

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

PEOPLE,

Respondent,

-against-

No. 28

AKIEME NESBITT,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
February 05, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

DAVID J. KLEM, ESQ.  
CENTER FOR APPELLATE LITIGATION  
Attorneys for Appellant  
74 Trinity Place  
11th Floor  
New York, NY 10006

PATRICIA CURRAN, ADA  
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Respondent  
One Hogan Place  
New York, NY 10013

Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So we're going to  
2 start with number 28, People v. Nesbitt. And  
3 counsel, would you like any rebuttal time?

4 MR. KLEM: Two minutes for rebuttal,  
5 please.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
7 Go ahead.

8 MR. KLEM: Good afternoon. David Klem for  
9 Appellant Akieme Nesbitt.

10 Mr. Nesbitt is serving twenty-five years in  
11 custody on charges that were never defended in the  
12 slightest by counsel. They were never - - -

13 CHIEF JUDGE LIPPMAN: Didn't the Appellate  
14 Division, though, compliment counsel?

15 MR. KLEM: I don't believe the Appellate  
16 Division complimented counsel.

17 CHIEF JUDGE LIPPMAN: I mean, for not  
18 having the top count?

19 MR. KLEM: For me, I don't think that it  
20 was the top count. There were three equal counts - -  
21 -

22 JUDGE GRAFFEO: There was - - -

23 MR. KLEM: - - - in this charge.

24 JUDGE GRAFFEO: - - - there was a mistrial  
25 on the attempted murder charge, correct?

1 MR. KLEM: That's correct. That's - - -

2 JUDGE GRAFFEO: And there was also a  
3 Sandoval ruling that was somewhat in your client's  
4 favor?

5 MR. KLEM: That - - - it's hard to credit  
6 counsel with the Sandoval ruling. He argues the  
7 wrong legal standard. He overstates his client's - -  
8 -

9 CHIEF JUDGE LIPPMAN: Yes, yes, but - - -

10 MR. KLEM: - - - record.

11 CHIEF JUDGE LIPPMAN: - - - my point is,  
12 and I think Judge Graffeo's point is, that's the  
13 premise of the Appellate Division decision that gee,  
14 he got something accomplished. Tell us - - -

15 MR. KLEM: Yes.

16 CHIEF JUDGE LIPPMAN: - - - what - - - what  
17 he should have done. And clearly, you know, this is  
18 an unusual case. But tell us what he should have  
19 done, because again, there was some, at least, from  
20 the Appellate Division majority saying, gee, you  
21 know, he was not guilty on the attempted murder.

22 MR. KLEM: What he should have done is  
23 pretty simple. It's what defense counsel does every  
24 day. It's actually defend the charges. We're not  
25 asking for anything other - - -

1 CHIEF JUDGE LIPPMAN: But you agree there  
2 was a difficult - - -

3 MR. KLEM: - - - than that - - -

4 CHIEF JUDGE LIPPMAN: - - - difficult  
5 defendant here?

6 MR. KLEM: It might have been a difficult  
7 defendant. It makes no difference. If the defendant  
8 isn't - - -

9 JUDGE SMITH: But you're not saying he  
10 could have gotten an acquittal on the assault?

11 MR. KLEM: I think there was certainly a  
12 good chance of an acquittal - - -

13 JUDGE SMITH: I mean, an acquittal - - -

14 MR. KLEM: - - - on the assault.

15 JUDGE SMITH: - - - he could have got - - -  
16 he could have got assault second. There's no way  
17 this guy was not guilty of some kind of assault.

18 MR. KLEM: True. Counsel, of course, ruled  
19 out the possibility of there ever being that verdict,  
20 because he didn't even ask for the lesser included -  
21 - -

22 JUDGE SMITH: He - - -

23 MR. KLEM: - - - because he couldn't think  
24 of - - -

25 JUDGE SMITH: - - - he obviously thought -

1 - -

2 MR. KLEM: - - - the lesser included.

3 JUDGE SMITH: - - - he seemed to think he  
4 had no shot.

5 MR. KLEM: He's told us he could think of  
6 no defense to these charges. But there was a  
7 defense.

8 JUDGE SMITH: Okay. And it's an abstract  
9 proposition, you'll agree, that when you can't think  
10 of a defense, you can't think of a defense.

11 MR. KLEM: Right.

12 JUDGE SMITH: I mean, you can't make it up.

13 MR. KLEM: I will not agree, as an abstract  
14 proposition, that a defense counsel, in any case,  
15 could sit there and say I'm not going to present a  
16 defense because I can't think of a defense.

17 JUDGE READ: Well, he did argue, didn't he  
18 - - - he did emphasize that the wounds were  
19 superficial. And he certainly never conceded guilt  
20 of assault.

21 MR. KLEM: He certainly implicitly conceded  
22 guilt. He started that in jury selection, when he  
23 started prepping the jurors, making them promise to  
24 him, that they could find guilt on a charge, as long  
25 as they would also look at the other charge

1           separately from that. He - - -

2                   JUDGE SMITH: Well, if - - - suppose he was  
3 right in thinking - - - and I understand there's a  
4 case that he was not right - - - maybe a good case he  
5 was not right - - - but suppose he was right in  
6 thinking that he had no - - - no realistic shot on  
7 the assault, and his only hope was to get rid of the  
8 attempted murder and hope that that improved his  
9 guy's sentence a little bit, even though they are  
10 both Bs. If that's - - - if he was right, then he  
11 did the right thing, didn't he?

12                   MR. KLEM: I still can't agree with that;  
13 I'm sorry. His job is to defend his client.

14                   JUDGE READ: But isn't that a - - -

15                   MR. KLEM: Sometimes - - -

16                   JUDGE READ: - - - strategic decision? I  
17 mean, isn't that just a strategic decision that  
18 counsel might make to emphasize - - - to try to  
19 emphasize - - - get him off the attempted murder for  
20 exactly the reasons that Judge Smith described, even  
21 though they are both B felonies? Why isn't that a  
22 strategic decision?

23                   MR. KLEM: There's no strategic reason here  
24 when counsel states that his reason is because he  
25 can't think of any defense to the charge.

1 CHIEF JUDGE LIPPMAN: What should he have  
2 done, though, in all of this? What should he have  
3 done?

4 MR. KLEM: He should have defended the  
5 assault 1 charges. The defense was simple. It was  
6 straightforward. It's a strong defense.

7 JUDGE PIGOTT: Let's go back - - -

8 MR. KLEM: He should have - - -

9 JUDGE PIGOTT: - - - a little bit more. I  
10 was a little surprised at the record on appeal here.  
11 Because there was an awful lot that went on before  
12 that we don't have in our record with respect to this  
13 man's mental state. And it certainly seems like  
14 something should have been said about the fact that  
15 this guy's doing twenty-five years in someplace that  
16 apparently is not going to take care of his mental  
17 condition.

18 Secondly, I was surprised that there was no  
19 motion, if there was one, with respect to the fact  
20 that there was a missing witness that - - - and that  
21 would be the treating physician at the emergency room  
22 who said all of these wounds are superficial.  
23 There's nothing in the record with respect to why he  
24 or she wasn't part of this particular record. And I  
25 didn't see an objection, although I don't know where

1           it would have done, on a medical examiner testifying  
2           as an expert with respect to superficial or not  
3           superficial wounds in an accident like this.

4                   MR. KLEM:  Yes.  Although it's certainly  
5           the case - - -

6                   JUDGE PIGOTT:  But it's not in the record.

7                   MR. KLEM:  - - - in terms of - - - in terms  
8           of what we know, Mr. Nesbitt had serious mental  
9           illnesses.  But that doesn't mean he doesn't get a  
10          right to have the charges defended.

11                   JUDGE PIGOTT:  No, but I'm wondering why -  
12          - - I mean, you're going to - - - you're arguing your  
13          case, and I want to agree with respect to the mental  
14          part.  It's not in the record.  I would like to have  
15          a discussion with respect to the witness who made out  
16          the medical forms at the emergency room where this  
17          guy was treated and released the same day, and said  
18          all of the wounds are superficial; not in the record.

19                   So I'm wondering where can we, as a court,  
20          go with respect to those type of arguments that kind  
21          of popped into my head?

22                   MR. KLEM:  Well, I think we have to look at  
23          what counsel announces before trial even begins,  
24          before he's heard one shred of evidence or even knows  
25          who the witnesses are.  He announces he could think

1 of no defense to the charges. So does he pursue  
2 anything regarding the medical evidence in the case?

3 No, aside from - - -

4 CHIEF JUDGE LIPPMAN: Should he have said  
5 he couldn't represent the defendant?

6 MR. KLEM: If he thought he couldn't  
7 represent the defendant, he certainly should have  
8 said that.

9 CHIEF JUDGE LIPPMAN: What does a - - -  
10 what does a lawyer do if he believes, at least in  
11 large measure, that there's no real defense, and the  
12 judge asks him can you represent the defense? Should  
13 you say I just can't, I think he's guilty and I can't  
14 think of a defense, or do you do the best you can - -  
15 - it's not a rhetorical question - - - or do you do  
16 the best you can and, you know, tackle it tactically;  
17 maybe say, gee, I have no defense here, but maybe I  
18 do there?

19 MR. KLEM: That's our job. I think, you  
20 know, our job as defense attorneys is to defend them.  
21 Some cases are harder than others. Some clients are  
22 harder than others. But there is no excuse for  
23 counsel ever to say I'm not going to defend or I  
24 can't think - - -

25 JUDGE SMITH: What if he - - -

1 MR. KLEM: - - - of a defense.

2 JUDGE SMITH: - - - what - - - suppose - -  
3 - take this case as a hypothetical. Suppose you  
4 didn't have the assault first charge. Suppose they  
5 said, okay, we're going to reduce it to assault  
6 second; now you defend it. You're the defense  
7 lawyer. What do you do?

8 MR. KLEM: You might go after the  
9 credibility of the witnesses. You may probe the - -  
10 -

11 JUDGE SMITH: But they - - -

12 MR. KLEM: - - - medical evidence.

13 JUDGE SMITH: - - - they got pictures of  
14 his wounds.

15 MR. KLEM: You're going to do something,  
16 because that's what your job is in this case.

17 JUDGE SMITH: Well, but - - -

18 MR. KLEM: But we're moving far away - - -

19 JUDGE SMITH: - - - it's easy to say you've  
20 got to do something. But aren't there cases where  
21 you really - - - especially when you've got multiple  
22 counts, and you've actually got a shot on one of  
23 them, and the other one is as hopeless as any case  
24 has ever been - - - is it so ridiculous to say I'm  
25 going to - - - I'll focus on the one I might have a

1 shot at winning?

2 MR. KLEM: If it's a lesser charge, it's  
3 absolutely a great - - -

4 JUDGE SMITH: Or - - -

5 MR. KLEM: - - - strategic reason.

6 JUDGE SMITH: - - - even though - - - even  
7 though it's not a lesser, is it ridiculous to think  
8 that maybe you'll get - - - that if you have  
9 attempted murder and assault, you're guaranteed the  
10 maximum, and if you've only got assault, the judge  
11 might knock a little off?

12 MR. KLEM: Mr. Nesbitt refused plea offers  
13 in this case that would have called for an assault 1  
14 charge with a twenty-year sentence and possibly a  
15 fifteen-year sentence. He didn't want that. That  
16 was his decision to make. Counsel cannot go and  
17 concede the assault 1 charge, no matter - - -

18 JUDGE SMITH: Even though - - -

19 MR. KLEM: - - - what.

20 JUDGE SMITH: - - - I do have a question.  
21 In light - - - was it unreasonable, at the time - - -  
22 this is before McKinnon had been decided, and in  
23 light of the Appellate Division cases - - - was it so  
24 unreasonable for the defense lawyer to think that he  
25 did not have a winner, even on getting assault 1 down

1 to assault 2?

2 MR. KLEM: Yes. And I have two answers to  
3 that. One is, McKinnon didn't change the law at all  
4 in this state. It didn't announce a new rule of law.  
5 It was a - - -

6 JUDGE SMITH: There are Appellate Division  
7 cases that seem to say scarring does it.

8 MR. KLEM: There were almost no Appellate  
9 Division cases that were saying minor scarring.  
10 Certainly, scarring can equal serious physical  
11 injury. But under the statute itself, it needed to  
12 be serious and protracted disfigurement. That's the  
13 statutory language.

14 JUDGE GRAFFEO: Did - - - the attorney did  
15 cross-examine the doctor, didn't he?

16 MR. KLEM: Briefly.

17 JUDGE GRAFFEO: He did - - -

18 MR. KLEM: He did.

19 JUDGE GRAFFEO: - - - he did, I think,  
20 explore a bit as to the fact that the physician had  
21 said it was superficial.

22 MR. KLEM: Yes, he did. And it was - - -  
23 and he explored the nature of the wound to the neck  
24 to try to establish that it didn't impact the carotid  
25 artery. All of that was part and parcel of his

1 defense of the - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 You'll have some rebuttal time.

4 MR. KLEM: - - - of the murder - - -

5 CHIEF JUDGE LIPPMAN: Thanks counsel.

6 MR. KLEM: - - - second murder charge.

7 Thank you.

8 CHIEF JUDGE LIPPMAN: Appreciate it.

9 MS. CURRAN: Good afternoon, Your Honors.

10 May it please the court, my name is Patricia Curran

11 and I represent the People on this appeal.

12 CHIEF JUDGE LIPPMAN: Counsel, didn't the  
13 defense lawyer here give up on his client?

14 MS. CURRAN: No, he never gave up on this  
15 man. He represented this man.

16 CHIEF JUDGE LIPPMAN: But not - - - you  
17 know, basically he says I have no defense?

18 MS. CURRAN: When the defendant asks for a  
19 third lawyer, just around the time of jury selection,  
20 and the court says the current lawyer is your second  
21 lawyer, and this is after the defendant has  
22 threatened his lawyer, this is after the defendant  
23 has - - -

24 CHIEF JUDGE LIPPMAN: Yes, but we - - -

25 MS. CURRAN: - - - spit in a lawyer's face.

1 CHIEF JUDGE LIPPMAN: - - - everyone  
2 acknowledges that you have a difficult defendant  
3 here. But - - -

4 MS. CURRAN: But that's key.

5 CHIEF JUDGE LIPPMAN: - - - if you're  
6 representing him, and as your adversary says, if it's  
7 your job, you know, doesn't it seem in so many ways  
8 that the defendant kind of lay - - - the defense  
9 counsel kind of laid down on a good part of the case?

10 MS. CURRAN: No, Your Honor. The defendant  
11 was entitled to representation that was meaningful.  
12 He got that.

13 CHIEF JUDGE LIPPMAN: The defendant was  
14 entitled to not plead guilty - - - not plead guilty.  
15 But once they're taking him, where do you draw the  
16 line between, kind of, saying I give up and putting  
17 in a perfunctory defense about certain parts of the  
18 case against him? You know, is it strategic when you  
19 say I give up these two counts, but on this, gee,  
20 there's really no proof of it, but do what you think  
21 best on the rest, because I can't really defend it?

22 Does it ever - - - can it cross that line  
23 in being, you know, that's just not good enough?

24 MS. CURRAN: Your Honor, this lawyer did  
25 not give up on the assault counts. He simply argued

1 more vigorously as to attempted murder counts.

2 JUDGE PIGOTT: But if you look at - - -

3 JUDGE GRAFFEO: Why didn't he submit a  
4 lesser included offense on the assault 1's?

5 MS. CURRAN: Obviously, he didn't feel  
6 there was a reasonable view of the evidence here.

7 JUDGE PIGOTT: But the judge did.

8 JUDGE SMITH: Was he right or wrong about  
9 that?

10 JUDGE PIGOTT: The judge offered it. I  
11 mean, I don't know how you can say that he - - - I  
12 mean, if you're the defense lawyer, and the judge  
13 says would you like a lesser included, he says no? I  
14 mean, why wouldn't he say absolutely? I mean - - -

15 MS. CURRAN: The lawyer - - - I don't  
16 believe that the court was asking him that question  
17 implying that the court felt that there was a lesser  
18 included that was appropriate here. She was simply  
19 asking the usual questions she asks before charges  
20 including - - -

21 JUDGE PIGOTT: So if he said - - - if he  
22 said yes, she'd go well, I'm not going to give it to  
23 you?

24 MS. CURRAN: I don't know what the court  
25 would have thought. Given the pictures, given the

1 injuries here, how could this lawyer have argued that  
2 this victim suffered only impairment of physical  
3 conditions - - -

4 JUDGE PIGOTT: By bringing in - - -

5 MS. CURRAN: - - - and substantial pain.

6 JUDGE PIGOTT: - - - the doctor that said  
7 that they were superficial, he was treated, and  
8 released. That's how you can argue it. Now, whether  
9 you win or not, I agree with you. I worry,  
10 fundamentally, about are we now going to say - - -  
11 and I'm sure you're going to agree with me on this  
12 statement - - - most of the people they arrest are  
13 guilty. They do a pretty good job of getting the  
14 right people.

15 Now, if we say to defense counsel, look, if  
16 they're guilty, sleepwalk. We can get triple the  
17 number of cases through the court system if you don't  
18 pick the jury, if you don't open, if you don't call  
19 the witnesses you're supposed to, if you don't  
20 challenge the mental health. If you go in front of  
21 the court and belittle your own client by saying,  
22 well, he spit at me again, Judge, and what am I going  
23 to do - - - but I'm going to go and do what I have to  
24 do, leaving the court with the impression that you've  
25 already abandoned your case.

1           I don't understand why you don't make an  
2           argument with respect to the - - - to the shackling  
3           and work with the court to get something done. It  
4           just seemed like he was saying, well, he's going to  
5           come in and say that he's against the shackling,  
6           Judge, and there's nothing I can do about it.

7           MS. CURRAN: Your Honor, there's a history  
8           here of this defendant threatening the court,  
9           promising a grand finale, suggesting violence in the  
10          court.

11          JUDGE PIGOTT: I know what you're saying.  
12          What I'm saying is the issue to me is the system. I  
13          mean, I can think, in almost every case that you've  
14          got that the guy is guilty. He was driving drunk.  
15          They got the test. They got the roadside test. They  
16          got everything. So you go in and you say, Judge, I  
17          got no defense, so I'm not going to open, I'm not  
18          going to pick. When the jury comes back with a  
19          guilty verdict, I'll submit my voucher and go home.

20          MS. CURRAN: Your Honor - - -

21          JUDGE PIGOTT: We wouldn't want that.

22          MS. CURRAN: - - - every defendant is  
23          entitled to a defense. That doesn't mean he has a  
24          viable defense as to each of the counts.

25          JUDGE PIGOTT: Right.

1 MS. CURRAN: He's entitled to  
2 representation. He got that here. If that weren't  
3 the case, lawyers would not want to represent  
4 defendants where the evidence was overwhelming, as it  
5 was here. And given the overwhelming nature of the  
6 evidence and the - - -

7 JUDGE SMITH: Was it really that  
8 overwhelming, even - - - I mean, you look at the - -  
9 - I mean obviously, if you look at the pictures  
10 immediately after he's hurt, he looks horrible. But  
11 he - - - but the wounds healed pretty well. I mean,  
12 it's not obvious to me there's serious disfigurement  
13 there.

14 MS. CURRAN: Your Honor, I would disagree  
15 with you there. This individual has a six-inch scar  
16 on his forehead.

17 JUDGE PIGOTT: But the question is whether  
18 or not the jury would have.

19 MS. CURRAN: I'm sorry, Your Honor?

20 JUDGE PIGOTT: The question is whether or  
21 not the jury would have, not whether - - - and I - -  
22 - with all due - - - I know you know the case very  
23 well - - - I don't know why he didn't object to the  
24 DNA. I mean, what was the point of bringing in DNA  
25 when you've got the defendant - - - you've got two

1           eyewitnesses saying he did it; you've got him  
2           arrested with the blood on his clothes, and yet we  
3           turn it into a CSI. I think on the defense side you  
4           say, Judge, let's shorten this up. You know, we  
5           don't need any DNA evidence on this thing, and all  
6           it's going to do is get the jury inflamed to the  
7           point of saying well, it's him and they say it's  
8           murder, and since he's not saying it's not murder,  
9           we'll try it and, you know, we'll do our best.

10                   MS. CURRAN: Well, Your Honor, the DNA  
11           evidence was part of the overwhelming nature of the  
12           case here, which limited this attorney's options in  
13           terms of the kind of defense that he could bring  
14           forth here.

15                   CHIEF JUDGE LIPPMAN: Do you think,  
16           counsel, that the treatment that the lawyer got - - -  
17           isn't it possible that the treatment that the lawyer  
18           got from his client was so horrific that it just  
19           poisoned the lawyer's ability to really make a real  
20           defense? And look, all of us in that situation, how  
21           are we going to react to this when the defendant is  
22           spitting in your face and is so difficult to deal  
23           with?

24                   Isn't it possible that that happens, and  
25           you just don't do what you know you should do,

1 because you just don't have the stomach for it?

2 MS. CURRAN: Your Honor - - -

3 CHIEF JUDGE LIPPMAN: And you basically lay  
4 down? Can't that happen in a case where you have a  
5 client like this one who apparently just was so  
6 horrible in terms of dealing with his lawyer?

7 MS. CURRAN: It's true the defendant was  
8 horrible in dealing with his lawyer, but that's not  
9 what happened here. In these kinds of instances, a  
10 lot of attorneys would shut down, and they would be  
11 there physically, but they would not still be  
12 fighting for their lawyer (sic).

13 CHIEF JUDGE LIPPMAN: You don't think you  
14 could argue that, basically, that's what happened - -  
15 - not doing the lesser included, you don't think it's  
16 possible that it kind of looks like he shut down?

17 MS. CURRAN: Not on this record. If you  
18 sit down and read this record, even after the - - -

19 CHIEF JUDGE LIPPMAN: Does it really argue  
20 that he meant - - - didn't mean to disfigure? I  
21 mean, there's a lot here that one could say, gee, if  
22 I was the defense lawyer, maybe I could have done a  
23 better - - -

24 MS. CURRAN: Those are all - - -

25 CHIEF JUDGE LIPPMAN: - - - really a better

1 job?

2 MS. CURRAN: - - - those are all hindsight  
3 views, though, Your Honor. We have the clarity - - -

4 JUDGE PIGOTT: Well, peremptories - - -

5 MS. CURRAN: - - - of second-guessing.

6 JUDGE PIGOTT: - - - it's hard to picture  
7 somebody not using his peremptories - - - his or her  
8 peremptories. He used one, I guess. It's hard to  
9 picture that you don't open. And he didn't open. I  
10 mean, at some point, you know, you got to wonder.

11 MS. CURRAN: Your Honor, most defense  
12 attorneys don't open. It's often a viable strategy  
13 until they hear what evidence the People are going to  
14 put forward.

15 JUDGE PIGOTT: I don't think I've ever not  
16 opened. Maybe I should - - - I mean - - -

17 MS. CURRAN: It may be more popular in  
18 Manhattan.

19 JUDGE PIGOTT: Maybe.

20 MS. CURRAN: But - - - and I should point  
21 out, too, that the court limited the amount of time  
22 that both lawyers could voir dire, and the prosecutor  
23 didn't challenge that many people, either.

24 JUDGE PIGOTT: Well, that's - - -

25 MS. CURRAN: Apparently - - -

1                   JUDGE PIGOTT: - - - well, I'm talking  
2                   peremptories, not the length of questioning. I  
3                   appreciate your fact with respect to that, but you  
4                   got - - - in other words, the DA was totally happy  
5                   with not quite the first twelve. I think - - - did  
6                   she use three? But in any event, it would seem to  
7                   me, if the DA's pretty happy with its dozen, I  
8                   wouldn't be. And I - - - but he was.

9                   MS. CURRAN: Well, perhaps the panelists  
10                  here - - - and we don't know this because there  
11                  wasn't a 440.10 on this issue - - - were fair and  
12                  impartial jurors. We don't really know all of the  
13                  information as to that. But there's no reason to  
14                  believe, given the facts of this case, that there was  
15                  anything about the panelists that were chosen that  
16                  led them to be fair or not - - - or not impartial in  
17                  this case.

18                  But I do want to address a couple of  
19                  things. Your Honor, you talked about whether the  
20                  assault 2 should have been given as a lesser  
21                  included. Given the testimony here and the  
22                  photographs here, this lawyer obviously believed, and  
23                  the evidence supports this, that the jury - - - that  
24                  there was no - - - excuse me, there was no reasonable  
25                  view of the evidence here that - - -

1 JUDGE SMITH: Well, did you think - - -

2 MS. CURRAN: - - - assault 2 was wrong.

3 JUDGE SMITH: - - - do you think he might  
4 have been thinking on those Appellate Division cases  
5 which I - - - sort of make me think that if you've  
6 got permanent scarring, you can't - - - you've got  
7 assault 1?

8 MS. CURRAN: Perhaps. This case was tried  
9 before McKinnon and Stewart. But - - -

10 JUDGE SMITH: It's a closer case if it's  
11 after McKinnon, isn't it?

12 MS. CURRAN: I think that even after  
13 McKinnon, these injuries are sufficiently distressing  
14 and objectionable that they would have met the  
15 standard this court set in McKinnon.

16 JUDGE SMITH: Well, no one's saying they're  
17 not sufficient. But you're saying that - - - you're  
18 saying these are so objectionable that you can't  
19 imagine a jury saying - - -

20 MS. CURRAN: Yes.

21 JUDGE SMITH: - - - that they're not - - -  
22 that they - - - I mean, this is a young man with a  
23 scar on his face. A lot of people don't turn away in  
24 horror.

25 MS. CURRAN: This man has a scar on his

1 face, keloid scars on his neck that are visible. He  
2 has a keloid scar on his arm and two on his back.  
3 Given all of the scarring here, we definitely met the  
4 standard for assault 1 on both these counts. And  
5 this lawyer was not incompetent for not submitting or  
6 asking for the submission of the assault 2 counts  
7 here. Nor, in summation, did he ever concede the  
8 defendant's guilt on those counts, as well.

9 JUDGE SMITH: Well, you certainly - - - you  
10 certainly get the - - - if you're a juror listening  
11 to that summation, you know what he's asking you to  
12 do.

13 MS. CURRAN: He's leaving it up to the jury  
14 to decide based on all the evidence.

15 JUDGE SMITH: I mean, he's - - - but isn't  
16 the message - - - and isn't it - - - surely there are  
17 cases where it's appropriate, where you're sending  
18 the message, if not explicitly, go ahead and convict  
19 on the assault, but my guy's not guilty of attempted  
20 murder. Isn't that the impression you get from the  
21 summation?

22 MS. CURRAN: His strategy was obviously to  
23 focus on the attempted murder, in hopes of arguing to  
24 the judge at sentence, which he did, when he  
25 amazingly got a hung jury on the attempted murder,

1 even though the evidence here was overwhelming that  
2 the defendant - - -

3 CHIEF JUDGE LIPPMAN: Okay - - -

4 MS. CURRAN: - - - attempted to kill - - -

5 CHIEF JUDGE LIPPMAN: Counselor, thanks.

6 MS. CURRAN: - - - the victim.

7 CHIEF JUDGE LIPPMAN: Thank you.

8 MS. CURRAN: Thank you very much.

9 CHIEF JUDGE LIPPMAN: Thank you.

10 Counselor, why couldn't it be strategy?

11 MR. KLEM: We have the attorney himself  
12 telling us why he did what he did. It wasn't a grand  
13 strategic plan. He could think of no defense.

14 JUDGE PIGOTT: Ms. Curran raises the point  
15 that you did not argue the shackle - - - the defense  
16 did not argue the shackling issue before the  
17 Appellate Division, nor the jury selection issue, and  
18 therefore, it would make much more sense for this to  
19 be determined after a 440.

20 MR. KLEM: I think we have four pages of  
21 defense counsel explaining to us exactly why he did  
22 what he did. Certainly, why he presented no defense  
23 is laid out fully in the record; his reason or lack  
24 of reasons - - - because he could think of none.

25 I think the record is more than sufficient

1 to establish every aspect of this ineffectiveness.  
2 Certainly, you could even take out those minor little  
3 issues and look at the rest of it. This was  
4 overwhelmingly ineffective. He did not try at any  
5 stage - - -

6 JUDGE SMITH: But you admit that he  
7 defended the attempted murder effectively?

8 MR. KLEM: He got a hung jury. If you look  
9 only at - - -

10 JUDGE SMITH: He did a - - -

11 MR. KLEM: - - - results - - -

12 JUDGE SMITH: - - - a pretty good job - - -  
13 I mean, I just read the - - - I thought the summation  
14 was pretty good on the - - - it persuaded me that  
15 there was no attempted murder.

16 MR. KLEM: It should have persuaded you.  
17 There was almost no evidence that he came dangerously  
18 close to killing him. You know, the only - - -

19 JUDGE GRAFFEO: But this defendant - - -

20 MR. KLEM: - - - injury - - -

21 JUDGE GRAFFEO: - - - made some pretty dif  
22 - - - made some comments prior to when he went in the  
23 hallway.

24 MR. KLEM: Yes. I mean, this was - - -

25 JUDGE GRAFFEO: I mean, there was some

1 evidence of intent. I'm - - -

2 MR. KLEM: I'm from Brooklyn - - -

3 JUDGE GRAFFEO: - - - sure the jury would  
4 decide - - -

5 MR. KLEM: - - - I don't - - -

6 JUDGE GRAFFEO: - - - what intent it was.  
7 That would be a jury determination. But he did make  
8 some comments about what he intended to do.

9 MR. KLEM: He intended to do - - - to do  
10 something. We have no doubt about that.

11 As to the lesser included offense in this  
12 case, I refer you to what counsel said. Again, he  
13 could not think of a lesser included offense, maybe  
14 assault 3. He didn't even think of assault 2. This  
15 wasn't a strategic gambit. He didn't know the law.  
16 He just assumed that the injuries were overwhelming.  
17 These injuries were not overwhelming.

18 JUDGE PIGOTT: This is the one where he got  
19 the Sandoval backwards, too?

20 MR. KLEM: That's a different - - - a  
21 different time.

22 JUDGE PIGOTT: A different issue, but - - -

23 MR. KLEM: But he got the Sandoval ruling -  
24 - - I mean, the reasoning - - -

25 JUDGE PIGOTT: Yes.

1 MR. KLEM: - - - exactly flipped from what  
2 it should be.

3 CHIEF JUDGE LIPPMAN: Okay, thanks counsel.

4 MR. KLEM: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank you both.  
6 Appreciate it.

7 (Court is adjourned)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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. Akieme Nesbitt, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: February 12, 2013