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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 137

DUPREE HARRIS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 11, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 137, People v.
2 Harris.

3 Counselor, do you want any rebuttal time?

4 MR. VORKINK: Two minutes, Your Honor,
5 please.

6 CHIEF JUDGE LIPPMAN: Go ahead, you're on.

7 MR. VORKINK: Good afternoon, Your Honors.
8 May it please the Court, Mark W. Vorkink of Appellate
9 Advocates for appellant Dupree Harris.

10 Your Honors, in this case, the trial
11 court's erroneous evidentiary ruling which occurred
12 pre-trial, prior even to voir dire, transformed what
13 should have been a straightforward and otherwise
14 generally pedestrian prosecution involving tampering
15 and bribery charges of witnesses, into a full-blown
16 relitigation of a heinous witness elimination murder,
17 namely the murder of Mr. Bobby Gibson.

18 CHIEF JUDGE LIPPMAN: Did - - - did you
19 have any role in opening the door to this - - - the
20 kind of information about the murder?

21 MR. VORKINK: We did not, Your Honor. We
22 did not. The defense counsel did not. And I think
23 that that's a critical - - -

24 CHIEF JUDGE LIPPMAN: You wanted to get the
25 testimony in, right?

1 MR. VORKINK: Testimony regarding?

2 CHIEF JUDGE LIPPMAN: By Ragsdale, whatever
3 his name was?

4 MR. VORKINK: We did. But I think - - -
5 and this was actually what's crucial in this case.

6 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

7 MR. VORKINK: And the chronology - - -

8 CHIEF JUDGE LIPPMAN: That's why I'm asking
9 you.

10 MR. VORKINK: Exactly, Your Honor. The
11 chronology of how the case plays out is critical.
12 Because the ruling regarding the Bobby Gibson
13 evidence, that evidence of the murder could come in,
14 was made at the beginning of the trial, prior even to
15 voir dire.

16 And it's from that ruling that everything
17 else from the trial sort of went forth - - -

18 CHIEF JUDGE LIPPMAN: So then when you
19 asked that - - - that Ragsdale come in, that was
20 already - - - the door had been opened - - -

21 MR. VORKINK: Exactly.

22 CHIEF JUDGE LIPPMAN: - - - previously?

23 MR. VORKINK: Exactly, Your Honor.

24 JUDGE ABDUS-SALAAM: Counsel, was there any
25 reason or any reasonable, I guess, reason for the - -

1 - for the prosecution to submit the - - - the Bobby
2 Gibson murder in connection with why these women
3 changed their tune?

4 MR. VORKINK: There was not, Your Honor.

5 JUDGE ABDUS-SALAAM: There was nothing?

6 MR. VORKINK: There was not, Your Honor.

7 JUDGE ABDUS-SALAAM: That - - - they didn't
8 have to - - - the prosecution didn't have to submit
9 anything about why they changed their tune?

10 MR. VORKINK: Well, and I - - - I would
11 answer that this way, which is that I think the
12 People's position and the ruling that the trial court
13 made was, the trial court deemed evidence of the
14 Bobby Gibson murder to be relevant to explain why the
15 three complainants in this case essentially reverted
16 to the statements they originally made about the
17 Dennis Brown shooting in September - - -

18 JUDGE ABDUS-SALAAM: And your position is
19 that's not relevant?

20 MR. VORKINK: I think our position is one,
21 that's not supported by the record; that I think that
22 the testimony of the three complainants, Edmonds,
23 Smith, and Hardison, does not support the ruling that
24 the trial court originally made that they reverted
25 back to their original statements because of Bobby

1 Gibson's killing.

2 And in fact, they indicated it was not them
3 who contacted the police in June of 2002. The police
4 reached out to them. They denied - - -

5 JUDGE RIVERA: But isn't that a question
6 for the jury to figure out whether or not they're
7 persuaded that that's indeed the reason why they
8 flipped?

9 MR. VORKINK: I don't believe so, Your
10 Honor, because I think this comes down to the - - -
11 it - - - this is a basic rule of relevancy. And
12 evidence such as the Bobby Gibson murder, just like
13 any other sort of evidence in any criminal
14 prosecution, is relevant if it bears upon a material
15 fact.

16 CHIEF JUDGE LIPPMAN: Assuming - - -
17 assuming that you're right and the Gibson stuff
18 shouldn't have come in, what effect did it have?
19 They threw out the tampering charge, right? Not
20 guilt - - -

21 MR. VORKINK: They threw out the tampering
22 charge that - - -

23 CHIEF JUDGE LIPPMAN: Which would show that
24 really this issue of fear really was not one that - -
25 - that convinced the jury.

1 MR. VORKINK: That's true, Your Honor.

2 CHIEF JUDGE LIPPMAN: So - - - so doesn't
3 that play into - - - even assuming it was error,
4 whether it's really a - - -

5 MR. VORKINK: I don't believe - - -

6 CHIEF JUDGE LIPPMAN: - - - dispositive or
7 determinative - - -

8 MR. VORKINK: - - - I don't believe so,
9 Your Honor, and I'd answer that two ways. I think -
10 - -

11 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

12 MR. VORKINK: - - - I think first, the most
13 important thing is this case it's - - - it's not that
14 the fact of Bobby Gibson's murder came into the
15 evidence in this case. It's that nearly a hundred
16 pages of testimony of this trial was devoted to Bobby
17 Gibson's killing.

18 There were six witnesses who testified to
19 it. And they testified not only to the killing
20 itself, but their subjective reactions to it. And
21 that includes the three - - -

22 CHIEF JUDGE LIPPMAN: But it was clear - -
23 - it was made clear the defendant wasn't charged any
24 - - - any crime relating to the Gibson murder, right?

25 MR. VORKINK: Well, I - - - I guess I would

1 dispute that characterization with some point, Your
2 Honor, which is that yes, a charge was given to the
3 jury to the effect that - - - that Mr. Harris, in
4 this case, was not charged with the murder of Bobby
5 Gibson.

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. VORKINK: And the court said something
8 similar during the course of voir dire. But then I
9 think if you look at not only the fact that how much
10 the Bobby Gibson murder dominated the trial
11 proceedings, it would have been impossible for the
12 jury to not speculate as to why all this evidence
13 comes in, including the fact that you have Ragsdale's
14 confession ends up coming in. And again, defense
15 counsel felt obligated to do that - - -

16 CHIEF JUDGE LIPPMAN: Yeah.

17 MR. VORKINK: - - - because of all the
18 Bobby Gibson mur - - - murder evidence had already
19 come in. And then you have the autopsy - - - a page
20 of the Gibson autopsy which comes in in the People's
21 rebuttal - - -

22 CHIEF JUDGE LIPPMAN: So - - - so you would
23 have kept this out altogether?

24 MR. VORKINK: I think the ruling originally
25 should have been to preclude evidence of the Bobby

1 Gibson murder. And I think we, based on a cold
2 record, cannot predict how the trial would have
3 unfolded, had that ruling been - - -

4 JUDGE ABDUS-SALAAM: I thought you just
5 agreed that it was relevant to something related to
6 these witnesses' testimony about why they might have
7 changed their minds?

8 MR. VORKINK: I - - - I don't - - - again,
9 Your Honor, respectfully, I don't think that we can
10 concede that it's irrelevant. Again, relevancy is a
11 material issue. And Bobby Gibson was murdered a week
12 after all of the constative events which - - -

13 JUDGE RIVERA: Wasn't the theory of the
14 defense that the women were just not believable?

15 MR. VORKINK: That was one - - -

16 JUDGE RIVERA: They were just not
17 believable.

18 MR. VORKINK: That's one theory that they
19 offered. One - - - and the defense pursued a variety
20 of theories. And again, theories that she pursued
21 after the ruling allowing in the Bobby Gibson
22 evidence. One - - -

23 JUDGE FAHEY: I - - - I thought more that
24 it was - - - I thought you were - - - your theory
25 wasn't - - - is that this one became a trial within a

1 trial, that - - - see, it's hard, I think, not - - -
2 not to - - - to criticize a judge for saying well,
3 they - - - they have a right to say this is why they
4 changed, and they - - - there could have been a
5 limiting instruction, saying something happened and
6 caused them to change and - - - but none of that took
7 place.

8 And then it accelerated and got out of
9 control and it became autopsy reports, video
10 confessions for crimes that weren't being discussed,
11 autopsies for crimes that weren't before the jury on
12 this case. And - - - and I thought that was at the
13 source of your theory; not that the initial ruling at
14 all, if it had been - - - it had been structured
15 right, was improper.

16 But you're saying completing the narrative
17 concept was entirely wrong in the very beginning?

18 MR. VORKINK: Well, our - - - our position
19 was, is that the evidence was irrelevant and not have
20 - - - should not have come in. But - - -

21 JUDGE FAHEY: Completing the narrative
22 evidence, relevant at all, that something happened
23 that caused them to change?

24 MR. VORKINK: I think the - - - it's hard
25 to predict exactly how that could have unfolded - - -

1 JUDGE FAHEY: That's true.

2 MR. VORKINK: - - - if evidence of the
3 Bobby Gibson murder had not have come in. But I
4 think - - - Judge Fahey, I think your point is well-
5 taken, which is this - - - this was a classic trial
6 within a trial, which this court has talked about in
7 prior decisions.

8 Ultimately, this became a relitigation of
9 the Bobby Gibson murder, which of course, the People
10 had already achieved a conviction for, as to Travis
11 Ragsdale, who of course, was convicted of second-
12 degree murder, at a proceeding at which the jury
13 rejected the notion that Bobby Gibson was murdered
14 because he was a witness to the Dennis Brown killing
15 in September.

16 And I - - - I think because it became a
17 trial within a trial, that's why the introduction of
18 this evidence was so fundamentally prejudicial to Mr.
19 Harris in this case. Again, so many witnesses
20 testified to it. All of this extraneous evidence
21 additionally came in. And you know, this court - - -

22 CHIEF JUDGE LIPPMAN: You think it was so
23 prevalent that the jury couldn't have really ignored
24 much of the - - - of this evidence relating to the
25 Gibson murder?

1 MR. VORKINK: Precisely, Your Honor.

2 CHIEF JUDGE LIPPMAN: Just overwhelming?

3 MR. VORKINK: Precisely. And that's
4 especially true, given the - - - given that the
5 court's ruling led to the summation remarks by the
6 prosecutor in this case.

7 So even prior to the - - - prior to the
8 summation, all of this evidence is coming in, and
9 obviously this sort of specter is in the - - - in the
10 sort of wings during the course of the trial
11 proceedings. But then you get to the summation, and
12 the prosecutor invites the jury to speculate
13 precisely on the issues that defense counsel was so
14 concerned about as to why this evidence should have
15 been excluded, including - - -

16 CHIEF JUDGE LIPPMAN: And once it was in,
17 there was all these kinds of things that evolved from
18 it?

19 MR. VORKINK: Exactly, Your Honor.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.
21 You'll have rebuttal. Let's hear from your
22 adversary.

23 MR. VORKINK: Thank you, Your Honor.

24 MR. DENNEHY: Good afternoon, Your Honors.
25 May it please the court. My name is Morgan Dennehy.

1 I represent the respondent.

2 CHIEF JUDGE LIPPMAN: Counsel, wasn't this
3 - - - the evidence relating to the Gibson murder
4 devastating to the defendant?

5 MR. DENNEHY: Absolutely not. The defense
6 had a choice in this case, Your Honor. It - - -
7 there's an extensive pre-trial colloquy between the
8 parties here, because everyone understood that this
9 Gibson murder was an important part of - - - of this
10 narrative, and they needed to discuss - - - because
11 they knew it was sensitive, they knew it was
12 potentially prejudicial - - -

13 CHIEF JUDGE LIPPMAN: Yeah, but everyone
14 understood - - -

15 MR. DENNEHY: - - - and they needed to
16 discuss - - -

17 CHIEF JUDGE LIPPMAN: - - - once it comes
18 in, then it's going to really have an effect - - -

19 MR. DENNEHY: Well - - -

20 CHIEF JUDGE LIPPMAN: - - - wouldn't you
21 think?

22 MR. DENNEHY: - - - that's - - - that's
23 right. So - - - so - - -

24 CHIEF JUDGE LIPPMAN: You really have to be
25 very careful, you would agree, with this kind of

1 evidence, and - - -

2 MR. DENNEHY: And - - -

3 CHIEF JUDGE LIPPMAN: - - - some of the
4 speculation that went on about it from the
5 prosecution, you know, about what might have caused
6 it and all of that, that's not being really careful
7 about letting that evidence in, is it?

8 MR. DENNEHY: Well, let me first comment on
9 - - - on the collo - - -

10 CHIEF JUDGE LIPPMAN: Answer my question.

11 MR. DENNEHY: Oh, on the speculation by the
12 prosecutor?

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MR. DENNEHY: If you're referring to the
15 prosecutor's summation comments, the - - - when read
16 in context, the prosecutor was not inviting the jury
17 to speculate. The prosecutor was simply being
18 responsive to what defense counsel was saying, and
19 putting in the Ragsdale confession, and arguing that
20 the statements that Ragsdale made in the confession -
21 - -

22 CHIEF JUDGE LIPPMAN: But as your adversary
23 says, it - - - they didn't direct that this evidence
24 come in. It was already in. In that context, they
25 wanted the Ragsdale - - -

1 MR. DENNEHY: That - - - that's right. But
2 - - - but again, I go back to - - - to the pre-trial
3 colloquy where - - -

4 CHIEF JUDGE LIPPMAN: Yes. Go ahead.

5 MR. DENNEHY: - - - where - - - where the
6 discussion of the admissibility of the Gibson murder
7 was - - - was extensively bro - - - discussed by the
8 parties. And the prosecutor made the argument that,
9 look, Judge, this needs to come in because it helps
10 explain two very relevant factors in this case that
11 go to the direct issue that's presented in - - - in
12 this case, which is the credibility of these three
13 women.

14 CHIEF JUDGE LIPPMAN: Is it a trial within
15 a trial, what ultimately happened, because - - -

16 MR. DENNEHY: It's not - - - it's not at
17 all.

18 CHIEF JUDGE LIPPMAN: - - - of - - -
19 because of allowing that evidence in?

20 MR. DENNEHY: Not at all.

21 CHIEF JUDGE LIPPMAN: Did this dominate the
22 trial?

23 MR. DENNEHY: It did not. It answered - -
24 -

25 CHIEF JUDGE LIPPMAN: How much - - -

1 MR. DENNEHY: - - - it answered important
2 questions, questions that were - - -

3 CHIEF JUDGE LIPPMAN: - - - how much of the
4 trial involved talking about the Gibson murder or - -
5 -

6 MR. DENNEHY: A portion of it. Most of the
7 trial involved - - -

8 CHIEF JUDGE LIPPMAN: What portion?

9 MR. DENNEHY: A portion of it. Most - - -

10 CHIEF JUDGE LIPPMAN: What portion?

11 MR. DENNEHY: You want me to describe a
12 percentage?

13 CHIEF JUDGE LIPPMAN: Yeah. Half of it;
14 three-quarters of it?

15 MR. DENNEHY: Less - - - less than half of
16 it. For - - - thirty to forty percent perhaps. But
17 this trial was mostly about the charged crimes - - -

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. DENNEHY: - - - which was the bribery
20 and the tampering allegations.

21 JUDGE STEIN: You talked about two purposes
22 for this, two things that it was - - -

23 MR. DENNEHY: Yes, Your Honor.

24 JUDGE STEIN: I assume the second one was -
25 - - had to do with the Witness Protection Program?

1 MR. DENNEHY: Absolutely.

2 JUDGE STEIN: Under what theory would - - -
3 would that come in with - - - before there was any
4 testimony brought out - - -

5 MR. DENNEHY: Right.

6 JUDGE STEIN: - - - by the defense on - - -

7 MR. DENNEHY: Right. Again, I'll go back
8 to the pre-trial colloquy where these issues are
9 discussed. And I urge the court to really look at
10 that colloquy.

11 Defense counsel was - - - was faced with -
12 - - defense counsel obviously didn't want the
13 evidence of the Gibson murder to come in. And the
14 court said, defense counsel, I'm going to let this
15 in, because it's relevant to the relocations. That -
16 - - that's an issue that defense counsel was going to
17 bring up on cross.

18 And defense counsel said nothing. Defense
19 counsel didn't say, Judge - - - Judge don't let that
20 be a basis for admitting this evidence. I'm - - -
21 I'm not going to go into the relocations. She of
22 course was going to go into the relocations.

23 The relocation evidence was the best source
24 of impeachment that defense counsel had to attack the
25 credibility of - - - of these three women.

1 JUDGE ABDUS-SALAAM: Counsel, in - - - in
2 your estimation, if - - - if there's a proffer of
3 what the - - - the cross-examination is going to be,
4 that makes it relevant - - -

5 MR. DENNEHY: Yes, Your Honor.

6 JUDGE ABDUS-SALAAM: - - - on - - - on the
7 - - -

8 MR. DENNEHY: Absolutely.

9 JUDGE ABDUS-SALAAM: - - - on the People's
10 direct case?

11 MR. DENNEHY: Absolutely. The door doesn't
12 need to be opened by - - - by the direct examination.
13 When something so gla - - - by - - - by the cross-
14 examination. Something - - - when something is so
15 glaring an issue like this exists pre-trial, it's
16 prudent for the court to address it pre-trial rather
17 than to have to excuse the jury and to go into a
18 lengthy colloquy in the middle of a trial.

19 This - - - it was obvious that this issue
20 was going to come up. So the court wisely said,
21 let's discuss it - - -

22 JUDGE RIVERA: Why - - -

23 MR. DENNEHY: - - - now before the trial
24 even starts. And defense counsel signaled her intent
25 to not only talk about the - - - the relocations but

1 more importantly - - -

2 JUDGE RIVERA: If - - - if the court had
3 said you can't - - -

4 MR. DENNEHY: I'm sorry?

5 JUDGE RIVERA: If the court had said you
6 can't raise it on direct, and if once they raise it,
7 then you can - - - then you can cross and - - - and
8 respond to it?

9 MR. DENNEHY: That was one way to go. That
10 would have been fine too.

11 JUDGE RIVERA: Yeah, well - - - well - - -

12 MR. DENNEHY: But it doesn't mean that this
13 was error.

14 JUDGE RIVERA: That's what I'm saying. You
15 were not foreclosed from that if the court had held
16 the other way. Is that correct?

17 MR. DENNEHY: That's correct. It could
18 have gone that way. But it's - - - it doesn't mean
19 that it was improper that it went this way.

20 I also want to direct the court's attention
21 - - - this is very important. The court said - - -

22 JUDGE RIVERA: Well, only because you're
23 not - - - although maybe there is a proffer, maybe
24 there isn't - - - until they actually proceed on the
25 theory, there's nothing in the record - - -

1 MR. DENNEHY: Right. But there - - - there
2 was some unequivocal statements made by defense
3 counsel during his pre-trial colloquy, one of which
4 was the court said, I see no way of excluding
5 evidence of the Sykes trial. And - - - and the
6 defense counsel said, I agree.

7 JUDGE RIVERA: If - - - as the trial
8 unfolds, defense counsel can't change strategy?

9 MR. DENNEHY: Defense counsel can change -
10 - - change strategy. But if you look - - - I mean,
11 let's look at the evidence in this case. Defense
12 counsel - - -

13 JUDGE RIVERA: But he's got to wait for
14 your case-in-chief.

15 MR. DENNEHY: I know, but the defense
16 counsel knows certain things before the trial starts.
17 In developing her defense strategy - - -

18 JUDGE RIVERA: Then - - -

19 MR. DENNEHY: - - - it's - - - it's
20 apparent to defense counsel that the evidence will
21 show that an attorney will come in- - - the attorney
22 where - - - that took the recantations, and testify
23 that this defendant delivered these three women to
24 the - - - to the defense attorney's office for the
25 purpose of recant - - - making the re - - -

1 recantations.

2 The question then becomes whether or not
3 the testimony of the three women about receiving 500
4 dollars is credible or not. The case hinges upon
5 that.

6 JUDGE STEIN: Well, I keep thinking that -
7 - - that - - - you know, that some testimony about
8 the fact that Gibson was killed and - - - and how it
9 may or may not have affected what these three women
10 did, would have been, you know, lim - - - in a very
11 limited sense with a stipulation that the jury in
12 Gibson's - - - in the murder trial of Gibson did not
13 find that it was a witness issue.

14 MR. DENNEHY: The - - -

15 JUDGE STEIN: I mean, wouldn't that have
16 solved the problem right there?

17 MR. DENNEHY: In other words, more toward
18 the - - - a limiting instruction, Your Honor is
19 suggesting?

20 JUDGE STEIN: Well, yeah. Exactly.
21 Limiting - - - so then the testimony about this trial
22 could have been so limited - - -

23 MR. DENNEHY: Well - - -

24 JUDGE STEIN: - - - and we wouldn't have
25 had all of this, you know, looking for - - - drawing

1 inferences in the summation and - - - all - - -

2 MR. DENNEHY: But - - -

3 JUDGE STEIN: - - - of that. And - - - and
4 the defense wouldn't - - - it's - - - what concerns
5 me is it looks like because of this initial ruling,
6 everything sort of came out, one after the other
7 after the other. And then everybody's arguing well,
8 I had to do this because the other side did this, and
9 - - - and it just got out of hand.

10 MR. DENNEHY: Once defense counsel signaled
11 her intent to talk about the women flip-flopping at
12 the Sykes trial and then going into Witness
13 Protection and receiving ten - - - tens of thousands
14 of dollars from the - - - from the District
15 Attorney's Office, it made it - - -

16 JUDGE STEIN: But they did that because - -
17 - because this eviden - - - this was already in
18 evidence.

19 MR. DENNEHY: It - - - they did that
20 because Gibson was killed. And - - - and without
21 evidence of the Gibson murder, they would - - - the
22 jury would have been left with the false impression
23 that - - -

24 JUDGE STEIN: I'm sorry, I meant - - -

25 MR. DENNEHY: - - - they were doing it

1 because the - - -

2 JUDGE STEIN: - - - the defense did that.

3 MR. DENNEHY: - - - District Attorney was
4 paying them to do it.

5 JUDGE STEIN: Not the witness.

6 MR. DENNEHY: There was a legitimate reason
7 why these things happened, and the jury would - - -

8 JUDGE PIGOTT: Well, it sounds - - - it
9 sounds to me that there was a decision made by the
10 trial judge on a matter of evidence, and - - - and
11 our decision is to decide whether that decision was -
12 - - was an error as a matter of law, right? I mean -
13 - -

14 MR. DENNEHY: An abuse of discretion, as a
15 matter of law, correct, Your Honor.

16 JUDGE PIGOTT: If it's - - - if it's - - -
17 yeah, if it's just a discretionary call, then who are
18 we to second guess it?

19 MR. DENNEHY: Especially where there was a
20 really legitimate basis for - - - for the court's
21 decision here to permit - - - to permit this
22 evidence.

23 And don't forget, instructions were given
24 throughout - - - during jury selection by the judge.
25 The prosecutor even made statements in his opening

1 statement that there was no evidence - - - I don't
2 want to mischaracterize what he said. He said that -
3 - - that defendant was nowhere near the shooting when
4 Gibson was killed. And then again, there was a
5 charge given in the final charge by the jury - - - to
6 the - - - by the judge to the jury. And again, the
7 prosecutor stated in his summation that there was no
8 evidence that - - - that defendant was involved in
9 the Gibson shooting.

10 So any - - - any prejudice that - - - that
11 was caused by this was - - - was slight, at best.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. DENNEHY: Could I just address - - -

14 CHIEF JUDGE LIPPMAN: Sure, you have time.

15 MR. DENNEHY: - - - I have a little bit of
16 time?

17 CHIEF JUDGE LIPPMAN: Go ahead.

18 MR. DENNEHY: My - - - my adversary
19 mentioned that there was - - - there was no evidence,
20 or that - - - that the Gibson murder caused the girls
21 to act as they did in flip-flopping at the - - - at
22 the Sykes trial. And - - - and in his brief he
23 argues that - - - that threats from law enforcement
24 about arrests were the reason why they - - - they
25 actually flip-flopped and why they went into Witness

1 Protection.

2 That's simply not the case. If - - - the
3 evidence shows that the girls - - - the detectives
4 asked - - - after the Gibson murder, the detective
5 reached out to them and said do - - - we're concerned
6 about you. Do you want to come with us? And they
7 said, no, we're okay.

8 And then a day later, the girls reached out
9 to that detective and said we have something to tell
10 you. So the girls reached out on their own, and - -
11 - and revealed the - - - the witness bribery and
12 tampering that the defendant did.

13 So therefore, of course, they - - - they -
14 - - it was - - - it was the Gibson murder and not the
15 threats. Because the threats only came after the
16 girls reached out on their own. So I wanted to clear
17 that up.

18 JUDGE ABDUS-SALAAM: If you know, counsel,
19 does the record reveal whether - - - there were other
20 witnesses besides these three teenage girls to the
21 Sykes murder?

22 MR. DENNEHY: Correct.

23 JUDGE ABDUS-SALAAM: So after Gibson, who
24 was one of those witnesses, was - - - was murdered
25 himself, or killed, you said the police reached out

1 to those teenage witnesses. Did they reach out to
2 any other - - - of the other witnesses?

3 MR. DENNEHY: From my involvement with the
4 case - - -

5 JUDGE ABDUS-SALAAM: Does the record show -
6 - -

7 MR. DENNEHY: - - - Your Honor, the only
8 four witnesses that were lined up to testify against
9 Wesley Sykes were the three women and Bobby Gibson.

10 JUDGE ABDUS-SALAAM: And Gibson?

11 MR. DENNEHY: Yes. The last point I want
12 to make is that my adversary also said the defense -
13 - - we don't know what - - - what theory the defense
14 would have pursued. There were multiple theories
15 available.

16 I want to dispute that. The only theory
17 the defense had was that the girls - - - the women
18 were lying at the trial about receiving 500 dollars.
19 The defense counsel had to admit that - - - that
20 defendant brought them over to the attorney's office.
21 The only possibility for an acquittal here was that
22 they were lying about receiving the 500 dollars.
23 That's credibility.

24 And the Gibson murder was directly relevant
25 to - - - to the credibility of these three witnesses.

1 Therefore, it was properly admitted.

2 CHIEF JUDGE LIPPMAN: Okay, thanks,
3 counselor.

4 MR. DENNEHY: Thank you, Your Honors.

5 CHIEF JUDGE LIPPMAN: Rebuttal?

6 MR. VORKINK: Yes, Your Honors, very
7 briefly. I just want to address one minor record
8 point. I don't want to get bogged down in the
9 appendix. But the issue as to whether or not - - -
10 who contacted who that late June weekend of 2002,
11 there's widely conflicting testimony about that.

12 The officers testified that Smith called
13 them on June 30th. Smith actually never indicates
14 precisely that she called. She actually gives
15 conflicting reports as to what happened. She says I
16 never reached out to the police. At one point she
17 says potentially I did, but then she - - - she then
18 contradicts herself. And so there's no real
19 evidence. And I would - - -

20 JUDGE ABDUS-SALAAM: But it's true,
21 counsel, that the police reached out to the - - - the
22 witnesses - - -

23 MR. VORKINK: Right.

24 JUDGE ABDUS-SALAAM: - - - after the Gibson
25 murder. Was there something wrong with that?

1 Because Gibson was one of the witnesses who was
2 slated to testify, I think, two days after he was
3 murdered?

4 MR. VORKINK: That's right, Your Honor.

5 JUDGE ABDUS-SALAAM: So would there be
6 anything wrong with the police reaching out to other
7 potential witnesses to find out if they're okay, or -
8 - -

9 MR. VORKINK: I think, as a matter of
10 procedure, of course not, Your Honor. I - - - but I
11 think in this case the question was, insofar as the
12 Bobby Gibson evidence was admitted because it was
13 relevant to the issue of why the girls came forward
14 to the police, that arguably the record and what was
15 ultimately testified to, did not support that ground
16 of relevancy.

17 And - - - and what I'd also like to just
18 say is that defense counsel did not telegraph her
19 intent to bring up the issue of the relocation which
20 was discussed by my adversary here. And I think that
21 notwithstanding the prosecutor's own statement to the
22 court that the defense counsel did not intend to do
23 that, defense counsel never raised the issue of the
24 relocation in her opening statement. And while
25 ultimately she did cross-examine the complainants

1 about it, she only did that after the People had
2 elicited substantial testimony about their big
3 relocation project, again - - -

4 JUDGE RIVERA: But could you realistically
5 - - - I mean, he's saying that realistically, that -
6 - - that is your theory. You have to do that. Is it
7 possible to have proceeded without that?

8 MR. VORKINK: I think that it was, Your
9 Honor. I think that these were three young teenage
10 girls - - -

11 JUDGE PIGOTT: But wouldn't it have been
12 ineffective assistance of counsel if you - - - if
13 that wasn't raised and the - - - and the conviction
14 followed? I mean, wouldn't you say wait a minute;
15 you know, here's a - - - here's a key piece of
16 evidence that should have been brought out that the
17 defense did not do?

18 MR. VORKINK: Well, respectfully, Your
19 Honor, I think defense counsel pursued a variety of
20 theories. Yes, she did challenge the credibility of
21 the complainants. But again, this was after the
22 initial ruling.

23 But Judge, I think she also questioned the
24 circumstances of the July 4th shooting themselves,
25 and I think suggested that one could perceive the

1 events differently, and so in fact, maybe the girls'
2 test - - - gave truthful statements sworn. And so
3 she didn't necessarily have to attack them based on
4 the relocation.

5 The final thing I just want to mention - -
6 -

7 CHIEF JUDGE LIPPMAN: Last point,
8 counselor. Your time is up.

9 MR. VORKINK: The People have pursued what
10 is, in effect, an anticipation - - - anticipatory
11 relevancy, which is to say that something which might
12 potentially become relevant based on cross-
13 examination by the defense is, in effect, relevant
14 from the start of trial.

15 And there's no case law to support this.
16 And I would actually argue that this court's decision
17 in Liller and in other cases suggests that you cannot
18 do that.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. VORKINK: That the proper thing is to
21 bring this in rebuttal, if not at all.

22 CHIEF JUDGE LIPPMAN: Thank you. Thank you
23 both.

24 MR. VORKINK: Thank you very much, Your
25 Honors.

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CHIEF JUDGE LIPPMAN: 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 of the State of New York v. Dupree Harris, No. 137 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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