2010 CarswellOnt 6584,

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R. v. Taylor

Her Majesty the Queen and Bryan Taylor

Ontario Court of Justice

Melvyn Green J.

Heard: June 1 - July 29, 2010
Judgment: September 2, 2010
Docket: None given.

Counsel: E. Evans, for Crown

S. Pieters, for Defendant

Subject: Criminal; Evidence

Criminal law --- Offences — Assault — Common assault — Elements — Miscellaneous

Identity of accused — While C was working security at bar, patron punched him in head — C grabbed his assailant for couple of seconds in order to look at him — Melee erupted and other security guards pushed patrons out of bar onto sidewalk — Approximately 40 minutes after C was punched, police arrived and intercepted group of patrons across street from bar — Accused was arrested and C identified him to police as his assailant — Accused was charged with assault — Accused acquitted — There was reasonable doubt as to accuracy of C's identification of accused — Crown rightly eschewed any reliance on C's courtroom identification given factors bearing on its integrity — These factors included that accused was only black person in courtroom and that C admitted he would not have been able to identify accused had he seen him on street — C's allegedly continuous observation of his assailant until point when accused was arrested did not confirm reliability of his identification — C was honest witness — However, there were two problematic junctures with respect to C's observational continuity — First was whether man C grabbed was his assailant — Second, assuming that C did grab his assailant, was whether C continuously eyeballed him for following 40 minutes — Reasons for doubt included that scene at time of assault

was chaotic, that C witnessed later events at night from across crowded street, that accused was significantly taller than assailant described by C, and that C did not identify accused to police until after his arrest.

Evidence --- Opinion — Opinion evidence in particular matters — Identification — Miscellaneous

Eyewitness identification of accused by complainant — While C was working security at bar, patron punched him in head — C grabbed his assailant for couple of seconds in order to look at him — Melee erupted and other security guards pushed patrons out of bar onto sidewalk — Approximately 40 minutes after C was punched, police arrived and intercepted group of patrons across street from bar — Accused was arrested and C identified him to police as his assailant — Accused was charged with assault — Accused acquitted — There was reasonable doubt as to accuracy of C's identification of accused — Crown rightly eschewed any reliance on C's courtroom identification given factors bearing on its integrity — These factors included that accused was only black person in courtroom and that C admitted he would not have been able to identify accused had he seen him on street — C's allegedly continuous observation of his assailant until point when accused was arrested did not confirm reliability of his identification — C was honest witness — However, there were two problematic junctures with respect to C's observational continuity — First was whether man C grabbed was his assailant — Second, assuming that C did grab his assailant, was whether C continuously eyeballed him for following 40 minutes — Reasons for doubt included that scene at time of assault was chaotic, that C witnessed later events at night from across crowded street, that accused was significantly taller than assailant described by C, and that C did not identify accused to police until after his arrest.

Criminal law --- Offences — Assault — Assault with intent to resist or prevent arrest

Cellphone video contraverting officers' accounts of accused's resistance.

Cases considered by *Melvyn Green J.*:

R. v. A. (F.) (2004), 184 O.A.C. 324, 183 C.C.C. (3d) 518, 2004 CarswellOnt 1055 (Ont. C.A.) — referred to

R. v. Burke (1996), *(*sub nom. *R. v. Burke (No. 3))* 194 N.R. 247, *(*sub nom. *R. v. Burke (No. 3))* 433 A.P.R. 147, 46 C.R. (4th) 195, 105 C.C.C. (3d) 205, [1996] 1 S.C.R. 474, 1996 CarswellNfld 85, 1996 CarswellNfld 85F, *(*sub nom. *R. v. Burke (No. 3))* 139 Nfld. & P.E.I.R. 147 (S.C.C.) — referred to

R. v. Cloutier (1991), 1991 CarswellQue 309, 66 C.C.C. (3d) 149, 51 Q.A.C. 143 (Que. C.A.) — referred to

R. v. Dillon (1964), 43 C.R. 259, 1964 CarswellAlta 32, 47 W.W.R. 510, [1964] 3 C.C.C. 205 (Alta. C.A.) — referred to

R. v. Hanemaayer (2008), 2008 CarswellOnt 4698, 2008 ONCA 580, 239 O.A.C. 241, 234 C.C.C. (3d) 3 (Ont. C.A.) — considered

R. v. M. (R.E.) (2008), [2008] 11 W.W.R. 383, 83 B.C.L.R. (4th) 44, [2008] 3 S.C.R. 3, 2008 CarswellBC 2037, 2008 CarswellBC 2038, 2008 SCC 51, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, 380 N.R. 47, 439 W.A.C. 40, 260 B.C.A.C. 40 (S.C.C.) — referred to

R. v. Miaponoose (1996), 1996 CarswellOnt 3386, 30 O.R. (3d) 419, 110 C.C.C. (3d) 445, 93 O.A.C. 115, 2 C.R. (5th) 82 (Ont. C.A.) — referred to

R. v. Morrissey (1995), 1995 CarswellOnt 18, 38 C.R. (4th) 4, 22 O.R. (3d) 514, 97 C.C.C. (3d) 193, 80 O.A.C. 161 (Ont. C.A.) — considered

R. v. Newton (2006), 2006 CarswellOnt 1535, 29 M.V.R. (5th) 11 (Ont. C.A.) — considered

R. v. Quercia (1990), 75 O.R. (2d) 463, 60 C.C.C. (3d) 380, 1 C.R. (4th) 385, 41 O.A.C. 305, 1990 CarswellOnt 63 (Ont. C.A.) — referred to

R. v. S. (J.H.) (2008), 2008 CarswellNS 270, 2008 CarswellNS 271, 293 D.L.R. (4th) 257, 57 C.R. (6th) 79, 375 N.R. 67, [2008] 2 S.C.R. 152, 265 N.S.R. (2d) 203, 848 A.P.R. 203, 2008 SCC 30, 231 C.C.C. (3d) 302 (S.C.C.) — considered

R. v. Smierciak (1946), [1946] O.W.N. 871, [1947] 2 D.L.R. 156, 1946 CarswellOnt 26, 2 C.R. 434, 87 C.C.C. 175 (Ont. C.A.) — referred to

R. v. Spatola (1970), 10 C.R.N.S. 143, [1970] 4 C.C.C. 241, 1970 CarswellOnt 4, [1970] 3 O.R. 74 (Ont. C.A.) — referred to

R. v. Tat (1997), 117 C.C.C. (3d) 481, 35 O.R. (3d) 641, *(*sub nom. *R. v. T.T.)* 103 O.A.C. 15, 14 C.R. (5th) 116, 1997 CarswellOnt 5434 (Ont. C.A.) — referred to

R. v. Tebo (2003), 2003 CarswellOnt 1749, 172 O.A.C. 148, 175 C.C.C. (3d) 116, 13 C.R. (6th) 308 (Ont. C.A.) — referred to

R. v. Trochym (2007), 43 C.R. (6th) 217, 221 O.A.C. 281, 2007 SCC 6, 2007 CarswellOnt 400, 2007 CarswellOnt 401, 216 C.C.C. (3d) 225, 85 O.R. (3d) 159 (note), 276 D.L.R. (4th) 257, 357 N.R. 201, [2007] 1 S.C.R. 239 (S.C.C.) — referred to

R. v. W. (D.) (1991), 1991 CarswellOnt 1015, 3 C.R. (4th) 302, 63 C.C.C. (3d) 397, 122 N.R. 277, 46 O.A.C. 352, [1991] 1 S.C.R. 742, 1991 CarswellOnt 80 (S.C.C.) — followed

Statutes considered:

Criminal Code, S.C. 1953-54, c. 51

s. 232(1)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 177 — considered

s. 265(1) "assault" (a) — considered

s. 270(1)(b) — considered

Words and phrases considered

resist or prevent

[T]here is little or no reported jurisprudence respecting [s. 270(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46] which, in its entirety, reads: "Every one commits an offence who assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person". The words "resist" and "prevent" are framed disjunctively. Accordingly, the provision may well give rise to two separate offences, one of assault with the intent to resist arrest and a second of assault with the intent to prevent arrest. . . . Even if s. 270(1)(b) does not admit to this construction and, instead, describes two alternative modes of committing the same offence, it must be borne in mind that in charging the defendant the Crown has particularized the offending conduct as that of "preventing" — rather than "resisting" — a lawful arrest. These two words — "resist" and "prevent" — convey different meanings (indeed, reputable thesauruses do not advance one word as a synonym for the other: *Concise Oxford Thesaurus*, 2nd Ed., Oxford University Press, 2002; *Roget A to Z*, Harper Collins, 1994; *Canadian Thesaurus*, Fitzheney & Whiteside, 2002) and the distinction between the two may on occasion be of forensic significance. For example, it is possible for someone to assault another with an intention to resist his arrest without concurrently intending to prevent that same arrest. The converse, although theoretically possible, seems far less conceivable.

TRIAL of accused charged with assault and assault with intent to prevent arrest.

***Melvyn Green J.*:**

A. Introduction

1 The 2009 Much Music Video Awards (MMVA) ceremony was held in Toronto on June 21st

of that year. A number of after-parties followed. One was at Cobra, a club on King Street in downtown Toronto. A fracas occurred in the foyer area at about 4am the following morning. Bryan Taylor, the defendant, is alleged to have punched a security guard, Victor Cid, in the course of the commotion. Sometime later he was intercepted by the police across the street from the club and, according to several police and civilian witnesses, actively resisted his apprehension. In the result, he is charged with assaulting Cid and, in addition, with assaulting one of the officers, PC Manpreet Kharbar, with intent to prevent his lawful arrest. As the defendant was on probation on June 22nd he is also charged with non-compliance with his probation order by failing to keep the peace and be of good behaviour, a compulsory term of the order.

2 The defendant did not testify but concedes through counsel that he was subject to a probation order at the time of the alleged assaults. Two witnesses, Athanasios ("Tommy") Theodorakapoulos and Omar Grant, testified on behalf of the defence. Kharbar and two further officers (Cst. Christopher Meuleman and Sgt. Peter Wehby), were called by the Crown, as were the complainant Cid and a second security guard, Damian Porter. Grant recorded the defendant's confrontation with the police on his cellphone camera, and this videotape assumes an important role in the evidentiary landscape of this trial.

3 Contrary to the evidence of the Crown witnesses, the defendant's position, in brief, is that he did not strike or otherwise assault the complainant Cid, and although arrested by the police he never assaulted PC Kharbar or otherwise actively resisted the police efforts to arrest him. Accordingly, he cannot have violated the particularized probation condition as he at no time failed to keep the peace or be of good behaviour. The defence, then, is a denial of the *actus reus respecting* all offences and, as such, starkly focuses the necessary judicial inquiry on the credibility of the various witnesses and, as regards the alleged initial assault, the reliability of Cid's identification of the defendant as his assailant.

4 No burden rests on the defendant in regard to the issues in contest. Ultimately, it is the Crown alone who bears the onus, on a standard of proof beyond reasonable doubt, of establishing that the defendant committed the essential elements of each of the alleged assaults.

B. Evidence

(a) Overview

5 The defendant attended the after-party at Cobra about midnight with his friend. Omar Grant. They were part, if loosely, of a group or entourage associated with "J.B.", a musician who had been nominated for an MMVA award. Others in this grouping included Tommy, two of his friends and a man described as J.B.'s manager. They all went downstairs to the dance-floor level of the club where they spent the next few hours.

6 Shortly before 4am members of this group variously made their way upstairs to the ground-level foyer or lobby of the club which opens onto King Street. One of the patrons (likely

J.B.) got into a fracas with one or more of the bouncers on his way out of the club. The complainant, Victor Cid, was working at the front desk in the foyer area at the time. He says the defendant sucker-punched him on the left side of his head during this disturbance. The defence evidence contradicts this allegation.

7 The defendant and Grant left Cobra and crossed King Street. Coincidentally, dozens of police officers were in the vicinity in response to a shooting incident at a nearby club. Some of these officers were alerted to the disturbance at Cobra and, according to their evidence, sought to apprehend the defendant when he was pointed out as the perpetrator of the assault on Cid. They approached the defendant, held him against a wall, and then took him to the ground where he was cuffed and then removed from the scene. No firearm or other weapon was found on the defendant. Much — but not all — of the defendant's physical exchange with the police was captured on Grant's cellphone video.

8 Many persons gathered to watch the confrontation. Some members of the crowd threw debris in the direction of the officers. In response, at least one officer drew a Taser and a second pepper-sprayed the spectators in an effort at crowd control.

9 A summary of additional salient evidence of the witnesses, in the order in which they testified, follows.

(b) Crown Witnesses

1. The Complainant Cid's Account

10 Although currently an elementary school teacher, at the time of the incident the complainant, Victor Cid, was a 30-year old student who worked security at downtown bars, as he had for the previous five or so years. He was assigned to the front desk in the foyer area at Cobra on June 21, 2009, collecting tickets as the patrons arrived.

11 One of the club's patrons, a black male, was ejected by other bouncers at around 4am. The man had a beer in one hand and a glass in the other. He was resisting his removal in the midst of a departing crowd of patrons and a couple of security guards. Cid was focused on the man being ejected. He was trying to remove the glass from the man's hand when he was suddenly punched in his left temple by a man standing in front of him and a little to his left. The blow startled Cid. He had, he said, a peripheral view of the punch and he had not seen the man who punched him until the blow landed. He did not know whether the man used his left or right hand, nor could he say what part of his hand the man used. Cid grabbed the top of the man he believed responsible for the punch and held on to him for "a couple of seconds"; he wanted to get a good look at him so could identify him in future.

12 Cid described the man who punched him as male black, wearing a baggy white top, baggy blue jeans and big white running shoes. Cid stands five foot eight and a half, and the man he held

was a "slim and tall guy" who he estimated was younger and a "little bit taller" than himself. Cid did not describe the man's hair length, its style or his facial hair, if any. Nor did he mention any jewellery or other sartorial accessories or, for that matter, any distinguishing features.

13 Cid had never previously seen this man. In court, he identified the defendant as the man who punched him. Asked by Crown counsel if he could identify the man's face, Cid answered "no". Seeking to "clarify" that answer, he added:

> When you just asked me that question, if I just saw him on the street walking by, I wouldn't recognize him, but in this setting, because I know that he was the one involved, and we are sitting in court, yes, I do recognize him.

Cid is white and the defendant is black. There were no other black persons in the courtroom at the time Cid identified the defendant as his assailant other than the defendant's lawyer and a uniformed courtroom security officer. There were also no persons other than the defendant in the prisoners' box.

14 Cid said a melee erupted after the punch. He backed off and let his larger colleagues — "the big guys" — push the defendant and other troublemakers out the front door and onto the King Street sidewalk. Cid testified he kept his eye on the man he grabbed "for the entire time" and "never" lost sight of him. This man, who Cid dock-identified as the defendant, was yelling and screaming and kicking other security personnel on the sidewalk outside the club, as were a number of other patrons who had been pushed onto the street. At one point, according to Cid, the man he identified as the defendant said, "You guys don't search. How do you know we're not packing?" Cid thought the defendant was intimating that he was carrying a firearm.

15 Cid testified that some police officers arrived within five to seven minutes after he was punched. He did not know who summoned the police, but insisted he had no communication with any of them prior to the defendant's arrest. He closely watched the defendant who walked into an alley across the street with three or four others as the police appeared. Cid observed several officers intercept the group a few steps into the alley and return the defendant to King Street within a couple of seconds. One or two officers forcefully held him "up hard" against a wall on King Street while he squirmed and, according to Cid, struggled to escape. Meantime, various persons in the crowd were taking photos with their cellphones, throwing rocks at the police and shouting "police brutality", leading one of the officers to take out a shotgun and point it skyward.

16 Cid first spoke with the police after the defendant had been securely apprehended. This was "not even a minute" after the defendant was pressed against the wall. Cid approached an officer, pointed to the defendant in police custody across the street and said something like, "See that guy. He punched me and I'd like to do something about it". He then provided a statement to the officer. Cid testified he was "100% sure" the defendant was the man who punched him. Cid also maintained that he had his "eye on [the defendant] the whole time". Given the defendant's assaultive behaviour, Cid expressed surprise that he had lingered in the area long enough to be confronted by

the police, adding that he himself "wouldn't have".

17 Due to a technical malfunction, Grant's cellphone video of the defendant's exchange with the police was not played during Cid's testimony.

2. Porter's Account

18 Damian Porter was an experienced security guard who was employed in this capacity at Cobra on the night of June 21st to 22nd. He was cashing-out at the downstairs bar when he received a radio call at about 3:35am alerting him to a problem at the upstairs front door. About eight to ten members of the security staff were trying to remove a group of patrons by the time he reached the foyer area. Cid, says Porter, was one of a number of bouncers who formed a "wall of security". There was some pushing and shoving in the patio area at the front of the club and he heard some patrons say they weren't searched coming into the club and uttering veiled threats such as "I've marked your face". Porter did not identify the defendant as one of the patrons vocalizing these remarks.

19 A number of those involved in the altercation crossed King Street as six to ten uniformed police officers approached. Some, Porter said, were being aggressive and one, who he did not identify, pushed an officer in his upper body with both his hands as he was confronted by the police. The pusher was then subdued by the police who took him to the ground and cuffed him from behind. The only struggle Porter observed was after the man was on the ground when he resisted being cuffed. Porter says the arrestee was one of the men security was trying to eject from the club. He described him as a dark-skinned man of about five foot ten inches. He was wearing a white shirt with a multi-coloured print, blue jeans and brown Timberland or Wallabies shoes. Porter says he got a good look at the man's face from across the street and identified him in court as the defendant. Again, other than the witness himself, defence counsel and a uniformed court officer, the defendant was the only black man in the court during this dock-identification. He was also the only person in the prisoners' box. In his initial police statement Porter had described the arrestee's height as six foot one inch; on viewing the standing defendant in the courtroom he said he was "just over six feet". (To be clear: that the defendant was the man arrested by the police is not at issue. There were no other arrests flowing from the 4am incident at Cobra.)

20 Porter did not see any rocks being thrown. He did see a police officer produce a shotgun and hold it diagonally across his chest with the barrel pointed skyward.

21 Porter was shown the cellphone video taken by Grant. He said he recognized the man being arrested by the police in the video as the defendant. He agreed that he could not see the defendant resisting or struggling with the police in the video but explained that the straggling he witnessed occurred between the images of the defendant with his hands raised and the images of him being cuffed on the ground and that this portion of the video was incompletely videotaped or blurry. He also noted that the defendant's shoes were white and that he was mistaken when he initially described them to the police as brown. The shotgun-bearing officer does not, he said, appear in the

video.

3. PC Moulmein's Account

22 PC Christopher Meuleman was one of a number of officers who responded to the reports of a fracas at Cobra. He was alerted to the problem at about 4:35am. Meuleman was one of many police officers who had been at a nearby club, the Century Room, for hours while responding to a gun call. As he walked along King Street to Cobra he was approached by persons who identified themselves as members of the Cobra bar staff. They advised him that they had been threatened by patrons who said they were going to return with firearms. Later, after the defendant's arrest, he took a statement from Victor Cid. Meuleman did not know if Cid was one of the staff who approached him on King Street to report the threats.

231 Meuleman testified there were a couple of hundred people in front of Cobra when he arrived with Sgt. Wehby, and PCs Kharbar and Ogg. Wehby directed Meuleman towards a group of four or five black males near an alleyway across the street who were "possibly involved" in an earlier fight. One was a lighter skinned, goateed man wearing a white baseball cap with a red Blue Jays insignia and a white jacket. A second was tall and skinny and wore a white t-shirt. The group began to disperse as the police approached them. The first man was field-searched. The second, and a shorter man wearing a black baseball hat, quickly walked away, ignoring instructions to stop. The police detained and separated these two to investigate the allegations. As they did so a crowd gathered and swore and yelled at the police.

24 Meuleman dealt with the shorter man. Wehby, meanwhile, put the taller man, the defendant, against a wall. Meuleman had his back to Wehby and was focused on the crowd. However, he heard a commotion and, in his peripheral vision, saw the defendant taken to the ground where he struggled with the officers. Although he had only a fleeting view, he said the defendant was trying to plant his hands on the ground rather than obeying commands to put them behind his back so he could be cuffed.

25 Meuleman said that pebbles were being thrown at the police as the defendant was arrested. He had no recall, however, of any officer producing a shotgun or otherwise drawing a firearm. Although he did not see who took the defendant to the ground, on being shown Grant's cellphone video he identified Kharbar as the responsible officer. He also identified Wehby as the officer who held the defendant against the wall as he pointed a Taser at the hostile crowd. Meuleman agreed that he did not see the defendant struggling in the "unjumbled" portion of the video.

4. Det. Wehby's Account

26 Det. Peter Wehby was one of approximately 50 officers who attended at the Century Room following reports of a gun being fired. Two guns were subsequently located during searches of approximately 150 Century Room patrons. Wehby (then a sergeant) and a few other officers walked over to Cobra when, at about 4:35am, they learned of a fight at that venue. A man who

identified himself as a Cobra employee approached Wehby and told him he had been assaulted by a man who said he was going to get a gun. Wehby could not recall the man's name or his appearance, or even if he was black or white. The employee pointed to a man in a white shirt across the street who was standing with two others, identifying him as his assailant. Concerned that an additional gunman had escaped from the Century Room, Wehby decided to investigate these men.

27 One of the men across the street was a six foot three black male who weighed about 180 pounds. He was slim, wore a white shirt and blue jeans and fit the description provided by the employee. The second man looked Spanish, stood five foot eight and weighed about 200 pounds. He too wore blue jeans and a white top. The third man was a six foot black man who weighed about 180 pounds. He wore a green shirt, blue jeans and a black leather ball cap. All three men walked away as the police crossed King Street. They also ignored police calls to stop. Wehby walked directly in front of the first man (the defendant, who he identified in court), put his hands on his chest and said, "Stop". The defendant appeared agitated and started yelling. He tried to push past Wehby who told him he was under arrest for assault on the Cobra employee.

28 Pebbles were being thrown in the direction of the police by the gathering crowd and someone was videotaping the events. Wehby did not know if the defendant had a gun and wanted to take control of the situation. He forcefully put the defendant face-first against the wall, holding him there with his hand against the back of his neck. As the crowd moved closer Wehby drew his Taser. He did not see any firearms drawn by the police attending Cobra that evening.

29J The defendant did not actively resist at first but Wehby soon felt him pushing back as the crowd grew more agitated. Wehby was concerned for officer and public safety. He wanted to get the defendant on the ground as quickly as possible in case he was carrying a firearm. Once on the ground, the defendant started to resist by trying to pull away, struggling and failing to put his hands behind his back in the face of police commands; however, he was "not", said Wehby, "fighting me". To ensure the defendant did not get away, Wehby called for the assistance of his nearby officers. PC Kharbar responded. They cuffed the defendant within seconds and escorted him to a scout car where he was arrested for assault and assault with intent to resist arrest. Later Wehby learned that Kharbar had injured his hand during the defendant's apprehension. Wehby testified that he did not see how this happened.

30 Wehby described the cellphone video as "accurately" portraying his description of the occurrence and capturing the volatility of the situation. The defendant's non-compliance, he said, was not clear on the video.

5. PC Kharbar's Account

31 PC Manpreet Kharbar was among the officers who responded to the gun call at the Century Room. Sgt. Wehby detailed him, along with other officers, to Cobra to investigate a matter. A man who identified himself as a bouncer at that club approached the officers as they walked to Cobra. Kharbar described the man as white and of medium build, but he did not know his name. The man

pointed to a group of about five men across the street who he said had punched him and another bouncer and threatened to return with guns.

32 The five men were then walking west on the south side of King, across the street from Cobra. Kharbar could describe three of the men. The first was a heavy-set male mulatto wearing a white hat and jacket and blue jeans. He swayed as though he was holding something in the hand inside his pocket. The second man was a dark-skinned male black with short hair. He stood about five foot eleven and wore a green t-shirt and blue jeans. The third person of interest was also a black man. He was about six foot one and slim, and he too wore a white jacket and blue jeans.

33 Kharbar approached the five men and asked them to stop. They ignored him, turned and began walking east. Two of the men eventually followed Kharbar's commands and he field-searched the first of them. The second man — described as a six foot to six foot one inch tall, short-haired black man wearing a white t-shirt and blue jeans — paced back and forth cursing at the police. As he finished the searching the first man Kharbar heard a commotion and saw the second man — who he identified as the defendant — try and push past by Wehby. Kharbar was not sure if this man was one of those he had earlier described.

34 Kharbar ran to assist Wehby who was struggling with the defendant as they faced each other. Kharbar could not recall the defendant ever having raised his arms. Wehby was simultaneously trying to control the crowd by pointing his Taser in their direction. Kharbar shoved several pedestrians aside as he moved to Wehby's side. The two officers repeatedly told the defendant to stop resisting as they both struggled to ground him. He was "wrestling" with Kharbar and they both fell to the ground. Kharbar felt sharp pains in his hand as it hit the pavement and he later learned he had broken his hand.

35 The defendant continued to actively resist the police while on the ground by refusing to place his arms behind his back so the police could cuff him. Kharbar testified he finally gained control after landing five to eight "distracting" blows and punches to the defendant's face and body. Meantime, some members of the crowd were shouting and throwing stones at the officers. Finally, the defendant was cuffed, escorted to a police vehicle and transported from the scene.

36 Kharbar recognized the events recorded in the video. While the defendant's hands are clearly raised in the early phase of the video, Kharbar claimed he did not see this at the time. He agreed that there was no apparent active resistance by the defendant in the portions of the confrontation captured on the videotape.

(c) Defence Witnesses

1. Theodorakopoulos' Account

37 Athanasios "Tommy" Theodorakopoulos, an aspiring musician, was 29 at the time of the trial. He is a white man of Greek descent with a Mediterranean complexion. He attended the

MMVA ceremony on June 21, 2009 as his manager, J.B., was nominated for an award. He then attended the after-party at Cobra along with six others, including two of his Greek friends, J.B, the defendant and two other black men. He arrived at Cobra between 11:30pm on the 21st and lam on the 22nd of June and spend most of the next four or five hours at the downstairs part of the club. Between 4 and 5am he said goodnight to his friends downstairs and went up to the foyer area with his two Greek buddies where, in his words, he "mingled with the ladies" for the next half hour or so. There was a sudden rush and commotion and he saw a couple of security guards drag J.B. upstairs and take him out of the club. He testified that J.B. was not holding anything in his hands and that he did not see any of the bar staff dealing with anyone bearing a glass or bottle. Tommy intervened by trying to push off the bouncers.

38 A number of patrons were pushed out of Cobra and onto King Street by the security staff. A large crowd had gathered and Tommy had trouble finding his two friends. While searching for them he clearly saw the defendant pressed to a building's wall by the police with his hands in the air as though he was being arrested. He could not say whether this was on the same side of King Street as Cobra or across the street. The police then threw the defendant to the ground and one of them, a man he described as looking East Indian, bent down and punched the defendant. The defendant, he said, was not struggling with or resisting any of the police officers. Tommy finally located his two friends and left before the defendant was placed in a police car.

39 Tommy had known the defendant for more than ten years and described him as a friend. He testified he was "tipsy" rather than drunk by the time of the incident on June 22nd. He was not, he said, stopped or questioned by the police that evening. He was wearing a black t-shirt, black pants with blue Velcro straps, a black Blue Jays hat and black Air Force Ones. J.B. was wearing a shiny "Miami Vice"-type suit. One of Tommy's Greek friends wore a blue or white Adidas jacket. He could not recall the defendant's attire.

2. Grant's Account

40 Omar Grant is 28. His only conviction is for fairing to comply with the conditions of a recognteance in 2006 or 2007. He had known the defendant for more than 13 years. They grew up together. While he considered the defendant a close friend he said he would not lie for him.

41 Grant picked up the defendant at his home on June 21st and drove to the MMVA ceremony, arriving about 9pm. After the show he and the defendant followed J.B.'s entourage — including his road manager (Show Stevens), "Tommy" (the previous defence witness) and two other white guys — to the after-party at Cobra, arriving close to midnight. Grant did not drink before the after-party; since he was driving, he only nursed one alcoholic drink through the rest of the evening.

42 Grant was wearing blue jeans and a blue and silver t-shirt on June 22nd. The defendant, he recalled, wore a red hat, a white shirt and white sneakers. J.B. was dressed in a suit.

43 Grant, the defendant and the J.B. crew were on the basement dance-floor level for two to three hours. He walked upstairs to leave between 3:45 and 4am. The defendant was about an arm's length in front of Grant, and Tommy and his friends about 30 feet in front of the defendant. There were many other patrons in the immediate vicinity. As he reached the top of the stairs he could see an altercation in the foyer area: J.B. and his manager were involved in a "commotion" with several security guards. In direct examination, Grant testified that Tommy pulled one of the security guards off J.B. In cross-examination, he explained that Tommy appeared to know one of the bouncers and his intervention somewhat relaxed the situation. In any event, the skirmish soon spilled outside the club. According to Grant, neither he nor the defendant — who, he said, was always within his close and immediate sight in the lobby or foyer area — played any part in the fracas. Although he knows J.B., Grant insisted that nether he nor the defendant were friends of his or, indeed, that their relationship was so close that either would physically intervene to defend J.B. were he involved in an altercation.

44 Grant and the defendant then walked towards Grant's car which was parked in a lot down an alleyway directly across the street from Cobra. Police officers were grabbing and searching persons on the street and Grant was concerned by their aggressiveness. He pulled out his Blackberry cellphone, activated the video function and began recording the events just as a black officer grabbed the defendant and pushed him against a wall. The defendant's hands were in the air and he faced the wall with the officer behind him. A white police officer approached Grant and punched or grabbed at him, causing the camera to fly into the air. Grant caught the camera and continued shooting, although he missed recording brief portions of the events as a result of this and, later, other officers' approaches or interference.

45 Grant's recall, before being shown the video, was that the black officer transferred his control of the defendant to an Indian officer as he, the black officer, went after another pedestrian. The defendant, Grant said, was slammed to the ground and punched by the Indian officer. The black officer then kicked the defendant. That same officer had something in his hand during the ruckus; Grant was not sure if it was a club, a gun, mace or a Taser. Meantime, some police officers sprayed mace at persons in the encircling crowd.

46 (Although none of the police witnesses mentioned it in their testimony, Crown counsel ultimately conceded that pepper spray was used during the course of the disturbance. Grant's testimony stretched over two days. After the first, the notes of a further attending officer — PC Astolfo — were obtained by the Crown and disclosed to the defence. They were introduced for the truth of their contents, on consent, at the conclusion of the defence case. These notes refer to members of the crowd showering the officers with debris. Astofo's notes then read: "Pepper spray a cloud towards group (40 people). No one in contact directly with spray but cloud effective in keeping crowd at bay".)

47 Although Grant's camera was damaged, the video was stored on a memory stick which he passed to a girlfriend of the defendant within a week of the incident so she could give it to the defendant's lawyer. Grant testified he had never seen the contents of the video prior to it being

screened for him in court near the conclusion of his direct examination. He corrected his earlier "mistaken" testimony on watching the video, noting that the black officer who initially detained the defendant against the wall also took him to the ground; the Indian officer's participation, he said, began only after the defendant was already on the ground. He noted the points where he observed a punch thrown at the defendant by the Indian officer while the defendant was lying on the pavement and the spraying of mace by another officer across the top of a police vehicle. He did not, he said, see any police officer fall on the ground. In essence, Grant testified that the defendant never actively resisted the police and that the video confirmed his recall in this regard. He could not remember any rocks or pebbles being thrown at the police.

(d) The Cellphone Videotape

48 The Grant videotape lasts just under two and a half minutes. Given that it is shot on a cellphone camera at night, it is hardly surprising that the video quality — the resolution in particular — is poor. While no counsel or witness has suggested that the exhibit is anything other that a continuous video documentation of the events that ensued during the approximately 148 seconds of recording, there are occasions, lasting several seconds each, when the camera is focused other than on the defendant. There are also some equally brief periods when blurring or hyper-illumination obscures the image. Grant testified that these interruptions coincide with, in the first instance, an officer's attempt to interfere with his recording and, later, Grant's own efforts to evade further impeding of his documentation. This, on several reviews, appears to be a reasonable explanation for these lapses in consistent focus. Grant similarly explained the zoom-like quality of certain passages as reflecting his retreats and advances as he responded to various officers' interference, rather then his manipulation of a zoom function on his cellphone. This, too, appears a reasonable explanation for the changes in focal length.

49 By way of overview, it need be said that the images — particularly at the front end of the videotape — convey a sense of frantic urgency. The police — about six to ten officers — appear extremely wary, if not palpably anxious, which is hardly surprising given the unseen crescent of hostile pedestrians around them. The audio track consists chiefly of Grant's voice loudly repeating "I'm recording" and "He's not resisting", the latter mantra sometimes thinly echoed by a chorus of onlookers. The defendant is wearing a plain white long-sleeved shirt, dark pants and white sneakers. A medallion is suspended from a waist-long chain that hangs from his neck. This last detail is consistent with Grant's evidence that he was allowed to retrieve the defendant's chain before he was taken away by the police and, as well, with the word "chain" on the audio-track in the final sequences of the video.

50 The videotape begins with an image of the defendant with his arms raised and his hands (and perhaps his head) pressed against the ledge of a wall in front of him while an officer, identified by all the police witnesses as Sgt. Wehby, holds the back of his neck with his left hand. Nothing done by the defendant in these initial moments suggests anything other than compliance. Wehby lifts his right hand and shines a light (described, again by the police witnesses, as the illumination device at the end of a Taser) towards Grant. At that point, about four seconds in, there

is the sound of an impact and the images are reduced to indecipherable lines of light and abstract patches of colour for the next seven seconds. (This, according to Grant, coincides with the camera being knocked from his hand by one of the officers.) The next focused image is of a white officer backing away from Grant, his left arm extended toward the camera and his right hand raised in a fist-like position as he or another officer brusquely shouts "Stay there" at Grant.

51 At about the 20 second mark the defendant is recorded being taken to the ground by a small phalanx of officers. His arms appear to be held by several of them as his back is lowered to the street. No one else — in particular, no other officer — is on the ground. This brief image of the defendant is interrupted by a further six or seven seconds of abstract flashes of light. The camera only briefly returns to the defendant before being obscured by a passing police car at about the 32 second point. An officer appears to lean over the roof of the police vehicle and point something in Grant's general direction. (Grant identified this image as the occasion when mace is released; the image is at least consistent with this interpretation of the event and no other construction has been advanced.) A few seconds later the defendant is videotaped being turned onto his front as his arms are pulled behind him. The defendant's head (which is facing the camera) is planted in the pavement and his right arm is raised behind his back as a kneeling officer (likely Kharbar) attaches a cuff to his right hand. The defendant's left arm is behind his back and a second officer (likely Wehby) is bending over him on that side. Other than the kneeling officer applying the cuffs, no policeman is on the ground. The cuffing of the defendant takes mere seconds.

52 Once cuffed, the defendant is turned onto his back by the police and assisted to a semi-vertical sitting position about 85 seconds in. He then raises himself to his feet and is escorted, without force, by a single officer to a curb-side police car. Again, the defendant seems completely acquiescent, not even appearing to utter a word of protest or complaint. He is briefly field-searched at about the two-minute mark while bent over the hood of the scout. He is then taken to the rear door of the vehicle at which point the videography concludes.

53 At no time during the visually intelligible and unobscured portions of the videotape (which, to be clear, is the majority of its contents) does the defendant exhibit any behaviour that can fairly be described as assaultive or actively resistant of police efforts to arrest him.

C. Analysis

(a) Introduction

54 The issues before me focus directly and almost exclusively on the physical conduct of the defendant. First, did the defendant punch the complainant Victor Cid? Second hand irrespective of whether he struck Cid, did he intentionally apply force to PC Kharbar to prevent his arrest? If the answer to the first question is 'yes' he guilty of assault. If the answer to the second question is 'yes' he is guilty of assault with intent to prevent his arrest. If the answer to either question is 'yes' the defendant is also guilty of failing to comply with that condition of his probation order compelling him to keep the peace and be of good behaviour. Framed in this manner, and in view of the con-

flicting testimony pertaining to the defendant's conduct on June 22nd, an appropriate legal analysis must address the credibility of the various witnesses in an effort to resolve each of the critical evidentiary disputes. This analysis, of course, is governed by settled legal principles which, in the end, are anchored in the presumption of innocence.

55 The two assault charges both require contextual assessments of the credibility of the complainants and other Crown witnesses and, where necessary, those of the defence witnesses. I say "where necessary" because in some criminal trials the evidence of the Crown witnesses alone may fall short of establishing proof to the requisite standard of the offences alleged. Indeed, this is the inevitable effect of cases where no defence evidence is tendered yet an acquittal results. I appreciate, of course, that witnesses called by the defence sometimes supplement the inculpatory force of the Crown's case, but that situation does not materially obtain here.

56 As I have just suggested, a credibility analysis must first focus on the evidence of the two complainants, Victor Cid and PC Kharbar. In the end, each is the only Crown witness to the assaults to which they each testify. No one but Cid testified that the defendant punched him. There is some confirmation, although not from an independent source, that he was indeed punched (for example, some facial bruising Cid reports), but it does not help to identify the defendant as the person who threw the punch. Similarly, Kharbar's evidence that he fell to the ground while struggling with the defendant rests solely on his testimony; neither of the two officers in Kharbar's immediate vicinity testified to observing his fall or the events that directly precipitated it. Nor is there any independent evidence confirming that Kharbar's injury (again self-reported) was consistent with the trauma caused by a fall as opposed, for one example, to the many blows he said he later landed on the defendant.

57 Unlike many cases requiring the resolution of conflicting testimony, the defendant is here not part of that exercise. Taylor did not testify. Had he, and assuming his evidence amounted to denials of the alleged assaults, the appropriate analysis would be governed by the three-pronged formulation directed by the Supreme Court in *R. v. W. (D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.). The first two *W. (D.)* prongs have no application here as they address the effect to be given the testimony of a defendant where, at minimum, it leaves a trier of fact with a reasonable doubt. As the Court of Appeal observed in *R. v. Newton* [2006 CarswellOnt 1535 (Ont. C.A.)], 2006 CanLII 7733, at para. 5, the *W. (D.)* directives apply where "the issue ... is how to apply the burden of proof to the totality of the evidence *when an accused testifies*" (emphasis added). However, the third *W. (D.)* tine is a helpful reminder of the general principles governing proof in criminal trials. Even if a trial judge is not left in doubt by a defendant's evidence, he is still, as said in *W. (D.)*, required to decide "whether, on the basis of the evidence [he does] accept, [he is] convinced beyond a reasonable doubt by that evidence of the guilt of the accused". Put simply by the Supreme Court in *R. v. S. (J.H.)* (2008), 231 C.C.C. (3d) 302 (S.C.C.), at para 9, even where a defendant's evidence is entirely rejected (or, as here, simply absent) the lesson of *W. (D.)* is that "the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt".

58 "Credibility" is an omnibus shorthand for a broad range of factors bearing on an assessment

of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: honesty (sometimes, if confusingly, itself called "credibility") and reliability. The first, honesty, speaks to a witness' sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture of cognitive psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness' perception, memory and, ultimately, testimonial recitation. The evidence of even an honest witness may still be of dubious reliability.

59 All of this has been said many times before, including by Doherty J.A. for the Court of Appeal in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at 205:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

60 Depending on the circumstances, some portions of a witness' testimony may be more credible or worthy of belief than other portions. Accordingly, I can, with good reason, accept all, some or none of any witness' evidence: see *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3 (S.C.C.), at para. 65.

(b) The Simple Assault Allegation

61 As I have already noted, only a single witness, Victor Cid, testified to the assault he says he suffered. Accepting, as I do, that Cid was assaulted, the central remaining question is whether the evidence pertaining to this assault satisfies me beyond reasonable doubt that the man he identified as his assailant was in fact the defendant. The only directly contrary evidence emenates from Grant whose evidence, says Crown counsel, is utterly unworthy of belief. Tactically, of course, the Crown has no alternative but to advance this position if it is to maintain any prospect of conviction: I have no legal option but to find the defendant "not guilty" if I accept Grant's exculpatory account or am left in doubt by it.

62 The nature of the identification in this case requires me to alert myself to the risks associated with this species of evidence. Eyewitness identification evidence, particularly of cross-cultural or cross-racial strangers in, as here, heated situations with limited windows of observation, are notoriously suspect. As said by the Court of Appeal in *R. v. Hanemaayer*, 2008 ONCA 580 (Ont. C.A.), at para. 29, "Mistaken eyewitness identification is the overwhelming factor leading to wrongful convictions". Eyewitness identification evidence — even standing alone and even where, as here, bottomed on the testimony of a single witness — can ground a

legally and factually unassailable finding of guilt. However, appellate courts have repeatedly cautioned jurists of the need for special caution in assessing such evidence: see, e.g., *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.); *R. v. Trochym* (2007), 216 C.C.C. (3d) 225 (S.C.C.); *R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.); *R. v. Spatola*, [1970] 3 O.R. 74 (Ont. C.A.); *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.); *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.); and *R. v. A. (F.)*, [2004] O.J. No. 1119 (Ont. C.A.).

63 Eyewitness identification is particularly dubious where, as here, it includes dock-identification (the pointing out in court of the defendant as the alleged perpetrator) or, in a worst-case scenario, where positive identification occurs for the first time in a courtroom setting. (See, e.g., *R. v. A. (F.)* (2004), 183 C.C.C. (3d) 518 (Ont. C.A.) and *R. v. Tebo* (2003), 175 C.C.C. (3d) 116 (Ont. C.A.). Given the circumstances surrounding Cid's dock-identification of the defendant, and given Cid's own explanation of the factors bearing on the integrity of this identification, as quoted earlier, Crown counsel rightly eschews any reliance on the witness' courtroom identification of the defendant. Her, theory, instead, is that Cid's initial and careful inspection of his assailant and his uninterrupted observation of that man until the point when the man — unquestionably the defendant — is arrested by the police confirms the reliability of his identification. In other words, the continuity of Cid's observation, coupled with his honesty, affords adequate proof of the defendant's commission of the assault.

64 This thesis is facially attractive. I agree with Crown counsel that Cid is an honest witness in the sense that he tried to sincerely recount the events as best he could recall them. He was even-tempered, consistent and, to my mind, forthright. He displayed no indicia of bias. I am especially impressed with the qualifications he volunteered with respect to his dock-identification of the defendant. In short, I have little concern with Cid's testimonial veracity.

65 I do, however, have concerns about the reliability of his evidence. Cid insistence that he was "100% sure" that the defendant was the man who punched him calls to mind the "comments" of the Court of Appeal in *Hanemaayer*, *supra*, at para. 21, in relation to the crucial identification evidence of the eyewitness in that case:

> We now know that the homeowner was mistaken. No fault can be attributed to her. She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses. Even the appellant, who knew he was innocent, was convinced that the trier of fact would believe her. The research shows, however, that there is a very weak relationship between the witness confidence level and the accuracy of the identification.

66 In the end, and with all due respect, I am not persuaded to the requisite standard of proof that the Crown theory of observational continuity adequately compensates for the evidentiary frailties that attach to Cid's identification. I say this for the following reasons:

• The events at issue occurred nearly a year before Cid testified. He could not recall if he had made any notes of the incident and, even if he had, he did not keep them.

• The scene during which the assault occurred was chaotic, emotionally charged and crowded with persons milling about or leaving the club.

• The man who threw the punch was a complete stranger to Cid. Not only had he never seen him before that evening, he never saw him before he felt the force of the punch to his temple.

• Likewise, the defendant was complete stranger to Cid.

• The man who punched Cid was not directly in his line of vision but, rather, somewhat off to one side. The blow was entirely unanticipated. And Cid's attention at the time was focused on the man holding the glass in one of his hands.

• Cid claims he grabbed the man who punched him and held him, in his own estimation, for "a couple of seconds" — an extremely brief window of acute observation by any measure.

• Despite Cid's description of their face-to-face confrontation, he could not recall the fabric of the top worn by the man he grabbed, and wondered whether it was a sweater. (Others' descriptions of the defendant's attire and the videotape establish to my satisfaction that the defendant wore a white shirt.)

• Cid, I find, was mistaken about the height of the man he grabbed. He testified that the man was only a little taller than his own five foot eight and half inches. This is significantly different from the defendant's height of between six foot one and six foot three, as consistent with my own observations and, more importantly, as described by police witnesses (whose evidence I accept in this regard) and Porter when he was afforded the opportunity to estimate the standing defendant's height in court.

• The defendant wore a long chain and medallion on top of his shirt, as conspicuously displayed in the videotape. Despite Cid's claim that he grabbed and held his assailant's top, and despite proffering a description of the defendant, he did not mention that the man bore any jewellery, let alone an ornament as ostentatious as that worn by the defendant.

• As is clear from the evidence of various witnesses, including the police, the defendant was not the only one of the young men across King Street from Cobra who sported a white top — be it a shirt, jacket or t-shirt — when the police arrived.

• Cid's evidence, which I accept, is that he did not identify the defendant to any police officer as his assailant until after the defendant was arrested. Put otherwise, Cid identified the man in police custody — the only man who was arrested outside Cobra that evening. While not quite a "show-up", this sequencing bears sufficient similarities to that discredited procedure to further

erode confidence in the reliability of his eyewitness identification: see *R. v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.).

• Cid's claim to have continually observed the defendant depends on his capacity to witness events at night from across the width of a crowded and clearly tumultuous King Street.

• While several other witnesses (including police officers and Porter) testified that the man arrested by the police pushed his way by one of the officers across the street, Cid, who claimed to have never lost sight of the defendant, failed to mention this confrontation.

• Cid testified that the altercation in the foyer or lobby area occurred at about 4am. (On Porter's evidence, the assault must have transpired sometime earlier as he was alerted to the fracas, on his evidence, at about 3:35am and immediately responded.) Cid says the police arrived some five to seven minutes after he was punched, so that his continuous observation of the defendant between the occasions of his assault and the defendant's arrest would, using Cid's timeline, be in the neighbourhood of only ten minutes. However, the two officers who testified as to the timing of their involvement both said they were first informed of the disturbance at Cobra at 4:35am, and then walked over to that club from their vigil at the Century Room. Accepting the police evidence in this regard, which I do, it is patent that Cid sorely underestimated the period between the punch he described and the arrival of the police: indeed, it was much closer to 40 minutes than the five to seven he attributes to this interregnum. Translated, the reliability of Cid's evidence as to duration of his eagle-eyeing of the defendant appears, to me, to be highly questionable as does, perforce, his claim to uninterrupted observation.

• Cid, like Porter, testified that an officer brandished a shotgun during the street disturbance. The police (whose evidence in this regard is consistent with the cellphone videotape and which I accept) deny that any firearm was drawn during the altercation.

• Although of only marginal relevance, it is of some interest that Cid himself testified that were he the man who punched him he would not have hung around the vicinity of the club, as did, of course, the defendant.

67 Viewed more conceptually, there are two problematic junctures respecting Cid's identification of the defendant. Framed as questions, the first is whether — given the congestion and chaos occurring in the foyer area as the patrons departed — the man Cid grabbed was in fact the same man who had punched him? And secondly, and assuming that the man who threw the punch and man he grabbed were indeed the same person, did Cid continuously eyeball that man for the following 40 or so minutes? While no single factor is determinative, the constellation of concerns I have listed leave me with a reasonable doubt as to the accuracy of Cid's identification. In these circumstance, an assessment of Omar Grant's veracity and the reliability of his evidence contradicting that tendered through Cid is superfluous. Irrespective of my determination in these regards the result would be the same: a finding, which I make, that the defendant is not guilty of the charge of assaulting Victor Cid.

(c) The Assault Prevent Arrest Allegation

1. Section 270(1)(b)

68 The defendant is charged with assaulting "Manpreet Kharbar with intent to prevent the lawful arrest of himself", an offence set out in s. 270(1)(b) of the Criminal Code. An "assault", as defined in s. 265(a) of the Code, occurs when a person "without the consent of another person ... applies force intentionally to that other person, directly or indirectly". Accordingly, to secure a conviction on this count the Crown must establish beyond a reasonable doubt not only that the defendant intentionally applied force to PC Kharbar but, in addition, that he did so with the intention of "preventing" his own arrest. Put otherwise, establishing the requisite mental element of the offence requires proof of a double intentionality. Further (and atypically for prosecutions arising from similar fact patterns), the offence charged is not one of assaulting a peace officer in the execution of his duty or of "resisting" a lawful arrest. Further still, no offence lies unless Kharbar — and not any other person — is proved the victim of the assault, if so found.

69 While the section numbers have changed, the language of what is now s. 270(1)(b) has remained unaltered for more than 50 years. (See, for instance, s. 232(1)(b), as then numbered, of the 1953-54 major revision to the Criminal Code: A.E. Popple, Ed., *Snow's Criminal Code of Canada*, 6th Ed., Carswell, 1955.) Despite its textual longevity there is little or no reported jurisprudence respecting the provision which, in its entirety, reads: "Every one commits an offence who assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person". The words "resist" and "prevent" are framed disjunctively. Accordingly, the provision may well give rise to two separate offences, one of assault with the intent to resist arrest and a second of assault with the intent to prevent arrest. At least some similarly worded provisions have been construed in this manner. For example, s. 177 of the Code, which criminalizes "everyone who ... loiters or prowls at night...", is generally recognized as creating two offences, one of loitering and the second of prowling: *R. v. Dillon*, [1964] 3 C.C.C. 205 (Alta. C.A.) and *R. v. Cloutier* (1991), 66 C.C.C. (3d) 149 (Que. C.A.). Even if s. 270(1)(b) does not admit to this construction and, instead, describes two alternative modes of committing the same offence, it must be borne in mind that in charging the defendant the Crown has particularized the offending conduct as that of "preventing" — rather than "resisting" — a lawful arrest. These two words — "resist" and "prevent" — convey different meanings (indeed, reputable thesauruses do not advance one word as a synonym for the other: *Concise Oxford Thesaurus*, 2nd Ed., Oxford University Press, 2002; *Roget A to Z*, Harper Collins, 1994; *Canadian Thesaurus*, Fitzheney & Whiteside, 2002) and the distinction between the two may on occasion be of forensic significance. For example, it is possible for someone to assault another with an intention to resist his arrest without concurrently intending to prevent that same arrest. The converse, although theoretically possible, seems far less conceivable.

2. The Alleged "Assault"

70 The core issue is whether the conduct of the defendant amounts to an assault — the intentional infliction of force on another person without their consent. The latter requirement — that of an absence of consent — is of no moment in this case; no one can seriously contend that the police officers — and, in particular, PC Kharbar — consented to having physical force applied to them by the defendant.

71 But did the defendant intentionally apply force to Kharbar? No witness says he struck, kicked or pushed him. But did he struggle with or actively resist Kharbar in a manner that can fairly be said to amount to an assault? The police, of course, say he did, as do Cid and Porter who were watching from across a crowded street. The two defence witnesses swear otherwise. The first of these latter two, Tommy theodorakopoulos, is, frankly, not a very reliable witness. He had consumed a substantial amount of alcohol and, on his own admission, was at least "tipsy". His sense of time was vague, elastic and, I find, frequently distorted. He could not find his two friends when they left the club and was preoccupied with trying to locate them. He could not recall whether the defendant's confrontation with the police occurred on the same side of King Street as Cobra or, as was the consistent evidence of every other witness, across the street. He left the scene before the end of the altercation. I cannot, in short, rely on Theodorakppoulos' averment that the defendant neither struggled with or resisted any of the police officers.

72 Omar Grant's account of the circumstances surrounding the defendant's arrest raises a different concern. He testified that his optic on these events was in essence that of the cellphone camera he was holding. While his interpretation or explanation of various ambiguous images in the videotape are helpful, his narrative ultimately adds very little to the raw footage. Further, Grant himself, on viewing the videotape, caught certain "mistakes" in his prior testimony that call into question his unaided memory of the incident. In my view, the videotape affords a more compelling and reliable record of the defendant's arrest than does Grant's gloss on these events.

73 The three police officers uniformly speak of the defendant's failure to comply with their demands and of his struggling with them as they endeavoured to assert control and cuff him. However, each of the officers (and Porter) agreed on watching the videotape that they did not see any of the active resistance they had described. Nor do I. While the tape suffers unfortunate interruptions and other sequences are obscured, in the end it serves as an unimpeachable record of those parte of the defendant's altercation with the police that are captured and, as such, a reliable means of assessing the accuracy of the police accounts of those portions of the events that have been digitally preserved.

74 Curiously, of the three police witnesses only Kharbar testified to having been somehow grounded and injuring his hand in the process. Despite their immediate proximity, neither Meuleman or Wehby saw Kharbar fall, nor does either afford any explanation for the injury Kharbar suffered. The videotape is equally unsupportive of Kharbar's account. The cellphone camera records the defendant as he is brought to ground. But directly contrary to Kharbar's recall, there is no videotape evidence of the officer "falling" to the pavement along with the defendant. Indeed, the defendant, as video-recorded, does not "fall" to the pavement: he is forcefully taken to

the ground by the combined efforts of several officers, Kharbar among them.

75 Kharbar's erroneous recall is not limited to this single incident. He testified that the defendant and Wehby were facing each other when he rushed to Wehby's side and that he had no recall of the defendant ever having raised his arms. Kharbar's evidence is directly contradicted by the videotape and, not incidentally, by Sgt. Wehby. Further, while Kharbar may well have punched the defendant when he was on the ground, his account of raining multiple blows is not confirmed by the video images of that portion of the defendant's apprehension.

76 The officers' accounts of the defendant's "active resistance", "noncompliance" and "struggling" are also contraverted, or at least rendered suspect, by the cellphone videotape. As all of the officers testified, this misbehaviour is simply not apparent in the digital recording. Crown counsel suggest that these omissions result from Grant deliberately averting the camera whenever the defendant engaged in such misconduct or because, by some unhappy coincidence, each occurrence of his struggling and resistance occurred during an obstructed or indecipherable portion of the videotape. I cannot accept either of these explanations for the absence of any documentary record of the defendant applying force to any of the officers. The notion that Grant could somehow intuit each occasion when the defendant was about to physically defy the officers is most improbable. And the theory of repeated coincidences strains credulity. I agree, of course, that the videotape is not a complete record of the two-and-a-half-minute's worth of events following Wehby's initial containment of defendant. However, it seems to me that the best measure of the defendant's unrecorded conduct is his recorded conduct. And in this regard, the defendant's behaviour is consistent: when restrained against the wall, during his very brief cuffing on the ground, and when subsequently escorted to the police vehicle the defendant — as recorded on the videotape — appears uniformly compliant.

77 Any physical force exerted against the officers once the defendant was placed against the wall by Wehby appears to have been reactive only. Accordingly, I have at least a doubt whether any intentional force was ever applied by the defendant to any of the officers and, in particular, to the named complainant, PC Kharbar.

3. "Resist" v. "Prevent"

78 In the alternative, even if the defendant's physical contact with the officers was intentional, I simply cannot infer beyond reasonable doubt that his intent in doing so was to "prevent" (as particularized) his arrest rather than merely resist it. None of the officers testified that the defendant struck or kicked them, bolted or otherwise tried to escape, nor do they say the defendant uttered any words that evinced the latter intention. Meuleman's account amounts to no more than an allegation of the defendant's non-compliance with police commands. Wehby speaks of resistance and struggling, but concedes that the defendant was not fighting him. And Kharbar, other than his entirely unconfirmed account of wrestling with the defendant as they both fell to the ground, has little further pejorative to say about the defendant other than that he resisted the police by refusing to proffer his hands for cuffing. At highest, the police testimony consistently characterizes the

offensive conduct by the defendant as resistance to rather than prevention of his arrest. While I am not persuaded that the defendant's behaviour constituted an assault (and certainly not one directed at Kharbar), even were I to accept the police evidence in this regard I would still not be convinced to the requisite standard that the impugned conduct reflected an intent to prevent his arrest.

(d) The Fail to Comply Charge

79 Apart from the assaults, the defendant is charged with failing to comply with a probation order by failing to keep the peace and be of good behaviour. The factual foundation for the defendant's non-compliance with this condition of a sentencing court's order is his commission of one or both of the assaults alleged to have occurred on June 22, 2009. As I find the defendant not guilty of both of these charges, the fail to comply prosecution must suffer an identical fate.

D. Conclusion

80 In the result, I find the defendant not guilty of all three charges.

Accused acquitted.

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Citing References

Words & Phrases (Canada)

1 RESIST OR PREVENT; **Subject(s):** Criminal law