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FALSE CONFESSIONS: 2014 UPDATE

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FALSE CONFESSIONS, TRUE CONFESSIONS, AND VOLUNTARINESS: SELECTED ISSUES AND PRACTICE TIPS

Richard M. Greenberg
May 1, 2014

I. Introduction: The Phenomenon of False Confessions

- 25% of all DNA exonerees either confessed or pled guilty
- George Whitmore (1964)
- Central Park Five (1989)
- Martin Tankleff (1988)
- *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stanford L. Rev. 1051 (2010)
- *See* Steven A. Drizin & Richard A. Leo, T*he Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004).
- *See* Saul M. Kassin, Steven A. Drizen, Thomas Grisson, Gisli H. Gudjonsson, Richard A. Leo, Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law Hum. Behav. 3 (2010)
- Types of False Confessions:
  - Voluntary: Suspect claims responsibility without police involvement.
  - Coerced-compliant: Suspect, desperate to end the interrogation, admits to the crime even though s/he knows s/he is innocent.
  - Coerced-internalized: Suspect, confused and rendered psychologically vulnerable by hours of interrogation, comes to believe that s/he may have actually committed a crime.

II. Criminal Procedure Law § 60.45: Rules of Evidence, Admissibility of Statements of Defendants

1. Evidence of a written or oral confession, admission, or other statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.

2. A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him:

(a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or

(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:

(i) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or (ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

III. Risk Factors for False Confessions

A. Personal Risk Factors

- Youth; *see J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (holding that suspect's age is relevant in determining whether individual is in "custody" for *Miranda* purposes).
- Mental Illness/Cognitive Impairment
- Substance Abuse

B. Situational Risk Factors

- Fatigue/Isolation
- Length of Interrogation
- Promises of Leniency (minimization)
- Deception (maximization)

IV. The Reid/Imbau Interrogation Method

- Criminal Interrogation and Confessions, Fred E. Inbau, John E. Reid, Joseph P. Buckley, Brian C. Jayne (Fifth Ed. 2013)

V. *People v. Adrian Thomas*, 22 N.Y.3d 629 (2014)

- *See* Lorca Morello, *Rescuing the Fifth Amendment*, NYLJ, March 21, 2014

A. Extraordinary Case ("Good Facts Make Good Law")

- Nine hours of interrogation fully videotaped.
- Medical evidence showing that child not abused, but died of infection.

B. "Totality Of Circumstances" Test ("What Is The Rule? Where do we draw the line?")

- Rule ostensibly remains the same – whether, *under the totality of the circumstances*, the statement is voluntary.

- Deception not prohibited (but here, D told 67 times that police understood the injuries to be result of accident; 14 times that he would not be arrested; 8 times that he would be going home; and 21 times that he needed to show how he slammed the child down in order to assist the doctors in saving the child's life).

C. Remember that the Fifth Amendment Protects Right to Silence and Right Against Self-incrimination.

- *Miranda* ostensibly vindicates right to remain silent, but does nothing to preclude police from coercing a statement, once the suspect has agreed to answer questions.
- Police may not threaten that asserting one's Fifth Amendment rights will result in harm. For example, may not threaten to arrest his wife if the suspect continues to deny throwing the child down.

D. *People v. Aveni*, 100 A.D.3d 228 (2d Dep't), *appeal dismissed*, 22 N.Y.3d 1114 (2014): Right Not to Be Threatened into Making a True Confession.

- Remember that, in *Aveni*, no claim that defendant's confession was false; rather, that he was implicitly threatened into implicating himself. "The false prospect of being severely penalized for remaining silent, raised by defendant's interrogators, was . . . incompatible with a finding that defendant's confession was voluntary beyond a reasonable doubt."

VI. The Use of Experts on the Issue of False Confessions and Police Interrogations

- *People v. Bedessie*, 19 N.Y.3d 147 (2012) (in proper case expert testimony on phenomenon of false confessions should be admitted).
- Does *Bedessie* also permit the defense to call an expert on voluntariness? Or on defendant's ability to understand and knowingly waive *Miranda* rights?

VIII. Selected Practice Tips for Litigating Voluntariness Issues

A. Get Details of Interrogation from Client

- While it goes without saying, try to get as much information as possible from client about the details of any interrogation as soon as

possible, preferably at arraignment, while the memory is freshest. Such details may well come in useful in examining the detectives at a hearing. Where, when, how long, who was there, whether client was fed, had opportunity to sleep, make call, use bathroom. Was the questioning intermittent? Who wrote it? Were there language difficulties?

B. Bill of Particulars

- Always request a bill of particulars soon after arraignment. There is no need to wait to include it with the Omnibus motion. Demand that the prosecution disclose all known facts that support each element of the indictment: where, when, who, how, and why? Nature of weapon, wounds, substances, property, quantities, value, and which defendant (if more than one) is alleged to have engaged in which conduct. (Since motive is not an element, they probably do not need to disclose their motive theory.) If you get a boilerplate response, or one that is vague or incomplete, make a motion to compel. CPL § 200.95. Don't let the DA off the hook!

C. Motion to Suppress Statement

- In your motion, invoke all possible grounds – e.g., allege that statement was the result of "improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement," CPL § 60.45(2)(a), or "by means of a promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself, § 60.45(2)(b)(i), or in violation of any state or federal constitutional rights, § 60.45(2)(b)(ii), such as failing to properly advise the client of his *Miranda* rights, or violating the client's right to counsel.
- In addition, I would start including as a branch of the motion to suppress that the police's failure to create a video or audio recording of the entire interrogation should require (a) suppression, or at least (b) a presumption of involuntariness.

D. Huntley Hearings

- Be aggressive. Research history of the detective taking the statement.
- Demand proof when they say that your client had opportunities to eat, sleep, or use the restroom.

- Cross examine about the police department's ability to record the interrogation.
- Learn about the Reid techniques and get the detective to admit to methods that are consistent with the Reid protocols.
- Learn as much about your client as you can prior to the hearing. Consider calling an expert re: client's ability to understand and waive *Miranda* rights, if client is young, has a mental health history, substance abuse problems, language or literacy deficits, etc. *See People v. Oliveras*, 21 N.Y.3d 339 (2013) (counsel ineffective for failing to obtain medical, educational, and psychiatric records to support proffered defense that false confession was extracted from client who was particularly susceptible to police coercion and pressure).
- Consider an expert on the Reid technique and the ways in which the use of that technique overcomes an individual's ability to make a choice whether to make a statement or not, and how it increases the risk of false confession. Remember that it is not about proving that the statement is false, but that the interrogation techniques were of the kind as to create a substantial risk of false self-incrimination.
- Consider having your client testify at the hearing as to how the interrogation really happened – how *Miranda* was handled, the promises, threats, deceptions, and pressures.
- Be sure to preserve every conceivable argument supporting suppression, either orally or in writing. Ask for time to submit a post-hearing memorandum, and give the judge a legal basis to grant suppression.
- Even when we lose, we will be educating judges to the changing legal landscape and getting them to start paying attention to the vast numbers of false confessions obtained through deceptive, unfair, coercive practices.

E. Trial

- Replay the *Huntley* hearing before the jury. You have the right to submit all of the voluntariness issues, including client's understanding of and knowing and intelligent waiver of *Miranda* rights, coercion, trickery and deceit, false promises, threats, and deprivation of counsel.
- Be sure to alert jury to absence of any details in alleged confession that were not previously known to the police, i.e., demonstrate the likelihood of contamination.

- Be alert for any testimony at trial that contradicts testimony at the *Huntley* hearing and move to reopen the hearing, if warranted. Crim. Proc. Law § 710.40(4).
- Seek to call an expert (through *in limine* motion) on false confessions, or the client's susceptibility to pressure and coercion due to client's age, socio-economic background, intellectual deficits, mental health history.
- Be sure to get jury instruction on voluntariness. Crim. Proc. Law § 710.70(3).

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Rescuing the Fifth Amendment

Lorca Morello, New York Law Journal

March 21, 2014

The New York Court of Appeals has issued a landmark decision on coercive interrogation tactics in *People v. Adrian Thomas.*[1] It overturns what is most likely a wrongful conviction based entirely on the coerced confession of a young father accused of murdering his 4-month-old son.

Writing for a unanimous court, Chief Judge Jonathan Lippman reaffirmed the bedrock principle that regardless of how convinced the police are of a suspect's guilt, they "may not by coercion prove its charge against the accused out of his own mouth." The decision implicitly overrules the long-established but unconstitutional holding of *People v. Tarsia* that shifted the burden to the defendant to show that deceptive tactics are coercive.[2] *Thomas* further clarifies that although tactics likely to induce a false confession will render the resulting statement involuntary, that may not be inverted into a rule that tactics are not coercive unless they are likely to induce a false confession.

Thomas discredits the assumption that deceptive interrogation tactics are merely a neutral police tool with no necessary connection to voluntariness. Rather, deceptions are coercive when they undermine the right against compelled self-incrimination.

Perhaps the most radical aspect of *Thomas* is its citing *Garrity v. New Jersey* and *People v. Avant* to reaffirm the broad principle that the state may not compel a person to waive his Fifth Amendment rights by threatening his "vital interests," which encompass the right to engage in "substantial or fundamental exercise of life, liberty, and the pursuit of happiness."

To fully appreciate the importance of *Thomas*, one must look at how far courts have departed from Fifth Amendment principles. The lower court decisions overruled by *Thomas* are typical of how courts reflexively find confessions voluntary so long as the police give the defendant *Miranda* warnings and a Coke. But a *Miranda* waiver is merely consent to be questioned, not consent to incriminate oneself, let alone to be tricked into a confession. The only purpose of deception is to make a suspect say what he would not say if he knew the real facts. Therefore, deceptive tactics necessarily call into question whether the resulting statement was the product of a knowing and voluntary waiver of the right against self-incrimination.

The leading case until *Thomas* was *People v. Tarsia,* which treated deceptive interrogation tactics as a protected species. *Tarsia* not only shifted the burden to the defendant to prove the tactics coercive, it applied a higher standard of coerciveness than merely overbearing the will. The defendant had to show that the deceptions were "so fundamentally unfair as to deny due process," or alternatively, that "a promise or threat was made that could induce a false

confession."

Thomas has exposed the unconstitutionality of this reasoning.

The prosecution of Adrian Thomas began when a doctor precipitously told the police that the Thomas baby's sudden respiratory failure was due to "murder" by non-accidental head trauma. Armed with this murder diagnosis, the police set out to obtain the proof from Thomas's own mouth. He was relentlessly interrogated for 91/2 hours, all of which was videotaped. The police told him that if he did not explain how the baby was "injured" they would go arrest his wife. At the same time, they assured him over and over that if he would just say he had thrown the baby down in an impulsive moment of frustration without meaning to harm him, this would be considered an "accident." They promised that if he acceded to this scenario he would not be charged with a crime. On the other hand, if he continued to deny having done anything, he and his wife could face charges of intentional murder. He was also told, falsely, that the baby was still alive and that the doctors could save him if Thomas would only give them the "information" they needed.

Thomas, worn down by hours of relentless interrogation, grieving for his son, anxious about his wife's possible arrest and duped by the interrogators' lies, adopted the suggested accident scenario. He was promptly arrested.

The confession was the only evidence against him. At trial, leading specialists in pediatric neuropathology and infectious diseases showed that the baby's symptoms and death were caused by a rapidly-acting pneumococcal infection and not abuse, let alone murder. The local doctor, however, held fast to his belief in head trauma, seconded by the Medical Examiner and an anti-child-abuse advocate who considered the confession to be part of the medical history. Such is the power of a confession to influence medical diagnosis and a jury verdict.

The lower courts saw nothing coercive about the interrogation. Purporting to apply the totality of circumstances test, they emphasized that the police took Thomas to the station house in a car with no partition between the front and back seats, left the door to the interrogation room open, "repeatedly" offered him "food and drink" (a soda and a bag of chips after he confessed), and were "friendly and supportive." The threats to arrest Thomas's wife were explained as a reasonable investigation.

Despite having a complete videotape of the interrogation, the lower courts managed to overlook the massive deceptions perpetrated on Thomas. The courts appeared to be just as taken in as Thomas by the officers' assurances that they were only there to "help" and not get him "in trouble." The courts never noticed that Thomas was induced to admit to a crime by the officers' insisting for 91/2 hours that it was not a crime.

These oversights were ironic, considering that the same courts precluded expert testimony on police interrogation tactics, saying that the jury was "perfectly capable" of recognizing them by watching the video.

The Appellate Division, Third Department, did recognize that the "information for the doctors" ruse was deceptive, but found it not coercive because it would induce any decent parent to make a true, not a false confession. Applying *Tarsia*, the court concluded that Thomas had failed to prove that the deceptions were so fundamentally unfair as to violate due process or create a substantial risk of eliciting a false confession.

Lippman's analysis began by making clear that it is only and always the state's burden to prove that a confession was not induced by coercion, not the defendant's burden to prove that it was.

"The task is the same when deception is employed in the service of psychological interrogation." The state may not "effectively eliminate" the right to silence "by any coercive device."

Thomas also reaffirms that the test of coercion is whether it overbears the will or, as the court phrased it, whether deceptive tactics were "sufficiently potent to nullify individual judgment in any reasonable person." This implicitly overrules *Tarsia*'s heightened standard whereby a deception is not coercive unless it is "so fundamentally unfair as to deny due process."

In a lengthy quote from the 1961 Supreme Court decision, *Rogers v. Richmond, Thomas* makes clear that coercive tactics are unconstitutional regardless of whether the resulting confession is reliable. It is therefore unconstitutional to find a confession voluntary on the ground that the tactics used to elicit it would not have induced a false confession. The court explained that under CPL §60.45, the use of false confession-inducing tactics is "an additional ground for excluding statements as 'involuntarily made,' not a license for the admission of coerced statement a court might find reliable."

Under *Thomas* courts can no longer discount the coerciveness of threats to investigate a family member unless the suspect makes a statement. Where the interrogators threatened to arrest Thomas's wife unless he explained why the baby stopped breathing, "the issue is not whether it reflected a reasonable investigative option," but whether it placed impermissible pressure on Thomas to incriminate himself.

Thomas further makes clear that informing a suspect of his Miranda rights does not insulate the subsequent questioning from coerciveness when the police deploy deceptions that contradict and undermine those very rights. In other words, the police may not say, "You have the right to remain silent, but if you do, we will arrest your wife and you could be charged with intentional murder." The police may not tell a suspect, "Anything you say can be used against you in court, but if you adopt our accident scenario you won't be charged." Falsehoods are coercive when they make the "defendant's constitutionally protected option to remain silent seem valueless."

Thomas also demonstrates that the "totality of circumstances" analysis may not be selectively limited to the absence of overt restraint or abuse. If the police are threatening to arrest one's wife, it makes no difference that they are "friendly" and offer food. If the police deceive the suspect into thinking that his only choices are between admitting to an accident or being charged with intentional murder, it is irrelevant whether the door to the interrogation room is open or shut.

In returning to the principle that interrogators may not obtain a statement by threatening "vital interests," the court has made clear that the threats need not be as extreme as those used against Thomas. The decision's reliance on *Garrity* and *Avant,* which involved threats to economic livelihood, shows how broadly "vital interests" may be construed.

In sum, although *Thomas* does not attempt to create bright-line rules, it gives significant guidance to police and lower courts about what psychological tactics are impermissibly coercive.

The court's analysis was possible only because it had a complete, objective record of the interrogation. If there had been no video, there would have been nothing but the officers' suppression hearing testimony that the 91/2 hour interrogation was merely a conversation where Thomas initially said it was an accident but finally confessed. As a Canadian court observed, "It is only by watching these interrogations that one can experience the full flavour of the intensity of the questioning, and the psychological manipulation of the accused."[3]

Considering how easy it is to record station house questioning, it is astonishing that courts have so

unquestioningly found that the prosecution has met its burden to prove the confession voluntary, based on nothing but the word of the same officers whose conduct is at issue.

Ten years ago, the Massachusetts Supreme Court, fed up with the foot-dragging of the Legislature and the police, invoked its authority to decide "how and under what conditions evidence will be admitted in our courts."[4] It ruled that when the prosecution proffers a confession unaccompanied by at least an audio recording of the full interrogation, the defendant is entitled to a strong adverse inference. Recording quickly became standard practice. Nothing prevents New York State from doing the same.

1. *People v. Thomas* 2014 NY Slip Op. 01208. Adrian Thomas's case is the subject of the award-winning documentary "Scenes of a Crime" by Grover Babcock and Blue Hadaech.

2. *People v. Tarsia*, 50 NY2d 1, 11 (1980).

3. *R. v. Chapple,* 2012 ABPC 229 (Provincial Court of Alberta 2012). Videotaping the full interrogation is established police practice in Canada.

4. *Commonwealth v. DiGiambattista*, 813 NE2d 516, 535 (Mass. 2004).

Lorca Morello is staff attorney at The Legal Aid Society and author of its amicus curiae brief in 'People v. Thomas.'

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22 N.Y.3d 629

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

The PEOPLE & c., Respondent,
v.
Adrian P. THOMAS, Appellant.

Feb. 20, 2014.

Synopsis

Background: Following denial of his motion to suppress, defendant was convicted in the County Court, Rensselaer County, Ceresia, J., of depraved indifference murder of his infant son. Defendant appealed. The Supreme Court, Appellate Division, Spain, J.P., 93 A.D.3d 1019, 941 N.Y.S.2d 722, affirmed. Defendant appealed.

Holdings: The Court of Appeals, Lippman, Chief Judge, held that:

[1] incriminating statements by defendant were not voluntary but were products of coercion, in violation of Due Process Clause of Fourteenth Amendment, and

[2] defendant's inculpating statements were inadmissible as involuntarily made.

Reversed and motion to suppress granted.

West Headnotes (6)

[1] **Criminal Law**
⇐ Voluntariness

Criminal Law
⇐ Voluntariness

It is the People's burden to prove beyond a reasonable doubt that statements of a defendant they intend to rely upon at trial are voluntary; to do that, they must show that the statements were not products of coercion, either physical or psychological, or, in other words that they were given as a result of a free and unconstrained choice by their maker.

Cases that cite this headnote

[2] **Criminal Law**
⇐ What Constitutes Voluntary Statement, Admission, or Confession

Criminal Law
⇐ Deception

Statements of a defendant the People intend to rely upon at trial must be proved, under the totality of the circumstances, necessarily including any potentially actuating deception, the product of the maker's own choice.

Cases that cite this headnote

[3] **Criminal Law**
⇐ Coercion

The choice to speak where speech may incriminate is constitutionally that of the individual, not the government, and the government may not effectively eliminate it by any coercive device. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[4] **Constitutional Law**
⇐ Particular Cases

Criminal Law
⇐ Particular Cases

Criminal Law
⇐ Threats to Third Persons

Incriminating statements by murder defendant were not voluntary but were products of coercion, in violation of Due Process Clause of the Fourteenth Amendment, where police officers threatened that if defendant continued to deny responsibility for his child's injury, his wife would be arrested and removed from his ailing child's bedside, defendant immediately agreed to "take the fall" in response to threat, officers told defendant 21 times that his disclosure of circumstances under which he injured his child was essential to assist doctors attempting to save

child's life, and officers assured defendant that whatever had happened was accident, that he could be helped if he disclosed all, and that, once he had done so, he would not be arrested, but would be permitted to return home. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**
Circumstances Under Which Made; Interrogation
Criminal Law
Coercion
Criminal Law
Promises; Hope of Benefit

The statutory provision treating as "involuntarily made" a statement elicited by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself does not, and indeed cannot displace the categorical constitutional due process prohibition on the receipt of coerced confessions, even those that are probably true. U.S.C.A. Const.Amend. 14; McKinney's CPL § 60.45(2)(b)(i).

Cases that cite this headnote

[6] **Criminal Law**
Nature of Promise

Murder defendant's inculpating statements to police officers were inadmissible as involuntarily made within meaning of statutory provision treating as involuntarily made a statement elicited by means of any promise or statement of fact, which promise or statement creates substantial risk that defendant might falsely incriminate himself; various misrepresentations and false assurances used to elicit and shape defendant's admissions raised substantial risk of false incrimination, defendant initially agreed to take responsibility for injuries of his son, the victim, to save his wife from arrest, and defendant's subsequent confession provided no independent confirmation that he had in fact caused child's fatal injuries. McKinney's CPL § 60.45(2)(i).

Cases that cite this headnote

Attorneys and Law Firms

Jerome K. Frost and Ingrid Effman, for appellant.

Kelly L. Egan, for respondent.

Legal Aid Society; New York Law School Post Conviction Innocence Project; American Psychological Association; Innocence Network; District Attorneys Associaton of the State of New York; New York City Bar Association, amici curiae.

Opinion

LIPPMAN, Chief Judge.

Defendant was convicted by a jury of murdering his four-month-old son, Matthew Thomas. The evidence considered by the jury included a statement in which he admitted that on three occasions during the week preceding the infant's death he "slammed" Matthew down on a mattress just 17 inches above the floor and a videotape of defendant's interrogation, near the end of which defendant, a particularly large individual, [1] demonstrated how he raised the infant above his head and threw him down with great force on the low lying mattress. The jury also heard testimony from the child's treating doctors from Albany Medical Center, the medical examiner who performed the autopsy on Matthew, and an expert on child abuse from Brown Medical School. These witnesses, citing radiologic and post-mortem findings of subdural fluid collections, brain swelling and retinal hemorrhaging, as well as defendant's account of what he had done, said that Matthew died from intracranial injuries caused by abusively inflicted head trauma. Although defendant argued at trial and on appeal that the proof before the jury was insufficient to support a verdict finding him guilty of depraved indifference murder (Penal Law § 125.25 [4])—the theory charged—the argument was correctly rejected. Defendant's written and videotaped confession together with the evidence presented by the prosecution's medical experts sufficed to demonstrate that defendant, with depraved indifference to human life, recklessly engaged in conduct which created a grave risk of serious physical injury to the four-month-old infant and thereby caused the child's death. Although there may have been uncertainty at the time of defendant's trial and prior appeal as to whether a one-on-one

killing of a helpless infant by an adult through the infliction of physical abuse could qualify as depraved indifference murder, it is now settled that it can (*see People v. Barboni*, 21 N.Y.3d 393, 403 [2013]), rendering defendant's argument to the contrary unavailing. That the evidence was sufficient to support the conviction, however, does not end the inquiry we are assigned on this appeal before us by leave of a Judge of this Court (19 NY3d 1105 [2012]), since there is a persisting issue of law as to whether the jury should have had before it all the evidence it did. Inasmuch as we conclude that defendant's inculpating statements were not demonstrably voluntary, we reverse the order of the Appellate Division affirming defendant's conviction (93 AD3d 1019 [3d Dept 2012]), grant defendant's previously denied motion to suppress those statements, and direct a new trial.

I.

On the morning of September 21, 2008, defendant's wife, Wilhelmina Hicks awoke to discover that the couple's four-month-old prematurely born infant, Matthew, was limp and unresponsive. Emergency assistance was immediately summoned and the child was rushed to Samaritan Hospital in Troy, New York. There, he presented with a range of symptoms, including a low white blood count, irregular heartbeat, low blood pressure, severe dehydration and respiratory failure. The most likely differential diagnosis was noted by the treating emergency room doctor as septic shock, although intracranial injuries were also listed to be ruled out. Blood tests to confirm sepsis were performed, but their results were not immediately available. Meanwhile, the child was placed on massive doses of antibiotics.

In the early afternoon, Matthew was transferred to the Pediatric Intensive Care Unit at Albany Medical Center, where he continued to be treated for sepsis. The child's treating physician concluded that his patient had been a victim of blunt force trauma—indeed, that the by-then moribund child had been "murdered." (At the trial of the case, this doctor and other prosecution experts testified that blunt force trauma was indeed the cause of death; defense experts disputed this, attributing the death to sepsis, and the defense suggested that the treating doctor was misled by his initial impression, later proved wrong, that the child's skull was fractured). He so informed local child protective and law enforcement authorities on the evening of September 21st.

At the hearing upon defendant's motion to suppress his inculpating statements, the course of the ensuing investigation was described through the testimony of Troy Police Sergeant Adam Mason and the video recording of defendant's entire interrogation was placed in evidence. Mason stated that, based on the report that Matthew had been physically abused, he accompanied child protective workers to defendant's home and assisted in the removal of defendant's six other children.[2] Defendant, who had been caring for the children while his wife was at the hospital with Matthew, remained at his residence subsequent to the removal. Hours later, the police returned and escorted defendant to an interrogation room at the Troy Central Police Station. There, they read the evidently distraught father his rights and commenced a course of videotaped interrogation. The interrogation lasted about 9 and 1/2 hours, broken into an initial two-hour, and a subsequent 7 and 1/2–hour session. In between, defendant, having expressed suicidal thoughts during the initial interview, was involuntarily hospitalized pursuant to Mental Hygiene Law § 9.39 for some 15 hours on a secure psychiatric unit. By prearrangement, he was released back to his interrogators who immediately escorted him back to the police station where the interrogation resumed.

The premise of the interrogation was that an adult within the Thomas–Hicks household must have inflicted traumatic head injuries on the infant. Indeed one of the interrogating officers told defendant that he had been informed by Matthew's doctor that Matthew had been "slammed into something very hard. It's like a high speed impact in a vehicle. This baby was murdered ... This baby is going to die and he was murdered." The interrogators, however, repeatedly reassured defendant that they understood Matthew's injuries to have been accidental. They said they were not investigating what they thought to be a crime and that once defendant had told them what had happened he could go home. He would not, they reassured over and again, be arrested. When, however, defendant continued to deny having hurt Matthew, even accidentally, the officers falsely represented that his wife had blamed him for Matthew's injuries and then threatened that, if he did not take responsibility, they would "scoop" Ms. Hicks out from the hospital and bring her in, since one of them must have injured the child. By the end of the initial two-hour interrogation, defendant agreed to "take the fall" for his wife. He said that he had not harmed the child and did not believe that his wife had either because "she is a good wife," but that he would take responsibility to keep her out of trouble.

Before the interrogation recommenced on the evening of September 22nd, Matthew was pronounced brain dead. Nonetheless, the interrogating officers, told defendant that he was alive and that his survival could depend on defendant's disclosure of how he had caused the child's injuries:

> "SERGEANT MASON: The doctors need to know this. Do you want to save your baby's life, alright? Do you want to save your baby's life or do you want your baby to die tonight?
>
> "DEFENDANT: No, I want to save his life.
>
> "SERGEANT MASON: Are you sure about that? Because you don't seem like you want to save your baby's life right now. You seem like you're beating around the bush with me.
>
> "DEFENDANT: I'm not lying.
>
> "SERGEANT MASON: You better find that memory right now, Adrian. You've got to find that memory. This is important for your son's life man. You know what happens when you find that memory? Maybe if we get this information, okay, maybe he's able to save your son's life. Maybe your wife forgives you for what happened. Maybe your family lives happier ever after. But you know what, if you can't find that memory and those doctors can't save your son's life, then what kind of future are you going to have? Where's it going to go? What's going to happen if Matthew dies in that hospital tonight, man?"

About four hours into the second interrogation session defendant gave a statement. He said that, about 10 or 15 days before, he accidentally dropped Matthew five or six inches into his crib and Matthew hit his head "pretty hard." He supposed that that impact caused Matthew's brain injury. He also recalled accidentally bumping Matthew's head with his head on the evening of September 20th. He noticed that Matthew's breathing became labored, but was afraid to tell his wife what happened. Defendant would expand upon this statement, but before he did so a second officer, Sergeant Colinari, entered the interrogation room. He claimed to have had experience with head injuries during his military service in Operation Desert Storm, and angrily accused defendant of lying-he said that Matthew's injuries could only have resulted from a far greater application of force than defendant had described. Matthew's doctors, he reported, had stated that the child's head injuries were comparable to those that would have been sustained by a passenger in a high speed car collision. After Colinari left, Sergeant Mason, said that he felt betrayed by defendant's untruthfulness and that he was doing all he could to stop his superior from having defendant arrested. Although he would acknowledge in his hearing testimony that he did not then have probable cause for defendant's arrest, he represented to defendant that he was defendant's last hope in forestalling criminal charges. He said that he could not help defendant unless defendant told him how he had caused Matthew's injuries. He proposed that defendant had been depressed and emotionally overwhelmed after having been berated by his wife over his chronic unemployment and that, out of frustration, he had, without intending to harm the infant, responded to his crying by throwing him from above his head onto a low-lying mattress.[3] He emphasized several times that, according to the doctor at the hospital, the child would have had to hit the mattress at a speed of 60 miles-per-hour to sustain the injuries from which he was suffering. He had defendant demonstrate with a clipboard how he threw the child down on the mattress, instructing:

> "Move that chair out of the way. Here hold that like you hold the baby. Turn around, look at me. Now here's the bed right here, all right. Now like I said, the doctor said that this injury is consistent with a 60 mile per hour vehicle crash, all right, all right. That means it was a very severe acceleration. It means he was going fast and stopped suddenly, all right, so think about that. Don't try to downplay this and make like its not as severe as it is. Because [we] both know now you are finally starting to be honest, okay, all right. Maybe this other stuff you said is the truth.
>
> "MR. THOMAS: That is.
>
> "SERGEANT MASON: For what the information that I need to know we both know now you are starting to finally be honest with that, all right. Hold that like you hold that baby, okay and start thinking about them negative things that your wife said to you, all right, start thinking about them kids crying all day and all night in your ear, your mother-in-law nagging you and your wife calling you a loser, all right, and let that aggression build up and show me how you threw Matthew on you bed, all right. Don't try to sugar coat it and make it like it wasn't that bad. Show me how hard you threw him on that bed."

The ensuing enactment conforming to the Sergeant's directions was captured on the interrogation video. Defendant then enlarged upon his prior statement, now admitting that, under circumstances precisely resembling those specified by Mason, he threw Matthew down on his mattress on the

Wednesday, Thursday and Saturday preceding the child's hospitalization.

Defendant's motion to suppress his written and videotaped statements on the ground that they were not voluntary, but had been extracted by means of threats and misrepresentations to which he was specially vulnerable by reason of physical and emotional exhaustion, and upon the ground that the police tactics used during the interrogation created a substantial risk of false incrimination, was denied. In the decision and order we now review, the Appellate Division upheld the denial of suppression reasoning that the People met their burden at the *Huntley* hearing to prove defendant's confession voluntary beyond a reasonable doubt (93 AD3d at 1026) and, relatedly, that the ploys and misrepresentations of defendant's interrogators were not so serious as to offend due process (*id.*). The court found that the threat to arrest Ms. Hicks was "reasonable" (*id.* at 1028), and that the misrepresentation that Matthew's life depended upon defendant's disclosure of the manner in which he had caused the child's injuries, did not offend due process because it would not have elicited unreliable information. In the latter connection the court observed, that "common sense dictates the ... conclusion ... that parents, aware of their child's life threatening predicament, would *accurately* disclose any information that might enable doctors to save their child" (*id.* at 1027). As to the officers' many reassurances that what was involved was an accident and that defendant would not be arrested—indeed, that he would be returning home—the court was of the view that they reflected the officers' beliefs at the time they were given (*id.* at 1027–1028).

II.

[1] [2] [3] It is the People's burden to prove beyond a reasonable doubt that statements of a defendant they intend to rely upon at trial are voluntary (*People v. Guilford,* 21 N.Y.3d 205, 208 [2013]). To do that, they must show that the statements were not products of coercion, either physical or psychological (*see Miranda v. Arizona,* 384 U.S. 436, 448 [1966]), or, in other words that they were given as a result of a "free and unconstrained choice by [their] maker" (*Culombe v. Connecticut,* 367 U.S. 568, 602 [1961]). The task is the same where deception is employed in the service of psychologically oriented interrogation; the statements must be proved, under the totality of the circumstances (*see Guilford,* 21 N.Y.3d at 206, 969 N.Y.S.2d 430, 991 N.E.2d 204)—necessarily including any potentially actuating deception—the product of the maker's own choice. The choice to speak where speech may incriminate is constitutionally that of the individual, not the government, and the government may not effectively eliminate it by any coercive device. It is well established that not all deception of a suspect is coercive, but in extreme forms it may be. Whether deception or other psychologically directed stratagems actually eclipse individual will, will of course depend upon the facts of each case, both as they bear upon the means employed and the vulnerability of the declarant. There are cases, however, in which voluntariness may be determined as a matter of law—in which the facts of record permit but one legal conclusion as to whether the declarant's will was overborne (*see e.g. Guilford, supra*). This, we believe, is such a case. What transpired during defendant's interrogation was not consonant with and, indeed, completely undermined, defendant's right not to incriminate himself—to remain silent.

III.

Most prominent among the totality of the circumstances in this case, is the set of highly coercive deceptions. They were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system.

It is established that interrogators may not threaten that the assertion of Fifth Amendment rights will result in harm to the interogee's vital interests. In *Garrity v. New Jersey* (385 U.S. 493 [1967]), police officers were convicted of conspiracy to obstruct justice on the basis of confessions made after the officers were threatened with the loss of their jobs if they asserted their Fifth Amendment rights. The Court held that the confessions were "infected by the coercion inherent in the scheme of questioning" and thus impossible to sustain as voluntary (*id.* at 496–498). In *People v. Avant* (33 N.Y.2d 265 [1973]) this Court, following *Garrity,* held that municipal contractors could not be pressured to make incriminating disclosures by threatening forfeiture of the right to bid on municipal contracts if they did not. Recognizing the breadth of the principle informing *Garrity,* the Court stated

> "While there was once a different view, it is now ... undisputed that one may not be 'coerced' into waiving his constitutional privilege by the withholding of a substantial right to engage in one's occupation *or of any other*

substantial or fundamental exercise of life, liberty, and the pursuit of happiness (Gardner v. Broderick, 392 U.S. 273, 279 [1968]; *Garrity v. New Jersey,* 385 U.S. 493, 497, 87 S.Ct. 616, 17 L.Ed.2d 562)" (*id.* at 273 [emphasis supplied]).

[4] It was not consistent with the rule of *Garrity* and *Avant* to threaten that if defendant continued to deny responsibility for his child's injury, his wife would be arrested and removed from his ailing child's bedside. While the People and the Appellate Division viewed this threat as "reasonable," the issue is not whether it reflected a reasonable investigative option, but whether it was permissibly marshaled to pressure defendant to speak against his penal interest. It was not. And, although the Appellate Division treated the threat as benign because defendant did not finally provide a complete confession until many hours had passed, it is clear that defendant's agreement to "take the fall"—an immediate response to the threat against his wife—was pivotal to the course of the ensuing interrogation and instrumental to his final self-inculpation.

Another patently coercive representation made to defendant —one repeated some 21 times in the course of the interrogation—was that his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life. We agree with the Appellate Division, and it is in any case self-evident, that these were representations of a sort that would prompt any ordinarily caring parent to provide whatever information they thought might be helpful, even if it was incriminating. Perhaps speaking in such a circumstance would amount to a valid waiver of the Fifth Amendment privilege if the underlying representations were true, but here they were false. These falsehoods were coercive by making defendant's constitutionally protected option to remain silent seem valueless and respondent does not plausibly argue otherwise. Instead, it is contended that they did not render defendant's ensuing statements involuntary because there was no substantial risk that appealing to defendant's fatherly concern would elicit a false confession. It has long been established that what the due process clause of the Fourteenth Amendment forbids is a coerced confession, regardless of whether it is likely to be true. In *Rogers v. Richmond* (365 U.S. 534 [1961] [Frankfurter, J.]) the Court explained:

> "Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees"

id. at 540–541 [internal citations omitted]).

[5] It is true that our State statute (CPL 60.45[2][b][i]) treats as "involuntarily made" a statement elicited "by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself," but this provision does not, and indeed cannot displace the categorical constitutional prohibition on the receipt of coerced confessions, even those that are

probably true (*see Rogers*, 365 U.S. at 545 n. 3 ["whether the question of admissibility is left to the jury or is determinable by the trial judge, it must be determined according to constitutional standards satisfying the Due Process Clause of the Fourteenth Amendment"]). As CPL 60.45's enumeration of the various grounds upon which a statement may be deemed involuntary itself demonstrates, subsection (2)(b)(i) constitutes an additional ground for excluding statements as "involuntarily made," not a license for the admission of coerced statements a court might find reliable.

Additional support for the conclusion that defendant's statements were not demonstrably voluntary, under the totality of the circumstances, can be found in the ubiquitous assurances offered by defendant's interrogators, that whatever had happened was an accident, that he could be helped if he disclosed all, and that, once he had done so, he would not be arrested, but would be permitted to return home. In assessing all of the attendant circumstances, these assurances cannot be minimized on the basis that the eventual confession admitted behavior that could not be characterized as accidental. It is plain that defendant was cajoled into his inculpatory demonstration by these assurances—that they were essential to neutralizing his often expressed fear that what he was being asked to acknowledge and demonstrate was conduct bespeaking a wrongful intent. Defendant unquestionably relied upon these assurances, repeating with each admission that what he had done was an accident. These assurances, however, were false. From its inception, defendant's interrogation had as its object obtaining a statement that would confirm the hypothesis that the infant had been murdered through physical abuse. That objective was incompatible with any true intermediate representation that what defendant did was just an accident. Had there been only a few such deceptive assurances, perhaps they might be deemed insufficient to raise a question as to whether defendant's confession had been obtained in violation of due process. This record, however, is replete with false assurances. Defendant was told 67 times that what had been done to his son was an accident, 14 times that he would not be arrested, and 8 times that he would be going home. These representations were, moreover, undeniably instrumental in the extraction of defendant's most damaging admissions. When Sergeant Mason suggested that defendant had thrown Matthew down on the bed, defendant protested repeatedly that he was being asked to admit that he had intentionally harmed his son. To each such protest, Mason responded that what defendant had done was not intentional, often adding an elaborate explanation of why that was so. In this way, and after a final appeal from Mason to provide the "proper information to relate to the hospital and talk to the doctors to keep your son alive," defendant at last agreed that he argued with Ms. Hicks and then threw Matthew down on the bed. Based on that admission, he would be prosecuted for murder. We do not decide whether these police techniques would themselves require suppression of defendant's statements, but that they, taken in combination with the threat to arrest his wife and the deception about the child, reinforce our conclusion that, as a matter of law, defendant's statements were involuntary.

IV.

[6] Defendant's inculpating statements were also inadmissible as "involuntarily made" within the meaning of CPL 60.45(2)(i). The various misrepresentations and false assurances used to elicit and shape defendant's admissions manifestly raised a substantial risk of false incrimination. Defendant initially agreed to take responsibility for his son's injuries to save his wife from arrest. His subsequent confession provided no independent confirmation that he had in fact caused the child's fatal injuries. Every scenario of trauma induced head injury equal to explaining the infant's symptoms was suggested to defendant by his interrogators. Indeed, there is not a single inculpatory fact in defendant's confession that was not suggested to him. He did not know what to say to save his wife and child from the harm he was led to believe his silence would cause. It was at Mason's request and pursuant to his instructions, that defendant finally purported to demonstrate how he threw the child. And after Mason said that he must have thrown the child still harder and after being exhorted not to "sugar-coat" it, he did as he was bid. Shortly after this closely directed enactment, defendant was arrested.

Defendant's admissions were not necessarily rendered more probably true by the medical findings of Matthew's treating physicians. The agreement of his inculpatory account with the theory of injury advanced by those doctors can be readily understood as a congruence forged by the interrogation. The attainment of the interrogation's goal therefore, cannot instill confidence in the reliability of its result.

Inasmuch as we conclude that defendant's confession should not have been placed before the jury, there is no need to address whether defendant's expert should have been permitted to testify about the phenomenon of false

confession and the interrogation techniques employed to elicit defendant's admissions.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress statements granted and a new trial ordered.

Order reversed, defendant's motion to suppress statements granted and a new trial ordered.

Judges GRAFFEO, READ, SMITH, PIGOTT, RIVERA and ABDUS SALAAM concur.

1 At the time of the events in question, defendant weighed well over 300 pounds.

2 There was no evidence that any of these other children were themselves abused or neglected.

3 The officer suggested that defendant had thrown the child down on his mattress after defendant adamantly denied throwing the child against a hard surface, i.e., the wall or the floor.

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93 A.D.3d 1019
Supreme Court, Appellate Division,
Third Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Adrian P. THOMAS, Appellant.

March 22, 2012.

Synopsis

Background: Defendant was convicted in the County Court, Rensselaer County, Ceresia, J., of depraved indifference murder of his infant son, and he appealed.

Holdings: The Supreme Court, Appellate Division, Spain, J.P., held that:

[1] without more, mere fact that first police interview extended for two hours and the second for an additional seven hours the following day did not render defendant's confession involuntary;

[2] defendant did not unequivocally invoke right to counsel;

[3] tactics employed by detectives, such as in telling father that his truthfulness might enable doctors to effectively treat son at time when they were aware that son would not survive, were not so unfairly deceptive as to render defendant's confession involuntary;

[4] evidence supported defendant's conviction of second-degree murder on depraved indifference theory; and

[5] trial court did not abuse its discretion in denying defendant's request to permit expert testimony from social psychologist on police interrogation tactics and false confessions.

Affirmed.

West Headnotes (14)

[1] **Criminal Law**
⇐ What constitutes voluntary statement, admission, or confession

Voluntariness of defendant's statements is evaluated by looking at totality of circumstances in which they were obtained.

Cases that cite this headnote

[2] **Constitutional Law**
⇐ Circumstances Under Which Made; Interrogation

Criminal Law
⇐ Promises; Hope of Benefit

Criminal Law
⇐ Threats; Fear of Injury

Criminal Law
⇐ Deception

Deceptive police strategies in securing confession need not result in finding of involuntariness, without some showing that deception was so fundamentally unfair as to deny due process, or that promise or threat was made that could induce false confession. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[3] **Criminal Law**
⇐ Particular cases

Criminal Law
⇐ Particular Cases

While duration of station house interviews was certainly a significant factor to be considered in evaluating voluntariness of defendant's confession to having forcefully thrown his infant son on mattress, without more, mere fact that first interview extended for two hours and the second for an additional seven hours the following day did not render defendant's confession involuntary and inadmissible against him in criminal prosecution arising from death of son, where there was significant break in police questioning, during which time father was under 15 hours of mental health observation as possible suicide risk, where father, upon his release from observation, asked discharge nurse if he could wait for detectives who would be

coming to speak to him, thereby manifesting his consent to continued questioning, where both interviews were conducted in same unlocked interview room, after defendant was advised of and waived his *Miranda* rights, and after he was informed that he was not under arrest and could stop questioning at any time.

Cases that cite this headnote

[4] **Criminal Law**
Repetition

While defendant was likely not free to leave once he admitted forcefully throwing infant on mattress three times over four-day period, at that point, police had probable cause to continue to detain him in connection with infant's death and were not required to repeat *Miranda* warnings, given his valid waiver of those rights at outset of police interviews. U.S.C.A. Const.Amends. 4, 5, 6.

Cases that cite this headnote

[5] **Criminal Law**
What Constitutes Custody

Even an interview of extended duration at police station is not necessarily a "custodial" interrogation.

Cases that cite this headnote

[6] **Criminal Law**
Particular cases

Father who was under investigation in connection with severe head trauma sustained by his infant son, in inquiring whether he would need attorney, did not unequivocally invoke right to counsel, so as to compel end to further questioning in absence of attorney, especially given evidence that father, in inquiring about his need for attorney, was referring to pending Family Court matter and not to police investigation. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**
Threats to third persons

Criminal Law
Deception

Tactics employed by detectives during their interviews of father who was under suspicion for severe head trauma sustained by his infant son, in telling father that his truthfulness might enable doctors to effectively treat son at time when they were aware that son would not survive, in assuring father that they believed that son's injuries were accidental and that, based on information they had at that time, father would not be going to jail, or in focusing on mother's potential culpability, were not such as to render father's confession to having forcefully thrown infant on mattress involuntary and inadmissible against him, either on theory that detectives' tactics were so deceptive that they were fundamentally unfair and deprived father of due process, or that they were of such character as to induce false confession in order to protect mother from possible criminal liability, given that, when father stated that he would "take the fall" for mother to keep her out of jail, he was told he could not do so and should instead tell detectives what he knew. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[8] **Homicide**
Second degree murder

Confession of 500-pound defendant that, despite being aware that his infant son, who had been born prematurely, was sick, and despite being responsible for son's care, had acted out of sense of anger and frustration in repeatedly throwing son with considerable force from above his shoulders to mattress was sufficient, along with expert medical evidence that child had died from severe head trauma, to support defendant's conviction of second-degree murder on depraved indifference theory. McKinney's Penal Law § 125.25(4).

Cases that cite this headnote

[9] **Homicide**
⇦ Second degree murder

Depraved indifference, of kind sufficient to support conviction of murder in second degree, may be demonstrated by circumstantial evidence. McKinney's Penal Law § 125.25(4).

Cases that cite this headnote

[10] **Criminal Law**
⇦ Credibility, Veracity, or Competency

In prosecution of defendant for depraved indifference murder of his infant son based on his confession to having repeatedly thrown infant to mattress with considerable force, trial court did not abuse its discretion in denying defendant's request to permit expert testimony from social psychologist on police interrogation tactics and false confessions; trial court could find that jury, having watched the videotaped interviews and heard defendant's testimony explaining why he had confessed falsely, were capable of determining for themselves, without aid of expert testimony, whether police interrogation techniques had produced a false confession. McKinney's Penal Law § 125.25(4).

Cases that cite this headnote

[11] **Criminal Law**
⇦ Aid to jury

Criminal Law
⇦ Discretion

Admissibility and bounds of expert testimony are addressed primarily to sound discretion of trial court, which in first instance must determine when jurors are able to draw conclusions from evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by specialized knowledge of expert witness.

2 Cases that cite this headnote

[12] **Criminal Law**
⇦ Opinion testimony

Criminal Law
⇦ Admissibility

Trial court's decision regarding admissibility and scope of expert testimony will not be disturbed absent a showing of serious mistake, error of law, or abuse of discretion.

1 Cases that cite this headnote

[13] **Criminal Law**
⇦ Misconduct of or Affecting Jurors

Trial court did not abuse its discretion, during lengthy and difficult trial of defendant for death of his infant son while under defendant's care, in allowing jurors to take notes.

Cases that cite this headnote

[14] **Criminal Law**
⇦ Repetition

Criminal Law
⇦ Copies of instructions

Trial court's conduct, in obliging jury requests to repeat portions of its charge or to speak more slowly, was not tantamount to improperly giving jury a copy of a statute or selected portions of written charge.

Cases that cite this headnote

Attorneys and Law Firms

****724** John C. Turi, Acting Public Defender, Troy (Jerome K. Frost of counsel), for appellant.

Richard J. McNally, District Attorney, Troy (Gordon Eddy of counsel), for respondent.

Before: SPAIN, J.P., LAHTINEN, MALONE JR., STEIN and EGAN JR., JJ.

Opinion

SPAIN, J.P.

***1020** Appeal from a judgment of the County Court of Rensselaer County (Ceresia, J.), rendered November 12, 2009, upon a verdict convicting defendant of the crime of murder in the second degree.

On Sunday, September 21, 2008, defendant's wife, Wilhemina Hicks, woke around 9:00 A.M. in their two-bedroom apartment in the City of Troy, Rensselaer County to find that their four-month-old son Matthew was unresponsive and not breathing regularly; she awoke defendant, 911 was called and emergency personnel responded. Upon arrival at a local hospital with Hicks, Matthew was in critical condition, in severe respiratory distress, unconscious and nonresponsive, and placed on a ventilator and antibiotics; blood tests later showed that he had streptococcal pneumonia, a bacterial infection. The infant was transferred to the pediatric intensive care unit of Albany Medical Center Hospital (hereinafter AMCH), where he arrived unresponsive, with very little brain activity or neurological functions, and was not adequately breathing on his own. A CAT scan disclosed what treating physicians determined to be subdural hematomas on both sides of his brain consistent with **725 severe head trauma resulting from rapid acceleration and then sudden deceleration of the head, causing the brain to move back and forth inside the skull. Matthew also exhibited signs of sepsis, an overwhelming systemic infection. Shortly after his arrival at AMCH, despite extensive medical intervention, it was determined that Matthew was brain dead; two days later he was removed from life support and died.

Defendant remained at the apartment with the couple's six other children, all under nine years old, including Matthew's twin brother. That evening City of Troy police detectives accompanied Rensselaer County Child Protective Services (hereinafter CPS) caseworkers to the apartment where they briefly questioned defendant and CPS removed the children, leaving defendant alone. Interviewed by detectives hours later and again the next evening at length, defendant ultimately confessed that he had thrown Matthew onto a mattress and box spring located—without a bedframe—directly on the floor in defendant's bedroom, three times in the four days preceding the 911 call. Defendant also admitted that he had unintentionally hit the infant's head against the side of his crib several times, including after the 911 call. The police interviews were recorded on DVDs, which captured defendant, self-described at 500 pounds, demonstrating how he had forcefully thrown the infant to the mattress. *1021 Defendant signed two statements that reflected essential parts of his admissions during each interview. It was also established that Matthew, who weighed just 15 pounds and had been born two months premature, had been ill and experiencing fevers, diarrhea and vomiting in the days preceding his death.

Defendant was indicted on one count of depraved indifference murder and, at trial, Hicks testified, denying harming Matthew. A plethora of highly credentialed medical subspecialists were called by both sides, offering two sharply conflicting opinions regarding the primary cause of death. The People's experts, including the pediatric critical care supervisor and pediatric neurosurgeon who treated Matthew at AMCH and the forensic pathologist who performed the autopsy, all testified that the cause of death was the subdural hematomas or brain swelling and bleeding caused by severe blunt force head trauma, and that sepsis and pneumonia were secondary contributing factors, but not the sole cause. Defendant's experts, by contrast, concluded that sepsis leading to meningitis and septic shock and not head trauma was the cause of death. Whereas the pediatric critical care physician who treated Matthew opined that defendant's admitted actions in throwing a four month old with considerable force onto a mattress and box spring—the surface of which was located 17 inches above the floor—several times in four days is the type of rapid acceleration-deceleration that could cause the severe head trauma and subdural hematomas found in Matthew, the neuropathologist who testified on behalf of the defense opined that such an injury would "probably not" result from such actions. Defendant, in his trial testimony, disavowed his confession as coerced and false, and denied throwing Matthew or hitting his head against the crib.

After a jury trial, at which the jury viewed a redacted video version of most of defendant's interviews with police, defendant was convicted of depraved indifference murder and sentenced to a prison term of 25 years to life. Defendant now appeals.

Initially, defendant argues that his oral and written statements to police should have been suppressed on the grounds that they were involuntarily obtained and the **726 product of coercive custodial interrogation methods, which included false promises, misrepresentations and threats. After a hearing, County Court denied defendant's suppression motion finding that the statements had been voluntarily made in a noncustodial setting in which police did not employ impermissible coercive tactics.

[1] [2] [3] The voluntariness of defendant's statements is evaluated by looking at the totality of the circumstances in

which they were ***1022** obtained (*see People v. Anderson*, 42 N.Y.2d 35, 38, 396 N.Y.S.2d 625, 364 N.E.2d 1318 [1977]; *see also People v. Mateo*, 2 N.Y.3d 383, 413–414, 779 N.Y.S.2d 399, 811 N.E.2d 1053 [2004], *cert. denied* 542 U.S. 946, 124 S.Ct. 2929, 159 L.Ed.2d 828 [2004]; *People v. Pouliot*, 64 A.D.3d 1043, 1044, 883 N.Y.S.2d 372 [2009], *lv. denied* 13 N.Y.3d 838, 890 N.Y.S.2d 454, 918 N.E.2d 969 [2009]), guided by the axiom that deceptive police strategies in securing a confession "need not result in [a finding of] involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a *false* confession" (*People v. Tarsia*, 50 N.Y.2d 1, 11, 427 N.Y.S.2d 944, 405 N.E.2d 188 [1980] [emphasis added] [internal citations omitted]; *see People v. Mateo*, 2 N.Y.3d at 413, 779 N.Y.S.2d 399, 811 N.E.2d 1053; *People v. Tankleff*, 84 N.Y.2d 992, 994, 622 N.Y.S.2d 503, 646 N.E.2d 805 [1994]; *People v. Munck*, 92 A.D.3d 63, 68, 937 N.Y.S.2d 334 [2011]; *People v. Dishaw*, 30 A.D.3d 689, 690, 816 N.Y.S.2d 235 [2006], *lv. denied* 7 N.Y.3d 787, 821 N.Y.S.2d 817, 854 N.E.2d 1281 [2006]; *see also* CPL 60.45[2][b] [i]). Upon our review of the unredacted recorded interviews and the *Huntley* testimony, we find that defendant —who did not testify at the hearing—voluntarily confessed during noncustodial interviews in which police employed permissible strategies aimed at eliciting the truth of what had occurred leading up to Matthew's death.

According to the police officers who testified, defendant was interviewed by police on two separate occasions: for about two hours beginning around midnight on Sunday, September 21, 2008, and the next day, Monday, for approximately seven hours—from around 6:00 P.M. until 1:00 A.M. on Tuesday, when he was arrested. On Sunday, after the other children were removed by CPS, the officers told defendant that they would be in touch and left him alone. Hours later, around midnight, Detectives Adam Mason and Ronald Fountain, who had been to AMCH, returned to defendant's apartment; he was awake and agreed to accompany them to the police station to discuss the incident. At the outset of the first interview, Mason read defendant each individual *Miranda* warning, some of which he explained at defendant's request, and he was advised that he was not under arrest and could stop questioning at any time; defendant indicated that he understood, signing a waiver after they had him read the document aloud to ascertain his reading ability. Defendant was questioned by Mason and Fountain for two hours in an unlocked interview room, during which he was apprised that Matthew was not expected to live and that doctors suspected that Matthew had been slammed into something,[1] and they suggested, among other things, that someone might have bumped the infant's head against the crib. Defendant denied any wrongdoing or knowledge of anyone harming Matthew, ***1023** and he reviewed and signed ****727** a one-page witness statement to that effect; officers indicated that they would want to speak with him again the next day, and defendant agreed. When defendant expressed suicidal thoughts, i.e., that he might jump off a bridge if Matthew were to die, he was immediately offered an opportunity to speak with a counselor which, after some discussion,[2] he accepted, and he was then transported to the mental health unit of a local hospital around 2:00 A.M. (*see* Mental Health Law § 9.41).

1 Although doctors at the Troy hospital initially reported that Matthew had a skull fracture, doctors at AMCH later ruled that out.

2 Defendant himself thereafter continued to initiate further conversation about what may have caused Matthew's injuries and what transpired in the days leading up to the 911 call, appearing eager to continue speaking despite those suicidal thoughts.

After about 15 hours of mental health observation—a significant break in police questioning—it was determined that defendant was not a danger to himself and he was discharged around 5:45 P.M. on Monday; upon his release, he asked the discharge nurse if it would be okay to wait there for the detectives who would be coming to speak with him, supporting the conclusion that he wanted to speak with them. The testimony and records of that evaluation demonstrate that defendant was somewhat depressed, preoccupied and anxious, but do not suggest that he was incapable of making voluntary and knowing choices, such as whether to speak with police, or that he was unable to fully understand and invoke his rights.

As defendant exited the mental health unit, Mason, accompanied by another detective, approached and defendant agreed to go back with them to the station for questioning. Defendant was transported and placed in the same unlocked interview room at approximately 6:00 P.M. where he was again advised of and waived his *Miranda* rights—after indicating he understood them—and he was told he was not under arrest and could stop questioning at any time; he agreed to answer questions. Mason continued with investigatory questions centered on the cause of Matthew's condition, exploring a vast array of scenarios over the next six hours which defendant denied, including throwing Matthew

or causing him injury. Mason's nonthreatening, nonhostile strategy focused on gaining defendant's trust and assuring him that he believed that whatever had caused Matthew's injuries had been accidental; Mason encouraged defendant to disclose the truth about what had occurred in order to assist the doctors in saving Matthew's life, although Mason had been advised at that point that Matthew would not survive. Defendant signed the first part of his second statement, consisting of six pages in which he made admissions of how he ***1024** might have accidentally caused the injuries.[3] Thereafter, another detective briefly entered the interview room and challenged defendant in a raised voice that his account was not consistent with the X rays and the doctors' opinions. He accused defendant of slamming him against something and of lying; defendant again denied any wrongdoing. The detective exited and Mason responded with the ruse that he felt betrayed by defendant's dishonesty and that he was defendant's last ally; Mason pressed defendant more forcefully for the truth, suggesting possible scenarios, including ****728** that he threw the infant, demonstrating how this might have occurred. This was the turning point of the interview.

3 These admissions included that 10 to 15 days earlier he had accidentally dropped Matthew in his crib, causing his head to hit the side of the crib; that the day before the 911 call, he had laid back in bed where Matthew was laying, and accidentally struck his head against Matthew's head, which caused breathing problems that persisted until the following morning when Hicks found him unresponsive; and that in the ensuing panic after the 911 call, he had again accidentally dropped Matthew into his crib, causing him to hit his head hard against the crib.

Defendant then admitted in increasing detail having thrown the child in frustration onto the bed forcefully, three times, in the four days preceding the 911 call, after he had arguments with Hicks[4] over his lack of a job; defendant demonstrated how he had done so using Mason's briefcase binder, which he ultimately raised above his shoulders and slammed to the ground with considerable force. After a break during which he was left alone, defendant confirmed that this account of repeatedly throwing the infant on the bed was accurate; four pages were added to the second statement summarizing these admissions, and he reviewed it by himself and signed it.

4 Defendant never implicated Hicks or suggested that she knew Matthew had been injured.

Initially, the *Huntley* transcript and recorded interviews fully support County Court's factual determination that defendant voluntarily accompanied the officers to the station for questioning on both occasions and waived his *Miranda* rights each time. No questioning occurred outside the interview room, and the questioning was (until the last segment of the second interview) investigatory; defendant's statements were the product of permissible police tactics and were not coerced, and defendant was not in custody, as a reasonable person in his position, innocent of any wrongdoing, would have believed that he or she was free to leave (*see People v. Paulman,* 5 N.Y.3d 122, 129, 800 N.Y.S.2d 96, 833 N.E.2d 239 [2005]). The video confirms that defendant was never—at any time—handcuffed or restrained, frisked or placed under arrest, ***1025** physically or verbally abused, threatened or mistreated; he was not told he had to remain or prevented from leaving. He was repeatedly offered food, beverages and bathroom breaks, which he declined, and his numerous requests for cigarettes were honored. Defendant, who retained his cell phone, never asked to make a phone call, for an attorney, to leave, to end questioning or take a break, to go home or to the hospital, or to sleep or rest. The interview room was a relatively bare room with two or three chairs and a small table; the second interview consisted of defendant sitting in a chair, while a seated Mason questioned him mostly in a calm, often friendly and supportive manner; when defendant became upset and cried a few times, Mason comforted him. He was left alone in the room many times, did not object to or resist the ongoing questioning or appear anxious to leave or afraid of police, and remained cooperative, alert and eager to eliminate himself as a potential perpetrator; he did not appear to be either overly fatigued or particularly distraught beyond a few brief episodes of crying.

[4] **[5]** While defendant was likely not free to leave once he admitted repeatedly throwing Matthew, police had probable cause to continue to detain him and were not required to repeat *Miranda* warnings, given his valid waiver of those rights at the outset of that interview (*see People v. Davis,* 72 A.D.3d 1206, 1207–1208, 898 N.Y.S.2d 715 [2010], *lv. denied* 15 N.Y.3d 803, 908 N.Y.S.2d 163, 934 N.E.2d 897 [2010]; *People v. Westervelt,* 47 A.D.3d 969, 972, 850 N.Y.S.2d 226 [2008], *lv. denied* 10 N.Y.3d 818, 857 N.Y.S.2d 51, 886 N.E.2d 816 [2008]; *People v. Maddox,* 31 A.D.3d 970, 973–974, 818 N.Y.S.2d 664 [2006], *lv. denied* ****729** 7 N.Y.3d 868, 824 N.Y.S.2d 613, 857 N.E.2d 1144 [2006]). Thus, his confession was likewise not the product of an illegal arrest. While defendant focuses on the length of the interviews to argue that he was in custody the entire time, we disagree, as "[e]ven an interview of extended duration at a police station is not necessarily a custodial interrogation" (*People v. Centano,*

153 A.D.2d 494, 495, 545 N.Y.S.2d 131 [1989], *affd.* 76 N.Y.2d 837, 560 N.Y.S.2d 121, 559 N.E.2d 1280 [1990]; *see People v. Hernandez,* 25 A.D.3d 377, 378, 806 N.Y.S.2d 589 [2006], *lv. denied* 6 N.Y.3d 834, 814 N.Y.S.2d 82, 847 N.E.2d 379 [2006]). Considering all of the relevant factors (*see People v. Johnston,* 273 A.D.2d 514, 515, 709 N.Y.S.2d 230 [2000], *lv. denied* 95 N.Y.2d 935, 721 N.Y.S.2d 612, 744 N.E.2d 148 [2000]), using a reasonable person standard (*see People v. Paulman,* 5 N.Y.3d at 129, 800 N.Y.S.2d 96, 833 N.E.2d 239), the record supports the finding that defendant was not in custody until he incriminated himself (*see People v. Pouliot,* 64 A.D.3d at 1046, 883 N.Y.S.2d 372). As the *Miranda* safeguards were knowingly and voluntarily waived, no violation of defendant's rights occurred and his statements were admissible (*see People v. Culver,* 69 A.D.3d 976, 977, 893 N.Y.S.2d 327 [2010]).

[6] We reject defendant's claim that questioning should have ceased on the premise that he invoked his right to counsel during the second interview (*see* ***1026** *People v. West,* 81 N.Y.2d 370, 373–374, 599 N.Y.S.2d 484, 615 N.E.2d 968 [1993]). A review of the interview itself fully supports County Court's conclusion that defendant's inquiry regarding whether he would need an attorney referred to a pending Family Court matter and not to the present matter. Defendant was not yet in custody (*see id.*), and his inquiry did not constitute the "unequivocal invocation" required for that right to attach, so as to compel an end to further questioning in the absence of an attorney, because "a query as to whether counsel ought to be obtained will not suffice" (*People v. Mitchell,* 2 N.Y.3d 272, 276, 778 N.Y.S.2d 427, 810 N.E.2d 879 [2004], citing *People v. Hicks,* 69 N.Y.2d 969, 970, 516 N.Y.S.2d 648, 509 N.E.2d 343 [1987]; *see People v. Culver,* 69 A.D.3d at 977–978, 893 N.Y.S.2d 327). Thus, defendant was not entitled to suppression on this ground (*see People v. Mayo,* 19 A.D.3d 710, 711, 795 N.Y.S.2d 799 [2005]).

On the issue of the voluntariness of defendant's statements and his extensive claims of coercive police tactics, promises and threats, looking at all of the foregoing circumstances under which they were obtained (*see People v. Mateo,* 2 N.Y.3d at 413, 779 N.Y.S.2d 399, 811 N.E.2d 1053), we agree that the People satisfied their burden of demonstrating beyond a reasonable doubt that his statements were voluntary (*see People v. Rosa,* 65 N.Y.2d 380, 386, 492 N.Y.S.2d 542, 482 N.E.2d 21 [1985]).[5] The circumstances and atmosphere of the interviews fail to demonstrate involuntariness. While the interviews were lengthy, two hours and seven hours, a factor on which defendant places great emphasis, they were separated by a 15–hour break in questioning during which defendant had a bed and food and ample opportunities to rest, sleep, make phone ****730** calls, eat, contemplate and consult help. While defendant argues that the proof established that he was awake almost 40 hours, i.e., from the Sunday 9:00 A.M. 911 call until his Tuesday 1:00 A.M. arrest, with less than two hours of sleep at the mental health unit, the suppression testimony did not support that conclusion.[6]

5 Defendant's claim that suppression should have been granted because his confession was proven false by the defense's medical testimony at trial is fundamentally flawed. First, defendant cannot rely on *trial* testimony to establish entitlement to suppression (*see People v. Millan,* 69 N.Y.2d 514, 518 n. 4, 516 N.Y.S.2d 168, 508 N.E.2d 903 [1987]). Second, even if the jury had credited his trial experts' opinions that Matthew died of infection and not head trauma, this would not disprove defendant's admitted acts of throwing him on the bed.

6 The suppression testimony did not establish that defendant was deprived of sleep. The evidence shows that defendant slept for about one hour and 45 minutes at the mental health unit, and was checked on frequently, but did not account for all of his time there. It did not establish that any requests to sleep more were denied or that he was overly fatigued or emotionally distraught. Further, defendant had opportunities to sleep, including (1) after the Sunday 9:00 A.M. 911 call until the arrival of CPS at 6:00 P.M. (nine hours), (2) after the children were removed at approximately 7:00 P.M. until the detectives returned at midnight (five hours), and (3) after his Monday 2:00 A.M. arrival at the hospital and his admission to the mental health unit at 6:00 A.M. (four hours). Thus, we find that the People proved the voluntariness of defendant's conduct and statements and disproved defendant's claim that sleep deprivation rendered them involuntary.

More importantly, the recorded interviews simply do not support ***1027** the conclusion that defendant was unduly fatigued or sleepy, or that he was physically or psychologically overwhelmed (*contrast People v. Anderson,* 42 N.Y.2d at 39–40, 396 N.Y.S.2d 625, 364 N.E.2d 1318 [the defendant interrogated without advisement of his rights by eight or nine officers operating in relay teams for 19 continuous hours and deprived of food, shaken awake when he dozed or nodded off, and was awake 30 hours without sleep by the time he confessed]). While lack of sleep or nourishment and the duration of station house interviews are certainly significant factors to be considered in evaluating voluntariness (*id.* at 40, 396 N.Y.S.2d 625, 364 N.E.2d 1318),

on the record before us, "[w]ithout more, the length of time involved did not render the confession[ ] obtained during that period inadmissible" (*People v. Tarsia*, 50 N.Y.2d at 12–13, 427 N.Y.S.2d 944, 405 N.E.2d 188 [test and interview lasted 11 hours]).

[7] Also contrary to defendant's vehement claims, the strategies and tactics employed by the officers during these interviews were not of the character as to induce a false confession and were not so deceptive that they were fundamentally unfair and deprived him of due process (*see id.* at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188). The officers' repeated misrepresentation that defendant's truthfulness might enable doctors to effectively treat Matthew did not render his statements involuntary, because appealing to his parental concerns did not create a substantial risk that he might falsely incriminate himself (*see id.* at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *People v. Dishaw*, 30 A.D.3d at 690–691, 816 N.Y.S.2d 235; *People v. Henderson*, 4 A.D.3d 616, 617, 772 N.Y.S.2d 120 [2004], *lv. denied* 2 N.Y.3d 800, 781 N.Y.S.2d 299, 814 N.E.2d 471 [2004]). Indeed, common sense dictates the opposite conclusion, i.e., that parents, aware of their child's life threatening predicament, would *accurately* disclose any information that might enable doctors to save their child.

Likewise, Mason's persistent assurances, including that he believed that it had been an accident and that defendant would not be arrested or go to jail at that time (based upon information then available to police that did not yet connect defendant to this crime), were not improper promises of leniency that would induce a false confession (*see People v. Lyons*, 4 A.D.3d 549, 552, 771 N.Y.S.2d 585 [2004]; *People v. Richardson*, 202 A.D.2d 958, 958–959, 609 N.Y.S.2d 981 [1994], *lv. denied* 83 N.Y.2d 914, 614 N.Y.S.2d 396, 637 N.E.2d 287 [1994]). Indeed, defendant ****731** had been advised that any admission to criminal conduct could be used against him in court; when defendant asked if he would be ***1028** criminally prosecuted, Mason told him that he did not know and no promises could be made, but it would not happen "right now," which was true as he had not yet confessed.

Further, defendant's eventual confession that he had slammed the infant on the bed on three separate days in frustration, decidedly not accidental conduct, belies his claim that he succumbed to Mason's pressure and suggestions to attribute the infant's condition to accidental causes. Also untrue is that threats to arrest Hicks coerced defendant's confession. When defendant said he would "take the fall" for her to keep her out of jail, he was told he could not do so and should instead tell what he knew. The focus on Hicks' potential culpability was reasonable and did not overbear his will or coerce his subsequent confession some 19 hours later, or render it involuntary (*see People v. Lyons*, 4 A.D.3d at 552, 771 N.Y.S.2d 585; *cf. People v. Keene*, 148 A.D.2d 977, 539 N.Y.S.2d 214 [1989]). While we adhere to the constitutionally-mandated "steadfast refusal to countenance confessions obtained by [impermissibly] coercive means" (*People v. Tarsia*, 50 N.Y.2d at 10, 427 N.Y.S.2d 944, 405 N.E.2d 188), the record fully supports County Court's finding that defendant's statements were voluntary and admissible.

[8] [9] Next, we find the jury's verdict convicting defendant of depraved indifference murder of a child pursuant to Penal Law § 125.25(4) is supported by legally sufficient evidence and not against the weight of the credible evidence (*see People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1985]). Viewing the evidence in the light most favorable to the prosecution, as we must in our legal sufficiency inquiry (*see People v. Contes*, 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932 [1983]), we conclude that the evidence, including defendant's recorded confession and the medical testimony, proved that defendant acted with the requisite mens rea of depraved indifference and established his guilt of depraved indifference murder of a child (*see People v. Feingold*, 7 N.Y.3d 288, 294, 819 N.Y.S.2d 691, 852 N.E.2d 1163 [2006]). The facts of this case fall within the limited class of one-on-one killings that still satisfy the depraved indifference standard (*see People v. Suarez*, 6 N.Y.3d 202, 210, 811 N.Y.S.2d 267, 844 N.E.2d 721 [2005]; *People v. Manos*, 73 A.D.3d 1333, 1334, 901 N.Y.S.2d 408 [2010], *lv. denied* 15 N.Y.3d 807, 908 N.Y.S.2d 166, 934 N.E.2d 900 [2010]; *People v. Varmette*, 70 A.D.3d 1167, 1169, 895 N.Y.S.2d 239 [2010], *lv. denied* 14 N.Y.3d 845, 901 N.Y.S.2d 152, 927 N.E.2d 573 [2010]; *People v. Ford*, 43 A.D.3d 571, 573, 840 N.Y.S.2d 668 [2007], *lv. denied* 9 N.Y.3d 1033, 852 N.Y.S.2d 19, 881 N.E.2d 1206 [2008]). Depraved indifference may be demonstrated by circumstantial evidence (*see People v. Snyder*, 91 A.D.3d 1206, 1211, 937 N.Y.S.2d 429 [2012]), and defendant's actions here fall within one of the recognized rare factual patterns in which the unintentional killing of a single person constitutes depraved indifference murder, in that defendant " 'acting with a conscious objective not to kill but to ***1029** harm—engage [d] in torture or[7] a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim' " ****732** (*People v. Taylor*, 15 N.Y.3d 518, 523, 914 N.Y.S.2d 76, 939 N.E.2d 1206 [2010], quoting

People v. Suarez, 6 N.Y.3d at 212, 811 N.Y.S.2d 267, 844 N.E.2d 721 [footnote added]).

7 At defendant's request, the word "torture" was deleted from the jury charge on depraved indifference murder and we evaluate the sufficiency of the evidence in light of the charge as given, without objection (*see People v. Ford*, 11 N.Y.3d 875, 878, 874 N.Y.S.2d 859, 903 N.E.2d 256 [2008]).

His admitted conduct in repeatedly forcefully throwing his premature infant over the course of four days reflects just such depraved indifference, in that he acted with "an utter disregard for the value of human life" (*People v. Suarez*, 6 N.Y.3d at 214, 811 N.Y.S.2d 267, 844 N.E.2d 721). Defendant was aware that Matthew had been sick during this ongoing brutality. His acts, born of anger and frustration, against a tiny, helpless infant behind closed doors, when he was responsible for his care, reflected "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target" (*id.* at 213, 811 N.Y.S.2d 267, 844 N.E.2d 721; *see People v. Snyder*, 91 A.D.3d at 1211, 937 N.Y.S.2d 429; *People v. Manos*, 73 A.D.3d at 1334–1336, 901 N.Y.S.2d 408). The People's medical testimony established that Matthew had sustained severe head trauma, causing his death, and that defendant's admitted conduct was capable of producing his catastrophic injuries. Defendant inflicted injury, ignored signs that the child was in distress (by defendant's account) and allowed him to slowly deteriorate, prolonging his suffering, until Hicks discovered him unresponsive, evincing depraved indifference (*see People v. Suarez*, 6 N.Y.3d at 212, 811 N.Y.S.2d 267, 844 N.E.2d 721; *People v. Manos*, 73 A.D.3d at 1337–1338, 901 N.Y.S.2d 408; *People v. Varmette*, 70 A.D.3d at 1171, 895 N.Y.S.2d 239).

While defendant also argues that the evidence did not establish that he acted recklessly, we strongly disagree (*see* Penal Law § 15.05[3]; § 125.25 [4]). In light of the medical testimony of the premature infant's extensive fatal injuries and the degree of force required to inflict them and defendant's admissions, the jury reasonably concluded that defendant, aware of an obvious risk of death or serious physical injury, acted recklessly (*see People v. Varmette*, 70 A.D.3d at 1169, 895 N.Y.S.2d 239; *People v. Heslop*, 48 A.D.3d 190, 193, 849 N.Y.S.2d 301 [2007], *lv. denied* 10 N.Y.3d 935, 862 N.Y.S.2d 342, 892 N.E.2d 408 [2008]; *People v. Ford*, 43 A.D.3d at 573, 840 N.Y.S.2d 668; *People v. Smith*, 41 A.D.3d 964, 966, 838 N.Y.S.2d 690 [2007], *lv. denied* 9 N.Y.3d 881, 842 N.Y.S.2d 793, 874 N.E.2d 760 [2007]; *People v. Maddox*, 31 A.D.3d at 972, 818 N.Y.S.2d 664). Further, we reject defendant's claim that his actions bespoke "an intentional [killing] or no other" (*People v. Suarez*, 6 N.Y.3d at 215, 811 N.Y.S.2d 267, 844 N.E.2d 721 [internal quotation marks and citation omitted]) as unsupported by the evidence.

Turning to defendant's extensive challenge to the weight of ***1030** the evidence, while a different finding would not have been unreasonable—had the jury credited either the opinions of the defense's medical experts that Matthew died of sepsis infection or defendant's testimony that his confession was false and had been coerced—we cannot conclude that the verdict was contrary to the weight of the credible evidence (*see People v. Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Weighing the relative probative force of the conflicting testimony, particularly the sharply divergent medical opinions on the cause of death and defendant's testimony repudiating his confession which contradicted that of the interviewing detective, and considering the relative strength of the inferences to be drawn from that conflicting testimony, we conclude that the jury gave the evidence the weight it should be accorded (*see id.; see also People v. Danielson*, 9 N.Y.3d 342, 348–349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]; ****733** *People v. Mateo*, 2 N.Y.3d at 414–415, 779 N.Y.S.2d 399, 811 N.E.2d 1053). In so finding, "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v. Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

We have reviewed the extensive, conflicting medical testimony offered by the opposing medical experts—all highly experienced and credentialed subspecialists in their relevant fields—regarding the cause of death (head trauma versus systemic infection) and whether defendant's confessed actions could have produced serious head injuries. Notably, the jury observed the experts' testimony firsthand, including extensive and probing cross-examination challenging the bases for their conclusions, and we "cannot assign error in the trier of fact crediting the People's experts over that of defendant's experts" (*People v. Strawbridge*, 299 A.D.2d 584, 593, 751 N.Y.S.2d 606 [2002], *lv. denied* 99 N.Y.2d 632, 760 N.Y.S.2d 114, 790 N.E.2d 288 [2003]). All of the experts offered compelling testimony, and the jury's task was difficult. However, the defense experts were not, as a factual matter, more qualified, persuasive or credible, and we cannot say that the jury erred in not finding their testimony more believable or persuasive. As for defendant's testimony

denying throwing Matthew and disavowing his confession to police as false and coerced, the jury viewed the confession and was charged to evaluate witness credibility and the voluntariness of his statement, and we discern no basis upon which to overrule its implicit determination not to credit defendant's testimony or the defense's efforts to undermine his confession.

[10] [11] [12] Next, we find no error in County Court's ruling, after a *Frye* hearing, denying defendant's request to permit expert testimony from a social psychologist on police interrogation tactics and false confessions. "The admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the ***1031** trial court, ... [which] in the first instance [must] determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness" (*People v. Cronin,* 60 N.Y.2d 430, 433, 470 N.Y.S.2d 110, 458 N.E.2d 351 [1983] [internal citation omitted]). "The trial court's decision will not be disturbed absent a showing of serious mistake, error of law or abuse of discretion" (*People v. Fish,* 235 A.D.2d 578, 579–580, 652 N.Y.S.2d 124 [1997], *lv. denied* 89 N.Y.2d 1092, 660 N.Y.S.2d 386, 682 N.E.2d 987 [1997] [citation omitted]; *see People v. LeGrand,* 8 N.Y.3d 449, 456–459, 835 N.Y.S.2d 523, 867 N.E.2d 374 [2007]).

The record, including the hearing testimony of the People's expert, a law school professor expressly credited by County Court, fully supports the court's ruling that the psychologist's proffered testimony neither concerned a subject matter outside of the ken of the average juror, nor had the principles upon which the psychologist relied been established as accepted within the relevant scientific community (*see People v. LeGrand,* 8 N.Y.3d at 455–457, 835 N.Y.S.2d 523, 867 N.E.2d 374; *People v. Wernick,* 89 N.Y.2d 111, 115, 651 N.Y.S.2d 392, 674 N.E.2d 322 [1996]; *People v. Wesley,* 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 633 N.E.2d 451 [1994]; *People v. Taylor,* 75 N.Y.2d 277, 286–288, 552 N.Y.S.2d 883, 552 N.E.2d 131 [1990]; *People v. Shepard,* 259 A.D.2d 775, 777, 687 N.Y.S.2d 196 [1999], *lv. denied* 93 N.Y.2d 979, 695 N.Y.S.2d 65, 716 N.E.2d 1110 [1999]). The court determined that current research fails to establish either a consensus connecting specific interrogation techniques ****734** to the occurrence of false confessions or a reliable basis for distinguishing false confessions from truthful ones. We agree with the court that the jury—having watched the videotaped interviews and defendant's trial testimony explaining why he had confessed falsely, as well as the defense's vigorous cross-examination of the interviewing officers, which fully exposed the tactics employed—was "perfectly capable of assessing whether it believes that the [d]efendant's statements were true and accurate, or whether they were falsely made as a result of police tactics and coercion." Indeed, the court noted that the jury would be charged on voluntariness and the factors to evaluate in determining whether the confession was the result of undue pressure or improper conduct (*see* CJI2d[NY] Confessions; CPL 60.45, 710.70[3]), and the court in fact provided an expanded charge on this matter. Given the foregoing, we discern no abuse of discretion or error in the court's ruling.

[13] [14] Finally, defendant's remaining contentions for reversal similarly lack merit, including his claim that County Court violated the principles governing juror note taking and responses to juror requests for readbacks of the charge. We perceive no abuse of discretion in the court allowing jurors to take notes in this lengthy and difficult trial, and find that it gave appropriate ***1032** and repeated cautionary instructions (*see People v. Hues,* 92 N.Y.2d 413, 419, 681 N.Y.S.2d 779, 704 N.E.2d 546 [1998]; *People v. Strasser,* 249 A.D.2d 781, 782, 671 N.Y.S.2d 873 [1998], *lv. denied* 91 N.Y.2d 1013, 676 N.Y.S.2d 141, 698 N.E.2d 970 [1998]; *see also* 22 NYCRR 220.10[c]). [8] The court responded meaningfully to the jury's numerous requests for readbacks and queries (*see People v. Steinberg,* 79 N.Y.2d 673, 684, 584 N.Y.S.2d 770, 595 N.E.2d 845 [1992]; CPL 310.30), including rereading portions of the original charge (*see People v. Santi,* 3 N.Y.3d 234, 248–249, 785 N.Y.S.2d 405, 818 N.E.2d 1146 [2004]). Obliging jury requests to repeat portions of the charge or to speak more slowly was not tantamount to improperly giving the jury a copy of a statute or selected portions of the written charge (*see People v. Tucker,* 77 N.Y.2d 861, 862–863, 568 N.Y.S.2d 342, 569 N.E.2d 1021 [1991]; *People v. Strasser,* 249 A.D.2d at 782–783, 671 N.Y.S.2d 873; *cf. People v. Johnson,* 81 N.Y.2d 980, 981–982, 599 N.Y.S.2d 525, 615 N.E.2d 1009 [1993], *affg.* 181 A.D.2d 103, 585 N.Y.S.2d 851 [1992]; *People v. Owens,* 69 N.Y.2d 585, 590–591, 516 N.Y.S.2d 619, 509 N.E.2d 314 [1987]).

8 We decline to review the jurors' notes (*see* 22 NYCRR 220.10 [e]).

ORDERED that the judgment is affirmed.

LAHTINEN, MALONE JR., STEIN and EGAN JR., JJ., concur.

Parallel Citations

93 A.D.3d 1019, 941 N.Y.S.2d 722, 2012 N.Y. Slip Op. 02128

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22 N.Y.3d 1114

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

The PEOPLE of the State of New York, Appellant,

v.

Paul AVENI, Respondent.

No. 19. | Feb. 20, 2014.

Attorneys and Law Firms

Janet DiFiore, District Attorney, White Plains (Raffaelina Gianfrancesco, Steven A. Bender and Richard Longworth Hecht of counsel), for appellant.

John F Ryan, Legal Aid Society of Westchester County, White Plains (David B. Weisfuse of counsel), for respondent.

Kathleen M. Rice, Mineola, Vincent Rivellese, New York City, and Hilary Hassler, for District Attorneys Association of the State of New York, amicus curiae.

Opinion

OPINION OF THE COURT

MEMORANDUM.

***1** The appeal should be dismissed upon the ground that the modification by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to ... modification" (CPL 450.90[2][a]).

On the night of January 12, 2009, police and emergency medical personnel arrived at the residence of defendant's mother in response to her call. They found defendant's girlfriend, Angela Camillo, dead of an apparent heroin overdose. While the police were still at the residence, but after Ms. Camillo's body had been removed, defendant emerged from an attic space and was immediately arrested for violating a temporary order of protection forbidding him from visiting his mother's home. He was taken to the police precinct, read *Miranda* warnings, and questioned about his possible illicit involvement in Ms. Camillo's death. At first, he claimed that Ms. Camillo arrived at his mother's already intoxicated and that when he subsequently came on the scene in response to a call from his brother reporting Ms. Camillo's condition, he saw that Ms. Camillo was unconscious. He said that he did not stay to help her because of the order of protection, but before leaving told his mother to call 911. He recalled that when he returned to his mother's home later the same night, he found it empty and fell asleep. When he woke and came downstairs he was arrested by an officer who had evidently arrived while he slept.

Defendant refused to sign a statement recounting this narrative, and some four hours later, after being re-read *Miranda* warnings, he was interviewed again. On this occasion, one of the interviewing detectives, although aware that Ms. Camillo was dead, told defendant that

> "she was at the hospital and the doctors are working on her, but it's imperative; did she use any drugs or did she take anything, because whatever medications the doctors give her now could have an adverse effect on her medical condition. You—she's okay now but if you lie to me and don't tell me the truth now and they give her medication, it could be a problem."

Defendant immediately admitted that he had injected Ms. Camillo with heroin. A videotaped statement was then taken during which the interrogators reiterated the substance of their ruse—that Ms. Camillo was alive, but that disclosure from defendant was essential to her safe treatment—and defendant again admitted that he had purchased heroin and injected Ms. Camillo with it.

The trial court denied suppression of defendant's incriminating statements, finding that the deception employed by defendant's interrogators was not so egregious as to cast in question the voluntariness of the resulting confession because there was no accompanying promise or threat (*People v. Aveni,* Sup Ct, Westchester County, May 7, 2010, Molea, J., indictment No. 978/ 2009, citing *People v. Pereira,* 26 N.Y.2d 265, 269 [1970], and *People v. McQueen,* 18 N.Y.2d 337, 346 [1966]). In reversing the denial of suppression, upon the law and the facts (100 AD3d 228[2d Dept 2012]), the Appellate Division took a very different view of the deception, finding that it did not simply misrepresent the victim's existential status but implicitly threatened that defendant could be held responsible for her demise if he did not immediately break his silence

as to the nature and extent of Ms. Camillo's drug ingestion. The threat, said the court, was perhaps subtle but nonetheless clear: "[defendant's] silence would lead to Camillo's death, and then he could be charged with her homicide" (100 AD3d at 238). The false prospect of being severely penalized for remaining silent, raised by defendant's interrogators, was, in the court's view, incompatible with a finding that defendant's confession was voluntary beyond a reasonable doubt.

***2** The People now contend that the Appellate Division's finding with respect to the voluntariness of defendant's confession was in error. A voluntariness determination by the Appellate Division on the facts, however, ordinarily implicates a mixture of factual and legal elements resistant to this Court's review.

Here, the People argue that the Appellate Division applied the wrong legal standard when it focused upon the interrogating officer's deception, instead of the entire set of circumstances attending defendant's custodial interrogation and confession. They urge that, had the totality been considered, it would have dictated the conclusion that defendant was not threatened with a homicide prosecution and that his inculpating statements were voluntary. They stress that defendant was not new to the criminal justice system and was given *Miranda* warnings; that he had some higher education; and that he seemed relaxed with his interrogators, was given food, drink and cigarettes, and appeared alert and comprehending during the videotaped portion of the interrogation. [*] They contend that, at the time defendant confessed to injecting Ms. Camillo with heroin, there could have been no threat of a homicide prosecution because the officers did not yet know what caused Ms. Camillo's death.

* The video recording device, we note, was not turned on until after defendant made his initial inculpating statement.

It is true that the judicial inquiry as to whether a confession was voluntary in the due process sense is addressed to the totality of the circumstances under which the statement was obtained (*see People v. Guilford,* 21 NY3d 205, 208 [2013]). However, the Appellate Division used the correct legal standard in its reversal (100 AD3d at 237). Its determination that the potential to overwhelm defendant's free will was realized was plainly one of fact. Accordingly, the appeal must be dismissed.

PIGOTT, J. (dissenting).

***2** I dissent because, in my view, although the Appellate Division paid lip service to the totality of circumstances standard (100 AD3d 228, 237 [2d Dept 2012]), [*] it failed to apply that standard in this case. As a result, the Appellate Division, and now the majority, deviate from a standard that has existed and been relied upon by law enforcement for over 35 years (*see People v. Anderson,* 42 N.Y.2d 35, 38 [1977]; *see also People v. Guilford,* 21 NY3d 205, 206 [2013]). According to the Appellate Division's understanding of defendant's argument, defendant claims he was deceived when the police officer:

* It is evident from the opening paragraph of the Appellate Division order that it intended to focus solely on the deceptive techniques employed by the police as opposed to applying the totality of the circumstances test: "This case presents us with an opportunity to decide under what circumstances the police, while interrogating a suspect, exceed permissible deception, such that a suspect's statements to the police must be suppressed because they were unconstitutionally coerced" (100 AD3d at 231).

> "explicitly lied to him by telling him that [the victim] was alive and that the physicians treating her needed to know what drugs she had taken or else she could die, and *implicitly* threatened him with a homicide charge by stating, 'if you lie to me and don't tell me the truth now ... it could be a problem' " (100 AD3d at 237 [emphasis supplied]).

The record belies that "implicit" threat. In actuality, the police officer explained:

> "What I said was, she is at the hospital and the doctors are working on her, but it's imperative; did she use any drugs or did she take anything, because whatever medications the doctors give her now could have an adverse effect on her medical condition. You-she's okay now but if you lie to me and don't tell me the truth now *and they give her medication,* it could be a problem" (emphasis supplied).

***3** The Appellate Division's conclusion that the phrase "it could be a problem" constituted an "implied" threat to charge defendant with homicide is a reach; the officer was plainly referring to the victim's potential reaction that the administered medication would have on any drugs the victim may have ingested. However, the Appellate Division went so far as to conclude that defendant's failure to tell the police what drugs, if any, the victim had ingested " 'could be a problem' *for him* " (100 AD3d at 238 [emphasis supplied]), but the record contains no such threat from the police.

In cases like this, where there may be no witnesses other than the victim and the alleged perpetrator, the only proper way to evaluate police conduct is by reviewing the entire case, as opposed to cherry picking a phrase or two from a comprehensive interrogation. Accordingly, I would remand the matter to the Appellate Division for the appropriate application of the totality of the circumstances test.

Appeal dismissed upon the ground that the modification by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to ... modification" (CPL 450.90[2][a]), in a memorandum.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH, RIVERA and ABDUS-SALAAM concur; Judge PIGOTT dissents and votes to reverse in an opinion.

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100 A.D.3d 228
Supreme Court, Appellate Division,
Second Department, New York.

The PEOPLE, etc., respondent,
v.
Paul AVENI, appellant.

Oct. 17, 2012.

Synopsis

Background: Defendant was convicted in the Supreme Court, Westchester County, Susan Cacace, J., of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, Belen, J., held that:

[1] detectives coerced defendant's confession, thus warranting suppression;

[2] evidence supported conviction for criminal contempt in the first degree; and

[3] evidence did not support conviction for burglary in the second degree.

Affirmed as modified.

West Headnotes (16)

[1] **Criminal Law**
⇐ Necessity in general
Criminal Law
⇐ Right to remain silent

Under *Miranda*, for a statement to be admissible, the People must prove a voluntary, knowing, and intelligent waiver of the privilege against self-incrimination; the requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[2] **Criminal Law**
⇐ Waiver of rights

While it is not necessary for a *Miranda* waiver to be expressly oral or written, a valid waiver will not be presumed simply from the fact that a confession was in fact eventually obtained. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[3] **Constitutional Law**
⇐ Circumstances Under Which Made; Interrogation
Criminal Law
⇐ Right to remain silent

Any evidence that a defendant was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege against self-incrimination; therefore, the use of a defendant's statement offends due process where his or her will has been overborne and his or her capacity for self-determination critically impaired. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[4] **Criminal Law**
⇐ Waiver of rights
Criminal Law
⇐ Waiver of rights

Under the State Constitution, when a suspect is interrogated without the presence of counsel and gives a statement, at a suppression hearing, the People must demonstrate, beyond a reasonable doubt, that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and his or her right to counsel; if the People meet their burden, the burden then shifts to the defendant to prove that the police acted illegally. McKinney's Const. Art. 1, § 6.

1 Cases that cite this headnote

[5] **Criminal Law**
⇦ Right to remain silent

Determining whether an individual has voluntarily, knowingly and intelligently waived his or her rights, for purposes of the State Constitution's self-incrimination provision, is a factual inquiry that is based on the totality of the circumstances. McKinney's Const. Art. 1, § 6.

Cases that cite this headnote

[6] **Constitutional Law**
⇦ Circumstances Under Which Made; Interrogation

Criminal Law
⇦ Deception

Generally, alleged police conduct must not be so fundamentally unfair as to deny due process or likely induce a false confession, but mere deception, without more, is not sufficient to render a statement involuntary. U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's CPL § 60.45(1), (2)(a).

2 Cases that cite this headnote

[7] **Criminal Law**
⇦ Threats; Fear of Injury

Criminal Law
⇦ Deception

Detectives coerced defendant's confession, thus warranting suppression, where they not only repeatedly deceived the defendant by telling him that his girlfriend was alive, but implicitly threatened him with a homicide charge by telling him that the consequences of remaining silent would lead to her death; by lying to him and threatening him, the detectives eviscerated any sense the defendant may have had that he could safely exercise his privilege against self-incrimination and put the People to their proof. U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's CPL § 60.45(1), (2)(a).

1 Cases that cite this headnote

[8] **Constitutional Law**
⇦ Circumstances Under Which Made; Interrogation

Criminal Law
⇦ Deception

When interrogating a suspect, the police may, as part of their investigatory efforts, deceive the suspect, and any resulting statement will not be suppressed for that reason alone, but even with a voluntary, knowing, and intelligent waiver of one's *Miranda* rights, there are boundaries the police cannot cross during an interrogation; while deception may be used to obtain a statement, police conduct must not be so fundamentally unfair as to deny due process. U.S.C.A. Const.Amends. 5, 14; McKinney's Const. Art. 1, § 6; McKinney's CPL § 60.45(1), (2)(a).

2 Cases that cite this headnote

[9] **Protection of Endangered Persons**
⇦ Defenses

Evidence that defendant violated an order of protection supported conviction for criminal contempt in the first degree; although a witness' trial testimony indicated that she attempted to have the order of protection modified or vacated, it was indisputably in effect when the defendant entered her home, and the fact that she may have permitted the defendant to enter her home did not render his entry lawful. McKinney's Penal Law § 215.51(c).

Cases that cite this headnote

[10] **Burglary**
⇦ Intent

Despite evidence that defendant entered victim's home unlawfully, in violation of an order of protection, there was insufficient evidence that he did so to commit the offense of criminal possession of a controlled substance, and thus, evidence did not support conviction for burglary in the second degree; the victim's home had

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multiple bedrooms and occupants, any of whom could have easily accessed the defendant's second-floor bedroom, and in any event, a bag in his bedroom, which contained a trace amount of heroin, could have been there for days, or been placed there immediately before or after his entry. McKinney's Penal Law §§ 10.00(8), 140.00(5), 140.25(2), 220.03.

Cases that cite this headnote

[11] **Burglary**
⇐ Consent of owner or occupant of building

For purposes of the offense of burglary a person is generally "licensed or privileged" to enter a private premises when the person has obtained the consent from the owner or from someone who maintains the authority to consent. McKinney's Penal Law §§ 140.00(5), 140.25(2).

1 Cases that cite this headnote

[12] **Burglary**
⇐ Consent of owner or occupant of building

For purposes of the offense of burglary, where there is an absence of license or privilege, a person may be deemed to have entered or remained unlawfully on the premises, but an intruder must be aware of the fact that he has no license or privilege to enter the premises. McKinney's Penal Law §§ 140.00(5), 140.25(2).

1 Cases that cite this headnote

[13] **Burglary**
⇐ Intent

For purposes of the offense of burglary in the second degree, the intent to commit a crime must exist contemporaneously with the unlawful entry; a defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar. McKinney's Penal Law § 140.25(2).

Cases that cite this headnote

[14] **Burglary**
⇐ Intent

Burglary
⇐ Intent

For purposes of the offense of burglary, generally, the People do not need to prove that a defendant intended to commit a particular crime, but where the People expressly limit their theory of the defendant's guilt of burglary to the intent to commit a specific crime, they are bound to prove the defendant's intent to commit that particular crime. McKinney's Penal Law § 140.25(2).

Cases that cite this headnote

[15] **Controlled Substances**
⇐ Possession

Controlled Substances
⇐ Elements in general

Generally, the Legislature has defined criminal possession of a controlled substance in terms of dominion and control, and unlawful possession is a continuing offense. McKinney's Penal Law §§ 10.00(8), 220.03.

1 Cases that cite this headnote

[16] **Controlled Substances**
⇐ Elements in general

Controlled Substances
⇐ Knowledge and intent

Controlled Substances
⇐ Constructive possession

To sustain a conviction for possession of a controlled substance, in its simplest form, the prosecution must prove beyond a reasonable doubt the presence of a controlled substance as statutorily defined, that it was physically or constructively possessed by the accused and that the possession was knowing and unlawful. McKinney's Penal Law § 220.03.

1 Cases that cite this headnote

Attorneys and Law Firms

****57** John F. Ryan, White Plains, N.Y. (David B. Weisfuse of counsel), for appellant.

Janet DiFiore, District Attorney, White Plains, N.Y. (Raffaelina Gianfrancesco and Richard Longworth Hecht of counsel), for respondent.

RUTH C. BALKIN, J.P., ARIEL E. BELEN, L. PRISCILLA HALL, and ROBERT J. MILLER, JJ.

Opinion

BELEN, J.

***231** This case presents us with an opportunity to decide under what circumstances the police, while interrogating a suspect, exceed permissible deception, such that a suspect's statements to the police must be suppressed because they were unconstitutionally coerced. During the early morning of January 13, 2009, the defendant, Paul Aveni, who had been arrested the previous night for violating a temporary order of protection obtained by his mother, Mary Aveni (hereinafter Mary), was intentionally deceived and threatened by two detectives from the New Rochelle Police Department into making various inculpatory statements. Knowing that the defendant's girlfriend, Angela Camillo, had died in Mary's home earlier the previous night, Detective Claudio Carpano intentionally deceived and threatened the defendant by telling him that Camillo was receiving medical treatment at a hospital and that, "she's okay now but if you lie to me and don't tell me the truth now ... it could be a problem" because medical personnel would be unable to properly treat Camillo and the defendant could be held responsible for her death.

Shortly thereafter, the defendant made inculpatory statements that he had procured heroin and had injected Camillo with the drug. The cause of Camillo's death was later determined to be acute mixed drug intoxication involving heroin, ecstasy, and Alprazolam, also known as Xanax.

After a jury trial, the defendant was convicted of burglary in the second degree, ****58** criminally negligent homicide, criminal injection of a narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree.

The defendant appeals from the judgment of conviction, arguing, among other things, that his statements to the police should have been suppressed because they were involuntarily made as a result of the deception and threats used by the detectives, and that his will was overborne by the length of the detention, lack ***232** of food and water, his intoxication, and false promises made by the police. Furthermore, he contends, since his statements were thus rendered involuntary and, hence, inadmissible, there is legally insufficient evidence to support his convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree. He separately contends, on different grounds, that there is legally insufficient evidence to convict him of criminal contempt in the first degree and that the verdict of guilt with respect to that conviction was against the weight of the evidence.

We agree with the defendant that the statements he made to law enforcement officials at the police station must be suppressed, and that, therefore, his convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree must be vacated as unsupported by legally sufficient evidence, and those counts dismissed from the indictment. However, the defendant's challenge to the legal sufficiency of the evidence supporting his conviction of criminal contempt in the first degree is unpreserved, and, in any event, without merit, and the verdict of guilt with respect to that conviction was not against the weight of the evidence.

The principal issue presented in this case is whether the defendant's will was overborne, in violation of the United States Constitution and *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the New York Constitution, and the Criminal Procedure Law, when he made inculpatory statements indicating that he had procured heroin and had injected Camillo with the drug. We further consider whether the defendant's conviction of burglary in the second degree was supported by legally sufficient evidence with regard to the elements of "enter[ing] ... unlawfully," based upon the violation of an order of protection, and "intent to commit a crime therein" (Penal Law § 140.25), based upon the intent to commit the offense of criminal possession of a controlled substance in the seventh degree, as charged in the indictment and the bill of particulars.

The Supreme Court held a pretrial suppression hearing to determine the admissibility of, inter alia, the defendant's inculpatory statements made to the police (*see People v.*

Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179). During the hearing, the People presented the testimony of Detective Carpano, who testified that at approximately 11:30 P.M. on January 12, 2009, after advising the ***233** defendant of his *Miranda* rights (*see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694), he interviewed the defendant at the New Rochelle police station. At that time, the defendant stated that he had seen Camillo earlier that day, but had dropped her off at a gas station, and had not seen her again until several hours later, after his brother contacted him and informed him that Camillo was in their mother Mary's home and under the influence of narcotics. When he arrived at ****59** Mary's home, he found Camillo unconscious in a chair in his old bedroom. After asking Mary to call 911, he left because there was an order of protection barring him from the home.

The defendant initially told Detective Carpano that some time later, the defendant returned to the house to check on Camillo's condition. The house appeared empty, and he fell asleep in his brother's bedroom. He awoke at approximately 11:15 P.M., fell out of bed, and heard a police officer instructing him to identify himself. According to the hearing testimony of two police officers, the defendant came down a stairway to a landing, was handcuffed by an officer, and was advised of his *Miranda* rights.

At approximately 2:00 A.M., Detective Carpano presented the defendant with a transcription of the above statement, which the defendant refused to sign.

More than four hours later, at approximately 6:30 A.M., the defendant, after again being advised of his *Miranda* rights, was interviewed again at the police station by Detective Carpano and another detective. During that interview, Detective Carpano, who knew that Camillo was dead, testified that he told the defendant,

> "[Camillo] was at the hospital and the doctors are working on her, but it's imperative; did she use any drugs or did she take anything, because whatever medications the doctors give her now could have an adverse effect on her medical condition. You—she's okay now but if you lie to me and don't tell me the truth now and they give her medication, it could be a problem."

Immediately thereafter, the defendant made an inculpatory statement that he had injected Camillo with heroin.

At approximately 7:00 A.M., Detective Carpano began videotaping the interview. During the recorded interview, the defendant stated that, before going to Mary's home, he had purchased ***234** the heroin that he later injected into Camillo. Throughout the recorded interview, Detective Carpano continuously stated that Camillo was alive and that she had told the police she had been forced to take heroin, which contradicted the defendant's assertion that Camillo did so voluntarily. Further, when the defendant asked about the criminal contempt charge arising out of the violation of the order of protection, the detectives promised him, on numerous occasions, that they would help him with that matter if he was cooperative, although the District Attorney would ultimately decide how to proceed.

During her summation at the suppression hearing, defense counsel argued, inter alia, that the police acted improperly by deceiving the defendant into believing that Camillo was still alive and threatening him that his failure to tell them what drugs she had taken would make him responsible for her death.

At the conclusion of the suppression hearing, the hearing court, among other things, declined to suppress the statements made by the defendant at the police station.

The matter then proceeded to trial before a jury. As part of the People's case-in-chief, Camillo's mother testified that, prior to Camillo's relationship with the defendant, Camillo had dated and lived with another man who was a heroin addict. On January 11, 2009, the day before she died, Camillo told her mother that she was going out to lunch with the defendant.

The defendant's mother, Mary, testified that on January 12, 2009, at approximately 4:00 P.M., the defendant and Camillo entered her home, despite the temporary order of protection against the defendant barring him therefrom, and went to his ****60** second-floor bedroom. Previously, Mary had unsuccessfully attempted to have the order vacated or modified to allow the defendant to visit her home, and on this date, and on prior occasions, she allowed him to enter and stay in her home notwithstanding the order.

At approximately 8:45 P.M., the defendant told Mary that something was wrong with Camillo. Mary went into the bedroom and saw Camillo sitting in a chair with her legs

crossed and her eyes open, looking straight ahead. At approximately 9:10 P.M., Mary called 911.

Meanwhile, the defendant's older brother, Eric Aveni (hereinafter Eric), was watching videos with a friend in a third-floor apartment in Mary's home. According to Eric, the defendant banged on the door and stated that there was something wrong ***235** with Camillo. The defendant then grabbed a chair, stood on top of it, and climbed into a crawl space in the attic. Eric heard Mary scream from the second floor and went into the defendant's bedroom, where he found Camillo sitting upright in a chair, with her eyes open. After determining that Camillo was unconscious, Eric put her on the bed and attempted to perform CPR.

At approximately 9:15 P.M., Police Officer Michael Ciafardini responded to Mary's home after receiving a radio transmission from police headquarters. At approximately 9:20 P.M., paramedic Robert Fardella arrived at the home and observed members of the New Rochelle Fire Department performing CPR on Camillo. Fardella testified that, by that time, Camillo showed signs of having been dead for approximately 45 minutes to an hour. After inserting a breathing tube into Camillo, Fardella noticed pink frothy sputum which, he explained, is indicative of a heroin overdose. He also noticed a spoon with a white substance underneath a dresser drawer. The medical examiner testified that the cause of Camillo's death was acute mixed drug intoxication and that she had needle marks on her wrists, which could have been made by Camillo herself.

At approximately 9:45 P.M., Detective Christopher Greco arrived at Mary's home. According to Detective Greco, there were "obvious signs" of drug use in the second-floor bedroom, including a hypodermic needle and wax paper commonly used for packaging heroin.

At approximately 11:15 P.M., Officer Ciafardini and Detective Greco heard a loud noise coming from the third floor. They ordered whoever was there to come down the stairs, and the defendant complied. Based upon the order of protection barring the defendant from Mary's home, the defendant was taken into custody. Officer Ted Pitzel placed the defendant in his patrol car and advised him of his *Miranda* rights, then transported him to the New Rochelle police station. Detective Carpano's trial testimony was similar to his suppression hearing testimony. At trial, he also testified that between 1:20 A.M. and 1:30 A.M., Mary consented to a search of her home, during which the police recovered a bottle of the prescription medication Xanax, hypodermic needles, and several bags stamped "Lock Down." A forensic scientist testified that one of the bags contained a trace amount of heroin.

The jury found the defendant guilty of burglary in the second degree, criminally negligent homicide, criminal injection of a ***236** narcotic drug, criminal contempt in the first degree, and criminal possession of a controlled substance in the seventh degree. The defendant appeals from the judgment of conviction.

The Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, ****61** provides, in pertinent part, that "[n]o person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" (U.S. Const. Amends. V, XIV; *see Duckworth v. Eagan*, 492 U.S. 195, 201–202, 109 S.Ct. 2875, 106 L.Ed.2d 166; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653). "The *Miranda* warnings are procedural safeguards intended to secure the Fifth Amendment privilege against self-incrimination by protecting individuals from the informal compulsion exerted by law enforcement officials during custodial questioning" (*People v. Borukhova*, 89 A.D.3d 194, 211, 931 N.Y.S.2d 349; *see Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. 1602, 16 L.Ed.2d 694; *People v. Paulman*, 5 N.Y.3d 122, 129, 800 N.Y.S.2d 96, 833 N.E.2d 239).

In *Miranda v. Arizona*, the United States Supreme Court explained that interrogations in certain custodial circumstances are presumed to be inherently coercive and "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice" (*Miranda v. Arizona*, 384 U.S. at 458, 86 S.Ct. 1602, 16 L.Ed.2d 694). Hence, the prosecution may not use any statements that stem from a custodial interrogation unless it establishes that procedural safeguards were properly followed (*see id.* at 444–445, 86 S.Ct. 1602, 16 L.Ed.2d 694).

[1] [2] [3] *Miranda* emphasizes the "badge of intimidation" created when officers do not make efforts to "afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice" (*id.* at 457, 86 S.Ct. 1602, 16 L.Ed.2d 694). Hence, for a statement to be admissible, the People

must prove a voluntary, knowing, and intelligent waiver of the privilege against self-incrimination (*id.* at 444, 86 S.Ct. 1602, 16 L.Ed.2d 694). As the United States Supreme Court explained, "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation" (*id.* at 476, 86 S.Ct. 1602, 16 L.Ed.2d 694). While it is not necessary for a waiver to be expressly oral or written, "a valid waiver will not be presumed ... simply from the fact that a confession was in fact eventually obtained" (*id.* at 475, 86 S.Ct. 1602, 16 L.Ed.2d 694). However, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" (*id.* at 476, 86 S.Ct. 1602, 16 L.Ed.2d 694). ***237** Therefore, the use of a defendant's statement offends due process where his or her "will has been overborne and his [or her] capacity for self-determination critically impaired" (*Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037; *see Rogers v. Richmond,* 365 U.S. 534, 540, 81 S.Ct. 735, 5 L.Ed.2d 760 ["convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand"]).

[4] [5] Furthermore, under the New York State Constitution, "[n]o person shall be ... compelled in any criminal case to be a witness against himself or herself" (N.Y. Const. art. I, § 6). Consequently, when a suspect is interrogated without the presence of counsel and gives a statement, at a suppression hearing, the People must demonstrate, beyond a reasonable doubt, that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and his or her right to counsel (*see* ****62** *People v. Mateo,* 2 N.Y.3d 383, 413–414, 779 N.Y.S.2d 399, 811 N.E.2d 1053, *cert. denied* 542 U.S. 946, 124 S.Ct. 2929, 159 L.Ed.2d 828; *People v. Davis,* 75 N.Y.2d 517, 554 N.Y.S.2d 460, 553 N.E.2d 1008; *People v. Anderson,* 42 N.Y.2d 35, 38, 396 N.Y.S.2d 625, 364 N.E.2d 1318; *People v. Ringer,* 140 A.D.2d 642, 528 N.Y.S.2d 674; *see also* CPL 60.45[1], [2][a]). If the People meet their burden, the burden then shifts to the defendant to prove that the police acted illegally (*see People v. Berrios,* 28 N.Y.2d 361, 367, 321 N.Y.S.2d 884, 270 N.E.2d 709). Determining whether an individual has voluntarily, knowingly and intelligently waived his or her rights is a factual inquiry that is based on the totality of the circumstances (*see People v. Anderson,* 42 N.Y.2d at 38–39, 396 N.Y.S.2d 625, 364 N.E.2d 1318; *People v. Gotte,* 150 A.D.2d 488, 541 N.Y.S.2d 89).

[6] Generally, the alleged police conduct must not be so "fundamentally unfair as to deny due process" or likely induce a false confession (*People v. Tarsia,* 50 N.Y.2d 1, 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *see People v. Gordon,* 74 A.D.3d 1090, 902 N.Y.S.2d 386; *People v. Green,* 73 A.D.3d 805, 900 N.Y.S.2d 397; *People v. Sanabria,* 52 A.D.3d 743, 745, 861 N.Y.S.2d 359; *People v. LaGuerre,* 29 A.D.3d 820, 822, 815 N.Y.S.2d 211). However, mere deception, without more, is not sufficient to render a statement involuntary (*see People v. Tarsia,* 50 N.Y.2d at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *People v. Pereira,* 26 N.Y.2d 265, 309 N.Y.S.2d 901, 258 N.E.2d 194; *People v. McQueen,* 18 N.Y.2d 337, 346, 274 N.Y.S.2d 886, 221 N.E.2d 550).

[7] Here, the defendant argues that his statements should be suppressed because the detectives improperly deceived him when they explicitly lied to him by telling him that Camillo was alive and that the physicians treating her needed to know what drugs she had taken or else she could die, and implicitly threatened him with a homicide charge by stating, "[I]f you lie to me and don't tell me the truth now ... it could be a problem."

[8] ***238** Our review of the case law amply demonstrates that when interrogating a suspect, the police may, as part of their investigatory efforts, deceive a suspect, and any resulting statement will not be suppressed for that reason alone (*see e.g. People v. Pereira,* 26 N.Y.2d 265, 309 N.Y.S.2d 901, 258 N.E.2d 194; *People v. McQueen,* 18 N.Y.2d 337, 274 N.Y.S.2d 886, 221 N.E.2d 550; *People v. Thomas,* 93 A.D.3d 1019, 941 N.Y.S.2d 722; *People v. Jordan,* 193 A.D.2d 890, 597 N.Y.S.2d 807). However, even with a voluntary, knowing, and intelligent waiver of one's *Miranda* rights, there are boundaries the police cannot cross during an interrogation. While deception may be used to obtain a statement, police conduct must not be so "fundamentally unfair as to deny due process" (*People v. Tarsia,* 50 N.Y.2d at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *see* U.S. Const. Amends. V, XIV; N.Y. Const. art. I, § 6; CPL 60.45[1], [2] [a]; *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *People v. Pereira,* 26 N.Y.2d 265, 309 N.Y.S.2d 901, 258 N.E.2d 194; *People v. Gordon,* 74 A.D.3d 1090, 902 N.Y.S.2d 386; *People v. Green,* 73 A.D.3d 805, 900 N.Y.S.2d 397). Notably, in *People v. McQueen,* 18 N.Y.2d at 346, 274 N.Y.S.2d 886, 221 N.E.2d 550, the officers used mere deception by telling the defendant that "she might as well admit what she had done inasmuch as

otherwise the victim, who she had not been told had died, would be likely to identify her," but did not threaten her with repercussions if she chose to remain silent. [1] In this case, by ****63** contrast, the detectives not only repeatedly deceived the defendant by telling him that Camillo was alive, but implicitly threatened him with a homicide charge by telling the defendant that the consequences of remaining silent would lead to Camillo's death, since the physicians would be unable to treat her, which "could be a problem" for him. While arguably subtle, the import of the detectives' threat to the defendant was clear: his silence would lead to Camillo's death, and then he could be charged with her homicide (*see Culombe v. Connecticut,* 367 U.S. at 574–575, 81 S.Ct. 1860, 6 L.Ed.2d 1037["[T]he risk is great that the police will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not ***239** only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices"]). [2]

1 In *People v. McQueen,* 18 N.Y.2d 337, 342, 274 N.Y.S.2d 886, 221 N.E.2d 550, the defendant's trial commenced on November 9, 1964, and concluded on November 25, 1964, and was not subject to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, which was decided on June 13, 1966, unless *Miranda* applied retroactively beyond the requirements of the United States Constitution (*see People v. McQueen,* 18 N.Y.2d at 342, 274 N.Y.S.2d 886, 221 N.E.2d 550). The Court of Appeals recognized that *Miranda* could apply retroactively for a claim regarding an involuntary statement (*id.* at 344, 274 N.Y.S.2d 886, 221 N.E.2d 550). However, the Court held that the defendant's statements were voluntary (*id.*).

2 In *Culombe v. Connecticut* (367 U.S. 568, 577, 620, 81 S.Ct. 1860, 6 L.Ed.2d 1037), the petitioner was held without the benefit of counsel and was not advised of his constitutional rights. He was held in custody for five days and questioned intermittently by the police (*id.* at 625, 81 S.Ct. 1860, 6 L.Ed.2d 1037). After seeing his wife and sick daughter, and being urged by his wife to tell the truth, the petitioner confessed to participating in a holdup during which two men were murdered (*id.* at 616–617, 81 S.Ct. 1860, 6 L.Ed.2d 1037). The confession was admitted at trial and he was convicted of murder in the first degree (*id.* at 619, 81 S.Ct. 1860, 6 L.Ed.2d 1037). However, the United States Supreme Court held that the petitioner's confession was involuntary and its admission deprived him of due process in violation of the Fourteenth Amendment to the United States Constitution (*id.* at 621, 81 S.Ct. 1860, 6 L.Ed.2d 1037).

In this case, the detectives coerced the defendant's confession by deceiving him into believing that Camillo was alive and implicitly threatening him with a homicide charge if he remained silent. The detectives used the threat of a homicide charge to elicit an incriminating statement by essentially telling the defendant that the consequences of remaining silent would lead to Camillo's death, which "could be a problem" for him. Faced with this Hobson's choice, the defendant had no acceptable alternative but to talk to the police. By lying to him and threatening him, the detectives eviscerated any sense the defendant may have had that he could safely exercise his privilege against self-incrimination and put the People to their proof. Either he would tell them what he knew or he would face the probability of life imprisonment if Camillo died. In light of the detectives' implicit threat of a homicide charge if the defendant remained silent, we cannot conclude that the defendant voluntarily waived his Fifth Amendment privilege against self-incrimination (*see* U.S. Const. Amends. V, XIV; *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *Culombe v. Connecticut,* 367 U.S. at 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037; *Rogers v. Richmond,* 365 U.S. at 541, 81 S.Ct. 735, 5 L.Ed.2d 760). Similarly, the detectives used the threat to overcome the defendant's will, and this was so "fundamentally unfair as to deny due process" ****64** (*People v. Tarsia,* 50 N.Y.2d at 11, 427 N.Y.S.2d 944, 405 N.E.2d 188; *see* N.Y. Const. art. I, § 6; CPL 60.45[1], [2][a]; *People v. Gordon,* 74 A.D.3d 1090, 902 N.Y.S.2d 386; *People v. Green,* 73 A.D.3d 805, 900 N.Y.S.2d 397; *People v. Sanabria,* 52 A.D.3d 743, 861 N.Y.S.2d 359; *compare People v. Pereira,* 26 N.Y.2d 265, 309 N.Y.S.2d 901, 258 N.E.2d 194; *People v. McQueen,* 18 N.Y.2d 337, 274 N.Y.S.2d 886, 221 N.E.2d 550; *People v. Thomas,* 93 A.D.3d 1019, 941 N.Y.S.2d 722; *People v. Jordan,* 193 A.D.2d 890, 597 N.Y.S.2d 807).

We thus hold that the People failed to establish, beyond a reasonable doubt, that the defendant knowingly, voluntarily, and intelligently waived his rights against self-incrimination. Accordingly, the Supreme Court should have suppressed the ***240** defendant's statements made to law enforcement officials at the police station. Since those statements are the only evidence supporting the defendant's convictions of criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, those convictions are based on legally insufficient evidence, and therefore must be

vacated, and those counts dismissed from the indictment (*see* CPL 70.10[1]; *People v. Washington,* 8 N.Y.3d 565, 838 N.Y.S.2d 465, 869 N.E.2d 641; *People v. Cintron,* 95 N.Y.2d 329, 717 N.Y.S.2d 72, 740 N.E.2d 217; *People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932; *cf. People v. Ridley,* 307 A.D.2d 269, 761 N.Y.S.2d 871; *People v. Carter,* 163 A.D.2d 320, 558 N.Y.S.2d 93).

[9] The defendant also argues that there was legally insufficient evidence to convict him of criminal contempt in the first degree and burglary in the second degree. Initially, although the defendant's contention that his conviction of criminal contempt in the first degree is based upon legally insufficient evidence is unpreserved for appellate review (*see* CPL 470.05 [2]), we review it in the exercise of our interest of justice jurisdiction (*see* CPL 470.15[6]). Under the Penal Law, a person is guilty of criminal contempt in the first degree when

> "he or she commits the crime of criminal contempt in the second degree ... by violating that part of a duly served order of protection, or such order of which the defendant has actual knowledge because he or she was present in court when such order was issued ... which requires the ... defendant to stay away from the person or persons on whose behalf the order was issued, and where the defendant has been previously convicted of the crime of aggravated criminal contempt or criminal contempt in the first or second degree for violating an order of protection as described herein within the preceding five years" (Penal Law § 215.51[c]).

In enacting this statute, the Legislature recognized that " '[j]udicial orders of protection are issued chiefly to help protect victims of domestic violence from additional acts of abuse. Yet, they are violated all too frequently; sometimes with lethal—all but invariably with serious—consequences for those the orders are supposed to protect' " (*People v. Gellineau,* 178 Misc.2d 790, 795, 681 N.Y.S.2d 729, quoting Mem. of Senate, 1996 McKinney's Session Laws of N.Y., at 2309–2310). Hence,

> "the Legislature was seeking not only to vindicate the right[s] of the individual, the court, or society in the administration of justice, but also to stop a very ***241** real and present danger of domestic violence through acts committed between persons who are connected to each other either by blood, by marriage, acquaintance, or who reside in the same household. The major purpose was to prevent the great cost of domestic violence to society as a whole, and not only to the ****65** victim" (*People v. Gellineau,* 178 Misc.2d at 796, 681 N.Y.S.2d 729).

Here, the order of protection was issued against the defendant, who was present in court when it was issued and, thus, had actual knowledge of the order. At trial, the defendant admitted to a special information which charged that he was previously convicted of criminal contempt in the second degree. Further, although Mary's trial testimony indicated that she attempted to have the order of protection modified or vacated, it was indisputably in effect on January 12, 2009, when the defendant entered her home. Thus, the fact that Mary may have permitted the defendant to enter her home did not render the defendant's entry lawful (*see* Penal Law § 140.00[5]; *People v. Jones,* 79 A.D.3d 1244, 1246, 912 N.Y.S.2d 746; *People v. Lewis,* 13 A.D.3d 208, 211, 786 N.Y.S.2d 494, *affd.* 5 N.Y.3d 546, 807 N.Y.S.2d 1, 840 N.E.2d 1014; *People v. Liotta,* 274 A.D.2d 751, 753, 712 N.Y.S.2d 65). To find otherwise would subvert the very purpose of orders of protection, which is to protect victims of domestic violence. Accordingly, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes,* 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient to establish the defendant's guilt of criminal contempt in the first degree beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt with respect to that conviction was not against the weight of the evidence (*see People v. Romero,* 7 N.Y.3d 633, 826 N.Y.S.2d 163, 859 N.E.2d 902).

[10] Turning to the legal sufficiency of the evidence supporting the defendant's conviction of burglary in the second degree, pursuant to the Penal Law, as charged here, "[a] person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein" (Penal Law § 140.25), and "[t]he building is a dwelling" (Penal Law § 140.25[2]).[3]

[3] Historically, burglary was regarded as an "offense against the habitations of men" (*Rodgers v. People,* 86 N.Y. 360, 363). The burglary statute is meant to protect an occupant, dweller, or possessor (*see Quinn v. People,* 71 N.Y. 561, 570, 573; *People v. Scott,* 195 Misc.2d 647, 650–651, 760 N.Y.S.2d 828). The underlying policy for this statute is to protect such individuals from a "heightened danger posed when an unlawful intrusion into a building is effected by someone

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bent on a criminal end" (*People v. Gaines*, 74 N.Y.2d 358, 362, 547 N.Y.S.2d 620, 546 N.E.2d 913).

***242** In this case, the indictment, the bill of particulars, and the People's theory at trial accused the defendant of committing burglary in the second degree when he entered Mary's home unlawfully in violation of a duly served order of protection with the intent to commit the offense of criminal possession of a controlled substance in the seventh degree.

[11] [12] Turning to the first element of burglary, "[a] person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so" (Penal Law § 140.00[5]). Generally, a person is "licensed or privileged" to enter a private premises when such an individual has obtained the consent from the owner or from someone who maintains the authority to consent (*see People v. Graves*, 76 N.Y.2d 16, 20, 556 N.Y.S.2d 16, 555 N.E.2d 268). Where there is an absence of "license or privilege," a person may be deemed to have entered or remained unlawfully on the premises (*id.*). Furthermore, an "intruder must be aware of the fact that he has no license or privilege to enter the premises" (*People v. Uloth*, 201 A.D.2d 926, 926, 607 N.Y.S.2d 767 [internal quotation ****66** marks omitted]; *see People v. Reed*, 121 A.D.2d 574, 575, 503 N.Y.S.2d 624 [internal quotation marks omitted]).

For example, in *People v. Lewis*, 13 A.D.3d at 211, 786 N.Y.S.2d 494, the Appellate Division, First Department, held that the trial court properly instructed the jury that "the complainant could not grant defendant a license or privilege to enter premises from which he had been excluded by a court order" and that "the individual must comply with the order while it remains in effect, regardless of anything said or done by the occupant of the premises." Hence, "[i]n the absence of a stay, the parties are generally obligated to obey a court order until it is vacated or reversed on appeal" (*id.* at 219, 786 N.Y.S.2d 494; *see* Penal Law § 140.00[5]; *People v. Jones*, 79 A.D.3d at 1246, 912 N.Y.S.2d 746; *People v. Liotta*, 274 A.D.2d at 753, 712 N.Y.S.2d 65).

Here, as discussed above, there was a valid temporary order of protection issued against the defendant for the benefit of his mother, Mary, which was indisputably in effect on January 12, 2009, when the defendant, who was aware of the order, entered Mary's home. Accordingly, viewing the evidence in the light most favorable to the prosecution, there was legally sufficient evidence to establish that the defendant entered Mary's home unlawfully.

[13] ***243** Turning next to the element of intent, burglary in the second degree, as charged here, is a criminal trespass in a building that is a dwelling "with intent to commit a crime therein" (Penal Law § 140.25[2]; *see People v. Lewis*, 5 N.Y.3d at 548, 807 N.Y.S.2d 1, 840 N.E.2d 1014). The intent to commit a crime must exist contemporaneously with the unlawful entry (*see People v. Gaines*, 74 N.Y.2d at 359–360, 547 N.Y.S.2d 620, 546 N.E.2d 913). "A defendant who simply trespasses with no intent to commit a crime inside a building does not possess the more culpable mental state that justifies punishment as a burglar" (*id.* at 362, 547 N.Y.S.2d 620, 546 N.E.2d 913; *see People v. Lewis*, 5 N.Y.3d at 551–552, 807 N.Y.S.2d 1, 840 N.E.2d 1014).

[14] Generally, the People do not need to prove that a defendant intended to commit a particular crime (*see People v. Gaines*, 74 N.Y.2d at 362 n. 1, 547 N.Y.S.2d 620, 546 N.E.2d 913). General intent may be sufficient to establish this element (*see People v. Mackey*, 49 N.Y.2d 274, 279, 425 N.Y.S.2d 288, 401 N.E.2d 398). However, where, as here, the People expressly limit their theory of the defendant's guilt of burglary to the intent to commit a specific crime, they are bound to prove the defendant's intent to commit that particular crime (*see People v. Shealy*, 51 N.Y.2d 933, 434 N.Y.S.2d 986, 415 N.E.2d 974; *People v. Barnes*, 50 N.Y.2d 375, 379 n. 3, 429 N.Y.S.2d 178, 406 N.E.2d 1071). Accordingly, since the indictment, as amplified by the bill of particulars, expressly charged the defendant, with respect to burglary, with the intent to commit the crime of criminal possession of a controlled substance in the seventh degree, the People had the burden of proving that the defendant, at the time he entered Mary's home, intended to commit that crime while inside.

[15] Under the Penal Law, "[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance" (Penal Law § 220.03). Generally, "the Legislature has defined criminal possession in terms of dominion and control, and unlawful possession is a continuing offense" (*People v. Carvajal*, 6 N.Y.3d 305, 314, 812 N.Y.S.2d 395, 845 N.E.2d 1225; *see* Penal Law § 10.00[8]; *Matter of Johnson v.* ****67** *Morgenthau*, 69 N.Y.2d 148, 151–152, 512 N.Y.S.2d 797, 505 N.E.2d 240).

[16] Further, "[t]o sustain a conviction [of] the crime of possession of a controlled substance, in its simplest form, the prosecution must prove beyond a reasonable doubt the presence of a controlled substance as statutorily defined, that it was physically or constructively possessed by the

accused and that the possession was knowing and unlawful" (*People v. Sierra*, 45 N.Y.2d 56, 59 60, 407 N.Y.S.2d 669, 379 N.E.2d 196). To establish constructive possession, "the People must show ***244** that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v. Manini*, 79 N.Y.2d 561, 573, 584 N.Y.S.2d 282, 594 N.E.2d 563, quoting Penal Law § 10.00[8]; *see People v. Arnold*, 60 A.D.3d 960, 875 N.Y.S.2d 571; *People v. Tirado*, 47 A.D.2d 193, 366 N.Y.S.2d 140, *affd.* 38 N.Y.2d 955, 384 N.Y.S.2d 151, 348 N.E.2d 608).

Here, the evidence that connected the defendant with the trace amount of heroin in one of the "Lock Down" bags found in his bedroom was the inculpatory statements that he made after he was improperly deceived and threatened by the detectives. As discussed above, those statements must be suppressed. According to the trial testimony of Mary, and of Eric, the defendant's brother, Mary allowed the defendant to enter and stay in her home on a regular basis despite the order of protection issued for her benefit and against the defendant. Although the evidence at trial established the defendant's regular use of that bedroom, and his close proximity thereto when he was taken into custody, no evidence was presented to establish that the defendant possessed heroin on his person at the time of his arrest. Moreover, since Mary's home has multiple bedrooms and occupants, any of whom could have easily accessed the defendant's second-floor bedroom, even viewing the evidence, excluding the defendant's improperly admitted statements, in the light most favorable to the prosecution (*see People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), the evidence is legally insufficient to establish that the defendant constructively possessed heroin (*see People v. Alicea*, 23 A.D.3d 572, 806 N.Y.S.2d 645; *People v. Brown*, 240 A.D.2d 675, 659 N.Y.S.2d 82; *People v. Webb*, 179 A.D.2d 707, 578 N.Y.S.2d 579; *People v. Harvey*, 163 A.D.2d 532, 558 N.Y.S.2d 605). [4]

4 We further note that in *People v. Rosado*, 96 A.D.3d 547, 947 N.Y.S.2d 434, the trial court convicted the defendant of two counts of criminal possession of a controlled substance in the seventh degree. On appeal, the defendant argued that the "room presumption" did not apply to seventh-degree possession. While his argument was unpreserved, the Appellate Division, First Department, reached the question in the interest of justice and held that the "room presumption and constructive possession ... should only apply to crimes requiring intent to sell, or crimes involving amounts of drugs greater than what is required for misdemeanor possession" (*id.* at 548, 947 N.Y.S.2d 434 [internal quotation marks and citations omitted]).

Even if the People had established the defendant's constructive possession of the heroin recovered from his bedroom, they nevertheless failed to present legally sufficient evidence establishing that the defendant intended to commit ***245** the offense of criminal possession of a controlled substance in the seventh degree at the time he entered Mary's home. Criminal possession, generally, has been defined as a "continuing offense" (*see* Penal Law § 10.00 [8]; *People v. Carvajal*, 6 N.Y.3d at 314, 812 N.Y.S.2d 395, 845 N.E.2d 1225; *Matter of* ****68** *Johnson v. Morgenthau*, 69 N.Y.2d at 151–152, 512 N.Y.S.2d 797, 505 N.E.2d 240). Since criminal possession of a controlled substance in the seventh degree is a "continuing offense," viewing the evidence, excluding the improperly admitted statements, in the light most favorable to the prosecution (*see People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), the People could not establish, beyond a reasonable doubt, that the trace amount of heroin found in the second-floor bedroom existed at the moment of the defendant's unlawful entry into Mary's home. The "Lock Down" bag which contained the trace amount of heroin could have been there for days, or placed there immediately before or after his entry. Therefore, the People did not establish that any intent on the defendant's part to commit the offense of criminal possession of a controlled substance in the seventh degree was contemporaneous with the unlawful entry.

Accordingly, the conviction of burglary in the second degree was not supported by legally sufficient evidence.

The defendant's remaining contentions are without merit or need not be reached in light of our determination.

Accordingly, the judgment is modified, on the law and the facts, by vacating the convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and that branch of the defendant's omnibus motion which was to suppress certain statements made to law enforcement officials is granted.

ORDERED that the judgment is modified, on the law and the facts, by vacating the convictions of burglary in the second degree, criminally negligent homicide, criminal injection of a narcotic drug, and criminal possession of a controlled substance in the seventh degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and that branch of the defendant's omnibus motion which was to suppress certain statements made to law enforcement officials is granted.

BALKIN, J.P., HALL and MILLER, JJ., concur.

Parallel Citations

100 A.D.3d 228, 953 N.Y.S.2d 55, 2012 N.Y. Slip Op. 06968

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21 N.Y.3d 339
Court of Appeals of New York.

The PEOPLE of the State of New York, Appellant,
v.
George OLIVERAS, Respondent.

June 6, 2013.

Synopsis

Background: Defendant was convicted in the Supreme Court, Bronx County, David Stadtmauer, J., of murder in second degree, and The Supreme Court, Appellate Division, 90 A.D.3d 563, 936 N.Y.S.2d 12, reversed and remanded. People appealed.

[Holding:] The Court of Appeals, Rivera, J., held that trial counsel rendered ineffective assistance.

Affirmed.

Smith, J., issued dissenting opinion.

West Headnotes (4)

[1] **Criminal Law**
Standard of Effective Assistance in General

In determining whether a defendant has been deprived of effective assistance, a court must examine whether the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

1 Cases that cite this headnote

[2] **Criminal Law**
Preparation for trial

When reviewing an ineffective assistance claim, it is essential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, the attorney's investigation of the law, the facts, and the issues that are relevant to the case. U.S.C.A. Const.Amend. 6; McKinney's Const. Art. 1, § 6.

Cases that cite this headnote

[3] **Criminal Law**
Preparation for trial

An attorney's strategy is shaped in significant part by the results of the investigation stage of the representation; thus, a defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
Preparation for trial

Criminal Law
Experts; opinion testimony

Trial counsel's failure, in defendant's prosecution for second degree murder, to take any steps to obtain defendant's relevant psychiatric and educational records, or to consult with expert psychiatrist or psychologist, and to instead present defense that mental weakness undermined voluntariness of admissions of guilt through mother's testimony, constituted deficient performance, as part of ineffective assistance claim. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

***221** Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard and Joseph N. Ferdenzi of counsel), for appellant.

Office of the Appellate Defender, New York City (Richard M. Greenberg and Risa Gerson of counsel), for respondent.

Milbank, Tweed, Hadley & McCloy LLP, New York City (Dorothy Heyl of counsel), for The Innocence Network, amicus curiae.

Opinion

***341 OPINION OF THE COURT**

RIVERA, J.

****1241** The People appeal an order of the Appellate Division granting defendant George Oliveras' motion to vacate his conviction, and remanding for a new trial on the ground that defendant was deprived adequate assistance of counsel (90 A.D.3d 563, 936 N.Y.S.2d 12 [1st Dept.2011]). We affirm *****222** and reject the People's argument that defendant received adequate assistance where trial counsel failed to conduct an ****1242** appropriate investigation of records critical to the defense.

I. Facts and Procedural History

A. Defendant's Interrogation and Inculpatory Statements

New York City Police Department detectives suspected defendant of the November 24, 1999 shooting and murder of Marvin Thompson. Upon defendant's voluntary appearance at the police station two days after the shooting, detectives immediately arrested and placed defendant in a windowless interrogation room. Prior to the interrogation, defendant's mother, who had gone to the station with him, informed the detectives that defendant had been hospitalized for mental illness as a child.

Detectives proceeded to interrogate defendant over the next 6 1/2 hours. [1] During the course of the interrogation, defendant made three statements. His first statement, made within the first 30 minutes of the interrogation, asserted his innocence and that he was at his girlfriend's home when the shooting occurred. The officers then left defendant alone for several hours. When they returned to resume their questioning, defendant appeared ***342** tired and upset and explained to the detectives he felt overwhelmed. At 12:50 A.M. the detectives recorded defendant's second statement, that he had killed the victim because he had reached into his coat pocket as if to pull out a gun to shoot defendant. At approximately 2:00 A.M., defendant made a third statement repeating he had shot the victim when he saw him reach in his pocket for what he thought was a gun. He made this statement in the presence of an Assistant District Attorney who had joined the interrogation and asked defendant questions about the shooting, [2] including if the gun he used was an automatic or a revolver, to which defendant replied "I think revolver. I'm not sure." [3]

1 A police officer read defendant his *Miranda* rights and recorded defendant's waiver of those rights prior to the first interview (*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 [1966]).

2 The Assistant District Attorney re-Mirandized defendant on the record before asking him any questions.

3 The two inculpatory statements were inconsistent and contradicted the evidence which established that the victim was not wearing a coat and the gun used in the shooting was not a revolver.

B. Trial Counsel's Pretrial Motions

In early 2000, trial counsel moved for a psychiatric examination pursuant to CPL article 730. Two reports from psychiatric experts concluded defendant was fit to stand trial, but also noted he has a learning disability and certain mental health issues. Specifically, both psychiatric experts separately noted that defendant demonstrated a mild impairment of concentration and memory and was previously evaluated for auditory hallucinations. They both noted that defendant's intelligence was in the low average range. Supreme Court eventually found defendant fit to stand trial.

At the psychological evaluation hearing, trial counsel also announced his intention to present his client's psychiatric records to an expert in order to challenge the voluntariness of the admissions. The court issued judicial subpoenas for those records.

Months later, by early 2001, trial counsel had neither sought to execute the subpoenas *****223** nor otherwise reviewed these or other documents related to defendant's mental illness or condition. Nevertheless, without supporting witnesses and relying solely on ****1243** the existing CPL article 730 report, trial counsel moved to suppress the incriminating statements based on involuntariness. Supreme Court denied the motion, concluding that the CPL article 730 report did not support the defense claim that defendant was unable to knowingly and voluntarily waive his *Miranda* rights due to mental illness.

The court specifically noted the failure to produce defendant's psychiatric records.

***343** After another nine months, trial counsel belatedly moved under CPL 250.10 for permission to serve and file late notice of intent to proffer psychiatric evidence. In response, the People objected and requested by motion in limine a ruling precluding trial counsel from raising any psychiatric or psychological issues during the trial. Supreme Court denied defendant's motion, predicating its denial on trial counsel's failure to proffer a reasonable explanation for the notification delay, and the failure to produce the aforementioned records in support of the motion. The court observed that the medical records "were never delivered to the Police Department" and were never seen by trial counsel. The court then observed that "we don't know what the abnormality is and we don't have any records and we don't have any consultation report to go on." The court ultimately found that trial counsel was "just fishing" for any useful information. Supreme Court granted the People's motion, holding that CPL 250.10 notice "is required in all sorts of different situations, including situations where ... the defense might wish to call a lay person to testify about psychiatric difficulties." In response to trial counsel's assertions at the hearing that he intended to present defendant's mental health history through testimony of defendant's mother but "not in an expert format," the court ruled that defendant's mother could give "non-expert" testimony, if relevant to the issue in the case, provided that she did not allude "to psychiatric records or the contents thereof," or otherwise give "the patina of psychological expertise" to her testimony.

C. Trial and Sentence

At the trial, the People's case consisted of testimony from a witness who saw the shooter running from the scene and who called 911 to report the incident; testimony from the detective who collected bullet casings from the crime scene; testimony from a medical examiner who reviewed the autopsy records describing the victim's wounds; testimony of the police officer who arrested, interrogated, and obtained defendant's inculpatory statements; and the submission into evidence of the defendant's statements. However, other than defendant's statements to the police, no other evidence directly connected defendant with the murder. The 911 caller's description of the perpetrator did not match defendant's ethnicity or attire, and the ballistic evidence recovered from the scene of the crime did not link defendant to the homicide.

Trial counsel called one witness, defendant's mother, who testified that her son attended special education classes as a ***344** child, was committed to the Bronx Children's Psychiatric Center as a teen, and receives Social Security disability benefits as an adult. However, the court's limiting instruction precluded trial counsel from asking the mother about defendant's psychiatric history, mental issues, and the basis for his receipt of government benefits. [4]

4 The court also instructed the jury during the charge that "there [was] no evidence concerning any psychological or psychiatric issues."

*****224** ****1244** After several requests to review the evidence and for a clarification on *Miranda*, the jury found defendant guilty of murder in the second degree. The court sentenced him to 25 years to life.

D. Defendant's Motion to Vacate the Conviction

Defendant obtained new counsel who moved to vacate the conviction pursuant to CPL 440.10, arguing that defendant's trial counsel was ineffective based on several enumerated failures and errors. The motion raised trial counsel's failure to provide timely notice pursuant to CPL 250.10, to present evidence of defendant's psychiatric history, to obtain defendant's psychiatric records, to consult an expert to explain the relationship between defendant's psychiatric history and the voluntariness and reliability of his statements, and trial counsel's ignorance of the law regarding the CPL 250.10 notice.

At the hearing, trial counsel testified about his representation of defendant, and explained his decision to not obtain defendant's records. He stated that while he initially intended to obtain defendant's psychiatric records to show that defendant's inculpatory statements were involuntary, he did not pursue this approach because of defendant's objections. He testified that defendant said he was innocent, and "shut [him] down" from pursuing a psychiatric defense. According to trial counsel, defendant "did not want to be portrayed as someone suffering from a psychiatric mental illness." He said he believed that defendant did not want to "end up in a mental institution." He further stated that it was his understanding that defendant "didn't want psychiatric mumbo jumbo, whatever you want to call it, because he felt it would paint him in a bad way."

Trial counsel explained that he then decided to present defendant's mental capacity without the records and as a result

decided to forgo obtaining them. Trial counsel claimed that he "stood to gain nothing by getting those records ... unless [he] was headed towards [putting on] a psychiatric defense." Counsel *345 further claimed: "And my feeling is and has been, and I've done it in many cases, is that you're better off ... without having so many experts on the witness stand and getting bogged up in that, and just giving the jury a good gut feeling." Thus, trial counsel sought to secure his client's acquittal by demonstrating to the jury that his client was "not playing with a full deck" and arguing on summation that the police took advantage of him.

Trial counsel said he intended to convince the jury that defendant's will was overborne by the police due to his mental history and the affects of the interrogation. According to trial counsel, he wanted to "build" this idea "in the minds of the jury" by demonstrating that defendant "had no work history," "was on SSI," "had a grade school education at the most," "was in special ed," "had some hospitalizations," and was someone "whose mind could be played with." Trial counsel sought to have this history introduced by defendant's mother, who would discuss her son's educational, institutional, and occupational history.

At the hearing, trial counsel admitted that he developed this defense approach without the full benefit of defendant's psychiatric and government records. He **1245 stated that he never saw defendant's psychiatric records or Social Security Administration records, and that he did not know the diagnosis contained in those records. ***225 Trial counsel also admitted that he did not get the records because he believed that he would have to turn them over to the People, even if he never introduced them at trial or presented a formal psychiatric defense.

> "And you know, yes, the strategy was born in the blind without those [records], but I felt that number one, if I have the records, I got to turn them over. Number two, I don't gain anything by having those records. The fact that he was—his history is what it was should have been good enough."

In an attempt to explain his late filed CPL 250.10 motion, trial counsel stated that he initially declined to file a CPL 250.10 application because he believed at the time that no such application was required where an attorney seeks to present psychiatric evidence through a layperson. Concerned that he might have made an error, he decided to submit a late motion.

Supreme Court denied the motion to vacate, holding that trial counsel pursued a legitimate trial strategy, despite the seemingly insurmountable obstacles posed by defendant.

*346 E. Appellate Division Decision

On appeal, the Appellate Division reversed the denial of the motion to vacate and remanded the matter for a new trial.[5] The majority held that trial counsels failure to obtain and review the psychiatric records deprived defendant of meaningful representation under federal and state law. As relevant here, the majority determined that trial counsel misapprehended the law pertaining to criminal discovery, and further held that his failure to review the relevant records could not be deemed a reasonable trial strategy. The dissent argued that trial counsel's conduct was not so egregious and prejudicial as to deprive defendant of the right to a fair trial because trial counsel's decision not to obtain the psychiatric records was a reasonable and legitimate trial strategy. The People appeal to this Court by permission of a dissenting Justice of the Appellate Division.

5 Based on its ruling on the motion to vacate, the Appellate Division dismissed, as academic, defendant's appeal from the judgment of conviction and sentence.

II. Analysis

[1] The right to effective assistance of counsel in a criminal matter is guaranteed by the Federal and State Constitutions (*see* U.S. Const. 6th Amend.; N.Y. Const., art. I, § 6). In determining whether a defendant has been deprived of effective assistance, a court must examine whether "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v. Baldi*, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]).

[2] [3] Essential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case (*see Strickland v. Washington*, 466 U.S. 668, 690–691, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]). An attorney's strategy is shaped in significant part by the results of the investigation

stage of the representation. Thus, "[a] **1246 defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial" (*People v. Bennett,* 29 N.Y.2d 462, 466, 329 N.Y.S.2d 801, 280 N.E.2d 637 [1972] [internal ***226 quotation marks omitted]; *see also People v. Droz,* 39 N.Y.2d 457, 462, 384 N.Y.S.2d 404, 348 N.E.2d 880 [1976] ["it is elementary that the right *347 to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense"]). [6]

6 The American Bar Association has set forth standards articulating this duty to investigate:

> "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty" (American Bar Association, ABA Standards for Criminal Justice, Prosecution Function and Defense Function, standard 4–4.1 at 181 [3d ed. 1993], available at http://www.americanbar. org/content/dam/aba/publications/criminal_justice_standards/prosecution_ defense_function.authcheckdam.pdf [accessed May 21, 2013]).

[4] The People argue that trial counsel made a reasonable choice not to use defendant's psychiatric records even though trial counsel had elected to portray defendant as a person with mental problems that made him vulnerable to police interrogation tactics. The People further assert that trial counsel strategically chose not to obtain the documents in order to prevent the People from obtaining certain information concerning defendant's purportedly violent tendencies. More specifically, the People claim that trial counsel's approach to the case was based on his assessment of the options available to him after defendant had precluded him from presenting a psychiatric defense. Under these circumstances, the People argue, trial counsel made a proper choice to introduce critical aspects of defendant's mental state through the mother rather than the records.

The record reveals that trial counsel sought to build a defense based on defendant's mental weakness undermining the voluntariness of his admissions of guilt. Despite the focus on defendant's mental abilities, trial counsel chose to forgo any investigation of the critical documents concerning defendant's mental condition, and instead, sought to present this defense through the testimony of defendant's mother, an obviously biased witness. Regardless of whether the decision to present defendant's condition through his mother's testimony was a valid strategy, it was, as trial counsel admitted at the post-conviction hearing, a "strategy" "born in the blind"—one he admittedly pursued without benefit of the contents of defendant's records.

*348 This is not simply a case of a failed trial strategy (*see Baldi,* 54 N.Y.2d at 146, 444 N.Y.S.2d 893, 429 N.E.2d 400 ["trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness"]). Rather, this is a case of a lawyer's failure to pursue the minimal investigation required under the circumstances. Given that the People's case rested almost entirely on defendant's inculpatory statements, trial counsel's ability to undermine **1247 the voluntariness of those statements was crucial. The strategy to present defendant's mental capacity and susceptibility to police interrogation could only be fully developed after counsel's investigation of the facts and law, which required review of records that would reveal and explain defendant's mental illness history, and defendant's diagnosis supporting his receipt of federal Supplemental Security Income benefits.

***227 The People's argument that the contested records would not have helped the defense, regardless of trial counsel's choices, misconstrues the central issue in this case. The issue is not whether trial counsel's choice to have certain documents excluded from the record constitutes a legitimate trial strategy, but whether the failure to secure and review crucial documents, that would have undeniably provided valuable information to assist counsel in developing a strategy during the pretrial investigation phase of a criminal case, constitutes meaningful representation as a matter of law. The utter failure to obtain these documents constituted denial of effective assistance.

Trial counsel did not fully investigate the case and did not collect the type of information that a lawyer would need in order to determine the best course of action for his or her client. It simply cannot be said that a total failure to investigate the facts of a case, or review pertinent records, constitutes a trial strategy resulting in meaningful

representation. There is simply no legitimate explanation for this purported strategy (*see generally People v. Benevento*, 91 N.Y.2d 708, 712, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]; *see also People v. Caban*, 5 N.Y.3d 143, 152, 800 N.Y.S.2d 70, 833 N.E.2d 213 [2005]; *People v. Rivera*, 71 N.Y.2d 705, 709, 530 N.Y.S.2d 52, 525 N.E.2d 698 [1988]). At a bare minimum, trial counsel should have obtained and reviewed the relevant records, and, after considering the pertinent information contained in the records, considered the contents of those records and pursued a strategy informed by both the available evidence and defendant's concerns. This failure seriously compromised defendant's right to a fair trial (*see generally People v. Hobot*, 84 N.Y.2d 1021, 1022, 622 N.Y.S.2d 675, 646 N.E.2d 1102 [1995]). Based on the foregoing, the order of the Appellate Division should be affirmed.

SMITH, J., (dissenting).

***349** I agree with the majority that counsel's performance was deficient, in that he should have subpoenaed defendant's psychiatric records, and examined them, before trial. As it turns out, however, if the records had been available they would have been worse than useless to defendant —they would have hurt his case. Since a claim of ineffective assistance requires not only a showing of deficient performance, but also a showing that counsel's errors prejudiced defendant's right to a fair trial (*People v. Stultz*, 2 N.Y.3d 277, 283–284, 778 N.Y.S.2d 431, 810 N.E.2d 883 [2004]; *People v. Benevento*, 91 N.Y.2d 708, 713–714, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]), I conclude that ineffectiveness has not been established.

As the majority opinion explains, the case against defendant rested heavily on his confession, and the essence of his defense at trial was that the confession was false. This was not a hopeless defense. The confession was short on detail and some of the details, as the majority opinion points out, were incorrect (*see* majority op. at 342 n. 3, 971 N.Y.S.2d at 222 n. 3, 993 N.E.2d at 1242 n. 3), Defense counsel ****1248** sought to bolster his attack on the confession by showing that defendant was a mentally limited and disturbed man, vulnerable to manipulation by the police who interrogated him. To this end, counsel elicited the following testimony from defendant's mother:

"Q And was he in any particular educational program during his schooling?

"A Yes.

"Q What was that?

"A Special Education....

"Q How far did he get in school?

"A Eight.

*****228** "Q And where did he go or what did he do after eighth grade?

"A After eighth grade he was in a hospital for five months.

"Q And do you know the name of the hospital?

"A The Bronx Children's Psychiatric Center.

"Q And between the time that he got out of that particular hospital until the time of his arrest, did George have a work history?

***350** "A No.

"Q How did he support himself?

"A SSI.

"Q Is that Social Security Disability?

"A Yes."

The gist of defendant's argument here is that, because of his counsel's failings, he did not have more and better evidence than this—specifically, he did not have the records of his psychiatric history. In theory, those records could have shown, or provided an expert with a basis for opining, that he was, for example, submissive to authority, or easily misled and confused, or perhaps even that he had a history of admitting to things he did not do. Counsel certainly should have subpoenaed the records, looked for such evidence and preserved his right to offer it at trial, and I offer no excuse for his failure to do so.

But the records of defendant's stay when he was 15 years old at the Bronx Children's Psychiatric Center, which were finally obtained by successor counsel and presented on a motion pursuant to CPL article 440 to vacate the judgment of conviction, do not say what defense counsel would have wanted them to say. They do show that he had learning difficulties (as the jury, knowing that he had been in special education and that his schooling ended in eighth grade, presumably inferred) and that his IQ was low. An expert

retained by defendant for his posttrial motion prepared a report dwelling on these facts, and others that the expert thought might predispose defendant to making a false confession.

The records also contained, however, facts that the defense expert understandably did not dwell on. They showed that defendant's psychiatric problems included violent—indeed, homicidal—impulses and fantasies. A doctor who interviewed him found a "strong streak of paranoia," and added:

> "He feels that people were against him at school and didn't treat him with the respect that he deserved and therefore he had to carry a gun and act very tough in order to demand respect. He says that he wouldn't hesitate to beat people up in order to get the respect he deserves."

Later in the same examination, the doctor noted: "What he would like to do in the **1249 future is to join the army and travel *351 around the world and kill people. He says that would be quite enjoyable and exciting." Eight days later, the doctor assessed the adolescent defendant by saying: " George's weak superego certainly will allow him to kill somebody with no remorse if he felt appropriately aggrieved."

It hardly seems necessary to argue that these psychiatric records would not have improved defendant's chances of acquittal. Indeed, his counsel, though perhaps more through luck than skill, achieved what seems the best of all possible worlds from his point of view: the jury knew that defendant had psychiatric problems requiring hospitalization, but never found out what those problems were. As it happens, the jury convicted defendant anyway, but it is hard to imagine a trial that gave him a better chance of acquittal.

***229 In arguing that he was indeed prejudiced by his counsel's failure to obtain and offer psychiatric evidence, defendant suggests that he would have been allowed to offer at trial the favorable parts of the records, and exclude all reference to the unfavorable parts. I think that highly unlikely; such a trial would not have been the fair one to which defendant was entitled, but one decidedly unfair to the People. I do not recommend to the counsel who represents defendant on his retrial the strategy of relying on part of the psychiatric records, in the hope that the jury will never find out about the rest. To pursue that strategy would be to invite an ineffective assistance claim much better, in my judgment, than the one the Court upholds today.

Chief Judge LIPPMAN and Judges GRAFFEO, READ and PIGOTT concur with Judge RIVERA; Judge SMITH dissents in an opinion; Judge ABDUS-SALAAM taking no part.
Order affirmed.

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19 N.Y.3d 147
Court of Appeals of New York.

The PEOPLE of the State of New York, Respondent,
v.
Khemwattie BEDESSIE, Appellant.

March 29, 2012.

Synopsis

Background: Defendant was convicted in the Supreme Court, Queens County, Michael B. Aloise, J., of first degree rape, first degree sexual abuse, and endangering welfare of child, and she appealed. The Supreme Court, Appellate Division, Second Department, 78 A.D.3d 960, 911 N.Y.S.2d 453, affirmed. Defendant was granted leave to appeal.

Holdings: On a matter of first impression, the Court of Appeals, Read, J., held that:

[1] trial judge did not abuse his discretion in excluding proffered expert testimony on issue of reliability of defendant's confession, but

[2] in a proper case expert testimony on the phenomenon of false confessions should be admitted.

Affirmed.

Jones, J., filed a dissenting opinion.

West Headnotes (3)

[1] **Criminal Law**
Credibility, Veracity, or Competency

Expert's testimony proffered on issue of reliability of defendant's confession was not relevant to defendant and interrogation before the court, and therefore trial judge did not abuse his discretion when he excluded the proposed testimony in defendant's prosecution for rape, sexual abuse, and endangering welfare of child, even assuming the confession was not corroborated; expert's report was slightly over seven pages long, and represented at the outset that expert's proposed testimony would involve three elements, namely, presentation of information on the topic of police interrogation and tactics that could result in unreliable statements, information on the phenomenon of false confession, and analysis of defendant's confession, but the body of the report was filled with discussion of extraneous matters, speculation, and conclusions based on facts unsupported even by defendant's version of her interrogation.

1 Cases that cite this headnote

[2] **Criminal Law**
Matters Directly in Issue; Ultimate Issues

An expert's testimony, by its very nature, always to some degree invades the jury's province, and so this circumstance alone is not an adequate basis for rejecting expert testimony.

Cases that cite this headnote

[3] **Criminal Law**
Credibility, Veracity, or Competency

False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system, and experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions; while the expert may not testify as to whether a particular defendant's confession was or was not reliable, the expert's proffer must be relevant to the defendant and interrogation before the court.

3 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

***149 OPINION OF THE COURT**

READ, J.

****380** In this appeal, we are asked for the first time to consider the admissibility of expert ****381** *****358** testimony proffered on the issue of the reliability of a confession. While in a proper case expert testimony on the phenomenon of false confessions should be admitted, the expert here did not propose testimony relevant to this defendant or her interrogation. As a result, the trial judge did not abuse his discretion when he declined to hold a *Frye* hearing to assess whether any principles about which the expert proposed to testify were generally accepted in the scientific community, or to permit the expert to testify.

I.

Defendant Khemwattie Bedessie, who worked as a teacher's assistant at Veda's Learning World in Queens, New York, is alleged to have sexually abused a four-year-old boy left in her ***150** care. In particular, she is accused of pressing the boy's hand to her partially exposed breast, and touching his penis on three separate occasions between January 2 and February 11, 2006. During the last of these sexual encounters, defendant is also alleged to have placed the boy's penis against and into her vagina. Suspicion that defendant had sexually abused the boy first surfaced on February 19, 2006, a Sunday. The boy, who was recovering from a virus, had developed a rash in his rectal area. After his mother finished bathing him that evening, he repeatedly complained of itching, causing his mother to ask him if anyone had touched him in his "private areas." The mother had asked her son this question before, and he had always replied "[n]o mommy." But this time, the boy answered "yes," that "Miss Anita," his name for defendant (along with "teacher"), "went up and down, up and down on his pee-pee." He asked his mother not to tell anyone, though, because "teacher" wanted him to keep this secret.

The mother sought medical attention for her son the next day. When she arrived at the hospital emergency room (the medical practice where she usually took him was closed for the President's Day holiday), she pulled the nurse aside and related what her son had revealed to her the night before. When examining the boy, the nurse asked him what happened at school. He said that Miss Anita had touched her "pishy" to his "pishy." The mother explained that "pishy" was her four year old's word for penis. The nurse asked the boy how Miss Anita had touched him, and he moved his hand around his penis in a circular fashion. The nurse notified the attending physician, who also examined the boy, and contacted the hospital's social worker. Hospital personnel got ahold of the police, who escorted the mother and the boy to the Queens Child Advocacy Center, where the boy underwent another medical examination. There they also met with Detective Ivan Bourbon. A 20–year police force veteran, Detective Bourbon was at the time working in the Queens Child Abuse Squad, which deals with allegations of physical and sexual abuse, neglect and assaults against children under 11 years of age.

Detective Bourbon was assigned to investigate this matter; he started out by gathering background information on the day care facility's owner and employees, generally by conducting various computerized searches. He visited the facility for the first time at night on February 21 or 22 (he was working the ***151** night shift that week), just to observe the building. Detective Bourbon returned at midday on February 27, 2006, accompanied by two other detectives. He knocked on the door, identified himself to the lady who answered and asked to be shown around. He saw a room where he estimated that 9 to 10 children were sleeping or resting on cots; he also noticed three bathrooms on ****382** *****359** the first floor—one for boys, one for girls and one for staff. While Detective Bourbon was chatting with the lady who was giving him a tour, defendant walked in and was introduced to him as "Anita."

Then on March 1, 2006, Detective Bourbon and the two other detectives visited the day care facility again, arriving at about 10:00 A.M. This time he asked defendant to accompany him to the Queens Child Advocacy Center for an interview. She agreed. Once there, Detective Bourbon took her to the interview room, a small room with a desk, chairs and a two-way mirror. He immediately read defendant her *Miranda* rights, and she signed a *Miranda* form. Detective Bourbon then told defendant that the boy had made an allegation and "that it was very important[,] that we are here to find out the truth and find out what happened there. I know what happened, now I need to hear from your side." As he later testified at trial, Detective Bourbon did not, in fact, then have any idea what might have transpired between the boy and defendant beyond the boy's bare-bones allegation. He

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also later testified that he did not raise his voice, promise defendant leniency or discuss punishment at all.

According to Detective Bourbon, defendant "looked at [him] in the eyes and she looked very nervous and ... got to slowly explain how this boy ... was very different" from the other children at the day care facility—that he "would come to [her and] use his hands to touch her breasts," which led to an incident that occurred around noon time in early January, and then another in late January, early in the morning. Both times, she and the boy were in the bathroom. Defendant stated that she held the boy's penis, "jerking him" while his pants were down, as she "play[ed] with herself[,] using her fingers." Defendant then described a third encounter on a Monday morning in February. This time she dropped her pants, sat on the toilet in the teacher's bathroom, and jerked the boy's penis with one hand while she brought him forward into her vagina and pushed him in and out of her until he "start[ed] doing it himself ... almost as if he had done this before." The interview began at about 10:30 A.M. and lasted over an hour.

***152** When defendant finished, Detective Bourbon asked her if she would sit down with him and someone from the District Attorney's Office to recount on video what she had just told him. She agreed, and he contacted the Queens District Attorney's Office at roughly 11:45 A.M. The detective commented that defendant, "in the early stages" of his interview with her, expressed some relief at "getting this off her chest" and "telling the truth," saying that she herself had difficulty understanding "what she had done to this child." Defendant then gave a videotaped statement in which she described the three episodes of sexual abuse in considerably greater detail. The videotaped statement began at 12:53 P.M. and ended at 1:20 P.M.

Defendant was arrested after she made her oral confession. She was subsequently indicted for first-degree rape (Penal Law § 130.35[3] [engaging in sexual intercourse with a child under 11 years old]) (one count); first-degree sexual abuse (Penal Law § 130.65[3] [subjecting a child under 11 years old to sexual contact]) (six counts); and endangering the welfare of a child (Penal Law § 260.10[1] [knowingly acting in a manner likely to be injurious to the physical, moral or mental welfare of a child under 17 years old]) (one count). Defense counsel moved to suppress the oral and videotaped statements as involuntary. At the end of the *Huntley* hearing on January 19, 2007, at which Detective ****383 ***360** Bourbon testified, Supreme Court denied the motion.

On May 29, 2007, the day before the trial was scheduled to begin, defense counsel made an application to the judge for permission to introduce the testimony of Dr. Richard J. Ofshe, an expert in the field of false confessions, on "issues such as the social science research that indicates that false confessions do exist and research regarding the correlation between the use of certain police interrogation techniques and proven false confessions." Defense counsel informed the judge that if he granted the application, the defense would need an adjournment until after June 19, 2007, when Dr. Ofshe was scheduled to return from two months in Europe.

Reasoning by analogy to our decision in *People v. LeGrand,* 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 374 (2007), which dealt with expert testimony on eyewitness identification, defense counsel argued that the judge should at a minimum hold a *Frye* hearing on the admissibility of Dr. Ofshe's proffered testimony, and urged that defendant "need[ed] an expert on this vital issue" of false confessions in order to "mount a meaningful defense." His application included Dr. Ofshe's curriculum vitae and a report dated May 18, 2007. The ***153** report indicated that Dr. Ofshe had interviewed defendant on March 11, 2007.

Before beginning jury selection, Supreme Court denied defense counsel's application. The judge stated that he had read the cases and memorandum submitted by counsel, and that it appeared that all or most of the decisions considered expert testimony on eyewitness identification. He commented that he was "not inclined to draw a parallel with respect to expert testimony of false confessions ... [and] accuracy of identification testimony," stating as follows:

> "I don't see in any way, shape or form how an expert can assist ... juror[s] in their ability to draw conclusions from the evidence in a case by case basis [as to] whether or not a confession was falsely given. In this court's opinion jurors are completely and utterly competent to draw from their own life experiences, from their every day experiences whether or not a statement is in fact voluntary and knowingly given."

The judge further noted that, unlike the situation in "the identification cases," there was corroboration here if the jury believed the child.

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During jury selection, defense counsel asked prospective jurors if they accepted the notion that "there are instances where there could be a false confession," and could "embrace that principle in the right circumstance even though there [was] not necessarily evidence of physical torture or abuse." Only one individual out of two panels of 14 prospective jurors voiced difficulty with this idea, saying that he considered it "pretty unusual that you'd get a false confession without some kind of extraordinary ... torture tactic or some kind of crazy tactic." The judge granted defense counsel's for-cause challenge to this prospective juror.

The People called as witnesses the boy, his mother, the nurse who examined the boy at the emergency room and the doctor who examined him at the Queens Child Advocacy Center. This physician, a pediatrician and the Center's director, testified, among other things, that a four-year-old male could achieve an erection. Detective Bourbon took the stand, testifying as described earlier, and the jury was shown defendant's videotaped statement.

During the detective's testimony, defense counsel again brought up the subject of an expert on false confessions. ***154** Supreme Court reiterated that a *Frye* ****384 ***361** hearing was not necessary because even if such evidence was scientifically valid, it might not be relevant in a particular case. He added that such expert testimony was not

> "appropriate in this particular case and the Courts have held, in my opinion, in my research, that such testimony usurps comments to the jury.
>
> "You do it in a case where there is little or no corroboration. In this particular case, this Court deemed, based upon the representation of the district attorney as to what the [child] was going to testify to, that there was ample corroboration, if believed, to support ... the confession."

Defendant presented two character witnesses. She also called the sister of the day care facility's owner. This witness, a certified preschool teacher who helped her sister out three or four days a week in early 2006, described the facility's physical layout and the procedures followed, including that employees were instructed never to enter the children's bathroom and close the door, or take children into the staff bathroom; that the children used the cots only during their nap time from 12:30 to 2:30; and that noise coming from the bathrooms could be heard in the classroom. Dr. David Mantell, a forensic psychologist, testified about the proper technique for interviewing young children when investigating sexual abuse allegations. He opined that the mother's practice of randomly and frequently asking her son whether anyone had touched him inappropriately had a "suggestive quality" to it and alerted the child to a particular area of parental concern; and that young children, who are especially susceptible to suggestion, have difficulty keeping track of whether they know something because it actually happened, or because someone important in their lives told them about it.

Defendant testified on her own behalf. She denied having sexual intercourse with the boy, denied that she placed his hand on her breast and denied that she touched his penis. Defendant said she accompanied Detective Bourbon to what he called his office at the behest of the day care facility's owner, leaving at about 9:00 A.M. Upon arrival at their destination, the detective took her to a small room, placed a tape recorder on the table in the room and asked defendant if she knew why she was there. When she responded that she did not, he accused her of raping the boy, whose name he had written on a piece of paper that he ***155** showed to her. Defendant testified that she asserted "[Y]ou can't accuse me like that." She also said that the detective claimed that he had a recording of her voice on the tape recorder "sexing" with the boy. Defendant challenged the detective "to play it and let [her] hear because [she] never done nothin' to no kids."

Detective Bourbon did not play the tape, but instead next confronted defendant with two options: to tell the truth and go home, or to go to Rikers Island jail, where she would be beaten. Defendant testified that she then "started to get scared" because she had never before experienced a "police problem." At that point, she acquiesced, telling the detective she would "do anything" for him if he would let her go home to her sickly mother.

According to defendant, Detective Bourbon then began quizzing her about what she wore and how she sat when reading books to the children; he said "promise me that this is going to [be] between me and you; accept everything that I will tell you and you [are] going to go home because your brother is outside." She later learned her brother was not outside, but she had no way of knowing it at the time because she could not "see anybody because ****385 ***362** [she] was in the room." Defendant assured the detective that she would do anything he wanted as long as he sent her home. When he then wrote something on a piece of paper and directed her to sign it, she did so without reading what she was signing.

Defendant denied that anything she said during her videotaped confession was true, asserting that she "said all those things on tape" only because Detective Bourbon gave his word that he would let her go home to her mother if she did; and that she sincerely believed that if she admitted to the acts described in the videotape, the detective would let her leave because that was what he promised. Defendant claimed that she did not know the meaning of some of the words that Detective Bourbon coached her to say—including orgasm and climax—and that he told her to put her hands between her legs, to describe how a woman feels after sex and to describe the difference between how she felt having sex with an adult as opposed to a child. Defendant said that Detective Bourbon did not put her in handcuffs or restrain her before she made the statement. Nor did he threaten or hit her.

The jury convicted defendant on all counts. On July 31, 2007, Supreme Court sentenced her to determinate prison terms of 20 ***156** years plus five years of postrelease supervision on the first-degree rape conviction, to run concurrently with determinate prison terms of five years plus three years of post-release supervision on the sexual abuse convictions, and a definite term of one year on the child endangerment conviction. Defendant appealed.

In a decision dated November 16, 2010, the Appellate Division unanimously affirmed (78 A.D.3d 960, 911 N.Y.S.2d 453 [2d Dept.2010]). The court rejected all of defendant's claims of error, concluding, in particular, that "in the context of this case, the Supreme Court providently exercised its discretion in precluding expert testimony on false confessions generally and as to the defendant's particular susceptibility to make a false confession under police interrogation" (*id.* at 960, 911 N.Y.S.2d 453). A Judge of this Court granted defendant leave to appeal (16 N.Y.3d 828, 921 N.Y.S.2d 192, 946 N.E.2d 180 [2011]), and we now affirm.

II.

That the phenomenon of false confessions is genuine has moved from the realm of startling hypothesis into that of common knowledge, if not conventional wisdom. After all, here there were two panels of prospective jurors, and during voir dire only one individual out of 28 questioned the proposition that an innocent person might confess to a crime he did not commit, even in the absence of physical coercion. This does not put off limits in every case, however, expert evidence on those factors that the scientific community has determined may contribute to a false confession.

Our decision in *People v. Lee,* 96 N.Y.2d 157, 726 N.Y.S.2d 361, 750 N.E.2d 63 (2001) is instructive. Although *Lee* addressed expert evidence on the reliability of eyewitness identification, we there laid out broad principles governing the admissibility of expert psychological testimony; namely, "the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court," which should be guided by "whether the proffered expert testimony would aid a lay jury in reaching a verdict"; "courts should be wary not to exclude such testimony merely because, to some degree, it invades the jury's province"; "[d]espite the fact that jurors may be familiar from their own experience with factors relevant to the reliability" of the evidence at issue, "it cannot ****386** *****363** be said that psychological studies" bearing on reliability "are within the ken of the typical juror"; and since the expert testimony "may involve novel scientific theories and techniques, a trial court ***157** may need to determine whether the proffered expert testimony is generally accepted by the relevant scientific community" (*id.* at 162, 726 N.Y.S.2d 361, 750 N.E.2d 63 [internal quotation marks and citation omitted]).

[1] The judge in this case declined to hold a *Frye* hearing. He reasoned that this was unnecessary because Dr. Ofshe's expert testimony was not relevant and likely to assist the jurors in any way. He noted in particular that the jurors, based on their own life experiences, were competent to assess the reliability of defendant's confession, and, indeed, the expert's testimony threatened to usurp the jury's function. Second, he concluded that the child's testimony was likely to (and, in fact, did) corroborate defendant's confession.

[2] Of course, as we pointed out in *Lee,* an expert's testimony, by its very nature, always to "some degree ... invades the jury's province" (*id.*), and so this circumstance alone is not an adequate basis for rejecting expert testimony. As for corroboration of defendant's confession, the child's testimony substantiated both commission of the offenses charged, as is necessary whenever a defendant confesses (*see* CPL 60.50), and defendant's identity as his abuser. Defendant argued that this evidence was tainted by the suggestive, even though unintentional and well-meaning, influence of the mother, reinforced by the nurse and others who questioned the boy, who was of an age where suggestibility is a recognized risk. And certainly this is not a case where there was corroboration by verifiable evidence supplied in a defendant's

confession itself and previously unknown to the police. Defendant furnished most of the details of the crimes with which she was charged, but there was no way to validate her narration—recanted at trial—although it was consistent with the nature and timing of the boy's allegation of sexual abuse. Whether or not his allegation alone was sufficient reason for the judge to deny defendant's application, Dr. Ofshe's proffer had nothing to say that was relevant to the circumstances of this case. The judge therefore did not abuse his discretion when he determined that Dr. Ofshe's testimony would not assist the jury in evaluating the voluntariness and truthfulness of defendant's confession or reaching a verdict.

Dr. Ofshe's report was slightly over seven pages long. He represented at the outset that his proposed testimony would "involve three elements: presentation of information on the topic of police interrogation and tactics that can result in unreliable statements, information on the phenomenon of false confession and an analysis of Ms. Bedessie's interrogation." But the ***158** body of his report was filled with discussion of extraneous matters, speculation and conclusions based on facts unsupported even by defendant's version of her interrogation. For example, Dr. Ofshe discussed at some length the "rash of day-care sexual abuse cases based on false accusations elicited from pre-school children," the suggestibility of very young children and the caution that must be exercised when "de-briefing" them. As noted earlier, defendant's theory of the case was that the mother unwittingly created an illusion of sexual abuse in her son's memory, which medical and law enforcement personnel bolstered by sloppy questioning. In other words, nothing improper happened to the boy, although he and his cadre of supporters may have sincerely thought otherwise. But this has nothing to do with ****387** *****364** any factors or circumstances correlated by psychologists with false confessions. In any event, defendant could—and did—fully explore her theory through cross-examination and the direct testimony of another expert, Dr. Mantell.

Dr. Ofshe also criticized at length Detective Bourbon's failure to videotape his interview with defendant and any discussions that took place between her oral and videotaped confessions, a period of slightly more than one hour in Detective Bourbon's telling; slightly more than two hours in defendant's. While electronic recording of interrogations should facilitate the discovery of false confessions and is becoming standard police practice, the neglect to record is not a factor or circumstance that might induce a false confession. Dr. Ofshe talked in his report about videotaping as a means to identify what is called "contamination"—inadvertent or deliberate police disclosure of nonpublic crime facts to the suspect during interrogation, which then seep into the suspect's confession and so make it seem more credible (*see Warney v. State of New York,* 16 N.Y.3d 428, 922 N.Y.S.2d 865, 947 N.E.2d 639 [2011]). To this point, he asks "Were [the particular facts that came into the videotaped statement] volunteered by the suspect or deliberately or inadvertently revealed by the interrogator?" But contamination was never relevant in this case. All that Detective Bourbon knew at the time of the interview was that the boy had made an allegation that defendant sexually abused him by genital sexual contact.

Dr. Ofshe suggested that Detective Bourbon may have neglected to record the interrogation so that he could surreptitiously overbear defendant's will and then school her as to what to say in her videotaped confession; specifically, the detective's

> "failure to record ... deprives anyone seeking to evaluate the truthfulness of [defendant's] confession ***159** of the evidence that would allow for this determination based on fact rather th[a]n prejudice. It would have been possible to evaluate whether she introduced the wealth of apparently corroborative information contained in the recorded statement, whether those parts of the recorded statement she introduced (if she is the source of any of it) were likely to be nothing more than inventions, and how much, if any, of the factual description of the sexual assaults contained in the confession was first provided by [Detective Bourbon] and then merely parroted by [defendant]."

This is argument and speculation, not a topic on which expert evidence might aid the jury in determining the reliability of defendant's confession.

Research in the area of false confessions purports to show that certain types of defendants are more likely to be coerced into giving a false confession—e.g., individuals who are highly compliant or intellectually impaired or suffer from a diagnosable psychiatric disorder, or who are for some other reason psychologically or mentally fragile (*see* Chojnacki, Cicchini and White, *An Empirical Basis for the Admission of*

Expert Testimony on False Confessions, 40 Ariz. St. L.J. 1, 15–17 [2008] [discussing "dispositional factors" associated with false confessions]). Dr. Ofshe did not proffer testimony that defendant exhibited any of the personality traits that research studies have linked to false confessions. And in fact, defendant, although not well-educated, appeared at trial to be an adult of normal intelligence. She displayed no sign of any of the mental factors associated by psychiatrists or psychologists with individuals more likely to confess to crimes they did not commit.

***365 **388** Research also purports to identify certain conditions or characteristics of an interrogation which might induce someone to confess falsely to a crime (*id.* at 17–18 [discussing "situational factors" associated with false confessions]). Dr. Ofshe offered to "apply the published analysis of interrogation to the specifics" of defendant's "deeply troubling" account of what happened to her. But his descriptions of the allegations on which he purported to base his expert opinion were general or vague and not, in fact, linked to any published analysis. First, he stated that defendant "report[ed] being tricked into accompanying ***160** Detective [Bourbon] into his car and then being transported to a police facility." But he never explained how she claimed to have been "tricked." Defendant did not claim deception when she later testified at trial. As noted earlier, there she said that she left the day care center with Detective Bourbon at her employer's direction.

Dr. Ofshe also stated that defendant told him that Detective Bourbon "very strongly" accused her of sexually abusing the child in an aggressive and threatening manner, demeaned her by using vulgar language and was "punishing" in other unspecified ways. Dr. Ofshe did not say what these generalizations about Detective Bourbon's alleged behavior have to do with false confessions, based on published analyses of interrogations. And in her trial testimony, defendant did not portray Detective Bourbon as acting aggressively toward her during the interview. She claimed only that when he used the word "rape," she immediately denied the accusation; and when he told her that he had a tape recording of her sexual encounter with the boy, she called his bluff by inviting him to play it for her, and he backed down.

As a final example, Dr. Ofshe commented that

> "[i]n an interrogation such as [defendant's] in which the investigator relies on evidence ploys (claims that overwhelming evidence links the suspect to the crime) to base his a[s]sertion that the suspect's position is hopeless and therefore the suspect will be arrested, tried and convicted, introducing the treatment alternative strategy is likely to be very influential."

He defines the "treatment alternative strategy" as offering a suspect a choice "between two alternatives ... clearly linked to very different results." In this case, he stated that Detective Bourbon "promised" defendant that "confession would result in nothing more than ... being required to undergo counseling which ... would happen in the building where she was being interrogated," but that if she "continued to deny guilt she would be sent to Rikers Island where she would be brutalized by the other inmates because she was a child abuser."

In the first place, Dr. Ofshe does not say that defendant ever informed him that Detective Bourbon made claims that there was "overwhelming evidence [linking her] to the crime"; he did not identify any published studies to support the proposition ***161** that the "treatment alternative strategy" is generally accepted within the relevant scientific community as a situational factor associated with false confessions. And again, at trial defendant did not testify that she was offered treatment. She claimed that Detective Bourbon assured her there would be no repercussions if she confessed.

[3] False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system. And there is no doubt that experts in such disciplines **389 ***366** as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions. While the expert may not testify as to whether a particular defendant's confession was or was not reliable, the expert's proffer must be relevant to the defendant and interrogation before the court. Dr. Ofshe's proffer does not meet this standard, and therefore the trial judge did not abuse his discretion when he excluded the proposed testimony, even assuming that the confession was not corroborated.

We have considered defendant's other arguments and find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed.

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JONES, J. (dissenting).

Mere acceptance that false confessions exist does not aid a jury in assessing the reliability of a thinly corroborated, recanted confession. Where, as here, there is little to no corroborating evidence connecting defendant to the commission of the crimes charged, a jury will benefit from the testimony of an expert explaining factors relevant to the reliability of a confession. Because I conclude, consistent with *People v. LeGrand,* 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 374 (2007), that the court abused its discretion by excluding defendant's expert testimony, I respectfully dissent.

New York does not allow a defendant to "be convicted of any offense solely upon evidence of a confession" (CPL 60.50). Section 60.50 requires "additional proof that the offense charged has been committed." Similarly, a "defendant may not be convicted of an offense solely upon unsworn evidence" given by a young child (CPL 60.20[3]). Here, the evidence that led to defendant's conviction consists of her confession and the unsworn ***162** statements, both in court and out of court, of a young child. [1] In these circumstances, a *Frye* hearing to consider the admissibility of expert testimony on the reliability of the confession, at the very least, should have been conducted. Moreover, it would be error to exclude such testimony, assuming it satisfied the relevant prongs enunciated in *LeGrand* (a case where, upon reviewing the *Frye* hearing, this Court concluded that the expert established at the hearing that his conclusions were generally accepted, and thus the testimony was error to exclude). Undoubtedly, relevant testimony of an expert on the reliability of confessions according to scientifically accepted principles, as well as Criminal Procedure Law §§ 60.20 and 60.50, seeks to prevent a taint of the criminal justice system —wrongful convictions.

1 Concerning the charges of sexual abuse and rape, the child testified that defendant "squeezed [his] penis." When asked what did defendant do to him after defendant took her pants off, the child responded, "She just squeezed my pee-pee." The child's mother testified that he told her that defendant "went up and down, up and down on his pee-pee." Lastly, the medical evaluation written by the Child Advocacy Center indicated that the child told his mother that defendant had sexually abused him and "reported that [defendant] put his 'peepee in her weewee.' "

In *LeGrand,*

> "we h[e]ld that where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are ****390** ***367** generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror" (*id.* at 452, 835 N.Y.S.2d 523, 867 N.E.2d 374).

A similar rule should be extended to the phenomenon of false confessions. Where, aside from the confession, there is little or no evidence connecting the defendant to the charged crime, to exclude expert testimony on the reliability of the defendant's disavowed confession would be an abuse of a trial court's discretion "if that testimony is ... ([1]) based on principles that are generally accepted within the relevant scientific community, ([2]) proffered by a qualified expert and ([3]) on a topic beyond the ken of the average juror" (*id.*).

***163** The majority observes that the trial judge concluded that a *Frye* hearing was unnecessary because the "expert testimony was not relevant and likely to assist the jurors" (majority op. at 157, 947 N.Y.S.2d at 363, 970 N.E.2d at 386). More specifically, the court noted that (1) "the jurors, based on their own life experiences, were competent to assess the reliability of defendant's confession, and, indeed, the expert's testimony threatened to usurp the jury's function [and (2)] ... that the child's testimony was likely to ... corroborate defendant's confession" (*id.* at 157, 947 N.Y.S.2d at 363, 970 N.E.2d at 386). Although the majority does not accept all of the judge's observations, it nonetheless concludes, that such determination was not an abuse of discretion. I maintain, however, without a *Frye* hearing on the issue of whether the proposed testimony contained information generally accepted by the scientific community, such conclusion is not possible.

The majority questions the sufficiency of the proffer, curiously concluding that it was not "relevant to the defendant and interrogation before the court" (majority op. at 161, 947 N.Y.S.2d at 366, 970 N.E.2d at 389). Here, the proffer was made by a highly qualified individual as demonstrated by his curriculum vitae, who had previously testified in numerous cases where defendants raised the reliability of a confession as an issue. The proffer involved research concerning incidents that lead to false confessions and the tactics in

this case that may have compromised the reliability of the confession. Additionally, Dr. Ofshe specifically applied his research to defendant's interrogation and "formal" videotaped confession.[2] ***164** Such a proffer, ****391 ***368** which was indeed relevant to this specific case, is sufficient to warrant a *Frye* hearing on whether such information is generally accepted.

2 Dr. Ofshe described "the *pre-admission* phase of the interrogation (that part of an interrogation in which a suspect is influenced to shift from denial to admission)" and "the *post-admission* phase (during which the confession statement is developed and memorialized)" and explained that a contemporaneous electronic recording would have allowed one to assess, in this case, "whether [defendant] complied with [the detective]'s demand for a confession due to psychological coercion or whether she voluntarily gave a confession presumably because she felt guilt about a crime she had committed." He also explained that such a recording is necessary in the instant case for the following reasons: (1) "Physical evidence or lack thereof"; (2) "The suggestibility of very young children" and (3) "The de-briefing of very young children" (by a parent, rather than a professional in the area of child sexual abuse cases). While Dr. Ofshe's report explained how to ensure the reliability of defendant's confessions, he further explained how specific tactics employed could have led to psychological coercion and, thus, the unreliability of the videotaped confession. Specifically, Dr. Ofshe stated:

> "The tactic that [defendant] describe[d] [detective] using is the psychologically coercive motivational strategy I most frequently find in use in improperly conducted sex[u]al abuse interrogations. I am familiar with this tactic because it has been repeatedly described to me by persons whose interrogations were not recorded and because I have observed it in use in fully recorded interrogations done by investigators who did not recognize how blatantly coercive it was and allowed themselves to be recorded. I've found this tactic in use in so many coercive sexual abuse interrogations that I've labeled it as 'the treatment alternative strategy.' "

Dr. Ofshe then detailed the coercive tactics in this case and how they affect the reliability of a confession.

Moreover, in light of *Warney v. State of New York,* 16 N.Y.3d 428, 922 N.Y.S.2d 865, 947 N.E.2d 639 (2011) [claimant was incarcerated for a murder he did not commit based upon his false confession], expert testimony in this area warrants close consideration. It may be that this issue is not only beyond the ken of an average juror but also beyond the ken of many jurists, as it was in the area of the accuracy of eyewitness identifications. Understandably, the concept that a person would voluntarily admit to a crime he or she did not commit is counterintuitive. As we have previously observed in *LeGrand,* a trial court is "obliged to exercise its discretion with regard to the relevance and scope of [the] expert testimony," despite the conclusion that an expert should have been admitted in that case (8 N.Y.3d at 459, 835 N.Y.S.2d 523, 867 N.E.2d 374). Thus, not only would have it been proper to conduct a *Frye* hearing, but also proper to admit such testimony and limit it to information that is accepted by the scientific community and is relevant to this particular case.

In sum, it is necessary to extend *LeGrand* to the area of false confessions. Given the unreliability of the corroborating evidence—unsworn testimony and hearsay—it was an abuse of the court's discretion to exclude expert testimony on the reliability of defendant's recanted confession if the proffered testimony is indeed supported by the scientific community. Certainly, it was an abuse of discretion to deny a *Frye* hearing given that the proffer appeared to sufficiently highlight the issues relevant to the reliability of a confession and the factors that may have undermined the reliability of defendant's confession in this case. Accordingly, I would reverse the Appellate Division order and order a new trial.

***165** Judges CIPARICK, GRAFFEO, SMITH and PIGOTT concur with Judge READ; Judge JONES dissents and votes to reverse in a separate opinion in which Chief Judge LIPPMAN concurs.
Order affirmed.

Parallel Citations

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