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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 23

KATHON ANDERSON,

Appellant.

20 Eagle Street
Albany, New York
March 23, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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1 CHIEF JUDGE DIFIORE: Good afternoon, Counsel.
2 This is appeal number 23, The People of the State of New
3 York v. Kathon Anderson.

4 Counsel?

5 MS. COLT: Good afternoon, Your Honors. Cynthia
6 Colt of Appellate Advocates for appellant, Kathon Anderson.

7 Your Honors, in this case, the trial court
8 committed reversible - - -

9 CHIEF JUDGE DIFIORE: Ms. Colt, would you like to
10 reserve - - - excuse me for interrupting you.

11 MS. COLT: Oh, yes, thank you for reminding me.

12 CHIEF JUDGE DIFIORE: Rebuttal time?

13 MS. COLT: Yes, two minutes, please.

14 CHIEF JUDGE DIFIORE: Sure.

15 MS. COLT: Thank you.

16 Your Honors, the trial court in this case
17 committed reversible error when it barred defense counsel
18 from calling the leading expert in adolescent brain
19 development and behavior, Dr. Laurence Steinberg.

20 Dr. Steinberg would have testified that the
21 adolescent brain differs fundamentally, both in structure
22 and function from the adult brain.

23 JUDGE STEIN: Counsel, if we were to find that
24 this testimony should be permitted, where do you draw the
25 line? I mean, here you have a fourteen-year-old who is



1 apparently at the - - - below the lower range of what this
2 particular expert indicates is the pro - - - is the range
3 at which the adolescent brain is developing or whatever.

4 So at what age - - - I mean, is it at age twenty
5 - - - four - - - fifteen, sixteen, seventeen, eighteen? Is
6 there a particular age at which it's no longer relevant or
7 how do you draw that line?

8 MS. COLT: Well, I think - - - well, as you said,
9 first, Kathon Anderson is at the very bottom level where
10 all these differences are much more pronounced. He was
11 fourteen.

12 But I think that the Supreme Court has drawn the
13 age for this topic, for this scientific evidence at
14 eighteen for - - - or at least they've relied on this
15 evidence to draw the line at eighteen.

16 JUDGE STEIN: So any time you're dealing with an
17 adolescent under the age of eighteen, then this testimony
18 becomes relevant? Is this - - -

19 MS. COLT: No, not at all. I think relevance is
20 a whole separate issue. It was particularly relevant in
21 this case because the jurors had to assess the
22 reasonableness of appellant's fear that he faced imminent
23 deadly physical harm by these rival gang members. So there
24 was a subjective element they had to determine.

25 And this court has been clear - - - People v.



1 Wesley, trial counsel cited; People v. Goetz - - - that the
2 jurors must stand in the defendant's proverbial shoes to
3 assess the reasonableness of his perception of his fear.
4 And they must do it based on his circumstances and his
5 background and his characteristics.

6 In this case, really a significant characteristic
7 of Kathon Anderson was the fact that he was fourteen years
8 old; he had an undeveloped prefrontal cortex which
9 regulates decision-making. That's the executive
10 functioning part of the brain. And then he was - - - as a
11 fourteen-year-old, he was significantly influenced by that,
12 by relying on the amygdala, that - - -

13 JUDGE STEIN: I think you have an interesting
14 dichotomy here, because all these things sort of play
15 together in my view. But here you have the People wanting
16 to assert that there's a combat by agreement, okay? And
17 the defense doesn't want that, because that goes against
18 the justification defense.

19 But in some ways, this - - - all these Facebook
20 posts and all this other stuff, and the proof that goes
21 toward the combat by agreement would also support the
22 argument that he had a reasonable fear of deadly physical
23 force, even though there are, you know, no weapons that
24 were, you know, shown, or anything like that.

25 So how do you - - -



1 MS. COLT: Well, I do - - -

2 JUDGE STEIN: - - - reconcile that?

3 MS. COLT: Reconcile the fact - - - I do agree
4 with Your Honor that some of the gang evidence, the fact
5 that he - - - Mr. Anderson was in a gang, and that he was
6 confronted by a whole group plus the three on the bus, of
7 rival gang members, and the fact that the rival gang
8 members - - - a police officer testified they were known to
9 shoot at their rivals and publicly post about it. That did
10 go to his reasonable belief that he was in deadly - - -
11 that deadly physical force was imminent by these gang
12 members.

13 But I think the - - - all the evidence - - - his
14 Facebook evidence really worked against him in a lot of
15 ways, because it, on one hand we have a fourteen-year-old
16 child and the People - - - and defense wasn't able to
17 present evidence of what this entailed as a group
18 characteristic.

19 JUDGE RIVERA: Was there a problem with the
20 expert proffer in this sense that because he was a gang
21 member that the expert would not be able to address sort of
22 how that might affect this particular defendant's
23 perspective, in the moment?

24 MS. COLT: Well, no, I don't think so, because I
25 think it was a group - - - first it was a group



1 characteristic of fourteen years old. All fourteen-year-
2 olds have an undeveloped prefrontal cortex. All fourteen-
3 year-olds, as a group characteristic, rely on the - - -

4 JUDGE FAHEY: Wouldn't that, though - - -

5 JUDGE RIVERA: Not all fourteen-year-olds join
6 gangs and kill people. So the question is whether or not
7 the expert, because the expert was limited to just that
8 testimony without what it may be particular to this
9 individual could really speak to the issue?

10 MS. COLT: Well, it could speak to his emotional
11 and his fear, which was the issue that jurors were charged
12 with assessing.

13 JUDGE RIVERA: Um-hum.

14 MS. COLT: But this particular - - - I mean, this
15 isn't in the record, but having read about this particular
16 expert, I think he probably would have had a lot of
17 testimony about a teenager's involvement in a gang and how
18 that's actually very consistent with a teenage brain.

19 JUDGE RIVERA: Um-hum.

20 MS. COLT: The peer affiliation.

21 JUDGE FAHEY: Can we just take a step back as to
22 the - - - a teenager's ability to exercise executive
23 function. The way I understood the trial court's ruling,
24 they seemed to be saying - - - and the Appellate Division
25 also - - - that the emotional immaturity and intellectual



1 immaturity of a teenager is within the ordinary ken of the
2 average juror. How do you respond to that?

3 MS. COLT: Well, first, the - - - she said that
4 the impulsiveness is within the ordinary ken. And that
5 really wasn't the - - -

6 JUDGE FAHEY: That's right. Yeah.

7 MS. COLT: - - - extent of the expert testimony
8 in this case.

9 JUDGE FAHEY: Um-hum.

10 MS. COLT: Maybe that's one aspect of this lack
11 of brain development. But other aspects that were
12 particularly important - - - and trial counsel pointed this
13 out - - - to appellant, was that in particularly stressful
14 circumstances, emotional - - - negative emotional stimuli,
15 those are the precise circumstances where the teenage brain
16 really comes into play.

17 JUDGE FAHEY: One of the other aspects of kind of
18 the convoluted way that this case has come up to us is that
19 while combat by agreement was rejected for - - - by the
20 Appellate Division, as an exception to a justification
21 defense, the initial aggressor charge wasn't.

22 And what do you say about the proof in the record
23 on the initial aggressor charge?

24 MS. COLT: Well, again, there - - - that does
25 include that he has a reasonable belief that - - - that



1 deadly physical force is about to be used against him.

2 CHIEF JUDGE DIFIORE: But what was the objective
3 indicia of deadly physical force being threatened against
4 him that's in this record?

5 MS. COLT: The - - - that's in this record is
6 that this - - - the bus he was on was stopped by rival gang
7 members. And trial counsel - - - when you count - - - I
8 think he counted eight rival gang members. They were at
9 the front of the bus holding the door, and the bus driver
10 testified she wanted to get them out of there and close the
11 doors. They would not let her do that.

12 There was gang members at the back entrance also
13 guarding the back entrance. They were all communicating
14 with each other.

15 And the People put in evidence that this rival
16 gang was known to shoot their rivals and even - - -

17 JUDGE FAHEY: Well, we could see the video. I
18 mean, I watched the video - - -

19 MS. COLT: Yes.

20 JUDGE FAHEY: - - - it was in the record. And it
21 looked like they were about a third of the way down the
22 aisle to halfway down the aisle, when the defendant shot
23 the gun off.

24 But there was no showing of weapons, just rushing
25 towards him to attack him.



1 MS. COLT: That's true, Your Honor. On the video
2 there was no show of weapons. But I don't think that - - -

3 JUDGE WILSON: So can you - - -

4 MS. COLT: - - - is conclusive - - -

5 JUDGE WILSON: - - - identify a case - - - sorry,
6 over here - - - where there's no a show of weapons and
7 there's not a specific threat from person A to defendant,
8 where the defendant brandishes a weapon, uses a weapon, and
9 is not deemed the initial aggressor?

10 MS. COLT: My case law, no I did not find that
11 specific case. But this case has a lot of other elements
12 and a lot of evidence that - - -

13 JUDGE GARCIA: But wouldn't you - - - to follow
14 up on Judge Wilson's - - -

15 MS. COLT: Yes.

16 JUDGE GARCIA: - - - question. Would your expert
17 testimony then be being used to bridge that gap in our case
18 law - - -

19 MS. COLT: No, I think - - -

20 JUDGE GARCIA: - - - that instead of showing a
21 weapon here, you can have expert testimony on frontal lobe
22 development?

23 MS. COLT: No. And I don't think that that was
24 the purpose of the testimony, Your Honor. This - - - the
25 video wasn't conclusive evidence that they weren't carrying



1 guns. And I don't think it was conclusive evidence of the
2 fact that Mr. Anderson did not reasonably fear that they
3 were - - -

4 JUDGE GARCIA: But there's no testimony that he
5 ever saw a weapon, right?

6 MS. COLT: No. There is not.

7 JUDGE GARCIA: And there's no testimony - - - I
8 think the testimony was they didn't recover any weapons
9 from anyone, right?

10 MS. COLT: Of some of the ones who were stopped,
11 that the police officers stopped.

12 JUDGE GARCIA: Right.

13 MS. COLT: But I mean, as you know, that people
14 are able to - - - we hear all the time in cases that people
15 - - -

16 JUDGE FAHEY: Well, you know, when you look at
17 it, you'd say, all right, they're initially aggressing at
18 him in the sense that they're coming at him. But he brings
19 out deadly physical force.

20 So is it a reasonable belief for him to bring out
21 deadly physical force? I don't know the answer to that
22 question. But also, if it was an overreaction, is his
23 overreaction - - - your argument then is his overreaction
24 is a result of his - - - his limited prefrontal lobe
25 development; in other words, it's more than just an average



1 teenager?

2 MS. COLT: Yes, his perception of the fear and
3 that they were armed and his reaction to it was- - - the
4 expert's testimony certainly would have explained that and
5 explained his thought process and how his thought process -
6 - -

7 JUDGE GARCIA: But doesn't that go to what I was
8 asking you before?

9 MS. COLT: Sure.

10 JUDGE GARCIA: Then that fills the gap that he -
11 - - there's no indication that there was any weapon here.
12 So you're saying because of his development as a fourteen-
13 year-old, he would have perceived deadly force was going to
14 be used against him, where otherwise, let's assume, under
15 our case law, we have never said that, under these
16 circumstances?

17 MS. COLT: I guess in one sense, then, it would
18 bridge the gap to some extent. But there's - - -

19 JUDGE FAHEY: Well, it goes directly to what
20 Judge Stein was saying also, was that the combat by
21 agreement proof might support the - - - where he got that
22 belief from. But this case has come to us in a convoluted
23 fashion. So in some ways, it demands some legal and
24 logical parsing.

25 JUDGE STEIN: But that - - -



1 JUDGE RIVERA: Counsel, if there's no - - - if
2 there's - - - let's say there's not a combat by agreement
3 in the sense of each gang says we're going to get you and
4 they have this understanding that that's the way they're
5 functioning, but if a gang member is aware that if you
6 enter the rival gang's turf, the consequences are perhaps
7 death, is that also what - - - I'm just trying to be clear
8 - - - this is in part trying to understand your response to
9 Judge Garcia. Is that part of what you're arguing, that
10 exists - - - putting aside what the expert might have said
11 about whether or not a fourteen-year-old under the
12 circumstances would have believed that. Is that - - -

13 MS. COLT: Yes, definitely. And I'd like - - -
14 the combat by agreement, I'd sort of like to put to the
15 side, because that, in the end, really worked against the
16 defendant - - -

17 JUDGE RIVERA: So does that mean anybody who goes
18 into a neighborhood that perhaps does have a high crime
19 rate, maybe is known for weapon - - - you know, weapon-
20 based robberies, might - - - you know, if someone comes up
21 to them and they think they're going to be robbed, they
22 think they're going to pull a gun, so they pull a gun, and
23 they're justified in doing so? Is that what you're trying
24 to say?

25 MS. COLT: Well, no because I think we have more



1 than that here.

2 JUDGE RIVERA: Okay.

3 MS. COLT: We have the fact that he was riding -
4 - - first of all he's riding the bus. So he's in an
5 enclosed area.

6 JUDGE RIVERA: Um-hum.

7 MS. COLT: The gang members - - - and the DA in
8 her summation even said there's no question they acted
9 aggressively - - -

10 JUDGE RIVERA: Um-hum.

11 MS. COLT: - - - toward this young man. So
12 there's no question that at the very least, they were
13 initial aggressors and acting aggressively.

14 CHIEF JUDGE DIFIORE: I guess my problem is, I
15 too watched the tape, and I saw those boys get on the bus,
16 coming down, and I also saw the defendant jump up, pull out
17 his gun, and shoot on the bus.

18 So again, I'm going back to, I - - - I'm not
19 getting the display of deadly physical force that would
20 justify him jumping up on a bus and shooting a gun.

21 MS. COLT: Well, it also - - - it goes back to
22 the fact that he knows that these are rival gang members.
23 He - - - this is aside from the expert - - - he knows that
24 these rival gang members carry guns and shoot at their
25 opponents. They haven't let the bus go. They've stopped



1 it.

2 So you have all these external circumstances
3 where - - -

4 JUDGE FAHEY: But isn't your point something
5 different? Isn't your point that obviously he didn't make
6 the right decision, and obviously he miscalculated. I
7 thought your point was is that we need to put an expert on
8 to show why he made such a stupid and wrong decision?

9 MS. COLT: Well, an expert to show, yes, that his
10 - - -

11 JUDGE FAHEY: Yeah.

12 MS. COLT: - - - thought process would have been
13 how it was based on the fear-based. But at the same time,
14 there was evidence that along with the expert, that it made
15 it reasonable for him to believe that they were going to -
16 - -

17 JUDGE GARCIA: Do we want to - - - do we really
18 want a - - -

19 MS. COLT: - - - use deadly - - -

20 JUDGE GARCIA: - - - rule that says it's
21 reasonable that because you're in a gang and rival gang
22 members approach you, not brandishing weapons in a public
23 place, in this case an enclosed bus, you can shoot; that's
24 justified? You can shoot - - -

25 MS. COLT: Well - - -



1 JUDGE GARCIA: - - - because they're rival gang
2 members, you know, they sometimes may kill you, so I'm in a
3 public place and rival gang members approach me; they're
4 walking down the aisle, I can start shooting because that
5 is the - - - reasonably the threatened use of deadly
6 physical force - - - put aside the expert testimony.

7 MS. COLT: Well, the - - -

8 JUDGE GARCIA: That's the kind of rule from this?

9 MS. COLT: Well, no, I don't think so. I think -
10 - - as I said, there was lots of evidence in this case. Of
11 course, weapons are not on the video. It's a shocking
12 video - - -

13 JUDGE GARCIA: It's gang members.

14 MS. COLT: - - - in a lot of aspects.

15 JUDGE GARCIA: It's what you're arguing. The
16 gang members - - -

17 MS. COLT: Gang members - - -

18 JUDGE GARCIA: - - - you know, they can be - - -

19 MS. COLT: - - - who were aggressively - - -

20 JUDGE GARCIA: - - - more reasonable in
21 anticipating deadly force.

22 MS. COLT: - - - approaching - - - gang members -
23 - - sorry, Your Honor. Gang members - - -

24 JUDGE GARCIA: No, no, no. But it seems like
25 there would be a different rule for gang members, then.



1 Like it might be reasonable if two gang members are walking
2 down the subway car towards you, because, hey, you're in a
3 gang, they're in a gang, they may hurt you, they may kill
4 you; so I can take out my gun and start shooting. Some
5 people may be around. But I have a reasonable belief they
6 may kill me, even though they haven't shown any weapons,
7 but I know they're in a gang.

8 MS. COLT: Well - - -

9 JUDGE GARCIA: Why would we want that?

10 MS. COLT: - - - again, it would depend on the
11 circumstances. In this case he was - - - couldn't escape
12 because the bus was surrounded. So we have - - - in many
13 circumstances, there is the ability to retreat, to safely
14 retreat. In this case, I don't think there's any question
15 that there was no ability to safely retreat.

16 JUDGE GARCIA: But let's say same facts, he knows
17 they don't have guns, could he still shoot, because he
18 still can't retreat. He still has to think there's deadly
19 physical force going to be used against him.

20 MS. COLT: Yes. And under the facts of this
21 particular case, it was reasonable for him to believe that.
22 And that belief was supported - - - would have been
23 supported also by the expert testimony of what he was
24 relying on. He was relying upon the fear-based part of his
25 brain so he - - -

1 JUDGE RIVERA: So let's say he's not a gang
2 member. Let's say he's refused to join the gang. It's in
3 fear of the gang nevertheless, and he gets on the bus and
4 he just knows that these gangs are violent and he's turned
5 them down. Maybe that's a wrinkle in the hypothetical.
6 Can he pull out that gun - - - does he have the - - -

7 MS. COLT: Well - - -

8 JUDGE RIVERA: - - - does he have to have that -
9 - - would it be, again, abuse to preclude that kind of
10 testimony under those circumstances? Is he an initial
11 aggressor under those kinds of circumstances?

12 MS. COLT: An abuse to preclude te - - -

13 JUDGE RIVERA: As opposed - - - let's just take
14 out for one moment that the individual is a gang member.
15 I'm just trying to see where this rule is going - - -

16 MS. COLT: Right.

17 JUDGE RIVERA: - - - that you're suggesting to
18 us.

19 MS. COLT: And then - - -

20 JUDGE RIVERA: But it knows about gangs and is
21 fearful.

22 MS. COLT: Right. Are you talking about the rule
23 concerning the expert witness, at this point?

24 JUDGE RIVERA: Both. Both. And then on the
25 initial aggressor.



1 MS. COLT: Well, the expert witness still - - -
2 if it's a fourteen-year-old - - -

3 JUDGE RIVERA: Um-hum.

4 MS. COLT: - - - I think that his testimony
5 should still be admissible and not excluded - - - a blanket
6 exclusion of - - -

7 JUDGE RIVERA: Even if that expert may not be
8 well-versed on issues related to gangs?

9 MS. COLT: Yes, because this expert, even though
10 as I said, he does have a lot of writings about that - - -
11 but he's mainly an expert on adolescent brain development
12 and behavior. And much of what he would have testified
13 about would have been the - - - that adolescents have - - -
14 are much more stress responsive than adults.

15 JUDGE RIVERA: And on the initial aggressor- - -

16 MS. COLT: So - - -

17 CHIEF JUDGE DIFIORE: So before you leave that
18 point, isn't the thrust - - - let me get this straight in
19 my head - - - that the fourteen-year-olds are justified - -
20 - of the argument that fourteen-year-olds are justified in
21 having - - - in responding violently based on their brain's
22 development - - - isn't that really an argument for saying
23 that fourteen-year-olds across the board shouldn't be
24 culpable of murder?

25 MS. COLT: No, I don't think it is at all.



1 Because this was just testimony - - - evidence to go before
2 the jury so that they could decide from the proverb - - -
3 you know, from - - - like I said, the proverbial - - -

4 CHIEF JUDGE DIFIORE: I'm talking more at a
5 policy level.

6 MS. COLT: I don't think this - - - it does
7 create a policy, like the trial judge said - - -

8 CHIEF JUDGE DIFIORE: Okay.

9 MS. COLT: - - - because in - - - in - - -

10 JUDGE WILSON: Isn't the effect that - - - even
11 though it is as jury question, isn't the effect of that to
12 make it easier for a - - - somebody who's eighteen years
13 old or under, to get an acquittal in a circumstance where
14 somebody who was nineteen couldn't? As an overall matter,
15 isn't that the effect of what you're asking for?

16 MS. COLT: Well - - -

17 JUDGE WILSON: Just focusing on the expert
18 testimony.

19 MS. COLT: Okay. In - - - in similar
20 circumstances?

21 JUDGE WILSON: Yeah, everything else is the same.

22 MS. COLT: Because I'm not saying that an expert
23 testimony on adolescent brain development and behavior
24 should be admitted in any case of a - - - of a child under
25 eighteen, because in this case it was particularly relevant



1 because of the circumstances and the stress response.

2 But I guess if you have similar circumstances of
3 a sixteen - - - say he was sixteen - - -

4 JUDGE WILSON: No, no. My question is, if he'd
5 been nineteen, you wouldn't be asking for the admission of
6 this testimony, or twenty, or twenty-one, right?

7 MS. COLT: That's true.

8 JUDGE WILSON: And so effectively, you're asking
9 for a different rule that is going to make it easier for
10 somebody who is under eighteen to be acquitted in exactly
11 the same circumstances than somebody who is nineteen or
12 twenty?

13 MS. COLT: Well, I respectfully disagree, Your
14 Honor. I think I'm just asking this court to follow its
15 expert testimony law that - - - where it's generally
16 accepted science, where it's relevant to the issues that
17 the jury is going to determine and to decide on. And if
18 it's beyond the ken of the average juror, then it should be
19 evidence that should come in at trial for a jury to
20 consider.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
22 you.

23 Counsel?

24 MR. NEUBORT: May it please the court. My name
25 is Solomon Neubort, and I represent the People.



1 The trial court did not abuse its discretion in
2 precluding the expert testimony. The trial court correctly
3 concluded that the conclusions that the defense counsel
4 wished the jury to draw from the expert's testimony were
5 not legally relevant - - -

6 JUDGE STEIN: Counsel - - -

7 MR. NEUBORT: - - - and were not beyond the ken
8 of the average juror.

9 JUDGE STEIN: I think this is a very difficult
10 question. And I'm honestly struggling with it in terms of
11 the expert testimony. But one of the things that's
12 troubling me is how is this different from testimony about
13 PTSD or battered woman syndrome when it comes to the
14 perception of danger and the response to it?

15 Is there - - - they seem to be very similar
16 principles. And I'm - - - and we've let in this testimony
17 about PTSD and battered woman syndrome. So if we say that
18 this is never acceptable testimony, then how, you know, are
19 we endangering those other defenses?

20 MR. NEUBORT: Well, there are several answers to
21 that question. First of all, the expert in this case was
22 going to testify that adolescents do know the difference
23 between right and wrong - - - this is a quote - - - but
24 they just simply can't exercise the self-control. They
25 don't have the regulative abilities that enable them to act



1 in a right way instead of a wrong way. Now - - -

2 JUDGE STEIN: So the court could have kept that
3 part of it out, potentially, if that's troublesome. I'm
4 talking about - - - more about how the - - - you know,
5 prefrontal cortex does and does not enable an adolescent to
6 understand - - - you know - - - to perceive fear and to
7 respond in a way in which we would expect - - -

8 MR. NEUBORT: Well, this - - -

9 JUDGE STEIN: - - - rather than saying what you
10 just said.

11 MR. NEUBORT: Sorry. Dr. Steinberg, in his own
12 words, in his own writing, taken from his studies, say:
13 "It's certainly reasonable to speculate that adolescents
14 who commit crimes make more impulsive decisions than their
15 adult counterparts, because their prefrontal lobes are less
16 fully developed or because their ventral striatum is more
17 responsive to rewards or emotional stimuli. However, this
18 remains largely a matter of what I would characterize as
19 sensible conjecture.

20 "More research that directly links age
21 differences in brain structure and function to age
22 differences, illegally relevant capacities, and
23 capabilities, is needed."

24 So Dr. Steinberg never held that - - - or found -
25 - - or the science states that the pre - - - the



1 underdeveloped prefrontal cortex causes an adolescent to
2 act one way or another.

3 Now, that behaviorally, adolescents may be more
4 impulsive than are adults, that's something that every
5 adult knows. Every adult has been an adolescent at one
6 point.

7 JUDGE STEIN: So you see that as different from
8 the expert testimony that is deemed admissible on PTSD and
9 battered woman syndrome?

10 MR. NEUBORT: The - - -

11 JUDGE STEIN: You see those two as different; is
12 that what you're saying?

13 MR. NEUBORT: Well, one, there isn't - - - the
14 science doesn't back up, in this case, under - - -
15 according to Dr. Steinberg himself. And two, with battered
16 woman syndrome, battered women is not necessarily something
17 that the average juror knows how a battered woman will
18 react. But every adult - - -

19 JUDGE STEIN: But that's what they're arguing is,
20 is that the average juror doesn't understand how an
21 adolescent would perceive the circumstances.

22 MR. NEUBORT: But - - -

23 JUDGE STEIN: Not how they would act. Every - -
24 - it would - - - I think when you're talking about
25 impulsiveness, that's a different issue. And I think that



1 they made that distinction.

2 MR. NEUBORT: But let's see what Dr. Steinberg
3 has to say about - - -

4 JUDGE FAHEY: Well - - -

5 MR. NEUBORT: - - - perception here.

6 JUDGE FAHEY: - - - let me stop you before you
7 read to us for a second. Just to - - - I just wanted to
8 follow up on Judge Stein's question.

9 What I'm curious about here is, is the fact that
10 he wasn't allowed to testify, not the validity of his
11 testimony - - - because no determination was made on that -
12 - - shouldn't there simply have been held a Frye hearing,
13 and if your argument's correct, then the cross-examination
14 would have brought that out, and that would have been the
15 end of it?

16 But isn't this issue significant enough to
17 require that the court make a determination that the - - -
18 as to general acceptance in the scientific community?

19 MR. NEUBORT: Well, in this case, Dr. Steinberg -
20 - -

21 JUDGE FAHEY: Let me just - - -

22 MR. NEUBORT: Sorry.

23 JUDGE FAHEY: - - - because - - - and you see why
24 that's important for other types of trauma-induced violence
25 with domestic violence or PTSD, things like that?



1 MR. NEUBORT: Yes, Your Honor. But in this case,
2 Dr. Steinberg hadn't examined this defendant. This
3 defendant, as the People argued at trial, was not the
4 typical adolescent. Where - - - in response to that, trial
5 counsel, defense counsel said, well, there's a - - -

6 JUDGE FAHEY: But those are legitimate - - -

7 MR. NEUBORT: - - - a range - - -

8 JUDGE FAHEY: - - - let me just slow you down.
9 Those are legitimate points about their argument. Why not
10 simply have the Frye hearing outside the presence of the
11 jury and make a determination? Then we've got a record
12 that we can look at and go forward from there?

13 MR. NEUBORT: It's - - -

14 JUDGE FAHEY: I'm wondering why that would be - -
15 - what's the problem with that?

16 MR. NEUBORT: Well, Your Honor, certainly the
17 trial court could have done that.

18 JUDGE FAHEY: Um-hum.

19 MR. NEUBORT: But the question before this court
20 is not what this court would have done, but whether the
21 trial court abused its discretion under these circumstances
22 in excluding the testimony by saying I'm not going to have
23 now a Frye hearing on something that's not legally relevant
24 and not - - - and in any event, this whole justification
25 charge for which the expert was going to come in to help

1 the jury determine, was itself a gift, because the
2 defendant wasn't entitled to the jury charge at all. The
3 defendant - - -

4 JUDGE STEIN: Well, when you get to that, so then
5 there are two aspects to that. One is whether there was
6 combat by agreement, right, and then the other is the
7 initial aggressor - - -

8 MR. NEUBORT: Correct.

9 JUDGE STEIN: - - - right? Well, it seems that
10 both courts were - - - I'm sorry, the Appellate Division
11 agreed that the combat by agreement should not have been
12 charged to the jury. So if we take that out, then we're
13 left with the initial aggressor exception, right?

14 And wasn't that issue resolved in defendant's
15 favor by the trial court? Didn't the court say that there
16 was a question of fact about that?

17 MR. NEUBORT: Yes, but the - - - this court, in
18 People v. Butler, said that where a court gives the
19 defendant a gift, that doesn't inexorably tie the - - -
20 that court to do everything that logically flows from that.

21 So in People v. Butler, the decision to submit an
22 intoxication instruction did not - - - does not inexorably
23 block - - - bind the trial court to instruct automatically
24 on lesser included manslaughter offenses, even though
25 logically it's the same.



1 If the intoxication defense is given to the
2 murder count, that would mean that the defendant couldn't
3 form the intent to commit murder, which would mean that he
4 could be found that he had acted recklessly because
5 intoxication, not a defense to recklessness.

6 So it logically flows bec - - - from the fact
7 that the court gives an intoxication charge that it should
8 give the reckless manslaughter charge; but this court said
9 that that doesn't matter, and what really matters is the
10 particularized evidentiary evaluation.

11 So this court has to decide on its own whether or
12 not the charge should have been given. And if the
13 defendant wasn't entitled to the charge, it doesn't matter
14 whether the trial court actually gave the charge.

15 And I submit that in this case, the defendant was
16 not entitled to the charge, because it's clear that the
17 defendant was the initial aggressor, that the defendant
18 used excessive - - -

19 JUDGE STEIN: What if - - -

20 MR. NEUBORT: - - - force - - -

21 JUDGE STEIN: - - - what if we disagree with you
22 on that? What if we disagree with you on that?

23 MR. NEUBORT: Well, I still think that even if
24 you disagreed with that, the - - - and even if you were to
25 believe that the expert testimony should have been



1 admitted, which I think - - - I submit is not correct - - -

2 JUDGE STEIN: Well, certainly, if it was, it
3 would go directly to the initial aggressor issue, right?

4 MR. NEUBORT: No, I think that even with the
5 expert testimony, even had it come in, even as we see it
6 now, I don't think that a fourteen-year-old would - - -
7 would have perceived that he was necessarily - - - or at
8 all, that there was deadly physical force being threatened
9 against him.

10 He had been in skirmishes on this bus twice
11 before without deadly force having been used. He lived in
12 the neighborhood where there were rival gangs across the
13 street. The testimony was that the rival gangs were just
14 across the street from each other.

15 He lived in that area. Then he moved out. Then
16 he visited. Not every time there were - - - they saw each
17 other was there necessarily skirmishes, and certainly not
18 deadly skirmishes.

19 And while there was this combat by agreement
20 instruction, but the combat by agreement wasn't necessarily
21 that every time they saw each other, they killed each other
22 - - -

23 JUDGE WILSON: Let me ask you about that - - -

24 MR. NEUBORT: - - - or used deadly physical
25 force.



1 JUDGE WILSON: Can I ask you about the combat by
2 agreement instruction? If we assume that that's error - -
3 - I'm not saying it is - - - assume that it is, do you have
4 a view on why it would be harmless?

5 MR. NEUBORT: I'm sorry, if we assumed that the -
6 - -

7 JUDGE WILSON: That - - -

8 MR. NEUBORT: - - - the combat by agreement - - -

9 JUDGE WILSON: - - - the combat by agreement was
10 an error.

11 MR. NEUBORT: Because there's no reason to
12 believe that the jury ever reached that question, because
13 in order to reach that question, they would first have to
14 find that the defendant was justified in using force, and
15 then come to the question of whether or not the
16 justification would be taken away because there was this
17 combat by agreement.

18 But given the circumstances of this case, it's
19 clear that the jury would have concluded from the fact that
20 the defendant pulled out his gun before anyone even came
21 towards him; he fired the shot when no - - - when people
22 weren't even a third of the way down the bus, he fired
23 without warning, he then - - - after his rivals fled from
24 the bus, he jumped over somebody in the aisle; he ran off
25 the bus, instead of staying the relative safety of the bus

1 - - -

2 JUDGE FAHEY: I had thought - - - Counsel, I had
3 thought that the People's alternative position was if we
4 reversed, that we should just reverse for a Frye hearing,
5 get a determination on that. If the court rules against
6 the defendant after a Frye hearing is conducted, then the
7 verdict would stand, and if not then the - - - that he
8 would get a new trial? I thought that was your
9 alternative.

10 MR. NEUBORT: Well, my alternative argument is
11 that if the - - - if this court rejects that the
12 instruction didn't have to be given or - - - or that - - -
13 or shouldn't - - - the combat by agreement shouldn't have
14 been given, and that it wasn't harmless, then a Frye
15 hearing should be conducted.

16 But if this court concludes that the exclusion of
17 the expert was harmless, then there's no reason to submit
18 it for a Frye hearing.

19 JUDGE FAHEY: Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MR. NEUBORT: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MS. COLT: Yes, Your Honors. I just wanted - - -
24 I believe that all the arguments the DA just made about the
25 combat by agreement charge are absolutely contrary to what



1 the trial DA said. Her arguments were that a confrontation
2 between the two gangs, necessarily, results in some type of
3 shootout. And that was her whole argument for getting the
4 combat by agreement charge, and of course, for admitting
5 all of the Facebook posts.

6 And I believe without the combat by agreement
7 charge, there was a good possibility that Kathon Anderson
8 would have been acquitted.

9 This was a case that the first trial hung. The -
10 - - without even an expert. The second trial the jurors
11 asked to be reinstructed on justification, which included
12 the combat by agreement charge. They deliberated for two
13 days.

14 So I think that con - - - the combat by agreement
15 charge is actually very - - -

16 JUDGE RIVERA: Counsel, what about this argument
17 that counsel made that - - - the proffer on the expert
18 about, you know, adolescents do actually know right from
19 wrong and they just don't have this impulse control, but
20 nevertheless, the expert would have had to testify that
21 they may not have impulse control, but the science isn't
22 there that shows that lack of impulse control leads to
23 criminal conduct?

24 MS. COLT: Well, the - - - I mean, Dr. - - -

25 JUDGE RIVERA: If I - - - that's the argument as



1 I understand it. So what's your response?

2 MS. COLT: I think he was talking to the fact
3 that Dr. Steinberg - - - because Dr. Steinberg is a
4 behavioral scientist.

5 JUDGE RIVERA: Yes, yes.

6 MS. COLT: He's studied this field for forty
7 years. And the neuroscience is a little bit behind - - -

8 JUDGE RIVERA: Um-hum.

9 MS. COLT: - - - the behavioral science.

10 JUDGE RIVERA: Okay.

11 MS. COLT: So his belief is that the neuroscience
12 shouldn't take precedence over the behavioral science; but
13 it validates, corroborates, confirms everything behavioral
14 scientists - - - the conclusions that they have reached.
15 And it also provides a source of why adolescents react to
16 negative stimuli. It's - - -

17 JUDGE RIVERA: So then how is it abuse of
18 discretion if there are two strains of science that are not
19 yet in agreement? As you've just said, the expert would
20 have testified that there's a lag in this other area, this
21 other discipline.

22 What - - - how is that an abuse of discretion if
23 you've got that - - -

24 MS. COLT: Well, I don't think - - -

25 JUDGE RIVERA: - - - kind of proffer?



1 MS. COLT: - - - they are in - - - they're - - -
2 they're actually very consistent.

3 JUDGE RIVERA: Okay.

4 MS. COLT: It's - - - I think, for behavioral
5 scientists, they think, yes, we've known this all along - -
6 -

7 JUDGE RIVERA: Yes.

8 MS. COLT: - - - that adolescents have these
9 reactions. And now the actual neuroscience, the brain
10 itself, the anatomy of the brain and not just the activity
11 of the brain, actually confirms this.

12 JUDGE RIVERA: Yeah, but the - - - unless I'm
13 misunderstanding - - -

14 MS. COLT: Okay.

15 JUDGE RIVERA: - - - this argument, which it
16 could be - - -

17 MS. COLT: Yeah.

18 JUDGE RIVERA: - - - as I understood the point
19 was that goes to impulse control not whether or not the
20 impulse control is such that you then would commit a crime.

21 MS. COLT: Again, the - - - I - - - for this case
22 I know - - -

23 JUDGE RIVERA: Yes.

24 MS. COLT: - - - impulse control is one of the
25 factors that behavioral sciences and neuroscience, they've

1 all studied.

2 JUDGE RIVERA: Yes.

3 MS. COLT: But for the purposes of this testimony
4 and this case, it does have to do with that, but it has to
5 do a lot with the fact that as a fourteen-year-old - - -

6 JUDGE RIVERA: Okay.

7 MS. COLT: - - - where it's more pronounced in
8 him, he's relying on the fear-based part of his brain. And
9 this was a decision he made based on fear - - - whether he
10 reasonably feared that these rival gang members - - - and
11 there's a lot of other evidence - - - and I'm not saying
12 that every time a rival gang member sees other rival gang
13 members that they're going to pull out a gun. But in this
14 particular circumstance that he faced, as a single
15 fourteen-year-old confronted by many rival gang members
16 commandeering the bus, not listening to the bus driver,
17 blocking off the back exit, having shots fired - - - and of
18 course, that's a little - - - in the case - - -

19 JUDGE RIVERA: Um-hum.

20 MS. COLT: - - - it's a little ambiguous, but the
21 police officer did testify that these same young men who
22 were on the bus were in the territory where Kathon Anderson
23 was visiting his grandmother at the time of shots fired.
24 There was a lot of information in the trial that I think
25 does support and lends to the reasonable inference that



1 these gang members were not there to just beat him up.
2 They were there to kill him.

3 And that would have been reasonable for him,
4 particularly based - - - knowing what Dr. Steinberg would
5 have testified to.

6 And I know the record, just to say he isn't as
7 elaborate as - - - I mean, even I would like or that we
8 would like about - - - because it wasn't Dr. Steinberg
9 saying all these things. And he's the scientist. So he
10 would have been much more articulate than myself or trial
11 counsel.

12 But there is a lot of scientific evidence that
13 the Supreme Court has basically taken judicial notice of -
14 - -

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MS. COLT: - - - in this context. Thank you.

17 (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 The People of the State of New York v. Kathon Anderson, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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