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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 36

AUSTIN CORNELIUS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 6, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 36, People versus  
2 Cornelius.

3 Counselor, do you want any rebuttal time?

4 MS. KNIGHT: Two minutes, please.

5 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
6 counselor.

7 MS. KNIGHT: Good afternoon. My name is  
8 Margaret Knight from the Office of the Appellate  
9 Defender on behalf of Austin Cornelius. In Mr.  
10 Cornelius's trial, the prosecution was allowed to  
11 prove critical elements of burglary through  
12 statements of absent witnesses contained in - - -

13 CHIEF JUDGE LIPPMAN: What about Delacruz,  
14 though? He had knowledge of what's going on, right?

15 MS. KNIGHT: We're not challenging the  
16 trespass notice that was introduced through Delacruz;  
17 that is correct. But there were two other notices  
18 that contained accusations of past criminal activity.

19 CHIEF JUDGE LIPPMAN: Are they just  
20 cumulative or - - -

21 MS. KNIGHT: Absolutely not, and I - - -

22 CHIEF JUDGE LIPPMAN: Why not? Why not?

23 MS. KNIGHT: Because the testimony of  
24 Delacruz was very - - - was impeached. He testified  
25 that he saw Mr. Cornelius secreting disposable

1 cameras in the Duane Reade and that he saw him trying  
2 to leave the store. In fact, the videotapes showed  
3 neither one of those things. So his testimony was  
4 already impeached with that inconsistency.

5 In addition, the videotapes seemed to show  
6 Mr. Cornelius - - - certainly a reasonable inference  
7 was that he was being assaulted by Delacruz, so he  
8 had a bias motive there. The trespass notice that  
9 was introduced through Delacruz - - - it said it was  
10 refused. There was no signature there. And in fact,  
11 Police Officer Darryl Ng testified that he called, he  
12 asked Duane Reade, he looked for a trespass notice  
13 and was told that none existed.

14 So, I mean, these were critical elements  
15 that - - - they could have rejected Delacruz's  
16 testimony. They could have found that Mr. Cornelius  
17 had no knowledge of a prior testim - - - prior  
18 trespass notice. So Delacruz - - - this was not an  
19 open-and-shut case. What, in fact, these other  
20 trespass notices did was - - -

21 JUDGE GRAFFEO: Did the situation change  
22 when the defense used a portion of the trespass  
23 notices?

24 MS. KNIGHT: Are you - - -

25 JUDGE GRAFFEO: There was a top and bottom

1 half, I guess.

2 MS. KNIGHT: Are you asking he ope - - -

3 JUDGE GRAFFEO: In other words - - -

4 MS. KNIGHT: - - - did he open the door to  
5 the bottom half of these? Absolutely not. I think,  
6 first of all, the bottom half of the trespass notices  
7 already contained allegations that Mr. Cornelius had  
8 committed - - - engaged in criminal activity on prior  
9 occasions. So it wasn't substantively different,  
10 what came in.

11 And as to the opening of the door, defense  
12 counsel's questions were directed exactly at the  
13 nature of the confrontation clause violation in this  
14 case. All he showed was that Delacruz did not have  
15 personal knowledge of what had happened before. And  
16 this is the crux of the confrontation clause problem  
17 here, that this was a weaker substitute for live  
18 testimony that was coming in. It was past criminal  
19 activity that was formalized for use at a later trial  
20 and it - - -

21 JUDGE GRAFFEO: If you could stop right  
22 there.

23 MS. KNIGHT: Yeah.

24 JUDGE GRAFFEO: How did the - - - they were  
25 different Duane Reade stores involved here, I

1 presume.

2 MS. KNIGHT: Yes.

3 JUDGE GRAFFEO: When they issued these  
4 trespass notices, how did they know he was going to  
5 be arrested in the future in another Duane Reade  
6 store? Weren't they preparing those for the purpose  
7 of telling him you're not to come back to this store?

8 MS. KNIGHT: But it was inextricably  
9 linked. I mean, they looked forward to whether or  
10 not he came back. I mean, these aren't relevant if  
11 he wasn't going to come back into the store. And  
12 every single witness who testified about him said,  
13 though, yes, it was telling him that his license to  
14 enter was revoked but also that he would be arrested  
15 if he came back in.

16 And these witnesses - - - looking at this  
17 court's indicia of testimoniality that you've put  
18 forth, Delacruz was acting in a law enforcement  
19 capacity. He was acting just as a police officer  
20 would to - - - you know, to apprehend shoplifters, to  
21 catch criminal activity. And these trespass notices  
22 reflected the exercise of fallible human judgment.  
23 They weren't contemporaneous records of objective  
24 facts. And as such, they fit squarely within the  
25 indicia of testimoniality.

1                   JUDGE SMITH: Well, the - - - the main  
2                   importance of the trespass notices is that they - - -  
3                   they recite on their face that they were, in fact,  
4                   given to the defendant, right?

5                   MS. KNIGHT: They were admissible, really,  
6                   I think, for three purposes, one of them that they  
7                   were given to the defendant as to knowledge but, in  
8                   fact, for burglary it also is true that his license  
9                   to enter the place had to have been revoked so - - -

10                  JUDGE SMITH: They - - - to make - - - to  
11                  turn the shoplifting into a burglary, the People had  
12                  to show that he wasn't - - - that he entered  
13                  unlawfully and, I guess, that he knew he was entering  
14                  unlawfully, right?

15                  MS. KNIGHT: And that he intended to commit  
16                  a crime.

17                  JUDGE SMITH: I mean, even - - - even  
18                  though - - - even if he intended to shoplift, which  
19                  is very hard to believe he didn't, when he crossed  
20                  the threshold, it's not burglary unless he knew he  
21                  was trespassing?

22                  MS. KNIGHT: That is correct, Your Honor.  
23                  But the trespass notices went to his knowledge but  
24                  also to the actual unlawful entry, whether or not he  
25                  wasn't allowed in there, and what his intent was in

1           there. And the court specifically instructed the  
2           jurors that past criminal activity, which is what is  
3           contained in the bottom half of these trespass  
4           notices, was relative - - - or relevant to his  
5           intent. So the trespass notices came in - - -

6                    JUDGE SMITH: Intent - - - you - - - on  
7           intent, don't you have a harmless error problem? I  
8           mean, if you look at the video, it's very hard to  
9           believe he was shopping for his girlfriend and was  
10          going to pay for the items.

11                   MS. KNIGHT: I mean, he was never shown  
12          putting the items into his - - - into a bag or  
13          anything like that, and he was never shown trying to  
14          leave the store. So, I mean - - - and also, you  
15          know, is there legally sufficient evidence? That's  
16          one question, but this is - - -

17                   JUDGE SMITH: The fact that he'd been  
18          shoplifting from a Duane Reade that day, which I  
19          think you say is legitimately admissible, right?

20                   MS. KNIGHT: Yes. The - - -

21                   JUDGE SMITH: The fact that he suddenly  
22          decided he was going to become a normal shopper  
23          paying for the stuff seems like a stretch.

24                   MS. KNIGHT: I mean, it's whether or not  
25          the error was harmless beyond a reasonable doubt.

1 And just because he had shoplifted before does not  
2 necessarily mean that every time he enters a Duane  
3 Reade he was there to shoplift.

4 But going back to the other purposes for  
5 which they came in, the unlawful entry and his  
6 knowledge of that, certainly - - - and going back to  
7 what was said before, the only other trespass notice  
8 that came in was through Delacruz and it was refu - -  
9 - and there was no signature there, and Police  
10 Officer Ng said that there was no other trespass  
11 notice that he was able to locate.

12 So I think respondent, going to the  
13 harmless error, in his Appellate Division brief may  
14 have said it best: "Had only one of the notices been  
15 admitted into evidence, defendant's claim that he did  
16 not remember receiving or signing the notice might  
17 have appeared to have more credence; that the three  
18 trespass notices had previously been issued to  
19 defendant by Duane Reade made it less likely that he  
20 did not know that his entering the Duane Reade store  
21 in this case was unlawful."

22 So, I mean, there was ab - - - they  
23 absolutely shored up a hole in the prosecution's case  
24 that was presented in Delacruz's testimony and in the  
25 refused trespass notice there.

1           Going briefly to the preservation argument,  
2           defense counsel absolutely objected to this on  
3           confrontation clause grounds. He said before the  
4           trial, in a timely specific fashion, that - - - that  
5           he was objecting based on Liner and Cox. The court  
6           said, well, you know, in Liner this court found that  
7           the issue was unpreserved, and defense counsel said,  
8           well, I'm absolutely asserting that now. So we would  
9           argue, certainly, that this court can hear it and the  
10          argument is preserved for review. These are formal  
11          recitations, signed and dated of past criminal  
12          activity that directly accused the recipient of  
13          engaging in criminal conduct. And under Crawford and  
14          its progeny, they are certainly testimonial.

15                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
16           Thank you.

17                   Counselor?

18                   MR. VICKEY: Good afternoon. Allen Vickey  
19           for the People.

20                   I'd just like to start with the top portion  
21           of the trespass notices. The court does not even  
22           need to reach whether it's a confrontation clause  
23           issue because - - -

24                   JUDGE PIGOTT: Do you agree it's preserved?

25                   MR. VICKEY: No, we don't agree it's

1 preserved. The issue is is although they said - - -  
2 after the Molineux hearing, the day after, they  
3 state, in conclusory fashion, we're objecting on  
4 confrontation clause grounds.

5 JUDGE PIGOTT: Didn't he assert it under  
6 Liner? I mean, he practically read Liner and then  
7 said, just for the record I want you to know that I'm  
8 raising this issue.

9 MS. KNIGHT: But the issue in Liner - - -  
10 all Liner said was you have to - - - it said - - - he  
11 was saying on the grounds of - - - on the grounds of  
12 Liner. The problem is is all Liner said was you have  
13 to assert confrontation clause, and that supports - -  
14 -

15 JUDGE PIGOTT: "I'm mentioning this because  
16 I am, for the record, asserting that the admission of  
17 those notices will violate my client's right to  
18 confrontation. I would like to preserve for the  
19 record and also ask the court not to allow these  
20 trespass notices in because of the reasoning of  
21 People v. Liner."

22 MR. VICKEY: Right.

23 JUDGE PIGOTT: What did he miss?

24 MR. VICKEY: He did not make any of the  
25 specific arguments they make now. They weren't - - -

1 never said anything about these being formal  
2 affidavits, never saying these contain written  
3 recitations.

4 JUDGE SMITH: You - - - you really have to  
5 go through everything - - - you have to write your  
6 appellate brief while - - - while you're on trial?

7 MR. VICKEY: There should have been more  
8 than just simply stating confrontation clause, but he  
9 - - -

10 JUDGE PIGOTT: What was missing? I mean,  
11 what fooled the court and the People that wasn't  
12 contained in that statement?

13 MR. VICKEY: On what grounds it violated  
14 the confrontation clause. But it - - -

15 JUDGE SMITH: I mean, how was - - - how  
16 could the court - - - how was the court led into  
17 error when he stands up and reads aloud from the  
18 case, that here's a case where it wasn't preserved, I  
19 just want to be sure it's preserved? And it sort of  
20 - - - it sort of boggles the mind that you're now  
21 here arguing he - - - arguing he didn't preserve it.

22 MR. VICKEY: Well, it's because it never  
23 gave the - - - he never gave the issue as to - - - he  
24 never gave the reasons as to why it violated the  
25 confrontation clause. So it never gave the trial

1 court an opportunity to create a record as to what  
2 grounds it believed it was a violation of the  
3 confrontation clause. But even as - - - even  
4 assuming, if this court finds it's preserved, it's  
5 still - - - the court does not need to reach the  
6 confrontation clause issue because the top portion  
7 simply contained admissions of the defendant.

8 JUDGE SMITH: But doesn't it say in the top  
9 portion that the notice was handed to the defend - -  
10 - was given to the defendant?

11 MR. VICKEY: Yes.

12 JUDGE SMITH: And what other proof was  
13 there other than - - - as to the two that Delacruz  
14 did not deliver, what other proof was there that they  
15 were delivered?

16 MR. VICKEY: That - - - I'm sorry, Your  
17 Honor.

18 JUDGE SMITH: You - - - it was important to  
19 you to prove that he actually got these notices,  
20 right?

21 MR. VICKEY: Right.

22 JUDGE SMITH: That's what makes it a  
23 burglary. As to one of them, you had an officer - -  
24 - you had the store detective testify he gave it to  
25 him. But as to the other two, where's the proof that

1 he got them other than - - - other than the - - - the  
2 recitation in the top of the notices?

3 MR. VICKEY: Well, I mean, the recitation  
4 on the top of the notice is simple - - - is pretty  
5 strong evidence that he got the notices.

6 JUDGE SMITH: Well, yeah, but - - - if you  
7 accept it for its truth, yes.

8 MR. VICKEY: Well, no. He had his name,  
9 his date of birth were on there.

10 JUDGE SMITH: Well, with no - - - but with  
11 no proof of who wrote them there.

12 MR. VICKEY: Well, his signed - - - his  
13 signature is on there.

14 JUDGE SMITH: How do we know it's his  
15 signature? I mean, I - - - I agree you could have  
16 got them in with a handwriting exemplar, but you  
17 didn't.

18 MR. VICKEY: Well, we don't need to get it  
19 with a handwrite - - - we - - - it - - - they were -  
20 - - it was - - - it was admissible and then that just  
21 - - - whether it was his signature or not went to the  
22 weight.

23 JUDGE SMITH: Now, how do you pro - - - I  
24 mean, you have here a piece of paper that says this  
25 was given to Austin Cornelius on this date and then

1 the words "Austin Cornelius" are written in  
2 handwriting on it. How do you get that in without  
3 either proving that it's his handwriting or accepting  
4 the truth of the statement on the piece of paper?

5 MR. VICKEY: Well, then it would - - - it  
6 would go as the Appellate Division said and it was  
7 properly admitted as a business record because it was  
8 made - - -

9 JUDGE SMITH: Well, but business record - -  
10 - yeah, but business records are - - - business  
11 records are not - - - we've all - - - we held in  
12 Rawlins that not all business records are - - -  
13 anyway, business records are admitted for their  
14 truth.

15 MR. VICKEY: But this - - -

16 JUDGE SMITH: That's the point of a  
17 business record.

18 MR. VICKEY: But this - - - this would not  
19 be - - - the top portion was not necessarily admitted  
20 for the truth; it was just admitted - - - as you've  
21 pointed out questioning appellant, it was just so  
22 that he knew that it had been communicated to him  
23 that he was not allowed. It was a command.

24 JUDGE SMITH: Yeah, but you can't prove  
25 that unless you prove he received it. What's the

1 proof that he received those two notices?

2 MR. VICKEY: His signature on the notice.

3 JUDGE SMITH: And how - - - what's the  
4 proof that the signature is his?

5 MR. VICKEY: That it was made - - - it was  
6 a contemporaneous business record in that - - -

7 JUDGE PIGOTT: But who testified to that?

8 MR. VICKEY: Who testified - - - well, it  
9 was the - - - Delacruz who testified that it was a  
10 properly made business record made under Duane  
11 Reade's business practice.

12 JUDGE PIGOTT: But I mean - - - I mean,  
13 normally when somebody signs something, there's  
14 usually a jurat or, you know, somebody says I - - - I  
15 know that person and that's the person who signed it.

16 MR. VICKEY: Well, there's - - - definitely  
17 you can make a reasonable inference it was defendant  
18 because it had his name, it had his date of birth on  
19 both trespass notices.

20 JUDGE SMITH: I mean, in common sense you  
21 can make the inference that People probably wouldn't  
22 be waving it around if they didn't think it was his  
23 signature, but you're supposed to prove these things.

24 MR. VICKEY: Well, I think here the People  
25 were able to prove - - -

1 JUDGE SMITH: I mean - - - I mean, the fact  
2 that I have a piece of paper with your name and date  
3 of birth on it doesn't prove you signed it unless  
4 somebody says it's your handwriting.

5 MR. VICKEY: Well, first of all, defendant  
6 never ex - - - never explicitly stated that those  
7 were not his signatures at trial.

8 JUDGE SMITH: Well, he doesn't have to - -  
9 - he doesn't have to say anything. He didn't - - -  
10 he hadn't testified at the point where they were  
11 admitted into evidence.

12 MR. VICKEY: Correct. But again, I think  
13 it was -- it was certainly reasonable for the court  
14 to admit those as the defendant's own admissions.

15 JUDGE PIGOTT: I get that you say that, but  
16 I'm just worried that Duane Reade doesn't say, you  
17 know, geez, that son of a gun got away again, let's  
18 put one of those forms in the - - - in the file. He  
19 says, well, you can't get him to sign it now; he  
20 left. Well, you sign it and we will - - - and we'll  
21 worry about that later.

22 MR. VICKEY: But again, that goes to the  
23 weight; that doesn't go to the admis - - -

24 JUDGE PIGOTT: No. That goes to the  
25 admissibility. I mean, you got to prove that - - -

1           you can't say it goes to the weight. I mean, it's -  
2           - - you're saying this is his signature.

3                   MR. VICKEY: Yes. And that - - - that's -  
4           - -

5                   JUDGE PIGOTT: Well, that's not weight.  
6           That's either true or not.

7                   MR. VICKEY: Again, it's - - - we hold that  
8           we - - - our position is that these were properly  
9           admitted because it had a number of issues that  
10          allowed for it to certify that that was - - - I'm  
11          sorry, not certify, but to demonstrate that that was  
12          defendant's signature and that that notice was given  
13          to him including his name, date of birth, and the  
14          defendant's signature.

15                   As to this bottom portion, the opening of  
16          the door portion, clearly that was not an abuse of  
17          discretion by the trial court. Defense counsel was  
18          attempting to give an inference to the jury that  
19          there was some improper or nefarious purpose for why  
20          these trespass notices were - - -

21                   JUDGE SMITH: Well, what exactly was the  
22          testimony that created the false impression?

23                   MR. VICKEY: He kept repeatedly asking  
24          whether he had personal knowledge and whether - - -  
25          and he was asking - - -

1 JUDGE SMITH: You mean asking a witness  
2 whether he has personal knowledge of the facts in a  
3 document creates a false im - - - is that - - - well,  
4 what's the false impression that creates?

5 MR. VICKEY: It was because - - - the  
6 trespass notice already was redacted. There was no  
7 reason for defense counsel to ask about that portion  
8 of the trespass notice. That was already redacted.  
9 There - - -

10 JUDGE SMITH: Wasn't he obviously just  
11 trying to show that this guy couldn't adequately  
12 authenticate it?

13 MR. VICKEY: Well, then he should have - -  
14 - the questions he asked were not typical where you  
15 authenticate that it was a proper - - -

16 JUDGE SMITH: Let me - - - let me ask - - -  
17 I'm going to change - - - I'm going to ask you a  
18 different question. Suppose we think that the  
19 opening of the door ruling was wrong but this stuff  
20 was admissible anywhere - - - anyway for intent; that  
21 doesn't work, does it, under LaFontaine (ph.)?

22 MR. VICKEY: I'm sorry?

23 JUDGE SMITH: I mean, can we - - - can we  
24 affirm the conviction on the alternative ground that  
25 the lower portions of these notices were admissible

1           anyway to show intent?

2                   MR. VICKEY: Well, yeah, because for - - -  
3           under LaFontaine, the court never made a specific  
4           ruling as to how - - - why.

5                   JUDGE SMITH: Yeah.

6                   MR. VICKEY: As to harmless, clearly this  
7           was - - - even if the court has issue with the two  
8           2004 trespass notices, it was clearly harmless.  
9           Delacruz testified as to the 2008 incident. So he  
10          had - - - defendant had an opportunity to cross-  
11          examine.

12                   JUDGE SMITH: But if - - - did you - - -  
13          did you have to prove not just that he was  
14          trespassing but that he knew he was trespassing?

15                   MR. VICKEY: We had to prove that he knew -  
16          - - it was - - - his entry was unlawful and he knew -  
17          - -

18                   JUDGE SMITH: That he knew - - - and that  
19          he knew it was unlawful.

20                   MR. VICKEY: Right.

21                   JUDGE SMITH: Aren't - - - if - - - you  
22          know, the fact that he'd been handed one notice once  
23          in his life seems to me less strong proof of that  
24          than the fact that he'd been handed three.

25                   MR. VICKEY: Well, clearly, the three would

1 - - - is stronger than one.

2 JUDGE SMITH: I mean - - - I mean, there's  
3 nothing - - - to me, it's not ridiculous for - - -  
4 assuming you can believe anything this man says, it's  
5 not ridiculous to say, yeah, they handed me a piece  
6 of paper a year and a half ago and I forgot it. On  
7 the other hand, if you've been getting them every  
8 couple of years for the last six years, it's less  
9 likely that you forgot it. Why didn't that  
10 materially strengthen that element of the piece - - -  
11 People's case?

12 MR. VICKEY: It definitely strengthened but  
13 it was not necessary because here, a trespa - - - the  
14 2008 tres - - -

15 JUDGE SMITH: Well, necessary isn't the  
16 test. It's a question of if it was - - - if it was -  
17 - - - if it definitely strengthened, it sounds like  
18 it's not harmless.

19 MR. VICKEY: It was - - - there was no  
20 reasonable possibility that the jury would have come  
21 to a different conclusion because here, it was a 2008  
22 notice, this wasn't a year and a half earlier; this  
23 was about seven months earlier. It had his own  
24 picture - - - it had the defendant's picture attached  
25 to it. There is no doubt that the - - - that was

1 simple enough - - - that was enough evidence and  
2 showed beyond a reasonable possibility that there was  
3 sufficient evidence to prove that he knew he was not  
4 allowed to enter Duane Reade. Also the testimony of  
5 Delacruz telling him that he told him he was not  
6 allowed was enough evidence.

7 If the court has no further questions?

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 Thanks.

10 Counselor, rebuttal?

11 MS. KNIGHT: If the court has no further  
12 questions - - -

13 CHIEF JUDGE LIPPMAN: Okay. Thank you  
14 both. Appreciate it.

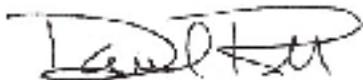
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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Austin Cornelius, No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: February 12, 2013