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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 32

YUSUF SPARKS,

Appellant.

20 Eagle Street
Albany, New York
February 15, 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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Official Court Transcriber

1 CHIEF DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 32, the People of the
3 State of New York v. Yusuf Sparks.

4 Good afternoon, counsel.

5 MR. DALACK: Good afternoon, Your Honors.

6 Before I begin, may I please ask for two minutes
7 for rebuttal time, please?

8 CHIEF DIFIORE: Of course.

9 MR. DALACK: Thank you.

10 May it please the court. My name is Andrew
11 Dalack, I'm here on behalf of the appellant, Mr. Yusuf
12 Sparks.

13 Mr. Sparks went to trial with one defense and one
14 defense only. And that was, on December 21st, 2012, when
15 he picked up an empty milk crate and struck Mr. Reginald
16 Randolph, also known around the neighborhood as The
17 Punisher, over the head, one time - - -

18 JUDGE RIVERA: So can there be a reasonable view
19 of the evidence in support of that justification defense if
20 he's outside, and he walks back in, and asks for a stick to
21 beat up Mr. Randolph?

22 MR. DALACK: The - - -

23 JUDGE RIVERA: And when - - - and when the
24 manager of the store refuses to give him the stick, he gets
25 the crate.

1 MR. DALACK: The chronology - - -

2 JUDGE RIVERA: Where does that fit in?

3 MR. DALACK: Okay. So that - - - that chronology
4 can't be taken apart from the rest of the video and the
5 rest of the evidence that was presented to the jury.

6 JUDGE FAHEY: No, I watched - - - I watched the
7 video; it's - - - it's pretty damning. I thought it was
8 pretty difficult to see that the argument for justification
9 in that - - - that five minute sequence, the central part
10 that we're really talking about here, you know, I looked at
11 - - - there was no attempt to retreat, there was no initial
12 aggression. If there's some area that you want us to look
13 at, point us to where you're talking about where it's in
14 the video that would substantiate a justification defense.

15 MR. DALACK: Sure, Your Honor.

16 So to take those two questions together, the - -
17 - the reasonable view of the evidence in a light most
18 favorable to Mr. Sparks in this context isn't in a vacuum.
19 We don't just look at those, you know, thirty seconds in
20 which he picked up the milk crate and struck Mr. Randolph
21 in the - - - in the head; we have to look at what happened
22 minutes before that event.

23 And what the reasonable view of the evidence in a
24 light most favorable to Mr. Sparks asks the trial courts to
25 do in its gatekeeper role, in this case, is to say, could a

1 reasonable juror have had a reasonable doubt that Mr.
2 Sparks acted in self-defense given the following. First -
3 - -

4 JUDGE ABDUS-SALAAM: The jurors - - - the jurors
5 saw the video, correct?

6 MR. DALACK: The jurors saw the video, yes. But
7 assuming the following to be true. So could a reasonable
8 juror have had a reasonable doubt, assuming all the
9 following to be true.

10 First, that Mr. Sparks was aware of Mr.
11 Randolph's reputation in the community for being a violent
12 crack addict whose nickname is The Punisher, had seen Mr.
13 Randolph rob and assault others in the past. We have to
14 assume that to be true.

15 We also saw from the video that Mr. Randolph was
16 behaving, throughout the course of that morning, in a very
17 erratic belligerent behavior. Indeed, when Mr. Ran - - -
18 when Mr. Sparks was standing outside of the bodega,
19 initially, and Mr. Randolph lurched forward at him and
20 another person standing out front of there, pardon the
21 expletive, but he yelled at them. And this was clear on
22 the video. " I'm going to fuck you up, I'm going to fuck
23 you up too." And he threatened them outside of the bodega.
24 That's uncontroverted. And we also know that to be true.

25 JUDGE WILSON: My - - - my problem with the

1 litany you're about to go through though - - -

2 MR. DALACK: Yes.

3 JUDGE WILSON: - - - is that he leaves.

4 MR. DALACK: Yes.

5 JUDGE WILSON: He leave safely, he goes eats some
6 chicken - - -

7 MR. DALACK: Right.

8 JUDGE WILSON: - - - and then he comes back.

9 MR. DALACK: Right.

10 JUDGE WILSON: He could have just continued on
11 home.

12 MR. DALACK: Well, he - - - he could have, Your
13 Honor, but he still needed to go back to the bodega to get
14 the medication that his grade aunt needed, and - - -

15 JUDGE ABDUS-SALAAM: That's the problem, isn't
16 it? He didn't need to go back to that store. Was that the
17 only store he could've gotten Tylenol from?

18 MR. DALACK: Certainly not, Your Honor. But the
19 question here is, he only returned to that store, and he
20 testified to this after he saw that Mr. Randolph was no
21 longer there. So the issue for him was, he was confident
22 that Randolph have left, this was only minutes before - - -
23 minutes after the altercation inside the bodega in which we
24 have to assume again that this is true - - -

25 JUDGE ABDUS-SALAAM: (Indiscernible) he was

1 outside walking around in the video. He was sort of
2 walking in a circle looking kind of dazed on the video.

3 MR. DALACK: Well, he wasn't just walking in a
4 circle at that moment. There were other patrons outside of
5 the store that were outside as well, and they kept a very
6 healthy distance from Ms. Randolph. The jury saw this too.

7 And from Mr. Sparks' vantage point, he testified
8 that when he was back inside the bodega, he didn't know
9 what kind of imminent threat he was facing. And the penal
10 law envisions a situation in which a person can - - - if
11 they are subjectively afraid that they are about to face an
12 imminent threat- - -

13 JUDGE RIVERA: Did - - - did - - - didn't he, as
14 he's walking into the bodega, ask for the stick?

15 MR. DALACK: No. Not until he actually saw Mr.
16 Randolph reappear.

17 JUDGE RIVERA: So how - - - how long after he
18 walks in does he make this request for the stick?

19 MR. DALACK: A matter of - - -

20 JUDGE RIVERA: When - - - when does he say, ah,
21 he's out there, and I'm - - - I'm afraid again?

22 MR. DALACK: Very shortly thereafter. Maybe a
23 half a minute.

24 So again, sort of - - -

25 CHIEF DIFIORE: Counsel, setting aside the

1 defendant's subjective belief, describe for us the
2 threatening behavior of the victim outside the store in a
3 light most favorable to your client.

4 MR. DALACK: At that moment, we can't divorce
5 that objective inquiry from what transpired minutes before
6 then. And we heard on the video, so setting aside Mr.
7 Sparks' testimony for a moment, we heard on the video,
8 because again, there was no video footage from within the
9 bodega; it was just auditory. But we hear Mr. Sparks
10 distinctively yell, take your hands off of me.

11 So for the purposes of the inquiry, we assume
12 that Mr. Sparks' testimony is true that Mr. Randolph was
13 trying to rob him. But setting that aside for the moment,
14 it's clear that there was some sort of an altercation that
15 was instigated by Randolph inside of the bodega in which he
16 put his hands on Mr. Sparks.

17 JUDGE RIVERA: Didn't defendant knock him out and
18 Randolph leave?

19 MR. DALACK: Knocking out is a very strong term,
20 Your Honor. I believe that Mr. Sparks pushed him to the
21 ground and left, and then only came back when he believed
22 that Mr. Randolph wasn't there.

23 But, Your Honors, let's assume for a moment that
24 you're not inclined to find that Mr. Sparks deserved the
25 justification charge, he still gets a new trial because the

1 court permitted the prosecution to cross-examine him on the
2 extremely prejudicial details of a prior robbery conviction
3 that had no probative value whatsoever as it pertained to
4 the justification defense, and certainly had no probative
5 value given the fact that the court refused to charge
6 justification.

7 So this was sort of an unconstitutional catch-22
8 that the court put Mr. Sparks in.

9 When Mr. Sparks testified, and essentially laid
10 out, from his perspective, why he was subjectively afraid
11 of Randolph that night and left it to the jury to decide
12 whether or not that fear was reasonable, the court
13 instructed the prosecution, after having already decided
14 that she wasn't going to allow the details of this prior
15 robbery conviction to come in, that if, on
16 cross-examination, Mr. Sparks insists that inside the
17 bodega Mr. Randolph, when the attempted robbery occurred by
18 Randolph against Mr. Sparks, that if - - - if Mr. Randolph
19 was the initial aggressor in that context, she was going to
20 allow in the prejudicial details in order to rebut his
21 justification defense.

22 So at that point, the - - -

23 JUDGE RIVERA: Didn't she let it in to show that
24 he's fabricated - - - or to let the jury determine whether
25 or not he's fabricated the story that - - - or his version

1 of those facts that Mr. Randolph attacked him in the same
2 way that he, himself, had been found guilty of committing a
3 robbery?

4 MR. DALACK: I see what you're saying, Your
5 Honor. Well, even - - - even assuming that's true, New
6 York's rule is very specific in either the Sandoval or the
7 Molineux context. In the Sandoval context, once a
8 definitive Sandoval ruling has been given, and the
9 defendant has chosen to testify based of that Sandoval
10 ruling, he can open the door to allow the prosecution to go
11 beyond the scope of that Sandoval ruling if the precluded
12 testimony directly refutes his direct examination; we don't
13 have that here.

14 Nothing about the details of the prior robbery
15 conviction directly refute his subjective fear that evening
16 of Mr. Randolph.

17 In the Molineux context, it's a similar inquiry.
18 We start from the position where the details of the prior
19 conviction are inherently prejudicial; there's no question
20 about that. So the court has to ask, does the probative
21 value of this evidence outweigh its naturally prejudicial
22 effect.

23 Here, we have the same problem. When the court
24 allowed the prosecution to introduce the prejudicial
25 effects, or the - - - I'm sorry, the prejudicial details of

1 this prior robbery conviction, she was essentially saying,
2 this is elucidative, you know, this is going to elucidate
3 Mr. Sparks' subjective intent that evening. But in People
4 v. Bradley, this court was very clear. The information has
5 to be demonstrably probative, demonstrably relevant to that
6 subjective fear. In Bradley, we had a situation where the
7 defendant had asked for a justification - - -

8 JUDGE RIVERA: So it could not be used to show
9 fabrication?

10 MR. DALACK: No.

11 JUDGE RIVERA: It could not?

12 MR. DALACK: It - - - it could not be used for
13 that purpose. That was erroneous. And even if it - - -

14 JUDGE FAHEY: The circumstances - - - the
15 circumstances were different in Bradley, though. That was
16 ten years before. Right. It's the thigh stabbing
17 incident, that's the case - - -

18 MR. DALACK: It's the thigh stabbing incident.
19 Yes, Your Honor.

20 JUDGE FAHEY: - - - you're talking about. Here's
21 the problem with the argument, the Sandoval argument.
22 Let's say the court, releveling the play field - - -
23 playing field in some senses was error, and how is this not
24 harmless error in light of the video, which seems to be
25 overwhelming evidence?

1 MR. DALACK: Well, first, the video isn't
2 overwhelming, and the evidence, as taken as a whole, wasn't
3 overwhelming because the jury acquitted Mr. Sparks of the
4 top count - - -

5 JUDGE FAHEY: Um-hum.

6 MR. DALACK: - - - and convicted him only of the
7 - - -

8 JUDGE FAHEY: Well, that's - - - I don't know if
9 that's - - - that may have been a rational decision on the
10 jury's part, you know, between serious physical injury and
11 physical injury.

12 MR. DALACK: And also as to what Mr. Sparks
13 intended that evening, right. So what Mr. Sparks' intent
14 was, was obviously something that the jury was seriously
15 considering, and the evidence, in and of itself, didn't
16 preclude a finding that Mr. Sparks intended to inflict
17 physical injury - - -

18 JUDGE FAHEY: So you're saying - - -

19 MR. DALACK: - - - versus serious physical.

20 JUDGE FAHEY: - - - it's not overwhelming because
21 - - - in essence, because they didn't convict him of the
22 top count.

23 MR. DALACK: Well, that's one of the reasons why
24 it's not overwhelming. And another reason why it's not
25 overwhelming is because Mr. Sparks' justification defense

1 was meritorious. The jury should have been allowed to
2 answer the question. Would a reasonable person in Mr.
3 Sparks' shoes had felt subjectively afraid of an imminent
4 threat coming from Mr. Randolph, such that it was necessary
5 to, essentially, effectuate a preemptive strike which the
6 Penal Law envisions in these kind of situations, to
7 ameliorate that threat.

8 The problem that we have here is that when it
9 comes to the evidentiary issue, the court tethered that
10 evidentiary ruling to the justification charge. And so at
11 the moment that the court does that, it essentially says,
12 there is enough evidence here for the jury to really
13 debate, to an extent, about justification.

14 And then it says, you know what, after the fact,
15 after having let these details in, I'm not going to give
16 Mr. Sparks the justification charge; he got the worst of
17 both worlds and deserves a new trial.

18 CHIEF DIFIORE: Thank you, sir.

19 MR. DALACK: I'll save the rest for rebuttal.
20 Thank you.

21 CHIEF DIFIORE: Counsel.

22 MS. GLINER: Good afternoon.

23 CHIEF DIFIORE: Good afternoon.

24 MS. GLINER: Your Honors, the reason why the jury
25 was not given the option of making a factual determination

1 here is that there was no factual determination essentially
2 for the jury to make, because when the judge looked at the
3 defendant's testimony and credited it as a matter of law,
4 it did not make out justification.

5 Several of the judges have referred to the video,
6 which I think, actually, you know, really speaks for
7 itself. The video shows that at the moment that the victim
8 here was assaulted, he was simply standing outside the
9 bodega, the defendant, even if you credit his story that
10 the victim attacked him inside, which there is reason not
11 to credit, but let's say you credit it, the defendant is
12 seen coming out of the bodega with a milk crate in his
13 hand, and he just clocks the victim of the head. Now - - -

14 JUDGE STEIN: But if you credit his testimony, he
15 said that he did that because, given all the things he
16 knew, and all the things that had happened, he thought that
17 this guy might have had a gun, and he - - - that he was in
18 imminent risk of being injured.

19 MS. GLINER: But, Your Honor, there still has to
20 be an objective basis for believing that the victim has - -
21 - what you say, has a gun. The victim was standing outside
22 at that point. This had - - - was way after the claimed
23 attempted robbery in the bodega. So that - - -

24 JUDGE STEIN: But assuming that he had to leave,
25 he had to walk out that door at some point, and - - - and

1 he gives all these reasons why he feared that he was going
2 to be attacked - - -

3 MS. GLINER: They still have to - - -

4 JUDGE STEIN: - - - why - - - why - - - why does
5 that eliminate any possibility- - -

6 MS. GLINER: Because they still have to be - - -

7 JUDGE STEIN: - - - for a jury - - -

8 MS. GLINER: - - - objectively reasonable. He
9 could - - - in other words, he can't say, gee, I was afraid
10 of this man who was just standing there doing nothing, and
11 if anything, looking drunk and dazed, because I've heard
12 bad things about him, or he did bad things. There has to
13 be an objective reason why he believes the victim is
14 actually going to do something rather than the victim just
15 standing there.

16 And I think it's very instructive that in the
17 defendant's reply brief, he talks about this is a
18 preemptive action. And there are circumstances, I suppose,
19 where you can use preemptive action in self-defense. If
20 someone is pointing a gun at you, or if someone lifts a bat
21 - - -

22 JUDGE STEIN: Well, what if - - - what if - - -
23 what if he was in the store, he knew this guy, they were
24 rival drug dealers, and he knew from, you know, from the
25 talk on the street that this guy was out to get him, and

1 the first time he laid eyes on him, he was going to kill
2 him.

3 MS. GLINER: I mean, that - - - that would
4 essentially do away with the defense of self-defense.
5 There has to be an objective reason for why the defendant
6 fears, at that moment, as some of the other judges have
7 pointed out, there were millions of things he could have
8 done. He did not have to walk out and immediately hit the
9 victim on top of the head with a milk crate. That was not
10 his only option by any means.

11 And he can't justify it by saying, I was scared
12 of the guy because as a bad reputation and he said some
13 nasty things to me. There has to - - -

14 JUDGE RIVERA: I think - - - I think concern is
15 why is he walking back in. And counsel says, you have to
16 credit his testimony that since he no longer saw Randolph
17 around and he still needed to get the - - - I think it was
18 Tylenol for his great aunt, or whatever it was for his
19 family member, that he - - - he went back to get that.

20 And only once he's inside, and there's only one
21 exit, that - - - that door, that front door, he then sees
22 that Randolph has returned. And a certain amount of time
23 has elapsed, and he doesn't know if Randolph, who is a drug
24 addict, there's no dispute about that, People don't dispute
25 that, may have, perhaps further armed himself, or is now a

1 very serious threat to him.

2 MS. GLINER: But - - -

3 JUDGE RIVERA: So if - - - the point is, if your
4 crediting that version, why isn't that version - - - as we
5 must, right, why isn't that objectively enough to get the -
6 - -

7 MS. GLINER: Because it's not- - -

8 JUDGE RIVERA: - - - justification charge?

9 MS. GLINER: It's not objectively enough, as a
10 matter of law, for a defendant to be in the store and see
11 the victim just standing there and say, I'm afraid he has a
12 gun. Perhaps if Randolph had a bulge in his waistband,
13 perhaps if Randolph had moved in some way, all you have,
14 and this is according to the reply brief if you really
15 examine it closely, the only action that was taking place
16 outside at the time the victim was assaulted, was that
17 Randolph was lurking. And this is the description given by
18 the defendant - - - the defense brief.

19 JUDGE STEIN: But aren't you taking that just one
20 little piece of testimony out of the whole scenario that
21 the defendant gave?

22 MS. GLINER: But it's the most important piece.
23 In other words - - -

24 JUDGE STEIN: But - - - but you - - - but you
25 don't get to select that, right? The question is, is

1 whether given the - - - the testimony and the evidence
2 viewed in the light most favorable to the defendant, is it
3 possible that the jury could have found - - -

4 MS. GLINER: And - - - and I think the judge, as
5 the gatekeeper here, had an obligation to take the evidence
6 in the light most favorable to the People, which she did,
7 and reached the legal conclusion that, on these facts,
8 whether the defendant had a subjective fear or not, there
9 was no objective basis for the assault. In other words,
10 you - - -

11 JUDGE GARCIA: And counsel, there is an objective
12 component to this analysis, right?

13 MS. GLINER: Yes.

14 JUDGE GARCIA: And it seems that some of the
15 trouble is the distinction between an objective component,
16 and here, you have a very objective film, and the light
17 most favorable to the defendant, which doesn't seem to
18 equate to me to accepting this objective view of the
19 defendant as objective.

20 I mean, there's a difference there. It doesn't -
21 - -

22 MS. GLINER: But if what you're saying is that we
23 have to accept that the defendant may have subjectively had
24 fear - - -

25 JUDGE GARCIA: Right.

1 MS. GLINER: - - - I think that's true.

2 JUDGE GARCIA: That's a difference between
3 objective evidence.

4 MS. GLINER: Right. But still, if the defendant
5 had come out, and had a bazooka in his hand, and, you know,
6 used it against Mr. Randolph was just standing there, he
7 may very well had feared Mr. Randolph subjectively. We - -
8 - we give him that in the legal analysis. But there still
9 has to be an objective basis for the fear.

10 And if you look at the video, all you see is the
11 victim standing there, and the defendant coming out, and
12 clocking him with a milk crate.

13 Now - - -

14 JUDGE WILSON: What about Mr. Dalack's last
15 point, that there's something fundamentally inconsistent
16 about the judge hearing the testimony and then saying, I'm
17 going to allow the Sandoval material because it is related
18 to justification? She must have thought there was
19 sufficient grounds then to - - - to give a justification
20 instruction, and then refusing to give a justification
21 instruction.

22 MS. GLINER: Okay. I think one of the issues
23 here is that everything is sort of gotten lumped together,
24 and a lot of these rulings happened at different times of
25 the trial when different evidence was being presented.

1 The judge originally made a Sandoval ruling.
2 Then, at one point, the defendant suggested that he might
3 put on a defense witness. She made another ruling. But
4 she never actually let him question the defendant about the
5 prior conviction until the defendant actually took the
6 stand and testified that the victim did to him what he had
7 actually done to someone else.

8 JUDGE WILSON: But she explained her reason for
9 doing that as it relating to the justification defense,
10 right?

11 MS. GLINER: Well, the reason - - -

12 JUDGE WILSON: At the time.

13 MS. GLINER: The reason she did was this. First
14 of all, I think you have to realize that a judge can't make
15 a ruling on a justification charge or any charge until she
16 heard all the evidence. At the time the defendant was
17 being cross-examined, the case wasn't over.

18 So actually, if at that point the judge had said,
19 you know what, you have no justification charge, then, of
20 course, the defendant would've objected, but the evidence
21 is not all in. So she had to make - - -

22 JUDGE RIVERA: But - - - but once he testifies,
23 you've seen the best-case scenario for him, haven't you? I
24 mean, it's his - - -

25 MS. GLINER: But - - -

1 JUDGE RIVERA: - - - it's his version. He's now
2 explained his subjective belief, and he's given his
3 chronology of what has occurred, what - - -

4 MS. GLINER: But - - -

5 JUDGE RIVERA: I mean, on cross, all the People
6 are going to try and do is knock that down and make it look
7 worse.

8 MS. GLINER: But she's being - - -

9 JUDGE RIVERA: So you've heard the best version
10 from his side.

11 MS. GLINER: She's - - - she's being asked, the
12 judge in this case, to make a very specific evidentiary
13 ruling. And the evidentiary ruling she makes at the time
14 that she makes it has nothing to do with the Sandoval,
15 really; it has to do with Molineux.

16 Because what happens, and again, if you look at
17 about three or four different junctures in the case, this
18 judge repeatedly would not let the defendant be
19 cross-examined about what the prosecutor wanted to
20 cross-examine about. It was only when the defendant, on
21 cross-examination, says that the victim did to him exactly
22 is what he's done in the past that she - - -

23 JUDGE RIVERA: You're saying it's to show
24 fabrication.

25 MS. GLINER: To show fabrication. And the reason

1 - - -

2 JUDGE RIVERA: What - - - what - - - what does
3 the judge say to make clear that that's - - - that's the
4 choice being made?

5 MS. GLINER: Well, I - - -

6 JUDGE RIVERA: Is there something at that time?
7 Is there something in the instruction, a combination of
8 both?

9 MS. GLINER: Yes. Yes, the judge actually
10 indicated at various points that this was no longer
11 Sandoval, and the reason why it was probative, contrary to
12 what my adversary is saying, is that this is not a case
13 where the defendant was accused of robbery, so the People
14 are asking to, you know, introduce a prior robbery on some
15 modus operandi theory, you know, to show that he commits
16 robberies.

17 This is a - - - an assault case. And the fact
18 that, in the past, the defendant was, himself, has
19 committed or was convicted of an act that he's now
20 describing to the victim, certainly goes to the credibility
21 of his claim that the victim actually did it. It's a very
22 bizarre thing, very uncanny thing. Certainly, the jury was
23 entitled to know that, not to show that the defendant had a
24 propensity to commit robberies, but to show that his
25 version, or to help judge whether - - -

1 JUDGE RIVERA: Does the - - - does the charge
2 reflect that?

3 MS. GLINER: I believe so, Your Honor.

4 JUDGE RIVERA: Does the judge say you can't
5 consider this for a propensity - - -

6 MS. GLINER: The judge did say that.

7 JUDGE RIVERA: - - - it goes to credibility?

8 MS. GLINER: On page 39 of our brief, the jury
9 was told that the only purpose that they could use this was
10 on the degree of credibility you wish to give to the trial
11 testimony.

12 So she made very clear that while this was
13 probative of something, they could not use this in any way
14 to assume that the defendant had a propensity, and that it
15 was only on the matter of credibility.

16 JUDGE RIVERA: Did the defendant object to the
17 charge?

18 MS. GLINER: I don't believe so.

19 JUDGE RIVERA: Okay.

20 MS. GLINER: And even more fundamentally, the
21 fact of the matter remains that in some ways, the
22 evidentiary ruling was moot because, for the very reason,
23 as I began my argument, if you have the defendant on the
24 video, striking the victim over the head with a milk crate
25 with absolute no provocation at the time, and no

1 justification, there's no way this ruling could have made a
2 difference.

3 So we'll stand on our brief and ask you to affirm
4 the Appellate Division.

5 Thank you.

6 CHIEF DIFIORE: Thank you, counsel.

7 Mr. Dalack?

8 MR. DALACK: Thank you, Your Honor.

9 JUDGE RIVERA: Counsel, is it the defendant's
10 argument that when he's inside, and he chooses to pick up
11 this milk cart - - - crate, and come out, and hit Mr.
12 Randolph, that he thinks Mr. Randolph is going to come in,
13 or it's the only way he thinks that he can get out?

14 MR. DALACK: Both. Either way, he doesn't know
15 what the immanency of the - - - of the- - -

16 JUDGE RIVERA: Because if Mr. Randolph - - -

17 MR. DALACK: - - - threat is, at that point.

18 JUDGE RIVERA: - - - is not coming in, why can't
19 they just call the cops, or why can't he wait it out?

20 MR. DALACK: There were many - - -

21 JUDGE RIVERA: Randolph left before.

22 MR. DALACK: I guess there were many different
23 options in front of Mr. Sparks at that time, but that is a
24 question for the jury to decide concerning the
25 reasonableness of his action. I think the problem with the

1 People's iteration - - -

2 JUDGE ABDUS-SALAAM: Counsel, I - - - I have a
3 couple of questions about that for you. It seemed to me,
4 from watching the videotape, that everybody involved in
5 this was familiar with the bodega owner, and he was
6 familiar with the actors involved, Mr. Randolph, your
7 client - - -

8 MR. DALACK: Yes.

9 JUDGE ABDUS-SALAAM: And in fact, I think he
10 called him Joseph.

11 MR. DALACK: Yes.

12 JUDGE ABDUS-SALAAM: So I - - - I realized that
13 there was one entrance into the store for patrons to come
14 in and buy things, but there must have been another exit
15 from the store, or out the back, or something.

16 So if your client was really afraid of Mr.
17 Randolph, couldn't he have asked the bodega owner, let me
18 go out the back way instead of let - - - going out the
19 front way?

20 MR. DALACK: There was no testimony about an
21 alternative entrance - - -

22 JUDGE ABDUS-SALAAM: Exactly. He - - -

23 MR. DALACK: - - - adduced at trial.

24 JUDGE ABDUS-SALAAM: - - - he wanted to go out
25 the front away. Didn't - - - if he was so afraid, he could

1 have - - - he could have - - - what my suggestion is that
2 he could have gone out a different way if he wanted to
3 avoid Mr. Randolph.

4 MR. DALACK: Sure. But that, again, goes to the
5 weight and credibility of the defense as a whole. Right?

6 JUDGE ABDUS-SALAAM: But doesn't he have the
7 requirement to retreat if he wants to have a justification
8 defense?

9 MR. DALACK: I don't believe that there is a duty
10 to retreat under Penal Law 3515 as it pertains to the use
11 of physical force; I believe that duty to retreat pertains
12 to the use of deadly force. And so, to the extent that he
13 requested an instruction regarding the use of physical
14 force, there's no duty to retreat imbedded in there.

15 Again, part of the tragedy here is that all of
16 these questions go to the weight and - - -

17 JUDGE RIVERA: Well, let's take his - - - his
18 version, again. So - - - and view it objectively, the
19 objective component of it. So his version, as I understand
20 it, is he goes in, he asks the bodega owner manager for a
21 stick, and that person says, no. Doesn't that objectively
22 tell us something about whether or not the defendant's
23 response is justified?

24 MR. DALACK: Well, it might mean that the manager
25 wasn't afraid of Randolph, but Mr. Sparks was. And I mean,

1 and that, again, just goes to the weight and credibility of
2 Mr. Sparks' justification claim.

3 The problem here is that all of these questions
4 sort of implicate the core issue, which is, when is a
5 defendant entitled to a justification charge. And the
6 People's iteration of the standard seems to be, a defendant
7 is only entitled to a justification charge when his
8 justification defense is meritorious. That's not the rule
9 in New York. The rule in New York is, the reasonable view
10 of the evidence by taking in a light most favorable to
11 defendant - - - to the defendant.

12 JUDGE RIVERA: And done in such a situation if -
13 - - than the evidence belies the justification defense,
14 would you agree that then there's no error if the judge
15 chooses not to permit the justification charge?

16 MR. DALACK: Certainly. But that gatekeeper role
17 is limited in the court - - - this court has said so in
18 People v. McKenzie, "To patently insufficient claims in
19 which there is nothing but a speculative relationship
20 between the action taken and a triggering circumstance."

21 We don't have that here if you take the evidence
22 in the light most favorable to Mr. Sparks, for all the
23 reasons that we outlined in the brief. He had an
24 altercation with him inside the bodega, in which Mr.
25 Randolph tried to rob him. He had seen him rob and assault

1 others in the past, Mr. Randolph had lurched forward at him
2 and attacked and when he was outside of the bodega, and
3 then Mr. Sparks - - -

4 JUDGE RIVERA: Can you address the question of
5 the charge? Your light has gone, so it will be my last
6 question.

7 The question of the charge, right, the ADA says
8 the charge makes clear that - - - that - - - on the second
9 point.

10 MR. DALACK: Yes. Concerning the evidentiary
11 ruling.

12 JUDGE RIVERA: The information about the robbery
13 comes in to show fabrication, not propensity.

14 MR. DALACK: Well, there are two things there.
15 If I may, I understand the red light is on.

16 CHIEF DIFIORE: You may.

17 MR. DALACK: The first is that the court's
18 instruction is incomplete to the extent that it notifies
19 the jury, you've learned that the defendant has previously
20 been convicted of a crime.

21 They didn't just learn that. They learned that
22 two years prior to that in a totally unrelated instance.
23 My client went up to an unknown stranger, a total stranger,
24 and pretended to have a gun, and threatened to kill that
25 person and beat her up. They learned then. They didn't

1 just learn the existence of a prior conviction.

2 And the court, tellingly, at the very beginning,
3 before the jury was paneled, when this was sort of
4 happening pretrial, said that that information was useful
5 to discerning whether or not my client had a propensity to
6 act with violence with little or no provocation. That is
7 the extent to which the court admitted it, because she
8 wanted the jury to know that this was a bad dude who was
9 probably not really afraid of Mr. Randolph.

10 And for that reason, if we don't win on the
11 justification defense, we should win on the evidentiary
12 ruling. If we lose on the evidentiary ruling, we should
13 win on the justification issue.

14 CHIEF DIFIORE: Thank you, counsel.

15 MR. DALACK: Thank you.

16 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Yusuf Sparks, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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