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R. v. Gallerno, 2025 ONSC 236

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CITATION: R. v. Gallerno, 2025 ONSC 236
COURT FILE NO.: CR 24-50000398
DATE: 20250110

2025 ONSC 236 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	*Sunita Malik,* for the Crown
	)	
– **and** –	)	
	)	
WILLIAM GALLERNO	)	*William Gallerno,* self-represented
	)	
	)	*Ingrid Grant*, Amicus Curiae
	)	
	)	
	)	
	)	**HEARD at Toronto:** January 7-9, 2025

REASONS FOR JUDGMENT

S.DUNPHY J.

[1] Mr. Gallerno was tried before me on a charge of aggravated assault contrary to s. 268 of the Criminal Code.

[2] The circumstances of the offence in this case are primarily uncontradicted – the main issue in this case is that of identification.

The incident

[3] On February 3, 2023 Ms. Assenza set out from her home on foot to go to the Queen St. location of The Bay to make a purchase. She was walking on the north side of Queen Street in a westerly direction just to the west of Parliament Street between about 3:30 pm and about 4 pm – no greater precision being required for present purposes.

[4] That particular stretch of Queen Street was overlooked by a surveillance video camera located near 342 Queen Street West in the video clip marked as Exhibit 2. I shall review the issues associated with this evidence below but my conclusion based upon the totality of the evidence, and notwithstanding the gaps in the Crown's evidence on the origin and creation of it, is that the video is an authentic depiction of what occurred.

[5] The short (29 second) video clip depicts a woman walking down the street away from the camera. She was wearing a long, white winter coat and a small backpack. As she walked, she approached and then passed a significantly taller man dressed in dark clothing walking in the opposite direction. There is no indication of any recognition or interaction between the two as they approached and then passed each other.

[6] Ms. Assenza suffers from an irreversible and progressive neurological condition which severely impairs her memory. While she had some limited memory of the incident at the time of the preliminary inquiry on May 31, 2024, a reading of the transcript makes it clear how limited her surviving memory of the incident was at that time. At the opening of trial, I heard a Crown application to receive her preliminary inquiry evidence at trial pursuant to s. 715 of the Criminal Code in light of her medical condition. The application was granted on consent. There is no suggestion that her medical condition is in any way a consequence of her injuries in the incident giving rise to this charge.

[7] For all intents and purposes, her preliminary inquiry testimony goes no further than to establish (i) that she was walking on the north side of Queen Street that afternoon, (ii) that she was assaulted by a man she had never met nor seen before; (iii) she could not describe her assailant more than to say that he was tall – her estimates varied widely but he was taller than her, seemed to be about 60 and she thought he had some kind of weapon in his hand; (iv) that she suffered significant injuries to her face and jaw that required surgery, the wiring shut of her jaw and still continued to cause her pain as of May, 2024 when she testified; and (v) that she recognized herself wearing the jacket and back-pack in the surveillance video played at the preliminary inquiry (the same video was an exhibit at trial) and recognized the depicted assault in the video as being what happened to her. She did not recognize Mr. Gallerno as her assailant.

[8] All of the non-subjective elements of her testimony are firmly corroborated by (i) the video surveillance evidence which depicts an unmistakable and brutal assault by a man upon the woman Ms. Assenza identified as herself on February 3, 2023; (ii) the testimony of her husband whom she called immediately after having been taken to the nearby Shoppers Drug Mart and summoned to come and pick her up; and (iii) the testimony of the two police officers (P.C. Estevez and P.C. Hynes) from 51 Division to whom Ms. Assenza made a report of the assault at approximately 4:23 pm that same afternoon and who accompanied her to the hospital and recorded her statement on a body-worn camera.

[9] I must now address the issues raised by the defence and by Amicus regarding the authenticity of the video clip of the incident tendered by the Crown as Exhibit 2. There are gaping holes in the chain of custody evidence tendered by the Crown. Among these gaps:

a. On February 9, 2023, a special constable was assigned to the team that canvassed the neighborhood for video surveillance cameras. He could provide only vague evidence as to how the video clip came to be in the possession of police. He noticed cameras at a closed building in the target neighborhood and took down the contact number he found posted on the building. He reached one person by telephone at the number, was put on to another IT person whose name he did record who, after consulting an unnamed superior, confirmed over the telephone that the owner or

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tenant (it is not clear on the evidence which) of the building indeed had video surveillance footage from the relevant time frame being sought. The IT person in question was not called as a witness. The special constable provided instructions over the phone on how to upload the video footage for the requested time frame. The next morning, the operator of the file transfer service used by Toronto police notified 51 Division of the receipt of a file of 494 MB apparently from the same organization contacted by the special constable. The arrival log from the software server was not produced to provide further details, including the name or type of file received. Four days later, the special constable received a forwarded email from the 51 Division mailbox forwarding the notification email along with a download link. This email referred to the unique police file number associated with this investigation. There is no evidence that the uploaded file had any such reference attached to it and the four-day delay between the receipt of the notification of the uploaded file by 51 Division and that same notice being forwarded to the special constable who had requested it suggests that some manual research was needed to determine who the uploaded file was intended for. No witnesses were called to cast more light on this question.

The special constable reviewed the clip uploaded and then uploaded the clip to the police case file. He made no contemporary notes of what he observed when he observed the clip, the length of the clip or how much of the clip he reviewed. His evidence confirming that the clip he examined was the same as the 29-second clip played at trial is too unreliable to be given any material weight. Had he observed a violent assault on the clip he viewed, it is hard to imagine that the detective charged with the investigation (Det. Pischedda) would not have known that police had video footage of the assault for more than a month afterwards.

Det. Pischedda did not view the clip until April 8 and when he did, he spoke to another IT person at the sender's organization. This person was not called as a witness either and Det. Pischedda's hearsay evidence of the conversation was disallowed.

This evidence was handled in a needlessly careless manner and evidence that might have filled in some of the gaps – i.e. the testimony of the actual custodian of the video equipment who found the clip and uploaded it as instructed – was not called as a witness or apparently even contacted for that purpose.

b. The actual clip tendered as an Exhibit at trial was almost certainly an extracted portion of the entire clip received. The subject time frame requested in the instructions given to the special constable covered a 40-minute time frame (from 3:20 pm until 4:00 pm) on the date of the incident. The clip played in court and entered as a trial Exhibit was only 29 *seconds* in length and begins at a point in time where the victim had already passed in front of the camera and proceeded ten or fifteen yards down the sidewalk beyond. It begins only a step or two before the assault depicted occurred.

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The clip played was clearly a "screen within a screen" and had a file name which the Crown advised – after the close of evidence – had been added by Crown counsel herself. The "inner screen" starts at 22:53 while the "outer" screen starts at 00:00. This strongly suggests that somebody selected the clip from a longer file and did so by simply recording a portion of the larger clip being played – an inference corroborated by the time counters on both "screens" counting forward in tandem when the clip is played. No evidence about how or why this happened was tendered at trial.

The uploaded clip is clearly much, much larger than the clip that was made a trial exhibit – the one is approximately 10 MB in size, the other 494 MB.

c. To add to the unexplained elements of this "screen within a screen" evidence, the video clip presented contains two date stamps. The one within the video is dated February 3, 2023 while another counter on the top is time stamped April 25, 2019.

[10] These are not immaterial gaps in the evidence and it is perfectly fair to observe that identification of Mr. Gallerno as the assailant is 100% dependent upon the integrity of that evidence. The victim could not identify the accused as her assailant and the only evidence of Mr. Gallerno being the assailant comes from the view afforded by the video of the assailant's face and of the clothing he wore as he passed underneath the camera. I shall be examining that evidence below.

[11] The Crown's obligation is to prove its case beyond reasonable doubt but it is not obliged to do more than that nor is it required to answer *every* question that arises from the evidence providing the unanswered questions do not themselves amount to reasonable doubt alone or in combination. The evidence of the chain of custody and the evidence of the editing of the clip is evidence which, *in combination with other evidence*, may be considered and assessed against that high standard of beyond reasonable doubt. In my view, considering this unnecessarily flawed evidence in the context of the other evidence provides me with sufficient basis to conclude beyond reasonable doubt that the video clip is an authentic recording of the events it purports to show and the unanswered questions adverted to above do not give rise to reasonable doubt when considered in context.

[12] First, there is simply no evidence whatsoever that the clip in question was faked and the circumstantial evidence renders that hypothesis unlikely:

a. It was received by the police portal on the morning of February 10, 2023 (less than a day after it was requested by the special constable calling the number posted on the building) even if not forwarded internally by police to the special constable until February 14, 2023. The sender was from an email domain name identified as being apparently the same organization that the special constable had contacted and recorded the name of in his notes.

b. The clip itself did not "solve" the crime but provided an image of a face which, when run through facial recognition software provided police with a *lead* on the

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> identity of the assailant after some delay. On a stand-alone basis, the evidence was nothing resembling conclusive or even reliable evidence by itself. It took the circumstances of luck (that Mr. Gallerno had other contemporary filmed interactions with police), legwork and many weeks of effort to proceed from a clip uploaded to the case file on February 14, 2023 until Det. Pischedda had the grounds for the search warrant he sought on April 20, 2023. As noted, he did not even realize that the uploaded clip captured the incident until he viewed it on April 8, 2023 – almost two months following its receipt. Further, February 2023 is long before the advent of and broad access to artificial intelligence tools for the relatively swift creation of faked videos.

[13] The fact that gaps in the evidence leave open the *possibility* of a faked or altered video being produced does not necessarily render that possibility a *reasonable* one absent some evidence tending to make that inference more than a fanciful or far-fetched one. There is for example no evidence of any particular motive on the part of anyone to frame Mr. Gallerno. There is no evidence, for example, that Mr. Gallerno was even *suspected* of being the perpetrator at any time prior to Det. Pischedda realizing that there was video of the incident on April 8 and then receiving the lead pointing in Mr. Gallerno's direction supplied by the facial recognition software analysis a week after that.

[14] Second, there *is* evidence tending to corroborate the authenticity of the video clip. Ms. Assenza was able to identify herself and the assault as depicted on the video clip she reviewed "absolutely". She was walking on a cold day from her home to The Bay on Queen Street about ten blocks or so beyond where the incident occurred. While no street photographs were introduced in evidence to confirm the location and vantage point of the camera that recorded the footage, I can safely infer that Ms. Assenza was walking on familiar ground to her and her unhesitating and unequivocal evidence that the video clip depicts her and the assault upon her that she described as taking place on the north side of Queen Street East just beyond Parliament Street is entitled to some weight. As well, Det. Pischedda was able to identify the area depicted in the clip as being from the same location described by the special constable and Ms. Assenza. Ms. Assenza's husband was also able to identify his wife and the clothing she wore from the video clip.

[15] Third, despite the degree of confusion as to the time stamps on the video footage – a not at all unusual occurrence with security camera evidence routinely received in evidence by our courts – the identification of the camera doing the recording which is visible on screen can be readily deciphered sufficiently to confirm that the clip is entirely consistent with Ms. Assenza's evidence of the time and place of the assault upon her. It refers to an IP address, "334 Q L1 Ext" which I infer refers to an exterior as opposed to interior camera and "Queen St. W" which I infer refers to the direction being recorded (west bound on Queen Street). The address of the building from which the special constable said he sought the clip from was "342-334 Queen Street East".

[16] It is noteworthy that there is no evidence that police had more than the vaguest description of the clothing Ms. Assenza was wearing - neither of the two officers who interviewed her made a note of her clothing with any particularity. The body-worn camera of one of the officers recorded Ms. Assenza's statement to police and the transcript of the preliminary inquiry clearly indicates that she was not then wearing her coat.

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[17] In conclusion, I find that the foregoing evidence establishes beyond reasonable doubt that Ms. Assenza was the victim of an unprovoked assault on Queen Street just west of Parliament Street on February 3, 2023 at or about 3:40 pm by the man depicted in the surveillance video of this incident (Exhibit 2). I accept the evidence of the video clip as an authentic capture of the event.

[18] As to the nature of the assault depicted, I find that the combination of the video evidence and the *viva voce* evidence of the victim's husband (Mr. Boone), the two attending police officers (P.C. Estevez and P.C. Hynes) and Ms. Assenza herself all provide overwhelming and uncontradicted evidence of the severity of the injuries inflicted on her by this brutal and vicious assault. Ms. Assenza suffered a broken jaw of sufficient severity to require surgery two days later that resulted in her jaw being wired shut. A molar was shattered at the root and remains un-treated to this day because of the other harms suffered. She continues to suffer significant pain. Even in the hour or two afterwards, the bruising and swelling were obvious to the attending police officers and they also observed bleeding from her nose.

[19] Mr. Gallerno suggested that I should consider (a) the lack of any medical reports to confirm the severity of the injuries together with (b) the fact that Ms. Assenza left the hospital able to walk and without her jaw wired. Neither of these consideration is persuasive.

[20] There is *no* evidence to contradict the evidence of the four witnesses cited above regarding the extent of the injuries to the victim each of them described. Those injuries are *entirely* consistent with the tremendously forceful punch that can clearly be seen as depicted in the video clip. The fact that Ms. Assenza was not hospitalized, was able to walk on her own out of the hospital and did not undergo surgery for a day or two afterwards does not detract from any of this. There is no requirement to introduce *all* evidence to prove an essential element of the crime alleged as long as sufficient evidence of the crime has been introduced to prove all of the essential elements beyond reasonable doubt. The absent medical records are not essential evidence. The Crown has tendered sufficient evidence to establish the aggravated nature of the assault in this case beyond reasonable doubt. More is not required.

[21] This assault satisfies in every conceivable way the definition of aggravated assault in s. 268 of the *Criminal Code*. There can be no question that the assault whose aftermath was described by these witnesses must be categorized at the very severe end of the aggravated assault spectrum.

Identification evidence

[22] Having been satisfied for the reasons given that Ms. Assenza was the victim of an aggravated assault by the man depicted in the video clip on February 3, 2023 at or near 3:40 pm on Queen Steet East west of Parliament Street in Toronto, I must now consider whether the Crown has proved beyond reasonable doubt that the accused is indeed the man who committed this crime.

[23] The starting point for my analysis of this question is the video clip itself. As noted, the assailant observed in the video clip was walking towards the camera. After delivering a punch to the face of Ms. Assenza with his entire body behind it, the assailant resumed walking towards the camera for about 40 paces before passing under the camera and out of sight. As he passes near

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and underneath the camera, his face and clothing are quite clearly and distinctly visible in the video clip. While the hood of his winter coat conceals his head to some degree, the face is clearly visible.

[24] Having observed Mr. Gallerno in court over several days during his trial, I find that he bears a very, very strong resemblance to the man depicted in the video clip. His height relative to Ms. Assenza can be assessed at the time he passes beside her just before winding up to punch her and is consistent with the height of the man I have observed. The distinctive lines and features of his face and hair (to the limited extent the hair is visible on the video) align quite neatly. Alone, this identification by me comparing the man before me to the video could not be considered to be conclusive, but must be assessed with other identification evidence.

[25] The Amicus very strongly urged me to consider the exculpatory evidence of Ms. Assenza on the subject of identification when considering the matter of reasonable doubt. As noted, Ms. Assenza was not able to testify at trial and her evidence at the preliminary inquiry was tendered by the Crown. Aspects of that evidence were unquestionably exculpatory.

[26] During cross-examination, Mr. Gallerno asked Ms. Assenza if the assailant – described by her to police as perhaps 6'7" to 6'11" was taller than his own 6'1". Ms. Assenza replied "maybe" and "I don't know". She was also asked about her statement to police estimating her assailant to be close to 60 years of age and was asked to estimate his age as she saw him in court. She estimated his age to be 48 compared to his actual age of 43. Finally he asked her if he looked like the individual who struck her to which she replied "No". In re-examination she was asked if she could tell the man's height from the video clip and said she could only say "taller than me" and when asked the age of the person in the video clip she said "I can't say who that person is….it happened so fast".

[27] It must be born in mind that Ms. Assenza saw her assailant only for a matter of a moment before an entirely unexpected attack was loosed upon her. He then walked quickly away from her. Her opportunity to make a careful or meaningful observation was exceptionally limited. She did state that she was "absolutely" able to identify herself being struck in the video and confirmed that she did not know the man who did it and never seen him before or since. I accept her evidence that the video depicts the assault upon her but I attach little weight to her ability to identify the man who assaulted her with any particular degree of accuracy given the stressful circumstances and the very short window of observation.

[28] Exhibit 9 contains an April 15, 2023 booking photograph of Mr. Gallerno from Sarnia Police. The booking photograph is a full shoulder and head view. I have no difficulty whatever in confirming that the Mr. Gallerno before me in court is the same man purported to be Mr. Gallerno in the booking photograph and the details of his facial lines in particular on that photograph - being viewable from a much clearer vantage point than is possible in the courtroom - further confirms my conclusion that Mr. Gallerno is the man depicted in the video clip.

(i) 129 Peter Street evidence

[29] Mr. Irwin Wesley was working as shift leader on the morning shift on February 9, 2023 at a shelter located at 129 Peter Street in Toronto. This shelter is somewhat less west of Yonge St.

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as Parliament St. is East. It can fairly be described as being in the same general downtown core area as the assault and walking distance from the location of the assault being considered here. Police had already been called to escort Mr. Gallerno from the premises. Mr. Gallerno was known to Mr. Wesley. When police arrived, Mr. Wesley escorted them to the lower level where Mr. Gallerno was sleeping.

[30] Officer Nehring and Officer Rorabeck were the two police officers who responded to the call at 129 Peter Street that morning. Both of them had body worn cameras which recorded their interaction. The videos of both were made exhibits. These depict police waking a man sleeping amid a collection of belongings on the floor whom they addressed as William Gallerno. The man identified himself as such and produced identification in that name with Mr. Gallerno's birthday that was read into the camera. The man depicted in these two video clips is unquestionably Mr. Gallerno and unquestionably the same man depicted in the Sarnia police booking photo referred to above (Exhibit 9).

[31] The video clips depict Mr. Gallerno putting on a checked flannel shirt and a winter coat on top of that. Both of these appear to be identical to the clothing worn by the assailant depicted in the 29 second video clip of the assault. He was wearing black pants which, although having no distinctive marking on them, also appear identical. The video depicts Mr. Gallerno packing away an orange hoodie which is consistent with the orange hoodie worn by the assailant under his jacket in the assault video. Mr. Gallerno's face and appearance appear identical to the face and appearance of the man depicted in the video. He had an identical appearing ring on his hand. The markings on the jacket match. The colours match.

[32] This video evidence recorded less than a week after the assault and in the same general downtown area provides overwhelming evidence that Mr. Gallerno is the man depicted in the assault video clip.

(ii) The Sarnia Jail evidence

[33] Det. Pischedda did not connect Mr. Gallerno to the crime he was investigating until mid-April 2023. By that time, Mr. Gallerno had been apprehended on an unrelated matter in Sarnia and was in jail there. A warrant was obtained by him to seize clothing held by the jail for Mr. Gallerno resembling the clothing worn by the assailant in the assault video. Det. Pischedda sent Sgt. Lafferty who was operational manager of the Sarnia Jail a text message showing a screen shot extract of the assailant and the black pants, checked shirt, orange hoodie and black jacket that he was wearing.

[34] Sgt. Lafferty confirmed that she had Mr. Gallerno in custody at the jail at the time and that the jail was holding personal effects for him. Amicus asked me to take note of the gaps in the chain of custody between police apprehending Mr. Gallerno in Sarnia and the personal effects purporting to be his being retrieved by Sgt. Lafferty and left in her office for pick-up and delivery to the warrant execution officer. All of these are fair critiques, but they do not introduce reasonable doubt. The clothing that Sarnia Jail thought it was holding for Mr. Gallerno was not seized as evidence and was not the object of detailed chain of custody records. It was of no intrinsic value to anyone but Mr. Gallerno. Sgt. Lafferty was able to find among what purported to be Mr.

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Galerno's effects the four items of clothing sought – black pants, check flannel shirt, orange hoodie and black jacket – that appeared to precisely match the clothing depicted in the photograph sent to Sarnia Jail by Det. Pischedda. The items sent to Toronto police by Sarnia Jail via courier match the same description. Gaps in record keeping notwithstanding, this is corroborating evidence entitled to weight.

(iii) Victim identification evidence

[35] I recognize that Ms. Assenza was unable to identify Mr. Gallerno as her assailant in court when she saw him at the preliminary inquiry. During cross-examination she described her assailant as being well over six feet in height and about 60 years of age and confirmed that she did not recognize Mr. Gallerno as her assailant when he cross-examined her. I consider that evidence but do not afford it significant weight relative to the objective identification evidence of the 129 Peter Street video evidence and the Sarnia Jail evidence viewed in the context of the 29 second video clip of the assault. Ms. Assenza was asked in chief whether she saw the man who hit her and she replied "Not really. It just happened so fast". This observation by her is borne out by the video clip. She had only the most limited of opportunities to make any observations of her assailant as she had no interactions with him whatsoever before an entirely unexpected assault was unleashed upon her.

(iv) Conclusion regarding identification

[36] In my view, the evidence confirming that Mr. Gallerno is one and the same person as the assailant depicted assaulting Ms. Assenza in Exhibit 2 is convincing beyond reasonable doubt. The evidence of the Peter Street encounter with police is overwhelming and convincing. Any minor weaknesses in the chain of custody of the physical articles of clothing between Sarnia Jail and Toronto Police is immaterial in the face of this overwhelming and convincing body of evidence viewed as a whole.

[37] In my view the Crown has discharged its burden of proving beyond reasonable doubt that Ms. Assenza was the victim of a vicious aggravated assault on February 3, 2023 at the hands of the defendant Mr. William Gallerno as charged. Accordingly, a finding of guilt will be entered on the record and a date will now be set for sentencing.

S.F. Dunphy J.

Released: January 10, 2025

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