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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 13

CHRISTOPHER MARTINEZ,

Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 14

SELBIN MARTINEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
January 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 13 and 14,
2 Martinez; Christopher Martinez and Selbin Martinez.
3 Counselor, would you like any rebuttal
4 time?

5 MS. CABRERA: One minute, please, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: One minute. Go
8 ahead.

9 MS. CABRERA: May it please the court.
10 Marisa Cabrera, on behalf of Mr. Christopher
11 Martinez.

12 The Appellate Division and respondent are
13 confusing the application of 240.75 and the level of
14 prejudice defendants are required to suffer when
15 requesting the minimal sanction of an adverse
16 inference instruction.

17 JUDGE SMITH: Well, what prejudice have you
18 got?

19 MS. CABRERA: Well, in this case, we have -
20 - - the prejudice was the loss of the scratch 61
21 notes and the fact that Mr. Martinez was unable to
22 review them.

23 JUDGE SMITH: Well, but I mean, that - - -
24 are you saying there's automatic prejudice any time
25 anything is lost?

1 MS. CABRERA: Well, no. The - - - the
2 issue - - - what it boils down to, and what Joseph
3 really talks about, is that it's an issue of
4 relevance. It's a relevance determination. And if
5 you look at the document that was lost here, the
6 scratch 61 notes, especially in light of the evidence
7 used in this case to - - - to convict Mr. Martinez,
8 and the fact that the issue was an identification
9 issue, which this document would - - - would assist
10 in terms of impeachment evidence - - -

11 JUDGE SMITH: Do we know what a - - -
12 either from this record or by judicial notice or
13 somehow, what a - - - what a scratch 61 is?

14 MS. CABRERA: Well, scratch 61 is just the
15 initial investigation notes and - - - and, you know,
16 it's the - - -

17 JUDGE SMITH: It sounded to me, and I admit
18 it's much less - - - it sounded to me, just from
19 reading the record, that it's a handwritten draft
20 from which somebody types the complaint report.

21 MS. CABRERA: Later on it does - - - there
22 is a typed version.

23 JUDGE SMITH: So - - -

24 JUDGE READ: How do we know - - -

25 JUDGE SMITH: - - - if all goes - - -

1 JUDGE READ: - - - they're any different?

2 JUDGE SMITH: - - - in the normal course,
3 you would expect one to be a verbatim copy of the
4 other.

5 MS. CABRERA: Well, that - - - we don't
6 know that; we simply can't know that. And, you know
7 - - -

8 JUDGE READ: That's the problem?

9 MS. CABRERA: - - - Joseph talks about
10 that.

11 JUDGE READ: That's the problem?

12 MS. CABRERA: That is the issue. We - - -

13 CHIEF JUDGE LIPPMAN: Why do you presume
14 that it's not?

15 MS. CABRERA: Well, because we - - - it's
16 not really a presumption as much as it is just an
17 entire lack of evidence here.

18 CHIEF JUDGE LIPPMAN: Do you always have to
19 see both?

20 MS. CABRERA: Yeah, it is - - - they're - -
21 - they are both Rosario material, and - - -

22 JUDGE GRAFFEO: In some of the other cases,
23 the officer didn't testify or it was the only written
24 document that existed. Here you had the opportunity
25 to cross-examine the police officer. You also had

1 the memo book that had the notes from the interview
2 with the victim, and you had a typed up statement.

3 MS. CABRERA: Correct.

4 JUDGE GRAFFEO: That's quite a bit of
5 information.

6 MS. CABRERA: Nonetheless, we still had no
7 opportunity to review what was in the original - - -

8 JUDGE READ: Why wouldn't you just - - -

9 MS. CABRERA: - - - and Joseph - - -

10 JUDGE READ: Why wouldn't you just assume,
11 sort of, a presumption of regularity - - -

12 MS. CABRERA: Well - - -

13 JUDGE READ: - - - that what was in the - -
14 - what was in the typed up version was supposed to be
15 a verbatim copy of what was in the original or was?

16 MS. CABRERA: Well, I think it's - - - if -
17 - - if we look at the language of Joseph, I think
18 it's very helpful in this regard in clarifying this
19 issue. And it - - - I'm quoting, "A document's - - -
20 unavailable - - - unavailability poses an
21 insurmountable barrier to making a detailed
22 comparison". And that's the issue that we have here.

23 JUDGE SMITH: But in Joseph we did say that
24 the defendant had to make a colorable showing of
25 prejudice. And I forget, was that - - - was that the

1 one where they - - - they had some confusion between
2 the two arrestees? There was - - - but there was
3 some kind of - - - yeah, it seemed to me like there
4 was more showing of prejudice in Joseph than you've
5 got, or at least maybe there is.

6 MS. CABRERA: Well, it's - - - it's really
7 not - - - it's not an affirmative burden that - - -
8 that defendants have to show. It's the prosecution
9 that's seeking to be relieved of their duties.

10 JUDGE SMITH: Well, forget about burden.
11 Why - - - why should we - - - whoever has the burden,
12 why doesn't the - - - this record indicate that
13 prejudice is highly unlikely?

14 MS. CABRERA: Well, this record doesn't
15 indicate it because this is entirely relevant to - -
16 - to the issue of identification which was litigated
17 in this case. This goes to the - - -

18 JUDGE SMITH: So you would - - - you would
19 say that the loss of anything relevant is prejudicial
20 per se?

21 MS. CABRERA: I wouldn't necessarily make
22 a per se ruling, because I think it can really depend
23 on the facts and circumstances of the case.

24 JUDGE GRAFFEO: So that would go back to
25 the old Ranco (ph.) rule before the legislature - - -

1 I mean, Joseph was years before the legislature acted
2 in 2000.

3 MS. CABRERA: Correct, but that - - - we're
4 not - - - we're not asking for a per se reversal.
5 And that wouldn't - - - I would actually disagree
6 that it would go back to a per se reversal, because
7 it would still require the - - - the prejudice
8 showing of the - - - of the relevance - - -

9 JUDGE ABDUS-SALAAM: Assuming - - -

10 MS. CABRERA: - - - of the document.

11 JUDGE ABDUS-SALAAM: - - - there is
12 prejudice and there was an error, is the error
13 harmless?

14 MS. CABRERA: Well, the - - - the - - - so
15 the standard that - - - that the courts must apply on
16 appeal is not what's listed in 240.75; it's still the
17 same standard as listed in Wallace, Joseph, the
18 "might have been helpful", the "would have been
19 helpful". However, even if we were to apply 240.75,
20 the reasonable possibility test, we would still win.
21 It's codifying the - - - the Constitutional Crimmins
22 (ph.) analysis.

23 JUDGE SMITH: Your point is that this guy's
24 testimony was so shaky it wouldn't have taken much to
25 push it over the line?

1 MS. CABRERA: Correct. And so, you know,
2 it - - - even if we were to assume that 240.75 is
3 applicable in these cases, you know, we would still
4 win. There was certainly no overwhelming proof in
5 this case; that Mr. Martinez was purportedly
6 identified by a backwards movement only, and it was
7 only described as awkward.

8 JUDGE ABDUS-SALAAM: Yeah, but he
9 demonstrated it before the jury, correct?

10 MS. CABRERA: Correct. And - - -

11 JUDGE ABDUS-SALAAM: And the jury had the
12 opportunity to assess his movement, based upon his
13 own demonstration, as well as Mr. Irizarry Sr.'s
14 description of it.

15 MS. CABRERA: Correct. But nonetheless,
16 there are still other - - -

17 JUDGE GRAFFEO: I thought that he used a
18 street name as well.

19 MS. CABRERA: That wasn't my client, Your
20 Honor. That was the - - -

21 CHIEF JUDGE LIPPMAN: The other - - -

22 MS. CABRERA: - - - the co-defendant.

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MS. CABRERA: Yeah, that wasn't my client.

25 And - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 MS. CABRERA: Oh, sorry.

3 CHIEF JUDGE LIPPMAN: Okay, go ahead.

4 Finish your thought. Go ahead.

5 MS. CABRERA: It was just that, you know,
6 if - - - it's not just the movement in this case.
7 It's that the complainant made other incredulous
8 statements, discussed more in depth in point 2 of our
9 brief.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 Thanks, counselor.

12 MS. CABRERA: Thank you.

13 CHIEF JUDGE LIPPMAN: Counselor, would you
14 like any rebuttal time?

15 MR. SHARMA: Yes, Your Honor, one minute,
16 please.

17 CHIEF JUDGE LIPPMAN: Go ahead. Sure.

18 MR. SHARMA: May it please the court. My
19 name is Rahul Sharma. I'm from the Office of the
20 Appellate Defender, and I represent Selbin Martinez.

21 A permissive adverse inference charge was
22 the mildest sanction available for the State's
23 failure to preserve Rosario material in this case.

24 JUDGE SMITH: But you're not entitled to
25 any sanction unless you have some showing of

1 prejudice, are you?

2 MR. SHARMA: That's correct, Your Honor,
3 but prejudice should - - - prejudice is presumed. I
4 mean, even if we're - - - even if we're saying that
5 CPL 240.75 applies, the reasonable possibility
6 standard, as this court said in Vilardi, is the same
7 as seldom, if ever, excusable. And so it's really -
8 - - this case is really about fundamental fairness.
9 Can the State not preserve Rosario material and then
10 impose upon the defendant the burden of showing that
11 missing material - - -

12 JUDGE SMITH: Can you come up with a - - -

13 MR. SHARMA: - - - was prejudicial?

14 JUDGE SMITH: - - - nonridiculous
15 possibility of how this - - - this document could
16 really have been significant?

17 MR. SHARMA: Certainly, Your Honor. If - -
18 -

19 JUDGE SMITH: Go ahead.

20 MR. SHARMA: If the document had said that
21 - - - if the document had said that neither
22 perpetrator ever said "Give it up". If the document
23 had said that - - - that according to Armando
24 Irizarry he had had previous conflicts with - - -
25 with the assailants.

1 JUDGE SMITH: Okay. But isn't it - - -
2 isn't it unusual for the scratch 61 to say something
3 that's not in the complaint report?

4 MR. SHARMA: It's - - - it's typically the
5 case that - - - that it's copied. But as this court
6 said in Joseph, the State needs to provide necessary
7 assurance in order to show that - - -

8 CHIEF JUDGE LIPPMAN: Well, aren't you
9 asking for a per se rule, though, if it's very
10 unlikely that this is going to be prejudicial?

11 MR. SHARMA: It is - - - it is seldom, if
12 ever, excusable, just like this court said in
13 Vilardi. I mean, this court would really have to - -
14 -

15 CHIEF JUDGE LIPPMAN: There has to be some
16 kind of sanction, at the very least?

17 MR. SHARMA: There has - - - at the very
18 least, a permissive adverse inference charge. You
19 know, it's not like defense counsel was asking for
20 dismissal of the charges or witness preclusion; he
21 was asking for permissive adverse inference charge.
22 That's the mild - - -

23 JUDGE SMITH: In Handy, we said you get a
24 permissive adverse inference charge if it's
25 reasonably likely to be material. Does that meet

1 that standard?

2 MR. SHARMA: Well, yes - - - yes, Your
3 Honor, because in Handy the court - - - the court
4 held that - - - that a permissive adverse inference
5 charge was required, even though the exculpatory
6 nature of the missing evidence was merely
7 speculative. And that's absolutely right. It can't
8 possibly be that the State gets to lose material and
9 then say, well, it's merely speculative that the
10 missing - - - that the material we lost - - -

11 JUDGE SMITH: Well, I would certainly agree
12 with you if there was nothing that was - - - if there
13 weren't in the record another document which, in the
14 ordinary course, would be a transcript of what you've
15 - - -

16 MR. SHARMA: But suppose - - -

17 JUDGE SMITH: - - - of what you - - -

18 MR. SHARMA: But suppose, Your Honor - - -
19 suppose it's the - - - suppose it's the - - - the
20 officer himself or - - - or a secretary or someone
21 who - - - who is responsible for transposition - - - for
22 - - - for transcribing those written notes into the
23 typed complaint report. And suppose they forget to
24 write a sentence. Suppose they intentionally change
25 something. Suppose they see something in the - - -

1 in the handwritten notes, and it's shorthand, and
2 they say, oh, I think I know what he means here; he
3 means blank.

4 JUDGE RIVERA: So how is that not a per se
5 rule? When is there an exception, I guess you were
6 calling it - - -

7 MR. SHARMA: It is seldom, if ever,
8 excusable.

9 JUDGE RIVERA: - - - an exception to the
10 per se rule, if you could have such a thing.

11 MR. SHARMA: It is seldom, if ever,
12 excusable. Even if - - -

13 JUDGE RIVERA: Okay. But when - - - when
14 would it be excusable? I guess that's what I'm
15 asking.

16 MR. SHARMA: It would be excusable, for
17 example, at - - - at least on appeal, it would - - -
18 it would constitute harmless error. Suppose you have
19 a - - - an insignificant witness and - - - and really
20 the loss of the Rosario material is de minimis, and
21 you have videotape of the defendant robbing the
22 place, right? Then, on appeal, the - - - the loss of
23 Rosario material by that de minimis witness would, of
24 course, not make - - - have made a difference - - -

25 JUDGE RIVERA: But that just sounds like

1 you're saying - - -

2 MR. SHARMA: - - - in the conviction.

3 JUDGE RIVERA: - - - it wouldn't be
4 prejudicial.

5 MR. SHARMA: Exactly. Here - - -

6 JUDGE ABDUS-SALAAM: Well, even when the
7 witness is the single eyewitness here - - -

8 MR. SHARMA: Exactly.

9 JUDGE ABDUS-SALAAM: - - - would you say
10 that there could be harmless error?

11 MR. SHARMA: Well, probably not, Your
12 Honor. Here you have an official police form missing
13 that contained statements by the complainant. And
14 it's - - - their story is constantly evolving, and
15 they admit that they rehearsed their testimony. If -
16 - -

17 JUDGE SMITH: The case against your guy is
18 pretty strong. I mean, this is - - - this is the guy
19 not - - - I mean, first of all, there's testimony
20 that the victim called him by his street name, but
21 also he's found - - - he's found hiding under the
22 clothes with a fresh wound on his head.

23 MR. SHARMA: Even if the - - - even if the
24 court thinks that the evidence is strong that Selbin
25 was somehow involved in some incident with the

1 complainant, the evidence is not strong that it was
2 necessarily an attempted robbery instead of an
3 attempted assault. And it's important to remember
4 that the State even thought the jury might find that
5 this was an attempted assault. They never challenged
6 the submission of that charge to the jury, Your
7 Honor.

8 CHIEF JUDGE LIPPMAN: Okay, counselor,
9 you'll have your rebuttal.

10 Counselor?

11 MR. KANTHA: May it please the court. Ravi
12 Kantha for the People of the State of New York.

13 CHIEF JUDGE LIPPMAN: Counsel, no sanction
14 is okay - - -

15 MR. KANTHA: Yes.

16 CHIEF JUDGE LIPPMAN: - - - in this
17 situation? Why?

18 MR. KANTHA: Your Honor, because there was
19 absolutely no prejudice in this case, and that's CPL
20 - - -

21 CHIEF JUDGE LIPPMAN: Could there not
22 possibly be prejudice?

23 MR. KANTHA: I believe it is possible, and
24 as - - - as this court acknowledged during
25 questioning with opposing counsel - - -

1 CHIEF JUDGE LIPPMAN: So shouldn't there be
2 some penalty, at least a permissive adverse inference
3 charge? Why is that - - -

4 MR. KANTHA: It was not - - -

5 CHIEF JUDGE LIPPMAN: Why was that not the
6 appropriate thing to do here?

7 MR. KANTHA: Well, we're talking about a
8 document, a scratch 61, which this is a draft written
9 report that's immediately transcribed after - - -
10 Officer Franco's testimony - - -

11 CHIEF JUDGE LIPPMAN: But it would be
12 significant if there were differences between the
13 two, right?

14 MR. KANTHA: There would - - - it would - -
15 -

16 CHIEF JUDGE LIPPMAN: Between the typed and
17 the written?

18 MR. KANTHA: It would be significant, but
19 here we have testimony from Officer Franco about the
20 process in which this report was drafted and then
21 subsequently moved to where it would be typed. He
22 said that he wrote this report out after the arrest.
23 Now, he interviewed the complaining witness at the
24 scene of the - - - at the scene of the crime, took
25 notes in his memo book, and testified very clearly

1 that the only notes that he took, contemporaneously
2 with that interview, were in his memo book. So
3 Selbin Martinez is arrested and Officer Franco then
4 makes these notes.

5 JUDGE ABDUS-SALAAM: Counsel, what about
6 your adversary's hypothetical that perhaps in
7 transcribing the scratch 61 to the written or the
8 typewritten report, maybe Officer Franco overlooked
9 something, or he gives it to someone else to
10 transcribe who really can't read his handwriting and
11 decides, oh, you know, that's not important, I'll
12 leave that out, I'll just type up what I can read.

13 MR. KANTHA: I don't think there's anything
14 on the record in Officer Franco's testimony that
15 makes that a reasonable possibility.

16 JUDGE PIGOTT: If we saw the first draft of
17 your brief to this court, would it be identical to
18 the one that you filed?

19 MR. KANTHA: Slightly different - - - well,
20 in light of People v. Thomas or Handy?

21 JUDGE PIGOTT: The only reason I'm asking
22 is maybe the first draft of what the officer did - -
23 -

24 MR. KANTHA: Oh.

25 JUDGE PIGOTT: No, I wasn't picking on you.

1 MR. KANTHA: No, I - - - Your Honor, yes,
2 there - - - there were, I think, a few edits. But in
3 the context of Officer Franco's testimony, that's
4 what's important here, is Officer Franco testified
5 very clearly; he was available for cross-examination
6 - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but isn't it
8 likely there would be a few edits?

9 MR. KANTHA: Is it likely? No, not based
10 on his testimony at all. He testified that he wrote
11 this thing - - -

12 CHIEF JUDGE LIPPMAN: It would be exactly
13 the same?

14 MR. KANTHA: There is nothing in the - - -
15 in the evidence and no - - - nothing offered - - -

16 JUDGE SMITH: Are you saying that scratch
17 61 is written by hand and handed to a civilian, and
18 the civilian's job is just to copy off from one piece
19 of paper to another?

20 MR. KANTHA: That is a very common
21 procedure at the police department, Your Honor.

22 JUDGE SMITH: We don't - - - we don't know
23 that - - -

24 MR. KANTHA: We don't - - -

25 JUDGE SMITH: - - - that's true in this

1 case.

2 MR. KANTHA: We - - - what we have is
3 Officer Franco's testimony, and that's what I'm
4 relying upon in - - - in our papers and also here
5 today.

6 JUDGE ABDUS-SALAAM: And Officer Franco
7 testified that this - - - the typewritten report was
8 substantially the same as the handwritten one, even
9 though he didn't - - - or did he transcribe it
10 himself?

11 MR. KANTHA: I believe there's an inference
12 from the testimony that he didn't - - - that he did -
13 - - he may not have transcribed it himself. It's not
14 entirely clear, but he testifies that he placed - - -
15 he wrote it after the arrest, so this was all - - -
16 both the - - - the - - - I think it's important to
17 acknowledge both the written scratch 61 and the typed
18 version are based on one interview that happened
19 prior to - - - prior to - - -

20 JUDGE ABDUS-SALAAM: Understandable, but -
21 - -

22 MR. KANTHA: - - - Selbin Martinez's
23 arrest.

24 JUDGE ABDUS-SALAAM: - - - what about my -
25 - - the scenario where, you know, the transcriber

1 can't read his handwriting and decides you know what,
2 that's probably not that important, I'll just leave
3 it out.

4 MR. KANTHA: Your Honor, I think in looking
5 at the cross-examination that the - - - that defense
6 was able to utilize, both - - - both counsel below
7 were able to utilize, it's clear they - - - they
8 cross-examined the complaining witness, Mr. Irizarry,
9 on whether he told Officer Franco, initially, did you
10 tell them that they took - - - they forcibly removed
11 property from you? They used the - - - they quoted
12 the language of Penal Law 160.10, I believe it was.
13 And that demonstrated what the 61 had. Very often
14 these 61s - - - and I think it's clear from the
15 record that that was the case here, is that the 61
16 really just reflected an officer saying - - - quoting
17 the penal law as, you know, the complainant was
18 robbed by the defendants - - -

19 JUDGE RIVERA: But the problem is, because
20 you can't find it, it's lost, whatever has happened
21 to it, they're behind the eight ball, unable to show
22 what, if any, value this might add to their case, how
23 it might help them, and whether they can use it for
24 impeachment, as they argue. They're in that
25 difficult position, yet that's their burden.

1 MR. KANTHA: And Your Honor, I would - - -
2 I would respond by pointing out the complainant's
3 very - - - very candid testimony before - - - before
4 the jury here. He - - - we have a complaining
5 witness. This is not a case where the complaining
6 witness, on cross-examination, was confronted with
7 inconsistencies that he was not ready for. On direct
8 examination, he testified to the fact that he
9 withheld this information. These - - - these
10 defendants were known to him. He lived in the same
11 building as these defendants for seven years.

12 JUDGE PIGOTT: The - - -

13 JUDGE ABDUS-SALAAM: What - - -

14 JUDGE PIGOTT: The - - - I'm sorry, Judge.

15 JUDGE ABDUS-SALAAM: I was just - - -

16 JUDGE PIGOTT: Your opponents make the
17 argument that this is a - - - this is a minor
18 sanction. It's - - - it's no big deal. And you can
19 - - - you can supplement - - - I mean, the judge can
20 say, you know, everything that - - - that the
21 inspector or the detective said, and however these
22 are missing and you can - - - you can do this to
23 temper whichever way it was. Should our concern be
24 that if we somehow say that you can lose these at - -
25 - at will, and we're not going to sanction the - - -

1 the People, that we're - - - we're sending the wrong
2 message?

3 MR. KANTHA: I don't think that should be
4 the concern here. I think there's a - - - there's a
5 clear - - - in context of what a scratch 61 is, with
6 the fact that they had a typed version, which there's
7 nothing on the - - - on the record to demonstrate
8 that there would have been any material variance
9 there, I think what's important is also to consider
10 the fact that the complaining witness admitted to all
11 of these inconsistencies. He didn't stand up there
12 and dispute the fact that he - - -

13 JUDGE ABDUS-SALAAM: Assuming there was - -
14 -

15 MR. KANTHA: - - - didn't identify two
16 people - - -

17 JUDGE ABDUS-SALAAM: - - - there was some
18 prejudice - - - I know your position is there wasn't
19 any and no sanction should have been provided, but
20 assuming there was and we believe a sanction should
21 have been provided, was there - - - is that error
22 harmless?

23 MR. KANTHA: Yes, and I believe 240 - - -
24 the legislature made it very clear when it passed
25 240.75.

1 JUDGE ABDUS-SALAAM: In both cases? I can
2 understand in - - - in Selbin's case there's a lot of
3 evidence; it's overwhelming evidence about his guilt.
4 What about Christopher?

5 MR. KANTHA: Well, I believe, first, for
6 Christopher Martinez, I think it's important to
7 acknowledge the relevance of the fact that they were
8 brothers. That's - - - it's been established that
9 that - - - that is relevant to the inquiry of, you
10 know, of codefendant's guilt, the fact that they knew
11 each other, the fact that they were more likely to
12 plan a crime together because they knew each other.

13 JUDGE RIVERA: But that can't be the basis
14 to find someone guilty just because there - - -
15 there's a familial connection. You're not arguing
16 that, are you?

17 MR. KANTHA: Absolutely not. What I am
18 arguing is the fact that - - - I think defense
19 counsel's minimizing the relevance of the
20 identification of Christopher Martinez's backwards
21 run. As - - - as this court acknowledged, the
22 defendant demonstrated for the jury his backwards
23 run. The prosecutor argued, on summation, that that
24 demonstrated - - -

25 CHIEF JUDGE LIPPMAN: That's essentially

1 your whole case, though, the backward run, right?

2 MR. KANTHA: Yes, and these are two people
3 that lived - - -

4 JUDGE SMITH: Are you making a harmless
5 error argument as to Christopher?

6 MR. KANTHA: I - - - it's a harmless error
7 argument for both defendants, Your Honor. I believe
8 that any - - -

9 JUDGE SMITH: But do you call this
10 overwhelming as to Christopher?

11 MR. KANTHA: It is strong evidence. Now, I
12 - - -

13 CHIEF JUDGE LIPPMAN: All on the backward
14 run, it's overwhelming, essentially? You don't have
15 much else, right?

16 MR. KANTHA: Well, for the identification.
17 Now, the - - - the victim's testimony is corroborated
18 by his son, to other - - - as to other factors, and
19 also by a civilian witness - - -

20 JUDGE SMITH: The son - - -

21 MR. KANTHA: - - - Mr. Krouser.

22 JUDGE SMITH: The son didn't do an ID.

23 MR. KANTHA: Did not do an ID; I wouldn't
24 represent that, but I would say - - -

25 JUDGE PIGOTT: This might be an unfair

1 question, but let's assume it's a different case
2 where the scratch 61, for some unknown reason, the
3 detective mixes the names up and says Selbin is
4 Christopher and Christopher is Selbin. And now he -
5 - - now he - - - he says, well, I can - - - I can fix
6 that on the typo, you know, on the - - - on the
7 machine. Would something like that - - - I mean, how
8 would the defense know, and how would the judge
9 decide that perhaps an adverse inference in something
10 like that could be done?

11 MR. KANTHA: I think, you know, it may - -
12 - it might be appropriate, in a scenario where an
13 officer acknowledges that changes were made at any
14 point during - - - during his testimony, to have a
15 hearing, and that's - - - and to have a hearing to
16 explore whether or not the defendant was prejudiced
17 and to explore the angle - - - to allow the
18 defendants to establish prejudice. And there's
19 precedent for that.

20 But I do believe here, just to go back
21 briefly to the identification of Christopher
22 Martinez, these are people that - - - this is, you
23 know, body - - - body type identifications are not
24 unprecedented. There is - - - there is an
25 established cases on that.

1 JUDGE SMITH: We're not saying it's
2 illegal; we're just saying - - - we're just
3 suggesting to you maybe it's not of such an
4 overpowering force that it gets you to harmless
5 error.

6 MR. KANTHA: I believe it's strong enough,
7 when the - - - when the victim testifies that he
8 lived in the same building, one floor above - - -
9 above each defendant for a period of seven years and
10 saw him on a daily basis.

11 CHIEF JUDGE LIPPMAN: But the other
12 defendant he knew a lot better, right?

13 MR. KANTHA: He did know him better.

14 CHIEF JUDGE LIPPMAN: He called him by his
15 nickname.

16 MR. KANTHA: Yes.

17 CHIEF JUDGE LIPPMAN: Here you know that
18 there - - - there's no injury like there was to
19 Selbin. The focusing on the gun - - - you know, it's
20 not overwhelming, by any standard, this backwards
21 walk.

22 MR. KANTHA: I - - -

23 JUDGE RIVERA: Certainly, it wouldn't be
24 unreasonable to think that he might perhaps be
25 influenced by the fact that he sees the brothers

1 together and, oh, I know that's Selbin, maybe that's
2 his brother too, and he convinces himself and his
3 son, his own son, of such.

4 MR. KANTHA: Your Honor, I don't think
5 there's any - - - there's no reading this - - -
6 there's nothing in his testimony to indicate that he
7 was influenced in such a way. And again, this is - -
8 - I think some of the arguments that defendant makes
9 are more appropriate for weight of the evidence
10 argument. This is a sufficiency - - - this is a
11 sufficiency argument and - - -

12 JUDGE SMITH: If you're talking about
13 harmless error, you have to talk about the weight of
14 the evidence, don't you?

15 MR. KANTHA: Yes, Your Honor, but I do
16 think in the context, you have to view the evidence
17 of each defendant together in this case. And short -
18 - -

19 JUDGE SMITH: Whose - - - who should - - -
20 the record could be better than it is, obviously, on
21 exactly what this scratch 61 was. The officer could
22 presumably have testified, if it's true, I put it in
23 - - - my procedure was that I put it in my outbox, a
24 civilian secretary came and typed it, I've never yet
25 seen anything but a typo in them in all of my twenty

1 years. Whose - - - whose burden is it to elicit that
2 sort of evidence?

3 MR. KANTHA: I believe it's the defendant's
4 burden to elicit that sort of evidence on cross-
5 examination. If they want to establish prejudice as
6 to missing - - - as to missing Rosario material, I
7 think it's clear. And if that wasn't the case, I
8 don't think we would have cases like Brown in the
9 Second Department, Norris in the Second Department,
10 and also Ward in the Third Department, where they all
11 discuss CPL 240.75 abrogating the per se reversal
12 rule, which really is what the defendant is trying to
13 come back to. I think if we - - - if we institute
14 what the defendant wants, the failure to give an
15 adverse inference - - - the failure to give at least
16 an adverse inference - - -

17 JUDGE SMITH: Well, isn't 240.75 at least
18 primarily designed for the case where you have the
19 document that was withheld and you can look at it and
20 see whether there's a reasonable possibility of
21 reversal?

22 MR. KANTHA: I believe it applies to a
23 scenario such as the one at trial here, and that's
24 what the Second and Third Department have both - - -
25 have both interpreted, in addition to the First

1 Department, I think. The courts have examined the
2 scenario in which this - - - in which the, you know,
3 Rosario material was either not turned over at all or
4 destroyed, and have determined that harmless error
5 analysis does apply there and that the burden is on
6 the defendant to establish prejudice. And that
7 simply did not happen here. There is a typed version
8 of this report, a complainant who admits to the
9 inconsistencies that the defendant seek - - - was
10 seeking to establish.

11 CHIEF JUDGE LIPPMAN: Okay, counselor,
12 thanks.

13 MR. KANTHA: Thank you, Your Honor.

14 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

15 MS. CABRERA: I just wanted to make a few
16 points. Respondent acknowledges the fact that there
17 was possible prejudice to the defendants in - - - in
18 their failure to preserve the scratch 61 notes.
19 That, in and of itself, just demonstrates the fact as
20 to why there needs to be a sanction. You know, as
21 you stated in Joseph, we just simply don't know any
22 omissions or errors or deletions that perhaps
23 occurred between the creation of the scratch 61 notes
24 and the typed complaint report.

25 In this case, Mr. Martinez asked for a very

1 appropriate and proportionate sanction of an adverse
2 inference instruction for the prejudice which he
3 suffered. He was under no burden to present anything
4 else, to go any further. In Banch and Joseph, this
5 court stated similarly that actually it was the trial
6 court that should develop the record and perhaps
7 inquire, once defense counsel makes the request for
8 an adverse inference instruction. The prosecution is
9 asking to be relieved of its burden, of its Rosario
10 obligations. There's no reason why defendants should
11 then have to make a case as to why they should be
12 relieved of that burden. And so for that, we ask
13 this court to reverse.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MS. CABRERA: Thank you.

16 CHIEF JUDGE LIPPMAN: Thanks, counselor.

17 Counselor, rebuttal?

18 MR. SHARMA: Yes, Your Honor. With
19 respect, Judge Abdus-Salaam said that the evidence
20 here is overwhelming against Selbin. Even assuming
21 the court finds that the evidence was overwhelming as
22 to identification, it was not overwhelming as to what
23 the offense was. The prosecution did not challenge
24 the submission of attempted assault to the jury, and
25 frequently, attempted assaults occur using masks,

1 right?

2 And furthermore, even the complainant,
3 Armando Irizarry, on pages 90 to 92 of the appendix,
4 said, when he was asked: Do you have any sort of
5 drug conflicts? Do you - - - do you understand that
6 violence is sometimes associated with a drug trade?
7 He said, yes, I know that sometimes a bat or gun is
8 involved. Those are the exact weapons that he
9 claimed the assailant had. Furthermore, he only said
10 that this might have been a robbery. After the 911
11 operator said, were they trying to rob you, he did
12 not say someone was trying to take my money. And
13 defense counsel focused on that. In summation, on
14 page 387 of the appendix - - -

15 JUDGE ABDUS-SALAAM: So are you saying,
16 counsel, that "Give it up" didn't mean robbery, it
17 meant something else?

18 MR. SHARMA: But that's exactly why we need
19 Rosario material, Your Honor, because - - -

20 JUDGE SMITH: Are you saying that depends
21 on the witness' credibility?

22 MR. SHARMA: Exactly. And if the Rosario
23 material said the witness said no one said anything
24 to him, or the witness even said that something else
25 was said other than "Give it up" - - - this was a

1 constantly evolving storyline - - - that would have
2 changed the jury's conviction from attempted robbery
3 to one of the lesser charges like attempted assault.

4 Thank you.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 Thank you all.

7 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of The State of New York v. Christopher Martinez, No. 13, and The People of The State of New York v. Selbin Martinez, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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