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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent, Papers Sealed

-against-

No. 130

RAYMOND DENSON,

Appellant.

20 Eagle Street
Albany, New York 12207
September 09, 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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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 130, People v.
2 Denson.

3 Counsel, would you like any rebuttal time?

4 MS. JAMIESON: Yes, Your Honor, three
5 minutes.

6 CHIEF JUDGE LIPPMAN: Three minutes. Go
7 ahead. You're on.

8 MS. JAMIESON: May it please the court
9 Kerry Jamieson with the Office of the Appellate
10 Defender on behalf of Raymond Denson. A mere offer
11 or suggestion that someone go to another location
12 unaccompanied by you does not constue - - -
13 constitute an attempted - - -

14 CHIEF JUDGE LIPPMAN: Counsel, but
15 everything's in context, right?

16 MS. JAMIESON: Yes. Absolutely, Your
17 Honor.

18 CHIEF JUDGE LIPPMAN: I mean, you're - - -
19 you're talking in general. What about here where - -
20 - where the history that was involved with the
21 defendant as context and then this repeated, you
22 know, asking her to go places with him or asking the
23 child, what, in that context, does it mean, what the
24 defendant did?

25 MS. JAMIESON: Well, with - - - with

1 respect to the attempt portion of it, whether or not
2 this - - -

3 CHIEF JUDGE LIPPMAN: Yes. Let's start
4 with the attempt portion.

5 MS. JAMIESON: - - - this - - - this - - -
6 this amounted to an attempt, it did not, because
7 here, all we have is an offer. And yes - - -

8 CHIEF JUDGE LIPPMAN: But you're dealing
9 with - - - how old is the child?

10 MS. JAMIESON: She was ten years old.
11 Howev - - -

12 CHIEF JUDGE LIPPMAN: If she's ten years
13 old, doesn't that play into this offer? I mean, it
14 dif - - - dealing with a ten-year-old is different
15 than dealing with an eighteen-year-old, right?

16 MS. JAMIESON: That's correct, Your Honor,
17 but it's - - -

18 CHIEF JUDGE LIPPMAN: And - - - and - - -

19 MS. JAMIESON: I'm sorry.

20 CHIEF JUDGE LIPPMAN: - - - whether you'd
21 be required to use force or whatever to get a ten-
22 year-old to do something is different than an
23 eighteen-year-old, right?

24 MS. JAMIESON: Right. But that's relevant
25 to the element of the statute as it relates to lack

1 of consent. However, that's a separate showing that
2 the prosecution has. It still has the burden of
3 proof to show beyond a reasonable doubt that this was
4 an attempted crime and also has the burden - - -

5 CHIEF JUDGE LIPPMAN: Why - - - what else
6 would it be if it wasn't an attempted crime?

7 MS. JAMIESON: Well - - -

8 CHIEF JUDGE LIPPMAN: Then what did - - -
9 in - - - in that situation, you would have restricted
10 the movement of the child?

11 MS. JAMIESON: Well, what we have here his
12 - - - Mr. Denson's actions did not ripen to
13 punishable conduct. All he made was an offer. Had
14 this been a situation - - -

15 CHIEF JUDGE LIPPMAN: What would he have
16 had to do for it to ripen?

17 MS. JAMIESON: Well, everything here re - -
18 - relied on this ten-year-old girl in order to
19 complete the crime. She had to accept the keys, she
20 had to - - -

21 JUDGE FAHEY: So - - - so - - - so let me
22 ask this, then. He - - - he - - - he's observing her
23 for a period of time, that's the first thing;
24 secondly, there was prior attempts to date; third
25 thing, he offers keys to the apartment; fourth thing,

1 he - - - he disclosed that she could play with cats;
2 the fifth thing was an offer to take her to movies.
3 All of these things were rejected, he came to the
4 door of the apartment to take her - - - dressed - - -
5 dressed in similar clothes that had been involved in
6 a previous crime, allegedly. It seems to me that
7 we're really dealing with what the meaning of
8 "dangerously close" is in - - - in the attempt
9 argument, and is it your position that he had to
10 either - - - that he had to actually restrain her or
11 physical re - - - grab her or restrain in some way
12 before you can say that there's been an attempt to
13 kidnap her?

14 MS. JAMIESON: No. That's not my permis -
15 - - position at all, Your Honor. But here, given the
16 context where you're giving keys to a ten-year-old
17 girl. She can't travel on her own. She has to first
18 agree to go to the apartment, which we know that she
19 wouldn't have done. Then she doesn't know where Mr.
20 Denson lived, they weren't introduced to each other,
21 they didn't even know each other's names. So she
22 would have had to travel to some unknown location - -
23 -

24 JUDGE FAHEY: So you can't att - - - I - -
25 - I don't mean to be flip about but you - - - it's

1 almost like you're arguing you can't attempt to
2 kidnap this young lady unless she agrees with the
3 attempt.

4 MS. JAMIESON: Well, if the way that you're
5 attempting to kidnap someone is through acquiescence
6 as opposed to through force or through threats, in
7 which case, obviously, if you grab someone or
8 something, that's a different situation. But here -
9 - -

10 JUDGE ABDUS-SALAAM: Counsel, what if there
11 had been no history here and, you know, the history
12 of the prior crime, this man just approached this
13 young girl and, you know, said to her, why don't you
14 just come along with me somewhere or, you know - - -
15 and she started to move away and he moved closer to
16 her but he didn't actually grab her, would that be
17 dangerously close to - - -

18 MS. JAMIESON: Yes. That would be
19 different. And I think the key distinction between
20 that situation that you posit and the one that's here
21 is that in that situation, the - - - the person who's
22 approaching the child is saying, come along with me.
23 Here's that not what we have. Mr. Denson's not - - -
24 is not suggesting that she come with him.

25 JUDGE ABDUS-SALAAM: So he - - - he - - -

1 he didn't say - - - oh, he said go to my apartment
2 and wait for me.

3 MS. JAMIESON: He said here are the keys to
4 my apartment.

5 JUDGE ABDUS-SALAAM: Go and wait for me.
6 But if he had said, come on with me now, you would
7 say that was dangerously close?

8 MS. JAMIESON: Well, it'd be - - - the - -
9 - I think it would be a closer question because the
10 immediacy of the completion of the crime would - - -
11 would be different. Here, where you're saying to a
12 ten-year-old, here, take my keys, she doesn't know
13 where he lived, go - - - she'd have to travel, which
14 she'd have to get a MetroCard, call a cab, all of
15 these things.

16 JUDGE STEIN: Well, we don't know if the
17 apartment was in the building next door.

18 MS. JAMIESON: That was never introduced at
19 trial. We do know that Mr. Denson commuted to work,
20 but the prosecution never introduced where his - - -
21 his actual apartment was, which it is their burden to
22 prove as this is a legal sufficiency claim.

23 JUDGE RIVERA: So - - - so how much - - -
24 so let - - - let's get a little bit more into the
25 weeds on this. So how much closer did he have to

1 come to the actual completion of the kidnapping?

2 Because he could have given the keys, she could have
3 taken it, and a minute later changed her mind.

4 MS. JAMIESON: Right. I think if she - - -

5 JUDGE RIVERA: But if she had taken the
6 keys, he'd turn around, and she followed him. So at
7 what point do you have the attempt if you're saying
8 merely the offer of the keys, regardless of the
9 background, is not enough?

10 MS. JAMIESON: Well, had she taken the
11 keys, had she somehow found her way to his apartment,
12 I think then we may have - - -

13 JUDGE RIVERA: If she finds her way to his
14 apartment - - -

15 MS. JAMIESON: And then she goes - - -

16 JUDGE RIVERA: - - - haven't we reached not
17 an attempt, but a completed kidnapping?

18 MS. JAMIESON: Well, it depends on whether
19 he's there, whether she stays. I think it's a closer
20 question at that point, and again - - -

21 JUDGE STEIN: What bothers me is that we're
22 - - - we're defining whether he committed a crime, an
23 attempt crime, by her behavior rather than his. Is -
24 - - isn't - - - isn't - - -

25 MS. JAMIESON: Well, actually, this court

1 has talked about - - - in the attempt context about
2 how where everything to complete the crime is fully
3 within the - - - the - - - the scope or the - - - the
4 control of the victim here, not the defendant, that
5 is very significant in whether or not there is an
6 attempt here, because you're relying on her to do all
7 of these things in order for this crime to be
8 committed, but what we're punishing here is Mr.
9 Denson's conduct. All he did was make an offer. Had
10 she accepted, had - - -

11 CHIEF JUDGE LIPPMAN: What if his address
12 was on the keys?

13 MS. JAMIESON: That might be a closer - - -
14 but again, I don't think that we would have gotten to
15 an attempt, because we have to become dangerously
16 close.

17 CHIEF JUDGE LIPPMAN: That wouldn't be
18 enough, if he gave her the keys and said, here's the
19 address?

20 MS. JAMIESON: That - - - that would be
21 closer. It would be. But here, all we have is an -
22 - - an offer. He didn't even hand her the keys. He
23 says, here's the keys. It wasn't a direction, he
24 didn't make any threats, nothing of the sort. He
25 said here are the key - - - here are the keys to my

1 apartment.

2 CHIEF JUDGE LIPPMAN: What if the child
3 said, can you take me or where - - - where - - - or
4 where do I go? You know, what if she wanted to
5 acquiesce?

6 MS. JAMIESON: Okay. And I think - - -

7 CHIEF JUDGE LIPPMAN: You're saying that
8 would be then getting closer again?

9 MS. JAMIESON: Well, I think that's more -
10 - - that's closer to the situation that Judge Abdus-
11 Salaam suggested where he's saying well, she's going
12 to come along with him.

13 CHIEF JUDGE LIPPMAN: No. No. But what -
14 - - what if she doesn't answer - - - a ten-year-old
15 child. She's - - - you know, she basically nods.
16 What happens next?

17 MS. JAMIESON: Right. But if she nodded
18 and take the - - - took the keys but never went to
19 his apartment, we're still not at the point - - -

20 CHIEF JUDGE LIPPMAN: And nodded and
21 looking to him to - - -

22 MS. JAMIESON: If he was going to go along
23 with her, then we would have an attempted kidnapping
24 at that point, because the distinction here would be
25 if he's going along with her, he's now doing - - -

1 he's now making the movement. Here, what we have is
2 a suggestion that you - - - here, go to this
3 location. If there was a fair down the street and I
4 had a extra ticket and I say to a child here, you
5 know, here's the ticket to the fair, go to the fair,
6 I might be there, it's very different than saying,
7 come with me to this location. Again, everything is
8 within the control of this ten-year-old girl. And
9 what Mr. Denson's asking - - -

10 CHIEF JUDGE LIPPMAN: But you don't think
11 that - - -

12 MS. JAMIESON: I'm sorry.

13 JUDGE FAHEY: You see, the problem is is
14 it's like you're arguing that it's a factual
15 impossibility for this young lady to have done this,
16 and - - - and I don't - - - I - - - I don't think the
17 case law allows for that. I don't think the penal
18 law allows for that.

19 MS. JAMIESON: Well - - -

20 JUDGE FAHEY: That's not what's relevant
21 here.

22 MS. JAMIESON: I'm not saying that simply
23 because it's a factual impossibility. What I'm
24 saying is because there's so many steps that needed
25 to be taken. Attempt is on a continuum. We have

1 what could be the initial preparation for the crime,
2 you may even take one or two steps to complete it.
3 However, you have to get to the point where you're
4 almost to complete - - - actually completing the - -
5 -

6 CHIEF JUDGE LIPPMAN: You mean you can take
7 - - - you can take three steps, four steps, five
8 steps and at some point, it becomes an attempt?
9 Isn't it an awfully dangerous game when you're
10 dealing with a ten-year-old child?

11 MS. JAMIESON: Yes. When you're - - - it -
12 - - it is - - - that's a vaster concern here because
13 she's a ten-year-old child; however, attempt is
14 defined as coming dangerously close irrespective of
15 who your victim is or at what the crime is.

16 CHIEF JUDGE LIPPMAN: Yeah. But where - -
17 - but you're drawing - - - you're making it very hard
18 to draw a line. There is case law that seems to say
19 it doesn't take much to it attempted, right?

20 MS. JAMIESON: No. Actually - - - and I
21 refer to this court's decision in *People v. Warren*,
22 where, you know, this court found that the defendant
23 did not come very close to completing a - - - a drug
24 possession where there were several contingencies
25 that stood between the agreement and the completed

1 agree - - - and the compl - - - completed purchase,
2 and that case is cited in - - - in my briefs. And so
3 on - - - on those kind of facts where the court is
4 pointing out that where you have all these steps that
5 need to be taken, you can't find - - -

6 JUDGE ABDUS-SALAAM: So what would you call
7 what the defendant did here besides an offer? Would
8 you say that would be in - - - in your analysis,
9 preparation only and not dangerously close to
10 completion?

11 MS. JAMIESON: Well, it's possible that had
12 all of these things that had to occur, had they
13 occurred, that we would have a completed crime, but
14 here we - - - all we have is a mere offer, that's all
15 that we have. And if we're looking at Mr. Denson's
16 conduct that is all that he did.

17 CHIEF JUDGE LIPPMAN: So what would it be
18 if the - - - if the child said yes? Then it's - - -
19 you're - - - you're beyond - - - you're going in one
20 step from attempted - - -

21 MS. JAMIESON: That's a little closer - - -

22 CHIEF JUDGE LIPPMAN: - - - from attempted
23 - - - where you can't get to attempt, but you'll be
24 at completed already?

25 MS. JAMIESON: No. If she said yes, that's

1 not enough, and again, that's what the Appellate
2 Division says, I know that's my adversary's position,
3 that merely saying yes is enough, but that is not
4 enough.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MS. JAMIESON: If she said yes and then
7 threw the keys in the garbage and never went
8 anywhere, we still would be in ess - - - essentially
9 the same position.

10 CHIEF JUDGE LIPPMAN: Okay. You'll have
11 your rebuttal time. Let's hear from your adversary.

12 MS. JAMIESON: Thank you.

13 MR. MARINELLI: Good afternoon. May it
14 please the court, Christopher Marinelli for the
15 respondent, the People.

16 CHIEF JUDGE LIPPMAN: So what did the - - -
17 what did the defendant do here? What was it if it
18 wasn't an attempt? Your adversary says it's an offer
19 and then not really close, that the child - - - you
20 know, they're not - - - the - - - the child isn't
21 capable really of going to the address. You don't
22 buy that?

23 MR. MARINELLI: When a fifty-one-year-old
24 pedophile tries to lure to his apartment the ten-
25 year-old girl he's been fixated on for three years,

1 that's an attempted - - - attempted kidnapping. And
2 what the People - - -

3 CHIEF JUDGE LIPPMAN: Well, yeah. But
4 she's saying you didn't get to that point where he
5 really tried to lure her. He's just kind of being
6 playful; it's a general offer and not an attempt.

7 MR. MARINELLI: These actions were
8 potentially and immediately dangerous and - - -

9 CHIEF JUDGE LIPPMAN: Because of the age of
10 the child or in general?

11 MS. JAMIESON: In general. The - - -

12 JUDGE ABDUS-SALAAM: Counsel, you just
13 mentioned it took three years for him to get to the
14 point where he's now just offering her keys,
15 according to your adversary, so how is - - - how does
16 that play into whether this is dangerously close to
17 kidnapping? He could - - - under your - - - you
18 know, under your scenario, he could go another two,
19 three, four years and - - - and never actually get
20 her anywhere.

21 MR. MARINELLI: Well, there'd been an
22 escalation here in the weeks - - - two weeks leading
23 up to this incident. First, there was the invitation
24 in front of her mother to bring the child to the
25 movies; that's on August 29th. On September the 6th,

1 he goes up to the door.

2 JUDGE PIGOTT: Yeah. But here - - - here
3 you got - - - whatever happened, the mother and the
4 police came to two conclusions; there was endangering
5 the welfare of a child and there was harassment.
6 They looked at the facts and the circumstances and
7 they said this guy is endangering the welfare of a
8 child and he's harassing, that's it.

9 Sometime later, somebody says, you know,
10 twenty years ago he was - - - he was convicted of
11 sexually abusing his stepdaughter; that turned his
12 actions on that day into attempted kidnapping. I
13 don't see how you can do that. I mean either it was
14 an attempted kidnapping when it happened or it
15 wasn't. Otherwise, aren't you violating Molineux by
16 showing - - - by - - - by showing an - - - fishing
17 for the word, but - - - that he's predisposed to do
18 this?

19 MR. MARINELLI: The - - - oh, pleaded - - -
20 the way the complaint may have been filled out, after
21 like, further consideration, that this was understood
22 to be a - - -

23 JUDGE PIGOTT: No. It was - - - it was
24 only after they found that out; it wasn't they said,
25 oh, you know, now that we've looked more closely at

1 these facts, we've decided this. And it seemed to me
2 that if - - - if what they were saying was true, he
3 was guilty of attempted kidnapping when he asked her
4 out to the movies, when they went - - - and offered
5 to go ice skating, when he wanted to take her for ice
6 cream, when - - - when he went to her door and asked
7 her to go to the movies, and then, when he offered
8 her the keys. On all of those occasions, it was
9 clearly an attempted kidnapping, was it not?

10 MR. MARINELLI: The - - - the - - - I
11 believe the - - - the final action was the most
12 dangerous and that that was the one that - - -

13 JUDGE PIGOTT: What was more dangerous than
14 that than saying come to the movies with me in my red
15 velvet suit and red shoes?

16 MR. MARINELLI: Okay. At this time the
17 child's alone without her mother, she's on her way
18 home alone from school by herself.

19 JUDGE PIGOTT: Well, he didn't know - - -
20 he - - - he went to the - - - well, I don't want to
21 argue each one of the facts.

22 MR. MARINELLI: Right.

23 JUDGE PIGOTT: But my point is that
24 everybody knew what had happened at that time and
25 nobody said, this guy was trying to kidnap her. And

1 it was actually based on extensive testimony; the
2 defendant transferred his fantasy from his
3 stepdaughter and his fixation to the new victim. And
4 accord - - - you know, approximately - - -

5 JUDGE PIGOTT: So - - - so when he offered
6 to take her to the movies and the mother got upset
7 and said, you know, this guy's harassing my daughter,
8 and they said oh, my God, twenty years ago he did
9 this, that's an attempted kidnapping.

10 MR. MARINELLI: No. What spurred the
11 complaint was the approaching the child when she was
12 alone, and that - - - I think it's also sig - - -
13 significant the child's reaction to this where, you
14 know, previously, she seem - - - did not seem to
15 attach much weight to defendant's - - - had to say
16 this time she goes screaming to her apartment and
17 wants to move, because as - - - at ten years old, she
18 understood this for what it was, which was a serious
19 attempt - - -

20 JUDGE PIGOTT: So at that point - - -

21 MR. MARINELLI: - - - to separate her from
22 her mother.

23 JUDGE PIGOTT: At that point, police and
24 the mother said this was an attempted kidnapping?
25 No. They said this is harassment and endangering the

1 welfare.

2 MR. MARINELLI: The - - - the - - - well,
3 and the grand jury reviewed the evidence and indicted
4 for attempted kidnapping, which it - - - if - - -

5 JUDGE PIGOTT: Because twenty years ago he
6 did what he did.

7 MR. MARINELLI: No. Because he was trying
8 to move this young girl and - - -

9 CHIEF JUDGE LIPPMAN: So the exact same
10 scenario, without the prior incident, would still be
11 attempted kidnapping?

12 MR. MARINELLI: Yes. The - - - I mean, if
13 you look - - -

14 CHIEF JUDGE LIPPMAN: It - - - it really
15 has no relevance that they showed that this - - -
16 this guy's delusional and he's reliving a fantasy?
17 It would be - - - you know, out of that context, it
18 would still be attempted kidnapping?

19 MR. MARINELLI: It has relevance, because
20 the specific intent at issue is defendant's intent -
21 - -

22 CHIEF JUDGE LIPPMAN: It shows the intent,
23 is that what you're saying?

24 MR. MARINELLI: Yes. It - - - his
25 intention.

1 CHIEF JUDGE LIPPMAN: It shows the
2 propensity or it shows specifically the intent?

3 MR. MARINELLI: Specifically the intent is
4 - - -

5 CHIEF JUDGE LIPPMAN: Because he's done it
6 before?

7 MR. MARINELLI: The - - - not just because
8 he's done it before but because there's this
9 transference of specific fantasy and fixation.

10 CHIEF JUDGE LIPPMAN: It's scientific that
11 it's transference and - - -

12 MR. MARINELLI: Yeah.

13 CHIEF JUDGE LIPPMAN: - - - fantasy and
14 reliving it and all - - - all of that makes it
15 attempted kidnapping?

16 MR. MARINELLI: The - - - what makes it the
17 attempt - - - attempted kidnapping - - -

18 CHIEF JUDGE LIPPMAN: In the context of
19 that, the offering the keys is attempted kidnapping?

20 MR. MARINELLI: Yes. The - - - the situa -
21 - -

22 CHIEF JUDGE LIPPMAN: So it's not just the
23 - - - the - - - in isolation what happened, it's - -
24 - it's with that intent. That shows the intent?

25 MR. MARINELLI: The - - - it definitely - -

1 - it shows the intent. Yes. I mean it's a tougher
2 case without that proof, but again, you'd have to
3 look at the elements of the crime.

4 CHIEF JUDGE LIPPMAN: But with that, it's -
5 - - it's a - - - it's a slam dunk?

6 MR. MARINELLI: The - - - yeah.

7 CHIEF JUDGE LIPPMAN: That - - - that it's
8 attempted kidnapping?

9 MR. MARINELLI: It's much - - - it's much
10 more compelling. Yes. Because, again, the specific
11 intent is the intent to prevent the liberation of the
12 victim.

13 JUDGE PIGOTT: The intent what?

14 JUDGE ABDUS-SALAAM: Should the - - -

15 MR. MARINELLI: The intent to prevent the
16 liberation of the victim.

17 JUDGE ABDUS-SALAAM: Counsel, should the
18 focus here be on the child's conduct or on the
19 defendant's conduct?

20 MR. MARINELLI: The defendant's, and, you
21 know, Penal Law 110.10 says that factual or legal
22 impossibility is no defense to an attempt, and the
23 whole reason that law was enacted was to focus the
24 inquiry on the behavior of the defendant. And it - -
25 -

1 CHIEF JUDGE LIPPMAN: But what about their
2 argument that - - - that it was really impossible to
3 - - - to - - - to have this crime because the kid
4 doesn't know where to go, the - - - doesn't have the
5 address, that's really - - - it wasn't close to
6 actually being an attempt. Why is that fallacious,
7 that argument?

8 MR. MARINELLI: Oh, and certainly as far as
9 the child not being willing to acquiesce, for the
10 reason just said, you know, the impossibility is not
11 an issue - - -

12 JUDGE FAHEY: But - - - but - - - but the
13 factual impossibility argument, wasn't there a case
14 that - - - that a fift - - - a twenty-four-year-old
15 undercover police office - - - policewoman, was a
16 police officer, was - - - was - - - was pretending to
17 be a fifteen-year-old prostitute and it was a factual
18 impossibility for her - - - for this person to commit
19 the crime of prostitution, but it was still an
20 attempt to commit the prostitution. And here I think
21 the judges are right, that may - - - this - - - and
22 this young lady's character is such that it may be
23 impossible factually that it would have happened, but
24 it doesn't alter the attempt to - - - to make it
25 happen.

1 MR. MARINELLI: Exactly. And - - - and as
2 for the other question that - - -

3 CHIEF JUDGE LIPPMAN: So does it matter
4 what she does - - -

5 MR. MARINELLI: No.

6 CHIEF JUDGE LIPPMAN: - - - in - - - in
7 answer to Judge Abdus-Salaam? We're looking at what
8 he's doing and it - - - it's not - - - and it's not a
9 rhetorical question, then it - - - it doesn't matter
10 whether it was possible that she didn't know the
11 address or whatever it is, that's what he wanted to
12 do?

13 MR. MARINELLI: Absolutely, Your Honor. It
14 - - -

15 CHIEF JUDGE LIPPMAN: Especially in the
16 context of the earlier - - -

17 MR. MARINELLI: Yes. I mean - - -

18 CHIEF JUDGE LIPPMAN: It shows his intent?

19 MR. MARINELLI: This court has stated, "The
20 very essence of criminal attempt is the defendant's
21 intention to cause the prescribed result." So, you
22 know, we're - - -

23 JUDGE PIGOTT: What - - - what are you
24 quoting from there?

25 MR. MARINELLI: That's People v. Campbell

1 at 72 N.Y. - - - N.Y.2d.

2 JUDGE STEIN: But it's not the intent alone
3 that's enough. The - - - he's still required to take
4 certain steps to become - - - to come dangerously
5 close to comm - - - actually committing the crime.

6 MR. MARINELLI: Right. And - - -

7 JUDGE STEIN: Right. And - - - and that's
8 really what we're talking about here. Even if we
9 assume the intent, the question is - - - is, did he
10 get close enough.

11 MR. MARINELLI: Yes. But the statute - - -
12 you know, he was convicted of attempting to abduct
13 her. Abduction means restraining a person with the
14 intent to prevent their liberation by means of
15 holding them in a place where they aren't likely to
16 be found. Restrain just means to interfere with
17 their - - - the person's liberty either by moving or
18 confining them. He's attempting to move the victim.

19 JUDGE STEIN: What - - - what - - - what if
20 - - - what if he was communicating with her by e-mail
21 and he said, you know, why don't you come over and
22 watch my cats some afternoon, I'll - - - I'll bring
23 the keys to you? Is that close enough?

24 MR. MARINELLI: The - - - I would say it's
25 a closer case because here we have him physically

1 offering the keys. You know, I think at that point,
2 having opted to try to persuade, pretty much the only
3 thing left is he's trying to give the keys for her to
4 accept the keys. Maybe the only left for the
5 defendant do - - - to do is, you know, give the
6 address.

7 CHIEF JUDGE LIPPMAN: If he thinks that
8 he's abducting her, is he abducting her? If he
9 thinks, oh, I'm going to give her the keys and she's
10 going to come to my apartment, is that attempted
11 kidnapping?

12 MR. MARINELLI: Yes. Because, you know, as
13 far as the - - -

14 CHIEF JUDGE LIPPMAN: You know what I mean?
15 It maybe isn't intent to do it, but - - -

16 MR. MARINELLI: - - - factual and legal
17 impossibility - - -

18 CHIEF JUDGE LIPPMAN: - - - what if he
19 thinks that this will do it when I give her the keys?

20 MR. MARINELLI: That - - - that is - - -

21 CHIEF JUDGE LIPPMAN: How does that play
22 together?

23 MR. MARINELLI: Well, to go back to Penal
24 Law 110.10 where factual and legal impossibility
25 aren't a defense and it says, if the circumstances

1 were as the defendant believed them to be, defendant
2 believes he's forged this relationship to this - - -
3 with this victim - - - I mean, he showed up for their
4 date that he thought they had a few days before - - -
5 if he thinks this is the plausible way to move her to
6 his apartment, then he's trying to move her to an
7 apartment, and that's attempt to kidnap.

8 JUDGE PIGOTT: Play it out. How - - - what
9 - - - what would have happened next if - - - if this
10 attempt had gone further?

11 MR. MARINELLI: The - - - if she had
12 accepted the keys?

13 JUDGE PIGOTT: Well, you're saying she
14 would accept the keys, then what?

15 MR. MARINELLI: The - - - if she accepted
16 the keys and defendant provides her his address, then
17 she's - - -

18 JUDGE PIGOTT: Then next thing would - - -
19 he would provide an address, and then what?

20 MR. MARINELLI: Then presumably - - - she's
21 ten-years-old, she walks home from school by herself.

22 JUDGE PIGOTT: What - - -

23 MR. MARINELLI: She - - - presumably if she
24 were so inclined, she would proceed to his apartment.
25 And - - -

1 JUDGE PIGOTT: And where would that be?

2 MR. MARINELLI: The - - - the record
3 doesn't show where defendant's address - - -

4 JUDGE PIGOTT: Does she drive, fly, take
5 the - - - take a - - - take a bus or what?

6 MR. MARINELLI: We know defendant - - -

7 JUDGE PIGOTT: So we don't know that. So -
8 - - but let's assume - - - all right, and so then
9 she's going to get to his apartment and play with his
10 cats, and then what?

11 MR. MARINELLI: Well, that's the
12 significance of the evidence about the prior crime.

13 JUDGE PIGOTT: Now we say - - - now we say
14 he - - - he didn't really want her to play with the
15 cats, he wanted to sexually abuse her?

16 MR. MARINELLI: Right. That - - - that
17 goes to whether he intended to confine her.

18 JUDGE PIGOTT: Okay.

19 CHIEF JUDGE LIPPMAN: Couldn't he just say
20 at that point, she takes the keys, then he just walks
21 away with her. Isn't that conceivable?

22 MR. MARINELLI: That's absolute - - -

23 CHIEF JUDGE LIPPMAN: She has the keys and
24 they go?

25 MR. MARINELLI: That's certainly possible.

1 JUDGE PIGOTT: No, it's not, because he
2 said he had to go to work.

3 MR. MARINELLI: The - - - if you'd like to
4 - - - take it - - -

5 JUDGE PIGOTT: Doesn't sound - - - doesn't
6 - - - okay.

7 CHIEF JUDGE LIPPMAN: Okay. Let's hear
8 from the rebuttal.

9 MR. MARINELLI: Thank you.

10 MS. JAMIESON: Just very briefly, Your
11 Honor, again - - -

12 CHIEF JUDGE LIPPMAN: Counsel, we're
13 focusing on his conduct and not whether she's - - -
14 can do it or not do it or - - -

15 MS. JAMIESON: Right. And all of the - - -

16 CHIEF JUDGE LIPPMAN: - - - acquiesce or
17 not acquiesce.

18 MS. JAMIESON: Yes. And all - - -

19 CHIEF JUDGE LIPPMAN: Why isn't he - - - he
20 thinking that this is it, giving her the keys and
21 she's going to come with me or - - - or he'll point
22 her to where she has to go?

23 MS. JAMIESON: It's possible that he could
24 have - - - I mean, I'm - - - I'm assuming that having
25 offered her the keys, he - - - he wanted her to do

1 that, he wanted her to go to his apartment. However
2 - - - and I think one thing that is being very
3 conflated here is even considering his history, even
4 if he wanted to have a sexual encounter with her,
5 that does not equate to an intent to abduct. Those
6 are two very separate intents.

7 CHIEF JUDGE LIPPMAN: But I'm saying is
8 there's no place for intent really - - - for attempt,
9 because if - - - if she goes with him - - - he offers
10 the keys, she takes it, he goes, or - - - it's done
11 then, right. It's not even an attempt.

12 MS. JAMIESON: But if he goes with her and
13 he takes her to another and he moves her, that is a
14 different situation.

15 CHIEF JUDGE LIPPMAN: So what I'm saying
16 is, are we - - - are we skipping over - - - are there
17 really no steps till you - - - you've done it, and
18 isn't that dangerous if you look at it from that
19 perspective? You follow what I mean that - - - that
20 - - - it - - - it - - - you're not getting to an
21 attempt but in a split second you're there and you've
22 done it, you've kidnapped her.

23 MS. JAMIESON: I think it is possible that
24 in - - - in many scenarios, the kidnapping happens
25 right away. However, under the facts of this case

1 and how Mr. Denson approached this particular child,
2 it wasn't to come along with me and I'll take you
3 immediately now. It's to take my keys and as, Judge
4 Pigott, you - - - you - - - you were mentioning
5 during my adversary's argument, there's so many
6 things that have to be done. She has to take the
7 keys, she has to find out where he - - - he lives.
8 She's ten years old. How's she going to get there?
9 She's not going to drive. What's she going to do,
10 take a taxi? Does she have money to do that?
11 There's so many things that have to occur before she
12 even gets to this person's apartment.

13 JUDGE STEIN: So how many things get you to
14 an attempt?

15 MS. JAMIESON: Well, I think it's - - -
16 that's going to be different in every case. It's not
17 going to be the same in every case. However, in this
18 case where all we have is an offer, we can't simply
19 punish conduct when we're just at this very initial
20 stage. There needs to be other things that occur
21 before we can say that this came dangerously - - -

22 JUDGE STEIN: So, for example, we do - - -
23 we do one thing more than an offer. He could have
24 gone to the apartment and he could have said, you
25 know, how would you like me to - - - how would you

1 like to come to my apartment some afternoon, I'll - -
2 - I'll - - - I'll come bring you the keys if you say
3 yes.

4 MS. JAMIESON: Right. If it's - - -

5 JUDGE STEIN: And then the next time, he
6 brings her the keys. Then - - - then do we have - -
7 -

8 MS. JAMIESON: And again, I think if you're
9 - - - it's - - - that situation still relies on her
10 to take all of those steps. If he's saying come with
11 me to my apartment and he's taking her at that
12 particular time, then that's a different scenario
13 because if - - -

14 JUDGE RIVERA: Aren't you - - - aren't you
15 just really arguing that because he's not successful
16 on the attempt, it's not attempt?

17 MS. JAMIESON: Well, no. Because if he
18 tried to grab her and she pulled her hand away and
19 ran way, that would have been an attempted
20 kidnapping, right. I mean there's several cases that
21 said that.

22 CHIEF JUDGE LIPPMAN: What if he hands her
23 the keys and she takes it?

24 MS. JAMIESON: Right. But if he's relying
25 on her to on her own go to some location later on - -

1 - remember, Mr. Denson's going back to work.

2 CHIEF JUDGE LIPPMAN: If she's acquiescing,
3 she - - - acquiescing, she gets the key.

4 MS. JAMIESON: Well - - -

5 JUDGE RIVERA: The - - - the point of that
6 is you don't - - - you - - - you - - - your response
7 to me was no, if he had tried to grab her, but he's
8 trying to - - - to seduce her in a way that has
9 nothing to do with a - - - a physical limitation,
10 right. And I think that's the Chief Judge's point.

11 MS. JAMIESON: Right. So when you have
12 acquiescence as the mode to which you're going to try
13 to retr - - - restrain a person, or restrain a child,
14 rather, then the - - - the showing is different. I -
15 - - I think the intent of what the defendant wants to
16 do is very obvious when, you know, they make a grab
17 or they threaten a - - - a child, but we don't have
18 that.

19 JUDGE RIVERA: We don't know if it's going
20 to be - - - it's a ten-year-old who's not related to
21 him. Why's he giving her the keys to his home?

22 MS. JAMIESON: Well, I'm not saying that -
23 - -

24 JUDGE RIVERA: And he's not even going
25 home.

1 MS. JAMIESON: Right. Mr. Denson's
2 behavior here, I'm certainly not saying it's
3 condonable or that it was - - -

4 JUDGE RIVERA: No. I understand that.

5 MS. JAMIESON: Right. And not even that
6 it's not criminal. He could - - - he was probably
7 rightfully convicted of endangering the welfare of a
8 child. But what this wasn't was an attempted
9 kidnapping. He simply did not take the steps here,
10 and furthermore - - -

11 JUDGE STEIN: In this case, which is the
12 final step that gets him dangerously close?

13 MS. JAMIESON: I think if she's at his
14 apartment. She gets to the - - -

15 JUDGE STEIN: She has to actually get to
16 his apartment?

17 MS. JAMIESON: She gets to the apartment,
18 then I think we have an attempted kidnapping.

19 CHIEF JUDGE LIPPMAN: Not a kid - - - not a
20 kidnapping?

21 JUDGE STEIN: So then you have a
22 kidnapping?

23 MS. JAMIESON: It's possible, depending on
24 what the circumstances, it may be a kidnapping there.
25 But yes, that would be - - -

1 JUDGE RIVERA: How - - - how - - - how
2 close does she have to get? Does she have to walk in
3 the door? Does she have to be turning the key? Does
4 she have to be at the corner a block away? How
5 close?

6 MS. JAMIESON: I would say that if she - -
7 - if - - - if she gets close to there, even if she
8 makes movements and she gets on a bus or tries to do
9 something - - -

10 JUDGE RIVERA: Makes an effort to actually
11 - - -

12 MS. JAMIESON: - - - to try to get to that
13 location, then we have an attempted kidnapping. But
14 here, where all we have is the offer and she
15 immediately rejects it, then we - - - we haven't
16 gotten close enough.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 Thanks.

19 MS. JAMIESON: Thank you.

20 CHIEF JUDGE LIPPMAN: Thank you both.
21 Appreciate it.

22 (Court is adjourned)

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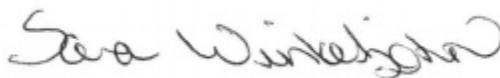
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Raymond Denson, No. 130 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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