

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

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

DANIEL ISRAEL,

Appellant.

No. 171
(Papers sealed)

20 Eagle Street
Albany, New York 12207
October 21, 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:

JAN HOTH, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorneys for Appellant
120 Wall Street, 28th Floor
New York, NY 10005

DEBORAH L. MORSE, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 171, People v. Israel.

3 Counselor, do you want any rebuttal time?

4 MS. HOTH: Three minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Three minutes, go
6 ahead. You're on.

7 MS. HOTH: Thank you. Good afternoon, Your
8 Honors. Jan Hoth for appellant Daniel Israel.

9 As this court made clear in Santarelli and
10 its progeny, evidence of a defendant's bad acts is
11 only admissible to rebut a state-of-mind defense - -
12 -

13 CHIEF JUDGE LIPPMAN: Counsel, let's - - -
14 let's talk about these particular three instances.
15 Why aren't they appropriate under the circumstances
16 to come in, you know, in terms of this issue that's
17 been raised about EED and - - - what - - - why is it
18 not appropriate?

19 MS. HOTH: Well, I think we have to look at
20 each incident separately.

21 CHIEF JUDGE LIPPMAN: Yes, let's take them
22 - - - take them one of at a time.

23 MS. HOTH: Yes. And there's problems with
24 each incident.

25 CHIEF JUDGE LIPPMAN: Yeah, let's hear it.

1 MS. HOTH: Okay, so if we discuss the
2 incident where the prosecutor asserted that Mr.
3 Israel - - - the prosecutor asserted that Mr. Israel
4 punched and choked a woman in response to taunts
5 aimed at his mother. But that's the prosecutor. We
6 don't know if that's what happened. We on - - - they
7 didn't provide a sufficient and detailed foundation.

8 If their aim was to show that Mr. Israel
9 reacted violently without provocation, they need to
10 bring in the wit - - - the girl or a witness to the
11 actual event, not just the prosecutor's assertion of
12 what happened at that event.

13 JUDGE ABDUS-SALAAM: What about Mr. Lucas'
14 testimony, Ms. Hoth? Did - - - was that - - - Lucas
15 was Mr. Israel's witness, right?

16 MS. HOTH: Um-hum.

17 JUDGE ABDUS-SALAAM: His former friend or
18 good friend, and he testified to that. Was there a
19 problem in having him testify to that?

20 MS. HOTH: Well, he didn't testify to it.
21 He was - - - the district attorney was allowed to ask
22 him if he had heard of that incident, and his
23 response was that he had heard something about it,
24 but his understanding was that Mr. Israel pushed the
25 girl. That's all he could say.

1 The defense expert was asked if his opinion
2 would change if he heard of that incident, and he
3 said no. There was no direct evidence. No witness
4 was brought in to testify to the incident itself.

5 JUDGE STEIN: So you're saying that if - -
6 - if a witness had come in and - - - and - - - and
7 said exactly what it was that the prosecutor alluded
8 to, that would be okay?

9 MS. HOTH: No, I think it's a two-step
10 evaluation that you have to go through. First the
11 district attorney has to establish the foundation or
12 the context, so to speak, that then - - -

13 JUDGE STEIN: But - - - but he was
14 described as being a peaceful, laid back, you know,
15 nonviolent person, so do - - - does it really matter,
16 at least as to that incident, you know, exactly what
17 the context was?

18 MS. HOTH: Well, I think it does,
19 especially with that incident. If you look at it - -
20 - he was a juvenile; he was only sixteen years old.
21 And sixteen-year-old boys may react in ways that
22 other people would find inappropriate. But - - -

23 JUDGE STEIN: Well, then how could the
24 People rebut this testimony?

25 MS. HOTH: Well, they had this - - - their

1 own psychiatrist who was testifying. This was a case
2 about whether Mr. Israel was suffering from post-
3 traumatic stress disorder at the time he's - - -

4 CHIEF JUDGE LIPPMAN: Counselor, but why
5 couldn't this come in just as the way of evaluating
6 the psychiatric testimony?

7 MS. HOTH: Well, I'm not sure how it helps
8 evaluate the psychiatric testimony if you - - -

9 CHIEF JUDGE LIPPMAN: Well, what was the -
10 - - what was the psychiatrist's testimony about the
11 incident?

12 MS. HOTH: Well, the psychiatrist, when
13 asked if his opinion would change having heard of
14 that - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MS. HOTH: - - - particular incident, said
17 no, it would not. That maybe it wasn't an
18 appropriate reaction, but it didn't show a pattern,
19 it didn't show pervasive conduct - - -

20 CHIEF JUDGE LIPPMAN: So why isn't this
21 relevant in terms of this issue? It's been raised.
22 You asked the friend about it, right, as to - - - so
23 what - - - what's the harm in let - - - in letting it
24 in?

25 MS. HOTH: Well - - -

1 CHIEF JUDGE LIPPMAN: How does it prejudice
2 your client?

3 MS. HOTH: Well, the harm, of course, is
4 that here in particular, and we haven't even gotten
5 to the other two incidents, is the district attorney
6 was also allowed to bring in two witnesses to testify
7 to three separate incidences in which Mr. Israel may
8 or may not have been provoked. It's clear - - -

9 CHIEF JUDGE LIPPMAN: What about the '05
10 incident?

11 MS. HOTH: The '05 is with - - -

12 CHIEF JUDGE LIPPMAN: The server?

13 MS. HOTH: - - - the chicken restaurant?

14 CHIEF JUDGE LIPPMAN: Yes.

15 MS. HOTH: Yes.

16 CHIEF JUDGE LIPPMAN: What about that?

17 MS. HOTH: Well, we - - - at - - -

18 JUDGE RIVERA: Well, did he preserve that?

19 MS. HOTH: Yes, Your Honor.

20 JUDGE RIVERA: He did preserve that.

21 MS. HOTH: Counsel complained repeatedly
22 from the get-go that they needed to have the witness
23 testify to the whole event. And the - - -

24 JUDGE FAHEY: Well, didn't the - - - on the
25 '05 incident, didn't - - - didn't he waive any

1 objection to that by cross-examining the police
2 officer Marino?

3 MS. HOTH: No, Your Honor. The district
4 attorney - - -

5 JUDGE FAHEY: Why - - - why not?

6 MS. HOTH: - - - misled the court as to
7 what her witness was going to testify to, whether - -
8 - whether inadvertently or not. She kept insisting
9 that she had a witness who had seen the whole thing.
10 The court was very concerned that unless the witness
11 had seen the whole thing and could testify, it had to
12 be - - -

13 JUDGE RIVERA: Yeah, but - - - but then the
14 court gave counsel a choice. Counsel made a choice.
15 Did - - -

16 MS. HOTH: Yes.

17 JUDGE RIVERA: - - - he make the choice
18 over objection? Did he say - - -

19 MS. HOTH: He made - - -

20 JUDGE RIVERA: - - - I object, but if these
21 are my only choices, then I choose - - -

22 MS. HOTH: No, what specifically happened
23 was when the officer said he wasn't there at the
24 beginning of the incident, counsel objected.

25 JUDGE RIVERA: Yes, yes.

1 MS. HOTH: They had the side bar - - -

2 JUDGE RIVERA: Yes.

3 MS. HOTH: - - - and again objected that
4 the witness had not seen the entire incident, and the
5 court gave him a choice. Making the best of a bad
6 situation is not waiving an objection that - - -

7 JUDGE ABDUS-SALAAM: But what should the
8 court have done? Should - - - should the court have
9 declared a mistrial because that testimony came in?
10 What - - - what was - - - what was the other choice?
11 That's - - -

12 MS. HOTH: Well, the choice was to strike
13 the testimony or to allow the counsel to cross-
14 examine the witness.

15 CHIEF JUDGE LIPPMAN: What's the harm in
16 light of the fact that - - - that the police officer
17 indicated that, you know, the server could have
18 initiated the fight? There was no - - - right?
19 There was - - - what's the harm?

20 MS. HOTH: Well, the harm here - - -

21 CHIEF JUDGE LIPPMAN: You got to cross and
22 on cross, the police officer said, yeah, maybe the
23 server did initiate the fight.

24 MS. HOTH: Because what - - - what the
25 prosecution was doing was painting a picture of Mr.

1 Israel as someone who was subject to violent outburst
2 and therefore was not suffering - - -

3 CHIEF JUDGE LIPPMAN: Again, as relevant to
4 the psychiatric testimony, they wanted to show that
5 he's a hothead or, you know, as you say, gets excited
6 ease - - - easily.

7 MS. HOTH: But if they're trying to show
8 that he is subject to violent outbursts without
9 provocation, then they need to bring in the evidence
10 to show that it was in fact - - -

11 JUDGE RIVERA: Well - - - well - - - well -
12 - -

13 MS. HOTH: - - - without provocation.

14 JUDGE RIVERA: - - - is it really without
15 provocation or it's with respect to the type of
16 trigger that provokes his violence?

17 MS. HOTH: Well, I - - -

18 JUDGE FAHEY: I thought it was more - - - I
19 thought it was more inappropriate response,
20 inappropriate violent reaction. It's - - - it's a
21 difficult evidentiary problem because how - - - how
22 broad from - - - of a time frame do you have to look
23 at to - - - to examine whether or not it's probative
24 or prejudicial? I - - - I can see the argument.

25 The problem here is that you have three

1 incidents. The first is a 2002 which - - - only
2 speaking for myself - - - seems to be admissible.
3 2005 - - - you seem to have waived on 2005. But
4 2010, the Rikers Island incident, it - - - it may be
5 a more problematical. The question there is, is it
6 harmless error or not?

7 I - - - I don't - - - I can't say that I
8 know the answer to that, but those are the kind of
9 things I think we need to look at. There seems to be
10 a continuum with the three different incidents in a
11 different time frame.

12 MS. HOTH: Yes, Your Honor, but the problem
13 is that all three came in. Whether - - - whether the
14 chicken restr - - - the chicken restaurant would not
15 have come in had the prosecutor made sure she
16 understood the nature of the officer's testimony
17 before she put him on the stand.

18 JUDGE RIVERA: Right, but then the - - -
19 the judge gave the choice, I'll strike the testimony.
20 Counsel didn't make that choice.

21 MS. HOTH: No, counsel cho - - - counsel
22 was given a choice to make the best of a bad
23 situation. By choosing to cross-examine the witness,
24 that's not suddenly a windfall to him. The witness
25 should never have been on the stand. The court would

1 never have allowed the witness on the stand.

2 CHIEF JUDGE LIPPMAN: Okay, counsel. Okay?

3 MS. HOTH: Thank you.

4 CHIEF JUDGE LIPPMAN: You'll have your
5 rebuttal. Thank you.

6 Counsel?

7 MS. MORSE: May it please the court, my
8 name is Deborah Morse and I represent the People on
9 this appeal. Your - - -

10 CHIEF JUDGE LIPPMAN: Counsel, why didn't
11 these three incidents prejudice the - - - the
12 defendant in that it - - - it - - - do we know the
13 whole story of how they began, what the provocation
14 was? Why is this more probative than - - - than - -
15 - than prejudicial? And if it is, what - - - what's
16 the relevance? What are we looking towards?

17 MS. MORSE: Okay, so Your Honor's question
18 has so many different parts.

19 CHIEF JUDGE LIPPMAN: Go, answer them.

20 MS. MORSE: Yeah. The - - - of course, any
21 evidence that comes in from the People against
22 defendant is going to be prejudicial. The question
23 is it undue - - -

24 CHIEF JUDGE LIPPMAN: Yes, it's the
25 weighing.

1 MS. MORSE: - - - undue prejudice? But in
2 this case, the issue was relevance, which is ve - - -
3 which is different from, of course - - -

4 CHIEF JUDGE LIPPMAN: What's it relevant
5 to?

6 MS. MORSE: It's relevant to in that - - -
7 it is relevant to the fact that this was a very
8 specific defense in this case, not just EED defense
9 as other cases have had. This was a case where
10 defendant urged - - - excuse me, pardon me - - - the
11 way you know that I acted out of EED is because my
12 very nature is nonviolent. And that's critical. And
13 the defense expert hinged the EED defense on the
14 notion that he had - - - the defendant - - - had a
15 nonviolent nature. He actually used the words that
16 the - - -

17 JUDGE RIVERA: Well, how could - - - how
18 can that be if his own witness says he changed? He's
19 not the same.

20 MS. MORSE: Well, his own witness - - -

21 JUDGE RIVERA: Lucas - - - we're talking
22 about Lucas.

23 MS. MORSE: I know what you mean - - - yes,
24 Your Honor. He - - - he said he changed, but Lucas
25 very spe - - - I'll get back to - - - to the expert

1 because that was actually - - - said a number of very
2 strong things - - - but even Lucas supported the
3 idea, because Lucas said even after the trauma,
4 defendant did not go out - - - and I had written down
5 his exact words - - - he - - - he didn't go - - - he
6 was still - - - he didn't go out and commit violent
7 acts. He just wasn't as calm as he was before. And
8 that's on 675, 676.

9 JUDGE STEIN: So you're saying because of
10 this - - -

11 MS. MORSE: So - - -

12 JUDGE STEIN: - - - because of the way he
13 presented his defense, any acts of violence, no
14 matter how they occurred or why they occurred or what
15 the circumstances were, were - - - would - - - would
16 be relevant and admissible?

17 MS. MORSE: No, not - - - no, Your Honor.
18 Not any acts, not at all, but - - -

19 JUDGE STEIN: So then what acts would be -
20 - - what acts would be, what acts wouldn't be?

21 MS. MORSE: The acts that would be
22 admissible and the acts that were admissible here - -
23 - were admitted here - - - because the judge actually
24 kept out many acts - - - the ones the judge admitted
25 were those that were tailored specifically that had -

1 - - and then, of course, the standard for relevance
2 is quite low - - -

3 CHIEF JUDGE LIPPMAN: Counsel, but what
4 about the 2005 incident - - -

5 MS. MORSE: Yes.

6 CHIEF JUDGE LIPPMAN: - - - where we don't
7 know how this thing all started. Why - - - why would
8 you let that in?

9 MS. MORSE: Well, first of all, I would
10 just say, Your Honor, it was an ab - - - it was a
11 mistake. When this happened below, there was no
12 suggestion whatsoever by anybody - - - defense
13 counsel, the court - - - that this was anything. Now
14 it's called a duping, but this was just a mistake, on
15 the theory that they - - - the prosecutor thought
16 that the - - - that the police officer had witnessed
17 the entire event and even heard what was said
18 earlier. But - - -

19 CHIEF JUDGE LIPPMAN: So is your - - - is
20 your argument that it's a mistake, but it doesn't
21 matter?

22 MS. MORSE: No, I - - - I would say - - -
23 honestly, Your Honor, I would say that this
24 particular trial judge was so scrupulous and so
25 meticulous, I think an argument can be made that even

1 with the nonhearsay information here, the evidence
2 could have been admitted, because what you had, even
3 just based on this officer's firsthand testimony, was
4 defendant leaning across the counter, grabbing a
5 counter guy - - -

6 JUDGE ABDUS-SALAAM: But counsel - - - but
7 - - -

8 MS. MORSE: I'm sorry.

9 JUDGE ABDUS-SALAAM: - - - but the judge
10 decided it shouldn't have been admitted - - -

11 MS. MORSE: Exactly.

12 JUDGE ABDUS-SALAAM: - - - and he - - - and
13 then gave some alternatives - - -

14 MS. MORSE: Exactly.

15 JUDGE ABDUS-SALAAM: - - - and then counsel
16 chose one - - -

17 MS. MORSE: Yes.

18 JUDGE ABDUS-SALAAM: - - - as opposed to
19 the other. Are you saying that the defense counsel
20 should have chosen to have the testimony stricken and
21 - - -

22 MS. MORSE: No, Your Honor, I - - - I - - -

23 JUDGE ABDUS-SALAAM: - - - a curative
24 instruction? Or what - - - what is your position?

25 MS. MORSE: No, Your Honor, I think Your -

1 have put it in if they didn't open the door?

2 MS. MORSE: I would say that's accurate,
3 Your Honor. That - - -

4 JUDGE FAHEY: Well, you wouldn't have been
5 able to. Santarelli is - - - is - - - you wouldn't
6 have even been able to - - - this evidence only comes
7 in in a response, in rebuttal.

8 MS. MORSE: Yes, but - - - and Your Honor,
9 and I believe that - - - that the reason it comes in
10 in response is because the language - - - and it's
11 very specific about relevance - - - is that it must
12 be - - - the information must be tailored - - - it
13 must be specifically tailored so it has a - - - Your
14 Honors know better than I - - - so it has a natural
15 tendency to - - -

16 JUDGE ABDUS-SALAAM: Well, how does - - -
17 how does somebody pushing someone up against a wall
18 or punching a fast-food worker in the face have a
19 natural tendency to show that someone is so stressed
20 that they would shoot in to a crowd?

21 MS. MORSE: It - - - it doesn't, Your
22 Honor. It doesn't show that he would be so stressed
23 to shoot in to a crowd. In this case, his defense
24 went much further than that. His defense said - - -
25 the defense came from his expert - - - his expert

1 said, in essence, but I can read you the exact
2 language - - - the expert said, you know he committed
3 EED because it's against his very nature.

4 He said "He only" - - - I'm sorry. He said
5 "Defendant used violence only defensively". These
6 are quotes from the record. "Fought only when he
7 couldn't avoid it. He never took out his anger for
8 no good reason. Defend" - - - the expert, the
9 psychiatric expert, went so far as to label defendant
10 "serene". He said "Defendant was normal" - - -

11 JUDGE RIVERA: The expert knew about these
12 incidences?

13 MS. MORSE: Yes.

14 JUDGE RIVERA: And still came to this
15 conclusion?

16 MS. MORSE: Yes, Your Honor. In fact - - -

17 JUDGE STEIN: But isn't that the point that
18 - - - that he only used it defensively. He only used
19 it, you know, when he was - - - but if we don't know
20 these circumstances, then how do we know that - - -
21 that these situations rebutted that proof?

22 MS. MORSE: We do know in these
23 circumstances, if I could just take them one by one.
24 The first one was a little girl who insulted
25 defendant's mother. And what defendant did was he

1 punched her, choked her and threw her against the
2 wall. He was adjudicated a JD based on that. I
3 mean, that didn't come in - - - juvenile delinquent -
4 - - that didn't come in at trial. But I'm saying, in
5 this case, we have - - - we know what happened. That
6 information went in front of the jurors because it
7 conflicted with his, I'll call it, Gandhi-esque
8 portrayal of himself that - - -

9 JUDGE STEIN: Okay, well, what about the
10 KFC incident?

11 MS. MORSE: Same thing. In that case - - -

12 JUDGE STEIN: We don't - - - but nobody
13 knew what happened before the - - - the moment that
14 the - - - the police officer walked in and saw him
15 doing what he did, but we don't have any idea what
16 happened before that.

17 MS. MORSE: I guess this - - - this could
18 be a very fine - - - there's a distinction I'm making
19 just for the purpose of answering that question. We
20 do know, actually. The jury wasn't allowed to hear,
21 because it was hearsay. We do know that, in fact,
22 there was no prov - - - there was no punching, there
23 was no threat of violence, there was no weapon, there
24 was nothing. Defense counsel was allowed to bring
25 out that possibility because of the fact that we

1 didn't have nonhearsay evidence, but - - -

2 JUDGE STEIN: But that's - - - but that's -

3 - -

4 MS. MORSE: But you're right.

5 JUDGE STEIN: - - - the proof that we're
6 dealing with.

7 MS. MORSE: Ab - - - absolutely, Your
8 Honor. So in this case, what I would submit is - - -
9 that's why I say there is a - - - reasonable minds
10 could differ, perhaps, that what - - - when you have
11 a situation where you have a defendant re - - - a guy
12 reaching across a counter to grab a guy and punching
13 him in the face, it doesn't naturally lend itself to
14 the idea that perhaps he was - - -

15 JUDGE RIVERA: But isn't that the whole
16 problem - - -

17 MS. MORSE: But - - - yes.

18 JUDGE RIVERA: - - - with the bad acts, and
19 that's why the case, as Santarelli and the rest of
20 these, are written as they are, that - - - as you
21 say, they're tailored to show this - - - this natural
22 tendency - - -

23 MS. MORSE: Yes.

24 JUDGE RIVERA: - - - to the violence - - -

25 MS. MORSE: Yes.

1 JUDGE RIVERA: - - - because of that very
2 fear that otherwise you assume that every violent act
3 is indeed showing this proclivity to be violent, and
4 that's what happened in this case, right?

5 MS. MORSE: Well, what - - -

6 JUDGE RIVERA: So the - - -

7 MS. MORSE: I'm sorry.

8 JUDGE RIVERA: So that is why what provokes
9 him - - - because that is his defense, that there is
10 a trigger - - - what provokes him is what's critical
11 for each of those incidences.

12 MS. MORSE: But what I would say, Your
13 Honor, is there's a very big distinction between this
14 - - - a number of distinction, but in terms of what
15 you just said about - - - about Santarelli and what
16 was really at issue. The evidence here was not
17 admitted to show the defend - - - or could not have
18 reasonably been read - - - the issue was not he had a
19 violent propensity. This is where defendant
20 portrayed himself as someone who, by nature, wouldn't
21 do this but for the triggers, so - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but the overall
23 effect is that he had a violent propensity. That's
24 why you're offering it.

25 MS. MORSE: No, Your Honor, absolutely not,

1 because in this case, he had an expert. He put
2 forward a specific defense. It wasn't like in
3 Santarelli - - -

4 JUDGE ABDUS-SALAAM: Wasn't - - - but was
5 that - - -

6 MS. MORSE: I'm sorry.

7 JUDGE ABDUS-SALAAM: Was that his main
8 defense? I know you've quoted - - -

9 MS. MORSE: Yes.

10 JUDGE ABDUS-SALAAM: - - - from the
11 expert's testimony, counsel, but I thought the expert
12 was saying he suffered from PTSD and that on the date
13 on the incident of the shooting, he was reliving the
14 PTSD, what happened to him at the stabbing, so - - -
15 in 2005. So what you say seems to me that the expert
16 testified to is somewhat peripheral to the main - - -
17 the main defense, which was PTSD and he was reliving
18 this.

19 MS. MORSE: I - - - I know exact - - - in
20 this case - - - it's an unusual case and Your Honor
21 can see the record. This expert did not base his
22 conclusions on - - - about PTSD and about the - - -
23 whether the defendant was suffering from it, on any
24 basis like the People's expert based it on diagnostic
25 tests and all sorts of scientific things.

1 This defendant - - - this expert went out
2 of his way and actually hinged his EED defense almost
3 entirely on the notion that he - - - it was - - - it
4 was a nonscientific notion, frankly, on some level;
5 that was our - - - what our expert said - - - is that
6 he wouldn't have done it because it's against his
7 nature. And - - - and if you look throughout the
8 testimony, he said things, you know, that - - - that
9 he wants to be nice. "Defendant wants to be nice.
10 He wants to help others. He wants to be a good
11 person."

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MS. MORSE: I'm sorry, Your Honor.

14 CHIEF JUDGE LIPPMAN: Thanks, counsel.

15 MS. MORSE: Okay.

16 CHIEF JUDGE LIPPMAN: Counsel, what - - -
17 what about that? The - - - your adversary says that
18 the whole defense is based on his nature, that that's
19 what's it's about, that he has this nonviolent
20 personality. Is that the heart of what your - - -

21 MS. HOTH: The heart - - -

22 CHIEF JUDGE LIPPMAN: - - - medical
23 evidence showed?

24 MS. HOTH: The heart of the defense was
25 that appellant, as a result of his own stabbing, was

1 suffering from post-traumatic stress disorder. This
2 is something that even the prosecution's expert did
3 not dispute; agreed that his stabbing caused post-
4 traumatic stress disorder. The question was whether
5 he was still suffering from it at the time of the
6 shooting, and whether the post-traumatic stress
7 disorder, the trigger of seeing his friend - - -

8 CHIEF JUDGE LIPPMAN: But doesn't - - -
9 doesn't those - - - don't the first two incidents go
10 towards answering that question as to, you know,
11 whether post the - - - the original issue that caused
12 him the - - - the trauma, that those incidents show
13 that he's - - -

14 MS. HOTH: The point is that they might
15 show that - - -

16 CHIEF JUDGE LIPPMAN: Show - - - yeah.

17 MS. HOTH: - - - had the People established
18 the context and the foundation. My adversary said
19 that the first incident was punching, choking,
20 pushing. It was the trial assistant who called it
21 punching and choking. The defense witness said no, I
22 think he pushed her, and now my adversary calls it,
23 punching, choking and pushing. So we don't know what
24 happened. We have a defense witness who said, yeah,
25 I heard something about it, and I think he pushed

1 her.

2 CHIEF JUDGE LIPPMAN: So there - - -
3 therefore prejudicial to your side?

4 MS. HOTH: Totally prejudicial. And it
5 doesn't go to the question of whether seeing his
6 friend being attacked in a situation somewhat similar
7 to when he was himself attacked and stabbed,
8 triggered his post-traumatic stress disorder. Among
9 - - - EED - - -

10 JUDGE RIVERA: So that means the only kinds
11 of incidences they would have brought in is a
12 stabbing or a shooting or something like this that
13 looks like that moment - - -

14 MS. HOTH: No, Your - - -

15 JUDGE RIVERA: - - - that - - - that the
16 defendant claims triggered this response?

17 MS. HOTH: No, Your Honor, that's not what
18 I've been saying at all. What I've been saying is
19 that this evidence might have been relevant had the
20 People had the evidence to show that Mr. Israel was
21 acting without any provocation whatsoever, that he
22 did, in fact, have a violent nature, aside from the
23 fact that he was a juvenile at the first time.

24 If that's what they had been able to bring
25 witnesses in to show, then it may have been relevant.

1 I'm not saying they had to bring in an actual
2 shooting, although there is some question as to
3 whether pushing someone is a precursor to walking
4 down a street and wildly shooting at a crowd,
5 including two uniformed officers who are repeatedly
6 telling you to drop your gun.

7 JUDGE RIVERA: Not commensurate to the
8 conduct.

9 MS. HOTH: Excuse me?

10 JUDGE RIVERA: Not commensurate to the
11 conduct, is that what you're saying?

12 MS. HOTH: It might - - - it might not be,
13 but I'm not saying that it wouldn't totally be
14 relevant. What I'm saying is that without the
15 adequate and - - - foundation, the context that shows
16 that - - - him pushing or choking or whatever it is
17 he did, did have a natural tendency to disprove his
18 defense. You can't just bring in evidence, you can't
19 bring in hearsay, and you certainly shouldn't be
20 relying on the trial assistant's representation.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MS. HOTH: Thank you.

23 CHIEF JUDGE LIPPMAN: Thank you both.

24 Appreciate it.

25 (Court is adjourned)

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

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

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Daniel Israel, No. 171, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

Date: October 28, 2015