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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 154

DARYL H. ,

Appellant.

20 Eagle Street
Albany, New York 12207
September 9, 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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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 154, People v. Daryl
2 H.

3 Counselor, would you like any rebuttal
4 time?

5 MS. PREVE: One minute, please.

6 CHIEF JUDGE LIPPMAN: One minute. Okay,
7 counselor, go ahead.

8 MS. PREVE: Good afternoon, Your Honors.
9 I'm Kristin Preve, and I represent Daryl H.

10 CHIEF JUDGE LIPPMAN: Counselor, was Dr.
11 Marshall a fact witness who turned into an opinion
12 witness, or what was she?

13 MS. PREVE: I think she was - - - she was
14 giving an expert psychiatric opinion from the get-go,
15 straight up.

16 CHIEF JUDGE LIPPMAN: So she was not really
17 a fact witness, in your mind, ever.

18 MS. PREVE: No, she - - - she was not,
19 because - - -

20 JUDGE GRAFFEO: Didn't she make it clear,
21 though, that she wasn't there, so she didn't know his
22 mental state at the time of the incident, that she
23 was basing her judgment on the day after her
24 interview with him?

25 MS. PREVE: She does say that, Your Honor,

1 but we submit that's either disingenuous or kind of
2 muddled, because she makes a conclusion that my
3 client should be arrested for the assault. And you
4 know, she interviews him eight or nine hours
5 afterwards - - -

6 JUDGE ABDUS-SALAAM: Doesn't she - - -

7 MS. PREVE: - - - but - - -

8 JUDGE ABDUS-SALAAM: Doesn't she have to
9 make that judgment, if you will, in relation to her
10 position as an administrator, about whether this
11 particular patient is a danger to anybody else in the
12 hospital at any - - - at the point that she did, not
13 when the incident occurred, because she wasn't there;
14 she didn't see the incident. So as her - - - in her
15 - - - using her administrative hat, she does have to
16 make a judgment about whether this person should stay
17 in the hospital, isn't that correct?

18 MS. PREVE: Well, if she were making a
19 determination about his dangerousness as of the time
20 that she interviewed him, then why does she go back
21 to the assault? I mean, if he's so calm and rational
22 at that point, then he doesn't present a danger - - -

23 JUDGE SMITH: Are you saying - - -

24 MS. PREVE: - - - because she has to go - - -

25 -

1 saying he knew right from wrong as of the time of the
2 assault.

3 JUDGE SMITH: Going back to the Chief
4 Judge's original question, what was she testifying
5 to? What - - - I mean, was she - - - I mean,
6 certainly part of what she is saying is I met this
7 guy on this day and I asked him some questions and
8 these were his answers. That's a pure fact witness
9 so far, right?

10 MS. PREVE: Yes, to a point - - - well,
11 yes.

12 JUDGE SMITH: And at what point did she
13 become an expert witness, if ever?

14 MS. PREVE: When she testified on direct
15 examination, as part of the People's case in chief,
16 that she concluded he should be arrested for the
17 assault.

18 JUDGE PIGOTT: Doesn't that go to the
19 weight, though? In other words, she does say that
20 she was going to assess - - - her job was to assess
21 his mental status and make a decision about his
22 safety and the safety of the other people in the
23 unit. And then she says, "The defendant was alert
24 and calm. He did not appear to be responding to
25 internal stimuli", which means he seemed to be okay.

1 And that's when the objection happened, and the
2 defense lawyer said, you know, we want to put on our
3 psychiatric defense later. And the objection is that
4 he's - - - that she's - - - that she's intruding on
5 an area that she had no right to because she wasn't
6 there at the time of the incident. Is that what
7 we're talking about?

8 MS. PREVE: Yes.

9 JUDGE PIGOTT: Okay.

10 MS. PREVE: Yes.

11 JUDGE SMITH: But isn't what really
12 happened, and what she actually testified to, as I
13 remember it, is she described the conversation. And
14 then she doesn't say and I - - - it is my opinion, as
15 an expert, that this was someone who deserves arrest.
16 It was, and then I asked the police to arrest him.
17 It was just narrative.

18 MS. PREVE: She does say that - - - that
19 she concluded he should be arrested. That's what she
20 says on direct. And as I said, you know, this - - -

21 JUDGE SMITH: And is that even a proper
22 subject of expert opinion? I mean, in an awful lot
23 of criminal cases, the guy was arrested and somebody
24 testifies that he decided to arrest him. That's not
25 an expert opinion that he deserves arrest, is it?

1 MS. PREVE: Well, Your Honor, she - - -
2 now, she was not a witness. As I said, she - - - she
3 interviewed the hospital staff, she interviewed my
4 client.

5 JUDGE SMITH: Well, she was - - -

6 MS. PREVE: She asked him - - -

7 JUDGE SMITH: - - - she was not a witness
8 to the assault.

9 MS. PREVE: - - - questions about the
10 assault.

11 JUDGE SMITH: She was a witness to your
12 client's statements the morning after.

13 MS. PREVE: Correct. But then she goes on
14 to - - - first of all, you know, she really - - - she
15 decides the very question that psychiatric expert
16 witnesses decide under - - -

17 JUDGE READ: What you're saying was the
18 very act of them having him arrested meant she made a
19 conclusion about his medical condition. Is that what
20 you're arguing?

21 MS. PREVE: Yes, Your Honor. I think the
22 trial court in this case could not have been under
23 any other impression. That's the only - - - I mean,
24 what else could the trial court have thought she
25 meant? Now, granted, the way this played out, in a

1 perfect world, we submit, the prosecutor would have
2 said, okay, really she's an expert witness, she
3 should only come in rebuttal. That way all of my
4 client's answers to her questions about the assault,
5 everything is an expert opinion, all of her testimony
6 should have been adduced and rebuttal after the
7 defense had put on its insanity case. It would have
8 been a perfect world, and I don't think I would have
9 been here - - -

10 JUDGE SMITH: In fact - - -

11 MS. PREVE: - - - I'd be here right now.

12 JUDGE SMITH: In fact - - -

13 MS. PREVE: But it didn't happen, and - - -

14 JUDGE SMITH: Well, what did happen, as I
15 read it, is she did become an expert on redirect.
16 They - - - they asked her, in your opinion, was he
17 responding to internal stimuli. And she says no.
18 That same question, essentially, had been asked on
19 direct. Your client's lawyer got up and objected and
20 the judge sustained the objection.

21 MS. PREVE: Your Honor, as I said, this - -
22 - this whole thing was - - - was muddled; the waters
23 were muddied. But we submit that when she says, and
24 I asked that he be arrested for this, she is - - -
25 you know, she is making - - - she has made her

1 conclusion that my client - - -

2 JUDGE SMITH: So - - -

3 MS. PREVE: - - - knew right from wrong - -

4 -

5 JUDGE SMITH: So you're - - -

6 MS. PREVE: - - - that he - - - he was sane

7 and rational, sane as a - - - sane as a judge or

8 right as rain when she interviewed him - - -

9 JUDGE SMITH: So you - - -

10 MS. PREVE: - - - afterwards, so - - -

11 JUDGE SMITH: So you - - -

12 MS. PREVE: - - - he was right as rain - -

13 -

14 JUDGE SMITH: - - - you say - - - you read

15 her direct testimony as essentially an opinion on

16 your client's sanity?

17 MS. PREVE: It is, absolutely, Your Honor.

18 JUDGE SMITH: And from that you say,

19 therefore, everything she relied on for her opinion

20 is fair game, and I can cross-examine her about who

21 told you this, who told you this, who told you this.

22 MS. PREVE: Absolutely, Your Honor.

23 JUDGE SMITH: Assume you're right. Don't

24 you still have to make an offer of proof as to what

25 you're going to show? How do we know there's

1 anything of any significance in all those statements?

2 MS. PREVE: Well, that's why we're saying
3 it should have been explored.

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

5 MS. PREVE: It should have been allowed - -
6 -

7 JUDGE SMITH: - - - the point - - -

8 MS. PREVE: - - - to be explored in cross-
9 examination.

10 JUDGE SMITH: Isn't it the general rule,
11 when you're trying to proffer evidence and it's
12 excluded, you have to make an offer of proof to make
13 an appellate record so we can know whether anything
14 of significance was excluded?

15 MS. PREVE: But I don't know that the
16 district attorney who was prosecuting the case would
17 have - - - you know, I mean, that - - - it was his
18 witness at that point, and he wasn't about to do
19 that.

20 JUDGE SMITH: I understand, but you were
21 trying - - - this was when your guy - - - your lawyer
22 was cross-examining.

23 MS. PREVE: Um-hum, um-hum.

24 JUDGE SMITH: And he was not allowed to go
25 into the hearsay statements that she had relied on -

1 - - that you say she relied on. Doesn't he have to,
2 at that point, say, Your Honor, for the record, what
3 I - - - I offer to prove that you would get all this
4 stuff that shows he was crazy as a bat? He didn't do
5 that.

6 MS. PREVE: Your Honor, you're right. And
7 in a perfect world, he would have done it. But we
8 submit - - - I really don't think you need that to
9 decide this case because, you know, when she says I
10 concluded he should be arrested for this assault,
11 there's only one way that the trier of fact in this
12 case, the judge, could have interpreted that. And -
13 - -

14 CHIEF JUDGE LIPPMAN: So what harm did you
15 suffer from not being able to cross?

16 MS. PREVE: Well, Your Honor, Dr. Marshall
17 says that she concludes that he should be arrested,
18 that he was - - - you know, was not insane at the
19 time. And not only does she testify to that, but
20 then the prosecution's other expert witness, Dr.
21 Horowitz (ph.), relies on her opinion. He considers
22 her opinion to be an expert opinion on his capacity
23 at the time of the assault, and he relies on that
24 opinion, as well. And you know, the prosecution's
25 witness - - -

1 CHIEF JUDGE LIPPMAN: So you would have
2 been able to change or undermine their opinions, or
3 what - - - what would your benefit be?

4 MS. PREVE: The benefit would be that the
5 only - - - the only evidence at trial that this was a
6 fight over a television channel and a racial slur
7 came from my client exclusively.

8 JUDGE PIGOTT: But if she was - - - let's
9 assume she was not an expert of any kind. I mean,
10 she's testifying as to what happened, and whether he
11 was in a paranoid state the night before or not is
12 one issue, but whether or not, you know, she needs to
13 get him off the floor because, you know, of what
14 happened, and have him arrested, I mean, that's going
15 to come in in any event, is it not?

16 MS. PREVE: Well, as I said, my client was
17 dangerous, I submit, probably, regardless of whether
18 he - - - this incident happened due to provocation or
19 it was a fight over a TV channel. And I think that -
20 - - that Dr. Marshall - - - her opinion all stemmed
21 from this being just a fight over a TV channel. And
22 I think that the idea that that may not have happened
23 at all, that there may have been no fight, no racial
24 slur, no provocation, that certainly indicates that
25 my client, you know, may - - - may, in fact, have

1 been psychotic. And I think that reverberated out in
2 terms of affecting the case, because then Dr.
3 Horowitz relies on her opinion, and I do think - - -

4 JUDGE PIGOTT: Well, did he have a personal
5 interview with the defendant too, Horowitz?

6 MS. PREVE: Dr. Horowitz?

7 JUDGE PIGOTT: Yeah.

8 MS. PREVE: Yes, he did. Yes, he did.

9 Once again, this is, of course, months later. You
10 know, Dr. Joseph (ph.), the defense witness, had a
11 big advantage in that he had worked with my client,
12 he had seen him, he had treated him in the hospitals,
13 and he had seen him go from A to B, change in - - - I
14 guess lability is what they call it, labile. He had
15 seen him; he had that big advantage.

16 CHIEF JUDGE LIPPMAN: Okay. Okay,
17 counselor. Thanks.

18 Counselor?

19 MR. POWERS: Good afternoon, Your Honors.

20 Matthew Powers on behalf of the People. Your Honor -
21 - -

22 CHIEF JUDGE LIPPMAN: Counselor, answer the
23 threshold question: Was the doctor a fact witness or
24 an expert witness or did she change at some point
25 from one to the other?

1 MR. POWERS: I think someone said it best
2 during my opponent's argument, Your Honor. Dr.
3 Marshall was a fact witness who evolved or devolved
4 into an opinion witness. But at the time - - -

5 CHIEF JUDGE LIPPMAN: When did she evolve
6 into an opinion witness?

7 MR. POWERS: When she rendered an opinion,
8 following the opening of the door, during cross-
9 examination, and after cross-examination was
10 curtailed, Your Honor. During her direct
11 examination, she did not offer an opinion - - -

12 JUDGE SMITH: Would you say as the direct,
13 she was a pure fact witness, that's all there is to
14 it?

15 MR. POWERS: On direct examination, Dr.
16 Marshall was able to testify to defendant's - - -

17 JUDGE SMITH: Is this a yes?

18 MR. POWERS: This is a yes, Your Honor.
19 Forgive me - - - to defendant's demeanor at the time
20 of her interview, to statements that he made, and as,
21 I guess, narrative completion that she made the
22 recommendation that he be placed under arrest. But
23 not - - -

24 JUDGE PIGOTT: My notes aren't exactly as
25 good as they should have been, I guess, but when I

1 was looking at appendix 265 I had a note. It says,
2 "to assess his mental status and to make a decision
3 about his safety and the safety of other people in
4 the unit." I guess that's what she testified to.
5 Did she testify to that on direct?

6 MR. POWERS: She did, Your Honor.

7 JUDGE PIGOTT: All right.

8 MR. POWERS: And the point, I think, is
9 that this was not pure mental disease or defect
10 opinion evidence because it contemplated factors
11 external to that defense, specifically to say - - -

12 JUDGE SMITH: Well, she - - - your point is
13 she testified that she was - - - that her purpose in
14 talking to him was to assess his mental status.
15 She's never asked, as I see it, on direct - - - or I
16 guess, she's never asked anywhere, as far as I know,
17 and did you make an assessment and what was it.

18 MR. POWERS: That's correct, Your Honor.
19 That did not come out on direct, and it - - -

20 JUDGE SMITH: But your adversary says that
21 when she says I decided to have him arrested, that's
22 sort of a clue as to what her assessment was, as to
23 whether he was sane or insane.

24 MR. POWERS: I think that it perhaps
25 suggests it, Your Honor, but I think we also have to

1 remember that she's considering other factors, like
2 the safety of patients. And she's not - - - she's
3 not a judge reviewing a search warrant application,
4 Your Honor. She's a doctor trying to figure out if I
5 keep this guy here, who am I endangering, if anyone.

6 And more importantly, and I don't believe
7 this was mentioned, by virtue of the trial court's
8 ruling during the People's direct, it was clear that
9 the trial court was not considering opinion evidence
10 from this witness at the time. It deemed it
11 premature, which means there's really no harm in it.
12 Following the - - - excuse me - - - the opening of
13 the door and the rendering of the opinion on
14 redirect, Your Honors, I think this is still not the
15 kind of opinion that it would have been an abuse of
16 discretion.

17 JUDGE SMITH: If they had, on - - -
18 following the redirect, if the defense lawyer had got
19 up and done recross and said okay, now you're an
20 expert, tell me everything all your interviewees said
21 to you, would that be a proper question?

22 MR. POWERS: I think so, Your Honor. The
23 problem is that they didn't do it. They could have
24 done that with Dr. Marshall; they didn't. They could
25 have done that with Dr. Horowitz; they didn't.

1 And even if this was opinion, Your Honor,
2 it's still not the kind contemplated by the statute,
3 inasmuch as it doesn't relate to defendant's state of
4 mind at the time the assault occurred. That is to
5 say, if all we do is call Dr. Marshall to testify
6 that defendant had capacity nine hours after the
7 assault, we've accomplished nothing. We've
8 effectively brought a knife to a gunfight, when
9 juxtaposed against the testimony of Dr. Joseph. That
10 being the case - - -

11 JUDGE SMITH: Most insanity cases, the
12 prosecution shrink didn't interview the defendant
13 nine - - - that close to the event. That's really
14 pretty good evidence, isn't it, of his mental state
15 at the event?

16 MR. POWERS: It's good evidence of what he
17 said at the time, Your Honor, but she places
18 limitations on her own opinion. She has - - - I
19 don't know what to call it other than the humility to
20 recognize she's incapable of making this assessment.
21 That being the case, it's really not the kind of
22 opinion evidence contemplated by the statute, and it
23 was therefore not an abuse to restrict it.

24 Unless there are other questions, I'll stop
25 there, Your Honor.

1 CHIEF JUDGE LIPPMAN: Thank you, counsel.

2 MR. POWERS: Thank you.

3 CHIEF JUDGE LIPPMAN: Counselor, your one-
4 minute rebuttal?

5 MS. PREVE: If this wasn't an expert
6 opinion, it was almost like it approaches
7 un-Mirandized interrogation, what she's doing. If
8 she asks him - - - you know, she interviews the rest
9 of the staff about what happened and then she asked
10 him all these questions about the assault, and I
11 think, you know, because she relates - - -

12 JUDGE SMITH: She obviously - - - she had a
13 rather legitimate purpose for doing that, didn't she?
14 I mean, she wanted to know whether he was going to
15 kill somebody.

16 MS. PREVE: Right. Right, yes, Your Honor.
17 I'm not saying that, but I guess what I'm saying is,
18 you know, she's asking him all these questions, she's
19 making these depositions, she's - - - you know, it's
20 a formal accusation that's being levied, and at a
21 certain point she asked the hospital police to take
22 him away.

23 JUDGE GRAFFEO: Well, it was a fairly
24 serious result here, wasn't it?

25 MS. PREVE: Yes, Your Honor.

1 JUDGE GRAFFEO: There were very serious
2 injuries.

3 MS. PREVE: Yes, Your Honor.

4 JUDGE GRAFFEO: So she had some
5 responsibility, as an administrator, to ask some
6 questions and to do some investigation, didn't she,
7 to secure - - -

8 MS. PREVE: Oh, absolutely - - -

9 JUDGE GRAFFEO: - - - the safety - - -

10 MS. PREVE: - - - Your Honor, the question
11 is - - -

12 JUDGE GRAFFEO: - - - of the other
13 patients?

14 MS. PREVE: I'm sorry. Yeah. She did - -
15 - we're not saying that what she was doing was
16 invalid or illegitimate. We're just saying that it
17 was an expert opinion on his capacity at the time of
18 the offense, and the reason I say that is because
19 she's making that conclusion. She's extrapolating;
20 she's saying that because he seems sane and, you
21 know, totally fine, right as rain now, he was that
22 way eight or nine hours earlier at the time of the
23 assault.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MS. PREVE: If anyone else has - - -

1 CHIEF JUDGE LIPPMAN: Thanks, counselor.

2 MS. PREVE: - - - any other questions.

3 CHIEF JUDGE LIPPMAN: Thank you both.

4 Appreciate it.

5 (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. Daryl H., No. 154 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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Date: September 15, 2013