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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 233

DONALD O'TOOLE,

Respondent.

20 Eagle Street
Albany, New York 12207
November 14, 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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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. O'Toole.
2 Counselor, you want some rebuttal time?

3 MR. STONE: Three minutes, please.

4 CHIEF JUDGE LIPPMAN: Three minutes?

5 MR. STONE: Three minutes, yes.

6 CHIEF JUDGE LIPPMAN: Go ahead. You're on.

7 MR. STONE: Timothy Stone for the People.

8 I want to start out just by underscoring,
9 we're dealing with collateral estoppel. There's a
10 heavy burden. The burden is on the defendant, and
11 the burden is on the defendant to prove what the jury
12 necessarily found in order to trigger collateral
13 estoppel.

14 JUDGE SMITH: Why do they not necessarily
15 find that there was no gun?

16 MR. STONE: In this case, based on the
17 evidence, the way in which the case was tried, the
18 most reasonable explanation for what the jury did - -
19 - what the jury found, was that there was a gun. It
20 was the lynchpin of the People's theory of force. It
21 was a gunpoint robbery in a barber shop.

22 JUDGE SMITH: You said they found there was
23 a gun?

24 MR. STONE: Yes.

25 JUDGE SMITH: Then how did they - - - how

1 did they acquit of robbery 1?

2 MR. STONE: That's the - - - that's the
3 question implicated in this case.

4 JUDGE SMITH: Yes. That's the question I'm
5 asking you.

6 MR. STONE: And my response is - - -

7 CHIEF JUDGE LIPPMAN: How do they find the
8 gun if it's - - - if they acquitted on first degree
9 robbery?

10 MR. STONE: Honestly, we don't know. But -
11 - -

12 CHIEF JUDGE LIPPMAN: Wasn't that the whole
13 thrust of the charge?

14 MR. STONE: It was the thrust of the
15 charge, yes, there was a gun. But my argument is - -
16 -

17 CHIEF JUDGE LIPPMAN: So why is it not - -
18 -

19 MR. STONE: - - - they - - -

20 CHIEF JUDGE LIPPMAN: - - - collateral
21 estoppel - - -

22 MR. STONE: My - - -

23 CHIEF JUDGE LIPPMAN: - - - estoppel on
24 what would seem to be an ultimate fact?

25 MR. STONE: My argument is, at the very

1 least, this verdict is ambiguous. Based on the way
2 in which the case was tried, there is - - - my
3 adversary points out a rational - - -

4 JUDGE GRAFFEO: If it's - - - if it's
5 ambiguous, why doesn't the benefit go to the
6 defendant?

7 MR. STONE: Because this court in Goodman
8 and Acevedo said if there's an ambiguity in a jury
9 verdict, if - - - if it's factually inconsistent, but
10 at the very least if there's an ambiguity in a jury
11 verdict, collateral estoppel doesn't apply, because
12 you're trying to glean - - -

13 JUDGE GRAFFEO: So - - -

14 MR. STONE: - - - findings - - -

15 JUDGE GRAFFEO: - - - what's - - -

16 MR. STONE: - - - from a jury verdict.

17 JUDGE GRAFFEO: - - - what's the force for
18 robbery second if it's not the gun?

19 MR. STONE: If it's not the gun, I - - - we
20 submit in the brief that there's really no force.
21 There's a large gentleman that walks in. He stands
22 next to the victim. He accompanies them outside, and
23 the victim surrenders his necklace.

24 The evidence was, apart from the gun,
25 that's the evidence. But the evidence the victim

1 testified to was this accomplice walked in, jammed a
2 gun in the guy's stomach, followed him outside - - -

3 JUDGE GRAFFEO: I'm trying to find the
4 ambiguity, because it seems like the gun is the
5 force.

6 MR. STONE: The gun is the force.

7 JUDGE GRAFFEO: So - - -

8 MR. STONE: The gun was the essence of the
9 - - -

10 JUDGE GRAFFEO: - - - so where's the
11 ambiguity as to what the jury - - -

12 MR. STONE: The ambiguity is that the jury
13 - - -

14 JUDGE GRAFFEO: - - - why the jury - - -

15 MR. STONE: - - - well, the jury - - -

16 JUDGE GRAFFEO: - - - acquitted on the
17 first degree?

18 MR. STONE: - - - the jury acquitted. This
19 was a single criminal transaction; two theories of
20 robbery. The People presented it as the same theory
21 of force with respect to two theories of robbery.
22 But the jury acquitted of robbery 1 - - -

23 JUDGE SMITH: But you're saying - - - so
24 you're saying it was an out-and-out inconsistent
25 verdict, therefore - - -

1 MR. STONE: I'm not - - -

2 JUDGE SMITH: - - - it doesn't even - - -

3 MR. STONE: - - - I'm not even saying it -
4 - - we do argue - - -

5 CHIEF JUDGE LIPPMAN: You're saying it's
6 ambiguous.

7 MR. STONE: At the very least, it's
8 ambiguous. It - - -

9 JUDGE SMITH: It's ambiguous as to whether
10 it was consistent or inconsistent? I'm not sure
11 that's possible.

12 MR. STONE: It's - - - I would submit it's
13 factually inconsistent, because I think if the shoe
14 was on the foot, my adversary would be arguing that
15 there's insufficient evidence of force apart from the
16 gun.

17 CHIEF JUDGE LIPPMAN: What's - - - what's
18 ambiguous and what's factually inconsistent? Isn't
19 it clear that - - - why they acquitted him on one?

20 MR. STONE: In - - - in conducting
21 collateral estoppel analysis, you have to look at how
22 the case was actually tried. And my adversary's
23 burden is to show that the jury necessarily found
24 that no gun was used.

25 CHIEF JUDGE LIPPMAN: How could they not

1 necessarily find it?

2 MR. STONE: Because in the manner in which
3 the case was presented to the jury, no alternative
4 theory of force other than the gun was presented.

5 JUDGE SMITH: Well, is it ridiculous to
6 imagine that when a very large guy without a gun
7 stands next to you and says give your chain to my
8 friend here, that there's a certain amount of
9 intimidation?

10 MR. STONE: And, Your Honor, I'll
11 acknowledge that. That's a theoretical possibility.
12 That doesn't mean my adversary has met her burden of
13 showing that the jury necessarily found that that
14 alternative - - -

15 JUDGE SMITH: Well, they did find - - -
16 they sure found that he didn't commit robbery 1.

17 MR. STONE: But they convicted of robbery
18 2.

19 JUDGE SMITH: But - - - and what element of
20 robbery 1 could possibly have been missing, except
21 the gun?

22 MR. STONE: But they convicted of robbery
23 2. And for collateral estoppel analysis, you have to
24 look at the way in which the case was tried.

25 JUDGE ABDUS-SALAAM: Well, if you look at

1 JUDGE RIVERA: But - - - but the - - - I
2 thought I understood the argument and the facts were,
3 yes, you've got the guy who's got the muscle, but the
4 victim's child runs out and certainly a jury could
5 say, even if he doesn't have a gun, I might, as a
6 parent, see how this person's worried about their
7 child being injured by this big person or injuring
8 me.

9 MR. STONE: My - - - my response would be -
10 - -

11 JUDGE RIVERA: I mean, you were presenting
12 a case that obviously this person felt fearful and
13 that he feels even more fearful - - -

14 MR. STONE: Yeah.

15 JUDGE RIVERA: - - - once his child runs
16 out.

17 MR. STONE: I agree. But merely because
18 there's a rational view of this evidence - - - and
19 obviously if you - - - Your Honors view it as there's
20 some evidence of force apart from the gun; even if
21 that exists, that's true, the defense counsel still
22 cannot meet her burden of showing that the jury
23 necessarily found - - -

24 CHIEF JUDGE LIPPMAN: Aren't you almost
25 turning common sense on its head in your analysis of

1 this?

2 MR. STONE: I don't think so. In what
3 sense, Judge?

4 CHIEF JUDGE LIPPMAN: Wouldn't it seem so
5 basic that by acquitting him of that first charge,
6 that they did not find a gun?

7 MR. STONE: Because the gun - - - the gun -
8 - -

9 CHIEF JUDGE LIPPMAN: Why do you say common
10 sense tells you the opposite?

11 MR. STONE: Because the gun was interwoven
12 in the - - - the evidence. It was a part of the
13 actus reus - - - the essential part of the actus
14 reus. The People never presented an alternative
15 theory of force in their arguments. Even when they
16 talked about robbery 2, they said the accomplice
17 always had the gun, but that doesn't make defendant
18 any less guilty.

19 JUDGE SMITH: Well, but look, the People
20 didn't present an alternative theory, because they
21 wanted a conviction - - - they wanted a conviction on
22 the top count. The defendant didn't present an
23 alternative theory because he wanted a conviction
24 (sic) on both counts. The jury, which happens to be
25 impartial, unlike either one of those, might have

1 thought that there was a - - - that there was no gun,
2 but that there was force.

3 MR. STONE: I agree. But for the purpose
4 of collateral estoppel, you have to - - - you have to
5 - - - this is the language. Where is the language?
6 This is from - - - I think it's from Goodman. It's
7 "whether a rational jury could have grounded its
8 verdict on an issue other than that which the
9 defendant seeks to foreclose from consideration."

10 JUDGE PIGOTT: Is that in your brief?

11 MR. STONE: Yes, it is. The responsibility
12 of my adversary is to prove that the only decision,
13 the only rational decision the jury could have come
14 to was that there was no gun and that the - - - the
15 accomplice was the proof of force. And for the
16 purpose of collateral estoppel, you have to examine
17 the way in which the case was tried, the parties'
18 arguments, and the most reasonable conclusion - - -

19 JUDGE ABDUS-SALAAM: Wasn't part of the way
20 the case was tried, that the defendant himself
21 admitted that he stole the victim's property by
22 calling the victim and telling the victim he had to
23 turn it over to this big man who would come to get
24 it?

25 MR. STONE: Yes. There was - - -

1 JUDGE ABDUS-SALAAM: So he admitted that he
2 was committing a robbery?

3 MR. STONE: He admitted - - - he - - -

4 JUDGE ABDUS-SALAAM: And the jury heard
5 that, so they could say well, you know, maybe there
6 wasn't a gun or there was a gun, but I'm - - - we're
7 not convicting him of the first-degree robbery, we're
8 convicting him of the second degree - - -

9 MR. STONE: The jur - - -

10 JUDGE ABDUS-SALAAM: - - - robbery, because
11 he's admitted to stealing property.

12 MR. STONE: - - - but the jury - - - but as
13 to that, the admission, the defendant's admission was
14 that a simple robbery occurred, not that a robbery
15 with a second assailant, in order to establish second
16 degree robbery, and not a gun.

17 JUDGE ABDUS-SALAAM: No, the - - - no, the
18 admission was I told the victim to give his property
19 to my accomplice.

20 MR. STONE: No, that was not. That was - -
21 - the admission that was made to this gentleman
22 Mitchell by the defendant was that I stole this - - -
23 I stole the necklace. It was not that there was a
24 second accomplice there, and it was not that there
25 was a gun there. So that doesn't account for - - -

1 that corroboration explanation doesn't account for
2 the jury's verdict.

3 JUDGE RIVERA: But - - -

4 CHIEF JUDGE LIPPMAN: Okay, counsel - - -
5 go ahead. Judge Rivera?

6 JUDGE RIVERA: But the only - - - I
7 thought, again, the only factual scenario that you
8 presented was when he comes with this muscle, with
9 the other individual. What's the other opportunity
10 for this - - - for this theft?

11 MR. STONE: For the theft?

12 JUDGE RIVERA: Right.

13 MR. STONE: Well, there's - - -

14 JUDGE RIVERA: That - - - that he's
15 admitting to?

16 MR. STONE: That he's admitting to? Well,
17 he's admitting to I robbed him of the necklace. He's
18 not admitting to there was a second assailant there,
19 which was the aggravating factor necessary for
20 robbery 2. And he's not admitting that there was a
21 gun there, which is the aggravating factor for
22 robbery 1.

23 CHIEF JUDGE LIPPMAN: Okay cou - - -

24 MR. STONE: So that - - -

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thanks. You'll have rebuttal.

2 MS. MARTONE: Good afternoon, Your Honors.
3 I'm Katheryne Martone on behalf of Mr. O'Toole. The
4 - - -

5 CHIEF JUDGE LIPPMAN: What about the
6 acquittal on robbery 1? What is it - - - what's the
7 significance?

8 MS. MARTONE: What - - -

9 CHIEF JUDGE LIPPMAN: In terms of
10 collateral estoppel?

11 MS. MARTONE: What happened here is the
12 prosecution presented the jury with two theories of a
13 robbery, one in which a display of a weapon was
14 involved and the other in which a gun was not
15 involved. And by acquitting Mr. O'Toole of the first
16 degree robbery charge, they necessarily found the
17 facts in his favor, and but acquitting - - - but
18 convicting him of the second degree robbery charge,
19 they necessarily decided in his favor.

20 JUDGE PIGOTT: Remember depraved
21 indifference murder?

22 MS. MARTONE: The question - - -

23 JUDGE PIGOTT: When we used to have, you
24 know, the double charges on that, and we said you
25 shouldn't do that, and one of the reasons we said you

1 shouldn't do that is because the juries, thinking
2 that DIM was a lesser included, would find that way
3 despite the fact that the - - - that the evidence was
4 clearly the other way.

5 MS. MARTONE: You know, Your Honor, I don't
6 want speculate about the district attorney's motives,
7 but I do think it was reasonable for them to include
8 the second degree - - -

9 JUDGE PIGOTT: No, I'm just asking you if
10 you remembered that, because - - -

11 MS. MARTONE: Sure, I do.

12 JUDGE PIGOTT: - - - what I want - - - what
13 I wanted to suggest to you was that juries do what
14 juries do. And they could have had a fight over the
15 word "displays". Because it never showed up. It was
16 in somebody's pocket. And I can picture twelve of
17 them sitting around, somebody saying, well, it says
18 "displays", and you know, he had a gun, but it wasn't
19 displayed so I'm not going there. And they
20 compromise with rob 2, and that - - - as your
21 opponent points out - - - would not stop the next
22 trial from using the gun for rob 2.

23 MS. MARTONE: Well, what we have to do here
24 - - - you know, the part of the record that the - - -
25 that the district attorney hasn't mentioned so far

1 is, you know, as the court instructed in Ashe v.
2 Swenson and this court in Goodman, a court deciding a
3 collateral estoppel claim has to review the entire
4 record of the prior proceeding, and that includes the
5 trial court's instructions.

6 And here the trial court instructed the
7 jury that it could convict Mr. O'Toole of a for - - -
8 of a robbery if it found that either he or his - - -
9 of robbery in the second degree, if it found that
10 either he or his accomplice used or threatened the
11 use of immediate physical force.

12 So the jury was instructed that - - - and
13 that's - - - and that's clearly what the jury found
14 here, is that there was - - - by acquitting him of
15 the first degree robbery charge, that there was no
16 weapon involved, but the jury was instructed - - -

17 JUDGE PIGOTT: Wasn't a weapon displayed,
18 was my question. In other words, isn't it
19 conceivable that the jury could have said, there was
20 a gun but it wasn't displayed, and I think you have
21 to display - - - you know, I don't want to
22 overestimate the intelligence of juries, but I don't
23 want underestimate it either.

24 MS. MARTONE: Judge, we have to presume
25 that the jury appropriately applied the trial court's

1 instructions in analyzing one of these claims. We
2 can't speculate that the jury compromised, because if
3 we - - - if we do that, that would defeat - - -
4 because a jury can do that in any case - - - that
5 would defeat the application of collateral estoppel
6 in every case.

7 JUDGE PIGOTT: Not according to the - - -

8 JUDGE RIVERA: What - - - I'm sorry. I
9 thought you said that there - - - there were the two
10 theories: one is about the gun and the other theory
11 is about - - -

12 MS. MARTONE: Yes.

13 JUDGE RIVERA: - - - the force. How are
14 you arguing that that's the other theory that they
15 presented? Or did I misunderstand you?

16 MS. MARTONE: Yeah. What - - - what I'm
17 saying, Your Honor, is that the - - - that the
18 prosecution presented two theories of a robbery. The
19 first degree robbery involved the display of a
20 firearm. They also presented the theory of second
21 degree robbery which did not involve the use of a
22 firearm, of the display of a firearm.

23 So by acquitting Mr. O'Toole of the first
24 degree robbery count, they necessarily found that no
25 weapon was involved in the robbery.

1 JUDGE RIVERA: You're saying they presented
2 that theory by the witnesses they called, by their
3 summation, by the charge, all of the above?

4 MS. MARTONE: By the charge. By all of
5 that. You know, and this - - - this view of it, that
6 the jury - - - that the jury rejected the theory that
7 there was a weapon involved, you know, which is a
8 classic type - - - a gun allegation is a classic
9 embellishment. And on the facts of this case, it
10 really looked like it was, because the display
11 allegedly happened inside of a very small barber shop
12 in front of - - - in front of numerous witnesses.
13 And these people were, you know, not just bystanders,
14 they were Mr. Horsey's customers - - -

15 JUDGE SMITH: How - - -

16 MS. MARTONE: - - - and even a friend, who
17 he had seen just two days before - - -

18 JUDGE SMITH: Assume you're right. How do
19 you - - - how is the DA supposed to try the second
20 degree robbery case the second time? He can't have
21 his witness lie and say - - - or he can't tell his
22 witness say you didn't see a gun even if you did.
23 What's he supposed to do?

24 MS. MARTONE: You know, this is - - - this
25 comes up in all sorts of contexts in the criminal

1 law, that a witness is instructed - - - in criminal
2 cases - - - that a witness is instructed that he
3 can't refer to certain matters in his testimony. If
4 evidence is suppressed, if - - - if it's - - -

5 JUDGE SMITH: And if the defense opens the
6 door, that's the defense's problem?

7 MS. MARTONE: You know, and - - - or, Your
8 Honor, you know - - -

9 JUDGE SMITH: But I - - - can't the - - - I
10 mean, wouldn't this be a case where it's very, very
11 hard? I mean, how do you answer the question "what
12 happened" without saying, I saw a gun?

13 MS. MARTONE: Mr. Horsey can testify to
14 everything that - - -

15 JUDGE SMITH: And what if the witness isn't
16 all that sophisticated? What if he has trouble
17 coping with that sort of very counterintuitive
18 instruction?

19 MS. MARTONE: He can testify to everything
20 that Mr. O'Toole allege - - - and his accomplice
21 allegedly did, except the display of the firearm - -
22 -

23 JUDGE GRAFFEO: So what's the force
24 element? What are you suggesting is going to be the
25 force element, then?

1 MS. MARTONE: It would be the threat of the
2 immediate use of physical force. As this court held
3 in People v. - - -

4 JUDGE PIGOTT: But that's - - -

5 MS. MARTONE: - - - Woods - - -

6 JUDGE PIGOTT: - - - but that's not true.
7 I mean, you don't - - -

8 MS. MARTONE: It is true. Because that's
9 what the first jury found, Your Honor.

10 JUDGE PIGOTT: No, what the jur - - - the
11 first jury found was they - - - in their view there
12 wasn't sufficient evidence to establish that - - -
13 that a firearm was displayed, not that there wasn't a
14 firearm, but that one wasn't displayed. And - - -
15 and - - -

16 MS. MARTONE: Your Honor, with all due
17 respect - - -

18 JUDGE PIGOTT: Wait, let me - - - so in the
19 next trial, you don't have to worry about rob 1. He
20 can - - - he can use all the weapons he wants,
21 there's never going to be a rob 1.

22 MS. MARTONE: You know, we have to - - -
23 collateral - - - you know, the application of the
24 doctrine of collateral estoppel in criminal cases
25 generally, which there's no doubt now - - - I mean,

1 Acevedo and Goodman have been on the books for a very
2 long time now - - - requires - - - requires the - - -
3 requires the reviewing court to ascertain what facts
4 were necessarily decided. The doctrine - - -

5 JUDGE SMITH: What about Dowling?

6 MS. MARTONE: - - - itself - - - the
7 doctrine itself requires the court to, you know, to
8 accept that a jury's verdict - - - an acquittal does
9 decide certain facts.

10 JUDGE SMITH: What about - - - what about
11 Dowling? Does Dowling undermine the force of Acevedo
12 and Goodman?

13 MS. MARTONE: Not at all, Your Honor.

14 JUDGE SMITH: Why not?

15 MS. MARTONE: It does not. First of all,
16 because New York does not just follow federal law.
17 New York recognizes a broader right that's based on
18 its own common law - - -

19 JUDGE SMITH: Not necessarily - - -

20 MS. MARTONE: - - - conceptual - - -

21 JUDGE SMITH: - - - a constitutional right,
22 you're saying?

23 MS. MARTONE: A broader constitution right.

24 JUDGE SMITH: I mean, if the legislature
25 want to overrule Acevedo by statute, maybe they could

1 do it?

2 MS. MARTONE: I - - - I guess. You know.
3 But - - - but I think that's the first point is that
4 New York doesn't just follow federal law. And the
5 second point I would make is that Dowling did not
6 change the law regarding the application of
7 collateral estoppel in criminal cases at all.

8 So - - - so the court in Dowling did not
9 hold that an acquittal represents only a finding that
10 the jury did not find overall that the prosecution -
11 - - that the jury found overall that the prosecution
12 failed to prove guilt beyond a reasonable doubt - - -

13 JUDGE PIGOTT: Right, but didn't - - -

14 MS. MARTONE: - - - overall.

15 JUDGE PIGOTT: - - - didn't they say it
16 does not preclude the use of evidentiary facts in a
17 subsequent trial?

18 MS. MARTONE: I'm sorry, Your Honor. If
19 you don't mind repeating that?

20 JUDGE PIGOTT: Didn't Dowling say that it
21 does not preclude the use of evidentiary facts in a
22 subsequent trial?

23 JUDGE SMITH: That the acquittal did not.

24 MS. MARTONE: Right. Dowling went - - -
25 Dowling applied the principles that the Supreme Court

1 had set forth in Ashe to analyze the claim - - -

2 JUDGE SMITH: I guess - - - I guess maybe
3 the question is, aren't Dowling and Acevedo
4 inconsistent, except for your point that they're
5 applying different laws?

6 MS. MARTONE: I don't think so, Your Honor.
7 I don't - - - I know that the court in Dowling spoke
8 in terms of collateral estoppel applying to ultimate
9 facts, and the court held in Acevedo that collateral
10 estoppel also applies to evidentiary facts.

11 But in this case, the type of fact that
12 we're dealing with here is - - - is such an important
13 fact that the prosecutor here is arguing that it's
14 essential to Mr. O'Toole's conviction in - - -

15 JUDGE PIGOTT: Well, he's saying it's
16 essential for the truth. In other words, you want
17 him to say even though we all know that the - - -
18 that the force that we're talking about here is the
19 gun, because he got - - - he got acquitted of rob 1,
20 you can't use the gun anymore, and you have to make
21 up a story. You have to - - - you have to convince
22 this jury that - - - you can't say there was a gun,
23 and you got to - - - you got to at least imply, so
24 they can infer, that the mere size of this - - - of
25 the accomplice was the force.

1 MS. MARTONE: The witness will have to be
2 instructed that - - -

3 JUDGE PIGOTT: And that may not be true.

4 MS. MARTONE: Your Honor, the first jury
5 necessarily decided that fact in Mr. O'Toole's favor.
6 And on the question of whether there's sufficient
7 evidence of force to make out - - - you know, to
8 sustain a prosecution for robbery in the second
9 degree, the district attorney has argued in this case
10 in both the trial court and the Appellate Division,
11 that the only reasonable view of the evidence here,
12 even if you enti - - - even if the jury entirely
13 discredited and rejected Mr. Horsey's testimony about
14 the gun, the only reasonable view of the evidence
15 here is that it is a forcible taking.

16 Even apart from the evidence of the gun,
17 the only reason - - - and the district attorney has
18 argued in the Appellate Division that it would be
19 rational for a jury to reject all of Mr. Horsey's
20 testimony except for the part that was corroborated
21 by the admission that Mr. O'Toole had stolen the
22 chain - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 Let's get your adversary for his rebuttal.

25 Go ahead.

1 MR. STONE: A rational finding for what the
2 finding could have done does not equate with the
3 conclusion that that's the only rational conclusion
4 the jury could have drawn.

5 And I think just the - - - this dispute
6 about these - - - these different reasonable views of
7 this record just underscores defense counsel can't
8 meet her burden of showing what the jury necessarily
9 found.

10 JUDGE SMITH: I'm -- - I'm still not sure
11 I heard your reasonable view of the record on which
12 they acquit him of first degree robbery, if he
13 displayed a gun.

14 MR. STONE: Well, my argument is that it's
15 ambiguous and we don't have to provide a reasonable
16 view.

17 JUDGE SMITH: Okay.

18 MR. STONE: The defense attorney hasn't - -
19 - hasn't met her burden.

20 JUDGE SMITH: Then I wasn't missing
21 anything.

22 MR. STONE: Yeah. You know - - -

23 JUDGE RIVERA: Well, why is not that the
24 answer every single time? And that doesn't strike me
25 as satisfying.

1 MR. STONE: What - - -

2 JUDGE RIVERA: You'd always say, well, it's
3 ambiguous. We'll throw up our hands. It's
4 ambiguous.

5 MR. STONE: Well, it's not always
6 ambiguous. It happens to be ambiguous in this case,
7 because we're dealing with a single criminal
8 transaction and a split verdict at the same trial
9 where the verdict is seemingly factually inconsistent
10 or at the very least ambiguous.

11 This - - - this specific case, it's hard to
12 look at this case and say the jury heard this
13 evidence and found a robbery occurred, but there was
14 no gun.

15 And as Judge Pigott pointed out, it's kind
16 of an absurd result, we send this case back down; how
17 do you have the victim testify about what happened in
18 the barber shop - - -

19 JUDGE SMITH: But isn't - - -

20 MR. STONE: - - - without a gun?

21 JUDGE SMITH: - - - isn't that a problem
22 with Acevedo? I mean, in Acevedo, you kind of wonder
23 how they're supposed to try the case when they can't
24 - - - they're not allowed to show that the defendant
25 was at the scene.

1 MR. STONE: Yeah, but this is even more
2 severe here, because that - - - that dealt with two
3 different robberies, and theoretically - - -

4 JUDGE SMITH: Okay, but - - - but isn't
5 that an argument for overruling Acevedo?

6 MR. STONE: I mean, I'm all for you
7 overruling Acevedo. But I don't necessarily believe
8 it has to be overruled for us to succeed.

9 CHIEF JUDGE LIPPMAN: Acevedo's been around
10 a long time, though, hasn't it?

11 MR. STONE: It has. But Acevedo - - - I
12 want to jump to another point, really quickly.

13 CHIEF JUDGE LIPPMAN: No, no, but answer
14 this question, before you jump to the other point.

15 MR. STONE: Acevedo's been around for a
16 long time. This - - - this court's law of repugnancy
17 is more established than Acevedo. And this court's
18 law of repugnancy says that you're - - - a jury is
19 allowed to - - - it recognized the fact that a jury
20 is allowed to consider compromise, mercy, mistake, in
21 deciding a - - - in giving meaning to or not giving
22 meaning to a verdict.

23 So I would say that there's - - - there's
24 an inconsistency between repugnancy law and Acevedo.
25 I think Acevedo was bad law, and I think Dowling

1 exposed the logical flaws behind it.

2 CHIEF JUDGE LIPPMAN: Yeah, but Acevedo
3 hasn't been overruled yet, right?

4 MR. STONE: It has not been overruled. But
5 in any event - - -

6 CHIEF JUDGE LIPPMAN: It's still the law
7 here.

8 MR. STONE: - - - in any event, regardless
9 of the evidentiary fact - - - ultimate fact, the
10 holding in Acevedo, here, there - - - we're dealing
11 just with the burden on defendant to show what the
12 jury necessarily found. And even under Acevedo,
13 defense counsel can't meet that burden.

14 And then there's one more - - -

15 CHIEF JUDGE LIPPMAN: One more point. Go
16 ahead, counsel.

17 MR. STONE: Okay. That under my argument,
18 it's not always true that you - - - it's always
19 possible that a jury can exercise mercy, or
20 compassion or compromise, that this would eviscerate
21 or gut the doctrine of collateral estoppel.

22 Our position is only that when you have a
23 situation such as you have here, where you have a
24 split verdict that seemingly ambiguous or possibly
25 factually inconsistent, that in the same way you take

1 into account mercy or a compromise in the context of
2 repugnancy, there should be equivalency in the law.
3 This - - - these interrelated universes or these
4 areas of the law, they should be consistent.

5 So in this case, one explanation is, yeah,
6 the jury said there's corroboration for some stuff,
7 there's not corroboration for another stuff. We're
8 going to compromise.

9 And in conducting collateral estoppel
10 analysis, a court should be able to take that into
11 account.

12 CHIEF JUDGE LIPPMAN: Okay, counselor.

13 MR. STONE: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you. Thank you
15 both.

16 (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. Donald O'Toole, No. 233 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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