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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 68

THEODORE WILSON,

Appellant.

20 Eagle Street
Albany, New York
May 1, 2018

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
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The final appeal on this
2 afternoon's calendar is number 68, the People of the State
3 of New York v. Theodore Wilson.

4 MR. VORKINK: Good afternoon. Could I have two
5 minutes for rebuttal, please?

6 CHIEF JUDGE DIFIORE: Yes, you may.

7 MR. VORKINK: Good afternoon, Your Honors, may it
8 please the court, Mark W. Vorkink of Appellate Advocates
9 for appellant, Theodore Wilson.

10 Your Honors, the evidence of depraved
11 indifference was insufficient in this one-on-one
12 confrontation involving an adult victim to convict - - -

13 JUDGE RIVERA: So why doesn't the - - - the
14 analysis that's at the heart of Trappier sort of guide us
15 here? The - - - you've got two results that you're going
16 towards, even though it's one individual. Why - - - why
17 can't that analysis apply?

18 MR. VORKINK: We are not raising a repugnancy
19 claim, and a repugnancy claim is not before this court.
20 The single issue before this court - - - well, two issues
21 are raised, but as a sufficient - - -

22 JUDGE STEIN: But what difference does that make
23 that it happened to be in the posture of a repugnancy
24 claim?

25 MR. VORKINK: Well, I think because you're - - -



1 JUDGE STEIN: Why doesn't the analysis still
2 apply?

3 MR. VORKINK: Because the evolution of this
4 court's depraved indifference jurisprudence shows that a
5 willingness to act - - - that it requires a willingness to
6 act not to cause to harm. And I think as this court put it
7 in Taylor, when the conscious objective of the defendant is
8 an intent to harm, that negates or cannot support a finding
9 of depraved indifference.

10 JUDGE GARCIA: All those cases up to Feingold,
11 came out of a scenario where it was a depraved indifference
12 murder and it was a deadly weapon. So it was a knife or a
13 gun, they were charged with intentional murder and depraved
14 indifference, and there was an acquittal on the intentional
15 murder. And the concern of the court was depraved
16 indifference was being used as sort of lesser included,
17 when really what it was, was a substitute for intent.

18 Feingold is a very different case, because of the
19 findings by the bench and then the bench trial. But this
20 is an assault. And it's not an assault with a deadly
21 weapon. And you apply Feingold's requirement that depraved
22 indifference is a mens rea, but you don't have that
23 inherent - - - and I think perhaps is what Judge Rivera is
24 getting at, as well - - - you don't have that inherent
25 tension with the death.



1 So it seems to me, when we're purely looking at
2 sufficiency here, so we accept now under Feingold, depraved
3 indifference is not an objective circumstance; it's a mens
4 rea. But if we're just purely looking at sufficiency, and
5 applying - - - looking at the proof as we must in the light
6 most favorable to the government here, the People - - - why
7 doesn't this easily pass? Because you could have someone
8 who engages in this type of conduct - - - and it's brutally
9 described, graphic detail in the papers - - - who creates a
10 grave risk of death under circumstances showing this
11 defendant didn't really care one way or another if this
12 victim died, leading to serious physical injury.

13 And that's really all we're looking at. And we
14 don't have that lesser included offense concern that you
15 have in depraved indifference, and we don't have the type
16 of weapon that was being used in those cases, which raises
17 that concern of how can you be indifferent and shoot
18 somebody five times in the heart?

19 MR. VORKINK: Yeah. Several responses, Your
20 Honor, to that. I think first is that this case, I think,
21 does implicate precisely the questions that arose in
22 Feingold and then arose in pre-Feingold cases like Chan - -
23 - Sanchez, like even Register, because this was a case that
24 always was prosecuted as an intentional crime.

25 JUDGE GARCIA: But that goes, I think, to what



1 they were saying. You would then be arguing there's an
2 inconsistent verdict here, because unlike all those cases
3 Feingold back, and Feingold forward, you have convictions
4 for intentionally inflicting serious bodily injury here and
5 a depraved indifference, and your argument isn't that those
6 are inconsistent.

7 MR. VORKINK: Well, I think that this - - - I
8 think - - - one additional factor is that, yeah, Trappier
9 stands for what it says. Of course, the counts at issue in
10 Trappier are distinguishable from those here. Trappier
11 involved an attempted first-degree assault and a first-
12 degree reckless endangerment, neither of which, I think, in
13 effect, had a practical actus rea. And really this court
14 was grappling with the sort of different causes involved in
15 those counts.

16 And I think while Carter, this court sort of
17 addressed Trappier, it left open the question of whether or
18 not the mens reus at issue here, depraved indifference and
19 an intent to cause serious physical injury, are in fact
20 inconsistent. So I just would put out there that it's an
21 open question.

22 JUDGE GARCIA: And they may be. They may be.
23 But this isn't the case where there is an assault - - -
24 depraved indifference assault conviction - - - they were
25 acquitted of intent, so you're saying, well, how can you be



1 acquitted of intent? Because the only intentional harm,
2 the attempted murder, intent to kill he was acquitted of.
3 We're not saying you were acquitted of this intentional
4 crime, and now you're using depraved indifference to get
5 the same result.

6 MR. VORKINK: I - - -

7 JUDGE GARCIA: You actually have a consistent
8 verdict here.

9 MR. VORKINK: I disagree, Your Honor. I think -
10 - - I think it bears mention, of course, that - - - that
11 appellant was acquitted of first degree intentional assault
12 as well.

13 JUDGE GARCIA: That just means they didn't find
14 the use of a deadly weapon. Here, which you can see on
15 this proof, this - - - the elements are exactly the same
16 except for the deadly weapon and the second-degree assault.
17 So he's convicted of intentionally causing serious bodily
18 injury, and he's convicted of depraved indifference.

19 MR. VORKINK: Well, I think two additional
20 points. One is that the only injury - - - and I think - -
21 - I don't think the People would dispute this - - - that
22 posed a risk of death - - - risk of death, of course, being
23 a prerequisite to a finding of depraved indifference - - -
24 was the diffuse axonal brain injury.

25 JUDGE FAHEY: So wouldn't that make this more



1 like Barboni?

2 MR. VORKINK: In - - - in what respect, Your
3 Honor?

4 JUDGE FAHEY: Well, the nature of the industries,
5 it's all - - - injuries, it's one-on-one, all the proof is
6 circumstantial. The only difference I see between this
7 case and Barboni is Bar - - - Barboni was an infant victim,
8 and this victim was an adult. I - - - I don't see any
9 other real difference.

10 MR. VORKINK: Well, I - - - I - - - I think
11 that's true, Your Honor. And I - - - let me - - - let me
12 get to that in a second, but I think Bar - - -

13 JUDGE FAHEY: Go ahead. Go ahead.

14 MR. VORKINK: Barboni is I think interesting and
15 responsive to Judge Garcia's question, as well, because one
16 of the points raised by the defendant in Barboni was, my
17 conduct was intentional; I shouldn't have been acquitted -
18 - - I shouldn't have been convicted of depraved
19 indifference murder. And this court, I think, could've
20 addressed - - - or could've responded to that argument by
21 raising Trappier and saying these are not inconsistent mens
22 reas, but in fact, this court held that while his conduct
23 may have been voluntary, it nonetheless was reckless, and
24 because it was reckless, he - - - it - - -

25 JUDGE FAHEY: It falls within the category, and



1 this - - -

2 MR. VORKINK: Precisely, and I think that - - -

3 JUDGE FAHEY: Right. So - - - so in this case,
4 then, doesn't our analysis follow that Barboni path? It
5 seems to be that we're down that particular line of
6 jurisprudence.

7 MR. VORKINK: I - - - I - - - I think not; and I
8 think - - - I think that's why the brain injury, I think,
9 is relevant here, because he, of course, would have to
10 appreciate that that injury was in play and then been
11 reckless to the risk of death involved.

12 JUDGE FAHEY: So you're saying that he wasn't
13 aware that - - - that he could - - - that he had created a
14 grave risk.

15 MR. VORKINK: And I think - - -

16 JUDGE FAHEY: And in like - - - unlike Barboni,
17 where you're saying he was aware.

18 MR. VORKINK: And I think that the no rea - - -
19 the - - - the only reasonable reading of the record is that
20 no one could have been aware of it. The EMTs were not
21 aware of it when they responded, and the medical examiner -
22 - - I think the medical expert who testified said that this
23 injury, because it affected the complainant's ability to
24 breathe, would've resulted in death within an hour. I
25 think that the only conclusion to be drawn from that - - -



1 JUDGE FAHEY: Well, I - - - I had Barboni at the
2 Fourth Department; I was on that panel, and it - - - it's -
3 - - it seemed to me that the defendant said similar things.
4 I can't quote the record now; it's been about - - - it's
5 five or six years, but it - - - as I recall, the
6 circumstances were almost identical in terms of the
7 defendant's posture, except for the allegations of mental
8 illness. There was no allegation of mental illness in
9 Barboni. There is some here, so.

10 MR. VORKINK: I think there are allegations, but
11 I would dispute that there's a specific finding of mental
12 illness. But I think that my final response to Judge
13 Garcia's question is, is that it is significant under this
14 court's case law, the complainant here was an adult and not
15 a child.

16 JUDGE GARCIA: What if it's - - - I'm sorry.

17 JUDGE STEIN: Was that raised at all at - - - at
18 trials? Can you point to me anything in the record where
19 this issue of whether a vulnerable victim could be an adult
20 was ever discussed by an - - - either counsel, by the
21 court, by anybody?

22 MR. VORKINK: The - - - the specific question
23 about whether or not the victim was particularly vulnerable
24 was not addressed, but I think that the court grappled with
25 the question - - -

1 JUDGE STEIN: Then how can we - - - how can we
2 address it? Isn't - - - you know, isn't that then an
3 unpreserved issue?

4 MR. VORKINK: I - - - I think it's part and
5 parcel of the analysis of whether or not depraved
6 indifference was proven. Depraved indifference - - -

7 JUDGE STEIN: But - - - but you can't just make a
8 general motion for insufficiency. You have to raise the
9 specific argument that you're making.

10 MR. VORKINK: Right, and the court - - -

11 JUDGE RIVERA: Was there a discussion of the
12 cases that refer to that particular - - -

13 MR. VORKINK: There was not a discussion of - - -

14 JUDGE RIVERA: - - - category?

15 MR. VORKINK: There was not a discussion of the
16 cases, but the court engages in a long colloquy when it
17 discusses its ruling and its decision to submit depraved
18 indifference. It says that the People can pursue the
19 alternative theories of an intent and a depraved
20 indifference crime. And it also says that the injuries
21 that occurred here over a long period of time were
22 indicative of depraved indifference, which I think harkens
23 precisely to the type of preservation arguments that were
24 raised in cases like Taylor and Barboni, where this court
25 then addressed these issues.



1 So I don't think that there's a preservation
2 problem with this court addressing it, but - - - and I also
3 don't think that ultimately this court has to determine
4 whether or not the victim was particularly vulnerable, for
5 the reason that the conduct was intentional. But I think
6 this distinction between adults and children is significant
7 - - -

8 JUDGE GARCIA: A ninety-eight-year-old
9 Alzheimer's sufferer, not a vulnerable victim because
10 they're an adult?

11 MR. VORKINK: Not under this court's precedent.

12 JUDGE STEIN: Well, we - - - there has been at
13 least one case where we applied it to an adult, and that
14 was the intoxicated adult left - - -

15 CHIEF JUDGE DIFIORE: Kibbe.

16 JUDGE STEIN: - - - by the side of the road,
17 Kibbe, right?

18 MR. VORKINK: Right, well - - -

19 JUDGE STEIN: So - - - so - - - so the fact that
20 the victim is an adult, it - - - we haven't said per se
21 prevents this from being applicable, right?

22 MR. VORKINK: I - - - I think with respect to the
23 People, I think Kibbe doesn't get them very far. Kibbe,
24 this court actually did not address the sufficiency of
25 depraved indifference. The issue in play there was whether

1 or not there was sufficient causation to sustain the
2 conviction. Kibbe, of course, is also a case in the 1970s.
3 The only other time that this court has applied Kibbe, it
4 applied it in Mills. Mills, of course, involved a twelve-
5 year-old.

6 JUDGE STEIN: So we had - - - so - - - so have we
7 had an opportunity - - - have we had a case where we said
8 no? You - - -

9 MR. VORKINK: Yes, I think Bussey, and I think
10 Taylor, and I think other cases subsequent to 2000, when
11 this court's jurisprudence - - -

12 JUDGE STEIN: That involved a prolonged - - -

13 MR. VORKINK: I think the facts in Bussey are
14 fairly significant. Bussey involved a - - - a significant
15 beating. The complainant was in - - - wrapped in a carpet,
16 put in a trunk, driven twenty miles, and dumped in a - - -
17 in a creek.

18 JUDGE RIVERA: So - - - so let me just un - - -
19 if I'm understanding the argument. Is your argument that
20 it - - - if a defendant's conduct is such that he's taken
21 the position, yes, I intended to harm the victim, but I
22 didn't intend to kill them, even if one could infer from
23 the nature of the conduct in this case, the - - - the
24 pattern that appears to be a very severe pattern of injury
25 to this defendant, would allow for the inference that the

1 defendant just - - - as we've said in the cases - - -
2 didn't care if the victim lived or died, that you - - - you
3 can't charge them with both, and a jury couldn't come to
4 the conclusion that - - -

5 MR. VORKINK: No, he - - -

6 JUDGE RIVERA: - - - that they're guilty under
7 both?

8 MR. VORKINK: He cannot be convicted in those
9 circumstances of depraved indifference, again, because the
10 core statutory requirement of depraved indifference must be
11 satisfied, and that requires a finding of recklessness.
12 And this court has held that that recklessness is not one
13 of an intent to harm. And I think that's - - - the sort of
14 sole exception to that are these very rare unique cases
15 involving one-on-one intentional assaults of children.
16 Really Barboni is the only case in this court's recent
17 jurisprudence of the last thirty years where it's affirmed
18 a conviction along that line, that sole exception.

19 And I - - - I think it bears mention, that
20 exception is, in some respects, inconsistent with its other
21 jurisprudence involving depraved indifference, which, of
22 course, focuses on recklessness.

23 JUDGE GARCIA: You still have this fundamental
24 problem with recklessness as to depraved in - - -
25 recklessness as to creating a grave risk of death, and then



1 intent to cause serious physical injury, which is defined
2 as a number of different things, doesn't raise the same
3 issues of being intention with a depraved indifference to,
4 you know, recklessness in creating this - - - this grave
5 risk of death, that you have in murder cases, because the
6 end result is so different.

7 So the concern in the pre-Feingold cases is how
8 can you recklessly create a depraved indifference - - - no,
9 recklessly create a grave risk of death and at the same
10 time that the evidence clearly shows you intended to kill?
11 But here we have recklessly create a grave risk of death
12 and at the same time intend to cause serious physical
13 injury. It's not the same.

14 MR. VORKINK: I - - - I would respectfully
15 disagree, Your Honor, and I - - - and - - - and I think, to
16 take a step back, I - - - you know, we haven't talked about
17 sort of the evolution of the jurisprudence, but again, I
18 have to emphasize that the People's theory always was that
19 this was an intentional crime. They specifically said this
20 was not a depraved crime and it wasn't a reckless crime - -
21 -

22 JUDGE GARCIA: That's a very different argument.
23 What - - - what we have here is a jury verdict for - - -
24 you're - - - you're switching, I think, a little bit back
25 and forth with this inconsistent verdict argument. But

1 what we have here is a depraved indifference conviction,
2 assault, and can we look at this evidence to say, this
3 course of conduct created a grave risk of death, while at
4 the same time, this defendant may have intended to inflict
5 serious bodily injury, like, you know, impairment of
6 health, or whatever the terminology is in - - - in Section
7 10?

8 Why is that a problem, like we had with you shoot
9 someone five times in the heart and how can you be
10 indifferent to death, when you intended to kill?

11 MR. VORKINK: Well, I - - - I think the
12 circumstances of it as they present themselves in this case
13 show that the same problem is in play. I also think that,
14 again, this court would have to make a decision and reach
15 the question that it didn't reach in Carter that these are,
16 in fact, consistent counts, and I think there's substantial
17 reasons for them to hold to the contrary.

18 I know that this court addressed Robinson in its
19 decision of Matter of Suarez. But in Robinson, which this
20 court talked about in Trappier, its said - - - it said that
21 intentional first-degree manslaughter was arguably
22 inconsistent with a depraved indifference finding, because
23 the result was the same, death; and the result here is
24 serious physical injury. That is the same result of both
25 offenses. Now I - - - I understand Your Honor's point



1 about could you have simultaneously been reckless to the
2 grave risk of death, which is, of course, a greater cause;
3 but then I would turn to the fact that I don't think that
4 the record supports that.

5 Again, it's simply the brain injury and because
6 that incurred arguably close in time to when the medical
7 professionals arrived on the scene - - -

8 JUDGE STEIN: Actually, I think maybe there are
9 two different results here. One is serious physical
10 injury, and the other is grave risk of death; and I think
11 that's what we're talking about here.

12 MR. VORKINK: I - - - I would agree, and - - -
13 and that's the People's position as well, and that's, I
14 think, why they argued that it's - - - it's not - - -
15 they're - - - it's not an inconsistent verdict insofar he
16 was convicted of intentional second-degree assault. But I
17 think no reasonable reading of the record supports that,
18 putting aside the fact, of course, that this court has
19 never convicted - - - upheld a conviction involving an
20 adult complainant in circumstances like these.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. VORKINK: Could I briefly address point two?

23 CHIEF JUDGE DIFIORE: You - - - we'll take you on
24 your rebuttal time.

25 MR. VORKINK: Okay. Thank you, Your Honors.



1 CHIEF JUDGE DIFIORE: You're welcome.

2 Counsel?

3 MR. WASHER: Good afternoon, Your Honors. Eric
4 Washer from the Queens County District Attorney's Office.

5 For almost fifty years, this court has recognized
6 that a quintessential example of depraved indifference is a
7 brutal, prolonged course of deliberately injurious conduct
8 inflicted against a particularly vulnerable individual.
9 Importantly, that reasoning has withstood Feingold and
10 Suarez, and it's exactly what happened in this case.

11 The victim, Millie Shinsel (ph.), was brutalized
12 for a period of months. She withstood - - -

13 JUDGE STEIN: What do we do about the fact that -
14 - - that the - - - the issue of what a particularly
15 vulnerable victim is was not raised down in the lower
16 courts?

17 MR. WASHER: I think clearly, that's not
18 preserved. There was never any mention - - -

19 JUDGE STEIN: So what does that - - - what does
20 that mean? That we - - - how - - - then how can we address
21 that argument?

22 MR. WASHER: Well, I think that specific argument
23 the court should not address at all, because the defense -
24 - - defendant didn't raise it below. He also didn't really
25 raise the issue of what he's saying now, is that he only



1 should have been convicted of intentional crimes.
2 Actually, when you look at the colloquy regard - - -
3 regarding the trial order of the dismissal, the defendant
4 said that the People failed to prove that any of the
5 injuries were inflicted intentionally.

6 So he - - - essentially made the exact opposite
7 argument that he's making now. He also said that there was
8 no proof about how any of the injuries were inflicted, and
9 he called into question some of the credibility of the
10 People's witnesses, but he - - -

11 JUDGE RIVERA: Yeah, but the colloquy that
12 follows with the prosecutor is very clear, that they're all
13 - - - at least, they are - - - talking about depraved
14 indifference and whether or not there's evidence to - - -
15 to be able to charge the jury on that, so - - -

16 MR. WASHER: Right, there is - - -

17 JUDGE RIVERA: So let's assume for one moment,
18 it's preserved. Let's get to that argument here. I guess
19 my difficulty with - - - with the position as I understand
20 it in the briefing is, that I - - - it strikes me that this
21 opens up to a - - - a very expansive reading of depraved
22 indifference, which even if much of the jurisprudence is in
23 - - - as Judge Garcia rightly points out - - - with
24 situations where someone dies, and we're talking about
25 death, nevertheless, the - - - the concern has always run

1 through that jurisprudence. So that these are - - - these
2 are a very narrow group of cases. This is not supposed to
3 be a default.

4 MR. WASHER: Absolutely.

5 JUDGE RIVERA: Right? So how - - - how do you
6 address that this sounds potentially like it runs in the
7 opposite direction?

8 MR. WASHER: Well, I don't think it does, Your
9 Honor. Because back in 1972, in People v. Poplis, the
10 People - - - I'm sorry - - - this - - - this court
11 described exactly this set of scenarios - - - this
12 scenario: a longstanding prolonged brutal course of
13 intentional conduct done with the conscious objective to
14 harm, when the defendant simply doesn't care whether the
15 person lives or dies. And that's exactly what happened in
16 this case.

17 So I - - - I would resist the premise which is
18 that - - -

19 JUDGE RIVERA: Well, yeah, yeah, but okay, but
20 then I don't think that - - - well, that's not the point
21 I'm trying to get to. The question is, let's assume that
22 you've established that and you have the evidence for that,
23 how are you also going to get the intentional assault,
24 right? How - - - how - - - his argument is that you can't
25 have the same mens rea.



1 MR. VORKINK: Well, it's not - - -

2 JUDGE RIVERA: But you can't have these two mens
3 rea, excuse me - - -

4 MR. WASHER: Well, it's not the same mens rea and
5 - - -

6 JUDGE RIVERA: - - - for this. Because of the
7 result?

8 MR. WASHER: Yes, because there's two different
9 results. And in Dubarry, which is - - -

10 JUDGE RIVERA: Yeah.

11 MR. WASHER: - - - your - - - your opinion, you
12 said that that's exactly the holding the Trappier. When
13 there are two different results you can - - - that two - -
14 - you can have two different mens reas. Here, it's pretty
15 clear that he intended to injury this person, Millie, and
16 to inflict serious physical injuries. That was the
17 prosecutor's position below.

18 JUDGE RIVERA: Um-hum.

19 MR. WASHER: We haven't changed position on
20 appeal. But he also recklessly created a grave risk of
21 death. Indeed, the medical testimony was that had she - -
22 -

23 JUDGE RIVERA: So does that mean that every
24 batterer fits this particular category, if they batter
25 their victim so significantly over a period of time?



1 MR. WASHER: Well, then they would fit - - -

2 JUDGE RIVERA: Does that open this up for all
3 these intimate partner violence cases?

4 MR. WASHER: Well, I think that - - - that you'd
5 have to take it on a case-by-case basis. I mean, the
6 Poplis scenario that we've been talking about has existed
7 for fifty years. I don't think there's been a lot of
8 prosecutions like that. I think prosecutors have
9 understood - - -

10 JUDGE RIVERA: I guess my question is: will that
11 change? Let's say we agree with you and - - -

12 MR. WASHER: I - - -

13 JUDGE RIVERA: - - - and of course, this is - - -

14 MR. WASHER: I - - - I don't think - - -

15 JUDGE RIVERA: - - - an example of what the
16 People argued. This is her batterer. This was her
17 intimate partner, and this was what he did to her over a
18 very extensive period of time, certainly, that's the way
19 the judge saw it, given the colloquy. And so does that
20 mean that now this is going to be the way prosecutors will
21 approach these kinds of intimate partner violence cases?

22 MR. WASHER: I don't think so, because I think
23 even the prosecutor understood in this case; she heeded the
24 court's warnings in Suarez and Feingold. She had a
25 reluctance about this charge going to the jury. She cited

1 Bussey and she said, Judge, I - - - I'm concerned that
2 based on what the Court of Appeals has said, that we might
3 have a problem on appeal, and - - - and here we are. But -
4 - -

5 JUDGE RIVERA: She was - - -

6 MR. WASHER: - - - so she was prescient in that
7 respect.

8 JUDGE RIVERA: Very prescient - - -

9 MR. WASHER: Yeah.

10 JUDGE RIVERA: - - - that's true. If - - - if
11 she had died - - -

12 MR. WASHER: This would be a depraved
13 indifference - - -

14 JUDGE RIVERA: - - - then at that point - - -

15 MR. WASHER: - - - murder prosecution; it would
16 be a textbook one.

17 JUDGE RIVERA: - - - it's one or the other. You
18 agree that at that point, it's one or the other. It's
19 either intentional or depraved indifference; if she had
20 died?

21 MR. WASHER: Oh, I think it would be depraved
22 indifference murder. I think it would be - - - would have
23 been a difficult potential murder prosecution - - -

24 JUDGE RIVERA: Well, that's what I'm saying.
25 You'd have to choose one or the other, decide which way you



1 were going to proceed.

2 MR. WASHER: Yes. Yes. But it's different here
3 - - -

4 JUDGE GARCIA: And - - - and, counsel, if you're
5 taking your argument as I understand it - - - as I
6 understand that argument with the two different results,
7 you don't need the vulnerable victim exemption.

8 MR. WASHER: No.

9 JUDGE GARCIA: You're just looking at
10 sufficiency.

11 MR. WASHER: Yes.

12 JUDGE GARCIA: And I think the answer to can you
13 do this all the time is, you always will have a sufficiency
14 review, and you always - - - it seems to me - - - will have
15 what Feingold was saying, which is wherever this depraved
16 indifference language appears in the statute, you have to
17 prove it as a mens rea.

18 MR. WASHER: Yes, and it's a very high bar. You
19 have to show literal indifference to the fate of the
20 victim, and that's a hard thing to prove.

21 JUDGE RIVERA: Yes, but in this case, as I
22 understand it, and you will correct me if I'm wrong, that
23 boils down to a pattern of physical violence against her.
24 Yes, it took her to the point of almost death. Thank
25 goodness, they got there in time. And - - - and I'm asking



1 you how is that different for a category of intimate
2 partner cases, where that's exactly what the batterer does,
3 violent abuse over a period of time? Those survivors
4 describe basically being in a terrorist environment. So
5 how is it different?

6 MR. WASHER: Well, I think those cases could be
7 charged as depraved indifference assaults, and I think they
8 could be appropriately so.

9 JUDGE STEIN: But could this be distinguished
10 based upon her brain injury and the fact that, at least,
11 for a period of hours - - -

12 MR. WASHER: Well - - -

13 JUDGE STEIN: - - - maybe days, when people could
14 hear her moaning in - - - incoherently - - -

15 MR. WASHER: Yes.

16 JUDGE STEIN: - - - on the phone, that that in
17 and - - - in and of itself could make her a particularly
18 vulnerable victim?

19 MR. WASHER: Yes, and at - - - at - - -

20 JUDGE STEIN: But that - - - leaving aside
21 whatever beatings and whatever broken bones, whatever
22 happened before that, just that very thing that he
23 continued to - - - to beat her once she was no longer
24 mentally - - -

25 MR. WASHER: Well, that - - - that's certainly a



1 factor that makes - - - made her particularly vulnerable
2 towards the end - - -

3 JUDGE RIVERA: I thought your point was - - -

4 MR. WASHER: She couldn't - - - she couldn't
5 communicate - - -

6 JUDGE RIVERA: - - - you didn't have to show she
7 was particularly vulnerable.

8 MR. WASHER: We - - - we don't. I did want to
9 address Judge Garcia's point, because we don't. And this
10 court in Barboni and in Heidgen made clear that although
11 there are some quintessential examples of depraved
12 indifference, there's no exhaustive list. And - - - the -
13 - - the bottom line finding, and the thing that's most
14 difficult is literal indifference to whether the victim
15 lives or dies. And so that's what we have to prove,
16 vulnerable victim or no.

17 So even if we hadn't had that, we still would
18 have had the pattern of abuse going for months and bringing
19 her quite literally to the brink of death. So even if the
20 court is disinclined to make a finding that she was a
21 particularly vulnerable victim, that doesn't mean that we
22 didn't establish depraved indifference.

23 I do want to talk - - -

24 JUDGE RIVERA: So then will that - - - as you
25 say, it may open it up to these other cases. Will that



1 then come down to how severe is the physical abuse every
2 time? For the - - - in these intimate partner cases, where
3 you have that pattern of physical violence throughout.

4 MR. WASHER: No, I think it's going to come down
5 to the state of mind of - - - of the defendant. Whether
6 it's - - -

7 JUDGE RIVERA: But don't you draw that out,
8 because of this pattern of conduct?

9 MR. WASHER: Of course, and that's - - -

10 JUDGE RIVERA: It doesn't matter to me if - - -

11 MR. WASHER: That - - - and that's what the - - -

12 JUDGE RIVERA: - - - if they live or die?

13 MR. WASHER: That's what the majority said in
14 Barboni. When you have a pattern going on for weeks or
15 months, then the actor has the opportunity to say maybe I
16 should get some help for this person or to reflect on what
17 he's doing; and that's what makes it so egregious in this
18 case. It went on and on and on, and he never stopped until
19 she was just about to die, and the - - - the mother was
20 calling. The bishops from the church were calling, and he
21 knew at that point that he had to get her some help, I
22 think, or that the police were going to come.

23 JUDGE WILSON: So the record is - - - I think;
24 and correct me if I'm wrong - - - establishes that there
25 were a series of assaults over a long period of time.

1 We've been talking about that all afternoon. Is there
2 record support for the following conclusion by the jury
3 that one of the assaults was intentional and the rest were
4 not, but were depraved indifference?

5 MR. WASHER: Well - - -

6 JUDGE WILSON: Would that be supported?

7 MR. WASHER: I don't think those findings are
8 mutually exclusive. I think that - - -

9 JUDGE WILSON: That's what I'm asking.

10 MR. WASHER: Right, the jury could have
11 reasonably found that there was a series of intentional
12 assaults, that in the end amounted to depraved
13 indifference. In other words, that he was recklessly
14 creating a grave risk of death, and that while he was doing
15 that, he was literally indifferent to whether she lived or
16 died.

17 I do want - - -

18 CHIEF JUDGE DIFIORE: Counsel, do you care to
19 address the jury note issue?

20 MR. WASHER: Yes, just - - - just briefly. I
21 know - - - what - - - what the defendant - - - or what the
22 jury asked in this case was, well, why the grand jury
23 prosecutor had been dismissed. And both sides and the
24 court looked at the record, and there was no testimony to
25 that effect.



1 And so that was the answer, ultimately, that the
2 court gave. It didn't supplement the record - - - the
3 record. And I know of no case that would require the judge
4 to have done so. If the defendant in this case wanted the
5 reason for the prosecutor's recusal to be on the record, he
6 had to ask about it, and he didn't. So I certainly don't
7 think the judge abused his discretion in the way that he
8 answered the question.

9 JUDGE STEIN: Did the judge erroneously as - - -
10 assume that he had to get the consent of both?

11 MR. WASHER: No, I - - - I think if you read that
12 discussion in context, all he was saying is that, if I'm
13 going to tell the jury something that's not in evidence, I
14 want both sides to agree or to stipulate to that, and the
15 prosecutor didn't agree that that was an answer that she
16 felt should be given under the circumstances, and so the
17 court didn't do it. And I think that was particularly - -
18 - I think that was perfectly reasonable under the
19 circumstances.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. WASHER: Thank you, Your Honors.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MR. VORKINK: Just a few brief points. One, I -
24 - -I realize that the People's position is that, you know,
25 that - - - that they proved utter indifference to life, and



1 notwithstanding the tragic nature of the injuries here, I
 2 think it bears mention that there were efforts by the
 3 appellant to communicate that the complainant had been
 4 injured. He said this to her mother. He said this to the
 5 bishops. And when the EMTs arrived, he suggested that she
 6 be taken to the hospital.

7 I - - - I mention these facts only because of
 8 this court's opinion in Lewie and this court's opinion in
 9 Matos. Of course, efforts to conceal a crime cannot be
 10 used as proof of depraved indifference, nor can an
 11 inability to render timely medical assistance. And so I
 12 think in those respects, while I recognize that the cases
 13 are factually dist - - - this case is factually
 14 distinguishable from Matos and Lewie, I think that those
 15 bear emphasis, because they don't support a conclusion that
 16 he was utterly indifferent to whether she lived or died.

17 I think as - - - just to reiterate Justice Ri - -
 18 - Judge Rivera's points, there is a real floodgates concern
 19 here. This court's efforts since Suarez have been to cabin
 20 depraved indifference to only the rarest of circumstances.
 21 I think the People point out why this is, you know, an
 22 unusual case, but I do think that it will encourage twin-
 23 count indictments in more circumstances, particularly where
 24 this court gives a green light for the People to do so.
 25 That was precisely the co - - - the sort of situation that



1 led to Suarez - - -

2 JUDGE GARCIA: I thought in those cases, the
3 court was really concerned with these people were being
4 convicted of depraved indifference murder when they weren't
5 guilty of that. There was insufficient evidence to support
6 it, because clearly they intentionally murdered someone.
7 But here, I don't think the concern is just you'll have
8 more depraved indifference convictions that are supported
9 by the evidence.

10 I mean, this is just so different to me. So it
11 isn't the concern that, oh, you shot someone five times in
12 the heart, and now they're compromising on, you know,
13 depraved indifference. It's that the proof in cases
14 particularly with beatings and not involving deadly
15 weapons, where the victim survives, more naturally fits a -
16 - - over a course of time, beatings - - - naturally fits a
17 depraved indifference count.

18 So we weren't so concerned with the numbers that
19 people guilty of depraved indifference, but we'll have so
20 many convictions, it was that it didn't fit. The facts
21 didn't fit under a sufficiency theory. So where they do,
22 where you have this type of - - - it - - - it isn't just we
23 don't want a lot of depraved indifference convictions.

24 MR. VORKINK: I respectfully disagree. I think
25 Suarez makes clear that depraved indifference only applies



1 to a limited category of offenses, and that was the
2 legislature's original intent. And I think as to your
3 point, there is a concern here, because, again, depraved
4 indifference is supposed to apply in situations not
5 involving intentional conduct.

6 JUDGE GARCIA: The language, I think, in Suarez
7 was where there's a deadly attack with a knife or gun or
8 similar attack or something like that. So these cases
9 where you have beatings, particularly, beatings over time,
10 raise these issues I think that we've been discussing,
11 which really go to how do you read the proof, that you can
12 intend to harm someone, but the repetitive nature of those
13 injuries indicates a reckless creation of a grave risk of
14 death, which to me, just fundamentally - - - and I know
15 we're beating a horse here, but - - - seems so different
16 than I shot someone five times in the heart, and now I want
17 just to be convicted of reckless - - - you know, I don't
18 want to be convicted of recklessly creating a grave risk of
19 death for that.

20 MR. VORKINK: I - - - I think the practical
21 effect is the same. And I think that this court could hold
22 that way but doing so would be contrary to its prior
23 precedent and would open up the door to, I think, a
24 plethora of depraved indifference charges, precisely the
25 scenario that Suarez was designed to prevent.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. VORKINK: Thank you, Your Honors.

(Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Theodore Wilson, No. 68 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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