentences at the higher end of the range tend to be imposed in situations where the victims are attacked with a weapon, without provocation and without any opportunity to defend themselves.

[85] Of course, it is well established that ranges are not conclusive and do not preclude greater or lesser sentences if the circumstances or principles of sentencing warrant it.

G. SENTENCE

[86] Section 718.2(b) requires the Court to impose similar sentences for similar offences committed in similar circumstances.

a. The Crown’s Cases

[87] The Crown is relying on the following cases for guidance on the duration of sentence:

R. v. Kandola, [2010] BCJ 1160 BCSC
R. v. Kandola, [2011] BCJ 963 BCCA
R. v. Woodward, [2011] BCJ 964 BCCA
R. v. Miloszewski, [1999] BCJ 2710 BCPC
R. v. Sesay, [2020] BCJ 135 BCCA
R. v. S.F., [2015] BCJ 2439 BCPC
R. v. Richter, [2013] BCJ 664 BCSC
R. v. Richter, [2014] BCJ 2483 BCCA
R. v. Taylor, 2021 BCCA 283

b. Defence Cases

[88] Defence Counsel is relying on the following cases:

R. v. Tone, 2003 BCSC 880
R. v. Nakamura, 2012 BCSC 327
R. v. Charlie, 2020 YKCA 6

R. v. Anthony-Cook, 2014 BCSC 1503

R. v. Woodward, 2011 BCCA 251 (as above)

R. v. Hansen, 2014 BCSC 625

R. v. Paquette, 2012 BCSC 1497

c. Appropriate Sentence

[89] I have read all of the cases provided to me by both Crown and Defence Counsel.

[90] I note that many of the Crown's cases do not involve *Gladue* considerations. Several include more aggravating factors relating to the accused's failure to assist the victim after the offence, including further abuse and even further endangering their lives.

[91] I find the case of *S.F.* to be the most helpful in that it is similar in many respects, including:

- i) the nature of the assault,
- ii) the significance of the injury sustained,
- iii) the accused's prior criminal record which included some violent offences, and
- iv) the fact that the Court found that the *Gladue* factors should apply in sentencing because of the offender's personal history.

[92] In that case, the Court imposed a sentence of **three years** for the aggravated assault after taking into account the *Gladue* factors.

[93] Mr. S.F.'s circumstances differ in that:

- i) It was determined that the assault was unprovoked but for a comment made to the accused.
- ii) The injuries sustained were even greater than Ms. Schmetterling suffered, in that the victim required surgery and was in a medically induced coma for two weeks.
- iii) The accused was almost ten years older than Mr. Nelson, had a lengthier record and suffered from long-term substance abuse issues.

[94] Many of defence counsel's cases can also be distinguished on the facts or circumstances. For example:

- The case of *Tone* involved unique circumstances, including significant provocation, a guilty plea, no history of violence and no risk of re-offending.
- The case of *Nakamura* involved a younger first offender, as well as an issue of parity with an under aged offender participant.
- In the case of *Charlie*, the victim was the initial aggressor, first verbally and then physically, making it a provoked and consensual fight. Mr. Charlie's personal circumstances were more mitigating than Mr. Nelson's.
- *Anthony-Cook* related to a charge of manslaughter. The Court struggled with a joint submission that it found did not adequately address the principles of sentencing.
- While *Hansen* dealt with an aggravated assault where the *Gladue* factors were relevant, Ms. Hansen did not have a significant related record and the Court found that she had turned her life around since the offence.

[95] There are also differences in the *Paquette* case, which are both more mitigating and more aggravating. These include that it was a guilty plea; the accused hit and kicked the victim after he had fallen to the ground unconscious, the accused was under the influence of drugs at the time of the offence and Mr. Paquette had taken very significant steps to manage his longstanding addiction over the prior two years. At the time of sentencing, he was in the process of weaning off methadone.

[96] All of the cases presented are helpful in determining an appropriate sentence for Mr. Nelson.

[97] I find that general and specific deterrence and denunciation of such unnecessary violence, particularly where it involves striking people in the head with sufficient force to cause these injuries must result in a sentence that will send a strong message that such conduct is utterly unacceptable in our society. The nature of this offence is such that it falls within the middle of the range of sentences for aggravated assault, rather than into the range proposed by Crown Counsel. I find that a sentence of three years is an appropriate sentence for this offence.

[98] However, in accordance with s. 718.2(e) and the Supreme Court of Canada's decisions of *Gladue* and *Ipeelee*, I must also take into consideration my finding that Mr. Nelson's past and current circumstances reduce his moral culpability for this offence. I must now determine whether that finding affects the sentence.

[99] In *Hansen*, at para. 35, the Court cited *R. v. Skani*, [2002] A.J. No. 1579 where Greckol J. described the background circumstances of an offender as follows:

...[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled". Failing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*.

[100] In these circumstances, I find that I must take into consideration Mr. Nelson's very difficult childhood and the role that has likely played in the level of anger he carries with him and the development of his personality traits and disorders. While Mr. Nelson is an adult and responsible for his own actions, I can see that his past has to some extent contributed to the level of violence in this offence and consequently, I find that his moral blameworthiness is reduced somewhat.

[101] I accept, as well, that Mr. Nelson has taken steps in the past to remove himself from influences that tend to lead him to react violently. To a certain extent, he was successful, as he did not commit any offences for a period of five years. On the other hand, he has been aware of his vulnerabilities and does not seem to have taken steps to date to obtain the counselling and therapy necessary to overcome his disadvantages. He now says he is interested in doing so, which is a good thing, because he is the only one that can do this.

[102] Nonetheless, given his disproportionate reaction to the Ms. Schmetterling's tug on his pants, the degree of violence and the significant and lifelong personal and financial impact on her, I find that a sentence of 28 months is necessary to meet the principles of sentencing in this case.

H. CONDITIONAL SENTENCE

[103] The question remains whether a Conditional Sentence Order is appropriate.

[104] I note that s. 718.2(d) of the *Criminal Code* provides that “an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.” This provision requires Judges to take into account the risk factors in each individual case as well as any alternatives to incarceration.

a. Criteria

[105] The criteria for Conditional Sentence orders are set out in s. 742.1 of the *Criminal Code*, which provides that a Conditional Sentence order may be imposed if the Court imposes a sentence of less than two years. Counsel now agree that the provisions in 742.1(e)(i) do not create a bar to imposing a Conditional Sentence Order.³

b. Restrictions on a CSO

[106] The Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5, stated that the following conditions determine whether a CSO is **possible**:

- a) that the term of sentence is no more than two years;
- b) that the maximum sentence is more than 14 years; and
- c) that the offender serving the sentence in the community would not endanger the safety of the community.

[107] However, a conditional sentence will only be **appropriate** if it is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[108] Mr. Justice Taylor found that in accordance with *R. v. Proulx*, 140 CCC (3d) 449, even when a conditional sentence is available, it must not be imposed if the safety of the community is endangered or a conditional sentence does not meet the principles of sentencing. In assessing the former, the Court must look to the specific threat posed by

³ Counsel made submissions before me today as to the impact of recent decisions on the Criminal Code provisions referred to herein. However, they also submit that the case law relating to the appropriateness of a Conditional Sentence has not changed.

the offender and consider the likelihood of the offender reoffending and the gravity of the damage that could result if the offender does reoffend. In assessing the latter, the Court must consider whether the principles of deterrence and denunciation can be met by a conditional sentence order.

[109] I find in this case that Mr. Nelson does not qualify for a Conditional Sentence Order for the following reasons:

- a) The sentence which I have determined is appropriate is more than two years;
- b) Mr. Nelson's assessed level of risk is moderate to high;
- c) The damage that could result if Mr. Nelson were to re-offend is considerable given the limitations on his ability to manage his responses, although I acknowledge he has been able to comply with his conditions during the period he has been on bail; and
- d) Finally, and most importantly, when I consider the aggravating and mitigating circumstances, the principles of sentence, the gravity of the offence and moral culpability of the offender, I conclude that a jail sentence is necessary to address deterrence and denunciation, which are the sentencing principles to which I must give the greatest weight.

[110] Accordingly, I am imposing a jail sentence of 28 months.

[111] I will recommend that while he is in custody, to the greatest extent possible, Mr. Nelson should be afforded any and all resources available for Indigenous offenders with the objective of overcoming the many disadvantages he has experienced as a result of colonization of Indigenous peoples.

[112] I am aware of resources such as Kwikwèxwelhp in the valley here, which is a hugely affective program in such circumstances.

I. RESTITUTION

[113] The Crown is seeking an order for restitution. Defence counsel notes there is some disparity in the Crown's material in support of this claim. The Crown initially filed a victim impact statement indicating a loss of income of \$12,000 as at September 30,

2020. Subsequently, they filed a Statement on Restitution dated January 12, 2021, indicating a loss of wages from October 2018 to March 2020 of \$9,823.

[114] I note that Ms. Schmetterling's manager testified at the trial in September 2019 that Ms. Schmetterling had been off work for a period of time and at the time of trial, she was no longer able to perform her former duties and had to be re-assigned.

[115] The Crown has provided an undated letter from Cindy Endrizzi, a Social Worker with the Squamish Mental Health and Substance Use Services stating that Ms. Schmetterling was unable to work for three months after the assault in October 2018. She returned to decreased hours in January 2019, and to her regular hours, but modified duties in early February 2019. After a few months, she had to reduce her hours to approximately five hours per week. As of March 2020, she was no longer employed by the Dollar Tree.

[116] Ms. Endrizzi attached a list of the hours worked and net income earned by Ms. Schmetterling during July 2018 to March 2020. It shows a dramatic reduction in her income in the months of October 2018 through January 2019, and then again from September 2019 through to March 2020. It appears that the calculation of lost income of \$9,823 is a fair reflection of her lost hours of work.

[117] Neither counsel has provided any case law on the issue of whether a restitution order is appropriate.

[118] In this case, I must take into consideration the fact that I am imposing a federal sentence on Mr. Nelson. Given his mental health challenges, this might well take him out of the work force for the full period of his sentence.

[119] In addition, Mr. Nelson is a person with a disability. His challenges have rendered him unable to sustain steady employment over the last two years. After his recent assessment, he wishes to obtain some treatment for his mental health challenges.

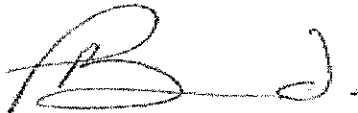
[120] While I recognize the significant hardship, which Ms. Schmetterling has endured and continues to face because of this assault, I find that I cannot lose sight of the length

of sentence I have imposed and all the other factors I have taken into consideration in determining a just and appropriate punishment. I find it would not be fit or proportionate to impose restitution as part of Mr. Nelson's sentence.

[121] The DNA order sought by Crown is mandatory as is the firearms order pursuant to s. 109(2)(a)(ii). Mr. Nelson will be prohibited for a period of 10 years.

[122] Given Mr. Nelson's disability status, challenges and the length of the sentence I am imposing, I will waive the Victim Fine Surcharge as he will not be in a position to pay it.

[123] Finally, I am making an order that the Pre Sentence Report, the *Gladue* Report and Forensic Assessment be made available to the appropriate officials of the Penitentiary to assist with programming for Mr. Nelson.

A handwritten signature in black ink, appearing to read 'P. Bond', with a stylized flourish at the end.

The Honourable Judge P. Bond
Provincial Court of British Columbia