

CANADA / JUDGMENT

R. v. Fulton

2021 BCSC 2721

COURT

Supreme Court of British Columbia

DECIDED

16 July 2021

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2021 BCSC 2721 R. v. Fulton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Fulton,

2021 BCSC 2721

Date: 20210716

Docket: X082111

Registry: New Westminster

Regina

v.

David Troy Fulton

Before: The Honourable Mr. Justice Skolrood

Oral Reasons for Sentence

Counsel for the Crown:

M.A. MacDonald

Appearing on his own behalf:

D.T. Fulton

Appearing as Amicus Curiae:

H. Lucky

Place and Date of Hearing:

New Westminster, B.C.

July 15, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 16, 2021

[1] THE COURT: On May 25, 2021, David Troy Fulton was convicted of four counts: one count of criminal harassment and three counts of break and enter. He was acquitted on one other charge of criminal harassment and one charge of nuisance.

[2] More specifically, the four counts on which Mr. Fulton was convicted are:

Count 1: Between August 6, 2019, and October 24, 2019, at or near Delta, B.C., without lawful authority and knowing that another person was harassed or was reckless as to whether the other person was harassed, did engage in conduct that caused that other person, Sarah McPhee, to reasonably fear for her safety or the safety of anyone known to her, contrary to s. 264 of the Criminal Code;

Count 2: On or about July 23, 2019, at or near Delta, B.C., did break and enter a dwelling house at 973 53A Street and commit an indictable offence therein, theft, contrary to s. 348(1)(b) of the Criminal Code;

Count 3: Between August 31, 2019, and September 1, 2019, at or near Delta, B.C., did break and enter a dwelling house at 973 53A Street and commit an indictable offence therein, mischief, contrary to s. 348(1)(b) of the Criminal Code; and

Count 6: On or about October 18, 2019, at or near Delta, B.C., did break and enter a place, a marina, at 4850 McNeely Way, with intent to commit an indictable offence therein, contrary to s. 348(1)(a) of the Criminal Code.

[3] Mr. Fulton is now before the court for sentencing.

Circumstances of the Offences

[4] The circumstances of the offences are set out in detail in my reasons for judgment on conviction. I will not review the background facts in great detail here, but will provide a summary overview.

[5] By way of general background, in the summer of 2019, Mr. Fulton was hired by Tyler Treftlin to work for Mr. Treftlin's gardening and landscaping company on a part-time or casual basis. Mr. Treftlin and Mr. Fulton knew each other from high school some 20 years earlier.

- [6] Sarah McPhee, Mr. Treftlin's sister, also works for the landscaping company. She and Mr. Fulton met at work and began dating. At the time, Ms. McPhee was recently separated from her husband, Jesse McPhee, with whom she has two young daughters.
- [7] In or about late June 2019, Mr. Treftlin and Mr. Fulton had a dispute about a particular job done by Mr. Fulton, and Mr. Treftlin decided he would no longer hire Mr. Fulton. Their parting of ways was acrimonious.
- [8] In late July or early August 2019, Ms. McPhee broke up with Mr. Fulton. At the time, she told him that she wanted to focus on her daughters and deal with the fallout from the dissolution of her marriage.
- [9] Mr. Fulton did not take the break-up well and embarked on a course of conduct that led to the criminal charges.
- [10] Against that general background, I will describe briefly the circumstances of each of the offences that Mr. Fulton was convicted of.

Count 1: Criminal harassment of Sarah McPhee

- [11] Much of the conduct giving rise to the criminal harassment charge involved repeated telephone, text, and MMS communications from Mr. Fulton to Ms. McPhee. His communications often fluctuated between aggressive and threatening on the one hand, to apologetic on the other. Certain text messages appeared to threaten Ms. McPhee's family and her former husband. Mr. Fulton also sent two MMS messages in which he appeared to threaten suicide. Mr. Fulton continued to communicate with Ms. McPhee despite being warned by the police to stop.
- [12] Mr. Fulton also used Facebook to communicate with Ms. McPhee. While he was careful not to specifically name her, it was clear and I found that numerous posts were directed at her.
- [13] I also found that Mr. Fulton's conduct had a significant impact on Ms. McPhee. In my reasons, I reproduced the following excerpt from the transcript of her evidence, in which she described her reaction to a particular Facebook post:

Well, I bounced back and forth, like the whole time, and now this. And I don't know. Is there -- does he have any idea of where I am? Is this not bullshit and I just think it's bullshit and he's trying to fuck with me? Or, I don't know. I am so confused and I am so terrified and I don't know what to do with myself.

I don't feel safe. I can't go anywhere. I don't feel comfortable. I have to check who's where I'm going, drive around the block five times before I go anywhere. You know, do my research. Who does that person know? Who have they talked to? Who did they see earlier?

Fuck, it was tiring. And fuck, was it scary. And the whole time he's threatening about my family members. And then there's my kids. And I'm feeling like if I just fucking disappear, I don't know. Like, will that make it stop?

I was tempted to just, like, fuck off somewhere and hide, 'cause it was like -- this keeps coming at me and I don't know why. And I'm causing everybody's life around me to turn to complete shit. Oh, fuck, I just wanted to . . . die. God. And trying to get out of that anchoring, even when they go out and they put him away. My phone rings and I fucking jump sky high. Sorry. I read back at this shit. It just . . .

So, to answer your question, I'm terrified.

[14] Clearly the impact on Ms. McPhee was profound.

Count 2: Break and enter on July 23, 2019

[15] Count 2 deals with a break and enter at Ms. McPhee's residence that occurred on or about July 23, 2019. Around that time, Ms. McPhee returned from a family trip to Penticton and discovered that her computer, that she normally kept on a table in her dining room, was missing.

[16] Ms. McPhee believed that Mr. Fulton had taken the computer and she confronted him through texts. Mr. Fulton in effect acknowledged that he had taken the computer and he said he would return it. Shortly after, the computer was in fact returned. I found Mr. Fulton's communications and apparent possession of the computer sufficient to establish that he had committed the charged offence.

Count 3: Break and enter on August 31 or September 1, 2019

[17] Count 3 concerned a break and enter that occurred late in the evening of August 31 or early in the morning of September 1, 2019. Prior to that time, Ms. McPhee had left the home where she had been living and had moved with her children to a new residence. However, she returned periodically to pick up personal effects. When doing so, she noticed things that caused her to believe that someone was breaking into the house. Ms. McPhee therefore decided to set a trap. She did so by placing small jars of paint inside the house near to a window where it appeared access was being gained.

[18] She set the trap on August 31, 2019. When she returned to the house on September 1, 2019, she saw that the paint had been poured on the front door of the house and spilled in various places in the house. Some paint had also been poured in an aquarium upstairs in the house, killing the family fish.

- [19] Through circumstances that are described in my reasons for judgment that I will not repeat here, a pair of pants were subsequently discovered by the police that had traces both of Mr. Fulton's DNA and of paint that an expert witness described as chemically and physically indistinguishable from the paint used by Ms. McPhee to set her trap.
- [20] Mr. Fulton provided an explanation for the paint on the pants that I found "defied belief" and I convicted him of the break and enter.

Count 6: Break and enter at Ladner Harbour Marina on October 18, 2019

- [21] Count 6 dealt with Mr. Fulton's attendance at the Ladner Harbour Marina, which is where Ms. McPhee's former husband, Jesse McPhee, stored his boat. Prior to this date, Mr. Fulton had been making statements to Ms. McPhee about confronting Jesse McPhee.
- [22] On the evening of October 18, 2019, Mr. Fulton attended the marina and forced his way through a locked gate in order to obtain access to the dock where Mr. McPhee's boat was moored. I accepted Ms. McPhee's identification of Mr. Fulton from security video and, in addition, later that evening Mr. Fulton left a voicemail message for Jesse McPhee saying that he had been at the boat. I found Mr. Fulton's conduct in breaking into the marina with a view to confronting Jesse McPhee to be part of his ongoing harassment of Ms. McPhee.

Circumstances of the Offender

- [23] In arriving at an appropriate sentence, it is important to understand the circumstances of the offender. This has proven to be somewhat challenging in the case of Mr. Fulton.
- [24] I note that after delivering my reasons for judgment, I ordered that a Pre-Sentence Report be prepared with the report to include a psychological assessment of Mr. Fulton. Unfortunately, Corrections was unable to complete the report in time for the sentencing hearing. There is, however, a psychological assessment report dated June 30, 2021, prepared by Dr. Whittemore of the BC Forensic Psychiatric Services Commission. In addition, Crown produced a previous Pre-Sentence Report dated March 11, 2011, prepared in respect of a previous conviction for making harassing telephone calls.
- [25] The psychological assessment is based upon a review of numerous records taken from the court file, psychological testing, questionnaires completed by Mr. Fulton, and interviews with Mr. Fulton. As noted in the report, the interview portion is somewhat incomplete due to numerous technical difficulties encountered.
- [26] Another challenge reflected in the report is the inconsistency in information contained in the various records and obtained from Mr. Fulton. For example, the information is inconsistent about basic facts, like where he was born and what his family background is.
- [27] That said, I will outline some of the key elements of his background and circumstances as best they can be gleaned from the available information.

- [28] Mr. Fulton was born on September 12, 1979, and is currently 41 years old. It appears that he had a difficult childhood. He was principally raised by his mother until about 11 years old, at which time he moved in with his grandparents, due to addiction issues his mother was experiencing.
- [29] In his evidence at trial, he said that he has spent much of his life in Tsawwassen. This is borne out by the extensive knowledge of the geography and layout of Tsawwassen that he demonstrated at trial. He says he graduated from Delta Senior Secondary School and then took some post-secondary classes at Vancouver Community College, but did not complete a degree.
- [30] Mr. Fulton's work history is similarly vague. In the psychological assessment report, he says he spent a number of years doing demolition work and obtained his arborist ticket. He says he has been self-employed doing arborist and related work for the past 24 years. In his evidence at trial, he referred at various times to being engaged in this type of work, and indeed it was arborist and related landscaping work that he was doing for Tyler Treftlin in the summer of 2019.
- [31] The psychological report describes Mr. Fulton's relationship history, although the details are again vague. There is some indication that past relationships ended poorly, resulting in conduct similar to that which forms the basis for the charges here. I will return to those incidents when discussing Mr. Fulton's criminal record.
- [32] Mr. Fulton states that he is currently in a relationship with a woman he married in 2015 or 2016, in order to bring her to Canada. I understood him to say that when released, he will be living with this woman. Again, the details of the relationship and the proposed living arrangements are scarce.
- [33] The psychological assessment identifies a number of risk factors relating to Mr. Fulton. Quoting in part from the report [as read in]:

Mr. Fulton reveals serious problems related to anger and hostility. His behaviour suggests preoccupation with past and current victims. He denies and/or minimizes his past and current behaviours and the impact of such behaviour. Mr. Fulton reveals an antisocial lifestyle. He has had significant problems in his intimate and non-intimate relationships and there is a clear past and current history of substance abuse. His current pattern of stalking revealed clear presence of distress (threatening suicide) and there is some information to suggest possible distress in his history of stalking behaviour. There is some information, both past and current, to suggest employment and financial instability leading to homelessness. Of further consideration, Mr. Fulton's marked impulsivity and personality characteristics (for example sense of entitlement, lack of empathy, emotional dysregulation) create some barriers to perspective and effective emotional and behavioural control, particularly in times of crisis.

- [34] As noted, Mr. Fulton has a criminal record. A number of the entries in his record are driving offences, for example, driving while prohibited and dangerous operation of a motor vehicle. There are also a number of entries for breach of probation and breach of an undertaking or recognizance.
- [35] Of particular note for the Crown are two convictions involving harassing-type behaviour. One conviction was on March 14, 2011 for making harassing communications. Mr. Fulton was given a conditional discharge with 18 months' probation. According to Mr. Fulton, he complied with the terms of probation and as a result the discharge was made absolute at the completion of the 18 months.
- [36] On February 23, 2015, Mr. Fulton was convicted of again making harassing communications to a former girlfriend. He was given a suspended sentence of 24 months.
- [37] The other notable aspect of Mr. Fulton's criminal record is that there are a number of negative interactions with police. In particular, there are a number of convictions for wilfully resisting a police officer and one conviction on February 23, 2015, for assaulting a police officer. Mr. Fulton said that many of the problems he experienced with the police occurred when he was living on Galiano Island where he apparently had a difficult and fractious relationship with the local police.
- [38] In addition to the information provided through the psychological report and the previous Pre-Sentence Report, I will add some observations of my own. Because Mr. Fulton has represented himself throughout this proceeding, I have had the opportunity to observe and interact with him extensively.
- [39] First, it is clear that Mr. Fulton is an intelligent man. While he sometimes, not surprisingly, struggled with some of the legal principles, for example determining what is and is not relevant evidence, he nonetheless represented himself well. He generally conducted competent examinations and cross-examinations of witnesses and made cogent submissions.
- [40] Second, it seems apparent that Mr. Fulton is good at what he does, in terms of being an arborist and working in landscaping. The witness Mr. Willox testified to this. Even Tyler Treftlin did not take issue with the quality of Mr. Fulton's work, rather it was his difficult personality that ultimately led Mr. Treftlin to fire him.
- [41] That leads me to my third observation. In my decision ordering a Pre-Sentence Report, I described Mr. Fulton as "a person who is oppositional in nature". That is reflected in aspects of his criminal record and was also on display at trial. While, as noted, Mr. Fulton generally conducted himself well during trial, there were moments of conflict between him and a number of police witnesses, and with Crown counsel. In my reasons for judgment convicting Mr. Fulton, I described his conduct when being cross-examined by Crown as "sarcastic, dismissive [and] argumentative". Mr. Fulton himself has acknowledged his confrontational nature. His oft-used phrases during trial were "give a dog a bone" and "poke

the bear", meaning that he often does things to get a rise out of others. This has often gotten him into trouble. To use a somewhat trite and perhaps overused phrase, Mr. Fulton is often his own worst enemy.

Impact Statements

[42] The impact of Mr. Fulton's conduct on Ms. McPhee was significant. This was reflected in her testimony at trial, and I previously included an excerpt of her evidence in this regard. In my reasons for judgment, I said:

Ms. McPhee testified at some length about the impact of Mr. Fulton's conduct on her. As I noted previously, her emotions ranged from frustration to rage to absolute terror. I found her to be sincere in expressing these reactions and it is clear on the evidence that she felt harassed by Mr. Fulton. It is also clear on the evidence that she feared for both her emotional well being and her physical safety.

[43] I also found that Ms. McPhee reasonably feared for the safety of her former husband and of her children.

[44] Ms. McPhee prepared a victim impact statement that she read at this sentencing hearing. She described the profound impact Mr. Fulton's conduct has had on her, which continues to this day. She described her "entire world" as being "flipped upside down".

Aggravating and Mitigating Circumstances

[45] The determination of a sentence must take into account the aggravating and mitigating circumstances relating to the offence and the offender when considering where, within the applicable range of sentence, the particular sentence should fall.

[46] Here the aggravating circumstances include:

- a) Mr. Fulton's criminal record, including past similar offences;
- b) his risk profile as identified in the psychological assessment;
- c) the fact that the offences were committed in the context of an intimate relationship;
- d) the break and enter offences, including two break and enters into a dwelling house related to the harassment;
- e) minimal insight or remorse displayed by Mr. Fulton; and
- f) the significant impact upon the complainant.

[47] There are few mitigating circumstances. I do acknowledge that Mr. Fulton has taken steps to improve himself while in custody. At trial, he provided letters describing programs he has participated in while in custody, including counselling sessions with a concurrent disorders counsellor, and the positive changes that he has made as a result of those programs.

[48] The other mitigating factor that I will return to is the length of time Mr. Fulton has spent in segregation while in pre-trial custody.

Principles of Sentencing

[49] Section 718 of the Criminal Code [, R.S.C. 1985, c. C-46,] provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. It also lists a number of specific objectives that a sentencing judge must consider, which are:

- (a) to denounce 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.

[50] Section 718.1 states the most basic principle of sentencing, namely that the sentence imposed should be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[51] Section 718.2 sets out a number of additional principles, including that:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances ;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate ; and
- (e) all [reasonable] sanctions, other than imprisonment, should be considered , with particular attention to the circumstances of Aboriginal offenders.

[52] No single sentence objective takes precedent and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight given the particulars of the case: see R. v. Nasogaluak, 2010 SCC 6 at para. 43.

Statutory Provisions

[53] Mr. Fulton was convicted of criminal harassment under s. 264 of the Criminal Code. Section 264(3) states:

- (3) Every person who contravenes this section is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years;

[54] The three break and enter convictions were pursuant to s. 348 of the Criminal Code. The relevant provisions state in part:

348 (1) Every one who

- (a) breaks and enters a place with intent to commit an indictable offence therein,
- (b) breaks and enters a place and commits an indictable offence therein

is guilty

- (d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and
- (e) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years

Positions of the Crown and Offender

[55] The Crown submits that this case is principally about the criminal harassment of Ms. McPhee and that all of the offences occurred as part of or in connection with that harassment. The Crown submits that the harassment was significant and occurred in the context of an intimate partner relationship. Crown submits further that the break and enter offences, particularly those involving Ms. McPhee's residence, are significant aggravating factors.

[56] The Crown seeks a global sentence of four years' imprisonment broken down as follows, with the sentences to be served concurrently:

Count 1, four years;

Count 2, four years;

Count 3, four years;

Count 6, two years.

[57] The Crown also seeks a period of probation of three years.

[58] Mr. Fulton has spent a considerable amount of time in pre-trial custody. I will return to the issue of what credit should be given for that time later in my reasons.

[59] Mr. Fulton submits that a sentence of 20 months is appropriate, based upon six months for each of Counts 1 to 3, and two months for Count 6, to be served consecutively. He submits that based upon credit for pre-trial custody, he has already served well beyond the appropriate custodial sentence. For that reason, he submits that he should be released immediately with no probation. Alternatively, he submits that probation should be for no more than six months with minimal terms.

Relevant Case Authorities

[60] The Crown cites the following cases in support of its position on sentence:

- a) *R. v. Taylor*, 2014 BCCA 304: the Court of Appeal upheld a sentence of 4.5 years for criminal harassment. The harassment occurred in the context of a former intimate relationship. The offender had previously been convicted of assaulting the complainant and was incarcerated for that offence. Upon his release, he was subject to a no-contact order. While the offender was incarcerated, the complainant got married. When the offender learned of this upon his release, he engaged in a course of harassing conduct towards the complainant. A significant aggravating factor was the offender's 25 prior criminal convictions, including a number for domestic violence. In upholding the sentence of four and a half years, the Court of Appeal noted that the sentence was clearly at the high end of the range of sentences imposed for this offence, however the court found the sentence justified in the circumstances.
 - b) *R. v. Myers*, 2019 BCSC 457: a jury convicted the offender of uttering threats and harassment. The offences again occurred in the context of an intimate relationship. The harassing behaviour consisted of threats of violence against the complainant and her family, posting private photographs on Facebook, and watching or besetting the complainant's residence. The court imposed a sentence of 16.83 months, which equated to time served, plus two years' probation.
 - c) *R. v. Fox*, 2017 BCSC 2361: a jury convicted the offender of criminal harassment and illegal possession of a firearm. The harassing conduct involved a protracted campaign comprising a website, blog posts, communication with the complainant and third parties, all aimed at destroying the complainant's reputation and, as the offender acknowledged, making the complainant's life as miserable as possible. The court imposed a sentence of three years' imprisonment followed by three years of probation.
- [61] Mr. Fulton did not cite any case law but amicus brought two additional cases to the court's attention:
- a) *R. v. Schuil*, 2021 BCPC 103: this case was cited for the purpose of providing some guidance on the sentence for the break and enter offences. Here the offender was convicted of one count of break and enter into the dwelling house of his former partner. The court imposed a sentence of one year imprisonment followed by one year probation.

- b) R. v. Chappell, 2019 BCSC 644: the offender in this case pled guilty to 16 charges, one of which was criminal harassment. Amicus cited this case because Justice Matthews provided a useful review of a number of cases dealing with sentences for criminal harassment. Based upon her review of the case law, Justice Matthews said at para. 136:

I conclude that the lower range is a conditional sentence under one year. A brief period of incarceration for less than six months is a typical sentence for criminal harassment for an accused with no previous convictions. The middle range of sentence for criminal harassment is between six months and two years. A sentence between two and four years is on the higher end of sentencing range and almost always involves violence or threats. Serious violence and threats of violence will merit a sentence between two and four years. This higher range is confirmed by British Columbia cases such as: R. v. Campbell, 2012 BCSC 904; R. v. Taylor, 2014 BCCA 304; and R. v. R.D.C., 2016 BCPC 388.

Credit for Pre-Trial Custody and Relevance of COVID Restrictions

- [62] As I have noted, Mr. Fulton has been in custody since his arrest on October 29, 2019. He has spent a total of 627 days in custody. Pursuant to s. 719(3.1) of the Criminal Code and R. v. Summers, 2014 SCC 26, the Crown submits that Mr. Fulton is entitled to credit based upon a 1.5:1 ratio, for a total of 940.5 days, which equates to 2.58 years or 31.35 months.
- [63] While in pre-trial custody, Mr. Fulton spent a considerable amount of time in segregation, largely due to COVID-19 protocols in the institution. Specifically, during the period in which Mr. Fulton travelled between the institution and the courthouse for appearances at trial and for pre-trial applications, he was required to quarantine upon return to the institution. This was done by housing Mr. Fulton in a segregation unit.
- [64] The Crown calculates that Mr. Fulton spent 113 days in segregation. Mr. Fulton says the number is 121, however as I understand it, the additional eight days occurred as a result of charges, or potential charges, different from the ones that were the subject of the trial. In my view, therefore, they are not relevant for the purposes of this sentencing.
- [65] Mr. Fulton seeks enhanced pre-trial credit for the time spent in segregation. He submits that a ratio of 5:1 is appropriate, or alternatively 3.5:1.
- [66] The Crown submits that the case law does not support further enhanced credit, beyond the statutory 1.5:1, for pre-trial conditions. Rather, if the court is inclined to consider this factor, it should be treated as a mitigating factor in arriving at an appropriate sentence. Further, to the extent that enhanced credit is applied or considered, the Crown submits it should be on a maximum of a 2:1 basis.
- [67] The issue of enhanced credit appears to have received more judicial attention in Ontario than British Columbia. Of particular note is the recent Court of Appeal decision in Ontario in R. v. Marshall, 2021 ONCA 344, where Justice Doherty said at paras. 50 to 53:

- [50] Before I move to Marshall #2, I propose to make some observations about the calculation of the "Duncan" credit. A "Duncan" credit is given on account of particularly difficult and punitive presentence custody conditions. It must be borne in mind the 1.5:1 "Summers" credit already takes into account the difficult and restrictive circumstances offenders often encounter during pretrial custody. The "Duncan" credit addresses exceptionally punitive conditions which go well beyond the normal restrictions associated with pretrial custody. The very restrictive conditions in the jails and the health risks brought on by COVID-19 are a good example of the kind of circumstance that may give rise to a "Duncan" credit: *R. v. Morgan*, 2020 ONCA 279.
- [51] It is also important to appreciate and maintain the clear distinction between the "Summers" credit and the "Duncan" credit. The "Summers" credit is a deduction from what the trial judge determines to be the appropriate sentence for the offence. The "Summers" credit is calculated to identify and deduct from the appropriate sentence the amount of the sentence the accused has effectively served by virtue of the pretrial incarceration. The "Summers" credit is statutorily capped at 1.5:1. It is wrong to think of the "Summers" credit as a mitigating factor. It would be equally wrong to deny or limit the "Summers" credit because of some aggravating factor, such as the seriousness of the offence.
- [52] The "Duncan" credit is not a deduction from the otherwise appropriate sentence, but is one of the factors to be taken into account in determining the appropriate sentence. Particularly punitive pretrial incarceration conditions can be a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at the appropriate sentence from which the "Summers" credit will be deducted. Because the "Duncan" credit is one of the mitigating factors to be taken into account, it cannot justify the imposition of a sentence which is inappropriate, having regard to all of the relevant mitigating or aggravating factors.
- [53] Often times, a specific number of days or months are given as "Duncan" credit. While this quantification is not necessarily inappropriate, it may skew the calculation of the ultimate sentence. By quantifying the "Duncan" credit, only one of presumably several relevant factors, there is a risk the "Duncan" credit will be improperly treated as a deduction from the appropriate sentence in the same way as the "Summers" credit. If treated in that way, the "Duncan" credit can take on an unwarranted significance in fixing the ultimate sentence imposed. Arguably, that is what happened in this case, where on the trial judge's calculations, the "Duncan" credit devoured three-quarters of what the trial judge had deemed to be the appropriate sentence but for pretrial custody.
- [68] As indicated by Justice Doherty, difficult or harsh pre-trial custody conditions cannot be used to enhance pre-trial credit beyond the statutory maximum of 1.5:1. However, it may be a mitigating factor in determining a fair sentence.
- [69] The impact of COVID more generally on sentencing was considered in *R. v. Hearn*, 2020 ONSC 2365, an Ontario Superior Court decision that pre-dates Marshall. There, Justice Pomeroy said at paras. 22 and 23:

- [22] First, I am not suggesting that the offender receive more than the statutory credit for pre-sentence custody. The accused is entitled to credit on a 1.5 to 1 basis and that is what he will receive. I am not at liberty to assign credit beyond that prescribed in the Code. The question is not whether, looking backwards, the offender is entitled to more credit. The question is whether, looking forward, the pandemic warrants reduction of the sentence yet to be served. The question is whether the sentence already served, calculated with 1.5 to 1 credit, is a sufficient penalty. Given the pandemic, it may be that a sentence of shorter duration is not only tolerable, but appropriate, in the interests of personal and public safety.
- [23] Second, I am not suggesting that the pandemic has generated a "get out of jail free" card. The consequences of a penalty - be they direct or collateral - cannot justify a sentence that is disproportionately lenient, or drastically outside of the sentencing range. It cannot turn an inappropriate sentence into an appropriate one or justify dispositions that would place the public at risk. As noted by A.J. Goodman J. in *R. v. T.K.*

In summary, even in these very challenging times, the court must fully recognize the potential harmful health impact on detained persons in the various institutions, while at the same exercising the balancing required to sustain its fundamental role in the administration of justice and protection of the public.

[Emphasis in original]

- [70] Hearn was considered in BC in *R. v. Greer*, 2020 BCSC 1131, where Justice Crabtree declined to reduce a sentence based upon general COVID concerns. He said at paras. 52 to 53:
- [52] Any sentence imposed must be guided by the statutory and common law principles of sentencing. That said, it was suggested that COVID-19 may reduce the requirement of parity with previously established ranges, or may justify a departure from the usual range of sentence in certain circumstances; and here, I refer to *R. v. Lacasse*. The defendant requests the court grant a reduction in what would otherwise be an appropriate sentence, based on the potential prospect of difficulties posed by the current pandemic that the defendant may be subject to.
- [53] While I have considered this, I am not inclined to do so in these circumstances for the following reasons. I do not know for how long such restrictive conditions may continue and in what form. Not enough is known at this point, as to whether conditions may improve, worsen, or remain the same. As a result, it appears to me to be speculative to assess the impact. Again, as I noted previously, there is no specific evidence concerning the particular health issues or risks, if any, that are faced by Mr. Greer
- [71] In *R. v. Zhao*, 2020 BCSC 1552, Justice Schultes endorsed Justice Crabtree's analysis, saying at para. 136:
- [136] I would not give specific effect to the impact of COVID [19] on Mr. Zhao's correctional experience, either thus far or prospectively.

See also *R. v. Costello*, 2020 BCSC 1206 at para. 82.

- [72] The difference between this case and *Greer and Zhao* is that in those cases, the court was asked to fashion a sentence taking account of general concerns about possible restrictions in institutions and potential risks associated with COVID. However, as Justice Crabtree noted in *Greer*, the identified concerns were largely speculative.
- [73] In the present case, the concerns identified by Mr. Fulton are not speculative but very real. There is no issue that he has spent 113 days in segregation. I will say that there is minimal evidence about the specific conditions that Mr. Fulton was subjected to, but I do accept his statements that his ability to eat properly, sleep, exercise, and socialize were adversely impacted. Further, and the Crown did not take serious issue with this, I think the court can accept, even in the absence of more specific evidence, that segregation is difficult on the person in custody.
- [74] I am therefore prepared to consider the time spent in segregation by Mr. Fulton. In my view, the proper approach, as stated by Justice Doherty in *Marshall*, is to treat Mr. Fulton's time in segregation as a mitigating factor relevant to determining a reasonable and fit sentence. Also for the reasons of Justice Doherty, unlike the application of pre-trial credit under *Summers*, consideration of the impacts of COVID on the conditions of Mr. Fulton's pre-trial custody is not a mathematical calculation. As such, it is not necessary, and I decline, to calculate a specific time period, whether based upon a 2:1 or some other ratio.
- [75] The Crown submits, as did amicus, that this case is principally about the criminal harassment of the complainant, Ms. McPhee, by Mr. Fulton. I agree that the additional break and enter counts are essentially part of the same harassing conduct and, as such, any sentences imposed are to be concurrent with the harassment sentence: see *R. v. Li*, 2009 BCCA 85 at para. 42. Before turning to the appropriate sentence for each charge, I will make some general observations.
- [76] Criminal harassment is an insidious offence in that it attacks a complainant's sense of personal safety, security, and well-being. As eloquently described by Ms. McPhee, Mr. Fulton's conduct flipped her world upside down. She has justifiably been fearful for herself and her family.
- [77] Harassment in the context of an intimate relationship is particularly worthy of reproach. All individuals are entitled to make personal decisions about who they are in a relationship with and who they choose not to be. That is essential to one's sense of personal autonomy. No one should be subjected to threats and harassment simply because they choose to end a relationship.
- [78] In this case, Ms. McPhee was in a particularly vulnerable position in that she was coming off the breakdown of her marriage. Mr. Fulton knew that and took advantage of it.

- [79] I have already described the sentencing principles that inform the determination of a fit sentence. In applying those principles here, Justice Holmes' observations in *Fox* is worth noting. She said at para. 81:
- [81] The sentencing principles of specific deterrence and rehabilitation can have little play in the sentence for the criminal harassment, because Mr. Fox has no insight at all into his offending.
- [80] I think that is largely true with respect to Mr. Fulton. He has continued to downplay his conduct, as well as its impact on Ms. McPhee. Rather than acknowledging the significant impact on her, that was evident both during trial and when she read her victim impact statement, he was largely dismissive of it. He has provided explanations for his conduct and for the conduct resulting in past convictions that largely places the blame on others. He has also disavowed any need for or interest in counselling or treatment.
- [81] That said, I am not prepared to give up on any possibility of rehabilitation for Mr. Fulton, given that, as I have noted, he has positive qualities that could serve him well if properly directed.

Counts 2, 3 and 6

- [82] I will first deal with the break and enter counts. As indicated, the Crown seeks sentences of four years for each of Counts 2 and 3, the residential break-ins, and two years for Count 6, the break-in at the marina. Mr. Fulton submits that an appropriate sentence is six months for each of Counts 2 and 3, and two months for Count 6.
- [83] In my view, the most serious of the break and enter counts is Count 3, the break and enter that occurred on August 31 or September 1, 2019. Not only did Mr. Fulton break into the residence, when he was caught by way of a paint trap he made a point of pouring paint on the front door and into the fish tank. The purpose of doing so could only be to send a message to Ms. McPhee that she was not safe in her home. I appreciate that she had moved out by that time, but that does not diminish the impact of Mr. Fulton's conduct.
- [84] In the circumstances, I find that a sentence of two years' imprisonment is appropriate on this count.
- [85] Count 2 also involved a break and enter into Ms. McPhee's dwelling house. However, I would characterize it as somewhat less serious than Count 3. The break and enter and corresponding theft of the computer happened very shortly after Ms. McPhee broke up with Mr. Fulton and occurred when he knew she was away. The circumstances suggest it was something of an impulse action by Mr. Fulton that he subsequently remedied by returning the computer. At the time, Ms. McPhee was not even certain that there had been a break and enter or theft. This in no way is intended to diminish the significance of a break and enter into a home, but again I would place it lower on the spectrum of seriousness than Count 3. I find that a sentence of one year's imprisonment is appropriate for Count 2.

[86] Count 6, dealing with the break and enter at the Ladner Harbour Marina, may also be characterized as a less serious count than Count 3. It did not occur at a residence and did not involve Ms. McPhee directly, although I find that it was part of the course of harassment of her. Mr. Fulton committed the offence by jimmying open the locked gate to the dock where Mr. McPhee's boat was moored, but he did not damage the boat, nor did he damage Mr. McPhee's truck in the parking lot. He left when asked to do so by the harbourmaster, Mr. Staines. In the circumstances, I find that a sentence of six months' imprisonment is appropriate for Count 6.

Count 1 - Criminal Harassment

- [87] This brings me to Count 1, the criminal harassment of Sarah McPhee. I have already touched upon the insidious nature of this offence, particularly in light of the vulnerable position that Ms. McPhee was in and the significant impact it has had on her.
- [88] I have also addressed the various aggravating factors that far outweigh any mitigating factors. Of particular significance in this regard are Mr. Fulton's history of similar conduct, the fact of the break and enters as part of the harassing conduct, and the relative lack of insight and remorse displayed by Mr. Fulton.
- [89] As I have indicated, the principles of specific deterrence and rehabilitation have less significance in this case. Rather, the principles of denunciation and general deterrence are particularly important. With respect to the latter principle, it is important that the court send a strong signal condemning the harassment of former intimate partners.
- [90] The Crown seeks a sentence of four and a half years, which it acknowledges is at the high end of the range, to the extent that there is a range based on the authorities. Taylor is a case in which the Court of Appeal upheld a sentence at the high end, in that case 4.5 years. However, the facts in Taylor were more egregious than here, given the offender's lengthy criminal record and the fact that he was convicted of harassing a complainant that he was previously convicted of assaulting.
- [91] Conversely in Myers, where the court imposed a sentence of 16.83 months, equating to time served, the circumstances were less egregious. There, as described by Justice Verhoeven at para. 105, there were no break-ins, the harassment was largely spontaneous and not part of a sustained or malicious plan, and it occurred over a relatively short time.
- [92] In Fox, where the court imposed a sentence of three years, the nature of the harassing communications and publications was more egregious than Mr. Fulton's communications here, but Fox did not involve break-ins.
- [93] Taking account of all of the relevant circumstances, I would find that three years or 36 months is a fit and reasonable sentence. However, that is before taking into account the mitigating factor of Mr. Fulton's time in segregation. As discussed, that is a factor that is relevant to determining the ultimate sentence.

- [94] As I indicated, considering Mr. Fulton's time in segregation is not a matter of assigning a specific amount of credited time or doing a mathematical calculation, nor can consideration of this issue serve to reduce a sentence below what would otherwise be considered a fit sentence. It is again one mitigating factor to be considered alongside all other relevant factors.
- [95] Recognizing that the segregation here did cause hardship to Mr. Fulton, but keeping in mind the need to impose a reasonable and fit sentence, I would reduce the sentence that I would otherwise impose of 36 months to 33 months. Reducing the sentence below that figure would, in my view, render the sentence unfit.
- [96] Mr. Fulton is entitled to credit, based upon the Summers formula, of 940.5 days or 31.35 months. Applying that credit against the sentence of 33 months leaves 1.65 months of additional custody to be served. By my calculation, that equates to 50 days. Fifty days from today expires on September 4, 2021.

Probation and Ancillary Terms

- [97] Before formally pronouncing sentence, I will address the issues of probation and any ancillary orders.
- [98] In terms of probation, the Crown again seeks a period of three years, whereas Mr. Fulton seeks no probation or alternatively a six-month period.
- [99] The various harassment cases that I have considered uniformly include a period of probation as part of the sentence. Given the nature of the circumstances and conduct underlying such charges, courts have recognized the importance of ongoing monitoring and supervision.
- [100] Those factors are significant in this case, given again Mr. Fulton's history and apparent lack of insight into his behaviour.
- [101] Taking account of all of the relevant circumstances, I find that a period of two years' probation is appropriate here. I will outline the terms momentarily.
- [102] The Crown also seeks ancillary orders that Mr. Fulton provide a DNA sample pursuant to s. 487.05(1) of the Criminal Code, and a lifetime firearms prohibition pursuant to s. 110.
- [103] Mr. Fulton opposes both. He notes that he already gave a DNA sample pursuant to a warrant, thus an additional order is unnecessary. With respect to a firearms prohibition, he submits that he has just completed a 10-year prohibition and he wishes to be able to hunt and shoot recreationally.
- [104] I will grant both orders sought. With respect to the DNA sample, while there may be a sample in the DNA database, it is useful and important to formalize the DNA requirement by way of a term of the order.

[105] In terms of the firearm prohibition, it is in my view justified on the basis of the charges and Mr. Fulton's history. I note that such a term is also common in the other criminal harassment cases that I have been referred to. However, rather than a lifetime ban, I impose a ban of 10 years.

Sentencing

[106] I am now going to impose sentence on Mr. Fulton. I am going to ask you to stand up.

[107] THE ACCUSED: Yep.

[108] THE COURT: On Count 1, the charge of criminal harassment, I sentence you to 33 months' imprisonment; on Count 2, I sentence you to one year's imprisonment; Count 3, I sentence you to two years' imprisonment; Count 6, I sentence you to six months' imprisonment.

[109] The sentences on all four counts will be served concurrently and will be followed by a term of probation of two years on terms I will outline shortly.

[110] You will be given credit for the time you have served in pre-trial custody, with credit that equates to 31.35 months, leaving a total of 1.65 months or 50 days remaining to be served. In order to avoid any confusion, I calculate that your sentence will therefore be completed effective September 4, 2021.

[111] I make the following ancillary orders:

- a) You are to provide a DNA sample pursuant to s. 487.051(3) of the Criminal Code;
- b) you are prohibited from possessing any type of firearm, ammunition, cross-bow, or restricted or prohibited weapon for a period of 10 years pursuant to s. 110 of the Criminal Code.

[112] Turning to the terms of probation, which again will be for two years, you will be subject to the following conditions:

- 1) You will keep the peace and be of good behaviour.
- 2) You must appear before the court when required to do so by the court.
- 3) You must report in person to a probation officer within 48 hours of your release from custody, and after that you must report as directed by the probation officer.

We will come back to that. I think, Mr. MacDonald, typically we would specify an office, so I will ask you about that in a moment.

- 4) You must provide your residential address and phone number, both residential and cellphone, to the probation officer and promptly notify the probation officer of any changes to your address or phone number.

- 5) You are prohibited from having any contact or communication, directly or indirectly, with any of Sarah McPhee, Osa McPhee, Tana McPhee, Brent Treftlin, Jo-Anne Treftlin, Tyler Treftlin, and Danielle Treftlin, and you shall not attend any residence, school, place of employment, or place of worship where any of the named people are known to be.
- 6) You shall not attend within 200 metres of residences located at 5224 7A Avenue, Delta, BC, and Number 47, 4720 52A Street, Delta, BC.
- 7) Lastly, should you desire to do so, you may attend any counselling or treatment identified by your probation officer and, where so identified, Corrections will facilitate such attendance.
- [113] As suggested by the Crown, I have made this last term voluntary, given Mr. Fulton's stated reluctance to attend counselling or treatment. However, as I have indicated, I am not prepared to give up on the idea of rehabilitation, and I would encourage Mr. Fulton to take advantage of any treatment or counselling opportunities.
- [114] Those are my reasons. You can have a seat, Mr. Fulton.
- [115] THE ACCUSED: Thank you very much.
- [116] THE COURT: Anything arising, other than, Mr. MacDonald, as I say --
- [117] CNSL A. MACDONALD: Yes, My Lord.
- [118] THE COURT: -- preferably we would specify a probation office.
- [119] CNSL A. MACDONALD: Yes, I believe that the probation office would be the Surrey Community Probation. I apologize, My Lord, but I did --
- [120] THE ACCUSED: That's -- I'm not going to that one.
- [121] CNSL A. MACDONALD: I did not bring a contact detail, but I can certainly provide that shortly, My Lord.
- [122] THE COURT: All right, we will make a note, we will leave the order as is with the appropriate office to be provided.
- [123] CNSL A. MACDONALD: Yes, thank you, My Lord.
- [124] THE ACCUSED: I can give you the office that I'd either be going to, it'd either be Victoria or Richmond. So I'll probably --
- [125] THE COURT: Well, I guess the issue will be what the plan is on release.
- [126] THE ACCUSED: Yeah.
- [127] THE COURT: And where you will be residing, in which case it would be that office, I would expect.

- [128] THE ACCUSED: It just depends. I mean, if I -- I mean, if I'm gonna go grab my boat from Poets Cove on Pender Island, I'm gonna probably putt back over to Ladner, which basically I would just drive my boat into Steveston and then run over to the office in Richmond, which is by the -- it's in the Richmond Courthouse.
- [129] CNSL A. MACDONALD: If I may, My Lord --
- [130] THE ACCUSED: Which -- which is by the probation office.
- [131] THE COURT: Yes.
- [132] CNSL A. MACDONALD: The initial report would be where Mr. Fulton was required to provide his address, and then my understanding is that the probation office refers him to the nearest local community office.
- [133] THE COURT: The Richmond one would, in some respects, make a lot of sense.
- [134] THE ACCUSED: It would make -- it's -- yeah, I can just run through the tunnel in my truck, right, so --
- [135] THE COURT: All right, Madam Clerk, we will include in that term the Richmond Community Corrections office as the place of first reporting.
- [136] THE ACCUSED: Yes, fair enough, okay.
- [137] THE COURT: Anything else?
- [138] CNSL A. MACDONALD: No, My Lord. I suspect that given what Mr. Fulton is indicating today, that the other point that I had may be moot, in that the --
- [139] THE COURT: Yes, all right.
- [140] CNSL A. MACDONALD: -- 200-metre will cover the neighbour, Mr. Willox, so no, I don't have anything else.
- [141] THE ACCUSED: Two hundred metres, I mean, that's a -- that's a bit -- I foresee --
- [142] THE COURT: No, that is done. I am not going to change that.
- [143] THE ACCUSED: So if I'm working on -- around that -- around that area, I mean, doing landscaping, as well as Mr. Treftlin and Sarah McPhee, the issue that I have with this is that working in a small community, we're going to be around neighbourhoods, we'll see each other. Obviously I'm not going to go and breach myself, but there -- as I brought up, the grey area, to be --
- [144] THE COURT: No, I appreciate it, but you are just going to have to be alive to those concerns and deal with it.
- [145] THE ACCUSED: Okay.
- [146] THE COURT: All right.

"Skolrood J."

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