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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 7

CARL WATSON,

Appellant.

20 Eagle Street
Albany, New York 12207
January 3, 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.

Appearances:

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1 CHIEF JUDGE LIPPMAN: People v. Watson, number
2 7.

3 Counsel, would you like any rebuttal time?

4 MR. DONN: Three minutes, please, Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 MR. DONN: May it please the court, Alex Donn
7 for Carl Watson. This case demonstrates exactly - - -

8 CHIEF JUDGE LIPPMAN: Counselor, your position
9 requires us to change the law of this state?

10 MR. DONN: Yes, it does, Your Honor.

11 CHIEF JUDGE LIPPMAN: And then what - - - how
12 would you change it?

13 MR. DONN: We change the law to allow evidence
14 of the deceased's violent character on the initial
15 aggressor issue, specifically allowing both reputation
16 evidence - - -

17 CHIEF JUDGE LIPPMAN: Both reputation and
18 specific acts?

19 MR. DONN: Yes. And including criminal
20 convictions when - - -

21 JUDGE PIGOTT: Why do we have to go that far?
22 Why does it have to be that broad?

23 MR. DONN: Both reputation and specific acts?

24 JUDGE PIGOTT: Well, when you look at this
25 particular case, what I thought of was the judge quashed

1 the subpoena. Maybe he shouldn't have, and let you have
2 the documents there. And then if they're relevant and
3 material, then they can come in. If they're not, then
4 they won't, without saying broadly that all reputation
5 evidence or all - - -

6 MR. DONN: Well, we're certainly not asking the
7 court to adopt a rule that says all reputation evidence or
8 violent act evidence should necessarily come in, in any
9 case, no matter what. All we're trying to do is say adopt
10 a rule that says when it's determined in the trial court's
11 discretion to be relevant, not too old, not too dissimilar
12 - - -

13 CHIEF JUDGE LIPPMAN: But the trial court judge
14 would have to depart from existing law to get there?

15 MR. DONN: Well, that's why we're asking this
16 court to - - -

17 CHIEF JUDGE LIPPMAN: Yes.

18 MR. DONN: - - - to change the rule.

19 JUDGE SMITH: But before you get there, I'm
20 troubled with how the facts of this case present the
21 problem. This victim could not possibly have been the - -
22 - in fact, the initial aggressor, because he didn't have a
23 gun.

24 MR. DONN: This - - - oh, this - - - this victim
25 could have been the initial aggressor. There is - - -

1 there isn't a requirement that he actually possess a gun
2 or that - - - even that the defendant actually see a gun.
3 He needs to believe that he's about to be shot.

4 JUDGE SMITH: Yes, okay. You're - - - maybe
5 you're right in thinking that your client would be found
6 not to be the initial aggressor if he honestly believed
7 that the victim had a gun. But I don't quite see how the
8 victim's history of violence, however violent, could bear
9 on what your client believed, unless your client knew it.

10 In another case - - - in another case, if the
11 guy did have a gun, there might be a real issue as to - -
12 - not just as to what your client believed but who was, in
13 fact, the initial aggressor. And I understand that at
14 that point, you might want to be able to go into showing
15 the victim was the most violent thug who ever walked the
16 streets. But here, however violent he was, he wasn't out
17 to shoot anybody that day. So what - - - how can the
18 evidence possibly be relevant?

19 MR. DONN: Well, I'll point you, at pages 9 and
20 10 of the appendix, when defense counsel is attempting to
21 set forth the limited violent act evidence he's been able
22 to uncover, he mentions a specific violent act that is so
23 relevant to this case that it clearly would have affected
24 the determination, not going to mental state - - -

25 JUDGE SMITH: Explain - - - oh, he mentions a

1 specific violent act. You don't want - - - for some
2 reason you don't want to say what it is?

3 MR. DONN: I'm sorry, Your Honor. It's the
4 threatening of another livery cab driver on the very block
5 where the incident in this - - -

6 JUDGE SMITH: Okay. And - - -

7 MR. DONN: - - - while reaching for his
8 waistband, where a weapon was hidden.

9 JUDGE SMITH: Okay. I understand that. Let us
10 assume that that happened. And if your client knew that
11 it had happened, obviously everyone understands why it
12 would get in. Let us assume that it did happen, and your
13 client did not know about it. How is that relevant on
14 this case?

15 MR. DONN: Because when Carl Watson testifies in
16 his own defense with no other witnesses except for
17 Christopher Mantori (ph.), who we can get to, and Carl
18 Watson says, he was reaching for his waistband; I thought
19 he was going to shoot me - - - the jury - - -

20 JUDGE SMITH: All right. This proves he's a
21 serial waistband-reacher?

22 MR. DONN: This proves that this is what Danger
23 did. This is who he was. He ran this corner through
24 violence - - -

25 JUDGE SMITH: So he had - - - so even when he

1 does not have a gun, he has a propensity to reach for his
2 waistband. That's what you're trying to prove?

3 I actually don't mean to sound that - - -

4 MR. DONN: Reaching - - -

5 JUDGE SMITH: I don't mean to sound sarcastic.

6 I can see the point. But that - - -

7 MR. DONN: Reaching - - -

8 JUDGE SMITH: - - - is what you're trying to
9 prove?

10 MR. DONN: Well, I'm trying to prove that he was
11 a violent man who acted violently in scenarios exactly
12 like the one at issue in this case.

13 JUDGE SMITH: But the only - - - the only
14 violent act he can possibly be accused of having actually
15 committed in this case, if it's a violent act, is to reach
16 for his waistband for a gun he didn't have.

17 MR. DONN: In a threatening manner. And we
18 don't know - - -

19 JUDGE SMITH: In a threatening manner.

20 MR. DONN: - - - necess - - - and we don't know
21 necessarily - - -

22 JUDGE SMITH: So you - - - I mean, you're
23 saying, essentially, the evidence is relevant here to
24 prove a propensity to act in a threatening manner, even
25 when unarmed?

1 MR. DONN: And to corroborate the testimony of
2 the defendant, which was critical at this trial.

3 JUDGE SMITH: Okay.

4 MR. DONN: The People argued in their summation
5 that Carl Watson was the initial aggressor. And they
6 basically called him a liar in summation, saying he'll say
7 anything. He's just trying to get out of this. He'll say
8 anything. Here he was, he's a peaceful guy, he's been
9 working at a nursing home for twenty years leading up to
10 the incident. He's up against Danger. He's scared out of
11 his mind. He sees Danger reach for his waistband in a way
12 that Danger does reach for his waistband when he has
13 weapons.

14 Carl Watson knows that Danger has hidden guns
15 and has shown - - -

16 JUDGE PIGOTT: You had me there for a moment.
17 When you say "sees Danger", you're talking about the
18 person, not the milieu?

19 MR. DONN: Right. Livingston Powell, known only
20 as Danger to everyone who testified at trial. This is
21 what he went by. This is not - - -

22 JUDGE SMITH: If - - -

23 JUDGE GRAFFEO: Are you looking to admit it with
24 respect to the defendant's state of mind, or do you want
25 the jury to be able to consider that evidence on the issue

1 of who was the initial aggressor?

2 MR. DONN: Who was the initial aggressor, Your
3 Honor.

4 JUDGE GRAFFEO: That's not what some of the
5 other states permit, though, is it?

6 MR. DONN: As specific acts - - - I'm sorry.
7 There's - - - what other states do, about forty-five other
8 states allow evidence of the deceased's violent character
9 into evidence on the initial-aggressor issue. The only
10 split there is, do they allow reputation only, which many
11 states do, or as a significant minority have chosen to do,
12 do they also allow specific acts evidence in. And - - -

13 CHIEF JUDGE LIPPMAN: The federal rule doesn't
14 allow the specific acts, right?

15 MR. DONN: It does not. It does not. But this
16 case demonstrates exactly how probative specific act
17 evidence can be. And by no means are we saying that
18 everything we know about Danger would have come in.
19 Similarly, in the Massachusetts case adjutant, they said,
20 we're not saying it all has to come in.

21 CHIEF JUDGE LIPPMAN: In this case, does it
22 matter? You have an eyewitness. The - - - your guy could
23 have retreated, gone away. Does it matter? You know - -
24 -

25 MR. DONN: Oh, it clearly matters - - -

1 CHIEF JUDGE LIPPMAN: - - - what your - - - why
2 does it matter?

3 MR. DONN: Well, given everything Carl Watson
4 knew about Danger, at the moment we're talking about: he
5 knows he's a violent guy; he knows he's wearing these
6 cutoff gloves - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but you've got a
8 witness that says he has no gun.

9 MR. DONN: Right. And so there's a dispute as
10 to exactly what happened.

11 JUDGE SMITH: There's no dispute as to the gun.
12 It's not just that a witness said it - - -

13 MR. DONN: Well - - -

14 JUDGE SMITH: - - - it's that he didn't have a
15 gun.

16 MR. DONN: - - - a crowd of people gathered
17 immediately after the scene. No gun was recovered. It
18 doesn't necessarily mean there wasn't a weapon. But
19 regardless, even if Danger didn't have a weapon, the fact
20 that he was moving in this threatening way, given what
21 Carl Watson knew - - - because evidence did come in - - -

22 JUDGE SMITH: Isn't it unusual for people to
23 reach for guns they don't have?

24 MR. DONN: For Danger to reach in a threatening
25 manner, in order to scare somebody out of their mind, is

1 not necessarily that odd.

2 JUDGE PIGOTT: I see.

3 MR. DONN: This is what he did. And the trial
4 record is very clear. The People's witnesses, Watson,
5 they all demonstrate that who Danger was, was a bully; a
6 very, very violent person.

7 We're not saying everything Danger ever did had
8 to come in. But you look in particular: bragging about
9 shooting a police officer - - - yes, it was old, but
10 updating that case by bragging about it in the present - -
11 - and the two - - -

12 CHIEF JUDGE LIPPMAN: You've got to weigh the
13 probative value, though, in terms of what this brings to
14 the - - -

15 MR. DONN: Absolutely.

16 CHIEF JUDGE LIPPMAN: - - - to the table and the
17 probative value.

18 MR. DONN: Absolutely. And this - - - should
19 this court change the rule, a trial court could say, you
20 know what; I think a 1983 attempted assault might be too
21 old, but this 2004 case, where he's reaching for his
22 waistband, while bullying another driver, exactly as he
23 did here, I think the jury's going to look at that and say
24 hey, maybe Carl Watson - - -

25 JUDGE GRAFFEO: Why wouldn't the reputation

1 evidence rules take care of what you want to do?

2 MR. DONN: We think that - - - well, current law
3 in New York - - -

4 JUDGE GRAFFEO: Because it's - - - clearly, you
5 want to show some propensity to engage in violence. So
6 why wouldn't the reputation evidence take care of that?

7 MR. DONN: Well, current law in New York is
8 reputation cannot come in for this purpose. So we
9 definitely would like - - -

10 CHIEF JUDGE LIPPMAN: Right. But if you
11 couldn't have the specific acts, but you could have the
12 reputation, is what the judge is asking you.

13 MR. DONN: Well - - -

14 CHIEF JUDGE LIPPMAN: Would you that do it for
15 you?

16 MR. DONN: It wouldn't, because number one,
17 there isn't always reputation evidence available. If
18 someone is new to an area, people don't necessar - - -

19 CHIEF JUDGE LIPPMAN: In your case there is,
20 though, right?

21 MR. DONN: In our case there is. And if the
22 court were to adopt a rule that said we're going to change
23 the rule, but we're - - -

24 JUDGE SMITH: The jury did - - - the jury did
25 know his nickname, right?

1 MR. DONN: The jury knew his nickname.

2 JUDGE SMITH: Do you think they might have - - -
3 do you think they might have got the idea of what kind of
4 reputation he had from the nickname?

5 MR. DONN: I think so. And some acts came in.
6 But they were specifically instructed by the court that
7 they could only consider this stuff on the mental state of
8 Carl Watson. So yes, the jury did hear a sliver or a
9 fraction of the violent things that Danger had done. But
10 - - -

11 JUDGE PIGOTT: You can see the problem, though,
12 right? I mean, too much of the stuff comes in, and all of
13 a sudden, we're just getting rid of a bad guy.

14 MR. DONN: Absolutely. Absolutely. And - - -

15 JUDGE PIGOTT: So where do you - - - how do you
16 do that? How does a judge - - - how do we instruct judges
17 in the future on how to handle this, if we were to find in
18 your favor?

19 MR. DONN: I think to - - - I think looking at
20 how this court handled a very, very similar situation in
21 Miller is the answer. In Miller, this court decided that
22 juries could be trusted to hear specific violent acts of
23 the deceased, and that they wouldn't necessarily sanction
24 the killing of the violent person, and that trial courts
25 could be trusted to use their discretion to limit exactly

1 what would go before the jury. If something was too old
2 or too dissimilar, there would be sufficient safeguards in
3 place.

4 CHIEF JUDGE LIPPMAN: It's only relevant,
5 really, to the fear of the decedent, right, in Miller?

6 MR. DONN: In Miller. But - - -

7 CHIEF JUDGE LIPPMAN: Specific acts.

8 MR. DONN: Right. In Miller, the probative side
9 of the equation was different, because it was going in for
10 a different reason. But in terms of the potential
11 prejudice, the fear that we're just going to say okay, he
12 was a bad guy, that prejudice is essentially the same in
13 these two situations. And this court, in Miller,
14 determined that it's a valid concern, but it's not a
15 concern that outweighs the probative value of the
16 evidence.

17 JUDGE SMITH: And obviously you couldn't - - -
18 you could not introduce evidence of this kind against a
19 defendant. It is pure propensity evidence, isn't it?

20 MR. DONN: You could not introduce this against
21 a defendant.

22 JUDGE SMITH: And would you agree with me that
23 what you are trying to prove is the victim's propensity
24 for violence?

25 MR. DONN: Essentially, I think it - - -

1 JUDGE SMITH: You're proving exactly what
2 Molineux forbids for the defendant, the prior acts to
3 prove a propensity to act in accordance with his previous
4 course of conduct.

5 MR. DONN: Basically, I think there's a nuance
6 or so corroborating the defendant.

7 JUDGE SMITH: So why shouldn't there be a
8 Molineux - - - why should Molineux apply to defendants and
9 not victims?

10 MR. DONN: Because defendants have the right to
11 a fair trial. Their liberty is at stake. And
12 essentially, the policy - - -

13 JUDGE SMITH: The People have a right to a fair
14 trial too, don't they?

15 MR. DONN: They do. But only the defendant is
16 on trial. And there are statements that courts have made
17 in the past that we should have a greater latitude in
18 allowing defendants to introduce exculpatory evidence.
19 And this is a great example of why, because there isn't
20 much for the jury to go on. You've got Carl Watson. He's
21 acknowledged by the People to be a peaceful guy. He says
22 Danger was reaching for his waistband. But there isn't a
23 lot of evidence about this incident. You've got one - - -

24 JUDGE SMITH: Would you agree with me that if
25 you prevail, and if your client is allowed to give - - -

1 to bring in all Danger's history, your client's
2 effectively waived Molineux, that they should be allowed
3 to bring in Watson's history, too?

4 MR. DONN: Well, first, we're not saying
5 everything of Danger should be allowed to - - -

6 JUDGE SMITH: Okay. But if you're going to
7 produce propensity evidence on the victim, surely you
8 should be allowed to do it on the defendant, too?

9 MR. DONN: I think it's an issue not before this
10 court. I think this is the wrong case to address that
11 issue, because Carl Watson was a peaceful person working
12 at a nursing home, twenty years. And the People - - -

13 JUDGE SMITH: Is - - - I mean, but if we're not
14 resolving that, isn't there some really potential
15 unfairness? You prove the victim was a thug and the jury
16 thinks the defendant's a choirboy when he's not?

17 MR. DONN: Very understandable concern. We
18 definitely don't want - - -

19 JUDGE GRAFFEO: We have a lot of cases involving
20 gang-on-gang violence. And the rule you're proposing
21 would really affect the evidence in those cases, wouldn't
22 it?

23 MR. DONN: I'm not sure about - - - I'm not sure
24 about the specific question you asked about that type of
25 violence. I would say that regarding rebuttal - - -

1 JUDGE GRAFFEO: Well, if we agree to the
2 admissibility of the broad range of what I would call the
3 background criminal record of the victims, there's certain
4 kinds of cases - - - I mean, you can have a drive-by
5 shooting that's gang violence, where the victim has quite
6 an extensive criminal record.

7 MR. DONN: Well, what we're asking the court to
8 do is only adopt a rule that when the evidence is
9 probative and relevant and not too prejudicial, courts can
10 allow it in - - -

11 CHIEF JUDGE LIPPMAN: Okay, counselor. You'll
12 have some rebuttal. Thank you, counsel.

13 Counselor?

14 MS. GILLESPIE: Good afternoon, Your Honors.
15 Camille Gillespie for the respondent.

16 CHIEF JUDGE LIPPMAN: Why shouldn't we let this
17 kind of evidence in, in order to prove that the defendant
18 was not the aggressor?

19 MS. GILLESPIE: Well, this court has established
20 in Miller and has affirmed in Petty and other decisions -
21 - -

22 CHIEF JUDGE LIPPMAN: Why shouldn't we change
23 the law?

24 MS. GILLESPIE: Because the rule works, and the
25 rule is fair, and there are good reasons outlined in

1 Miller for - - - for the rule.

2 JUDGE GRAFFEO: Why have all these other states,
3 though, taken a different direction?

4 MS. GILLESPIE: It's not monolithic. Different
5 states do different things.

6 CHIEF JUDGE LIPPMAN: But forty-five out of
7 fifty states is a lot though, right?

8 MS. GILLESPIE: Well, no. That forty-five
9 figure he's talking about allow - - -

10 CHIEF JUDGE LIPPMAN: Well, there are different
11 things that they allow, agreed - - -

12 MS. GILLESPIE: Right.

13 CHIEF JUDGE LIPPMAN: - - - right.

14 MS. GILLESPIE: And some don't. But New York
15 isn't the only state that restricts - - -

16 CHIEF JUDGE LIPPMAN: And the Federal Rule
17 allows it?

18 MS. GILLESPIE: The Federal Rule allows - - -

19 CHIEF JUDGE LIPPMAN: General - - -

20 MS. GILLESPIE: - - - reputation evidence.

21 CHIEF JUDGE LIPPMAN: So why couldn't you have
22 general reputation here?

23 MS. GILLESPIE: Well, but also the Federal Rule
24 allows the prosecution to introduce reputation evidence
25 regarding the defendant, and also in a homicide case, the

1 victim's reputation for peacefulness, too. So there is at
2 least a balance there. That's not the rule that the
3 defendant is arguing - - -

4 CHIEF JUDGE LIPPMAN: But assuming - - -

5 MS. GILLESPIE: - - - for.

6 CHIEF JUDGE LIPPMAN: - - - in this - - - in
7 this case, assume his guy is the most peaceful character
8 in the world, and your person is the worst lowlife one
9 could imagine, why would it not be helpful, probative, to
10 know that - - - the reputation of your guy, assuming that
11 that was the case?

12 MS. GILLESPIE: Well, let's just talk about the
13 rule for a minute, though. Is the rule about what it's a
14 particular defendant's self-interest to do, or is the rule
15 something that serves - - -

16 CHIEF JUDGE LIPPMAN: The rule is to give - - -

17 MS. GILLESPIE: - - - all litigants?

18 CHIEF JUDGE LIPPMAN: - - - defendants a fair
19 trial.

20 MS. GILLESPIE: Of course.

21 CHIEF JUDGE LIPPMAN: That's the goal.

22 MS. GILLESPIE: Of course. But what - - -

23 CHIEF JUDGE LIPPMAN: So why wouldn't - - - why
24 wouldn't that contribute to giving defendant a fair trial?

25 MS. GILLESPIE: Because first of all, if you

1 have the rule, the Miller rule does serve that purpose.
2 It allows the defendant, where he's aware of such
3 evidence, and it affects his state of mind, to elicit that
4 evidence. There's no issue with respect to that. Also,
5 New York already allows evidence of threats, even if the
6 defendant is not aware of them.

7 CHIEF JUDGE LIPPMAN: What are the policy
8 reasons that support your position?

9 MS. GILLESPIE: Okay, the - - -

10 CHIEF JUDGE LIPPMAN: Why we shouldn't allow
11 this in a situation, like I said, assuming that the
12 defendant was totally peaceful in nature and the other
13 fellow was not and was a terrible person. What are the
14 policy reasons in that circumstance - - -

15 MS. GILLESPIE: Well, the policy reason is
16 still, in part, what's articulated in Miller, that every -
17 - - that every person is entitled, regardless of their
18 worth to the community, to live undisturbed by assault.
19 There's the policy reason that the victim is not on trial
20 and - - - but a parade of prior acts concerning the victim
21 may make it seem so. And juries are not always good at
22 figuring out probabilities and mere propensities.

23 JUDGE PIGOTT: What troubled me about this is
24 the judge says nor - - - this was a subpoena, right, for
25 all of the files that the DAs had. And I guess the files

1 were given to the calendar judge - - -

2 MS. GILLESPIE: Yes, they were.

3 JUDGE PIGOTT: - - - was it, in camera?

4 MS. GILLESPIE: There were files that were found
5 - - - of the People's files - - -

6 JUDGE PIGOTT: Right.

7 MS. GILLESPIE: - - - we're talking about here.

8 JUDGE PIGOTT: He said, "Nor is it clear that in
9 any of the prior cases, the victim had a propensity to
10 engage in deadly physical force, as opposed to ordinary
11 force. For these reasons, the defendant's motion to admit
12 evidence of the victim's prior acts of violence, not known
13 by or directed against the defendant, is denied."

14 Shouldn't that have waited until he wanted to
15 offer the evidence? In other words, why not give him the
16 files - - - not the old ones, but the two newer ones - - -
17 and let him then determine whether or not that evidence is
18 germane to some point he wants to make bef - - - rather
19 than just denying it even before trial starts?

20 MS. GILLESPIE: Well, Your Honor, that's a very
21 interesting point you're making. Because that actually is
22 part of our preservation argument here. In other words,
23 what this - - - the application was, was for a subpoena.

24 Now, the defendant, in this case, had access to
25 court files, which is what he based his information on.

1 He didn't come forward with a certificate of conviction
2 for - - - and tell the judge who was making the
3 determination, I'd like to introduce this item of
4 evidence, or this witness will come and testify about
5 this.

6 JUDGE PIGOTT: You see, I got the impression,
7 and maybe I'm wrong, that there were these files that were
8 never given to the defendant; that he was subpoenaing
9 them, and one judge got them and was looking at them in
10 camera. The second judge, whether he got them or not,
11 said you're not getting them. Am I wrong? Did he get
12 them?

13 MS. GILLESPIE: My understanding of the record
14 is that they - - - the files did go to the calendar judge,
15 who then reviewed them. It's not clear from the record
16 then, exactly whether anything was provided to the
17 defense. I guess we can assume that - - -

18 JUDGE PIGOTT: It wasn't.

19 MS. GILLESPIE: - - - it wasn't necessarily.
20 However, but I agree with Your Honor absolutely. What
21 should have happened was defense counsel should have
22 specified what are the items I intend to - - -

23 JUDGE PIGOTT: But you don't know. In other
24 words, what he's trying to say is, you've got files on
25 this guy. Most people don't have seven files with the DA;

1 this guy does. And it's part of my case is to show that
2 this guy was trouble. And maybe in there, in particularly
3 the recent files, there was something very similar, as
4 counsel's pointing out, almost an identical situation,
5 where this guy is just trouble. And it's not necessarily
6 a bad thing to be prepared for that, and he was, and he
7 shot him, and that's too bad. That's what he wants to
8 defend.

9 MS. GILLESPIE: Well, Your Honor, it's really -
10 - - that's kind of a discovery question, but - - -

11 JUDGE PIGOTT: Right.

12 MS. GILLESPIE: - - - but the discovery question
13 isn't really what is being raised here on appeal. And so
14 - - - but I do - - - I do agree, absolutely. The way this
15 should have happened was, the defense attorney should have
16 said I want to submit these certificates of conviction,
17 because clearly he had the - - -

18 JUDGE SMITH: Well, but he subpoenaed - - -

19 MS. GILLESPIE: - - - identifying numbers.

20 JUDGE SMITH: - - - he subpoenaed some stuff he
21 didn't get. He tried to get it. Why should he have to
22 say I want to offer this stuff you refuse to give me?

23 MS. GILLESPIE: Well, clearly he had access to
24 the information concerning criminal convictions and the
25 court papers - - - the court files - - -

1 JUDGE PIGOTT: He may and he may not have. I
2 mean, a good investigator would have said - - - because it
3 looked like this guy was the ruler of the corner here with
4 respect to taxis. And they might have said, yeah, he did
5 exactly the same thing two years ago, got arrested for it,
6 and then he walked. And so they know there's a file and
7 they want to see it and they want to prove that this is
8 what this guy was doing.

9 MS. GILLESPIE: Well - - -

10 JUDGE PIGOTT: But he doesn't get it.

11 MS. GILLESPIE: - - - all I'm saying is that it
12 doesn't - - - it doesn't really come out on this record.
13 And he never ends up offering what he did have - - -
14 clearly did have access to. And that is the problem with
15 the adequacy of the record.

16 And to go to the issue of the remedy and what we
17 - - - what are we really talking about that wasn't - - -

18 JUDGE SMITH: Are you really saying that if
19 there is evidence that he subpoenaed that he would be
20 entitled to offer, that he's entitled as a matter of
21 giving him a fair trial, and the judge refuses to give him
22 the evidence, that he hasn't preserved the error?

23 MS. GILLESPIE: I'm - - - I don't think that's
24 quite what we have here. What we have is we have a
25 defendant who was aware - - -

1 JUDGE SMITH: Well, then, you disagree with the
2 substance. You say he wasn't entitled to it. But assume
3 - - - assume that in that file, the judge had in camera
4 and refused to give him, was stuff he's entitled to offer
5 in evidence, surely he's preserved the point?

6 MS. GILLESPIE: Well, if he showed that, yes.
7 But I mean, I don't think that's shown in this case.

8 JUDGE SMITH: He can't show it very well, if
9 they won't give him the - - - won't give him the
10 documents.

11 MS. GILLESPIE: But - - -

12 JUDGE PIGOTT: He says, "In an attempt to gather
13 evidence of prior acts of violence by the victim, the
14 defendant sought a subpoena - - - to subpoena case files
15 from the victim in this case" - - - of the victim, from
16 the DA's office.

17 MS. GILLESPIE: Right.

18 JUDGE PIGOTT: The issue of admissibility of
19 this evidence was referred to the trial judge, and then he
20 says it's not coming in, without him ever seeing it. And
21 that's my point, it - - -

22 MS. GILLESPIE: Well, he did say he looked over
23 the files. He was aware that the files - - -

24 JUDGE PIGOTT: No - - -

25 MS. GILLESPIE: - - - he did - - -

1 JUDGE PIGOTT: - - - no. Because he says - - -
2 he said that - - -

3 MS. GILLESPIE: I mean, the papers. He didn't
4 say - - -

5 JUDGE PIGOTT: He said, the issue of
6 admissibility was - - -

7 MS. GILLESPIE: But determined by the previous
8 court.

9 JUDGE PIGOTT: He said he looked at some of
10 them. He'd looked at some of the files. Anyway, that's
11 the preservation issue.

12 I was thinking in terms of, it happens on
13 occasion where you have children, not really young - - -
14 let's say a twelve-year-old who shoots his father. And
15 there's - - - the reason - - - kids don't normally do
16 that. And the reason they may have done that is a
17 situation where there is a history of drunkenness,
18 violence, aggression, maybe not even against the kid, but
19 against the mother or something like that.

20 Sometimes that's very important evidence that
21 should come in in a case where you have a relatively
22 peaceful defendant, who's now charged with a capital
23 crime, or a very serious crime, and he wants to bring that
24 stuff out. Do you see a problem with that?

25 MS. GILLESPIE: Well, Your Honor, if the rule is

1 going to be that that comes out, then the problem would
2 be, if the goal is to advance the accuracy of jury
3 determinations, it doesn't - - - it doesn't come - - - it
4 doesn't do that unless the whole picture is there.

5 So in the case where you're positing, where I
6 believe you said the defendant didn't have any background
7 and all of the background - - -

8 JUDGE PIGOTT: Given, that he's twelve-years-
9 old.

10 MS. GILLESPIE: - - - is on the - - - on the
11 victim. Okay, it does that. But it only does, if the
12 jury has the whole picture. It - - -

13 JUDGE PIGOTT: Well, you're - - -

14 MS. GILLESPIE: - - - logically, it doesn't make
15 - - -

16 JUDGE PIGOTT: - - - if you're suggesting that -
17 - -

18 MS. GILLESPIE: - - - it more accurate.

19 JUDGE PIGOTT: - - - in response to that, you
20 can say that he pulled wings off of flies when he was
21 four, I would agree that no, that can't come out.

22 MS. GILLESPIE: And that's the kind of
23 determination that - - -

24 JUDGE PIGOTT: Exactly.

25 MS. GILLESPIE: - - - that the court would need

1 to make.

2 JUDGE PIGOTT: Right.

3 MS. GILLESPIE: And in fact, the court in this
4 case wasn't able to make that determination, so that even
5 if this court were to decide that it was - - - a change in
6 the rule were warranted, which I'm not suggesting - - -
7 but even if it were to decide that, there's no
8 determination - - - there's no - - - actually - - - we
9 don't really know which evidence it is that the defendant
10 - - -

11 JUDGE PIGOTT: My point exactly.

12 MS. GILLESPIE: - - - that the defendant - - -

13 JUDGE PIGOTT: My point exactly.

14 MS. GILLESPIE: - - - and so the People weren't
15 allow - - - didn't have the opportunity to make arguments
16 and the court really never had the opportunity to specify
17 - - -

18 JUDGE PIGOTT: You moved to quash the subpoena.

19 MS. GILLESPIE: Quash the subpoena, exactly.
20 Not - - - but the defendant never offered any other
21 evidence - - -

22 JUDGE PIGOTT: We're getting into that circular
23 argument.

24 MS. GILLESPIE: Yes.

25 JUDGE PIGOTT: Let's assume for a minute this is

1 a domestic violence case. Instead of the defendant being
2 another taxi driver, it's the spouse of the victim. Can
3 she bring out evidence of his prior conduct and things
4 like that to say sure, you know, maybe he didn't have a
5 gun today, but he had one yesterday, and he was probably
6 going to have one tomorrow; and I want to point that out
7 because I'm not a violent person, and all I'm trying to do
8 is save myself and my family?

9 MS. GILLESPIE: Well, if you have a rule, the
10 rule should be fair for everyone.

11 JUDGE PIGOTT: Right.

12 MS. GILLESPIE: And the rule isn't fair for
13 everyone, and does not advance the accuracy of the jury's
14 determination. If the rule can be - - - if you can simply
15 say it's accurate in this case or it's more accurate in
16 this case, because the defendant wants to use it, and in
17 another case, well, it doesn't really apply, because the
18 defendant wants to use it, that's not a fair rule.

19 JUDGE PIGOTT: No, but I mean, are you saying
20 that all of the stuff being true, that you've got the
21 biggest bully on the block; you've got the most
22 obsequious, benign, Casper Milquetoast who's just walking
23 past that block every day getting - - - going from home to
24 work, and every day, something happens. And then this guy
25 finally makes the threat that scares this guy and he

1 shoots him, that none of that comes in. All you can say
2 is he - - - that guy just was standing there, and this guy
3 shot him?

4 MS. GILLESPIE: Well - - -

5 JUDGE PIGOTT: Murder one - - - two- - - murder
6 two.

7 MS. GILLESPIE: - - - presumably he knew
8 something about - - - in other words, the scenario you're
9 positing to me sounds like the reason the victim - - -

10 JUDGE PIGOTT: Right, but then - - -

11 MS. GILLESPIE: - - - was shot, because the
12 victim was aware of these circumstances.

13 JUDGE PIGOTT: - - - if I'm representing the
14 People, I get up in front of the jury, and just as your
15 counsel says, I say, he's lying. I mean, that's just
16 nonsense; that what happened here is he pulled the gun and
17 he shot the guy. That's all; end of story.

18 MS. GILLESPIE: Well, in this case, there was
19 extensive evidence about the victim's prior acts. And
20 it's not just through the defendant's testimony.

21 JUDGE SMITH: But take a - - -

22 MS. GILLESPIE: To - - -

23 JUDGE SMITH: - - - a hypothetical case. I
24 mean, Judge Pigott's Casper Milquetoast, say, was suddenly
25 found to have killed somebody.

1 JUDGE PIGOTT: I object.

2 JUDGE SMITH: And Casper didn't know who the
3 victim was, but we can prove that the victim was the local
4 thug who had mugged fourteen people in the neighborhood.
5 You really think the jury shouldn't know that?

6 MS. GILLESPIE: Well, I guess in answer to your
7 question, I think the current rule addresses it well
8 enough. If the defendant is aware - - -

9 JUDGE SMITH: Well, under the current rule, it
10 doesn't get in.

11 MS. GILLESPIE: I'm sorry?

12 JUDGE SMITH: Under the current rule, the prior
13 bad acts - - -

14 MS. GILLESPIE: Sure.

15 JUDGE SMITH: - - - of the victim, don't get in
16 if they're not known to the victim - - -

17 MS. GILLESPIE: If they're not known to the
18 victim.

19 JUDGE SMITH: - - - not known to the defendant.

20 MS. GILLESPIE: If they're not known to the
21 victim.

22 JUDGE SMITH: The defendant.

23 MS. GILLESPIE: But that's really - - - I mean,
24 in most cases, yes, you can posit the most extreme case
25 where it just seems like it would be a violation of the

1 defendant's rights. But those exceptions to the rule
2 exist anyway. A judge is capable of making that - - -

3 JUDGE PIGOTT: But they - - - but he made it - -
4 -

5 MS. GILLESPIE: - - - judgment for the rare case
6 where it would be so critical.

7 JUDGE PIGOTT: - - - he made it before trial. I
8 think that's what troubles me the most about this. I
9 mean, you haven't picked a jury yet. It's the week before
10 the trial's starting, and he said this evidence is not
11 coming in.

12 Now, it's helpful, if you're picking a jury, to
13 know what your evidence is going to be. But I don't know
14 why he wouldn't have waited and said take a look at the
15 files and see what you're going to do.

16 MS. GILLESPIE: I agree with you, Your Honor.
17 But I think the burden is on the defendant as the moving
18 party to say this is what I wanted to get in, and I - - -
19 you didn't let me get it in; and this is what I would have
20 done to show - - - this is what - - - the defendant here
21 didn't even say, oh, the defendant was aware of this, he
22 wasn't aware of that, but I'd like to get this all in.

23 We don't even have that. We don't really know
24 what this rule is going to be based on. If there was a
25 remi - - - there can't really be a remittal in this case,

1 unfortunately, because the defendant didn't make a record
2 that the trial court could go back and say, oh, well, in
3 the alternative ground this is too remote or this is too -
4 - - the proof is too flimsy.

5 JUDGE SMITH: Well, maybe on remittal they
6 should look for that in-camera file and take it out and
7 give it to the defendant, and take it from there.

8 MS. GILLESPIE: Well, but in this case, it was
9 clear, because the defendant outlined everything on a
10 subpoena, that he knew about - - - and he says, he had
11 read the court files. He had access to documents in the
12 court files, which typically include the complaint - - -
13 the felony complaints and the indictment and discovery
14 items.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MS. GILLESPIE: And so - - -

17 CHIEF JUDGE LIPPMAN: Thank you, counselor.

18 MS. GILLESPIE: - - - under these circumstances,
19 I'd ask that the court affirm the judgment.

20 CHIEF JUDGE LIPPMAN: Thank you, counselor.

21 Counselor, rebuttal?

22 MR. DONN: The notion that defense counsel
23 should have done more to put this issue before the court
24 is ridiculous. Because Danger's character for violence
25 was - - -

1 JUDGE PIGOTT: Well, not quite. Because an
2 awful lot of defen - - - I mean, if we go your way, and I
3 was a defense lawyer, I'd start printing my subpoenas now
4 and fill in the date at the bottom, and then hit the DA
5 with them every time I go in to the trial.

6 MR. DONN: Well, defense counsel was aware that
7 - - -

8 JUDGE PIGOTT: There's a limit, is my point.

9 MR. DONN: - - - Danger's reputation and
10 character for violence was such a big part of this case,
11 so early on, that counsel filed this unusual paperwork
12 specifically designed to get the information he wanted to
13 introduce at trial. And not only was it reviewed by the
14 calendar court, but Judge Marrus put out a decision citing
15 the rule we're seeking to overturn today and specifically
16 saying it can't come in.

17 So I think the answer to the question is what
18 Judge Smith said. Of course, if the court were to adopt a
19 new rule and remit the case, it should be sent back and
20 they should look at those files.

21 CHIEF JUDGE LIPPMAN: He gave other reasons why
22 it shouldn't come in other than the rule, right, didn't
23 he?

24 MR. DONN: Well, he was a little bit equivocal
25 on that. He said it shouldn't come in period, because of

1 the rule. And then he said - - -

2 CHIEF JUDGE LIPPMAN: Yes, but then he went
3 further.

4 MR. DONN: - - - and then he said, in any event
5 - - - he didn't say they're too remote or - - - he said
6 it's not - - - it is unclear whether or not they are too
7 remote in time and what have you. But a few things on
8 that.

9 First, he was only able to pass on what he had
10 before him. We, as we've been discussing, don't know the
11 details of all of these cases. Some of them were quite
12 recent. Some of them were older. We're not saying his
13 entire record should come in.

14 JUDGE READ: So if it goes back on remittal, the
15 judge could still decide, in his discretion, not to let it
16 in?

17 MR. DONN: Absolutely. And when we say "it",
18 we're actually referring to a whole body of evidence. So
19 it could well decide that it - - -

20 JUDGE READ: Or some of it; not all of it.

21 MR. DONN: Absolutely. Absolutely. And
22 reputation and/or certain of the acts. But defense
23 counsel clearly did everything he needed to do.

24 Just before I - - -

25 CHIEF JUDGE LIPPMAN: Sure, go ahead.

1 MR. DONN: On point two, we did raise an issue
2 that would not require this court to change the law. And
3 I'd just like to specifically say that defendant Carl
4 Watson should have been able to corroborate his testimony
5 regarding his reasonable belief that he was about to be
6 shot with documentary evidence that - - - that Danger had
7 shot a police officer.

8 Watson testifies that Powell had bragged about
9 this. However, this evidence would have corroborated that
10 testimony and enabled - - -

11 CHIEF JUDGE LIPPMAN: Didn't the cop say
12 something about it?

13 MR. DONN: I believe the cop testified that he
14 had heard about shootouts with the police - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. DONN: - - - but the paperwork coming in
17 would have made a difference.

18 JUDGE SMITH: So your theory is even if he's not
19 entitled to prove things not known to him, he's entitled
20 to corroborate his own testimony about what he did know by
21 showing that the fact was true and therefore it's more
22 likely Danger would have said it to him?

23 MR. DONN: Yes, Your Honor.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. DONN: Thank you.

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CHIEF JUDGE LIPPMAN: Thank you. Appreciate it.
(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Carl Watson, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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