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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 192

AKIVA DANIEL ABRAHAM,

Appellant.

20 Eagle Street
Albany, New York 12207
October 15, 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.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 192, People v. Abram
2 - - - Abraham.

3 Counselor, would you like any rebuttal
4 time?

5 MR. FISHBEIN: Two minutes, please, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
8 go ahead, counsel.

9 MR. FISHBEIN: My name is Jonathan
10 Fishbein. I represent appellant Akiva Abraham.

11 CHIEF JUDGE LIPPMAN: Counselor, where's
12 the legal repugnancy here as opposed to factual
13 inconsistency?

14 MR. FISHBEIN: Well, under Muhammad, there
15 isn't. But if you go to the dissent there is,
16 because you have to look at the facts.

17 JUDGE ABDUS-SALAAM: Counselor, are you
18 pressing the repugnancy claim here?

19 MR. FISHBEIN: In the sense that there are
20 no facts to support the - - - the conviction on the
21 second count, yes. Because the whole issue of that
22 second count is knowledge.

23 JUDGE ABDUS-SALAAM: But don't you spend
24 all your - - - your time in your brief on the legal
25 sufficiency or insufficiency of the evidence on that

1 count?

2 MR. FISHBEIN: I do. Because - - -

3 JUDGE SMITH: Go ahead.

4 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

5 MR. FISHBEIN: I do because I looked at
6 Muhammad; I looked at the dissent, and I decided it
7 wasn't an argument that I wanted to make to this
8 court. I felt - - -

9 JUDGE SMITH: So you're not - - - you're
10 not arguing repugnancy as such, but you are arguing
11 an insufficiency of evidence stemming from the - - -
12 the inconsistency between the verdicts. Is that a
13 fair summary?

14 MR. FISHBEIN: That is a fair summary.

15 JUDGE SMITH: Why doesn't your argument
16 completely eviscerate Muhammad, though? I mean, you
17 - - - in every case where you have inconsistent
18 verdicts isn't - - - doesn't it then necessarily
19 follow that if you take the acquittal as establishing
20 whatever fact it is, then the inconsistent conviction
21 is going to be supported by insufficient evidence?
22 In other words, in every Muhammad case, we'll wind up
23 reversing if someone makes the argument you make?

24 MR. FISHBEIN: But even with inconsistent
25 verdicts, you have to have - - - you have to have

1 some element that you can prove of those crimes.
2 Here the elements that they - - - they could not
3 prove knowledge. In order to have insurance fraud,
4 there has to be knowledge.

5 JUDGE SMITH: Well, they - - -

6 MR. FISHBEIN: And there was no knowledge.

7 JUDGE GRAFFEO: They couldn't use all the
8 circumstantial evidence that they attempted to
9 introduce to show knowledge?

10 MR. FISHBEIN: As I went through in my
11 brief, there - - - even looking at it in a light most
12 favorable to the People, it doesn't exist. They - -
13 - they state that he only - - - he had financial
14 difficulties. But they assign the financial
15 difficulty to a checking account, saying he only had
16 \$22.90 in a checking account. That's like saying
17 that the net worth is what's in the checking account
18 at the end of the month. Now - - -

19 JUDGE GRAFFEO: Well, was there really a
20 mortgage here?

21 MR. FISHBEIN: Yes, there was - - -

22 JUDGE GRAFFEO: There wasn't a - - -

23 MR. FISHBEIN: - - - no - - -

24 JUDGE GRAFFEO: - - - it was never - - -

25 MR. FISHBEIN: - - - the mortgage was never

1 in front of - - -

2 JUDGE GRAFFEO: - - - was it filed?

3 MR. FISHBEIN: - - - there - - -

4 JUDGE GRAFFEO: Was it filed?

5 MR. FISHBEIN: It was not filed, but the
6 deed wasn't filed either. And the mortgage was - - -

7 CHIEF JUDGE LIPPMAN: Why isn't there a - -
8 - why isn't there a legitimate argument that the
9 mortgage was a sham?

10 MR. FISHBEIN: Well, first off, there's no
11 evidence to that effect. Nothing was brought in to
12 infirm the mortgage.

13 JUDGE SMITH: Well, it was - - - it was a
14 mortgage from his father. And when he discussed it
15 with the police he didn't mention that it was a
16 mortgage from his father. And apparently no money
17 changed hands?

18 MR. FISHBEIN: As far as we know in the
19 record, that's correct. However - - -

20 JUDGE GRAFFEO: And he didn't tell the
21 insurance company that either, correct, when he went
22 and got coverage?

23 MR. FISHBEIN: That the mortgage was - - -
24 I don't know what he told the insurance company. And
25 that's not in the record.

1 What we do know is the insurance company
2 chose - - -

3 CHIEF JUDGE LIPPMAN: He didn't say that
4 the mortgage came from an account where there was
5 twenty-five dollars in it, right?

6 MR. FISHBEIN: I'm sorry?

7 CHIEF JUDGE LIPPMAN: He didn't say that
8 the mortgage came from an account that there was
9 twenty-five dollars in?

10 MR. FISHBEIN: The twenty-five-dollar
11 account is really a ruse. As was - - -

12 CHIEF JUDGE LIPPMAN: Why is it a ruse?

13 MR. FISHBEIN: - - - brought out - - -

14 CHIEF JUDGE LIPPMAN: Tell me.

15 MR. FISHBEIN: Because as brought out by
16 the prosecution's own witness, it doesn't account for
17 the other assets that Mr. Abraham had.

18 JUDGE SMITH: You said he could have had
19 another account with four million dollars it?

20 MR. FISHBEIN: They never asked the banker.
21 And it's not in the record. But had they asked the
22 banker - - - but it's not in the record.

23 I mean, I can tell you, but it's not in the
24 record. The bottom line is that they never
25 established that this was his net worth. If they had

1 appraisal. There was an appraisal, and Mr. Abraham
2 discusses it in, I believe, the first interview with
3 the police. And the appraisal was for 575,000
4 dollars. And they chose not - - -

5 JUDGE SMITH: If I'm understanding - - -
6 maybe I'm not - - - are you now arguing sufficiency -
7 - - it's just - - - the evidence is just plain
8 insufficient, regardless of the inconsistent
9 verdicts?

10 MR. FISHBEIN: Yes.

11 JUDGE SMITH: So in other words, even if
12 he'd been convicted of arson, you'd be standing here
13 making the same argument you're making now?

14 MR. FISHBEIN: If he'd been convicted of
15 arson, then there would be other facts in the record
16 to which the Court could look to say he knew about
17 it.

18 JUDGE SMITH: I see. Okay. So what you're
19 saying - - - you're saying is that without the arson,
20 the mor - - - yeah, the mortgage and the - - - and
21 the bank account don't amount to fraud. I guess - -
22 - well, in other words, if somebody else burned down
23 this building, it would not have been fraud for him
24 to - - - for him not to tell them about the mortgage.
25 Is that the argument you're making?

1 MR. FISHBEIN: He - - - what's - - - where
2 is - - - where is the requirement or even why would
3 he discuss the mortgage - - -

4 JUDGE SMITH: I'm just trying to understand
5 what you're saying.

6 MR. FISHBEIN: I'm not sure what your - - -

7 JUDGE SMITH: I mean, you - - - you're
8 basically saying that if you assume - - - you have to
9 assume on this record that this was an accidental
10 fire or set by someone else. And you're saying on
11 that assumption, you can't send a guy to jail because
12 the mortgage - - - the mortgage that he disclosed to
13 the insurance company happened to be from his father?
14 Is - - - have I summarized your argument?

15 MR. FISHBEIN: Yes. I don't see anywhere
16 that that is relevant.

17 JUDGE SMITH: Okay, but it - - - all this
18 does require us to assume that he's innocent of the
19 arson?

20 MR. FISHBEIN: Well, the jury found him
21 innocent beyond a - - - well, not guilty beyond a
22 reasonable doubt. And the prosecution - - -

23 JUDGE SMITH: I mean, aren't you - - -
24 your ar - - - isn't this just an argument that the
25 verdicts are inconsistent? That is, I mean, if your

1 - - - if there's - - - if there's other evidence - -
2 - if the fraud - - - if the mortgage and whatever
3 else are sufficient to support the fraud conviction,
4 then there's no inconsistency in the verdicts. But
5 if the verdicts are inconsistent, then necessarily
6 there has to - - - the evidence has to be
7 insufficient on the - - - on the fraud, right?

8 MR. FISHBEIN: If I understand the
9 question, yes.

10 JUDGE SMITH: So why doesn't your argument
11 completely eviscerate Muhammad?

12 MR. FISHBEIN: Because in Muha - - - maybe
13 it does.

14 JUDGE GRAFFEO: Why couldn't the jury have
15 reached the conclusion that he knew about the fire,
16 but perhaps there wasn't evidence beyond a reasonable
17 doubt that he was the individual who lit the fire?

18 MR. FISHBEIN: Well, the prosecution opened
19 - - -

20 JUDGE GRAFFEO: Why doesn't - - - why
21 doesn't the proof at trial support that view of the
22 evidence?

23 MR. FISHBEIN: Because the prosecution
24 opened with - - - and this was their argument
25 throughout - - - you created a fire to get insurance

1 money that you weren't entitled to. And throughout,
2 it's you created the fire, therefore you knew of the
3 fire. Now, at no point do - - - they don't charge
4 him with conspiracy, they don't charge him with
5 accessorial liability, they don't even argue that.

6 In fact, the only thing they really argue
7 in the closing - - - I mean, the majority of the
8 closing and three hours of videotape - - - is of the
9 mortgage.

10 JUDGE GRAFFEO: Well, could it - - - can
11 insurance fraud be supported by the fact that someone
12 knows there's been arson but doesn't know who did it?

13 MR. FISHBEIN: Well, if - - - if he knew it
14 was arson and - - - let's say the police in the first
15 interview had told him it was burnt down and it's
16 arson, he would then have had to go to the insurance
17 company and say, look, my building burnt down. My
18 understanding is it was arson. And he would have to
19 disclose that. But he didn't know.

20 JUDGE ABDUS-SALAAM: Was there any view of
21 the evidence that would suggest that the fire was
22 accidental, given that there was no heat in the
23 building, no electrical service, and probably nothing
24 else that would create a fire?

25 MR. FISHBEIN: I don't think that there's

1 anything in the record that particularly says it was
2 accidental. But also the claim in the record by the
3 prosecution that there was - - - that he was the only
4 one that had access, is also completely false. They
5 - - - there's testimony, again, from the
6 prosecution's witnesses, that not only did my client
7 have access, but three other people had keys to the
8 building and other individuals were getting access -
9 - -

10 JUDGE ABDUS-SALAAM: Well - - -

11 MR. FISHBEIN: - - - by opening - - -

12 JUDGE ABDUS-SALAAM: - - - the previous
13 owners - - -

14 MR. FISHBEIN: - - - some of the - - -

15 JUDGE ABDUS-SALAAM: - - - what motive
16 would they have to burn the building down? They had
17 no interest in it?

18 MR. FISHBEIN: Actually, the way it played
19 out they did.

20 JUDGE PIGOTT: Well - - -

21 JUDGE ABDUS-SALAAM: They did have an
22 interest in it?

23 MR. FISHBEIN: They ended up getting the
24 property back. The - - - my understand - - - again,
25 it's not in the record. If you don't want me to go

1 there, I won't. But you asked the question. They -
2 - - my understanding is, is that after the fire the
3 bank - - - because it was in foreclosure, the bank
4 had fire insurance, the bank got paid off in full,
5 and the Sutliffs, the prior owners, recreated the
6 deed which is still, I understand, in the - - - is
7 held as evidence.

8 JUDGE ABDUS-SALAAM: But at the time of the
9 fire, they had sold the property to your client?

10 MR. FISHBEIN: Yes.

11 JUDGE SMITH: That suggests to me that
12 maybe it's not a - - - I mean, it's not a problem for
13 the insurance if it's arson, as long as it's not his
14 arson, is it? I mean - - -

15 MR. FISHBEIN: No.

16 JUDGE SMITH: - - - if I insure a building
17 and someone else burns it down, I sure hope my
18 insurance covers it.

19 MR. FISHBEIN: The way I read the statute,
20 it - - - it appeared to me that if my house burned
21 down and I knew it was arson, I had to tell the
22 insurance company, even though I didn't burn it down.

23 JUDGE PIGOTT: Yeah, but that's not the
24 quest - - - well, I guess that - - - that is the
25 question. As Judge Smith says, if someone torches

1 your place, you know, your restaurant or whatever,
2 for vengeance or - - - you still collect on your
3 insurance, right?

4 MR. FISHBEIN: Yes.

5 JUDGE PIGOTT: Because they - - -

6 JUDGE SMITH: So where's the fraud? Even -
7 - - okay, maybe - - - maybe you have some obligation
8 to disclose it, but how can the insurance company say
9 they've been defrauded, if they have to pay anyway?

10 MR. FISHBEIN: I'm not sure I understand
11 the question.

12 JUDGE SMITH: Assume - - - if you assume
13 there's - - - and I guess I'm maybe - - - maybe it's
14 a friendly question. I don't know. If you - - - I
15 don't see how there can be a fraud unless Mr. Abraham
16 was the arsonist.

17 MR. FISHBEIN: That is exactly the argument
18 we're making.

19 CHIEF JUDGE LIPPMAN: Okay, counselor.
20 You'll have rebuttal time.

21 MR. FISHBEIN: Thank you.

22 MR. HORN: May it please the court, my name
23 is Chris Horn, and I represent the People of the
24 State of New York in this matter.

25 Defendant initially contends that the

1 evidence was not legally sufficient for the jury to
2 determine that he knowingly submitted a false written
3 statement to his insurer concealing a material fact
4 that the fire was - - -

5 JUDGE SMITH: Is he correct, if you assume
6 he's not the arsonist?

7 MR. HORN: No. It - - - if he knows
8 somebody else burned the place down, and he doesn't
9 report that to the insurance company when he calls it
10 in, and they say do you have any information as to
11 how the place burned down, and he says no, I have no
12 idea - - -

13 JUDGE SMITH: But that - - - you can be
14 convicted of that even though you have a perfect
15 right to collect the insurance in full?

16 MR. HORN: Sure. But you don't get to file
17 a false written claim in the attempt to collect on
18 it.

19 JUDGE SMITH: Was the case submitted to the
20 jury on that theory, that this is a - - - this is a
21 guy who, for whatever reason, failed to disclose some
22 fact that would not have prevented him from
23 collecting insurance?

24 MR. HORN: Yes, Your Honor. The first
25 count on the arson, we're alleging that he actually

1 committed the arson.

2 JUDGE SMITH: Yeah.

3 MR. HORN: And we didn't have a Section 20
4 charge on that. And we believe that he did commit
5 the arson, and we presented evidence on that.

6 The second count, however, we didn't make
7 it that specific. We said that he submitted that
8 false claim knowing that the building had been burned
9 down by arson. And it's our posi - - - it was our
10 position at the Appellate Division and here that the
11 same proof that tends to establish that he actually
12 committed the arson is certainly capable of
13 establishing that he knew about the arson - - -

14 JUDGE SMITH: Did he say - - -

15 MR. HORN: - - - or participated.

16 JUDGE SMITH: - - - did he say anything to
17 the insurance company that was actually false, again
18 on the assumption that he's not the arsonist? Did he
19 ever lie to the insurance company, or it's just a
20 failure to disclose?

21 MR. HORN: Well, that - - - that becomes
22 very hypothetical. He said he had no idea how the
23 place burned down.

24 JUDGE PIGOTT: Maybe he didn't. Do - - - I
25 mean, doesn't it have to be a material fact? In

1 other words, let's - - - let's assume he thinks the
2 people that I bought it from, you know, maybe - - -
3 maybe my neighbor who I owe 50,000 dollars to, or - -
4 - I've got a lot of ideas as to, you know, how it
5 happened. But I don't have any idea, I don't know.
6 I'm not about to accuse somebody of a felony.

7 MR. HORN: Yes, but that's not what the
8 jury found. I mean - - -

9 JUDGE PIGOTT: Well, that wasn't the way
10 you presented - - -

11 MR. HORN: - - - were they - - -

12 JUDGE PIGOTT: - - - that's not the way you
13 presented the case the case either. I mean, your
14 case was he burned it down and false - - - and failed
15 to - - - filed a false claim with the insurance
16 company. One of them - - -

17 MR. HORN: Yes.

18 JUDGE PIGOTT: - - - was attached to the
19 other.

20 MR. HORN: Yes. But we pled that he knew
21 that it was destroyed - - -

22 JUDGE PIGOTT: Yeah, but you didn't - - -
23 you didn't - - - I mean, when you read the summation
24 and the way the proof went in, it seems that - - -
25 you know, the mortgage was a big deal.

1 MR. HORN: It was - - - it was a big deal.

2 JUDGE PIGOTT: And it seems to me why is
3 the mortgage relevant? Let's assume for a minute you
4 have a 500,000-dollar mortgage on a 200,000-dollar
5 building. The carrier does not object and say gee,
6 you ought to give us a little less premium, because
7 we don't think your house or the - - - your business
8 is worth that.

9 Even after this, if the value of the
10 building was 100,000 dollars, they're not going to
11 pay him the mortgage. Right?

12 MR. HORN: True. But the - - -

13 JUDGE PIGOTT: But why is - - - why does
14 the fake mortgage, fake mortgage, fake mortgage,
15 prove that he filed a false claim with the insurance
16 company?

17 MR. HORN: What it's probative of is his
18 fraudulent intent. The reason why he came up with
19 that bogus mortgage was to induce the insurance
20 company to give him a policy in the amount of 475,000
21 dollars.

22 JUDGE PIGOTT: But that doesn't make any
23 difference, because - - - they can give a million.

24 MR. HORN: But he doesn't necessarily know
25 that.

1 JUDGE PIGOTT: Well, you don't prove that
2 he didn't.

3 MR. HORN: I mean, most - - -

4 JUDGE SMITH: I got a - - - I got a - - -

5 MR. HORN: That's our inference.

6 JUDGE SMITH: - - - a simpler question.

7 How, on this record, would he have known it was
8 arson, unless he's the arsonist?

9 MR. HORN: Let's say - - - let's say he has
10 his buddy go over to the place with - - -

11 JUDGE SMITH: Well, what evidence is there
12 of that?

13 MR. HORN: Well, I - - - you want me to go
14 through the circumstantial facts. I can go through
15 the circumstantial - - -

16 JUDGE SMITH: Do you have circumstantial
17 facts that he knew it was arson that do not also tend
18 to show that he's the arsonist?

19 MR. HORN: It all - - - the jury had
20 trouble concluding that he actually struck the match.
21 There were a bunch of - - -

22 JUDGE SMITH: I guess I'm saying - - -

23 MR. HORN: - - - sort of weird characters -
24 - -

25 JUDGE SMITH: - - - isn't it - - - isn't it

1 basically inconsistent for them to say he didn't burn
2 it down, but he defrauded the insurance company?

3 MR. HORN: No. I don't think it's
4 inconsistent at all. He - - - he knew about it. The
5 context and the sequence of events of the
6 circumstantial case make it really clear he knew what
7 was going on.

8 JUDGE SMITH: Tell me a scenario in which
9 he is innocent of arson, but guilty of fraud, a
10 factual scenario that a jury can find beyond a
11 reasonable doubt?

12 MR. HORN: If they suspected there was
13 somebody else involved in this case.

14 JUDGE SMITH: Suspected?

15 MR. HORN: The jury. The jury hears a
16 bunch of - - - I mean - - -

17 JUDGE SMITH: They suspect he had an
18 accomplice?

19 MR. HORN: Correct. They suspect that he
20 has an accomplice.

21 JUDGE SMITH: They're supposed to acquit -
22 - -

23 MR. HORN: If there's no accomplice - - -

24 JUDGE SMITH: - - - is that the rule, if
25 they suspect you have an accomplice, they acquit you?

1 MR. HORN: No, juries do a lot of strange
2 things - - -

3 JUDGE SMITH: Oh, yeah, I agree. That - -
4 - but I guess, isn't this one of them, that's what
5 I'm saying?

6 MR. HORN: Oh, no, it is certainly a
7 strange thing. I agree with the court that it is a
8 strange thing.

9 JUDGE SMITH: You're saying it's strange -
10 - - you're saying it's strange but not inconsistent?

11 MR. HORN: Correct, Your Honor.

12 JUDGE SMITH: Suppose - - - if we disagree
13 with you and we think it's inconsistent, do we have
14 to reverse?

15 MR. HORN: Could you repeat that question?

16 JUDGE SMITH: If we think this is - - -
17 these verdicts are inconsistent, do we reverse?

18 MR. HORN: No, Your Honor.

19 JUDGE SMITH: Why not?

20 MR. HORN: Well, if you think they're
21 inconsistent? Well, they're not repugnant. And
22 inconsistency, I don't think, requires any reversal.
23 And it's not even argued by him in his brief.

24 JUDGE SMITH: Okay, but - - -

25 MR. HORN: He abandoned the repugnancy

1 argument.

2 JUDGE SMITH: - - - he - - - what he does
3 argue is, if they're inconsistent, then the
4 inconsistency itself doesn't invalidate the
5 conviction. But if you take the - - - but if they're
6 inconsistent, and you take the acquittal as
7 conclusive, then a conviction has to be bad. Does it
8 - - - that's logical, isn't it?

9 MR. HORN: I think, as Judge Lamont said,
10 there's a certain logical appeal, but it doesn't fit
11 within the law.

12 The way I would look at it is, pretend we
13 never indicted him for arson, and we just indicted
14 him for the insurance fraud, and we adduced all of
15 this evidence that we have right here, all this
16 circumstantial evidence - - -

17 JUDGE SMITH: Then you wouldn't have an
18 acquittal of arson. You would have no inconsistent
19 verdict.

20 MR. HORN: Right. And I - - - and it's not
21 an inconsistent verdict, because he's accused of
22 committing the arson in the one, and knowing about
23 the arson in the other one.

24 JUDGE SMITH: But if it was - - - but if it
25 is an inconsistent verdict, you seem to be - - - you

1 seem to be acknowledging that you've got a problem?

2 MR. HORN: No. I'm not going to agree that
3 I have a problem. Because I don't believe that
4 they're inconsistent. And there are a number of
5 cases where exactly that situation that we're talking
6 about has occurred. You've got People v. Chase;
7 People v. Pagan; People v. Michael; People v. Amar.
8 They're all Appellate Division cases. But they're
9 all cases where it says it is not necessary that you
10 be convicted of the arson in order to be found guilty
11 of the - - -

12 JUDGE RIVERA: So - - - so - - -

13 MR. HORN: - - - insurance fraud.

14 JUDGE RIVERA: - - - so the way - - - so
15 the way you're seeing that verdict is, that they're
16 not persuaded that he, as you say lights - - - lights
17 the match, lights the flame, lights the Tiki fuel,
18 whatever it is, but he has set up everything else to
19 profit off of that - - -

20 MR. HORN: Correct, Your Honor.

21 JUDGE RIVERA: - - - and that's where they
22 could come to that conclusion - - -

23 MR. HORN: Correct, Your Honor.

24 JUDGE RIVERA: - - - based on everything
25 else you've shown that that was the point of this

1 insurance fraud.

2 MR. HORN: That's exactly what I'm saying,
3 Your Honor.

4 JUDGE ABDUS-SALAAM: Can you go back to
5 what you - - - what you showed that he knew this was
6 arson?

7 MR. HORN: Okay. I mean, well, it is a - -
8 - it is a timeline that suggests that he was involved
9 in the entire thing. On April 16th, 1st Call buys
10 this property from the Sutliff's for one dollar. On
11 the same day, Parel Road, his other LLC - - -

12 JUDGE PIGOTT: Doesn't it say a dollar and
13 more?

14 MR. HORN: I was only aware of the dollar.

15 JUDGE PIGOTT: One and more and other
16 valuable consideration, which - - - I was looking for
17 the deed stamps. I - - - it didn't occur to me that
18 it wasn't filed.

19 MR. HORN: I didn't catch that detail. But
20 it's referred to as a dollar the entire time.

21 On that same date, his other LLC that he
22 controls - - - it's his dad's 401(k) - - - grants him
23 a 475,000-dollar mortgage on that property. Now,
24 they have \$22.90 to their name. There is no evidence
25 of these other accounts. We're just supposing, oh,

1 maybe he has another account somewhere. But, you
2 know, that checking account, where all the money was,
3 that originally there was \$300,000 in, is down to
4 \$22.90.

5 JUDGE PIGOTT: His 401(k) had no money in
6 it?

7 MR. HORN: It was down to \$22.90.

8 JUDGE PIGOTT: That's held in his checking
9 account?

10 MR. HORN: Okay. So that occurs. Then he
11 gets insurance based on the value of that bogus
12 mortgage. They say, okay, fine. When they ask you
13 how much do you want it to be for, oh, for the amount
14 of the loan. It's so that you have some basis for
15 why you're saying 475,000 dollars.

16 JUDGE ABDUS-SALAAM: What about the
17 appraisal that your adversary says - - -

18 MR. HORN: I've never seen the appraisal.
19 He talks about the appraisal. When you look at the
20 interviews in 44 and - - - People's 44 and 45, he
21 talks about a million different things. Most of them
22 are not true. I defy any of you to understand what
23 he is talking about in the course of that interview.
24 I am certainly not smart enough to figure it out.

25 JUDGE PIGOTT: You mean the interviews with

1 the - - - with the firefighters?

2 MR. HORN: With the police department.

3 JUDGE PIGOTT: Police department? Okay.

4 MR. HORN: So on the 20th that insurance
5 policy becomes effective. On the 27th he goes to
6 Home Depot and buys two nine-pack Duraflame logs and
7 four gallons of Tiki torch fuel. On 4/29 he calls -
8 - -

9 JUDGE SMITH: Tell me how that's consistent
10 with his being innocent of arson?

11 MR. HORN: Oh, I think it's not consistent
12 with him being innocent.

13 JUDGE SMITH: Oh, okay.

14 MR. HORN: I think it's consistent with him
15 being guilty. But it's also consistent with him
16 knowing about the arson. Because - - - because
17 somebody else helped him.

18 JUDGE SMITH: Well, if you know about arson
19 in advance - - -

20 JUDGE ABDUS-SALAAM: Was there a - - -

21 JUDGE SMITH: - - - it's of your own
22 building, it's sort of strange for you to be
23 acquitted of arson, isn't it?

24 MR. HORN: It's because there was no
25 Section 20 instruction. Hindsight being twenty-

1 twenty, we should have requested that. I think if we
2 had requested that, he would have been convicted.

3 JUDGE GRAFFEO: You mean accessorial - - -

4 MR. HORN: Accessorial liability. Because
5 ultimately the jury just couldn't get there. They
6 couldn't conclude that he lit the match.

7 JUDGE PIGOTT: Wasn't - - - isn't that
8 because that wasn't your theory? Your theory was he
9 burned down his place to get the insurance money.

10 MR. HORN: Well, that was certainly - - -
11 that was our theory of the arson.

12 JUDGE PIGOTT: But you're saying - - -
13 you're saying, you know, you needed the accessorial -
14 - - you didn't charge it. You didn't indict him on
15 it.

16 MR. HORN: We didn't request it, no.

17 JUDGE PIGOTT: So you can't - - -

18 JUDGE SMITH: But was the jury - - -

19 MR. HORN: But they're the same principle
20 under - - -

21 JUDGE SMITH: - - - was the jury instructed
22 - - -

23 MR. HORN: - - - Rivera.

24 JUDGE SMITH: - - - that he had to
25 personally light the match?

1 MR. HORN: No, but they weren't instructed
2 on accessorial liability, either.

3 JUDGE SMITH: But on the - - - but on the
4 instruction they got, shouldn't they have convicted
5 him if he just stood there and watched while somebody
6 else lighted it?

7 MR. HORN: Right. Well, we're right back
8 to where I started with. Juries do strange things
9 sometimes. But - - -

10 JUDGE SMITH: Yeah, okay - - -

11 MR. HORN: - - - it's just we think he was
12 guilty of - - -

13 JUDGE SMITH: - - - I guess I was - - -
14 we're also back to where I started. It looks to me
15 like these things are obviously inconsistent, and you
16 should be arguing that inconsistency's not a problem.

17 MR. HORN: I do maintain that inconsistency
18 is not a problem.

19 CHIEF JUDGE LIPPMAN: Okay, thanks counsel.

20 MR. HORN: Thank you, Your Honor.

21 MR. FISHBEIN: The cite to - - -

22 CHIEF JUDGE LIPPMAN: Counselor, don't you
23 think it could have been reasonably concluded that
24 either he burned the place down or someone else did
25 it at his direction? Isn't there evidence to show

1 that?

2 MR. FISHBEIN: There isn't.

3 CHIEF JUDGE LIPPMAN: And couldn't the jury
4 have reasonably just not been able to get to the
5 point of saying that he put the match onto the
6 building, but yet, found what they found, that he
7 lied to the insurance company and all of that?

8 MR. FISHBEIN: Well, I'll rely on my
9 adversary's line, that juries do strange things. But
10 - - -

11 CHIEF JUDGE LIPPMAN: So what's the
12 consequence of the jury doing strange things?

13 MR. FISHBEIN: My client gets convicted of
14 a crime he didn't commit. In this - - -

15 CHIEF JUDGE LIPPMAN: Well, which crime
16 that he didn't commit?

17 MR. FISHBEIN: Well, he was acquitted of
18 one, now - - - and he's convicted. He didn't commit
19 any crime.

20 JUDGE PIGOTT: Could this have been a
21 compromise verdict?

22 MR. FISHBEIN: Let's assume it was a
23 compromise verdict. Even if it's a compromise
24 verdict, you still have to have some ele - - - some
25 knowledge. He had - - - they have to have some

1 evidence of knowledge.

2 JUDGE PIGOTT: Well, as Mr. Horn was about
3 to lay out and we interrupted him a couple times, but
4 the jury could have said all of this that happened,
5 you know, whoever - - - he bought the fuel, he did
6 this, we can't - - - we can't get him, the fuel, and
7 a match together. But the firefighters said it was
8 the Tiki torches and, you know, all of that's there -
9 - -

10 MR. FISHBEIN: Um-hum.

11 JUDGE PIGOTT: - - - and then he makes this
12 claim. You know, maybe we - - - maybe we can't get
13 him on the arson, but it sure seems like - - -

14 MR. FISHBEIN: But they never argued it to
15 the jury. They never made the argument that it was
16 somebody else. They never said - - - they said, in
17 fact, that no one else had access to the building.

18 JUDGE PIGOTT: You're making the argument,
19 I guess, then, that had they argued that - - - or had
20 they indicted on accessorial liability, you would
21 have been able to better defend yourself on those,
22 because you would have brought in, I presume, people
23 who had the keys or, you know, whatever else was
24 going on.

25 MR. FISHBEIN: Had they - - - had they made

1 that claim, trial counsel would have done exactly
2 that. And it would've fully explained what happened.
3 But they didn't make that claim. And he was entitled
4 - - - my client was entitled to fair notice.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 MR. FISHBEIN: Thank you.

7 CHIEF JUDGE LIPPMAN: Thanks. Thank you
8 both. Appreciate it.

9 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Akiva Daniel Abraham, No. 192 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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