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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 108

CHESTER J. THOMAS,

Appellant.

20 Eagle Street
Albany, New York 12207
April 30, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 108, People v.
2 Thomas.

3 Counsel, would you like any rebuttal time?

4 MS. SOMES: I would like two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: They're just about
7 out. You can start.

8 MS. SOMES: Thank you. Janet Somes from
9 the Monroe County Public Defender's Office on behalf
10 of Chester Thomas. The overarching issue in this
11 case is, or perhaps I should say was, whether, when
12 the People failed to call a police officer who's
13 listed on their witness list, who was in a position
14 to give favorable test - - - to give testimony that
15 would most likely support a somewhat implausible
16 claim that one of their witnesses has made, can the
17 defense talk about it in summation?

18 In this case, the trial court prevented the
19 defense from doing exactly what it was entitled to
20 do, and something that was absolutely critical to the
21 defense.

22 JUDGE GRAFFEO: But what - - - what exactly
23 did the defense attorney want to argue it during the
24 summation?

25 MS. SOMES: The defense attorney was

1 arguing during the summation. He was pointing out
2 Officer McKnees was not called by the People. And
3 then he was - - -

4 JUDGE GRAFFEO: And he's allowed - - - he's
5 allowed - - -

6 MS. SOMES: And he's absolutely - - -

7 JUDGE GRAFFEO: - - - to comment on that,
8 correct?

9 MS. SOMES: Yes, yes. And then he
10 explained in his mistrial motion that he was - - -
11 what he wanted to do and that he was entitled to
12 argue that the jury should draw an adverse inference
13 against the prosecution for their failure to call
14 Officer McKnees.

15 JUDGE SMITH: I'm not sure - - - I mean,
16 Judge Graffeo may have been asking, was he permitted
17 to make that comment?

18 MS. SOMES: No, he wasn't. He was - - -

19 JUDGE SMITH: He's allowed in the sense the
20 law allows him, but the judge did not allow him?

21 MS. SOMES: I'm sorry; I misunderstood
22 that. The law does not - - - the law allows him to
23 do that and the court did not allow him to do that.

24 JUDGE READ: So the law allows him - - -

25 JUDGE GRAFFEO: Did not allow what?

1 JUDGE READ: - - - to ask the jury to draw
2 the inference?

3 MS. SOMES: Yes, the law allows him to do
4 that, absolutely. And he - - -

5 JUDGE GRAFFEO: But he was allowed to
6 comment to the jury that the police officer hadn't
7 been called as a witness, correct?

8 MS. SOMES: I don't - - - I don't think
9 that that's a fair review of the record. That's what
10 the trial court explained why she was denying the
11 mistrial motion. She thought that her ruling had
12 allowed him to comment on the absence, but not draw
13 the inference he was en - - - it turned out, he was
14 entitled to draw.

15 But I think when you look at the record,
16 what you see is anytime that he made a reference to
17 Officer McKnees' absence, there was an objection, and
18 the objection was sustained. And he tried three
19 different times, and it was always sustained.

20 And then we also look at what the court
21 instructed the jury before closing arguments. The
22 court told the jury, if I sustain an objection, that
23 means that the answer is stricken or the comment is
24 stricken from the record, and you are not to consider
25 it; it's as if it was never said. So I think when

1 evidence here showed that there were a lot - - -
2 there was a lot of missing evidence that one normally
3 might expect if what the complainant was testifying
4 was true. And the whole - - - the whole summation
5 was built around the missing evidence, and then we
6 get to the missing witness, who is going to explain -
7 - - who would be in a position to counter - - -

8 JUDGE SMITH: But he was the - - - the
9 lawyer was allowed to make the argument that the
10 complaining witness' testimony was totally
11 incredible; no police officer would ever have told
12 her that.

13 MS. SOMES: He did suggest that no police
14 officer would ever have told her that. But then he
15 was - - -

16 JUDGE SMITH: Yeah, but - - - then he
17 barred from saying, if he did say it, why isn't he
18 here?

19 MS. SOMES: That's exactly it. And that's
20 the strongest piece. That's the strongest piece - -
21 -

22 JUDGE SMITH: Okay.

23 MS. SOMES: - - - of that argument.

24 JUDGE SMITH: Now - - - now put me inside
25 the mind of a juror who is motivated to acquit by the

1 absence of that argument?

2 MS. SOMES: I think what happens is when
3 you - - - you look at the instruction that the court
4 gave the jury on. If you find any part of the - - -
5 of a witness' testimony to be untruthful, you can
6 disregard just that part, or you can disregard the
7 entire testimony.

8 JUDGE SMITH: Okay, but they - - -

9 MS. SOMES: I think that that is - - -

10 JUDGE SMITH: - - - they weren't going to
11 find that nothing happened to this lady, that she
12 made it all up. I mean, there was pretty strong
13 medical evidence that something happened.

14 MS. SOMES: I - - - there was evidence that
15 something happened, but they could have discounted
16 how it happened. They could have discounted her - -
17 - found that there was not forceful compulsion,
18 because she'd never mentioned anything about the box
19 cutter. So I think that there - - -

20 JUDGE SMITH: I mean, this is - - -

21 MS. SOMES: - - - could have been - - -

22 JUDGE SMITH: - - - you have a - - - this
23 is a - - - there's a history of abuse in the record.
24 He's - - - there's a couple of protective orders, one
25 of which he's in violation of that moment. There's a

1 bite mark on her back with his DNA in it. There's -
2 - - she's - - - there's pictures of her beaten up,
3 and the jury's going to find it's consensual sex?

4 MS. SOMES: I don't know what the jury
5 would have found, but it certainly - - - these two
6 had a volatile relationship. They beat up each
7 other. They charged each other with crimes. She
8 stabbed him at some point. She tried to stab him at
9 another point. So how her injuries were sustained,
10 the jury might have had some skepticism about whether
11 or not her testimony was accurate and truthful.

12 I'd like to go on to one of the issues in
13 the case, which is the Concepcion or LaFontaine issue
14 here. What we have is the trial court making a
15 ruling. The ruling is you - - - you cannot talk
16 about, you know, the missing witness. You cannot
17 draw an inference because you did not ask for a
18 missing witness instruction. That is the narrow,
19 narrow rationale relied upon by the trial court in
20 sustaining the objections and denying the mistrial.

21 What we have at the Appellate Division,
22 however, is an agreement - - - or not an agreement.
23 The Appellate Division said - - - agreed with us - -
24 - that you don't have to request a missing witness
25 instruction in order to comment upon a failure to

1 call a witness. So we have the Appellate Division
2 deciding this case on a rationale that was not
3 decided below. And I think that that is - - - is a
4 larger problem in this case. And I think that - - -

5 CHIEF JUDGE LIPPMAN: Then what do we have
6 to do based on LaFontaine?

7 MS. SOMES: Based on LaFontaine, I think
8 that the next question is - - - I think is - - -
9 probably what happens to the other charges in the
10 case? I think that you need to reverse and send it
11 back for a new trial.

12 JUDGE SMITH: So we can't - - - we can't
13 consider those arguments either, even if we think the
14 arguments are no good. We can't reject them. We
15 have the give the courts below a shot at them?

16 MS. SOMES: I think it needs a new trial
17 right away, as opposed to going back for - - -

18 JUDGE SMITH: Well, wait, wait, wait. You
19 want us to hold that the reason for the court's
20 ruling was wrong, but if it could be sustained on
21 some other reason, doesn't - - - doesn't he get a
22 chance to say - - - doesn't the - - - or she, the
23 trial judge, get a chance to say, you know what,
24 maybe my reason was wrong, but I got a perfectly good
25 reason.

1 MS. SOMES: I don't think so. It - - - I
2 think that was happens would - - - he should have a
3 new trial, because he was - - - I think that we have
4 a trifecta of wrong here. We've got - - - the ruling
5 was wrong; the rationale of the trial court was
6 wrong; and the rationale of the Fourth Department was
7 wrong. I think it was wrong all - - -

8 JUDGE SMITH: Okay, but, wait. We're not
9 allow - - - you may be right; they may be totally
10 wrong, but we're not allowed to say that because of
11 LaFontaine, right?

12 MS. SOMES: I don't - - - I think that the
13 prob - - - I think that the result needs to be to go
14 back for a retrial, given the - - -

15 CHIEF JUDGE LIPPMAN: Why - - - why a
16 retrial? Why can't it go back on whether a refusal
17 to - - - failure to allow him to make the argument,
18 because it was harmless?

19 MS. SOMES: Go back to?

20 JUDGE READ: Yeah, that's what we did in
21 those other cases.

22 MS. SOMES: To the Fourth Department?

23 JUDGE READ: We remitted, right? No, go
24 back to trial court.

25 MS. SOMES: Well, I'm not - - -

1 CHIEF JUDGE LIPPMAN: Why can't we just
2 remit to the trial court to determine, you know, if
3 it's harmless?

4 JUDGE SMITH: Does LaFontaine apply to
5 harmless error?

6 MS. SOMES: Does La - - - I haven't seen -
7 - -

8 JUDGE SMITH: We can rule - - - we can rule
9 on harmless error, right? I mean, obviously, the
10 judge below never decided harmless error? He didn't
11 think it was error.

12 MS. SOMES: He didn't think it was error,
13 so we don't have a ruling.

14 CHIEF JUDGE LIPPMAN: But we can't rule - -
15 -

16 MS. SOMES: If we don't have a ruling - - -

17 CHIEF JUDGE LIPPMAN: - - - here because of
18 LaFontaine?

19 MS. SOMES: Pardon?

20 CHIEF JUDGE LIPPMAN: But we can't rule now
21 because of LaFontaine?

22 MS. SOMES: I guess my argument would be
23 that it should go back to the trial court.

24 JUDGE SMITH: Well, you mean, you're not -
25 - -

1 MS. SOMES: I'm not sure.

2 JUDGE SMITH: But you're not saying we
3 can't rule on harmless error because of - - - you're
4 saying it's not harmless. But the alternative
5 grounds on which the court might have made the same
6 ruling, we can't touch those, right?

7 MS. SOMES: On the alternative grounds? I
8 think that - - - I think that you have to send it
9 back. I don't think that you can - - -

10 CHIEF JUDGE LIPPMAN: You send it back for
11 them to rule on the alternative grounds?

12 MS. SOMES: I think so.

13 CHIEF JUDGE LIPPMAN: If there are
14 alternative grounds?

15 MS. SOMES: If there are.

16 CHIEF JUDGE LIPPMAN: But not a retrial
17 necessarily.

18 MS. SOMES: Well, I would ask for the
19 retrial, obviously.

20 CHIEF JUDGE LIPPMAN: Okay.

21 Counsel?

22 MR. KAEUPER: Good afternoon, Your Honors,
23 Geoffrey Kaeuper for the People.

24 CHIEF JUDGE LIPPMAN: Does LaFontaine apply
25 here?

1 MR. KAEUPER: I don't think the LaFontaine

2 - - -

3 CHIEF JUDGE LIPPMAN: Why not?

4 MR. KAEUPER: - - - or Concepcion applies
5 here.

6 CHIEF JUDGE LIPPMAN: Why not?

7 MR. KAEUPER: I think those cases have been
8 applied in suppression context where you have really
9 very different theories of suppression, so you can't
10 in the suppression court say, well, it was
11 consensual, and then in the Appellate Division say,
12 oh, well, no, but it was an emergency. Those are
13 very different things from "objection sustained".
14 And I think if we to require that kind of narrow
15 parsing under Concepcion, you know, trial - - - trial
16 rulings would - - - would balloon out of all
17 proportion.

18 JUDGE SMITH: I mean, I'm not - - - as you
19 may know - - - I'm not unsympathetic to what you're
20 saying, but tell me again, what the distinction is?
21 I mean, you're saying because it's so fast paced,
22 Concepcion just can't work?

23 MR. KAEUPER: No, because - - - I mean,
24 here - - - here, when the objection's made, there's
25 no - - - nothing - - - there's no grounds stated.

1 JUDGE SMITH: But didn't she - - - she made
2 it very clear at some point that she was relying on
3 the failure to ask for a missing witness instruction.

4 MR. KAEUPER: The trial judge - - - the
5 trial judge says that later, yes. And - - - but at
6 the same time that the prosecutor is arguing this was
7 speculative, there was no evidentiary basis for this
8 - - -

9 JUDGE SMITH: So you're saying that when
10 the judge says "sustained, jury to disregard", that
11 opens up all pos - - - that any - - - that it can be
12 affirmed on any ground, even if later on the judge
13 articulated one ground that may be wrong.

14 MR. KAEUPER: That sounds like a good rule
15 to me.

16 JUDGE PIGOTT: Don't you run into
17 preservation issues, then? I mean, because then when
18 the defense comes up, and you're going to argue it
19 wasn't preserved; he says what are you talking about,
20 the judge said sustained. So it could have been one
21 of seven, and this is the sixth one that it could
22 have been that we were saying was preserved when the
23 objection was made. And we're - - -

24 MR. KAEUPER: I guess the alternative,
25 then, is that you have to have grounds listed for

1 each objection and you have to then also say, Judge,
2 I know you just - - - you just sustained my
3 objection, but I also want you to sustain it on this
4 other ground, too - - -

5 JUDGE PIGOTT: Well, no, you say, Judge,
6 I'm not - - - are you objecting - - - are you
7 sustaining the objection for this reason or for that
8 reason? I don't think that's unreasonable, is it?

9 MR. KAEUPER: I mean, I think as a
10 practical matter that would cause, probably, a lot of
11 problems.

12 JUDGE PIGOTT: It would be risky, yeah.

13 JUDGE SMITH: It's unusual. That kind of
14 dialogue is unusual in trials.

15 CHIEF JUDGE LIPPMAN: Are you really saying
16 that LaFontaine doesn't apply or that just we should
17 not apply LaFontaine?

18 MR. KAEUPER: No, I think - - - I think
19 LaFontaine should apply to really different theories
20 of, you know, like suppression, where you have, you
21 know, consent versus emergency doctrine or something.

22 JUDGE READ: Well, so you're saying it
23 doesn't apply here or we shouldn't apply it here?

24 MR. KAEUPER: I think it doesn't apply
25 here.

1 JUDGE READ: Okay.

2 MR. KAEUPER: I also - - - I also think,
3 though, that you don't need to entertain the question
4 of whether it applies here, because I think that even
5 if there was an error here, that it was harmless - -
6 -

7 JUDGE SMITH: You don't really have any
8 doubt that the ground that the judge did articulate
9 was wrong?

10 MR. KAEUPER: I think - - - I think that
11 the judge is wrong in saying that if you don't ask
12 for the missing witness charge, you can't argue it
13 under any circumstances.

14 CHIEF JUDGE LIPPMAN: So what about finding
15 out the other grounds? Why would that be such a
16 terrible thing if we sent it - - - remitted it to see
17 if there are other grounds?

18 MR. KAEUPER: I mean, I suppose that would
19 be - - - that would be a workable solution, too,
20 although, I think - - - I think - - -

21 CHIEF JUDGE LIPPMAN: No terrible result
22 from your perspective, especially the way you view
23 what's going on here, right?

24 MR. KAEUPER: Right, I think that's true.

25 JUDGE SMITH: Well, how - - - what's so

1 workable about that? We go to - - - we send - - -

2 MR. KAEUPER: I - - - it's extremely - - -

3 JUDGE SMITH: We send it back and say and
4 try another ground. She tries another ground, it
5 comes back, saying we don't like that one either,
6 send it back for a third one. Is - - - workable
7 isn't the word that comes to mind to describe that.

8 MR. KAEUPER: Right. I - - - and I guess
9 at some point I come up against the - - - I think
10 Concepcion's not very workable, but that's - - - I
11 understand - - -

12 CHIEF JUDGE LIPPMAN: We have to work with
13 it, right, or do we?

14 MR. KAEUPER: I understand that. But I
15 think harmless error here would be the easiest way to
16 avoid the problem, but - - -

17 JUDGE READ: Let me ask - - - let me ask
18 you this. Since the trial court's grounds were
19 wrong, what about the Appellate Division's?

20 MR. KAEUPER: No, I think the Appellate
21 Division's grounds were correct, and I think - - - I
22 think that what the - - -

23 JUDGE READ: The cumulative, the - - -

24 MR. KAEUPER: Absolutely.

25 JUDGE READ: - - - you think that's

1 correct?

2 MR. KAEUPER: Absolutely.

3 CHIEF JUDGE LIPPMAN: Yeah, but explain
4 again how you get around that the trial court didn't
5 go there, to cumulative? It wasn't an adverse ruling
6 below.

7 MR. KAEUPER: Well, I think it was an
8 adverse ruling. The attorney wanted to make an
9 argument; the judge said no, I'm sustaining the
10 objection to that. That's an adverse ruling against
11 that party.

12 JUDGE READ: But the part of the
13 cumulative, that's something you have to show to get
14 a missing witness charge, right? That it's
15 noncumulative?

16 MR. KAEUPER: Right. Right. And so here,
17 I mean, he's making - - - it's not - - - it's not a
18 question of whether he's entitled to the - - - to the
19 inference. I think - - - I mean to the instruction.
20 It's whether the inference is fair, based upon the
21 evidence here.

22 JUDGE READ: And you're saying that he was?
23 That the judge was wrong; the trial judge was wrong
24 in ruling that he couldn't make those arguments and
25 ask the jury to draw the inference.

1 MR. KAEUPER: No, no, I think - - - I think
2 - - - I think he could not - - - maybe I'm getting
3 confused here, but no, I think - - - I think that the
4 judge was correct in sustaining the objection. I
5 think the objection should have been sustained on the
6 ground that it was an argument asking the jury to
7 speculate, to come to a conclusion that was not
8 fairly inferable from the evidence, because the
9 People wouldn't be expected to - - -

10 JUDGE SMITH: Well, what's so unfair about
11 the conclusion? You really - - - I mean, you really
12 think that the police officer's going to come up - -
13 - come in and say, oh, yeah, that's exactly what I
14 told her. I said, you're a woman in a relationship;
15 no one would ever believe you were raped. You think
16 the police - - - you really think that it's likely
17 the officer was going to say that?

18 MR. KAEUPER: I think that's a very strange
19 thing - - - thing for - - - to say, and I - - -

20 JUDGE SMITH: It's a strange thing for - -
21 - you think it's a strange thing - - - even stranger
22 to admit it if he said it, isn't it?

23 MR. KAEUPER: I mean, I'm going to presume
24 that the officer would tell the truth when he
25 testified.

1 JUDGE SMITH: It may be the assumption that
2 the testimony would have been cumulative seems far-
3 fetched?

4 MR. KAEUPER: Well, but then - - - but then
5 we're flipping it. Then we're making the adverse
6 inference on the assumption that he's going to come
7 in and contradict her. And that - - - that is not
8 how you can do an adverse inference - - - I mean, a
9 missing witness - - -

10 JUDGE SMITH: The point of the ad - - - the
11 point of the adverse inference is to say to the jury
12 if that man were here, he would not back up the
13 complaining witness' story. That's what an adverse
14 inference is.

15 MR. KAEUPER: I would disagree a little
16 bit. I think the point is to say that that witness
17 would so naturally be called by the other side, that
18 the fact that they didn't call that witness means you
19 can infer they wouldn't have said something helpful
20 to them. And here, it wasn't at all natural for the
21 People to call this witness.

22 JUDGE SMITH: So it would have been fine -
23 - - it would have been fine for the lawyer to argue,
24 you know perfectly well that if that officer were
25 here, he'd deny every word she said. That's okay?

1 MR. KAEUPER: I think that's basically what
2 he did argue - - - I mean, it's not in the proof, but
3 - - -

4 JUDGE SMITH: Well, yeah, is it - - - you
5 say that argument would not have been stricken? But
6 when he says, why isn't he here?

7 MR. KAEUPER: When he says - - -

8 JUDGE SMITH: That's a bad argument?

9 MR. KAEUPER: - - - he says - - -

10 JUDGE SMITH: To say he would contradict
11 her is okay, but to say why isn't he here is not
12 okay?

13 MR. KAEUPER: Well, I guess - - - I guess
14 it depends on how you say he would contradict her. I
15 mean, I think if the argument that - - - if the
16 argument is nobody can believe this - - - that's the
17 argument he basically makes first without objection.

18 JUDGE PIGOTT: Well, no, he's saying - - -
19 he's saying it's not in the report, therefore it
20 probably didn't happen.

21 MR. KAEUPER: Right, right. No, no, this
22 is all to get to recent fabrication.

23 JUDGE PIGOTT: Which is real - - -

24 MR. KAEUPER: Right.

25 JUDGE PIGOTT: Which really there is a

1 logic to it, maybe not in this case, but I'm saying,
2 you know, usually police officers are, you know,
3 pretty good at this stuff.

4 MR. KAEUPER: Well, but this isn't even - -
5 - this isn't even about the recent fabrication.
6 Really, this is about whether he told her that no
7 judge would believe you, or as the defense counsel
8 actually - - -

9 JUDGE RIVERA: Yeah, but the - - - but the
10 point - - - isn't the point of that that she says
11 that she told him everything that happened and then
12 he didn't put it in the report, and she decided to
13 sign it anyway, just to get it over with and move on,
14 because he had said no one's really going to take you
15 seriously?

16 MR. KAEUPER: Right, so he's impeaching her
17 about the fact that this is not in the report.

18 JUDGE SMITH: It's not that - - -

19 JUDGE RIVERA: That - - - that it - - -
20 yes, that it's not in the report, but the point of
21 that is because she says that this occurred to her.

22 MR. KAEUPER: Right, right. No, so right,
23 so she - - - he's impeaching her about the facts done
24 in the report. She offers an explanation, but
25 ultimately - - -

1 JUDGE SMITH: I don't see why this isn't a
2 classic missing witness, apart from the adverse
3 request for an instruction. The - - - the
4 prosecution witness says something. There's a police
5 officer, who's certainly under your control, who
6 knows whether it's true or false, and he isn't
7 called. Why isn't he an obvious - - - yeah, why
8 isn't that a huge, gaping hole in the case?

9 MR. KAEUPER: Because the People can
10 establish that there's no recent fabrication totally
11 independent of him.

12 JUDGE SMITH: Well, you're making a
13 harmless error point?

14 MR. KAEUPER: No, I'm say - - - I'm - - -
15 although, I think that - - - I think these two points
16 blend together in certain ways, but no, the People -
17 - -

18 JUDGE GRAFFEO: What would substitute - - -

19 JUDGE PIGOTT: Well, no one's suggesting
20 recent fabrication, they're saying, you know, that
21 the story that she told the police is the true one,
22 and - - - but you indicted on her statements, I
23 presume, with a grand jury, which it wasn't today, it
24 was, you know, months ago, in which she said that all
25 these horrible things happened.

1 MR. KAEUPER: Right, right. So - - -

2 JUDGE PIGOTT: So it's not recent.

3 MR. KAEUPER: Well - - -

4 JUDGE PIGOTT: It's not a recent
5 fabrication.

6 MR. KAEUPER: It's fabrication after the
7 time of the crime.

8 JUDGE PIGOTT: After, yeah.

9 MR. KAEUPER: So the - - - so it should be
10 rebutted by showing - - - no, she reported it at the
11 time. She reported it to Dr. McKnight. So since
12 we've got Dr. McKnight, who says, yes, she reported
13 it to me, I was anally raped. I did a rape kit on
14 her; her anus was bleeding. Why would the People
15 call in an officer to then also say, and she told me
16 too, and - - -

17 JUDGE RIVERA: Because the defense is
18 saying, it - - - but it doesn't say that on the
19 report.

20 MR. KAEUPER: But, if - - -

21 JUDGE RIVERA: You say one thing to one
22 person, and one thing to another. Why should you be
23 believed? Isn't that - - - am I missing what the
24 defense is trying to do?

25 MR. KAEUPER: No, no, but I think - - - but

1 I think, again, it goes to this question that she
2 made it up after the fact. And we can rebut that
3 anyway, so - - -

4 JUDGE GRAFFEO: If the People didn't want
5 to produce the police officer, then don't they have
6 to live with the fact that that's going to be
7 commented on to the jury?

8 MR. KAEUPER: If the People were presented
9 with that choice. But again, because I think it's
10 not - - -

11 JUDGE PIGOTT: You knew that would be
12 coming, didn't you?

13 MR. KAEUPER: I beg your pardon?

14 JUDGE PIGOTT: Wouldn't you know that's
15 coming? I mean, you know the police report doesn't
16 match her statement.

17 MR. KAEUPER: Right. But you know you can
18 rebut the claim of recent fabrication anyway. You've
19 got - - - I mean, you've got physical evidence so
20 far.

21 JUDGE SMITH: Well, you're really saying,
22 we had such a great case, we didn't bother to call
23 the police officer, but, okay, but then don't you
24 have to live with a defense lawyer who might dare to
25 think your case isn't so great, and make an argument

1 based on your failure to call the police officer?

2 MR. KAEUPER: Well, then I think - - - then
3 I think the prosecutor has to be presented with a
4 choice. That is, again, that the missing witness
5 inference makes sense if the prosecutor is presented
6 with a choice and says, you know, I can call this
7 witness, but you know, he's going to give maybe,
8 whatever, kind of testimony that may or may not be
9 helpful to me. Or I can take this charge and I'm
10 going to opt to not call him anyway.

11 JUDGE PIGOTT: Right, so - - -

12 MR. KAEUPER: But here - - -

13 JUDGE PIGOTT: Well, my - - - I mean,
14 consent - - - I don't know if consent fits into this
15 thing or not, but, you know, whatever happened,
16 happened. You had a problem because this officer is
17 either going to say, yes, she's telling you the
18 truth; I told her not to - - - I told her I wasn't
19 going to put it in the report, which he's going to
20 have a hard time testifying to, I guess. Or he's
21 going to say, yeah, this is what she told me; all
22 this other stuff, I never heard. I mean you're in a
23 horns of a dilemma with that officer, right?

24 MR. KAEUPER: I mean, I guess so, but I
25 don't think - - - I don't think whether he gets to

1 make that argument about drawing an inference from
2 not calling him changes that.

3 JUDGE PIGOTT: You're saying that doesn't -
4 - -

5 MR. KAEUPER: I mean, the problem - - - the
6 problem, there, I think that you're getting at is the
7 problem that this statement is inherently not very
8 plausible. It sounds - - - it sounds not very
9 believable.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MR. KAEUPER: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks.

13 MS. SOMES: Just very briefly, the decision
14 of the Appellate Court - - -

15 CHIEF JUDGE LIPPMAN: Counsel, does any of
16 this many any sense to remit this back?

17 MS. SOMES: To remit it back to the
18 Appellate Division for a harmless error? Is that
19 what you're asking? Assessment?

20 CHIEF JUDGE LIPPMAN: Where should we remit
21 it back to?

22 MS. SOMES: Well, I'm unable to articulate
23 the reasons for remitting all the way back - - -

24 JUDGE READ: You just want it reversed.

25 MS. SOMES: We do want it - - - with a new

1 trial. But what I'd like to point out is that the
2 decision of the Appellate Division, that alone was
3 wrong, and I think that you've been talking about
4 that, but it also was not preserved. So I'm in a
5 position where, you know, if you remit it back and
6 the argument was not prove - - - the argument that,
7 you know, Mr. Kaeuper makes now was not preserved for
8 review there in any event.

9 And it's true, the horns of the dilemma
10 that the People found themselves in - - - this did
11 not come as a surprise to the People, because when
12 there is - - -

13 CHIEF JUDGE LIPPMAN: It shouldn't have
14 come as a surprise, right?

15 MS. SOMES: It shouldn't have. I mean, we
16 should assume that the prosecutor can figure out
17 where the holes in the case are. But also, the
18 defense ar - - - the defense counsel, when they were
19 arguing about whether or not her statement about what
20 the officer told her would come in, he said, you've
21 got to call - - - you've got to call Mr. - - -
22 Officer McKnees. Officer McKnees is the one that
23 should be - - - you've got to call here, and they
24 didn't.

25 CHIEF JUDGE LIPPMAN: Okay, thanks.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Chester J. Thomas, No. 108 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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