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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

DAVON HARRIS,

No. 164
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
October 15, 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:

ALEXIS A. ASCHER, ESQ.
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1 CHIEF JUDGE LIPPMAN: 164, People v.
2 Harris.

3 Counsel.

4 MS. ASCHER: Good afternoon; two minutes
5 for rebuttal please, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, go
7 ahead. You're on.

8 MS. ASCHER: My name is Alexis Ascher, and
9 I'm here on behalf of Davon Harris. The record in
10 this case is clear; Juror O. did not understand and
11 had a hard time accepting that a witness may
12 intentionally lie under oath. We know this because
13 twice defense counsel asked this juror, do you think
14 somebody would not be telling the truth even if they
15 were under oath, and twice this juror said, well, if
16 they're not telling the truth at that moment, it
17 might be because maybe they forgot something or they
18 - - -

19 JUDGE PIGOTT: I'm surprised you even got
20 to ask those questions because there are places where
21 the judge would say move on, that's not - - - you
22 know, that's not the purpose of jury selection. And
23 - - - and it just seemed a little confusing to me the
24 way the thing was being approached. I mean, I - - -
25 I don't know if - - - if - - - if the witness (sic)

1 can even understand what you're talking about when
2 you ask questions like that.

3 MS. ASCHER: Well, first, Your Honor, I
4 respectfully disagree with you that this wasn't
5 appropriate for jury selection. I wouldn't want this
6 juror sitting on my case if my case rested on the
7 credibility of the People's witnesses.

8 JUDGE STEIN: Well, hadn't counsel gone
9 through a whole thing about, you know, sometimes
10 people's perception and they make mistakes and all
11 that? I mean, doesn't that have to be factored into
12 how - - - how this wit - - - how this perspective
13 juror was - - - was answering the questions?

14 MS. ASCHER: Of course, and the series of
15 questions that encompassed the two outstanding
16 questions and the answers make the juror's answers
17 even more harmful. Counsel establishes that this
18 witness believes that a - - - a person could lie,
19 that cops could lie, and that somebody might not want
20 to admit that they lied. And then when counsel - - -

21 JUDGE PIGOTT: Is that - - - is that new to
22 anyone? I mean, if you were asked that question, do
23 you think people can lie, you would say gee, I'm not
24 sure? Or if they're under oath, do you think they
25 can lie -- gee, I'm not sure?

1 MS. ASCHER: But when counsel asked, if
2 that person's under oath, do you think that person
3 would be telling the truth, what the juror said was
4 well, at that moment I would think that they were
5 forgotten or mistaken, and that's a big deal.

6 JUDGE PIGOTT: That's a nice thing to say.
7 In fact, did you ever have a police officer say, I
8 didn't - - - that's not a Catholic bible so when I
9 get sworn, I'm not really sworn?

10 MS. ASCHER: But you also want a juror to
11 acknowledge that sometimes people can take the stand
12 and they can take that oath, but they're still lying.

13 JUDGE RIVERA: Okay, but the - - - the
14 court says, sometimes people can lie knowing they're
15 lying, and the juror says right.

16 MS. ASCHER: People - - -

17 JUDGE RIVERA: Why doesn't that resolve
18 this?

19 MS. ASCHER: People, not witnesses, and not
20 under oath. And - - -

21 JUDGE PIGOTT: Well, most witnesses are
22 people. I've found that out in my own private
23 practice.

24 MS. ASCHER: But the oath here in this
25 colloquy meant something more for this juror, and

1 that's what counsel was trying to get at. And in
2 fact, when counsel brings this to the court's
3 attention during the challenge part, the court says
4 well, that question wasn't asked of this witness. So
5 the court acknowledged that the question that Judge
6 Rivera points out didn't pertain to a witness who was
7 under oath. It just pertained to people lying in
8 general, which had already been established.

9 JUDGE ABDUS-SALAAM: But, counsel - - - but
10 didn't the question after that - - - after one of
11 those attempts to get the witness to - - - or the
12 prospective juror to say you that you either have to
13 believe that somebody can lie under oath or not,
14 wasn't there an attempt - - - I mean, it sound - - -
15 it looks to me like there was an attempt to - - - to
16 rehabilitate that witness (sic) by the defense
17 counsel when defense counsel said, "but that's what
18 you believe and then you look at what they say,
19 correct?" And the juror said "Yes, I look at what
20 they say." So if that - - - that suggests that the
21 witness would be able to determine whether - - - or
22 at least consider whether someone was telling the
23 truth or not under oath because that's the line of
24 questioning about under oath.

25 MS. ASCHER: Right, but not when it's read

1 in context with the two questions that were asked
2 earlier. If a witness is under oath - - - after this
3 witness (sic) already - - - after this juror's
4 already acknowledged that they believe a person would
5 lie, when it comes right down to the oath, do you
6 think that they would be telling the truth if they
7 were under oath, that juror still said, but only if
8 they were mistaken. So the question that you point
9 out doesn't really clear up the two answers that the
10 juror had given.

11 And the two answers the juror had given,
12 that was really bad stuff. I mean, all - - - all you
13 need under the statute is it - - - is it likely that
14 this juror's state of mind would preclude it from,
15 you know, being impartial in evaluating the evidence.

16 JUDGE PIGOTT: What - - - what - - - what
17 in your mind should the normal juror respond in these
18 - - - to these questions?

19 MS. ASCHER: As a defense attorney, I would
20 want that juror to affirmatively state, yeah, I
21 acknowledge that somebody can take the oath and - - -
22 you know, and still lie. That's exactly what you
23 want.

24 JUDGE PIGOTT: Is that surprising? I - - -
25 I'm - - - I'm just wondering - - - never mind.

1 MS. ASCHER: I believe plenty of people,
2 probably like this juror, believe that the oath means
3 something. That, you know, if - - - if you're not
4 telling the truth while you're under it, you're
5 mistaken. But the point is is that you need a juror,
6 especially in this case when the case rises and falls
7 on the credibility of the People's witnesses, you
8 need a juror who's going to be, you know, on board
9 with you; not already go and sit down on the panel
10 and al - - - and already think well, you know, the
11 People's witnesses are telling the truth. That's one
12 strike against you, and that's why it mattered.

13 And just one other thing on this issue is
14 that - - -

15 JUDGE RIVERA: Is - - - is the fact of
16 lying that matters or the fact that it may not be an
17 accurate response? And - - - and isn't the point
18 whether or not the witness (sic) can discern whether
19 or not a response is correct? Because he says, or he
20 responds, "Do you believe that a pol" - - - "police
21 officer can lie?" "Yes." "Sometimes people can lie
22 knowing they are lying." "Right." Then he says yes,
23 I listen to what they say, I think about they say.
24 But isn't the point -- he's already said yes, I
25 believe an - - - an officer and anyone else might

1 actually lie and I listen to what they say on the
2 stand? So is - - - isn't the concern about
3 understanding the accuracy of the response and
4 discerning from that if there's some reason this lie
5 has meaning in the context of the trial?

6 MS. ASCHER: Of course, but just because
7 the juror says, you know, I could listen and I'll
8 make my own assessment doesn't mean that that juror's
9 going to factor in the possibility that this person
10 is intentionally lying, and that's the problem with
11 this case. You already start off, like I said, with
12 one strike against you if you have a juror who's
13 seated and who already gives more credibility to the
14 People's case.

15 JUDGE RIVERA: You're not saying that - - -
16 are you saying that - - - that this particular
17 inquiry with the - - - this colloquy with this juror
18 suggests that this juror is completely closed off to
19 the possibility that people will lie on the stand,
20 or, as you say, the - - - the court's assessment of
21 this is well, you never really asked that question?

22 MS. ASCHER: I'm saying both. I'm saying
23 that this juror never acknowledged that possibility
24 and that's why it's a big deal. But then I'm also
25 saying - - - and you're bringing me to the - - - the

1 point that I wanted to make - - - was that the judge
2 was wrong. The judge said well, the juror was never
3 asked this question, but the judge is wrong. The
4 record shows that the juror was asked this question,
5 and the juror still couldn't state affirmatively that
6 they recognized this possibility.

7 CHIEF JUDGE LIPPMAN: Counsel, what other
8 issue you want to deal with? Your time is short. Go
9 ahead.

10 MS. ASCHER: Yes, the Turner issue. I
11 present to you the rare and exceptional case where
12 defense counsel's failure to raise a winning statute
13 of limitations defense constitutes ineffective
14 assistance of counsel.

15 CHIEF JUDGE LIPPMAN: Just like Turner?

16 MS. ASCHER: It's exactly like Turner.

17 There was a winning - - -

18 JUDGE ABDUS-SALAAM: There was no strategic
19 reason for keeping the petit larceny charge in?

20 MS. ASCHER: Absolutely not, and this - - -

21 JUDGE ABDUS-SALAAM: Even if - - - even if
22 there would be testimony, as there was, that
23 something was stolen from the - - - the premises
24 after your client came into it?

25 MS. ASCHER: That testimony would have come

1 in with or without the petit larceny count dangling
2 there. We know that this - - -

3 JUDGE ABDUS-SALAAM: Exactly.

4 MS. ASCHER: - - - we know that this wasn't
5 a good strategy because defense counsel used -- his
6 basis for the burglary was no larceny happened, so
7 why would you want to have the object of the burglary
8 sitting there for the jur - - - for the jurors to
9 consider?

10 JUDGE ABDUS-SALAAM: Couldn't the jury - -
11 - if the jury believed that something was actually
12 stolen from the property, then you would have this
13 dilemma of whether the jurors would then convict him
14 of the felony as opposed to the misdemeanor petit
15 larceny, right?

16 MS. ASCHER: No, not so. The jury still
17 could have convicted him on the petit larceny and
18 acquitted him on the burglary, found that they didn't
19 prove the intent that when he went in there it was to
20 steal, but found that the theft was completed
21 nonetheless. That's why his strategy didn't work.
22 That's why there was no strategy. That's the biggest
23 - - -

24 JUDGE STEIN: Can I - - - what - - -

25 JUDGE FAHEY: Let me ask this; Turner - - -

1 Turner says that the - - - that - - - that the error
2 has to be dispositive to apply. Are you saying that
3 - - - let's assume it's an error. He should have
4 made a motion to dismiss the - - - the petit larceny
5 charge at the close of proof on the statute of
6 limitations, and then say because they can't prove
7 the petty larceny, I move to dismiss the burglary.
8 The burglary probably still would have survived but
9 nonetheless he should have made that motion.

10 So you've got a partial Turner problem.
11 It's not you - - - you can win on the statute of
12 limitation charge but it's not dispositive, and since
13 it's not dispositive, then we're into was it
14 ineffective assistance of counsel and - - - and is
15 there a strategic reason.

16 MS. ASCHER: But it is dispositive on the -
17 - -

18 JUDGE FAHEY: No, it's not dispositive of
19 everything, because the one charge survives, so - - -
20 so it can't be dispositive. So - - - and I don't
21 think we've dealt with this problem; at least in - -
22 - in my research I wasn't able to find it. And it's
23 - - - I think that's the - - - that's the edge of
24 this particular spear here. Is a partial Turner prob
25 - - - possible where there isn't a purely dispositive

1 action that the court can take by a clear error?

2 MS. ASCHER: It was dispositive to the
3 misdemeanor that he didn't need for the burglary
4 charge.

5 JUDGE FAHEY: Yeah, but that's not what
6 Turner says. That's not what Turner says. You got -
7 - - you got to be able to throw out the whole case.
8 Otherwise, we're talking ineffective assistance of
9 counsel purely and is there a strategic reason.

10 JUDGE STEIN: Alon - - - along those same
11 lines, on page 5 of your brief you do say that the
12 petit larceny conviction must be reversed and that
13 count dismissed. Is that the relief you're
14 requesting?

15 MS. ASCHER: Yes.

16 JUDGE STEIN: You're not requesting that
17 the burglary be reversed?

18 MS. ASCHER: No, the - - - the relief is at
19 the petit larceny which the winning statute of
20 limitations issue it applied to would be dismissed.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MS. ASCHER: Thank you.

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

25 Counsel, start with the petty larceny. Why

1 shouldn't we throw that out?

2 MS. DISALVO: Yes, Your Honor. And good
3 afternoon, Your Honors; my name is Christine DiSalvo
4 on behalf of the respondent Richard A. Brown. Your
5 Honors, there was a legitimate strategic reason for
6 defense counsel to maintain - - -

7 CHIEF JUDGE LIPPMAN: What was the
8 legitimate strategic reason?

9 MS. DISALVO: The legitimate - - - the
10 legitimate strategic reason was this was a very
11 unorthodox case with very bad facts for the defense.
12 The defense attorney here wanted to focus the jury on
13 the petit larceny evidence which had apparent
14 weaknesses.

15 CHIEF JUDGE LIPPMAN: Why? Why?

16 MS. DISALVO: And he wanted to not have the
17 jury consider the petit larceny as an afterthought.
18 He wanted them to fully - - -

19 JUDGE PIGOTT: As - - - as a what?

20 MS. DISALVO: As an afterthought. He
21 wanted them to fully deliberate on the petit larceny
22 charge because the only - - - because of the facts of
23 the case; the fact that the defendant unlawfully
24 entered this apartment --

25 CHIEF JUDGE LIPPMAN: You could have the

1 burglary without the larceny, right?

2 MS. DISALVO: Well, here, Your Honor, the
3 specific charge to the jury that the court gave was
4 that in order to find the defendant guilty of the
5 burglary count, they had to find that the defendant
6 unlawfully entered the apartment with the intent to
7 commit the specific crime here of the petit larceny.
8 Because of how rare this case was in the sense that
9 the other facts that were present, the other evidence
10 that was elicited at trial, was that the defendant
11 also, while he was in the apartment, masturbated and
12 then ejaculated on the victim.

13 JUDGE STEIN: Yeah, but the - - - but he -
14 - - he could have been found guilty of the burglary
15 without being guilty of the petit larceny, right? I
16 mean he could have intended to commit petit larceny
17 and then not succeeded.

18 MS. DISALVO: Well, Your Honor, usually in
19 a particular case, the intent and the completed crime
20 are not one and the same. However, here the evidence
21 of the defendant's intent to commit the crime and the
22 completed crime were one and the same.

23 CHIEF JUDGE LIPPMAN: He's not trying to
24 create a repugnancy situation here, right?

25 MS. DISALVO: No, Your Honor. But - - -

1 but here - - - well, if - - - if he - - - if the
2 petit larceny would have been dismissed and it would
3 not have been on the verdict sheet and had they
4 convicted of the burglary, then he would have had no
5 way of knowing in that situation whether they
6 actually convicted because of the petit larceny or
7 they convicted him of the burglary because they
8 considered - - -

9 JUDGE FAHEY: Isn't - - - isn't the real
10 reason because the victim couldn't identify any
11 stolen property, and she didn't even -- mentioned to
12 the detective who testified that there was no stolen
13 property. So if I'm the defense attorney I want to
14 say look at this, you know, she didn't even report
15 any stolen property and now we're in here on a
16 larceny charge and nothing was taken.

17 MS. DISALVO: Yes, Your Honor, but that
18 supports my argument in the sense that he relied on
19 those weaknesses.

20 JUDGE FAHEY: I understand that.

21 MS. DISALVO: - - - in that evidence.

22 JUDGE FAHEY: I understand, that's why I
23 was telling - - -

24 MS. DISALVO: And he - - - and he relied on
25 that in his summation. And in fact, it was implicit

1 in his summation that this was his strategy, to focus
2 the jury on the petit larceny evidence.

3 JUDGE ABDUS-SALAAM: So he was trying to
4 create a compromise for the jury, you're saying,
5 because if the petit larceny charge was gone, then he
6 could only be convicted of burglary? Is that - - -

7 MS. DISALVO: Well, his - - - his - - - the
8 - - - his argument on summation was that if the petit
9 larceny fails, the burglary fails as well. Yes, so
10 he would have an acquittal of the petit larc - - -

11 CHIEF JUDGE LIPPMAN: Didn't compromise the
12 burglary verdict with the petit larceny. You could
13 still have it. I - - - I don't know why you say
14 that.

15 MS. DISALVO: Yes, you can still have it,
16 Your Honor, but there's a difference with having a
17 charge on a verdict sheet, having it before the jury,
18 having the jury go down the verdict sheet, deliberate
19 fully on a charge. If it - - - if it had not been
20 there, it's very possible that the jury would have
21 considered the - - - the masturbation - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but the
23 evidence of the theft could be admitted as part of
24 the burglary, right?

25 MS. DISALVO: Yes, the evidence of the - -

1 - of the petit larceny would have been admitted had
2 it been on the verdict sheet.

3 CHIEF JUDGE LIPPMAN: Right, so why don't
4 we just throw out the petit larceny? Why isn't it
5 clearly a - - - a Turner-kipe - - - type situation?

6 MS. DISALVO: Well, it's very
7 distinguishable from Turner because in Turner the
8 defense attorney placed on the record that he did not
9 want the time barred count to be considered by the
10 jury, completely disavowed any sort of strategy he
11 may have had to have the time barred count be
12 considered. Here, that's not the case. So for that
13 reason alone, it's completely distinguishable from
14 Turner.

15 And also to - - - to dismiss it here, the
16 harm is that this court would be finding an error
17 where there is none. It would be finding that
18 defense counsel did not have a legitimate trial
19 strategy for keeping it on the verdict sheet where he
20 did in a case that the facts were very bad for the
21 defense; he wanted to focus the jury on the petit
22 larceny charge, the evidence of which he perceived as
23 very weak; and to get them away from the masturbation
24 which it - - - by the way, was very counterintuitive.

25 JUDGE ABDUS-SALAAM: Didn't he - - - didn't

1 he also successfully have the - - - the court
2 instruct the jury that masturbation was not a crime
3 at the time that this alleged burglary was - - - was
4 committed?

5 MS. DISALVO: Yes, Your Honor.

6 JUDGE ABDUS-SALAAM: So why would he need
7 to keep the petit larceny focus? Why would - - - why
8 would he need to have the jury focus on that when the
9 court had instructed the jury that masturbation was
10 not a crime that they could consider as the
11 underlying charge for the burglary?

12 MS. DISALVO: Well, Your Honor, I believe
13 it's - - - it's more effective, again, to have it on
14 the verdict sheet, to have the jury see the charge,
15 to have them know that they need to fully deliberate
16 on that evidence rather than to just hear it from the
17 judge during the charging, where the judge would go
18 on and explain to the jury that masturbation was not
19 a crime at the time, which is counterintuitive to
20 people and arguably extremely more heinous than - - -
21 to anybody to - - - to have their property stolen.
22 So he wanted to focus the jury. He wanted to focus
23 the jury on that evidence. He relied on the
24 weaknesses in that evidence in order - - -

25 JUDGE FAHEY: Let - - - let me ask you

1 this. Isn't it just a better policy to say you can't
2 charge people after the statute of limitations is
3 done; no matter what the situation is, we don't want
4 people charged if the - - - if the time to bring that
5 charge is expired? And then whenever anybody's
6 strategy is, that's their strategy, but as a policy
7 from this court, a two-year statute of limitation on
8 misdemeanors, you can't charge them on misdemeanors
9 ten years afterwards or - - - or that's just our - -
10 - should be our policy. Why - - - why isn't that a
11 logical approach for us to take?

12 And then whatever strategies counsel takes,
13 well, then that's the strategy counsel takes. But
14 how does it make sense that we're allowing someone to
15 be charged with something that they cannot be
16 convicted of?

17 MS. DISALVO: Well, Your Honor, it - - -
18 it's not a logical approach because one, under the
19 rules of professional conduct that guide the
20 prosecutors, we - - - prosecutors are permitted to
21 charge crimes so long as there is probable cause - -
22 - cause that supports - - - supports those crimes.
23 There is no limitation that our office cannot charge
24 crimes that are time barred. And in essence, they
25 are very - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but isn't it -
2 - - isn't - - - don't you agree with the Judge,
3 though, that it would be better not to?

4 MS. DISALVO: Well - - -

5 CHIEF JUDGE LIPPMAN: Why would you charge
6 someone when - - - when their time has run?

7 MS. DISALVO: Well, Your Honor, it's - - -
8 it's beneficial to the plea bargaining process.

9 JUDGE FAHEY: So you can charge people with
10 - - -

11 CHIEF JUDGE LIPPMAN: Beneficial to - - -
12 go ahead.

13 JUDGE FAHEY: - - - things that you cannot
14 be convicted of to enhance your plea bargaining
15 position? That doesn't seem like a - - - a public
16 policy that any of us would really advocate.

17 MS. DISALVO: Well, it's not just that,
18 it's also beneficial to defendants, many of which who
19 choose to waive this offense.

20 JUDGE FAHEY: I've never met a defendant
21 who thinks it's better to get charged with more
22 crimes, particularly ones they can't be convicted of.

23 MS. DISALVO: Well, Your Honor, it was - -
24 -

25 JUDGE PIGOTT: Well, isn't - - - isn't - -

1 - isn't that your better argument that it's an
2 affirmative defense? I mean, you don't have to worry
3 about the statute of limitations. If they choose to
4 assert it, they may; if they choose not to, they
5 don't have to?

6 MS. DISALVO: Yes, correct, and here,
7 didn't assert it.

8 JUDGE PIGOTT: Which is why - - - go ahead.

9 CHIEF JUDGE LIPPMAN: Which is what we're
10 looking at.

11 MS. DISALVO: Rel - - - relied on it,
12 wanted it on the verdict sheet, and to have a rule
13 where a - - - a - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but the whole
15 question is is - - - is that okay for them to do
16 that?

17 MS. DISALVO: Well, it is - - - it's okay -
18 - - it's - - - and it's completely ethical to do it.

19 CHIEF JUDGE LIPPMAN: Yeah, but it doesn't
20 help their client, that's for sure.

21 MS. DISALVO: Well, it - - - it doesn't
22 help their client.

23 CHIEF JUDGE LIPPMAN: It's not - - - it's
24 not effective representation, is it?

25 MS. DISALVO: Well, no, it is, Your Honor.

1 And it's - - -

2 CHIEF JUDGE LIPPMAN: It is?

3 MS. DISALVO: It's effective representation
4 to have time barred counts on the verdict sheet
5 depending on the circumstances of each case. For
6 example, in this case where the facts were bad, and
7 it was - - - he faced an A misdemeanor, it was a
8 petit larceny A misdemeanor, the evidence of which
9 would have come in had the petit larceny not even
10 been on the verdict sheet.

11 JUDGE PIGOTT: So - - - so and - - - and
12 summarize this, what you're saying is that it - - -
13 the jurors that your opponent didn't like picking but
14 they could have said at some point we convicted him
15 of petit larceny, that's enough? You know, we like
16 him, he's a nice guy, the defense lawyer did a good
17 job, why don't we just convict him of petit larceny
18 and go home because we can't agree on something else?
19 But if it's not there, they only have one thing to
20 convict him of and that's going to be the - - - the
21 felony.

22 MS. DISALVO: Yes.

23 JUDGE PIGOTT: Okay.

24 JUDGE FAHEY: So then he's convicted, you
25 bring a 440 motion and you say it was ineffective

1 assistance of counsel for - - - to - - - not to
2 strike that out because that's the only thing that's
3 left. And of course then that charge would be thrown
4 out on a - - - because under Turner, then, it would
5 be dispositive and it would be out. So that's why
6 you shouldn't bring things that are blown on the
7 statute of limitation already because you create that
8 error where you wouldn't have otherwise.

9 MS. DISALVO: But then to - - - to hold
10 otherwise would be to put future attorneys who - - -
11 who are in a position where it is a very
12 unconventional case with unconventional facts that
13 calls for an unconventional strategy, they would be
14 in a position at that point where they would have to
15 move to dismiss a time barred count, Constitutionally
16 required to do so, when they didn't deem it necessary
17 or - - - or they actually wanted it on the verdict
18 sheet because of the particular - - -

19 JUDGE RIVERA: What makes it so
20 unconventional?

21 MS. DISALVO: Well, just the - - -

22 JUDGE RIVERA: Maybe I missed something
23 here in your argument. What - - - what's so
24 unconventional?

25 MS. DISALVO: Well, the facts of the case

1 alone are - - - are just - - - I - - - I believe are
2 somewhat rare in the sense that the defendant enters
3 this apartment illegally, he - - - he steals this
4 woman's property - - -

5 JUDGE RIVERA: Um-hum.

6 MS. DISALVO: - - - and then before he
7 leaves, he masturbates and then he ejaculates on her.
8 I think - - -

9 JUDGE RIVERA: So the - - - no - - - no one
10 ever does anything like this where they enter with
11 the intent to commit one crime and become very
12 opportunistic in the moment - - -

13 MS. DISALVO: Yes.

14 JUDGE RIVERA: - - - and commit another?

15 MS. DISALVO: Yes. Yes, but - - -

16 JUDGE RIVERA: Well, then, why is this
17 rare?

18 MS. DISALVO: Because it was not a crime at
19 that time. In - - - in 2002, when the crime was
20 committed, it was not a crime under the Penal Law.
21 So that's what makes it rare because now a defendant
22 is at trial, he's faced with these bad facts for his
23 client that the jury is going to hear, and he wants
24 to steer them away from these bad facts so that they
25 can focus on the - - -

1 JUDGE ABDUS-SALAAM: Would this be a
2 different case, counsel, if the masturbation weren't
3 in - - - in the scenario at all? Would it be
4 different? Would you be arguing differently that he
5 still would have some strategy, a strategic reason
6 for keeping the petit larceny in?

7 MS. DISALVO: No, Your Honor, because here
8 the petit larceny and the burglary were inextricably
9 intertwined. The - - -

10 JUDGE ABDUS-SALAAM: So it wouldn't be a
11 different case if the masturbation weren't involved?

12 MS. DISALVO: No, Your Honor.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 Thanks.

15 MS. DISALVO: Thank you.

16 CHIEF JUDGE LIPPMAN: Rebuttal, counsel.

17 MS. ASCHER: Just briefly, Your Honors.

18 Counsel could have done exactly what he did without
19 the charge being on the verdict sheet. He could have
20 made the same arguments in summation, he could have
21 guided the jury towards finding that this was a
22 burglary but the intent was the sexual offense,
23 without ever having the - - - the petit larceny there
24 risking an additional conviction. That's what the
25 misdemeanor was, an additional conviction that he did

1 not need.

2 JUDGE RIVERA: Is it not rare? Her
3 argument about it's a whole rare situation?

4 MS. DISALVO: The facts of this case were
5 unique, and as I said, this is the rare case - - -
6 you know, ten years after Turner came down, here's
7 the rare case where defense counsel's ineffective
8 again and this time it happens to be on a
9 misdemeanor. There was no reason in the world to
10 have that misdemeanor on the verdict sheet, and in
11 fact, it compromised his strategy on the burglary.

12 JUDGE PIGOTT: I would have thought, you
13 know, I can see it, you know, where - - - where you
14 think if you can acquit them out - - - out of the
15 petit larceny, you can get an acquittal on the
16 burglary. I mean, the - - - the jury could say well,
17 you couldn't find the jewelry, you know - - - you
18 know, we - - - we don't - - - we don't believe that
19 was a petit larceny; therefore there's no burglary.

20 MS. ASCHER: But for the burglary, you just
21 need the intent. And the facts of this case was that
22 the woman went to sleep, she left the window blinds
23 open, it was 3:30 in the morning - - -

24 JUDGE PIGOTT: Right, but - - - but - - -
25 but I - - - I guess the argument is that if you want

1 to say the guy's a pervert and he came in to do
2 perverted stuff and that's a burglary and that's all
3 they got, they may not like the man because of his
4 sexual conduct.

5 MS. ASCHER: But then you run the risk that
6 the jury could also convict you of the petit larceny
7 and then convict you of the burglary and then you're
8 convicted, as Mr. Harris, is of a time barred - - -

9 JUDGE PIGOTT: But it's - - - it's a - - -

10 MS. ASCHER: - - - charge.

11 JUDGE PIGOTT: - - - it's a strategy. I
12 mean, maybe it worked, maybe it didn't, but it was a
13 strategy.

14 JUDGE STEIN: Yeah, but that - - -

15 MS. ASCHER: It's an unreasonable strategy.

16 JUDGE STEIN: - - - that strategy would
17 entail arguing on the one hand that there's no proof
18 of the larceny and on the other hand hoping that
19 they're going to find that he comm - - - that he
20 committed the larceny but not the burglary, right?

21 MS. ASCHER: It's a big risk to take
22 because you risk your client ending up, as Mr. Harris
23 did, convicted of a time barred charge.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MS. ASCHER: Thank you.

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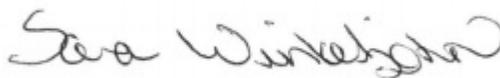
CHIEF JUDGE LIPPMAN: Thank you both.
Appreciate it.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Davon Harris, No. 164 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 21, 2015