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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 65

LAWRENCE P. FRUMUSA,

Appellant.

20 Eagle Street
Albany, New York
May 3, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
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 JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 64, the People of the
3 State of New York v. Lawrence Frumusa.

4 Counsel.

5 MR. DUBRIN: Good afternoon. Three minutes for
6 rebuttal, if I may?

7 CHIEF JUDGE DIFIORE: Three, sir?

8 MR. DUBRIN: Three minutes.

9 CHIEF JUDGE DIFIORE: Yes.

10 MR. DUBRIN: County Court erred as a matter of
11 law in this case by admitting a civil contempt order, which
12 in the context of this case, revealed a Supreme Court
13 justice's finding that Mr. Frumusa committed the very
14 larceny to which - - -

15 CHIEF JUDGE DIFIORE: Well, he put his state of
16 mind in - - - in play, didn't he now?

17 MR. DUBRIN: He did. That was - - - that was a
18 critical issue in this case. But our position is - - - is
19 that the prejudice in this case as to that question
20 substantially outweighed any probative worth. In fact, as
21 the People seeming concede, the - - - the contempt order
22 was immensely prejudicial. It came dangerously close to
23 directing a verdict against Mr. Frumusa and usurping the
24 jury's fact-finding function. Yet, it really had no real
25 probative worth.

1 JUDGE STEIN: Well, how - - -

2 JUDGE FAHEY: Well, it's - - - it's - - - what if
3 we start out with the premise that this isn't Molineux?
4 Let - - - let's accept your premise that it isn't Molineux.
5 It's not a prior bad act. And it - - - and it - - - so
6 it's not being introduced as propensity evidence. But it
7 seems to be clearly relevant. It involves the acts that
8 are involved there. Would you - - - would you agree to
9 that?

10 MR. DUBRIN: No. I wouldn't agree to that.
11 First of all, I - - -

12 JUDGE FAHEY: Okay. Go ahead.

13 MR. DUBRIN: - - - agree with you - - - well, I
14 agree with the first part of the premise.

15 JUDGE FAHEY: Well, sure.

16 MR. DUBRIN: It's not - - - it's not Molineux.
17 Matter of fact, it's far more prejudicial than Molineux
18 ever - - -

19 JUDGE FAHEY: Well, no. That's the second part
20 of the Molineux analysis. First is the propensity
21 evidence. And then we - - - then we measure prejudicial -
22 - - or probative value versus prejudicial effect, but you
23 measure that as to all relevant evidence. So if we assume
24 it's relevant evidence, and you say no, it's not relevant
25 evidence, then it's really just a question of the balancing

1 between probative value prejudicial effect.

2 MR. DUBRIN: All right. If we - - - if we do the
3 balancing, the People contend that its probative worth lies
4 on the question of knowledge and mistake of fact. There
5 are four reasons why it's not sufficiently probative for
6 that - - - for that question.

7 JUDGE FAHEY: Go ahead.

8 MR. DUBRIN: First of all, knowledge and mistake
9 of fact really weren't at issue in this case. It was not
10 Mr. Frumusa's contention that he mistakenly believed the
11 money belonged to him. Clearly, it didn't. It belonged to
12 WHD, the company. It obviously - - - it's obviously an
13 unlawful taking to take the money. Rather, it was Mr.
14 Frumusa's contention that he was authorized on the
15 operating agreement to use the money to pay bills, and
16 that's exactly what he did as managing member. If the jury
17 rejected his - - - and by the way, you can see this
18 throughout the entire trial. You can see this throughout
19 the entire trial. You can see it in the opening statement,
20 closing remarks, his trial order of dismissal motion,
21 cross-examination of Hernandez and Foster. That was his
22 contention throughout the trial. If the jury were to have
23 rejected his contention and concluded that indeed he was
24 using the money for personal expenses - - -

25 JUDGE FAHEY: See, this is where I'm getting

1 confused because it seems like relevant evidence. It's
2 tendency to produce or to - - - to support a material fact.
3 Here, we have a fact that there was a contempt order based
4 on a series of facts where a civil court found that he had
5 not complied with a directive of that court its
6 relationship with the - - - oh, God. I'm drawing a blank.
7 With the relationship not with the court, but with the
8 person who was appointed to - - -

9 JUDGE WILSON: The receiver.

10 JUDGE FAHEY: - - - the receiver. Thank you,
11 Judge Wilson. And I - - - how do we move beyond intent
12 there?

13 MR. DUBRIN: Well, I - - - I think you were - - -

14 JUDGE FAHEY: See, it seems to me that you're
15 rattling off the Molineux exceptions and then knocking them
16 down one-by-one. But I'm saying assume it's not Molineux.

17 MR. DUBRIN: Well - - -

18 JUDGE FAHEY: It's just normal evidence.

19 MR. DUBRIN: Right. Right. Well, the Molineux
20 exceptions ultimately exist because they are relevant to or
21 they're germane to any sort of relevancy analysis. So I
22 think we should draw some guidance from Molineux here.

23 JUDGE FAHEY: Okay.

24 MR. DUBRIN: I think it's appropriate. Now I
25 think your question suggests that you're pointing to the

1 Appellate Division's decision in which the Appellate
2 Division concluded that it was relevant and showed that Mr.
3 Frumusa had disobeyed a prior order of the court and from
4 that one can conclude that it's relevant to the question of
5 intent. But I would submit that that order did not show
6 that Mr. Frumusa had disobeyed a prior order of the court.
7 It showed - - -

8 JUDGE STEIN: I thought it was - - - I thought it
9 was to show that he didn't intend to - - - that he intended
10 to deprive the - - - the company or the receiver of that -
11 - - of that money permanently. I thought that was the
12 purpose or at least one of the purposes.

13 MR. DUBRIN: Yeah. The - - - the Appellate
14 Division, that was the ultimate conclusion that the
15 Appellate Division drew, but it drew it from first
16 concluding that it was relevant to show that Mr. Frumusa
17 disobeyed a prior order of the court. And - - -

18 JUDGE STEIN: But is it enough if it's - - - if
19 it's not the disobedience, if it is - - - if it is intended
20 to show that intent to deprive?

21 MR. DUBRIN: I - - - I don't see how one can get
22 to the question of intent unless we first conclude that it
23 shows that Mr. Frumusa had disobeyed the order of the
24 court. And that is really the - - - the logic of the
25 Appellate Division's decision. And there are four reasons

1 why it wasn't sufficiently probative to show that Mr.
2 Frumusa disobeyed an order of the court and thus ultimately
3 intended to - - -

4 JUDGE STEIN: Well, it showed that he didn't give
5 the money back.

6 MR. DUBRIN: It showed that the ord - - -
7 contempt order showed that an Appellate Division - - - or
8 excuse me, a Supreme Court judge had concluded that Mr.
9 Frumusa had not given the money back. And that's not an
10 evidentiary fact, but rather, just - - -

11 JUDGE FAHEY: But he didn't - - - Mr. Frumusa
12 didn't even challenge the contempt order. He didn't - - -
13 he challenges at the criminal trial, but at the civil
14 trial, he didn't even challenge.

15 MR. DUBRIN: Right. And I - - - I don't see how
16 that would add to its relevance. If anything, it would
17 show that the - - -

18 JUDGE FAHEY: Well, you're - - -

19 MR. DUBRIN: - - - determination - - -

20 JUDGE FAHEY: - - - using it, as I understand it,
21 to - - - to establish certain facts. And if he didn't
22 challenge those facts, then how would they not be
23 admissible?

24 MR. DUBRIN: Well, if he didn't - - -

25 JUDGE FAHEY: For relevance purposes?

1 MR. DUBRIN: Well, I think, you know, ultimately
2 rele - - - evidence is relevant where it has some probative
3 worth. I - - - that - - -

4 JUDGE FAHEY: Sure.

5 MR. DUBRIN: - - - goes without saying,
6 obviously.

7 JUDGE FAHEY: Yeah.

8 MR. DUBRIN: And - - -

9 JUDGE FAHEY: The way I understand your argument,
10 you're not saying that it's not probative. You're simply
11 saying that it's so - - - it's prejudicial.

12 MR. DUBRIN: Well, I'm - - - I'm saying if - - -
13 if to the extent you were to conclude that there was any
14 probative worth, what - - - what we're talking about is
15 extreme - - - extremely remote probative worth. And I've
16 set the - - - forth the reasons in my brief but the first,
17 as I was suggesting to - - -

18 JUDGE RIVERA: So let's talk about why - - - why
19 isn't it just harmless under the circumstances?

20 MR. DUBRIN: Why - - - well, first of all, I - -
21 - I don't think it's amenable to harmless error analysis
22 because it's hard to imagine any evidence which essentially
23 directs a verdict against a defendant could - - - well,
24 could be more - - - could be more prejudicial. If - - -

25 JUDGE WILSON: But the prior orders are all in

1 without objection, right, that he - - - that he violated
2 directing him not to, right?

3 MR. DUBRIN: That's correct.

4 JUDGE WILSON: And there's also testimony that -
5 - - from the receiver and from the - - - his co-owner that
6 he - - - you know, he took the money and didn't return it.

7 MR. DUBRIN: That - - - that's correct. So what
8 I - - - what I would suggest is that shows why the contempt
9 order had such little probative worth. That - - -

10 JUDGE FAHEY: Was there - - -

11 MR. DUBRIN: That rendered - - - that really
12 rendered the contempt order unnecessary and - - -

13 JUDGE WILSON: Why doesn't it also show that it's
14 harmless, though?

15 MR. DUBRIN: Well - - -

16 JUDGE WILSON: There's so much other evidence of
17 - - -

18 MR. DUBRIN: Well, I - - - I don't believe that
19 the evidence is overwhelming. What we have here is an
20 operating agreement that authorized Mr. Frumusa to cont - -
21 - to manage the company by using company money. There was
22 much to support Mr. Frumusa's contention that - - -

23 JUDGE RIVERA: But you agree - - - but you don't
24 object to the other orders going in. It's only this
25 contempt order, correct?

1 MR. DUBRIN: That's - - - that's correct. And
2 that's - - - I mean that order was different because of it
3 - - - its finding that Mr. Frumusa had committed the very
4 crime that he was charged - - -

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. DUBRIN: - - - and faced at trial. Thank
7 you.

8 CHIEF JUDGE DIFIORE: Ms. Wolford. Ms. Wolford,
9 doesn't the admission - - - admission and use of the court's
10 judicial finding invade the province of the jury in this
11 case?

12 MS. WOLFORD: No. Not, Your Honor, in this case.
13 What we have here is an order that was signed by a Supreme
14 Court judge in a civil action against three companies that
15 - - - that two of which contained the name of the defendant
16 but not the defendant himself. So it's very important that
17 we talk a little bit about what that order actually did.

18 JUDGE STEIN: But you - - - but you argued,
19 essentially, or you tried to argue that it was - - - it was
20 related to defendant himself.

21 MS. WOLFORD: Yes. And - - - but there's two
22 parts to that because it's - - - what that order is is a
23 piece of the puzzle that the prosecutor had to put together
24 to get to the point in time where we could prove that
25 defendant, who was the majority owner in the corporation -

1 - - or in the company, did not have the right to take this
2 - - -

3 JUDGE RIVERA: But didn't - - -

4 MS. WOLFORD: - - - 250,000 dollars.

5 JUDGE RIVERA: But didn't the People argue that
6 he failed to, as you say, he's in contempt. He failed to
7 comply with that order.

8 MS. WOLFORD: Yes.

9 JUDGE RIVERA: So the judge was trying to make
10 him comply. He didn't. But now you can make him comply,
11 right? You can now serve justice.

12 MS. WOLFORD: Yes.

13 JUDGE RIVERA: I'm paraphrasing, but that's
14 really what the People were arguing, correct?

15 MS. WOLFORD: It is exactly what the People
16 argued, and I think that probably exceeded the appropriate
17 argument on the use of that particular document because it
18 is somewhat of a safe-street type of argument that we
19 probably should have avoided.

20 JUDGE FAHEY: Well - - -

21 JUDGE RIVERA: Well, then how can this be
22 harmless error given that argument?

23 MS. WOLFORD: Well, a few things. First of all,
24 I want to clarify. There was no objection to that comment
25 whatsoever, so that wasn't stricken. There was no

1 discussion.

2 JUDGE FAHEY: Was there - - - was there any
3 limiting instruction requested or - - - or sought on the -
4 - - the order itself?

5 MS. WOLFORD: No, Your Honor. And I would like
6 to point out that although we're here talking about this
7 case as if it's a preserved issue, if - - - I would direct
8 the court back to when the order comes into evidence
9 because the People mark it as an exhibit and move it into
10 evidence and the words out of the defense attorney's mouth
11 are no objection, Your Honor. Done. So to the extent that
12 he disagreed with the Molineux ruling, which he never
13 objected to the - - - to the ultimate ruling of the court,
14 he then, at the point in time when this order goes into
15 evidence, says no objection, consenting to the order at
16 that point coming into evidence. That's the only thing
17 that the jury heard. And then there's no request for a
18 limiting instruction. The People had, at the beginning of
19 the case, very specifically said that we were putting it in
20 to prove an intent to permanently deprive, that that was
21 part of our theory of the case that we knew from statements
22 that the defendant had made to the Rochester Business
23 Journal that his defense was going to go down that line.

24 JUDGE FAHEY: Is - - - isn't it relatively common
25 in the criminal context to take civil orders and - - - and

1 put them in to - - - to show relevant facts?

2 MS. WOLFORD: It can be.

3 JUDGE FAHEY: All right. So give - - - give us
4 some examples of when that would happen.

5 MS. WOLFORD: Well, there's times when we have
6 family court orders that are - - -

7 JUDGE FAHEY: For orders of protection - - -

8 MS. WOLFORD: Correct.

9 JUDGE FAHEY: - - - things like that would come
10 in and - - -

11 MS. WOLFORD: And they're temporary order
12 sometimes and sometimes they're permanent orders. But
13 there are orders.

14 JUDGE FAHEY: But - - - but ultimately, they - -
15 - they make a finding to stay away but that's not a
16 determination as to the ultimate facts but only as to
17 relevant evidentiary facts in dispute.

18 MS. WOLFORD: Right. And here it's not the
19 determination as to the ultimate facts, either. Because it
20 requires not only that the jury draw the lines that we
21 requested, which was to take that order that was to the
22 defendant's three companies and use the other evidence that
23 we presented to draw the conclusion that it was actually
24 the defendant who stole the money, not the three companies
25 taking the money and not paying it back, but that the

1 defendant, by taking - - - by creating a new account
2 outside of the receivership and having funds funneled into
3 the account that only he had access to that in fact, even
4 though he was putting it in the name of his companies, that
5 it was actually the defendant. Judge Fisher's order says
6 nothing about that. So in order for the jury to get to the
7 point in time where they can convict him of grand larceny
8 as charged by the jury - - - by the judge in this case,
9 they have to go far, far beyond the order off Judge Fisher.

10 But there is, I think, ultimately a
11 jurisdictional issue that I apologize that it's not raised
12 in our brief because we have a situation here where we - -
13 - I would call it a motion in limine even though it was
14 titled a Molineux application, about this evidence prior to
15 the beginning of trial. There is no objection to the
16 court's ruling on that. There's no objection to the order
17 coming in. There's no request for a limiting instruction.
18 And there's no request for an instruction during the final
19 jury charge. At that point in time, the defense has
20 abandoned any offer at trying to fix this problem that they
21 now bring before this court. And I think that affects the
22 very jurisdiction of this court's ability to hear this
23 because the issue's entirely unpreserved. And I do
24 apologize because that was not raised in our brief. But I
25 do agree with the court that this is not Molineux evidence.

1 This is evidence - - -

2 JUDGE FAHEY: I was trying to think of how it got
3 here, but then it came - - - but an Appellate Division
4 judge, correct?

5 MS. WOLFORD: Yes. And I - - - and I can say
6 that I know from reading the pleadings there was - - - the
7 jurisdictional issue was not raised by us, either, at that
8 stage. So I apologize to the court for that.

9 JUDGE FAHEY: So in fairness, it was perfectly
10 proper to - - - for the grant to given then.

11 MS. WOLFORD: Yes. I don't - - - I don't fault
12 the court at all for - - - for granting leave in this case.
13 It is an unusual case. I can understand why he would grant
14 leave in this case, and we did not raise a jurisdictional
15 issue.

16 JUDGE FAHEY: I see.

17 MS. WOLFORD: But it really truly is not
18 Molineux. It is about the crime that the defendant's being
19 charged with. It is not an unrelated crime. There is no
20 propensity issue here. This is about whether or not the
21 defendant, as the majority owner of a corp - - - of a
22 company, had the right to keep the money and defendant put
23 that at issue himself. And this became far more relevant
24 in this case because it was - - - actually was about the
25 money that the defendant was accused of taking. And

1 because the defendant's state of mind was put in issue by
2 the defendant's - - - the way the defendant tried the case.

3 JUDGE FAHEY: Thank you.

4 MS. WOLFORD: If there's no further questions,
5 I'll rest on our brief.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MS. WOLFORD: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel.

9 MR. DUBRIN: Ms. Wolford is correct. The People
10 did not raise in their brief the question of preservation,
11 and I would submit there's good reason for that. The - - -
12 the People sought to introduce this order in the context of
13 a Molineux application. Defense counsel vigorously opposed
14 that application. We have raised exact grounds that were -
15 - - were addressed by the court below, raised before the
16 court below. And to the extent defense counsel didn't
17 object to the actual admission of the order in the trial,
18 well, an objection at that point would be futile, and as
19 this - - -

20 JUDGE FAHEY: I wasn't particularly moved by that
21 part of it since it wasn't raised. The - - - the question
22 of the limiting instruction, though, may be more relevant
23 to your argument.

24 MR. DUBRIN: Well, a limiting instruction is not
25 a panacea to the admission of - - - of highly prejudicial

1 evidence. We see that all the time where erroneous
2 Molineux evidence is admitted. And despite a limiting
3 instruction - - - I'm not sure how you could even draft a
4 limiting instruction that could cure the prejudice - - -

5 JUDGE RIVERA: You mean it was a strategic choice
6 not to object or to request - - -

7 MR. DUBRIN: Clear - - -

8 JUDGE RIVERA: - - - excuse me, a limiting
9 instruction?

10 MR. DUBRIN: Clearly not a strategic choice.
11 Counsel did his best to minimize the damage. He addressed
12 it, the contempt order, made this argument about the
13 varying burden of proof - - -

14 JUDGE RIVERA: No. I'm saying - - - I'm saying
15 that was it a - - - are you arguing it's a strategic choice
16 not to request a limiting instruction?

17 MR. DUBRIN: I don't see - - - I don't see it - -
18 - it being a strategic choice. I don't see how you could
19 even envision what - - - what sort of a limiting
20 instruction could be given to - - - would you tell ignore
21 the elephant in the room, a judge, a Supreme Court justice
22 has found - - -

23 JUDGE FAHEY: No. One of - - -

24 MR. DUBRIN: - - - that defendant has committed
25 the very crime he's - - -

1 JUDGE FAHEY: The core of your argument, the way
2 I understand it, is contempt - - - this is - - - the
3 contempt isn't actually a finding that the defendant stole
4 the money, and that's why the - - - and that's the core of
5 your objection. But it seems that the core of the order is
6 that the business has failed to abide by the order to
7 return money, which is different than saying that the
8 defendant stole money. You want to address that?

9 MR. DUBRIN: Well, first of all, I think the term
10 conversion is a fancy term for steal, and you should expect
11 jurors to give words that are used in the course of a trial
12 the ordinary meaning.

13 JUDGE FAHEY: Well, you see what I'm saying,
14 though. He sets up three accounts. It's right before the
15 receiver is appointed. It looks like he's planning to
16 siphon off the money. He doesn't comply with the order to
17 return the money. That's unquestioned. So by not
18 complying with the order to return the money, that's not
19 the same as saying he stole the money. That requires
20 intent. Intent means they have to look into these facts
21 then.

22 MR. DUBRIN: I understand the point you're trying
23 to make, but I would suggest that common understanding of
24 the - - - of conversion is a theft and that jurors could
25 see that - - -

1 JUDGE FAHEY: You think the word in the contempt
2 order, "conversion," is sufficient - - -

3 MR. DUBRIN: Right.

4 JUDGE FAHEY: - - - to make it so prejudicial
5 that it shouldn't be admitted?

6 MR. DUBRIN: Well, in - - - in conjunction with
7 the - - - the language or the order which says calculated
8 to deprive WHD and impede the rights of WHD.

9 JUDGE FAHEY: I see.

10 MR. DUBRIN: Which refers - - -

11 JUDGE FAHEY: I see.

12 MR. DUBRIN: And if I can just - - -

13 JUDGE FAHEY: But that's the key language you
14 want us to look at?

15 MR. DUBRIN: If - - - if I could just address the
16 last - - - last part of your point, Judge Fahey - - -

17 JUDGE FAHEY: Go ahead.

18 MR. DUBRIN: - - - which I think is important
19 here, the People still have not addressed why they haven't
20 - - - didn't introduce the July 27th order itself. The
21 July 27th order directed Mr. Frumusa to turn over this
22 money. They could have introduced that order and that
23 order in conjunction with the testimony from Hernandez and
24 Foster would have demonstrated that Mr. Frumusa have viol -
25 - - violated a prior order of the court. This - - - the

1 order that was introduced is just a roundabout way of
2 demonstrating the same point but - - - but far more
3 prejudicial.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 (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. Lawrence P. Frumusa, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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