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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 103

DAVID VAUGHN,

Appellant.

20 Eagle Street
Albany, New York
October 17, 2024

Before:

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

Appearances:

SAM FELDMAN, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street, 9th Floor
New York, NY 10038

MELISSA OWEN, ADA
BROOKLYN DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
350 Jay Street
Brooklyn, NY 11201-2904

Christian C. Amis
Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is People v. Vaughn.

3 MR. FELDMAN: Good afternoon. Sam Feldman of
4 Appellate Advocates for appellant, David Vaughan.

5 The trial court in this case excluded important
6 topics of expert testimony on the reliability of eyewitness
7 identifications at a trial where eyewitness identifications
8 were vital to the - - -

9 JUDGE TROUTMAN: When were these requests made
10 with respect to the trial itself?

11 MR. FELDMAN: The - - - so I believe defense
12 counsel first alerted opposing counsel and the trial court
13 that he wanted to call an expert on, I believe it was - - -

14 JUDGE TROUTMAN: That was after the trial court
15 initially made the inquiry of defense counsel as to whether
16 he was going to offer expert testimony, correct?

17 MR. FELDMAN: I believe the initial notification
18 that he intended to offer expert testimony was before
19 trial. It was a week - - -

20 JUDGE GARCIA: That was only on cross-racial at
21 that time, right?

22 MR. FELDMAN: Yes, that's right. That's the only
23 topic that was mentioned at that time. But - - - but he
24 did say it was a week or nine days before trial that he
25 wanted to call an expert.

1 JUDGE TROUTMAN: Did the court have the ability
2 to consider the timing of the request and the adequacy of
3 what it was that supported him getting it?

4 MR. FELDMAN: Well, there's sort of two - - - two
5 responses I'd give to that. The first is that - - - that
6 the timing of this request to put on this testimony was not
7 unusual, and it's one that this court has blessed in the
8 past, in both People v. McCullough and People v. Lee - - -

9 JUDGE TROUTMAN: And the court did in fact grant
10 the request for cross-racial identification. Let's go to
11 the second part with respect to those factors. And the
12 court questioned whether he sufficiently laid out support
13 for the fact that he was entitled to get them.

14 MR. FELDMAN: That's - - - that's true. There
15 was some discussion of that. I mean, I'll say the - - -
16 whether - - - as to the question of whether or not the
17 application was timely. First of all, the court
18 specifically said it - - - it wasn't going to deny - - -
19 deny it as untimely. And it didn't. It denied it on the
20 merits. In general, I think under the criminal - - -

21 JUDGE TROUTMAN: So let's go to the adequacy of
22 the request.

23 MR. FELDMAN: Sure. So the - - - the - - - the
24 main - - - the factors that we're - - - we're raising on
25 appeal here, these three factors, the effect of stress;

1 whether - - -

2 JUDGE TROUTMAN: He offered more than three,
3 initially.

4 MR. FELDMAN: He did, yes. There was, I think,
5 like - - -

6 JUDGE TROUTMAN: And did he refine them for the
7 court at that point so that the court could make a reasoned
8 decision?

9 MR. FELDMAN: Yeah. The court basically said
10 pretty much from the get-go that for all the factors other
11 than cross-racial identification, it believed they were
12 within the ken of an - - -

13 JUDGE TROUTMAN: What did he give the court?

14 MR. FELDMAN: Only argument. He didn't give the
15 court case law on that. It's - - - it's true - - -

16 CHIEF JUDGE WILSON: And then that's my sort of
17 problem is that - - - it seems to me reading the record,
18 the court says I want you to - - - you've got to give me
19 some case law support for this.

20 MR. FELDMAN: I think it - - -

21 CHIEF JUDGE WILSON: And - - - and counsel says,
22 okay, I'll do that and then doesn't provide it.

23 MR. FELDMAN: I think what the court said, and
24 this was early on in the discussion, was something like
25 before I can consider this, you know, give me case law or

1 something like that.

2 CHIEF JUDGE WILSON: Yeah.

3 MR. FELDMAN: And if the court had not - - - had
4 left it at that, had not considered the request, had not
5 given a decision because it was never given case law, then
6 this issue wouldn't be preserved for this court's review.
7 But the court did in fact consider the request at length
8 and did render a decision, did make very clear what the
9 decision - - -

10 JUDGE TROUTMAN: Did the court note that it was a
11 preliminary - - - a preliminary decision with respect to
12 it?

13 MR. FELDMAN: Did the court know that it was a
14 preliminary - - -

15 JUDGE TROUTMAN: Did - - - what - - - when the
16 court made a determination, doesn't the record reflect that
17 the court initially characterized it as a preliminary
18 determination?

19 MR. FELDMAN: It did. And then there was further
20 discussion later, and the court made a final decision - - -

21 JUDGE TROUTMAN: Did - - -

22 JUDGE HALLIGAN: But - - - but didn't - - - go
23 ahead. Sorry.

24 JUDGE TROUTMAN: Did the defendant's counsel, at
25 - - - after that - - - what did he do after that

1 preliminary determination?

2 MR. FELDMAN: Just offered further argument
3 during the subsequent discussion.

4 JUDGE TROUTMAN: Did he offer case law at that
5 point?

6 MR. FELDMAN: No. No. And perhaps he should
7 have. But since the court did decide the issue on the
8 merits, I think the merits of the issue are, you know, ripe
9 for this court's review. And the - - - what the court
10 never did was apply the correct test based on existing case
11 law from this court at the time - - -

12 JUDGE SINGAS: But why does the Supreme Court's
13 accurate statement that it has the discretion whether to
14 admit or preclude this testimony warrant reversal?

15 MR. FELDMAN: That statement alone doesn't. But
16 the court never applied the - - - the proper test, which is
17 just the same test that applies to any type of expert
18 testimony. This is under this court's decision in People
19 v. McCullough. That test is - - - of course, there's the
20 Frye factors: relevance, qualified expert, and so on. And
21 then if - - -

22 JUDGE TROUTMAN: But isn't there an argument that
23 the court couldn't tell - - - tell whether it was or wasn't
24 because the defense didn't sufficiently put forth that
25 which the court needed in order to make that determination?

1 MR. FELDMAN: The defense argued that it was
2 beyond the ken of the average juror. The court concluded,
3 otherwise. I think that decision - - -

4 JUDGE TROUTMAN: So what - - - could one say
5 that's a conclusory argument?

6 MR. FELDMAN: Which would - - - the - - - what
7 defense counsel's argument was - - -

8 JUDGE TROUTMAN: Correct.

9 MR. FELDMAN: I wouldn't say it was conclusory.
10 I think defense counsel asserted what he needed to assert,
11 which is that the average juror just doesn't - - -

12 JUDGE TROUTMAN: With all ten of those factors,
13 not three like it's been reduced.

14 MR. FELDMAN: The court did address some of them
15 specifically, including at least weapon focus and stress,
16 and argued specifically that those were beyond the ken of
17 the average juror, which is, of course, what this court and
18 other courts have held, and which is also supported by
19 ample empirical evidence as cited in our briefs.

20 But what the court never did was it never looked
21 at the - - - the probative value of this evidence and
22 weighed it against any countervailing factors. It never -
23 - - it never decided that the - - - the probative value of
24 this testimony to the jury - - -

25 JUDGE TROUTMAN: The court was required to do

1 that, regardless of the adequacy or inadequacy of that put
2 forth - - - put forth by the defense?

3 MR. FELDMAN: The court was required to do that
4 if - - - you know, if this evidence was relevant and passed
5 the other factors of the Frye test.

6 JUDGE TROUTMAN: Doesn't that - - - doesn't that
7 assume that there was an adequate request before the court
8 - - -

9 MR. FELDMAN: Yes.

10 JUDGE TROUTMAN: - - - so that the court could
11 ascertain what he wanted, why he wanted it, and what
12 supported it being given to him?

13 MR. FELDMAN: Yes. I mean, I would say as far as
14 what he wanted and why he wanted it, I mean, he did lay out
15 the factors. He made specific arguments as to some of
16 them, including some of these that we're raising on appeal.
17 And as for why he wanted it, I mean, this - - - this trial
18 centered on these eyewitness identifications. And that's
19 what the - - - that's what the summations were primarily
20 about. That's what the jury was thinking about, was were
21 these - - -

22 JUDGE TROUTMAN: And the record does clearly
23 reflect that the court was aware of that. And the court
24 prompted the defense, tell me, do you want cross-racial
25 identification before he ever even - - - two weeks out,

1 close to trial, defense hadn't asked for anything. But the
2 court was being proactive, so to speak.

3 MR. FELDMAN: In - - - in that way, it was. I
4 mean, the problem is just that it - - - it got it wrong as
5 to these other factors. The court - - - basically, it said
6 - - -

7 JUDGE TROUTMAN: And timing has nothing - - - no
8 impact?

9 MR. FELDMAN: Timing - - - well, there - - -
10 there's two different ways timing could have an impact.
11 One is if the court had denied the application as untimely,
12 which it didn't do, and maybe it could have done that. The
13 criminal procedure law - - -

14 JUDGE TROUTMAN: With respect to exercising the
15 court's discretion.

16 MR. FELDMAN: Yeah, I would say that a trial
17 court, when - - - when faced with an application that's at
18 least arguably untimely, if the trial court thinks, you
19 know, given the circumstances - - -

20 JUDGE TROUTMAN: And not necessarily untimely - -
21 - in the usual sense, but how it's going to impact with
22 respect to the trial going forward, whether you've already
23 picked the jury, whether you've not picked the jury, if
24 it's going to cause other witnesses to be impacted on when
25 they can give their testimony and their potential

1 unavailability.

2 MR. FELDMAN: Yes. So I'd say there's - - -
3 there's really sort of two - - - two related but different
4 timing topics.

5 JUDGE TROUTMAN: Correct.

6 MR. FELDMAN: There's untimeliness and there's
7 trial delay, and I think - - -

8 JUDGE TROUTMAN: Correct.

9 MR. FELDMAN: Yes. So as far as the - - - the
10 question of trial delay goes, this is an unusual case
11 because here, although the court did preclude these topics
12 of expert testimony, the expert testified anyway and was -
13 - - testified and was cross-examined about his
14 qualifications and his neutrality and his experience in
15 publications. So all of that was essentially a sunk cost.
16 The additional trial time that would have been required to
17 go over these additional topics, which is something that
18 the expert usually tied into cross-racial identification,
19 would have been pretty minimal, especially compared to the
20 - - -

21 JUDGE GARCIA: Would you need a Frye hearing
22 here?

23 MR. FELDMAN: No. And as the trial court
24 recognized, it wouldn't need to hold a Frye hearing if
25 other courts had already held Frye hearings and concluded

1 that these topics, in the past - - -

2 JUDGE GARCIA: And where - - - which - - - which
3 courts had already held that?

4 MR. FELDMAN: It - - -

5 JUDGE GARCIA: And not to cross-racial. Put that
6 aside, of course.

7 MR. FELDMAN: This court had in Santiago and
8 Abney for witness confidence, I believe. And then the
9 lower court also had in Abney, and I think some other
10 courts had as well.

11 JUDGE TROUTMAN: Was that put before the trial
12 court?

13 MR. FELDMAN: No. Again, it wasn't something
14 that defense counsel said - - -

15 JUDGE CANNATARO: Wasn't that the case law that
16 the trial court was asking for?

17 MR. FELDMAN: The trial court was asking for case
18 law specifically on whether it was beyond the ken, I think.

19 JUDGE CANNATARO: They didn't mention Frye - - -
20 about how this might need a Frye test, or maybe it's
21 already been decided? That wasn't part of the colloquy?

22 MR. FELDMAN: The - - - the court did - - - did
23 say that. But its - - - its - - - its main conclusion,
24 which it said, you know, would welcome case law and was
25 that it was within the ken of the average juror.

1 JUDGE GARCIA: Isn't it the burden of the
2 defendant putting forward this evidence to meet the Frye
3 test standard?

4 MR. FELDMAN: Yes. But again, here, the other
5 courts had already held that this evidence had said - - -

6 JUDGE GARCIA: But again, that it wasn't put in
7 front of the judge.

8 MR. FELDMAN: It's true. It would have been - -
9 - it would have been better if it had - - -

10 JUDGE SINGAS: Are you conceding that those areas
11 of law don't require Frye hearings?

12 MR. FELDMAN: Can some - - -

13 JUDGE SINGAS: Those points.

14 MR. FELDMAN: The - - -

15 JUDGE SINGAS: Is that your concession here?

16 MR. FELDMAN: I'm sorry. I'm not sure I
17 understand that question.

18 JUDGE SINGAS: That you don't need a Frye hearing
19 for all nine of those points.

20 MR. FELDMAN: Nine? No. No. I'm just talking
21 about three - - - the three topics that we're arguing about
22 on appeal. You don't need a Frye hearing for those because
23 other courts had already held after Frye hearings that
24 those topics are properly - - -

25 JUDGE TROUTMAN: But he didn't just limit his

1 application to three at the trial.

2 MR. FELDMAN: That's right. But again, I think
3 the - - - the - - - the real - - - the test that courts
4 should apply was not the test that this court applied.
5 This test - - - this court applied the test that has - - -
6 this court deprecated in People v. McCullough, the - - -
7 the two-stage-threshold test, which first says, is there
8 corroboration? And if the answer at that stage is yes,
9 then nothing else matters. The court can admit or deny the
10 testimony as it pleases. That's - - - that's not what the
11 law is under McCullough. That's a position that other
12 state courts have moved away from, and it's one that
13 uniquely disfavors this kind of expert testimony on
14 eyewitness IDs for no reason.

15 JUDGE GARCIA: McCullough, I think, seems to say
16 you just apply discretion, right?

17 MR. FELDMAN: I think it refers to - - - I - - -
18 I don't know if the language is exactly this, but basically
19 general evidentiary principles.

20 JUDGE GARCIA: Which involves some level of
21 discretion.

22 MR. FELDMAN: Yes, certainly.

23 JUDGE GARCIA: And isn't that what the court did
24 here?

25 MR. FELDMAN: The - - - the - - - specifically

1 the way that the court exercises its discretion is by
2 balancing probative value versus countervailing
3 considerations, which isn't what the court did here, but -
4 - -

5 JUDGE GARCIA: Yeah. But I don't see the effect
6 of - - - I think you're arguing the La Grande test, which
7 we said means this in McCullough. What is different than
8 what we said you had to do in McCullough that this judge
9 did?

10 MR. FELDMAN: This - - - both the - - - both the
11 trial court and the Appellate Division were applying a - -
12 - you know, a threshold test, which is exactly what this
13 court said not to do in McCullough, where, again, first you
14 look at is there corroboration? If there is corroboration,
15 then you go to the second stage of the Frye test and all
16 that. If there is - - - if there isn't - - - sorry, I
17 don't know if I said that right. If - - - the point is
18 that here the court said there's corroboration, there's
19 nothing further we need to look at. That's not - - -

20 JUDGE GARCIA: You didn't say that - - -

21 JUDGE SINGAS: I mean, I think the court said, I
22 - - - I've been reading the case law, and the case law says
23 I have the discretion. And he said, I'm applying my
24 discretion. He made his decision. I - - - I don't see
25 where you're - - - you - - - like, show me in the record

1 where he did a two part test pursuant to La Grande.

2 MR. FELDMAN: The court says, since this is
3 corroborated - - - and then the court goes on about how
4 strong the - - - the video evidence is - - - the court
5 says, since this is corroborated, it's really totally in my
6 discretion. And then it - - - it doesn't - - - it never
7 refers to any factor that might outweigh the probative
8 value of the testimony. It doesn't even seem to think
9 about the probative value of the testimony, because once
10 it's determined that there's corroboration, it doesn't - -
11 - there's no further factors that it's looking to there.

12 JUDGE RIVERA: Can you address harmless ever - -
13 - error?

14 MR. FELDMAN: Yeah, certainly. I would say the -
15 - - the error is not harmless for sort of similar reasons
16 to why it's an error, which is that the trial was really
17 centered on these eyewitness identifications, the
18 summations centered on the eyewitness identifications. And
19 the - - - the prosecutor, in fact, used her summation to
20 assert things that were directly contrary to this expert
21 testimony that was excluded. Specifically, she kept
22 returning to the fact that a gun was held to the faces of
23 the complainant, and she asserted to the jury that when a
24 gun is held to your face, that's - - - that's a face you're
25 never going to forget, which - - - which may be intuitive

1 and may - - - may line up with the preconceptions of
2 jurors, but is - - - is contradicted by scientific evidence
3 that would have been presented if the expert was allowed to
4 testify on that.

5 So it certainly could have affected the - - - the
6 jury's consideration, considering that this case really
7 came down - - - as the prosecutor admitted, this case came
8 down to the eyewitness identifications. The prosecutor was
9 asking the jury to rely on them.

10 If there's no further questions, I'll reserve the
11 remainder of my time.

12 CHIEF JUDGE WILSON: Thank you.

13 MS. OWEN: Good afternoon, Your Honors. Melissa
14 Owen for the People of the State of New York. This court
15 has not blessed untimely applications. Opposing counsel
16 referred to the cases of Lee and McCullough - - -

17 JUDGE RIVERA: Yeah, but that - - - the judge
18 addressed the merits. The judge did not deny this based on
19 the timeliness or the untimeliness of the application. Why
20 don't you talk about the merits?

21 MS. OWEN: Certainly, Your Honor. The judge did
22 not say she was not going to preclude based on
23 untimeliness. I believe opposing counsel misspoke. At
24 appendix 241, after defendant made his late application for
25 eleven completely new topics, some of which were not



1 relevant to the facts of the case, the ADA got up and
2 objected, and when she did, she said she was going to
3 reserve her objections to the other eleven to some later
4 point and spoke only to the cross-racial identification,
5 the timely application. It was in response to that that
6 the judge said, I'm not likely to deny this based on
7 timing. The timing comment was solely related to the
8 cross-racial identification. The judge did appropriately
9 exercise her discretion here. She did not summarily stop
10 thinking about the admissibility of this evidence when she
11 determined that there was sufficient corroboration such
12 that she was not - - -

13 JUDGE RIVERA: But - - - but - - - but I - - - I
14 - - - didn't the judge state that it's not - - - it is
15 within the ken of the jurors for some of the kinds of
16 issues that they wanted to address through the expert, and
17 that seems contrary to what we have said.

18 MS. OWEN: Absent to any - - -

19 JUDGE RIVERA: Not for all of them. Not for all
20 - - - I'm not saying about all of them, but for some of
21 them.

22 MS. OWEN: Absent any support from defense
23 counsel handing up any case law, she said she believes some
24 of that - - -

25 JUDGE RIVERA: But didn't the judge say, I

1 reviewed the case law?

2 MS. OWEN: Pardon me?

3 JUDGE RIVERA: Didn't the judge say, I reviewed
4 the case law?

5 MS. OWEN: She reviewed the case law for some of
6 the topics. We don't know - - -

7 JUDGE RIVERA: Well, shouldn't we assume the
8 judge is aware of the case law?

9 MS. OWEN: Judge - - -

10 JUDGE RIVERA: Especially from this court.

11 MS. OWEN: Certainly, Your Honor. She did refer
12 to Le Grande. She did refer to Boone. It was on the other
13 topics that she wasn't entirely sure of, which is why she
14 twice asked defense counsel for case law, which he did not
15 hand up at any point, though he was given ample
16 opportunity. He made his - - -

17 JUDGE RIVERA: So the judge denied the motion
18 because the judge didn't know the law?

19 MS. OWEN: The judge denied the motion because
20 the request was untimely and because she did not - - -

21 JUDGE RIVERA: Well, again, that's not the ground
22 that the judge articulated.

23 MS. OWEN: The judge is not required to
24 articulate every specific reason for her ruling. As long
25 as upon review we look at the record and we can find a

1 rational basis for that decision, the decision can be
2 upheld, and that is the case here. She repeatedly said
3 that - - -

4 JUDGE RIVERA: And what's the rational basis
5 here? Just that it's untimely?

6 MS. OWEN: It's undue delay. When we're
7 performing the probative - - -

8 JUDGE RIVERA: But that's contrary to the record
9 that that isn't the basis for the finding. What else would
10 make it an - - - a reasonable decision?

11 MS. OWEN: Undue delay alone makes it a
12 reasonable decision.

13 JUDGE RIVERA: I understand. But let's say the
14 record doesn't support that. So I'm asking you to - - - to
15 get to something else.

16 MS. OWEN: The judge could have found that
17 because there was ample evidence in this case that it would
18 not have been sufficiently probative. Here, when we look
19 at corroboration, it's not just little to no and then
20 everything else afterwards. There's a spectrum. Here, the
21 judge under McCullough is required to look at the case
22 holistically, which he did.

23 JUDGE RIVERA: Okay.

24 MS. OWEN: We look at the categories. How many
25 witnesses were there? Were there one or were there two?

1 What was the extent of the interaction?

2 JUDGE RIVERA: But it's hard to see how you can
3 use the - - - the evidence that's going to be challenged
4 through this expert testimony as being corroborative.
5 That's the whole point, right? Isn't that the point of
6 this request?

7 MS. OWEN: The point of - - -

8 JUDGE RIVERA: I want to put in this testimony.
9 I want the jurors to fully appreciate some of these
10 weaknesses in eyewitness testimony. Isn't that the point?

11 MS. OWEN: When - - -

12 JUDGE RIVERA: So how can - - - how can the very
13 testimony that's - - - that's the subject of the request be
14 corroborative?

15 MS. OWEN: Because when there are sufficient
16 indicia of reliability, the judge can appropriately find
17 that the testimony of an expert witness would not have a
18 great likelihood of affecting the result of the jury.

19 JUDGE RIVERA: Well, what would be the indicia of
20 reliability if the science works in the opposite direction?
21 I mean, the prosecutor got at least one of those wrong.

22 MS. OWEN: Well, again, the court was confronted
23 with eleven topics. And here, at a remove of seven years,
24 defense counsel has winnowed them down to the three that
25 happened to meet Frye.

1 JUDGE RIVERA: Right.

2 MS. OWEN: That's not the situation the judge was
3 faced with. What she was faced with was - - -

4 JUDGE RIVERA: Well, what about the three,
5 though? I mean, that's what judges do, right?

6 MS. OWEN: The judge - - -

7 JUDGE RIVERA: They say you're not - - - I'm not
8 going to grant it on this, but I'll grant it on that.

9 MS. OWEN: Which is what she did, which is why we
10 know she appropriately exercised discretion.

11 JUDGE RIVERA: Well, only on one, and
12 begrudgingly so. But let's talk about the three on appeal
13 that you say there had been Frye - - - Frye decisions on.

14 MS. OWEN: Expert witness testimony provides a
15 lens by which other testimony could be viewed. Because of
16 that, we have to look at what the other testimony and what
17 the other evidence in the case is to see whether or not it
18 would have been sufficiently probative to overcome what, in
19 this case, would have been very specific and record
20 supported undue delay - - -

21 JUDGE RIVERA: Well, other than the - - - other
22 than the - - - the complainants who are also the victims
23 are also the eyewitnesses. Other than the witnesses, what
24 - - - what else was the evidence against the defendant?

25 MS. OWEN: When we're looking at the reliability

1 of the evidence, it's not just are there victims, and did
2 they identify him? We have to look at the quality of the
3 interaction that they had. Was it a few seconds? Was it
4 longer?

5 JUDGE RIVERA: No. No. I understand - - - I - -
6 - I fully understand your point. It's well taken. I'm
7 asking, in addition to the witnesses, what was the other
8 evidence - - -

9 MS. OWEN: There was - - -

10 JUDGE RIVERA: - - - that the judge considered?

11 MS. OWEN: There was a video of the entire
12 incident.

13 JUDGE RIVERA: Okay.

14 MS. OWEN: The defendant showed his face on
15 camera for thirty seconds. You saw his full face. You saw
16 his profile. You saw his height. You saw his gait. You
17 saw his weight. You saw what he was wearing. The jury was
18 able to view that and then look at the arrest photograph of
19 defendant, where he was also wearing a brown-hooded
20 sweatshirt. They were then able to compare that with a
21 photograph of defendant, taken four months before the
22 arrest, where he was wearing a brown-hooded sweatshirt.
23 And because of that, because we're not just at the state of
24 eking over the line of little to no, we have more than
25 adequate, sufficient corroboration here.

1 And the evidence, when we're looking at the
2 reliability, also counsels towards preclusion of these
3 other eleven late-requested topics. This interaction was
4 inside a well-lit office. It was not outside. It was not
5 in the dark. It was thirty seconds with ninety seconds of
6 defendant - - - or the robber, who was later identified as
7 defendant - - - being on camera. And after that we have
8 the two victims following defendant for three minutes while
9 they're making contemporaneous descriptions over the phone
10 to 911.

11 We're looking at a case where they're in an
12 office. They're arm's length away. The victims had
13 adequate opportunity to view the defendant. And the judge
14 hearing all that and working behind the eight ball, as she
15 said repeatedly during this case, she found that she would
16 admit the evidence on cross-racial identification because
17 that was something that had already been brought up during
18 the trial. It was something that was opened on. It was
19 something that was part of the - - - the cross-examination
20 of the complainants.

21 And here when we're talking about, I believe you
22 referred to it as the sunk cost phenomenon, adding eleven
23 topics is not a small cost, especially here. Whereas the
24 judge said, she was already beyond the time that she told
25 the jurors they would sit for. She had already lost an

1 alternate. The ADA said, depending on the scope of the
2 expert testimony that was going to be admitted, she may
3 very well need a rebuttal.

4 We're butting up against the very real courtroom
5 issue of scheduling here. It is a pillar of what can be
6 found to be prejudicial in a case like this, which is why
7 the court appropriately exercised her discretion.

8 JUDGE RIVERA: And why - - - why did the court
9 get to the merits?

10 MS. OWEN: Pardon me?

11 JUDGE RIVERA: Why did the court get to the
12 merits? Seems - - - seems like a fair argument you're
13 making for saying it causes too much trial delay. You're
14 late. Sorry.

15 MS. OWEN: I'm sorry. Did you say, why did the
16 court get?

17 JUDGE RIVERA: Yeah. Why did the court get to
18 the merits?

19 MS. OWEN: It's possible she was thinking out
20 loud. She was trying to explain what she was doing. She
21 was suddenly confronted with eleven topics and - - -
22 without a list, without case law, without any support from
23 anyone, and saying, I don't think this would be helpful,
24 but please convince me. Tell me - - - give me some case
25 law. Show me how this would be helpful. She said, if you

1 brought this up earlier, things could have been different,
2 but that's not what happened. What happened - - -

3 JUDGE HALLIGAN: Well, she says there's
4 corroboration for the identification through the clothing
5 of the defendant as well as the videotape. So isn't that a
6 ruling on the merits, or - - - or you think not?

7 MS. OWEN: I think that's her determining that
8 she's not constrained to admit the testimony under Le
9 Grande, but she does have to proceed into what McCullough
10 counseled as a more holistic view of the case and where - -
11 -

12 JUDGE HALLIGAN: And where is she doing that?

13 MS. OWEN: Pardon me?

14 JUDGE HALLIGAN: Where is she doing that? You
15 said she has to proceed, as McCullough instructs. Where is
16 she doing that? In this sentence or someplace else?

17 MS. OWEN: She's doing it when she talks about
18 the undue delay, because when we're looking at the probity
19 of the evidence, we balance that against prejudice. And
20 something that could be prejudicial and is in this
21 instance, under Purdue, is - - -

22 JUDGE HALLIGAN: So her reference is to delay,
23 and there are certainly some, you're right. You think that
24 that is - - - is where she's doing the balancing? You said
25 she's got a balance, right, the probative value and the

1 prejudice. I think that's what you just said.

2 MS. OWEN: That's right.

3 JUDGE HALLIGAN: And - - - and your view is that
4 the delay is the prejudice.

5 MS. OWEN: The delay is the prejudice, and the
6 delay is what makes her ruling appropriate for the other
7 eleven topics that she was suddenly confronted with.

8 If there are no other questions, I would rely on
9 my brief. Thank you.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. FELDMAN: I'd like to just direct the court
12 to page 350 of the appendix for the question of sort of
13 what - - - what was the trial court's decision here, or
14 what test was it applying? On 350 of the appendix, the
15 court says, basically, I'm going to have pretty strong case
16 law. I've been reading a number of cases. It's really
17 totally in the discretion of the court and goes on to say -
18 - - and this is the - - - the part where I think the
19 threshold test the court's applying is clear. The court
20 says, on this identification testimony, it's really in the
21 discretion of the court with respect to denying it when it
22 is corroborated by other evidence in the case, and there is
23 corroboration for the identification.

24 JUDGE HALLIGAN: She says on the next page that,
25 I guess the other issue is, as I mentioned earlier, you

1 really needed to raise this issue a while ago, and perhaps
2 it might have been a different result. And she goes on to
3 discuss the delay. So she is putting the delay on the
4 table when she's discussing why she's reaching this
5 conclusion, isn't she?

6 MR. FELDMAN: It's - - - it's true. I mean, the
7 court was - - - was complaining about this and clearly
8 wished that defense counsel had presented this earlier.

9 JUDGE HALLIGAN: Well, she - - - I'm not sure if
10 she's just complaining. She says, perhaps it might have
11 been a different result.

12 MR. FELDMAN: That's true. I don't think that -
13 - - I don't think anybody at the time understood this to be
14 denying it as untimely. And I will say, I believe opposing
15 counsel, I think, just argued that the topics we're arguing
16 about on appeal were denied as untimely. That's - - - I've
17 been litigating this case through the Appellate Division
18 here, and that's the first suggestion of that I've heard.
19 I - - - I don't think anybody until now had asserted that
20 the application was denied as untimely. The - - -

21 JUDGE GARCIA: But can't timeliness factor into
22 this discretionary decision, and particularly where you
23 come in with a list of eleven topics which now have been
24 narrowed to, for an appeals court, to three. And we can
25 look at the law, and we can look at the Frye, and we can

1 look at - - - but this is walking in on a judge with eleven
2 topics without briefing, without cases, without follow up
3 at this stage of the trial. So why isn't it within the
4 trial court's discretion to say that's a factor here?

5 MR. FELDMAN: It's - - -

6 JUDGE GARCIA: You got something else, give me
7 something else, but these eleven topics, no.

8 MR. FELDMAN: So I'll say, trial courts have a
9 difficult job. I certainly recognize that. And sometimes
10 a trial court will be presented with a number of arguments,
11 and some of them are meritless, and some of them have
12 merit, and it's the trial court's job to sort through them
13 and - - - and sort - - -

14 JUDGE GARCIA: So let's say the trial court here
15 had said, I looked at this, and I just think, given you
16 came in at this 11th hour, I'm giving you the one that you
17 had given some notice of before. I'm denying all the
18 others as untimely, given the state of the trial now and my
19 repeated request and this late hour, would that be okay?

20 MR. FELDMAN: I'm sorry. Could you just repeat -
21 - -

22 JUDGE GARCIA: They just want to - - - if the
23 judge just went on timeliness and said, look, you've come
24 in here. Look at the stage of the trial we're at. Look at
25 this - - - which they - - - she does walk through, I



1 believe. This is when you were asked. This is when you -
2 - - this is when it got here. This is when - - - and now
3 you come in with eleven topics, and you expect me to parse
4 through them without any case law. I'm denying it. Is
5 that okay?

6 MR. FELDMAN: On the one hand, it might be. On
7 the other hand, I would point to this court's language in
8 McCullough and Lee saying that, you know, it is appropriate
9 for courts to decide these issues during trial.

10 But I would just point back to the cardinal
11 principle, as this court has said, that all relevant
12 evidence is admissible unless there's - - -

13 JUDGE TROUTMAN: Whose job is it to establish for
14 the trial court so that the trial court will have the
15 information to consider before rendering a decision as to
16 the probative value and relevance of? Was that on the
17 defense?

18 MR. FELDMAN: The probative value and relevance?

19 JUDGE TROUTMAN: Yes. And the case law
20 supporting that he was entitled to this, that he needed it.
21 And - - - and I am puzzled how in the calm of an appellate
22 court you got - - - you have three. You have eleven. The
23 court - - - the trial court's responsible for the jury, for
24 the lawyers, for staffing, and all these other issues. Are
25 you telling - - - are you suggesting to us that the trial

1 court has to lay all of that out before they can say that
2 the defendant is being denied, if, quite frankly, you can
3 see by the record, when the request was made, how it was
4 made, that the court did not abuse its discretion.

5 MR. FELDMAN: I guess just a couple of quick
6 things. I know my light is on. Did - - - I think it is on
7 the proponent to establish the relevance and the probative
8 value. I think that - - - that was clear on the - - - on
9 the record of this trial, the relevance and the probative
10 value of at least the - - -

11 JUDGE TROUTMAN: And the support - - -

12 MR. FELDMAN: As for the legal - - -

13 JUDGE TROUTMAN: - - - as to his entitlement to
14 it.

15 MR. FELDMAN: As for the - - - the - - - I - - -
16 I don't think that counsel, you know, by not offering case
17 law has - - - has forfeited the issue. I would also point
18 out the court was aware - - -

19 JUDGE TROUTMAN: So the court's responsibility is
20 to do the research, argue both sides as to the law too?

21 MR. FELDMAN: I mean, the court's responsibility
22 is to make the right decision when the motion has been
23 presented to it. But I would point out that the court was
24 aware that this particular expert normally testifies about
25 cross-racial ID together with these two other topics - - -

1 JUDGE TROUTMAN: Are - - - are you telling me
2 proactively the court has to assume that those extra
3 factors were going to be requested by the defendant when
4 the defendant never even asked originally for cross-racial
5 identification until the court inquired, hey, are you going
6 to do something? Are you going to offer something?
7 Because the court has to factor all of that into
8 consideration with respect to the running of the trial.

9 MR. FELDMAN: Yes. Again, I think once it was -
10 - - it was clear enough from the trial record that this was
11 relevant and probative information, at that point, it was
12 up to the trial court to apply the correct test. The trial
13 court was aware - - -

14 JUDGE TROUTMAN: It was up to the trial attorney
15 to do their job and to get it to the court in a timely
16 fashion and fully explore it so that the court could make
17 that decision.

18 MR. FELDMAN: I - - - I'll - - - I'll just - - -
19 I'll just end by saying that the trial court was aware, at
20 the point where it made - - - where it made its final
21 decision, there was reference to the fact that this expert
22 generally testified about cross-racial ID together with
23 weapon focus and stress effects. So of course, the court
24 could know from that alone that - - - that this - - - these
25 topics had been approved by other courts, had passed the

1 Frye test. There was nothing further that the court needed
2 to note for at least those two topics, that this should
3 have been admissible evidence.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. FELDMAN: Thank you.

6 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. David Vaughn, No. 103 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: C. Chris Amis

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: October 23, 2024

