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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 201

DALE BRADLEY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 17, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 201, People v.  
2 Bradley.

3 Counselor, would you like any rebuttal  
4 time?

5 MS. DUGUAY: Yes, please. I'd like two  
6 minutes, please.

7 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

8 MS. DUGUAY: May it please the court, my  
9 name is Kim Duguay with the Monroe County Public  
10 Defender's Office, and I represent Dale Bradley.

11 In this case the trial court erred by  
12 admitting evidence that ten years before the incident  
13 in this case - - -

14 CHIEF JUDGE LIPPMAN: Counsel, what's  
15 unfair about it? Tell us, from your perspective, why  
16 did that deprive your client of a - - - her day in  
17 court?

18 MS. DUGUAY: Well, there was no information  
19 whatsoever about this alleged prior stabbing. First  
20 of all, it came in through a statement by a social  
21 worker that was made ten years before the incident in  
22 this case, when Ms. Bradley was thirty-five years  
23 old. We also don't have any information about the  
24 prior incident.

25 JUDGE SMITH: But your proof went back to

1 when she was two?

2 MS. DUGUAY: Yes.

3 JUDGE SMITH: I mean, didn't she pretty  
4 much put her biography in issue?

5 MS. DUGUAY: Well, to some extent she did,  
6 through post-traumatic stress disorder, which of  
7 course, the jury wasn't instructed that they could  
8 consider. But - - -

9 JUDGE SMITH: But if she's - - - if she's  
10 saying my whole life has - - - supports my defense,  
11 which is either justification or maybe just lack of  
12 intent, can't - - - you know, why can't the  
13 prosecution say what about this part of your life,  
14 where you stabbed another guy? Was that one  
15 justified, too?

16 MS. DUGUAY: Well, I think the problem is  
17 that we don't have any information about it. It's  
18 critical what her mindset was at the prior time as to  
19 whether it was a problem.

20 CHIEF JUDGE LIPPMAN: So your issue is that  
21 it - - - there's no - - - that it's not contextual?  
22 Is that - - -

23 MS. DUGUAY: That's correct.

24 CHIEF JUDGE LIPPMAN: - - - the social  
25 worker's testimony is not contextual?

1 MS. DUGUAY: Yes. There's no information  
2 about it. We don't know - - -

3 JUDGE CIPARICK: So we don't know if she  
4 was in a relationship with him. We don't know if it  
5 was an unwanted sexual advance. We don't know  
6 anything.

7 MS. DUGUAY: Correct. And given her  
8 history - - -

9 JUDGE SMITH: She said he was harassing  
10 her?

11 MS. DUGUAY: She said someone who was  
12 harassing her, she didn't say - - - that's all the  
13 information we have. We don't know if it was because  
14 he was harassing her. We don't know who he was, when  
15 it happened - - -

16 CHIEF JUDGE LIPPMAN: So how does that  
17 impact or not impact on the situation here, the  
18 present facts?

19 MS. DUGUAY: Well, the prosecution's theory  
20 for admitting this evidence was that she was angry.  
21 And the prosecutor argued during her closing argument  
22 that this was evidence that she was angry towards  
23 men, and she stabbed men in anger before, and  
24 therefore she stabbed Mr. Wilburn in anger.

25 JUDGE SMITH: Well, and in the interview

1 with that same - - - was it a social worker or a  
2 therapist, whoever it was, she did say that she was  
3 angry at men, that she had - - - I'm sure they  
4 weren't her words - - - that she had homicidal  
5 ideation?

6 MS. DUGUAY: Well, she took that back on  
7 cross, when she said that the only - - - the only  
8 threat of violence she had was her own suicide - - -

9 JUDGE PIGOTT: Let me ask you about - - -

10 JUDGE SMITH: But didn't the social worker  
11 say that, or quote - - - essentially quote her as  
12 saying that?

13 MS. DUGUAY: She said that on direct and  
14 then - - -

15 JUDGE SMITH: Oh, I see - - -

16 MS. DUGUAY: - - - stepped back from that -  
17 - -

18 JUDGE SMITH: - - - you're saying - - -

19 MS. DUGUAY: - - - on cross.

20 JUDGE SMITH: - - - you mean that's the  
21 witness that took it back on cross.

22 MS. DUGUAY: Right. But I would like to  
23 address quickly the issue of these other statements  
24 by the social worker. Ms. Bradley saw her  
25 intermittently for a year and a half. We don't know

1 when the one statement was made about the prior  
2 stabbing versus several other general statements she  
3 said at some point during several sessions. We don't  
4 know when these statements were made, and there was  
5 no information stating that they were even made  
6 during the same session or in the same time period.

7 JUDGE SMITH: Is it really - - - I mean,  
8 the - - - she tells the whole story of her life, and  
9 of course, she can tell - - - you know, she doesn't  
10 have a problem of providing context. She knows and  
11 she will tell what she wants to tell. Is it really  
12 fair to say to the prosecution, well, you can't bring  
13 this out with no context? I mean, they don't have  
14 the kind of context she has. She can obviously  
15 explain it. I mean, she can say that didn't happen  
16 or it happened for this reason. But what's the  
17 prosecution supposed to do?

18 MS. DUGUAY: Well, this court in People v.  
19 Santarelli was faced with the same thing. The  
20 defendant put his mental state in question with an  
21 insanity defense. And again, the prosecution had the  
22 burden to disprove that. But, you know, this court  
23 went through step-by-step different incidences - - -

24 CHIEF JUDGE LIPPMAN: Counsel - - -

25 MS. DUGUAY: - - - and said - - -

1 CHIEF JUDGE LIPPMAN: - - - why is this  
2 closer to Santarelli than Cass?

3 MS. DUGUAY: Because in Santarelli, the  
4 court specifically looked at instances and said - - -  
5 like, perhaps there was one incident when he was  
6 throwing bottles around the room, and they said we  
7 don't have any predicate to say that this was  
8 explosive personality or explosive disorder versus a  
9 paranoid delusion. You know?

10 And also, they said there was another  
11 incident they were particularly troubled about that  
12 involved a factual predicate that they actual knew,  
13 which was a premeditated assault on someone. But the  
14 court said, look, that's inconsistent with this  
15 explosive personality disorder.

16 Cass, you had a tremendous amount of detail  
17 about the prior crime. But it was consistent with  
18 the theory of premeditation and it cut against the  
19 defendant's theory that he just snapped. And of - -  
20 -

21 JUDGE PIGOTT: If this - - - if this social  
22 worker had testified after the defendant, in other  
23 words, because she came out as part of the direct  
24 case, which I'm not sure that the People needed. I  
25 mean, she stabbed him. There wasn't any doubt about

1           that. And then she says, but the reason I stabbed  
2           him is all of this affirmative stuff, and then the  
3           social worker testified, would that have been - - -  
4           would that be a different case?

5                       MS. DUGUAY: I don't think it would be a  
6           different case, because it wouldn't be any more  
7           relevant if it came out on cross. Because we still  
8           don't have any kind of factual predicate, and we  
9           don't have any nexus to the particular theory of the  
10          prosecution - - -

11                     JUDGE PIGOTT: Well, it - - - all right - -  
12          -

13                     MS. DUGUAY: - - - which is anger.

14                     JUDGE PIGOTT: - - - that's a - - - you're  
15          talking about admissibility. But I'm talking about  
16          the - - - I don't know if the People needed her for  
17          their case-in-chief, because I mean, it's a stabbing.

18                     MS. DUGUAY: Well, I think that's an  
19          excellent point, in that if you look at the  
20          prosecution's case and pretend that the, you know,  
21          the defendant's case never came in, you know, you  
22          have the - - - she should have had the opportunity to  
23          look at their proof without the social worker and  
24          say, wait a minute; I don't even need to put on this  
25          psychiatric evidence.

1 JUDGE PIGOTT: Right, right.

2 MS. DUGUAY: It really needs to be relevant  
3 to their direct case, especially in a case like this,  
4 where you have her statement, you have a shovel, you  
5 have a 911 call, you have all of this justification  
6 evidence coming in. And you know, they might have  
7 looked at the faces of the jury and said, you know  
8 what, I'm think I'm going to stop here. But by  
9 admitting - - -

10 JUDGE SMITH: Wasn't it pretty clear that  
11 the defendant was going to rely on essentially a  
12 mental disorder defense, and that - - - was it really  
13 - - - wasn't it okay for the prosecution to  
14 anticipate that?

15 MS. DUGUAY: Well, I think that there's a  
16 danger in placing a defendant in a position where  
17 they have to commit to a defense before the People  
18 are put to their proof.

19 JUDGE SMITH: Could - - - the defendant, I  
20 suppose, could have stood up and objected and said,  
21 Judge, I haven't got - - - I haven't put my mental  
22 status in issue yet, and maybe I won't, and they  
23 should - - - they aren't allowed to do that.

24 MS. DUGUAY: Um-hum.

25 JUDGE SMITH: They didn't really make that

1 argument.

2 MS. DUGUAY: Well, in the beginning of the  
3 Molineux argument, when they were talking about  
4 another piece of Molineux evidence, the defense  
5 counsel said, look, there's no context for this yet.  
6 You know, it's - - -

7 JUDGE GRAFFEO: But you - - -

8 MS. DUGUAY: - - - you know, perhaps on  
9 cross, but not - - -

10 JUDGE GRAFFEO: - - - but you did file a  
11 250.10 notice about the battered women syndrome,  
12 didn't you?

13 MS. DUGUAY: Yes, she did.

14 JUDGE GRAFFEO: So they know that you were  
15 going to put in some psychiatric testimony.

16 MS. DUGUAY: Yes, but I - - -

17 JUDGE GRAFFEO: Then why is it so  
18 unrealistic to presume that this prior incident was  
19 irrelevant?

20 MS. DUGUAY: Well, I think she was - - -  
21 there's two things. One is that she wasn't  
22 necessarily obligated, at that point, to put in the  
23 battered women syndrome evidence when, at that point,  
24 she should have been free to look at the jury and  
25 say, you know what, you know, they weren't put to

1 their proof yet. So - - -

2 JUDGE CIPARICK: Do you want to take a  
3 second and talk about the refusal to instruct the  
4 jury on the post-traumatic stress disorder?

5 MS. DUGUAY: Sure. I - - -

6 JUDGE GRAFFEO: You didn't notice that,  
7 correct?

8 MS. DUGUAY: I'm sorry?

9 JUDGE GRAFFEO: You didn't note - - - add  
10 that in the 250 notice?

11 MS. DUGUAY: The post-traumatic stress  
12 disorder? She didn't - - - it was not included in  
13 the written notice. But they had certainly plenty of  
14 notice, certainly, that there was a - - an intent to  
15 - - - would you like me to - - -

16 JUDGE CIPARICK: Yes, please.

17 CHIEF JUDGE LIPPMAN: Finish the answer.  
18 Sure, counsel.

19 MS. DUGUAY: Okay. There's certainly  
20 sufficient information regarding post-traumatic  
21 stress disorder that was going to be based on her  
22 history of abuse, because defense counsel put that on  
23 the record. They also received Dr. Nasra's report  
24 that had a diagnosis of post-traumatic stress  
25 disorder in that report. And they had four months

1 before trial with which to consider that evidence.  
2 They even got a different psychiatrist during this  
3 time period who diagnosed her with post-traumatic  
4 stress disorder and said he didn't find it - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MS. DUGUAY: - - - relevant.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 You'll have some rebuttal. Thanks.

9 MS. DUGUAY: Okay, thank you.

10 MS. SWIFT: May it please the court, Leslie  
11 Swift from the Monroe County District Attorney's  
12 Office. First in regard to - - -

13 CHIEF JUDGE LIPPMAN: Counsel, isn't the  
14 testimony of the social worker in a vacuum here?

15 MS. SWIFT: No, I don't - - -

16 CHIEF JUDGE LIPPMAN: Does - - - is there  
17 any way to figure out how it relates to this latest  
18 incident?

19 MS. SWIFT: It relates to this latest  
20 incident because it was contained in mental health  
21 records.

22 JUDGE PIGOTT: She didn't remember a single  
23 thing. I mean, I guess at some point, she remembered  
24 that her birth date was 8/31/61 or something, but it  
25 was very clear that she did not remember this lady,

1           said I wouldn't know her if I saw her on the street.  
2           And the only thing I think that she ever testified to  
3           was what she read. Was that stuff entered into  
4           evidence?

5                       MS. SWIFT: The mental health records? I  
6           don't believe they were, Your Honor. But - - -

7                       JUDGE PIGOTT: It could have been a post -  
8           - - I thought, you know, it certainly wasn't - - -  
9           didn't help her recollection, but it was, you know -  
10          - - was it past something recorded. I can't even  
11          remember the - - - past recollection recorded. It  
12          could have gotten in, but it didn't.

13                      MS. SWIFT: Correct. They did just use  
14          those - - - her own records to refresh her  
15          recollection so then she could talk from a refreshed  
16          memory as to identification and all the other  
17          statements that were made during the course of the  
18          treatment.

19                      JUDGE PIGOTT: But isn't it true that we  
20          don't know who the guy was, we don't know when it  
21          was. It was sometime between '93 and '99 or  
22          something like that, and we don't know the context in  
23          which whatever supposedly happened, happened? Or - -  
24          - I mean, it just seemed like it was propensity. It  
25          was, you know, this is a lady that, you know - - -

1 Lizzie Borden of the - - -

2 MS. SWIFT: I don't think we definitely  
3 don't know who the person was. Yes, we don't have a  
4 name. But - - - and in the People's Molineux notice,  
5 they specifically said that it was intimate partner,  
6 a paramour. Also at the Molineux hearing, the ADA  
7 did say, based upon the defendant's own statement,  
8 that it was a person in the defendant's life, at page  
9 27 - - -

10 THE COURT: How does - - - and what does  
11 that tell you?

12 MS. SWIFT: I think that then correlates  
13 back to what Judge Smith had said about her whole  
14 life had been put forth as it affected her state of  
15 mind.

16 CHIEF JUDGE LIPPMAN: Yes, but what does  
17 that particular - - - the level of detail that you  
18 say is in there, relating to this incident, what does  
19 that tell anybody in relation to what is the current  
20 incident?

21 MS. SWIFT: I think it goes to affect the  
22 intent and motive, which then also tie into  
23 justification - - -

24 CHIEF JUDGE LIPPMAN: Does it go to  
25 propensity?

1 MS. SWIFT: I think just the fact that the  
2 events were similar, this court has repeatedly said,  
3 just because they're similar doesn't mean they're  
4 automatic - - -

5 CHIEF JUDGE LIPPMAN: Without any context?

6 MS. SWIFT: There is some level of context.  
7 Yes, there isn't a great deal of detail. But I think  
8 the context and the nexus you have is that these  
9 statements to the mental health counselor were relied  
10 upon by the defense expert in formulating his opinion  
11 about battered woman syndrome.

12 JUDGE CIPARICK: The People used it in  
13 their arg - - - in their closing arguments to argue  
14 propensity. They said, "Because she stabbed another  
15 man in anger," et cetera. So they did use it for  
16 that purpose.

17 MS. SWIFT: Those comments weren't objected  
18 to, so they would be unpreserved. And I would have  
19 preferred that the ADA perhaps didn't go that far in  
20 the summation. But I think that there was adequate  
21 proof before the jury as far as - - -

22 JUDGE SMITH: At the time the social wor -  
23 - - am I right in thinking it's a social worker?

24 MS. SWIFT: I think it was a  
25 psychotherapist who was her - - -

1                   JUDGE SMITH: Okay. At the time - - - at  
2 the time she testified, had the defendant done all -  
3 - - had she gone through her life story from the age  
4 of two?

5                   MS. SWIFT: No.

6                   JUDGE SMITH: So why - - - how come you're  
7 allowed to - - - what about your adversary's point  
8 that you have to wait until she does it before you  
9 respond to it?

10                  MS. SWIFT: I think if you look - - - my  
11 understanding is that Dr. Nasra's report, which is  
12 disclosed in further support of her psychiatric  
13 notice, the report, he starts with a chronology at  
14 age two.

15                  JUDGE PIGOTT: But - - - but - - -

16                  JUDGE SMITH: Yes, but she's - - - but they  
17 don't have to call the doctor. As Ms. Duguay said,  
18 they could take a look at the People's case and say  
19 that's it, we rest.

20                  MS. SWIFT: I think that the defendant  
21 still would have had to have testified, even if the  
22 psychotherapist wasn't allowed.

23                  JUDGE PIGOTT: Well, maybe not. I mean, in  
24 this particular case, perhaps. I don't know the way  
25 it went in. But just because you give a notice does

1 not mean you have to do it. Right? And so often, on  
2 alibis, for example, they don't have to get up and  
3 testify that this is the alibi. They don't have to  
4 put their alibi witnesses on.

5 But when you know there's an affirmative  
6 defense coming, you have to prepare for it. But you  
7 can't make them put on their affirmative defense by  
8 putting your proof on first, can you?

9 MS. SWIFT: Well, justification, in this  
10 case, wasn't - - - it wasn't an affirmative defense.  
11 So it's an ordinary defense that the People would  
12 have a burden to prove beyond a reasonable doubt.  
13 And that would be my primary part in it.

14 JUDGE PIGOTT: But you had to prove a lack  
15 of justification as part of your case-in-chief?

16 MS. SWIFT: Yes, Your Honor.

17 JUDGE PIGOTT: Okay.

18 MS. SWIFT: And that's why I think that it  
19 did not need to be reserved for rebuttal, unlike  
20 Cass.

21 JUDGE SMITH: So in any justification case,  
22 can you put in any act of violence by the defendant  
23 as part of the prosecution's case-in-chief.

24 MS. SWIFT: No, I would agree it's still -  
25 - -

1 JUDGE SMITH: What's the boundary?

2 MS. SWIFT: It still needs to be relevant.

3 And I think in this case it was relevant, because it  
4 was contained in the mental health records that  
5 formed the basis of the expert opinion, which then  
6 tied - - -

7 JUDGE SMITH: The expert opinion, which had  
8 not yet been offered.

9 MS. SWIFT: Correct. But it bore on the  
10 issue that she had raised of justification. And her  
11 subje - - - the subjective component of justification  
12 based upon the totality of her life experience, she  
13 had different perspective on threats than ordinary -  
14 - -

15 JUDGE PIGOTT: Well, what did the social  
16 worker bring - - - or psychotherapist bring to the  
17 table in terms of disproving justification?

18 MS. SWIFT: I think it showed, at least in  
19 regard to battered women syndrome, trying to show  
20 that she didn't have this learned helplessness that  
21 is typically associated with battered women syndrome.  
22 It also showed that she was able to help herself.  
23 She was able to - - -

24 JUDGE PIGOTT: Didn't it show that she had  
25 a propensity to stab people?

1 MS. SWIFT: Yes, the crimes were similar,  
2 but I don't th - - - again, I wouldn't argue that it  
3 automa - - -

4 CHIEF JUDGE LIPPMAN: You don't think that  
5 Santarelli controls here?

6 MS. SWIFT: No, I don't think it does,  
7 because - - -

8 CHIEF JUDGE LIPPMAN: Why not?

9 MS. SWIFT: - - - in Santarelli, that was a  
10 situation where the People went out, actively looked  
11 for basically bad character evidence, and tried to  
12 bring that in through various other third-party  
13 witnesses. In this case, the only way that the  
14 People were privy to this information was by way of  
15 the defendant's psychiatric notice and the records on  
16 which their expert relied.

17 And their expert, himself, Dr. Nasra,  
18 testified on direct examination about this same anger  
19 towards men, that she definitely displayed a lot of  
20 anger towards men.

21 JUDGE PIGOTT: Would it be your opinion  
22 that once the social worker or psychotherapist had  
23 testified that the defense had no choice but to put  
24 on Dr. Nasra?

25 MS. SWIFT: No. I think there's other

1 reasons why the defendant and also Dr. Nasra would  
2 want to testify - - -

3 JUDGE PIGOTT: I understand that. But what  
4 I'm asking you is, do you think that once you put on  
5 the psychotherapist, who testified as she did, from  
6 reading her notes that didn't go into evidence - - -  
7 but that's another issue - - - but she testified, did  
8 that require, then - - - did that force the defense  
9 to call Dr. Nasra?

10 MS. SWIFT: No, I don't think it did.

11 JUDGE PIGOTT: What would be in front of  
12 the jury, had there been no mental health testimony  
13 by the defense?

14 MS. SWIFT: You would have the defendant's  
15 admission to the police, which she did chronicle some  
16 of her relationship with Wilburn. And one of the  
17 interesting things about her statement to the police  
18 is, to the police, the defendant said she took the  
19 knife, she went towards the defendant and stabbed  
20 him. And I think that was a very important reason  
21 why she testified not only to set her background, her  
22 life history, but also in her testimony she said, no,  
23 I didn't go at him; I closed my eyes and I blindly  
24 swung.

25 So I think that was another important

1 reason that she would want to testify. She was  
2 trying to backtrack from her initial statements that  
3 somehow suggest that she could have been more of an  
4 initial aggressor. And I think that's - - -

5 JUDGE SMITH: In the defense opening  
6 statement - - - I was just - - - I haven't read it,  
7 and I was just looking for it. But did the defen - -  
8 - I assume the defendant must have made the mental  
9 status and justification arguments in the opening?

10 MS. SWIFT: Yes, Your Honor. It was - - -

11 JUDGE SMITH: Does that give you the right  
12 to anticipate it on your case-in-chief?

13 MS. SWIFT: Yes, it does. I think it opens  
14 the door. It was heavily voir dired. And in opening  
15 statements, the defense counsel, I think expressly  
16 asked the jury, please pay attention to the  
17 defendant's state of mind. That's very important.

18 So I think through voir dire and through  
19 the opening statement that the door was open. And in  
20 Rojas, this court found that given - - - partly due  
21 to opening statement comments, otherwise excludable  
22 bad acts are now relevant to the People's chief case.

23 And in this circumstance, it was properly  
24 admitted as being relevant and that the probative  
25 value did outweigh any potential prejudice. And if

1 the court were to disagree on that point, of course,  
2 our second argument is, again, that the error was  
3 harmless, given other proof in this case.

4 CHIEF JUDGE LIPPMAN: Harmless in the  
5 context of this patient's pri - - - this defendant's  
6 prior history?

7 MS. SWIFT: I'm sorry, Your Honor. I  
8 didn't quite understand the question.

9 CHIEF JUDGE LIPPMAN: Harmless in the  
10 context of this defendant's prior history of  
11 victimization and everything that had gone on in her  
12 life; you think that this was harmless?

13 MS. SWIFT: I think it was harmless. There  
14 isn't a significant probability that the result would  
15 have been different because the jury also heard about  
16 the threat - - - may I finish, Your Honor?

17 CHIEF JUDGE LIPPMAN: Finish, yes.

18 MS. SWIFT: - - - the threat the day before  
19 to the victim to stab him. They heard about all the  
20 different knives that were found in the location. So  
21 any evidence about a prior stabbing of an intimate  
22 partner would have been cumulative to other proof,  
23 and I don't think was enough to tip the scales.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MS. SWIFT: Thank you, Your Honors.

1 CHIEF JUDGE LIPPMAN: Thank you.

2 Counselor, rebuttal?

3 MS. DUGUAY: Yes. Your Honor, first, I'd  
4 like to point out that neither expert relied on this  
5 particular incident for their expert opinion.  
6 Neither one mentioned it. It was mentioned once on  
7 cross-examination of Dr. Nasra when he was  
8 specifically asked about post-traumatic stress  
9 disorder and he was talking about the cycling between  
10 depression and anger.

11 And then prosecutors asked him, "And isn't  
12 there something in the records where she said she  
13 stabbed men before?" and he said yes. That's a far  
14 cry from relying on it for a diagnosis.

15 Second of all, that was in context of post-  
16 traumatic stress disorder, the only disorder that  
17 both experts agreed that she had and was recognized  
18 in the community - - - the scientific community as a  
19 mental health disorder. That, of course, was not put  
20 before the jury. And it was also the only diagnosis  
21 that explained these knives in terms of her specific  
22 mental health disorder, as far as being  
23 hypervigilant, being always on the lookout, trying to  
24 make sure her environment was safe; as opposed to  
25 battered women syndrome, where these knives actually

1 were incongruous with that diagnosis.

2 JUDGE SMITH: Didn't she - - - didn't she  
3 also testify - - - putting apart the question of  
4 whether the proof was premature - - - didn't she also  
5 testify, essentially, to mistake; that she stabbed  
6 with her eyes closed and didn't know where the knife  
7 was going?

8 MS. DUGUAY: She did. And I would point  
9 out - - -

10 JUDGE SMITH: Can't they - - - I mean,  
11 isn't that alone enough - - - if it were rebuttal,  
12 and I agree with you it's not rebuttal - - - but if  
13 it were rebuttal, wouldn't that justify them in  
14 saying, hey, you stabbed somebody else before; how  
15 many mistakes are you going to make?

16 MS. DUGUAY: No, I don't think so. Because  
17 we don't know the context of what the stabbing was  
18 before. I mean, it could have been an intentional  
19 stabbing when she was being raped before. She was  
20 thirty-five years old at the time she made that  
21 statement to the social worker.

22 JUDGE SMITH: A lot of things could have  
23 been. But isn't it a classic Molineux exception that  
24 when somebody says, oh, I did it, but I didn't mean  
25 to, you can prove the fact that it isn't the first

1 time she did it?

2 MS. DUGUAY: I think - - - no. I think you  
3 have to show some kind of factual predicate or some  
4 type of context in order to say she didn't mean to.  
5 Because she would have had to have meant to do it in  
6 the past. I mean, there - - - you know, we don't  
7 know whether - - -

8 JUDGE SMITH: But how - - -

9 MS. DUGUAY: - - - she was even - - -

10 JUDGE SMITH: - - - well, can't a jury  
11 infer that only a - - - I mean, the accident she  
12 testified to was fairly improbable. Two of them is  
13 really quite a stretch.

14 MS. DUGUAY: Well, Your Honor, we don't  
15 know the context. She came to that caseworker  
16 because she had a - - - sorry, can I finish the  
17 answer?

18 CHIEF JUDGE LIPPMAN: Finish, sure.

19 MS. DUGUAY: She came to that social worker  
20 because her substance abuse counselor was afraid she  
21 was suffering from a delusional - - - or I'm sorry,  
22 dissociative disorder. We don't know what her mental  
23 state was even when she was making the statement to  
24 the counselor who was making the records, let alone  
25 at the prior offense.

1                   JUDGE SMITH: Different question. If,  
2                   indeed, you did open on the either - - - on either of  
3                   these defenses, either on the mental disturbance or  
4                   post-traumatic stress disorder/battered women defense  
5                   or on the simple mistake defense, would that give the  
6                   prosecution the right to anticipate the defense on  
7                   their case-in-chief?

8                   MS. DUGUAY: No, I don't think so. I think  
9                   that if I come out and do an opening argument, say an  
10                  opening argument, I say my client's going to testify;  
11                  this is what he's going to say. I have the right,  
12                  then, to put the People to their proof. If the  
13                  People haven't met their burden - - -

14                 JUDGE SMITH: You believe - - - you say you  
15                  can change your mind?

16                 MS. DUGUAY: Absolutely. The defense has  
17                  an absolute right to put the People to their proof.  
18                  And if they don't make their case, then the defense  
19                  has the right to rest.

20                 JUDGE SMITH: But shouldn't - - - in that  
21                  context, if you open saying I'm going to prove this  
22                  lady was battered all her life and that because of  
23                  her mental condition, I'm going to prove the defense  
24                  of justification, and the People get up and start to  
25                  prove - - - start to respond to that assertion, don't

1           you at least have to get up and say, Judge, this is  
2           premature; I don't even know if I'm going to do it?

3                       MS. DUGUAY: Well, I think it depends on  
4           the context. You know, and there's always a risk,  
5           you know. I mean this is all - - - you know, there's  
6           certainly a defense strategy here. If I say I'm  
7           going to put my client on; my client's going to  
8           testify to X, Y, Z, I'm certainly taking a calculated  
9           risk that the jury might say, well, wait a minute; we  
10          thought we were going to hear this information.  
11          Certainly it's strategy. But it's a strategy that  
12          defense counsel has the right to employ. And a  
13          defendant has the right to say, you know what, it's  
14          not worth it to me. I don't want my - - -

15                      CHIEF JUDGE LIPPMAN: Okay, counsel.

16                      MS. DUGUAY: - - - mental state on the  
17          record.

18                      CHIEF JUDGE LIPPMAN: Thanks, counsel.

19                      MS. DUGUAY: okay.

20                      CHIEF JUDGE LIPPMAN: Thank you.

21                      Counsel, thank you both.

22                      (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. Dale Bradley, No. 201 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: October 25, 2012