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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 9

ANDERSON (KELLY),

Appellant.

20 Eagle Street
Albany, New York
January 7, 2026

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Anderson.

3 MS. SWARTZ: Good afternoon. May it please the
4 court. Melissa Swartz, on behalf of the appellant, Kelly
5 Anderson. My plan would be to address point one and then
6 skip to point three. Unless this court would happily take
7 me on some sort of detour, I'm happy to do that. Regarding
8 point one, whether or not the Fourth Department manifested
9 a lack of application of its review power in this case by
10 applying an incorrect legal standard, I do have to
11 acknowledge the Baque decision and some of the writing in
12 the Baque decision, which says, the Appellate Divisions
13 don't need to, you know, go through all the facts. I would
14 have loved it if they did so in this case. But they don't
15 have to according to this court's precedent.
16 I believe there's a footnote in Baque that says, even if
17 the decision - - - the writing is unclear, that that seems
18 to go against anybody making the same argument that I'm
19 making.

20 And I'd also like to acknowledge that the court
21 did cite to Bleakley. I believe they cited to Lane. And
22 both of those cases pertain to the weight of the evidence.
23 What's different in this case than in Baque is that the
24 court quoted and cited to a legal sufficiency standard.
25 The court stated, to the extent there was conflicting

1 testimony, we conclude that it is merely presented - - - it
2 merely presented an issue of credibility for the jury to
3 resolve. They then cite to Boyd, which is another Fourth
4 Department case, that - - - and that section of Boyd dealt
5 with the legal sufficiency.

6 And this court's decision in Bleakley says that
7 this court - - - the Fourth - - - the Appellate Divisions
8 are obligated to weigh the evidence and weigh the
9 conflicting testimony. So they clearly did not do that.
10 While I agree with my opponent that the Appellate Division
11 usually defers to the jury's credibility determinations,
12 there's ample case law saying that. But what they're
13 saying is, oh, the jury did it, and it can't - - -

14 JUDGE TROUTMAN: But couldn't it just mean in an
15 appropriate case, they can substitute? They chose not to
16 here.

17 MS. SWARTZ: I think if it was worded differently
18 and it didn't directly cite to Boyd, which, if you go into
19 Boyd, it's the legal sufficiency point in Boyd, where they
20 said that weighing the evidence has just merely presented
21 an issue of credibility for the jury to resolve. That's
22 incorrect. Bleakley tells us that's incorrect, right? The
23 Appellate Division has to weigh the evidence. If they had
24 framed it in a way that said - - -

25 JUDGE TROUTMAN: But again, what do you say about

1 the Appellate Division's ability, in an appropriate case,
2 to substitute their judgment on credibility? They don't
3 have to always, do they?

4 MS. SWARTZ: They don't always have to. They can
5 say, here, we've deferred to the credibility deter - - -
6 determinations.

7 JUDGE CANNATARO: And what's the difference?

8 JUDGE TROUTMAN: But you acknowledge they have
9 the ability - - -

10 MS. SWARTZ: They do.

11 JUDGE TROUTMAN: - - - to reject substituting.

12 MS. SWARTZ: Correct. But I don't specifically
13 say - - - I don't believe they're rejecting it here. I
14 think they're saying that credibility issues are a matter
15 always for the jury. And that's in - - -

16 JUDGE HALLIGAN: It's a little hard to tell,
17 though, from that sentence, isn't it?

18 MS. SWARTZ: I don't believe it is. And
19 especially because it's a quote.

20 JUDGE SINGAS: We said in Baque, the Appellate
21 Division must afford deference to the fact finders
22 opportunity to view the witnesses, hear the testimony,
23 observe demeanor, although it may substitute its own
24 credibility determinations for those made by the jury in an
25 appropriate case.

1 MS. SWARTZ: Correct.

2 JUDGE CANNATARO: May, but doesn't have to.

3 MS. SWARTZ: May but doesn't have to. But here,
4 the Appellate Division didn't say that. The Appellate
5 Division said that credibility determinations and how those
6 are looked at are a matter for the jury, but it's not.

7 JUDGE CANNATARO: And is your argument on this
8 that the - - -

9 JUDGE HALLIGAN: It could be, though, okay? I
10 don't - - -

11 JUDGE CANNATARO: - - - that it's such a sweeping
12 statement that they deferred all credibility doubt to the -
13 - - to what the jury did and just said, we're not going to
14 and maybe even we can't do that. Is that your argument?

15 MS. SWARTZ: I think it is my argument - - -

16 JUDGE CANNATARO: Okay.

17 MS. SWARTZ: - - - because I think it's the only
18 argument I can make - - -

19 JUDGE CANNATARO: Okay.

20 MS. SWARTZ: - - - on the issue is regards to
21 that. I - - - I guess - - -

22 JUDGE HALLIGAN: But it might be - - - and I
23 appreciate your candor.

24 MS. SWARTZ: Okay.

25 JUDGE HALLIGAN: It might be that, although the

1 sentence could have been more precisely written, it seems
2 to me that maybe you could read the sentence - - - this is
3 the one that precedes the Boyd cite, right?

4 MS. SWARTZ: This - - -

5 JUDGE HALLIGAN: That you're referring to?

6 MS. SWARTZ: No. I'm referring to the sentence
7 that is directly proceed - - - yes, precedes the Boyd cite
8 case.

9 JUDGE HALLIGAN: To the extent it was conflicting
10 testimony, we conclude it merely presented an issue of
11 credibility for the jury to resolve, yes? I mean, that
12 could be understood, perhaps not precisely crafted, but as
13 saying, here, we looked at it, and we've decided that where
14 there is conflicting testimony, we're going to defer to the
15 jury as opposed to, we are operating under a sweeping rule
16 that says, in every circumstance, you know, from behind the
17 - - - the veil, we're going to decide, we defer to the
18 jury, which I take it you're saying, fairly, so probably, I
19 think, that that would be an incorrect statement of law?

20 MS. SWARTZ: Correct.

21 JUDGE CANNATARO: That - - - I agree that would
22 be, but I - - - and I think in that sentence, the - - - to
23 the extent it's probably the language that signals, we're
24 not saying this is a rule of general application. We're
25 saying that there might be credibility issues arising that

1 we know we can address if we want to, but we're okay with
2 what the jury did. Isn't that another reasonable reading
3 of that sentence?

4 MS. SWARTZ: I think that is a reasonable reading
5 of that sentence. My issue with the sentence is that it
6 directly quotes - - - it directly cites to Boyd.

7 JUDGE CANNATARO: Cites to Boyd.

8 MS. SWARTZ: And if you look at Boyd, the - - -
9 the paragraph that Boyd is referring to is strictly a legal
10 sufficiency point.

11 JUDGE GARCIA: But it also cites to Lane. I
12 mean, you see, generally, and Lane sets out the right
13 standard, right?

14 MS. SWARTZ: It also cites to Lane, correct, as I
15 acknowledged at the beginning of the argument.

16 JUDGE GARCIA: Yeah.

17 MS. SWARTZ: It also cites to Garrow, a Fourth
18 Department case, which frankly, I don't know why Garrow was
19 cited.

20 JUDGE TROUTMAN: So we're supposed to go through
21 and cite-check the AD? Do you want us - - -

22 MS. SWARTZ: I think - - - yeah.

23 JUDGE TROUTMAN: - - - to cite-check them - - -

24 MS. SWARTZ: I - - -

25 JUDGE CANNATARO: - - - to determine if they

1 don't explicitly say what you think they should say? That
2 - - - that is what you're suggesting.

3 MS. SWARTZ: I don't think I'm suggesting that,
4 Your Honor, respectfully. I think - - -

5 JUDGE TROUTMAN: Then what?

6 MS. SWARTZ: I - - - they're using a direct quote
7 from another decision, and that direct quote pertains to
8 the sufficiency argument in the case they cite to.

9 JUDGE TROUTMAN: But that does involve checking
10 their cites.

11 MS. SWARTZ: Correct.

12 JUDGE GARCIA: But that's a general argument,
13 right? That doesn't go to the circumstantial evidence
14 issue, right?

15 MS. SWARTZ: It does not. And if I can move on
16 to point three, unless the court has any other questions
17 about point one. Again, I'm going to start my argument by
18 acknowledging, you know, ineffective assistance of counsel
19 is a high burden on a defendant. And it's my burden. And
20 I understand that, and I acknowledge that. And I don't
21 think I would be standing here even making this argument if
22 this was a run-of-the-mill case and it was me complaining
23 about attorney failing to make evidentiary objections,
24 preclusion motions on evidence that didn't matter. But
25 this case isn't run of the mill, and this isn't evidence

1 that the People classify as unimportant to their case.

2 It's an eighteen-year-old cold case,
3 circumstantial. It's a highly emotionally charged child
4 homicide. And by the People's own admission and their
5 eavesdropping warrant, they didn't have enough - - - they
6 didn't believe they had enough to convict her without the
7 calls. And the Fourth Department stated that I would not
8 have had any chance of success - - - not me, but trial
9 counsel would not have been able to preclude the phone
10 calls that I take issue with. Many of the phone calls that
11 were - - -

12 JUDGE TROUTMAN: But couldn't there have been a
13 strategy - - - it seems there was, in fact, a strategy.
14 She was a young, confused mother, distraught, and parsing
15 out which parts of the phone calls, because they seem
16 innocuous. There's no out-and-out admission of guilt in
17 them, is there?

18 MS. SWARTZ: She makes no admissions of guilt in
19 the call, although the People characterizes some of the
20 statements as full-out - - - I - - - they equate it almost
21 to confessions in their summations. But I don't believe
22 the strategy is - - - I don't think the record fairly bears
23 out the strategy that the Fourth Department gave to it,
24 which was, oh, trial counsel just said she was a grieving
25 mother - - - a confused, grieving mother. If you go back

1 and look at trial counsel's summation, that's not something
2 that she argues. And when she puts her client on the
3 stand, that's not something that she tries to get out
4 through her client, that she was confused and grieving.

5 JUDGE TROUTMAN: So what should the attorney have
6 done here?

7 MS. SWARTZ: The attorney? I mean, the best
8 practice, and the practice she should have done in this
9 type of case when the evidence is so slim and it's so thin
10 by the People's own admissions and by the fact that it took
11 eighteen years to arrest it, is you preclude the evidence
12 that is inadmissible, and then you form a strategy. This
13 court has said that. You don't take evidence - - - not try
14 to get rid of something that's damning, and then put your
15 client on the stand and hope that they can explain it. And
16 that's specifically important regarding the calls, where my
17 client talks about getting a lawyer and the calls where she
18 talks about not speaking to the police. I think those were
19 calls that definitely would not have come in. I can't
20 actually think of an argument that would have allowed them
21 to come in if the proper objections would have been made
22 for them. They're clearly inadmissible.

23 JUDGE TROUTMAN: So because that is - - - those
24 were a mistake, you say making no - - - is it just not
25 objecting to those or not making an objection to the calls

1 in total?

2 MS. SWARTZ: Not the calls in total. I mean, I
3 think that some of the calls properly came in. The
4 District attorney's Office, while I disagree with what they
5 showed, I think some came in to show inconsistency, which
6 is consciousness of guilt.

7 JUDGE TROUTMAN: But that which affected her
8 right to counsel, her right to remain silent, and it's
9 fundamental you're arguing the lawyer should have said no?

10 MS. SWARTZ: Correct. And it's highly damning,
11 right? It might not be that highly damning to us, you
12 know, people that know the law, and say, well, people
13 invoke the right to an attorney all the day - - - all the
14 time, but it's highly damning to lay people. And that's
15 why it's not permissible when it comes out at trial. And
16 it shouldn't be permissible because your attorney allowed
17 it to come in under the guise of, they hoped they would
18 explain it as somebody being confused. When I listen to
19 those calls and I hear the calls about the lawyer and about
20 the silence, I don't get confusion, right? I get - - -

21 JUDGE RIVERA: Why isn't that a disagreement
22 about strategy?

23 MS. SWARTZ: I don't think that's a disagreement.
24 I think a disagreement about strategy would be the fact
25 that trial counsel tried to pin this homicide on the other

1 child in the bedroom, and when she could have tried to say
2 it was Maguire. That's - - - I disagree with - - - you
3 know, one of those - - - both of those could be made, and I
4 think they're fine to be made. I disagree when an attorney
5 doesn't protect their client by precluding what is
6 obviously inadmissible evidence. There is no argument that
7 those calls can come in.

8 JUDGE RIVERA: Would you agree that a lawyer
9 could strategically decide that I could object to it, but I
10 think I have a way I can use that, and that lawyers might
11 disagree about whether or not one could get the benefit
12 from the use that that lawyer has decided they're going to
13 get from the evidence if it is admitted? I'm sorry if
14 that's a little convoluted.

15 MS. SWARTZ: No. It's not complicated. I'm
16 trying to think of a situation where I would want any jury
17 to hear that my client invoked the right to a lawyer. I
18 don't think there is a situation.

19 JUDGE CANNATARO: It sounds to me like - - -

20 JUDGE RIVERA: Is that the only one then? Is
21 that the one - - - that's the call?

22 MS. SWARTZ: No. I have other calls. Those
23 calls, I take particular issue with. The other calls are
24 where my client is talking about third-party opinion
25 regarding her guilt, and specifically that Kelly did do

1 this call. I take issue with that. My opposing counsel
2 has not made any efforts to explain how that call is
3 admissible. Everything a defendant says is not admissible.

4 And in summation, opposing counsel did say Kelly
5 did do this. Those are her words. And he equates it to a
6 confession. But those aren't Kelly's words. Those are the
7 words of her sister. And now the jury's heard that even
8 her own sibling believes she's guilty. And again, if I was
9 sitting here on a run-of-the-mill that had DNA, had some
10 sort of video evidence, I wouldn't be making this type of
11 argument. This isn't that case.

12 Those calls were extremely important to the
13 People's case by their own admissions - - - by their own
14 sworn admissions and their affirmation. And I think trial
15 counsel, if she would have been doing her due diligence - -
16 - and I bring up other issues in my brief that I won't
17 touch upon, but I think these are the ones that I - - - I
18 really thought I wanted to address with the court. She
19 would have asked to preclude them like any legitimate or
20 reasonable attorney would have. And unless the court has
21 any other questions for me, I'll rely on the - - - on my
22 brief for the remaining point.

23 CHIEF JUDGE WILSON: Thank you.

24 MS. SWARTZ: Thank you.

25 MR. CASELLA: Good afternoon. Todd Casella, for

1 the People. I'll start with that last point because I
2 don't know that I made it as clear as I could have in my
3 brief. That call where Kelly Anderson says - - - and she's
4 purporting to be quoting her sister. She says, an in - - -
5 and I'll tell you - - - my bro - - - she's talking to her
6 brother. I'll tell you what she said. Kelly did do this.
7 I listened to that call as well, and that's not what
8 Kelly's sister said. Kelly's sister said - - -

9 JUDGE TROUTMAN: Why offer that call?

10 MR. CASELLA: Because Kelly's sister said, Kelly
11 did not do this. Kelly Anderson, the defendant, misquoted
12 her sister. She didn't say what her sister said. What
13 that call was was Kelly's words. She's purporting to be
14 quoting her sister, but she's misquoting her sister. Her
15 sister said, Kelly did not do this, but Kelly Anderson,
16 quoting her to her brother, says - - -

17 JUDGE TROUTMAN: What about her silence, her
18 right to counsel - - -

19 MR. CASELLA: So the calls - - -

20 JUDGE CANNATARO: - - - the purpose of offering
21 that. Does the defendant not have the right to counsel and
22 to remain silent?

23 MR. CASELLA: Absolutely. So the calls where
24 there's - - - where the word lawyer is mentioned, these
25 aren't calls where Kelly says - - - and I trust the court's

1 listened to them. She's not saying, I want my lawyer to -
2 - - they come up in a larger context of the call. It's
3 almost in passing. And the one call her mother is speaking
4 over her.

5 JUDGE TROUTMAN: But why offer them?

6 MR. CASELLA: So the one call where she's
7 speaking to her mother, and she tries to get - - - and that
8 she's going to ask for a lawyer - - - that she got a quote
9 from a lawyer is a call where her mother is telling her,
10 you need to put it in the police officer's minds that if
11 you ever had a problem with the child - - - if you couldn't
12 handle what was going on with those boys, you could've walk
13 across the parking lot and gave those boys to Ron's mother,
14 that was Allen, and you need to get that in their mind. So
15 the reason that call was offered was because it
16 foreshadowed what Kelly Anderson said to her son, Jordan,
17 in the 2015 call, where she says - - - in response to, why
18 Ethan and not me? She says, because he cried a lot and he
19 woke up at night.

20 CHIEF JUDGE WILSON: Yeah. But I think the
21 question of the ineffectiveness, though, is why the lawyer
22 didn't ask to excise the portion that had to do with
23 counsel. It's not that the rest of the call was admissible
24 or not, right?

25 MR. CASELLA: You know, in hindsight, 20-20 - - -



1 and could it have been redacted? Possibly. It was
2 embedded in the larger context of that call, embedded in
3 the call itself, and muting it was something - - -

4 CHIEF JUDGE WILSON: But Judge Troutman's
5 question was whether the particular piece that mentions
6 counsel - - - let's assume it could be redacted for the
7 purpose of this - - - was there any purpose the - - - the,
8 you know - - -

9 MR. CASELLA: And I don't - - - and I never
10 referred to her asking for a lawyer in summation, in an
11 opening. I was never arguing to the jury that this means
12 something, folks. It was just - - - it was to get to that
13 other part of the call. And that's true of the other ones
14 as well, that there was a greater purpose to why I was
15 introducing that call. It had nothing to do with the
16 attorney. I never argued that to the jury in opening or
17 summation. And you're not going to hear what Kelly had to
18 say about this because she was asking for a lawyer. I was
19 never making that argument to the jury.

20 JUDGE TROUTMAN: But that's why the question, as
21 the Chief Judge points out, redaction would have been the
22 simple measure to - - -

23 MR. CASELLA: Redaction - - -

24 JUDGE TROUTMAN: - - - have been undertaken.

25 MR. CASELLA: - - - would have been the - - - how

1 it was interwoven into the portions that I believe were
2 relevant made it difficult to do that. And it didn't
3 happen. And in hindsight, if I - - - I would have - - -
4 would have tried to find a way to mute that - - - it wasn't
5 objected to by counsel because these calls had relevant
6 information in it, but they also showed Kelly Anderson's
7 demeanor as this investigation was unfurling. So the way
8 the wiretap worked was, how do you get a suspect in a
9 homicide to talk about a crime that happened seventeen
10 years ago? Well, you start talking to people.

11 JUDGE SINGAS: No. I think you're
12 misunderstanding. I don't think the point - - - we're
13 questioning why the calls came in at all or what the
14 motivation was to bring the calls in. What we're
15 questioning is why the defense attorney never objected to
16 them and made the motion to - - - so it's not - - -

17 MR. CASELLA: So - - - so - - -

18 JUDGE SINGAS: - - - your explanation really is -
19 - -

20 MR. CASELLA: So - - -

21 JUDGE SINGAS: - - - besides the point.

22 MR. CASELLA: I believe, again, when you look at
23 the Fourth Department's decision, I think they hit it.
24 They showed how Kelly was reacting to this investigation
25 being reopened, her emotional response, her - - - in the

1 moment, how she was dealing with this coming back to life.

2 JUDGE TROUTMAN: But again, the problem with the
3 lawyer and the silence is that that's still - - - arguably,
4 could have been offered by the defense attorney without the
5 portions that the jury had no business hearing. That's the
6 objection of - - - of - - -

7 MR. CASELLA: And - - - and it's - - -

8 JUDGE TROUTMAN: - - - the appellate counsel
9 here. It's like, it's fine if that's your strategy, but do
10 your job and protect your client. Don't offer more than is
11 necessary.

12 MR. CASELLA: To the point of whether she thought
13 about this and made the conscious decision, strategically,
14 to allow these clips in, okay? I would draw the court's
15 attention to what wasn't in the initial appendix, but what
16 was in the supplemental, which was the three extensions
17 that defense counsel made to review the record before she
18 filed her motions. So she asked for a total of ninety days
19 of additional time to go through the - - -

20 JUDGE HALLIGAN: Is that relevant?

21 JUDGE CANNATARO: What's the strategy of that?

22 MR. CASELLA: So what I'm saying is that she
23 considered it - - - that she considered this. I had made
24 the clips. She had - - - she knew what they were going to
25 be. She had the opportunity to review them and to make the

1 decision of whether, strategically - - -

2 JUDGE HALLIGAN: I'm not sure whether we engage -
3 - - yeah. I'm not - - -

4 MR. CASELLA: - - - she would want to have those
5 in or - - -

6 JUDGE RIVERA: It's possible - - -

7 JUDGE HALLIGAN: I'm not - - -

8 JUDGE RIVERA: - - - that all that consideration
9 still resulted in a decision that falls below professional
10 standards.

11 MR. CASELLA: It's possible.

12 CHIEF JUDGE WILSON: It's also possible that the
13 three successive extension requests were because she had so
14 many other things to do, she couldn't focus on this case at
15 all, and maybe nothing changed after ninety days.

16 MR. CASELLA: There's nothing to indicate that,
17 but - - -

18 CHIEF JUDGE WILSON: Yeah. Right. Or - - - yeah
19 - - - right? There's nothing to indicate any relevance to
20 that.

21 MR. CASELLA: She was - - -

22 JUDGE HALLIGAN: And I'm not sure that we gauge
23 whether there's been a strategic decision by how long
24 counsel has had to consider the question.

25 MR. CASELLA: Fair.

1 JUDGE HALLIGAN: Right?

2 MR. CASELLA: Fair. As it concerns her overall
3 preparedness for this case, what did she do as a whole in
4 this case? She was extremely prepared to cross-examine the
5 medical examiners and try to provide an innocent
6 explanation or a medical explanation for the bruising that
7 Ethan occurred. A big part of the People's case was the
8 Molineux evidence that Ethan had been abused at the hands
9 of Kelly. We had witnesses to that, pediatric expert for -
10 - - the pediatrician of the child for that. And she was
11 very well prepared to cross-examine those medical examiners
12 about what tests weren't done, what medical diagnoses could
13 have explained this bruising other than Kelly Anderson. So
14 I think she was - - - she had a plan. She had a strategy.
15 She attacked the People's case where she could, and she
16 didn't fight where she didn't think she could be
17 successful. If there's nothing more on that - - -

18 JUDGE RIVERA: Well, can you address the weight
19 of the evidence issue?

20 MR. CASELLA: Yes.

21 JUDGE RIVERA: Please.

22 MR. CASELLA: Thank you. So - - -

23 JUDGE RIVERA: Well, I'm particularly curious
24 what we should make of the fact that the Appellate Division
25 says, although a different verdict would not have been

1 unreasonable, what do we do with that in a circumstantial
2 evidence case?

3 MR. CASELLA: So I would start with that's a
4 threshold issue that has - - - so the court has to say a
5 different verdict wouldn't have been unreasonable, or they
6 don't get to conduct the weight of the evidence review.
7 They don't have that power unless a different verdict would
8 have been unreasonable. So it's odd the way - - - where
9 that sentence is placed in the decision. I'll give that.
10 I think it would have made more sense if it preceded the
11 sentence before it. If they started with, although a
12 different verdict, wouldn't have been unreasonable, and
13 then gave their concluding sentence. Rather, they start
14 with their concluding sentence and deciding that, viewing
15 the evidence in light of the elements of the crime charged
16 as - - - of the crime as charged to the jury, we conclude
17 the verdict was not against the weight of the evidence.
18 That's their conclusion. It would have made sense if the
19 supporting sentence was perhaps before it, but it's - - -

20 CHIEF JUDGE WILSON: So if you believe that a
21 different verdict on the evidence, and presumably, that's a
22 verdict of innocent - - - not guilty, right, would have - -
23 - not have been unreasonable, how do you get to the record
24 providing support for a finding of guilt beyond a
25 reasonable doubt?

1 MR. CASELLA: Well, if I take that question to
2 its final conclusion, any time you have a circumstantial
3 evidence case, if the court is able to do a weight of
4 evidence analysis, then they essentially have to reverse.
5 Because if a different verdict would be unreason - - -
6 would be unreasonable - - -

7 CHIEF JUDGE WILSON: Well, that's if you view
8 that the - - - if you view that test the way you're saying
9 it. But what - - - let's take it a piece at a time. What
10 do you think when a court says a different - - - and it's a
11 purely circumstantial case. A court says, on this record,
12 a different verdict would not have been unreasonable. What
13 do you think that means?

14 MR. CASELLA: It means that, if you were to try
15 the case ten times, you might get nine convictions and one
16 acquittal. That a different jury could have reached a
17 different conclusion, or that that jury themselves could
18 have reached a different conclusion. But the standard from
19 circumstantial is not beyond - - - it's not any different
20 than beyond a reasonable doubt. It's not - - -

21 CHIEF JUDGE WILSON: Right.

22 MR. CASELLA: - - - beyond all doubt. So - - -

23 CHIEF JUDGE WILSON: Right.

24 MR. CASELLA: So - - -

25 CHIEF JUDGE WILSON: Right.

1 MR. CASELLA: - - - really, it's something that
2 has to be said in order to reach - - - to reach the weight
3 of the evidence. Otherwise, there is no threshold. So in
4 a case that's just so clear-cut, the defendant completely
5 admits to the crime, there's video of him doing the crime,
6 we're not going to do a weight of the evidence analysis.
7 But anything where we have a circumstantial case, where
8 there's conflicting testimony or reliability issues of
9 witnesses or evidence, we're going to look at this more
10 closely. We're going to look at that evidence because a
11 different - - - a jury could have come out differently on
12 this case because it's not clear-cut. We're going to
13 exercise that - - - that authority there.

14 JUDGE CANNATARO: So irrespective of where you
15 put it in the - - - where a court puts it in the decision,
16 do you see a tension in the Bleakley requirement that there
17 has to be a finding, one, that a different verdict would
18 not have been unreasonable, and two, that the inference of
19 guilt is the only one that could be fairly and reasonably
20 drawn from the facts? Is there some internal contradiction
21 in those two requirements?

22 MR. CASELLA: I really don't think so. When
23 we have to look at what the Baque decision says and what
24 Bleakley says and what Romero says, it says, if there's not
25 a manifest error in the - - - the standard that was applied

1 by the court, there's nothing here that would indicate that
2 they didn't appreciate the standard that they needed to
3 apply when they did weigh. There's nothing to indicate
4 they applied the wrong standard. Lane cites to Bleakley.
5 It was decided the same day as Romero - - - the same day
6 the decision for Romero came out. The Garrow decision
7 clearly states the correct standard. There was no dispute
8 amongst the parties at the Fourth Department as to what the
9 standard was. We both all - - - we both briefed the
10 correct court cases.

11 JUDGE CANNATARO: And you can have those two
12 things? That's really all I'm asking. You think - - - you
13 would argue, as a matter of law, that you can have both a
14 view that a different verdict would not be unreasonable,
15 but also a view that, in the case at hand, the inference of
16 guilt is the only one that can reasonably be drawn from the
17 facts?

18 MR. CASELLA: Yes. I think you have to. Because
19 if the answer to that is no, then every purely
20 circumstantial case must be reversed on a weight - - - if
21 the weight of the evidence analysis is done.

22 JUDGE CANNATARO: It's scary.

23 MR. CASELLA: That's scary. And that's not what
24 the law says, right?

25 CHIEF JUDGE WILSON: Well, you could have a

1 purely circumstantial case where the court concluded that
2 no reasonable jury could have come out the other way.

3 MR. CASELLA: That's a different answer. That's
4 a different question, right? If no reasonable jury could
5 have convicted this person, that's not the - - - that's not
6 the standard here. That's more likely - - - that's a - - -

7 CHIEF JUDGE WILSON: Well, no reasonable - - -

8 JUDGE CANNATARO: That's a sufficient - - -

9 MR. CASELLA: Sorry.

10 CHIEF JUDGE WILSON: - - - no reasonable person
11 could have acquitted the person.

12 MR. CASELLA: No reasonable person could have - -
13 -

14 CHIEF JUDGE WILSON: No reasonable jury could
15 have acquitted the person.

16 MR. CASELLA: Could have acquitted - - - then you
17 wouldn't do a weight of the evidence - - -

18 CHIEF JUDGE WILSON: Right.

19 MR. CASELLA: - - - analysis at that point. So
20 what they're saying here is this isn't that case. This is
21 a case where we should exercise our weight of the evidence
22 power. And still the - - - it was there, right? They have
23 to have that ability. Otherwise what's the point of - - -
24 of - - - really - - -

25 JUDGE RIVERA: Is there difference between - - -

1 between determining that an acquittal might have been
2 appropriate, but not that that equates to a finding of
3 innocence?

4 MR. CASELLA: Can you - - - so when you say a
5 finding of innocence, meaning, like, that they're not
6 guilty, correct?

7 JUDGE RIVERA: No. Because we've been pretty
8 clear those are not the same.

9 MR. CASELLA: Right. I'm just trying to
10 understand.

11 JUDGE RIVERA: An acquittal could mean the People
12 didn't meet their burden.

13 MR. CASELLA: Right.

14 JUDGE RIVERA: But not that the jury is persuaded
15 that the individual is innocent.

16 MR. CASELLA: Correct.

17 JUDGE RIVERA: I think it's - - - myself, I find
18 this very challenging jurisprudence, but it seems to be our
19 jurisprudence.

20 MR. CASELLA: Yes.

21 JUDGE RIVERA: So I'm asking you in this context
22 on the weight of the evidence, does sort of that
23 jurisprudence matter? Does the way the court has, in the
24 past, viewed an acquittal not necessarily equating with a
25 finding of innocence matter?

1 MR. CASELLA: I think it matters, but I think it
2 goes to what's the - - - what was the court's decision on
3 the weight of the evidence? Did they do what they're
4 supposed to do, weigh the conflicting testimony, look at
5 the rational inferences to be drawn for that, and - - - and
6 decide for themselves as that thirteenth juror if - - - if
7 it was proven. And here, they did. And there's nothing in
8 this decision to indicate that they obfuscated that
9 responsibility or that they applied the wrong legal
10 standard. Thank you, Your Honors.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. SWARTZ: Very briefly. Regarding the Kelly
13 did do this call, opposing counsel states that his
14 justification for putting it in was that he had listened to
15 the other call. That other call was not admitted into
16 evidence. And there was a very, very easy remedy for
17 actually putting it in a proper way, if that was his
18 legitimate concern. And that would be on rebuttal if Ms.
19 Anderson brought up that call and then somehow he wanted to
20 rebut, you know, that she made the incorrect statement. On
21 the record that's before this court, he put in the Kelly
22 did do this call for the purpose of the argument he made in
23 his summation, which is to say that those are her words and
24 to equate it to a confession.

25 He also discussed the lawyer call and said that

1 while it was embedded - - - if this court goes back and
2 looks at those calls, the lawyer conversation that she had
3 with her mother - - - not her stepmother, but with her
4 mother is at the very end of that call. It easily could
5 have been clipped. If you take a look at all the other
6 clips, there seems to be some pretty advanced precision in
7 how the calls are clips. Some of them are just, you know,
8 one party saying one sentence and another party saying
9 another. It easily could have been taken out and it
10 wasn't.

11 Regarding the ineffective assistance of counsel
12 and the other things that counsel did - - - you know, that
13 she effectively cross-examined a medical expert, I - - - my
14 argument is more of analogy to this court's decisions in
15 Fisher or T.P., right? Where I don't know in those
16 decisions whether or not counsel effectively cross-examined
17 anybody. I'm sure they did. Any, not even great lawyer,
18 but halfway decent lawyer knows how to cross-examine any
19 witness. It's more so what was allowed to be said that was
20 highly prejudicial. In this case, I do make some
21 references to the prosecutor's summation and some things
22 that I thought were improper. But the calls that were put
23 in and the failure to object to those calls, I would equate
24 to making inappropriate arguments during summation, which
25 this court has reversed on - - - recently in T.P. and as

1 well as in Fisher.

2 And then regarding the court's last questions to
3 opposing counsel regarding, if you can have a finding of
4 legally sufficient evidence, but then also have the finding
5 that another verdict would have not have been - - - would
6 not have been unreasonable, that's this court's law right
7 now. And I would be a fool to say I could opine on
8 something brilliant that would be better than what this
9 court could opine on in fashioning. I do think those two
10 things are inconsistent with each other. And what troubles
11 me in this case is that they found another verdict wouldn't
12 be unreasonable, and then said that the - - - the jury did
13 all of the credibility determinations and they were okay
14 with that, as opposed to exercising their weight of the
15 review power to review those - - - that conflicted
16 testimony.

17 JUDGE RIVERA: The question is, if they say,
18 although a different verdict would not have been
19 unreasonable given it's a circumstantial evidence case,
20 does that, as he says, mean that they can't do a weight of
21 the evidence because they'd have to do an automatic
22 reversal?

23 MS. SWARTZ: I don't believe that this court's
24 precedent says that right now, if I'm being completely
25 intellectually honest.

1 JUDGE TROUTMAN: But it - - - could it be that it
2 was just left off that if the jury credited the defendant's
3 version, it would not have been unreasonable, but then go
4 on to the review of the weight of the evidence? Is that
5 possibly what they simply did here?

6 MS. SWARTZ: It could be, Your Honor.

7 JUDGE TROUTMAN: It is an awkward way to speak.

8 MS. SWARTZ: Correct.

9 JUDGE TROUTMAN: I understand, but - - - and did
10 you - - - so is that one of your main arguments?

11 MS. SWARTZ: It is not, Your Honor.

12 JUDGE TROUTMAN: Okay.

13 MS. SWARTZ: Thank you. Unless there's anything
14 further - - -

15 JUDGE RIVERA: Can I just - - - well, let - - -
16 let - - - no. So in Baque, if it's - - - if we say the
17 Appellate Division must satisfy itself that - - - and here
18 it's quoting Sanchez - - - the inference of guilt is the
19 only one that can fairly and reasonably be drawn from the
20 facts, and that the evidence excludes, beyond a reasonable
21 doubt, every reasonable hypothesis of innocence. So if you
22 say, although a different verdict would not have been
23 unreasonable, how have you excluded every possible theory
24 of innocence?

25 MS. SWARTZ: Correct, Your Honor. And that's why

1 I said I do - - - I do believe those two things are
2 inconsistent, but I think that's an issue that has been
3 created by this court's precedent, respectfully, because I
4 do think those two things are highly inconsistent.

5 JUDGE RIVERA: So the - - - is he then correct
6 that, as a consequence of Baque, that any time an Appellate
7 Division says this prefatory phrase, that they must
8 automatically reverse in a circumstantial evidence case?

9 MS. SWARTZ: I don't think they would have to
10 automatically reverse, but I think they would if - - - if
11 they believed that it wasn't against the weight of the
12 evidence.

13 JUDGE GARCIA: Well, we said in Baque you have to
14 do that. And then we went on and did the circumstantial
15 evidence test. So apparently, in Baque, it didn't prevent
16 this court from reaching the weight of the evidence review,
17 even though, as we said, that must be a preliminary step,
18 right?

19 MS. SWARTZ: Correct. And that's where I find
20 myself in a difficult position of - - -

21 JUDGE GARCIA: Understood.

22 MS. SWARTZ: - - - telling this court how to
23 resolve an issue that was created in Baque.

24 JUDGE GARCIA: By us.

25 JUDGE CANNATARO: By itself.

1 MS. SWARTZ: But prior to that - - - but prior to
2 - - - itself, yes - - - I do think those two things are
3 inconsistent. And if this court wants to take this
4 opportunity to clarify those two things, then obviously,
5 this court has the power to do that. How it should do
6 that, like I said, I think, that's best for the court's
7 discretion to do. And if it favors my - - -

8 JUDGE RIVERA: Of course. The decision here
9 predates Baque?

10 MS. SWARTZ: Correct.

11 JUDGE RIVERA: So the appellate panel did not
12 have the benefit of Baque to - - -

13 MS. SWARTZ: Correct.

14 JUDGE RIVERA: - - - perhaps share some wisdom of
15 its own view of what that language might mean, or perhaps
16 not use this phrase.

17 MS. SWARTZ: Correct. And if that decision comes
18 out to benefit my client, then I would obviously ask you to
19 remit or reverse. So thank you so much.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anderson (Kelly), No. 9 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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