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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 75

DONNA JORDAN,

Appellant.

20 Eagle Street
Albany, New York
October 17, 2023

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Number 75, People v. Donna Jordan.

3 MS. COHEN: Good afternoon. May it please the
4 court. Sarah Cohen on behalf of appellant, Donna Jordan.
5 I'd like to save three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MS. COHEN: And I'd like to address both points
8 in my brief, beginning with point 1. In this one witness
9 identification case, in which Donna Jordan was twenty years
10 older and half a foot taller than the description of the
11 suspect, the People introduced evidence that Ms. Jordan's
12 DNA was on a phone left behind at the scene without calling
13 a witness who performed, witnessed, or supervised the
14 critical portions of the DNA testing. And this violated
15 the Confrontation Clause.

16 JUDGE GARCIA: So they said this was a witness
17 who reviewed the raw data, right? That was their claim
18 that this was the appropriate witness under - - - under
19 Sean John. So what, in your view, would that entail? If
20 you really did have the right witness who reviewed the raw
21 - - - independently reviewed the raw data, what does that
22 mean?

23 MS. COHEN: So in order to independently review
24 the raw data, this requires looking at the unedited
25 electronic data which needs to be used - - - viewed using

1 computer software. This is different than the printed
2 graphs that appear in the OCME files, because it can be
3 viewed in much higher resolution with the computer
4 software, allowing the analysts to zoom in, zoom out, and
5 otherwise manipulate and edit the data, including removing
6 labels before that printed version that appears in the OCME
7 files, which is what the analyst reviewed in this case.

8 CHIEF JUDGE WILSON: How do - - - how do we know
9 that?

10 MS. COHEN: That that's what he reviewed in this
11 case?

12 CHIEF JUDGE WILSON: That he didn't review it
13 electronically?

14 MS. COHEN: Yes. And so if I could point - - -
15 address each of the samples separately because there's the
16 swab from the phone and then the buccal swab. The swab
17 from the phone, he testified that he was the technical
18 reviewer, and he never mentioned raw data with regard to
19 the phone. He said that he reviewed the - - - he - - - his
20 conclusions were based on his review of People's Exhibit
21 16, which is the OCME file. And that exhibit did not
22 include the raw data. So if his - - -

23 JUDGE GARCIA: Is the - - - is the software
24 program STRmix? Is that what it's called?

25 MS. COHEN: No. That's a different software



1 program. So the - - - the software program where you view
2 the raw data, it's GeneMarker in this case or GeneMapper in
3 other cases. STRmix is a different software program where
4 the final edited profile is entered into STRmix in order to
5 - - - to do the match typically.

6 JUDGE GARCIA: I see. Thank you.

7 MS. COHEN: So although Coy's (ph.) name appears
8 on some STRmix paperwork in this case, it's not on any of
9 the GeneMapper paperwork, it's not on the edit tables, it's
10 not on the control tables.

11 JUDGE HALLIGAN: And what - - -

12 JUDGE CANNATARO: And you're convinced this
13 expert did not look at the GeneMapper output, the raw
14 output?

15 MS. COHEN: He - - - right. He did not - - - so
16 to look at the raw data in - - - using GeneMapper, you need
17 to look at it at - - - using the software. And he didn't
18 do that. And for the phone swab, he admitted he didn't do
19 it. He said he was not there when the person was inputting
20 it into the computer, and that's on page 240.

21 JUDGE CANNATARO: So is the natural conclusion of
22 that statement that he - - - that the testifying expert was
23 relying on editorial choices that had been made by the
24 person who examined - - - it's the electrophoresis portion,
25 right?

1 MS. COHEN: Yes.

2 JUDGE CANNATARO: By - - - by the person who did
3 the original electrophoresis analysis?

4 MS. COHEN: Exactly. That's correct. And - - -
5 and that can be seen in the edit table in this case, which
6 is - - - which shows that three edits were made in - - - by
7 the analyst using GeneMarker to look at the raw data. They
8 deleted the labels on three peaks, and then that
9 information was not included in the printed
10 electropherogram that Coy looked at.

11 JUDGE HALLIGAN: If that analyst is not
12 available, the analyst that initially does that, to testify
13 at trial, can someone else perform that task again? Is the
14 - - -

15 MS. COHEN: Yes.

16 JUDGE HALLIGAN: And - - - and is that because
17 whatever the file is, is saved? How would - - -

18 MS. COHEN: Exactly.

19 JUDGE HALLIGAN: - - - you do that?

20 MS. COHEN: Exactly. So in - - - if the person
21 who performed the initial review of the raw data is
22 unavailable for trial, another analyst, such as Coy - - -
23 all he would need to do is go to the computer terminal, and
24 using the software, he can review the raw data which is
25 saved. So he would not need to redo any of the physical

1 testing. He simply needs to conduct his own independent
2 analysis.

3 JUDGE HALLIGAN: You don't need to still have the
4 actual sample - - -

5 MS. COHEN: You do not. You do not.

6 JUDGE HALLIGAN: - - - around?

7 MS. COHEN: It's all - - - the files are saved.

8 JUDGE HALLIGAN: And - - - and what about with
9 respect to the second swab where he was the reviewing
10 analyst?

11 MS. COHEN: Yes. So with respect to that swab -
12 - - and the People cite this in their brief - - - he did
13 make a remark to the effect that he reviewed the raw data.
14 However, when defense counsel asked him follow-up questions
15 to try to understand what was he referring to and what did
16 he actually do, this clarified that he actually did not
17 look at the unedited version of the raw data. And I'd
18 point the court to page 263 where defense counsel asks, "If
19 I understand you correctly, someone else ran the raw data,
20 did the work on it, and provided it to you, and you
21 reviewed it, correct?" And Coy says, "Yes."

22 So I think that's pretty dispositive that
23 although he made a prior statement that he reviewed the raw
24 data, when he's questioned on what does he actually mean by
25 this, he never viewed the unedited electronic version. And

1 there's also in - - - even in Coy's earlier testimony,
2 about twenty pages earlier, when he's discussing in general
3 terms, the role of the report analyst or the interpreting
4 analyst, he's always referring to the - - - the final data
5 or the completed data. So on 241, he says, "The reporting
6 analyst goes through the completed data and draws their own
7 independent conclusions." But that completed data is
8 exactly what this court explained in John is not sufficient
9 to meet the Confrontation Clause.

10 JUDGE CANNATARO: So it's been decided as a
11 matter of law that that cannot be raw data. In - - - in
12 other words, I was going to ask you originally whether
13 there was some sort of scientific consensus over what the
14 distinction is between raw data and edited data. But you -
15 - - basically, your last comment was this has already been
16 determined as a matter of law. Is that correct?

17 MS. COHEN: Exactly. John held that that is the
18 critical portion of the DNA testing - - - is that the - - -
19 the People must call an analyst who reviewed the raw,
20 unedited data before these edits were made. So the - - -
21 it's a straightforward application of - - - of John's
22 standard for which analyst the People need to call.

23 JUDGE HALLIGAN: So when you - - -

24 JUDGE GARCIA: Counsel, I know you're - - - oh,
25 I'm sorry. You were first.

1 JUDGE HALLIGAN: Just quick. When you say
2 completed data, to make sure I understand, you mean the
3 edited data, after the analyst has gone through and edited
4 out any alleles that she thinks don't appropriately belong
5 there?

6 MS. COHEN: Exactly.

7 JUDGE GARCIA: So I understand you say that this
8 wasn't done in any - - - any of the - - - for any of the
9 samples here, but hypothetical, if it had been done for the
10 swab from the phone and you had the right analyst, right,
11 who went into the software and reviewed that raw data,
12 would that be enough?

13 MS. COHEN: That - - - I'm sorry. Could you - -
14 -

15 JUDGE GARCIA: If you just had that witness for
16 the swab from the phone, right, where they developed a
17 profile, that witness comes in, testifies they went into
18 this software, and I did whatever needed to be done, and we
19 agree. Okay. Hypothetically, you did that in this case
20 for the phone swab. Would that be enough?

21 MS. COHEN: That - - - that would be enough for
22 the phone swab. So I think - - -

23 JUDGE GARCIA: You would still - - - let's say
24 you're just comparing it to the known swab, right? The
25 buccal swab. You would still have to call a raw data

1 reviewer for the buccal swab, as well?

2 MS. COHEN: Exactly. Yes. So this court in
3 Austin and Tsintzelis, which were cases looking at a post-
4 arrest buccal swab, held that you need to call the - - -
5 the analyst who reviewed the raw data for the buccal swab.
6 And in John, as well as Austin, this court explained that
7 testimony - - - opinion testimony about a match would be
8 inadmissible under New York law, absent the proper
9 foundation that each of the two profiles that the analyst
10 is testifying are a match, that each of those profiles is
11 reliable. So you'd need the proper analyst to testify for
12 both samples.

13 To address harmless error in this context, the
14 People's case, without the DNA evidence, would have solely
15 consisted of testimony from one witness that the robber was
16 a woman in her thirties who was five-five to five-seven,
17 who jumped over a counter and outran the twenty-five-year-
18 old store clerk. Ms. Jordan was nearly sixty years old.
19 She was six-feet tall. She presented medical evidence that
20 she had chronic lung conditions and severe osteoarthritis
21 in her hips.

22 So without this DNA evidence, which, as this
23 court explained in Wright, casts an aura of invincibility
24 upon the People's case, this would have been a very
25 different case.

1 JUDGE TROUTMAN: And what do you say about the
2 closing argument?

3 MS. COHEN: Thank you. Yes. The - - - the
4 summation - - - the People's summation capitalized on the
5 court's evidentiary rulings, excluding evidence that would
6 have been extremely probative of Ms. Jordan's defense in
7 order to knowingly, falsely argue to the jury that Ms.
8 Jordan created a person and that she tailored her testimony
9 to the People's case.

10 JUDGE TROUTMAN: And is that based on - - - the -
11 - - the photograph was allowed, but the pedigree
12 information was redacted.

13 MS. COHEN: Right. So what the court allowed was
14 a cut out photograph showing only Eleshia Redfern's face,
15 but without - - - without her name or her height or any
16 information that would show that the person in this
17 photograph was Eleshia Redfern.

18 JUDGE TROUTMAN: And is it correct that the
19 prosecutor suggested that the defendant made up Eleshia
20 Redfern?

21 MS. COHEN: Exactly. The prosecutor repeated in
22 summation this term that that Ms. Jordan was a creative
23 person, that she was literally creative because she created
24 a person, Eleshia Redfern. And that this person happened
25 to be the same height as the description provided by the

1 complainant - - -

2 JUDGE TROUTMAN: And the fact that he - - - he
3 knew that there was a police record - - -

4 MS. COHEN: Yes.

5 JUDGE TROUTMAN: - - - with her actual
6 information. Is that misconduct?

7 MS. COHEN: Absolutely. It violated his duty not
8 to knowingly advance false positions before the jury. And
9 it resulted in a trial that was skewed in the prosecutor's
10 favor and with the jury having a distorted impression of
11 the truth. Ms. Jordan was prevented from introducing a
12 video, that - - - a Mirandized statement that she gave on
13 the day of her arrest in which she maintained that she
14 never entered the store, and that Eleshia Redfern was the
15 robber. And she's prevented from introducing certified
16 records that would have established this.

17 Defense counsel preserved this issue by objecting
18 multiple times throughout the prosecutor's summation.
19 Although any attempts to create a more thorough,
20 contemporaneous record were frustrated by the prosecutor,
21 who, as the trial court noted, kept rolling through the
22 summation and did not pause for the court to rule on
23 objections.

24 JUDGE TROUTMAN: Would not the suggestion that
25 his claim was so outrageous, of course, the jury didn't

1 believe it - - - his comments.

2 MS. COHEN: That suggestion has no basis in any
3 of this court's law. This court has consistently held that
4 when the People misrepresent evidence, that that will not
5 be upheld by this court. That the prosecutor has a duty to
6 refrain from improper methods calculated to produce a
7 wrongful conviction. So that combined with the fact that
8 the jury never had the chance to consider the objective
9 evidence of Ms. Jordan's defense, deprived her of a fair
10 trial.

11 Thank you.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. BRANIGAN: Good afternoon, Your Honors.
14 William Brannigan for the Office of District Attorney Katz.
15 May it please the court.

16 Your Honors, first to the original swab of the
17 telephone. The reason why that swab was not precluded by
18 the Confrontation Clause is because it was taken before
19 there was a known suspect in this case. And the primary
20 purpose - - -

21 JUDGE GARCIA: But you didn't raise that as a
22 basis for getting that evidence in at trial. You raised
23 that you had the proper witness, right?

24 MR. BRANIGAN: Your Honor, we - - - we did argue
25 the proper witness, but the objection was made under this

1 court's precedent in Sean John and in Austin. And the
2 first thing that the defense needs to establish is that
3 it's testimonial. Those cases both address these issues.
4 In both cases, distinguished cases like this one, where the
5 - - - where the suspect was still at large when the
6 original sample was tested. And - - - and because of that
7 and because - - -

8 JUDGE GARCIA: Do you agree with your opponent's
9 characterization of what raw data is?

10 MR. BRANIGAN: Your Honor, I - - - there is some
11 problem when we discuss raw data because it is used
12 differently in different cases.

13 JUDGE GARCIA: How do you think we meant it?

14 MR. BRANIGAN: Well, I - - - okay. So - - - so
15 first of all, when - - - so the - - - the - - - when the -
16 - - the - - - the DNA is fed through the machine, the - - -
17 the initial data is indecipherable, and a software program
18 is applied. So what comes out of that, which is basically
19 a - - - a series of - - - of color-coded graphs that are
20 stored in the OCME computers, that is the - - - the raw
21 data, as I think this court has - - - has understood it.

22 So to the extent, yes, to the extent counsel has
23 argued that I - - - I agree with that. So - - -

24 JUDGE GARCIA: Is there anything in the record
25 that shows that this witness performed that step or redid

1 that step, in conformity with this understanding of raw
2 data consistent with that?

3 MR. BRANIGAN: Your Honor, under - - - under the
4 - - - the record here, only for the - - - the second swab.
5 The first swab, he was the final technical reviewer, and he
6 reviewed all the - - - the evidence in this case. And he
7 did testify that he came to his independent judgment as far
8 as the - - - as far as what was - - - what his conclusions
9 were when he testified at trial. As to - - -

10 JUDGE CANNATARO: Can you come to an independent
11 conclusion if you're not looking at the raw data? Does
12 that - - - that seems to undermine the independence of the
13 conclusion.

14 MR. BRANIGAN: I - - - no. Your Honor, you can
15 come - - - now, again, I - - - I understand. I have an
16 issue with Sean John with this. But the - - - but yes, you
17 can come to an independent conclusion if you look at - - -
18 if you look at all the data as he - - - he - - - as he
19 testified that he did as the technical reviewer in - - - in
20 the - - - the first - - - in the first instance.

21 JUDGE RIVERA: What - - - what is it - - - what
22 is it that he's reviewing? I'm over here.

23 MR. BRANIGAN: Your Honor, I - - - well, in - - -
24 in that case, he's - - - he's reviewing basically all of
25 the - - - the documents that went into - - - into compiling

1 the - - - the final - - - the final case.

2 JUDGE RIVERA: So he's reviewing everything post
3 going through the machine and whatever judgment calls may
4 be based on the material?

5 MR. BRANIGAN: Yes, Your Honor.

6 JUDGE RIVERA: That goes in the report? So
7 again, it does seem, again, odd to say that's an
8 independent review when it's building off something else
9 that's already embedded with judgment calls.

10 MR. BRANIGAN: Yes, Your Honor. Again, he - - -
11 he did testify that was his independent judgment.

12 JUDGE SINGAS: Again, he can - - -

13 JUDGE HALLIGAN: Can he see - - -

14 JUDGE SINGAS: - - - he said those words, it was
15 my independent judgment. But his testimony is problematic
16 in the sense that he keeps saying, we. And I don't know if
17 the, we, means he and another analyst in this case or the,
18 we, means the entire entity that's doing the testing.
19 Again, this imprecise language doesn't really lend itself
20 to us making an analysis of what he was looking at,
21 specifically, what he did. I can't tell what he did
22 because he kept using, we and I, interchangeably, and at
23 different stages.

24 MR. BRANIGAN: Your Honor, he - - - he was - - -
25 he did testify also, he was the technical reviewer in this

1 case. He had the responsibility for - - - for making a
2 final account of the case. That's as to the first swab.

3 As to the second swab taken post-arrest, again,
4 that was not objected to at trial. But as to the - - - as
5 - - - as to that swab, the - - - he testified that he
6 received the - - - the raw data. And what he described,
7 the way that he described it, he was receiving that
8 original information and then he put it into - - - into
9 document form.

10 CHIEF JUDGE WILSON: So just so I - - -

11 MR. BRANIGAN: I think he testified that he - - -

12 CHIEF JUDGE WILSON: Sorry. I just want to make
13 sure I have your point on the swab of the phone. If we
14 were to say that's testimonial, you don't think - - - you
15 agree you didn't bring the right witness, is that right?

16 MR. BRANIGAN: I - - - I agree with that, Your
17 Honor. But I - - - I think in order for this court to hold
18 that that's testimonial, you cannot splice the - - - the -
19 - - that this is testimonial from the primary purpose test.
20 Just like you can't splice, for instance, a Brady test.
21 The court has to make a decision on whether that - - - on
22 whether that - - - whether that - - - that testing done
23 before there's an apprehended suspect was testimonial.

24 JUDGE TROUTMAN: What do you say with respect to
25 the summation of the prosecution?

1 MR. BRANIGAN: Respect to the summation? The - -
2 - the claims at issue here were wholly unpreserved. It
3 wasn't just that he didn't object contemporaneously, he had
4 an opportunity to object before the charge, and he failed
5 to do so. He also had an opportunity to object at least
6 before the jury started to deliberate.

7 JUDGE TROUTMAN: So you say that it's not
8 preserved, that the prosecutor suggested that she made up
9 this witness?

10 MR. BRANIGAN: That's correct, Your Honor. And
11 if the defendant had preserved in this case, there were - -
12 -

13 JUDGE TROUTMAN: And if she had - - - assuming
14 she's preserved it, were those proper statements for the
15 prosecutor to make?

16 MR. BRANIGAN: Your Honor, created was simply
17 wrong. She did not create a person. When asked about
18 this, he said he meant - - - he basically meant that she
19 created the fact that she was at - - - at the scene
20 committing - - - committing the crime.

21 JUDGE TROUTMAN: What about the characterization
22 that the prosecutor wasn't even listening to the court,
23 just rolled on through?

24 MR. BRANIGAN: Your Honor, that - - - that's what
25 the court said. That's what the court said. The - - - the

1 problem with that, as far as the preservation in this case
2 or creating an exception for the preservation in this case,
3 is that there was no argument made after the summation was
4 finished. There was no argument made before the charge
5 when the - - - when this could have been cured. He waited
6 until the jury had already started deliberating. And
7 that's why these issues are outside of the court's
8 jurisdiction.

9 CHIEF JUDGE WILSON: And so going back to the - -
10 - to the buccal swab. Is there anywhere in the record that
11 we can tell whether the analyst looked at the raw data
12 before it had been edited and then compared it to the edits
13 and verified that the edits were done correctly? Is there
14 anything we can point to, to determine that?

15 MR. BRANIGAN: Your Honor, for the - - - for the
16 - - - again, for the - - - the second swab, you can look at
17 the record and his testimony regarding the fact that he
18 received the raw data and one, conducted his independent
19 review and said he was in charge with creating the report.
20 So that final report in the file, which has created an
21 issue - - - well, for the first swab and in other cases - -
22 - but that's where those - - - those final edits appear.
23 That's where you - - - you see the - - - you see the - - -
24 the edits and that - - - that - - -

25 CHIEF JUDGE WILSON: You see the - - - you see -

1 - -

2 MR. BRANIGAN: - - - that are then introduced.

3 CHIEF JUDGE WILSON: I'm sorry. You see the - -
4 - you see the unedited and edited data, raw data?

5 MR. BRANIGAN: Well, he - - - he's receiving the
6 - - - yeah. Well, he's - - - the - - - the raw - - - the
7 raw data is the raw data. So in - - - in this context,
8 when he says raw data, I think the plain view is that he
9 has received the - - - the original - - - the original data
10 without edits.

11 CHIEF JUDGE WILSON: Okay.

12 MR. BRANIGAN: Your Honors, if the court has no
13 further questions, the People rely on the brief.

14 CHIEF JUDGE WILSON: Thank you.

15 JUDGE TROUTMAN: Counsel, what do you say with
16 respect to the claim that your client didn't preserve the
17 prosecutorial misconduct with respect to the summation?

18 MS. COHEN: In addition to his contemporaneous
19 objections throughout the summation, defense counsel,
20 immediately after summation was over, moved to make a
21 record about the summation, which the court said was
22 preserved. Subsequently, defense counsel made a detailed
23 mistrial motion where he raised a majority of the issues
24 that are before this court today, including the
25 prosecutor's comments that - - - that Ms. Jordan created a

1 person, that she tailored her testimony to the People's
2 case. The court denied that mistrial motion on the merits.
3 The court noted that these cases tend to be reversed, told
4 the prosecutor that he went overboard, and needed to temper
5 his comments for the next trial, but nonetheless denied the
6 mistrial motion.

7 The court was wrong to use Ms. Jordan's trial as
8 a teachable moment for the prosecutor.

9 JUDGE SINGAS: If we agree with you about the DNA
10 evidence, do we have to even reach those issues?

11 MS. COHEN: No - - - they're both new trial
12 issues, so no. If the court grants a new trial with regard
13 to the DNA evidence, I don't see why the court would need
14 to reach the other issue. Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Donna Jordan, No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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