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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

TREVOR ANDERSON,

Appellant.

No. 29

20 Eagle Street
Albany, New York
February 14, 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:

A. ALEXANDER DONN, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street, 9th Floor
New York, NY 10038

TERRENCE F. HELLER, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
350 Jay Street
Brooklyn, NY 11201

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 29, The People of the
3 State of New York v. Trevor Anderson.

4 Ready?

5 MR. DONN: May it please the court, Alex Donn of
6 Appellate Advocates for appellant Trevor Anderson. With
7 the court's permission, I'd like to - - - to reserve two
8 minutes of time for rebuttal. And also with the court's
9 permission, I would like to - - - can you continue
10 discussing the PowerPoint first. Is it - - - would it - -
11 -

12 CHIEF JUDGE DIFIORE: Continue discussing?

13 MR. DONN: Would - - - would it be all right if I
14 started with point two - - -

15 CHIEF JUDGE DIFIORE: Yes. Of course.

16 MR. DONN: - - - the PowerPoint discussion?

17 CHIEF JUDGE DIFIORE: Of course.

18 MR. DONN: This case also involved alterations of
19 trial exhibits by the prosecutor outside the presence of
20 the jury displayed to the jury during summation on a
21 critical issue that went to a key issue in the case. In -
22 - - in this situation, the - - - the most egregious
23 exhibits were the complainant's medical records, which
24 nowhere stated that the complainant had been shot four
25 times. They had indications of four wounds. They never

1 said that the complainant had been shot four times.

2 JUDGE RIVERA: Welcome back. On - - - on the
3 PowerPoint is it your position if - - - if they weren't
4 doing a PowerPoint, if they just came in with the exhibit
5 enlarged but already marked up, could they do that? Or is
6 your position they can only point to it or put labels on it
7 or whatever, stick-ums, whatever you want, when it's
8 physically first shown in the - - - the clean exhibit
9 format that was admitted into evidence?

10 MR. DONN: Our position is they - - - they
11 definitely can't do anything outside the presence of the
12 jury and then bring it in marked up.

13 JUDGE RIVERA: Okay.

14 MR. DONN: And I wouldn't even go so far - - - I
15 mean I would - - -

16 JUDGE RIVERA: Regardless if it's a PowerPoint.
17 It doesn't even matter that way?

18 MR. DONN: PowerPoint not PowerPoint - - -

19 JUDGE RIVERA: Doesn't matter.

20 MR. DONN: - - - you can't bring in a trial
21 exhibit that's been marked up, you know, not say anything
22 to the jury like I marked up the exhibit. The court
23 doesn't give an instruction. In this case, defense counsel
24 doesn't object. I understand that the medical records were
25 made available to the jury - - -

1 JUDGE RIVERA: But - - - but if you come in - - -
2 but is your position if you come in, the exhibit enlarged
3 so people can see it, and then you mark it up in front of
4 the jury, is that okay?

5 MR. DONN: If we're talking about this exhibit in
6 this situation absolutely not. And - - - and anything - -
7 -

8 JUDGE ABDUS-SALAAM: Why not?

9 MR. DONN: - - - I might have said so far today
10 that suggests - - -

11 JUDGE ABDUS-SALAAM: Why not? Why not, counsel?

12 MR. DONN: Well, in - - - in this situation,
13 because the prosecutor is literally changing the meaning of
14 the medical evidence to make it seem as if it supports his
15 theory of the case when it doesn't. The medical records
16 said four wounds. They never said four gunshots. The
17 People never said they said four gunshots. So if the
18 prosecutor walked in with a clean version of the medical
19 record showing four wounds, four wounds - - -

20 JUDGE FAHEY: You know, I - - - you know what I
21 wonder, why is that important? If this person was shot
22 twice or four times, does that affect the outcome of this
23 case at all? I mean is it - - - is it really important? I
24 see your point in terms of alteration. Okay. In other
25 words, it's arguable that he was only shot twice rather

1 than four times, and I tend to think that is what the truth
2 would be. But leaving that aside one way or the other,
3 that's not really the key part of this case, is it?

4 MR. DONN: Well, the prosecutor thought it was
5 very important. In the prosecutor's summation - - -

6 JUDGE FAHEY: Well, sometimes they're wrong about
7 that. You know - - - you know, that they aren't
8 necessarily right about what they think the key part of the
9 case is. From your appeal point of view, the thing that
10 jumps out at me is not that at all. Because whether he
11 shot two times or four times, the person was shot and it
12 seems - - - it seems to be the - - - it seems to have some
13 strong proof against the defendant here that he actually
14 did the shooting. So whether it went in two or four times,
15 okay. Isn't the - - - the real question here is the
16 ineffective assistance of counsel. Isn't that the real
17 issue?

18 MR. DONN: Yes. I see them as - - - yes, Your
19 Honor. I see them as interrelated because the more
20 important and more egregious - - - more relevant the
21 misconduct was, the more clear the ineffectiveness. But I
22 would just say in addition to the prosecutor relying on the
23 four versus two in his summation to make the intent
24 argument, the jury also thought it was important so the
25 jury asked for the definition - - - definition of intent

1 during deliberations. So clearly, something was going on
2 with have the People proven that the shooter intended to
3 kill as opposed to injure - - -

4 JUDGE FAHEY: I - - - I understand your argument.
5 But it - - - what leaps out at me are slides with the
6 biblical texts saying "The wicked flee where no man pursues
7 but the righteous stands steadfast as a lion." That
8 certainly wasn't put into evidence. And - - - and yet - -
9 -

10 MR. DONN: Correct. And nor was the target.

11 JUDGE FAHEY: - - - it was put - - - it was put -
12 - - or the target. But it was put on top of it and - - -
13 and there are a number of instances. There was witness
14 testimony superimposed on trial exhibits, biblical quotes
15 superimposed on - - - on evidence. There's a court charge
16 giving a reference to what the law was. There was a
17 rearrangement of the hospital progress report, which is
18 what you're talking about in - - - in the form of a slide
19 which is different than the evidence itself. So - - - and
20 the rest photograph, of course, itself. Those are - - -
21 but there are almost eighty exhibits that we went through,
22 but those are the ones that kind of leaped out at me.

23 MR. DONN: The medical records - - - I mean,
24 sorry, the phone calls were redacted. The - - - a sheet
25 showing thirty-eight phone calls redacted, all but the two

1 - - -

2 JUDGE FAHEY: None of this was objected to?

3 MR. DONN: None of this objected to. And not
4 only was none of it objected to, but defense counsel made a
5 record of the fact that he knew a - - -

6 JUDGE FAHEY: But let's say this. Let's say we
7 don't apply your bright-line rule, and we're into an abuse
8 of discretion standard. How do you argue that in this
9 context, assuming that you get past the ineffective
10 assistance of counsel? You see what I'm saying?

11 MR. DONN: I'm sorry. I don't.

12 JUDGE FAHEY: It's all right. Assuming that we
13 don't apply the Washington State rule, it's a per se
14 reversal. We're saying no to you on that. We have a
15 previous case, the same issue. And so now we're into
16 whether or not there was an abuse of discretion here.
17 That's where I would look to focus your argument.

18 MR. DONN: You know, I'm - - - I'm still missing.

19 JUDGE FAHEY: All right. So - - - so the point -
20 - -

21 MR. DONN: Are we talking about the - - -

22 JUDGE FAHEY: The exhibits.

23 MR. DONN: The court's - - -

24 JUDGE FAHEY: Yeah. The court's ruling, the
25 exhibits.

1 MR. DONN: What - - -

2 JUDGE FAHEY: There was no - - - there was no
3 discretion exercised here, was there? The court made no
4 ruling.

5 MR. DONN: By the court. The court - - - the
6 court did not exercise any discretion in keeping from the
7 jury altered evidence that was not introduced in that form
8 or from - - - is this - - - is this what you're - - - the
9 question?

10 JUDGE FAHEY: Yeah. Go ahead. Yeah.

11 MR. DONN: - - - or from protecting the jury from
12 highly inflammatory closing statement in which the
13 prosecutor told the jury you're looking at the face of
14 death while displaying a photograph of the defendant that
15 had been altered to show - - - altered with evidence
16 circled around his head, very much like looking at him
17 through the scope of a gun or a target and basically giving
18 them the message get him, get him. Don't carefully sift
19 through the evidence and figure it out if the People have
20 proven their case on every element of every crime. Just
21 get him because he's the face of death.

22 JUDGE ABDUS-SALAAM: On that quote unquote
23 "target" photo that you were just talking about, the
24 mugshot of the defendant went into evidence, right?

25 MR. DONN: Yes.

1 JUDGE ABDUS-SALAAM: So here we are again
2 something has gone into evidence and it's words that are
3 put on that copy of the photo that is in evidence that the
4 jury is only going to see in the courtroom, not in the jury
5 room, right?

6 MR. DONN: Correct.

7 JUDGE ABDUS-SALAAM: That's what we're talking
8 about? Okay. And - - - and you say it's - - - it's
9 improper to have put those words around that photo because
10 you say it looks like you are looking at him through - - -
11 as a target through a lens like a gun, right?

12 MR. DONN: That's what makes it harmful. That's
13 not - - - that's not what makes it an error. What makes it
14 an error - - -

15 JUDGE ABDUS-SALAAM: But - - - but the prosecutor
16 could have taken the mugshot that was put into evidence and
17 held it up and said at the top of his head this - - - these
18 words around his ear, these words around his ear, these
19 words around his ear, these words?

20 MR. DONN: The - - -

21 JUDGE ABDUS-SALAAM: That would be okay?

22 MR. DONN: I - - - without visually altering the
23 exhibit the - - - the prosecutor could - - - could have - -

24 -

25 JUDGE ABDUS-SALAAM: Are we - - - are we not

1 giving the jury any credit at all by saying that, you know,
2 because they see something visual like that - - - didn't -
3 - - isn't that the argument that was made about, for
4 example, crime scene photos? We want to keep those from
5 the jury because they might appeal to the jury's sense of
6 emotion, not - - - we can't show them. They're too
7 horrifying. And yet, we decided long ago that those photos
8 are available to the jury.

9 MR. DONN: I - - - I think there's a big
10 difference between deciding whether or not to show the jury
11 actual evidence that they can evaluate that's relevant to
12 an issue and is admitted in a certain form and the
13 foundation has been laid and trusting them to - - - to
14 determine that what they're being shown by an officer of
15 the court during summation and what appears to be a piece
16 of evidence actually isn't. I think that those are two
17 very, very different things. And given the outsized impact
18 of visual information on jurors, I think that we - - -

19 JUDGE ABDUS-SALAAM: So if - - - if the
20 prosecutor said beforehand I'm going to show that - - -
21 this is exhibit, you know, whatever it was, Exhibit A, and
22 - - - but I'm going to make some arguments for you that I'm
23 going to have written on here. But you'll have the exact
24 exhibit that you - - - that was admitted into evidence
25 without these words, that would be - - - that would not be

1 okay?

2 MR. DONN: Well, I was asked this question in the
3 - - - in the last argument.

4 JUDGE ABDUS-SALAAM: Right.

5 MR. DONN: And I said maybe and now I'm going to
6 say no. But it's - - -

7 JUDGE ABDUS-SALAAM: Well, I figured you would.
8 It's - - -

9 MR. DONN: Now that I get to do it again, I'll
10 say - - - I'll say it's just never appropriate to alter
11 trial evidence and show it to the jury in an altered form.
12 And I would just say that it's not as if we have some big
13 problem we're trying to solve. I mean prosecutors have
14 been able to point to evidence in all the ways that the
15 prosecutor discussed without creating these problems. So
16 if technology is going - - -

17 JUDGE ABDUS-SALAAM: But you're seeing that as a
18 problem. You're saying it's a problem, and it may not be a
19 problem.

20 MR. DONN: What I'm - - -

21 JUDGE ABDUS-SALAAM: That's what we're here to
22 decide is, isn't it?

23 MR. DONN: Well, what I'm saying is to point to
24 something in order to draw the attention of other people to
25 it is not difficult. But if in creating the pointing

1 outside the presence of the jury there's the possibility of
2 confusion, that's a problem that's very avoidable. Just -
3 - -

4 JUDGE GARCIA: Now your rule, though, would be in
5 a defense summation as an eyewitness and the defense lawyer
6 wants to put up boxes like this saying failed to identify
7 on the stand, failed in prior - - - they can't do that,
8 either?

9 MR. DONN: The - - - the defendant is on trial,
10 so he has protections - - -

11 JUDGE GARCIA: So there's different slide rules
12 for a defendant?

13 MR. DONN: We don't have a defense PowerPoint
14 presentation in this case. And I - - - I don't - - -

15 JUDGE GARCIA: But we might in the next one so
16 what's the rule for a defendant's PowerPoint slide?

17 MR. DONN: If - - - if a defendant - - -

18 JUDGE GARCIA: They're altering evidence.

19 MR. DONN: I don't think that it would be a good
20 practice for any attorney to actually alter trial evidence
21 and display it to the jury in a summation.

22 JUDGE GARCIA: But would it be the same rule, you
23 can't do it?

24 MR. DONN: I - - - I assume the prosecutor would
25 - - - would object. I think it would depend on the case,

1 but I do not think it would be a good practice for any
2 attorney to alter the evidence. But what matters here - -
3 -

4 JUDGE GARCIA: It couldn't be not a good practice
5 for a prosecutor to do that, either. I mean what we're
6 asking now, really, is what's - - - you know, you want a
7 rule that says you can't do it not we're going to say it's
8 not a good practice to do it. That wouldn't really help
9 you that much. So is the rule for a defense lawyer if we
10 do this going to be the same?

11 MR. DONN: Often, these evidentiary rules don't
12 apply exactly equally to the defendant and to others
13 because the defendant is one on trial so - - -

14 JUDGE RIVERA: Well, how's the defendant being
15 denied a fair trial in this hypothetical where the
16 defendant is putting labels on things? Where - - - where's
17 the damage to the defendant which I think is what you're
18 trying to get to.

19 MR. DONN: Right. The - - -

20 JUDGE RIVERA: Where's the - - - where's the - -
21 -

22 MR. DONN: Right.

23 JUDGE RIVERA: - - - error that we would be
24 analyzing?

25 MR. DONN: Right. I'm not saying it could - - -

1 JUDGE RIVERA: It might be a bigger error about
2 the justice system at large.

3 MR. DONN: Right. But it doesn't go to the
4 defendant's right to a fair trial. And that's why it's - -
5 - I think that they are - - - the analysis is different.
6 But I - - - if I could - - - I think my light is on but if
7 I could just say a word about point one. This - - - this
8 case, the Sandoval error, in this case, was not harmless
9 because there a lot of things that the defendant could have
10 said that, if credited, would have resulted in an
11 acquittal.

12 JUDGE WILSON: I'm having - - - I'm having a
13 little trouble - - -

14 JUDGE ABDUS-SALAAM: Was there - - -

15 CHIEF JUDGE DIFIORE: What was his defense? I
16 thought his defense was misidentification.

17 MR. DONN: His trial - - - his defense was mis -
18 - - was misidentification. But - - - but the test that
19 this court set forth in Grant asks was there anything he
20 could have said that would have made a difference. Did he
21 have critical information, I'm sorry, to provide. And in
22 this case, he did on a number of topics. We discussed
23 intent in our - - - in our briefs.

24 JUDGE ABDUS-SALAAM: Was there actually a
25 Sandoval ruling? I was not clear about that from the

1 record.

2 MR. DONN: The court ruled - - - the court ruled
3 if he's cross-examined he can be asked about possession of
4 two guns and then he specifically - - -

5 JUDGE ABDUS-SALAAM: Well, that was in
6 connection, I thought, with some Molineux request by the
7 prosecution, and I think it could be read - - - it arguably
8 could be read that the judge was saying when I make that
9 Sandoval ruling that I said I was going to make later in
10 the trial, then maybe this would come in under Sandoval,
11 not under Molineux.

12 MR. DONN: Well, I think - - -

13 JUDGE ABDUS-SALAAM: Is that a fair reading of
14 what the judge said?

15 MR. DONN: I don't think so because I think if -
16 - - if that had been what the court intended, the court
17 would have said Molineux, no; Sandoval, maybe, we'll see.
18 What the court said was Molineux; no, Sandoval, yes. So I
19 think it's pretty clear that - - - that the court actually
20 ruled and - - -

21 JUDGE STEIN: Assuming that's true when the court
22 did that, which was not what had been previously discussed
23 and - - - and the defense made his position known, when the
24 court turned around and said, okay, I'm going to allow this
25 in on cross, was there any objection?

1 MR. DONN: There - - - there was no objection but
2 the court ruled on the issue - - -

3 JUDGE STEIN: Well, the court rules on allowing
4 it in a Molineux and said it's not relevant to intent.

5 MR. DONN: And - - -

6 JUDGE STEIN: The court had - - - at that point,
7 hadn't made any ruling whatsoever as to whether it could be
8 used on cross-examination on the issue of - - - of his
9 credibility. Doesn't that require another objection?

10 MR. DONN: My - - - my recollection of the ruling
11 was that it was kind of part and - - - and parcel at the
12 same time. The court said Molineux, no; Sandoval, yes.
13 That's a clear ruling on the ultimate issue and counsel
14 didn't need to - - -

15 JUDGE WILSON: But the - - -

16 MR. DONN: - - - to revisit it.

17 JUDGE WILSON: The People had never asked for the
18 evidence of the two - - - possession of the two guns to
19 come in on Sandoval grounds, right?

20 MR. DONN: Not at this - - - not - - - correct.
21 Not in this proceeding - - - that proceeding.

22 JUDGE WILSON: And could it even have done so?
23 That is Sandoval evidence should be evidence of past
24 misconduct, crime, so on. The possession of two guns is
25 not necessarily unlawful, right? They were simply trying

1 to get Ms. Perez to say she'd been shown guns on a prior
2 occasion. So would it even have been appropriate for
3 Sandoval?

4 MR. DONN: I don't think it would have been
5 appropriate for San - - - for Sandoval and that's, I
6 believe, why the - - -

7 JUDGE WILSON: So - - - so but the State wasn't
8 trying to get it in for Sandoval purposes and they couldn't
9 have tried, anyway. So why would we interpret what the
10 court said as a Sandoval ruling at all?

11 MR. DONN: Oh, I'm - - - the court ruled that it
12 - - -

13 JUDGE WILSON: I know what it said. But there
14 was no motion and one couldn't have been made.

15 MR. DONN: Well, the - - - the fact that - - -
16 the fact that the - - - the way I view it, and I understand
17 the question. But the way I view it is that the court made
18 a ruling that for the reasons that Your Honor just
19 mentioned was incorrect, and the court should not have
20 ruled that it could come in. But it did rule that way, and
21 then the Appellate Division held that it was an error. And
22 now we're here talking about harmless error analysis. And
23 there was a lot this defendant could have said, among other
24 things, about intent but also about identity. And unlike
25 the situation

1 JUDGE ABDUS-SALAAM: Do we know - - - counsel, do
2 we know whether those guns were legal? He was discharged
3 De Kalb County Police Officer. Did he have - - - were
4 those guns licensed in New York?

5 MR. DONN: I - - - I don't know the answer to
6 that question. But I can say that unlike Grant when there
7 was absolutely nothing the defendant could have possibly
8 said, and I would just - - - as my last words, I'll say in
9 - - - in Grant there is a footnote that discusses even the
10 possibility that he could have said, oh, I didn't go to the
11 house, I didn't violate the restraining order. The
12 footnote deals with that. There was an alibi witness who
13 turned around. There was nothing that witness could have
14 said. Here, we have an error that prevented the defendant
15 from testifying in his own defense, and there were things
16 he could have said. And therefore, the error was not
17 harmless.

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

19 MR. DONN: Thank you.

20 CHIEF JUDGE DIFIORE: Counsel.

21 MR. HELLER: May it - - - may it please the
22 court, Terrence Heller on behalf of the respondent. The
23 defendant abandoned his Sandoval claim in this case when he
24 did not renew his motion at the end of - - - of the
25 People's case. To the extent that the court even made a

1 Sandoval ruling whatsoever, the defendant in order to
2 preserve and - - - preserve a question of law, has to
3 object to the court's ruling. Here, the defendant objected
4 to one thing. The court ruled - - - the court sustained
5 defendant's objection. Then it ruled on a second point
6 entirely and the defendant did not object to - - - to that
7 other point, and he never came back to it, although he was
8 afforded ample opportunity to do so. Therefore, the
9 defendant's Sandoval claim is not before this court.

10 JUDGE FAHEY: Counsel, can - - - can we talk a
11 little bit about the photographs and the alter - - - the
12 question of the altered evidence on that point? Focus you
13 on that for a second?

14 MR. HELLER: Absolutely, Your Honor.

15 JUDGE FAHEY: Okay. One of the things that
16 strikes me is - - - is an underlying policy argument that
17 altering photographs or any evidence - - - any evidence at
18 all is the equivalent of allowing unadmitted evidence to go
19 before the jury. That's the core, I think, of the policy
20 argument that the court's presented with. Do you
21 understand what I'm saying here? That when evidence
22 normally comes in, it's - - - a foundation is laid, shown
23 to be material and relevant. The court acts as a
24 gatekeeper, allows it come before the jury in order to
25 prove a particular fact or series of facts. But if that

1 evidence is altered arbitrarily in pursuit of argument,
2 then that's - - - then that's altered evidence that hasn't
3 gone through that admission process. And that's the policy
4 question before us underneath this, leaving aside
5 ineffective assistance of counsel and those other issues.
6 What do you have to say about that?

7 MR. HELLER: There is a distinction between what
8 I would characterize as altered evidence, which is changing
9 the fundamental nature of the evidence and - - - and what a
10 particular exhibit means to the jury and mere highlighting
11 or - - -

12 JUDGE FAHEY: I think that makes sense.

13 MR. HELLER: - - - coming into evidence.

14 JUDGE FAHEY: That's a - - - that's a fair point.
15 You know - - -

16 MR. HELLER: And - - -

17 JUDGE FAHEY: Go ahead.

18 MR. HELLER: Sorry, Your Honor.

19 JUDGE FAHEY: No, no. You go ahead.

20 MR. HELLER: So for exam - - - there are a lot of
21 examples in this case, but with regards to the - - - to the
22 phone records, just as one example, the prosecutor showed a
23 slide which contained the unredacted complete phone records
24 with twenty-eight calls or how many calls it had. Then the
25 prosecutor showed a series of slides which had all of the

1 other calls except for particular calls he was referring to
2 in his oral comments up on the slide at one time. It's
3 clear that the prosecutor was not altering evidence in the
4 case. He was just highlighting the series of individual
5 calls that he wanted the jury to focus its attention on.
6 And - - -

7 JUDGE ABDUS-SALAAM: Well, were the calls that -
8 - - on that point, I - - - I was just curious about this.
9 Were the calls that were not made about the incident by Ms.
10 Perez, were they relevant to anything?

11 MR. HELLER: No, Your Honor. They weren't.

12 JUDGE ABDUS-SALAAM: So - - - so that - - - the
13 jury was kept from some irrelevant phone calls. Is that
14 important?

15 MR. HELLER: It is unimportant, Your Honor. And
16 if the defense counsel believed that they were important,
17 he could have asked questions of the People's witness on
18 the stand. He could have argued those in his own
19 summation. But the defense was that the defendant was not
20 at the scene at all. He was completely uninvolved. If he
21 was uninvolved, then it doesn't really matter who the
22 eyewitness called in the few minutes before the shooting
23 happened.

24 JUDGE STEIN: What do you think about a rule that
25 would require that there be sort of a prescreening of

1 PowerPoint presentations?

2 MR. HELLER: That would probably be a - - - a
3 good practice. I don't know that it has to be a hard and
4 fast rule.

5 JUDGE STEIN: What about if the - - -

6 MR. DONN: But in this case, the prosecutor did
7 show the defense counsel his PowerPoint presentation in
8 advance.

9 JUDGE STEIN: What about if the rule was just
10 limited, not to - - - it didn't require - - - in other
11 words that - - - the that the People present their entire
12 PowerPoint presentation but just those aspects of it that
13 were altered trial exhibits?

14 MR. HELLER: That could be a compromise that
15 would work. That might be difficult to draw the line at
16 that point without getting into the arguable accuracy or
17 inaccuracy of the summaries of other evidence that is on
18 the slides that contain text and so forth. But that would
19 be one compromise that the court could come up with.

20 JUDGE ABDUS-SALAAM: Did the - - - did the
21 prosecutor also show the slides in advance to the court?
22 You said he showed them to the prosec - - - to the defense
23 counsel. What about the court?

24 MR. HELLER: I believe the prosecutor only showed
25 them to the defense counsel, and the defense counsel

1 explained on the record that - - - the court asked a
2 question about the PowerPoint, and the prosecutor explained
3 that he had already shown them to defense counsel and the
4 defense counsel explained that he had reviewed it
5 beforehand. With regards to the slides that were discussed
6 earlier that do contain text, I believe, that as - - - as
7 my colleague explained, if - - - if an attorney is able to
8 say it then they're able to show it. And this case - - -

9 JUDGE FAHEY: Really? Now how about the biblical
10 quotes? Do you think you should be able to put a biblical
11 quote on a piece of evidence?

12 MR. HELLER: Well - - -

13 JUDGE FAHEY: I can see that it's argument - - -

14 MR. HELLER: - - - in this case, it's not a piece
15 of evidence.

16 JUDGE FAHEY: No. Let me finish my point. I
17 mean I can see it's argument. But it seems to be a clear
18 alteration of the evidence. It's not - - - you're not
19 pointing out how - - - you know, where the shell casings
20 are, say, or something like that. It's just - - - it's
21 just oral argument

22 MR. HELLER: In this case, it's not evidence at
23 all. It's - - - it's one of the rhetorical tools that
24 attorneys have always been allowed to use. The - - - you
25 know, I - - -

1 JUDGE GARCIA: And, counsel, I'm sorry. On that
2 point in that particular slide, the wicked flee, that's not
3 an overlay on anything, right? It seems to me, at least
4 the copy I seem to have, is it's a standalone slide with
5 just the words on it. There's no exhibit that that
6 overlays, is there?

7 MR. HELLER: That's right, Your Honor. It's just
8 only words on a black background.

9 JUDGE GARCIA: Text, right?

10 MR. HELLER: Yes. So although attorneys have
11 different styles, there - - - there are trials where
12 attorneys rhetorically quote Shakespeare or a civil rights
13 leader or the bible, and while that's not everybody's style
14 and it's up to the other party to object if they believe it
15 crosses a line. That didn't happen here. And in terms of,
16 you know, how it played in the courtroom, defense counsel
17 would have been in the best position - - - and although he
18 did not object to the - - - the PowerPoint slides, he did
19 object on a number of occasions to the oral comments by the
20 prosecutor. And certainly, if he believed that this
21 biblical quote had crossed the line, is the sort of
22 rhetorical comment he had been objecting to, you know,
23 independent of the fact that it was on a PowerPoint.

24 JUDGE FAHEY: Well, your point, and Judge Garcia
25 brings it out, it's not the PowerPoint. It's the

1 alteration of evidence that - - - that we should be
2 concerned about. And so if the PowerPoint presentation
3 doesn't alter evidence, then it - - - then it's a fair
4 argument, right?

5 MR. HELLER: Yes, Your Honor.

6 JUDGE FAHEY: And it's - - - it's the alteration
7 of evidence that we should be concerned about.

8 MR. HELLER: Yes, Your Honor. And I would argue
9 in this case all of the - - - I see that I'm almost out of
10 time, but in this case, all of the highlights and insertion
11 of numerals that the prosecutor put on the slides were
12 based on the testimony at the trial. The victim testified
13 that he got shot four times. He had at least two bullets
14 in his body at the time he got to the hospital. And so
15 when there's testimony that I got shot four times, the
16 victim has four bullet wounds, the prosecutor showed an
17 unredacted chart to the jury as part of the PowerPoint
18 shortly before he showed the blown-up version with the four
19 numerals there. Those numbers were just rhetorical comment
20 on evidence that was already in the record.

21 JUDGE FAHEY: I see. Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, Mr. Heller.

23 MR. HELLER: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel.

25 MR. DONN: Three - - - three quick points, Your

1 Honor. First, regarding the phone calls, there was a
2 question about whether or not there was any relevance to
3 the redactions in the phone calls. Defense counsel did
4 refer to the phone records in his own summation. He felt
5 it was important. He highlighted discrepancy between
6 Perez's testimony that she made no phone calls and what the
7 records themselves showed. The redacted exhibit did not
8 include the phone calls that she denied having made but
9 that showed up on - - - on the records.

10 JUDGE ABDUS-SALAAM: But were they phone calls
11 from her or from someone else?

12 MR. DONN: I'm not sure, Your Honor. I - - - I
13 believe some - - - I believe some were. I believe I
14 checked that some were from here, but - - - but either way,
15 the exhibit should not have been - - - that should have
16 been for the jury to evaluate. So I just - - - it wasn't
17 completely irrelevant.

18 Second, I believe - - - I believe the People just
19 said that the prosecutor showed the PowerPoint presentation in
20 this case to defense counsel. If - - - if that happened, I'm
21 not aware of it. I didn't see it in the People's brief. My
22 understanding is that - - - and this is essentially anecdotal
23 but is - - - but is that the - - - this is a retrial. The jury
24 failed to convict Mr. Anderson at the first trial. That the - -
25 - that the client told the defense lawyer, who had not been at

1 the first trial, that there was a PowerPoint and defense lawyer
2 made a record, essentially, I hear it's a real doozy or I - - -
3 I hear it's a force to be reckoned with. My understanding is
4 that he didn't even decide to go take a look at it. If - - - if
5 I'm wrong on the record, but that's my understanding. I haven't
6 seen anything to say that it was actually shared.

7 And the third thing I'd just like to say is - - -
8 is the People just said that there's a difference between
9 showing an exhibit that highlights certain things or circles
10 some - - - you know, circles a lamppost or what - - - what have
11 you. But between that and doing something that changes the
12 fundamental nature of the evidence. And I would say that on the
13 medical records in this case that is exactly what happened. We
14 can go back and forth about the testimony of how many gunshots
15 may or may not have - - - have occurred. But there's no dispute
16 about the fact that the record themselves did not say four
17 gunshots.

18 JUDGE GARCIA: Chief, may I ask a question?

19 CHIEF JUDGE DIFIORE: Yes. Of course.

20 JUDGE GARCIA: Counsel, just to go back for a
21 minute to this - - - you know, we've been discussing a
22 potential rule that would say you exchange PowerPoints
23 before summation if you're going to use one. What would
24 the standard of our review be if it didn't happen and you
25 use it and the judge allows it?

1 MR. DONN: Your Honor, I - - - I don't know the
2 answer to that question, and that's not a rule that we've
3 proposed in our - - - in our briefing. I - - -

4 JUDGE GARCIA: I know.

5 MR. DONN: To me, it sounds like a good - - - it
6 sounds like it would be a good practice that would - - -
7 that would solve a lot of problems, but - - - but either
8 way, the flat out rule that - - - that we believe is
9 required is you cannot take evidence, people can quibble
10 about whether or not manipulate, alter, doctor is the best
11 word, but you cannot change the evidence outside the
12 presence of the jury and put it before the jury on
13 summation. And reversal is required, clearly, where the
14 substance of the alterations goes to a key issue in the
15 case. Here, it was intent. Reversal is required. Thank
16 you, Your Honor.

17 CHIEF JUDGE DIFIORE: Thank you, sir.

18 (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. Trevor Anderson, No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: February 21, 2017