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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 57

COGGINS (TONIE),

Appellant.

20 Eagle Street
Albany, New York
May 20, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Leda Yeager
Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon and welcome.
2 I wanted also especially to welcome Lexie Haas from the
3 National Judicial Competition of the YMCA for joining us
4 today.

5 Counsel, ready when you are. I should have said
6 the first matter on the calendar is People v. Coggins.

7 MR. BARR: Good afternoon, Your Honors. Samuel
8 Barr of the Legal Aid Society for Appellant, Tonie Coggins.
9 May I please reserve three minutes for rebuttal?

10 CHIEF JUDGE WILSON: Yes.

11 MR. BARR: The State here destroyed critical
12 video evidence that the defense never saw.

13 JUDGE SINGAS: Are you saying that was done in
14 bad faith?

15 MR. BARR: We're not saying it was done in bad
16 faith, in the sense that it was malicious intent to harm
17 the defense, but this was not mere inadvertence as the
18 Appellate Division said, this was intentional destruction
19 of evidence.

20 JUDGE TROUTMAN: Well, who destruct - - - who
21 destroyed it?

22 MR. BARR: Well, it was actually destroyed
23 several times over, so.

24 JUDGE TROUTMAN: So are you counting both that
25 which belonged to the private property owners and that

1 which was said to have copied the videotape?

2 MR. BARR: So we are focused, as was the trial
3 court, on the second copy made by the officers, because
4 that's what came in. That's what the People and their
5 agents, the police, had a duty to preserve once it came
6 into their possession. And as I was about to respond to
7 Judge Singas, it was intentional. Deliberate is the word
8 that's used in Joseph. It was deliberate.

9 JUDGE SINGAS: How so?

10 MR. BARR: Ofc. Boyce testified that he thought
11 he could destroy this evidence because he thought, again,
12 that he had texted it to a fellow officer who, by the way,
13 did not recall receiving it and said didn't recall ever
14 viewing it.

15 JUDGE SINGAS: So are you asking for a different
16 rule than Schozer, because Schozer is pretty much prong two
17 as bad faith. So if it's not bad faith, it wouldn't
18 capture negligence or extreme negligence or I don't know
19 how you would characterize it if you're not characterizing
20 it as bad faith, but are you asking us for a different
21 rule?

22 MR. BARR: We're not asking you for a different
23 rule. And while bad faith wasn't the crux of our argument
24 below, if this court has the opportunity to clarify that
25 bad faith does not, as I said, require malicious intent to

1 harm the defense, I think that's - - -

2 JUDGE HALLIGAN: And what - - -

3 MR. BARR: - - - consistent with the court's
4 cases.

5 JUDGE HALLIGAN: What would it mean? To me, bad
6 faith - - - the word bad is doing the work there. And it
7 does. It seems to me generally we think about that as some
8 malicious intent. So how would you have us define bad
9 faith if not with reference to some bad intent?

10 MR. BARR: Well, the - - - I mean, the very year
11 after Schozer, in People v. Joseph, this court did - - -
12 said there was no bad faith, but nevertheless this sort of
13 testimony is inadmissible.

14 JUDGE HALLIGAN: But that's a different question,
15 I think, which is whether bad faith is required. How would
16 you have us define bad faith? You're saying - - - well,
17 let me be clear. You're saying there is bad faith here or
18 there's not?

19 MR. BARR: Again, we did not preserve that there
20 was malicious, bad faith in the way I'm describing it
21 below. I do not - - - I would not characterize bad faith
22 in quite that strenuous way. I think that the degree of
23 fault is relevant for the best evidence rule, as it is for
24 our other point, which was the spoliation argument.

25 JUDGE GARCIA: So where would you set the bar for

1 bad faith?

2 MR. BARR: Your Honor, this was - - - I would
3 characterize it as gross recklessness. Systemic gross
4 recklessness.

5 JUDGE CANNATARO: You're saying gross
6 recklessness and - - -

7 MR. BARR: Well - - -

8 JUDGE CANNATARO: - - - bad faith are the same
9 thing?

10 MR. BARR: I'm not saying they're the exact same
11 thing, but again, the gro - - - recklessness, especially
12 when systemic in the way that this was.

13 JUDGE GARCIA: Systemic how? What does that
14 mean?

15 MR. BARR: Well, it means that we know the police
16 department, the NYPD, the largest and most well-resourced
17 police department in the world, did - - - really, really
18 did not have adequate procedures to handle the fact that it
19 was asking officers who create evidence on their phone - -

20 CHIEF JUDGE WILSON: But what evidence of that -
21 - - of that is there?

22 MR. BARR: Of?

23 CHIEF JUDGE WILSON: Of the fact that the
24 procedures generally failed? They had procedures. They
25 had an instruction. It's in the record.

1 MR. BARR: They had instructions. But Ofc. Boyce
2 himself said - - -

3 CHIEF JUDGE WILSON: Well, no.

4 MR. BARR: - - - it was essentially - - -

5 CHIEF JUDGE WILSON: Right, but you said
6 systemic, which implies more than one such incident. Is
7 there anything in the record from which we could conclude
8 that this policy didn't work generally?

9 MR. BARR: No, Your Honor, that's not how it was
10 litigated. But I do think we can infer from the record
11 that this - - - that the procedures the NYPD did have in
12 place were inadequate. They're - - -

13 CHIEF JUDGE WILSON: Well, in this case, they
14 didn't work.

15 MR. BARR: They're leaving it up to the
16 discretion of every individual officer to - - - to remember
17 that I might have evidence on my phone. And if I happen to
18 think it's important to save, I should do that. Ofc. Boyce
19 admitted he did not think it was necessary to save it
20 because, again, he thought he'd given it to another
21 officer. That's not a valid excuse for destroying
22 evidence. He never confirmed with Ofc. Catlin that he'd
23 received it. He never said, hey, buddy, I'm transferring
24 this to you and you better keep it safe. He just said he
25 texted it in a one-off. And that's - - - this is a

1 casualness - - -

2 JUDGE CANNATARO: I don't really understand the
3 nexus between that situation that you just described and
4 this claim that you made a moment ago, that the procedures
5 in place at the police department weren't sufficient for
6 the purposes that they were instituted. Are you saying
7 that the procedures should have - - - I - - - my
8 recollection of the record is the officers were told that
9 the phones were going to be turned in, and that if there
10 was anything that you needed to preserve before you turn it
11 in, you should preserve it. And if you need help doing
12 that, contact One Police Plaza and they'll help you do
13 that.

14 MR. BARR: Right.

15 JUDGE CANNATARO: So I mean, are you saying there
16 should have been even more? Like, give us your phone and
17 we'll look through it and tell you if there's something you
18 need to preserve?

19 MR. BARR: You - - - Your Honor, I do think
20 everyone here has changed their phones at some point.

21 JUDGE CANNATARO: Yeah.

22 MR. BARR: Usually what happens is you keep the -
23 - - a backup you create, or you inherently have a backup in
24 the cloud. For whatever reason, the NYPD didn't think it
25 was important that its officers who were creating evidence



1 on the fly like this maintain that evidence in that way.

2 JUDGE HALLIGAN: Did you make an argument below
3 that there's some systemic defect in the NYPD's procedures
4 for handling phone swaps?

5 MR. BARR: I don't think - - - I think this
6 distinction between systemic and individual is, with
7 respect, a little bit beside the point.

8 JUDGE HALLIGAN: I think you raised the systemic
9 point, but maybe I misheard it.

10 MR. BARR: It is. Yeah, I did, because that's
11 the severity of the situation we're dealing with. But even
12 if those procedures were totally accurate by their own
13 terms, and this was just a one-off officer who decided
14 without authorization to destroy critical evidence, we
15 would still be entitled to an adequate remedy and - - -

16 CHIEF JUDGE WILSON: Well, let me ask you,
17 instead of one-off officer who decided to destroy critical
18 evidence. Let me ask you this. Suppose, hypothetically,
19 we conclude this was an honest mistake. Do you lose?

20 MR. BARR: No. Your Honor. I - - -

21 CHIEF JUDGE WILSON: Well, can you work with that
22 assumption and tell me why, if this was an honest mistake,
23 you still win.

24 MR. BARR: So I think Joseph talks about
25 deliberate and intentional destruction of evidence, not bad

1 faith. And I think we win under that standard. The second
2 thing - - -

3 CHIEF JUDGE WILSON: I'm asking you something
4 different. Suppose it's just an accident, not deliberate.
5 It's just a mistake.

6 MR. BARR: Sure. So I think we still win. I
7 think we win on two different grounds. I think we win
8 under the final prong of Schozer, which is the heavy
9 foundational burden of establishing preliminary to - - -
10 preliminarily to the Court's satisfaction that the
11 testimony of these witnesses was a reliable and accurate
12 reproduction of the lost video. And secondly, I think we
13 win on the spoliation ground, which was granting even if
14 this was competent evidence under the best evidence rule,
15 it was under the circumstances here the severity of this
16 destruction of evidence, the importance of this lost
17 evidence to the case that Ms. Coggins was - - -

18 JUDGE SINGAS: Why - - -

19 JUDGE RIVERA: Did they have another opportunity
20 other than the officer recording it that evening on the
21 phone?

22 MR. BARR: I'm sorry. Did they have another
23 opportunity to do what?

24 JUDGE RIVERA: To get the copy?

25 MR. BARR: Well, they - - - yes, they did. They

1 had - - - there was testimony - - -

2 JUDGE RIVERA: And how did they handle that?

3 MR. BARR: There was testimony that they went
4 back a week later, that they got the password from the
5 superintendent, that they viewed the video, and that for
6 reasons that aren't in the record, that we're just, I
7 guess, speculating about, they again, did not get it. So
8 they didn't have the USB as Ofc. Boyce said on the day of
9 the incident a week later.

10 JUDGE RIVERA: That's not a one-off.

11 MR. BARR: It's not a one-off. It's a week
12 later. And then, of course, there's the fact that they
13 don't go back. Everyone here knows that after 30 days,
14 video gets destroyed, and the fact that they don't go back
15 is extremely negligent, and making matters - - -

16 JUDGE SINGAS: Well, why doesn't the adverse
17 inference charge take care of that? I mean, that's a
18 pretty hefty charge. The jury can come to a conclusion
19 that nothing on there is accurate, and they can hold that
20 against the police. Like, why doesn't that take care of
21 this?

22 MR. BARR: Well, Your Honor, this court has
23 described that as the mildest available sanction. So I
24 disagree that it's a hefty charge. I also think in the
25 circumstances of this case, look, an adverse inference may

1 make sense where you're not introducing - - - you're not
2 trying to reproduce, in effect through testimony, what the
3 lost evidence or destroyed evidence was. But that doesn't
4 - - -

5 JUDGE TROUTMAN: So let's talk about that
6 evidence and why it was okay or wrong for the court to
7 allow those number of witnesses to testify and the burden
8 required of the People.

9 MR. BARR: Under the - - - I'm sorry, you're - -
10 -

11 JUDGE TROUTMAN: In order to hear a number of
12 witnesses - - - the tape is gone.

13 MR. BARR: Yes.

14 JUDGE TROUTMAN: And then the People sought to
15 offer the evidence on the video through individuals,
16 correct?

17 MR. BARR: Yes. They sought to recreate the
18 video.

19 JUDGE TROUTMAN: And why was that correct ruling
20 of the court or a wrong ruling. Did the People meet their
21 burden?

22 MR. BARR: So number - - -

23 JUDGE TROUTMAN: And if not, why?

24 MR. BARR: So number one, they essentially gained
25 an advantage from their own spoliation by getting to have

1 prosecution witnesses come in, try to reproduce through
2 testimony a lost video that if we had it would have showed
3 every aspect of this chaotic, short-lived fight.

4 JUDGE TROUTMAN: Okay. Getting past the
5 advantage, what they offered, did it meet the burden
6 required to allow it to substitute the visual evidence?

7 MR. BARR: Under the best evidence rule?

8 JUDGE TROUTMAN: Correct.

9 MR. BARR: Okay. Under the best - - - I was
10 talking about the other argument, but under the best
11 evidence rule the - - - no, I submit that the testimony of
12 individuals about a video they saw as few as one time for
13 several of them 18 months earlier, on which they took no
14 contemporaneous notes, made no contemporaneous reports,
15 that is not reliable and accurate testimony.

16 JUDGE CANNATARO: Is that assertion that you're
17 making something unique to video as opposed to a written
18 document? Or would you say that this would have been a
19 problem regardless of what the missing quote unquote
20 document was?

21 MR. BARR: I don't think it's unique to video,
22 but I do think it's - - - in some ways it's - - - this case
23 is as bad as it gets, because what was allegedly depicted
24 on the video was, again, this chaotic fight in which my
25 client indisputably had justification at the outset. She

1 was - - - there was - - - as the People put it in one of
2 their briefs, it was a mutual fight. So they had just - -
3 she had justification at one point. What is - - - what
4 they are trying to recreate is the complexity of a blow-by-
5 blow fight, where if we had the video, the jury would be
6 looking at it frame by frame, pausing as many times as they
7 want.

8 JUDGE RIVERA: Was the video - - - well, was
9 there any testimony about the video itself being authentic?
10 I mean, it's pretty hard to have witnesses tell you that's
11 the way the fight went when you don't even know if the
12 video captured the fight.

13 MR. BARR: No, Your Honor, and that's a critical
14 difference between - - -

15 JUDGE RIVERA: Did you preserve or did they
16 preserve that below?

17 MR. BARR: Your Honor, I think this goes to what
18 my adversary said in his recent supplemental letter. I
19 think authentication, as Your Honor is using the term, is
20 part of the best evidence rule. Shows or uses the word
21 authentic. It talks about correctly reflecting the
22 original. It's really the same concept. And it goes to
23 this heavy foundational burden that's on the proponent of a
24 substitute for lost original evidence. I do not think that
25 - - - I think it's also important - - -

1 JUDGE RIVERA: Well, is the problem just that the
2 witnesses have, as you described them in your argument to
3 us in your briefing, have these inconsistencies? Is that
4 why?

5 MR. BARR: It's not just the inconsistencies. We
6 cite four different things. We cite the inconsistencies.
7 We sought - - - cite the far less than ideal circumstances
8 in which these people viewed the video. They viewed it
9 knowing they - - - or thinking that they wouldn't ever have
10 to remember what they saw. Because, as Caraballo said, if
11 you if you need the video, you go and get it. So they're
12 not paying attention in the way we might think a store
13 security guard - - -

14 JUDGE RIVERA: Why doesn't that go to weight?

15 MR. BARR: I - - -

16 JUDGE RIVERA: The weight of the testimony?

17 MR. BARR: I - - - it - - - I think when you're -
18 - when it's the confluence of all the factors I was about
19 to go through, I think it goes to admissibility. It's the
20 inconsistencies. It's the poor circumstances under which
21 they viewed the video. It is - - - sorry, Your Honors. I
22 think it's important to keep in mind what this trial would
23 have looked like if we had the video. The video would have
24 been absolutely central. It would have been central to
25 cross-examining every single witness. It would have been

1 central to developing a defense in the first place. It
2 would have been everything. And the jury - - - and
3 instead, the jury was presented with this pale substitute.
4 It is not good enough under the best evidence rule.

5 JUDGE RIVERA: Does your rule mean no one can
6 ever testify when a video is lost to what they saw on the
7 video?

8 MR. BARR: This is what I was getting at with
9 Judge Cannataro a moment ago. I think the complexity of
10 what they are attempting to recreate or reconstruct really
11 makes it difficult. Now, this is not a whodunit case.
12 This is a what happened case. If the testimony that they
13 were trying to admit was just, I saw the now-destroyed
14 video and it showed a woman I recognized as Tonie Coggins
15 on the video and that - - - that undermines the defense
16 that it wasn't Tonie Coggins at all. Maybe that sort of
17 simple yes or no question could be answered reliably
18 through testimony like this. But here again, we're trying
19 to recreate a fight where my client indisputably had
20 justification, at least at some point, and we're trying to
21 pinpoint the moment that she lost it. And we're doing that
22 through witnesses who are testifying merely based on their
23 recollection of a video that the State destroyed.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. BARR: Thank you.



1 JUDGE TROUTMAN: Was an argument of bad faith
2 preserved?

3 MR. RIENZI: Your Honor, good afternoon. The - -
4 - I don't believe an argument of bad faith was preserved
5 because defense counsel below did concede that he thought
6 it was inadvertent. Whether or not it was preserved,
7 though - - -

8 JUDGE TROUTMAN: And does it go to the video from
9 the building or from the one on the phone, or were they
10 both treated the same as one?

11 MR. RIENZI: I think that the best evidence - - -
12 the determination under the best evidence rule, under
13 Schozer, I think, was going towards, in effect, both,
14 because we're talking - - - but really it's Ofc. Boyce
15 makes a videotape from the building video, right? He - - -
16 that's what he - - - that he makes.

17 JUDGE CANNATARO: In that regard, is there an
18 authenticity issue before us?

19 MR. RIENZI: I don't believe that there is an
20 authenticity - - - authentication issue before us, no.

21 JUDGE CANNATARO: Authentication.

22 MR. RIENZI: No, I don't believe so, Your Honor.
23 That was not - - - it was not raised below. It has not
24 been advanced on appeal as a justification for reversal
25 here. If it had been raised below, there was plenty of

1 evidence in the record. I'm sorry. This has been raised
2 on appeal in a hypothetical sense, in the sense that if the
3 video had survived, it would not have - - - it might not
4 have been authenticated. That's how it's been raised in
5 our back-and-forth litigation.

6 JUDGE RIVERA: What's the evidence that
7 otherwise, if I look through the record, is it the
8 testimony of Reynolds?

9 MR. RIENZI: Well, it would be, Your Honor. Just
10 that - - - in other words, under the - - - under Patterson.
11 In other words, like, it could have been authenticated. If
12 the video survived, it could have been authenticated by Ms.
13 Scott, by a witness to the events. It could have been
14 authenticated by people from the building saying, yes, the
15 camera angles - - -

16 JUDGE RIVERA: But that's what I'm saying.

17 MR. RIENZI: I'm sorry.

18 JUDGE RIVERA: Even though authentication is not
19 raised, if I went to look through the record - - -

20 MR. RIENZI: Yes.

21 JUDGE RIVERA: - - - who other than Reynolds, I
22 think is the one person because she's there at the time of
23 the video. She's a security officer, right?

24 MR. RIENZI: Yes.

25 JUDGE RIVERA: Would have been able to perhaps

1 provide the kind of testimony that would have gone to
2 authentication?

3 MR. RIENZI: I think that Reynolds could have
4 done that. Yes. The security guard. Right. Well, most
5 of the people were not witnesses to the live events, of
6 course.

7 JUDGE RIVERA: Right.

8 MR. RIENZI: That is certainly true. However, I
9 think - -

10 JUDGE RIVERA: Although she did, right?

11 MR. RIENZI: She viewed - - - yes, it seems the
12 balance of her testimony seems to be that she viewed a lot
13 of the incident in - - - live, like, through the window in
14 that security room.

15 JUDGE RIVERA: And she testified to the placement
16 of the cameras and so forth?

17 MR. RIENZI: I'm - - - honestly, I'm not positive
18 that she testified to the placement of the cameras. The
19 building - - -

20 JUDGE RIVERA: Someone did.

21 MR. RIENZI: The building people. Mr. Caraballo,
22 Mr. Kenny - - - Devin Kelley.

23 JUDGE RIVERA: Okay.

24 MR. RIENZI: Sorry, Kelly. Those people
25 testified to the placement of the cameras. There was

1 testimony about - - - you know, there were pictures of the
2 building showing where the cameras were and things like
3 that. And then there was discussion of the views.

4 JUDGE HALLIGAN: So even if - - - over here.

5 MR. RIENZI: Yes. I'm sorry.

6 JUDGE HALLIGAN: Even if we set aside the
7 question of bad faith, it seems clear that the PD didn't
8 manage to secure the video. So why shouldn't the
9 prosecution bear the consequence of that?

10 MR. RIENZI: It's fair for the prosecution to
11 bear the consequence of that, Your Honor. In other words.
12 And here we did.

13 JUDGE HALLIGAN: I mean, in the way your
14 adversary suggests.

15 MR. RIENZI: Well, I mean, here the permissive
16 adverse inference did address the prejudice that - - - that
17 the defendant faced here because in addition to the defense
18 counsel's rigorous cross-examination of all these witnesses
19 - - -

20 JUDGE RIVERA: Well, how could they draw such an
21 adverse inference if you've got a parade of witnesses
22 coming in and basically making your case for you by
23 describing the altercation in a way that supports the
24 prosecution's theory?

25 MR. RIENZI: I mean, it's still, though - - - the

1 - - - the defense counsel - - - the cross-examination in
2 this case was very thorough. It undermined a lot of the
3 People's - - - a lot of the witnesses that - - -

4 JUDGE TROUTMAN: Then how do you - - - what in
5 the record establishes that the testimony that was
6 presented was such that it - - - that they could recount or
7 recite from personal knowledge the substantial - - - that
8 the video substantially and with reasonable accuracy
9 reflected that which was in the video?

10 MR. RIENZI: I mean, I - - - all of the hearing
11 evidence, Your Honor, that the court when it had this - - -

12 JUDGE TROUTMAN: What about the fact that there
13 were a number of witnesses saying, I don't know, with
14 respect to who threw the first punch and the issue of
15 justification? Isn't it impacted by whether one was
16 justified, be it the first or the last, or which one caused
17 the harm?

18 MR. RIENZI: Certainly. Yes, Your Honor, it
19 certainly was relevant. And most of the video witnesses
20 were not able to say who punched first. That's absolutely
21 true. But - - -

22 JUDGE TROUTMAN: Could anyone definitively say
23 which blow caused the blindness?

24 MR. RIENZI: I don't believe that anyone could
25 definitively say that. I mean, I think Ms. Scott herself -

1 - - none of the video witnesses. No, I don't believe so.

2 CHIEF JUDGE WILSON: The prosecution, I think, in
3 summation, suggested it was the final kick when she was on
4 the ground, right? That was the People's argument, I
5 think.

6 MR. RIENZI: Well, it's - - - but not entirely
7 that, Your Honor. It was that - - - the prosecution's
8 argument during summation was that it was the barrage of
9 punches that occurred when defendant was on top of Ms.
10 Scott. And then the - - - then there was the kick, and the
11 prosecutor said that you might - - - you're not going to -
12 - - told the jurors, you know, you will - - - I'm sorry.
13 You will not necessarily know which blow caused the final
14 injury, the ruptured eyeball. But that you've heard this
15 evidence that all these - - - all these blows were given
16 when she was on the ground.

17 JUDGE TROUTMAN: Then how could you say she
18 wasn't - - - that it was established that there was no
19 justification then? If you can't tell which one caused the
20 damage?

21 MR. RIENZI: In other words, the theory at that
22 point, but obviously the theory about who started the fight
23 is disputed and it is disputed. It is not - - - we did not
24 concede that defendant was justified at the beginning, just
25 to make that clear.

1 JUDGE CANNATARO: Counsel, getting back to best
2 evidence for just a second.

3 MR. RIENZI: Yes.

4 JUDGE CANNATARO: I think your adversary's point
5 is well taken, at least with me, that calling seven
6 witnesses to testify about what they saw, what they
7 perceived on a video, or actually what they recollect
8 perceiving on a video is different than what you would
9 normally expect in a best - - - in a more traditional, best
10 evidence analysis where someone's trying to accurately
11 convey to the fact finder what the contents of the missing
12 document are. And I think in some ways you could argue
13 it's impossible. No human being can tell you what's going
14 on scene-by-scene, or frame-by-frame much less, in a video.
15 So it's interpretive and not descriptive. Do you
16 understand the distinction I'm making?

17 MR. RIENZI: Yes, I believe I understand it.

18 JUDGE CANNATARO: And I'm concerned that on some
19 level that takes it completely out of the realm of best
20 evidence, or doesn't at least satisfy the requirements of
21 what you're trying to accomplish in a best evidence
22 context.

23 MR. RIENZI: I mean, I would say, though, that
24 here because the court under these circumstances of having
25 seven witnesses who observed this evidence that is relevant

1 and now has been lost and there was a best evidence
2 objection about this. I mean, so they did obviously
3 litigate it on those grounds.

4 JUDGE CANNATARO: We're in the realm of best
5 evidence.

6 MR. RIENZI: Yes.

7 JUDGE CANNATARO: So what is the - - - what kind
8 of testimony - - - I think about written documents.

9 MR. RIENZI: Yes.

10 JUDGE CANNATARO: And you would call witnesses
11 who have recollection of the words that were contained in
12 that written document. And they would try to establish as
13 accurately as they can what each and every word of that
14 missing document was. That's not what's happening here.
15 We have witnesses telling - - - it's like going to watch a
16 movie and then telling your friend what you remember seeing
17 in the movie, and that seems different.

18 MR. RIENZI: However, Your Honor, it still is - -
19 - I mean, this is the evidence that they're able to give
20 that is relevant to the question of defendant's guilt or
21 not guilt of assault.

22 JUDGE HALLIGAN: But it seems like for some of
23 the reasons I think Judge Cannataro is identifying, an odd
24 fit for the best evidence rule to me, right? Because the
25 ultimate factual question here, I don't think, is what did

1 the video show? The ultimate question is what happened in
2 the course of the assault. And I'm not sure I have seen
3 cases where we apply or other jurisdictions apply the best
4 evidence rule where the writing, if we assume that the
5 video qualifies as a writing for purposes of the rule, is
6 not even the ultimate question, its contents are not. That
7 probably doesn't mean that it should come in as a
8 substitute without some inquiry. But is it really a good
9 fit for the doctrine?

10 MR. RIENZI: I think it's a - - - again, because
11 the objection was raised in this way and this is - - - you
12 know, Schozer is the case - - -

13 JUDGE HALLIGAN: We are where we are is, I take
14 it, what you're saying?

15 MR. RIENZI: That is. Yes, Your Honor, thank
16 you.

17 JUDGE HALLIGAN: But it just seems we're far
18 afield from the, you know, antecedents of the doctrine,
19 which are, you know, what does this piece of paper say?
20 And if the piece of paper has - - - the words have some
21 legal effect, you'd best have the piece of paper and not
22 some testimony as to its contents, unless you have a really
23 good reason.

24 MR. RIENZI: I mean, however, though I think that
25 there are - - - even Schozer itself cites these antecedents

1 of Schozer that describe even in a written document
2 context, it is not required that the document be a perfect
3 duplicate or that, you know, there are cases that talk
4 about not literally, but substantially describing it.

5 JUDGE CANNATARO: No, there's no - - - there is
6 no requirement of 100 percent accuracy - - -

7 MR. RIENZI: Right.

8 JUDGE CANNATARO: - - - when you're dealing with
9 testimony. But it's not perception that's being related by
10 the witness. It's more along the lines of recollection.
11 These are the words in the written document that I recall,
12 to the best of my ability, being in that written document.
13 This is people relating their perception. And we know from
14 the testimony that different people saw different things.
15 Kicks were delivered to different parts of the body. A
16 shirt was lifted up, a shirt was not lifted up. It's all
17 very interpretive.

18 MR. RIENZI: But I think that that's - - - that's
19 the reason why I believe that the Court was correct to kind
20 of - - - to analogize this to eyewitness testimony, in
21 other words, because they are - - - what they're giving is
22 their observation of what occurred in - - -

23 JUDGE RIVERA: But would it matter but for the
24 variances? Let's say every one of them got up and said,
25 yes. The last thing that happened was the defendant kicked

1 the complainant in the head. They all said that.

2 MR. RIENZI: Yes, they all said that.

3 JUDGE RIVERA: They all saw that. It wouldn't
4 matter that they're interpreting the video, right? Only
5 what matters is the fact that there are differences in
6 their views of what they saw on the video. Isn't that
7 really what's at the heart of the disagreement between you
8 and counsel, or am I misunderstanding your arguments here?

9 MR. RIENZI: Your Honor, I apologize. Would you
10 mind repeating the question? I'm sorry.

11 JUDGE RIVERA: Well, I'm just saying it - - -
12 isn't his point that the reason you can't, or this was
13 error to allow the witnesses is in part his point, because
14 there were these variances in their testimony, variances
15 that matter about things that are relevant?

16 MR. RIENZI: Yes.

17 JUDGE RIVERA: But if they all said the same
18 thing about whatever is a crucial moment, let's say the
19 ADA's position was that it's - - - it's a kick to the head
20 at the end. And every one of them said, well, I'm not sure
21 about this, I'm not sure about that. But that is what I
22 saw at the end. Don't you have then the stronger case?

23 MR. RIENZI: Then - - -

24 JUDGE RIVERA: Because it doesn't matter about
25 perception. They're all saying the exact same thing.

1 MR. RIENZI: Yes. And then, I mean, in that
2 circumstance, obviously, then my adversary would lose the
3 argument about - - - he would not have the argument about
4 discrepancies anymore, or at least not about the kick. But
5 then, you know, there might be other arguments, but - - -
6 but I think that this - - - if they agreed about that - - -
7 I mean, there are things also, by the way, that many
8 witnesses did agree about. There are - - - they obviously
9 all are watching the same video in the most basic sense.
10 They - - - six of the sev - - -

11 JUDGE RIVERA: But they all agree there's a
12 physical altercation between these two people.

13 MR. RIENZI: Exactly.

14 JUDGE RIVERA: There is no doubt.

15 MR. RIENZI: They're both - - - right, both
16 hitting each other.

17 JUDGE RIVERA: I believe they all agreed that the
18 complainant was on the ground. I think there's not an
19 issue about that. Even the defendant, I believe, concedes
20 that.

21 MR. RIENZI: I that. Yeah, I mean, right. Five
22 of the witnesses saw the defendant throw the victim to the
23 ground. Six of - - -

24 JUDGE RIVERA: Well, I'm just saying being - - -

25 MR. RIENZI: Six of the witnesses - - -



1 JUDGE RIVERA: - - - on the ground. Not how they
2 got there. It's all agreement that that is at the end of
3 the fight.

4 MR. RIENZI: There were. Yeah, five - - - even
5 my adversary's brief mentions that five of the witnesses
6 kind of said a similar way of defendant dragging victim
7 down by her clothing.

8 CHIEF JUDGE WILSON: But some said on her back,
9 some said on her stomach. One said on her knees - -

10 MR. RIENZI: There were some - - -

11 CHIEF JUDGE WILSON: - - - or even on the ground.
12 There's some - - -

13 MR. RIENZI: Yes.

14 CHIEF JUDGE WILSON: - - - differences about
15 where on the ground or how on the ground, right?

16 MR. RIENZI: That is correct, Your Honor. Yes.
17 So but six of the seven to the point of the agreement, you
18 know, thought that there - - - testified that there was - -
19 - that there were blows after that point when she was on
20 the ground, and that is the - - - that is - - -

21 JUDGE RIVERA: So just to be clear.

22 MR. RIENZI: Yes.

23 JUDGE RIVERA: Because his argument also in part
24 is that the other problem with the witnesses is that this
25 has already being asked of you. You know, this is an

1 atomized perception of that video. It's what he's saying,
2 that blow-by-blow. And that's where the differences come
3 in, and that matters. You want to know when these blows
4 happen. I just want to be clear. You agree that that is
5 true, that that's the lens through which we should think
6 about this case, that we are trying to figure out the blow-
7 by-blow, or that's the jury had to do that to determine
8 whether or not there was justification?

9 MR. RIENZI: I certainly agree that the jury had
10 to do that.

11 JUDGE RIVERA: Okay.

12 MR. RIENZI: No question. And I think that that
13 it - - -

14 JUDGE RIVERA: Okay.

15 MR. RIENZI: - - - it was appropriate to have
16 that be - - -

17 JUDGE RIVERA: Because the prosecution is
18 identifying a particular blow or particular set of blows?

19 MR. RIENZI: I think in terms of - - - so when we
20 discuss justification a few moments ago - - -

21 JUDGE RIVERA: Yes.

22 MR. RIENZI: - - - right? There were a few
23 different theories of how the defendant could not have been
24 justified. One of them would have been that the defendant
25 started the fight, right? Was the first person to use

1 physical force.

2 JUDGE RIVERA: Uh-huh.

3 MR. RIENZI: Right? Obviously, there is
4 differing testimony about that. Both of these participants
5 testified they had different views and even the video
6 witnesses, if we just took them as a block, most didn't
7 know who struck first.

8 JUDGE RIVERA: Uh-huh.

9 MR. RIENZI: But then there's the initial
10 aggressor theory of who's the first to use deadly physical
11 force. And then that would be, what I think Your Honor was
12 just saying, the idea of these blows when Ms. Scott is on
13 the ground whether it's the barrage of punches or the kick,
14 as the prosecutor said in summation, whatever - - -
15 whatever the jury finds happened that is what - - - the
16 argument was that's what's caused - - - that's what caused
17 the injury. And that was not justified because serious - -
18 - I'm sorry, deadly physical force was used and inflicted
19 serious physical injury. So have I answered your
20 questions, Your Honor? May I for one minute just address
21 the - -

22 CHIEF JUDGE WILSON: Take one minute.

23 MR. RIENZI: Yes. Thank you. As far as the
24 permissive adverse inference it was not a tactical
25 advantage to the People in this case. Having video

1 witnesses instead of the video was a disadvantage to the
2 People. The video itself was likely stronger based on the
3 testimony than the video witnesses would have been.
4 Obviously, the witnesses would not have faced the cross-
5 examination of counsel or the adverse inference in that
6 circumstance. And again, what was done in the trial,
7 giving the permissive adverse inference along with the
8 cross-examination by counsel likely contributed to
9 defendant being acquitted of second degree assault despite
10 the serious and permanent injury to Ms. Scott. If there
11 are no further questions, we ask that you affirm.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. BARR: I just want to start with one quick
14 correction, which is that deadly physical force instruction
15 was not given. This was not a deadly physical force case.
16 Secondly, authentication was absolutely in our briefs. We
17 con - - - repeatedly point out that nobody who live
18 witnessed the fight - - -

19 CHIEF JUDGE WILSON: I'm sorry, briefs where?

20 MR. BARR: In our briefs. And it was argued by
21 trial counsel below, I submit. And it was also in our
22 Appellate Division and our Court of Appeals briefs, this
23 theme that nobody could come in and say, the video that we
24 all watched is what happened to me or to us.

25 JUDGE CANNATARO: You need that? You need a live

1 witness to the fight in order to authenticate the
2 genuineness of the video?

3 MR. BARR: You would normally need that under
4 Patterson. The fact that they destroyed the video, get - -
5 - it seems to have let them get around that, at least in
6 the lower courts. And I don't think that's appropriate. I
7 also want to take issue with this idea that cross-
8 examination was a cure-all. This court itself had
9 explained in Schozer that the opponent of such evidence is
10 always at a disadvantage when cross-examining about a lost
11 document. I also want to emphasize that this type of, as
12 Your Honor put it, interpretive testimony would otherwise
13 be inadmissible if they had the video. If they had the
14 video, there is no - - - most of these people wouldn't even
15 be on the stand. None of them would be allowed to
16 interpret the video.

17 JUDGE RIVERA: That's the question.

18 MR. BARR: Well - - -

19 JUDGE RIVERA: That's the point.

20 MR. BARR: Well, but I think it goes - - -

21 JUDGE RIVERA: They don't have the video. That's
22 the point.

23 MR. BARR: I think it goes to the tactical
24 advantage that they received. And with respect, I don't
25 think the relevant comparison on that issue is between the

1 video and the video witnesses. I'm sure the prosecution in
2 some sense would have preferred to have the video, but we
3 don't have the video. Now they get to reconstruct that
4 video through their own witnesses. And yes, the defense
5 gets to cross-examine - - -

6 JUDGE RIVERA: So does your argument really just
7 turn on how much variance there is amongst the witnesses
8 regarding what they observed on this video?

9 MR. BARR: I don't think it's just the variance,
10 but I would say that, again, only three of the seven
11 testified that there was a final kick - - -

12 JUDGE RIVERA: Well, if they all agreed to this
13 last point you're making, you don't have that argument
14 anymore, do you?

15 MR. BARR: Well, that's not this case.

16 JUDGE RIVERA: Are you satisfied Schozer third -
17 - - I know.

18 MR. BARR: Oh, okay.

19 JUDGE RIVERA: Are you satisfied of Schozer's
20 third prong?

21 MR. BARR: Maybe. But I do think I take issue
22 with the idea that, well, if we just had one - - - the one
23 final kick, then we could - - - then we're okay. Because
24 the reality is a jury thinking about a justification
25 defense between two women who are indisputably in a mutual

1 fight is going to be interested in more than whether
2 there's just one final kick at the end. There also are - -
3 -

4 JUDGE SINGAS: So isn't your argument really that
5 the best evidence rule shouldn't apply to videotapes?
6 Because you're always going to be interpreting what you see
7 on a video if it's a videotape.

8 MR. BARR: I don't think that's - - - I don't
9 think that's true. I think that our position is consistent
10 - - -

11 JUDGE RIVERA: But the rule is you can't testify
12 about what you saw. You could have copies. You could have
13 something else.

14 MR. BARR: You - - -

15 JUDGE RIVERA: You can't do what they did.

16 MR. BARR: You could absolutely have copies. I
17 think Boyce's copy would have been subject to a best
18 evidence rule challenge, but it probably would have been
19 admitted because he testified I held it up to the screen,
20 and I created a reliable copy in such and such a way.

21 CHIEF JUDGE WILSON: I thought the rule was if it
22 was something like identity, that would be okay, no?

23 MR. BARR: That's what I was about to say, which
24 is that I think our position is consistent with some of the
25 lower court decisions that have approved of quote unquote,

1 video witness testimony under the best evidence rule, like
2 the Fourth Department case in Jackson, where it's a - -
3 it's just a store security guard against someone who knows
4 he's going to be asked questions about this, is creating a
5 contemporaneous report, is professionally trained, very
6 familiar with the system like none of the witnesses here
7 were. And he's testifying about just a really discrete
8 event, which is someone pulling something from the shelf
9 and putting it in their shopping cart. That's probably
10 reliable. I think that's consistent with the rule that
11 we're advancing here. I think this case takes us far away
12 from that. Thank you, Your Honor.

13 CHIEF JUDGE WILSON: Thank you.

14 (Court is adjourned)

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

I, Leda Yeager, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Coggins (Tonie), No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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