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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE

Respondent,

-against-

No. 68

JAFARI LAMONT

Appellant.

20 Eagle Street
Albany, New York 12207
March 26, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 68, People v.
2 Lamont.

3 Counselor, do you want any rebuttal time?

4 MS. SOMES: Good afternoon. I'd like three
5 minutes, please.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go
7 ahead.

8 MS. SOMES: Janet Somes on behalf of Jafari
9 Lamont.

10 JUDGE PIGOTT: I was tempted to ask, and I
11 guess I will ask, where's the beef?

12 MS. SOMES: Where's the beef?

13 JUDGE PIGOTT: I'm sorry.

14 CHIEF JUDGE LIPPMAN: Proceed, counselor.

15 JUDGE READ: Don't encourage him.

16 MS. SOMES: I'm not sure what to do now.

17 CHIEF JUDGE LIPPMAN: The best - - - the
18 best solution is - - -

19 JUDGE PIGOTT: Just ignore it.

20 CHIEF JUDGE LIPPMAN: - - - keep going.

21 JUDGE READ: Keep going.

22 MS. SOMES: I'm going to keep going.

23 JUDGE READ: Keep going.

24 MS. SOMES: It's probably - - - well, it
25 might be fair to say that my client and his companion

1 were up to no good behind the Wendy's in the early
2 morning hours of November 1st. Precisely what kind -
3 - -

4 JUDGE ABDUS-SALAAM: And why can't we
5 determine what no - - - or why couldn't the jury
6 determine what no good they were up to by the way
7 they did it, as opposed to the way your client says
8 that they were - - - they could have been doing any
9 number of things, like raping somebody or assaulting
10 an employee or something else, at the back door, when
11 people come in the front door - - - when the
12 employees come in the front door.

13 MS. SOMES: Because there's just no - - -
14 there's no evidence that - - - that gets you over the
15 line to saying that there is an intent to steal here.
16 What we've got is activity that is - - - is
17 absolutely equivocal. And we've got circumstances -
18 - -

19 CHIEF JUDGE LIPPMAN: Yeah, but why can't
20 you - - -

21 MS. SOMES: - - - that are clearly
22 equivocal.

23 CHIEF JUDGE LIPPMAN: - - - infer it? Why
24 can't you infer it? I mean, I don't know what the
25 hell else they might be doing there.

1 MS. SOMES: Well - - -

2 CHIEF JUDGE LIPPMAN: I understand what you
3 say, as Judge Abdus-Salaam just said, but why can't
4 you infer this most basic crime that - - - that one
5 would, looking at, you know, when they were there,
6 what they were wearing, how close they were to the
7 restaurant, why couldn't you just infer it? Why is
8 that different than Bracey or, you know, other cases
9 along these lines, where you infer a particular
10 crime?

11 MS. SOMES: Because in Bracey, there was -
12 - - there was at- - - there was conduct that was
13 unique and common to - - - to robberies that took it
14 over the line. The people in Bracey actually went
15 into the store, they walked around, they looked
16 around, they bought two cents' worth of gum and then
17 they, you know, looked at the register - - -

18 CHIEF JUDGE LIPPMAN: Yeah, but you - - -

19 MS. SOMES: - - - they left, they came back
20 - - -

21 CHIEF JUDGE LIPPMAN: But you could make a
22 pretty good case, as was made, that - - - that
23 they're there at some ungodly hour where they know
24 that they're - - - they might know that people are
25 there but they haven't opened yet. They're very

1 close to - - - so close they're - - - they're
2 knocking on the door. Why - - - why is that so
3 remote?

4 MS. SOMES: Because they have to - - -

5 JUDGE RIVERA: They've got ski masks,
6 they've got gloves, the car is parked a certain
7 distance away, they've got the fake firearms. It
8 sounds pretty - - -

9 MS. SOMES: Because it has to be - - -

10 JUDGE RIVERA: - - - good there.

11 MS. SOMES: - - - it has to be proven
12 beyond a reasonable doubt, and here there is doubt.
13 There's doubt primarily because - - - or in part
14 because - - -

15 JUDGE RIVERA: As a matter of law.

16 MS. SOMES: As a matter of law there's
17 doubt here. There are all sorts of other things that
18 they could have been doing. And as this court has
19 said, on Appellate review, the court must look and
20 see whether or not the fact finder could rationally
21 have excluded the innocent explanations. In - - - in
22 our case it wouldn't be an innocent explanation; it
23 might be some other - - -

24 CHIEF JUDGE LIPPMAN: Nefarious.

25 MS. SOMES: - - - malfeasance. But - - -

1 but that's the - - - that's what needs to happen - -
2 -

3 JUDGE ABDUS-SALAAM: Well, couldn't - - -

4 MS. SOMES: - - - here in order - - -

5 JUDGE ABDUS-SALAAM: On that point,
6 counsel, couldn't the jury have excluded the
7 explanation of assaulting any of the employees
8 because each employee got on the stand at trial and
9 said, I don't know him from Jack, you know, so - - -

10 MS. SOMES: What the employees were
11 actually asked were do you know an individual by the
12 name of Jafari Lamont? And they said no.

13 JUDGE ABDUS-SALAAM: But he was sitting
14 right there at counsel table.

15 MS. SOMES: No one asked him if - - - if -
16 - - have you ever seen this guy before, and there was
17 - - - his companion was never apprehended. So we
18 have no idea whether or not the employees - - - there
19 might have been some sort of prior relationship;
20 there might have been some sort of prior beef between
21 the two.

22 JUDGE RIVERA: Well, they could have been
23 hired also.

24 MS. SOMES: Or they - - - they could have
25 been hired, yes, absolutely. So we don't - - - we

1 don't know. In - - - in Bracey, that has been - - -
2 that was excluded, because they asked - - - they
3 asked the - - - the two men were apprehended, they
4 were seen by the complainant in that case, and there
5 was no prior relationship. And so therefore, in
6 Bracey, you could exclude that; it was reasonable to
7 exclude that other - - - other possibility. And here
8 we don't have that.

9 I would argue that Bracey - - - if - - - if
10 you look at the spectrum, from proof - - -

11 JUDGE RIVERA: Well, Bracey is - - - those
12 particular defendants attempting something in - - -
13 in the open space, in - - - in a particular time of
14 day. But this is just a crime that's, as the chief
15 has already mentioned, at a different time of day.
16 So the - - - what you're calling the - - - the
17 commonality of a particular way of conducting
18 yourself to commit the crime in Bracey, because of
19 the time of day, because of the space, is different,
20 because you're committing the crime in a different
21 time and in a different space in a different way.
22 But there's a commonality to it, right, the ski mask,
23 the banging at the door at a certain hour, the car
24 parked the way, the - - -

25 MS. SOMES: That's a - - -

1 JUDGE RIVERA: Why isn't that a commonality
2 to that crime?

3 MS. SOMES: Because it can be a commonality
4 to so many other things. I mean, it could be a
5 commonality to - - - the car was parked in a parking
6 lot next door, as opposed to - - - so - - - so that
7 doesn't really tell us anything. I mean, if these
8 two had - - - you know, were being chased by
9 somebody, they ditched the car, they wanted to be
10 hiding, they'd leave it there. You know, it would
11 make more sense, if they were going to rob someone,
12 that one of them would stay in the car and be ready,
13 as in Bracey, to drive by, and after the deed was
14 done, hop in - - - so that he could hop in the car
15 and they could get away. So we really are so far
16 away from - - - from the facts in Bracey.

17 And Bracey, I think, really is the - - -
18 the extreme on the spectrum. It's - - - it's the - -
19 - the outer boundary when it comes to speculation - -
20 - you know, that spectrum of speculation to - - - to
21 solid facts to support an inference. We've got
22 Bracey that's - - - that's way over here as the outer
23 bound. And if - - - if - - - under the facts of this
24 case, if - - - if this is found to be legally
25 sufficient, I would argue that we then muddy the

1 water and - - - and we're putting a lot of cases at
2 risk where - - - where we're going to have
3 convictions where there is no intent proven beyond a
4 reasonable doubt.

5 And in People v. Castillo, the - - - this
6 court has said that the foundation for the findings,
7 and the facts and the inferences that are drawn, must
8 be so reasonable that they cannot be confused with
9 mere conjecture or suspicion. And here that's all we
10 have is conjecture or suspicion.

11 The other alternatives here are real,
12 unfortunately. There are a lot of threats with guns.
13 There are people - - - you know, they want to get
14 their way, they want to send a message. There is an
15 awful lot of use of violence and guns. And
16 therefore, we cannot rule out something other than -
17 - - we can't rule out something other than a larceny
18 being the - - - being the intent here.

19 CHIEF JUDGE LIPPMAN: Okay, thanks,
20 counsel.

21 MS. SOMES: Thank you.

22 CHIEF JUDGE LIPPMAN: Counselor?

23 MS. MERVINE: Thank you. May it please the
24 court. Leah Mervine on behalf of the People of
25 Monroe County.

1 I would just note to this court that this
2 case is the 2008 equivalent of 1977's Bracey. And as
3 Judge Rivera was speaking about, in terms of Bracey -
4 - - and they term it reconnoiter because there is
5 this casing of the store - - - you need that, in that
6 case, because all you have in Bracey is a storeowner
7 who's already reported conduct to the police that he
8 deems somewhat - - -

9 CHIEF JUDGE LIPPMAN: What about your
10 adversary's contention that they could be doing a lot
11 of things? Why is it particularly that they're going
12 to rob - - - rob this or steal? What - - - why - - -
13 why do we - - - why can we infer that, rather than, I
14 don't know, they're waiting to beat up one of the
15 workers, or who knows what - - - what deviants they
16 might be? Why - - - why do we assume that they're
17 stealing?

18 MS. MERVINE: We are not assuming anything.
19 We are looking at the facts and making the inferences
20 that logically flow - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but that's what
22 I'm asking you; isn't there - - -

23 MS. MERVINE: Correct.

24 CHIEF JUDGE LIPPMAN: - - - just as - - -
25 as strong inferences that they're doing something

1 else? So how do we know it's stealing?

2 MS. MERVINE: This is how we know it's
3 stealing: because they're at a store at 6:30 in the
4 morning, before the store is open to the public.
5 There is an employee who knocks on the back door,
6 Justin. He's entered into the restaurant by the
7 other employees inside. A short time later, these
8 two men are standing at the back door of a commercial
9 establishment that is closed to the public, carrying
10 nonlethal weapons, as was carried in Bracey as well.

11 CHIEF JUDGE LIPPMAN: Maybe they want to
12 beat up Justin. Maybe that's what they were doing;
13 they were following Justin and they want to beat him
14 up - - -

15 MS. MERVINE: And if that was the case - -
16 -

17 CHIEF JUDGE LIPPMAN: - - - assault him.

18 MS. MERVINE: - - - then the evidence would
19 have showed that they would have intercepted him,
20 perhaps, before he went in.

21 CHIEF JUDGE LIPPMAN: Maybe he was too
22 quick; he got inside before they could - - - I'm just
23 - - -

24 MS. MERVINE: Right - - -

25 CHIEF JUDGE LIPPMAN: - - - trying to - - -

1 MS. MERVINE: - - - but the - - -

2 CHIEF JUDGE LIPPMAN: - - - say that - - -
3 aren't there other explanations, not - - - as your
4 adversary admits, not necessarily innocent
5 expectations, given - - -

6 MS. MERVINE: Right.

7 CHIEF JUDGE LIPPMAN: - - - the masks and
8 all that business, but why - - - why isn't it just
9 as, you know - - - why couldn't we just as easily
10 suggest lots of other scenarios here?

11 MS. MERVINE: The strongest reason is
12 because it fits the fact pattern of commercial
13 robberies.

14 JUDGE PIGOTT: It struck me too that it fit
15 the pattern of attempted burglary.

16 MS. MERVINE: And again, that was a charge
17 that was charged, the - - -

18 JUDGE PIGOTT: It was charged - - -

19 MS. MERVINE: - - - the fact finders - - -

20 JUDGE PIGOTT: - - - and he was found not
21 guilty, so I was - - -

22 MS. MERVINE: - - - did not - - -

23 JUDGE PIGOTT: - - - curious, he's found
24 not guilty of attempting to enter or remain
25 unlawfully on - - - in a building, and yet, he's

1 convicted of attempted robbery. I - - - I don't
2 know, you know, maybe - - - maybe he was a
3 disappointed job seeker and he wanted to go beat up
4 the manager. Could you have charged him with
5 attempted rape?

6 MS. MERVINE: No.

7 JUDGE PIGOTT: Why not?

8 MS. MERVINE: You don't have the facts to
9 support an attempted rape. That would - - -

10 JUDGE PIGOTT: What's missing?

11 MS. MERVINE: You are missing any nexus
12 between those two individuals and the restaurant.
13 And I would point out - - -

14 JUDGE PIGOTT: Well - - -

15 MS. MERVINE: - - - in Bracey - - -

16 JUDGE PIGOTT: - - - were there any females
17 in the restaurant?

18 MS. MERVINE: Not at the time the two had
19 initially arrived; there were not.

20 JUDGE PIGOTT: Is that the reason why?

21 MS. MERVINE: No, not necessarily. Rape
22 could be perpetuated against males. But again, that
23 would call for sheer speculation. Here they have
24 nonlethal weapons with them, they've parked their car
25 quite a distance away. There's no evidence of a

1 kidnap, for instance. They're not seeking to pull
2 somebody into a vehicle.

3 JUDGE PIGOTT: Well, you're talking
4 attempted.

5 MS. MERVINE: Correct.

6 JUDGE PIGOTT: It could be attempted
7 kidnapping.

8 MS. MERVINE: It could not be, under these
9 facts. And that would call for sheer speculation,
10 and you can't do that. What you have to do is take
11 the facts that we have. We have - - -

12 JUDGE PIGOTT: Suppose, suppose they were
13 hungry.

14 MS. MERVINE: Then they should have waited
15 till 10 o'clock when the restaurant opened and went
16 to the front door. And that's - - -

17 JUDGE RIVERA: And not worn the ski mask.

18 MS. MERVINE: And not worn the ski masks.
19 They're there in masks, covered head to toe in
20 clothing, dark clothing. They both have nonlethal
21 weapons.

22 JUDGE RIVERA: So if we disagree with you,
23 what, if anything, could you - - - another - another
24 - - - the same scenario, the day after the decision
25 comes down, agreeing with - - - with defense - - -

1 defendant. What, if anything, could you charge that
2 next group that does the exact same thing?

3 MS. MERVINE: And I think that's a public
4 policy concern. And in Miller, this court said that
5 attempted criminal conduct is a danger to organized
6 society, and therefore, independently culpable, even
7 though the intended result does not ensue. And I
8 think that's really critical here. What we have are
9 all of the facts that fit an attempted robbery. The
10 only thing that stopped or thwarted them was the
11 ingenuity of the two people inside knowing that they
12 were both there and no further employees were coming.
13 So they checked the monitors before opening the door.
14 Had they opened that door, there would have been a
15 robbery. And for us to say that those facts don't
16 fit the robbery, for the police then to respond and
17 see two gentlemen in ski masks at 6:30 in the
18 morning, when the restaurant doesn't open till 10:30,
19 and say, oh, yeah, you were up to no good, but we'll
20 just let you go home now, it doesn't comport with a
21 civilized society. It doesn't provide justice.

22 Here, there is proof beyond a reasonable
23 doubt, as found by a fact finder. This case fully
24 comports with Bracey. And I just really wanted to
25 point out, in Bracey, there was a third codefendant

1 that got away, and the store owner said that he was
2 not familiar with that person. So we don't know, in
3 Bracey, maybe there was some attenuated - - - or some
4 goal to - - - to have some type of assault or some
5 other thing. And in Bracey they considered all of
6 those things, but what they looked at were the most
7 obvious things. And here this fits the fact pattern
8 of a commercial robbery. You have the consciousness
9 of guilt, of flight of the defendant, who flees
10 across a highway and then through a commer - - - or
11 through a residential neighborhood and over another
12 highway. He's found with a backpack in which he
13 could collect the goods. He's found with, again, two
14 nonlethal weapons.

15 JUDGE PIGOTT: He's found with a backpack
16 to do what?

17 MS. MERVINE: To collect the - - - the
18 goods from the robbery, the proceeds.

19 JUDGE PIGOTT: I thought it was full of
20 clothing.

21 MS. MERVINE: It was not full of clothing.
22 The only item of clothing that was recovered in the
23 backpack was one spare pair of gloves. And again,
24 why wear gloves if you're there for another purpose?
25 You're there because you're going to be touching

1 things; you're going to be taking the cash. And we
2 would ask this court to uphold the Appellate
3 Division.

4 CHIEF JUDGE LIPPMAN: Okay. Thank you,
5 counselor.

6 MS. MERVINE: Thank you.

7 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

8 MS. SOMES: Very quickly. First, this does
9 not fit the pattern of a - - - of a commercial
10 robbery.

11 CHIEF JUDGE LIPPMAN: What about it does
12 not fit that pattern?

13 MS. SOMES: Because we - - - we don't have
14 - - - what exactly that pattern is, I - - - I don't
15 think is - - - is established at all. You know, we
16 had a pattern of - - - of basic - - -

17 CHIEF JUDGE LIPPMAN: She's just explained
18 the different things that she thinks leads one - - -

19 MS. SOMES: We had - - -

20 CHIEF JUDGE LIPPMAN: - - - to infer that
21 that's what they were doing.

22 MS. SOMES: First of all, this was - - -
23 this was a - - - these guys - - - there were two guys
24 hanging out in back of the - the - - - the Wendy's.
25 They - - - they did it - - - they were there for at

1 least twenty-five, thirty-five minutes. That is not
2 a typical pattern of a robbery that you go and you
3 hang out and you look at - - - then you look at what
4 they're doing. They're looking through the door.
5 They keep going back. I mean, if you look at the
6 video, it's - - - it's kind of curious. They - - -
7 they go, they look through the window, and then
8 they're looking away. And at one point, one of the -
9 - - one of the peo - - - one of the guys actually
10 gets down on the ground, and he's looking outwards,
11 away from the building, like he's looking for someone
12 - - - you know, is someone coming after - - -

13 CHIEF JUDGE LIPPMAN: Well, you know,
14 robbers are not necessarily the smartest people in
15 the world. Maybe they can't figure out exactly how
16 to do it, you know?

17 MS. SOMES: We just - - - their conduct
18 here just doesn't even come close to the line. I do
19 agree with - - -

20 CHIEF JUDGE LIPPMAN: To what line?

21 MS. SOMES: To the line where - - - that it
22 - - that it's no longer speculation.

23 CHIEF JUDGE LIPPMAN: I see.

24 MS. SOMES: That - - - it doesn't - - -

25 CHIEF JUDGE LIPPMAN: Okay.

1 MS. SOMES: - - - come there.

2 JUDGE PIGOTT: You're saying it's
3 conceivable they could have been waiting for somebody
4 to come, that they were then going to, let's assume,
5 rob, I mean, the manager or, you know, somebody else.

6 MS. SOMES: They could have been doing
7 anything; we don't know. That's - - - that's the
8 whole point. They could have doing - - -

9 CHIEF JUDGE LIPPMAN: They could have been
10 - - -

11 MS. SOMES: - - - anything.

12 CHIEF JUDGE LIPPMAN: - - - going skiing,
13 right?

14 MS. SOMES: We don't know.

15 JUDGE READ: Well, that - - -

16 CHIEF JUDGE LIPPMAN: What month of the
17 year was it?

18 MS. SOMES: - - - the ski mask - - -

19 JUDGE READ: Does it make - - - does it
20 make any difference, in your view, that it was
21 Halloween?

22 MS. SOMES: Well, I think that's curious,
23 because there are a lot of prank - - - there's a lot
24 of pranking going on, and maybe they were just a
25 little delayed and it's a few hours later. But I

1 think that that's - - -

2 JUDGE RIVERA: Full firearms.

3 MS. SOMES: - - - interesting. Well, they

4 - - -

5 JUDGE RIVERA: And the gloves too?

6 MS. SOMES: - - - they had BB guns. They -

7 - - they were BB guns, and you know, as someone who

8 gets a lot of trick-or-treaters, we see guns coming -

9 - - coming by.

10 But the statement that had - - - had the
11 door opened there would have been a robbery is one
12 that I just don't see sustained by the proof at all.

13 JUDGE PIGOTT: Well, and the one thing we
14 do know, because of the acquittal, is they weren't
15 hamburglars.

16 CHIEF JUDGE LIPPMAN: Okay. Thank you
17 both.

18 MS. SOMES: Thank you.

19 CHIEF JUDGE LIPPMAN: Appreciate it.

20 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lamont, No. 68, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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