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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 89

LENNIE FRANKLINE,

Appellant.

20 Eagle Street
Albany, New York 12207
May 04, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 89, People v. Lennie Frankline.

3 MR. FALLEK: I would like to request two
4 minutes, Your Honor.

5 CHIEF JUDGE DIFIORE: You may have it.

6 MR. FALLEK: Good afternoon, my name is
7 Allen Fallek.

8 Under the Molineux rule, evidence of a
9 defendant's prior crimes are admissible if they are
10 relevant to a proper purpose. We have never argued that
11 was not the case here. We agree with the People that
12 under all the case law they rely on, Dorm, Leeson, Gines,
13 and the like, the evidence of the Niagara Falls previous
14 assault was admissible to show background, complete the
15 narrative, motive, whatever.

16 But then, the extreme overabundance of - - -

17 JUDGE RIVERA: But what - - - what part of
18 it could she not testify to? I know you provided
19 basically two or three sentences, but - - - but the
20 judge was going to let more come in, so what part of
21 it could she not have said?

22 MR. FALLEK: Well, I mean, that's the gist
23 of our argument. That - - - that while it was
24 admissible to these purposes, the complainant
25 couldn't testify to the details, the details of the

1 details, all the inflammatory information about
2 pouring the gasoline, where the gasoline was poured,
3 how she was hogtied, that specifically - - -

4 JUDGE RIVERA: Well, the gasoline and the
5 lighter, right, again - - - that - - -

6 MR. FALLEK: The - - - with respect to the
7 - - - yeah.

8 JUDGE RIVERA: - - - that's going to
9 perhaps her fear in the narrative, no?

10 MR. FALLEK: Yeah. With respect to the - -
11 - to the Niagara Falls incident, all that stuff, all
12 the particulars that constituted the assault that was
13 admissible.

14 JUDGE STEIN: So without - - - without
15 objections as the testimony was coming in, if - - -
16 if you would be asking us to make a rule about how
17 far generally such testimony should be allowed to go,
18 how would - - - how would you articulate that rule?

19 MR. FALLEK: Well, the rule has been pretty
20 much announced in Molineux, Ventimiglia, and all the
21 - - - all those cases.

22 JUDGE STEIN: But, you see, you're not
23 challenging it - - -

24 MR. FALLEK: That is - - -

25 JUDGE STEIN: - - - under that.

1 MR. FALLEK: Well, It's a rule - - -

2 JUDGE STEIN: You're challenging the extent
3 of it.

4 MR. FALLEK: Well, it's - - - because, as
5 Ventimiglia points out, it's - - - it's a very
6 difficult line to establish. It's - - - it's a
7 function - - -

8 JUDGE FAHEY: Well, it seems - - - it seems
9 like you're saying that - - - that you're not
10 objecting to the content of the testimony, that was
11 permissible, but that the amount of the testimony was
12 impermissible. And you're relying on Stanard and
13 cases like that.

14 MR. FALLEK: Stanard, yeah - - - yes, well,
15 the amount of the testimony was very much due to the
16 content of the testimony. That is, all the detailed
17 facts and everything else, even facts unrelated to -
18 - - to that. A narrative - - -

19 JUDGE FAHEY: So if that's the case, then
20 you're back to what Judge Stein was saying, which is
21 what's the rule here, how do we apply a ruling?

22 MR. FALLEK: Well - - - well, the rule is
23 always with respect to Molineux, evidence where the
24 probative is - - - value outweighs the prejudicial
25 effect. As long as that's the case, and as long as

1 the evidence is relevant to a proper purpose, then
2 it's admissible.

3 JUDGE GARCIA: So - - -

4 JUDGE ABDUS-SALAAM: Counsel, when did you
5 decide - - -

6 JUDGE GARCIA: It's all right, go ahead,
7 Judge.

8 JUDGE ABDUS-SALAAM: I'm sorry.

9 When did you decide that the evidence that was
10 being given was relevant to the proceeding? Was it before
11 - - - was it after voire dire, when I think you objected,
12 or your client objected to having any of the testimony
13 about Niagara come in?

14 MR. FALLEK: Well, there - - - there was an
15 initial Molineux ruling; we don't have those
16 particular minutes. But - - - but it was - - - the
17 ruling was reiterated, and in fact developed and
18 expanded in the course of the trial. And - - -

19 JUDGE ABDUS-SALAAM: My point - - - the
20 question - - - the reason I've raised that question
21 is that I am wondering why you didn't make a motion
22 in limine or something to limit the testimony, if you
23 decided it was relevant before it came out in trial,
24 that you limit it to certain areas or certain things,
25 then try to have the defendant's - - - or the witness

1 stick to that.

2 MR. FALLEK: Yeah - - - no. As I said, the
3 original minutes of the Molineux - - - the actual
4 ruling are not available. But there is reference by
5 counsel that he actually objected initially to any of
6 that coming in. But then the ruling came down
7 allowing the evidence of the Niagara Falls incident.

8 So after that, counsel made motions at
9 every turn, where - - - where he thought obviously
10 the initial ruling must have been ambiguous enough
11 for him to think that - - - that actual reference to
12 the rape, kidnapping, were beyond the scope of that.

13 And then we learned that the court, in the
14 context of these objections, clarified the rulings,
15 said, no, that was admissible. Then when it got even
16 more detailed and counsel objected further, the court
17 clarified again or expanded the ruling even further
18 to say that practically everything about the Niagara
19 - - - all the facts were admissible.

20 JUDGE ABDUS-SALAAM: In the end, after it
21 all - - - assuming you didn't feel, or it wasn't
22 necessary to make the motion in limine, after the
23 testimony came in, did you ask the judge to give a
24 limiting instruction or, you know, give some kind of
25 - - -

1 MR. FALLEK: Yeah, I don't know if he
2 requested it - - -

3 JUDGE ABDUS-SALAAM: (indiscernible).

4 MR. FALLEK: - - - the judge certainly
5 gave those limiting instructions - - -

6 JUDGE ABDUS-SALAAM: Right.

7 MR. FALLEK: But I mean, in the context of
8 these motions - - -

9 JUDGE RIVERA: And more than once.

10 MR. FALLEK: - - - he objected, and
11 objected, and objected, not only to, I mean, to the
12 scope of it being beyond the ruling.

13 JUDGE RIVERA: The judge gave limiting
14 instructions on more than one occasion, correct?

15 MR. FALLEK: About three occasions.

16 JUDGE RIVERA: Three times - - -

17 MR. FALLEK: Yeah.

18 JUDGE RIVERA: - - - and part of the final
19 instructions, correct?

20 MR. FALLEK: That's true.

21 JUDGE RIVERA: Object to the - - -

22 MR. FALLEK: And we're not complaining
23 about it - - -

24 JUDGE RIVERA: Right.

25 MR. FALLEK: - - - to the degree that

1 you're suggesting that - - -

2 JUDGE RIVERA: Your objected to the
3 instructions - - -

4 MR. FALLEK: - - - that maybe it cured the
5 problem on - - - and our position is that - - -

6 JUDGE RIVERA: I understand. You objected
7 to the instructions also?

8 MR. FALLEK: He didn't object to the
9 instructions, no.

10 JUDGE GARCIA: Counsel, what I'm sorry - -
11 -

12 MR. FALLEK: And our position is that - - -
13 that this is a violation of - - - of the self-
14 standing right to a fair trial, so - - -

15 JUDGE GARCIA: Counsel, on that. So what's
16 our standard in looking at this? One, you know,
17 Judge Stein raises the issue, we have to parse
18 through, you say twenty five pages of transcript, to
19 find out what the offending items are that went
20 beyond the scope of the motive, intent, and
21 background ruling that you're not objecting to.

22 But what's the standard that we're
23 reviewing this decision under? I mean, isn't that an
24 abuse of discretion here?

25 MR. FALLEK: The abuse of discretion, as a

1 matter of law, which when an Appellate - - - I
2 suppose when an Appellate Division - - - Appellate
3 Court says it's an abuse of discretion, it is an
4 abuse as a matter of law.

5 Yeah, I began - - - I began to answer that
6 because it's really not clear, as I said, it's always
7 a function of prejudice versus probative value. In
8 some cases, it's more difficult, and in the usual
9 case it is more difficult. And so if a judge
10 exercises his or her discretion, says, this is
11 relevant, then this is going to come in, it wouldn't
12 be so surprising for another judge to exercise his or
13 her discretion, to the opposite; and that's fine.

14 This case happens to be very easy. We are not
15 presented with that difficulty, because usually it is
16 difficult for an Appellate Court to say the court abused
17 its discretion. With respect to Molineux, as long as
18 there is - - - it's apparent that it's probative, and even
19 - - - even though it may also be apparent that it's
20 prejudicial - - -

21 CHIEF JUDGE DIFIORE: Counsel - - -

22 MR. FALLEK: - - - that balance is usually
23 something that we rely on trial courts to make. Here
24 - - -

25 CHIEF JUDGE DIFIORE: Counsel, if the - - -

1 if the Niagara incident took place in Bronx County,
2 the two incidents would have been charged in one
3 indictment.

4 MR. FALLEK: I'd suppose so.

5 CHIEF JUDGE DIFIORE: Would you have
6 prevailed on a severance motion, under those
7 circumstances?

8 MR. FALLEK: You know, I don't - - - I
9 don't recall all the rules of severance, but I think
10 it would have been probably an argument that - - -
11 depending on the lapse of time from one to the other
12 - - -

13 CHIEF JUDGE DIFIORE: Under these
14 circumstances - - -

15 MR. FALLEK: - - - but I supp - - - you
16 know, if I had a guess, I'd say we'd probably - - -
17 it probably would have been charged in one
18 indictment. That's an aspect of - - -

19 CHIEF JUDGE DIFIORE: (indiscernible).

20 MR. FALLEK: Go ahead.

21 CHIEF JUDGE DIFIORE: No - - -

22 MR. FALLEK: No, no, it's something that's
23 sort of disturbing, I'm just adding this that the
24 court thought this was simply a continuation, I think
25 treated it that way as if this was one big crime.

1 JUDGE STEIN: Along those lines, as far as
2 the proof of the - - - of the acts in Bronx County,
3 there was some pretty strong eye witness testimony
4 and other evidence about that crime. So if there was
5 an error here, why isn't it harmless?

6 MR. FALLEK: Well, let me just preface to
7 my response by reminding the court that our position
8 is that harmless error does not apply to this type of
9 error, and that this is analytically
10 indistinguishable from the Stanard case.

11 But we do think it was harmless, I mean
12 harmful in that, yes, there was strong evidence that
13 there was an assault, there was strong evidence that
14 there was a burglary, but there are weaknesses and
15 gaps in the proof with respect to the intent to kill.
16 And - - - and certainly with respect to the
17 aggravating elements of the burglary.

18 In particular, although the evidence of
19 intent to kill was simply pouring the gasoline and -
20 - - and the attempts to light it, it seems that if
21 that's was what the defendant wanted to do, he would
22 have done it, and then his efforts were quite
23 halfhearted to that - - - and the jury could
24 reasonably have seen that - - -

25 JUDGE STEIN: It seems to me that that

1 argument would be only strengthened by hearing what
2 happened in Niagara Falls because the same thing
3 happened there.

4 MR. FALLEK: That - - - that's, you know,
5 that's true.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. FALLEK: In that respect, it's - - -
8 it's hard to understand why the court admitted it to
9 show intent.

10 CHIEF JUDGE DIFIORE: Thank you, sir.

11 MR. FALLEK: Thank you.

12 Ms. Hummel.

13 MS. HUMMEL: Jordan Hummel for the Office
14 of the District Attorney Bronx County.

15 There was no abuse of discretion as a matter of
16 law in this case. The trial court permitted - - -
17 exercised appropriate discretion, which is clear from the
18 record supplemental appendix page 540 to 543, which
19 happens after Ayana's (ph.) testimony when trial court
20 herself stops the testimony.

21 CHIEF JUDGE DIFIORE: Counsel, could the
22 People have effectively limited the witness's
23 narrative and still proceeded appropriately with
24 their case?

25 MS. HUMMEL: I think that in this case, the

1 details were necessary because they were so extremely
2 probative. Ayana was the victim in the Bronx crime,
3 so her credibility was already at issue, so they
4 needed - - - she needed to be permitted to testify in
5 a way that was natural and consistent, as between the
6 Niagara incident and the Bronx incident.

7 JUDGE ABDUS-SALAAM: Even the court said at
8 some point that this is going a bit far afield and
9 then too - - - in so much detail. And I think the
10 court even said that defense counsel is waiting for
11 you to say something.

12 MS. HUMMEL: Right. So the court says - -
13 -

14 JUDGE ABDUS-SALAAM: It's the recognition
15 that this was going a little bit far.

16 MS. HUMMEL: Of course. No one would
17 dispute that this testimony is detailed. But the - -
18 - it's in that moment that we see the court exercise
19 discretion, and she says, this has gone far afield.
20 The People ask, there were some other incidents you
21 were going to let us inquire about, and can we still
22 do that. And she says, you know what, I think given
23 everything that's happened, I'm going to modify my
24 ruling, at this point, you can no longer ask about
25 those other incidents.

1 JUDGE RIVERA: Okay. So if it was already
2 an abuse of discretion, can you really cure? Can you
3 cure by just saying, okay, you can't put in anymore?

4 MS. HUMMEL: No, but I think - - -

5 JUDGE RIVERA: Once that horse is out of
6 the barn, aren't you kind of done?

7 MS. HUMMEL: Well, I think that we see her
8 discretion there, that she is actively thinking about
9 this. This isn't - - -

10 JUDGE RIVERA: I understand. That was not
11 my question; my question is, could she cure the error
12 if it already was error at that point?

13 MS. HUMMEL: If the error had already
14 happened, no. But we don't think that the error - -
15 - that there was error at that point.

16 JUDGE RIVERA: Why is it important to
17 describe the hogtying and the duct tape?

18 MS. HUMMEL: I think it's important because
19 when we look to why it's being admitted, which is for
20 defendant's motive and intent in the Bronx, so - - -

21 JUDGE PIGOTT: What was his motive?

22 MS. HUMMEL: His motive - - - he had a
23 couple of different motives.

24 JUDGE PIGOTT: And neither one of them had
25 anything to do with Niagara.

1 MS. HUMMEL: Well, I think they did because
2 Ayana was the main witness to the crimes he committed
3 in Niagara. So one of the motives was killing a
4 witness to the only crime - - - she was the only
5 person who could say what happened up there.

6 And indeed, when he did go to trial, he was
7 convicted based on her testimony and other evidence, and
8 received a very lengthy sentence. So the first motive
9 would be to kill the witness.

10 JUDGE PIGOTT: You could not - - - you
11 could not have proven that in of the Bronx without
12 having the Niagara Falls incident?

13 MS. HUMMEL: No, because I think that his
14 motive is strengthened with each horrible thing that
15 he does to her up in Niagara. And nobody disputes
16 that the so-called bullet points of the crimes that
17 he committed came in. It's really just about the
18 details. And if - - -

19 JUDGE RIVERA: Isn't it really just about
20 the drama?

21 MS. HUMMEL: The drama?

22 JUDGE RIVERA: Could you - - - could the
23 details come out without the drama of that narrative?
24 You do agree it's very powerful to have this victim -
25 - -

1 MS. HUMMEL: Yes.

2 JUDGE RIVERA: - - - describe being
3 hogtied, having gasoline poured on her, right - - -

4 MS. HUMMEL: Of course.

5 JUDGE RIVERA: - - - crawling on a rug,
6 trying to scrape the duct tape off her mouth with the
7 rug, that those kinds of details carry an emotional
8 impact and a dramatic impact on the jury, versus just
9 merely listing perhaps some of those events.

10 MS. HUMMEL: Sure. But I think in order
11 for her testimony to be credible, and this dovetailed
12 with the entire defense, was that her testimony is
13 incredible, it's exaggerated, it's fabricated. And
14 this started from voire dire. This was the defense
15 throughout trial.

16 JUDGE RIVERA: She is - - - she is - - -
17 there are eye witnesses to part of this; are there
18 not?

19 MS. HUMMEL: To the Bronx case there are -
20 - -

21 JUDGE RIVERA: Correct.

22 MS. HUMMEL: - - - to Niagara, there are
23 not.

24 JUDGE RIVERA: Well, no - - - but then
25 you're trying the Bronx case - - -

1 MS. HUMMEL: Yes.

2 JUDGE RIVERA: - - - so that's what we're
3 talking about.

4 MS. HUMMEL: Yes, there are eye witnesses
5 to parts of the incident, but there are some parts
6 where it is just Ayana.

7 JUDGE PIGOTT: Well, plus - - - plus, I
8 mean, obviously she suffered serious injuries as a
9 result.

10 MS. HUMMEL: Yes.

11 JUDGE PIGOTT: I - - - there's no question
12 that it happened.

13 MS. HUMMEL: Right.

14 JUDGE PIGOTT: You know, everything that
15 you said. I just figured about the time you got
16 through - - - not you personally, but you got through
17 the Niagara Falls incident, he was guilty. You
18 didn't have to put in any evidence about what went on
19 in the Bronx and he was going to get convicted; don't
20 you think?

21 MS. HUMMEL: Well, no. Because I think
22 that everybody agrees the crimes are coming in, and
23 it's the details that are the problem. But the
24 purpose of Molineux is so that a defendant isn't
25 convicted of propensity. So everyone agrees the

1 propensity of the crimes would not be a problem. But
2 there really is no propensity in the details if she
3 is crawling on the floor, if she sees a cop car drive
4 by; there just isn't propensity.

5 JUDGE PIGOTT: Well, that's not - - - you
6 can't reverse it that way, I mean, if you could
7 reverse it that way, then you nev - - - you don't
8 have a Molineux. I mean, the point was that you
9 needed to show either intent, motive, knowledge,
10 common scheme, or plan, or identity. And which one
11 was missing in the Bronx that you needed Niagara
12 Falls?

13 MS. HUMMEL: We don't think that you need
14 to - - - it doesn't need to be missing, we're allowed
15 to present additional evidence even if you can show
16 motive, but as defense counsel challenges - - -

17 JUDGE PIGOTT: Well - - -

18 MS. HUMMEL: - - - the intent is in
19 question, and there might not be enough evidence
20 there. So intent, I think his intent is clear that
21 he is trying to kill her when he gets to the Bronx.

22 JUDGE RIVERA: Is there any way - - -

23 MS. HUMMEL: And that might not be clear -

24 - -

25 JUDGE RIVERA: - - - this kind of testimony

1 - - - permitting this kind of testimony would be
2 abuse of discretion? Is there something that could
3 have been said in this narrative that if the judge
4 had permitted this over objection, it would have been
5 abuse of discretion?

6 MS. HUMMEL: I'm sure that there - - - there
7 could be, I can't think of what that would be. It was not
8 what happened in this record. Particularly because
9 defense does not object, they don't ask - - - challenge
10 the limiting instruction, they don't ask to strike any of
11 the testimony. The defen - - -

12 JUDGE RIVERA: They asked for a mistrial
13 and they did object during the testimony.

14 MS. HUMMEL: The objection - - -

15 JUDGE RIVERA: I agree with you it's at
16 particular points in time which may have not been the
17 wisest of choice.

18 MS. HUMMEL: Right. It's not clear that
19 they are objecting on Molineux grounds at that point.
20 And defense counsel never asks for anything less than
21 a mistrial. So he either wanted the case thrown
22 away, or he wanted those details to come out so that
23 on closing, he could say things like, she fabricated,
24 she exaggerated, that - - - and this is from page
25 647, "There is an exaggeration, if not extensive

1 problems outright untruthfulness."

2 JUDGE PIGOTT: Well, wait, wait, wait,
3 you're not saying, the tactic was, let's get all of
4 this in so we can then say she exaggerated in her
5 summation.

6 MS. HUMMEL: I think beginning with voire
7 dire, when he asked all of the jurors - - - potential
8 jurors, in domestic violence we know that things can
9 be exaggerated, yes, I think he committed - - -

10 JUDGE PIGOTT: Yeah, but then - - -

11 MS. HUMMEL: - - - to a defense that this
12 is exaggerated, you cannot believe this victim's
13 testimony, and that those - - - essentially once the
14 details started, he was writing his closing based on
15 everything that she said and how incredible it seems
16 that she was. And of course - - -

17 JUDGE RIVERA: If we disagree with you and
18 think of it as error, is it subject to harmless error
19 analysis?

20 MS. HUMMEL: Yes. And we would argue that
21 it's - - - that it is a harmless error, because there
22 was overwhelming evidence of his guilt. The jury had
23 plenty to look at of what happened in the Bronx
24 between eyewitness testimony, photos of her injuries,
25 medical records, her testimony that's corroborated by

1 those other pieces of evidence.

2 JUDGE RIVERA: Doesn't all of that
3 corroborate her credibility?

4 MS. HUMMEL: It does, but it also doesn't
5 necessarily explain defendant's motive and intent. I
6 mean, as the trial court said, the factual begins in
7 Niagara, and you can't really understand - - - if you
8 were to truncate it, and the jury didn't know about
9 Niagara, they really wouldn't know what happened in
10 this crime.

11 JUDGE PIGOTT: Really? You think they
12 would have been hung?

13 MS. HUMMEL: I don't know that they would
14 have been hung, but they certainly would not have
15 actually understood what happened. And there are
16 some things - - -

17 JUDGE RIVERA: What do you mean they are
18 not going to understand? This is - - - this is my
19 former lover, we had a violent relationship, he's
20 come and attacked me, and then you have medical
21 records, you have eyewitnesses - - -

22 MS. HUMMEL: I think there is that - - -

23 JUDGE RIVERA: Her clothes - - - her shirt
24 smells like gasoline.

25 MS. HUMMEL: I mean, there is the dispute

1 about what - - - again, that she is a witness of this
2 former crime, so that's part of his motive, any of
3 the testimony about her potential infidelity, her
4 pregnancy, the fact that he is tracking her down from
5 Niagara and lying in re - - -

6 JUDGE PIGOTT: You're putting - - - you
7 could put all that in. All that comes in.

8 MS. HUMMEL: But I think without the detail
9 of what happened in Niagara, it's - - - it's
10 meaningless. And it doesn't acu - - - actually - - -

11 JUDGE PIGOTT: It's meaningless?

12 MS. HUMMEL: Well, it's not meaningless,
13 but it doesn't accurately show the jury what
14 happened. Initi - - -

15 JUDGE PIGOTT: Well, you have - - - you
16 have a two prong problem - - - I mean, not a problem,
17 but, you know, as you pointed out when you said it's
18 harmless error, look what we had; we had it without
19 this. We had - - - we had him convicted without any
20 of this Niagara Falls thing. So if it came in
21 improperly, it's harmless error. And it almost makes
22 the argument that you didn't need it in the first
23 place.

24 MS. HUMMEL: Well, I think - - -

25 JUDGE PIGOTT: And it seems very

1 inflammatory under Allweiss and some of our balancing
2 cases.

3 MS. HUMMEL: Of course, and no one is
4 disputing that what happened in Niagara was horrible,
5 and it definitely was taken into consideration for
6 the jury for the proper purposes. But the rule can't
7 be that the more heinous the crimes committed by a
8 defendant that come in under Molineux, that the more
9 protection he is going to receive.

10 Defendant shouldn't benefit from having a
11 sanitized record just because the crimes were so
12 horrific.

13 JUDGE PIGOTT: No, but that's not how - - -
14 that's not how you look at Molineux. I mean, in
15 Molineux, you know, it's limited because you are
16 bringing in prior uncharged crimes.

17 MS. HUMMEL: Right.

18 JUDGE PIGOTT: All right. So to do that, I
19 mean, you've got to have a reason.

20 MS. HUMMEL: Right. But I think here,
21 where the reasons were so probative and so relevant,
22 as arguably a continuation of the crime, putting
23 everything into context, the same victim, and the
24 same defendant, only a week later, that it's so
25 probative, there is a good reason to put it in.

1 JUDGE PIGOTT: If he had - - - if he had
2 robbed a bank in Niagara Falls, and then robbed a
3 bank in the Bronx, would you bring both of them in to
4 show that he is a bank robber?

5 MS. HUMMEL: No, but that's different
6 because there is not - - - it's not one defendant
7 attacking and tracking the same victim.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MS. HUMMEL: Thank you.

10 CHIEF JUDGE DIFIORE: Counsel.

11 MR. FALLEK: Well, with respect to that - -
12 - the idea that the more heinous the crime, the
13 defendant - - - the gains of benefit, there is
14 actually something to that. I mean, that's not
15 really the case, but in answer to this idea of how we
16 weigh all of this, the truth is that the more heinous
17 it is, unless there is a match - - - matching probity
18 that keeps the balance, to the degree that it gets
19 more and more heinous, and it's not any more
20 probative, it upsets the Molineux balance, and I
21 suppose you could say the defendant benefits insomuch
22 as that upsets the balance, and it wouldn't be
23 admissible because then it becomes more prejudicial
24 than prep - - - than probative.

25 On the other hand, if it - - - it's equally - -

1 - if the probative level raises equally, then the level
2 remains the same. But that's - - - that's the type of
3 analysis that underlies Molineux.

4 JUDGE ABDUS-SALAAM: Even if that's - - -
5 that's so, counsel, in this case, you - - - as your
6 adversary points out, you didn't ask for any curative
7 instructions. The judge gave them sua sponte, but
8 you didn't ask for any, and you didn't move to strike
9 any of the testimony that you complained came in.
10 You gave the judge basically two choices, either let
11 it in or give me a mistrial.

12 MR. FALLEK: Well, not exactly, Your Honor.
13 I mean, our position was that this - - - only a
14 mistrial would have cured the problem.

15 But particularly important was the second
16 mistrial motion that occurred after the People's
17 opening, in which the prosecutor had devoted maybe a
18 third of the opening to previewing what - - - what
19 admitted - - - what the prosecutor admitted would
20 come in much more detail.

21 And when counsel moved for a mistrial after
22 all that came in, he - - - he pointed to all the
23 problems, you know, the detail, all the inflammatory
24 detail that came in. And the court made it - - -
25 made it clear that no, this - - - not only is the

1 motion denied, but this is all part of my ruling,
2 this was all necessary, and in fact, the jury needs
3 this to understand what happened. And - - - and the
4 court actually admonished counsel for that, didn't I
5 make myself clear, you know, why prac - - - like why
6 are you objecting. So - - -

7 JUDGE ABDUS-SALAAM: So are you saying the
8 diff - - -

9 MR. FALLEK: - - - it wasn't likely that
10 after that, counsel was going to speak up and - - -
11 and when did this - - - when did he know that this
12 was no longer in effect. I mean, at that point, I
13 suppose you're saying he might have asked to object
14 and strike it, but how would he know, where the court
15 had made it so clear - - - and in fact, there was one
16 point, I mean, I don't make it clear enough in my
17 brief, but there is a point even during this thirty-
18 five - - - twenty-five, thirty-five page account,
19 where - - - where counsel actually objects, amongst
20 some other general objections, objects and asks to be
21 heard, and the court just ignores him.

22 So that's a pretty clear message that in
23 fact the ruling is what I said it was, and - - - and
24 it would be futile for him to object, and object, and
25 that's our position.

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CHIEF JUDGE DIFIORE: Thank you, Mr.

Fallek.

MR. FALLEK: Thank you.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lennie Frankline, No. 89 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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