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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 50

TWANEK CUMMINGS,

Appellant.

20 Eagle Street
Albany, New York
March 28, 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: Number 50, the People of
2 the State of New York v. Twanek Cummings.

3 Good afternoon, counsel.

4 MR. WIENER: Good afternoon, Your Honors. I'm
5 Benjamin Wiener of behalf of appellant Twanek Cummings.

6 I'd like to please reserve two minutes of my time
7 for rebuttal.

8 CHIEF JUDGE DIFIORE: Of course, sir.

9 MR. WIENER: Thank you, Your Honor. In this
10 case, the prosecution took a judge falling ill as an
11 opportunity to get a second bite at the apple and - - -

12 JUDGE RIVERA: But, counsel, in - - - in a case
13 can't a party request that a judge reconsider a prior
14 motion or a prior decision?

15 MR. WIENER: Sure, Your Honor. The legislature -
16 - -

17 JUDGE RIVERA: But why - - - why then can't,
18 under your analysis, a substitute judge do the same here?

19 MR. WIENER: I'm sorry. I just want to make sure
20 I understand the question. You're asking about the same
21 judge on a case they could reconsider their motion and so
22 why can't a substitute judge?

23 JUDGE RIVERA: Also reconsider the motion.

24 MR. WIENER: Well, Your Honor, when it's a single
25 judge the core interest that underlie the law of the case



1 doctrine just don't apply. You don't have this kind of
2 forum shopping that essentially occurred in this case.

3 JUDGE STEIN: Well, what - - - they didn't cause
4 the judge to become ill or seek this particular judge. I -
5 - - I guess what intrigues me is if we agree with you and
6 we reverse on that ground then it goes back for another
7 trial and there's a whole other judge then - - - then I
8 assume you would agree they can make the motion again just
9 like they did the last time there was - - - the trial
10 wasn't - - -

11 MR. WIENER: That's right, Your Honor, but that -
12 - -

13 JUDGE STEIN: So why - - - so but what's the
14 point of that?

15 MR. WIENER: It's necessary to enforce the rule
16 that this court ratified in Evans and reiterated in Bilsky
17 and that protects critical interest in terms of finality,
18 in terms of preventing the parties - - -

19 JUDGE STEIN: What about the distinction between
20 evidentiary type rulings and other types of rulings? Why -
21 - - why shouldn't we adhere to that?

22 MR. WIENER: Well, Your Honor, nothing in Evans
23 or Bilsky suggests that the limited exception in Evans
24 should apply in any situation other than a retrial, and
25 that makes sense. After a retrial, it could be years later



1 until the next trial. It's going to be very difficult for
2 the parties to even know - - -

3 CHIEF JUDGE DIFIORE: But these are discretionary
4 rulings, counsel, right?

5 MR. WIENER: Well, Your Honor, they are
6 ultimately subject to the judge's discretion, but the judge
7 had exercised her discretion in this case. She had had - -
8 -

9 CHIEF JUDGE DIFIORE: And that's it, cemented in
10 stone?

11 MR. WIENER: Well, it is, Your Honor, especially
12 in a case like this where absolutely nothing had changed in
13 between the time she originally made the decision and the
14 time Justice Allen, the substitute judge, reconsidered it.

15 JUDGE WILSON: You're not arguing there's any
16 actual prejudice, that is you - - - you had planned your
17 case a particular way and then because the ruling changed
18 you had already done something that you were - - - you
19 know, would have not done that way, right? There's no
20 argument like that?

21 MR. WIENER: No, but this court has never
22 suggested a prejudice requirement. That - - - that would
23 be an independent due process issue if the parties had
24 detrimentally relied on a judge's ruling and then it
25 changed. But the rule here under law of the case is just a



1 determination that the judge has made that the parties had
2 a full - - -

3 JUDGE RIVERA: But - - - but is your - - - let's
4 go back to something you said before. Is it - - - is it
5 your position that if Justice Pickholz had not fallen ill
6 and had stayed in the case the People couldn't ask her to
7 reconsider her prior decision?

8 MR. WIENER: They could, but they absolutely
9 wouldn't have done that. There's no way they would have
10 done what they did here and resubmit the identical motion.

11 JUDGE RIVERA: You mean counsel - - - counsel
12 never asked for reconsideration thinking the judge has made
13 a mistake, let me try again?

14 MR. WIENER: They might, but the - - - the
15 judicial efficiency concerns that lie at the heart of the
16 law of the case doctrine - - -

17 JUDGE FAHEY: Yeah, but they - - - the bottom
18 line is - - - is they can reconsider it. You could come in
19 - - - it happens all the time. You're a trial judge,
20 somebody will come in and they'll say, Judge, there's a
21 case I failed to mention to you on this ruling on 911
22 tapes. I want you to look at this and maybe reconsider this
23 case, and the judge may or may not do that. And the - - -
24 it would be not only proper but probably required for the
25 judge to do that; wouldn't you say?



1 MR. WIENER: Well - - - well, again, the
2 legislature has established a procedure for a motion to
3 reconsider, a motion to renew when there is new
4 circumstances that arise when the court overlooked some
5 controlling law.

6 JUDGE FAHEY: But - - - but isn't in this case
7 really - - - you know, the law of the case thing, this is a
8 convoluted case where we have three judges on one case and
9 unusual circumstances where it's twice not admitted and
10 then finally admitted. Ultimately, though, aren't we
11 really talking about whether or not the excited utterance
12 exception was properly applied in this circumstance?

13 MR. WIENER: Well, it was not properly - - -

14 JUDGE FAHEY: Okay. So that's really - - -

15 MR. WIENER: - - - in this circumstance.

16 JUDGE FAHEY: - - - what we're ultimately
17 concerned with here, right?

18 MR. WIENER: No, Your Honor. The - - - the law
19 of the case - - -

20 JUDGE FAHEY: No?

21 MR. WIENER: - - - in - - - doctrine
22 independently barred Justice Allen from reconsidering - - -

23 JUDGE FAHEY: Well, do me a favor - - -

24 MR. WIENER: The - - -

25 JUDGE FAHEY: - - - go to the excited utterance -



1 - - go to the excited utterance argument, okay. Because I
2 understand you're on the law of the case, but I don't want
3 us to not hear from you on this point.

4 MR. WIENER: Sure.

5 CHIEF JUDGE DIFIORE: I - - - I have one more
6 question on this. Excuse me. So - - - so are you
7 suggesting that if I'm the trial judge and I make an
8 evidentiary ruling and I go home over the weekend and I'm
9 thinking about the trial that I can't return to court on
10 Monday and say I've reconsidered this, I don't - - - I'm
11 not comfortable with my ruling?

12 MR. WIENER: The court can absolutely do that.
13 They can - - - they can reverse their own rulings. And
14 again part of the law of the - - -

15 CHIEF JUDGE DIFIORE: So what is the diff - - -

16 MR. WIENER: Excuse me, Judge. I'm sorry.

17 CHIEF JUDGE DIFIORE: What's the difference?
18 What is the difference?

19 MR. WIENER: The difference is that in that case,
20 you don't have a judge of coordinate jurisdiction sitting
21 in what is essentially appellate review. A judge of
22 coordinate jurisdiction - - -

23 JUDGE WILSON: Why are you calling this a judge
24 of coordinate jurisdiction? Why - - - why are you calling
25 this a situation involving a court of coordinate



1 jurisdiction?

2 MR. WIENER: That's the language that the court
3 used in Evans and that obviously applies here.

4 JUDGE WILSON: That's when we're talking about a
5 different court that is parallel to the court you're in,
6 not the same court with a different judge replacing the
7 judge.

8 MR. WIENER: And it applies with all the same
9 force in the case of a substitute judge. This is another
10 judge who's a member of the same court, has no power of
11 appellate review over the initial judge that made the
12 determination, and so it is a judge of coordinate
13 jurisdiction under Evans. I do briefly want to get to - -
14 -

15 CHIEF JUDGE DIFIORE: Yes, let's get to the
16 excited utterance.

17 MR. WIENER: - - - the underlying issue. This
18 was a statement made by someone who is completely
19 unidentified. Not only do we not know what - - - their
20 name, we have no idea who they are, we have no idea what
21 their relationship was to the underlying issue. The
22 statement itself doesn't even describe an event - - -

23 JUDGE STEIN: Well, don't we just really need to
24 know whether they personally observed it? We don't need to
25 know all those other things, do we?



1 MR. WIENER: But the fact that we don't know any
2 of those things - - - the fact that we know so little about
3 who this person was means that the court can't infer that
4 this person personally observed the event.

5 JUDGE STEIN: What if it was within ten seconds
6 of the shooting? Would that make a difference?

7 MR. WIENER: Well, that's not the case here.
8 Initially by - - -

9 JUDGE STEIN: No, no, I know. But if it was. I
10 mean do we have to do any line drawing here?

11 MR. WIENER: Well, I don't think that would
12 really matter. Maybe the - - - if it was in ten seconds
13 the person was turned around and they heard or it was
14 something they assumed to be the case. And again, with a -
15 - -

16 JUDGE RIVERA: Well, we've already said it's not
17 about the amount of time.

18 MR. WIENER: It's not about the amount of time
19 for the excited piece.

20 JUDGE FAHEY: And it's not - - - it's not about
21 whether or not they're identifiable. Judge Stein really
22 identified it. It's the personal observation. The
23 language sometimes is a little different. They talk about
24 any basis to establish the declarant's personal knowledge.
25 Now there's an unknown declarant here who said, "It's



1 Twanek, man." Is there any basis in the record to
2 establish that declarant's personal knowledge? And if
3 there's none is there any place you can point to that we
4 should look at to say there's none here, Judge, and this is
5 where you should look?

6 MR. WIENER: There's none, Your Honor. And I'd
7 point you to the statement itself. There's almost no
8 content to this statement. There's nothing the court can
9 latch onto to say, oh, this is a statement of someone who
10 has personal knowledge, who personally observed. And I'd
11 also - - -

12 JUDGE RIVERA: Well, you - - - you've got a
13 shooting on a street, right. You - - - you've got - - -
14 the officers say there are people who are aware of this,
15 they - - - there were people there to begin with. There
16 are people who then start congregating. So we do have some
17 sense of there's - - - there's a chaotic situation.

18 MR. WIENER: Right, Your Honor.

19 JUDGE RIVERA: And if nothing else, it seems - -
20 - the - - - the remark, "It's Twanek, man" seems to suggest
21 that at least the individual knows the defendant. Your
22 point is whether or not they saw anything related to the
23 shooting that connects the defendant.

24 MR. WIENER: That's right, and the testimony here
25 - - - I'd just like permission to answer your question,



1 Your Honor.

2 CHIEF JUDGE DIFIORE: Yes, go ahead.

3 MR. WIENER: Is that minutes after the shooting
4 when the police arrived there's a huge crowd forming of
5 people who - - - who weren't there at the time of the
6 shooting itself. We have no idea who the declarant was in
7 this case, if he was one of those people, if he was
8 somebody else. We just don't know. And so this doesn't
9 meet the threshold reliability to be admitted.

10 JUDGE STEIN: What if the statement was oh, my
11 God, I just saw Twanek shoot at this guy?

12 MR. WIENER: That would be a substantially
13 different statement, Your Honor. I saw him shoot this guy.
14 What he's saying in the statement itself is I saw this. I
15 have personal knowledge. That's absolutely not what we
16 have here.

17 JUDGE STEIN: So - - - so you're not suggesting
18 we need to know who this person is or what his background
19 is. You're just saying that - - - that the content or the
20 circumstances may in and of themselves demonstrate that - -
21 -

22 MR. WIENER: Absolutely, and it doesn't here.
23 The content of the statement doesn't do that here, Your
24 Honor.

25 CHIEF JUDGE DIFIORE: Thank you.



1 MR. WIENER: Thank you.

2 MR. MAZER: May it please the court. My name is
3 Ross Mazer for the respondent, the People of the State of
4 New York.

5 CHIEF JUDGE DIFIORE: Mr. Mazer, what facts allow
6 this inference to be drawn that the speaker had personal
7 knowledge?

8 MR. MAZER: So before I answer your question,
9 Your Honor, I would just say that the - - - the lower
10 court's finding certainly has support in the record, and -
11 - - and as a result it presents a mixed question of law and
12 fact which so long as it has record support is beyond this
13 court's further review. And I think both sides agree on
14 that standard. Responding to your question, I would
15 highlight three reasons to support the lower court's
16 finding of personal knowledge.

17 First of all, the characteristics of the
18 statement itself demonstrate that the declarant was
19 speaking from - - - from having observed the shooting and
20 then having recognized the shooter. For one thing, this is
21 the unusual case where the statement was actually recorded
22 in the background of the 911 call, and so the jurors could
23 rely on their common sense and their common experience to
24 determine whether, as the People argued at trial, the tone
25 and the content of the declarant's statement was consistent



1 with someone who had just seen an ambush shooting of three
2 people.

3 JUDGE STEIN: Let's - - - let's assume you're - -
4 - that's true. When - - - if there are two equally
5 reasonable inferences, okay, is that - - - is that enough
6 to - - - to get you over the line? In other words, perhaps
7 one could - - - perhaps one could hear that statement as
8 indicating that there was - - - there was personal
9 observation but it's equally possible that they - - - that
10 they would say no, that doesn't tell me anything at all.
11 So - - - so is that enough?

12 MR. MAZER: In this case, first of all, I'd say
13 that I don't think the two - - - the inferences are equal,
14 that the - - - the inference of personal knowledge is much
15 stronger. But responding to your question, you know,
16 certainly in this court, you know, if - - - if different -
17 - - if reasonable minds could differ about the inferences
18 to be drawn from the established facts that would - - -
19 that would present a mixed question of law and fact beyond
20 the court's review. But even at the trial court's level,
21 the standard that this court has established in Fratello,
22 and I - - - again, I think both sides rely on Fratello to
23 provide the relevant standard - - - is whether the
24 circumstances permit the trial court to make the reasonable
25 inference that there's personal knowledge here.



1 JUDGE GARCIA: And what - - -

2 JUDGE STEIN: And doesn't that relate to the - -
3 - the minimum standard necessary and get us beyond a mixed
4 question and move it into a question of law?

5 I'm sorry.

6 MR. MAZER: Well, certainly, if - - - if at the
7 margins any question of fact could - - - could present a
8 question of law, but if - - - you know, if reasonable minds
9 could differ about the inferences then it's just a mixed
10 question. And I would point to the remarks of Justice
11 Merchan at the end of the first trial where he said this
12 was a close case and reasonable minds could differ. So
13 even the - - - one of the judges who excluded the statement
14 would have presumably acknowledged that it presents a mixed
15 question upon review before this court.

16 JUDGE GARCIA: Counsel, going back, I think
17 earlier I think the Chief Judge was asking, other than the
18 tape itself - - - so you have the timing of the statement
19 based on the 911 call and you have the statement itself, it
20 was the defendant. What else is there to provide any
21 background to who made that statement or what the person
22 who made that statement saw?

23 MR. MAZER: So in - - - in addition to the - - -
24 to the tone and the content of the statement itself there
25 was the fact that the statement was made immediately after



1 on the heels of the shooting. It's undisputed - - -

2 JUDGE GARCIA: Well, let's say it's a rival gang
3 member. It's - - - you know, I'm not saying there's a gang
4 involved here, but it could be - - - it could be the
5 shooter. It could be - - - you know, there's no - - - you
6 have no - - - and I agree this isn't necessary, but in many
7 cases you see you have at least the identity of the speaker
8 so you can extrapolate from that. You have someone who
9 could at least say I saw that person at the scene and they
10 witnessed it. You have nothing here. You have nothing
11 except a voice on a tape saying it was - - - a very strong
12 accusation which is very, you know, prejudicial - - - and
13 evidence could be prejudicial, I don't mean that in a
14 negative way. But without any context provided as to what
15 that person actually saw, who that person was. I - - - I'm
16 having some trouble understanding how as a matter of law
17 you could say there was a basis for admitting that.

18 MR. MAZER: Respectfully, Your Honor, I - - - I
19 would disagree with your characterization. Not only was
20 the statement made immediately after the shooting but it
21 was made at the same place where the shooting occurred. In
22 - - - and we know that because - - -

23 JUDGE STEIN: But there's - - - there's video
24 surveillance cameras and - - - and I mean I - - - well,
25 maybe if there was a camera showing the shooting and



1 showing a person right there who clearly had a view of the
2 shooting and - - - and you could see them saying something,
3 well, that certainly might be a closer case. But - - -

4 JUDGE GARCIA: It's a street, right? It's a - -
5 - it's a public street.

6 MR. MAZER: It's - - - it's a public street in
7 the middle of a sunny afternoon on a busy Manhattan street
8 corner, and the surveillance video - - - while it certainly
9 can't identify who the declarant was or even whether the
10 declarant was one of the bystanders pictured in the video -
11 - - shows that a number of bystanders were, you know, well-
12 positioned to observe the shooting.

13 JUDGE STEIN: But it's no way to know whether
14 it's more likely or not that he just walked up there after
15 the shooting and didn't see anything or he - - - or he did.
16 There's no way to - - - there's nothing in - - - in the
17 statement itself that enables you to make that
18 determination without speculation.

19 MR. MAZER: Well, you - - - I would say that
20 you're - - - you're drawing inferences from established
21 facts. It's not speculation. To finish answering Judge
22 Garcia's question, if the - - - we know that the declarant
23 ninety seconds after the shooting was standing at the
24 shooting site, at the corner itself. Because for his voice
25 to be overheard on the 911 call that the victim was placing



1 - - - or, you know, on the call that we can hear the victim
2 screaming on, he - - - he had to be right at the corner
3 which - - - and if we know exactly where he was ninety
4 seconds after the shooting we know about where he was
5 ninety seconds before - - - you know, before the statement
6 when - - - when the shooting occurred.

7 JUDGE STEIN: Well, we don't know if he was
8 bending down to tie his shoes or had his back turned and
9 was talking to somebody or buying a pretzel from a vendor.
10 We have no idea.

11 MR. MAZER: We don't know that, Your Honor. But
12 the - - - the jurors can listen to the statement and - - -
13 and gauge the - - -

14 JUDGE FAHEY: Well, couldn't they - - - couldn't
15 they quite simply just say all right - - - I listened to
16 the tape, and the man's talking on the 911 tape, one of the
17 victims. And you can hear - - - it's kind of difficult in
18 the background to hear, "It's Twanek, man." I couldn't
19 tell if it's, "That's Twanek" or "It's Twanek." But
20 nonetheless, listening to that tape I couldn't see where
21 that would illustrate the basis of a factual assertion that
22 his statement rested on his personal knowledge. He can't
23 identify the person. There's - - - he's making a factual
24 assertion. That's clear. Twanek - - - Twanek did it.

25 You don't know if somebody else told him that



1 Twanek did it. There's - - - there's - - - I just can't
2 find the basis for this factual assertion, and there's no
3 other surrounding circumstances that seem to support it.
4 The other evidence in the case is the video and the
5 fingerprint, and - - - and those are not good for the
6 defendant. But in this particular piece of evidence, I - -
7 - I fail to see where it is. Tell me where the basis is,
8 where we should look in the record for the basis for this
9 factual assertion that this unidentified person made.
10 Where do we look?

11 MR. MAZER: Well, you - - - I would - - -

12 JUDGE FAHEY: Is there anything beyond the 911
13 call I guess is my question to you.

14 MR. MAZER: Well, I would say a couple of things,
15 Your Honor.

16 JUDGE FAHEY: Well, answer that question. Is
17 there anything beyond the 911 call that we should look at
18 to identify what the basis for this factual assertion is?

19 MR. MAZER: Beyond the 911 call, I mean, there's
20 a lot of extrinsic corroboration in the record.

21 JUDGE FAHEY: Okay. That's fine. Tell me what
22 you think it is.

23 MR. MAZER: Well - - - I mean and this goes - - -
24 you know, this goes to harmless error as well. But the - -
25 - the trial judge would certainly be justified in



1 considering the other evidence, the circumstantial evidence
2 of identity showing that the - - -

3 JUDGE FAHEY: But that won't tell you the basis
4 for the factual assertion made by the unidentified person
5 on the 911 tape. That will link up the defendant which I
6 agree with you it does.

7 MR. MAZER: It - - - well, it would undercut any
8 alternative to personal knowledge that's premised on an
9 alternative to personal knowledge that presumes, you know,
10 either a mistaken identification or - - - or a bias to
11 falsely accuse - - - accuse the defendant, Twanek Cummings,
12 because it - - - it buttresses the reliability of the
13 statement.

14 CHIEF JUDGE DIFIORE: Mr. Mazer, let - - - let's
15 tease out the harmless error argument - - -

16 MR. MAZER: Sure.

17 CHIEF JUDGE DIFIORE: - - - a little bit and
18 let's assume for a moment that the statement is
19 inadmissible. What evidence do you offer up in support of
20 a harmless error finding?

21 MR. MAZER: So in the alternative, the Appellate
22 Division was certainly right that - - - that the other
23 circumstantial evidence of - - - of identity was
24 overwhelming that you could excise this statement and
25 there'd be no reasonable probability that the jury would



1 have acquitted. First of all, the cell-site evidence
2 showed that the - - - the defendant was with Hamilton, the
3 undisputed driver of the getaway vehicle both before,
4 during, and after the shooting.

5 JUDGE STEIN: Well, does it show that he - - - he
6 was with him or that at least they were in close proximity
7 because they were bouncing off the same cell towers?

8 MR. MAZER: Well, that they were in close
9 proximity.

10 JUDGE STEIN: Okay.

11 MR. MAZER: But that they also - - -

12 JUDGE STEIN: Well, probably a lot of people in -
13 - - in close proximity at that time; wouldn't you think?

14 MR. MAZER: I - - - I wouldn't think that there
15 are many people that - - - that travel, you know, the route
16 that the two of the traveled from, you know, near - - -
17 near, you know, 120th Street near defendant's apartment
18 when - - - by the way, they're calling each other back and
19 forth to a - - - to arrange it.

20 JUDGE RIVERA: Did I misunderstand the record?
21 Is one of those calls what the People's timeline indicates
22 they would have been in the same vehicle?

23 MR. MAZER: Yeah, one of the - - - it was a less
24 than ten-second call and - - - and on summation the
25 prosecutor argued convincingly that, you know, in the fast-



1 moving aftermath of the - - - the shooting the defendant
2 probably hit the wrong contact on his phone which I've
3 certainly done, you know, in non-stressful situations.

4 JUDGE RIVERA: I know your light is out. If the
5 Chief Judge will permit me this question. Slightly
6 different staying still on this issue. So if you could,
7 what's - - - what's the rationale for this exception to
8 hearsay and how does your analysis ground itself in that
9 rationale?

10 MR. MAZER: Well, the rationale is that - - -
11 that if the hearsay statement is made, you know, after a
12 clearly startling event and the declarant's faculties for
13 reflection and - - - and falsification are stilled, you
14 know, and his statement exhibits that excitement that it
15 wasn't made under the impetus of studied reflection, then
16 the statement is reliable. And I think this also speaks to
17 - - - to Judge Fahey's point that the statement itself, the
18 - - - you know, if you listen - - - you know, I really
19 would respectfully urge the court to listen to the
20 statement because I think the - - - the palpable urgency
21 and excitement in the - - - in the declarant's voice shows
22 not just that the statement wasn't made under the impetus
23 of studied reflection but also that it was made based on
24 personal knowledge. And the jury was well-equipped to
25 determine, you know, based on the tone and content whether



1 this was personal knowledge or not.

2 And if I could just have thirty more seconds,
3 Your Honor?

4 CHIEF JUDGE DIFIORE: Yes, please.

5 MR. MAZER: The last words that - - - you know,
6 of course in addition to the cell-site evidence we also
7 have surveillance video showing the - - - the defendant or
8 the shooter touching the outside of the passenger side
9 door, and the police recovered the defendant's right index
10 fingerprint from exactly that location which is powerful
11 circumstantial evidence of guilt.

12 But the last word that the jury heard about this
13 was the judge's instruction which reminded the jurors that
14 the declarant - - - or as the judge referred to him, the
15 individual in the background of the 911 call - - - was
16 unidentified and didn't testify in court and then modifying
17 the standard charge urged the jurors to consider the
18 evidence or lack of evidence of nine different factors that
19 bear upon the reliability and the accuracy of the
20 identification. So the judge repeated the phrase or lack
21 of evidence fully nine times, and the jury was well-
22 equipped to decide whether or not the statement was based
23 on personal knowledge.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. MAZER: Thank you very much.



1 CHIEF JUDGE DIFIORE: Mr. Wiener.

2 MR. WIENER: Thank you, Your Honor.

3 CHIEF JUDGE DIFIORE: You're welcome.

4 MR. WIENER: I think Your Honors have the
5 question here. The question is whether as a matter of law
6 it was - - - the court could determine that the declarant
7 had personal knowledge. And given the complete lack of
8 information about this person, the incredible lack of
9 detail in the statement itself as a matter of law - - -

10 JUDGE RIVERA: But - - - so does your rule lead
11 us to a statement that unless the declarant in - - - in
12 this moment of being affected by the excitement of what
13 they may have observed or what they've observed, that
14 declarant has to say I saw this, I saw the following?
15 Aren't we back to that line I think Judge Stein had asked
16 you about?

17 MR. WIENER: No, the - - -

18 JUDGE RIVERA: Isn't that very different from the
19 current rule we have?

20 MR. WIENER: We're not advocating that rule, but
21 there has to be something that the court can hang its hat
22 on.

23 JUDGE RIVERA: You may not expressly be
24 advocating it but it seems to me you may be taking us down
25 that road.



1 MR. WIENER: So for example, if the declarant had
2 described something specific in the statement that was
3 corroborated that might be enough, but we don't have that
4 here. There's no detail here that's corroborated elsewhere
5 in the evidence. It's this bare statement "It was Twanek."
6 It's not he has a gun and other people saw a gun; he's
7 driving this car, other people saw that car; nothing like
8 that here.

9 JUDGE RIVERA: So if instead of I saw Twanek
10 shoot the victim, whatever, if he just said Twanek had a
11 gun, what about that one?

12 MR. WIENER: That would be a lot closer. That
13 would be describing something specific, especially if it
14 was corroborated by other evidence that showed a gun. But
15 we don't have that here at all. We don't have that. It's
16 just this bare statement out in the ether.

17 And to get to harmlessness, this absolutely was
18 not harmless. The prosecution's case was nowhere near
19 overwhelming. This was the only direct evidence
20 implicating Mr. Cummings in the crime. I point out that at
21 the first trial when this evidence didn't come in there was
22 a hung jury. Even in this case, the jurors deliberated for
23 two-and-a-half days. They acquitted Mr. Cummings of all of
24 the attempted murder counts. This was clearly a close
25 case.



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And I'd also just refer Your Honors to the prosecutor's summation which began by playing this tape twice in a row. He played it once, he stopped, and then he asked the jurors to listen to it again. And then he ended his summation by playing it a third time. Clearly, this was the crucial piece of evidence in the prosecution's case. Thank you, Your Honors.

CHIEF JUDGE DIFIORE: Thank you, counsel.

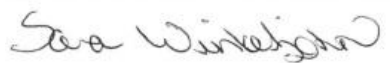
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Twanek Cummings, No. 50 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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