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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 13

DAMIEN WARREN,

Respondent.

20 Eagle Street
Albany, New York 12207
January 07, 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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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Warren.

2 Hi, counsel. Do you want any rebuttal time?

3 MS. MILLING: Good afternoon, my name is
4 Donna Milling. I represent the People of the State
5 of New York from an order of the Fourth Department
6 reversing Mr. Warren's conviction on the ground that
7 that court erred when it conducted - - -

8 CHIEF JUDGE LIPPMAN: Do - - - do you want
9 re - - - do you want rebuttal time, counsel?

10 MS. MILLING: Yes, Your Honor. May I have
11 one minute?

12 CHIEF JUDGE LIPPMAN: One minute? Sure, go
13 ahead.

14 MS. MILLING: The Fourth Department in its
15 decision found that the trial court erred when it
16 conducted a simultaneous bench and jury trial, where
17 it allowed the bench trial co-defendant to testify in
18 the presence of the jury. And if my reading of the
19 Appellate Division's decision is correct, what they
20 have done is they have a crafted a per se abuse of
21 discretion.

22 JUDGE PIGOTT: Well, it wasn't so much that
23 he testified in front of the jury. It was after you
24 had rested that that person was allowed to testify
25 and therefore become part of the case that was now

1 over. Am I misunderstanding the facts?

2 MS. MILLING: Yes, that is my opponent's
3 argument.

4 JUDGE PIGOTT: But that is what happened,
5 right?

6 MS. MILLING: And that is what happened.
7 And it's our position that that made no difference
8 whatsoever.

9 CHIEF JUDGE LIPPMAN: Even though the case
10 was over? Even though the case was over?

11 MS. MILLING: Even though the case - - -

12 CHIEF JUDGE LIPPMAN: Finished? It made no
13 difference?

14 MS. MILLING: It made no difference.

15 CHIEF JUDGE LIPPMAN: You think it had no
16 practical difference or no legal difference or - - -

17 MS. MILLING: No practical, no legal.

18 CHIEF JUDGE LIPPMAN: Why not?

19 MS. MILLING: And I want to go back to - -
20 -

21 CHIEF JUDGE LIPPMAN: Why not? Why - - -

22 MS. MILLING: It did not have any practical
23 or legal ramifications, because if you look at what -
24 - - what Marvin Howard had to say in front of that
25 jury was already in front of the jury, based on the

1 testimony - - -

2 JUDGE SMITH: But not from his mouth.

3 MS. MILLING: Pardon me?

4 JUDGE SMITH: Not from his mouth.

5 MS. MILLING: No, it was not from his
6 mouth.

7 JUDGE SMITH: And - - - and - - - and the
8 witnesses who had said it were not - - - meaning,
9 were not absolute saints. Neither was he, I grant
10 you. But the - - - I mean, didn't he add something
11 significant to the People's case?

12 MS. MILLING: Corroboration of the
13 testimony from the prosecution witnesses.

14 JUDGE SMITH: We've - - - we've - - - I
15 mean, there are cases that seem to suggest that a - -
16 - it's not fair for a defendant to have to try a case
17 with a co-defendant who's, in effect, his adversary.
18 Is that the law?

19 MS. MILLING: There are cases that say
20 that. And I have to be honest and tell you that I
21 could not find any cases where a situation like this
22 occurred, where - - -

23 JUDGE SMITH: Okay. But some of these case
24 - - - I mean, we've said in Mahboubian, or whatever
25 it's called, and another a case or two that - - -

1 that if the - - - if the tension between the co-
2 defendants is severe enough, if they're completely at
3 war with each other, the cases have to be severed.
4 And severance is a much more drastic remedy than what
5 he's asking for, isn't it?

6 MS. MILLING: Yes, it is. But there was no
7 tension here. And I think I - - -

8 JUDGE SMITH: There was no - - - no
9 tension? Wait a minute. Howard got up and said, "I
10 didn't do it; Warren did."

11 MS. MILLING: Well, maybe I shouldn't say
12 no tension. I should say what Mahboubian says, which
13 is that "the core of each defense is in
14 irreconcilable conflict with the other, and there's a
15 significant danger as both defenses are portrayed,
16 that the conflict alone will lead the jury to infer a
17 defendant's guilt."

18 This is not a case where we have both
19 defendants doing one of these. In other words - - -

20 CHIEF JUDGE LIPPMAN: Why not? Why isn't
21 it a case with irreconcilable differences?

22 MS. MILLING: Because this is a case - - -

23 CHIEF JUDGE LIPPMAN: The defenses.

24 MS. MILLING: This is a case where instead
25 of one defendant saying, "No, I didn't do it; you did

1 it." "No, I didn't do it; you did it." What we had
2 here was Damien Warren saying, "I was there; this is
3 misidentification; I did not shoot the victim." What
4 we had Marvin Howard saying was "I was there; I heard
5 shots; I saw Damien Warren chasing the victim, and
6 Damien told me after the fact that he shot the
7 victim." I don't - - - that's not the same as - - -

8 JUDGE SMITH: Would you say the conflict
9 here is more or less severe than it was in Mahboubian
10 between the two defendants there?

11 MS. MILLING: I think this is less severe.
12 And I want to go back to saying that - - -

13 JUDGE SMITH: I mean, here - - - neither -
14 - - yeah, well, maybe they did; okay, go ahead.

15 MS. MILLING: What I want to say is that if
16 you look at what - - - there was no abuse of
17 discretion here. If this is treated as a severance
18 motion, this court in Mahboubian said that the court
19 has to look at this prospectively, based on the
20 information provided to the court at the time of the
21 motion.

22 JUDGE GRAFFEO: Well, the defense counsel
23 did ask the court to have the jury leave the
24 courtroom - - -

25 MS. MILLING: Yes.

1 was going to say?

2 MS. MILLING: He did know, because if you
3 look at his cross-examination of Mr. Howard, what he
4 says to Mr. Howard is, now, you're sitting here
5 today, and you're telling this jury the same story
6 that you told to the prosecution and homicide
7 detectives three or four months before the jury - - -
8 before the jury trial, and they didn't believe you
9 then, because they - - - and the reason why the
10 prosecution didn't drop the charges is because they
11 found that you were not credible, and that's why
12 you're sitting here.

13 JUDGE SMITH: But did - - - did Warren's
14 counsel have Howard's statement at the time he - - -
15 at the time this issue was resolved?

16 MS. MILLING: Yes. There was no statement.
17 Well, I mean, there was no written statement. But
18 the same testimony that Howard provided to the jury
19 is the same thing that he had been telling the
20 prosecution.

21 JUDGE SMITH: No, my question is - - -

22 JUDGE PIGOTT: Is this - - -

23 JUDGE SMITH: - - - when did Warren's
24 counsel find that out? Didn't he find that out on
25 Howard's direct or did he find out before then?

1 MS. MILLING: I'm not aware of that, Your
2 Honor.

3 JUDGE PIGOTT: Is this your preservation
4 argument?

5 MS. MILLING: I'm sorry. Is this my - - -

6 JUDGE PIGOTT: Is this part of your
7 preservation argument?

8 MS. MILLING: Well, you see, I'm having a
9 tough time with the preservation argument, because I
10 think that - - - I don't know if the word is "moot",
11 but the Appellate - - - the Fourth Department
12 basically went right past that. They just said that
13 this is - - - it's per se abuse of discretion.

14 JUDGE PIGOTT: But he - - - Mr. D'Amico's
15 making the argument that if it wasn't preserved - - -
16 let's assume you're right; it wasn't preserved - - -
17 then the only way the Appellate Division can reach it
18 is in their interest of justice jurisdiction, which
19 we can't touch.

20 MS. MILLING: Correct. But that argument
21 doesn't hold any sway, because if you look at the
22 Appellate Division's decision, they clearly state the
23 conviction is unanimously reversed on the law, and
24 the matter - - - and the defendant is entitled to a
25 new trial.

1 JUDGE PIGOTT: But they don't say that it
2 was preserved.

3 MS. MILLING: They didn't acknowledge that
4 at all. They didn't mention the word "preserve" - -
5 -

6 JUDGE PIGOTT: Wasn't it a problem, because
7 - - - I mean, whether it's on the law or not, I mean,
8 don't - - - aren't they entitled to have it argue - -
9 - you know, isn't the trial judge entitled to have it
10 argued before her, so she can make an appropriate
11 ruling? And you say she did not have it properly in
12 front of her, so that the only way the Appellate
13 Division could have gotten it is to say we're going
14 to reach out and grab this, even though Judge
15 Troutman didn't have an opportunity to do it, and
16 we're going to make a decision in our interest of
17 justice jurisdiction, because we think it's an
18 important issue, and can we then get to it.

19 MS. MILLING: But then - - - but we're - -
20 - now we're speculating, because nowhere in the
21 court's decision do the words "interest of justice
22 jurisdiction" or "preservation" appear. They address
23 this on the merits, and reversed it on the law.

24 JUDGE PIGOTT: But did Judge Troutman?

25 MS. MILLING: Pardon me?

1 JUDGE PIGOTT: Did Judge Troutman?

2 MS. MILLING: Did Judge Troutman address
3 this on the merits? I don't think so, because I
4 think that based - - - the decision she made, she
5 made it in a vacuum, and based on only on the
6 information that was provided to her at the time.

7 JUDGE SMITH: Maybe - - - maybe your
8 argument is not really a preservation argument; it's
9 just an argument that on the basis of what was before
10 her, Judge Troutman ruled correctly?

11 MS. MILLING: Correct. She did the best
12 that she could, based on the information that was
13 provided to her at the time. She had no other
14 choice.

15 CHIEF JUDGE LIPPMAN: Okay, counsel,
16 thanks.

17 Counsel?

18 MR. D'AMICO: Your Honor, may it please the
19 court, Michael D'Amico on behalf of Damien Warren.
20 To respond to a couple of questions that were brought
21 up to Ms. Milling, it was not known to me at the time
22 of trial what Marvin Howard was going to say. There
23 was no statement; there was no recorded statement
24 whatsoever.

25 JUDGE SMITH: Well, okay, but if it wasn't

1 known to you, how could it be known to the judge?

2 MR. D'AMICO: I think there were some
3 meetings that were done with the other defense
4 attorney for Mr. Howard and the court that were not
5 when I was present.

6 JUDGE SMITH: But, I mean - - - but you're
7 not - - - you're not really saying that the court is
8 chargeable with some knowledge you didn't have? And
9 didn't the court have to rule on what you put before
10 her?

11 MR. D'AMICO: Well, Ms. Milling indicated
12 that I did say some things about the instruction and
13 the jury not understanding the instruction. She left
14 out the part where I said to Judge Troutman, I don't
15 expect him to get up there and confess; I expected
16 his testimony to point the finger at my client.
17 Essentially the way the trial went, it came down to
18 it was one or the other.

19 JUDGE SMITH: And you basically say that's
20 - - - that's enough that he - - - she - - - and it
21 was a plausible enough suggestion that she should
22 have taken the precaution of sending the jury out?

23 MR. D'AMICO: Absolutely.

24 JUDGE GRAFFEO: Was there any kind of
25 instruction at the conclusion of the entire case - -

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MR. D'AMICO: Her instruction - - -

JUDGE GRAFFEO: - - - to the jury?

MR. D'AMICO: Her instruction to the jury regarding the testimony was that the guilt or innocence of Marvin Howard was something that they were not to consider, which, I can't see how it could even - - -

JUDGE GRAFFEO: I thought that was the beginning.

MR. D'AMICO: She did it at the end again. I believe the instruction was - - - was reiterated.

JUDGE GRAFFEO: And that was all that was said.

MR. D'AMICO: That was it.

JUDGE GRAFFEO: Not how to deal with the Howard testimony versus - - -

MR. D'AMICO: Nothing.

JUDGE GRAFFEO: - - - your client's testimony.

MR. D'AMICO: Nothing. I think it's significant to note that - - -

JUDGE GRAFFEO: Did you ask for some kind of curative instruction at the end after you were not successful in having the jury sent out?

1 MR. D'AMICO: I believe my request was with
2 respect to the charge about jury and nonjury. I did
3 not ask for a curative; I don't believe I did in the
4 record. I don't recall.

5 JUDGE SMITH: What was - - - what was
6 unfair about what - - - why is it more fair rather
7 than less fair for the jury to hear what Howard has
8 to say and hear you cross-examine him?

9 MR. D'AMICO: Because the People had
10 rested. And we had rested. Our files - - -

11 JUDGE SMITH: But it's not a sporting
12 event. I mean, the idea is for the jury to find out
13 the truth. Why does it make it less hard - - - why
14 does it make it harder for them to find out the truth
15 just because they heard Howard's testimony after
16 somebody said "I rest"?

17 MR. D'AMICO: Well, because the testimony -
18 - - the burden's on the People, obviously. And
19 that's the reason, Your Honor. There's no reason for
20 the people to hear this testimony, because it's self-
21 serving.

22 JUDGE SMITH: Suppose - - - suppose - - -
23 suppose this had been - - - suppose Howard had never
24 waived a jury. Suppose they had all been tried at
25 the same jury. And let's suppose that you're not

1 entitled to a severance. I understand maybe there's
2 an argument that you are, but suppose that you're
3 not. Then you would have had exactly the same
4 situation. They could have - - - and they could have
5 heard Howard's testimony and they could have
6 considered it, right, against your guy.

7 MR. D'AMICO: Perhaps, but we don't know if
8 they did that, because they were told not to consider
9 it - - -

10 JUDGE SMITH: Well, that only helped you.

11 MR. D'AMICO: We don't know that, because -
12 - -

13 JUDGE SMITH: It couldn't have hurt you. I
14 mean, if - - -

15 MR. D'AMICO: Well - - -

16 JUDGE SMITH: - - - they were entitled to
17 hear it anyway.

18 MR. D'AMICO: I think that the problem - -
19 - just because of the way the whole thing worked.
20 Howard's attorney didn't open in front of the jury;
21 he didn't close in front of the jury. Howard wasn't
22 sitting there during the final instructions to the
23 jury. Who knows what those people were thinking? I
24 think that if it was done during the trial, they
25 perhaps would have made evaluations of the testimony

1 different than what they actually did.

2 JUDGE PIGOTT: If you're right, and this
3 goes back for a new trial, what's the difference
4 going to be? I mean, isn't he going to testify the
5 same way he did this time?

6 MR. D'AMICO: I would imagine.

7 JUDGE PIGOTT: Or this time he'd be part of
8 the People's case, right, because he's already - - -

9 MR. D'AMICO: He would be one of the
10 People's witnesses, I would - - -

11 JUDGE PIGOTT: Is he - - -

12 MR. D'AMICO: - - - his testimony would be.

13 JUDGE PIGOTT: Okay.

14 MR. D'AMICO: With respect to the
15 preservation, I don't believe that - - - well, I do
16 believe that the Appellate Division deemed - - - by
17 statute - - -

18 JUDGE SMITH: You're - - -

19 MR. D'AMICO: - - - it's deemed to be made
20 as a matter of discretion in the interest of justice,
21 but - - -

22 JUDGE SMITH: Wait, wait. You want to - -
23 - are you saying it's preserved or it's not
24 preserved?

25 MR. D'AMICO: Not.

1 JUDGE SMITH: Caution: trick question.

2 Yeah, okay.

3 MR. D'AMICO: Not.

4 JUDGE SMITH: It's not preserved.

5 MR. D'AMICO: Correct.

6 JUDGE SMITH: Okay. You're saying that you
7 committed an error by not preserving the point and,
8 therefore, you should win the case, and she should
9 lose.

10 MR. D'AMICO: Well, what I'm saying is - -
11 -

12 JUDGE SMITH: And believe it or not - - -
13 and I under - - - and that's probably a logically
14 sound argument.

15 MR. D'AMICO: That's exactly the argument.

16 JUDGE PIGOTT: Double switch hitters here.

17 JUDGE READ: And it appeals to at least two
18 of the judges sitting here today.

19 MR. D'AMICO: Anything else?

20 JUDGE READ: Doesn't appeal, I'm sorry.

21 MR. D'AMICO: I would rest on my papers,
22 thank you.

23 CHIEF JUDGE LIPPMAN: Okay, thank you,
24 counsel. I appreciate it.

25 Counselor, one minute, go ahead.

1 MS. MILLING: Thank you, Your Honors. I
2 just wanted to say that, you know, even if counsel
3 was unaware about - - - of Marvin Howard's testimony,
4 that it was the same statement he had made before, he
5 still has the obligation to put the information
6 before the court. The court doesn't have a crystal
7 ball. The court - - - it wasn't clear - - -

8 JUDGE SMITH: Well, what about - - - well,
9 what's - - - under these circumstances, why wasn't "I
10 expect him to pin the rose on my client" sufficient?

11 MS. MILLING: No, that's not what he said.
12 What he said was that Mr. Howard - - -

13 JUDGE SMITH: Point the finger, maybe.

14 MS. MILLING: - - - was not going to get up
15 there and exculpate himself. He didn't say, I don't
16 expect Mr. - - - I expect Mr. Howard to get up there
17 and point the finger at my client. If you look at
18 the record, that's not what he said.

19 JUDGE PIGOTT: Well, at that point, you're
20 pretty much stuck, because Young (ph.) had already
21 testified and I mean, everybody, I would assume, knew
22 what Howard was going to say.

23 MS. MILLING: Correct. And he didn't ask
24 for any instruction at the end of the proceedings.

25 JUDGE PIGOTT: But you know - - - I know

1 you know it - - - when trials happen, things happen.
2 And isn't it odd that there's someone sitting there,
3 Mr. Howard, his lawyer doesn't move, as far as the
4 jury's concerned. I mean, in front of judge, I don't
5 know if he opened or closed or anything else. But as
6 far as the jury, they see Mr. Howard there; they see
7 his lawyer there, and nothing happened.

8 I mean, it's just - - - it's just, you know
9 - - - he doesn't open to them, he doesn't talk to
10 them, he doesn't close to them. Wouldn't it - - -
11 isn't that going to give a jury some question as to
12 what all is going on here?

13 MS. MILLING: No, I think because the court
14 told them in the beginning that they're all - - -
15 this - - - they're all charged under Section 20 as
16 accomplices.

17 JUDGE PIGOTT: So they were aware - - -

18 MS. MILLING: Right, they were aware - - -

19 JUDGE PIGOTT: - - - that this was the way
20 it was going to unfold.

21 MS. MILLING: - - - that she was the trier
22 of fact for Marvin Howard; they were the trier of
23 fact for Nathaniel Williams and Damien Warren, so the
24 jury was aware of what was going on.

25 CHIEF JUDGE LIPPMAN: Okay, thanks,

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counsel.

MS. MILLING: Thank you.

CHIEF JUDGE LIPPMAN: Thank you, both.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE v. DAMIEN WARREN, No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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