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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 74

YOSELYN ORTEGA,

Appellant.

20 Eagle Street
Albany, New York
October 17, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE COLLEEN D. DUFFY

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1 CHIEF JUDGE WILSON: The next matter on the
2 calendar is Number 74, People v. Yoselyn Ortega.

3 MS. EVERETT: May it please the court. Abigail
4 Everett for appellant, Yoselyn Ortega. And I'd like to
5 request three minutes for rebuttal please?

6 CHIEF JUDGE WILSON: Yes, you may.

7 MS. EVERETT: Under the circumstances of this
8 case, the nontestifying medical examiner's autopsy report
9 was testimonial and gave rise to the defendant's right of
10 confrontation. Now, I - - -

11 JUDGE GARCIA: Can I ask you?

12 MS. EVERETT: Yes.

13 JUDGE GARCIA: So these are difficult issues,
14 these confrontation issues. And you know, we're looking
15 now at an autopsy case. What, in your view, could the
16 People do, assuming that the confrontation issues you
17 identify there - - - what could the People do if they do
18 not have a medical examiner available, who was prior - - -
19 previously cross-examined? What type of evidence can they
20 put in where the original medical examiner is not
21 available?

22 MS. EVERETT: Well, I'm going to suggest in a
23 minute a - - - a alternative standard between New York's
24 current confrontation rule and Garlick. But in direct
25 answer to that question, the Supreme Court has held that if

1 there's a confrontation error and it's testimonial and the
2 person is - - - hasn't been shown to be unavailable and the
3 defendant has not had a prior opportunity to cross-examine,
4 that it cannot come into evidence. Now - - -

5 JUDGE GARCIA: I know. So what could they do if
6 they don't have someone who was cross-examined before, but
7 the original ME is dead?

8 MS. EVERETT: Right.

9 JUDGE GARCIA: What can they - - -

10 MS. EVERETT: I think, you know, I want to stress
11 that both the Supreme Court and this court has said that,
12 you know, those kinds of practical considerations have no
13 bearing on the determination.

14 JUDGE GARCIA: I'm interested in your view - - -

15 MS. EVERETT: Right.

16 JUDGE GARCIA: Under your rule - - - maybe this
17 is a good way to flesh out your rule. Under your rule, is
18 there anything that the People could do in that situation
19 to get in the cause of death and related evidence?

20 MS. EVERETT: I think what they could do is
21 recognize up front that the standard should be, not what
22 this court has been advocating or it's been holding, I
23 should say, excuse me. In the cases leading up to John,
24 that you could take into consideration if it's directly
25 accusatory, but which the Supreme Court, if you look at

1 Melendez-Diaz or the cases cited in Garlick, pretty clearly
2 did - - - does not agree with it. I ask the court to
3 relook at those.

4 JUDGE SINGAS: To go back to Judge Garcia's
5 question. Do you believe that a surrogate M.E. could come
6 in and use an independent analysis looking at some evidence
7 - - - documentation and then give an opinion based upon
8 that?

9 MS. EVERETT: Not if they're taking - - - using
10 basis evidence. And basis evidence is what we talk about
11 in Williams. If they're taking it for the truth, then the
12 - - -

13 JUDGE SINGAS: So suppose they're not taking it -
14 - -

15 MS. EVERETT: - - - defendant has to have an
16 opportunity to - - -

17 JUDGE SINGAS: - - - suppose they're not taking
18 it for the truth? Suppose they're looking at the
19 underlying medical examiner's report just to inform their
20 opinion. Is that okay?

21 MS. EVERETT: Probably not. And the reason I'd -
22 - - what I'd like the court to consider, though - - -

23 JUDGE RIVERA: And they have to do another
24 autopsy?

25 MS. EVERETT: No. I'd - - - what I'd like the

1 court to consider is that both John and Garlick talk about
2 the appropriate standard being- - - and I recognize this
3 dicta in John. The appropriate standard being whether
4 statements made under circumstances that would lead
5 objective witness to reasonably believe the statement would
6 be available for use in trial.

7 JUSTICE DUFFY: Okay. Well, let's - - -

8 MS. EVERETT: If that's the standard - - -

9 JUSTICE DUFFY: - - - let's go to that question.

10 MS. EVERETT: Yeah.

11 JUSTICE DUFFY: That statement.

12 MS. EVERETT: Yeah.

13 JUSTICE DUFFY: So back to Justice Garcia's
14 question.

15 MS. EVERETT: Right.

16 JUSTICE DUFFY: Is the autopsy report, if redact
17 - - - if it had been redacted, what portion of that report,
18 under your view, would be admissible? If - - - if they
19 redact it? Is there nothing according to you - - -

20 MS. EVERETT: Nothing.

21 JUSTICE DUFFY: - - - nothing in that autopsy
22 could - - -

23 MS. EVERETT: Nothing. And the - - - and the
24 reason I'm arguing the - - - for the alternative standard
25 is that because if an objective witness would know that

1 this is likely to be used at trial, as in this case, when
2 you have police involvement ahead of time, then the medical
3 examiner's office can prepare for these eventualities. In
4 this case we had four medical examiners present - - -

5 JUDGE GARCIA: But what if you - - -

6 MS. EVERETT: - - - at the autopsy.

7 JUDGE GARCIA: - - - couldn't do that? What if
8 you're not in New York City, then - - - I mean, their point
9 is, aren't you then having a statute of limitations, which
10 is essentially the lifespan of your medical examiner?

11 MS. EVERETT: No, I disagree with that. Because
12 if this Court agrees with the Garlick standard about a
13 reasonable - - - what you can anticipate because the
14 medical examiner's - - -

15 JUDGE GARCIA: But how do they do it? They have
16 one medical examiner. You're in a small town in upstate
17 New York. You have one medical examiner. What do you do
18 not to have that problem?

19 MS. EVERETT: I think that what they're going to
20 need to do is if they have police involvement ahead of time
21 and you have an identified suspect, they're going to need
22 to get another medical examiner or they're going to need to
23 get a supervisor who reviews the work of the person who
24 does the autopsy.

25 JUDGE CANNATARO: And that - - -

1 JUDGE SINGAS: Okay, well, that's the question.

2 JUDGE CANNATARO: - - - that other medical
3 examiner, do they have to reperform the autopsy - - -

4 MS. EVERETT: No.

5 JUDGE CANNATARO: - - - or are there elements of
6 the autopsy - - - because my understanding is the autopsy
7 is comprised of varied - - - there's photographs - - -

8 MS. EVERETT: Right.

9 JUDGE CANNATARO: - - - there are some laboratory
10 tests. Then - - - then there are observations and
11 interpretations - - -

12 MS. EVERETT: Right.

13 JUDGE CANNATARO: - - - which could very well be
14 testimonial in nature. Are there things that a medical
15 examiner could look at in the preexisting autopsy to reach
16 their own independent conclusion?

17 MS. EVERETT: There may be cases where the
18 photographs would be sufficient for a medical examiner to
19 make a reasonable decision. In this case, the photographs
20 were not introduced into evidence. There - - - you know,
21 it's going to be a case-by-case determination.

22 JUDGE CANNATARO: So it is possible to have a
23 surrogate examiner come in - - -

24 MS. EVERETT: If the - - -

25 JUDGE CANNATARO: - - - and testify?

1 MS. EVERETT: Yes. If the material that's
2 available can support a decision.

3 CHIEF JUDGE WILSON: You began - - -

4 MS. EVERETT: This case - - -

5 CHIEF JUDGE WILSON: - - - you began by saying.
6 Sorry. You began by saying - - -

7 MS. EVERETT: I'm sorry.

8 CHIEF JUDGE WILSON: - - - that the error - - -
9 the error was the introduction of the report.

10 MS. EVERETT: Yeah.

11 CHIEF JUDGE WILSON: The evidence. What - - - is
12 it also your contention that the examiner's testimony was
13 erroneously admitted or no?

14 MS. EVERETT: Not per se her testimony, Dr. Ely's
15 testimony. However, to the extent she based her opinions
16 on findings of the absent medical examiner. For example -
17 - -

18 CHIEF JUDGE WILSON: So let's be careful about
19 findings. Finding, for example, that there was a stab
20 wound in a particular place that was - - - you consider
21 that a finding?

22 MS. EVERETT: Yes. And particularly in this
23 case, that it was a quote-unquote gaping wound, because
24 that finding in the autopsy report that it was gaping was
25 the basis of the testifying - - -

1 JUDGE TROUTMAN: So if you had a photograph of -
2 - -

3 MS. EVERETT: - - - medical examiner - - -

4 JUDGE TROUTMAN: - - - of that wound, could a new
5 examiner look at the photograph if the original autopsy,
6 for instance, were videotaped?

7 MS. EVERETT: Possibly.

8 JUDGE TROUTMAN: Could - - - could they, if it's
9 appropriately documented, make a - - - a record so that in
10 the unlikely or probable event, people don't work forever
11 and sometimes they do die, but couldn't there be an
12 opportunity for another person to make their own
13 conclusions and not violate the Confrontation Clause?

14 MS. EVERETT: Possibly. I think it really is a
15 case-by-case decision. That depends what kind of
16 information is important in the autopsy. In this case, if
17 they had introduced the photos, you know - - -

18 JUDGE TROUTMAN: But - - - but again, that's
19 setting forth a standard - - -

20 MS. EVERETT: Right.

21 JUDGE TROUTMAN: - - - giving guidance in the
22 future.

23 MS. EVERETT: Right. Exactly.

24 JUDGE TROUTMAN: So like the next case comes - -
25 -

1 MS. EVERETT: Exactly.

2 JUDGE TROUTMAN: - - - here are things that you
3 can consider.

4 MS. EVERETT: Yes.

5 JUDGE TROUTMAN: So it may or may not work, but
6 there are things, you agree - - -

7 MS. EVERETT: I do agree.

8 JUDGE TROUTMAN: - - - that could possibly.

9 MS. EVERETT: Yes. I agree that you could
10 videotape, you could have still photographs, you could have
11 other technical substitutions.

12 JUDGE RIVERA: So what - - - what - - -

13 MS. EVERETT: But I don't want to mislead the
14 court to say that it will always be a - - -

15 JUDGE RIVERA: So it - - -

16 MS. EVERETT: - - - substitute.

17 JUDGE RIVERA: - - - sounds like what you're
18 saying they - - - they can't do is simply take something
19 that contains conclusions and findings of the prior medical
20 examiner and build off of that?

21 MS. EVERETT: That is exactly what I'm saying.
22 Because the origin - - - the fact that it was gaping is a
23 term of art and based on the fact that the absent medical
24 examiner characterized the wounds that way, that's what led
25 Dr. Ely to determine that there had been twisting and

1 turning by the child during the event.

2 JUDGE RIVERA: It's got to be the testifying
3 medical examiner's judgment.

4 MS. EVERETT: The judgment, she - - -

5 JUDGE RIVERA: Not - - - not relying on someone
6 else's judgment and perhaps building from there, not merely
7 repeating it, but building off of that.

8 MS. EVERETT: Building. As long as the defendant
9 has an opportunity to confront those building blocks. It's
10 not enough to say - - - and this is our disagreement with
11 the - - - what's the word, the plurality decision in
12 Williams, that just because an examin - - - an expert is
13 building on basis facts, that - - - that it's okay for the
14 expert to give an opinion. This court in Goldstein clearly
15 rejected the notion that basis facts don't come in for the
16 truth.

17 JUDGE GARCIA: But how does that square with Sean
18 John's, no, you don't need all the analysts?

19 MS. EVERETT: I think if you read Sean John, I
20 think that the court held that the analysts who made the
21 determinative findings that were necessary for the
22 testimony in court to base the opinion on, those people had
23 to be produced.

24 JUDGE GARCIA: But not the three or four analysts
25 before that. So how do you analogize that to - - -

1 autopsy?

2 MS. EVERETT: Well, I think - - -

3 JUDGE GARCIA: So what don't you need?

4 MS. EVERETT: Well, you don't - - - what this
5 court, where it has erred, I think, in the past and that
6 Garlick thought was the notion that just because it's an
7 observable fact that's recorded, that that's something that
8 you don't have a right to - - -

9 JUDGE GARCIA: So a photo could come in - - -

10 MS. EVERETT: - - - confrontation with.

11 JUDGE GARCIA: - - - as a business record?

12 MS. EVERETT: Say that again. I'm sorry.

13 JUDGE GARCIA: A photo could come in as a
14 business record?

15 MS. EVERETT: Photograph could come in as a
16 business - - - a videotape.

17 JUDGE GARCIA: So - - -

18 JUDGE SINGAS: So following up on that - - - I'm
19 - - -

20 JUDGE GARCIA: Oh, go ahead.

21 JUDGE SINGAS: Following up on that, you made a
22 statement that the medical examiner couldn't testify about
23 a twisting or a gaping wound. But in this case, do we know
24 for certain that this medical examiner was relying on the
25 report when she was making those - - -

1 MS. EVERETT: We do.

2 JUDGE SINGAS: How?

3 MS. EVERETT: Because - - -

4 JUDGE SINGAS: Because I don't think it's that
5 clear in the record - - -

6 MS. EVERETT: She - - -

7 JUDGE SINGAS: We - - - she said - - -

8 MS. EVERETT: - - - she testified - - - I'm
9 sorry.

10 JUDGE SINGAS: She said that she had reviewed
11 photographs, and the question was asked about the wounds.
12 So if we're not sure, I don't know. I mean, I'm - - -

13 MS. EVERETT: All right.

14 JUDGE SINGAS: - - - I think that it isn't so
15 clear in this record what it is. But if she were looking
16 at photographs, then I think you would say that that would
17 be okay if she described it as gaping. But if the only
18 thing she was looking at was the report and the diagram
19 with the annotations, that that would be improper.

20 MS. EVERETT: Yes. I - - - I agree with you,
21 Your Honor. That this report - - - she said she relied on
22 the autopsy report, the audiotape that the examiner made,
23 and the photographs. The DA did not introduce the
24 photographs or the audiotape, but there's no testimony from
25 Dr. Ely that she - - - her personally determined that these

1 were gaping wounds.

2 JUDGE CANNATARO: And that's the reason why, you
3 know, to - - - to go to the first part of Judge Singas'
4 question, that's the reason why, you know, that that was
5 not her own independent conclusion because - - -

6 MS. EVERETT: That's what I'm basing it on.
7 Could I briefly talk about harm? Because I think harm is
8 going to play a big role in the discussion. So the - - -
9 based on the gaping characterization, the medical examiner
10 said that this - - - she talked about her conclusions about
11 how the crime took place and that one of the victims had
12 twisted and turned. Now, the respondent, in their brief on
13 page 11, acknowledges that Dr. Ely's conclusions, and I'm
14 including in that, her conclusion that she twisted and
15 turned based on the report that it was gaping. That these
16 conclusions, "provided support for several of the
17 prosecutor's arguments against defendant's insanity
18 defense." So that's one thing the court should consider.

19 JUSTICE DUFFY: Is that your argument as to why
20 this - - -

21 MS. EVERETT: That's part of my argument.

22 JUSTICE DUFFY: - - - wouldn't be harmless error?

23 MS. EVERETT: Right. That's part of it. The
24 other - - - another focus point should be that the jurors
25 deliberately - - - jurors explicitly asked for the

1 nontestifying medical examiner's annotated diagram.

2 JUDGE SINGAS: But how does that testimony
3 undermine the insanity defense? How, specifically?

4 MS. EVERETT: Well, the - - - for example, the
5 gaping wounds that led to a determination of twisting and
6 turning, the prosecutor in their cross-examination of the
7 defense expert witnesses said, doesn't that show that she
8 was acting with intent that - - - and they said - - -

9 JUDGE SINGAS: But she could still - - -

10 MS. EVERETT: - - - and - - -

11 JUDGE SINGAS: - - - have been acting with
12 intent. She said, yes, I wanted to kill these kids, but I
13 was acting because the devil told me to do it. So - - -

14 MS. EVERETT: Her defense, according to the
15 doctor, was - - -

16 JUDGE SINGAS: - - - I - - - I'm not sure how the
17 gaping wounds undermine that.

18 MS. EVERETT: Because the - - - the People really
19 focused on - - - the People's expert said, we could see
20 various things that happened that day. And we - - - based
21 on those things, we determined that she was not acting in a
22 dissociative state. And the - - - and the defense expert
23 said she was psychotic, depressed, and had hallucinations
24 and that the dissociative state was a coping mechanism that
25 a person, when they're - - - to fight off - - -

1 JUDGE TROUTMAN: But you don't just focus on one
2 part of the evidence. You - - - you look at all of the
3 evidence that was supporting one conclusion or another.
4 The burden, of course, was on the People. Didn't the
5 People have other evidence here?

6 MS. EVERETT: Well, the burden of proof - - -

7 JUDGE TROUTMAN: That one can argue that it was
8 overwhelming evidence?

9 MS. EVERETT: The burden of proof on the insanity
10 is the beyond - - - preponderance on the - - - it's an
11 affirmative defense. The - - - I argued that when you have
12 two expert witnesses, Dr. Resnick had forty years'
13 experience at the head of a clinic, a forensic clinic in -
14 - - in Ohio. You had doctors at the hospital who said she
15 was psychotic immediately after the crime, when she was - -
16 - that this was - - - and this is the operation of a mind.
17 This is a difficult thing for jurors to understand. And
18 under these circumstances - - -

19 JUDGE TROUTMAN: These jurors could also consider
20 her lifetime, whether she had psychotic breaks during her
21 lifetime.

22 MS. EVERETT: It's all relevant.

23 JUDGE TROUTMAN: Whether she was hospitalized.

24 MS. EVERETT: Yes.

25 JUDGE TROUTMAN: How did - - - what was her - - -

1 what were her actions on the day in question leading even
2 up to right before the children - - -

3 MS. EVERETT: Right. And that's the leading
4 right up to that I want the court to think about how the
5 medical examiner's opinion about the crime itself, whether
6 it did or didn't shed light on her insanity. And the other
7 thing I want to mention is that the prosecutor - - - the
8 trial prosecutor - - -

9 JUDGE TROUTMAN: What about an objective witness
10 that claims there was interaction with her before she went
11 up to the apartment?

12 MS. EVERETT: There was a - - - yes. There were
13 things that happened that the People's doctor thought
14 disproved insanity. But the two experts who testified for
15 the defense viewed that same facts, and then their - - - to
16 a degree of reasonable scientific certainty, they said that
17 did not disprove insanity.

18 JUDGE TROUTMAN: And what about the - - - the - -
19 - what she did with her precious belongings - - -

20 MS. EVERETT: Right.

21 JUDGE TROUTMAN: - - - prior to?

22 MS. EVERETT: I - - - I really have the same
23 answer to that. I think it's - - - there are a lot of
24 facts in this case that could go either way. I'm not
25 saying those aren't relevant. I'm just saying that expert

1 witnesses weighed all these facts. And the final thing I
2 do want to point out is the trial prosecutor really found
3 important this characterization of the child twisting and
4 turning that comes from the medical examiner relying on
5 that report. That was kind of a phrase that was used in
6 summation. That was a phrase used in cross-examination. I
7 submit it's a very graphic, maybe even heartbreaking
8 phrase. And even if it doesn't directly go to the insanity
9 defense, that opinion given by Dr. Ely, based on the absent
10 ME's testimony, was very significant to the jury's
11 deliberation about what happened in this case. It's very
12 prejudicial. And for that reason I would ask for reversal,
13 in addition to the other points raised in the brief.

14 CHIEF JUDGE WILSON: Thank you.

15 MS. POOLE: Good afternoon, Your Honors. Dana
16 Poole for the People.

17 What we have here is not a case in which the jury
18 was asked to rely on an autopsy report. This is not a case
19 in which the People's expert was called to parrot - - -

20 JUDGE TROUTMAN: So was it testimonial?

21 MS. POOLE: Arguably not. But what we have here
22 is an expert who is - - - is making - - - is coming up with
23 her own independent conclusions, expert opinions.

24 JUDGE GARCIA: But why do you need the notes on
25 the diagrams then? If it's an independent conclusion, why

1 put the exhibit in that not only has a sketch, but has
2 notes from the prior examiner, and then they're read in
3 part, I think.

4 MS. POOLE: They're - - - they're - - - I don't
5 believe they were read, but - - - but the - - - she used
6 that as a demonstrative aid in lieu of bringing the autopsy
7 photos.

8 JUDGE CANNATARO: What's your best evidence in
9 the record that she was drawing her own conclusions and not
10 just parroting testimonial aspects of the autopsy report,
11 assuming there are some testimonial aspects.

12 MS. POOLE: She specifically said. She had
13 reviewed the materials, the dictation tapes, the autopsy
14 report, and the photographs and using those had reached her
15 own independent conclusions. She was asked - - -

16 JUDGE CANNATARO: So you just have to say the
17 magic words and - - - and then you get - - - and - - - and
18 if it just so happens to be exactly the same as what the
19 medical examiner who performed the autopsy said and
20 concluded, that's just what happens sometimes?

21 MS. POOLE: Well, what - - - what happened here
22 is that the - - - the raw data that she's working off of,
23 the photographs, the tapes, the report, all of that is
24 turned over to the defense.

25 JUSTICE DUFFY: Wait. But is that admissible in

1 and - - - in and of itself?

2 MS. POOLE: The report? I mean, the photographs
3 definitely don't come under Confrontation Clause issues.
4 Now, in this case, they were not put into evidence because
5 they are incredibly disturbing. And there's really no
6 dispute in this case about how the children died.

7 JUDGE GARCIA: There was no stipulation from the
8 defense lawyer as to diagrams, right?

9 MS. POOLE: No.

10 JUDGE GARCIA: I mean, there was no exchange. We
11 don't put the photos in and you stick to the diagrams?

12 MS. POOLE: No. There's nothing in the - - - in
13 the record that says that. But that's the way that they
14 were used. And there really is no dispute here about the
15 wounds that the children received. The cross-examination -
16 - -

17 JUSTICE DUFFY: But what is at issue is the fact
18 that the prosecutor argued that the - - - sort of to
19 disprove the insanity defense, that these - - - this showed
20 intent, which, according to the argument, undermined the
21 fact that this was, you know, an act of somebody who was
22 incapacitated - - - mentally incapacitated through
23 insanity.

24 MS. POOLE: So that was a very small portion of
25 the rather long summation argument in this case.

1 JUSTICE DUFFY: But the - - - but the note that
2 asks the court to explain consciousness versus
3 understanding seems to suggest that the jury was grappling
4 with that, because one goes to the definition of the act
5 and the other goes to the definition of the defense.

6 MS. POOLE: Right. So the - - - so the real
7 dispute in this case was the defendant's state of mind. It
8 was not who caused the death or how the death was caused or
9 what the wounds were to the children. It was the
10 defendant's state of mind. And that - - - what the People
11 brought in regarding that information, what they relied on,
12 were her actions around - - -

13 JUDGE TROUTMAN: So what about the defense saying
14 the emphasis on the gaping stab wound and how the children
15 or child was stabbed somehow goes to whether she knew what
16 she was doing or if she was in a dissociative state.

17 MS. POOLE: Well, it - - - it has very little
18 bearing on it, because as Dr. Ely testified, she could
19 offer no insight into the operation of the defendant's
20 mind.

21 JUDGE CANNATARO: So then you disagree? Let me -
22 - - can I ask a two-part question and follow up to Justice
23 Duffy's question? Do you agree, first, that there is a
24 difference between proof of intentionality and proof that
25 tends to show whether or not the defendant understood the

1 nature and consequences of her actions? And if you do
2 agree that there is a distinction, is it in fact the case
3 that the prosecutor here used autopsy evidence to - - -
4 directed towards the NGRI defense and not intentionality?

5 MS. POOLE: What the argument was was that, you
6 know, that the - - - that the defendant was acting. And
7 again, this is a very small piece of - - - of why we know
8 that she acted intentionally, and she appreciated the
9 nature and consequence of her actions. Because what was
10 really at play, there were all of the activities leading up
11 to that moment.

12 JUDGE CANNATARO: But that goes to proof of the
13 crime, right? It - - - it doesn't necessarily relate to
14 the defense, or am I misunderstanding?

15 MS. POOLE: It related - - -

16 JUDGE CANNATARO: Intentionality is the prima
17 facie case.

18 MS. POOLE: Right. There - - - there are two
19 distinct questions, but they are in many ways interlaced.
20 Because there - - - there's first the question of was she
21 acting with intention when she killed those children? And
22 we proved that. And then there's the - - - the rebutting
23 the defense evidence that she did not appreciate the nature
24 and consequences. The - - - so a very small part of the
25 argument was, yes, you know, she was acting intentionally,

1 and she understood what she was doing. And in this case -
2 - -

3 JUSTICE DUFFY: And that argument was part - - -
4 using part of the testimony of the expert that indicated
5 that the younger child - - - the - - - the purposeful act
6 to the younger child was as a result of the experience with
7 the older child.

8 MS. POOLE: That was the prosecutor's argument.
9 That was not Dr. Ely's testimony.

10 JUSTICE DUFFY: No, that was the prosecutor's
11 argument relying on that testimony.

12 MS. POOLE: Right. And so what the - - - what
13 the prosecutor did was posit the possibility that defendant
14 had struggled with the first child and so caught this the
15 second child by surprise. You could easily flip that and
16 say that it proves the same thing. There's almost no way
17 that someone can manage to kill two children in a very
18 small room with kitchen knives and there not be a way to
19 argue that it shows intentionality and that she understood
20 the nature and consequences of her acts.

21 JUDGE CANNATARO: But assuming the autopsy was
22 erroneously admitted or testimonial portions, doesn't that
23 just sort of make out the error if that was used to negate
24 her defense?

25 MS. POOLE: The autopsy report itself was not

1 used for that. The - - - the - - - the only part that the
2 - - - of that that was actually published to the jury were
3 those diagrams, and those were used as - - - as
4 demonstrative.

5 JUDGE CANNATARO: That goes back to Judge Singas'
6 question, because it's very hard to distinguish here what
7 was independent opinion by Dr. Ely and what was very
8 similar content in the autopsy room.

9 MS. POOLE: And that - - - and - - - and I think,
10 Your Honor, that comes from the fact that these issues
11 weren't actually in dispute. Because this is a case,
12 again, where nobody is really disputing the nature of the -
13 - - the wounds to the child. I mean, we - - - even without
14 Dr. Ely's testimony, we have testimony from the first
15 responders that the two children were all but decapitated.

16 JUDGE SINGAS: But confrontation was at issue. I
17 mean, the defense raised it. And I think what's troubling
18 is that the imprecise language that was utilized during the
19 direct examination of the medical examiner. It's very hard
20 to read this record and try and figure out what is based on
21 her own independent observations, looking at photographs,
22 reviewing the documents, and - - - you know, for pages, she
23 goes on describing the wounds after the diagram has been
24 shown to the jury and published. And she routinely goes
25 through that and then talks about the torso and then talks



1 about the hand. And I mean, it - - - it - - - I don't
2 think it's common sense to think that she committed that to
3 memory. So she was looking at something. And the question
4 there is, is she allowed to do that?

5 MS. POOLE: I - - - I think she's allowed to - -
6 - she - - - the autopsy report is one of the kinds of
7 materials that experts in her field use to reach their
8 expert opinions. So it's unquestionably - - - she can rely
9 on that.

10 JUDGE SINGAS: Again, but there's a difference
11 between relying on it to inform her independent expert
12 opinion and parroting what the previous medical examiner
13 wrote down in his report.

14 MS. POOLE: Even if that should have been made
15 more clear, or even if she should have dialed back any of
16 those explanations, but again, she had seen those autopsy
17 photographs. She could make the determination of whether
18 those wounds were gaping or not, how deep they were,
19 whether they affected blood vessels or bodily organs.

20 JUSTICE DUFFY: But the problematic issue with
21 the report, or maybe not according to your adversary who
22 contends the whole report should have come out, but there's
23 opinion in that autopsy report and that went in. And even
24 though it may not have been published to the jury, that was
25 part of your argument, it still was information that's not

1 clear what was relied upon by the expert.

2 MS. POOLE: Right. And - - - and again, what we
3 have is - - - is a situation where that particular issue is
4 not being developed primarily because it's not the - - -
5 the true issue in the case. Nobody is disputing the kinds
6 of wounds that those children suffered. And again, the
7 defense had - - -

8 JUDGE CANNATARO: But when the prosecutor uses
9 that to argue that this shows that she understood the
10 nature and consequences of her actions, it really does go
11 to the issue in the case. I get that she didn't dispute
12 that she stabbed the children. She might have even been
13 willing to concede that there was an intentionality around
14 it. But she did definitely argue that she didn't
15 understand the nature and consequences of her action. But
16 that's exactly what the prosecutor used this evidence for,
17 albeit briefly, as you said.

18 MS. POOLE: Right. But the prosecutor's main
19 argument is, is you look to everything that came up to
20 that. The fact that she left her keepsakes for her son.
21 She left the documents for her sister. She used her phone
22 to contact her son that morning and then got rid of it.
23 She was able to show up to work on time. She took Leo out
24 of the apartment like she was supposed to. She picked up -
25 - -



1 JUSTICE DUFFY: But - - - but the problem is that
2 the focus is on what was the defendant's state of mind at
3 the time of the act, and albeit brief, that was what was
4 focused on in that summation.

5 MS. POOLE: Right. But her state of mind is
6 informed by the fact that she took all of these steps to -
7 - - to get to the point where she could kill those
8 children.

9 JUDGE CANNATARO: It sounds to me like you are
10 arguing if there was an error, it was a harmless one?

11 MS. POOLE: Absolutely, Your Honor.

12 JUDGE CANNATARO: Is that what you're saying?

13 MS. POOLE: Absolutely, yes. Because this is a
14 case about the defendant's state of mind. It is - - - her
15 state of mind is shown by the fact that she, for the first
16 time, didn't take those children where they were supposed
17 to be. She distracted them with ice cream. She walked
18 them around the - - - the neighborhood and she waited until
19 the time that she knew the mother would have left. And she
20 came back to the apartment building and she ensured that
21 they left. Speaking to the doorman for the first time ever
22 to ensure that the mother had left, he said, yes, the
23 mother left with Nessie (ph.), and that is when she took
24 the children up to the apartment. She took them to the
25 furthest room from the front door. She brought in two

1 kitchen knives and she killed those children. She laid
2 their bodies out neatly in a bathtub so that their mother
3 could find them and then she waited - - -

4 JUSTICE DUFFY: So those issues all go to intent?

5 MS. POOLE: They do go to intent. But they - - -

6 JUSTICE DUFFY: So how do they go to her state of
7 mind at the time of the act?

8 MS. POOLE: Because she had planned those
9 actions. This was not some dissociative state where all of
10 a sudden she had no idea what was going on.

11 JUSTICE DUFFY: So you would agree that the issue
12 of her intent was used to try to disprove the defense?

13 MS. POOLE: Well, there - - - there - - - there's
14 two things going on. So it is the People's burden to prove
15 her intent, so that we did. And a lot of that same
16 evidence also demonstrates her capacity to appreciate the
17 nature and consequences of her actions.

18 JUSTICE DUFFY: Right. But you have to - - - you
19 have to disprove. Assuming that they established it by
20 their burden, you have to disprove by a - - - beyond a
21 reasonable doubt.

22 MS. POOLE: It is their burden. We can rebut
23 their evidence, which is precisely what we did here. And -
24 - - and what we showed is - - - is all of these steps that
25 she took, she understood precisely what she was doing. And

1 however you argue about what happened in that bathroom, the
2 perseverance it would take to kill two children with that
3 much lethality is - - - is indicative of her intent and - -
4 - and that she understood her homicidal acts.

5 JUSTICE DUFFY: So is it your position that - - -
6 the autopsy report first did come into evidence, but it
7 wasn't published, correct?

8 MS. POOLE: Correct.

9 JUSTICE DUFFY: So absent Dr. Ely's testimony - -
10 - or you haven't been arguing about her testimony, just
11 some of it. The report - - - absent the report,
12 overwhelming evidence established both the intent and the
13 ability to appreciate.

14 MS. POOLE: Absolutely, Your Honor. This is a
15 case that even with - - - even if Dr. Ely had never
16 testified, if there was no information about the autopsy,
17 it was clear that defendant here intentionally killed these
18 children and understood precisely what she was doing. And
19 - - - and we know that because of these - - - of the steps
20 she took leading up to it and the steps that she took
21 waiting for the mother to come home and only trying to
22 escape the personal consequences of her acts by stabbing
23 herself.

24 JUDGE RIVERA: And - - - and that none of that
25 could reflect that she felt there was a demonic force at

1 play.

2 MS. POOLE: Well, I - - - I - - -

3 JUDGE RIVERA: I'm not sure how that, what you
4 just said, addresses that part of her defense?

5 MS. POOLE: Well, because what the - - - what the
6 defense was, was not merely she succumbed to these command
7 hallucinations. What - - - what the defense was, was that
8 she, in that moment, went into a completely dissociative,
9 psychotic state from the time that she was in the bathroom.
10 She was not in that dissociative, psychotic state leading
11 up to the bathroom. And there was even testimony that she
12 was conscious and aware when the mother came and opened the
13 door. So it's - - - it's not just a matter of succumbing
14 to those voices.

15 JUDGE RIVERA: Okay. Your white light is on.
16 I'm - - - I'm sorry. I was wondering if you could take a
17 moment to address the CPL 310.30 jury instruction issue?

18 MS. POOLE: The instruction regarding the - - -

19 JUDGE RIVERA: Understanding - - -

20 MS. POOLE: - - - the two prongs?

21 JUDGE RIVERA: Yes. Yes, yes.

22 MS. POOLE: Yes. So what - - - so courts are
23 routinely asked to adhere to the CJI instructions, and
24 that's what Justice Carro did here. He - - - he gave an
25 accurate description of the law, and he amended it to

1 comport with the defense, which was they were relying on
2 the nature and consequences solely.

3 JUDGE RIVERA: Did - - - didn't the judge say,
4 anticipated that they would come back and ask for further
5 clarification? Which seemed to me a bit odd.

6 MS. POOLE: Well, that was - - - that was in
7 response to the note asking for the legal definition of
8 conscious. And so the - - - and that's when the judge
9 said, yes, there's - - - there is no legal definition. It
10 has its ordinary meaning, aware, as does - - - they'd also
11 asked for the differentiation between conscious and
12 understanding - - -

13 JUDGE RIVERA: Understanding.

14 MS. POOLE: - - - he said. Right. So - - - so
15 that had to - - - that had to do with their understanding
16 of the instructions. And at that point, the judge said, if
17 it would be helpful for me to reread the - - - the charges
18 where those words are used, I'm happy to do that. The jury
19 did not ask.

20 JUDGE RIVERA: So the judge - - - well, perhaps
21 I'm misunderstanding the point here. I - - - I thought the
22 point was that the judge was incorrect to say the - - - the
23 term understanding was based on common sense.

24 MS. POOLE: The - - - the term understanding?
25 Yes. The judge - - - the judge stated it has its common

1 meaning. There is no legal definition of understanding.

2 JUDGE RIVERA: The judge had given the
3 definition, hadn't he?

4 MS. POOLE: No. The - - -

5 JUDGE RIVERA: Okay.

6 MS. POOLE: - - - the judge.

7 JUDGE RIVERA: Before the note, I mean, in the
8 original charge.

9 MS. POOLE: In the original charge, it's that - -
10 - that some understanding - - - when the - - - that - - -
11 for - - - to be able to know and appreciate - - -

12 JUDGE RIVERA: Yes.

13 MS. POOLE: - - - means having some
14 understanding, meaning more than surface knowledge. So
15 understanding was actually part of a definition of the - -
16 - the phrase know and understand.

17 JUDGE SINGAS: Can I ask one - - -

18 MS. POOLE: Yes. Know and appreciate.

19 CHIEF JUDGE WILSON: Of course.

20 JUDGE SINGAS: So is it the People's position
21 that anything that a surrogate ME relies on to form an
22 opinion could then be entered into evidence?

23 MS. POOLE: Not necessarily, Your Honor. And I -
24 - - I don't think it's necessary that that - - - that be
25 the case here.

1 JUDGE SINGAS: So what do you think could be
2 relied on?

3 MS. POOLE: Her testimony. She - - - and she can
4 rely on the materials that experts in her field routinely
5 rely on and - - -

6 JUDGE SINGAS: And you can put them into
7 evidence?

8 MS. POOLE: Not necessarily. She - - - the - - -
9 for instance, in this case, the photographs were put under
10 a sealing order so that they would not be made public.
11 They were shared with - - -

12 JUDGE SINGAS: And you - - - you think it's
13 proper for the original ME's report to go in and that does
14 not run afoul of Melendez-Diaz or Bullcoming?

15 MS. POOLE: Autopsies are a little bit of a
16 different animal, and we don't quite know how the Supreme
17 Court would rule on those. And in this case, what you have
18 with the autopsy - - - so you have the report which is near
19 contemporaneous documentation of data. You have the - - -
20 the tapes that are contemporaneous recordation of the data,
21 and you also have the photographs. And so - - - so the
22 second - - - Dr. Ely in this - - - in this case, the
23 testifying ME, could rely on all of those. They don't
24 necessarily have to come into evidence for her to be able
25 to rely on them. And - - - and that would be similar to

1 the Goldstein issue, where the hearsay that the
2 psychiatrist relied on could not come in. But this court
3 found that her testimony, her - - - the opinions that she
4 had formed could come into evidence.

5 JUSTICE DUFFY: However, the closer the opinion
6 is to relying on the underlying hearsay for the truth, the
7 more problematic it becomes, correct?

8 MS. POOLE: This - - - this is - - - this is sort
9 of where this case is a little bit unique because there's
10 really no dispute.

11 JUSTICE DUFFY: Right. So when there are other
12 cases where the cause of death may be at issue - - -

13 MS. POOLE: Right.

14 JUSTICE DUFFY: - - - that becomes problematic if
15 the - - - if there's testimony as to what the cause of
16 death is based on what is reliable hearsay.

17 MS. POOLE: Well, and that - - - that can - - -
18 the - - - the expert is allowed to rely on evidence that is
19 relied on by experts in her field. And so that all - - -

20 JUSTICE DUFFY: As long as there's also direct
21 evidence and not just hearsay?

22 MS. POOLE: In the - - - yes. I mean, I - - - I
23 think, you know, you would have to have a body, for
24 instance. And - - - and here we have plenty of evidence of
25 - - - of the death, the means of death, the manner of

1 death, the cause of death. And there really is no dispute.
2 So to the - - - to the extent that it may be hard to parse,
3 you know - - -

4 JUSTICE DUFFY: You agree with your adversary
5 that this is a fact-driven determination, which I think in
6 Williams, the Supreme Court was concerned about, or at
7 least Kennedy was concerned in the dissent?

8 MS. POOLE: Well, what - - - what is - - - is
9 true throughout, even the dissent in Williams said, expert
10 testimony is fine. The dispute is about the document and
11 the - - - and in this case, the hearsay from the document,
12 because the document didn't actually come into evidence.
13 So - - - so to that extent, then the question here would
14 be, you know, in - - - in a - - - probably in a different
15 case, is the - - - the testifying ME relying solely on that
16 document or is - - - does she have other things such as the
17 photographs where she can see the measurements and she can
18 see - - - see whether it fits a description of gaping or
19 notching or - - - or any of those other sorts of things.
20 Here, where there's almost no dispute about any of those
21 underlying facts, that was not explored. But it could have
22 been because the defense had all of the raw data that the -
23 - - that the expert was relying on.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. POOLE: Thank you.



1 MS. EVERETT: The question about whether or not
2 the basis, I believe that was your question, they could
3 rely - - - the jury could be told about the facts that the
4 expert relied on. I think Goldstein makes clear that this
5 court finds that if a psychiatrist is going to talk about
6 her opinion being based on interviews with other friends
7 and families, that that raises a confrontation issue. And
8 this court, in John, said that those facts - - - addressing
9 Williams, said those facts and - - - as the basis for the
10 expert's opinion, only are useful if they're true. So
11 they're coming in for their truth and they raise
12 confrontation issues.

13 I would also just - - - we talked - - - and
14 during this - - - of the DA's argument. I believe that the
15 People are conceding that they're - - - the testifying
16 doctor's testimony was used both to - - - partially to
17 establish intent and to rebut the insanity defense. That
18 seemed pretty clear.

19 The other thing was, Judge Rivera, on your
20 question about the answer to the jury note, the prosecutor
21 just now talked about the value of the CJI instruction.
22 The CJI instruction, regarding understanding, specifically
23 says that you define understanding as more than surface
24 knowledge. And the CJI instruction includes that
25 hypothetical that children can know, but do they really

1 know? They have to - - - you know, they're - - - what
2 they're doing. So that is part of the CJI definition of
3 these terms. What the judge did when he answered that jury
4 question would say, know is aware, and the otherwise, he's
5 had their common understanding.

6 JUDGE TROUTMAN: Are CJI charges mandatory or do
7 - - - do the - - - does the judge have the discretion to
8 shape the charge based upon the case before?

9 MS. EVERETT: They're not mandatory. However,
10 there's a lot of language in cases, I think, for this court
11 as well, saying they're highly recommended. And in this
12 case, the judge did give the CJI charge and when answering
13 the jury's question by omitting the full definition the
14 judge gave originally. And when the judge said to the
15 jurors, those terms are used in my discussion of the
16 crimes, the judge did not say to the jurors, there's more
17 definition of those terms in my main charge, which might
18 have prompted the jurors to say, well, give us the rest of
19 those definitions. What the judge said was those terms are
20 used in my discussion of the crimes. And I will - - - if
21 you want me to reread the elements of the crime, I will do
22 that for you. But nothing by that offer - - -

23 JUDGE TROUTMAN: But it's - - - it's not unusual
24 after a juror - - - a jury's been listening to a charge for
25 over an hour originally, when they come back, they don't

1 want the judge to repeat the whole thing.

2 MS. EVERETT: I'm not - - - no, I don't think
3 they wanted the whole thing, but they did want the part of
4 the original charge that bore on the definitions of know
5 and understand. That's what they asked about. And that's
6 what the judge did not repeat, what originally was in the
7 charge, and what the CJI includes in the model charge. And
8 that was specifically objected to by defense counsel. And
9 what - - - and the judge acknowledged - - -

10 JUDGE CANNATARO: What was specifically objected
11 to by defense counsel?

12 MS. EVERETT: That you - - -

13 JUDGE CANNATARO: Because I have an awfully hard
14 time understanding what happened there.

15 MS. EVERETT: That you didn't - - - that you
16 didn't include in your answer to the question what you said
17 originally, which was knowledge is more than, "surface
18 knowledge." And the defense lawyer specifically said to
19 the judge, and - - - and you didn't include the
20 hypothetical about children and their kind of
21 understanding. And the judge said to the defense lawyer, I
22 agree, you know, that they may be - - - still have
23 questions and I think, I predict that they'll come back and
24 ask for more. But they didn't come back.

25 JUDGE CANNATARO: And then didn't he say, if - -

1 - if I have to, I'll repeat - - - I'll reread the charges
2 to them?

3 MS. EVERETT: That was the point I was trying to
4 make earlier, and I - - - I don't think I made it clearly.
5 He said, I will repeat the charges, but he didn't say
6 there's more definition to these terms in the original
7 charge that I did not provide to you. That's - - - so the
8 judge didn't say there's more here. He said they had the
9 common usage. He didn't say they had their common usage -
10 - - he didn't say that the - - - the definition of these I
11 explained further in my original charge, and I will explain
12 that further if you want it. I think that's a - - - a
13 significant distinction that I - - - that I'm trying to
14 make.

15 JUDGE RIVERA: Why - - - I - - - I'm not. That's
16 why I'm saying it's odd to me, the jury is saying give
17 guidance on the difference. Why - - - why is it a half
18 answer? I'm - - - I was not understanding what went on
19 here. Perhaps you can help me.

20 MS. EVERETT: I don't know why it was half
21 answered. The defense - - -

22 JUDGE RIVERA: Well, he's saying I predict they
23 want - - - they'll - - - they'll come back and say they
24 want further clarification.

25 MS. EVERETT: Is your question, why didn't they

1 come back if that's what they wanted?

2 JUDGE RIVERA: No, no, no, I don't know why the
3 jury is not coming back.

4 MS. EVERETT: Right.

5 JUDGE RIVERA: But it just seemed to be an odd
6 thing for the judge to say, I predict they're - - -

7 MS. EVERETT: I thought it was very odd.

8 JUDGE RIVERA: - - - I predict this is not good
9 enough and they're going to come back and want more.

10 MS. EVERETT: It was very odd. The judge seemed
11 to recognize that the answer that the judge provided was
12 inadequate. And yet he kind of shrugged his shoulders and
13 said, oh, they'll come back and ask for more. But they
14 didn't.

15 CHIEF JUDGE WILSON: Thank you, Counsel.

16 MS. EVERETT: That doesn't mean that they got the
17 right answer. They just didn't know there was more to get.

18 CHIEF JUDGE WILSON: Thank you.

19 MS. EVERETT: So for the - - - I ask the court to
20 reverse the judgment.

21 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Yoselyn Ortega, No. 74 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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