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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 203

ROBERT L. WORDEN,

Appellant.

20 Eagle Street
Albany, New York 12207
October 17, 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: 203, People v.
2 Worden.

3 Counselor, do you want any rebuttal time?

4 MR. DAVIS: Two minutes, please, Judge.

5 CHIEF JUDGE LIPPMAN: Sure, go ahead.

6 MR. DAVIS: Timothy Davis on behalf of Mr.
7 Worden. If ever there was that rare case where the
8 defendant should be able to challenge the
9 voluntariness of his plea for the first time on
10 appeal, it is this one.

11 CHIEF JUDGE LIPPMAN: Tell us - - - tell us
12 exactly what happened on the allocution. Why - - -
13 which I gather is the key to your argument?

14 MR. DAVIS: Well, that's the key, but it's
15 - - - it's also the first part, but there's many
16 things that happen after that.

17 CHIEF JUDGE LIPPMAN: Yeah, yeah, tell us
18 about the allocution in par - - - in particular.

19 MR. DAVIS: Well, with regard to the third
20 subdivision of rape in the third degree, there's
21 essentially three elements: having sexual
22 intercourse with a person who is capable of
23 consenting - - - meaning not physically helpless,
24 mentally disabled, or mentally incapacitated - - -
25 and that person expresses - - - clearly expresses - -

1 - a lack of consent, either by word or deed.

2 In this case, the prosecutor established
3 that Mr. Worden had sexual intercourse with the
4 complainant on that date. He freely admitted that.
5 But the prosecutor then asked the opposite question
6 that she should have asked. The prosecutor asked,
7 and she didn't consent because she was physically
8 unable; she lacked the capacity to consent.

9 Now, usually plea colloquies are done in a
10 manner to secure easily a - - - a guilty plea by the
11 defendant. I mean, they're not a - - - a test of the
12 defendant's knowledge of the intricacies of the penal
13 law. In this case, Mr. Worden says yes, but it's not
14 clear whether he's saying - - -

15 JUDGE SMITH: He says "yes, I am
16 contesting", if you read it literally.

17 MR. DAVIS: Well, right.

18 JUDGE SMITH: Yeah, you're not contesting
19 this, are you? And he says yes.

20 MR. DAVIS: So it - - - but it's - - - it's
21 clear, though, that - - - it's not clear whether he's
22 saying, yes, she is - - -

23 JUDGE SMITH: And then - - - and then - - -
24 and then the judge says, you've got to rephrase. But
25 she does more than rephrase; she then asks a

1 different question, as I read.

2 MR. DAVIS: She asked a completely a
3 different question. And - - - and what she
4 establishes is - - - is the opposite of what the
5 element of this crime is. She says, and you had - -
6 - did she consent? And he says no.

7 JUDGE SMITH: Is it - - - I mean, the
8 bottom line that neither the prosecutor nor the judge
9 really understood what the guy was supposed to be
10 pleading to?

11 MR. DAVIS: That is the bottom line, yes.
12 And then it became - - - it becomes clear on defense
13 counsel's motion to withdraw Mr. Worden's plea, that
14 he doesn't understand the elements either.

15 CHIEF JUDGE LIPPMAN: So nobody, in your
16 view, understands in reality the - - -

17 MR. DAVIS: No one understood.

18 CHIEF JUDGE LIPPMAN: - - - consent here in
19 this context?

20 MR. DAVIS: No.

21 JUDGE SMITH: I have - - - I actually have
22 another question. Where in the transcript does he
23 plead guilty?

24 MR. DAVIS: Well, he says the word
25 "guilty", but what he's actually pled guilty to is

1 not a - - - not a crime.

2 JUDGE SMITH: Well, I mean, I didn't - - -
3 I didn't even see the - - - I mean, usually in these
4 things you see, you know, Robert Worden, you were
5 charged with such and such; how do you plead, guilty
6 or not guilty? Guilty, Your Honor. I didn't see
7 that in there.

8 MR. DAVIS: I believe the word "guilty" is
9 uttered. I'm not sure that the judge actually says -
10 - - specifically lays it out what he's actually
11 pleading guilty to, but that was my understanding. I
12 may be wrong, but that's what I believed.

13 In this case, it's - - - it's clear that he
14 doesn't understand what he's pleading guilty to.

15 CHIEF JUDGE LIPPMAN: So the consequence of
16 everyone not understanding this is what?

17 MR. DAVIS: Well, surely, if the three
18 participants with some legal training don't
19 understand the charge, it's difficult to then say or
20 presume that Mr. Worden would then have had - - -
21 would have had knowledge of what the charge actually
22 - - - what it is.

23 I think it's clear that - - - that's he's
24 negated an element of the charge. If - - - if the
25 last question the court asks, she didn't give consent

1 because she was - - - has a mental illness and she
2 took psychotropic medication, a normal person,
3 untrained in - - - in legal matters, and not familiar
4 with this statute, would assume that - - -

5 JUDGE ABDUS-SALAAM: Counsel, why - - - why
6 is that last question relevant? If - - - if we
7 believe that the defendant understood what he was
8 being asked when the prosecutor rephrased the
9 question, not the bad question that she first asked.
10 She said "Did [redacted] give you consent to have sex
11 with her on those dates?" And the defendant says no.
12 And we believe that he understood that he was having
13 sex with someone who was refusing consent. That he -
14 - - it wasn't consensual sex. Then why is that last
15 question important?

16 MR. DAVIS: Well, the problem with that
17 question is that, coming on the heels of what was
18 asked the first time, is - - - the only way a person,
19 untrained, not familiar with the statute, would
20 interpret that question is, did the person - - - did
21 the complainant expressly give you consent? And
22 that's - - - and that's not the law.

23 The definition of lack of consent with
24 regard to subdivision 3 of rape in the third degree
25 is the date rape or the acquaintance rape

1 subdivision, where it says that the claimant has to
2 specifically say no. And this becomes relevant in
3 defense counsel's motion, where he says that - - -

4 JUDGE SMITH: But is it also relevant,
5 though - - - I mean, if - - - if the colloquy had
6 stopped - - - I mean, Judge Abdus-Salaam asked you
7 about the question, did she give you consent, and the
8 answer is no. And if the colloquy had stopped there,
9 which seemed to me - - - your argument would be
10 weaker. But then the - - - then the judge says, and
11 she didn't give you consent because she took too much
12 mal - - - medication, and she has a mental illness,
13 correct? The defendant: Correct.

14 That seems to me to be where they - - -
15 they really introduce the incapacity element.

16 MR. DAVIS: Well, they do. But I would
17 also - - - I wouldn't concede that - - - I think my
18 argument would be, not as strong, but I would still
19 have a strong argument that the question: "and she
20 didn't give you consent?" The only way to take that
21 - - - I mean, it's clear defense counsel believes
22 that means that even with the long time marital
23 partners, unless the person specifically says, yes, I
24 agree to sexual intercourse, it's - - -

25 JUDGE SMITH: Yeah, but they don't - - -

1 but you don't have to - - - in an allocution you
2 don't have to get all the elements.

3 MR. DAVIS: No, but - - -

4 JUDGE SMITH: I mean, as I - - - at least -
5 - - at least for preservation purposes. To - - - to
6 get around the preservation rule, you have to have
7 not just an element lacking in the allocution, you
8 have to have a real indication that negates an
9 element, right?

10 MR. DAVIS: Well, yes. And I would say the
11 final question by the court negates the specific
12 element that - - - that the person has to not be
13 physically helpless. But I would say that - - -

14 JUDGE READ: Are you - - -

15 MR. DAVIS: Sorry.

16 JUDGE READ: Are you taking the position -
17 - - did he plead to a crime he wasn't charged with?
18 Is that part of your argument?

19 MR. DAVIS: Well - - -

20 JUDGE SMITH: He pled to subdivision 1,
21 didn't he?

22 MR. DAVIS: Well, he - - - actually, the
23 thing is, he didn't really plead to subdivision 1.

24 JUDGE SMITH: If he pleaded to anything.

25 MR. DAVIS: If he pled to anything, he pled

1 to subdivision 1, but it's not clear that - - - that
2 the court, defense counsel, or the prosecutor
3 actually understand the elements of subdivision 1
4 either, because there's a - - - defense counsel
5 states in his motion to withdraw Mr. Worden's plea
6 that this is a charge that hinges on the subjective
7 intent of the complainant. And he says, I think this
8 is the only penal law section I'm aware of that - - -
9 where the defendant's guilt hinges entirely on the
10 state of mind of the complainant, of which he's not
11 aware. And the court agrees to that.

12 So it's not clear whether he's pleading
13 guilty to having sexual intercourse with someone who
14 is incapable of consenting, whether he's pleading
15 guilty to having sex with someone who has not
16 affirmatively said yes, I want to have sex with you,
17 or whether he's pleading guilty to having sexual
18 intercourse with a person who simply has remained
19 passive, and said nothing, but thinks in her head she
20 doesn't want to have sex. So - - -

21 JUDGE PIGOTT: I - - - I'm sorry. But are
22 you - - - are you essentially saying - - - it - - -
23 it can read, like, everybody knew what was going on
24 here. He's getting time served, and he's getting
25 probation. Not bad, he's not looking at, you know,

1 time in the state, and so, you know, they just went
2 through the steps and got it done, and it was over.

3 MR. DAVIS: Well, I mean, the problem with
4 that is, since no one seems to understand what this
5 statute actually says, it's hard to tell whether Mr.
6 Worden actually would have pled guilty to that had he
7 actually understood. I mean - - -

8 JUDGE ABDUS-SALAAM: Well, what was the
9 question that you think the prosecutor should have
10 asked, or, you know, this is kind of unusual.
11 Usually the court does the allocution, right? But
12 here in this case the prosecution asked the
13 questions. So what was the question that should have
14 been asked? Did she say no?

15 MR. DAVIS: Did she say no?

16 JUDGE SMITH: Do - - - do you have to ask
17 that question to get a good allocution under
18 subdivision 3?

19 MR. DAVIS: I think you have to, because
20 otherwise there's - - - there's the problem where the
21 defendant thinks, as defense counsel thought, that
22 you have to have the complainant say yes, which is
23 not a crime. What Mr. Worden pled guilty to here
24 with the prosecutor's questions is having sexual
25 intercourse with a person who did not say yes, I want

1 to have sex with you beforehand.

2 JUDGE RIVERA: Excuse me, coun - - - I'm
3 sorry.

4 MR. DAVIS: Sure.

5 JUDGE RIVERA: Counsel, your light went on.
6 Could you just quickly refer to your recantation
7 argument?

8 MR. DAVIS: Yes. In this case, I think
9 it's clear, that under - - - this court's decision
10 over a hundred - - - well, almost a hundred years ago
11 now in Shilitano, characterized recantations as the
12 least favored type of evidence.

13 What's happened in the ninety-five years
14 since then is courts have - - - have interpreted that
15 to mean that recantations are inherently unreliable -
16 - - that's the way it's read - - - and ignoring the
17 fact that in Shilitano, this court said that
18 recantations have to be examined in the context of
19 the entire case. And also in Shilitano, this court
20 ruled that there should have actually been a hearing
21 in the case to determine whether or not the recant -
22 - -

23 JUDGE SMITH: Granted that you're - - -
24 you're right that - - - that you can't say every
25 recantation is incredible. Does the court have any

1 discretion to look at the paper and say, this is
2 ridiculous? This not - - - this doesn't merit a
3 hearing?

4 MR. DAVIS: The court does, but in this
5 case, there's several things that the court ignored.
6 And to a certain extent, this - - - this point is
7 intricately linked with the first one; you can't
8 really separate it. And the court says, the
9 defendant also admitted to the elements of the
10 charge, which the defendant didn't. But in this
11 case, we have a situation where there's no
12 corroboration to this crime whatsoever from any
13 outside source. There's no medical evidence. This
14 is essentially - - -

15 CHIEF JUDGE LIPPMAN: Your argument, she's
16 the whole case basically.

17 MR. DAVIS: She's - - - she's the whole
18 case. That's right.

19 JUDGE PIGOTT: You know - - - you know, one
20 of the things that - - - that sits, at least, in the
21 back of my mind is domestic violence. And I realize
22 that's not what's discussed here. But I think courts
23 are skeptical of victims recanting once the perp, if
24 I can use that thing, gets back home. And - - - is
25 that one of the reasons why I guess a hearing would

1 be - - - would be helpful here to find out exactly
2 who, what, when and where this - - - you know, this
3 recantation took - - - took place.

4 MR. DAVIS: That's right, especially in
5 this case, where the complainant contacts defense
6 counsel a week after the plea, and says, send an
7 investigator to my house. I want to recant. And
8 then defense counsel can't act soon enough. Three
9 days later, the complainant's calling back again, and
10 says, where is that investigator?

11 JUDGE SMITH: But isn't - - - isn't it a
12 problem that the - - - the recanting witness gave
13 absolutely no explanation of how she came to tell
14 this rather detailed consistent story in the first
15 place? I mean, she thought her - - - what, her
16 little sister got control of her mind and made her
17 say it?

18 MR. DAVIS: Well, first of all, we're
19 dealing with a complainant who suffers from - - - has
20 some mental illness, number one. Number two, she - -
21 - she says, as this court talked about in Shilitano
22 was, when you - - - when you see whether recantation
23 has any worth on its face, you have to look - - - or
24 any value, you have to see what the motivation was.

25 And she says, my family hates Robert

1 Worden. My sister's a liar and she hates Robert
2 Worden, as well. And so she gives the motivation for
3 why she actually makes this complaint to begin with.
4 She also - - -

5 JUDGE SMITH: I have a feeling I'm missing
6 something. And they pointed a gun at her and made
7 her go in and lie to the grand jury?

8 MR. DAVIS: Well, I mean, I'm not sure if
9 it's simply that she persuaded her, because - - - I
10 don't know what - - -

11 JUDGE RIVERA: If she has - - - if she has
12 mental limitations as you say, why is - - - why is
13 the recantation any more reliable than the original
14 statement - - -

15 MR. DAVIS: Well - - -

16 JUDGE RIVERA: - - - statements?

17 MR. DAVIS: That's why we need a hearing,
18 essentially. I mean - - -

19 JUDGE RIVERA: But if you're not - - - if
20 you're not arguing for a per se rule that you need -
21 - - excuse me - - - you need a hearing in all cases
22 where someone comes back and says we've got a
23 recantation, then when is a judge able to decide that
24 recantation is required in this case?

25 MR. DAVIS: Okay, well, in a situation such

1 as this, where the defendant doesn't say his plea of
2 guilty is contingent - - - as he says in his - - - in
3 his deposition is I thought she had the capacity to
4 consent, and I was wrong. So he's simply pleading
5 guilty, saying he mistook what her state of mind was
6 at that time.

7 So he hasn't said, you know, I punched her,
8 I choked her, whatever. He's not saying that he did
9 anything affirmatively to this person. He's simply
10 saying I was mistaken as to her state of mind. But
11 there's nothing that - - - there was no objective
12 indicia as to what her state of mind was at the time.

13 CHIEF JUDGE LIPPMAN: Okay, counsel. But
14 your argument is, if we find the due process issue,
15 then you don't reach the recant - - -

16 MR. DAVIS: That's correct.

17 CHIEF JUDGE LIPPMAN: - - - whether you
18 need a hearing or not. Okay.

19 MR. DAVIS: Thank you.

20 CHIEF JUDGE LIPPMAN: Let's go to your
21 adversary, and you'll have rebuttal time.

22 MR. DAVIS: Thank you.

23 MS. FANTIGROSSI: Good afternoon, Nicole
24 Fantigrossi of the Monroe Country District Attorney's
25 Office.

1 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
2 do you think anybody in this courtroom knew the
3 elements of this crime or understood what this was
4 all about - - -

5 MS. FANTIGROSSI: I do, Your Honor, and
6 most of - - -

7 CHIEF JUDGE LIPPMAN: - - - in terms of
8 consent?

9 MS. FANTIGROSSI: I'm sorry, Your Honor. I
10 do, and most significantly - - -

11 CHIEF JUDGE LIPPMAN: Yes. Tell - - - tell
12 us what evidence you would point to that shows that -
13 - - that the judge, the prosecutor or the defense
14 attorney understood what consent means in this
15 context.

16 MS. FANTIGROSSI: Sure. Well, first if you
17 look at the motion filed by defense counsel
18 requesting a bill of particulars, he asked for
19 specific information regarding this subdivision of
20 the statute. In response to that, the prosecutor
21 also detailed, pursuant to this specific statute, in
22 her bill of particulars what consent we were talking
23 about.

24 And I think most significantly, Your Honor,
25 even accepting counsel's argument, the one person who

1 knew exactly what was going at the time of this
2 guilty plea was the defendant, and that's what is
3 most important.

4 JUDGE PIGOTT: Well, it didn't sound like
5 it; as Judge Smith pointed out earlier, you know,
6 that the questions seemed to get transposed. I
7 wanted to pursue something Judge Abdus-Salaam asked
8 earlier - - -

9 MS. FANTIGROSSI: Sure.

10 JUDGE PIGOTT: - - - because I've seen this
11 before. Monroe County, it seems the judge - - - the
12 judge doesn't take the plea - - - well, we haven't
13 done all sixty-two counties - - - but generally it
14 seems, the judge is the one that presides over the
15 thing and asks the defendant, you know, what did you
16 do that - - - that adds up to this - - - this crime,
17 et cetera. In Monroe County, I guess, it's - - - the
18 judge says, Mr. or Ms. DA, take the plea.

19 MS. FANTIGROSSI: I think it varies by the
20 judge, Your Honor.

21 JUDGE PIGOTT: Oh, does it?

22 MS. FANTIGROSSI: I think the judges in
23 Monroe County typically do the legal colloquy, and
24 many will ask the prosecutor to the do factual
25 colloquy.

1 JUDGE SMITH: What - - - what - - - where
2 in - - - where in the transcript is the plea?

3 MS. FANTIGROSSI: I just tried to look back
4 as Your Honor did that question. I did not see an
5 actual word of "guilty" in there. I think it's - - -

6 JUDGE SMITH: Is that - - - I mean, is that
7 - - - I mean, is that okay? Can you do - - - can you
8 - - - aren't you supposed to say "I plead guilty" at
9 some point during the guilty plea?

10 MS. FANTIGROSSI: Yes, Your Honor. I would
11 also just point out that defendant's claim regarding
12 the voluntariness of his plea is not preserved and
13 was not raised to the trial court below.

14 JUDGE SMITH: And - - - and - - - and I
15 suppose if he were to claim now, hey, I never did
16 plead guilty, that would be unpreserved also. But
17 isn't there - - - doesn't there come a point, whether
18 it's preserved or not - - - I mean, if I can't find a
19 guilty plea in the record, can I affirm?

20 MS. FANTIGROSSI: I think looking at the
21 whole context, Your Honor, it's clear that he pled
22 guilty here in - - -

23 CHIEF JUDGE LIPPMAN: You can infer a
24 guilty plea, you mean?

25 MS. FANTIGROSSI: I think based on the

1 colloquy done by the trial judge and the questions
2 posed - - -

3 CHIEF JUDGE LIPPMAN: Yeah, yeah. But - -
4 - but as Judge Smith said, doesn't at some point, he
5 have to - - - has to say "I plead guilty"?

6 MS. FANTIGROSSI: Well, counsel here moved
7 to - - -

8 CHIEF JUDGE LIPPMAN: Without those magic
9 words, could it be good? I guess you're saying it
10 can.

11 MS. FANTIGROSSI: I think it could in
12 certain contexts, Your Honor. And I think the fact
13 that his counsel filed a motion to withdraw a guilty
14 plea just kind of assumes that a guilty plea occurred
15 right then and there.

16 JUDGE SMITH: What - - - what do you make
17 of the court's question at the end of the colloquy:
18 "And she didn't give you consent because she took too
19 much medication and she has a mental illness,
20 correct?" The defendant: "Correct".

21 MS. FANTIGROSSI: Well, Your Honor, I think
22 this case is unique because it's clear that the fact
23 that she had a mental illness and did take medication
24 impacted the whole string of events that we have
25 here.

1 JUDGE PIGOTT: But you were saying - - -

2 CHIEF JUDGE LIPPMAN: But doesn't it also
3 impact the issue that's in front of us and make - - -
4 that makes this colloq - - - this allocution even
5 more really unusual?

6 MS. FANTIGROSSI: Well, it is unusual; I
7 definitely would agree with you, Your Honor. But I
8 think, while this question was unnecessary, I think,
9 number one, it could have been significant for SORA
10 purposes; this is a rape third guilty plea. Also, I
11 think that- - -

12 CHIEF JUDGE LIPPMAN: Isn't the question
13 almost fatal in here?

14 MS. FANTIGROSSI: I don't think so, because
15 I think counsel would ask this court to assume that
16 having a mental illness and taking medication equates
17 with incapacity.

18 JUDGE SMITH: Well, if that is - - -

19 MS. FANTIGROSSI: And it clearly doesn't.

20 JUDGE SMITH: Well, it's not just that she
21 has the mental illness and that she takes the
22 medication, but that according to the court's
23 question, that was the reason for the failure to
24 consent. "And she didn't give you consent because".
25 Isn't that - - - doesn't that negate an element of

1 this subdivision 3?

2 MS. FANTIGROSSI: It does not, Your Honor,
3 because the reason someone didn't consent, does not
4 mean she was unable to, and incapacity would equate
5 with being unable to.

6 CHIEF JUDGE LIPPMAN: Is that what the
7 normal meaning of those words - - - that argument?
8 Does it make any sense in terms of what was said and
9 the answer given?

10 MS. FANTIGROSSI: I think it does, Your
11 Honor. I think the question was unnecessary, but the
12 judge felt the need to ask it at that point. I think
13 it would apply to this - - -

14 JUDGE SMITH: So - - - so if - - - you
15 would - - - you would admit, if the court had said,
16 and she didn't give you consent because she was
17 unable to by virtue of her medication and mental
18 illness, that would negate an element?

19 MS. FANTIGROSSI: I think that might, Your
20 Honor. I think it would be - - -

21 JUDGE SMITH: So - - - but - - - so it's
22 the absence of the words "unable" from the question
23 that make the difference?

24 MS. FANTIGROSSI: I think looking at the
25 context of the question, sure. If there was any

1 indication that the court was saying, and she did not
2 consent because she was incapable of consenting, she
3 was unable to, she was incapacitated, and if the
4 defendant said yes, that would be different.

5 JUDGE SMITH: And do you - - - and the
6 prosecutor, earlier in the colloquy, seems to think
7 that the - - - that the complainant was incapable of
8 giving you her consent to have sexual intercourse on
9 those dates. I admit, the - - - the defendant never
10 acknowledges that, but doesn't - - - if you read the
11 whole thing, doesn't it look a lot like they think
12 they're under subdivision 1, and they don't
13 understand what subdivision 3 says?

14 MS. FANTIGROSSI: Well, Your Honor, I think
15 probably she misspoke here. I'm not sure if she was
16 reading from the penal law, and perhaps read the
17 wrong subdivision, but what's important is, the
18 defendant said, yes, I contest that fact. She was
19 not incapable of consenting; she was not
20 incapacitated.

21 JUDGE PIGOTT: Not to - - - not to pick on
22 you, but you were saying, well, the defendant, you
23 know, knew, because there's a bill of particulars.

24 MS. FANTIGROSSI: Well, there wasn't only a
25 bill of particulars, Your Honor.

1 JUDGE PIGOTT: But didn't the - - -

2 MS. FANTIGROSSI: Sure.

3 JUDGE PIGOTT: - - - the DA have the bill
4 of particulars?

5 MS. FANTIGROSSI: Correct.

6 JUDGE PIGOTT: So how - - - so this - - - I
7 mean, how can she make this mistake? I mean, we're
8 saying, he can't make that mistake; he knows it was
9 in the bill of particulars, yet she made that
10 mistake, and she had the bill of particulars, too.

11 MS. FANTIGROSSI: I can't tell you what the
12 prosecutor was thinking at the time. I think she
13 clearly misspoke, but the significance is, it was
14 corrected by the defendant himself. And that's the
15 issue here. Was this guilty plea voluntarily,
16 intelligently and knowingly entered, and I believe it
17 was, based on the facts here.

18 Definitely confusing; definitely could have
19 been better phrased. But this guilty plea was
20 proper, based on this subdivision of the statute.

21 CHIEF JUDGE LIPPMAN: And what about the
22 recantation issue?

23 MS. FANTIGROSSI: Well, recantation
24 evidence, Your Honor, I submit is inherently
25 unreliable, because of what it is.

1 CHIEF JUDGE LIPPMAN: Yeah, but here - - -
2 here she was the whole case, really,

3 MS. FANTIGROSSI: She was, Your Honor.

4 CHIEF JUDGE LIPPMAN: But would you think
5 that if we reached that issue, that - - - that a
6 hearing would be appropriate?

7 MS. FANTIGROSSI: Absolutely not, Your
8 Honor. I think the trial judges have discretion in
9 this area. And what we're losing sight of is the
10 defendant pled guilty here. This wasn't after a
11 trial. I think he might have had a very different
12 situation if there was a trial in which she
13 testified.

14 CHIEF JUDGE LIPPMAN: Yeah, but you both -
15 - - you both said - - - have, you know, her being the
16 case, and that the plea allocation - - - allocution,
17 as you indicated, is at the very least somewhat
18 ambiguous, wouldn't those circumstances, wouldn't you
19 want him - - - held a hearing?

20 MS. FANTIGROSSI: Not on - - - in - - -
21 based on these facts, Your Honor, because I think the
22 trial judge indicated on the record, he reviewed the
23 grand jury testimony, he reviewed the plea
24 allocution, and he reviewed the statement of the
25 recantation, which he found to be equivocal at best.

1 She didn't deny, really, anything that happened.
2 After giving a very detailed statement to the police
3 - - -

4 CHIEF JUDGE LIPPMAN: She says that all the
5 people around me hate, you know, my husband, and, you
6 know, and they really took over this - - - this - - -

7 MS. FANTIGROSSI: Well, I'd submit it's
8 equivocal based on the fact that she was so detailed
9 in how this rape occurred. I question how her family
10 could give her such details to give to the police at
11 that point in time. But in any event - - -

12 CHIEF JUDGE LIPPMAN: But wouldn't the
13 hearing straighten all that out?

14 MS. FANTIGROSSI: I just think it's
15 unnecessary, Your Honor. Convenience should not be a
16 factor. And I think based on the facts in this case,
17 and what the trial judge reviewed, he reviewed the
18 totality of everything he had heard, and he found in
19 his discretion that a hearing wasn't necessary. This
20 recantation did not say that a rape didn't occur, I
21 lied, I made this whole thing up. Basically, she
22 said, I don't remember what happened, but you know
23 what?

24 CHIEF JUDGE LIPPMAN: No, she says I didn't
25 remember and I may have consented to this.

1 MS. FANTIGROSSI: Well, she said - - -
2 well, if we did have sex - - -

3 CHIEF JUDGE LIPPMAN: Doesn't she say that?

4 MS. FANTIGROSSI: I think - - -

5 CHIEF JUDGE LIPPMAN: I think that's what
6 she said.

7 MS. FANTIGROSSI: I think, Your Honor, she
8 says, if we did have sex, it would have been
9 consensual because we were in a relationship at the
10 time.

11 JUDGE SMITH: Your - - - your argument as I
12 understand it, is that you - - - to say - - - to say
13 six months later I don't remember, without explaining
14 why you told the grand jury that you remembered it
15 perfectly a week after the event, that that in itself
16 is a rather suspect statement.

17 MS. FANTIGROSSI: Absolutely, Your Honor.
18 And that was reviewed by the trial judge.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.
20 Anything else?

21 MS. FANTIGROSSI: Nothing. Thank you very
22 much.

23 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
24 you.

25 Counsel, rebuttal?

1 MR. DAVIS: Yes, Judge. Just very briefly,
2 I did review the - - - the plea colloquy, and Your
3 Honor is correct. He does not use the word "guilty"
4 at all.

5 CHIEF JUDGE LIPPMAN: But you agree with
6 your - - - your adversary that you could infer that
7 it was a guilty plea?

8 MR. DAVIS: Yes. I - - - it inferred - - -

9 CHIEF JUDGE LIPPMAN: And it's not an issue
10 as far as you're concerned?

11 MR. DAVIS: No, it's not.

12 With regard to the bill of particulars,
13 what's interesting is a few months before the actual
14 plea date, defense counsel does specifically ask
15 whether the prosecution's theory is that the - - -
16 the lack of consent was by forcible compulsion or
17 because the complainant said no, and the prosecutor
18 in fact does say, this isn't a forcible compulsion
19 case, this is where the complainant expressed her - -
20 - her refusal.

21 But then what's interesting is after that,
22 from the day of the plea on to the very end of the
23 case, nobody -- not the court, not the prosecutor,
24 not defense counsel -- no one actually clearly states
25 - - - or accurately states - - - what the elements

1 are of this charge.

2 I would also note that today, and before
3 the Fourth Department, the People's position was that
4 Mr. Worden did not plead guilty by saying that the
5 complainant was incapable of consenting. But what's
6 interesting is if the court reads - - - it's in the
7 record - - - the prosecutor's response - - - the
8 prosecutor who actually took the colloquy - - - when
9 she opposes defense counsel's motion to withdraw the
10 plea, she states, Mr. Worden's not coming before this
11 court and saying he was mistaken - - - he must have
12 been mistaken as to whether or not the complainant
13 had the capacity to consent to sexual intercourse.

14 So just a month after the plea colloquy,
15 the prosecutor believed that Mr. Worden had not pled
16 guilty to having sex with someone who said no
17 beforehand, but to having sexual intercourse with
18 someone who, in fact, lacked the capacity to consent.

19 Lastly I would note, with regard to the
20 recantation issue, it does seem rather curious that
21 the complainant had this specific deposition, these
22 specific allegations, and went before the grand jury
23 and made specific claims, but in my brief, I talk at
24 some length about the Gary Dotson case, the first
25 person in this country exonerated by DNA evidence.

1 And the first time they actually had a
2 hearing for the DNA - - - to actually prove that he
3 was not the rapist, all the complainant said on the
4 stand was, it didn't happen and everything else, I
5 don't remember. Now, this was a person who testified
6 at some length before the grand jury and at trial.

7 Clearly, just because the complainant in
8 this case had a detailed recitation of what happened
9 when she first complained of this matter, does not
10 mean that that in fact was - - - wasn't true.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. DAVIS: Thank you.

13 CHIEF JUDGE LIPPMAN: Thanks. Thank - - -
14 thank you both.

15 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Robert L. Worden, No. 203 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 25, 2013