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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 155

ALFRED GARY,

Appellant.

20 Eagle Street
Albany, New York 12207
October 13, 2015

Before:

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

Appearances:

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1 CHIEF JUDGE LIPPMAN: Let's go to 155,
2 People v. Gary.

3 Counselor, do you want any rebuttal time?

4 MS. DUBNO: Three minutes, please.

5 CHIEF JUDGE LIPPMAN: Three minutes, go
6 ahead.

7 MS. DUBNO: May it please the court, my
8 name is Erica Dubno, and I represent the defendant-
9 appellant Alfred Gary. At the outset, I just want to
10 say that Herald Fahringer, my partner, was supposed
11 to argue this case. He passed away this year.
12 Unfortunately he couldn't be here, but he was looking
13 forward to seeing you here.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MS. DUBNO: Okay. One of the most
16 cherished policies of this nation is that a defendant
17 has the right to confront the witnesses against him.
18 Obviously, that's protected in the Sixth Amendment,
19 in Article I, Section 6 of the New York State
20 Constitution.

21 CHIEF JUDGE LIPPMAN: But didn't you agree
22 to all this stuff coming in, though?

23 MS. DUBNO: Initially, yes, that is
24 correct. Initially - - -

25 CHIEF JUDGE LIPPMAN: So - - - so what do -

1 - - what do you mean "initially"? You agreed to let
2 it in, and couldn't you have stipulated it'll - - -
3 all in, unless or except so-and-so is the case?

4 MS. DUBNO: Well, that's exactly what
5 happened. In this case, because - - -

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MS. DUBNO: - - - there were two versions
8 of the document - - -

9 CHIEF JUDGE LIPPMAN: Right.

10 MS. DUBNO: - - - one containing the
11 handwritten notation and one without it, counsel
12 stipulated everything into the record and didn't
13 realize that the version with the handwriting had, in
14 fact, been admitted.

15 JUDGE STEIN: But didn't you let - - - let
16 a witness testify concerning this - - - this note and
17 then the handwritten comments and go - - - go through
18 his entire testimony and cross-examination and not
19 object?

20 MS. DUBNO: That - - - up until the last
21 part, that was correct, Your Honor. He did, in fact
22 - - - trial counsel did, in fact, allow the statement
23 to come in - - - the handwritten notation on the
24 bottom; and he said later on that it slipped passed
25 him and he missed it. He did, however, immediately

1 object to it the next day when he realized that that
2 was the version that was in evidence.

3 At that point, which was only the second
4 day in a two-week-long bench trial, trial counsel
5 moved to strike the handwritten hearsay at the bottom
6 of the document.

7 JUDGE RIVERA: But - - - but you're
8 conceding that he - - - counsel did receive both
9 documents?

10 MS. DUBNO: Yeah - - -

11 JUDGE RIVERA: You're not suggesting he
12 didn't get both?

13 MS. DUBNO: There - - - there's no question
14 - - -

15 JUDGE RIVERA: He stipulated to both as
16 part of all of the documents he stipulated to,
17 correct?

18 MS. DUBNO: Yeah, there were 150,000 pages
19 - - -

20 JUDGE RIVERA: Okay.

21 MS. DUBNO: - - - of Rosario - - -

22 JUDGE RIVERA: That's good, but he - - - he
23 stipulated to all of them. So then at - - - at the
24 trial, he's got a witness testifying about that
25 document. He knew he had stipulated to it.

1 MS. DUBNO: And - - - and Your Honor, he
2 admitted that it slipped past him. The next day - -
3 -

4 JUDGE ABDUS-SALAAM: Counsel, what about
5 the documents from Countrywide, the servicing
6 documents, that were also stipulated to that
7 apparently had the same information as was at the
8 bottom of this Exhibit 17C that you're - - - that
9 trial counsel said got by him?

10 MS. DUBNO: The servicing documents, did
11 not, in fact, have the same identical information at
12 all; and they were not nearly as devastating and
13 damaging as the hearsay statement. The servicing
14 documents, which are in the RA at 11 to 17, those
15 documents don't say that they spoke with Al Gary.
16 What they say is they have a phone number there, and
17 they say - - - they list some information there. It
18 does not say that they ever spoke with Mr. Gary,
19 whose name is Alfred Gary.

20 It was the handwritten notation that says,
21 "1/12 spoke with Gary", and that was what was so
22 devastating. And the reason why that was so
23 devastating is that the verification of employ - - -
24 excuse me - - - the verification of employment form
25 itself really was not a basis for anyone to have

1 convicted Mr. Gary. That information had the wrong
2 name on it. It was signed Alan Gary not Alfred Gary.
3 He - - -

4 JUDGE STEIN: Could you clarify something
5 for me? Was - - - was there only the one
6 verification of employment form here or were there
7 more than one? I - - - I thought that there were two
8 or three of them.

9 MS. DUBNO: In the record, there was only
10 one verification of employment form. The
11 prosecutor's cooperating witness testified without
12 any documentation to corroborate it that there were
13 three - - - that he said that at three times - - he
14 never indicated when those verifications were done;
15 and the fact that there were - - -

16 JUDGE STEIN: And then there was the
17 testimony that they were sent to him with
18 instructions to send them back, correct?

19 MS. DUBNO: That was his allegation. In
20 this situation - - -

21 JUDGE STEIN: Right, that was the
22 testimony.

23 MS. DUBNO: - - - the - - - the testimony
24 was that - - -

25 JUDGE STEIN: And the fact that the form

1 itself, even without the notation on it, says what
2 it's for and - - - and what the penalties are for - -
3 - for submitting a false one, that all would have
4 been in evidence anyway, correct?

5 MS. DUBNO: The - - - the form itself, that
6 - - - we were not contesting the admissibility of the
7 verification of employment form, the one verification
8 that was introduced into evidence.

9 JUDGE STEIN: But I guess I'm saying, that
10 together with - - - with the other testimony, isn't
11 that enough to - - -

12 MS. DUBNO: Not at all, Your Honor. If you
13 look at the verification form itself, on its face it
14 has the wrong company name, the wrong - - - his - - -
15 the defendant's name is wrong. His title is wrong.
16 There's no - - -

17 JUDGE STEIN: He said it was faxed from his
18 fax machine?

19 MS. DUBNO: That - - - that's correct, Your
20 Honor. There's repre - - - there's a fax line across
21 the top. However, the only testimony in the record
22 on this, which is at 1170 in the record, the
23 testimony was that other people had access to the fax
24 machine. This is a situation where you're condemning
25 a man to a fel - - -

1 JUDGE RIVERA: But - - - but there's no
2 evidence that anyone else had a connection - - -

3 MS. DUBNO: There were people - - -

4 JUDGE RIVERA: - - - Sweet and everyone
5 else, right?

6 MS. DUBNO: There were people in and out of
7 his office all the time. It was a common area, and
8 so it was possible other people could have sent the
9 fax.

10 JUDGE RIVERA: But - - - but clearly
11 defendant is the one who's - - - who's getting money
12 from the players - - -

13 MS. DUBNO: The defendant did not, in fact,
14 receive any money for the verification of employment
15 form, so - - -

16 JUDGE RIVERA: I understand that - - - that
17 - - - I understand his position. But certainly the
18 Government is putting forth evidence that he is
19 getting money off the Sweet deal. I understand your
20 argument, but it's not like there's no evidence that
21 somehow connects him.

22 MS. DUBNO: It - - - but the issue here was
23 - - - because the conspiracy - - - if you actually
24 look at the conspiracy charged in Count II, it was
25 for the production of false documents. And so that

1 was really what they were focusing on.

2 JUDGE RIVERA: But isn't this going to the
3 credibility?

4 MS. DUBNO: The credibility of - - -

5 JUDGE RIVERA: This evidence? Isn't - - -
6 isn't it the trial judge who's observing the witness
7 who's making a decision about the credibility about
8 what he says or doesn't say happened? Because
9 basically your client's saying they're all lying and
10 I didn't do this.

11 MS. DUBNO: The - - - this was not really a
12 credibility issue. What as this was, was this was
13 the only document or evidence to corroborate the
14 witness' testimony.

15 JUDGE FAHEY: What kind of rule - - - let
16 me ask this. It's - - - it's two things. What - - -
17 what kind of rule are you proposing that we would im-
18 - - - that we would apply where counsel had time to
19 prepare for the case - - - four-and-a-half months; I
20 think they gave him an adjournment to do it. He gets
21 ready for the case. He comes in. They agree to a
22 stipulation on the record. They waive any objections
23 to the documents. They're waived in. There's no
24 objection when the document is put in. It's not done
25 until the next morning.

1 As I understand it, you're proposing a
2 fairness demands objection that's preserved post-
3 waiver of rights. Is that correct?

4 MS. DUBNO: In - - - in a situation such as
5 this, where you have a bench trial - - - and I think
6 that that's the most important thing here, is that it
7 is a bench trial - - - that in a situation where you
8 can cure any kind of harm, the witness was still on
9 the stand. He had not even begun his cross-
10 examination at that point - - -

11 JUDGE FAHEY: So you're saying if it was a
12 jury trial, it would be different, because they
13 wouldn't be able to ignore the evidence, but in a
14 bench trial, the court would be able to?

15 MS. DUBNO: That's - - - that's certainly
16 one factor there. The second factor is that with a
17 jury trial, you have pressing time demands, whereas
18 here, this case was strung out over a two-week period
19 of time.

20 JUDGE FAHEY: What I'm trying to do is
21 visual - - - or articulate in my own head what this
22 rule would be. And it seems to be - - - anything
23 that I articulate would be an impossible rule to
24 apply and still preserve the right to stipulate
25 documents in evidence.

1 MS. DUBNO: That a stipulation would be
2 binding - - -

3 JUDGE FAHEY: Um-hum.

4 MS. DUBNO: - - - unless a defendant can
5 establish within a period of time, where they can
6 cure - - - recognizing that something - - - times,
7 thousands of documents come in. You stipulate.
8 That's the whole point of stipulations is to make
9 life easier. But sometimes stuff slips by.

10 JUDGE STEIN: What if the witness was no
11 longer available?

12 MS. DUBNO: In this situation, the witness
13 was available. There are cases - - - the DeMauro
14 case that was decided by the court - - - in that case
15 the witness had - - - was already off the stand. But
16 in this case - - -

17 JUDGE FAHEY: Well, it's even more serious.
18 What - - - to follow up on Judge Stein's point, what
19 if somebody passes away? That's - - - in civil
20 case, that's very common. It's a - - -

21 MS. DUBNO: And in that situation, you
22 wouldn't be able to - - - to have - - - you wouldn't
23 be able - - -

24 JUDGE FAHEY: So it'd be an abuse of
25 discretion standard. It wouldn't be - - - you

1 couldn't - - - you weren't really waiving that the
2 court could review it then, or had - - -

3 MS. DUBNO: The court certainly had the
4 authority to review it. The court - - - he was
5 there. The witness was there on the very first - - -
6 it was the second day of trial. It was a strung-out
7 long bench trial. The prosecution concedes that they
8 could have called the witness. We could have been
9 able to confront the witness who wrote the
10 handwritten notation, but at this - - -

11 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam -
12 - -

13 MS. DUBNO: I apologize.

14 CHIEF JUDGE LIPPMAN: - - - this is the
15 last question; go ahead.

16 JUDGE ABDUS-SALAAM: I - - - I was just
17 going to say that might have been ideal and perhaps,
18 you know, some other trial judge would do it, but
19 aren't we looking at an abuse of discretion standard
20 here? And would we call this an abuse of discretion
21 because the - - - the judge did say, if it hadn't
22 been for the testimony that came in, I might have a
23 different ruling?

24 MS. DUBNO: I - - - I believe in that case,
25 the judge may have believed incorrectly that he

1 didn't have the authority to make that determination.
2 I think he thought that the rule was that you have to
3 have a contemporaneous objection, and because a day
4 had gone by - - - you're correct, Your Honor, a day
5 had in fact gone by - - - that - - - that the judge
6 was now precluded from making that determination.
7 The witness was still there. The witness was on the
8 stand - - -

9 CHIEF JUDGE LIPPMAN: Okay, okay, counsel.

10 MS. DUBNO: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Thanks, counsel.

12 MS. DUBNO: I appreciate it.

13 CHIEF JUDGE LIPPMAN: You'll have your
14 rebuttal. Let's hear from your adversary.

15 MR. RICHARDS: Good afternoon.

16 CHIEF JUDGE LIPPMAN: Counsel?

17 MR. RICHARDS: Good afternoon, may it
18 please the court, my name is Jason Richards. I
19 represent the respondent in this matter, the People
20 of the State of New York.

21 CHIEF JUDGE LIPPMAN: There were an awful
22 lot of documents going in here, counsel, weren't
23 there?

24 MR. RICHARDS: Yes, there were. But this
25 particular document was among - - -

1 CHIEF JUDGE LIPPMAN: Are they held - - -
2 are they held to the nth degree for all these many,
3 many, many, many documents?

4 MR. RICHARDS: There were many documents
5 that were stipulated into evidence, but this was
6 among the most important. It was one of the few
7 documents that had the defendant's name on it and
8 that's - - -

9 JUDGE PIGOTT: He got acquitted of
10 everything except one charge, right?

11 MR. RICHARDS: That's correct.

12 JUDGE STEIN: Would it have been an abuse
13 of discretion if the trial court granted the motion?

14 MR. RICHARDS: Arguably, yes. I - - - I
15 think it would have been in - - - insofar as the
16 court would have been holding itself not bound by the
17 parties' stipulation.

18 JUDGE PIGOTT: Well, that happens all the
19 time. And - - - and - - - you know, what struck me -
20 - - one of the reasons why I granted leave in this -
21 - - is I do mostly civil work, but the number of
22 hospital records that go in, and all of sudden, you
23 say, judge, I didn't realize that there was a - - - a
24 chemical test that, you know, unrelated to what I'm -
25 - - you know, I want that redacted. Of course.

1 You know, I - - - I'm surprised someone
2 here didn't say, fine, you didn't stipulate to it;
3 we're moving it in anyway. And - - - and move it in
4 through a witness or something else. And you don't
5 need the stip. But the judge seemed to be saying,
6 you know, well, you stipulated it in; you're frozen.
7 And - - - and I - - - I think that's kind of a tight
8 straightjacket to put a court in, don't you think?

9 MR. RICHARDS: I'm not sure that's what the
10 trial court actually said. I - - - my reading of
11 what the trial court said was that had defense
12 counsel made a prompt objection, that the motion to
13 strike would have been entertained, but because he
14 waited a day, and he - - - he waited until after the
15 evidence had been - - - the arguably objectionable
16 evidence had been testified about extensively - - -

17 JUDGE PIGOTT: Did you - - - did you - - -
18 I know you didn't try the case - - - but was this a -
19 - - was this a surprise to both sides? Because the
20 stipulation seemed to be referring to the - - - the
21 verification of employment. This is a verification
22 of employment plus a note that was on - - - that was
23 underneath Exhibit 17C, and the argument could - - -
24 you know, it seemed to me, that 17C is the VOE; it's
25 not the note that whoever put it on there, because as

1 - - - as your opponent is pointing out, the name is
2 wrong. The name of the Capital Finance is wrong.
3 The dates are wrong.

4 I mean, this looked like a phony document.
5 And I - - - I'm just wondering if, you know, did the
6 judge think, you know, can't do anything about it
7 now; it's too late.

8 MR. RICHARDS: Well, there was no surprise.
9 The - - - the document was marked for admission as
10 Exhibit 17C and it was stipulated to be admitted as -
11 - - as such, as it was. So there was no surprise
12 from the People's perspective. As far as the
13 spelling of the defendant's name goes, the only
14 evidence that it was misspelled or that it wasn't his
15 signature, came from the defendant himself and as - -
16 -

17 JUDGE PIGOTT: Well, it says "Alan".

18 MR. RICHARDS: Yes, yes, but - - -

19 JUDGE PIGOTT: I think - - - couldn't you
20 take him at his word that his name isn't Alan?

21 MR. RICHARDS: His only - - - the only
22 evidence at trial that he doesn't go by that name was
23 from his own testimony and - - -

24 JUDGE PIGOTT: Well, who else?

25 MR. RICHARDS: - - - that he didn't sign

1 it.

2 JUDGE PIGOTT: How - - - do you - - - do
3 you honestly think that it - - - that everybody
4 called him Alan and his real name was Alfred?

5 MR. RICHARDS: I think it's possible that
6 he - - -

7 JUDGE PIGOTT: Okay.

8 MR. RICHARDS: - - - signed it "Alan" for
9 whatever reason.

10 JUDGE PIGOTT: No, he signed - - - well, he
11 printed his name "A. Gary", I guess. I don't know.
12 It just seemed to me that - - - that it would have
13 been an easy thing to say, fine, it's not stipulated,
14 and counsel, do you want to make a motion to - - - to
15 admit it based upon whatever the People had to
16 support that admission.

17 MR. RICHARDS: But the People relied on the
18 stipulation in planning their trial and planning on
19 which witnesses to call up to - - -

20 JUDGE PIGOTT: Yeah, but - - - but suppose
21 the document should not have gone in. Suppose it was
22 a document, you know, wholly unrelated. It's - - -
23 it's his - - - it's his child's birth certificate,
24 and he says, I don't think that ought to be part of
25 the record. I didn't - - - I overlooked it, sorry.

1 And the People say, oh, no, it's going in; we're
2 going to prove that your kid was born on St.
3 Patrick's Day.

4 What - - - I mean, what - - - what's the
5 harm to the People? I mean, why wouldn't they say,
6 okay, you didn't stipulate; you overlooked it, fine.
7 Judge, we're moving it. It's part of the record.
8 It's - - - it's critical to our case. It's a VOE.
9 This is the whole point, and - - - and we want it
10 moved into evidence.

11 MR. RICHARDS: You - - - Your Honor, that's
12 not this case, and I - - - it - - - this came up in
13 the context of a motion to strike, so - - -

14 JUDGE PIGOTT: Yeah.

15 MR. RICHARDS: - - - it's a - - - the issue
16 is whether the court abused its discretion in denying
17 that motion to strike at the - - - at the time when
18 the motion was made.

19 JUDGE PIGOTT: Yeah, but do you - - - am I
20 - - - do you understand my point? I mean, I don't -
21 - - I'm - - - I'm missing why two lawyers in a
22 courtroom where one says I made a mistake; I didn't
23 mean to stipulate that in. The other lawyer was, I
24 got it; judge, it's not stipulated in, but I'm moving
25 it in anyway, because it's germane, it's relevant and

1 it's - - - and it's part of the record, and the judge
2 would have said, it's in. And we wouldn't be arguing
3 over stips.

4 MR. RICHARDS: I - - - I think that that
5 wasn't done in this case because there had been a
6 stipulation and because the defendant was not timely
7 in - - -

8 JUDGE PIGOTT: But you - - - I guess you
9 don't see my point. I'm just wondering why, you
10 know, a judge wouldn't say, okay, you made a mistake,
11 what - - - I don't believe you made a mistake; I
12 think you're lying. No, I think what he said is, you
13 didn't catch it fast enough.

14 And - - - and as silly as it seemed, I just
15 thought, you know, why - - - what are we doing? I
16 mean, why - - - why can't we say, well, you know, if
17 a lawyer makes a mistake we let in and - - - or don't
18 let it in, and then you could made your mo - - - your
19 appropriate motion to - - - to admit it - - - mark it
20 and admit it.

21 She's making a confrontation argument for
22 goodness sake. You can get around that in a
23 heartbeat.

24 MR. RICHARDS: I think that in the context
25 in which this came up, there had already been

1 reliance on the stipulation, so if - - -

2 JUDGE FAHEY: By reliance, you mean, they
3 didn't have a witness to - - - to back it up to put
4 it in?

5 MR. RICHARDS: Exactly, exactly.

6 JUDGE FAHEY: And this is - - - you know,
7 we live in an imperfect world and that - - - that - -
8 - that's the real reality here. But really, and as a
9 practical point of view, all of the time in civil
10 cases you have information that's included,
11 particularly in hospital records, about people's
12 lives that are let in and not redacted by mistake
13 that you want to correct. And here this is clearly a
14 relevant piece of information, so - - -

15 MR. RICHARDS: Yes.

16 JUDGE FAHEY: - - - you would have just
17 brought somebody into do it, but you didn't line
18 somebody up, so that's why you relied on this?

19 MR. RICHARDS: Yes, that's correct.

20 JUDGE PIGOTT: Did you make that argument?

21 MR. RICHARDS: We made the argument that
22 the witness was not - - - oh, do you mean it - - -

23 JUDGE PIGOTT: Yeah, that - - - that - - -
24 but for the fact that there was a stip here you would
25 have had a witness and now you've lost him or her and

1 don't have it and therefore - - -

2 MR. RICHARDS: At trial, no, I don't think
3 that argument was made. But there's nothing in the
4 record that this witness - - - the witness who would
5 have come in and testified about the significance of
6 the handwritten note - - - was in fact available for
7 trial.

8 JUDGE RIVERA: Well, coun - - - counsel, if
9 I could just ask before your time runs out. You
10 started out saying this is an important document.
11 It's the one that has his name on it. So why do you
12 all argue alternatively it's harmless? How does it -
13 - - how is it harmless? If this - - - if we agree
14 with defendant that this is error. You're saying
15 it's such an important document. This is the one
16 with the name. It's almost like you're saying it's
17 the smoking gun.

18 MR. RICHARDS: As was mentioned before, the
19 document without the handwriting on it also came in,
20 and that in and of itself, combined with the
21 testimony of Carlos Irizarry, established that the
22 defendant had committed this fraud. The handwriting
23 was important, but it wasn't unavailable from other
24 sources. It also came in through the servicing
25 notes. And that's why this - - -

1 JUDGE ABDUS-SALAAM: But your adversary
2 says that his name wasn't on the servicing notes.
3 There was a phone number only, and the phone number
4 might have been to the dealership, but not his name.

5 MR. RICHARDS: There was a phone number and
6 there was his name as - - - as it was signed on the -
7 - - on the - - - Alan Gary, I think. But yes, his
8 name was on there, Gary, and the - - - his phone
9 number was on there. And there was also a
10 certificate of incorporation that was faxed from his
11 fax number that was included in the servicing notes,
12 so whoever - - -

13 JUDGE ABDUS-SALAAM: But the note didn't
14 say I spoke with him, and he verified this, right?

15 MR. RICHARDS: He - - - there's a box to
16 check that says "verified by speaking with" or
17 something along those lines. So the box was checked,
18 the number was listed, the name was written down, and
19 - - -

20 JUDGE FAHEY: Just so I'm clear though,
21 your argument isn't that stipulation once, stipulate
22 forever and you can never undo it. Your argument is
23 that it wasn't an abuse of discretion for the court
24 not to do it, right?

25 MR. RICHARDS: That's correct. That's

1 correct. I - - - I'm not saying that in all cases
2 where a stipulation has been entered that there's no
3 room to revise it. But in this case, where the
4 objection came in the late manner that it did, under
5 the circumstances that it did, it was not an abuse of
6 discretion to deny the motion to strike.

7 JUDGE FAHEY: Thank you.

8 CHIEF JUDGE LIPPMAN: Okay, thanks,
9 counsel.

10 Counsel, rebuttal?

11 MS. DUBNO: Thank you, Your Honor. At the
12 outset, it is indeed a dangerous precedent to say
13 that not catching something fast enough is a basis
14 for someone's conviction. The prosecution concedes
15 that this was among the most important documents.
16 They also conceded at oral argument in the Appellate
17 Division that the witness could have been called.
18 There was nothing in the record saying that - - -

19 JUDGE STEIN: Well, what - - - what if - -
20 - what if it was caught even later? What if it was
21 caught on the last day of trial? Would that - - -
22 would your answer be different?

23 MS. DUBNO: As long as - - - especially in
24 a bench trial, where it's easier to put things out of
25 your mind - - - as long as it's in a position where

1 the prosecution or the other side is not prejudiced
2 by the delay in catching an error, then it shouldn't
3 matter, because the reality is things happen. It's a
4 human enterprise.

5 CHIEF JUDGE LIPPMAN: Yeah, but is it - - -
6 don't you have any obligation to limit your
7 stipulation to say, stipulate subject to objections
8 for hearsay or whatever it might be? I - - - I - - -
9 just okay, let them in, you know - - - isn't there
10 any obligation on your part?

11 MS. DUBNO: No, there's no question,
12 counsel had an obligation. But in this situation
13 where you have two versions of the document and he
14 said on the record that he was confused by it, which
15 one was going in, and there absolutely no prejudice
16 to the prosecution, they could have called the
17 witness.

18 CHIEF JUDGE LIPPMAN: So it's an abuse of
19 discretion by the judge?

20 MS. DUBNO: I'm not sure it really is an
21 abuse of discretion, because in this situation the
22 judge admitted that he would have decided otherwise -
23 - -

24 CHIEF JUDGE LIPPMAN: So it's an abuse of
25 discretion?

1 MS. DUBNO: - - - but he felt - - - I think
2 he felt like he was obliged to do so, because I think
3 he thought the rule was you had to have a
4 contemporaneous objection.

5 CHIEF JUDGE LIPPMAN: You're saying he made
6 a mistake rather than an abuse of discretion?

7 MS. DUBNO: I think it was a mistake of law
8 - - -

9 CHIEF JUDGE LIPPMAN: Yeah, yeah.

10 MS. DUBNO: It was an error, and I think
11 that - - -

12 JUDGE ABDUS-SALAAM: I think - - - I'm
13 sorry, counsel. It sounds to me like, from the
14 record, that the judge decided that because there had
15 been testimony regarding the document, that that was
16 the reason that he wasn't striking it, because the
17 testimony had already come in.

18 MS. DUBNO: The testimony was only the
19 direct - - - the testimony - - - he had only been
20 examined by the prosecutor, and he had not, in fact
21 been cross-examined by the defense attorney on this
22 issue yet.

23 JUDGE ABDUS-SALAAM: But - - - but the - -
24 - but it came in without objection.

25 MS. DUBNO: It did - - - it certainly came

1 in without an objection, but the reality is, as Judge
2 Fahey asked what the rule should be; and I think
3 probably the rule should be that in a bench trial,
4 where there's no harm to the other side, and any kind
5 of prejudice - - - any harm - - - the is - - - the
6 error, I'm sorry, can be cured, that a stipulation
7 can be revisited and the court is not bound by it.
8 Thank you, Your Honor.

9 CHIEF JUDGE LIPPMAN: Okay, counsel,
10 thanks.

11 Thank you both. Appreciate it.

12 (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. Alfred Gary, No. 155, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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