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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

FRANKIE HATTON,

No. 157  
(papers sealed)

Respondent.

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20 Eagle Street  
Albany, New York 12207  
October 14, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
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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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Okay, let's go to  
2 People v. Hatton; that is number 157.

3 Counselor, do you want any rebuttal time?

4 MR. JOBLove: Yes, two minutes, please,  
5 Your Honor.

6 THE COURT: Two minutes, go ahead, counsel.

7 MR. JOBLove: May it please the court, my  
8 name is Leonard Joblove for the appellant on this  
9 appeal by the People.

10 The accusatory instrument in this case is  
11 facially sufficient with respect to the count of  
12 forcible touching to which the defendant entered a  
13 plea of guilty, because that count satisfies the  
14 facial sufficiency standard applicable to an  
15 information. In particular, the factual allegations  
16 which stated that the defendant smacked the  
17 complainant on the buttocks and that his act of doing  
18 so caused her to become alarmed, provided reasonable  
19 cause to believe - - -

20 CHIEF JUDGE LIPPMAN: Talk - - - talk to us  
21 about inference. What about inference?

22 MR. JOBLove: Yes, Your Honor. The - - -  
23 the Appellate Term held that the factual allegations  
24 are insufficient to support the elements of intent  
25 required by the statute.

1 CHIEF JUDGE LIPPMAN: So can we infer it?  
2 Can we infer it?

3 MR. JOBLove: Yes, Your Honor. In fact - -  
4 -

5 CHIEF JUDGE LIPPMAN: How so?

6 MR. JOBLove: Ordinarily intent needs to be  
7 inferred from the acts of the defendant and the  
8 circumstances surrounding the acts of the defendant.  
9 And it would be the exceptional case where there's an  
10 explicit statement of intent - - -

11 JUDGE STEIN: But what were the surrounding  
12 acts that were alleged here?

13 MR. JOBLove: The - - - the essence of the  
14 act, Your Honor, was - - -

15 JUDGE STEIN: Or the surrounding  
16 circumstances?

17 MR. JOBLove: Yes, well - - - well,  
18 starting with the act itself, it's - - - it's an act  
19 of forcible touching of - - - of the - - - an  
20 intimate part of the - - - the complainant's body;  
21 and the allegation also is that this touching by  
22 force was done without the consent of the  
23 complainant, because the allegation is that this  
24 touching caused the complainant to become alarmed.  
25 And in general, certainly for prima facie purposes,

1           allegations that a person is subjected to a touching  
2           of - - -

3                   CHIEF JUDGE LIPPMAN:   What does the intent  
4           have to be in this case?

5                   MR. JOBLove:   Your Honor, under the - - -  
6           the statute that defines the forcible touching  
7           offense, the intent needs to be that the defendant is  
8           performing the act for no legitimate purpose and  
9           either for the purpose of degrading or abusing the  
10          complainant or for the purpose of the actor's sexual  
11          gratification.

12                   JUDGE STEIN:   But how do we know - - -

13                   CHIEF JUDGE LIPPMAN:   So how - - - how do  
14          we know that from - - - from what we have?

15                   MR. JOBLove:   I think it's - - - it's - - -  
16          it's inherent in - - - in the act.   The reasonable  
17          inference from the act that the defendant is alleged  
18          to have approached the complainant on the street,  
19          subjected to - - - her to a forcible touching of an  
20          intimate part of her body without her consent - - -

21                   CHIEF JUDGE LIPPMAN:   So - - - so - - - so  
22          we get that.   How do you get to the next step?   It's  
23          - - - it's - - - it's part and parcel of those  
24          allegations?   I mean - - -

25                   MR. JOBLove:   Well, just in general, the

1 intent has to be inferred from the act and the  
2 surrounding circumstances.

3 CHIEF JUDGE LIPPMAN: Right.

4 JUDGE ABDUS-SALAAM: So it's - - - you're  
5 saying it's inherent that - - - that someone standing  
6 on a street corner and a stranger comes up and hits  
7 them in an intimate part of their body, like their  
8 behind, that - - - you can infer from that, that  
9 there was an attempt to embarrass or alarm or - - -  
10 or to satisfy the actor's sexual gratification?

11 MR. JOBLove: Yes, Your Honor. And  
12 certainly - - - this is at the pleading stage. So  
13 this is - - - the People are not expected to try  
14 their case in the accusatory instrument - - -

15 JUDGE ABDUS-SALAAM: So we don't need any  
16 other information, like there was a discussion or  
17 there was no discussion, nothing was said to the - -  
18 - between the two parties, either when the person  
19 came up and smacked this person on the behind, didn't  
20 have to say anything, didn't have to make any kind of  
21 comment or statement, and we can just infer that the  
22 act itself is - - -

23 MR. JOBLove: Well - - -

24 JUDGE ABDUS-SALAAM: - - - shows intent?

25 MR. JOBLove: Yes, Your Honor. Certainly,

1 if there either a contemporaneous statement by the  
2 defendant at the time or there was an admission  
3 subsequently regarding what his intent was, that  
4 would be relevant. But it's not - - -

5 JUDGE ABDUS-SALAAM: That does not have to  
6 be in the information, you're saying.

7 MR. JOBLove: Correct.

8 JUDGE PIGOTT: So you're saying it's an  
9 affirmative defense.

10 MR. JOBLove: Well, it's an element that  
11 the People have to prove beyond a reasonable doubt -  
12 - -

13 JUDGE PIGOTT: Well, then why - - - why are  
14 you saying, you know, if he wants to say that he  
15 didn't do it for sexual gratification, the - - - that  
16 way you're - - - you're suggesting that you don't  
17 have that burden, he or she does.

18 MR. JOBLove: Oh, no, Your Honor, quite the  
19 contrary. I was saying that in the event the  
20 defendant had made a statement indicative that he  
21 acted with the intent required by the statute, that  
22 would certainly be an additional fact that could be  
23 alleged.

24 CHIEF JUDGE LIPPMAN: How does this differ  
25 from like a Jo - - - the Jones case? How does it

1 differ from the Jones case?

2 MR. JOBLove: I'm not sure which case Your  
3 Honor is referring to. Jo - - - Jones?

4 CHIEF JUDGE LIPPMAN: Yeah, People v.  
5 Jones, 9 - - - it - - - when you're standing in the  
6 street and there's - - - where we said, you know,  
7 there's no - - - no showing of intent, not a  
8 reasonable inference. Are you familiar with that  
9 case?

10 MR. JOBLove: Was that the disorderly  
11 conduct case, Your Honor?

12 CHIEF JUDGE LIPPMAN: Yes.

13 MR. JOBLove: Yes, well, it's a question of  
14 - - - these are case-by-case about what are the facts  
15 alleged, what is - - - what is the conduct of the  
16 defendant - - -

17 CHIEF JUDGE LIPPMAN: But there we didn't  
18 find, you know, intent, right?

19 MR. JOBLove: Yes, Your Honor. But that  
20 was not a forcible touching statute. There was no  
21 allegation of a - - - a - - - a touching of the  
22 private parts of a person's body.

23 CHIEF JUDGE LIPPMAN: So this - - - the  
24 touching - - - coming back full circle, so the  
25 touching is all there needs to be?

1 MR. JOBLove: Well, it's not just the  
2 touching, it's the touching - - -

3 CHIEF JUDGE LIPPMAN: Or the allegation of  
4 touching, yeah.

5 MR. JOBLove: Yes, but it's an allegation  
6 of touching of - - - of - - - of an intimate part - -  
7 -

8 CHIEF JUDGE LIPPMAN: Yes.

9 MR. JOBLove: - - - of a person's body with  
10 the use of force, which is an element that's  
11 necessary for this particular offense. It was  
12 alleged that it caused the complainant to become  
13 alarmed, which supports the inference that there was  
14 a lack of consent.

15 There was the allegation that the defendant  
16 approached the complainant on the street, which  
17 supports the inference that it was the defendant who  
18 initiated this encounter, and that in terms of  
19 whether there was a legitimate purpose, that  
20 certainly tends to refute what would seem to be the  
21 unlikely inference in any event of the possibility of  
22 self-defense. And - - -

23 JUDGE RIVERA: So could I - - - what - - -  
24 to clarify. So in - - - in that conjunctive of the -  
25 - - of the statute, "purpose of degrading or abusing

1 the victim or the purpose of gratifying the  
2 defendant's sexual desire," which - - - which one  
3 applied here?

4 MR. JOBLove: Either could apply, Your  
5 Honor.

6 JUDGE RIVERA: Well, how does he know which  
7 one to defend against?

8 MR. JOBLove: He needs to defend against  
9 both because the statute provides in the disjunctive.  
10 But that means the People can prove either one.

11 JUDGE RIVERA: What if they listed five - -  
12 - five bases? He still wouldn't have to know which  
13 one or ones you're depending on?

14 MR. JOBLove: No, Your Honor, any more than  
15 in an assault prosecution where physical injury is  
16 defined as either impairment of physical condition or  
17 a substantial pain. The jury at trial would need to  
18 be unanimous that there was physical injury, but even  
19 at trial, the jury wouldn't have to be unanimous on  
20 that subsidiary component of the definition.

21 JUDGE FAHEY: Well, you know, what I'm  
22 wondering is could - - - could the alle - - - could -  
23 - - would it have been facially sufficient or more  
24 effective if you had said, being a stranger to the  
25 complainant he com - - - he completed these acts? It

1 - - - it would - - - it would seem to me, however, by  
2 articulating that she - - - that the complainant was  
3 alarmed, that should satisfy that element of the  
4 intent, to clarify that - - - because of course there  
5 can be intimate touching in public; that takes place  
6 all the time. And there can be other motivations. I  
7 mean, this person, as I understand it, offered a  
8 psychosis argument and was sent for some form of - -  
9 - of mental health counseling, wasn't he?

10 MR. JOBLove: Yes, Your Honor.

11 JUDGE FAHEY: Yeah, I - - - I think he - -  
12 - serendipity, I don't know what it is, but it  
13 sounded - - - going through the record. And it - - -  
14 it seemed there could be others - - - I mean, it  
15 could be a college student who's just an idiotic boor  
16 who's doing stupid things like this.

17 And - - - so it seems that there would have  
18 to be - - - and it is - - - it doesn't appear this  
19 way, but would you agree that there has to be some  
20 element in there that shows either from the  
21 complainant reacting to the - - - to the touching by  
22 saying it - - - it was objected to, or by the fact  
23 that there was no relationship at all, like there  
24 would be a stranger, to establish his element of  
25 intent?

1                   MR. JOBLove: Yes, well, fir - - - first,  
2                   certainly, just the fact of touching would not be  
3                   sufficient; and even a forcible touching generally  
4                   would not be sufficient - - -

5                   JUDGE FAHEY: And I'm not sure about that.  
6                   Forcible, it - - - it may be, but anyway, go ahead.

7                   MR. JOBLove: If - - - if the theory is  
8                   that it's possible for someone to consent to the  
9                   forcible touching, but - - - but - - - but the point  
10                  is there's more than that, and - - - and if it's a  
11                  forcible touching without the consent of the  
12                  complainant, in general, that's going to be enough.

13                  Here, certainly, if they were strangers,  
14                  that's an additional fact that could have been  
15                  alleged. But if the question is whether it's legally  
16                  necessary to make a prima facie case, it's not. And  
17                  in this case, even while there wasn't an explicit  
18                  statement that they were strangers, the fact that the  
19                  accusatory instrument alleged two different acts  
20                  against two different complainants a week apart that  
21                  were essentially the same - - - approaching someone  
22                  on the street and engaging in the same act - - - it  
23                  self-supports the inference that these were not  
24                  acquaintances - - -

25                  CHIEF JUDGE LIPPMAN: Okay, counselor.

1 MR. JOBLove: - - - of the defendant.

2 CHIEF JUDGE LIPPMAN: Thanks, counsel.

3 MR. JOBLove: Thank you.

4 CHIEF JUDGE LIPPMAN: You'll have your  
5 rebuttal. Let's hear from your adversary.

6 MR. HOPKIRK: May it please the court, my  
7 name is Arthur Hopkirk and I represent Frankie  
8 Hatton.

9 CHIEF JUDGE LIPPMAN: Why isn't this a  
10 reasonable inference in this case, counselor?

11 MR. HOPKIRK: Because the mere infer - - -  
12 the mere facts, and this is all we have in this case,  
13 of the complainant approaching somebody on the street  
14 and smacking her about the buttocks addresses the  
15 elements of touching and force, but it says nothing,  
16 for example, about the "for no legitimate purpose"  
17 element of the crime.

18 JUDGE ABDUS-SALAAM: How - - - what about  
19 the complainant's statement that she was alarmed or  
20 annoyed by this? You can't - - -

21 MR. HOPKIRK: That - - -

22 JUDGE ABDUS-SALAAM: - - - that doesn't  
23 raise an inference that this was without consent and  
24 that there was an intent to embarrass or alarm her?

25 MR. HOPKIRK: It - - - Your Honor, it

1           certainly goes, as the Appellate Term found, to the  
2           lack of consent element, but it doesn't go to the  
3           "for no legitimate purpose" argument - - - element,  
4           or for the sexual gratification or degrade or abuse  
5           elements. The People's argument in - - -

6                   JUDGE RIVERA: But - - - but why not? Why  
7           doesn't it go to that?

8                   MR. HOPKIRK: Because - - - well, first of  
9           all, you only get to the question of whether you can  
10          draw inferences if there are some facts alleged going  
11          to a particular element. There aren't any facts  
12          alleged here going to those elements.

13                   And in fact, the People, as one of the  
14          questions was suggesting about affirmative defenses,  
15          for whatever reason, the legislature apparently con -  
16          - - in putting in a "no legitimate purpose" element  
17          to the statute, contemplated that there might be some  
18          circumstances in which there would be a legitimate  
19          purpose and thus, consistent with the legislative  
20          scheme, the People need to allege some facts.

21                   They've alleged no facts. And very - - - I  
22          want to make it very - - -

23                   JUDGE STEIN: What would be an example of  
24          facts that - - - that you think could have been  
25          alleged and would have been sufficient here?

1                   MR. HOPKIRK: Certainly, Your Honor. And I  
2 want to make clear, it doesn't have to be many facts,  
3 it - - - but some facts. And I would suggest that an  
4 example that might have done the trick here is if the  
5 information had pleaded that there had been no prior  
6 interaction and no prior relationship between Mr.  
7 Hatton and the complainant. That might have been  
8 enough, but we don't even have that here.

9                   JUDGE FAHEY: How does - - - how does that  
10 get to "no legitimate purpose"?

11                   MR. HOPKIRK: Well, there we get back to  
12 the district attorney's argument that we don't have  
13 to have allegations of the sort which would be  
14 sufficient at a trial, but at least with those, you  
15 start to get towards some support and drawing some  
16 probable inferences there; whereas with no facts, you  
17 don't even get to that point.

18                   JUDGE FAHEY: So give me an example of a  
19 fact in this setting that would indicate either no  
20 legitimate or a legitimate purpose?

21                   MR. HOPKIRK: Well, a legitimate purpose,  
22 as we argue in our brief, would be self-defense. A  
23 no legitimate purpose would be many other things,  
24 obviously, the - - - the sexual gratification.

25                   And I think contrasting the facts of this

1 case with the Guaman case is useful. Guaman was the  
2 forcible touching case that was up here about a year-  
3 and-a-half ago. And there you have a defendant who  
4 was alleged to have exposed himself and had been  
5 rubbing up to the buttocks of somebody in the subway  
6 with an exposed penis and so forth. And there,  
7 clearly, I think under those facts - - -

8 JUDGE FAHEY: So there the - - -

9 MR. HOPKIRK: - - - those facts alone you  
10 can infer - - -

11 JUDGE FAHEY: So there the legitimacy of  
12 his purpose was unquestioned.

13 MR. HOPKIRK: It clearly was illegitimate.

14 JUDGE FAHEY: I would say so, yes.

15 MR. HOPKIRK: Yes, and - - -

16 JUDGE FAHEY: All right. But here it's  
17 different.

18 MR. HOPKIRK: That's correct, Your Honor.  
19 And I think that's a - - - a key point here is you  
20 have to look at context and circumstances - - -

21 JUDGE ABDUS-SALAAM: Speaking of context,  
22 counsel, there is another allegation that this same  
23 defendant came up to a second woman and smacked her  
24 on the buttocks as well. So are you - - - and there  
25 they were not together. They were two different

1 incidents.

2 So would you not be able to, from that  
3 context, infer that there's no legitimate purpose in  
4 smacking two or three or - - - I think there were six  
5 women in - - - in this instance - - - this defendant  
6 smacked six different women on the buttocks as they  
7 were standing in public on the street. So would - -  
8 - would that context suggest to you that there was no  
9 legitimate purpose in what he did or perhaps that he  
10 was doing it to satisfy his own sexual gratification?

11 MR. HOPKIRK: No, Your Honor, and my answer  
12 to that has, I think, three parts. First of all, the  
13 forcible touching counts on those other incidents  
14 suffer from the same defects as the one - - - on the  
15 one they pled guilty to; and one can't cure a de - -  
16 - jurisdictionally deficient count by drafting  
17 multiple counts - - -

18 JUDGE ABDUS-SALAAM: We're - - - we're - -  
19 - we are, to then, according to you - - - we would  
20 then be - - - you would be suggesting that these were  
21 all friends of his or acquaintances and he just  
22 happen to see them on the street and want to come up  
23 and smack them on the buttocks and that's it?

24 MR. HOPKIRK: No, Your Honor. Let - - -  
25 let me - - - I think it's useful to look at it - - -

1 let's assume for the purposes of argument that when  
2 you have a pattern of several incidents of this sort  
3 that perhaps some of these were not for legitimate  
4 purposes. Let's just assume that for purposes of  
5 argument. That doesn't cure the problem of - - -  
6 without providing some facts as to the context of  
7 these, you can't tell whether these involve similar  
8 MOs or completely different inci - - - situations  
9 that led to them.

10 JUDGE FAHEY: I think for your purposes, we  
11 should assume they're all the same. Really, it comes  
12 down to what Judge Lippman brought up initially,  
13 which is whether or not intent can be inferred from  
14 the act. Clearly there was a touching here. Since  
15 it's referred to as "smacking", we'll assume that it  
16 was a forcible touching. So therefore, can be  
17 inferred directly from the act? And either it can or  
18 it cannot. And it's whether or not that logical  
19 inference can be left, because there really isn't  
20 anything else to connect it.

21 MR. HOPKIRK: Yes, Your Honor, I'd agree  
22 with that.

23 JUDGE FAHEY: All right.

24 MR. HOPKIRK: Now - - -

25 JUDGE RIVERA: So then could we turn to the

1 pur - - -

2 JUDGE FAHEY: If it's quite - - - I'm  
3 sorry, Judge.

4 JUDGE RIVERA: No, no, finish your thought.

5 JUDGE FAHEY: It's quite common in sex  
6 cases - - - you know, in sex - - - sexual offenses  
7 for - - - almost always is the intent inferred from  
8 the act.

9 MR. HOPKIRK: That - - - that is often  
10 true, yes, Your Honor. However, that still doesn't  
11 excuse providing no facts relating to the context,  
12 however minimal here. As I say, the People would  
13 like to write some of the elements out of the statute  
14 - - -

15 JUDGE PIGOTT: Do you have an opinion - - -  
16 he was charged with, I think, six charges, twelve  
17 charges, a lot of them - - - forcible touching,  
18 sexual abuse to the third degree, and harassment in  
19 the second degree with respect to a number of - - - a  
20 number of people. When he pled guilty, the court  
21 said, you know - - - you know, walked - - - walked  
22 him through, and said "and this was done for the  
23 purposes of abusing that person or to gratify your  
24 sexual desire. Is that correct?" And he says, yes.  
25 And so the plea is accepted.

1                   And I understand you don't have to preserve  
2 jurisdictional stuff, but had the People charged him  
3 with harassment, you would not have the arguments  
4 that you have today, and yet, by pleading guilty,  
5 you've gotten rid of all of those charges, all - - -  
6 you know, the charges that may have not had a  
7 jurisdictional impediment such as you're raising  
8 today as - - - do you have a thought on how these  
9 pleas are taken and - - - and - - - and what's going  
10 here and - - -

11                   MR. HOPKIRK: Well, I ge - - - I guess the  
12 answer to that is, among other things, the - - - on a  
13 harassment charge, I forget the - - - I believe that  
14 was the violation - - the People - - - I won't speak  
15 for them - - - I'm suspecting they would answer that  
16 they want a plea to a crime, not to a violation. But  
17 beyond that, I think I'd be just speculating.

18                   JUDGE RIVERA: Let - - - counsel, let me -  
19 - - let ask you about - - - the same question I asked  
20 the People. The second part of the statute, the  
21 purpose of degrading or abusing the victim or the  
22 purpose of gratifying the defendant's sexual desires.  
23 Did they have to make clear in the instrument which  
24 of those purposes - - -

25                   MR. HOPKIRK: It certainly would - - -

1 JUDGE RIVERA: - - - drove the defendant?

2 MR. HOPKIRK: Excuse me?

3 JUDGE RIVERA: Which of those purposes  
4 motivated the defendant? Do they have to explain  
5 which one?

6 MR. HOPKIRK: I think they need to - - -  
7 they can plead in the alternative, but they need to  
8 provide some facts supporting whatever theories  
9 they're going to rely on, I guess would be my answer  
10 to that.

11 JUDGE ABDUS-SALAAM: Counsel, you - - - you  
12 mentioned - - - I'm - - - I'm just getting back to  
13 the inference question again. You mentioned in your  
14 brief that if the instrument - - - the instrument  
15 should have said something regarding whether there  
16 had been some words exchanged between the victim and  
17 - - - and the actor or blows or some - - - some sort  
18 of hitting. And if the instrument - - - suppose the  
19 instrument had said that none of these things  
20 occurred, would you then agree that you could infer  
21 from the instrument that the purpose of hitting this  
22 person on the buttocks was either to intimidate or  
23 embarrass or annoy or to satisfy the actor's sexual  
24 desire or gratification?

25 MR. HOPKIRK: Just so I'm sure I understand

1 the question, my understanding is that Your Honor's  
2 asking if they had pled facts of there was no  
3 conversation - - -

4 JUDGE ABDUS-SALAAM: Right.

5 MR. HOPKIRK: - - - between the  
6 complainant, there was no physical altercation  
7 between the complainant, et cetera, if they had pled  
8 those things, could you infer? I think certainly for  
9 pleading purposes, as opposed to trial conviction  
10 purposes, yes, you could infer; but none of that  
11 happened.

12 And I'm not even sure as - - - in - - - as  
13 I said in response to one of the earlier questions,  
14 you probably don't even need quite as much as I was  
15 just suggesting in response to your question. As I  
16 said in response, I believe, to Judge Stein's  
17 question, probably it would have been enough if you  
18 had pled something along the lines of just that there  
19 had been no prior interaction or no prior  
20 relationship between Mr. Hatton and the complainant,  
21 but there wasn't even that. And so for that reason,  
22 the accusatory instrument was jurisdictionally  
23 deficient and the order of the Appellate Term should  
24 be affirmed.

25 CHIEF JUDGE LIPPMAN: Thank you, counselor.

1 Counselor, rebuttal?

2 MR. JOBLove: Yes, thank you, Your Honor.  
3 First I'd just like to follow up on Judge Rivera's  
4 question about the fact that there are two  
5 alternative intents offered or that can satisfy the  
6 elements of the statute. And another example would  
7 be in a burglary case. There has to be proof that  
8 the defendant unlawfully entered the premises with  
9 intent to commit a crime therein. And there's no  
10 requirement that the People, certainly at the  
11 pleading stage, specify a particular crime, and even  
12 at trial, the People do not have to limit themselves  
13 to a particular crime.

14 So as long as the allegation is that the  
15 defendant acted with the intent to commit some crime,  
16 that's sufficient. And it may be that an accusatory  
17 instrument or even the evidence at trial would  
18 support inferences of - - - of different possible  
19 crimes, and even at trial, there's no requirement of  
20 unanimity that all twelve jurors - - -

21 JUDGE RIVERA: Ev - - - ev - - - even if  
22 the factual statement doesn't suggest a particular  
23 crime? Not with the assumption that it suggests a -  
24 - - a particular crime or several crimes, perhaps.

25 MR. JOBLove: It might, as long as the

1 evidence would support an inference of an intent to  
2 commit a number of different possible crimes. The  
3 point is, there doesn't have to be unanimity, even to  
4 support a verdict after trial. And certainly at the  
5 accusatory stage, it's sufficient - - -

6 JUDGE RIVERA: I think my question is, how  
7 - - - how - - - how is the defendant on notice to  
8 prepare their defense, if they don't know what - - -  
9 what crime you're charging? If they don't know  
10 whether or not you're arguing it's se - - - sexual  
11 gratification or to degrade?

12 MR. JOBLove: Well, this - - -

13 JUDGE RIVERA: Or both, you could say, or  
14 both?

15 MR. JOBLove: The defendant's on notice - -  
16 - the defendant's on notice that if the evidence  
17 shows that he acted with either intent, he's guilty  
18 of the crime, just as the - - - the trespasser who  
19 goes into premises is on notice that whether the  
20 intent was to commit a larceny or an assault, he's  
21 committed the crime, and he can be found guilty.

22 Second, with regard to the evidence about  
23 the repetition of the act, there doesn't have to be  
24 any showing of a similar modus operandi. This isn't  
25 being introduced - - - the evidence of the second

1 event wouldn't be introduced at the trial, on the  
2 theory of iden - - - identity. It would be  
3 introduced because the repetition of the act, by its  
4 nature, tends to refute an innocent explanation or  
5 the inference that there was an innocent explanation  
6 for the act itself, if there was any ambiguity about  
7 the intent underlying the first act.

8 And finally, the standard that applies in  
9 determining the facial sufficiency of the accusatory  
10 instrument is to give the factual allegations a fair  
11 and not overly restrictive reading. And certainly  
12 when it comes to the latitude that a trier of fact is  
13 given, even at trial, to draw an inference about  
14 what's a reasonable inference about the defendant's  
15 intent based on the act that applies in the - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MR. JOBLove: - - - accusatory instrument  
18 as well.

19 CHIEF JUDGE LIPPMAN: Thanks, counsel.

20 MR. JOBLove: Thank you.

21 CHIEF JUDGE LIPPMAN: Thank you both.

22 Appreciate it.

23 (Court is adjourned)

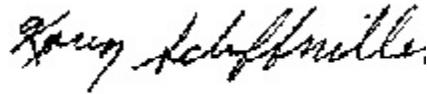
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Frankie Hatton, No. 157, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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