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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 12

SANTINO GUERRA,

Appellants.

20 Eagle Street
Albany, New York
February 7, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our next appeal is
2 number 12, People v. Santino Guerra.

3 MS. LIBRERA: Good afternoon, Your Honors. Kelly
4 Librera, of Winston & Strawn, for appellate, Santino
5 Guerra. I'd like to reserve two minutes for rebuttal, if
6 that's okay with Your Honors.

7 ACTING CHIEF JUDGE CANNATARO: You have two
8 minutes.

9 MS. LIBRERA: Thank you.

10 More than a hundred years ago, New York adopted a
11 rule categorically prohibiting trial courts from
12 considering specific violent acts of a complaining witness
13 if they were not known to the defendant, even if the
14 defendant claimed self-defense and the - - - the identity
15 of the initial aggressor was at issue.

16 JUDGE GARCIA: Counsel, exactly what evidence did
17 trial counsel proffer on this issue?

18 MS. LIBRERA: There were four specific violent
19 incidences that had involved the complaining witness in
20 this case. Two of the four were precluded all together by
21 the trial court. The other two were allowed to - - - to be
22 introduced but only for purposes of impeachment.

23 JUDGE GARCIA: What was - - - what were they?
24 What were the other two?

25 MS. LIBRERA: He - - - Mr. Pitt had been - - -



1 there were four incidences, two of which, he was drunk.
2 The other two, it - - - he may have been drunk, but we're
3 not sure. It - - - one was a gang assault.

4 JUDGE GARCIA: I'm sorry. I mean, I'm not - - -

5 MS. LIBRERA: Sure.

6 JUDGE GARCIA: - - - articulating this question
7 well. So what was the proof that you offered - - - that
8 the trial counsel offered on those two incidents?

9 MS. LIBRERA: The proof that the trial court
10 wanted to offer was the - - - that he - - - that Mr. Pitt
11 was the initial aggressor. However - - -

12 JUDGE GARCIA: I understand that. But so you had
13 two incidents, right? As I understand it, they were YO
14 front - - -

15 MS. LIBRERA: There were four. And - - -

16 JUDGE GARCIA: So about the two that - - -

17 MS. LIBRERA: Two were YO.

18 JUDGE GARCIA: - - - the judge didn't - - -

19 MS. LIBRERA: That's correct.

20 JUDGE GARCIA: So and all four were YOs, or no?

21 MS. LIBRERA: The last one, it - - - it's unclear
22 from the record whether it was actually a YO, but there
23 were no convictions in - - - in the case, which, I think,
24 may have been due - - - been due to the fact that these
25 were YOs.

1 JUDGE GARCIA: So you didn't offer the actual YO,
2 itself? You just - - -

3 MS. LIBRERA: No. We offered this specific
4 underlying facts.

5 JUDGE GARCIA: The underlying facts. So it was
6 conduct. You also didn't offer reputational informational
7 or testimony, right?

8 MS. LIBRERA: No, not for purposes of this. It
9 was - - - it - - -

10 JUDGE GARCIA: Okay.

11 MS. LIBRERA: Because we were constrained by the
12 Miller rule, counsel could only - - - and this happened in
13 both pretrial and at trial - - - could only introduce the
14 specific acts for purposes of bias and impeachment.

15 JUDGE GARCIA: But nevertheless, I believe, you
16 did preserve this argument you're making here. You tried
17 to offer it beyond that, right?

18 MS. LIBRERA: Counsel did make that argument
19 several times and was told by the trial court that because
20 of Miller, the court's hands were tied.

21 JUDGE GARCIA: Right. So the - - -

22 JUDGE TROUTMAN: So - - -

23 JUDGE GARCIA: The offer - - - I'm sorry. Just
24 so I'm perfectly clear, the offer is the conduct underlying
25 these four incidents.



1 MS. LIBRERA: It's the specific violent conduct
2 that was quite similar to what was at bar before the court,
3 yes, Your Honor.

4 JUDGE TROUTMAN: And it was propensity that they
5 were assaultive before, whether I know about it or not.
6 Therefore, they're more - - - unjustification, it should be
7 offered to show that they were violent in this incident.

8 MS. LIBRERA: I might put it a little bit
9 differently, Your Honor. I think, in - - - on the issue of
10 initial aggressor, the question is, are they relevant in
11 terms of an inference that could be drawn? Did the
12 complaining witness act as he had in the past on that
13 particular day?

14 JUDGE TROUTMAN: But it's quite complicated and,
15 especially, when you have young people involved. There's
16 brain development. There's been scientific evidence
17 offered that certain conduct should be excused because
18 brain development doesn't happen until age twenty-six.
19 You're talking about a YO person here. It's not as easy as
20 you say as to predictability of their conduct on the inci -
21 - - on the date of the incident in question.

22 MS. LIBRERA: It - - - it's certainly up to the
23 discretion of the trial court. Which is what we're asking,
24 Your Honor. We're not asking for a categorical rule that
25 that evidence should come in at all times.



1 JUDGE TROUTMAN: Trial courts now, they allow for
2 credibility on impeachment. And here, credibility
3 impeachment was allowed to take place, as to this witness,
4 correct?

5 MS. LIBRERA: Credibility was allowed to take
6 place only as to the two, not the four, incidences because
7 two were deemed to be - - -

8 JUDGE TROUTMAN: Because those - - - and the
9 incidents involved were what? Did they not have
10 assaultive?

11 MS. LIBRERA: No, they were assaults. Two - - -
12 two of the four were assault, but one, the court determined
13 to be too prejudicial because it involved a threatened - -
14 - a threatened attack with a knife.

15 JUDGE TROUTMAN: But assault was offered. It was
16 out there as to his credibility as to whether or not he was
17 telling the truth on this particular date and time of what
18 happened.

19 MS. LIBRERA: The jury was instructed that they
20 could only consider that material as to his motive to lie -
21 - -

22 JUDGE WILSON: So let me ask you this.

23 MS. LIBRERA: - - - and his bias.

24 JUDGE WILSON: If - - - if the - - - if the
25 instruction hadn't been - - - voting instruction hadn't



1 been given, that is the jury was allowed to consider it for
2 the purpose of determining - - - helping to determine who
3 was the initial aggressor, would the rule you want allow
4 for the court to say, I'm going to allow two of these in
5 but not the other two?

6 MS. LIBRERA: The rule that we are advocating is
7 a rule that - - - that leaves the discretion to the trial
8 court. So if the trial court determined, based on all of
9 the circumstances and the evidence, as trial courts often
10 do, that two of the incidences are prejudicial and not
11 probative or not sufficiently probative, then that would be
12 something that the trial court would do.

13 JUDGE WILSON: Or some number from - - - or some
14 number cumulative, or some are too unrelated to the
15 circumstances involved here. Those sorts of discretionary
16 decisions, your rule would still allow for?

17 MS. LIBRERA: We are not advocating to take
18 discretion from the trial court. The Miller rule actually
19 does take discretion from the trial court. We are
20 advocating that the trial court should have the discretion
21 that they have on myriad issues to decide whether, in
22 determining the objective question of initial aggressor,
23 all of the relevant evidence should be admitted, or whether
24 some should be excluded or prevented from the jury's
25 consideration.



1 JUDGE GARCIA: Let's say we agree, and we say,
2 okay. And the next case, you can bring underlying conduct
3 on a YO for this purpose. Next case, defendant also has
4 four YOs. People get to put the conduct in for the same
5 purpose?

6 MS. LIBRERA: Again, it would be up to the trial
7 court to determine - - -

8 JUDGE GARCIA: No prohibition, though.

9 MS. LIBRERA: There's no - - -

10 JUDGE GARCIA: Discretionary only - - -

11 MS. LIBRERA: No prohibition - - -

12 JUDGE GARCIA: - - - for the defendant's - - -
13 for the - - - for the defendant's history.

14 MS. LIBRERA: Well, if we're talking about the
15 defendant's history, I don't think it's a goose and gander
16 issue, necessarily. I think, as the - - - as the federal
17 courts - - -

18 JUDGE GARCIA: So prohibition or no prohibition
19 on doing it. Trial court discretion same as for the
20 complaining witness?

21 MS. LIBRERA: I think, the way that some states
22 have dealt with this is that they have allowed, once the
23 defendant - - -

24 JUDGE GARCIA: What rule are you asking for?

25 MS. LIBRERA: We are asking for a rule that



1 doesn't necessarily treat, on parity, the defendant and the
2 complaining witness, because the complaining witness gets
3 to go home.

4 JUDGE GARCIA: What does that mean, though, on
5 parity? What would the effect on the discretion of the
6 trial court be?

7 MS. LIBRERA: I think, for purposes of whether or
8 not you would - - - you would say that if the - - - if
9 there's a violent act of the - - - of the complaining
10 witness and a violent act of the defendant would both come
11 in. I think, it would be up to the trial court to
12 determine, subject to, again, as we talked about, all of
13 the discretion that the trial court has. But I think,
14 there's an added layer with a defendant because the
15 defendant is the one who's facing the loss of his
16 liberties, so that - - -

17 JUDGE TROUTMAN: But isn't a - - -

18 MS. LIBRERA: - - - should factor in as well.

19 JUDGE TROUTMAN: Isn't an alleged victim, their
20 right to have justice, to be free of assaultive behavior -
21 - - aren't you suggesting the rule - - - a rule that would
22 result in unworthy victims, possibly?

23 MS. LIBRERA: No, I think that - - - I think,
24 what this would do is, essentially, put the facts before
25 the jury, provided the court thought they should be there,



1 so that the jury can determine the objective question as to
2 who struck first. That's what we're talking about.

3 JUDGE GARCIA: But you're suggesting a heightened
4 standard for admission for history of the defendant, so I
5 don't know how that's a balanced presentation for the jury,
6 then.

7 MS. LIBRERA: Well, certainly, if - - - if the
8 courts chose to go down this road, and I should also note
9 that what's before the court today, the complaining witness
10 had a - - - a violent - - - had four violent prior issues,
11 and our client had none. So that's really not a question
12 that's before the court today.

13 But if the court did want to go down the road of
14 considering whether or not to do as the federal courts do,
15 for example, if the defendant opens the door as to - - - as
16 to conduct that - - - that the conduct - - - his own
17 conduct may come in on a similar issue.

18 JUDGE WILSON: I mean, following Judge - - - I
19 have the same concern, I think, that Judge Garcia has
20 articulated, which is - - - and maybe it's answered by the
21 door opening issues. But if we're not thinking now - - -
22 we're trying to decide guilt or innocence, but we're really
23 focused on a very narrow thing, which is who was the first
24 aggressor.

25 And we're going to say, well, you're - - - you're



1 saying we should allow, essentially, past conduct in the
2 form of propensity evidence to help the jury decide that,
3 actually, it really was Mr. Pitt, because look at his
4 history.

5 MS. LIBRERA: Uh-huh.

6 JUDGE WILSON: It seems, to me, that if what
7 we're trying to do is - - - is use propensity evidence to
8 help us solve that very narrow issue, just first aggressor,
9 it really is balanced if you then say, well, but if the - -
10 - what if it turns out the defendant is much more violent
11 than Mr. Pitt and has a much greater history? We really
12 would be misleading the jury if we said, we're going to
13 exclude that.

14 And if you're not saying, excluded, you're
15 saying, it would be a higher standard. I don't really
16 understand how we or any appellate court could review what
17 that somewhat higher but not exclusionary standard would be
18 in a way that would make this really getting at what the
19 truth is about who attacked first.

20 MS. LIBRERA: Your Honor, I appreciate that.
21 And - - - and I'm saying, for purposes of where we are
22 today, that that analysis is not before the court because -
23 - -

24 JUDGE WILSON: I got that.

25 MS. LIBRERA: - - - there - - - we had no violent



1 history - - -

2 JUDGE WILSON: I got that.

3 MS. LIBRERA: - - - on behalf of the - - - of the
4 defendant.

5 However, if - - - if the court were to adopt that
6 approach, I'll note that Massachusetts has done that, for
7 example, in the Adjutant case that we put in our briefs, as
8 does the federal government. So New York would be more
9 aligned with the majority were it to go with that approach,
10 as opposed to the categorical approach it has now.

11 JUDGE RIVERA: Even though your red light is on,
12 if I might just ask this question. I'm a little confused
13 because we really are dealing with a narrow issue and it's
14 only when the defendant is unaware of these actions, right?

15 MS. LIBRERA: Correct.

16 JUDGE RIVERA: If the defendant is aware this
17 gets in, and the court does a discretionary analysis about
18 what to let in, correct?

19 MS. LIBRERA: Per the Miller decision, if the
20 defendant is aware.

21 JUDGE RIVERA: Okay. So in those cases, what
22 happens with this hypothetical we're talking about, that
23 the defendant also has quite a storied history of violence?

24 MS. LIBRERA: I think, you're right, Your Honor.
25 And in that instance, there is no consideration as to



1 whether you'd also put in the defendant's history. That
2 we - - - we aren't seeing any trepidation on the part of
3 the courts applying the Miller rule as to the impact on - -
4 - on the defendant.

5 JUDGE GARCIA: But doesn't that go to a different
6 element? It doesn't go to who's the initial aggressor,
7 right? It goes to state of mind of the defendant.

8 MS. LIBRERA: It - - - it does go to the state of
9 mind of the defendant. But the point is that if you're
10 talking about whether, you know, we need to have all of the
11 facts before the jury, and do we need to have equivalent
12 facts for a defendant, and - - -

13 JUDGE GARCIA: What would be the - - -

14 MS. LIBRERA: - - - and aggressor.

15 JUDGE GARCIA: - - - equivalent fact be, the
16 state of mind of the victim? He's not asserting a self-
17 defense.

18 MS. LIBRERA: Well, I think, Your Honor, you're
19 illustrating why I don't think that, necessarily, even in -
20 - - in the initial aggressor context, that the two are - -
21 - are comparable. I think, what you're talking about is
22 when you have a defendant who's on trial, who's facing his
23 loss of liberty, you have an initial - - - you have a
24 complaining witness who can walk out that very same day.

25 On the - - - on the specific issue of initial



1 aggressor in determining who was the initial aggressor,
2 there is less harm or less potential harm to a complaining
3 witness, of course, than there would be to a defendant
4 under the circumstances.

5 JUDGE GARCIA: The defendant's state of mind does
6 spill over to initial aggressor, even if that's not the way
7 the jurisprudence has developed. Reality is the defendant
8 may act in a certain way based on their knowledge - - -

9 MS. LIBRERA: It - - - it - - -

10 JUDGE RIVERA: - - - including being the initial
11 aggressor.

12 MS. LIBRERA: That - - - that's right, Your
13 Honor.

14 ACTING CHIEF JUDGE CANNATARO: Thank you,
15 Counsel.

16 MS. LIBRERA: Thank you.

17 MR. WON: May it please the court. Charles Won,
18 for the respondent. In People v. Miller, this court
19 decided that propensity evidence should not be admitted on
20 the initial aggressor issue. And this court explained that
21 the worst man has the right to live the same as the best,
22 and no one may attack another because his reputation is
23 bad.

24 And this court also expressed concern that a jury
25 find a homicide justifiable for the wrong reason, i.e.,



1 that the deceased was unworthy of life. Basically, this
2 expressed concern that the jury would be misled in their
3 search for the truth - - -

4 JUDGE TROUTMAN: Is this rule that is being
5 offered, is it a workable one? In other words, should New
6 York just change because others are doing things
7 differently? And I'll compound the question. Are they
8 consistently all doing something the same, which is the
9 opposite of what New York is doing?

10 MR. WON: First, as to the other jurisdictions,
11 there's a mix in how they handle this issue, Your Honor.
12 For example, federal rules only allow character or trait
13 evidence. They do not allow actual specific instances of
14 prior bad acts. Whereas Massachusetts does allow - - -
15 excludes character evidence and only allow prior bad acts.

16 JUDGE GARCIA: But everybody other than Maine, my
17 understanding is, allows one or the other or both; is that
18 right? And us - - - and New York?

19 MR. WON: I believe so, Your Honor. But it
20 should be noted that allowing propensity evidence, even if
21 it is both as to the victim and the defendant, it misleads
22 the jury. It takes them away from searching for the truth
23 and deciding what happened here based solely upon the facts
24 of the case, based upon what the witnesses testify as to
25 what happened.



1 JUDGE WILSON: Well, then why do we have a
2 Molineux exceptions?

3 MR. WON: Molineux do not go through propensity.
4 There's a specific exceptions as to - - - and the jury's -
5 - -

6 JUDGE WILSON: No.

7 MR. WON: - - - instructed that the evidence
8 comes in for the specific reason that the court decided.
9 They are expressly told, it is not for propensity.

10 JUDGE WILSON: But well - - - but one of them - -
11 - I mean, the jury is told that, but one of them - - - one
12 of the exceptions is that the circumstances of the prior
13 acts are so similar, that this probably is the person.
14 That seems like propensity evidence. You can call it what
15 you want.

16 MR. WON: No, Your Honor. It has to do with - -
17 - that is to establish a modus operandi. There has to be a
18 very specific detail to show that it actually is the same.

19 JUDGE WILSON: Well, what if Mr. Pitt has a
20 regular history of beating - - - getting drunk on St.
21 Patrick's Day and beating people up, and he's done that ten
22 years in a row?

23 MR. WON: I think - - - I believe, Your Honor,
24 that's - - - that - - - that won't simply be as propensity
25 evidence. That is not a modus operandi evidence. There's



1 no evidence that in those passings, that - - -

2 JUDGE WILSON: What if he uses a shamrock to beat
3 people up on St. Patrick's Day?

4 MR. WON: But that is not what happened here,
5 Your Honor.

6 JUDGE WILSON: No, I understand that.

7 MR. WON: If - - - if - - -

8 JUDGE RIVERA: We hope.

9 MR. WON: If Mr. Pitt had acted the same way,
10 always used a beer bottle in the middle of a street, was
11 hanging out with his friend, then it might be considered a
12 modus operandi evidence. But in this past instance, he was
13 supposed to have punched a victim in the face.

14 Here, defendants are alleging that Mr. Pitt used
15 a beer bottle. It is not the - - - that is not the same.
16 It does not - - - it would not fit under Molineux - - -

17 JUDGE RIVERA: But why - - - why doesn't that go
18 to - - -

19 MS. LIBRERA: - - - exception.

20 JUDGE RIVERA: - - - your adversary's argument,
21 that that's for the judge to determine whether or not it's
22 really probative or more prejudicial? Why - - - why isn't
23 that just a determination about whether or not that - - -
24 that proffered evidence gets to the jury, rather than a per
25 se rule that it never goes in?



1 MR. WON: Well, for the same reason we have
2 Molineux and Sandoval rulings. This court has held that
3 propensity evidence is just too prejudicial. It misleads
4 the jury. And it is not - - -

5 JUDGE WILSON: Too prejudicial in the face of the
6 presumption of innocence and the high burden of proof
7 placed on the people. But what is the prejudice to the
8 complainant who doesn't have either of those protections?

9 MR. WON: Well, Your Honor, it's the concern that
10 is present in Miller, that the victim should not be
11 basically - - - that the jury should not decide "the victim
12 has a bad history. He's a violent person, so he must have
13 deserved it."

14 JUDGE WILSON: So of course, you could give a - -
15 - you could give a cautionary instruction to the jury to
16 the effect of the statement you read right at the beginning
17 of your argument, right?

18 MR. WON: Well, it's - - -

19 JUDGE WILSON: That is - - -

20 MR. WON: It's the same reason that - - -

21 JUDGE WILSON: This is not being admitted for the
22 purpose of demonstrating that Mr. X is a bad person, and
23 everybody deserves a right to be treated equally under the
24 law. However, for - - - because there's a dispute about
25 who was the initial aggressor here, you're entitled to



1 consider his prior behavior and the defendant's prior
2 criminal behavior, if that becomes an issue, if there's
3 evidence of it, in determining the narrow issue of who was
4 the initial aggressor.

5 Well, who does that prejudice? Why isn't that an
6 attempt to find out the truth?

7 MR. WON: Because then the jury's not deciding
8 what happened in this case. They'll just be considering
9 who has a worst history, who is more violent, who is more
10 prone to have acted out in this case, not necessarily
11 listening to the - - -

12 JUDGE TROUTMAN: Is there any evidence as to how
13 allowing a practice where you treat a witness in a manner
14 such that all of this evidence is allowed, how it impacts
15 their willingness to cooperate with prosecution? Does it
16 promote the truth or justice if witnesses don't come forth?
17 Is there any evidence as to their willingness to see a case
18 through?

19 MR. WON: Well, I guess, it could be argued that
20 there's a - - - that's the reason for the rape shield law,
21 where in such cases, the victim's prior history does not
22 come in because for that - - - for - - -

23 JUDGE TROUTMAN: It's had a chilling effect on
24 a - - - the ability to seek justice in those particular
25 instances.

1 MR. WON: Yes, Your Honor. And the same thing
2 would happen here in - - -

3 JUDGE RIVERA: Yeah, but the - - - but the
4 reality is, here is that the judge let - - - let them
5 question about two of them, not - - - not to the full
6 extent. And certainly, there were instructions that it
7 could not be used for purposes of determining who's the
8 initial aggressor. But the victim still has to face that
9 kind of questioning, and did.

10 MR. WON: Well, they came in for credibility, so
11 I mean, here - - -

12 JUDGE RIVERA: I mean, any witness is subject to
13 that kind of potential, right, questioning? The judge is
14 going to rule.

15 MR. WON: Yes, Your Honor. So I mean, the courts
16 do have the discretion. And in here, the trial court did
17 exercise it in deciding that certain evidence can come in.
18 And he instructed the jury that they're only coming in for
19 credibility to see whether the victim has a motive to lie,
20 based on the fact that he was on probation at the time.

21 ACTING CHIEF JUDGE CANNATARO: And isn't that
22 what Counsel's asking for here, a rule that allows certain
23 evidence to come in with an appropriate instruction?

24 I think, Judge Wilson put one out there, that it
25 should only be considered for the purpose of who started -



1 - - who was the initial aggressor in the case. And that,
2 you know, you shouldn't imply that's some character flaw as
3 a result of that evidence. Why doesn't it work the same
4 way, just because it's a different purpose for admitting
5 the evidence?

6 MR. WON: Because this court has always - - -
7 always held that propensity evidence is not a - - - is very
8 misleading. That is what the defense wants here. They
9 don't want it to just come in just to assess credibility.
10 Which they already had - - - was given the right to. And
11 that they do have.

12 JUDGE WILSON: Well, propensity evidence is used
13 all the time in civil litigation, right? I mean, if you're
14 proving a disparate impact case and an employment
15 discrimination case, you're using propensity evidence.

16 MR. WON: But it has always been - - -

17 JUDGE WILSON: It's really only as - - - really
18 only in the criminal realm. And then, again, really only
19 in the realm with propensity evidence as being used to
20 convict a defendant that we have this anathema, no?

21 MR. WON: That may be, Your Honor, but I mean, in
22 criminal cases, propensity is very prejudicial.

23 JUDGE WILSON: To the defendant.

24 MR. WON: Yes, Your Honor. but I mean, the - - -
25 the rule the defense is advocating is that - - - and most



1 other jurisdiction have is that propensity does come in
2 through the victim. Because it is so prejudicial, that the
3 government should be allowed to counter with similar proof.
4 In that case - - -

5 JUDGE RIVERA: I guess, the point is there's no
6 constitutional protection for a victim. The constitutional
7 protections are to the defendant.

8 MR. WON: But the defendant constitutional right
9 to present defense here was protected. The court allowed
10 the evidence - - - the prior incidents to come to impeach
11 the witness's credibility. It's not - - - this is not a
12 case where - - -

13 JUDGE RIVERA: But specific - - - unless I
14 misunderstood the instructions, but specifically instructed
15 that it could not be considered. Am I misunderstanding the
16 record? Could it not be considered for the very purpose
17 that the defendant claimed is so critical to their defense?

18 MR. WON: That's because this court has always
19 held that the propensity evidence is not - - - is very
20 misleading, it's too prejudicial, it does not allow for the
21 jury to consider the facts.

22 JUDGE RIVERA: Okay.

23 MR. WON: It basically is not helpful to
24 searching for the truth.

25 JUDGE RIVERA: Except when the defendant knows



1 about it.

2 MR. WON: Yes, Your Honor. When the defendant
3 knows about it, because then it goes to his subject - - -
4 is a subjective, what he was thinking at the time - - -

5 JUDGE RIVERA: But it wasn't - - - right - - -

6 MR. WON: - - -

7 JUDGE RIVERA: It's like they say, once - - -
8 once its rung, you can't unring that bell, right?

9 MR. WON: Well, I mean, in those cases, it's a
10 different instance, it goes to whether victim - - -

11 JUDGE RIVERA: Uh-huh.

12 MR. WON: - - - I'm sorry, the defendant believed
13 he had to defend himself in those cases. So it is for a
14 different reason. So - - -

15 JUDGE RIVERA: He may have acted as the initial
16 aggressor as a consequence, yes?

17 MR. WON: Yes, Your Honor. Because under New
18 York, if you truly believe that the victim is about to - -
19 - I mean, the - - - the other side is about to attack you,
20 you are allowed to act first, if that - - - if you're
21 subject - - - if you do have a reasonable subjective
22 belief.

23 JUDGE RIVERA: Uh-huh.

24 MR. WON: If there are no further questions,
25 people request an affirmance.



1 ACTING CHIEF JUDGE CANNATARO: Thank you.

2 MS. LIBRERA: Thank you, Your Honor.

3 I just wanted to raise - - -

4 JUDGE RIVERA: So under what - - - what category
5 of grounds for not following stare decisis do you think the
6 Miller rule falls under, your challenge falls under?

7 MS. LIBRERA: Our challenge, as to the stare
8 decisis, has to do with the Rock case - - -

9 JUDGE RIVERA: Uh-huh.

10 MS. LIBRERA: - - - and - - - and the fact that
11 the defendant here was not permitted to present a full
12 defense on an arbitrary basis, and that the entirety of the
13 evidence that could have been considered in his case was
14 arbitrarily limited.

15 JUDGE RIVERA: That was true when the rule was
16 adopted. So my question is, what has changed between then
17 and now?

18 MS. LIBRERA: Well - - -

19 JUDGE RIVERA: We don't usually overturn
20 something just because there are new people on the bench,
21 and a majority may not have ruled that way if the case had
22 come to them in the first instance, right?

23 MS. LIBRERA: That's absolutely true, Your Honor.
24 It's been nearly a hundred years since the Rodawald rule.
25 We've seen all but one state decide that this particular



1 rule is not consentient with the judicial system. And for
2 the reason, New York should follow suit.

3 JUDGE WILSON: Well, forty-five - - -

4 JUDGE TROUTMAN: Can I ask - - -

5 JUDGE WILSON: - - - since Miller, so that's more
6 recent.

7 MS. LIBRERA: Miller is, in fact, more recent;
8 that was forty years ago. But Miller only considered in -
9 - - in the context of what the defendant knew; it did not
10 consider the subjective question of the initial aggressor.

11 Now, the People v. Petty case talked about
12 threats that had been made against the defendant. And
13 there, this court held that it didn't matter if the
14 defendant knew or not. It based - - - what mattered was
15 that the complaining witness had made the threat because he
16 would, therefore, have - - - there could be an inference
17 drawn that he would act accordingly on that date. So what
18 the defendant knew in that case was not relevant to this
19 court.

20 JUDGE SINGAS: Should we be concerned at all
21 about the implications of a rule like this in cases, like
22 domestic violence cases, for example?

23 MS. LIBRERA: I think, Your Honor, again, that
24 we're not talking about a blanket rule. We're talking
25 about a - - - allowing the trial courts to have discretion.



1 So a trial court would, of course, be sensitive to issues
2 that you've identified, in addition to issues concerning
3 youthful offenders.

4 JUDGE GARCIA: But - - - I'm sorry.

5 MS. LIBRERA: It's all right. Go ahead.

6 JUDGE GARCIA: In Petty in '06, didn't we
7 reaffirm Miller, specifically?

8 MS. LIBRERA: It - - - Petty talked about Miller.

9 JUDGE GARCIA: Well, I'm going to - - - I'll
10 quote it. "With respect to the initial aggressor issue, we
11 first affirm that Stokes and Miller remain good law."

12 MS. LIBRERA: Correct. But then it went - - -
13 what it said was that threats did not need to be known by
14 the defendant.

15 JUDGE GARCIA: But that's a pretty strong
16 statement, right? It remains good law.

17 MS. LIBRERA: Well, I think, I mean, from our
18 purposes, I don't think in the instance where a - - - where
19 a defendant has knowledge of the specific acts, I don't
20 think that Miller is bad law.

21 I think, what we're talking about is a separate
22 issue, which is the initial aggressor issue. And that's
23 something that, I think, is more in line with something
24 like the Perry analysis, where it doesn't matter what the
25 defendant knew.

1 JUDGE GARCIA: Even though that sentence is with
2 respect to the initial aggressor issue.

3 MS. LIBRERA: Pardon me?

4 JUDGE GARCIA: The first clause of the sentence I
5 just read is with respect to the initial aggressor issue,
6 Miller remains good law.

7 MS. LIBRERA: And I - - -

8 JUDGE GARCIA: That's what we said.

9 MS. LIBRERA: And I think, it is good law when -
10 - - when someone is, as they were in Miller, making a
11 defense based on what they knew. We're talking about a
12 situation where the defendant doesn't know. It's something
13 more akin to the Robert S. case that we cited, where
14 there's a vigorous defense.

15 ACTING CHIEF JUDGE CANNATARO: Are you saying
16 this would not be an overruling of Miller?

17 MS. LIBRERA: I think - - - I think, it would be
18 an expansion of Miller, but not quite an overruling,
19 because if you do - - - if a defendant does have specific
20 knowledge, then the Miller rule is right on point. What
21 we're talking about is if a defendant doesn't have specific
22 knowledge, and that was not what was presented in Miller.

23 ACTING CHIEF JUDGE CANNATARO: Thank you.

24 MS. LIBRERA: Thank you, Your Honor.

25 (Court is adjourned)



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

I, Cynthia R. Piett, certify that the foregoing transcript of proceedings in the Court of Appeals of Santino Guerra v. The People of the State of New York, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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