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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 10

STEVEN REPANTI,

Appellant.

20 Eagle Street
Albany, New York 12207
January 08, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So counselor, you're
2 up. Do you want any rebuttal time?

3 MR. GERARD: No, thank you, Judge.

4 CHIEF JUDGE LIPPMAN: This is number 10,
5 People v. Ripanti. No - - - no rebuttal?

6 MR. GERARD: No rebuttal.

7 CHIEF JUDGE LIPPMAN: Okay, let's go.
8 You're on.

9 MR. GERARD: All right. Thank you. My
10 name is William A. Gerard. I'll be representing
11 Steven Repanti, here. May it please the court.

12 Up front, I want to confess a fundamental
13 flaw in the argument that both parties have submitted
14 to this court. I had asked in my remedy here to
15 vacate the greater conviction and leave in place the
16 lower conviction for harassment. The People have
17 asked to vacate the lower conviction and leave in
18 place the greater conviction for attempted assault.

19 I realized in looking at this from the
20 perspective that judges would look at it, that these
21 are really inconsistent counts and that the remedy,
22 if indeed it's found that the error was preserved,
23 and - - - the remedy would be to vacate both
24 convictions.

25 JUDGE READ: Do we have to overrule Moyer

1 to rule in your favor?

2 MR. GERARD: No. As a matter of fact, in
3 looking - - - relooking at Moyers and Stanfield, I
4 realized that Moyers is actually a correct case. And
5 that's so because in Moyers, unlike the case in
6 Repanti, the only charge initially was the greater
7 charge. The other charge was added at the end of the
8 case as a lesser included.

9 And so the question there is does it
10 qualify as something that could be added as a lesser
11 included - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but is that the
13 - - - is that the real holding in the case that
14 you're - - -

15 MR. GERARD: I think it is.

16 CHIEF JUDGE LIPPMAN: - - - you're only
17 dealing with - - - is it added or is it the principle
18 - - -

19 MR. GERARD: No, I think it - - -

20 CHIEF JUDGE LIPPMAN: - - - of - - - of can
21 you have a lesser included, you know, in this
22 circumstance we have assault and harassment. Why - -
23 - why isn't Moyer controlling, really?

24 MR. GERARD: Well, because - - -

25 CHIEF JUDGE LIPPMAN: What's the difference

1 between attempted assault and assault? Isn't that
2 the two charges and their relationship and whether it
3 can be a lesser included, isn't that the real holding
4 in Moyer, and isn't it really right on point in
5 relation to this case?

6 MR. GERARD: Well, you know, in relooking
7 at it, I'm - - -

8 CHIEF JUDGE LIPPMAN: Or I should say, why
9 isn't it directly? And I understand your point about
10 it's added. But what about the principle of what can
11 and can't be a lesser included? I guess that's what
12 I'm asking.

13 MR. GERARD: Well, I think in a - - - in a
14 very narrow - - - I think you have to look at Moyers
15 in terms of the way the - - - the charge got added,
16 because it - - - it's sort of a procedural matter.

17 In Moyers, had they charged the two
18 different things in the alternative, initially, it
19 would've simply been a matter of - - - basically it
20 was - - - it was under - - - it was not properly
21 charged in the first place.

22 JUDGE PIGOTT: Can I take you back to - - -
23 you think they both ought to be vacated?

24 MR. GERARD: I think they both ought to be
25 vacated.

1 JUDGE PIGOTT: You - - - and then what? Is
2 there - - - is there a new trial?

3 MR. GERARD: It - - - it - - - from - - -
4 the case I - - - I - - - I'm relying on is - - - is -
5 - -

6 JUDGE PIGOTT: Stanfield?

7 MR. GERARD: No, it's Gallagher. People v.
8 Gallagher. It's a 19 - - - I believe it's a 1987 - -
9 - I need my glasses.

10 CHIEF JUDGE LIPPMAN: Don't we all. Go
11 ahead.

12 MR. GERARD: It's a 1987 case. It's 69
13 N.Y.2d 525 (1987) case. It was a case where there
14 were - - - there was only one count of - - - of
15 intentional murder - - - well, it - - - one count of
16 intentional murder, one count of depraved
17 indifference murder.

18 And they - - - they said - - - and the
19 person was convicted of both. And they said wait a
20 minute; these states of mind are completely
21 inconsistent.

22 JUDGE READ: Well how does - - -

23 MR. GERARD: You can't both be negligent -
24 - -

25 JUDGE READ: - - - but - - - well, I

1 understand that, that was - - - that figured kind of
2 prominently in our depraved indifference jurisdiction
3 in - - - in recent years. But how - - - how is there
4 an inconsistency here between the intents? They're
5 just different, aren't they?

6 MR. GERARD: Well, it's - - - it's a - - -
7 it's the same act, and the same result. One is an
8 intent to harass, annoy, and alarm. The other is an
9 intent to cause physical injury. Those intents are
10 actually completely inconsistent.

11 JUDGE ABDUS-SALAAM: But you're saying that
12 it's the same - - - you're saying it's the same
13 result, but it's different results. One is to cause
14 - - - under the assault, it's to cause physical
15 injury; under harassment, it's to annoy, alarm, and
16 harass. So that's a different result.

17 MR. GERARD: Well, it's a different intent.
18 Result-wise I was talking about - - -

19 JUDGE ABDUS-SALAAM: It's a different
20 result.

21 CHIEF JUDGE LIPPMAN: Don't you have to
22 meet the Glover test?

23 MR. GERARD: The Glover test dealing with
24 whether it's - - -

25 CHIEF JUDGE LIPPMAN: Whether it - - -

1 MR. GERARD: - - - whether you can commit
2 one without committing the other?

3 JUDGE READ: Yeah.

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MR. GERARD: All right.

6 JUDGE READ: Under - - - under any
7 circumstances. Not - - - an impossibility.

8 JUDGE ABDUS-SALAAM: Yeah.

9 JUDGE READ: Impossibility.

10 MR. GERARD: Well, that's why I - - -
11 that's why I think Moyers is correct. You - - - if -
12 - - if you're talking about a charge of sale and
13 possession, if you're guilty of sale, you - - - you
14 have committed a possession. Same with these sex
15 charges. If you're - - - if you're guilty of having
16 sex fifteen times with an underage person, you're
17 also guilty of having sex thirteen times.

18 JUDGE RIVERA: Well, it sounds like you're
19 taking the position of the dissent in Moyer, and the
20 dissent did not win the day.

21 MR. GERARD: Well - - -

22 JUDGE RIVERA: It sounds like you're really
23 - - - although you've said Moyer can be harmonized
24 here, you're really arguing that we do have to
25 overrule Moyer.

1 MR. GERARD: No, I'm saying that the way -
2 - - in Repanti, they added the lower charge by a
3 prosecutor's information at the start of trial. And
4 so both - - - it wasn't a question like it was in
5 Moyer, can we add this at the end? It - - - does it
6 fit in the definition of lesser included.

7 JUDGE ABDUS-SALAAM: But in Moyer, the
8 court decided that it was proper to add it, just as
9 the court decided here that it was proper to add it.

10 MR. GERARD: In - - - in Moyer, no, I think
11 what they did was they - - - he - - - there was - - -
12 there was a greater charge that was existing in the -
13 - - in the first instance. They added a lesser
14 included - - - what they thought was a lesser
15 included at the end of the case.

16 JUDGE ABDUS-SALAAM: Well, counsel, let me
17 - - - let me just read you from Moyer, footnote 1:
18 "Though the appellate term was silent as to the
19 propriety of the amendment of the information, we
20 have all agreed that the amendment was entirely
21 proper." That's what the case says in Moyer.

22 MR. GERARD: In Moyer - - -

23 JUDGE ABDUS-SALAAM: That's - - - that's
24 the Judge Scileppi's dissent. It's footnote 1.

25 MR. GERARD: Well, in Moyers, they - - - he

1 was acquitted of - - - of the higher and convicted of
2 the lesser. And they said you can't be convicted of
3 something that was improper - - - that was never
4 charged in the first place, and which was added at
5 the end, and which shouldn't have been added at the
6 end. In other words - - -

7 JUDGE RIVERA: So how - - -

8 MR. GERARD: - - - there was no
9 jurisdiction - - -

10 JUDGE RIVERA: Counsel, let me ask you
11 about preservation. How have you preserved the
12 arguments you're making?

13 MR. GERARD: Well - - -

14 JUDGE RIVERA: Counsel below preserve it?

15 MR. GERARD: - - - all right. I - - -
16 first of all, I think I argued - - - I argued
17 initially when they moved to file a prosecutor's
18 information, I argued that - - - that the original
19 information was facially insufficient. There was no
20 facts in the original information that would
21 differentiate between the intent to harass, annoy, or
22 alarm or the intent to cause injury.

23 And so, since the original complaint really
24 didn't have enough to charge an attempted assault, it
25 - - - it said the he purposefully came down the

1 stairs and bumped into her; well purposefully is a
2 conclusory statement. There were no facts to show -
3 - - to back up that it was purposeful.

4 So I argued initially, you can't add this
5 because the original accusatory instrument is
6 facially insufficient in the first place. Well, I
7 lost that argument. It was added in.

8 We go through the case. On - - - on final
9 arguments I argued to the judge, well, you know, you
10 have two cases here. I argued them as if they were
11 inconsistent. He's not guilty of the greater. And
12 the only thing he could be guilty of, I suggest,
13 would be the lesser. Judge, please find him guilty
14 of the lesser, not the greater.

15 And then he's convicted - - -

16 JUDGE ABDUS-SALAAM: And that - - - that
17 was your argument on the verdict is repugnant and the
18 - - - the judge should reconsider. Is that what
19 you're saying?

20 MR. GERARD: No, I - - - before the verdict
21 I argued in summation, I said Judge, find him guilty
22 - - - if you're going to find him guilty of anything,
23 find him guilty of the lesser.

24 JUDGE RIVERA: What - - - were is that in
25 the record? What page - - - where would we find

1 get - - - we understand your arguments. Let's hear
2 from your adversary.

3 MR. GERARD: Thank you very much.

4 CHIEF JUDGE LIPPMAN: Thank you.

5 MR. DELLICARRI: Thank you. May it please
6 the court. My name is Anthony Dellicarri. I am a
7 supervising Assistant District Attorney down in
8 Rockland County.

9 CHIEF JUDGE LIPPMAN: Counsel, make it
10 simple for us. What - - - what controls this case?

11 MR. DELLICARRI: Well, what controls here
12 is that counsel's statement at the - - - right - - -
13 right before Mr. Repanti was sentenced, that he is
14 claiming preserves this - - - this alleged error, is
15 really - - - it's really just a - - - it was just an
16 off-handed comment that did not - - -

17 CHIEF JUDGE LIPPMAN: Say - - - okay.
18 We'll deal with the preservation issue. Say it's
19 preserved, what controls this case? What's this case
20 about, in its simplest form?

21 MR. DELLICARRI: In its simplest form,
22 Judge, these are not lesser included offenses because
23 - - -

24 JUDGE PIGOTT: Yeah, but why is it so
25 offensive? It - - - it struck me that you charge him

1 with assault-third or attempted assault-third in one
2 year, in November of '09; and then a year later,
3 someone gets it in their head that not only is this
4 attempted assault-third, but he harassed her too.

5 MR. DELLICARRI: Well.

6 JUDGE PIGOTT: And it sounded to me like if
7 you don't want to take a plea, we can make this
8 really miserable for you, and we're going to lay on
9 another charge. And I just don't see the how, the
10 why, or the wherefore of charging somebody that's
11 charged with a misdemeanor in the first place with
12 another one.

13 MR. DELLICARRI: Well, Judge, what the
14 motivations were behind charging - - - filing a
15 prosecutor's information on the eve of trial, I
16 honestly - - - I'm not aware of what the motivation
17 was. It's not in the record anywhere. And I'm sure
18 that there was some good reason for - - - for doing
19 it. And unfortunately, that - - - that's the best -
20 - -

21 CHIEF JUDGE LIPPMAN: The reason was - - -

22 MR. DELLICARRI: - - - I can give you.

23 CHIEF JUDGE LIPPMAN: - - - the reason
24 wasn't to harass?

25 MR. DELLICARRI: Excuse me?

1 CHIEF JUDGE LIPPMAN: The reason wasn't to
2 harass?

3 MR. DELLICARRI: Judge, I'm not going to
4 draw that conclusion. I - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. DELLICARRI: - - - I - - - having no -
7 - -

8 CHIEF JUDGE LIPPMAN: Continue, counsel.

9 MR. DELLICARRI: - - - knowing all the
10 people involved, Judge, I don't believe that that was
11 the situation.

12 CHIEF JUDGE LIPPMAN: All right.

13 JUDGE PIGOTT: He should have been
14 harassed, annoyed, and alarmed when that cap - - -
15 when that happened, though.

16 MR. DELLICARRI: Judge, I do know that the
17 two intents here for attempted assault and harassment
18 are different.

19 JUDGE PIGOTT: How - - - how close are you
20 slicing it to state - - -

21 MR. DELLICARRI: I'm not - - - I'm not
22 slicing it very close at all, I believe, Your Honor.
23 Attempted assault is the attempt to cause some
24 physical injury.

25 JUDGE PIGOTT: Without - - - without

1 causing any annoyance or alarm?

2 MR. DELLICARRI: Somebody may be annoyed
3 that you're trying to physically injure, but that
4 does not - - - that doesn't make harassment
5 automatically a sec - - - a lesser included offense.

6 CHIEF JUDGE LIPPMAN: What's an example of
7 attempted assault that - - - that doesn't sweep
8 harassment in?

9 MR. DELLICARRI: Okay. A person's walking
10 up the street. Mr. Defendant runs up behind, hits
11 him in the back of the head - - - hits the person in
12 the back of the head. The - - - the - - - and has no
13 connection with - - - with the complainant. Kind of
14 like those knockout cases that were happening in
15 Manhattan - - - in the Bronx, I guess, a while - - -
16 a few months back. There's no intent to harass,
17 annoy, or alarm, because the victim doesn't see any
18 of this coming on. It's - - -

19 JUDGE PIGOTT: Well, no, no, no - - -

20 MR. DELLICARRI: - - - it's just - - -

21 JUDGE RIVERA: You say to annoy the - - -
22 the person - - - a person who is the target actually
23 has to have seen the person?

24 MR. DELLICARRI: Well, I'm saying that to -
25 - - to actually - - - to - - - to annoy, it does - -

1 - there - - - most situations are, you would have to
2 actually have that to be your purpose. Like I
3 pointed out a couple of instances in - - - in my
4 brief, where you could swing a baseball bat in front
5 of somebody, five or six feet away, and you can scare
6 the daylights out of that person, but there's no - -
7 - there's no assault there.

8 JUDGE PIGOTT: When you - - - when you
9 attempt to assault them, I mean, aren't your
10 absorbing the - - - the harassment aspect of it into
11 the attempted assault?

12 MR. DELLICARRI: Not - - - not necessarily.
13 Not necessarily.

14 JUDGE PIGOTT: Something happened - - -
15 something happened between November of '09 and I
16 guess November of 2010, when somebody said, oh, my
17 god, we overlooked the fact that not only did he
18 attempt to assault, he attempted to harass, annoy, or
19 alarm.

20 MR. DELLICARRI: Judge, in this particular
21 case, where we had the - - - the entire action was
22 attempting to bump a person down a couple of stairs,
23 I believe what - - - to go back to what we were
24 speaking of earlier, what may have been the
25 motivation is, okay, we have a situation where he may

1 have actually been trying to hurt her, or he may have
2 actually been trying to scare her.

3 JUDGE PIGOTT: One or the other?

4 MR. DELICARRI: One or - - - it could be
5 one or the other. Not lesser included. But it still
6 doesn't make - - - it doesn't make the charges - - -

7 JUDGE PIGOTT: It's the "or" that's
8 troubling. I mean, it's one or the other. You got -
9 - - you've been successful in proving it's one and
10 the other. And I don't - - - I mean, I'm wondering
11 where - - -

12 MR. DELICARRI: Well, if - - - if you
13 don't want to - - - if one is - - - is truly a lesser
14 included of the other, the ha - - - the harassment is
15 truly a lesser included of attempted assault, then
16 you go to - - - forgive me if I get the number - - -
17 the C.P.L. statute number wrong - - - 300.40, where
18 it says well, if these two - - - if the two verdicts
19 are - - - are not consistent in that way, then you -
20 - - then the - - - then the verdict on the - - - on
21 the greater causes dismissal on the lesser.

22 JUDGE PIGOTT: Is - - - if it's an
23 attempted murder, and then it turns out the person
24 dies, you don't keep the attempted murder and the
25 murder.

1 MR. DELLICARRI: Well, that adds another -
2 - - that adds another element to the crime, though,
3 with all respect, when the person dies.

4 JUDGE PIGOTT: Right. Right. But what I'm
5 saying is, you don't get them both.

6 MR. DELLICARRI: No, if - - - and if you
7 did - - - if somebody did, for some strange reason,
8 give both, then the attempted would be a dismissal as
9 a matter of law, when the guilty verdict comes in on
10 the murder.

11 JUDGE READ: That is contrary to Moyer,
12 though, isn't it?

13 MR. DELLICARRI: Not necessarily. Moyer -
14 - - I argue in the ter - - - in the alternative, in
15 my brief, where Moyer clearly comes out and said back
16 in 1970, you can have - - - there are situations
17 where - - - where they are - - - where they're not
18 lesser includeds, and we say that in most situations
19 they're not lesser included. But this is one of
20 those - - - this is something that doesn't exi - - -
21 you know, it - - - you know, forty-five years later,
22 I don't know if Moyer anticipated all these
23 possibilities that come out here.

24 Moyer is still clearly good law, as I
25 argued. But it's - - - if you don't agree with that,

1 that's fine; then you go to 300.40, where you say - -
2 - you argue that the - - - the lesser should be
3 dismissed.

4 JUDGE RIVERA: So what - - -

5 JUDGE READ: So you win either way, is what
6 you're saying?

7 MR. DELLICARRI: Excuse me?

8 JUDGE READ: You win either way?

9 MR. DELLICARRI: Well, I think winning in
10 my way is the preservation argument. Because this -
11 - - it would be - - -

12 CHIEF JUDGE LIPPMAN: Well, if it's not
13 preserved, okay.

14 MR. DELLICARRI: I mean, saying to - - -
15 right before you go into a little spent - - - a
16 sentencing recommendation, saying to the judge,
17 "Judge, just briefly, I'm a little puzzled about a
18 conviction for both charges, I think it's one or the
19 other," that's not a formal request to have the judge
20 review the situation.

21 JUDGE PIGOTT: Did he - - - did he address
22 it, though? Did he - - -

23 MR. DELLICARRI: No. No. As a matter of
24 fact, trial counsel, after he said the paragraph I
25 just quoted, he said, "I had tended to believe that

1 harassment would be more appropriate based on the
2 evidence. I don't really think that he could be
3 convicted of both and sentenced for both." And then
4 he continues, goes right on to sentencing.

5 JUDGE PIGOTT: Got him a 330 motion - - -

6 MR. DELLICARRI: That was never made.

7 JUDGE PIGOTT: Well, he - - - that - - -

8 MR. DELLICARRI: But is that a motion, just
9 pointing out kind of off-handedly, the frustration
10 that you have with the - - - with the verdict.

11 JUDGE RIVERA: What - - - what more - - -

12 MR. DELLICARRI: Which is more what it
13 sounds like.

14 JUDGE RIVERA: - - - are you arguing he
15 should have done?

16 MR. DELLICARRI: Excuse me?

17 JUDGE RIVERA: What more should he have
18 done?

19 MR. DELLICARRI: He should have filed - - -
20 if there was a problem - - - he conceded the problem
21 with the verdict. Between the time of the verdict
22 and the sentence there should have been a motion
23 filed where the People would have had the opportunity
24 to respond, which we don't have here. And the - - -
25 what was stated in court - - - first of all, the

1 arguments that - - - that this legal issue was
2 addressed during the summation, that's not a motion
3 to - - - to dismiss.

4 JUDGE RIVERA: What about People v.
5 Stanfield?

6 MR. DELLICARRI: Well, again, if - - - to
7 get - - - to get to Stanfield, you've got to - - -
8 you've got to first say that, you know, we're going
9 to cast aside all of this - - - all of this waiver
10 law that we've got out there, we're just going to - -
11 - we have situations where we - - - we're only really
12 going to dive into the failure to preserve if it's a
13 mode of preservation error, which this clearly was
14 not.

15 You're going to have to push aside years
16 and years of litigation and precedents from the court
17 to get to this - - - to this issue. And that - - -
18 this is not - - - this is not a situation where - - -
19 where the - - - where that - - - that drastic a step
20 has got to be taken in this type of case.

21 JUDGE RIVERA: Well, what - - -

22 MR. DELLICARRI: It's not double jeopardy -
23 - -

24 JUDGE RIVERA: - - - what I'm saying - - -
25 People v. Stanfield, the court's - - - excuse me - -

1 - conclusion regarding the - - - the mental states,
2 why doesn't that help his case?

3 MR. DELLICARRI: Why it doesn't help this
4 case? Because we have - - - we have alternative
5 mental states here. We have - - -

6 CHIEF JUDGE LIPPMAN: It's a pre-Glover
7 case anyway. Isn't it?

8 MR. DELLICARRI: Excuse me?

9 CHIEF JUDGE LIPPMAN: Isn't Stanfield a
10 pre-Glover case?

11 MR. DELLICARRI: Yes, it is - - - I believe
12 so. Yes, it is. And Stanfield was one - - - was one
13 that was a situation, I believe, with the shooting,
14 which might have been accidental, which might have
15 been negligent. And there was a clear, clear
16 distinction, really, between - - - between those
17 intents.

18 This is not what - - - what you have here.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. DELLICARRI: And I believe - - -
21 getting waiver - - - there should be an affirmance,
22 and on the merits.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 Thank you both.

25 MR. DELLICARRI: Thank you.

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MR. GERARD: Thank you very much.

CHIEF JUDGE LIPPMAN: Appreciate it. Thank
you.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Steven Repanti, No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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