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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 178

EARL JONES,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 19, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Appeal number 178,  
2 People of the State of New York v. Earl Jones.

3 Good afternoon, counsel.

4 MS. RATNER: Good afternoon, Your Honors.  
5 Jody Ratner for appellant, Earl Jones. I'd like to  
6 request two minutes - - -

7 CHIEF JUDGE DIFIORE: You may.

8 MS. RATNER: - - - for rebuttal.

9 The admission of the bystander's out-of-court  
10 statement was erroneous, where the record did not support  
11 the trial court's finding that it was an excited utterance  
12 or a present sense impression.

13 Mr. Jones was harmed since the statement, the  
14 bystander's accusation, was the evidence that influenced  
15 the jury to convict him of a burglary rather than a  
16 trespass.

17 JUDGE RIVERA: Is the confrontation clause  
18 claim preserved?

19 MS. RATNER: The - - - I believe the  
20 confrontation claim - - - clause claim is preserved  
21 because the prosecution raised it as an issue;  
22 defense counsel noted that it related to hearsay, and  
23 that put it before the court's purview.

24 JUDGE RIVERA: Okay. So maybe I  
25 misunderstood the record. I thought - - - I thought

1 the judge asked counsel, counsel said, let me think  
2 about it, but then never came back.

3 MS. RATNER: Yes. And part of the  
4 preservation statute of require - - - merely requires  
5 that it be within the court's purview, and I believe  
6 that it was in this case.

7 JUDGE ABDUS-SALAAM: But don't you have to  
8 make a protest? Was that a protest; would you say  
9 that was a protest by saying, let me think about it?

10 MS. RATNER: It doesn't always have to be a  
11 protest; it can be something that the court  
12 understands is an issue and then either rejects,  
13 either implicitly or explicitly.

14 JUDGE ABDUS-SALAAM: So is that your - - -  
15 that your argument also for preservation on the  
16 excited utterance?

17 MS. RATNER: Not at all. So far as  
18 preservation for excited utterance and the present  
19 sense impression, defense counsel put forth before  
20 the court many gaps in the evidence as to what was  
21 lacking from the prosecutor's presentation or  
22 application, and why the prosecutor didn't meet his  
23 burden.

24 CHIEF JUDGE DIFIORE: So what would have  
25 been necessary, counsel, in addition? How to create

1 the foundation? What did they miss?

2 MS. RATNER: They missed quite a bit. As  
3 for excited utterance, there was no indication  
4 whatsoever that the bystander was startled or that  
5 this was - - - that she continued to be under the  
6 stress of a startling event. She merely stated, did  
7 you see him try to get in the back of the truck. She  
8 could have been a good citizen who was alerting a  
9 police officer to something that she believed she  
10 saw.

11 This is completely unlike most of the cases  
12 decided by this court in which a victim, especially,  
13 but even a bystander, observes an event that is  
14 either violent or so shocking. This is just not of  
15 that nature; this is somebody standing who happens to  
16 see possibly a tug on the back of a truck.

17 It could have been tug; he could have just  
18 been just standing there, and being that he wasn't in  
19 a FedEx uniform, he was carrying what looked to be  
20 like some sort of tool and a bag, she may have even  
21 just come to the conclusion that he had nefarious  
22 purposes.

23 But we don't know because that burden was not  
24 made out by the People when they made their application to  
25 admit this as hearsay.

1                   JUDGE STEIN:  What about the present sense  
2                   impression?  Does it have to be exactly  
3                   contemporaneous that while he's standing right there  
4                   she makes the statement or can it be as here,  
5                   apparently, as I see the record, within perhaps  
6                   seconds of when it happened?

7                   MS. RATNER:  The timeframe isn't the  
8                   important factor.  What's the important factor is  
9                   whether it's contemporaneous, which here, the event  
10                  had ended.  So even though it - - -

11                  JUDGE STEIN:  But he was still walking  
12                  away, wasn't he?  He was within - - -

13                  MS. RATNER:  He was walking away, but - - -

14                  JUDGE STEIN:  - - - sight?

15                  MS. RATNER:  But the crime she believes she  
16                  saw had ended.  He was departing.  The event was no  
17                  longer - - -

18                  JUDGE FAHEY:  So you have to do it right -  
19                  - - right - - - you have to - - - present sense  
20                  impression, your remark has to be while the crime is  
21                  occurring?

22                  MS. RATNER:  While the crime is occurring  
23                  or immediately thereafter.  This was not - - -

24                  JUDGE RIVERA:  Well, why isn't this  
25                  immediately thereafter?  And by the way, where is the

1 officer at that time? If it's at the moment that I  
2 think you're suggesting, which is as it's happening  
3 or just as he's turned his back, where is the  
4 officer? Does she have the opportunity to actually  
5 say something - - -

6 MS. RATNER: The - - -

7 JUDGE RIVERA: - - - to someone at that  
8 point?

9 MS. RATNER: The - - - what we know is that  
10 the officer is arriving towards the back at some  
11 point during this - - - by the time the officer  
12 reaches her, Mr. Jones is halfway up the block. So  
13 what she could be saying is what she saw. In fact,  
14 her words lead to impression that she is talking  
15 about a past impression.

16 She doesn't say, do you see him doing that; she  
17 says, did you see him doing that. Within that short  
18 timeframe, she could have leapt to a conclusion about what  
19 she thought she saw and not necessarily what she was  
20 perceiving.

21 JUDGE STEIN: Well, if it's immediately  
22 thereafter, it would also use the past tense. So  
23 when we say, thereafter, that assumes that it's - - -  
24 it's - - - it's happened. So that in itself isn't  
25 enough to - - -

1 MS. RATNER: It also needs to be what she  
2 perceives. And what she perceives - - -

3 JUDGE FAHEY: Well, isn't the - - -

4 MS. RATNER: - - - is - - -

5 JUDGE FAHEY: - - - isn't the test whether  
6 or not the person making the statement had time to  
7 reflect on the statement? Isn't that - - - would you  
8 agree with that - - -

9 MS. RATNER: It is, Your Honor, and she  
10 could have had time to reflect, yes.

11 JUDGE FAHEY: So you think here, your basic  
12 argument here, the factual structure is that she had  
13 time for reflection.

14 MS. RATNER: Correct.

15 JUDGE FAHEY: I see.

16 MS. RATNER: And it's also - - -

17 JUDGE GARCIA: But isn't that a factual  
18 question then? I mean, it's - - - as I recall the  
19 testimony, I think the officer sees the legs under  
20 the truck, so he's close enough to see that. So the  
21 judge is listening to this and hearing that  
22 testimony, he sees the legs behind the truck, I think  
23 it's the officer then goes around - - - the defendant  
24 comes around the other way.

25 So why would we substitute our assessment

1 of what the timeframe is for what the assessment that  
2 was made at the trial court?

3 MS. RATNER: Well, the timeframe and the  
4 corroboration, which is what your also is - - - Your  
5 Honor is also getting to, is - - -

6 JUDGE GARCIA: But it goes to timeframe  
7 since he was close enough - - -

8 MS. RATNER: Right.

9 JUDGE GARCIA: - - - to see it.

10 MS. RATNER: The timeframe is only one  
11 factor. The other factors that need to be determined  
12 are whether this was corroborated. We don't know  
13 what she saw. The officer doesn't know what she saw.  
14 The officer only knows that Mr. - - -

15 JUDGE GARCIA: But then he could testify to  
16 it himself. I mean, the point of getting this in is,  
17 it's an excited utterance. He wasn't there; she is  
18 saying it. So I don't understand the relevance of  
19 that arguments to how it comes in or not.

20 MS. RATNER: Well, that - - - I was  
21 referring to the present sense impression in  
22 corroboration, not to the excited utterance.

23 JUDGE GARCIA: Okay.

24 MS. RATNER: Again, I don't think this was  
25 an excited utterance in any sense of the word - - -

1 JUDGE GARCIA: So present sense impression

2 - - -

3 MS. RATNER: - - - she merely saw something

4 - - -

5 JUDGE GARCIA: - - - he doesn't see it - -

6 -

7 MS. RATNER: He doesn't - - -

8 JUDGE GARCIA: - - - but it's immediately  
9 thereafter as he comes around the truck.

10 MS. RATNER: Right. But it needs to be  
11 corroborated; it needs to have some indication of  
12 corroborated.

13 In Vasquez, this court said that there  
14 needs to be independent verification of the  
15 declarant's description of the unfolding events.

16 The officer here does not know what those  
17 unfolding events are. All he knows - - -

18 JUDGE GARCIA: He sees him in the cab,  
19 right?

20 MS. RATNER: Right.

21 JUDGE GARCIA: The officer sees him in the  
22 cab, then he sees his legs in the middle of the back  
23 of the truck, as I understand it. So doesn't - - -  
24 it doesn't have to be, he sees the same thing; it has  
25 to be some corroboration of what she saw.

1 MS. RATNER: Right. And there was none.

2 He saw a trespass; he saw a trespass in the cab - - -

3 JUDGE GARCIA: But he sees him standing - -

4 -

5 MS. RATNER: - - - and then he sees him by

6 - - -

7 JUDGE GARCIA: - - - at the back of the

8 truck.

9 MS. RATNER: Right. And that does not  
10 corroborate that Mr. Jones was trying to get into the  
11 truck. All it corroborates is that - - -

12 JUDGE STEIN: He also sees - - -

13 MS. RATNER: - - - he was standing there -

14 - -

15 JUDGE STEIN: He doesn't just see a  
16 trespass, he doesn't just see him go into the truck  
17 and, you know, sit down at the driver's wheel or  
18 something; he sees him go into the truck, and - - -  
19 and - - - and he has head movements that look like  
20 he's looking around for something. It - - - it's not

21 - - -

22 MS. RATNER: That's a trespass; that - - -

23 that's not an intent to do anything - - -

24 JUDGE STEIN: It is, but when - - - when  
25 it's coupled with everything else that he sees and he

1 knows, and then he goes to the back and then he stops  
2 there, he doesn't just walk around the back and keep  
3 going. He stops for some - - - some period of time.  
4 All of those things and what he did before he got  
5 there, all those things go together.

6 MS. RATNER: Right. But we need  
7 corroboration of - - -

8 JUDGE FAHEY: Well, you know the problem  
9 is, I think, maybe the way you're viewing  
10 corroboration. I don't think corroboration requires  
11 a witness that saw the exact same things that this  
12 witness is testifying about.

13 What it requires, and I think the case law show,  
14 is some evidence that at least - - - that part of what's  
15 been testified to can be verified by some independent  
16 observation or independent evidence. And here, we have  
17 that with the evidence of a trespass.

18 MS. RATNER: I respectfully disagree. In  
19 the case of Brown - - -

20 JUDGE FAHEY: You're saying that - - - let  
21 me just - - -

22 MS. RATNER: Um-hum.

23 JUDGE FAHEY: Let me just finish then so  
24 I'm clear. You're saying that it requires someone to  
25 see the same things that I saw to corroborate.

1 MS. RATNER: I'm not saying that; what I'm  
2 saying is it depends on the facts of the case.

3 JUDGE FAHEY: Okay.

4 MS. RATNER: In the case of Brown, the - -  
5 - somebody from across the street called 911, they  
6 said that they saw a break-in, they described two men  
7 on the scene, the police officer showed up, they saw  
8 the two men exactly as described by the witness - - -  
9 or by the 911 caller leaving a restaurant through a  
10 broken glass door.

11 They didn't see the exact thing; they  
12 didn't see them go in, but they saw them come out,  
13 and they saw all the indications that what the caller  
14 had reported was what had happened. In - - -

15 JUDGE GARCIA: But we would have to say  
16 then, as a matter of law, this wasn't corroboration.  
17 Because you're saying it depends on the factual  
18 circumstances of the case. But we would have to say  
19 here, as a matter of law, I think Judge Stein was  
20 describing, he sees him go to this building, he has a  
21 box cutter, he has a bag, he goes in the truck, he's  
22 going up and down in the truck, he sees his legs in  
23 the back of the - - - and that's not enough as a  
24 matter of law.

25 MS. RATNER: As a matter of law, the facts

1 that were presented by the People before the trial  
2 court were not sufficient to make out of their  
3 burden, yes, that is exact - - -

4 CHIEF JUDGE DIFIORE: Thank you, counsel.  
5 And if you care to address your legal sufficiency  
6 argument, you'll have that opportunity during  
7 rebuttal time.

8 MS. RATNER: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MR. WOLKOWITZ: Good afternoon, Your  
11 Honors. My name is Jared Wolkowitz, and I represent  
12 the People in this case.

13 JUDGE STEIN: What proof is there in this  
14 record that would support a finding that this was an  
15 excited utterance?

16 MR. WOLKOWITZ: Your Honor, as this court  
17 has said, above all, the test and decisive factor for  
18 an excited utterance is whether the surrounding  
19 circumstances reasonably justify the conclusion that  
20 the remark was not made under the impetus - - -

21 JUDGE STEIN: Don't we need something about  
22 her demeanor, her - - - you know, some indication of  
23 what her state of mind is, beyond the mere  
24 circumstances, or maybe that she had some connection  
25 to the truck, or something?

1 MR. WOLKOWITZ: Well, you do have that  
2 here. You don't have - - -

3 JUDGE STEIN: What do we have?

4 MR. WOLKOWITZ: You don't have tone.  
5 That's what they seem to get at, or psychological  
6 conditions. But what you do have here is the  
7 witness's actions, which display excitement and  
8 stress.

9 JUDGE STEIN: What were those actions?

10 MR. WOLKOWITZ: She waits there, because as  
11 you stated before, the Defendant is walking away from  
12 the scene, she stays there, she waits for the  
13 officer, she says to the officer, did you see what -  
14 - - that he tried to get into the back of the truck,  
15 then she says, are you going to get him?

16 So it shows that she has some sort of  
17 excitement or stress based upon this event, and the  
18 surrounding circumstances here show that - - -

19 JUDGE ABDUS-SALAAM: How do you know that  
20 based on the description of this woman from the  
21 officer? A little person, fifty years - - - about  
22 fifty years old, you think she is using the same tone  
23 that you just did when you made that argument? Is  
24 that what you - - -

25 MR. WOLKOWITZ: No, but the words use the

1 same tone. I mean, it's - - - it's that you have to  
2 be - - - it has to be sufficiently startling or  
3 powerful enough. It doesn't - - - as they write in  
4 their brief, I doesn't have to be a murder, it  
5 doesn't have to be a pres - - - it doesn't that to be  
6 a stabbing; it could just be, Your Honor, some event  
7 that causes you to stop that reflective process.  
8 That's what your cases tell us.

9 JUDGE STEIN: I don't know. I mean, if she  
10 came running around the back of the truck and ran up  
11 to the officer, and said the same thing, to me that  
12 would be some more of an indication. But you say  
13 she's standing there. So she just observed whatever  
14 she observed, and she is standing there. And then  
15 the police officer comes back and she says, did you  
16 see what he just did? Are you going to get him?

17 I mean, if you think of it that way - - -

18 MR. WOLKOWITZ: Right.

19 JUDGE STEIN: - - - it could be a complete  
20 absence of excitement.

21 MR. WOLKOWITZ: Well, we provided to the  
22 court - - - I just wanted to get back to preservation  
23 just for that one purpose.

24 We provided to the court an offer, and the court  
25 accepted that offer, and we went forward. We believed

1 that that was excitement for - - - and stressed to satisfy  
2 your standards.

3 If they wanted more, if they wanted that that  
4 tone, if they wanted that psychological condition, one,  
5 they were free to ask, and two, they were free to protest  
6 to the judge about that.

7 JUDGE PIGOTT: Doesn't that get, you know,  
8 this is a taffy pull, and it seems to happen a lot.  
9 What's wrong with the judge not being satisfied or  
10 being satisfied?

11 MR. WOLKOWITZ: I'm sorry?

12 JUDGE PIGOTT: What's wrong with the judge  
13 not being satisfied with your proffer, or being  
14 satisfied, and that preserving the issue?

15 MR. WOLKOWITZ: Well, the thing - - - the  
16 problem, Your Honor, is in New York there's a statute  
17 that says, here, what you need is them to  
18 specifically bring up the issue that they are raising  
19 on appeal, or, in response to a protest by a party,  
20 the court must expressly decide that issue.

21 Their issue on appeal is that they weren't under  
22 the stress of the startling event, that this wasn't a  
23 startling event, and that we didn't know the tone or the  
24 psychological condition of the declarant at the time.

25 JUDGE RIVERA: Right. But given the nature

1 of this exception, isn't the whole point that you got  
2 to be excited?

3 MR. WOLKOWITZ: Well, yes.

4 JUDGE RIVERA: So if the court - - -

5 MR. WOLKOWITZ: Yes.

6 JUDGE RIVERA: If the court allows it in,  
7 isn't that the court deciding, I think it was  
8 excited?

9 MR. WOLKOWITZ: But they're not protesting  
10 what they are arguing on appeal. If you read their  
11 brief, if you read their brief, their reply brief - -  
12 -

13 JUDGE RIVERA: Which we have.

14 MR. WOLKOWITZ: Of course, I'm saying - - -  
15 but I'm saying just as a general matter, it would  
16 obliterate New York's preservation requirement,  
17 because their theory is, what you have is, anytime  
18 the People go through the elements of a certain crime  
19 or a certain legal standard, if they just say, I  
20 object, they've preserved it.

21 JUDGE PIGOTT: Yes, they have.

22 MR. WOLKOWITZ: That's not the law, though,  
23 Your Honor.

24 JUDGE PIGOTT: Well, maybe it is, because  
25 it seems to me, the judge is not a cipher. I mean,

1 the judge doesn't just sit there and say, well, I've  
2 heard from the DA, and because they said that this  
3 woman was excited, even though she called three days  
4 later and said, you know, I really should have  
5 brought this up at the time, but I wanted to tell you  
6 that I saw this man in the truck, I find that to be  
7 an excited utterance. What - - - you want the  
8 defense to say, judge, how stupid can you get?

9 MR. WOLKOWITZ: No.

10 JUDGE PIGOTT: The judge has to have  
11 something to do with this, and in this case, did, and  
12 made a decision that - - - as we're arguing on the  
13 merits is not a bad one.

14 But to say that they cannot raise in front  
15 of an appellate court an excited utterance, when they  
16 objected, and you said, it's an excited utterance,  
17 and the judge said, I am - - - I'm overruling the  
18 objection, that that's not preserved, I missing it.  
19 And I do this a lot; I miss it a lot because I don't  
20 understand how many times you've got to go to a judge  
21 and say, judge, just so we're clear on why I think  
22 you're wrong, I want to spell out some more.

23 There are judges that say, I want no speaking  
24 objections.

25 MR. WOLKOWITZ: Well, Your Honor, that

1 would be a case, but that wasn't this case.

2 JUDGE PIGOTT: So let me ask you this.  
3 Don't you think you have enough in front of you to  
4 argue on the merits of this?

5 MR. WOLKOWITZ: Absolutely.

6 JUDGE PIGOTT: Okay. I guess - - -

7 MR. WOLKOWITZ: So I will do that as well,  
8 as I was doing before.

9 JUDGE GARCIA: Counsel, just to go back - -  
10 -

11 MR. WOLKOWITZ: Sure.

12 JUDGE GARCIA: - - - go off of that topic  
13 for a second to go back to something your opponent, I  
14 think, said early on. Is this harmless error - - -

15 MR. WOLKOWITZ: It would - - -

16 JUDGE GARCIA: - - - if it's error?

17 MR. WOLKOWITZ: It's not error, but if it  
18 was error, it would be harmless error, Your Honor,  
19 because even if you extracted that statement from the  
20 case, there's still plenty of evidence.

21 He looked both ways and looked into the van  
22 for five - - - to the cab for five seconds. His head  
23 bobbed up and down and he looked around. That's all  
24 that statement - - - he had a tile cutter, he had a  
25 duffel bag, which just added to the proof that he was

1 seeking to, you know, burglarize or take stolen items  
2 for the intent to - - - so even if you extracted that  
3 particular piece of evidence, there would be plenty  
4 of evidence.

5 JUDGE GARCIA: All of that except the  
6 duffel bag and the tile cutter are based upon the  
7 officer's testimony though, right?

8 MR. WOLKOWITZ: Yes.

9 Everything in the case besides the declarant's  
10 statement and the two items are based on the officer's  
11 testimony.

12 But I want to go back to the - - - just one  
13 thing my opponent said about the corroboration  
14 requirement. This court specifically, and I know Judge  
15 Fahey was getting to this in Brown, made clear that they  
16 rejected the equally percipient witness test.

17 That - - - there was three options in Brown.  
18 One was the prosecutor in that case argued, well, you  
19 know, there should be no - - - because the lack of time,  
20 there should be no corroboration whatsoever. Two, there  
21 is an equally percipient one where they have someone who  
22 saw exactly what the other - - - the witness saw. And  
23 then the third option, and this court described it as the  
24 middle ground, was that we would take other evidence and -  
25 - - as corroboration.

1           And here, you have clearly other evidence. Not  
2           only does he go into the truck, in the front compartment  
3           of the same truck that he is accused of going through the  
4           back of, he also is seen by the officer, as Your Honor was  
5           saying before, his feet are going to the back, the officer  
6           sees him through the side view mirror with his feet going  
7           to the back. The officer then sees him at the back for a  
8           few seconds, then sees him walking away from the back.

9           So there was an ample amount of corroboration  
10          for this particular case.

11          JUDGE PIGOTT: Is there an argument, I  
12          don't know if you made it, that neither one of these  
13          make any difference, whether it's an excited  
14          utterance or a present sense impression, it was  
15          simply an officer investigating, and somebody said,  
16          yeah, I saw the guy in the truck?

17          MR. WOLKOWITZ: Well, I mean, I think - - -

18          JUDGE PIGOTT: Doesn't go to the truth of  
19          it; it just says, you know, based on that, I did  
20          something else.

21          MR. WOLKOWITZ: I mean, we offered it for  
22          the truth, so to the extent that I can't - - - we  
23          formally - - -

24          JUDGE PIGOTT: Didn't preserve that  
25          argument?

1 MR. WOLKOWITZ: Well, we offered it for the  
2 truth.

3 And the one thing I do want to get back to on  
4 preservation, we argued about excited utterance as we were  
5 doing before, but they never used the word "present sense  
6 impression". So - - -

7 JUDGE PIGOTT: You did, right?

8 MR. WOLKOWITZ: Well - - -

9 JUDGE PIGOTT: The People did.

10 MR. WOLKOWITZ: The People did. But again,  
11 if they didn't even say pred - - - they didn't say  
12 corroboration, they didn't say - - - I mean, the part  
13 that I was - - - if I could just get back to that  
14 argument, I know we went onto something else about  
15 the preservation, because I do think this is an  
16 important point.

17 The point is, is not only is it - - - the judge  
18 is the one we're judging in some ways, right? We are  
19 asking that judge, did you make an error. And doesn't the  
20 defense owe it to the judge to make that argument in front  
21 of it, to give the judge to cure the error?

22 If they would've said to us on the excited  
23 utterance, People, I didn't hear anything about the tone.  
24 We could have asked the officer, what was her tone? Maybe  
25 it would've helped - - -

1                   JUDGE ABDUS-SALAAM: Well, they said - - -  
2 they did say, there is nothing here at all. They  
3 said, all we know is that there was a woman, we don't  
4 know if there was any contact, and then they said,  
5 there was nothing else about her that we know.

6                   MR. WOLKOWITZ: But they didn't say  
7 anything about excitement. They were talking about  
8 the foundation - - - it's about her - - - they said  
9 first her exact words. They were talking about her  
10 words at first.

11                  JUDGE PIGOTT: These aren't hard. Judges  
12 do them all the time. And for you to say, well,  
13 they've got to say tone, so that we can fix the error  
14 that we made in offering this, you know - - -

15                  MR. WOLKOWITZ: Well, you - - -

16                  JUDGE PIGOTT: - - - there are strategic  
17 reasons why you do stuff.

18                  MR. WOLKOWITZ: Well, the only thing - - -  
19 well, the strategic reason isn't to get a reversal;  
20 the strategic reason is, should this be admitted or  
21 not.

22                  JUDGE PIGOTT: Right.

23                  MR. WOLKOWITZ: And the point was, if  
24 they're going to argue it shouldn't be admitted,  
25 based upon the declarant's condition, they owe it to

1 - - -

2 JUDGE PIGOTT: It's not - - - it's not - -  
3 - you say it's not an excited utterance. I don't  
4 think they have to say, and, you know, pull out  
5 Richardson, or - - -

6 MR. WOLKOWITZ: But the point of the  
7 preserve - - - my final thing, Your Honor, I'll let  
8 it go after this.

9 JUDGE PIGOTT: Me too.

10 MR. WOLKOWITZ: The final - - - the point  
11 of preservation requirement is to give the judge, the  
12 People, whoever it is, an opportunity to cure; and we  
13 weren't given that opportunity here, and we were  
14 disadvantaged by that, and that's why it's not  
15 preserved.

16 Thank you.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.  
18 Counsel.

19 MS. RATNER: Before I'd like - - - get to  
20 legal sufficiency, I'd like to just finish one moment  
21 with the present sense impression merits analysis.

22 The corroboration, again, what could have  
23 happened behind the truck. I can think of at least three  
24 scenarios. My client stood there and looked at the lock.  
25 He tugged - - -

1                   JUDGE STEIN: But is that the test, that  
2 there is no other thing that could possibly have  
3 happened but what she said happened?

4                   MS. RATNER: Well, she said, get into the  
5 truck. We don't know what that means. She could  
6 have been making an assumption based on him standing  
7 there with the tile cutter and a duffel bag. She  
8 could have assumed that, he could have tugged on it,  
9 or he could have taken that tool and tried to rip it  
10 off.

11                   Between that whole range of things, we don't  
12 know - - -

13                   JUDGE STEIN: Isn't a subject for cross-  
14 examination?

15                   MS. RATNER: That is why we would have  
16 liked to have had her there, which is why - - -

17                   JUDGE STEIN: Well, no. I mean, you could  
18 cross-examine the police officer on that, right?

19                   MS. RATNER: All the police officer knows  
20 is what the bystander told him, which is the whole  
21 problem. Because he didn't see it himself, there was  
22 no corroboration. All he knows is that there were  
23 two legs there. His viewing of those legs didn't  
24 corroborate what she said. So no matter what  
25 question was asked of him, there was no corroboration

1 of that statement.

2 CHIEF JUDGE DIFIORE: So does the police  
3 officer's observations count for nothing in verifying  
4 or corroborating?

5 MS. RATNER: I wouldn't say that they count  
6 for nothing, but I don't think that they were  
7 corroborative in this situation here, merely because  
8 he saw legs behind the truck.

9 Going to legal sufficiency - - -

10 JUDGE RIVERA: Sorry, but before you do  
11 that - - -

12 MS. RATNER: Yes.

13 JUDGE RIVERA: - - - but your point is, the  
14 only observations of the officer that counts as  
15 seeing the legs behind the truck and the pausing of  
16 the legs and then the movement, as opposed to  
17 everything that went on before?

18 MS. RATNER: That was the moment that she  
19 was talking about; that is the moment that needed to  
20 be corroborated, yes.

21 And in addition, one other thing, before I get  
22 off corrobor - - - present sense impression is, the sense  
23 that she needed to perceive something is part of a present  
24 sense impression. And we - - -

25 JUDGE ABDUS-SALAAM: Counsel, I hate to

1 beat that preservation horse to death. But I didn't  
2 - - - I read that colloquy back and forth; I did not  
3 see anything from defense counsel in present sense  
4 impression.

5 MS. RATNER: I can review some of the  
6 things that I believe go to that.

7 Counsel stated that it wasn't corroborated when  
8 he said that the police officer didn't testify that he saw  
9 Mr. Jones trying to get in. He said he didn't know why  
10 she was surmising what she did. He didn't know where she  
11 was standing. All of those things go to what she was  
12 perceiving, how she was perceiving it, what exactly she  
13 saw; all of which were gaps in the People's presentation  
14 of their - - -

15 JUDGE RIVERA: Take thirty seconds on  
16 sufficiency, because your red light is on.

17 MS. RATNER: On sufficiency, all we have  
18 here is somebody walking around holding a bag in one  
19 hand, a tile cutter in another. He trespassed in the  
20 building; the jury got it right there. All we know,  
21 insofar as the FedEx truck, is that he trespassed in  
22 the front, and then he walked around the back.

23 A bystander thought he tried to get in, but this  
24 doesn't rise to the level of an intent to steal anything  
25 in the truck. When he was in the cab of the truck - - -

1                   JUDGE RIVERA: Intent can be made up from  
2 circumstantial evidence, right?

3                   MS. RATNER: It can be. But you need more  
4 than somebody wandering around, poking in here,  
5 poking in there. He tugged at the first door of the  
6 - - - of the first building, the - - - he wasn't even  
7 indicted for a burglary in that building. And for  
8 the second building, he was in the building. He came  
9 out of the building, the officer saw him came (sic)  
10 out, it was a trespass, and same with the FedEx  
11 truck. When he was inside the cab, he didn't turn  
12 around and try to get into the door that way.

13                   Thank you, Your Honor.

14                   CHIEF JUDGE DIFIORE: Thank you, counsel.

15                   (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Earl Jones, No. 178 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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