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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 28

LEONARD WILLIAMS,

Appellant.

20 Eagle Street
Albany, New York
February 14, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is number 28, People of the State of New York v.
3 Leonard Williams.

4 Good afternoon, counsel.

5 MR. DONN: May it please the court, Alex Donn of
6 Appellate Advocates for appellant Leonard Williams. With
7 the court's permission, I'd like to request two minutes of
8 time for rebuttal.

9 CHIEF JUDGE DIFIORE: You may have two minutes.

10 MR. DONN: Thank you, Your Honor. The
11 prosecutor, in this case, committed misconduct by
12 displaying doctored versions of trial exhibits to the jury
13 during - - -

14 JUDGE GARCIA: Counsel, what should the court
15 have done here? What should the court have done that it
16 didn't do?

17 MR. DONN: The court should have granted
18 counsel's request for a mistrial after - - -

19 JUDGE GARCIA: And - - - and that, as far as your
20 preserved arguments, at least, is really what the abuse of
21 discretion is here, right?

22 MR. DONN: A new trial.

23 JUDGE GARCIA: Failure to grant a mistrial?

24 MR. DONN: Correct, Your Honor. Failure to - - -
25 failure to grant a mistrial because in this case, in

1 particular, not only did the prosecutor display altered
2 evidence to the jury during summation, but the substance of
3 the alterations actually misrepresented the trial evidence.
4 And not only that, it did so on an issue that went to the
5 core of what this case was about, which was essentially
6 credibility battle. Leonard Williams - - -

7 JUDGE STEIN: Well, but all the things that were
8 on these exhibits, could the prosecutor have verbally made
9 the same arguments without the ex - - - without the visual
10 exhibits?

11 MR. DONN: To the - - - to the most egregious
12 errors and the ones that are preserved, absolutely not. He
13 could not have said, and counsel objected when he did, that
14 Kurt Clarke sees the defendant. That's - - - that's the
15 worst one. He couldn't say it because that's not what Kurt
16 Clarke said.

17 JUDGE GARCIA: That's argument, isn't it? Could
18 he have said he sees somebody on the street; he believes
19 it's the person because he - - - you know, he waved to him;
20 you heard the testimony; what does that tell you? He knew
21 who he was. It was the defendant. I mean you could
22 clearly argue that. It's relatively a shorthand way of
23 saying that. Now you can object to that. I think you're
24 going to get it's an argument response on something like
25 that. But clearly, you could say that. So the differences

1 between lining all those things first up and saying how do
2 you know it's the defendant he saw, because X, Y, and Z,
3 and saying it the way he had it, which is he identifies
4 him. And you think that's the difference because he put
5 that line up that makes this a mistrial?

6 MR. DONN: Yes. Your Honor, you said a lot, and
7 I - - - I'd like to respond. Number one - - - number one,
8 yes. I think there's a huge difference between carefully
9 going through the evidence and submitting that one possible
10 inference to be drawn is that Kurt Clarke, in fact, saw the
11 defendant. That's obviously not what the PowerPoint slide
12 said. And I submit that it would have been a pretty
13 ineffective PowerPoint slide if it was cluttered with 100
14 words saying I submit. The reason PowerPoint is effective
15 and the reason corporations use it and the reason it's
16 become a successful program is that it takes complicated
17 things and it makes them very simple. And I - - -

18 CHIEF JUDGE DIFIORE: So, counsel, how do you
19 suggest that we assess the propriety or a particular slide
20 weighing the oral word that's spoken to the jury as up
21 against the slide?

22 MR. DONN: I think, first and foremost, bright-
23 line rule. A prosecutor should never be allowed to alter a
24 trial exhibit and present it to the jury during summation -
25 - -

1 JUDGE STEIN: Would that include like a - - -

2 MR. DONN: - - - period.

3 JUDGE STEIN: - - - blow up?

4 MR. DONN: That - - - Your Honor, that would

5 include everything. It would include a blow up - - -

6 JUDGE FAHEY: Well, what about - - - what about

7 if you have a photograph and you marked on the photograph

8 where two cars collided?

9 MR. DONN: Yes. It would include that. It would

10 include everything and obviously, a question would become

11 was the error harmless, and clearly, some of the

12 hypotheticals we can all imagine and some of which occurred

13 in this case, drawing a circle around a lamppost may - - -

14 JUDGE FAHEY: Isn't the first distinction to be

15 drawn, you - - - you talk about PowerPoint presentation,

16 but at least in my mind, that doesn't - - - so what if they

17 use PowerPoint. The real question is alteration of the

18 evidence. That's the issue that this court should be

19 concerned about.

20 MR. DONN: Absolutely.

21 JUDGE FAHEY: Isn't it?

22 MR. DONN: Absolutely.

23 JUDGE FAHEY: All right.

24 MR. DONN: It happened to occur.

25 JUDGE FAHEY: So - - - so then the question is

1 should an abuse of discretion standard be applied or some
2 other more rigorous standard. Isn't that what you're
3 really saying? Let's say some of this was error and some
4 of it wasn't error. So which standard are we applying
5 here?

6 MR. DONN: Your Honor, our position is that this
7 was error. All of it was error. And that the - - - and
8 that the analysis is was it harmless. It should never be
9 proper to take an exhibit that was introduced in one form,
10 alter it, manipulate it, make it say what you want it to
11 say - - -

12 JUDGE FAHEY: You know what I understand your
13 argument. I - - - I agree with your argument to some
14 degree. The way I view evidence is is it's gone through a
15 process where a foundation has been laid, it's been shown
16 to be material and relevant, and the alterations in and of
17 themselves have not gone through those. They constitute
18 argument. So now we're talking about whether or not the -
19 - - the court abused its discretion here in allowing this
20 in in the way that it did before it gave an instruction.
21 Because we've got two cases here, this one, I believe, an
22 instruction was given.

23 MR. DONN: And I'd like to address the - - -

24 JUDGE FAHEY: And so I think, in many ways, in
25 this case, it comes down to the curative instruction and

1 when it was given and if it was adequate.

2 MR. DONN: Yes, Your Honor. The curative - - -
3 the curative instruction in - - - in this case was clearly
4 insufficient. Among other things, it never addressed the
5 very first and worst slide that I've mentioned. Kurt
6 Clarke seized the defendant, which was A-712 in the - - -
7 in the appendix. What happened and if you - - - you know,
8 it's kind of important to walk through the process.
9 Basically, prosecutor returns to the PowerPoint
10 presentation around A-709, 710. The slide I'm talking
11 about now, A-712, Kurt Clarke sees the defendant. The
12 court gets curious and says what's going on with all of
13 these alterations? How much of there is this? I forget
14 exactly what the prosecutor says, but he continues the
15 presentation. And the court says keep going. That's what
16 the court says at around 603 regarding the slide Kurt
17 Clarke sees the defendant. It isn't until later when there
18 are labels regarding Kurt Clarke's truck - - - which Kurt
19 Clarke didn't say it was his truck. He said he didn't
20 know. That's when the court says - - - and he limits it.
21 The court - - - the court says you have to look at the
22 exhibit as you saw it clearly referring to the surveillance
23 footage, not referring to the map which was the People's
24 Exhibit 1.

25 JUDGE ABDUS-SALAAM: Counsel, let - - - let me

1 stop you and ask you. These are slides that were taken
2 from video cameras, right?

3 MR. DONN: Many of them.

4 JUDGE ABDUS-SALAAM: And they - - - and some of
5 these - - - and they went into - - - the video went into
6 evidence, right?

7 MR. DONN: Yes, Your Honor.

8 JUDGE ABDUS-SALAAM: Okay. So on summation,
9 could the prosecutor have made these slides and just held
10 them up and spoken the words that were being said?

11 MR. DONN: Without - - -

12 JUDGE ABDUS-SALAAM: That would have been okay?

13 MR. DONN: Without altering them.

14 JUDGE ABDUS-SALAAM: Yeah. You know, just
15 holding - - -

16 MR. DONN: Yes.

17 JUDGE ABDUS-SALAAM: - - - the slide up and - - -
18 and say this is - - -

19 MR. DONN: I don't - - -

20 JUDGE ABDUS-SALAAM: - - - this is, you know,
21 what Kurt Clarke saw. This is - - - this was Kurt Clarke's
22 truck.

23 MR. DONN: Right. Yes.

24 JUDGE ABDUS-SALAAM: You think that's okay?

25 JUDGE WILSON: Or gotten a laser pointer - - -

1 MR. DONN: Or - - - or used a pointer.

2 JUDGE WILSON: Or used a laser pointer - - -

3 MR. DONN: Or used - - -

4 JUDGE WILSON: - - - and pointed to the exhibit
5 and circled it and said here's where the cameras are,
6 that's okay?

7 JUDGE ABDUS-SALAAM: That's all right?

8 MR. DONN: Yes. In - - - when you point at
9 something, the people who are watching you point know that
10 you're pointing at it and that - - - and that's it's not
11 part of the exhibit.

12 JUDGE ABDUS-SALAAM: So why - - - why is it
13 different because it's written on a slide that's not in - -
14 - not going into the jury room? The video's going to - - -
15 into the jury room. This is like a demonstrative aid,
16 correct?

17 MR. DONN: I would disag - - - I would - - - I
18 think that we can - - - we can imagine a lot of different
19 hypotheticals regarding the specific slides, but you create
20 the opportunity for significant confusion when the pointing
21 is done out of the presence of the jury. The circle is
22 drawn outside of the presence of the jury, and then the
23 document is - - - is presented to the jury. They don't
24 know exactly what the prosecutor did or didn't do - - -

25 JUDGE WILSON: Doesn't that go just to - - -

1 CHIEF JUDGE DIFIORE: Even though the jury
2 exhibits remain pristine and unaltered, the exhibits that
3 are available to the jury?

4 MR. DONN: The - - - the exhibits themselves do -
5 - - do remain - - -

6 CHIEF JUDGE DIFIORE: Correct.

7 MR. DONN: Correct.

8 JUDGE WILSON: And this goes right to Judge
9 Fahey's question of whether the curative instruction
10 sufficiently advises the jury that those - - - those labels
11 are not original.

12 MR. DONN: Well - - - well, two - - - two points
13 on the curative instruction. First, we've cited a lot of
14 data or studies talking about the impact of visual
15 information and - - - and how much that affects juries who
16 are deliberating. So I would be very wary of suggesting
17 that a cursory oral instruction could cure a visible
18 display of prejudice. For example, the jury's got the
19 image that says Kurt Clarke sees the defendant - - -
20 defendant. That is clearly the prosecutor's view of what
21 he thinks the evidence showed. That's what the jury's
22 going to remember, and a very quick throwaway disregard
23 what you saw is insufficient. Furthermore, as I mentioned
24 - - -

25 JUDGE RIVERA: So - - - so could they have put up

1 the exhibit - - - untouched, the exhibit with the circles,
2 with the text, with the this, with the that? Could they do
3 that? I mean it makes it obvious what's the exhibit and
4 what's not.

5 MR. DONN: Where the - - - I'm sorry. Where are
6 the circles in that?

7 JUDGE RIVERA: You've got one slide. You could
8 have two screens, you know. One slide or - - - or the
9 evidence untouched, absolutely untouched, and the other
10 slide is the one with the markups. Could they do that?

11 MR. DONN: Maybe. With - - - with an explanation
12 saying this is the actual - - -

13 JUDGE RIVERA: Why maybe? I've altered - - -
14 under your bright-line rule, I've altered. You can't do
15 that at all. What - - - what makes it maybe in that case?

16 MR. DONN: What makes it maybe in that case, and
17 you're right, it doesn't comport with my bright-line rule,
18 is - - - is that it is absolutely, unequivocally clear to
19 the jury what the evidence is and what the evidence isn't
20 in that situation, unlike this case. And we're not - - -
21 we've spent a lot of this discussion talking about circles
22 around the lampposts. What happened, in this case, was not
23 a circle around a lamppost.

24 JUDGE STEIN: But clearly, the jur - - - it's
25 going to be obvious to the jury when - - - when they have a

1 box and writing in it that that wasn't part of the exhibit.

2 I mean - - -

3 MR. DONN: Well, not - - - I mean I think it
4 depends on the - - - on the situation. You could have, for
5 example, a situation in which medical records are altered
6 in which the jury hasn't necessarily actually looked at the
7 actual medical records and - - -

8 JUDGE STEIN: But they're going to have the
9 medical records in the jury room with them, for one thing.
10 They won't have the slides, I think as was mentioned. But
11 I guess I haven't heard you talk about Santiago at all, and
12 Santiago, you know, if - - - if we said that it wasn't
13 ineffective assistance of counsel to fail to object to the
14 - - - the series of slides, I mean, certainly they were
15 altered. And - - - and there was no indication in the
16 decision there that that was - - - that was impermissible
17 as a matter of law.

18 MR. DONN: Actually, what - - - what - - -

19 JUDGE STEIN: We said - - - as a matter of fact,
20 I think we said it wasn't a clear and dispositive - - - it
21 wouldn't have a clear and dispositive - - -

22 MR. DONN: I believe it said - - -

23 JUDGE GARCIA: But to follow up on that, I have
24 that language, and we said "The slides depicting an already
25 admitted photograph with captions accurately tracking prior

1 medical testimony might reasonably be regarded as relevant
2 and fair, albeit dramatic commentary on the medical
3 evidence." How does that square with your rule?

4 MR. DONN: It's - - - it's great language for - -
5 - for us because the language in our case did not
6 accurately track - - -

7 JUDGE GARCIA: But you want a bright-line rule.
8 You want no comments on the slides.

9 MR. DONN: I want no comments on the slides, and
10 I want reversal because the commentary was in - - -

11 JUDGE GARCIA: But how does that square with
12 Santiago's language that you can put comments on the slide?

13 MR. DONN: The - - - what Santiago - - - what I
14 just heard Your Honor read there was that you might be able
15 to put testimony accurately reflecting - - - reflecting.
16 You might not. You might - - - you might not. It wasn't
17 presented. It wasn't preserved before the court. And I
18 think a bright-line rule would - - - would make it clear
19 that this evidence is too important to be doctoring and
20 then showing to the jury during the most sensitive part - -
21 -

22 JUDGE GARCIA: So if somebody put on an address
23 onto a slide, under the bright-line rule it would be per se
24 reversal if a mistrial wasn't ordered?

25 MR. DONN: Well, harmless error analysis would

1 apply. So it would be an error, and we would have to look
2 at how important that error was to the trial. In this
3 case, what the prosecutor did was say that a witness saw
4 someone who the witness didn't say he saw on an issue that
5 went to the core of the entire case.

6 CHIEF JUDGE DIFIORE: If he had put on the
7 PowerPoint I submit Kurt Clarke saw defendant, identified
8 defendant, would that have helped your view?

9 MR. DONN: I - - - I think it would be three
10 percent better but still require reversal. I don't - - -
11 and I - - -

12 JUDGE FAHEY: So you want - - - you want the rule
13 Washington v. Walker. You want - - - you're familiar with
14 that case?

15 MR. DONN: I'm - - - I believe I'm familiar with
16 - - -

17 JUDGE FAHEY: It's the State of Washington.

18 MR. DONN: The State of Washington - - -

19 JUDGE FAHEY: Yeah.

20 MR. DONN: - - - guilty stamped on the - - - on
21 the booking - - - on the booking photos. I mean all - - -
22 these cases and - - - are present - - - present, you know,
23 a wide array of factual scenarios, and I think that it
24 would be best to start with a clear rule that says you
25 can't alter the evidence and then have the analysis stem

1 from how much did it affect the trial. And - - - and here,
2 the difference is night and day between Kurt Clarke who was
3 asked point blank did you see the person's face and said in
4 response there was a blizzard, it was dark out. He's the
5 only - - -

6 JUDGE RIVERA: To your point, it's a
7 misrepresentation of the testimony.

8 MR. DONN: It is - - -

9 JUDGE RIVERA: Which is mentioned in the
10 Washington case Judge Fahey referred refers to. But you're
11 not arguing that any of these slides were inflammatory
12 which was a very big issue in the Washington case.

13 MR. DONN: That's what sets this case apart from
14 - - -

15 JUDGE RIVERA: And Santiago, being very familiar
16 with that dissent, of course, that - - - that the point
17 there was that it was to inflame the passions of the jury
18 to show the child fading out of existence.

19 MR. DONN: Yes. And that is - - - that is what
20 distinguishes this case from a lot of the PowerPoint cases
21 from the other states is the - - - the error is not so much
22 the inflammatory nature emotional appeal, it's getting the
23 facts wrong. And it's flatly asserting someone saw someone
24 when he didn't say he saw him at the most important part of
25 the trial when you're trying to prop up the testimony of -

1 - - of a witness who is extremely difficult to credit on
2 the stand. I think reversal is required.

3 CHIEF JUDGE DIFIORE: Thank you, Mr. Donn.
4 Counsel.

5 MS. JOYCE: May it please the court, Jean Joyce
6 for respondent. Good afternoon, Your Honors.

7 JUDGE RIVERA: What's wrong with a bright-line
8 rule you just can't touch the evidence? You can't alter
9 the evidence. Do whatever you want on a PowerPoint slide
10 otherwise, say what you wish, point to it, but you cannot
11 touch the evidence and - - - and change it in any way?

12 MS. JOYCE: You - - -

13 JUDGE RIVERA: What's wrong with that rule?

14 MS. JOYCE: You - - -

15 JUDGE RIVERA: It's straightforward. It's easy
16 to apply. Everybody understands it.

17 MS. JOYCE: It's very twentieth century. We're
18 in a digital age now.

19 JUDGE RIVERA: Well, you can use PowerPoints.
20 You just can't touch the evidence.

21 JUDGE FAHEY: That isn't necessarily a good
22 thing, by the way. You know, I just want to point that
23 out.

24 MS. JOYCE: Fair enough, Your Honor.

25 JUDGE RIVERA: I'll let him say that.

1 MS. JOYCE: What the prosecutor was doing was
2 simply taking an image from the video, the surveillance
3 video, and highlighting testimony. Putting them together
4 and being impactful. There's nothing wrong with an
5 impactful argument on the part of the prosecutor

6 JUDGE ABDUS-SALAAM: By the way, counsel, is this
7 only done by prosecutors?

8 MS. JOYCE: No. Absolutely not.

9 JUDGE ABDUS-SALAAM: I didn't think so.

10 MS. JOYCE: No.

11 JUDGE ABDUS-SALAAM: We only see the cases where
12 it's - - - the prosecutor has done something.

13 MS. JOYCE: That's right. That's right but - - -

14 JUDGE ABDUS-SALAAM: Because a lot of these cases
15 probably wind up in acquittal for the defendant because the
16 information or the evidence presented that way is very
17 impactful to the jury.

18 MS. JOYCE: Right. What's fair for one side is
19 fair for another in terms of PowerPoint.

20 JUDGE RIVERA: Although when the prosecutor gets
21 up he gets to respond to that PowerPoint, right? Or she.

22 MS. JOYCE: That's right.

23 JUDGE RIVERA: Defendant doesn't get that chance.

24 MS. JOYCE: That's correct, Your Honor. And one
25 - - - one possible, you know, opportunity for both sides to

1 work something like that in advance would be to talk to the
2 trial judge and say can we take a look at the PowerPoints.
3 That's certainly advice that - - -

4 JUDGE STEIN: You think that would be a good
5 rule?

6 MS. JOYCE: It would certainly be well-taken
7 advice. I don't think it would be required under the
8 statute.

9 JUDGE STEIN: Because once - - - once that image
10 is up on the screen, you know, you can't unring that bell.

11 MS. JOYCE: Sure. It's not possible to unring a
12 bell, but it is possible to object and to - - - to alert
13 the court that there is something that is inflammatory,
14 prejudicial, something - - -

15 JUDGE RIVERA: So you're saying that each side,
16 whatever - - - if they're going to use technology in this
17 way, not - - - and I'm not talking about you put up a slide
18 on your PowerPoint that is an image of the evidence without
19 touching it - - - I don't think even he's going that far,
20 right. It's not that. It's if you're doing something to
21 that evidence, right? That - - - that you're saying that
22 perhaps the rule makes sense to let - - - let the People
23 and defense counsel present that to the judge in advance
24 before summations to get, what, a pre-clearance from the
25 judge?

1 MS. JOYCE: That happens in many cases.

2 JUDGE RIVERA: Um-hum.

3 MS. JOYCE: Some judges prefer the evidence to be
4 on PowerPoint as opposed to coming in with twenty-five
5 whiteboards and an easel and a highlighter or a pen. It's
6 just more convenient for the court. Would that have to be
7 the rule? No. I think the rule should be the rule that we
8 state in our brief was - - - which is if you can say it you
9 can show it as long as it is not inflamm - - - too
10 inflammatory or prejudicial to the defendant.

11 JUDGE RIVERA: Well, why - - - why do you need to
12 show it, though, by changing the evidence? Why can't you
13 just show it on a separate slide or show it - - - or say it
14 simultaneously with the evidence, point to it?

15 MS. JOYCE: Sure. You can - - -

16 JUDGE RIVERA: He doesn't object to that.

17 MS. JOYCE: - - - point to it. You can point to
18 it. You can use a highlighter. But there's really very
19 little difference.

20 JUDGE RIVERA: You can use a highlighter? Just a
21 moment.

22 MS. JOYCE: I think that you can.

23 JUDGE RIVERA: Can I take the actual exhibit and
24 touch it?

25 MS. JOYCE: You could take a copy of it. You

1 couldn't take the exhibit that's going into the jury, but
2 you could take a copy.

3 JUDGE GARCIA: Or what we used to do back in the
4 old days is you'd take the blow-up copy and you'd clip a
5 plastic thing on front of it, which is the twentieth-
6 century version of your PowerPoint, and draw on the plastic
7 covering of the exhibit, right?

8 MS. JOYCE: Right. That's right. Or even more
9 old school would be an overhead projector where you got to
10 write on the plastic and it shows up - - - up on the
11 screen.

12 JUDGE GARCIA: Or a big pad that you flip. I
13 mean - - -

14 MS. JOYCE: Exactly. That's right. So that's
15 our - - - that's our position that if you can show it - - -

16 JUDGE STEIN: But - - - but defense counsel says
17 that's not the same thing as - - - as presenting it to the
18 jury already altered because then the jury can't see what
19 you're doing to it.

20 MS. JOYCE: Well - - -

21 JUDGE STEIN: What - - - how do you respond to
22 that?

23 MS. JOYCE: In this case, the prosecutor said
24 these are not in evidence at page A-607. The prosecutor
25 told the jury these exhibits are not in evidence. And I

1 don't know if he went further, but that was the gist of it,
2 and of course, the court continued and said these are
3 alterations, these are amendments.

4 JUDGE GARCIA: Coun - - - counsel, in this case,
5 the video went in. They asked for it. The testimony went
6 in of the brother and other testimony went in, certain
7 parts of the testimony of the victim, I believe, went into
8 the jury room at their request, right?

9 MS. JOYCE: Right.

10 JUDGE GARCIA: There was some discussion of
11 another exhibit, a map or something. Did that - - - did
12 all the exhibits go into the jury room?

13 MS. JOYCE: All the - - - all the exhibits were
14 available and went into the jury. Yes. Exhibit 1 is the -
15 - - is the map of - - - the street map.

16 JUDGE GARCIA: And that's - - -

17 MS. JOYCE: Yes.

18 JUDGE GARCIA: In the record that went into the
19 jury room?

20 MS. JOYCE: Yes. All the jur - - - yes. All the
21 exhibits went in. Yes. And that map had the words Kurt
22 Clarke's truck imposed - - - superimposed - - -

23 JUDGE RIVERA: If a pros - - - let's just stay
24 with the prosecutor for one moment. Obviously, could apply
25 to defense counsel, but let's just stay with the prosecutor

1 for one moment. Uses the PowerPoint, puts something on an
2 image that's evidence, a slide of the surveillance tape or
3 whatever it is, maybe it's just a hard picture and
4 misstates or misrepresents the testimony that is in dispute
5 and is crucial to the defense, is that reversible error?

6 MS. JOYCE: Well, first of all, it would have to
7 be objected to and - - -

8 JUDGE RIVERA: Okay. Let's go - - -

9 MS. JOYCE: Right.

10 JUDGE RIVERA: - - -with that hypothetical
11 first.

12 MS. JOYCE: Right.

13 JUDGE RIVERA: They object.

14 MS. JOYCE: Okay. So then - - -

15 JUDGE RIVERA: The objection's overruled.

16 MS. JOYCE: So then - - -

17 JUDGE RIVERA: Preserved.

18 MS. JOYCE: Okay.

19 JUDGE RIVERA: Is it reversible error?

20 MS. JOYCE: It would have to be a situation where
21 perhaps there was some bad faith, defense attorney could -
22 - -

23 JUDGE RIVERA: Why - - - why does that matter?
24 Isn't it the impact on the jury?

25 MS. JOYCE: Right. That's - - - that's correct.

1 But it would have to be in - - - within the context of the
2 entire summation, the entire trial. The prosecutor might
3 misstate something verbally in a summation. That would
4 have to be taken into context with the rest of the
5 summation, the entirety of the trial, whether that error
6 was - - -

7 JUDGE RIVERA: When it's on - - - when it's on
8 the slide, you've - - - we - - - we must assume that the
9 prosecutor has given thought, reviewed, proofed it, and is
10 certain of the information on the slide and what he or she
11 is communicating as opposed to the misstep. I agree with
12 you. People make mistakes and they misstep.

13 MS. JOYCE: Sure. Well, I'm not - - - you know,
14 these PowerPoints can be created within, you know, half an
15 hour, an hour feeding in the - - - the disk onto the
16 computer. I'm not sure that we would say automatically
17 there's a - - - you know, there's a bad faith - - -

18 JUDGE RIVERA: Well, we're not talking about bad
19 faith, just a mistake.

20 MS. JOYCE: Well, I'm sorry.

21 JUDGE RIVERA: But - - -

22 MS. JOYCE: I misunderstood. So in the - - - in
23 the sense that the prosecutor went back, looked very
24 carefully at the testimony, and then changed it and put it
25 on the PowerPoint, that sounds like bad faith. If it's not

1 bad faith, maybe it's an error that could be - - -

2 JUDGE RIVERA: Perhaps overzealousness.

3 MS. JOYCE: Perhaps.

4 JUDGE RIVERA: Believes it's an appropriate
5 inference but places it on - - -

6 MS. JOYCE: Right.

7 JUDGE RIVERA: - - - on the slide as if it's
8 certain that it was, indeed, said by the witness.

9 MS. JOYCE: Right. And I think the same thing
10 could happen if the - - - if the prosecutor held up an
11 exhibit, pointed to it, and - - - and misspoke the
12 testimony and said it with certainty. It's the same impact
13 on the jury.

14 JUDGE WILSON: But the import of Judge Rivera's
15 earlier question about a rule that said if you're going to
16 alter something on a slide, whether it's a - - - it's a
17 hardboard or it's a PowerPoint slide and it's a piece of
18 evidence, that there be a requirement that you exchange
19 with the other side and - - - and if there's an objection
20 raised, that with the judge ahead of time. If you're
21 trying to move to the twenty-first century, why isn't that
22 a good rule?

23 MS. JOYCE: It - - - it's a fine rule. Is it a
24 requirement that - - - you know, there's also disadvantages
25 for both sides. Does the defense attorney want to share

1 his summation with the prosecutor ahead of time and vice
2 versa. So, you know, I think it would be a good rule of
3 thumb, if you're going to use a PowerPoint, talk to the
4 other side, talk to the court, and see what - - - see what
5 the court believes is - - - is appropriate at the next
6 step. But would it be required by this court, I don't
7 think that's necessary.

8 JUDGE RIVERA: And - - - and in any case, of
9 course, if - - - if there's perhaps an erroneous ruling,
10 you're still going to be subject to reversal.

11 MS. JOYCE: That's right.

12 JUDGE RIVERA: The - - - the preclearance doesn't
13 ensure that there won't be error because certainly if there
14 had been an objection and the court rules - - -
15 subsequently is determined to have ruled erroneously, you
16 potentially have reversible error.

17 MS. JOYCE: Right. Be right back here.

18 JUDGE RIVERA: Not harmless.

19 MS. JOYCE: That's right. If there are no
20 further questions, I rest on my brief. Thank you.

21 CHIEF JUDGE DIFIORE: Thank you.

22 Mr. Donn. Mr. Donn, I'm looking at the
23 instruction that the judge gave before - - - to the jury
24 before the closing statements and it's pretty powerful.
25 The judge says in just a - - - just a couple of excerpts,

1 "You're the finders of fact. The lawyers are not
2 witnesses. One lawyer's recollection may differ from your
3 own recollection. It's your own evaluation of the evidence
4 that matters." How does that fold into your argument?

5 MR. DONN: Well, it doesn't say anything about
6 the PowerPoint. It doesn't say anything about the visual
7 presentation. And the jury could well be sitting there
8 thinking that - - - you know, I believe part of that
9 usually includes the - - - the prosecutor's words are not
10 evidence. But it doesn't specifically say the documentary
11 stuff that you were shown during the summation that may
12 have appeared to have been evidence wasn't evidence. So I
13 think there isn't - - -

14 JUDGE STEIN: But didn't the court tell them to
15 disregard any logos or labels?

16 MR. DONN: Yes. And, Your Honor - - -

17 JUDGE STEIN: I mean that's pretty directly
18 relevant to the - - - to the PowerPoint, isn't it?

19 MR. DONN: That was - - - that was relevant to
20 the PowerPoint as to one - - - one or two of the slides
21 regarding Kurt Clarke's truck. But actually, when the
22 first and worst slide was shown that said Kurt Clarke sees
23 the defendant, the prosecutor - - - the court just said to
24 the prosecutor keep going. And when the - - - when the
25 court later said disregard the logos, the court did not say

1 and by the way, go back and that slide where the - - - you
2 know, Kurt Clarke sees the defendant, that one too. So - -
3 -

4 JUDGE STEIN: Didn't the prosecutor stop what - -
5 - what he was doing and - - - and say the court's going to
6 tell you I - - - I can't do this anymore?

7 MR. DONN: Eventually he did, but no one went
8 back and said that it applied to the Kurt - - - to the
9 defendant sees Kurt Clarke - - -

10 JUDGE RIVERA: And if he had, would that have
11 been sufficient curative instruction? Would that have done
12 it?

13 MR. DONN: No.

14 JUDGE RIVERA: You have an appropriate curative
15 instruction.

16 MR. DONN: It is difficult for me to imagine how
17 an appropriate curative instruction in a situation like
18 this could - - - could have cured the error.

19 JUDGE RIVERA: Is that because, as Judge Stein
20 said before, once it's out of the bag, it's out of the bag,
21 it's been seen, you can't do anything about it?

22 MR. DONN: Yes. With the outsized impact of
23 visual information on jurors and the critical nature of the
24 improper comment in this case. It wasn't a stray thing.
25 It was what the - - -

1 JUDGE RIVERA: Well, then it's like a per se
2 error, it's reversible? There's no way around this?

3 MR. DONN: In - - - well, per se - - - when it
4 goes to the crucial issue in the case and it's displayed
5 the jury on an altered evidence in a visual form, it is
6 hard for me to imagine an - - - an oral curative
7 instruction that could do it but maybe there is one. This
8 wasn't it. Disregard it - - - disregard it not even
9 mentioning the first slide definitely wasn't it. Maybe
10 there could have been a better one. I'm not sure.

11 JUDGE RIVERA: What about the rule of - - - of
12 counsel reviewing whatever slideshow they may have with the
13 judge in advance? What's your position on that?

14 MR. DONN: I think that practice would probably
15 avoid a lot of problems down the road. If I could just
16 respond - - - I have - - - I'm basically out of time but
17 because it came up during - - - during the People's
18 discussion - - -

19 CHIEF JUDGE DIFIORE: You may. Go ahead.

20 MR. DONN: The - - - in terms of bad faith and -
21 - - and imagining the - - - you know, looking at the
22 context of the entire summation, I didn't discuss point - -
23 - point two, but I'd just like to take a step back and look
24 at how the video that was the subject of the alterations
25 even came into - - - into evidence because it's pretty

1 egregious. The prosecutor told the court you can't see
2 anybody, you can't make an ID. It's basically just coming
3 in to confirm these loose facts. No one is going to stand
4 up and make an ID based on this video. And then the
5 prosecutor himself basically did that saying - - -

6 JUDGE GARCIA: He argues there is an ID on the
7 video. No witness comes in and says I look at this screen
8 and that's the defendant and nobody did that. But then the
9 prosecutor gets up and essentially is saying if you look at
10 all of this testimony about time and place and who was
11 there, that's who's in that video.

12 MR. DONN: In fact, the - - - yes - - -

13 JUDGE GARCIA: So I - - - I have a hard time with
14 they locked into we're never going to use this video and
15 say - - - what were they - - - they had to say it isn't?

16 MR. DONN: He - - - the People - - - the
17 prosecutor said no one is going to make an ID, and what the
18 - - - that's what he said moving it in. And what he said
19 when it was playing - - - when it was playing was - - -
20 while it's playing he says that video corroborates Kurt
21 Clarke's testimony that he saw the defendant, i.e. that's
22 the defendant, even though nobody said that - - -

23 JUDGE GARCIA: Right.

24 MR. DONN: - - - and Kurt Clarke didn't even say
25 that. Kurt Clarke said he didn't really know, didn't get a

1 good look. Pretty egregious. And I'll rest on - - - on
2 the brief, but I'll just say it wasn't the only time that
3 the prosecutor violated his own representations to the
4 court regarding how evidence was going to be used. The - -
5 - the statement to Detective Jaklitsch at the hospital,
6 prosecutor says it's only going to come in to show how we
7 got here, i.e. there was an arrest. We're - - - I am not
8 going to argue that - - - that Lynville Scott said - - -
9 said the defendant did it because he said so in the past.

10 And then over and over and over again in the
11 summation, he made exactly that argument. He said the
12 first chance he - - - he gets on the night of the incident
13 two hours later he made the same types of improper comments
14 regarding Kurt Clarke's testimony saying that the told
15 different stories to - - - to different people at the same
16 time. He told the jury that - - -

17 JUDGE STEIN: You're - - - what you're talking
18 about now was - - - there was no objection made, correct?

19 MR. DONN: Correct, Your Honor. And I'm - - -
20 and I'm primarily mentioning it to the extent that the
21 People are - - - are saying we need to look at the entire
22 summation and the prosecutor's essential overall approach
23 to the summation in reviewing the harm on point one.
24 Overall, it was - - - it was pretty bad, Your Honor.

25 CHIEF JUDGE DIFIORE: Thank you, Mr. Donn.

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MR. DONN: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Leonard Williams, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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