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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 158

PATRICK A. ASARO,

Appellant.

20 Eagle Street
Albany, New York 12207
September 10, 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: 158.

2 Counselor, would you like any rebuttal

3 time?

4 MR. OSTRER: Yes, Your Honor, two minutes.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure.

6 Go ahead.

7 MR. OSTRER: Thank you, sir.

8 Your Honor, my name is Benjamin Ostrer, and

9 I'm the attorney for appellant, Patrick Asaro. If it

10 please the court.

11 We believe that there are two major faults
12 with the prosecution in this case, the first being
13 the inadequate sanction that was imposed for a
14 violation of the statutory disclosure requirements of
15 Criminal Procedure Law - - -

16 JUDGE SMITH: Why wasn't it - - -

17 MR. OSTRER: - - - Section 240.20.

18 JUDGE SMITH: Why wasn't it within the
19 court's discretion?

20 MR. OSTRER: Well, it is within the court's
21 discretion, Your Honor, but it's an abuse of that
22 discretion when the mandatory language of 240.20
23 imposes upon the People a responsibility to turn over
24 the notes - - -

25 JUDGE SMITH: Well, the language - - -

1 MR. OSTRER: - - - prepared by - - -

2 JUDGE SMITH: - - - the language is
3 mandatory in every case. You don't - - - you don't
4 grant - - - in some cases a modest sanction is
5 thought to be enough.

6 MR. OSTRER: Well, here it goes to the very
7 heart of the opinion offered by the expert. His
8 speculation as to the speed of both cars had been the
9 subject of our application - - -

10 CHIEF JUDGE LIPPMAN: Why isn't the - - -

11 MR. OSTRER: - - - for a Frye hearing.

12 CHIEF JUDGE LIPPMAN: Why isn't the adverse
13 inference enough showing?

14 MR. OSTRER: Because, Your Honor, the
15 adverse inference charge may overcome a simple, more
16 pedestrian Rosario violation. Here, in addition to
17 the Rosario violation, we have a per se violation of
18 Criminal Procedure Law, Section 240.20(1)(c).

19 JUDGE GRAFFEO: Did the officer - - -

20 JUDGE ABDUS-SALAAM: Are you saying that -
21 - -

22 JUDGE GRAFFEO: - - - explain the process
23 through which he - - -

24 MR. OSTRER: He - - -

25 JUDGE GRAFFEO: - - - determined these

1 calculations?

2 MR. OSTRER: No, he did not. He did not
3 explain the equation; when he was asked on cross-
4 examine if he could replicate his computation, he
5 said he could not - - -

6 CHIEF JUDGE LIPPMAN: But doesn't that
7 speak - - -

8 MR. OSTRER: - - - which - - -

9 CHIEF JUDGE LIPPMAN: Doesn't that speak
10 for itself, if you have the ability to cross-examine?

11 MR. OSTRER: Well, I don't have the ability
12 to check his arithmetic. It then becomes a beauty
13 contest, if you will, Your Honor, if they like the
14 witness. The witness can't say how he arrived at his
15 computations, and he can't perform those
16 computations; how is a defendant to - - - if the
17 expert himself can't reproduce the computation, how
18 can the defendant reproduce the computation for his
19 own expert, or to contest that evidence?

20 JUDGE GRAFFEO: How are the - - -

21 JUDGE ABDUS-SALAAM: Are you saying that -
22 - - I'm sorry. Are you saying that you can't lose
23 anything that might have to be - - -

24 MR. OSTRER: No, but - - -

25 JUDGE ABDUS-SALAAM: - - - turned over, and

1 that you can't substitute - - - you say that he
2 couldn't replicate his calculations, but he gave you
3 all of his observations and everything else, and is
4 the formula so germane to this one reconstruction - -
5 - accident reconstruction person that could - - -

6 MR. OSTRER: Well, Your Honor, we - - - we
7 argued to the court, in response to your question,
8 that the use of the conservation of the linear
9 momentum formula was improperly applied by this
10 witness, because it can be properly be used to solve
11 for one speed, not for two.

12 JUDGE SMITH: But he said he assumed one -
13 - -

14 MR. OSTRER: Well - - -

15 JUDGE SMITH: - - - and then derived the
16 other.

17 MR. OSTRER: - - - so then he's
18 speculating, Your Honor.

19 JUDGE SMITH: Well, you could make that
20 argument to the jury.

21 MR. OSTRER: Well, the judge was even
22 persuaded that Mr. Stevens was traveling at less than
23 the speed limit, based upon Mr. Pirtle's - - -

24 JUDGE SMITH: Well, the speed - - -

25 MR. OSTRER: - - - assumptions.

1 JUDGE SMITH: The speed limit was 55,
2 wasn't it?

3 MR. OSTRER: Yes, Your Honor.

4 JUDGE SMITH: Well, then he assumed that it
5 was 35 or 40.

6 MR. OSTRER: Well, by assum - - -

7 JUDGE SMITH: That's an assumption in favor
8 of your client.

9 MR. OSTRER: Your Honor, that's not an
10 assumption in favor of my client; he could also have
11 assumed that the car was stopped and turning. He
12 didn't assume that. He assumed - - - and the People
13 argued that they had taken a position that was most
14 favorable to my client; they had not.

15 But if it's science, to assume the speed of
16 one of the vehicles means that it's all conjecture on
17 the part of the expert. It must - - - an expert
18 opinion, as we argue in our brief, must be based upon
19 facts in the record. There was no facts in the
20 record as to the speed of the Stevens vehicle.

21 JUDGE PIGOTT: Mr. Ostrer?

22 JUDGE GRAFFEO: But did - - -

23 MR. OSTRER: Yes?

24 JUDGE GRAFFEO: I thought one of the other
25 occupants of the vehicle testified that he saw the

1 speedometer on the car.

2 MR. OSTRER: Yes, Your Honor, once - - -

3 JUDGE GRAFFEO: The jury heard that
4 testimony, right?

5 MR. OSTRER: Your Honor, the jury heard
6 from one witness that a - - - prior to the accident,
7 well bef - - - some distance before the accident,
8 somebody observed 60 miles an hour. Another witness
9 testified to 130. The People, in their summation,
10 conceded that could have been the kilometers per
11 hour, which would have reduced the speed to 80 miles
12 per hour. Neither said they knew how fast the
13 vehicle was going at the time of the collision. Both
14 their observations were less than the assumption made
15 by the expert. And if 240.20 is to - - - is to imp -
16 - -

17 JUDGE SMITH: Is it really - - - and this
18 is a case where your client's vehicle is in the wrong
19 lane, collides head on with somebody in the right
20 lane; is it really a ridiculous assumption to say
21 that we'll assume that the car that your guy hit was
22 traveling twenty miles under the speed limit?

23 MR. OSTRER: Your Honor, you've assumed
24 that Mr. Pirtle was correct in his determination that
25 the collision occurred in the Stevens' car lane. He

1 reached that conclusion - - - again, his notes were
2 not available. We had his testimony that I thought
3 he was near the fog line. There was a license plate
4 on the center line. There was a - - - a pool of
5 fluid on the center line of a crowned road. Again,
6 we could not contest Pirtle's conclusions because we
7 didn't have any of the data.

8 JUDGE SMITH: Well, I - - -

9 MR. OSTRER: In DaGata - - -

10 JUDGE SMITH: - - - I see your point about
11 the mathematical calculation, but the - - - you don't
12 need math to figure out from skid marks and things
13 like that. You could have called your own expert - -
14 -

15 MR. OSTRER: Well - - -

16 JUDGE SMITH: - - - to challenge it.

17 MR. OSTRER: - - - Your Honor, we are - - -
18 the arrest in this case takes place eight months
19 after the accident. All of the evidence of the
20 collision are long since gone by the time - - - this
21 accident took place on November 22nd, 2008. The
22 arrest takes place in July. The indictment and
23 arrest take place in July of 2009. We were unable to
24 replicate it. Mr. Pirtle couldn't even replicate his
25 own - - - he lost sufficient data that he couldn't

1 perform his calculation again.

2 JUDGE SMITH: But it seems - - - I guess
3 what I'm suggesting is your stronger point is on the
4 calculations. I mean, the purely qualitative
5 observation is different, but - - -

6 MR. OSTRER: Well, for the moment, Your
7 Honor - - -

8 JUDGE SMITH: - - - the math, I see your
9 point.

10 MR. OSTRER: - - - however, Pirtle conceded
11 he blew shots in using the total station material.
12 Mr. Ferrara, the prosecutor, conceded that, that
13 there was an error about the location of the fog
14 line, the measurements, he had blown shots. But we
15 were foreclosed from determining if, when he computed
16 the speed, if he used the same collision location.
17 We don't know what point in the road Mr. Pirtle used
18 as the collision point in computing the rate of speed
19 because his note - - - the drag factor of the
20 highway; he was asked at trial what drag factor did
21 you use; that would be in the notes that I lost.

22 And Your Honor, how do you leave a pad of
23 notes in the accident reconstruction unit at the
24 state police and they disappear and you can
25 characterize it as inadvertent?

1 JUDGE SMITH: You say that, as a matter of
2 law, we can find it was willful?

3 MR. OSTRER: I believe it was willful, or
4 certainly neglectful to rise to the level of
5 willfulness.

6 JUDGE SMITH: Isn't that something for the
7 trial court to evaluate?

8 MR. OSTRER: Well, but the trial court
9 denied our application for - - - to strike the
10 witness' testimony, which I think, Your Honor, a
11 reading of 240.20, where it says you're to produce
12 this for a witness who the People intend to call,
13 that that is inviting the sanction; that if you can't
14 produce it, you shouldn't be able to call the
15 witness. In 240.20(1)(c) it says somebody - - - a
16 report prepared at the request of the People or a
17 report for - - - prepared by a witness the People
18 intend to call. It invites a sanction, that if you
19 can't produce his work product, you can't call him.
20 It's a net opinion.

21 Your Honors, if I may, with respect to the
22 People's bill of particulars, they set forth three
23 bases upon which they were going to prove the guilt
24 of the defendant for reckless manslaughter: speed,
25 crossover and impairment. They modified their bill

1 of particulars two weeks before trial, offered no
2 evidence of impairment, no quantification of
3 marijuana in the system, no quantification of
4 dextromethorphan DayQuil, which presumably you can
5 ingest and drive a vehicle.

6 JUDGE SMITH: Are you arguing sufficiency
7 of the evidence now?

8 MR. OSTRER: Yes, Your Honor, because the
9 People set out what they were going to prove in their
10 bill of particulars: speed, crossover and impairment
11 - - -

12 JUDGE SMITH: You're saying that because of
13 their bill of particulars, their evidence was
14 insufficient without impairment?

15 MR. OSTRER: Without impairment, and Your
16 Honor, there's - - -

17 JUDGE SMITH: There's a general rule you
18 don't need impairment to prove reckless driving.

19 MR. OSTRER: Understood, and Your Honor,
20 that's another burden in this case, is that we had
21 three different definitions of reckless going to the
22 jury: the recklessness required for the manslaughter
23 and the reckless assaults, the recklessness for
24 reckless endangerment, and the recklessness for
25 reckless driving. And I think that that burdened our

1 case even further.

2 CHIEF JUDGE LIPPMAN: Okay, counselor,
3 thanks.

4 Counselor?

5 MR. MIDDLEMISS: Good afternoon, Your
6 Honors. May it please the court. My name is Robert
7 Middlemiss and I'm before you this afternoon on
8 behalf of the People.

9 Beginning with the adverse inference - - -

10 CHIEF JUDGE LIPPMAN: Counselor, doesn't
11 the losing the notes undermine virtually any
12 credibility to the calculations? And if not, why
13 not?

14 MR. MIDDLEMISS: No, Your Honor, because
15 essentially, defense counsel argued to the jury
16 correctly, they can't show you the math. And that
17 was absolutely true.

18 JUDGE SMITH: But isn't it - - - isn't it
19 really unfair to put the defense counsel in that
20 position? I mean, shouldn't - - - I mean, as he
21 says, then it becomes a beauty contest. If they like
22 the color of your witness' blue eyes, they think that
23 he did the math right. Isn't he entitled to say that
24 he had to go through the math step by step and see if
25 he got 7 times 8 equals 54 somewhere?

1 MR. MIDDLEMISS: It certainly would have
2 been preferable, for the exact numbers, for him to be
3 able to go through that math. But with the exception
4 of those individual numbers, he was able to go point
5 by point - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but if you
7 don't - - -

8 MR. MIDDLEMISS: - - - through the process.

9 CHIEF JUDGE LIPPMAN: - - - have the math,
10 what do you have left?

11 MR. MIDDLEMISS: The process that he used,
12 Your Honor.

13 JUDGE PIGOTT: Why did he need the notes at
14 all?

15 MR. MIDDLEMISS: We would certainly concede
16 that they were Rosario material.

17 JUDGE PIGOTT: Why would he need them at
18 all? In other words, why didn't the trooper just go
19 down and say I didn't take any notes, I just saw it
20 was fast and I think that's reckless and therefore I
21 think you ought to convict him. And he's - - - and I
22 bet you he shows up in his uniform.

23 MR. MIDDLEMISS: Well, that may have - - -
24 that may have been credible, but of course, that
25 would have been an opinion and it's - - -

1 JUDGE PIGOTT: Well, wouldn't you then want
2 to have - - - wouldn't it make sense, then, to strike
3 that testimony and say, wait a minute, you know, he
4 comes in a uniform and says I - - - I did some
5 computations, trust me.

6 MR. MIDDLEMISS: Because - - -

7 JUDGE PIGOTT: What they show is that this
8 guy was driving recklessly.

9 MR. MIDDLEMISS: Thank you, Your Honor.
10 The issue is not that he said this is what I think,
11 or I did these computations, but I can't show you
12 anything. That's - - - that's simply an incorrect
13 statement. The jury still received - - - his report
14 was still put into evidence, and a number of the
15 numbers that he produced were contained within that
16 report.

17 CHIEF JUDGE LIPPMAN: Yeah, but the report
18 - - -

19 MR. MIDDLEMISS: But also he - - -

20 CHIEF JUDGE LIPPMAN: But if the report's
21 not based on anything - - -

22 MR. MIDDLEMISS: But it was based on
23 things, Your Honor.

24 CHIEF JUDGE LIPPMAN: Yeah, but we don't
25 know it. There's no way of verifying that it's based

1 on something, because he doesn't have the basis of
2 it, the calculation.

3 MR. MIDDLEMISS: But his testimony was
4 consistent as to the methodology used. And there was
5 - - -

6 JUDGE PIGOTT: I apologize. I just - - -
7 you get into friction ratios and all of that stuff,
8 and is that all in his report and it's just that the
9 backup for that is not there?

10 MR. MIDDLEMISS: Yes, Your Honor. Maybe -
11 - - I would need to double check the record to say
12 every value, but the majority of the values, such as
13 friction ratios and things, were contained within the
14 report that he submitted - - - were contained within
15 the report.

16 JUDGE ABDUS-SALAAM: But your - - -

17 MR. OSTRER: There were those numbers and
18 there was - - - I'm sorry, Your Honor.

19 JUDGE ABDUS-SALAAM: So what's your
20 response to your adversary's point that this was
21 wrong formula to use and it could be - - - you know,
22 was a one-sided formula, and that's one of the other
23 reasons that it should have been - - -

24 MR. MIDDLEMISS: Well, Your Honor, that's
25 certainly an argument to be made, and it's the

1 argument that defense counsel was in a position to
2 make, in part, because the testimony was actually - -
3 -

4 JUDGE PIGOTT: To whom do you make that
5 argument?

6 MR. MIDDLEMISS: He made it the jury.

7 JUDGE PIGOTT: Yeah, but in your view,
8 wouldn't that be the subject of a Frye hearing - - -

9 MR. MIDDLEMISS: No, Your Honor.

10 JUDGE PIGOTT: - - - to determine whether
11 or not the methodology used should be going to the
12 jury?

13 MR. MIDDLEMISS: No, Your Honor. The Court
14 is enti - - - a court is entitled to, essentially,
15 take judicial notice of the acceptance of
16 methodology, and - - -

17 JUDGE SMITH: But where - - - if I want to
18 take judicial notice, where do I find it? I mean, I
19 looked at the cases you cited in your brief and they
20 don't - - - they don't really say what you want them
21 to say.

22 MR. MIDDLEMISS: My apologies, Your Honor.
23 I believe that they - - -

24 JUDGE SMITH: I mean, they say that
25 somebody testified from this methodology; that's

1 different from saying it's a well-accepted thing and
2 everybody knows it.

3 MR. MIDDLEMISS: Well, there were certainly
4 several cases, Your Honor. I mean, courts have
5 clearly admitted and accepted expert testimony in the
6 area. There are courts - - -

7 JUDGE SMITH: But I guess - - - I guess
8 what I'd say is I think that's probably true; how do
9 I know that?

10 MR. MIDDLEMISS: Perhaps, Your Honor,
11 you're suggesting that it would have been more clear
12 had a hearing been held. I think that that - - -

13 JUDGE SMITH: I guess what I'm really
14 saying, and maybe it's - - - is it's - - - I've
15 always wondered, how are we supposed to figure out
16 whether it requires a Frye hearing or not? Some
17 things are already generally accepted; some aren't.
18 But if I'm just some judge trying to figure it out,
19 how do I know?

20 MR. MIDDLEMISS: Well, I hadn't
21 specifically pondered that general question, Your
22 Honor.

23 JUDGE READ: Are you saying that other
24 judges who pondered it did think it was okay, so if
25 five other judges have thought it was okay, then I

1 can rely on it and say it's generally accepted?

2 MR. MIDDLEMISS: That's generally
3 understood to be - - - to be the - - - the common
4 methodology for determining whether or not a Frye
5 hearing is warranted, Your Honor.

6 JUDGE PIGOTT: Why did this happen?

7 MR. MIDDLEMISS: And more - - -

8 JUDGE PIGOTT: Why was it ten months after
9 the accident that the indictment occurred, and then
10 even after that, the theory of the People changed
11 from the intoxication, not intoxicat - - - or
12 impairment, not impairment?

13 MR. MIDDLEMISS: Well, it's - - - this
14 obviously wasn't my case, so I can't say for sure.
15 But it's my understanding that it took a while - - -

16 JUDGE PIGOTT: So you can speak candidly.

17 MR. MIDDLEMISS: - - - to gather all of the
18 evidence, in general, and that it was a matter of
19 when the prosecutor believed that we had sufficient
20 evidence to make out the case. Obviously, things
21 continued to come in after that. And again, it's my
22 understanding that the bill of particulars was
23 changed once the blood alcohol content had come in,
24 so that it was necessary to indicate that it was not
25 or did not - - -

1 JUDGE SMITH: Could I go back, for a
2 moment, to the ma - - - I thought you told Judge
3 Pigott that the numbers that he used were in the
4 report. I'm looking at the report, at 84 to - - - 84
5 to 90 - - - or I guess, 84 to 96 of the record. I'm
6 having trouble finding it. Can you point me to it?

7 MR. MIDDLEMISS: I apologize, Your Honor;
8 I don't have the entire record right in front of me.
9 But I believe on the first several pages of the
10 report that there were individual numbers repeatedly
11 mentioned with respect to lengths and angles and
12 friction factors, the first page or two.

13 JUDGE SMITH: I see the page numbers.

14 JUDGE ABDUS-SALAAM: Are exact numbers,
15 counsel, necessary for the accident reconstructionist
16 to testify that the speed was way over the limit?
17 Were the actual numbers necessary, or could that have
18 been gathered from other information like skid marks
19 and perhaps one of the passengers saying he was going
20 a certain speed?

21 MR. MIDDLEMISS: I'm sorry, could you - - -
22 were which actual numbers necessary, Your Honor?

23 JUDGE ABDUS-SALAAM: The 94 - - - 94 miles
24 an hour, the numbers that were used for this formula
25 that resulted in the formulas - - -

1 MR. MIDDLEMISS: The speeds for the - - -

2 JUDGE ABDUS-SALAAM: - - - 94 - - - yeah,
3 the speeds, yeah.

4 MR. MIDDLEMISS: Yes, apparently. It
5 required - - - the way that the calculation was
6 performed required a value for both vehicle speeds in
7 order to essentially explain the measurements that
8 were taken in terms of the amount of friction, the
9 length of movement and everything else. In this
10 case, the method used was to calculate a range of
11 speeds for the one vehicle and then a corresponding
12 range of speeds for the other vehicle, based on the
13 measurements that were taken.

14 JUDGE ABDUS-SALAAM: So even if this accid
15 - - - even if the defendant had been arrested sooner
16 or indicted sooner, you're saying nobody else could
17 reconstruct this, those particular numbers?

18 MR. MIDDLEMISS: No, that's - - - that's
19 not what I'm suggesting. I guess I'm - - - I'm not
20 sure how my answer to the question - - - maybe I
21 misunderstood the question - - - implies that
22 conclusion. The values were collected from the
23 scene, and based on those, the length of marks,
24 depth, and everything else, numbers were listed for
25 potential speeds, calculations were performed based

1 on the information that was gathered, and then the
2 number - - - the number of potential speeds for the
3 defendant's vehicle resulted from that.

4 JUDGE ABDUS-SALAAM: So with that
5 information, could someone else come up with those
6 same numbers?

7 MR. MIDDLEMISS: I believe so, Your Honor.
8 Obviously, the defense elected not to call an expert,
9 but presumably, they could have taken the numbers - -
10 -

11 JUDGE SMITH: But is it - - -

12 MR. MIDDLEMISS: - - - some of which - - -
13 I'm sorry.

14 JUDGE SMITH: Is it fair to say, though,
15 that what happened here was an expert took the stand
16 and said, I did a calculation and I assumed this and
17 I got 90 miles an hour, and I made another
18 assumption, I got 94 miles an hour, and I've lost the
19 notes from my calculation, and I can't replicate it.
20 Is that - - - why should that be allowed at all? Why
21 doesn't that put the defendant in an impossible
22 position?

23 MR. MIDDLEMISS: Well, in this case, Your
24 Honor, there are - - - there are several - - -
25 several reasons. First, that's not all he testified

1 to.

2 JUDGE SMITH: Oh, I understand that. But
3 why should he be allowed to testify - - - I mean,
4 it's obvio - - - you have somebody who says he's an
5 expert saying this guy was going 90 miles an hour.
6 That's powerful evidence. And if all he's got is,
7 take my word for it, I did a calculation, but I don't
8 remember it and I can't document it, is it really
9 fair to let him say it?

10 MR. MIDDLEMISS: Well, in the - - - in the
11 event that that were absolutely all he had, I think
12 that it might be a different situation, but it wasn't
13 the situation here, because there was the report and
14 there were values included in that report. I realize
15 Your Honor has had some difficulty identifying
16 specific numbers, but I would submit that, having
17 reviewed the record, there are several locations in
18 the report that identify specific values for marks
19 and locations.

20 JUDGE SMITH: If you can, at some point - -
21 - I - - - if the Chief won't object, I wouldn't mind
22 your letting us know what those pages are in a
23 subsequent argument.

24 MR. MIDDLEMISS: More importantly, however,
25 the defendant isn't really in a position to show

1 prejudice. I realize that the court - - -

2 CHIEF JUDGE LIPPMAN: No prejudice by that?

3 MR. MIDDLEMISS: No, Your Honor. In this
4 case - - -

5 CHIEF JUDGE LIPPMAN: Isn't that, as Judge
6 Smith indicated, a pretty powerful, damning kind of
7 calculation?

8 MR. MIDDLEMISS: In one sense it may be,
9 but at the same time, as - - - as defense counsel
10 pointed out to the jury, we couldn't show the math,
11 in that the underlying math was missing. And more
12 importantly - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but the - - -

14 MR. MIDDLEMISS: - - - the value - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but the point
16 is you're saying even without that, there's no
17 problem, but to say - - -

18 MR. MIDDLEMISS: I am, Your Honor.

19 CHIEF JUDGE LIPPMAN: - - - he's going 95
20 miles an hour, whatever it is?

21 MR. MIDDLEMISS: Well, I think it's
22 important to recognize the fact that that wasn't the
23 only source of information. As defense counsel
24 conceded, there were other individuals there who
25 identified speeds for the vehicle. So that the

1 numbers that were actually produced, based on the
2 calculations, were lower than the numbers identified
3 - - -

4 JUDGE SMITH: But to have a - - -

5 MR. MIDDLEMISS: - - - by the passengers -
6 - -

7 JUDGE SMITH: To have a witness - - -
8 especially some of your witnesses weren't absolutely
9 free from taint - - - to have a witness say, oh yeah,
10 I remember what the speedometer said, is not the same
11 as having a police officer say, I did the math.

12 MR. MIDDLEMISS: That's true, it's not the
13 specific same, but it's another source of credible
14 testimony. And certainly the adverse inference
15 instruction was sufficient to - - - to reference the
16 specific area of the testimony that - - -

17 JUDGE GRAFFEO: If we disagree - - -

18 MR. MIDDLEMISS: - - - became problematic.

19 JUDGE GRAFFEO: - - - about the adverse
20 inference charge, what would be - - - what would you
21 think our remedy should be?

22 MR. MIDDLEMISS: I'm sorry, Your Honor?

23 JUDGE GRAFFEO: If we disagree with you,
24 what do you think our remedy would be?

25 MR. MIDDLEMISS: Well, I think that the

1 remedy would still be to uphold the conviction,
2 because the question with respect to an adverse
3 inference charge is not whether the court would
4 generally agree with the relief, but whether the
5 relief constituted an abuse of discretion.

6 And in this case, defense counsel gave the
7 court two choices. First, defense counsel, who
8 specified I'm not alleging any misconduct, didn't
9 think that there was anything wrong with it, said I'd
10 like an adverse inference charge. And the next day
11 defense counsel came back, changed its mind and said,
12 actually, no, you know what, Your Honor, I'm sorry,
13 I'd like virtually all of the testimony stricken; not
14 the testimony specifically related to the numbers,
15 not the testimony specifically related to the
16 conclusion, but all of his testimony.

17 CHIEF JUDGE LIPPMAN: But without that - -
18 - without that testimony, it's still good? The
19 conviction's still good?

20 MR. MIDDLEMISS: Yes, Your Honor.

21 CHIEF JUDGE LIPPMAN: Why?

22 MR. MIDDLEMISS: Because there was plenty
23 of other evidence. Again, there were other numbers
24 concerning the speed. There was - - - even if
25 there's - - - even if there are - - -

1 CHIEF JUDGE LIPPMAN: It's a pretty central
2 testimony, though, wouldn't you say?

3 MR. MIDDLEMISS: Central in what respect,
4 Your Honor?

5 CHIEF JUDGE LIPPMAN: Central to getting a
6 conviction.

7 MR. MIDDLEMISS: I think that it was not
8 insignificant testimony, but one of the other
9 problems that defense counsel sought to raise on
10 appeal sort of illustrates the general nature of the
11 case. Defense counsel wants to talk about the
12 closings and everything and the marshaling of the
13 evidence. The ultimate point of the prosecutor's
14 summation was that there were differences in all the
15 numbers for speed - - - in the expert's numbers for
16 speed, in the eyewitness numbers for speed, in
17 everything else. But they were all consistent in
18 that they were all well in excess of the speed limit.

19 JUDGE PIGOTT: Can I ask you this? I know
20 your time has expired, but in your voluntary
21 disclosure form in August, with respect to the man 2,
22 you said that it was a "high rate of speed and he
23 crossed over double yellow, impaired by the voluntary
24 consumption of alcohol. As a result of said action
25 and voluntary impairment, defendant caused the death

1 of the young man and physical injuries to the
2 others." Absent that voluntary consumption of
3 alcohol, do you still have the same case?

4 MR. MIDDLEMISS: Yes, Your Honor. Two
5 things. One, that was the initial bill of
6 particulars, and it was amended to state alcohol
7 and/or drugs.

8 JUDGE PIGOTT: No, but once the jury
9 acquits him of one of your three legs of the stool,
10 do you still get the manslaughter? Because you said
11 that it was the high rate of speed, crossed the
12 yellow line, and he was impaired. They found he was
13 not impaired.

14 MR. MIDDLEMISS: No, Your Honor. They
15 found that he - - - specifically they found that he
16 was not impaired by alcohol. The charge was DWAI,
17 not - - -

18 JUDGE SMITH: Well - - -

19 MR. MIDDLEMISS: - - - DWAI drugs.

20 JUDGE SMITH: - - - to simplify the
21 question. If you prove crossing the red line and an
22 excessive rate of speed, will that - - - will that,
23 by itself, support a manslaughter conviction, if the
24 guy is cold sober?

25 MR. MIDDLEMISS: Yes, it will, Your Honor,

1 under these specific circumstances. There is other
2 case law in which this court has essentially said
3 that speed, by itself, is rarely enough. But in this
4 instance, you had an individual who had souped up his
5 car, who knew the area of the road that he was on
6 well, because he had been there earlier in the day,
7 who had been expressly told not to speed on that area
8 of the road because it posed a danger to a resident's
9 children just around that corner.

10 JUDGE SMITH: And it was on the wrong side
11 of the road. That's - - -

12 MR. MIDDLEMISS: And he crossed over the
13 road, yes - - -

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. MIDDLEMISS: - - - in light of the
16 amount of speed that he was using.

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

19 MR. MIDDLEMISS: Thank you, Your Honors.

20 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

21 MR. OSTRER: Yes, sir. Your Honors, if I
22 may. The fact that Mr. Pirtle couldn't replicate his
23 computation, I believe, is evidence that there was
24 inadequate information, absent his notes, to perform
25 the computation. His - - - the need, on his part, to

1 fix a speed on the Stevens vehicle is further
2 evidence that there wasn't enough information in the
3 record to determine the speed of one or the other of
4 the vehicles. He could have said, based upon what he
5 found to be credible as an expert, fixed the speed of
6 either vehicle to properly use the formula. He could
7 not, therefore - - -

8 JUDGE SMITH: You could not have
9 complained, I suppose, if he'd fixed the Stevens
10 vehicle speed at zero?

11 MR. OSTRER: If he - - -

12 JUDGE SMITH: Apart from the fact that you
13 can't replicate the calculations - - -

14 MR. OSTRER: Oh - - -

15 JUDGE SMITH: - - - but you wouldn't
16 complain about that assumption?

17 MR. OSTRER: Scientifically, Your Honor, we
18 would still need to know which numbers he multiplied
19 by which numbers. Even if he did it at zero and came
20 up with a number, I would - - - based upon his
21 interpretation of the linear momentum formula - - -

22 CHIEF JUDGE LIPPMAN: What about it if
23 should have been out; what's left?

24 MR. OSTRER: Your Honors, based upon - - -

25 CHIEF JUDGE LIPPMAN: Assuming the

1 testimony is no good, what's left?

2 MR. OSTRER: Well, Your Honor, what's left
3 is - - -

4 CHIEF JUDGE LIPPMAN: Is there enough?

5 MR. OSTRER: There is not enough.

6 CHIEF JUDGE LIPPMAN: Why not?

7 MR. OSTRER: Because, Your Honor, his notes
8 also bear on his conclusion as to where the impact
9 took place, which is the crossover. There is no
10 evidence of impairment, so we're left with a - - -
11 something that doesn't even rise to the level of this
12 court's jurisprudence for criminally negligent
13 homicide, which would be speed and an aggravating
14 factor. So if we can't reach that, we can't prove
15 the impairment. There was a lot of testimony about
16 the dextromethorphan, the DayQuil - - -

17 JUDGE SMITH: I'm sorry, I missed - - - why
18 is the - - - being in the wrong lane not an
19 aggravating factor?

20 MR. OSTRER: Well, being in the wrong lane
21 would be an aggravating factor, Your Honor, but the
22 only person who puts us in the wrong lane is Mr.
23 Pirtle. Nobody else puts us in the wrong lane. Mr.
24 Stevens' car is found off the road, and my client's
25 car - - -

1 JUDGE SMITH: So your - - -

2 MR. OSTRER: - - - is found off the road.

3 JUDGE SMITH: Then your argument,
4 essentially, is that all of Pirtle's testimony should
5 have been stricken, not just the bottom line of his
6 math.

7 MR. OSTRER: Your Honor, he could testify
8 to facts. He could testify, as a fact witness, as to
9 what he saw. He took pictures. These are the
10 numbers he found. But his opinion testimony, where
11 the collision took place, and what speed the cars
12 were going, should not be permitted if we don't have
13 his work papers.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MR. OSTRER: Thank you, Your Honors.

16 CHIEF JUDGE LIPPMAN: Thanks. Thank you
17 both.

18 (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. Patrick A. Asaro, No. 158 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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