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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 87

HAKIM B. SCOTT,

Appellant.

20 Eagle Street
Albany, New York 12207
May 05, 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
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to number
2 87, People v. Scott.

3 Counsel, would you like any rebuttal time?

4 MR. BERNHARD: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes?

7 MR. BERNHARD: Um-hum.

8 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

9 MR. BERNHARD: Good afternoon, Your Honors.
10 Jose Suc - - - Sucuzhaney was the victim of two
11 separate assaults in this case, two independent
12 assaults, one by my client, the appellant, and one by
13 Phoenix.

14 CHIEF JUDGE LIPPMAN: What's the connection
15 between the - - - the two assaults? Were they - - -
16 wha, what leads you to say that they were not in
17 concert?

18 MR. BERNHARD: There was no community of
19 purpose in - - -

20 CHIEF JUDGE LIPPMAN: I mean it seems like
21 you get the - - - the - - - the first incident and
22 then someone tries to help and - - - and your client
23 chases him, and then you get the second inci - - -
24 inc - - - the second incident. Why couldn't we infer
25 that this was really kind of a - a - a - a plan

1 together to - - - to do this, to - - - to hurt this
2 person?

3 MR. BERNHARD: Because there was no
4 evidence, Your Honor, of there being a plan together.
5 I mean, we have in this case, fortunately, a third
6 man in the SUV who testified very well for the
7 People. If there had been any verbal communication
8 between the two - - -

9 CHIEF JUDGE LIPPMAN: So it would be enough
10 if - - - if one says I'll chase him, you hit him.
11 That's clearly enough, right? I'll chase the other
12 guy.

13 MR. BERNHARD: Well, if there was something
14 like that - - -

15 CHIEF JUDGE LIPPMAN: You - - - you finish
16 him off, whatever. That's evidence?

17 MR. BERNHARD: If there was something like
18 that or if there was let's go get him; there was
19 nothing like that.

20 CHIEF JUDGE LIPPMAN: What if he - - - what
21 if he nods to the other guy - - -

22 MR. BERNHARD: There was no - - -

23 CHIEF JUDGE LIPPMAN: - - - and - - - and -
24 - - and then goes to chase and this guy comes. That
25 would be enough?

1 MR. BERNHARD: Again, yes. There - - -
2 there were no - - - there was no indication - - -

3 CHIEF JUDGE LIPPMAN: So your view is
4 there's nothing here?

5 MR. BERNHARD: There was nothing here. So
6 we don't - - -

7 CHIEF JUDGE LIPPMAN: So what happened,
8 there were two isolated events?

9 MR. BERNHARD: Yes. My client was sitting
10 in the backseat smoking. The window was open,
11 somebody - - - one of the gentlemen spit through the
12 window, got him annoyed. He ran out and hit Jose
13 over - - - over - - - over the head and then ran
14 after the brother, Romel.

15 JUDGE RIVERA: But doing so then leaves the
16 decedent - - -

17 MR. BERNHARD: Correct. That was unf - - -

18 JUDGE RIVERA: - - - on the ground alone,
19 defenseless.

20 MR. BERNHARD: Yes. But - - -

21 JUDGE RIVERA: What did he think was going
22 to happen?

23 MR. BERNHARD: There was no plan ahead of
24 time.

25 JUDGE RIVERA: Why couldn't the jury infer

1 that perhaps there's an understanding that if you run
2 and leave this man on the ground - - -

3 MR. BERNHARD: Only - - - un - - - ugly
4 enough, Your Honor; if there wasn't for the third
5 gentlemen present, Nathaniel, perhaps they could have
6 inferred.

7 JUDGE RIVERA: Um-hum.

8 MR. BERNHARD: But we had a witness here
9 who testified. He was a star witness for the People.

10 JUDGE RIVERA: Yeah.

11 MR. BERNHARD: Didn't testify to any
12 communication between - - -

13 JUDGE STEIN: But does there have to be
14 overt communication? I mean, what - - - what - - -
15 what about foreseeability? What about the fact that
16 here they are, they're driving together, this whole
17 thing un - - - un - - - unwraps and - - - and - - -
18 and the victim ends up kicking the car after - - -
19 after the driver has yelled these epithets. Doesn't
20 defendant - - - isn't there something that defendant
21 - - - can be inferred that he knew that if he got out
22 of the car and he did this and - - - and that the
23 driver was coming right after him and he was going to
24 finish the guy off.

25 MR. BERNHARD: I think - - -

1 JUDGE STEIN: Is that enough?

2 MR. BERNHARD: I think - - - I don't think
3 so, Your Honor. I think that - - -

4 JUDGE READ: Did he know there was a
5 baseball bat?

6 MR. BERNHARD: He knew there was a baseball
7 bat in the car. There's no reason for us to assume
8 that he knew the baseball bat was going to be used as
9 a weapon. I mean, it could have been simply - - -

10 CHIEF JUDGE LIPPMAN: What about if they
11 said - - - what about if they said, let's go get
12 those gay people?

13 MR. BERNHARD: If they - - -

14 CHIEF JUDGE LIPPMAN: Let's - - - let's go
15 get them. He goes out. He does what he does, then
16 he runs after the other guy. The other guy - - -
17 then Phoenix comes out, hits him with a bat. That
18 would be enough to show a - - -

19 MR. BERNHARD: I believe so. If there was
20 a let's go get him - - -

21 JUDGE READ: So there has to be some overt
22 statement?

23 MR. BERNHARD: There has to be something.
24 Either - - - either comm - - - a verbal
25 communication, Your Honor, or - - -

1 CHIEF JUDGE LIPPMAN: What if it wasn't a
2 bias situation? He doesn't say let's go get gay
3 people, or whatever. Let's get these - - - these
4 kids. That's enough, too, right?

5 MR. BERNHARD: Even then; that would
6 establish that there was some plan, that there was a
7 - - - a shared purpose between the two. Actually, I
8 think here is - - - the district attorney's brief
9 also - - -

10 JUDGE RIVERA: Why does the purpose have to
11 be determined when he's in the car?

12 MR. BERNHARD: I'm sorry, Your Honor.

13 JUDGE RIVERA: Why - - - why it can't be he
14 steps out, they - - - they're in this melee and - - -
15 and at that point there's an understanding? Why - -
16 - why does it have to be they figure it out in the
17 car, oh, let's proceed as follows?

18 MR. BERNHARD: Well, see, when they - - -
19 even when they got out of the car - - - Nathaniel
20 said he got out of the - - - got out of the car very
21 quickly. He said nothing about any communication
22 between them. He said nothing about any gestures
23 between them. There was nothing like pointing to the
24 guy.

25 JUDGE FAHEY: So doesn't it help if they

1 show that he intentionally aided? The one guy - - -
2 he - - - he gets hit with the bottle, the way it seem
3 - - - it - - - [inaudible]

4 MR. BERNHARD: Right.

5 JUDGE FAHEY: The defendant hits him with a
6 bottle and he chases his brother. He comes back.
7 The other codefendant's gotten out of the car with
8 the bat, hits him with the bat, and - - - and my
9 understanding is there's evid - - - there's evidence
10 from a taxi driver that the defendant then kicked him
11 and that - - - that he kicked him and then the
12 causation ev - - - evidence is then supplied by the
13 doctor. So I thought - - - you can correct me if I'm
14 wrong. I thought that you don't have to show that he
15 importuned or discussed anything. He intentionally
16 aided the person, and intent can be shown here by his
17 acts. So how does this not meet the legal
18 sufficiency standard then?

19 MR. BERNHARD: But there was no - - - there
20 was no plan established. There was no plan shown.

21 JUDGE FAHEY: And you're saying that a plan
22 is required?

23 MR. BERNHARD: Well, there - - - there has
24 to be some community of purpose. There has to be
25 something where they shared an intent. They shared -

1 - -

2 JUDGE FAHEY: But you say the aid - - -
3 aiding each other in - - - in the - - - in this
4 assault isn't enough?

5 MR. BERNHARD: He didn't aid him
6 beforehand. He - - -

7 JUDGE READ: Does it make any difference
8 that he didn't come back and say, oh, my God, what
9 did you do, that they drove off together?

10 MR. BERNHARD: No, Your Honor. He may not
11 be a good guy, but there's still no proof that there
12 was an - - - he - - - that he aided and abetted in -
13 - - in Phoenix's - - -

14 JUDGE READ: In other words, he didn't
15 express any surprise?

16 MR. BERNHARD: He said let's - - -

17 JUDGE READ: At what had happened.

18 MR. BERNHARD: - - - get out of here. He
19 did say let's get out of here.

20 JUDGE READ: Well, that - - - that would
21 seem to be - - -

22 MR. BERNHARD: Right.

23 JUDGE READ: - - - well advised under the
24 circumstances, I guess.

25 MR. BERNHARD: It - - - it seems what - - -

1 what happened here, and I'm going to take the DA at -
2 - - at what he said in his brief, that after my
3 client got out and hit Jose over the head with a
4 bottle, that Phoenix was spurred or an example was
5 set for him, and then independently and spontaneously
6 he got out, pulled out his bat, and went and beat
7 Jose over the head a few times.

8 JUDGE ABDUS-SALAAM: Counsel, on that note,
9 assuming they're two separate incidents, not an
10 acting in concert, why isn't there sufficient
11 evidence that what your client did, in hitting Jose
12 over the head with the bottle, enough to show that he
13 could have caused his death, and why couldn't the
14 jury infer that from the evidence that was presented?

15 MR. BERNHARD: Well, the ME said that the
16 murder was caused by a heavier object than a bottle
17 and that he was hit by it multiple times. That had
18 to be the bat. So it wasn't his hitting him with the
19 bottle that caused his death. The - - -

20 JUDGE ABDUS-SALAAM: The ME didn't say that
21 he - - - that he died from just the bat, right? I
22 mean he didn't say - - -

23 MR. BERNHARD: Well, actually, I believe he
24 did, although he didn't use the word bat. He did say
25 - - - this was on cross-examination, and it's pointed

1 to in my brief specifically; I don't remember the
2 page offhand.

3 JUDGE FAHEY: But I - - - what I got is at
4 486, 487 he said that a person could sustain deadly
5 injuries from a bottle breaking over his head and - -
6 - and that both a bat and a bottle would qualify as a
7 blunt instrument. That - - - that's what I got.

8 MR. BERNHARD: Correct. But later on - - -

9 JUDGE FAHEY: So - - - so I - - - I could
10 see the ambiguity you're arguing, but it - - - it
11 doesn't - - - it doesn't - - - it's not - - -

12 MR. BERNHARD: Later on in - - - in the
13 cross - - -

14 JUDGE FAHEY: Yeah.

15 MR. BERNHARD: - - - when he's asked
16 specifically, he said he - - - the weapon that killed
17 him had to be more than a bottle, something heavier
18 than a bottle, and that he was hit with it multiple
19 times. Clearly, he was talking about the bat. And -
20 - -

21 JUDGE STEIN: Well, he said that that
22 caused the skull fractures, but he said that there
23 were also brain injuries, including bleeding around
24 the brain, that are not - - - that were not
25 necessarily associated with the fractures. And that

1 such - - - such injuries could cause death, as well.

2 MR. BERNHARD: Could cause death, but I
3 believe the defense attorney specifically asks him on
4 cross, and I think he specifically said the cause of
5 death here was not from one hit with a bottle but
6 multiple hits with something heavier. Again, he was
7 obviously talking - - -

8 JUDGE ABDUS-SALAAM: The jury believed what
9 he said in what my colleagues just read to you, as
10 opposed to what he said later on cross-examination,
11 and decided that your client caused this man's death,
12 even if he weren't acting in concert with Phoenix.

13 MR. BERNHARD: It just seems as though the
14 ME ended making it clear that the cause - - - the
15 weapon that caused the man's death was the baseball
16 bat.

17 JUDGE STEIN: Well, but what he didn't say
18 may also, you know, be a factor, and that is I - - -
19 I - - - I didn't see where he ever said that the - -
20 - the hit over the head with the bottle was not a
21 contributing factor to the death. Maybe it didn't -
22 - - wasn't the only factor, but that he didn't - - -
23 he didn't say it - - - it wasn't a contributing
24 factor.

25 MR. BERNHARD: No. Your Honor, I - - - I

1 read - - - I read the cross-examination that the ME's
2 stating that the - - - the weapon that caused his
3 death was - - - was clearly the bat.

4 JUDGE READ: And the bottle wasn't a
5 contributing factor? The ME said that? He
6 discounted the bottle as a contributing factor?

7 MR. BERNHARD: Apparently, from what he
8 said on cross, if it was just the bottle, it wouldn't
9 have caused - - - he wouldn't have died.

10 JUDGE READ: Well, that - - -

11 MR. BERNHARD: But he said the death was
12 caused by multiple hits with something heavier than
13 the bottle.

14 JUDGE READ: And that's not enough for the
15 jury?

16 MR. BERNHARD: I don't believe it is. No,
17 Your Honor. I want to quickly move to the other
18 point because - - -

19 CHIEF JUDGE LIPPMAN: Quickly, counsel.
20 You have a minute, yeah.

21 MR. BERNHARD: Yes. This court has said
22 that a defendant has an absolute unequivocal right to
23 be present when anything is told to the jury, inst -
24 - - instructions, supplemental instructions - - - and
25 in this case, what was told to the jury I don't

1 believe can be called administerial. Not - - -

2 JUDGE STEIN: Well, if - - - if - - - but -
3 - - if - - - if we have a de minimis rule that - - -
4 that applies to this, and I don't know if we do or
5 not, but if we do, wouldn't this at least be de
6 minimis given the circumstances here?

7 MR. BERNHARD: I don't - - - I don't think
8 you do have a de minimis rule. The majority in
9 Rivera said there isn't. Morales and Bragle together
10 do not establish a de minimis rule. Bragle actually
11 - - - it's an interesting case, 1882, before my time.
12 But it - - - it said that the defendant had left the
13 courtroom to make a phone call. But this court, the
14 1882 version of this court, ended up saying that he
15 was in the courtroom; he was in an appendage of the
16 courtroom. So that case does not stand for de
17 minimis.

18 CHIEF JUDGE LIPPMAN: Okay, counsel.
19 You'll have your rebuttal.

20 MR. BERNHARD: Thank you. Thank you.

21 MR. LIEBERMAN: Good afternoon. My name is
22 Seth Lieberman.

23 CHIEF JUDGE LIPPMAN: So what's the
24 evidence, counsel, that shows some kind of a act in
25 concert in any way, sort of a shared purpose? What

1 do you have here? It doesn't - - - on its surface,
2 there's not too much to grab onto.

3 MR. LIEBERMAN: Your - - - Your Honor,
4 there's a lot.

5 CHIEF JUDGE LIPPMAN: Yeah. What is the
6 lot?

7 MR. LIEBERMAN: I'll - - - I'll tell you.
8 First, you have Romel, the victim's brother, saying
9 that both came out of the car, the SUV,
10 simultaneously. It happened almost immediately after
11 one of the brothers had kicked the car. It happens
12 all the time that people are acting in concert
13 without actually having an overt communication.

14 CHIEF JUDGE LIPPMAN: So there's nothing
15 overt that has to happen that tells you that they're
16 - - -

17 MR. LIEBERMAN: Abs - - - no. Well, for ex
18 - - - for example.

19 CHIEF JUDGE LIPPMAN: Go ahead.

20 MR. LIEBERMAN: If - - - if you're at
21 somebody's house for dinner - - -

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. LIEBERMAN: - - - and the dinner's
24 ended and everybody starts getting up and starts
25 clearing the table to help out the host, they're all

1 acting in concert, but nobody said anything.

2 Similarly, here - - -

3 CHIEF JUDGE LIPPMAN: So he - - -

4 JUDGE RIVERA: That's a far - - - that's a
5 far distance from somebody being beaten to death by a
6 bat when the other person isn't even near them.

7 MR. LIEBERMAN: Okay, so - - - so why are
8 they getting out of the car? The - - - if they're
9 getting out of the car - - -

10 JUDGE RIVERA: Defendant could be planning
11 to attack and then he ran after the other person as
12 opposed to this murder with the bat.

13 MR. LIEBERMAN: You know, this happens
14 within a matter of seconds on the spur of the moment.
15 But if they're coming out simultaneously, they are
16 aware of each other's conduct.

17 CHIEF JUDGE LIPPMAN: So that's your - - -
18 the key piece of evidence in your mind is that they
19 came out simultaneously?

20 MR. LIEBERMAN: Well, I - - - that is
21 absolutely key, and the - - - and the fact that it -
22 - - it was - - - it was instigated by the - - - the
23 kicking of the car. That they - - - they both
24 reacted to that. The defendant knew that the
25 codefendant had a bat in the SUV, so why is he

1 keeping this bat in the SUV? Obviously, for use as -
2 - - as a weapon in - - - in certain - - - certain
3 circumstances.

4 JUDGE PIGOTT: Wouldn't - - - wouldn't all
5 of what the information you just indicated apply, as
6 well, to the - - - was it to the brother that
7 testified for you?

8 MR. LIEBERMAN: Excuse me?

9 JUDGE ABDUS-SALAAM: Nathan - - -
10 Nathaniel.

11 JUDGE PIGOTT: Who - - - who - - - yeah, is
12 it Nathaniel?

13 JUDGE ABDUS-SALAAM: Yeah.

14 JUDGE PIGOTT: Was - - - was - - - was your
15 witness that testified as to what was going on?

16 MR. LIEBERMAN: There - - - there were
17 several wit - - - we had multiple witnesses who were
18 eyewitnesses.

19 JUDGE ABDUS-SALAAM: The other passenger.
20 I think - - -

21 JUDGE PIGOTT: Yeah.

22 JUDGE ABDUS-SALAAM: - - - Judge Pigott is
23 - - -

24 MR. LIEBERMAN: Where - - - well, the - - -
25 the - - -

1 JUDGE ABDUS-SALAAM: - - - talking about
2 the other passenger in the car.

3 MR. LIEBERMAN: Well, the - - - the
4 passenger in the car - - -

5 JUDGE PIGOTT: Let's name him. What's his
6 name?

7 MR. LIEBERMAN: Nathaniel. But he - - -
8 he's - - -

9 JUDGE PIGOTT: Right, Nathaniel - - -

10 MR. LIEBERMAN: - - - one witness.

11 JUDGE PIGOTT: All right.

12 MR. LIEBERMAN: He's one witness.

13 JUDGE PIGOTT: Right. But - - - but you
14 said these three things happened. Nathaniel got out
15 of the car when the other two got out of the car.
16 Are we in concert of action?

17 MR. LIEBERMAN: No, no. Your Honor, we - -
18 - this is the evidence viewed in the light most
19 favorable to the People. So we look at the evidence
20 that is most favorable to the People.

21 JUDGE PIGOTT: I understand that. And what
22 I'm suggesting to you is you say these are the things
23 that are most helpful to us, and I'm saying all those
24 things that are most helpful to you to show this
25 concert of action should have led to the indictment

1 of the other passenger, because he did exactly the
2 same thing.

3 MR. LIEBERMAN: No, Your Honor, Nathaniel
4 didn't do anything to hurt the victim.

5 JUDGE PIGOTT: Well, that's - - - that's
6 later on. I'm - - - I'm - - - you're - - - you're
7 trying to say they're in concert of action because
8 they got out of the car. Well, so did - - - so did
9 the third passenger.

10 MR. LIEBERMAN: No, but - - -

11 JUDGE PIGOTT: You're saying - - - you're
12 saying because they reacted to being kicked - - - the
13 car being kicked that you - - -

14 MR. LIEBERMAN: But let's - - - let's not
15 forget - - - let's not - - - let's not forget what
16 proceeded this. The driver of the car, unprovoked,
17 before any of this happened, starts yelling hostilely
18 to the two brothers slurs - - -

19 JUDGE PIGOTT: You're missing my point, but
20 that's okay. Go ahead.

21 MR. LIEBERMAN: If - - - then explain it to
22 me, Your - - -

23 CHIEF JUDGE LIPPMAN: But these - - - but -
24 - - but Phoenix and the defendant, weren't yelling
25 hostilely, were they?

1 MR. LIEBERMAN: But the defendant - - -
2 wait, Phoenix is yelling hostilely.

3 CHIEF JUDGE LIPPMAN: Yeah.

4 MR. LIEBERMAN: Phoenix is the codefendant.

5 JUDGE RIVERA: You mean Nathaniel,
6 Nathaniel and the defendant.

7 MR. LIEBERMAN: Nathaniel is uninvolved,
8 but defendant is involved in the sense that he knows
9 - - -

10 CHIEF JUDGE LIPPMAN: What's the total
11 involvement of defendant and Phoenix? What does
12 defendant do?

13 MR. LIEBERMAN: Okay. The defendant gets
14 out of the car, knocks the victim on the head, the
15 bottle breaks, the victim falls to the ground.

16 CHIEF JUDGE LIPPMAN: And then goes up and
17 chases the other brother.

18 MR. LIEBERMAN: Right. But almost at the
19 same time, according to Romel, the - - -

20 CHIEF JUDGE LIPPMAN: What does Phoenix do?

21 MR. LIEBERMAN: Phoenix gets out of the car
22 and grabs a bat from the back and starts whacking the
23 victim on the ground. And - - -

24 CHIEF JUDGE LIPPMAN: Yeah. But do you
25 think that the defendant says, okay, I'll hit him

1 with a bottle, you get him with the bat? It doesn't
2 - - - there's nothing that connects the two.

3 MR. LIEBERMAN: You know - - - you know,
4 the - - -

5 JUDGE FAHEY: Isn't it your point, though,
6 that he comes back with - - - and after chasing the
7 other brother and - - - and kicks him a few times
8 too, and there's some kicks also, an assault, isn't -
9 - - isn't that what - - -

10 MR. LIEBERMAN: I don't believe he comes
11 back and kicks him after that. No.

12 JUDGE FAHEY: Oh, okay, all right.

13 MR. LIEBERMAN: But - - - but, you know - -
14 -

15 JUDGE ABDUS-SALAAM: He gets in the car and
16 drives away with him - - -

17 MR. LIEBERMAN: Right.

18 JUDGE ABDUS-SALAAM: - - - with Phoenix.

19 MR. LIEBERMAN: Right. But - - - okay,
20 even if you don't accept the acting in concert
21 theory, which - - - but I think there is suffic - - -
22 obviously sufficient evidence for that, you have the
23 defendant acting as a principal, and that theory has
24 to be viewed in the context of the charge that was
25 given to the jury, because there was no objection to

1 the charge. And under those circumstances, you just
2 look at the charge, determine whether the elements
3 were established. There was - - -

4 CHIEF JUDGE LIPPMAN: I could see you're -
5 close - - I can see how you get close to joint
6 assault, you know, but - - - but this business with
7 defendant and - - - and manslaughter just doesn't
8 seem to - - - you just don't have - - - it's really
9 hard to get your arms around something that brings it
10 together.

11 MR. LIEBERMAN: Okay, first of all, in the
12 context of the charge, the People did not have to
13 establish reasonable foreseeability. They all - - -
14 all they had to - - - to establish was that defendant
15 was a contributory cause. In other words, he either
16 set in motion the - - - the chain of events or - - -
17 or forged a link in the chain of events. And by
18 hitting the victim on the head, he rendered the
19 victim totally defenseless. He then chases after the
20 one person who is likely to come to the victim's
21 assistance, the - - - the victim's brother.

22 CHIEF JUDGE LIPPMAN: What does this "set
23 in motion" really mean? If I - - - if I tap somebody
24 or give them a - - - a light punch or whatever and
25 they go to the ground, and then - - - and then you go

1 away and someone comes over afterward and says, oh,
2 the guy's on the ground defenseless, I'm going to
3 beat him to death with a baseball bat. Defendant is
4 not responsible for what the next person does, right?

5 MR. LIEBERMAN: But, Your Honor, we're - -
6 - we're talking - - -

7 CHIEF JUDGE LIPPMAN: What's the difference
8 between this situation and that?

9 MR. LIEBERMAN: We're - - - we're talking
10 about causation. Whether the defendant caused the
11 death and that - - -

12 CHIEF JUDGE LIPPMAN: I understand he
13 caused him to go on the ground.

14 MR. LIEBERMAN: And immobilize him.

15 CHIEF JUDGE LIPPMAN: But the bottle didn't
16 kill him, right?

17 MR. LIEBERMAN: No, no, no, wait. Wait a
18 second. He's knocked on the head with a bottle.

19 CHIEF JUDGE LIPPMAN: Yeah.

20 MR. LIEBERMAN: He's unconscious, he can't
21 move, he can't defend himself.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. LIEBERMAN: He can't escape. Then - -

24 -

25 CHIEF JUDGE LIPPMAN: But - - - but say - -

1 - say they weren't in the same car, these two guys,
2 and that - - - that happens and he's unconscious;
3 then another person comes and beats the guy to death
4 a bat.

5 MR. LIEBERMAN: Als - - -

6 CHIEF JUDGE LIPPMAN: Is the defendant
7 responsible for what the second guy does?

8 MR. LIEBERMAN: Under - - - first of all,
9 under the charge, yes, because all they were charged
10 with was causation. But let's go to the reasonable
11 foreseeability aspect of it. With respect to
12 reasonable foreseeability, the defendant is aware
13 that Phoenix is really angry, just - - - unprovoked
14 initially.

15 CHIEF JUDGE LIPPMAN: So that's different
16 than if someone who had no connection with him - - -

17 MR. LIEBERMAN: Absolutely.

18 CHIEF JUDGE LIPPMAN: - - - would have
19 walked over.

20 MR. LIEBERMAN: Absolutely. He had so much
21 more information to the - - - to the - - - the
22 defendant.

23 CHIEF JUDGE LIPPMAN: You're saying he's
24 thinking, oh, he knows what happened, he knows
25 they're kicking the car, they're spitting or whatever

1 the hell it was, so therefore - - -

2 MR. LIEBERMAN: Just - - - can I just say
3 about - - - something about the spitting?

4 CHIEF JUDGE LIPPMAN: Yes.

5 MR. LIEBERMAN: That's just - - - that's
6 just coming from defendant's statement, so that
7 should be totally discounted, because we have to look
8 at - - -

9 CHIEF JUDGE LIPPMAN: But your point is - -
10 - I'm trying to get - - -

11 MR. LIEBERMAN: Yeah.

12 CHIEF JUDGE LIPPMAN: - - - what the
13 connection. Your point is that defendant knows a lot
14 about Phoenix, knows a lot what led up to his hitting
15 this guy with the bottle.

16 MR. LIEBERMAN: Ex - - - exactly.

17 CHIEF JUDGE LIPPMAN: That's your basic - -
18 -

19 MR. LIEBERMAN: Ex - - - ex - - -

20 CHIEF JUDGE LIPPMAN: That's the cement
21 that ties it, even if there's nothing overt?

22 MR. LIEBERMAN: Abs - - - abs - - -
23 absolutely. Absolutely.

24 JUDGE FAHEY: Judge, can I - - - can I say
25 something?

1 MR. LIEBERMAN: And he also knows about the
2 bat.

3 CHIEF JUDGE LIPPMAN: Judge Fahey.

4 MR. LIEBERMAN: Yes.

5 JUDGE FAHEY: Thank you. My understanding
6 of your case is - - - is a little different than - -
7 - than yours.

8 MR. LIEBERMAN: Okay.

9 JUDGE FAHEY: The way I see the case - - -

10 MR. LIEBERMAN: Um-hum.

11 JUDGE FAHEY: - - - is - - - is that there
12 was a - - - as far as the defendant goes, he - - -
13 and the aiding question, he hits him with the bottle,
14 he chases after the brother, and then he comes back.
15 And after he's been - - - the - - - the victim has
16 been hit with a baseball bat by the codefendant, the
17 other vict - - - the other - - - this codefendant,
18 this defendant starts kicking him. And the way I
19 read the record, he said he just started kicking him
20 there, this is at page 102. "He stayed there."
21 "Who, the one who had the bottle?" "Yes, and he
22 never left." He was kicking him, so my reading of
23 the record is is that - - - is that the taxi cab
24 driver, Almonte, testifies that your client came - -
25 - or not your client, I'm sorry - - - that the

1 defendant came back and - - - and was kicking him.

2 And - - -

3 MR. LIEBERMAN: Well - - -

4 JUDGE FAHEY: So let me finish.

5 MR. LIEBERMAN: Um-hum.

6 MR. LIEBERMAN: That being the case - - -

7 MR. LIEBERMAN: Um-hum.

8 JUDGE FAHEY: - - - it supports your
9 fundamental proposition, but if that's a misreading
10 of it, if you say the proof is different than - - -
11 than the way I read that - - -

12 MR. LIEBERMAN: Your - - - Your Honor, if -
13 - - I - - - I'm not - - - presently not aware of that
14 particular detail, but if that's correct - - -

15 JUDGE FAHEY: Well, it's at 101, 102 in the
16 record, and it's from Almonte.

17 MR. LIEBERMAN: If that's correct then that
18 - - - that's - - -

19 JUDGE FAHEY: Yeah.

20 MR. LIEBERMAN: - - - that's great.

21 Absolutely.

22 JUDGE FAHEY: Well, I don't know if it's
23 great, but it - - - it is what it is, right?

24 MR. LIEBERMAN: But, right. It - - - it -
25 - - it - - - it shows the - - - the - - - the acting

1 in concert. It's the continuation. But the
2 reasonable foreseeability is if you render somebody
3 incapable of fleeing or defending himself, you chase
4 after the person who could defend them, you're aware
5 that some other person is really angry at the person,
6 has a bat available, and is also - - - relying on
7 Romel's testimony that they come out simultaneously -
8 - - is also aware that Phoenix has come out of the
9 car, and for what purpose, to attack him obviously
10 because he's really annoyed or angry that the guy has
11 kicked his car. He's dissed his car. That's what he
12 talks about afterwards. That's reasonably - - -
13 reasonable foreseeability. And - - -

14 JUDGE RIVERA: Does - - - does it matter if
15 - - - if he may think that he's going to attack him
16 but he has no idea that Phoenix is going to take a
17 bat and beat him over the head several times and
18 pummel him to death?

19 MR. LIEBERMAN: No, it's not - - -

20 JUDGE RIVERA: Does it - - - does it matter
21 - - -

22 MR. LIEBERMAN: He's - - -

23 MR. LIEBERMAN: - - - if he might think
24 we're just going to attack them, whatever?

25 MR. LIEBERMAN: Well, cer - - - certainly -

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JUDGE RIVERA: Injure them?

MR. LIEBERMAN: That - - - that - - - that would be enough, but the fact that he knew about the bat, I think that adds so much more. But even if he wasn't aware of the bat, it would have been enough, because he was sufficiently angry to know about the attack.

And I - - - and I just want to quickly say that in - - - in the event that you find that there wasn't legally sufficient evidence for manslaughter in the first degree, according to this court's decision in Suarez v. Byrne, 10 N.Y.3d 523, the proper remedy be - - - would be to remit to the trial court for a new trial on the counts that the jury - - -

CHIEF JUDGE LIPPMAN: Right.

MR. LIEBERMAN: - - - did not consider.

CHIEF JUDGE LIPPMAN: Right, right.

MR. LIEBERMAN: So that includes the assault in the first degree.

CHIEF JUDGE LIPPMAN: Okay, counsel.

MR. LIEBERMAN: And so with respect to the instructions - - -

CHIEF JUDGE LIPPMAN: Quickly, counsel. Go

1 ahead.

2 MR. LIEBERMAN: - - - not a violation of
3 310.30 because it was in response to - - -

4 CHIEF JUDGE LIPPMAN: Is that de minimis?
5 Is that - - -

6 MR. LIEBERMAN: Absolutely de minimis,
7 totally inconsequential, about something - - -

8 JUDGE RIVERA: Is that our rule about de
9 minimis?

10 MR. LIEBERMAN: Well, there is a de minimis
11 rule. There is a rule regarding de minimis
12 violation. If any case is de minimis violation, this
13 is it, be - - -

14 JUDGE READ: But you're saying it wasn't in
15 response to a juror's question.

16 MR. LIEBERMAN: No, absolutely not.
17 Absolutely not. This was totally coming from the - -
18 - the court and - - - and the - - - the attorneys.

19 JUDGE STEIN: But - - - but - - - but if -
20 - - if we say that jury instructions, whether it's
21 the initial instruction or it's an instruction that
22 comes following a - - - a question from the jury - -
23 -

24 MR. LIEBERMAN: Yes.

25 JUDGE STEIN: - - - I mean, why wouldn't

1 all - - - why wouldn't all jury instructions be the
2 same?

3 MR. LIEBERMAN: No, no. Because - - -
4 because a resp - - - a response to a request from a
5 jury, that indicates - - - and this court has said
6 that that could be determinative of - - - of the - -
7 - the - - - the verdict, because that shows what the
8 jury is concerned about.

9 JUDGE STEIN: This was a correction. It -
10 - - the initial jury instructions doesn't come from
11 resp - - - isn't based on a response.

12 MR. LIEBERMAN: That - - - that's correct.

13 JUDGE STEIN: That's the court - - -

14 MR. LIEBERMAN: Right.

15 JUDGE STEIN: - - - instructing the jury.

16 MR. LIEBERMAN: Right.

17 JUDGE STEIN: So in this case, what we
18 essentially have is an addendum or an amendment to
19 the jury - - -

20 MR. LIEBERMAN: Right, right.

21 JUDGE STEIN: - - - instruction, because
22 the court - - -

23 MR. LIEBERMAN: But about - - -

24 JUDGE STEIN: - - - made a mistake or
25 whatever happened.

1 MR. LIEBERMAN: But about a detail that's
2 inconsequential. Totally in - - -

3 JUDGE STEIN: Well, that - - - that's a
4 different question.

5 MR. LIEBERMAN: And that's - - - and that's
6 the de minimis violation.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. LIEBERMAN: Okay.

9 CHIEF JUDGE LIPPMAN: Thanks, counsel.

10 MR. LIEBERMAN: Thank you.

11 CHIEF JUDGE LIPPMAN: Rebuttal, counsel.

12 Counsel, what about this kicking business?

13 MR. BERNHARD: Actually, I - - - I believe
14 the kicking - - - one of the other witnesses I - - -
15 I believe saw kicking before my client ran after
16 Romel. I don't believe there was - - - I don't
17 recall there being kicking after he came back.

18 JUDGE FAHEY: That's the way - - -

19 MR. BERNHARD: At least that's - - - that's
20 the way - - -

21 JUDGE FAHEY: - - - the way I read it. You
22 know, it kind of speaks for itself. It's Almonte.
23 It's at 101, 102. You can look at it.

24 MR. BERNHARD: Okay, thank you.

25 JUDGE FAHEY: Yeah.

1 JUDGE PIGOTT: If you look at - - - if you
2 look at this thing, when I first looked at it,
3 there's sort of like big concert of action and little
4 concert of action. And, you know, when the - - -
5 when the first insult to the car happened, everybody
6 in that car was going to get these two guys because
7 they had dissed the car, and so acting in concert,
8 they did what they did. One guy went out with a bat
9 and beat somebody up. One guy went out with a bottle
10 and beat somebody. All of that was in concert of
11 action. That's, to me, a big concert of action.

12 What - - - what seems to have devolved here
13 is you want to say, well, within - - - within that,
14 we can tease out these actions and say this one was
15 not in concert with that one and therefore it's
16 insufficient. And that seems to me to be a flaw in
17 the - - - in - - - in - - - in the argument in terms
18 of what concert of action actually means. Am I
19 wrong?

20 MR. BERNHARD: I understand, Your Honor.
21 But again, I - - - I believe, even to - - - for there
22 to be acting in concert in the first instance, there
23 has to be some communication, verbal or physical or -
24 - - or something. There has to be some - - -

25 JUDGE READ: Wait. Have we - - - have we

1 ever said that, by the way, that there has to be some
2 kind of verbal communication?

3 MR. BERNHARD: No. But there's been a
4 number of cases where you've said - - -

5 JUDGE READ: Where's that's been the fact?

6 MR. BERNHARD: - - - you know, gestures
7 between the people and verbal. I mean, this was,
8 like, instantaneous. My client got out of the car
9 with a bottle. There was no - - - there has - - - he
10 had to intentionally - - -

11 CHIEF JUDGE LIPPMAN: What about your - - -
12 the argument that your adversary is saying that,
13 yeah, but he had a lot of knowledge when he jumped
14 out - - -

15 MR. BERNHARD: I think it's conv - - -

16 CHIEF JUDGE LIPPMAN: - - - about what
17 Phoenix was doing or thinking or whatever? Does that
18 make a difference?

19 MR. BERNHARD: I think it's pure
20 speculation on top of speculation. I mean, the - - -
21 again, I - - - I object to the fact that we have to -
22 - -

23 CHIEF JUDGE LIPPMAN: It's got to be
24 something, is your argument.

25 MR. BERNHARD: Well, we have to assume that

1 the bat was in the car as a weapon. I - - - I don't
2 think that's - - - that's reasonable, number one.
3 Phoenix is the one that yelled slurs at - - - slurs
4 at the two men. My client, not only does the
5 evidence show he did not, but the jury did not find -
6 - -

7 CHIEF JUDGE LIPPMAN: But he knows - - -
8 but your client knows that Phoenix is yelling slurs.

9 MR. BERNHARD: So in the moment that he
10 runs out of the car - - -

11 CHIEF JUDGE LIPPMAN: Does that mean
12 anything?

13 MR. BERNHARD: - - - to go after the guy
14 with the bottle because he spit at him, he's got to
15 be thinking that, well, Phoenix, I know, is really
16 angry at him and it was his car that was - - -

17 CHIEF JUDGE LIPPMAN: You're saying it's
18 just speculative.

19 MR. BERNHARD: It's just speculation.

20 CHIEF JUDGE LIPPMAN: Any - - - any way you
21 come at it.

22 MR. BERNHARD: It's completely speculation,
23 yes, Your Honor.

24 JUDGE RIVERA: Well, but what does he think
25 is going to happen, because he - - - he hits the

1 decedent, sees that he's down - - - well, he's
2 decedent later. Anyway, he runs after the brother.

3 MR. BERNHARD: Right.

4 JUDGE RIVERA: He's obviously - - - if he's
5 running after the brother and he's running from - - -
6 from where they're parked, he must be assuming
7 they're going to wait for him. What does he think is
8 going to happen in the interim?

9 MR. BERNHARD: First of all, he probably
10 wasn't thinking, Your Honor. He certainly couldn't
11 have foreseen that Phoenix - - -

12 JUDGE RIVERA: Well, he's got to be
13 thinking - - -

14 MR. BERNHARD: - - - was going to grab the
15 bat.

16 JUDGE RIVERA: No, no. He's got to be
17 thinking something. I understand your point, but
18 he's got to be thinking something. He's not going to
19 go out in the middle of the night, 2 in the morning,
20 whatever it was, complete dark, running off in the
21 street without thinking he's got a way to get home.

22 MR. BERNHARD: You're correct. But - - -

23 JUDGE RIVERA: He must anticipate the car
24 will be there and they will be there. What is he
25 going to - - - what does he think is going to happen

1 in the interim?

2 MR. BERNHARD: You're absolutely right.
3 But I - - - I think it's really complete speculation
4 for - - - for him to have foreseen that Phoenix was
5 going to take his bat, get out of the car, and beat
6 the guy over the head multiple times.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. BERNHARD: Thank you. Thank you.

9 CHIEF JUDGE LIPPMAN: Thank you both.
10 Appreciate it.

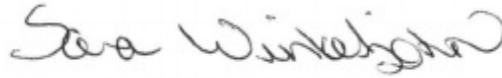
11 (Court is adjourned)

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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. Hakim B. Scott, No. 87 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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