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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 102

JAY J. BARBONI,

Appellant.

20 Eagle Street
Albany, New York 12207
April 25, 2013

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

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with Number 102, People v. Barboni.

3 Counsel, would you like any rebuttal time?

4 MS. DAVISON: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead.

8 MS. DAVISON: Thank you. May it please the
9 court, I'm Mary Davison for the appellant in this
10 matter.

11 Your Honors, in Taylor, indicated that the
12 decisive question to be answered in these depraved
13 indifference cases was whether the defendant acted
14 with utter disregard for human life. And I would
15 respectfully contend that the proof below failed to
16 allow any rational juror to find that.

17 The two-tiered - - -

18 CHIEF JUDGE LIPPMAN: What about the way -
19 - - what he did once the baby was hurt? Was that
20 consistent in your mind with a concern for human
21 life?

22 MS. DAVISON: When you talked about utter
23 indifference, you - - - specifically in Lewie and
24 Matos, you talked about the fact that - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but isn't this

1 different than Lewie and Matos, because here - - -
2 there it was bad decisions giving the baby over to a
3 certain caregiver. Here, he's the - - - he's the
4 caregiver.

5 JUDGE READ: In other words, in Lewie and
6 Matos, they didn't inflict the injuries.

7 MS. DAVISON: That's correct.

8 JUDGE READ: That's quite different, isn't
9 it? As the Chief Judge put it.

10 MS. DAVISON: Well, the actus reus
11 obviously is quite different, but the con - - -

12 JUDGE GRAFFEO: Do you think the fact that
13 he waited two hours and then called the child's
14 mother, that that takes it completely out of any
15 consideration for depraved indifference mens rea?

16 MS. DAVISON: I think if you're considering
17 that two-hour period, it's not a prolonged and brutal
18 course of conduct. If you're looking to - - -
19 whether he's conduct was utterly indifferent, it
20 wasn't utterly indifferent.

21 JUDGE SMITH: It is - - - there is a - - -
22 isn't it - - - isn't the moral enormity of what he
23 did on a different order from Lewie and Matos? I
24 mean, as the Chief was saying, it's one thing to - -
25 - to - - - to fail to prevent the injuries; another

1 to inflict them yourself.

2 MS. DAVISON: I would respectfully say
3 you're almost looking at it objectively. You're
4 almost looking at it in a Register or a Sanchez point
5 of view, if you say that, Judge Smith. You're
6 looking at the nature of the injuries, rather than
7 what he was thinking in his head.

8 JUDGE SMITH: Well, what was he thinking in
9 his head?

10 MS. DAVISON: He was cleaning the baby, he
11 was diapering the baby, he was giving him a bottle,
12 he was putting him to bed - - -

13 JUDGE SMITH: No, no; what was he thinking
14 when he inflicted at least five blows that killed the
15 child?

16 MS. DAVISON: I don't think that's part of
17 a brutal and prolonged course of conduct, sir. I - -
18 -

19 JUDGE SMITH: Well, okay. I - - - but just
20 - - - you want me to - - - you raised what he was
21 thinking. What was he thinking?

22 MS. DAVISON: The proof below doesn't show
23 that. I could speculate and I could say an
24 individual - - -

25 JUDGE SMITH: I mean, does indifference to

1 human life sound like a stretch for describing what
2 was in his mind at that moment?

3 MS. DAVISON: I think based upon his
4 actions, yes. I think if you looked at the actions
5 of Ms. Matos, for example, and you said trying to
6 cover up what had happened doesn't display utterly -
7 - - utter indifference - - -

8 JUDGE SMITH: Okay, but I'm not actually
9 talking about the cover up. I'm talking about his
10 state of mind at the time he beat the child.

11 MS. DAVISON: And I would - - -

12 JUDGE SMITH: I mean, doesn't "depraved
13 indifference to human life" seem to describe that to
14 you?

15 MS. DAVISON: To me, it's an intentional
16 act. It's - - -

17 JUDGE READ: Well, it's an intentional act,
18 but that doesn't say anything about his state of
19 mind. I mean, he hit the baby with a blunt
20 instrument, or hit the baby on something, or as Judge
21 Smith said, there were, like, five blows to the head.
22 I mean, that was the act - - - but that's the act is
23 one thing, and the mens rea is another.

24 MS. DAVISON: But again, then you're
25 looking objectively at the injuries inflicted, and

1 not to what - - -

2 JUDGE SMITH: But you can infer state of
3 mind from conduct. Nothing in our cases say that
4 conduct's irrelevant.

5 MS. DAVISON: And I would respectfully say
6 you can infer from the actions that he undertook that
7 he was not utterly indifferent, because he did try to
8 help the child. He went and checked on him; he
9 called the mother. He said, he stopped breathing; we
10 need help. This isn't like the other cases that have
11 been cited where - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but wasn't he
13 uniquely - - - didn't he uniquely understand the
14 condition that this child was in? Because, again, it
15 wasn't someone else doing the damage, it was him.
16 And then - - - so he understands what any delay is.
17 He understands the gravity of being more concerned
18 with covering it up then, you know, what happened.
19 Isn't that - - - again, coming back to your opening
20 point, doesn't this make this totally different than
21 Matos and Lewie? I mean, isn't it a very different
22 situation?

23 MS. DAVISON: No, because it - - - the
24 testimony of the experts below was that these
25 injuries, which were closed-head injuries, would not

1 necessarily had been readily apparent at the time
2 that they were inflicted. This is literally the thin
3 skull rule. This is a child who doesn't have the
4 same capacity to sustain blows as an adult.

5 JUDGE GRAFFEO: I thought - - -

6 JUDGE READ: But it's so - - -

7 JUDGE GRAFFEO: - - - the child was
8 vomiting. Didn't they say - - - didn't he say the
9 child vomited - - -

10 MS. DAVISON: He did.

11 JUDGE GRAFFEO: - - - and he cleaned up the
12 child?

13 MS. DAVISON: He did.

14 JUDGE GRAFFEO: Wouldn't that kind of
15 indicate to him there was something wrong?

16 MS. DAVISON: In fact the expert, Dr.
17 Botash testified that flu-like symptoms are commonly
18 misdiagnosed, even by pediatricians, in the case of
19 closed-head injuries. My client certainly wasn't a
20 medical doctor, and certainly shouldn't be held to
21 the standard that a medical doctor couldn't be held
22 to.

23 JUDGE READ: But he inflicted - - -

24 MS. DAVISON: But in fact the medical - - -

25 JUDGE READ: He inflicted the injuries.

1 MS. DAVISON: But again, he - - -

2 JUDGE READ: You think he didn't know - - -
3 what? You think he - - - there was blunt trauma to
4 the head, and he didn't know it? I mean, he - - -

5 MS. DAVISON: If you look at the statute
6 when it was - - -

7 CHIEF JUDGE LIPPMAN: Or was he indifferent
8 to it?

9 MS. DAVISON: I submit he was not, and I
10 submit that his conduct showed that he was not. But
11 I submit that this is - - - if - - - I started to
12 say, if you look at the purpose for which the statute
13 was promulgated in 1990, it was the very fact that
14 people didn't know that this - - - that it's abuse
15 directed toward a child that they're different than
16 types of injuries that would be seen in abuse toward
17 an adult. And so, I think you've got to look at it
18 in that light, that in fact - - -

19 JUDGE SMITH: Ma'am, I'm sorry. I didn't -
20 - - I'm not quite sure what you're saying. Different
21 types of injuries?

22 MS. DAVISON: The change of the statute in
23 1990 elevated, for example, assault third to assault
24 second, assault second to manslaughter, or assault
25 first - - -

1 JUDGE SMITH: Because of the inclusion of
2 serious physical injury in the statute?

3 MS. DAVISON: Because the actor didn't
4 necessarily act with the same intent toward a child
5 that that actor would have toward an adult.

6 JUDGE SMITH: Well, I mean, I understand, I
7 think, that the statute has the words "serious
8 physical injury" in it. Is that what you're
9 referring to or something else?

10 MS. DAVISON: I'm talking about when the
11 legislature decided to prom - - - to enact this
12 legislation in 1990, what they said was, their
13 expressed purpose was, we're having a hard time
14 proving these cases, because it doesn't seem that
15 somebody - - -

16 JUDGE SMITH: Because it's hard - - -
17 because it's hard to prove that he anticipated death.

18 MS. DAVISON: Or serious physical injury,
19 yes.

20 JUDGE SMITH: Well, but they - - - or
21 serious physical injury.

22 JUDGE GRAFFEO: They included serious
23 physical injury.

24 JUDGE SMITH: Yeah.

25 MS. DAVISON: Yes. So - - -

1 JUDGE SMITH: So what - - - so what did
2 they do to fix the problem?

3 MS. DAVISON: They objectified the statute.
4 They said, we're going to raise the playing field
5 here, because of the nature of the injuries and the
6 vulnerable victim. And that takes it into Register/
7 Sanchez territory, because it's no longer what's in
8 the individual's mind; it's what injuries have been
9 inflicted because of his conduct.

10 CHIEF JUDGE LIPPMAN: Okay, counsel,
11 thanks.

12 Counsel?

13 MR. OAKES: Good afternoon, may it please
14 the court, my name is Gregory Oakes. I'm the
15 District Attorney for Oswego County.

16 Your Honor's exactly correct. The moral
17 enormity of this case is much greater than that
18 present in Lewie and Matos.

19 JUDGE SMITH: Does it - - - does it - - -
20 does the record show that this man didn't care
21 whether the child lived or died?

22 MR. OAKES: I think it does, Your Honor.
23 After inflicting these injuries, around the time, the
24 child did throw up, there would have been clear signs
25 of his injuries that he was suffering grievous

1 injuries as a result of the repeated blows that he
2 took.

3 JUDGE SMITH: How is - - -

4 JUDGE GRAFFEO: Is there any other evidence
5 of that? I was trying to look at the autopsy report
6 from Dr. Phillip (ph.). Are these things that he
7 noticed - - - the twenty-five injuries clustered on
8 the right side of the head and the bruising on the
9 head, chest, abdomen, arms and legs - - - would - - -
10 did his autopsy report indicate if those would have
11 been evident after an hour or two?

12 MR. OAKES: They would have been, and in
13 fact, the testimony of Dr. Ann Botash, who is the
14 defense expert, she talked about the bruising that
15 would occur and that there is a varying period of
16 time when those bruising would be become apparent.
17 But Dr. Botash had said, had these injuries been
18 inflicted prior to him taking custody of the child,
19 it would have been immediately obvious to him that he
20 had suffered these injuries. And it - - -

21 JUDGE SMITH: Suppose - - - suppose he did
22 exactly what he did and run away, so there's no - - -
23 there's no period of waiting around while the child
24 is dying, is it still depraved indifference murder?

25 MR. OAKES: If he runs away from the scene?

1 JUDGE SMITH: The minute - - - the minute
2 he inflicts the beating, he says, oh, wait a minute,
3 I'm in trouble; I'm getting out of here.

4 MR. OAKES: I think it would be, Your
5 Honor, because at that point he's abandoning a
6 particularly helpless victim.

7 JUDGE SMITH: Well, but that - - - that's
8 what - - - the - - - and you say the difference from
9 Suarez is that it's a child?

10 MR. OAKES: It is, Your Honor, because - -
11 -

12 JUDGE SMITH: And the difference from
13 Bussey is that it's a child?

14 MR. OAKES: I think - - - God bless you,
15 Your Honor - - - the difference in Bussey is that it
16 is a child. But in part, I think in Bussey, I think
17 there's a clear - - -

18 JUDGE SMITH: Why - - - why - - - why is -
19 - - do we - - - committing the same acts against a
20 child, but not an adult, deprave - - - show
21 indifference to human life? Isn't - - - I mean, the
22 statute doesn't say - - - it doesn't distinguish
23 between indifference to - - - indifference to a young
24 person's or a mature person's human life.

25 MR. OAKES: You're correct in that respect,

1 but Subsection 4 is specifically designed for
2 children under the age of 11. And when we talk about
3 wanton cruelty, brutality and callousness, I think
4 any reasonable person would recognize to inflict
5 injuries on a child is more morally culpable.

6 JUDGE SMITH: Well, there was plenty of
7 wanton cruelty, brutality and callousness in Bussey,
8 wasn't there?

9 MR. OAKES: Absolutely, Your Honor. To
10 wrap him up - - -

11 JUDGE SMITH: But it wasn't murder.

12 MR. OAKES: - - - stuff him in a trunk - -
13 - it - - -

14 JUDGE SMITH: At least it wasn't depraved
15 indifference murder.

16 MR. OAKES: It was not a depraved
17 indifference murder, but I think in that - - - in
18 this particular case, the child is a particularly
19 vulnerable victim. Unlike the victim in Bussey - - -
20 he was in an open area where neighbors could hear
21 him. People could intervene, could come to his
22 rescue. He potentially, as an adult, could fight off
23 his ties - - -

24 JUDGE SMITH: I know that Suarez says a
25 potentially vulnerable victim. How do you - - - how

1 did we get that out of the statute? I mean, what
2 does the statute say that the particularly vulnerable
3 are more protected than others?

4 MR. OAKES: The statute does not say that,
5 Your Honor. This court craft - - -

6 JUDGE SMITH: I mean, isn't - - - if
7 depraved indifference is a state of mind, how can the
8 state of mind vary with the vulnerability of the
9 victim?

10 MR. OAKES: Well, because when - - - in the
11 Suarez court, they talked about the depraved
12 indifference being the wanton brutality and
13 callousness, coupled with indifference to human life.
14 So looking at that first prong of the brutality and
15 the callousness, I would respectfully submit, Your
16 Honor, that to do these acts to a child, a fifteen-
17 month-old - - -

18 JUDGE SMITH: But haven't we required both?
19 We have a lot of cases with a ton of brutality and
20 callousness, and we've said, unless you show
21 indifference - - - indifference to whether the victim
22 lived or died, that doesn't do it. Is that - - - is
23 that the rule for children?

24 MR. OAKES: That we also need to show the
25 indifference, Your Honor?

1 JUDGE SMITH: Yes. That we - - - that you
2 must show that the perpetrator in fact did not care
3 whether the child lived or died?

4 MR. OAKES: I believe that is correct, Your
5 Honor, that we do need to show that. And I think
6 that is evident in this case. After inflicting these
7 grievous injuries to Nicholas Taylor, the defendant
8 took him upstairs, put him in a crib, and then went
9 back downstairs in the residence, and waited - - -

10 JUDGE SMITH: But isn't there an anomaly in
11 the statute as you read it? You do not have to - - -
12 you do not have to consciously disregard a grave risk
13 of death. You can consciously disregard a grave risk
14 of serious physical injury, and you're in within the
15 statute.

16 MR. OAKES: Correct.

17 JUDGE SMITH: If you are not - - - if you
18 are not consciously aware of and disregarding a grave
19 risk of death, how can we ever say that you're
20 indifferent to whether the person lived or died?

21 MR. OAKES: I guess if you're consciously
22 aware of and disregarding it, Your Honor, I think
23 it's the disregard that equals the indifference.

24 JUDGE SMITH: But all you're disregarding
25 is the risk of serious physical injury. And the

1 indifference has to be to human life.

2 MR. OAKES: Well, I think the disregard is
3 to the risk. The act itself disregards the risk. I
4 think the indifference relates to the outcome and
5 what that's going to be. And in this particular
6 case, when you look at the indifference, he placed
7 Nicholas upstairs in the crib, left him alone, didn't
8 treat him, didn't try to give any kind of
9 ameliorative efforts, such as, you know, Tylenol,
10 Ibuprofen, such as we saw in Matos. Nothing to treat
11 the actual injuries of the child. He didn't call
12 911. He - - -

13 JUDGE SMITH: But you say you have a DIM
14 case without any of that?

15 MR. OAKES: I - - - excuse me, Your Honor?

16 JUDGE SMITH: You think you have a DIM case
17 without any of that?

18 MR. OAKES: Yes, yes.

19 JUDGE SMITH: If he'd run away like the guy
20 in Suarez.

21 MR. OAKES: Yes, Your Honor. And - - -

22 CHIEF JUDGE LIPPMAN: What else, counselor?

23 MR. OAKES: And, Your Honor, again, given
24 the multitude of injuries, again we talked about the
25 cluster of injuries. Dr. Phillip at trial, the

1 medical examiner, testified a - - - twenty-five fresh
2 injuries clustered around the head, and the photos
3 that were admitted into evidence showed just
4 horrible, horrible bruising to this child, the fact
5 that his ear was basically black, the area behind his
6 head was black.

7 No reasonable person in the defendant's
8 position - - - and again, as this court pointed out,
9 he's not a doctor looking at the injuries after the
10 fact, trying to discern what took place since he - -
11 -

12 JUDGE SMITH: You don't really mean no
13 reasonable person in his position; you mean no human
14 being in his position.

15 MR. OAKES: That's more accurate, exactly,
16 Your Honor.

17 JUDGE SMITH: I mean, this is not an
18 objective test.

19 MR. OAKES: Correct, correct. And again,
20 when the indifference - - - he is waiting downstairs
21 when Mom shows up. And yes, he did reach out and
22 call Mom, but I think the reasonable view of the
23 evidence is he knew Mom was going to be coming home
24 shortly. He knew she was going to be coming home and
25 finding her dead fifteen-month-old child.

1 Rather than waiting for her to discover it
2 upon her arrival, it was essentially the cover-up.
3 I'll call to let her know to kind of, you know,
4 distance myself from this act. But when she arrives,
5 he's not waiting with Nicholas upstairs; he's instead
6 downstairs in the kitchen. She asks what's going on.
7 He says, he's not breathing.

8 And when the investigators asked him why
9 didn't you call 911? He essentially says, it's
10 Dawn's kid. It's not my kid, is essentially what
11 he's saying, so he, therefore, didn't care. And
12 again - - -

13 JUDGE SMITH: Is it - - - is it possible
14 that the real reason that he - - - was that he knew
15 the child was dead?

16 MR. OAKES: It very well could have been at
17 that point, Your Honor. But, again, there's nothing
18 in the record to show that he tried to resuscitate
19 the child, you know. Again, his claim is that he
20 noticed the child wasn't breathing. But there's no
21 evidence, no statement from him, claiming that he
22 tried to resuscitate the child and bring him back.

23 Again, he - - - once he had committed this
24 horrible act, he was content just to let Nicholas
25 suffer, and Nicholas did suffer. He lived for over

1 two hours and during that period of time, you know,
2 the doctors testified had he had lived, he would have
3 been legally blind.

4 And I'm not trying to give a closing
5 statement here, but we have a two-year - - - fifteen-
6 month-old child who's left for two hours, blind. Not
7 a mom around to hold him; nobody to comfort him,
8 cuddle him. He's just left to suffer and wallow in
9 his own pain and misery, while the defendant sits
10 downstairs, who could help him, who's watching this
11 kid, and Nicholas is in his sole care and custody.
12 Yet he does nothing until Nicholas' final breath.

13 If that's not the very definition of
14 depraved indifference, if it doesn't reflect wanton
15 cruelty and indifference to human life, God help me,
16 I don't know what does.

17 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
18 you, counsel.

19 MR. OAKES: Thank you.

20 CHIEF JUDGE LIPPMAN: Counsel?

21 MS. DAVISON: This court has written that
22 the death of any child can be considered brutal and
23 depraved. That's not the test. It must be depraved
24 indifference. It must be depraved and it must be
25 indifferent. And this death was not indifferent.

1 And to say that he suffered for - - -

2 JUDGE SMITH: You won't - - - you don't
3 quarrel with depraved?

4 MS. DAVISON: I think a rational person
5 could find these acts were depraved.

6 To say that this child suffered for two
7 hours is entirely speculative, because it's just not
8 known. It's just not known when this child lost
9 consciousness and what happened in that intervening
10 time.

11 I agree, the facts are shocking, but that
12 in and of itself does not render my client
13 indifferent. He wasn't indifferent.

14 And counsel speaks of his statements. He
15 talked about the fact that this child had suffered
16 from epileptic seizures, and that when he went
17 upstairs and he saw the child, he thought maybe this
18 is an epileptic seizure, and called the mother.

19 He's not a doctor. There's no proof that
20 he knew how to resuscitate this child. There's no
21 proof that he knew what to do. And it may very well
22 have been that that was his reaction - - - what do I
23 do? I'll call the mother. And that may not - - -
24 may be woefully inadequate, as you wrote in Lewie and
25 Matos, but - - -

1 JUDGE SMITH: But I mean, that here - - - I
2 mean, I see your point, that the inaction after the
3 injuries is maybe explainable or no worse than
4 anybody, but what about, you know, he had - - - he
5 didn't have to beat the kid up in the first place?
6 Isn't that what really distinguishes this from a lot
7 of the other cases?

8 MS. DAVISON: No, it has to be a brutal and
9 prolonged course of conduct. And what you've talked
10 about as prolonged is in Best (ph.) - - -

11 JUDGE READ: So "prolonged", that's the
12 problem here? It wasn't prolonged?

13 MS. DAVISON: The problem is it was neither
14 prolonged nor indifferent. You've talked about - - -

15 JUDGE SMITH: Prolonged, of course, isn't
16 in the statute. That's in Suarez, but - - -

17 MS. DAVISON: No - - -

18 JUDGE SMITH: - - - but we didn't - - - we
19 didn't say in Suarez, did we, that nonprolonged
20 brutality could never be depraved indifference?

21 MS. DAVISON: I think you said the
22 opposite. You said it affirmatively, a des - - -

23 JUDGE SMITH: You say that a recurring fact
24 pattern is the prolonged brutality, but if ever there
25 were a nonprolonged case that was pretty brutal, this

1 is it, huh?

2 MS. DAVISON: I don't think that that's
3 dispositive of the issue, though. I think you have
4 to look at Best, where the beatings took place over
5 many days. You have to look at the actor in - - -

6 JUDGE READ: Well, a fifteen-year-old
7 infant probably wouldn't survive if the beatings - -
8 - if the beatings took place over many days?

9 MS. DAVISON: I think the infant in - - -
10 the child in Best was three or younger.

11 JUDGE READ: Yeah, fifteen-months, though,
12 that's pretty - - - pretty small.

13 MS. DAVISON: But the same is true in - - -
14 I'm sorry - - - it may be Matos or Lewie where the
15 partner beat the child for days before the child
16 actually succumbed to his injuries.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 Thanks, counsel.

19 MS. DAVISON: Thank you.

20 CHIEF JUDGE LIPPMAN: Thank you both.

21 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jay J. Barboni, No. 102 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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