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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

THOMAS JACKSON, (Papers Sealed)

No. 22

Appellant.

20 Eagle Street
Albany, New York
February 8, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 22, the People of the
3 State of New York v. Thomas Jackson.

4 Good afternoon, sir.

5 MR. KESSLER: Good afternoon, Your Honor. I'm
6 Mitch Kessler, may it please the court. I - - - I
7 represent Thomas Jackson. I'd like to reserve two minutes
8 for rebuttal.

9 CHIEF JUDGE DIFIORE: Yes, sir.

10 MR. KESSLER: Thank you very much.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. KESSLER: I'll start with the first issue
13 raised in the brief, which is whether or not the Sandoval
14 error was harmless.

15 JUDGE STEIN: How was that preserved if it - - -

16 MR. KESSLER: How was it preserved?

17 JUDGE STEIN: Yeah. Did - - - did you make an
18 objection to the Sandoval - - -

19 MR. KESSLER: The defense counsel said he
20 objected to any use of that adjudication. And the court -
21 - -

22 JUDGE STEIN: So what - - -

23 JUDGE RIVERA: And then the court ruled, and did
24 he object to the ruling?

25 MR. KESSLER: Counsel didn't say anything at that

1 point. But - - -

2 JUDGE RIVERA: Okay. So how is it preserved?

3 MR. KESSLER: It's preserved - - -

4 JUDGE RIVERA: How has the court - - - how has
5 the court been put on notice that its - - - its final
6 determination on that proffer for the juvenile adjudication
7 about the - - - the robbery of the bike, how is the court
8 put on notice that it may have rendered an erroneous ruling
9 and it should reconsider what it did?

10 MR. KESSLER: Because defense counsel argued
11 before the court made the ruling that it was not a proper
12 subject of impeachment.

13 JUDGE WILSON: Well, defense counsel actually
14 wanted the entire - - - not - - - there are two things at
15 play here, right. One is the fact of the disposition and
16 the other the underlying facts.

17 MR. KESSLER: That's correct.

18 JUDGE WILSON: Right. And defense counsel
19 objected to everything, correct.

20 MR. KESSLER: That's correct.

21 JUDGE WILSON: And the prosecutor, who I think,
22 correctly consistent with the law, said I'm not trying to
23 get into the fact of the adjudication, just the underlying
24 facts, right?

25 MR. KESSLER: That's not exactly what the

1 prosecutor said.

2 JUDGE WILSON: Okay.

3 MR. KESSLER: The prosecutor said it isn't
4 necessarily proper to allow - - - that she - - - basically
5 how she says not necessarily proper to allow in the fact of
6 the adjudication.

7 JUDGE WILSON: But the - - - it is proper to what
8 she wanted to get in was the fact that is it was - - - - -
9 - it was - - - he was - - - stole a bicycle, essentially.

10 MR. KESSLER: That's correct. But - - -

11 JUDGE WILSON: Right. And - - - and the judge -
12 - -

13 MR. KESSLER: But that's not what the proffer
14 said.

15 JUDGE WILSON: And then the - - - the judge then
16 said, well, here's what I'm going to do, a compromise, and
17 then he did exactly what the law doesn't allow. Was that
18 right?

19 MR. KESSLER: No.

20 JUDGE WILSON: That is he said I'm - - - I'm - -
21 -

22 MR. KESSLER: What happened was the People filed
23 a written proffer in which they wanted the adjudication,
24 the underlying facts, and the disposition to be fair game.
25 In Sandoval hearing, defense counsel argued - - -

1 JUDGE RIVERA: Now how is that? Their - - -
2 their proffer says - - - it doesn't say that. And it cites
3 the cases that don't allow that. How - - - how is that?

4 MR. KESSLER: Their proffer - - - well, I could -
5 - -

6 JUDGE RIVERA: No, no. Don't - - - don't - - -
7 please don't look it up. It's okay.

8 MR. KESSLER: My recollection is their proffer
9 said the - - - the defendant was found guilty of stealing a
10 bicycle, he was adjudicated a juvenile delinquent, and he
11 was placed on one year of probation. And they wanted to
12 use that information to impeach his credibility. And in
13 the Sandoval hearing, defense attorney said we object to
14 the use of the juvenile delinquency adjudication, the
15 underlying facts. The prosecution made a sort of - - -
16 they kind of hedged on whether it was outright inadmissible
17 to refer to the adjudication. They said it isn't
18 necessarily proper to use the adjudication.

19 JUDGE RIVERA: I guess the point is once the
20 judge renders a decision on the People's request - - -

21 MR. KESSLER: Yeah.

22 JUDGE RIVERA: Counsel did not - - - defense
23 counsel did not then object to the ruling; is that correct?

24 MR. KESSLER: That's correct. But that's like -
25 - -

1 JUDGE RIVERA: And so how is it preserved?

2 MR. KESSLER: It's preserved because counsel made
3 his position clear before the court's ruling, and the court
4 ruled on the ultimate question before it. And I don't
5 think the preservation doctrine requires so formalistic an
6 approach. That's like saying - - -

7 JUDGE RIVERA: Isn't that exactly what People v.
8 Cantave and - - - and People v. Hamlin require that you - -
9 -

10 MR. KESSLER: I - - - you - - -

11 JUDGE RIVERA: - - - that you present this to the
12 judge in time for the judge to cure, and if there's no
13 ruling what are you presenting? You're objecting to the
14 proffer but you need a ruling that you're objecting to to
15 be corrected.

16 MR. KESSLER: I don't think that's what this
17 court's precedent requires. I think we're getting back to
18 the old era where you had to take an exception to a court's
19 ruling which was eliminated when the legislature adopted
20 the current criminal procedure law in 1967. Defense
21 counsel made his position clear. The court ruled. That's
22 - - -

23 JUDGE ABDUS-SALAAM: Well, assuming - - -
24 assuming it was preserved, counsel - - -

25 MR. KESSLER: I'm sorry?

1 JUDGE ABDUS-SALAAM: Assuming it was preserved,
2 as you're arguing now, there were other - - - it was - - -
3 it was error, then, assuming arguendo that it was error,
4 and you're saying it's not harmless error, though.

5 MR. KESSLER: Right.

6 JUDGE ABDUS-SALAAM: And why is that?

7 MR. KESSLER: Well, if you - - - if you look
8 carefully at the record, you know, the defense was
9 vigorous. The defense was the first complainant, it was
10 consensual sex, and there were circumstances, there was
11 evidence that tended to support that inference. There was
12 evidence that called into question the credibility of her
13 claim of forcible rape. There was evidence showing a
14 motive to lie because she found out that my client had a
15 girlfriend, and maybe she was jealous and maybe that
16 prompted her to cry rape.

17 JUDGE ABDUS-SALAAM: But the - - - the rape - - -
18 the first case, the rape was immediately reported to the
19 hotel desk clerk.

20 MR. KESSLER: That's correct. And she made - - -

21 JUDGE ABDUS-SALAAM: So that was before - - -
22 before any other information, right?

23 MR. KESSLER: Actually, I - - - not necessarily.
24 I don't think the trial testimony really answered which
25 came first. I think there was some evidence, in fact, that

1 if you look at the timeline and the telephone records, I
2 think there was some evidence, in fact, that conversation -
3 - - the revelation that my client had a girlfriend might
4 have occurred before she reported it. And you also have
5 the false statement to the 911 operator that she had been
6 at the bar alone that night not mentioning - - -

7 JUDGE RIVERA: So - - - so - - -

8 MR. KESSLER: - - - the underage friend she
9 brought with her.

10 JUDGE RIVERA: So, counsel, under - - - under
11 Grant, what you had to establish is whether or not the
12 jury's deprived of any critical information. As - - - we
13 assume he would have testified.

14 MR. KESSLER: Yeah.

15 JUDGE RIVERA: So what's the critical information
16 his testimony would have provided? Because you've already
17 - - -

18 MR. KESSLER: That it was consensual.

19 JUDGE RIVERA: You've - - - you've highlighted
20 everything that's already out there at the trial.

21 MR. KESSLER: That - - -

22 JUDGE RIVERA: So what - - - what is the critical
23 information that the jury was deprived of by not having him
24 testify?

25 MR. KESSLER: That it was consensual. That's - -

1 -

2 JUDGE RIVERA: Both - - -

3 MR. KESSLER: No. The - - -

4 JUDGE RIVERA: - - - incidences?

5 MR. KESSLER: - - - first one.

6 JUDGE RIVERA: The first one.

7 MR. KESSLER: The sec - - - the defense to the
8 second one was that they never had sexual intercourse.

9 CHIEF JUDGE DIFIORE: Counsel, in your view, is
10 it more prejudicial for a jury to know that this young man
11 had a juvenile delinquency adjudication as a youth or to
12 know the specifics of the underlying commission of a
13 violent crime?

14 MR. KESSLER: I - - - I think you could say
15 either because if the jury hears this guy's an adult and he
16 was adjudicated a juvenile delinquent, the - - - you know,
17 a juror might naturally infer, oh, well, he's probably - -
18 - he's - - - this guy's been misbehaving for years. That's
19 where it comes from. The jury might draw an inference of
20 criminal propensity.

21 JUDGE STEIN: But under our Mol - - - Molineux
22 jurisprudence, we - - - we allow the underlying facts to
23 come in, don't we?

24 MR. KESSLER: If - - - if - - - you know,
25 assuming that it's otherwise proper.

1 JUDGE STEIN: Yes, I understand.

2 MR. KESSLER: Yes.

3 JUDGE STEIN: The balancing. So it's not just I
4 - - -

5 MR. KESSLER: All right. But here's what the
6 jury heard - - -

7 JUDGE STEIN: I was just trying to follow up on
8 the Chief Judge's question. Generally speaking, wouldn't -
9 - - wouldn't it arguably be more prejudicial to find out
10 about what he did as - - - as a juvenile than the fact
11 that, okay, well, he was - - - you know, he was
12 adjudicated?

13 MR. KESSLER: Oh, not in this instance. What did
14 he do? He stole a bicycle from another kid. Now back in
15 my day, you didn't get hauled into court for that. The
16 parents discussed it and the bicycle was returned, but now
17 every - - -

18 JUDGE RIVERA: Were there - - - was there
19 evidence of other bad acts that the court allowed or said
20 could be elicited if he testified?

21 MR. KESSLER: I believe so. The - - -

22 JUDGE RIVERA: So doesn't - - - doesn't the - - -
23 the theft of the bike - - - let's assume you're correct
24 about the way you've characterized the theft of the bike.
25 Doesn't that pale in comparison to the other bad acts?

1 MR. KESSLER: Not necessarily.

2 JUDGE FAHEY: Well - - -

3 JUDGE WILSON: Really? Didn't that include
4 sexual assault, for example?

5 MR. KESSLER: I'm sorry?

6 JUDGE WILSON: One of the - - - one of the ones
7 that was allowed was a sexual assault of a high school
8 student?

9 MR. KESSLER: Well - - -

10 JUDGE WILSON: In your day, how did that compare
11 to stealing a bike?

12 MR. KESSLER: Well, obviously, a sexual assault -
13 - - if that were allowed in, obviously, that would be very
14 prejudicial. But I don't believe that occurred. If that
15 had, I think I would have argued that - - -

16 JUDGE FAHEY: Let me ask - - - let me ask you
17 this. What - - - what rule are you asking us for? Are - -
18 - are you - - -

19 MR. KESSLER: It wasn't harmless.

20 JUDGE FAHEY: No. Let me finish. Let me just
21 get - - -

22 MR. KESSLER: Okay.

23 JUDGE FAHEY: Let me just get the point out here.
24 You're say - - - are you saying that a Sandoval error - - -
25 when defendant refuses to testify after - - - when

1 there's a Sandoval error that it can never be harmless and
2 that you get an automatic reversal?

3 MR. KESSLER: Oh, no. I don't - - - I didn't
4 make that argument.

5 JUDGE FAHEY: No. I'm asking you what rule are
6 you - - - are you - - - because that argument was made in
7 Grant, and I want to know if - - - if that's what you're
8 asking for.

9 MR. KESSLER: Oh, no. No. Absolutely not.

10 JUDGE FAHEY: What are you asking for?

11 MR. KESSLER: This is fact-specific. I'm asking
12 you that on this record - - -

13 JUDGE FAHEY: Um-hum.

14 MR. KESSLER: - - - you find that it wasn't
15 harmless.

16 JUDGE FAHEY: I see.

17 MR. KESSLER: I'm not - - - I'm not asking you to
18 - - - I know what the law is that - - - that this is a
19 trial error that's amenable to harmless error analysis.
20 I'm simply asking you to reject the ritualistic assertion
21 that the evidence of guilt was overwhelming. And, you
22 know, I've done over a hundred appeals from criminal trial
23 verdicts, and I have never once read in a prosecutor's
24 brief a concession that evidence of guilt was not
25 overwhelming. So - - -

1 CHIEF JUDGE DIFIORE: Thank you, sir.

2 MR. KESSLER: You know - - -

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. KESSLER: Okay.

5 JUDGE FAHEY: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel.

7 MR. WILLIS: Thank you, Your Honor; may it please
8 the court, Peter Willis for the Schenectady DA's office.
9 In this case, I think it's clear the judge's error was not
10 preserved. There was no objection after the Sandoval
11 compromise was issued.

12 JUDGE FAHEY: You'd be slicing it awful thin,
13 though, on preservation. You know, counsel has a good
14 point. It - - - you know, if that - - - if you stand up
15 and say I think this is wrong, it's a - - - it's a juvenile
16 delinquency, judge, and the judge - - - and the judge makes
17 the wrong ruling that - - - I - - - the way I read the
18 transcript, the prosecutor knew it was a wrong ruling right
19 then and there and tried to point the judge in the right
20 direction. He didn't take it. And the judge made an
21 error, and we went forward. You're saying he has to repeat
22 it afterwards, in essence, after he's made his objection.
23 That's - - - that could be a rule that we would come to
24 really regret on a number of other cases, it - - - it seems
25 to me.

1 MR. WILLIS: Well, I - - - I think that when
2 there's a compromise, when the prosecution says here are
3 all the facts and we'd like this and the court kind of, you
4 know, splits the difference and gives part of it, if the
5 defense still is objecting to that compromise, they have to
6 put it on the record that they think it's wrong. And in
7 this instan - - -

8 JUDGE FAHEY: Let's say it was preserved, though.
9 Was there any kind of minimal proffer made at all by the
10 defendant to say that - - - that would have protected their
11 position?

12 MR. WILLIS: From the defendant?

13 JUDGE FAHEY: Yeah.

14 MR. WILLIS: I - - - I think if defense counsel
15 had said, judge, with all due respect, juvenile delinquency
16 adjudications cannot be used for impeachment purposes so I
17 would object to the use of the - - - the barebones
18 allegations, the barebone request to cross-examine the
19 defendant just on the adjudication. I think that would
20 have sufficiently preserved the error. It also - - - when
21 that happens, two things. One, the prosecutor is alerted
22 to the - - - is alerted to the fact that defense counsel
23 does not want this ruling and knowing its error has a
24 chance to say, judge, we're not going to do that. We're
25 not going to use a JAD adjudication against the defendant

1 in this case.

2 Now the proffer that the prosecutor filed in this
3 case specifically said we do not intend to use the
4 adjudication. We intend only to ask about the underlying
5 facts. That was on - - - I think it's the respondent's
6 appendix page 7. That's - - - that's specifically laid out
7 there. So when the argument is going on when defense
8 counsel stands up and objects to the use of the facts
9 underlying the robbery adjudication, the prosecutor's not
10 thinking that he's itself because he's never even asked to
11 use that. So once the judge comes out with this erroneous
12 ruling, it's on the definition to object to it.

13 JUDGE STEIN: So if - - - if we were to find that
14 it is preserved and then you concede that it was error,
15 given the - - - the quintessential he-said-she-said nature
16 of this - - - these charges, how - - - why wouldn't it be -
17 - - how can it be harmless?

18 MR. WILLIS: I think it's harmless for - - -
19 well, I think it's harmless because, in this instance,
20 there was nothing that the defendant suggested either
21 through his defense counsel or even in the brief that he
22 would have offered to support his defense, other than some
23 allegation that it was consensual. There was no - - -

24 JUDGE STEIN: Well, but - - - but that's pretty
25 significant. That's - - - that's his defense, essentially.

1 So - - -

2 MR. WILLIS: I - - - I - - -

3 JUDGE STEIN: And - - - and who else could
4 possibly offer that evidence but himself?

5 MR. WILLIS: Well, the - - - obviously, the
6 evidence could have been offered or could have been
7 corroborated by the other points that are pointed to by
8 defense counsel now.

9 JUDGE RIVERA: But there - - - isn't there a
10 difference? The jury is observing the two victims who say
11 this happened to them, right.

12 MR. WILLIS: They're - - -

13 JUDGE RIVERA: They're assessing their
14 credibility, believing them or not. And they - - - and he
15 is not getting up and giving if you will, his side, his
16 version, so that they can assess not only him but the
17 women's version.

18 MR. WILLIS: The - - -

19 JUDGE RIVERA: Hearing both of these renditions
20 of these events?

21 MR. WILLIS: I - - - I agree that in some
22 circumstances you can make the argument that a defendant's
23 credibility in and of itself is a determination that the
24 court or that the jury is entitled to hear, but I - - - I
25 think the decision in Grant specifically says that just the

1 defendant's allegation that this didn't happen the way they
2 said is not enough when the evidence is overwhelming to
3 show that they - - -

4 JUDGE GARCIA: Grant - - - Grant is a little bit
5 different of a case given the charges there. I think what
6 we're struggling with a bit is how do you apply harmless
7 error in - - - in these circumstances when we've said you
8 can consider whether or not the definition would testify?
9 What I think is different about this case, and I think
10 Judge Wilson was getting at it earlier, is there were
11 rulings in the Molineux hearing about certain things that
12 could be asked, right, prior to that - - -

13 MR. WILLIS: I - - - I agree, at the Sandoval
14 hearing.

15 JUDGE GARCIA: Sandoval, I'm sorry. Excuse me,
16 Sandoval hearing. And so when we factor in yes, we assume
17 he would have testified, how do we factor in, in the
18 harmless error analysis the fact that had he testified he
19 would have been asked about those things that were
20 permitted in the Sandoval hearing? So it shouldn't be, it
21 seems to me, that in that analysis you get to assume
22 testimony without the negative of what you would have been
23 crossed on pursuant to the Sandoval ruling. And I - - - as
24 I understood it, although maybe there's some dispute, there
25 were Sandoval rulings that would have allowed cross-

1 examination.

2 MR. WILLIS: There was a significant amount of
3 Sandoval material that was allowed in, legitimately so, and
4 not challenged on appeal, including a felony conviction for
5 drug possession in add - - - in addition to several
6 misdemeanors and endangering the welfare of a child
7 adjudication that Judge Wilson, I think, referred to. So
8 there was a tremendous amount of material. And when you -
9 - - you look at the context of the harmless error analysis,
10 I do not believe that it is improper to consider whether it
11 is this one single instance of an improper ruling that
12 dissuaded the defendant from testifying versus these seven
13 others. Say this - - -

14 JUDGE RIVERA: No. But the - - - but the point -
15 - -

16 JUDGE GARCIA: Or but can you - - - can - - -

17 JUDGE RIVERA: - - - the point is we assume he's
18 going to testify and the point is whether or not he has
19 critical information. So if his critical information is
20 his - - - his articulation of his innocence, that's
21 something for the jury to weigh, and they may very well not
22 believe him based on some of these Molineux rulings, but
23 the point is whether or not under Grant's standard he has
24 critical information to provide. The jury could discount
25 it. The jury could not believe it. But the point is is

1 there critical information, and I'm - - - I'm not clear on
2 how his - - - the core of his defense, which is I did not
3 do these things - - - and where the evidence doesn't
4 necessarily show that he did these things, right? You have
5 really their word. You have to believe their word.

6 MR. WILLIS: I agree. You - - - that the - - -
7 the credibility of the victims in this case is obviously
8 paramount to the jury's decision. But there's not un - -
9 - it's not affected - - - or it's not an instance where
10 there's uncorroborating evidence. If you look at the
11 first assault, she comes running out of the hotel room
12 claiming he's raped - - - and the defendant is seen
13 running away leaving his underwear - - -

14 JUDGE RIVERA: The defendant's seen leaving and
15 he admits that they had sex. The woman ran out, and he
16 believe it's consensual, he - - - he - - - well, we don't
17 have to go into all the evidence. But this is my point, is
18 - - - is he not going to add critical information for the
19 jury to consider, because that's a standard, when he gets
20 up and gives his version of these events and perhaps better
21 explains exactly what you're describing, as showing that he
22 is, indeed, guilty.

23 MR. WILLIS: I - - - I agree that there is the
24 potential for that, but I think in this case the fact that
25 he would have been cross-examined on, not only the Sandoval

1 instances, but the other allegations - - - or the other
2 evidence in the case, you know, why did you call her friend
3 and offer her 1,000 dollars to keep her mouth shut before
4 you even knew she was accusing you of raping her? Why did
5 you leave your underwear behind in the motel room?

6 JUDGE WILSON: But - - - but you're sort of
7 asking us to assume that his testimony is less credible.
8 You're sort of asking us to be a fact finder.

9 MR. WILLIS: Well, I - - - I think when the - - -
10 we're making the allegation and I - - - or, not the
11 allegation, the assertion, and I think backed up by the
12 trial record here that the evidence is overwhelming, that -
13 - - that is something that's naturally going to flow to the
14 court in any instance. However, I think in this case, one
15 of the other issues to consider on preservation is - - -

16 JUDGE RIVERA: Well, they - - - they acquitted
17 him of the - - - the drug counts, right?

18 MR. WILLIS: Yes.

19 JUDGE RIVERA: So they didn't fully believe C.W.
20 other - - - the first victim.

21 MR. WILLIS: Whether that he brought those there?

22 JUDGE RIVERA: She said - - - she said he threw
23 the bag of drugs, he told me to take the drugs. I mean I
24 guess they didn't believe that part.

25 MR. WILLIS: Well, they - - - they didn't believe

1 - - - there's - - - I don't think there's any way to break
2 down what they believed from her testimony versus why they
3 acquitted him of those drugs but that's - - -

4 JUDGE FAHEY: Would - - - would you agree if they
5 - - -

6 CHIEF JUDGE DIFIORE: Counsel, in applying a
7 harmless error analysis here, can we parse the analysis to
8 Victim A's case and Victim B's case?

9 MR. WILLIS: Absolutely, Your Honor. And I think
10 whether or not that occurs with the - - - the first count
11 which obviously, as a predatory sexual assault, encompasses
12 the attacks on both women in combination. Or, if you just
13 look at the criminal sexual assault conviction under Count
14 II, if the court finds that there's overwhelming with
15 regard to one of the assaults and not with regard to the
16 other, I think that there's no issue with sustaining a
17 conviction on one and sending the case back for a retrial
18 on the others. In this case, what I do think, though, the
19 ultimate - - -

20 JUDGE RIVERA: But let me - - - I'm sorry. Is
21 that really the standard? Because I'm a little unclear as
22 to whether or not the Appellate Department applied the
23 correct standard. Isn't Grant's standard whether or not
24 the jury's been deprived of critical information?

25 MR. WILLIS: If they've been deprived of critical

1 information?

2 JUDGE RIVERA: Not - - - not only determining
3 whether or not the evidence is overwhelming based on what
4 is presented but this analysis, whether or not there's
5 critical information that this defendant would have added
6 when he got up and testified.

7 MR. WILLIS: Well, Your Honor, I think the basic
8 problem with that type of approach is the defendant never
9 puts anything on the record that indicates he has critical
10 information on his defense - - -

11 JUDGE FAHEY: Well, that's why - - -

12 MR. WILLIS: - - - unlike in Grant.

13 JUDGE FAHEY: - - - I was asking you before.
14 When you go back to the last prong under the Grant test,
15 you - - - there has to be some - - - the defendant's got to
16 make some minimal proffer that - - - that would allow us to
17 conclude at this point that there is a significant
18 probability that his testimony would have led to an
19 acquittal. So that - - - it seems what - - - what Grant is
20 asking us to do if we're past the preservation issue.

21 MR. WILLIS: Because even in Grant, the
22 defendant, as the court will note, said on the record I am
23 my only source of the defense, and the court still felt
24 that even if he's his only source of his defense - - - that
25 he had - - - which would indicate to me that he has

1 something critical, that doesn't occur. I mean - - -

2 JUDGE FAHEY: Right. So his - - - his
3 determination not to testify in and of himself does not
4 translate into an automatic reversal but something - - -
5 maybe something less like defense's counsel asking for or a
6 sustaining of the conviction.

7 MR. WILLIS: I agree, Your Honor.

8 JUDGE FAHEY: Yeah.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. WILLIS: Thank you.

11 CHIEF JUDGE DIFIORE: Mr. Kessler.

12 MR. KESSLER: First of all, on the issue of
13 preservation I think we're spinning our wheels because that
14 wasn't an argument the People made in the Appellate
15 Division. The Appellate Division reached the merits
16 without discussing preservation, so I don't think this
17 court can even find at this point that the issues unp - - -

18 CHIEF JUDGE DIFIORE: Counsel, are you going to
19 address the Antommarchi issue?

20 MR. KESSLER: I'm sorry?

21 CHIEF JUDGE DIFIORE: The Antommarchi issue?

22 MR. KESSLER: Antom - - - well, unfortunately,
23 because of the time limits I didn't get to address that.

24 But - - -

25 CHIEF JUDGE DIFIORE: Would you care to do that

1 now?

2 MR. KESSLER: If you'd like me to. I would love
3 to but - - -

4 CHIEF JUDGE DIFIORE: Please do.

5 MR. KESSLER: Thank you. I think that what the -
6 - - the advice my client received was too ambiguous to
7 secure a valid Antommarchi waiver. The court spoke about
8 legal discussions at sidebar. The written waiver said
9 discussions with prospective jurors and/or discussions of
10 points of law.

11 JUDGE STEIN: What's - - - what's ambiguous about
12 that?

13 MR. KESSLER: I'm sorry?

14 JUDGE STEIN: What is ambiguous about that? I -
15 - - assuming that the court not referring to the - - - the
16 juror issue and only talking about legal issues, assuming
17 that that's not good enough, what is ambiguous about the
18 written waiver?

19 MR. KESSLER: What's ambiguous about it, it
20 doesn't really apprise the defendant - - - first of all, it
21 refers to sidebar discussion with prospective jurors
22 generically. Now we all know if it's simply a question of,
23 you know, I'm going on vacation next week so I can't serve,
24 the defendant doesn't have a right to be present for that.
25 That's just administerial kind of inquiry. But if it has

1 to do with the qualifications of the juror, then the
2 defendant has the right to be present. Nothing in the
3 written waiver made any distinction between the various
4 types of inquiries of prospective jurors.

5 JUDGE STEIN: The record indicates a couple of
6 different conversations between the defendant and his
7 counsel during this - - - this whole Antommarchi
8 discussion, right?

9 MR. KESSLER: Right. Off - - - off record
10 conversation.

11 JUDGE STEIN: Off the record. Absolutely. Can -
12 - - can we infer anything from that?

13 MR. KESSLER: No.

14 JUDGE STEIN: And - - - and from counsel's
15 statement that I think he understands?

16 MR. KESSLER: Well, understands what? He didn't
17 specify what he thought the client understood. I don't
18 think you can infer from a silent record that defense
19 counsel said to him you have a right to be present for
20 sidebar questioning of prospective jurors on matters of
21 potential bias.

22 JUDGE STEIN: So in your view, either the - - -
23 the record of - - - of the - - - of a colloquy or the
24 written waiver has to go into - - - to how much detail is
25 necessary - - -

1 MR. KESSLER: Well - - -

2 JUDGE STEIN: - - - to make it a valid waiver?

3 MR. KESSLER: Well, I think you have to have
4 something on the record that's alerting the defendant to
5 the fact that he has a right to be present for sidebar voir
6 dire on matters of potential bias or hostility. And there
7 is absolutely nothing in the record here that my client
8 received - - -

9 JUDGE RIVERA: Didn't the judge tell him at any
10 time if you have any concerns or any issues that you could
11 - - - you could ask the judge? So if - - - if during this
12 proceeding he wanted to come up, couldn't he have said - -
13 - I thought I couldn't come up, but could I come up now?

14 MR. KESSLER: No. The judge said, you know, if
15 at any point, if we're discussing anything "particularly
16 important" quote unquote then you can come up. I mean, you
17 know, that even makes it more ambiguous.

18 CHIEF JUDGE DIFIORE: Thank you, Mr. Kessler.

19 MR. KESSLER: Thank you.

20 (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. Thomas Jackson, No. 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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