

COMMENTS ON PASSING SENTENCE

ESTCOURT J

The defendant, Thomas Michael Fulton, aged 21 at the time of the offending has pleaded guilty to a single count of assault.

The defendant and the complainant, Jonathon Luke Bennett, aged 37 at the time, worked together at a scrap metal recycle business in Derwent Park.

It was there on the morning of Wednesday 13 January 2021 that the defendant, after the two men had been arguing and name calling on and off for some hours, picked up a tungsten steel chipper tooth and threw it in a bowling action, as I understand it, at the complainant, hitting him in his left arm and chest. The chipper tooth was some twenty centimetres long, ten centimetres wide and weighed approximately 2-3 kilograms. It connected at such force that it caused considerable bleeding to the complainant's elbow and the injury resulted in exposed muscle and tendons.

The defendant did nothing to assist the complainant who was sought medical assistance and had surgery in relation to the fractures to his elbow the following day. The surgery included having two pins and wire placed in his elbow which he was told would need to be surgically removed in future.

The defendant was terminated from his employment on the day of the assault and he was arrested on 6 May 2021. He made full admissions to assaulting the complainant, although he exhibited little remorse.

Whilst the defendant intended to hit the complainant with the chipper tooth the State accepts that he did not foresee the likelihood of causing grievous bodily harm or wounding the complainant. In his interview with police, the defendant stated when he threw the tooth that it "wasn't intentionally to hurt him, it was the intention to get the fuck away from me sort of thing".

The State nonetheless asserts, correctly, that the extent of the complainant's injuries can still be taken into account as objectively they were a foreseeable consequence of the assault given the nature of the object and the force with which it was thrown.

The State assert that at approximately 11:30am that morning the defendant continued to verbally abuse the complainant calling him "bald" and "ugly", to which the complainant responded by telling the defendant to "take a look at himself" and called him a "fat piece of shit". Then, it is said, the defendant replied by saying "right, that's it" and walked down from the metal platform where he was standing towards the complainant and picked up the metal tooth.

However, I am told, without demur on the part of the State, that on the morning of the assault the defendant was working in company with a Mr Richard Taylor and the defendant and Mr Taylor were approached by the complainant who announced that the defendant had broken something, which was not true. The complainant then said "what have you done to fuck it up this time? Mr Taylor then describes verbal abuse directed at the defendant by the complainant which, in Mr. Taylor's opinion, "was a completely out of line thing to say". From Mr Taylor's

statutory declaration that seems to have been a derogatory and obscene reference to the defendant's partner in the ultimate event. Something which the complainant repeated before the defendant responded by committing the assault.

All of this is relevant only of course in the context of the defendant's genetic and associated behavioural disorder, as will become clear.

The complainant had surgery to remove the wire in his elbow in December 2021. He was on workers compensation from the date of the assault until about February 2022. He underwent weekly physiotherapy for approximately 13 months. He suffered expense notwithstanding his worker's compensation entitlements. He now has nearly recovered all movement in his elbow but occasionally needs to take some painkillers. There is no victim impact statement from him.

The defendant has a relevant prior conviction, along with a number of other convictions, all of which, of any significance, I am told, occurred during a period of great instability in the defendant's life in a period of some 5 months between 19 November 2018 and 11 April 2019.

The defendant is in a long term relationship with his partner, Chantelle Devine-Wordsworth. She resides in Lenah Valley and the defendant resides in a unit on a property owned by his parents. He shares his residence between that unit and Ms Devine-Wordsworth's home.

The defendant was born in Hobart and is the eldest of two siblings. He has a close and supportive family.

Once he was in the formal education setting in kindergarten he exhibited speech delays and behavioural issues which resulted in continual behavioural and learning assessments in grades 1, 2 & 3.

On 14 September 2009 at the age of nearly 10, the defendant's cognitive ability was assessed as being in the low average range and in that year he was diagnosed with Mosaic XYY syndrome, symptoms of which may include learning disabilities and behavioural problems such as impulsivity. He was unable to continue learning in a school environment due to his behaviours, particularly where he found social situations hard to interpret as he lacked the skills to navigate rules and interactions with fellow students.

His parents found that the only option was to home-school the defendant using an "Eschool" model. They also continued to try to find intervention to support him with his diagnosis with the assistance of either a psychologist or a psychiatrist, however the defendant found it very difficult to participate in those options because he had to talk about his emotions and experience, the complexity of which he found difficult to express. He would often remain silent, become overwhelmed or escalate extremely quickly to the point of throwing nearby objects in an attempt to escape the situation. Nonetheless he was able to participate in sporting and recreational activities and obtained a driver's licence and commenced an apprenticeship.

As an adult the defendant's world opened up to a level he could not navigate. He left home and rebelled against his family and refused to have any contact with them, with an intent to pursue his relationship with Ms Devine- Wordsworth.

He felt important due to many new associates and freedoms. However his life spiralled out of control quickly without the supports and structure of his family. He could not stay at Ms Devine-Wordsworth due to her living arrangement, so he slept in his car and was exposed to

anti-social associates who encouraged stealing, smoking marijuana and reckless behaviours in exchange for temporary accommodation. It was then that the defendant committed the offences contained in his record of prior convictions to which I have just referred.

He lost an apprenticeship he held at the time, all his belongings and his friends and then twice attempted suicide. After his car was impounded as a consequence of the evading police charge he lived on the street and under Ms Devine-Wordsworth's house. Eventually he reunited with his family. They have worked hard to rebuild their relationship.

The defendant obtained employment with the recycling business in April 2020. He obtained his forklift licence. The work suited his abilities. Although it was not physically demanding, the hours were long. He has since held further employment but is currently in receipt of Centrelink benefits. Due to his conditions he has been accepted as a suitable recipient for NDIS funding.

In mitigation it is submitted that whilst the defendant's plea of guilty was not entered at the earliest possible date, there were ongoing negotiations to resolve the charge in good faith, and he assisted the investigation, made full admissions and pleaded guilty at an early opportunity. The matter was not prepared by the DPP for trial and no witnesses had to give evidence.

It is submitted that the principles relating to the sentencing of youthful offenders are relevant to the defendant and that he is capable of and amenable to rehabilitation. Following the last of his prior offending he was able to cease his cannabis use. He navigated the deferred sentence regime in the Magistrates Court, and there has been no offending subsequent to the instant assault.

It is further submitted that the assault was clearly committed in the heat of the moment, not premeditated, and was an ill-considered response to the circumstances the defendant faced.

I am told that in preparation for a sentencing hearing in the Magistrates Court, psychiatrist Dr Philip Reid provided a report dated August 7, 2020 in which he expressed the view, among other opinions, that the defendant is "impulsive" and IQ testing showed low/average borderline scores.

In addition, the opinion of Dr David Amor, a consultant clinical geneticist, expressed in a letter of 4 November 2010, identifies the defendant's behavioural issues are related to the Mosaic XYY syndrome diagnosis and asserts that many males with that gene disorder have an increased incidence of problems with anger control and aggression.

It is submitted that the accused's diagnosis, and the attendant impulsivity, acted specifically on his response to the situation leading up to the assault and that it is clear that this was an impulsive act brought about by the confrontation he had with the complainant.

The report of Dr Amor is of some considerable age and that of Dr Reid predates the defendant's current offending. However, by its very nature, there is no reason to suspect that a genetic disorder has any capacity to change simply with the passage of time, and Dr Reid's opinion remains relevant notwithstanding it was expressed on an earlier occasion.

In all of the circumstances it would in my view be unfair and unjust to impose a sentence of actual imprisonment. Some modification of the defendant's sentence is called for and general deterrence and denunciation can be served by the imposition of a wholly suspended sentence.

The defendant is convicted and is sentenced to 9 months' imprisonment, which sentence I wholly suspend on condition that he commit no offence punishable by imprisonment for a period of 2 years.