COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 6

RAFAEL THEN,

Appellant.

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20 Eagle Street
Albany, New York 12207
January 05, 2017

Before:

CHIEF JUDGE JANET DIFIORE
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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CHIEF JUDGE DIFIORE: The next case on the calendar is appeal number 6, People of the State of New York v. Rafael Then.

Good afternoon, counsel.

MS. PAZNER: Good afternoon.

May it please the court. Patricia Pazner with Appellate Advocates for Appellant Rafael Then. I'd like to reserve two minutes for rebuttal, Your Honor.

CHIEF JUDGE DIFIORE: You may.

MS. PAZNER: Okay. This court, in Roman, held that a defendant is presumed innocent, is entitled to appear in court with the dignity and the self-respect of a free and innocent man, and to require him to appear in convict's attire denies him of that right.

In this case, appellant was similarly forced - - -

JUDGE ABDUS-SALAAM: Does it matter, counsel, whether the jury or - - - or anybody who would have to make a decision about the defendant's fate, knows whether he is in convict, or she is in convict attire, as you pointed out - - - as you put it?

MS. PAZNER: There is no dispute that this was identifiable prison garb here, Your Honor. The

court, prior to voir dire, understood it to be correctional wear.

JUDGE STEIN: Yeah, but I think the question, without trying to put words in my colleague's mouth, is whether it matters whether the - - - that the factfinders or prospect - - - potential factfinders actually knew he was wearing those clothes.

MS. PAZNER: I believe that he - - - they - - -

JUDGE STEIN: Whether they were visible.

MS. PAZNER: That yes, that they were visible. And in fact - - -

JUDGE STEIN: No, the question is, does it matter; does it make a difference?

MS. PAZNER: It matters that there is a possibility that they could see the clothes.

JUDGE STEIN: Any possibility means per se reversal. Even if there - - - even if there is nothing in the record to show that they did or could see it.

MS. PAZNER: The mere possibility, yes, requires reversal here. I would point to Cruz, there, in a shackling case, that show that unless the record conclusively determined that they were not

visible, this court cannot hold that there was not error here.

CHIEF JUDGE DIFIORE: Does it matter that the appearance in prison attire was for a portion of a trial day?

MS. PAZNER: No, Your Honor. First impressions matter here. They met the defendant, defendant was presented to them dirty, disheveled, and in prison attire.

From then on, this is the lens that defendant was going to be viewed through, that he wore civilian clothes following those days does nothing to cure the error, because - - -

JUDGE ABDUS-SALAAM: Counsel, what, in the record, suggests that these jurors, on that half day, could see that your client was wearing prison pants?

MS. PAZNER: It's actually the court's own record that shows that - - - that visibility was a possibility. Because it says, although unlikely, unless a juror strained, means that visibility was a possibility, because if one juror was intent on looking at defendant, then the pants were visible.

And I would like to point out that the prosecutor, during voir dire, made it a point of pointing out the defendant's disability. Because defendant was in

a wheelchair, in fact, made his legs much more noticeable.

JUDGE GARCIA: Counsel, you are citing the shackling cases for saying the mere possibility. But do you think the mere possibility language in the shackling case is somehow also a product of the fact that we do apply harmless error in the shackling cases? I mean, what you want is mere possibility, absolute error.

MS. PAZNER: Yes. I believe that the visibility part of that goes to whether an error has been established. So in - - -

JUDGE GARCIA: But you don't think that we might say, okay, mere possibility in a shackling case may get you an error, but that error is going to be analyzed under harmless error analysis. You want both of those parts.

MS. PAZNER: I - - -

JUDGE GARCIA: You want the mere possibility being automatic reversal.

MS. PAZNER: I want what this court held in Roman, which was that once the error is established, that a defendant is forced to appear in identifiable prison wear, that there is a reversal without harmless error analysis here.

JUDGE STEIN: Didn't - - - didn't the court

also say in Roman that there might be situations in which - - - that would present problems, practical problems of implementation of a request that a defendant not where prison garb? Doesn't that kind of, at least, suggest that - - - that we weren't talking about a rule of per se reversibility?

MS. PAZNER: No. I think - - - I think that they were leaving open the possibility that there may be some - - - a defendant that perhaps would want to wear prison attire, you know, they - - - they deal with that in Estelle, where if you're not compelled, if - - - then - - - then it's not a per se reversible error, but once you are compelled, it is so.

I think that's the opening - - -

JUDGE STEIN: Although the language refers to implementation of a defendant's request that he not wear prison garb. So I'm not sure that - - - that that makes sense.

MS. PAZNER: I think - - - I think that that is - - - that is foreclosed by Estelle, by the moment that Estelle wrote that there is no justifiable state interest in wearing prison garb, I don't think that now we can go back and find that there might be.

Appellant - - - appellant timely protested. He said that he was wearing orange pants, he didn't look appropriate, he recognized that he was meeting the jury for the first time, and this was his life on the line, and requested - - - while he requested a two-day adjournment, defense counsel did modify that and asked for just a mere afternoon, and in fact, was able - - - defendant was able to obtain civilian clothing the next day. And so this error could have been completely avoided by a mere afternoon adjournment.

Here, harmless error doesn't apply under Roman, and I would also point out that this court's reading in Nelson also suggests that the framework requires - - -

JUDGE ABDUS-SALAAM: So you don't think that - - -

MS. PAZNER: - - - per se reversible error.

JUDGE ABDUS-SALAAM: - - - Roman is distinguishable from this case at all? In Roman, the - - - wasn't the defendant required to wear prison garb during the entire trial?

MS. PAZNER: Yes. That's correct. They - - - they were. But I would just say that the - - - the - - - once the error is established, it's established. The peop - - - the jurors know. The jurors know who he is, who he's being presented as, a

criminal, an obviously guilty person. To be reminded of that is what Roman is, but that doesn't - - -

JUDGE GARCIA: But Roman also is - - -

MS. PAZNER: - - - erase what they know.

JUDGE GARCIA: But Roman does not get to the harmless error prong at all. In fact, it's not mentioned. Roman is a one-paragraph procurement opinion. It does - - - so you're saying you want what's in Roman, but you're saying you want a no-harmless error rule; that's not Roman. I mean, we didn't address it.

MS. PAZNER: Right.

JUDGE GARCIA: So in Roman, as the judge was saying, Judge Abdus-Salaam, it's a continuing presence in front of the jury, we didn't get to harmless error, but now you want a mere possibility, no harmless error.

MS. PAZNER: I - - - I want - - -

JUDGE GARCIA: And you said you want what's in Roman, but I don't see that as Roman.

MS. PAZNER: I want what - - - I want this court to hold that there is an error. Error was established, and just as in Roman, reversal is required.

CHIEF JUDGE DIFIORE: Counsel, do you - - -

JUDGE GARCIA: Without a harmless error - - - I'm sorry.

CHIEF JUDGE DIFIORE: You care to get to the issue regarding the ex-girlfriend's testimony?

MS. PAZNER: Sure, Your Honor. The complaint here is that appellant was deprived of his due-process right to a fair trial when the court allowed testimony from appellant's girlfriend, that he always carried a gun during the month - - -

JUDGE STEIN: Was there an objection to that? I - - - I haven't found anything in the record that indicates that it was preserved, but - - -

MS. PAZNER: I believe that the defense counsel asked that mention of the gun that he was carrying - - -

JUDGE STEIN: Well, there - - - there certainly was an objection to admiss - - - to admitting the gun itself, and - - - and in the end, the court did not allow any reference to finding the gun when he was arrested.

MS. PAZNER: Right.

JUDGE STEIN: But the remainder of this testimony, I didn't see any objection.

MS. PAZNER: I - - - I believe that you can imply from defense counsel's objections that - - -

that - - - to the gun being put in, and mention of the gun, is the girlfriend's testimony about the gun throughout the month.

JUDGE STEIN: Because I - - - I thought it was aimed at the fact that he was acquitted of the charge of having the gun at that particular time, and that was why he was focused on the gun at the time of his arrest.

MS. PAZNER: Right. I - - -

JUDGE STEIN: But - - - but that wouldn't preclude evidence of his having a gun on some other occasion, necessarily, and I just did - - - okay.

MS. PAZNER: Okay. And - - -

JUDGE STEIN: I see.

MS. PAZNER: Do you want me to address the actual issue at hand? Okay.

It was admitted, according to the court, under the identity, narrative, and access. None of these were appropriate here.

This did not go to ID. You know, for ID, you need to find something unique about the prior crime and the current crime. Here, there was nothing unique about this gun. It was a black gun that was six to seven inches long, the complainant was robbed by a black nine-millimeter gun, there's nothing - - - there's no unique

characteristics about that.

Nor did it complete the narrative. It had nothing to do with the date of the crime; it had to do - - - and specifically, I believe the girlfriend could not - - - did not see the robber - - - I'm sorry, the girlfriend did not see defendant on the day of the incident.

Access was just not necessary here, because the charges that the defendant faced were that he displayed a gun. The robber displayed a gun, rather than - - - what appeared to be a gun, rather than an actual gun here.

This was not harmless here; this was a very quick eyewitness, one-eyewitness robbery. It happened very fast, there was a weapon involved, so clearly, weapon focus was at play here. And there was no other identification, including a surveillance video; it was too grainy to make an identification here.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. PAZNER: Thank you.

CHIEF JUDGE DIFIORE: Mr. Ferdenzi.

MR. FERDENZI: Good afternoon, Your Honors. Joseph Ferdenzi for the People of the State of New York.

The defendant here got a fair trial. I grant you, maybe it wasn't perfect, but it - - - but it was fair.

JUDGE FAHEY: Let me ask you this - - -

MR. FERDENZI: Sure.

JUDGE FAHEY: - - - Mr. Ferdenzi. Do you - - - would you characterize the Appellate Division ruling as - - - as a harmless error ruling?

MR. FERDENZI: Essentially, yes.

JUDGE FAHEY: Okay. So that means, in essence, that they credited Supreme Court's statement that you had to strain to see the orange pants, which means that if you strained, you could see the orange pants. So therefore, they found that - - - so they were, therefore, identifiable, but - - - but it was a minor error, and it was a harmless error. And it didn't - - - it didn't have a significant effect on the outcome of the case.

MR. FERDENZI: I - - - I - - -

JUDGE FAHEY: Is - - - is that how you characterize it?

MR. FERDENZI: I don't think I - - - I would, Your Honor.

JUDGE FAHEY: Let me just explain the reason I asked.

MR. FERDENZI: Yes.

JUDGE FAHEY: I'm curious, what are we to do? Are we to say, number one, if there is an

affirmed finding of fact that this was not identifiable - - - identifiable piece of prison clothing, then I don't think we really have to go much further with this.

MR. FERDENZI: Um-hum.

JUDGE FAHEY: But if that's in question, and that if you can fairly or reasonably argue that it was identifiable, then the question, for this court, becomes whether or not - - - then it's error, so is it harmless error or not. And we're really focused in on whether or not harmless error can apply in this setting.

MR. FERDENZI: Yeah - - -

JUDGE FAHEY: That's why I'm asking you that.

MR. FERDENZI: Yes, I understand, Your Honor. Of course, it's understandable that many times an Appellate Court, especially a very busy Appellate Division like the Second Department, will base its ruling on what it thinks is the strongest - - -

JUDGE FAHEY: Well, you know - - -

MR. FERDENZI: Yeah.

JUDGE FAHEY: - - - I think, in fairness to them, I think they tried to cover both sides of this

question. You know, it's a prudent thing to do when you're an Appellate Court. But I'm curious to know how you see it.

MR. FERDENZI: Well, I don't see it as - - - first, I don't think that that statement, that if somebody strained they could see it, means that anyone actually saw the pants.

I know that when the assistant DA asked the panel if they noticed anything unusual about the defendant, the only response was, he's in a wheelchair. So - - -

JUDGE FAHEY: Yeah, I think you're totally right. But all they had to do, either court, was just say, they couldn't see it, it's not identifiable; that's our finding of fact.

Nobody said that.

MR. FERDENZI: I understand, Your Honor.

JUDGE FAHEY: Yeah.

MR. FERDENZI: I - - - I - - - I've been practice - - -

JUDGE FAHEY: So it's kind of simple. That's kind of simple.

MR. FERDENZI: Yeah, I underst - - - no, I totally understand, Your Honor. You know, I've been practicing appellate law for a long time - - -

JUDGE FAHEY: Yeah.

MR. FERDENZI: - - - and when I get the perfect record on appeal, I'll have retired by then.

JUDGE FAHEY: Good luck.

MR. FERDENZI: Thank you. So I just think that on this record, we - - - we should come to the conclusion, and - - - and this is the conclusion that I think - - - and the Appellate Division came to, which is that regardless of whether these pants were visible, which we say they're not, regardless of whether they were identifiable, which we say they're not, the fact is, this defendant was convicted because of the mountain of evidence arrayed against him.

And there's no way this half day of wearing orange pants could have led to this verdict. I don't think a jury even seeing the orange pants, when faced with this - - - I don't know, I don't know what to call it, but an insurmountable - - -

JUDGE FAHEY: You see, I - - - I - - - I happen to think you're right, if harmless error analysis can be applied.

MR. FERDENZI: Yes.

JUDGE FAHEY: So that's really the question.

MR. FERDENZI: And - - -

JUDGE FAHEY: Can it be applied to - - - to identifiable prison clothing.

MR. FERDENZI: I - - - I absolutely think it - - - it's in line with this court's jurisprudence.

JUDGE FAHEY: Um-hum.

MR. FERDENZI: I mean, when I read the - - - this court's cases on visible handcuffs, visible leg shackles - - -

JUDGE FAHEY: You know, the distinction though there, is that I think harmless error analysis is correctly applied by this court to those situations, because there's an element of a compelling state interest. There's a question of safety there. And we don't have that here.

MR. FERDENZI: But - - -

JUDGE FAHEY: This is the kind of error that, really, there's no compelling state interest in what attire somebody wears.

MR. FERDENZI: I quite agree with you, Your Honor, but that goes to whether there - - - there's error or not.

JUDGE FAHEY: Um-hum.

MR. FERDENZI: That analysis goes to

whether there's error. That analysis does not apply to whether it's harmless.

I understand that there's no compelling reason to wear prison clothes, and that in the other cases, in order to decide whether there was error by the trial court, one engages in that analysis. But I don't think it has any bearing on harmlessness. I think that it would be, as I said in my brief, and I apologize for repeating myself, it's counterintuitive to say, if a jury erroneously, erroneously, sees leg shackles or visible handcuffs, the error can nevertheless be harmless.

But to say that if there is an error in wearing prison clothing, that cannot be harmless. I - - - I don't think those things drive together. I don't - - - I think it would lead - - -

JUDGE RIVERA: I - - - I'm sorry - - -

MR. FERDENZI: - - - to confu - - -

JUDGE RIVERA: - - - I'm not really understanding.

MR. FERDENZI: Okay.

JUDGE RIVERA: Perhaps I'm just not hearing you clearly. Understanding the argument about the analysis on - - - on - - - in those prior cases goes to the compelling interest in error.

MR. FERDENZI: Um-hum.

JUDGE RIVERA: Right. Isn't the error whether or not you shackled them or didn't shackle them?

MR. FERDENZI: Yes.

JUDGE RIVERA: Or you handcuffed them or didn't handcuff them?

MR. FERDENZI: Correct.

JUDGE RIVERA: And you could or couldn't?

MR. FERDENZI: Um-hum.

JUDGE RIVERA: So okay. Walk me through, again, your argument of how in - - - in those examples, those prior cases, what's at play is the state's interest, which is not the case in the garb. It's either you're wearing the garb or you're not; isn't that the error?

MR. FERDENZI: Yes. But the - - - the point I'm making is that if you can have error in shackling somebody - - -

JUDGE RIVERA: Um-hum.

MR. FERDENZI: - - - in front of a jury - - -

JUDGE RIVERA: Yes.

MR. FERDENZI: - - - and yet hold the error to be harmless, then you should hold that visible prison clothing can be harmless also.

JUDGE FAHEY: Well, that's because the compelling state interest of safety in the courtroom may require shackles for certain defendants.

And you don't have that. And that makes sense. And that's logical. So if - - - even though it's error, you find that shackles are required because of an uncontrollable defendant, for some particular safety reason, then the judge can make an appropriate determination on the record, and you're allowed to go ahead and do that, even though it clearly impinges on their rights, and implies that - - - it undermines the presumption of innocence.

There is no compelling state interest for safety in the question of clothing. So that's why I focus in on the harmless error - - -

MR. FERDENZI: Right.

JUDGE FAHEY: - - - analysis.

MR. FERDENZI: But - - -

JUDGE GARCIA: Counsel, I'm sorry. I understood your point in the compelling argument - - - state interest argument to be, that's balanced in part one, were you say, the person is shackled to the table; is it error. And you say, well, he was violent, he was, you know - - - so there's no error. We don't get to harmless error analysis.

In the prison garb, you don't have that first part; there is no compelling state interest in having someone in and sits there in an orange jumpsuit, so it's error. Then you get to harmless error. Is - - -

MR. FERDENZI: That is correct. That is the way I think the - - - the analysis proceeds.

JUDGE STEIN: But you're not arguing that it's per se error if, for example, if - - - if the defendant here were seated at a table, and there was a, you know, one of those black curtains around the entire table, and he was seated in his wheelchair, and there was absolutely no possibility that he could be seen, then it wouldn't be error just because he was wearing the pants, right?

MR. FERDENZI: Correct. There are situations where the - - - a court could find that there was no error. I'm simply addressing the hypothetical scenario of, if this court were to find there were error here, that just like the Appellate Division did, it would apply harmless error analysis, and conclude that in this case, this half-day possibility would constitute - - -

JUDGE RIVERA: But again, this is why I'm asking you. I do not understand the argument about

the compelling state interest. Because once you've decided there's an error, that is no longer relevant. Now, you're deciding the impact of the error. So what is the compelling - - - it's an error or it's not an error, and then you move on from there.

MR. FERDENZI: Yes, Your Honor. I - - - I understand that. And so what I'm say - - - saying here is that if a court were to find that there were error - - -

JUDGE RIVERA: Um-hum.

MR. FERDENZI: - - - it could, nevertheless, be deemed harmless. And this would be an appropriate case for that, because there's overwhelming evidence of guilt here.

And the defendant - - - we understand, I mean, the judge here was obviously not pleased by having this defendant produced late and in prison clothing. And it did what it could, and I think it did it satisfactorily. It had - - - it waited until he was wearing a black knit top, it made sure that the wheelchair was pushed under this very - - - as the court described it, very wide table, and it did what it could to make sure that there was no error here, that the jurors could not see these orange pants, which, in any event, were not - - - didn't

have numbers, didn't have stripes, didn't have anything.

Yes, the participants, the judge, the prosecutor, the defense attorney, everybody knew they were prison pants, but that doesn't mean that a juror, upon seeing a man dressed in a black knit top with orange sweats, would come to that conclusion.

I see my time is up, and if there are no further questions, I will rest on our brief.

JUDGE ABDUS-SALAAM: I would like you to address the second half of the argument, though, counsel, about the gun testimony coming in.

MR. FERDENZI: Oh, yes, Your Honor. I'd be pleased to.

The main problem with that issue, before this court, is it's not preserved.

His objections were about - - - largely about the testimo - - - any testimony that was connected to the October 27th Bronx incident. He never objected to the ex-girlfriend's testimony about what she saw before the Bronx incident. In fact, that's why when you look at the record, you'll see that the prosecutor was very careful about understanding the scope of this ruling, and limited her testimony to events before October 27th.

And as far as the merits goes, I - - - I think

the trial court and the Appellate Division were all correct, that this was relevant evidence whose relevancy exceeded any prejudicial value.

So the ruling, I believe, was correct; it should be affirmed.

Thank you.

CHIEF JUDGE DIFIORE: Thank you, Mr. Ferdenzi.

Ms. Pazner.

MS. PAZNER: Shackling and prison garb are different. Shackling, there's sometimes a necessary state interest here. That presupposes both that there may be, at times, misapplication, and it presupposes, therefore, that harmless error analysis may apply.

JUDGE STEIN: Doesn't that work - - - cut both ways? Because to me, seeing a defendant in shackles would be way more prejudicial than seeing a defendant in prison garb.

MS. PAZNER: I disagree, Your Honor. I believe that while shackling - - - first of all, this court in Clyde said that - - -

JUDGE STEIN: Well, one - - - to me, one suggests that - - - that this person is in - - - is in prison, and - - - and I think most people

understand that sometimes people are held if they've been charged with a serious crime, or whatever. The other is that this person is a dangerous person.

MS. PAZNER: That - - -

JUDGE STEIN: That this is a violent person. And - - - and here, particularly in a case like this, where there is alleged use of a weapon, or something that appears to be a weapon, I - - - I just - - - I think it could cut both ways.

MS. PAZNER: I don't believe that it's just that he is a prisoner. I believe that it suggests he has a prior criminal record. It suggests that - - - because he's being held, it does suggest that he may have a prior pris - - -

JUDGE STEIN: But even - - - even if you're right about that, how - - - how is that more prejudicial than suggesting that here is a person that can't even be freely sitting in a courtroom with court officers and - - - and everything around. This person is so dangerous, we have to have him or her shackled.

MS. PAZNER: Well, first, this court, in Clyde, stated that likely, what a jury would say is - - - particularly in a violent crime, is that a person is being shackled for precaution, rather than assume

independently that he's a dangerous man. That's this court in Clyde.

First of - - - second of all, prison garb suggests a flight risk, suggests that he's generally a criminal, it's - - -

JUDGE FAHEY: Yeah, but rationally - - - rationally - - - listen, rationally, shackling just looks worse than - - - than orange pants. I mean, if - - - if you're sitting there in a jury, don't you think that that's kind of rational?

Isn't - - - isn't the real question not that, because I - - - the real question is, we apply a harmless error analysis to shackling, and that's because we're - - - there's a compelling state interest that we're trying to protect, and the safety, and the conduct of the courtroom. We don't have that compelling state interest in clothing. Isn't that the real distinction?

MS. PAZNER: It - - -

JUDGE FAHEY: Because Judge Stein, it's hard to rationally argue with what she said. It makes perfect sense; shackling is worse. You know, it's a - - -

MS. PAZNER: I understand, Your Honor, that - - - that - - - and I agree that the main argument

here is that harmless error is more appropriate in a shackling case, because there is sometimes a state interest to do so.

JUDGE GARCIA: But isn't the problem with that, once you get to the harmless error analysis in a shackling case, you've decided there isn't a compelling state interest? In order to get to the harmless error analysis, you've already determined, there is no compelling state interest to shackle the person. Otherwise, it's not error.

MS. PAZNER: I - - - I understand that. I think it's just more of looking at the error in a macro way, that we understand that sometimes there's going to be a misapplication, and it still gives the People a chance - - - the State a chance to prove its case, whereas here, there is never a justifiable reason to do so, and that does not - - - than pre - - - pre-assumed the same harmless error analysis.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. PAZNER: Thank you.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rafael Then, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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