

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

PEOPLE,

Respondent,

-against-

No. 147

CHRISTOPHER E. WALKER,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
September 17, 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:

TIMOTHY W. HOOVER, ESQ.  
PHILLIPS LYTTLE LLP  
Attorneys for Appellant  
One Canalside  
125 Main Street  
Buffalo, NY 14203

GEOFFREY KAEUPER, ADA  
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Respondent  
47 Fitzhugh Street S #4  
Rochester, NY 14614

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 147, People v.  
2 Walker.

3 Counsel, you want any rebuttal time?

4 MR. HOOVER: Two minutes for rebuttal, Your  
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go  
7 ahead, counsel.

8 MR. HOOVER: May it please the court, Tim  
9 Hoover of Phillips Lytle, counsel for appellant Chris  
10 Walker. In this defensive other case, the delivery  
11 of the form non-mandatory CJI initial aggressor  
12 instruction was a misstatement of New York law,  
13 confused the jury, and is reversible error.

14 CHIEF JUDGE LIPPMAN: How did it confuse  
15 the jury?

16 MR. HOOVER: Judge, well, first of all, it  
17 was inaccurate, and it allowed the jury to convict on  
18 at least one of two erroneous bases. First, the jury  
19 was told they had to decide who the initial aggressor  
20 was, and they could conclude that Mr. Walker was,  
21 even though he couldn't be under New York law. The  
22 second - - -

23 CHIEF JUDGE LIPPMAN: Meaning if he's a  
24 Good Samaritan, ev - - - even if he was the initial  
25 aggressor, it's a different situation?

1 MR. HOOVER: Correct. New York's not an  
2 alter ego state. The court has Judge Jones reason -  
3 - -

4 CHIEF JUDGE LIPPMAN: So if he believed  
5 that someone was - - - his whoever-it-was was in  
6 imminent danger, you know, if that was his  
7 understanding, that would have been okay, and you're  
8 saying that the - - - the charge doesn't make that  
9 clear, at the very least?

10 MR. HOOVER: Absolutely, it doesn't  
11 explicate, as the CPL requires it to - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. HOOVER: - - - the appropriate legal  
14 principles, and we get that from Judge Jones'  
15 decision in Melendez; we get that from the People's  
16 brief and concession at page 12 where they say the  
17 initial aggressor is never the - - - the intervenor.  
18 The - - - the limited application - - - and I'm  
19 referring to Judge Jones' decision so much because  
20 it's the lead decision.

21 JUDGE ABDUS-SALAAM: But what about the  
22 case, counsel, where the intervenor was there at the  
23 beginning of the altercation and saw what was going  
24 on, or maybe he should have known what was going on,  
25 and then jumps in? Is that - - - does that make that

1 person the initial aggressor at that point?

2 MR. HOOVER: It makes - - - it doesn't make  
3 them the initial aggressor, but it makes the concept  
4 that they're not legally allowed to - - - or they're  
5 not justified in intervening in that circumstance.  
6 That's - - - as Judge Jones says, the extremely  
7 limited application is that the def - - - the  
8 intervenor was present or initiated the - - - the  
9 contact at the outset or had reason to know. So in  
10 your question, the intervenor would have had reason  
11 to know and wouldn't have been privileged to  
12 intervene. In addition, their acts - - - actions  
13 wouldn't be reasonable, which is - - - which is the  
14 touchstone. But getting back to the second way - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. HOOVER: - - - it allowed the jury to  
17 go astray, the - - - the People made very clear here  
18 that they wanted exactly what I'm talking about,  
19 these two theories, to go to the jur - - - jury.  
20 They argued in avoiding the trial order of dismissal  
21 at 518 of the appendix that if the brother was the  
22 initial aggressor, then Mr. Walker would be guilty,  
23 but they also paired it with this acting in concert  
24 theory to make clear - - - really, it's kind of code  
25 for alter ego - - - that, look, if one of the two

1 people, the brother or the woman that were on the  
2 porch and part of the initial scene or fight - - -  
3 which, by the way, no one says Mr. Walker was part  
4 of, different from your question. If one of them was  
5 the initial aggressor, look at this alter eg - - -  
6 look at this acting-in-concert language and you can  
7 use that to convict.

8 And that's what the ADA hammers home in  
9 closing at page 616 of the appendix, says, "Consider  
10 this initial aggressor defense" - - - of course it's  
11 not a defense, it's an exception to the - - - the  
12 applicable defense - - - "How did the argument begin,  
13 how did defendant and his accomplices get on the  
14 porch". So the - - - the People got the best of both  
15 worlds. They got this instruction that was wrong on  
16 the law, and then they paired it up with their alt -  
17 - - their acting-in-concert theory to lead the jury  
18 astray with no different explication of - - -

19 JUDGE PIGOTT: I - - - I - - - I got - - -  
20 I lost you, because in reading the charge and  
21 knowing, you know, how this whole thing unfolded, it  
22 seemed like, you know, he's - - - he's coming there  
23 to defend his brother, right?

24 MR. HOOVER: Absolutely.

25 JUDGE PIGOTT: All right, and - - - but all

1 of the testimony was that this guy, this sixty-year-  
2 old guy, was - - - you know, they were kicking him  
3 off the porch and - - - and everything else. Doesn't  
4 all that factor in to what the judge is ultimately  
5 going to charge?

6 MR. HOOVER: It - - - it - - - it doesn't  
7 give - - - it doesn't let the judge charge initial  
8 aggressor in defense of another because the concept  
9 has no legal applicability.

10 Now, the other facts - - - and by the way,  
11 many of the prosecution witnesses say they didn't see  
12 Mr. Walker kick him after the fact, and the person  
13 who - - - the - - - the decedent here had a blood  
14 alcohol content of 0.19, was high on cocaine, there  
15 was testimony that - - - that he had a hammer, which  
16 is why Mr. Walker comes down the street to intervene.  
17 But all of those actions, Judge, go the reasonable -  
18 - - reasonableness of the intervention.

19 JUDGE PIGOTT: Um-hum.

20 MR. HOOVER: The - - - the idea of  
21 defending another. It has nothing to do with the  
22 initial aggressor concept, which the - - - the jury  
23 is told directly after - - - and this is at 646 of  
24 the appendix, they're given the general justification  
25 principles, and then they're told but if he's the

1 initial aggressor, he can't be justified. There - -  
2 - there's no - - - there's no defense.

3 JUDGE PIGOTT: Are you saying there is no  
4 way - - - there is no - - - there is no way to  
5 construe the evidence to establish that he was the  
6 initial aggressor?

7 MR. HOOVER: I'm absolutely saying that,  
8 Judge. Both - - - both because of what New York law  
9 is - - -

10 JUDGE PIGOTT: Um-hum.

11 MR. HOOVER: - - - and because there's no  
12 way to con - - - to construe that that he was not  
13 part of - - - so - - - so both he - - - he was not  
14 the initial aggressor, he didn't initiate the fight,  
15 and there's no testimony that he was present at - - -  
16 at its inception.

17 JUDGE PIGOTT: Right, but - - -

18 JUDGE FAHEY: Yeah, but he doesn't have to  
19 be, to be an intervenor, be present at the - - - at -  
20 - - at the initial inception, and - - - and that's  
21 why - - - see, the justification defense, the charge  
22 that was given was exactly what the - - - the PJ - -  
23 - the CJJ has, and the initial aggressor language.  
24 The real question for us is, should that language be  
25 changed if that language is wrong, and then are you

1 entitled to a new trial as a result of that. To  
2 argue that - - - that the trial should be thrown out  
3 is an entirely other - - - other issue, I think.

4 MR. HOOVER: I guess I would disagree. So  
5 - - - so - - - it is the pattern language.

6 JUDGE FAHEY: Um-hum.

7 MR. HOOVER: Judge Jones' decision says the  
8 language, it was incomprehensible in that grand jury  
9 context.

10 JUDGE FAHEY: Right.

11 MR. HOOVER: The New York City Bar  
12 Association says going back seven years, after the  
13 trial but fairly shortly after, that the language  
14 doesn't appropriately state New York law. It's  
15 inconsistent - - -

16 CHIEF JUDGE LIPPMAN: So there could be an  
17 explanation on the language beyond whatever the  
18 standard language is that would have made thi - - -  
19 this okay?

20 MR. HOOVER: There absolutely could. So -  
21 - - so out requ - - - the - - - the - - - the request  
22 was don't charge it; the judge did charge it. On  
23 remand, the trial judge, under the court's guidance,  
24 could not charge it or as - - - as long as the  
25 statement of law is accurate - - -

1 CHIEF JUDGE LIPPMAN: Straightens out.

2 MR. HOOVER: It straightens out, which - -  
3 - which would be something along the lines of the - -  
4 - the defendant is not the initial aggressor with  
5 regard to assessing defense of another.

6 JUDGE PIGOTT: That's where I'm - - -  
7 that's where I'm losing you. I - - - I get that the  
8 - - - the - - - the two that went to the store first  
9 and came back, you know, were the initial aggressors  
10 against the victim here. But does that mean that  
11 once that happens, there can be no other initial  
12 aggressors, in your view?

13 MR. HOOVER: As far as defense of another,  
14 that is what I'm saying. There - - - there's only  
15 one - - - and this is the People's brief at page 12 -  
16 - - there's only one initial aggressor with regard to  
17 a defense of another scenario, and it's one of the  
18 original - - -

19 JUDGE FAHEY: No, there could - - - could  
20 be two ways. One is a subjective way; he comes up  
21 and says, yeah, I'm going to help my brother beat on  
22 you - - - this is the guy with the hammer, Simmons,  
23 who's killed. Or another one says, you're beating up  
24 my brother, stop, and - - - and you're assuming that  
25 he was the initial aggressor - - - which he has a

1 subjective right to do; that's what the charge should  
2 say - - - and that therefore he's - - - the  
3 justification defense applies and he doesn't have the  
4 initial aggressor problem.

5 MR. HOOVER: I agree. In your first  
6 scenario, he - - - he ultimately is not justified  
7 because his actions aren't reasonable.

8 JUDGE FAHEY: Um-hum.

9 MR. HOOVER: There - - - there's a fight  
10 where, you know - - -

11 JUDGE FAHEY: Exactly.

12 MR. HOOVER: - - - my brother's beating on  
13 you - - -

14 JUDGE FAHEY: Justification - - -

15 MR. HOOVER: - - - and I'm going to jump  
16 in.

17 JUDGE FAHEY: Justification as a defense -  
18 - -

19 MR. HOOVER: He loses - - -

20 JUDGE FAHEY: - - - doesn't apply to the  
21 first scenario. He loses on that. But on the second  
22 scenario, if he subjectively believes it and  
23 objectively, if a reasonable person would believe it,  
24 then that - - - that - - - that initial aggressor  
25 exception would not apply to his justification

1 defense.

2 MR. HOOVER: I - - - I - - - I agree - - -

3 JUDGE FAHEY: That's your argument, right?

4 MR. HOOVER: That is my argument. And, you  
5 know, the - - - the - - - the judge, the court - - -  
6 the trial court has an obligation under the CPL not -  
7 - - I mean, it is a form pattern instruction. This  
8 court has reversed or vacated convict - - - or excuse  
9 me, verdicts - - - and if I could finish, Judge; I  
10 see my light's on.

11 CHIEF JUDGE LIPPMAN: Yeah, finish your  
12 thought. Go ahead.

13 MR. HOOVER: It - - - it's - - - it's not  
14 necessary. I mean we have an inaccurate statement of  
15 the law that's confusing. This court, and it's a  
16 2007 case, Boyd, a civil case, Judge Smith - - -  
17 there the form instruction was accurate, it wasn't  
18 legally wrong, but there was still the possibility of  
19 confusion. Here we have inaccuracy, confusion - - -

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. HOOVER: - - - the jury not getting the  
22 right legal principles.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 Thanks, counsel. You'll have your rebuttal.

25 MR. KAEUPER: Good afternoon, Your Honors.

1 May it please the court, Geoffrey Kaeuper for the  
2 People.

3 CHIEF JUDGE LIPPMAN: Counsel, why isn't it  
4 confusing in light of the - - - the Good Samaritan  
5 law?

6 MR. KAEUPER: Okay. Well, if - - - if I  
7 can - - -

8 CHIEF JUDGE LIPPMAN: You know, if he - - -  
9 if he comes, and - - - and to his knowledge there is  
10 - - - the - - - he's acting to protect his brother or  
11 whoever it is, wouldn't that - - - that charge that  
12 was read provide a - - - a wrong view of the law to  
13 the - - - to the jury?

14 MR. KAEUPER: No. No, and I think that's -  
15 - -

16 CHIEF JUDGE LIPPMAN: Is - - - does it  
17 matter if his - - - vis-a-vis his role as the - - -  
18 the Good Samaritan.

19 MR. KAEUPER: Um-hum.

20 CHIEF JUDGE LIPPMAN: It doesn't matter  
21 whether he's the first aggressor, does it? Or he  
22 takes the first - - - if he takes - - -

23 MR. KAEUPER: It - - - it matters whether  
24 he's the first one to use deadly force as opposed -  
25 - - he - - - you can - - - you can intervene in a - -

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

-

CHIEF JUDGE LIPPMAN: If you think the - -  
- the brother is in imminent danger?

MR. KAEUPER: If - - - if that's the case.

CHIEF JUDGE LIPPMAN: If - - - assume  
that's the case.

MR. KAEUPER: Sure. Sure. Yeah. No, if -  
- - if - - - if - - -

CHIEF JUDGE LIPPMAN: How does that charge  
guid - - - guide them, the jury?

MR. KAEUPER: Right. If - - - there - - -  
there's one initial aggressor in the encounter;  
there's one initial aggressor. Or - - - or two  
depending on non-deadly versus deadly force. But - -  
- but, I mean, the defendant keeps trying to - - - to  
make this something you'd have to view - - -

JUDGE ABDUS-SALAAM: But, counsel - - - Mr.  
Kaeuper, before - - -

MR. KAEUPER: - - - in binary - - -

JUDGE ABDUS-SALAAM: - - - you go on.

MR. KAEUPER: I beg your - - -

JUDGE ABDUS-SALAAM: What do - - - what do  
you mean by that? One, if there is deadly force, or  
two, non-deadly force? What if there are two deadly  
forces? I guess you can't have that unless both

1 people get killed, but - - -

2 MR. KAEUPER: Well - - -

3 JUDGE ABDUS-SALAAM: - - - what if - - -

4 what if someone, the person who is already on the  
5 scene, is - - - like this - - - in this particular  
6 case, has got a hammer, and then the intervenor comes  
7 up and he's got a weapon too. So what do you say  
8 there?

9 MR. KAEUPER: Right.

10 JUDGE ABDUS-SALAAM: Is that two aggressors  
11 or one?

12 MR. KAEUPER: There's one initial aggressor  
13 there; one - - - one deadly - - -

14 JUDGE ABDUS-SALAAM: The one with the  
15 hammer.

16 MR. KAEUPER: - - - initial aggressor of  
17 deadly force. And under that circumstance, which - -  
18 - which would be - - - if the - - - if the jury had  
19 bought defendant's testimony, right. So I come up -  
20 - - upon the scene where this guy is hitting my  
21 brother with a hammer. At that point, the defendant  
22 then is not the initial aggressor. But there's a  
23 reasonable view of the evidence here - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but does the  
25 charge allow the jury to understand the law in that

1 exact context that you're talking about?

2 MR. KAEUPER: Yes, be - - - because the  
3 defense requested that language for McWilliams and  
4 the court agreed and gave that. And that gets me to  
5 - - -

6 CHIEF JUDGE LIPPMAN: Don't you think there  
7 needed to be a clarification in the particular  
8 context that we're talking about now, assuming the -  
9 - - the other guy is using the hammer, he thinks  
10 brother is in imminent danger, in that circum - - -  
11 does - - - doesn't the judge have to explain, if  
12 that's the case, it's a little different scenario?

13 MR. KAEUPER: I - - - I think the judge's -  
14 - -

15 CHIEF JUDGE LIPPMAN: Given the Good  
16 Samaritan law?

17 MR. KAEUPER: No, I think the judge's  
18 instruction is correct on the law on that point.  
19 That is - - -

20 CHIEF JUDGE LIPPMAN: It is? How - - - how  
21 so?

22 MR. KAEUPER: That is - - - that - - - the  
23 - - - the - - - the confusion - - - if I can - - - if  
24 I can explain what - - - why I think - - - why I  
25 think the confusion that the defendant is finding is

1 created, which is something that's not in the statute  
2 at all; it's not in the instruction. And that is  
3 this - - - this idea that initial aggressor has to be  
4 something you do in a binary thing. So the - - - the  
5 defense says, well, they don't know, is it initial  
6 aggressor vis-a-vis the victim? Is it initial  
7 aggressor vis-a-vis the third party? That's - - -  
8 that's in your - - - that - - - that has - - - nobody  
9 would be confused by that because there's nothing in  
10 the instruction that would lead you to think that.

11 The - - - the - - - the statute would then have to  
12 say, unless the actor is the initial aggressor as to  
13 the victim or as to the - - - or, you know - - - it  
14 says nothing about that. It says the - - - the - - -  
15 that the defendant can use the justification - - -

16 CHIEF JUDGE LIPPMAN: Well, isn't there a  
17 difference between a three-way kind of situation and  
18 a two-way situation?

19 MR. KAEUPER: It ch - - - factually, it  
20 changes how you apply the law, but it doesn't change  
21 the law.

22 CHIEF JUDGE LIPPMAN: And you don't think  
23 that's confusing to - - - to a jury?

24 MR. KAEUPER: I - - - I don't think so, and  
25 I think the proof here is - - - is the fact that the

1 jury wasn't confused with it. They were able to ask  
2 - - - they were confused about intent.

3 CHIEF JUDGE LIPPMAN: May - - - maybe they  
4 were and that's why they came out the way they did.

5 MR. KAEUPER: I - - - I think - - - I think  
6 that - - - I mean, obviously we don't know,  
7 ultimately, but - - -

8 CHIEF JUDGE LIPPMAN: Right.

9 MR. KAEUPER: - - - but - - - but they  
10 asked no question about this, whereas they asked, you  
11 know, wait, with intent, do we - - - do we - - -  
12 where do - - - what - - - at what point do we - - -  
13 do we have to measure intent? If - - - if they were  
14 sitting there thinking, as the defense said, oh, do  
15 we have to measure initial aggressor against the  
16 victim or a third-party against the victim or - - -  
17 you know, presumably they're going to ask a question  
18 about that.

19 CHIEF JUDGE LIPPMAN: Maybe they didn't - -  
20 - may - - - maybe they didn't think there was any  
21 problem.

22 MR. KAEUPER: Yeah.

23 CHIEF JUDGE LIPPMAN: That they - - -

24 MR. KAEUPER: Perhaps.

25 CHIEF JUDGE LIPPMAN: - - - they just said

1 first aggressor, that's it, doesn't matter.

2 MR. KAEUPER: I - - - I think - - - I think  
3 we can assume that they understood the - - - the  
4 language in the ordinary sense of what it was, which  
5 says nothing about some sort of binary - - - singling  
6 out a binary relation - - -

7 CHIEF JUDGE LIPPMAN: That - - - but that -  
8 - - that's the point. The ordinary reading of it  
9 would be, oh, he's the first aggressor; that's the  
10 end of the story.

11 MR. KAEUPER: No, no. The - - - the - - -  
12 the - - -

13 CHIEF JUDGE LIPPMAN: No?

14 MR. KAEUPER: No, the - - - the - - - a - -  
15 - a normal reading of - - - of the charge that the  
16 judge gives is, if he's the first one to come in with  
17 deadly force, then he's the initial aggressor. If  
18 he's the first person - - - if he comes in to a  
19 situation where there's already deadly force being  
20 used, then he's not the initial aggressor. That's -  
21 - - I mean that's the factual issue that the jury is  
22 - - - is - - - is - - - is wrestling with. There's  
23 ultimately the question of - - - of did the - - - the  
24 victim have the hammer, you know.

25 JUDGE FAHEY: I guess, Mr. Kaeuper, the

1           problem I see in the way the charge is written now,  
2           and I agree with you that Judge Valentino read the  
3           law as - - - as he thought it was; it wasn't like he  
4           misread it or anything like that. He - - - he read  
5           the way the CJI charge - - - charge is actually  
6           written. But it seems that in this situation that  
7           the initial aggressor - - - we don't know objectively  
8           whether or not Simmons or the brother, whatever his  
9           name was, were the initial aggressor. Let's assume  
10          we don't know.

11                       The brother comes up and may subjectively  
12          believe that his brother is being attacked and was  
13          not the initial aggressor, be justified in his belief  
14          if an objective person would come by and sink - - -  
15          think the same thing. But the way I read the charge  
16          is the judge doesn't set out that three-prong  
17          analysis. And - - - and I think it's - - - it - - -  
18          in looking at it, and I - - - I'm concerned that the  
19          charge itself is - - - is defective, not that there  
20          was some defect in the trial or the case or they went  
21          to the wrong charge; I don't see that here. What I  
22          see is the charge itself is - - - is more of a  
23          concern.

24                       MR. KAEUPER: Okay. Well, I mean, I - - -  
25          I - - - I think the charge accurately states the law,

1 but if I can make a different point, if you're - - -  
2 you know - - -

3 JUDGE FAHEY: Go ahead.

4 MR. KAEUPER: - - - and that is that this  
5 is absolutely not preserved. There is no question  
6 this is not preserved. The defense makes an - - - an  
7 argument, I want no initial aggressor instruction;  
8 the court says no, I'm going to give an initial  
9 restructure - - - initial aggressor - - -

10 CHIEF JUDGE LIPPMAN: Doesn't he say it's  
11 confusing?

12 MR. KAEUPER: He says it's confusing, but -  
13 - -

14 CHIEF JUDGE LIPPMAN: So what else - - -  
15 what else do you need to say?

16 MR. KAEUPER: You have to say, and I want  
17 you to add something. And what did he - - - and what  
18 does he do? He says I want you to add something,  
19 McWilliams, and the judge says, okay, I'll add that.  
20 There's nothing else asked for. The defe - - - if -  
21 - - if - - -

22 CHIEF JUDGE LIPPMAN: What - - - what - - -  
23 what would the judge think when he's saying that it's  
24 confusing?

25 MR. KAEUPER: Exactly what the defense is

1 saying - - -

2 CHIEF JUDGE LIPPMAN: What would the judge

3 - - - what would the - - -

4 MR. KAEUPER: - - - it's confusing so I

5 don't want you to give it.

6 CHIEF JUDGE LIPPMAN: What would the judge

7 think he is saying?

8 MR. KAEUPER: The - - -

9 CHIEF JUDGE LIPPMAN: Just that the charge  
10 itself is - - - that he's not dealing with this issue  
11 that we've been asking you about?

12 MR. KAEUPER: Absolutely not. The jud - -  
13 - absolutely not. The question - - - the question  
14 is, I want you to get the initial jury instruction -  
15 - - initial aggressor instruction out entirely. I  
16 don't want you to read it.

17 CHIEF JUDGE LIPPMAN: How much do we  
18 stretch the preservation rule where that - - - that I  
19 don't think the - - - I mean, I don't think the  
20 average person will think he's confusing because that  
21 charge that's in the CJI is confusing. This is a  
22 complicated event that's happening.

23 MR. KAEUPER: You have - - - you have to  
24 ask - - -

25 JUDGE STEIN: Didn't the defense counsel,

1 after the court said they - - - it was going to give  
2 the initial aggressor charge, say that, "any language  
3 regarding initial aggressor should be omitted  
4 entirely" because he was "concerned about whether or  
5 not there would be confusion as to which person that  
6 they need to look at in terms of being an initial  
7 aggressor." That's exactly what he's arguing now;  
8 isn't it?

9 MR. KAEUPER: No, no. Because now he's  
10 arguing, you should have added something in to the  
11 charge, which he never asked before. He never - - -  
12 he never said, I want you to - - - to give a further  
13 clarification.

14 JUDGE FAHEY: You're saying that the only  
15 way he could have preserved it was not - - - not to  
16 say I don't want it at all or not to say it is  
17 confusing, but say, I want you to modify it and  
18 here's the language I want you to put in?

19 MR. KAEUPER: Yeah, it's confusing so you  
20 need to do something. But not - - - you're  
21 confusing, so - - - I mean he says, it's confusing so  
22 you need to clarify with McWilliams. That's what the  
23 court does. So I mean, the judge didn't just - - -

24 JUDGE RIVERA: And - - - and if he had  
25 requested that and the judge had made some other

1 modification, would he then preserve his position  
2 because he didn't get what he wanted?

3 MR. KAEUPER: I mean - - -

4 JUDGE RIVERA: Or does he then again have  
5 to say that doesn't work, I still want the McWilliams  
6 language?

7 MR. KAEUPER: If - - - if he asks for  
8 specific relief and the judge gives some other  
9 relief, I mean, I guess - - - I guess that gets a  
10 little - - - a little hairy. I - - - I would think  
11 probably if you - - - if you request the relief and  
12 the judge denies it, that that's preserved. He  
13 didn't request this at all. Very definitely did not  
14 ever ask the court to give further instructions;  
15 never asked - - - never mentioned Melendez; never  
16 said anything about - - - about - - -

17 CHIEF JUDGE LIPPMAN: You don't think that  
18 the judge gets the point as to what - - - you know,  
19 that he's complaining about?

20 MR. KAEUPER: I think the judge does get  
21 the point.

22 CHIEF JUDGE LIPPMAN: That's not - - -

23 MR. KAEUPER: That's what he's saying. He  
24 says exactly - - -

25 CHIEF JUDGE LIPPMAN: That's - - - that's

1 not - - - that's not preservation?

2 MR. KAEUPER: No, he's asking I want you to  
3 not read the - - - the initial aggressor instruction  
4 at all, or I want you to read the initial aggressor  
5 instructions - - -

6 CHIEF JUDGE LIPPMAN: But he's telling him  
7 exactly - - -

8 MR. KAEUPER: - - - plus McWilliams.

9 CHIEF JUDGE LIPPMAN: - - - what's  
10 confusing about it.

11 MR. KAEUPER: Well, but - - - but he can -  
12 - - I mean making an argument in which you say  
13 something's confusing doesn't preserve any argument  
14 that would also rely on something being confusing.

15 CHIEF JUDGE LIPPMAN: Pretty strict view of  
16 preservation.

17 MR. KAEUPER: I think that's exactly what's  
18 in 470.05(2). You - - - you have to direct the judge  
19 to what you think is the error. He doesn't just - -  
20 -

21 CHIEF JUDGE LIPPMAN: You don't think he  
22 directed him - - -

23 MR. KAEUPER: No.

24 CHIEF JUDGE LIPPMAN: - - - to what the  
25 error was?

1 MR. KAEUPER: No, I - - - I mean, he says  
2 you shouldn't have the initial aggressor instruction  
3 at all. He says, if you're going to have it - - -

4 CHIEF JUDGE LIPPMAN: But then he explains  
5 that you can't tell in - - - in this context.

6 MR. KAEUPER: So he can ask - - - if he  
7 wants to ask, I want you to clarify this - - -

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. KAEUPER: - - - but he absolutely never  
10 does that.

11 CHIEF JUDGE LIPPMAN: All right.

12 JUDGE ABDUS-SALAAM: So he had to come up  
13 with his own charge, and instead he came up with just  
14 add McWilliams?

15 MR. KAEUPER: Yeah. Yeah, I mean it - - -  
16 that was - - - that's what he - - - oh, well, I mean,  
17 he could - - - I mean, even - - - he doesn't even  
18 necessary - - - I mean, he could even just say,  
19 Judge, this is so confusing you need to add  
20 something. Even if he said that, that would preserve  
21 it. But he doesn't even say that.

22 CHIEF JUDGE LIPPMAN: Okay, thanks.

23 MR. KAEUPER: Thank you.

24 CHIEF JUDGE LIPPMAN: Your rebuttal,  
25 counsel.

1                   MR. HOOVER: As Judge Stein alluded to,  
2                   this is the gold standard of a preserved objection to  
3                   a jury charge. So on the Friday while they're having  
4                   the conference before the February holiday weekend,  
5                   defense counsel doesn't just say stuff; he hands up  
6                   the charge he wants without the initial aggressor  
7                   language, which is exactly what we're arguing on  
8                   appeal. He - - - the - - - the initial aggressor  
9                   language should not been given in defense of another,  
10                  545 of the record. He - - - he makes his legal  
11                  argument at 558 of the appendix. They come back over  
12                  the weekend. And by the way, no doubt here; everyone  
13                  agrees that defense of another had to be charged to  
14                  the jury.

15                  The trial court marks it as 569, Court  
16                  Exhibit 1, further argument by defense counsel about  
17                  why you shouldn't give it. And then the trial judge  
18                  says at 574, it's preserved for the record: I  
19                  understand what you asked me to do; I'm not going to  
20                  do it. And then by the way, McWilliams is a - - - a  
21                  separate part of the - - - the pattern instruction  
22                  that was erroneous as part of his alternate request.  
23                  It was not, okay, that takes care of everything.  
24                  There's nothing in this court's jurisprudence on  
25                  preservation that you need to come up with multiple

1 different scenarios and options.

2 CHIEF JUDGE LIPPMAN: But Mr. Kaeuper's - -  
3 - Kaeuper's point, though, is that you said don't  
4 charge initial aggressor, and the judge said, I'm  
5 going to. That's the only thing that was in front of  
6 the Appellate Division.

7 MR. HOOVER: Correct. And - - - and the  
8 Appellate Division, of course, found it was  
9 preserved, and that's exactly what we're arguing  
10 here, that the - - - the init - - - no initial  
11 aggressor language should have been given at all.

12 JUDGE PIGOTT: That's the only thing we  
13 should be deciding; not Melendez, not anything like  
14 that?

15 MR. HOOVER: Well, that - - - that's - - -  
16 that's all taken up within because Melend - - - the -  
17 - - the objection as to why it's confusing is based  
18 on an explanation of New York law as articulated in  
19 Melendez in the model charge.

20 CHIEF JUDGE LIPPMAN: Well, the idea is  
21 that the charge has to be precise enough to convey  
22 what needs to be conveyed about the law.

23 MR. HOOVER: That's absolutely this court's  
24 - - -

25 CHIEF JUDGE LIPPMAN: And that's your

1 argument; isn't it?

2 MR. HOOVER: That's absolutely this court's  
3 jurisprudence in CPL 300.10(2). So when my - - - my  
4 learned opponent says, you know, the jury could have  
5 figured it out in there, it's the trial judge's  
6 obligation to give them that clear instruction that  
7 he says so eloquently in his brief at page 12, the  
8 intervenor cannot be the initial aggressor. The jury  
9 was never told that. They weren't - - -

10 JUDGE PIGOTT: Well, you - - - you get the  
11 impression when you look at all the facts that at  
12 some point when - - - after - - - when Simmons is  
13 getting rolled off the porch, I mean, conceivably  
14 they could say at that point when he jumped in and -  
15 - - and - - - and further beat the guy, that he was  
16 an aggressor.

17 MR. HOOVER: Most of the prosecution  
18 witnesses, Judge, said that Mr. Walker did not kick  
19 at all.

20 JUDGE PIGOTT: Right.

21 MR. HOOVER: Had nothing to do with the  
22 kicking.

23 JUDGE PIGOTT: But he was part of the - - -  
24 part of the - - - the after-scene, so to speak, after  
25 the initial fight on the porch.

1                   MR. HOOVER:  But - - - but - - - but the  
2                   stabbing that we say is the justified defense of  
3                   another had already occurred, so that - - - that's  
4                   what he's charged with there.  And by the way, not to  
5                   be a - - - a broken - - -

6                   CHIEF JUDGE LIPPMAN:  Finish up, counsel.  
7                   Go ahead.

8                   MR. HOOVER:  Yes.  Yes, Your Honor.

9                   CHIEF JUDGE LIPPMAN:  Last thought.

10                  MR. HOOVER:  The - - - the People are the  
11                  ones that really wanted this instruction because it  
12                  dovetails with their acting-in-concert theory.  Why  
13                  do they need that theory when Mr. Walker admits he's  
14                  the one that did the stabbing?  Absolutely to  
15                  eliminate and - - - and to use the initial aggressor  
16                  to defeat the justification defense.

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

19                  MR. HOOVER:  Thank you, Your Honors.

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

22                  (Court is adjourned)

23

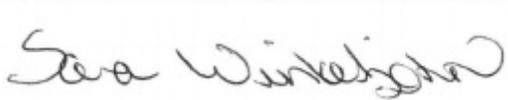
24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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. Christopher E. Walker, No. 147 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: September 24, 2015