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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 71

ANTHONY BADALAMENTI,

Appellant.

20 Eagle Street
Albany, New York 12207
February 11, 2016

Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 71 on the
2 calendar, People v. Anthony Badalamenti.

3 MS. KARAS: Thank you. Marianne Karas for
4 Appellant Anthony Badalamenti, may it please the
5 court, Mr. Richards. I want to start, not at the
6 beginning - - -

7 CHIEF JUDGE DIFIORE: Counsel, before you
8 start, would you like some rebuttal time? I'm sorry
9 to interrupt.

10 MS. KARAS: No. Thank you. When the
11 Appellate Division made its rulings, it specifically
12 did not say that even if there had been an error, it
13 would have been harmless. It didn't find
14 overwhelming proof of guilt in this case, and that's
15 important. When it ruled on the prosecutorial
16 misconduct, it found that there was an error and it
17 found that the error was taken care of because the
18 judge sustained an objection, but it did not say that
19 had it not sustained the objection, there - - - there
20 would have been - - - it would have been harmless
21 error because there was overwhelming proof of guilt.
22 It did not hold that there was overwhelming proof of
23 guilt in this case. And there clearly was an error
24 in admitting that tape. That eavesdropping tape was
25 error.

1 JUDGE ABDUS-SALAAM: Which - - - would that
2 be for the entire case, counsel, or only some part of
3 the case, for example, the EWC, the endangering the
4 welfare of a child count?

5 MS. KARAS: I would suggest that it would
6 be, of course, for the entire case. That - - - there
7 was no overwhelming proof of evidence on any point.
8 As to the endangerment, the - - - the child's teacher
9 testified she never saw any signs of abuse. The
10 child's father testified that he never saw any signs
11 of abuse. What's more, he testified that two days
12 before he made the eavesdropping tape, he was
13 hesitant to bring the child back because the child
14 had made some statements to him, but in the very next
15 breath, he said about my client, but I don't believe
16 Mr. Badalamenti would have physically harmed my
17 child.

18 So there was certainly some suggestion that
19 maybe the mother was abusing the child but not Mr.
20 Badalamenti. So yes, I would say as to the whole - -
21 - to the whole case. And the way that the tape was
22 used was so prejudicial. It was prejudice that - - -
23 that infected the whole case. Even - - -

24 JUDGE ABDUS-SALAAM: Limiting instructions
25 that the judge - - - judge gave that it was only

1 limited to the EWC count you think was - - - was - -
2 - didn't cure any problem with the rest of the case?

3 MS. KARAS: The - - - the count for the
4 endangerment, it was not for emotionally abusing the
5 child, was not for yelling at the child; it was for
6 physically abusing the child, for hitting the child.
7 And the way that the prosecutor used this tape over
8 and over in front of the jury was basically to show
9 my client's propensity for violence, my client's
10 propensity for hitting this child; it couldn't
11 possibly have not affected the other counts. At - -
12 - at one point, the prosecutor basically argues that
13 it shows that he would have assaulted this child
14 because he was so controlling, because you don't
15 threaten corporal punishment unless you're going to
16 carry it out. And he's talking about the - - - the
17 assaults.

18 JUDGE STEIN: Why - - - why wasn't the
19 father a party to the conversation once the mother
20 answered the phone and - - - and left the line open?

21 MS. KARAS: In a lot of eavesdropping
22 cases, the - - - that's a common factual scenario. I
23 think it's Duram (ph.), and it was a lower court
24 case, but basically two people are on a line and
25 someone else picks up a line and listens in. Well,

1 they're on the line, but they're not a party to the
2 case.

3 JUDGE STEIN: Well, that's not the case
4 here. The case here was that the father placed the
5 call. The - - - the mother, at least arguably, saw
6 that the call was coming in and who it was from since
7 he had made several calls previously and hit a
8 button. Now, maybe she - - - you know, she didn't
9 intend to hit that button - - -

10 MS. KARAS: Right.

11 JUDGE STEIN: - - - but she - - - she
12 opened the line, so once that happened, why wasn't he
13 a party to that call?

14 MS. KARAS: The mother never realized she
15 was opening that line, so she had no idea that he was
16 a party to that - - - to that call. And, I mean, the
17 People - - -

18 CHIEF JUDGE DIFIORE: Is that the test,
19 counselor, that she had to know that she was a party?

20 MS. KARAS: No. No, I wouldn't say that
21 that's the only test, but I would say that that - - -
22 it's a - - - it's a pretty - - - it's a pretty strong
23 factor in this case. She - - - he was calling
24 repeatedly and she kept clicking off, off, off, and
25 at one point she clicks the wrong button and there he

1 is as if he picked up a line.

2 JUDGE STEIN: Well, what - - - what bothers
3 me is that, you know, here you have a situation where
4 somebody makes a call. He didn't do anything
5 affirmatively to gain access to overhearing this
6 conversation. He placed a call because he wanted to
7 talk to her. Somehow the line gets open and he hears
8 it. So - - - and - - - and he hears somebody yelling
9 at his child. What is - - - what is a person
10 supposed to do? What concerns me is that - - - that
11 in this situation, that person then may be subject to
12 criminal liability under the statute. I mean, here
13 we're just talking about whether it's admissible. I
14 understand that, but - - -

15 MS. KARAS: Right.

16 JUDGE STEIN: - - - in order for it to be
17 inadmissible it has to be criminal under the Penal
18 Law, so I'm - - - I'm concerned with making that
19 determination under this sort of circumstance.

20 MS. KARAS: I think it's important, you
21 know, what he - - - what he did do and what he did
22 say. I mean, basically, he heard - - - he heard his
23 child being yelled at, which was not a charged crime
24 here, and he did nothing with the tape.

25 JUDGE STEIN: Well, I'm not talking about

1 the vicarious liability issue. I'm just - - - I'm
2 just - - -

3 MS. KARAS: Right.

4 JUDGE STEIN: - - - talking about - - -
5 assuming it wasn't a child, there was no child
6 involved, this person places a phone call - - -

7 MS. KARAS: Um-hum.

8 JUDGE STEIN: - - - the - - - the phone
9 gets answered and he hears something.

10 MS. KARAS: Right. Okay, and so - - -

11 JUDGE STEIN: That makes him - - - that
12 makes him criminally liable for overhearing that
13 conversation, whether or not the person who answered
14 it intended to?

15 MS. KARAS: I hear what you're saying and I
16 - - - this is - - - this is kind of the problem I
17 have with that. If I'm standing up here and I say to
18 you all, you know, my heart is beating not just
19 because I'm nervous, but because I'm having a heart
20 attack, what I would really respectfully not want you
21 to do is pull out your cell phones and press record.
22 I mean, if you really think that there's a problem,
23 if you really think there's a crime being committed,
24 probably pressing record on your cell phone isn't
25 going to - - - and - - - and if you have an

1 obligation to do something about that, I don't think
2 that pressing record on your cell phone - - -

3 JUDGE RIVERA: But - - - but in your - - -
4 but in your example, you - - - you would welcome the
5 - - - the act of someone, not the recording part of
6 this, of going and getting help.

7 MS. KARAS: Going and getting help.

8 JUDGE RIVERA: Under - - - under this
9 example - - -

10 MS. KARAS: Sure.

11 JUDGE RIVERA: - - - the recording, in a
12 sense, is a way to ensure that the people on the
13 other side don't deny the bad conduct, because your
14 example is not about bad conduct or potentially
15 criminal liability.

16 MS. KARAS: But it's - - - I think the
17 analogy is still apt, and I - - - and it's - - - it
18 works both ways. I mean, that's fine. Even if we
19 want to record it, record it for what? What he
20 recorded it for was to be used in court. He never
21 did anything with it. So what was he recording it
22 for?

23 JUDGE PIGOTT: Well, is - - - is that your
24 argument, that if he'd call 911, then it would have
25 been okay?

1 MS. KARAS: No. He - - - what he should
2 have done, perhaps, if he really was in fear for his
3 child - - - which he wasn't, because he testified he
4 wasn't - - - but if he was in fear for his child,
5 what he should have done is - - - is called 911.

6 JUDGE PIGOTT: And that would have been
7 okay and - - - and if the - - -

8 MS. KARAS: No, this tape's still out.

9 JUDGE PIGOTT: Let me finish my thought.
10 Let me finish my thought. He would have called 911,
11 the person would have been arres - - - this is the
12 next case, the person gets arrested for - - - for
13 beating up a kid, and he moves to suppress because
14 the - - - the probable cause is based on a violation
15 of his - - - of his rights under the eavesdropping
16 statute and so they dismiss the case, right?

17 MS. KARAS: Without any recording.

18 JUDGE PIGOTT: Right.

19 JUDGE FAHEY: Judge Pigott asks tough
20 questions.

21 MS. KARAS: He does ask tough questions.

22 JUDGE FAHEY: He does. He does.

23 CHIEF JUDGE DIFIORE: Counsel, counsel - -

24 -

25 JUDGE RIVERA: I guess you have - - -

1 MS. KARAS: Thank you.

2 CHIEF JUDGE DIFIORE: If the child - - - if
3 the child were twenty-one years old, would the child
4 have had the right to click on the recorder on their
5 cell phone and record that conversation in that
6 house?

7 MS. KARAS: Yes. Yes, if the child - - -
8 if the child was twenty-one and it was a conversation
9 between the child and the mother or the child and the
10 mother's boyfriend and he wants to record it, yes.
11 Yes.

12 JUDGE RIVERA: Because he's present.

13 MS. KARAS: Because he's present, yes.

14 JUDGE FAHEY: And the next - - - so the
15 Judge's point is is that, so why wouldn't the parent
16 be able to step in and have the same right?

17 MS. KARAS: That would be vicarious
18 consent.

19 JUDGE FAHEY: Right.

20 MS. KARAS: I know. And I did so much
21 research on it and it's - - - it's a great issue.

22 JUDGE FAHEY: I have too. I have too.

23 MS. KARAS: But it's not the issue in this
24 case because it wasn't preserved. It wasn't
25 litigated at trial. That issue was not litigated at

1 trial.

2 JUDGE STEIN: But the court made - - - made
3 a finding of that, made a determination of that.

4 MS. KARAS: No, respectfully, I - - - I
5 disagree. The court did not find that there was a
6 vicarious consent exception.

7 JUDGE STEIN: Well, it didn't use those
8 words, but - - - but - - -

9 MS. KARAS: No, and it did not use any
10 words that suggested that under New York law, there
11 is a vicarious excep - - - consent exception. It did
12 not use any words to suggest that this case would
13 fall into such an exemption, and he specifically did
14 not make the determination that the Pollock threshold
15 was met. In fact, if it had - - - had known - - -

16 JUDGE STEIN: The - - - the court didn't
17 say "Here the People sufficiently demonstrated that
18 the father had a good faith objectively reasonable
19 basis to believe that it was necessary for the
20 welfare of the infant to record the conversation such
21 that he could consent to the recording on the
22 infant's behalf"?

23 MS. KARAS: Is that the trial court?

24 JUDGE STEIN: It's the Appellate Division.

25 MS. KARAS: Right, I'm talking about the

1 trial court.

2 JUDGE STEIN: Oh, well. Go ahead.

3 MS. KARAS: This is waived - - - this is
4 waived in the trial court. The trial court, in fact,
5 said to defense attorney I'm going to let this in but
6 here's good news, you have a great avenue of cross-
7 examination, because anybody would expect a father
8 hearing this to have done something. So again, that
9 defeats Pollock. That - - - that defeats the Pollock
10 threshold. The court didn't know there was a Pollock
11 threshold because it wasn't ruling under Pollock.

12 This was not a vicarious consent case. It
13 wasn't an exempt - - - a vicarious consent exemption
14 case. If I had gotten into an elevator with the
15 judge and the defense attorney and the prosecutor
16 after this case was over and said hey, I heard about
17 your vicarious consent exemption case, they would
18 have looked at me like I was crazy. I would have
19 said hey, how did you get around the - - - you know,
20 the Pollock threshold; they would have had no idea
21 what I was talking about. So that's the elevator,
22 you know, waiver standard.

23 But do you - - - that - - - this wasn't
24 litigated at trial. Reading an exemption into a
25 statute is a pretty momentous kind of thing to do.

1 CHIEF JUDGE DIFIORE: Counsel, let's assume
2 for the sake of argument that the issue was
3 preserved. Can a vicarious consent exemption be
4 narrowly drawn from the facts of this case before us?

5 MS. KARAS: Absolutely not. Absolutely
6 not, and, you know, I walk through in my - - - in my
7 brief the difference between this case and something
8 like Pollock. I mean, first of all, I - - - I'm not
9 - - - I would say that the legislature didn't put in
10 an exception because it didn't want to, and here in
11 New York we have pretty strongly worded opinions that
12 says there's other ways we can protect our children,
13 but even if the legislature had put in an exemption
14 under these facts, no, because these facts are
15 different.

16 This conversation is by the noncustodial
17 parent and it's taking place in the custodial home.
18 So not only is somebody putting something on the
19 phone in their home or recording what their child is
20 saying in their home, this is somebody coming into my
21 home and recording what I'm saying in my home to my
22 child. That's - - - that's very, very different and
23 it really takes it out of the - - - the - - -

24 JUDGE STEIN: Yes, but this person didn't
25 come into your home. This person was let into your

1 home because you answered the phone; again,
2 intentionally or not.

3 MS. KARAS: Well, or one of my kids left
4 the phone off the hook, or I - - - I knocked the
5 phone over, I - - - I accidentally, without realizing
6 it, all of a sudden I allo - - - I mean, I'm - - -
7 I'm not very technologically savvy, so maybe I opened
8 something on my computer and maybe I did do that, but
9 I don't mean for somebody to spy on me through it.

10 JUDGE RIVERA: Well, I thought you were
11 making a little bit of - - - well, at the beginning,
12 I thought you were making what sounded like your
13 stronger argument which is - - -

14 MS. KARAS: Oh, good.

15 JUDGE RIVERA: - - - which is it's - - -
16 it's not my mistake. She's intentionally trying to
17 disconnect. The fact that she may - - -

18 MS. KARAS: Well, she was.

19 JUDGE RIVERA: - - - may have a
20 technological challenge - - -

21 MS. KARAS: Right.

22 JUDGE RIVERA: - - - and perhaps I would
23 have one too - - -

24 MS. KARAS: Right. Okay, yes.

25 JUDGE RIVERA: - - - that - - - that's what

1 - - - it's - - - she is not at all inviting this.
2 She is trying to stop this. I thought that was your
3 argument - - -

4 MS. KARAS: Thank you, Judge, exactly.
5 That's - - -

6 JUDGE GARCIA: But would it make a
7 difference under Judge Stein's - - - idea behind
8 Judge Stein's questioning, as I understand it, that
9 this really at best - - - at worst was an accident,
10 right. I mean the - - - the husband or the - - - the
11 person who's listening didn't call in, the father,
12 thinking that she's going to leave the phone off the
13 hook and I'll hear something. He calls in; whatever
14 happens, the mic is open. Would that be different
15 than somebody putting something on your computer so
16 when you open an e-mail, they can start listening to
17 your conversations?

18 MS. KARAS: Well - - -

19 JUDGE GARCIA: Would your analysis be
20 different?

21 MS. KARAS: Maybe, but what I think - - -
22 what I was saying is I think there are things on
23 computers now where, I don't know, FaceTime and stuff
24 like that, where somebody didn't necessarily put it
25 on but somehow, because I don't know what I'm doing,

1 I leave it open and somebody - - -

2 JUDGE GARCIA: But would it be different if
3 somebody put a bug in - - - in an e-mail - - - and
4 which I don't know if this is possible, but would
5 enable you to eavesdrop - - -

6 MS. KARAS: That would be - - -

7 JUDGE GARCIA: - - - and did it
8 intentionally?

9 MS. KARAS: That would be bad. But he did
10 intentionally push record.

11 JUDGE GARCIA: It would be bad, but would
12 it make it a difference to the analysis of whether or
13 not this is a problem?

14 MS. KARAS: I don't think so because,
15 again, he starts listening and instead of doing
16 something, he pushes record and that is intentional.

17 JUDGE GARCIA: So it's record that makes
18 this a violation?

19 MS. KARAS: There's so many - - - it's - -
20 - it's on so many levels, but again, as a factor, I
21 think yes, pushing record does make it - - -

22 JUDGE RIVERA: Well, they're the - - -
23 they're the same case, really. It's just perhaps you
24 get to that point from a different spot, but it's the
25 same case because your argument is he's intentionally

1 chosen to record.

2 MS. KARAS: Yes.

3 JUDGE RIVERA: Maybe that's not where he
4 started - - -

5 MS. KARAS: Yes.

6 JUDGE RIVERA: - - - but at the point in
7 time it matters, that is at the point when he's
8 recording, that is a - - - the phone call perhaps
9 there's no interest at that point, but the recording
10 which is what's at issue - - -

11 MS. KARAS: Yes.

12 JUDGE RIVERA: - - - is his volition,
13 right?

14 MS. KARAS: Yes. Yes.

15 JUDGE GARCIA: Is - - - is there any
16 difference in - - - in any case where if you have a
17 right - - - if you're on a party on a telephone call,
18 you have a right to tape it, right? It's one-party
19 consent; you can tape it.

20 MS. KARAS: Well, that goes back to the
21 party. I - - - on my - - -

22 JUDGE GARCIA: Right, but why would it be
23 different if - - - if the initial overhear is lawful
24 in some way through whatever consent, why is it
25 different if he tapes it or not?

1 MS. KARAS: Because he wasn't a party. He
2 wasn't a party to this conversation.

3 JUDGE PIGOTT: Yes, he - - - yes, he was,
4 and - - - and he's the one that made the call and
5 somebody else answered it. Now, suppose in the same
6 situation the - - - the television is on and - - -
7 and he overhears the theme song for Perry Mason and
8 the defendant, in this case, is making a claim that
9 he was not there at the time of this - - - of this
10 incident and the - - - and this guy can testify I
11 heard him, it was 4 o'clock because that's when Perry
12 Mason comes on. Are you saying that you can't use
13 that evidence because it was overheard on a telephone
14 conversation?

15 MS. KARAS: If the person overhearing it
16 who wants to testify wasn't a party to the
17 conversation, yes.

18 JUDGE PIGOTT: He's a party. He's got the
19 phone in his hands. I - - - I'm missing that. I - -
20 - I get the mistake. You can make all the mistakes
21 you want, but the fact of the matter is he's a party
22 to this phone call that was made through this phone.

23 MS. KARAS: No, I could have a spy cam in
24 my hand but that doesn't make me a - - - a party to
25 the conversation that I'm illegally, you know,

1 listening in on.

2 JUDGE PIGOTT: That's a non sequitur, but
3 I'll accept it.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MS. KARAS: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel.

7 MR. RICHARDS: May it please the court, my
8 name is Jason Richards. I represent the respondent
9 in this matter, the People of the State of New York.

10 JUDGE FAHEY: Counselor, could you - - -
11 could you address the - - - the argument that defense
12 counsel made that this wasn't preserved in the trial
13 court, in essence, vicarious consent?

14 MR. RICHARDS: In fact, it was preserved.
15 The judge, although perhaps not the most articulate,
16 was clearly aware of the issue. He cited Clark. He
17 used language that was similar to Clark in that in
18 Clark, over and over again it's emphasized that the
19 child was present during the conversation, and that's
20 something that this judge, this trial judge, said
21 repeatedly in supporting his rulings. He also said
22 that Clark was the - - -

23 JUDGE FAHEY: Well, he cited it - - -

24 MR. RICHARDS: - - - only case he could
25 find on - - -

1 JUDGE FAHEY: Just so - - - just so we're
2 clear, he cited it - - - I think it's in the appendix
3 at 69; is that correct?

4 MR. RICHARDS: Correct, yes.

5 JUDGE FAHEY: All right. Okay, go ahead.

6 MR. RICHARDS: Yes, correct. He - - - he
7 also said shortly after he mentioned the name of the
8 case that it was the only case that he could find on
9 point, which means - - - and - - - and he said that
10 it was - - - it involved a similar issue. So I think
11 - - -

12 JUDGE FAHEY: Yeah, he didn't put the good
13 faith exception in, but he did cite Clark.

14 MR. RICHARDS: He did cite Clark. And - -
15 - and he said repeatedly that the child was present,
16 that the father had a legal duty - - - which sounds
17 quite a bit like the - - - the reasoning in Clark
18 which is that the parent is acting out of necessity
19 for the welfare of his child. Although the language
20 doesn't match up exactly, it's clear that he was
21 aware of the issue and that he was relying on Clark,
22 at least in part, in reaching his decision. And for
23 that reason it - - - it was preserved.

24 JUDGE ABDUS-SALAAM: Is the father a party
25 to this conversation?

1 MR. RICHARDS: The father is a party to - -
2 - well, he's the - - - technically the sender of the
3 telephonic communication that he recorded.

4 JUDGE ABDUS-SALAAM: So he's not a party,
5 he's just technically the sender?

6 MR. RICHARDS: If one artificially extracts
7 something that's heard in the background and turns
8 that into a conversation, that's the only way that he
9 would not be a party to that conversation. But in
10 that case, the conversation is still part of the
11 telephonic communication, so it's still not
12 eavesdropping if he records it. Just as Judge Pigott
13 - - -

14 JUDGE ABDUS-SALAAM: If I'm - - - if I have
15 a - - - these don't happen as often as they used to,
16 counsel, but if you have a party line - - - you know,
17 do you remember that where you're trying to make a
18 call, but there are two other people already on the
19 phone? Are you - - - if that were the case, would
20 you be a party to that other conversation because you
21 called and these two other people were talking on a
22 party line?

23 MR. RICHARDS: Well, if your intention was
24 not to overhear the conversation, the - - - the
25 telephonic communication with - - - if you never

1 intended to overhear someone, you just picked up the
2 phone and accidentally heard it, I think that's the
3 deciding factor, the lack of criminal intent here.

4 JUDGE RIVERA: What if you stay on? You
5 hear it, it sounds good, I'm going to listen in for a
6 while. Does that make a difference?

7 MR. RICHARDS: Well, in this case, the
8 father heard his son being yelled at and threats of
9 violence being directed at his five-year-old son.
10 I'm not sure - - -

11 JUDGE RIVERA: Well, I understand the
12 interest in listening to it. I was - - - I just
13 wanted to see what your response was to a slight
14 tweaking of Judge Abdus-Salaam's hypothetical.

15 MR. RICHARDS: I - - - I think it matters
16 how he got to that point, and I - - - I think that's
17 implicit in one of the court's previous decisions
18 that's relevant here. In Basilicato, the court ruled
19 that the detectives who were listening in on a
20 conversation "had no prior" - - - this is a quote - -
21 - "no prior justification for the intrusion, no
22 legitimate reason for being present when they heard
23 it." In this case, the father had such a
24 justification, namely, his innocent phone call. He
25 called, the call was answered, and he immediately

1 heard threats of violence directed at his son.

2 JUDGE ABDUS-SALAAM: Well, would you expect

3 - - -

4 MR. RICHARDS: It's implicit in - - -

5 JUDGE ABDUS-SALAAM: Counsel, would you - -

6 - just on that point, would you expect the father to

7 do something other than just record the conversation

8 if he thought that there was something going - - -

9 untoward going on in that household that impl - - -

10 implicated his son?

11 MR. RICHARDS: Well, the - - - the father

12 was not on trial, but there are a lot of different

13 responses that a - - - a responsible parent could - -

14 - could make under those circumstances. One of them,

15 I think, is to record the conversation if he's not

16 sure what's happening and it sounds like there may be

17 violence or threats of violence, or references to

18 past violence, and perhaps he didn't feel that it was

19 - - - his son was imminent danger, but it was clear

20 that his son was in some kind of trouble in this

21 situation and that recording the conversation would

22 be in his son's best interest.

23 JUDGE STEIN: But if - - - if we were to

24 adopt a vicarious consent exception here, would we be

25 opening up the door to sort of like a mini-trial on

1 whether - - - whether there was a reasonable belief
2 that it was in the best interest of the child and,
3 you know, would - - - would we, as a court, rather
4 than, for example, the legislature have to be, you
5 know, kind of deciding where all these lines have to
6 get drawn and what's enough? Is that something that
7 - - - that we should be doing and does it make sense?

8 MR. RICHARDS: It does make sense. And I
9 don't think it adds a - - - there are pre-trial
10 hearings on issues, Huntley issues, all the time to
11 determine whether evidence is admissible.

12 JUDGE STEIN: Yes, but usually the - - -
13 the evidence itself is - - - is based upon some
14 legislative determination that's then being
15 interpreted rather than having it created by the
16 court.

17 MR. RICHARDS: Well, in - - - in this case,
18 I don't think that this doctrine in any way
19 contradicts the intent of the legislature, because
20 when the eavesdropping statute was adopted, it
21 included the term "consent", which is a loaded term
22 in the Penal Law and in the Common Law system which
23 we're part. As - - -

24 JUDGE STEIN: And it didn't say anything
25 about an exception for children, right? The

1 legislature didn't do that.

2 MR. RICHARDS: Not specifically, but given
3 - - -

4 JUDGE STEIN: Well, the - - - the
5 legislature really didn't define consent at all in
6 this particular statute.

7 MR. RICHARDS: Correct. Correct. And - -
8 - and that's - - - what I'm saying essentially is
9 that in - - - in using a term like that, they were
10 importing these other understandings or - - - from -
11 - - from other parts of the law, including the Penal
12 Law, where - - - where it's clear that a child of a
13 certain age isn't capable of consent, they're not
14 capable of consenting to sexual acts. In fact, if
15 they're younger than thirteen, they're not criminally
16 liable. Excuse me.

17 JUDGE STEIN: But I believe we have said
18 that they can consent to other things like being
19 tape-recorded, for example, in a case where they're
20 trying to get an admission from an abuser or
21 something like that.

22 MR. RICHARDS: Yes. Yes. That is - - -
23 that is correct. And - - - but this doctrine doesn't
24 exclude the possibility that a - - - that a minor can
25 consent. It just allows a parent to vicariously

1 consent under certain very specific circumstances,
2 and it's a - - - a rigorous standard where the parent
3 has to establish that he or she acted in good faith
4 and that he or she had a reasonable basis to believe
5 that it was in the best interest of his child to make
6 that recording.

7 JUDGE PIGOTT: Can I - - - can I ask you
8 about the - - - the prosecutor asking for a jury
9 charge on something that was not in the indictment?

10 MR. RICHARDS: Yes, of course.

11 JUDGE PIGOTT: How - - - how does that end
12 up not being harm - - - being - - - end up being
13 harmless? I - - - I just can't imag - - - I can't
14 imagine somebody doing it, and I can't imagine the
15 court allowing it, and I can't imagine saying well,
16 the jury, you know, had other - - - other reasons to
17 convict somebody. But it just seems so odd to me
18 that somebody - - - because he had taken the stand.
19 You know, if he - - - if he had not, you know, if he
20 had chose to remain silent, it would be one thing,
21 but it's almost as if what he said on the stand in
22 his own defense turned into it being used against him
23 in this omission charge.

24 MR. RICHARDS: Well, in this case, from the
25 record it's not clear, but it - - - it appears that

1 somehow this issue came up, whether the court itself
2 brought it up or - - - or the prosecutor did, it was
3 charged and it shouldn't have been charged. However,
4 there wasn't one scintilla of evidence at trial,
5 whether from defendant's testimony or from anything
6 the prosecution put on or - - - or anything else in
7 the defendant's case, that would have supported that
8 uncharged theory. And for that reason, it - - - it
9 was harmless. According to the defendant, he had no
10 idea that this assault was taking place.

11 JUDGE STEIN: Well, yes, but there was - -
12 - there was a lot of testimony and I'm not sure what
13 the purpose of it was otherwise other than to show
14 that his parental involv - - - or his involvement as
15 a parental figure for this child. There certainly
16 was evidence that he knew about these injuries to the
17 child and he didn't take the child for - - - for
18 treatment or anything like that even if it was just
19 after the fact. I - - - I mean, and - - - and other
20 evidence that he knew that the mother had been doing
21 these things in the past. So I don't know how you
22 can say there's no evidence and - - - and if there's
23 no evidence to support that theory, how could there
24 be proof to support an aiding and abetting theory?

25 MR. RICHARDS: There is no evidence to

1 support the idea that he was consciously aware that
2 this was happening and took no action with the
3 criminal intent that the mother - - -

4 JUDGE PIGOTT: Well - - - well, then how
5 did it end up in somebody's mind that it ought to be
6 charged? I would have thought everybody says it's
7 not here, we don't charge it. And then the judge
8 says you can get him - - - you can convict him on any
9 one of three theories and this happened to be one.

10 MR. RICHARDS: I can't answer that
11 question. I can say, however, that there was no
12 evidence that supported the theory - - - there was no
13 rational view of the evidence that would have
14 supported a finding of guilt on that theory. The
15 evidence that was presented at trial didn't vary from
16 what was in the indictment.

17 JUDGE PIGOTT: Well, one of the concerns I
18 have, and maybe - - - maybe you've experienced this,
19 maybe you haven't, if you - - - if - - - if you win a
20 case in the Appellate Division, the trial - - - the
21 trial lawyer's - - - you know, it's his win or her
22 win. If you lose one, it's your loss, it's not his
23 or hers. You know, you understand what I'm saying?
24 In other words, you lost. They won the case below
25 and you lost it in the Appellate Division. I worry

1 that if we don't do something about this, that DAs or
2 prosecutors can say well, we can amend an indictment
3 any time up to the - - - up to the jury charge or up
4 to the summation even after the defendant has
5 testified and left the stand. The only thing the
6 court said was that - - - that in this case, it was a
7 mistake but it was harmless.

8 MR. RICHARDS: I think this is not the case
9 for that. I think this is a very unusual case, and I
10 think that the Appellate Division's ruling already
11 makes very clear that this was error. We're
12 conceding that that was error.

13 JUDGE PIGOTT: And candidly, you did, which
14 is to your great credit, I know. Yeah.

15 MR. RICHARDS: But it's - - - it's an
16 unusual case in that there wasn't - - - it's like
17 Grega, this - - - this court's precedent, in which
18 there was no evidence supporting the uncharged theory
19 and for that reason, it was a harmless error. I
20 think that the - - - the decision on its own gives
21 proper guidance to prosecutors and it would be - - -
22 in a - - - in a case like this where there's no
23 evidence supporting on the charged theory it - - -
24 it's not the - - - the right case to send that
25 message.

1 JUDGE STEIN: I have one more question
2 about the eavesdropping. What - - - what was the - -
3 - the purpose for admitting that recording in
4 evidence?

5 MR. RICHARDS: To prove the endangering the
6 welfare of a child count, which covered the time
7 period - - -

8 JUDGE STEIN: Based on - - - based on the
9 threats?

10 MR. RICHARDS: The - - - the threats of
11 violence, the - - - the admissions of - - - of past
12 violence, the - - - it sounds like it's leading up to
13 - - -

14 JUDGE STEIN: So the - - - so you're saying
15 that the endangering - - - okay, but the endangering
16 was based on acts of violence.

17 MR. RICHARDS: Yes, yes. And - - - and
18 that wasn't the only proof of that. There was also
19 proof from the landlady that she heard other beatings
20 during this relevant time period. There was also
21 proof from the teacher that the child was absent
22 after one of those beatings for several days. And
23 there was proof from the father that he - - - that
24 the child was - - - part of it was stricken, but he
25 did learn from the child that physical punishment was

1 being inflicted upon his son.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. RICHARDS: Thank you.

4 (Court is adjourned)

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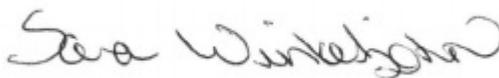
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Badalamenti, No. 71 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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