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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 226

TORREL SMITH,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
November 13, 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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start  
2 with number 226, People v. Torrel Smith.

3 Counsel?

4 MR. GAETANI: Good afternoon, Your Honors.  
5 Salvatore Gaetani on behalf of Torrel Smith. With  
6 the court's permission, I'd like to reserve two  
7 minutes of my time for a possible rebuttal.

8 CHIEF JUDGE LIPPMAN: Sure.

9 MR. GAETANI: Thank you, Your Honor.

10 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

11 MR. GAETANI: There is a very workable rule  
12 which can serve to do two things. It can serve to  
13 balance the recognized goals in Huertas while at the  
14 same time dealing with legitimate concerns about the  
15 bolstering of eyewitness identification.

16 CHIEF JUDGE LIPPMAN: So what's the rule?

17 MR. GAETANI: And this is the rule.

18 CHIEF JUDGE LIPPMAN: Tell us, yep.

19 MR. GAETANI: Where third-party testimony  
20 about the description evidence adds to the jury's  
21 assessment of the accuracy of the complainant's  
22 identification, then that testimony may be permitted.  
23 But where third-party testimony about description  
24 evidence adds nothing to the jury's determination of  
25 the accuracy, because it merely repeats what the

1 complainant has testified to, then it should not be  
2 admissible, because under those circumstances, it  
3 amounts to impermissible bolstering.

4 JUDGE GRAFFEO: And what does the defense  
5 attorney have to say in connection with an objection  
6 to reach those points?

7 MR. GAETANI: Well, that's a question with  
8 respect to preservation, Judge?

9 JUDGE GRAFFEO: Yes.

10 MR. GAETANI: Okay. Our position on  
11 preservation is that when the trial court made its  
12 ruling, it was dealing with a application from the  
13 People that not only - - - well, the application by  
14 the People was based upon People v. Huertas. The  
15 trial court was rendering its ruling with an  
16 understanding that the Appellate Divisions had -- the  
17 progeny of Huertas, as the prosecutor pointed out,  
18 had answered the question that third-party witnesses  
19 were permitted to testify. And - - -

20 JUDGE GRAFFEO: But there's a difference  
21 between what counsel said between Detective Griffith  
22 and Officer Burke, right?

23 MR. GAETANI: There is, Judge. There is,  
24 Judge. But what I'm saying here is - - -

25 JUDGE GRAFFEO: You're claiming both were

1 sufficient?

2 MR. GAETANI: No, I'm - - - I'm saying  
3 whatever counsel said, this case is governed by the  
4 provision in CPL 470.05 where the court has rendered  
5 a decision, based upon the arguments of the party,  
6 and in essence, what the court has done is to - - -  
7 is to reach the issue that's here on appeal,  
8 regardless of what the objection made was - - -

9 JUDGE SMITH: As long as the judge decided,  
10 it doesn't matter what the lawyer said?

11 MR. GAETANI: Your Honor, I would say this  
12 case is about as close to Ayala as we could possibly  
13 have, where in Ayala, the trial judge didn't mention  
14 - - - two weeks later after, in his written decision,  
15 the judge mentioned 670 of the procedure - - - of the  
16 Criminal Procedure Law to render his decision. That  
17 was never mentioned by trial counsel. So the fact is  
18 that because the court had an opportunity, an  
19 adequate opportunity to consider the arguments of  
20 counsel, and the court focused on what essentially  
21 was the issue - - - and that's what I'm saying  
22 happened here in this case; because the court  
23 essentially focused on what the issue was, there was  
24 preservation.

25 JUDGE READ: So let's get back to your

1 rule. So why - - - why - - - the second part of it  
2 was - - - was that it didn't add anything; is that  
3 what - - -

4 MR. GAETANI: Yes, Judge.

5 JUDGE READ: How - - -

6 MR. GAETANI: What was - - -

7 JUDGE READ: How does it not add anything?

8 Doesn't it - - -

9 MR. GAETANI: Well, what the purpose of  
10 Huertas was, this court said, was to give the jury  
11 information with respect to the complainant's ability  
12 to observe - - -

13 JUDGE READ: Perception.

14 MR. GAETANI: - - - and their memory.

15 JUDGE READ: Right.

16 MR. GAETANI: Their memory. In this case,  
17 the complainant, Velez, testified - - - he gave a  
18 description at trial. He testified that he gave a  
19 description to the police. He testified that he  
20 picked the defendant out of a lineup a couple of days  
21 afterwards. He also testified at trial and  
22 identified the defendant. I submit that at that  
23 point the jury had everything they need. All of the  
24 goals - - -

25 CHIEF JUDGE LIPPMAN: What would be a



1 given prior to the trial comes in through the  
2 witness. And you're saying now we shouldn't extend  
3 Huertas to third parties like police officers.

4 MR. GAETANI: That's exactly what I'm  
5 saying, Judge. When this court decided Huertas, it  
6 decided that the complainant could testify. It never  
7 answered the question - - -

8 JUDGE ABDUS-SALAAM: But that was according  
9 - - - well, according to you, that would be a prior  
10 consistent statement, but we said it was okay.

11 MR. GAETANI: Right, but what I'm saying,  
12 Judge, in Huertas, this court never answered the  
13 question of whether or not it would be okay for a  
14 third party to offer that testimony.

15 JUDGE READ: But, what - - - what's - - -

16 MR. GAETANI: What we're saying - - -

17 JUDGE READ: What's the logic - - - I  
18 guess, what's the logic that says it wouldn't be?

19 MR. GAETANI: The logic is this, Judge,  
20 that the police officer testimony is of no  
21 evidentiary value. Once the complaining witness has  
22 given the jury the information they need to make  
23 their decision about judging the accuracy of his  
24 identification, he's told them that he had the  
25 ability to observe. He told them that he remembers

1 what happened.

2 CHIEF JUDGE LIPPMAN: So is what you're  
3 saying is the repetition makes it prejudicial - - -

4 MR. GAETANI: Exactly, Judge.

5 CHIEF JUDGE LIPPMAN: - - - or bolstering?  
6 Is that - - -

7 MR. GAETANI: Exactly, Judge. The  
8 repetition is what makes it - - -

9 JUDGE SMITH: So you say it's of no  
10 evidentiary value but it's prejudicial?

11 MR. GAETANI: Right, exactly, Judge. It's  
12 of no evidentiary value to the jury helping the jury  
13 determine the accuracy of the identification.

14 JUDGE SMITH: But why - - -

15 MR. GAETANI: It doesn't add to that.

16 JUDGE SMITH: Why doesn't it help? I mean,  
17 if I've heard a witness say something, I might  
18 believe him; I may not believe him. Then another one  
19 comes on and says, yeah, what he said is absolutely  
20 true. Why isn't that helpful to the jury?

21 MR. GAETANI: It's impermissible  
22 bolstering, that's why, Judge.

23 JUDGE SMITH: Well, okay, but - - -

24 JUDGE GRAFFEO: Bolstering - - - but what  
25 if it's - - - you said third parties.

1 MR. GAETANI: Right.

2 JUDGE GRAFFEO: What if it's another  
3 eyewitness to the event testifying to what he or she  
4 - - -

5 MR. GAETANI: Observed?

6 JUDGE GRAFFEO: - - - observed, and - - -

7 MR. GAETANI: Now, let me just get this  
8 straight.

9 JUDGE GRAFFEO: - - - was saying what they  
10 were wearing.

11 MR. GAETANI: Is this third party  
12 testifying about their own observations?

13 JUDGE GRAFFEO: Their own observations.

14 MR. GAETANI: Well, absolutely. There's  
15 not a problem with that.

16 JUDGE GRAFFEO: All right.

17 MR. GAETANI: Here's the problem with - - -

18 JUDGE GRAFFEO: And what if they say we  
19 were together and, you know, five minutes after this  
20 happened, the victim told me that this guy was  
21 wearing a purple hoodie.

22 MR. GAETANI: That's a different story than  
23 what you just said, Judge.

24 JUDGE GRAFFEO: Then is that - - -

25 MR. GAETANI: The first - - -

1 JUDGE GRAFFEO: Well, that's why I'm asking

2 - - -

3 MR. GAETANI: Yeah.

4 JUDGE GRAFFEO: - - - you that scenario.

5 MR. GAETANI: Yeah, no, that scenario is  
6 different.

7 JUDGE GRAFFEO: I'm trying to figure out  
8 when you say "third-party testimony" - - -

9 MR. GAETANI: That - - -

10 JUDGE GRAFFEO: - - - what we're talking  
11 about.

12 MR. GAETANI: I don't only mean police  
13 officers.

14 JUDGE GRAFFEO: You'd say - - -

15 MR. GAETANI: I mean third - - -

16 JUDGE GRAFFEO: You'd say that's bolstering  
17 also?

18 MR. GAETANI: Yes, I would.

19 JUDGE ABDUS-SALAAM: Would bolstering - - -

20 MR. GAETANI: Any third-party testimony.

21 JUDGE ABDUS-SALAAM: - - - counsel, have  
22 any applicability outside of hearsay?

23 MR. GAETANI: I'm not sure I understand  
24 what you mean, Judge.

25 JUDGE ABDUS-SALAAM: Well, bolstering is

1 something that's done when there's some - - - in the  
2 context of hearsay, right? We're saying this isn't  
3 hearsay - - -

4 MR. GAETANI: Well - - -

5 JUDGE ABDUS-SALAAM: - - - that it - - -

6 MR. GAETANI: - - - here's the problem,  
7 Judge.

8 JUDGE ABDUS-SALAAM: - - - it goes to  
9 something else. It's not - - -

10 MR. GAETANI: If the court starts with the  
11 premise that the respondent would have, and that is  
12 that this is not coming in for the truth, therefore  
13 it's not hearsay and consequently it couldn't  
14 possibly be bolstering, then it's a fait accompli.  
15 You've answered the question already.

16 What we're saying is that premise begs the  
17 question of whether or not the evidence - - - the  
18 third-party description evidence is bolstering. What  
19 effect does it have upon the jury? Because in this  
20 case what we had was a single eyewitness. This  
21 incident lasted between twenty and thirty seconds.  
22 Even though there was a video, there was no way the  
23 jury could determine, from the surveillance video,  
24 who the perpetrator was. That was still the critical  
25 issue - - -

1 CHIEF JUDGE LIPPMAN: Okay, coun - - -

2 MR. GAETANI: - - - for the jury.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 You'll have your rebuttal time.

5 MR. GAETANI: Thank you, Judge.

6 CHIEF JUDGE LIPPMAN: Counsel?

7 MS. WAGER: May it please the court. Maria  
8 Wager of the Westchester County District Attorney's  
9 Office for respondent. Good afternoon.

10 CHIEF JUDGE LIPPMAN: Counsel, why isn't it  
11 bolstering? Why does it need to be repeated again  
12 and again, that might give the impression that  
13 there's a lot of testimony along these lines when  
14 there's - - - one person said it and the other's just  
15 repeating it? What's the logic of saying it's not  
16 bolstering?

17 MS. WAGER: Well, Your Honor, I - - -

18 CHIEF JUDGE LIPPMAN: What purpose does it  
19 serve, and why is it not bolstering?

20 MS. WAGER: The purpose it serves - - - it  
21 is evidence that the jury can use to determine if the  
22 witness had the opportunity to observe the assailant,  
23 to remember the assailant, to be able to articulate a  
24 description, and to remember that and carry it over  
25 to the corporeal ID. It's not offered for its truth

1 or accuracy. It's evidence that the jury can use to  
2 determine the - - -

3 JUDGE SMITH: I realize we did say that in  
4 Huertas, that it's not offered for its truth, but is  
5 it - - - can it really be that the jury can - - - can  
6 get benefit out of this without knowing whether it's  
7 a bad description or a good description?

8 MS. WAGER: Well, Your Honor, that is the  
9 jury - - - that's a question for the jury. They're  
10 given the evidence. This is what the victim said - -  
11 -

12 JUDGE SMITH: Well, but I'm suggesting that  
13 a question the jury must address is whether the - - -  
14 whether the out-of-court statement is true or false.

15 MS. WAGER: They must determine whether the  
16 victim actually said it. How accurate it is is a  
17 question they will have to determine - - -

18 JUDGE SMITH: Well, yes - - - yes, it's a  
19 question - - -

20 MS. WAGER: - - - by making a comparison -  
21 - -

22 JUDGE SMITH: - - - that they will have to  
23 evaluate. But doesn't that mean that they're  
24 considering it for its truth?

25 MS. WAGER: No, Your Honor, because the

1 description - - - it's going to be a rare case where  
2 that description is so unique that it directly  
3 implicates a defendant. The description cannot  
4 directly implicate a defendant. They're going to  
5 have to determine, well, how good is that description  
6 and do we now believe that witness had a great  
7 opportunity to observe and to remember - - -

8 JUDGE PIGOTT: Well, I think - - -

9 MS. WAGER: - - - and can we rely on this  
10 witness.

11 JUDGE PIGOTT: I think what the - - - if I  
12 understand Mr. Gaetani's point, it's this, that if -  
13 - - if a witness says, yeah, the perpetrator was six  
14 feet tall, he was Caucasian, he was wearing a white  
15 shirt and shorts, that's fine. And if a police  
16 officer gets on, in his blue uniform and his badge,  
17 and says the identical thing, that's bolstering.  
18 There is no independent basis for him to just repeat  
19 what she said or he said. But if he gets on and says  
20 this is what she told me and she said the lighting  
21 was fine, that it was - - - that she observed him for  
22 thirty seconds, you know, or whatever, that helps the  
23 jury. But if it's just repeating it, so that now  
24 it's been said twice, without any other basis, it  
25 sounds like it's bolstering.

1 MS. WAGER: Well, Your Honor, I agree that  
2 there shouldn't be a repetition of the same  
3 testimony, and this court said that in dicta in Rice,  
4 it shouldn't be four police witnesses coming on and  
5 saying the exact same thing. However, if - - -  
6 again, I think it's going to be the rare case where  
7 you're going to have identical testimony. Even in  
8 this case, the description the victim claimed to give  
9 and the description the police officer said the  
10 victim gave did vary a little bit. And I think the  
11 jury should have the benefit of hearing all of that -  
12 - -

13 JUDGE SMITH: But you're saying - - -

14 MS. WAGER: - - - and - - -

15 JUDGE SMITH: - - - you're saying that  
16 inconsistent testimony is of more value than  
17 consistent testimony?

18 MS. WAGER: Witnesses are fallible, and if  
19 we make a rule that bans police witnesses or third  
20 parties from giving testimony, the jury is not going  
21 to have the full evidentiary picture.

22 JUDGE SMITH: I see that point, but I don't  
23 see why inconsistency is a virtue. I mean, I can  
24 understand why it's not some very serious defect, but  
25 - - - but you're saying you let in - - - you let them

1 in so long as they're not all saying the same thing?

2 MS. WAGER: Your Honor, I'm not saying it's  
3 a virtue. The description testimony, what the victim  
4 said, it is what it is. And the victim might  
5 remember saying this, the police officers may vary a  
6 little, and it's for the jury to see if they can  
7 harmonize - - -

8 JUDGE SMITH: Okay.

9 MS. WAGER: - - - or who they find  
10 credible.

11 JUDGE SMITH: But what's so terrible if  
12 they all say - - - if they all report the victim as  
13 saying exactly the same thing?

14 MS. WAGER: Well, that's not terrible, but  
15 that's the job of the trial court to be the  
16 gatekeeper of this evidence. And we should not be  
17 allowed - - - I agree, we should not be allowed to  
18 offer repetitive - - -

19 CHIEF JUDGE LIPPMAN: Do you think it's - -  
20 -

21 MS. WAGER: - - - cumulative testimony.

22 CHIEF JUDGE LIPPMAN: - - - always up to  
23 the judge, and you can't say by - - - even if it's  
24 Judge Smith's example, where they say exactly the  
25 same thing, not bolstering, in your view?

1 MS. WAGER: It's not bolstering, because  
2 it's not being offered for its truth. And what is  
3 bolstering - - -

4 CHIEF JUDGE LIPPMAN: But in practice, you  
5 know, isn't that exactly what it's being offered for?  
6 I mean, what's - - - what's the purpose? I guess  
7 we're all trying to get at, if they say the same  
8 thing over and over again, if it's not being offered  
9 for the truth, why do you need it, other than to  
10 bolster, at least from my perspective?

11 MS. WAGER: I think - - -

12 CHIEF JUDGE LIPPMAN: You follow what I'm  
13 saying?

14 MS. WAGER: I - - -

15 JUDGE RIVERA: And aren't you bolstering  
16 the argument that the identification is accurate or  
17 consistent?

18 MS. WAGER: I agree with you that it serves  
19 no purpose to have it repeated and repeated, but I  
20 think there's a difference between bolstering and  
21 corroborating. And if you have a victim who may be  
22 attacked on cross-examination, there's nothing wrong  
23 with having one police officer come in and  
24 corroborate that this is what the victim said.

25 CHIEF JUDGE LIPPMAN: What about two?

1 MS. WAGER: It's a case-by-case - - -

2 CHIEF JUDGE LIPPMAN: How do you determine  
3 between corroborating and bolstering?

4 MS. WAGER: Well, that would be the job of  
5 the trial court to examine each case - - -

6 JUDGE SMITH: Well, what is - - -

7 MS. WAGER: - - - on its facts.

8 JUDGE SMITH: What is the difference, in  
9 principle? They sound like synonyms to me. That's  
10 what bothers me about this whole area. I mean, isn't  
11 bolstering what you do all day?

12 MS. WAGER: Well - - -

13 JUDGE GRAFFEO: Isn't that what trial  
14 lawyers do, bolster their case?

15 MS. WAGER: Well, bolstering, Your Honor,  
16 to me, means that if you're repeating something that  
17 somebody else said, and by repeating it it becomes  
18 more trustworthy. If the evidence is not being  
19 offered for its truth - - -

20 JUDGE SMITH: So the theory - - -

21 MS. WAGER: - - - as in Huertas.

22 JUDGE SMITH: - - - the theory is that the  
23 jury, merely by virtue of hearing it - - - hearing it  
24 a number of times, will get the - - - will get the  
25 mistaken impression that there are several witnesses

1 where there's really only one?

2 MS. WAGER: Well, I think that may be true  
3 for - - - if you're repeating that the witness made  
4 an identification.

5 JUDGE SMITH: But that is the danger that  
6 we're guarding against?

7 MS. WAGER: I don't think you're guarding  
8 against that danger when it comes to description  
9 testimony because there's a difference between - - -

10 CHIEF JUDGE LIPPMAN: Does it matter that  
11 it's a police officer who's doing it? Does that - -  
12 - is that what this bolstering concept is about, if  
13 someone in a position of legitimacy and credibility  
14 repeats it, it might be different than when somebody  
15 else repeats it, or doesn't it matter?

16 MS. WAGER: Well, that was the argument in  
17 Caserta, but - - - and I think that can be a  
18 legitimate concern, but when it comes to description  
19 testimony - - - for example, the description here  
20 that was repeated was that it was a short, dark-  
21 skinned male. And no matter how many times that's  
22 repeated, it doesn't make it any more - - -

23 CHIEF JUDGE LIPPMAN: If it's repeated - -  
24 -

25 MS. WAGER: - - - it doesn't prove that the

1 defendant - - -

2 CHIEF JUDGE LIPPMAN: If it's repeated ten  
3 times, bolstering, right?

4 MS. WAGER: If it's repeated - - -

5 CHIEF JUDGE LIPPMAN: Ten different people  
6 - - -

7 MS. WAGER: - - - ten times, I would argue  
8 that it's cumulative and it doesn't have any  
9 probative value at that point. But is that going to  
10 make the jury believe, looking at the defendant, oh,  
11 he's a short, dark-skinned male - - -

12 CHIEF JUDGE LIPPMAN: I don't know.

13 MS. WAGER: - - - and it must be him?

14 CHIEF JUDGE LIPPMAN: I thought we're  
15 asking you. What do you think?

16 MS. WAGER: I don't believe that's a  
17 danger. I think juries are more savvy than that, and  
18 I think there's a difference between description  
19 testimony and identification - - -

20 JUDGE RIVERA: But can you - - -

21 MS. WAGER: - - - testimony.

22 JUDGE RIVERA: I'm sorry. So he gave us  
23 his rule. What's your rule?

24 MS. WAGER: I would say to this court that  
25 his rule is how evidence - - - evidentiary decisions

1 are made all the time, that the trial court should be  
2 the gatekeeper. There's no - - - should not be a  
3 categorical - - -

4 JUDGE SMITH: So you accept the principle  
5 that if something's without evidentiary value, it  
6 shouldn't come in. If that's the rule, you would  
7 accept it. On the other hand, that's not quite  
8 specific enough to be very helpful.

9 MS. WAGER: I believe that's the rule, Your  
10 Honor. I don't think there should be a categorical  
11 ban on third-party testimony under Huertas. I don't  
12 think the source of the description testimony is  
13 what's relevant, that the trial court - - -

14 JUDGE SMITH: But can you give an example  
15 of evidence that is improper bolstering but is not  
16 cumulative?

17 MS. WAGER: For a police witness to come in  
18 here or a second eyewitness to say I heard the victim  
19 say that's him in the - - - in the lineup.  
20 Bolstering in identification, because it's being  
21 offered for its truth.

22 JUDGE SMITH: Well, that's what Trowbridge  
23 and Caser - - - Trowbridge says you can't do.

24 MS. WAGER: Right.

25 JUDGE SMITH: But I guess I'm - - - apart

1 from the Trowbridge situation, I mean, when you're  
2 dealing with a description that's to the eyewitness'  
3 description given at the time, at what - - - is there  
4 a point at which it is bolstering but it's not  
5 cumulative?

6 MS. WAGER: I don't believe it's capable of  
7 being bolstering, because it's not being offered for  
8 its truth.

9 JUDGE PIGOTT: How about - - -

10 MS. WAGER: And I think - - -

11 JUDGE RIVERA: Can we go back to the basics  
12 in the case? I'm sorry. What is the point of the  
13 police officers testifying?

14 MS. WAGER: Okay. Because - - -

15 JUDGE RIVERA: What - - - answering his  
16 rule, which you seem to agree with - - -

17 MS. WAGER: Okay.

18 JUDGE RIVERA: - - - what benefit did they  
19 add that helps the jury?

20 MS. WAGER: In this particular case?

21 JUDGE RIVERA: Yes, in this case.

22 MS. WAGER: Okay. In this particular case,  
23 Officer Burke testified before the complainant did.

24 JUDGE RIVERA: Yes.

25 MS. WAGER: - - - and he testified that

1 Velez, the victim, described the perpetrator as X, Y,  
2 and Z.

3 JUDGE RIVERA: Okay.

4 MS. WAGER: Then the complainant came on  
5 and testified and said I gave this description to the  
6 police officers. And it did vary. It was more  
7 detailed than what Burke said.

8 JUDGE RIVERA: But why do you need Burke,  
9 if she's getting up - - - if he's getting up?

10 MS. WAGER: Well, I think because the jury  
11 has to decide in - - - where identification is a  
12 critical issue, as it was in this case, the jury must  
13 decide how reliable, especially in one-witness  
14 identification cases, which this, I argue, is not,  
15 but in - - - especially in those kind of cases, they  
16 have to determine whether they find the victim  
17 reliable. It's a crucial issue. They should have  
18 the full evidentiary picture.

19 JUDGE RIVERA: So the fact that the victim  
20 says it to two cops makes it - - - and your argument  
21 is it must be reliable?

22 MS. WAGER: No, Your Honor, that's not my  
23 argument, because here we had descriptions that  
24 varied. The jury has to make the decision, well,  
25 what do we find credible, because witnesses are

1 fallible. And it is possible they might find the  
2 victim thinks that he told the police more than he  
3 really did, or maybe the police didn't write down  
4 everything the victim said. They need to hear this  
5 evidence and put it together for themselves to  
6 determine - - -

7 JUDGE RIVERA: Because the descriptions  
8 vary so much from the defendant?

9 MS. WAGER: I'm sorry, Your Honor?

10 JUDGE RIVERA: Because these descriptions  
11 vary so much from the defendant?

12 MS. WAGER: No - - - no, they did not. But  
13 the victim described to Police Officer Burke that the  
14 perpetrator was wearing a white T-shirt that - - -

15 JUDGE PIGOTT: Does it make a diff - - -  
16 I'm sorry. But did Detective Griffith then testify?

17 MS. WAGER: The People asked Detective  
18 Griffith for the description, and he was allowed to  
19 say the victim told me it was a short, dark-skinned  
20 male. When the People then tried to elicit more of a  
21 description, the trial court, in a sound exercise of  
22 discretion, said move on.

23 JUDGE PIGOTT: But if Burke testified, then  
24 Velez testified, essentially, to what Burke said - -

25 -

1 MS. WAGER: No, Velez - - - Velez thinks -  
2 - -

3 JUDGE PIGOTT: Velez - - -

4 MS. WAGER: - - - he gave more detail to  
5 the police officer.

6 JUDGE PIGOTT: All right. But they were  
7 talking about it. And then Griffith was going to  
8 come in and testify, essentially, to what Burke said?

9 MS. WAGER: Well, Your Honor, here we have  
10 a unique circumstance. The victim made a mistake in  
11 his description, and realized it himself, and  
12 corrected himself to Detective Griffith. And that's  
13 what I believe the People were trying to elicit. But  
14 the court, in exercising discretion, said move on.

15 And another - - - another thing for this  
16 court to look at is what is the prejudice here to the  
17 defendant. They heard from Burke, the officer, and  
18 Velez, that he described him as a relatively short,  
19 dark-skinned male. They didn't offer anything that  
20 the jury could not see for themselves on the  
21 surveillance - - -

22 JUDGE PIGOTT: Would your argument be the  
23 same if the situation came on where you had the  
24 victim testify and do only a courtroom ID saying  
25 that's the guy, and then after he leaves, have the

1 police officer get on and say yeah, the victim told  
2 me that this is what he looked like?

3 MS. WAGER: That should be allowed, because  
4 there's going to be situations the victim might not  
5 remember what they told the police officer.

6 JUDGE PIGOTT: Well, shouldn't he at least  
7 testify to that before, you know, the officer comes  
8 in and gives the description that - - - because  
9 you've got a courtroom ID, which is always easy;  
10 that's the guy. And now you have a police officer  
11 come in and say, yeah, that's the description that  
12 the victim gave me. And I would think there could be  
13 an objection to that, saying, well, he was sitting  
14 here, you could have asked him before you asked him  
15 for the courtroom ID, and instead, you put somebody  
16 in a blue uniform and a badge to testify to it, and  
17 that's not fair.

18 MS. WAGER: Well, Your Honor, there's going  
19 to be situations where the victim might not remember,  
20 but defense counsel's always free to cross-examine if  
21 he believes that - - -

22 JUDGE PIGOTT: Wouldn't that be bolstering,  
23 to get back to Mr. Gaetani's point?

24 MS. WAGER: No, because - - -

25 JUDGE PIGOTT: I mean, in other words, the

1           only ID from the victim is the courtroom ID. And now  
2           the police officer comes in and says, yeah, that's -  
3           - - that's what he told me, when he didn't say I  
4           didn't see it.

5                       MS. WAGER: Well, Your Honor, the victim  
6           might not remember, and the defense can always cross-  
7           examine. I mean, he'll, from the police reports,  
8           know what that description was, and if it varies  
9           greatly from the defendant, he would bring that out.  
10          And I don't believe asking the police officer alone  
11          is bolstering, because what Your Honor said before,  
12          in Huertas, this court already decided it's not a  
13          prior consistent statement.

14                      CHIEF JUDGE LIPPMAN: Okay, counsel.  
15          Thanks, counselor.

16                      Counselor, rebuttal?

17                      MR. GAETANI: Yes, very briefly. Judge  
18          Pigott, the precise situation that you just asked  
19          about occurred in this case. It wasn't on the Velez  
20          robbery, but it was on the Ellis robbery, where Ellis  
21          got on the stand and did not tell of the description  
22          he gave to the police but described the perpetrator.  
23          Then a police officer got on the stand and testified  
24          about the description. And there was an objection  
25          made by counsel, because you had Ellis on the stand,

1           why didn't you ask Ellis that question.

2                   JUDGE ABDUS-SALAAM:   But how is that  
3           bolstering, counsel?

4                   MR. GAETANI:   For the same reason that  
5           Judge Pigott just described.

6                   JUDGE ABDUS-SALAAM:   If he described  
7           nothing, how could it be bolstered?

8                   MR. GAETANI:   No, Your Honor.   He got on  
9           the stand and he identi - - - he gave a description  
10          of the perpetrator.   He gave a description of the  
11          perpetrator in his testimony.   He just didn't - - -

12                   JUDGE SMITH:   So you're saying it's the in-  
13          court testimony that is bolstered, not the testimony  
14          to the previous description?

15                   MR. GAETANI:   It bolsters the eyewitness  
16          identification.   It bolsters the eyewitness  
17          identification.

18                   JUDGE SMITH:   The in-court identification  
19          by the eyewitness?

20                   MR. GAETANI:   In that particular  
21          circumstance, yes.   But in the case of Velez - - -

22                   JUDGE RIVERA:   Because that's the only ID -  
23          - -

24                   MR. GAETANI:   - - - it did both.

25                   JUDGE RIVERA:   - - - he gave.   Because that

1 was the only ID he gave.

2 MR. GAETANI: Right. Right.

3 I'd just like to say that what we're  
4 talking about here is this court has recognized the  
5 vagaries with respect to eyewitness identification.  
6 This was a single eyewitness case, and even though  
7 there was a video, there was no physical evidence,  
8 there was a defendant arrested five days later, there  
9 was no incriminating statements. All the jury had to  
10 go on was the testimony of Velez and the eyewitness  
11 identification that he made. By having two police  
12 officers come in and repeat what in this case was an  
13 integral part of both the description and the  
14 identification, a shorter than average male with a  
15 dark skin tone. And I submit that that was the  
16 prejudice suffered in this case. And I'd just ask  
17 the court to strike a balance between these two  
18 competing interests.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. GAETANI: Thank you.

21 CHIEF JUDGE LIPPMAN: Thank you both.

22 Appreciate it.

23 (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. Torrel Smith, No. 226 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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