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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 159

JOSE ALFARO,

Appellant.

20 Eagle Street
Albany, New York 12207
September 5, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 159, People v.
2 Alfaro.

3 MS. HEEGER: Two minutes for rebuttal, Your
4 Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, go
6 ahead.

7 MS. HEEGER: May it please the court, my
8 name is Anastasia Heeger from the Office of the
9 Appellate Defender for the appellant, Jose Alfaro.

10 The admission of the toy gun and toy
11 handcuffs in this case was error. The items were not
12 probative of any legally relevant or material issues
13 in the case, and moreover, were extremely
14 prejudicial. Contrary to respondent's position,
15 these were not probative of intent or larcenous
16 intent.

17 CHIEF JUDGE LIPPMAN: Was intent conceded
18 here?

19 MS. HEEGER: Indeed, I think trial counsel
20 did. He said that - - -

21 JUDGE READ: Intent to steal was conceded?

22 MS. HEEGER: That - - - well, intent to, I
23 think, attempted robbery. The issue that was raised
24 at trial was it was unclear whether something had
25 actually been taken with the intent to keep it.

1 Because it was unclear, were these items sort of
2 taken and thrown out as they were looking for
3 something in Mr. Jin's pockets, or were the items
4 taken with the intention to keep - - -

5 JUDGE SMITH: But your point is they didn't
6 say they took his stuff - - - there was no suggestion
7 they took his stuff by accident?

8 MS. HEEGER: Absolutely not. No. And
9 defense counsel was quite clear. The threshold issue
10 here was identity. If you believed that Jose Alfaro
11 was one of the people who attacked Mr. Jin, then he
12 said there's more than enough evidence of intent.
13 And this evidence that was admitted is simply not
14 probative of intent, because it wasn't mentioned - -
15 -

16 CHIEF JUDGE LIPPMAN: They're saying it's
17 propensity.

18 MS. HEEGER: It's - - - it is propensity,
19 and that's exactly how it was used.

20 JUDGE SMITH: You even - - - but is this
21 even a Molineux problem, when this is something that
22 happened - - - these are things he had in his pocket
23 at the time of the crime. I mean, does Molineux
24 apply to acts that were simultaneous with or part of
25 the same act as the very crime on trial?

1 MS. HEEGER: Well, I would say, as a
2 threshold issue, identity is still a threshold issue.
3 But also, whether or not the detec - - -

4 JUDGE SMITH: But my question is - - -

5 MS. HEEGER: - - - whether or not it's - -
6 -

7 JUDGE SMITH: - - - what I'm suggesting is,
8 this just isn't Molineux. Forget about identity;
9 forgot about intent. There's no Molineux problem.

10 MS. HEEGER: Molineux, I would argue,
11 though, is still a subset of relevancy. We still
12 need to look - - - it needs to be relevant to
13 something in the case.

14 JUDGE PIGOTT: But isn't that an easier - -
15 - I mean, let's assume that instead of the toy
16 handcuffs and the cigarette lighter, they were drugs?

17 MS. HEEGER: Well, that's exactly - - -

18 JUDGE PIGOTT: Now, that obviously couldn't
19 come in, right? I mean, because it's - - -

20 MS. HEEGER: That's precisely the problem.

21 JUDGE PIGOTT: - - - wholly unrelated to
22 the crime. And your argument is, as are these
23 things, even though, I mean, they're not drugs,
24 they're evidence of something that the People were
25 using to imply that, therefore, this guy committed

1 that crime?

2 MS. HEEGER: That's exactly the problem.

3 JUDGE CIPARICK: This defendant was never
4 charged with the administrative - - -

5 MS. HEEGER: No.

6 JUDGE CIPARICK: - - - code violations.

7 MS. HEEGER: No, he was not charged.

8 JUDGE GRAFFEO: I take it that if any of
9 these items had been displayed during the commission
10 of the crime, this would be a different argument?

11 MS. HEEGER: I assume this would have
12 played out entirely different. I mean, I presume,
13 then, the prosecutor probably would have argued that
14 it goes to identity and that if he had been - - - if
15 he said well, a silver handgun was pulled - - - what
16 I thought was a silver handgun was pulled out and put
17 in my face, and then you find someone and they have
18 the silver handgun - - -

19 JUDGE SMITH: The prosecutor wouldn't even
20 have to argue. That would be obviously admissible,
21 right?

22 MS. HEEGER: Right. I mean, that would - -
23 - but the problem - - -

24 JUDGE GRAFFEO: And there's nothing in this
25 record to indicate that any of these items were

1 displayed during the crime?

2 MS. HEEGER: Not mentioned, not displayed,
3 had nothing at all to do with this crime.

4 JUDGE CIPARICK: Is there any La Fontaine
5 issue here? Because the court said it was part of
6 the res gestae. The Appellate Division, however, did
7 not discuss that.

8 MS. HEEGER: Well, I think that does raise
9 an interesting issue here. Because we start with a
10 very fundamental problem, is that the court never
11 really said exactly why it's going into the case, and
12 we're not - - -

13 JUDGE READ: Well, that often happens with
14 evidentiary rulings, doesn't it?

15 MS. HEEGER: Right. I mean - - -

16 JUDGE CIPARICK: Well, he said it's part of
17 the res gestae. He said that.

18 MS. HEEGER: Right. I mean, but I'm not
19 sure entirely what he means about that.

20 JUDGE CIPARICK: He meant by that.

21 MS. HEEGER: I mean, that's more of a
22 hearsay exception. But even if he was referring to -
23 - - let's try to say it was part of the narrative,
24 so, you know, that it was just part of the whole
25 scene.

1 JUDGE CIPARICK: To complete the narrative.

2 MS. HEEGER: I think you still have - - - I
3 would still argue that it's not relevant because even
4 if it's part of the - - - it still has to go to some
5 sort of issue in the case. You still need to do the
6 - - -

7 JUDGE SMITH: Why can't it prove out - - -
8 I mean, I would agree with you, that if he had had
9 these items a week before the crime, that would be
10 barred under Molineux as proof of propensity to
11 commit the crime. But the fact that he had them at
12 the very moment of its commission, why doesn't that
13 show that he had in mind to rob these people at that
14 - - - to rob someone at that moment?

15 MS. HEEGER: Because I - - - as a first
16 issue, I don't know that these are particularly
17 probative of an intent to rob. And what has been
18 raised before this court is that they're probative of
19 larcenous intent, the intent to permanently deprive.
20 These items could arguably be used for any number of
21 things. And it's not particularly probative - - -
22 particularly handcuffs. I don't - - -

23 JUDGE SMITH: If we were to - - - I
24 understand that argument. Suppose we don't agree
25 with you about that. Suppose we think it's - - -

1 suppose we think it is to some degree probative, or
2 at least the jury could find it probative of an
3 intent to rob; do you have another argument?

4 MS. HEEGER: Yes. If you were to find, as
5 a matter of law, that it's probative of an issue in
6 the case, then we get into the prejudice analysis.
7 And actually, even before we get into that, why do we
8 not have a jury instruction? Because even if we do
9 say that there is a relevant issue that this can go
10 to, then we need to direct the jury to this relevant
11 issue because we do know that there's a strong
12 propensity problem here.

13 And this is exactly what happened in
14 closing arguments. There wasn't an argument that
15 this goes to his intent to rob. This went to this is
16 how you identify him as the perpetrator. This - - -
17 and if you have a propensity risk out there, you at
18 least have to direct the jury to the proper
19 consideration of the evidence, because the
20 possibility and likely probability that the jury was
21 going to say - - - and given Mr. Jin's identification
22 was initially equivocal, he didn't remember a whole
23 lot of the attack, which was not surprising; he was
24 attacked from behind; he's face down; he's covering
25 his face for much of the attack. He doesn't have his

1 attackers in sight after they leave. He comes out to
2 36th and Broadway on - - -

3 JUDGE PIGOTT: Doesn't he say that your
4 defendant was sitting on top of him?

5 MS. HEEGER: Well, you know, if you read
6 through his testimony, he says a number of different
7 things. At one point he says I didn't really see the
8 faces very well. Then he says, you know, I'm not
9 sure it was him. I think it was him. I'm not sure
10 it was him; back and forth. And there were also some
11 language problems complicating things. But - - -

12 JUDGE GRAFFEO: There wasn't much time
13 left, so between when he started chasing after - - -

14 MS. HEEGER: I think we just don't know
15 what it was. At some point there's a colloquy about
16 well, was it a minute, was it ten minutes; and he
17 says I can't really say. But what he does not say is
18 I immediately got up and I followed these individuals
19 out the door, and I never lost sight of them. He
20 goes out into the sea of humanity at 36th and
21 Broadway at 5:15 on a Friday.

22 So what we're saying here is that this is
23 an eyewitness identification case. And if you put
24 into it a strong risk of propensity without any kind
25 of guidance - - -

1 JUDGE READ: What kind of instruction do
2 you say the judge should have given?

3 MS. HEEGER: Well, let's go with intent.
4 Let's say the People have taken the position that
5 this is relevant to intent. Arguably there was maybe
6 an argument made at the trial level. The judge could
7 have said to them, you can't use this to identify the
8 defendant. You're going to need to make a threshold
9 determination that he is the perpetrator. If he is
10 the perpetrator, then you can consider this evidence
11 as whether or not it was relevant to his intent to
12 rob, or whatever particular charge they believed that
13 that was relevant to.

14 But I think to just leave the jury to their
15 own devices and, say - - - throw it out there,
16 knowing that they may very well say well, I'm not
17 really sure about the ID, but if they're telling me
18 he had stuff that a robber could use, so he must be
19 the guy, that's the - - - that is, at the very basis,
20 an unfair trial.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.
22 Thanks.

23 Counselor?

24 MS. ZAUSMER: May it please the court, my
25 name is Sara Zausmer, and I'm appearing on behalf of

1 respondent.

2 CHIEF JUDGE LIPPMAN: What's relevant about
3 the - - -

4 MS. ZAUSMER: Your Honor, it's directly
5 relevant. It's part and par - - -

6 CHIEF JUDGE LIPPMAN: To what? To what?

7 MS. ZAUSMER: It's relevant, first of all,
8 to intent, as we argued. The fact that someone
9 fleeing the scene of a robbery has on him, at that
10 time, tools that can be used as robber's tools, even
11 if he didn't have the opportunity or need to actually
12 use them - - -

13 JUDGE PIGOTT: Suppose it wasn't him?

14 MS. ZAUSMER: Well, and it goes to that,
15 too. And that's why the court found that it was an
16 issue to - - -

17 JUDGE PIGOTT: I mean suppose - - -

18 MS. ZAUSMER: - - - res gestae.

19 JUDGE PIGOTT: - - - I mean, one of the
20 arguments here, I do think the ID was pretty strong,
21 but let's assume for a minute that as your opponent
22 is pointing out, you're in the middle of a thing, and
23 this guy has these materials. You say, well, you
24 have these materials, therefore, you attacked this
25 guy in an alley. He says, I don't know what the hell

1 that that's what the judge was saying. When the
2 judge was saying that's *res gestae*, and the critical
3 difference between the scene that you're positing and
4 what's happening here, is that you have a situation
5 where the defendant is caught fleeing the scene of
6 the robbery.

7 JUDGE PIGOTT: So the fact is, once the
8 jury hears about handcuffs and a cigarette lighter,
9 and the court interrupts - - - and the keys that
10 belong to the handcuffs, defense counsel says, that's
11 it for the case, Judge, and he says, maybe it should
12 be.

13 MS. ZAUSMER: But, Your Honor, the issue
14 isn't whether it's prejudicial in the sense that it's
15 probative of his guilt. The issue is whether it's
16 improperly prejudicial. If it's relevant because it
17 proves that he was the person there and that he was
18 the person there and he was there to rob - - -

19 JUDGE PIGOTT: How does it prove it?
20 That's what I'm - - - I guess, I mean, no one said
21 that the assailant had handcuffs and a cigarette
22 lighter.

23 MS. ZAUSMER: It's relevant because it
24 shows preparation. Preparation shows deliberation
25 and design. This court has said that the - - -

1 JUDGE PIGOTT: To do what?

2 MS. ZAUSMER: To rob someone. The fact
3 that he - - -

4 JUDGE PIGOTT: How was he going to rob
5 somebody with a cigarette lighter and handcuffs?

6 MS. ZAUSMER: Because if you display a gun
7 at someone, that's meant to frighten or intimidate -
8 - -

9 JUDGE PIGOTT: So that's what he did, he
10 displayed this gun and, therefore, you can use it in
11 evidence?

12 MS. ZAUSMER: The fact that he didn't have
13 opportunity to display it, the fact that he came
14 prepared to do so, the fact that you have a gun and a
15 gun - - -

16 JUDGE PIGOTT: Suppose he's got a criminal
17 record for robbery?

18 MS. ZAUSMER: Well, that's a separate issue
19 in terms of intent - - -

20 JUDGE PIGOTT: Well, no, that shows that's
21 probably what he was trying to do, because he's a
22 robber.

23 MS. ZAUSMER: The fact that a person
24 committed a robbery at an entirely separate time and
25 place, which is really more - - -

1 JUDGE SMITH: So your argument really
2 depends on the jury being able to infer that he
3 intended to use these things, not just to rob
4 anybody, but to rob this victim?

5 MS. ZAUSMER: Exactly. And that's really
6 the only - - -

7 JUDGE SMITH: Why is that inference
8 justified, when in fact, he didn't use either item?

9 MS. ZAUSMER: That inference is justified
10 because he had them at the time and place of this
11 particular robbery. As Your Honor said, if it had
12 been a week before, or if they caught him a week
13 later with them, then it's an improper inference to
14 say well, you have robber's tools at some separate
15 time and place, it's more likely that you committed
16 this other robbery.

17 The fact that you're caught in the process
18 of fleeing a robbery with tools that you can use to
19 commit a robbery, makes it more likely, from a direct
20 perspective, that you are the person who did it, and
21 that you were there to commit a robbery. That's not
22 a propensity - - -

23 JUDGE GRAFFEO: What else - - -

24 MS. ZAUSMER: - - - inference; that's
25 direct relevance.

1 JUDGE GRAFFEO: - - - what else in the
2 record connects Mr. Alfaro to this crime?

3 MS. ZAUSMER: Your Honor, the case was
4 overwhelming - - -

5 JUDGE GRAFFEO: Because you keep saying - -
6 -

7 MS. ZAUSMER: - - - connecting him to this
8 crime.

9 JUDGE GRAFFEO: - - - that he was fleeing.
10 But - - -

11 MS. ZAUSMER: Absolutely, Your Honor.

12 JUDGE GRAFFEO: - - - did the victim
13 actually identify him - - -

14 MS. ZAUSMER: The victim --

15 JUDGE GRAFFEO: - - - other than these
16 items that were found on the street?

17 MS. ZAUSMER: Yes, Your Honor. The victim
18 positively identified him. And just to clarify some
19 of the aspects of the testimony that were discussed
20 before, Mr. Jin, the victim, testified that he
21 clearly saw defendant's face during the attack,
22 because although he's originally on his stomach, the
23 perpetrators then turn him over, and defendant's
24 actually on top of him, and he can clearly see
25 defendant's face.

1 And then when they run out of the freight
2 elevator - - - the freight area, he testified that he
3 immediately - - - he actually does say that he
4 immediately jumped up and followed them. He can't
5 identify the exact number of seconds, but his
6 testimony is clear that it's immediate. And he runs
7 out and he sees defendant running away from the scene
8 of the crime. And he said that he specifically
9 followed him because he recognized him from the scene
10 of the crime. So we do have a positive
11 identification there.

12 And on top of that, you then have the
13 testimony of Mr. Vangas, who was watching on the
14 security monitor. Mr. Vangas sees about ten seconds
15 of the crime while he's calling 911. And then he
16 runs over to help. And he also testifies, positively
17 identifies defendant as the person who he saw on the
18 monitor attacking Mr. Jin, and he testifies that he
19 recognizes him again outside.

20 And then on top of that, you have Mr.
21 Gonzalez's testimony - - - I'm sorry, Your Honor - -
22 - the UPS driver who's standing outside. And he sees
23 three men run out. And he also positively identifies
24 defendant as one of those men. So that just vitiates
25 the whole idea that - - -

1 JUDGE SMITH: Well, suppose that - - -

2 MS. ZAUSMER: - - - he was an innocent
3 bystander caught up in this.

4 JUDGE SMITH: - - - suppose that what they
5 had found - - - let's take Mr. - - - take Judge
6 Pigott's burglar's tools. Suppose what they had
7 found instead of what they did find, he was carrying
8 a bag with tools that would be - - - could be used to
9 break into a store or an apartment, would that be
10 admissible?

11 MS. ZAUSMER: Your Honor, arguably that
12 would have a different relevance than having tools
13 used to commit a robbery. They could definitely make
14 an argument as to relevance, it's somewhat less
15 admissible, and the judge can make a determination as
16 to that.

17 JUDGE SMITH: Well, how - - - what's the
18 argument that that's admissible? That clearly wasn't
19 intended to be used in a street - - -

20 MS. ZAUSMER: In that case the relevance
21 argument - - -

22 JUDGE SMITH: - - - a street mugging.

23 MS. ZAUSMER: - - - would go more strongly
24 in favor of defendant. But that's entirely different
25 than saying that a defendant fleeing, not a robbery

1 with burglar's tools, but fleeing a robbery with
2 robber's tools - - - the fact that he had those on
3 him at the time, whether or not he had occasion to
4 use them, weren't relevant to whether he was the
5 person who was, in fact, there and what he was there
6 intending to do, even if, as the testimony indicates,
7 they got scared off, or they were able to restrain
8 him.

9 And the testimony is really that they drag
10 him in, and they restrain him, and they were going
11 through his pockets. So the fact that they had on
12 him, in the event they needed to use it, tools that
13 could be used to intimidate someone, to frighten
14 someone and to restrain someone, I would argue, are
15 directly relevant. Both of - - -

16 JUDGE SMITH: Let me go back. I'm changing
17 the subject. But Judge Ciparick asked about La
18 Fontaine a while ago. Is there a La Fontaine issue
19 here?

20 MS. ZAUSMER: There is no La Fontaine issue
21 here. It's clear on the facts that there isn't an
22 issue in that respect. Defense counsel moves to
23 preclude the evidence arguing that it's not necessary
24 because it isn't probative identity and it's not
25 necessary to prove intent. The People argue that it

1 is necessary to prove intent, and the judge admits
2 the evidence. So it's plain that this issue is
3 decided adversely to them.

4 JUDGE PIGOTT: What was the issue with
5 intent? I mean, was there some question that this
6 was negligently done?

7 MS. ZAUSMER: There was not an issue that
8 it was negligently done. But to address the issues
9 Your Honors raised before about whether intent was
10 conceded; although defendant said at the time he
11 wasn't planning to argue intent to the jury, he
12 didn't offer to stipulate to it the way the
13 defendant, for example, in Gillyard did.

14 And once that happens, once the element
15 isn't taken out of the case, then it's the People's
16 burden to prove every element of the crime beyond a
17 reasonable doubt.

18 JUDGE SMITH: You're not really saying you
19 could fit this into the Molineux intent exception,
20 are you?

21 MS. ZAUSMER: No, Your Honor. We're not
22 arguing that it's the specific intent. But again, as
23 Your Honor indicated, this really isn't traditional
24 Molineux evidence. This doesn't fit comfortably into
25 the Molineux framework, because this isn't a case

1 where you have a crime that takes place at a separate
2 - - - an entirely separate crime at an entirely
3 separate time and place. It's in that case that the
4 Molineux court is concerned that the jury's going to
5 draw an improper inference. Well, you committed a
6 robbery last year, so you're a robber, even though
7 we're not convinced you committed this robbery.
8 That's not the inference that it's natural for the
9 jurors to draw here. And that's why it was correct
10 to admit the evidence. And that's why it was correct
11 not to - - -

12 JUDGE SMITH: Well, there is some - - -

13 MS. ZAUSMER: - - - give the instruction.

14 JUDGE SMITH: - - - there is some danger of
15 prejudice here. I mean, maybe he was planning to use
16 these items in this particular mugging, but he
17 didn't. And maybe he just had those - - - maybe the
18 likeliest inference from the jury seeing these items
19 is, hey, this is a bad guy.

20 MS. ZAUSMER: I don't believe that's the
21 case, Your Honor. First of all, there's no
22 indication the jurors even knew it was illegal to
23 have a fake gun and handcuffs. And in fact, the
24 defendant argued at length that it was subject to
25 innocent purposes.

1 JUDGE SMITH: It's not necessarily a sign
2 of high character to be walking around with a fake
3 gun and handcuffs.

4 MS. ZAUSMER: It's not necessarily a sign
5 of high character. But it is probative, directly, of
6 whether he was the person who was there. Or is he -
7 - -

8 CHIEF JUDGE LIPPMAN: Doesn't there have to
9 be some weighing as to the probative value versus the
10 prejudice?

11 MS. ZAUSMER: Well, this - - -

12 CHIEF JUDGE LIPPMAN: Is there any
13 indication here that there was a real weighing in
14 that regard?

15 MS. ZAUSMER: The defen - - - well, two
16 things. First of all, the judge, in determining that
17 this evidence was highly probative and in rejecting
18 the inference that it was relevant only to
19 propensity, was to an extent, making that balancing
20 test. And that's a discretionary test - - -

21 CHIEF JUDGE LIPPMAN: That would be a - - -

22 MS. ZAUSMER: - - - subject to abusive - -
23 -

24 CHIEF JUDGE LIPPMAN: - - - sufficient - -
25 -

1 MS. ZAUSMER: I would argue that yes - - -

2 CHIEF JUDGE LIPPMAN: - - - showing that
3 the judge weighed the relevant prejudice versus the
4 probative value?

5 MS. ZAUSMER: I would argue yes. And in
6 any event, the defendant never, below, argued that to
7 the extent that there was that second balancing
8 process, that it wasn't done correctly. So it's not
9 really an issue that would be properly considered
10 here. But I do think that the judge's overall ruling
11 encompassed the idea that this evidence was relevant,
12 it was highly probative, and it was not subject to
13 the type of prejudicial inference that Molineux is
14 really concerned about.

15 JUDGE PIGOTT: The highly probative being
16 what?

17 MS. ZAUSMER: Highly probative being the
18 fact that a person is fleeing the scene of a robbery
19 with tools used to commit a robbery, shows that he
20 came prepared to commit that - - - to commit that
21 crime, both that he is not an innocent bystander who
22 got caught up in this, who just coincidentally
23 happened - - -

24 JUDGE PIGOTT: I get that. I just - - - I
25 mean, it just seems to me that when Mr. Jin chased

1 him, and I forget now whether he ever lost sight of
2 him, but then identifies him there, I just - - - I'm
3 missing - - - and I asked the question about drugs.
4 If he had drugs on him, could you introduce that and
5 say this is probably why he robbed people, because
6 the guy's got a habit?

7 MS. ZAUSMER: No, Your Honor. I would say
8 that that wouldn't pass the relevance test.

9 JUDGE PIGOTT: Why? I think - - -

10 MS. ZAUSMER: That's entirely - - -

11 JUDGE PIGOTT: - - - it's very relevant to
12 show that this guy has got a drug habit and he's got
13 to get money and he didn't have any on him. And so
14 he took it from Mr. Jin.

15 MS. ZAUSMER: I think that's a very
16 attenuated inference as opposed to the very direct
17 inference that if a person is fleeing the scene of a
18 robbery with tools used to commit a robbery, that he
19 is, in fact, the person who was there and that he was
20 there to commit a robbery.

21 And I would just add, as to the
22 identification, that again, because it was immediate
23 and because it was positive, and because of all those
24 other identifications as well, that even if this
25 court were to consider that there were any error, the

1 error would certainly be harmless, both as to the
2 admission and as to the instruction.

3 But I do feel that it is a very direct - -
4 - and when the court says that it's part of the res
5 gestae, that's what the court's saying. It's part of
6 this crime. This isn't a separate crime where you're
7 being asked to make some indirect inference about
8 what - - -

9 JUDGE PIGOTT: It was part of this crime.
10 That's important that it be part of this crime?

11 MS. ZAUSMER: It was part of the entire
12 sequence of events that was happening here.

13 JUDGE PIGOTT: Okay.

14 MS. ZAUSMER: Yes. That is correct, Your
15 Honor.

16 JUDGE SMITH: Which is it, part of the
17 crime or part of the entire sequence of events?

18 MS. ZAUSMER: It's part of the sequence of
19 events, and therefore, it's relevant to proving
20 elements of the crime - - -

21 JUDGE SMITH: You're not saying - - -

22 MS. ZAUSMER: - - - which is identity and
23 intent.

24 JUDGE SMITH: - - - it's part of the crime?
25 You're not saying it's part of the crime?

1 JUDGE CIPARICK: So it was to complete the
2 narrative.

3 MS. ZAUSMER: We're not saying it was
4 displayed during the crime. But because he had them
5 on him at the time of the crime, because he came with
6 these items that could have been used easily to
7 commit a robbery, we argue that it is very relevant
8 in a very direct sense to showing what defendant's
9 intent was - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MS. ZAUSMER: - - - at the time of the
12 crime.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MS. ZAUSMER: Thank you.

15 CHIEF JUDGE LIPPMAN: Thanks.

16 Counselor, rebuttal?

17 MS. HEEGER: Something that really sticks
18 out is this just conflating of these ideas of intent
19 and identity and res gestae. It's not clear exactly
20 why this was admitted. Respondent is saying here
21 this is relevant to intent, yet at the same time
22 saying it's relevant to identity. But this would
23 completely upend this idea of identifying somebody
24 through these items, because they weren't used in the
25 case. And we know that it's strongly prejudicial,

1 because again, it invokes this idea. He's a robber.
2 Which invokes the same kind of problems as you're
3 suggesting in the Sandoval context.

4 JUDGE SMITH: Suppose you have a bank
5 robbery case, and the alleged robber is seized
6 outside the store, and he has in his pocket a note
7 saying give me all the money in tens and twenties.
8 He never used it during the robbery. Is that
9 admissible?

10 MS. HEEGER: I think that would be a closer
11 case and likely admissible. And that's because that
12 would be something that you would use specifically to
13 commit a bank robbery. You would write a note saying
14 give me money in small bills. I don't know that
15 carrying fake handcuffs is such a direct correlation.
16 You need - - - this needs to be probative in a sense
17 of reason, not speculation. It can't be anything
18 that you come up with then makes it admissible.

19 JUDGE SMITH: If there was error, was it
20 harmless?

21 MS. HEEGER: And that's a really important
22 part. I think this case has a sort of superficial
23 appearance of being a slam dunk. And if we look
24 closely at the evidence, it's not. Mr. Jin was in a
25 very traumatic experience, and he did not see his

1 attackers the whole time. His initial identification
2 was equivocal. And I don't think that you can say at
3 all that it was corroborated by Mr. Vangas.

4 Mr. Vangas said that he saw an attack where
5 there was - - - where Mr. Jin was standing up the
6 entire time. He was being hit by one person the
7 entire time. He's asked over and over again. He
8 will not waver from this. This is what he saw. Mr.
9 Jin, on the other hand, is saying I am flat on the
10 ground being hit by more than one person, over and
11 over again. I never got up. My pockets are being
12 searched. Mr. Vangas is adamant, absolutely not.
13 His pockets were not searched.

14 These are not corroborative accounts. Mr.
15 Gonzalez, his contribution to this is de minimis.
16 He's standing outside with this back to the action.
17 People run from behind. He says he's not even
18 focused on the person who is initially believed to be
19 Mr. Alfaro. He's looking at someone else. And it's
20 not until this melee gets to this critical point that
21 he suddenly notices Mr. Alfaro.

22 So the evidence here, I think, is at a
23 point where the jury had to parse these things out.
24 They had to evaluate credibility, conflicting
25 stories. But allowing the prosecution to put their

1 thumb on the scale and to make this argument that you
2 know he's the right guy because he's a robber, made
3 for an unfair trial, particularly where the jury
4 received no proper guidance.

5 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
6 you.

7 MS. ZAUSMER: Thank you.

8 CHIEF JUDGE LIPPMAN: Thank you both.

9 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jose Alfaro, No. 159 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: September 11, 2012