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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 35

DAYSHAWN P. HANDY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 6, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 35, People v.  
2 Handy.

3 Okay, you're on. Counsel, you want  
4 rebuttal time?

5 MS. SOMES: Thank you. I would like two  
6 minutes of rebuttal. Janet Somes on behalf of  
7 Dayshawn Handy. And I would like to jump right to  
8 point two, if I may?

9 CHIEF JUDGE LIPPMAN: Sure.

10 MS. SOMES: Despite repeated requests by  
11 defense counsel to be provided with any surveillance  
12 or video recordings made in the Monroe County Jail  
13 with relating to this incident, the prosecutor, at  
14 the beginning of the trial, still didn't know whether  
15 or not any recordings had been made, but she did know  
16 that none had been preserved.

17 CHIEF JUDGE LIPPMAN: Counsel, what about  
18 the particular charge to and what the - - - the video  
19 did or could have shown? How does it relate? You  
20 know, they're kind of saying, well, it doesn't really  
21 involve what happened over there. Well, how do you -  
22 - - what's the answer to their contention?

23 MS. SOMES: I don't think you can separate  
24 the two. This was an incident that started in Cell  
25 Block C. It was a quick incident. A lot of action

1 going on. And with regard to Count II, that was the  
2 injury to Deputy Schliff's hand.

3 CHIEF JUDGE LIPPMAN: Right.

4 MS. SOMES: With regard to Count I, it was  
5 Deputy Saeva's hand. And it looks like probably they  
6 - - - Deputy Saeva didn't really know when his hand  
7 was injured.

8 CHIEF JUDGE LIPPMAN: You're saying they  
9 sort of combined the - - -

10 MS. SOMES: It's - - - it's one - - - it's  
11 one incident, really. It's one - - -

12 JUDGE SMITH: So - - - so even if - - - all  
13 you say all you have to show is that there was  
14 relevant footage from the Cell Block - - - Cell Block  
15 C camera; we don't have to worry whether anything was  
16 picked up in Cell Block B.

17 MS. SOMES: I think you - - - I think we  
18 should still be worried about whether anything was  
19 picked up. I mean, I'm in a better position to say  
20 that something was picked up in Cell Block C, because  
21 we have Deputy - - -

22 JUDGE SMITH: And you - - - you - - - you  
23 would - - - obviously, you want as much as you can,  
24 but you say that would do it in your view.

25 MS. SOMES: That would do it, yes. I think

1           it would do it.

2                   JUDGE GRAFFEO:   Because there was a little  
3           bit of discrepancy as to exactly where this took  
4           place, right?  One deputy said one location, and the  
5           other thought he was closer to the door?

6                   MS. SOMES:   Yes.  Deputy Saeva said that  
7           Deputy Schliff actually did come into Cell Block C  
8           area, and Deputy Schliff said, well, he - - - at one  
9           point, he said he did come in and at one point, he  
10          said he didn't come in.  So where this injury  
11          happened exactly, we can't pinpoint, and - - -

12                   JUDGE SMITH:   But even - - - suppose - - -  
13          suppose, hypothetically, that the only thing that was  
14          captured on tape was the interaction between Saeva  
15          and the defendant.  You still - - - can you still win  
16          the case even though he was acquitted on the Saeva  
17          count?

18                   MS. SOMES:   Absolutely, because the  
19          question was whether or not Mr. Handy had any intent  
20          to injure Deputy Schliff.  And intent, of course,  
21          we're going to look at all the surrounding  
22          circumstances.

23                   JUDGE SMITH:   So if he was actually in,  
24          like, a - - - like, a nice, quiet man one minute  
25          before, like a wild animal one minute before, it's

1 relevant.

2 MS. SOMES: It's relevant. And it also may  
3 be relevant in this case because the testimony of Mr.  
4 Handy was so opposite of the testimony of Deputy  
5 Saeva. Deputy - - - Mr. Handy testified to a use of  
6 excessive force. He testified to, you know, that  
7 Deputy Saeva just ended up hitting him and going  
8 after him.

9 And so if this video might have shown some  
10 sort of excessive force being used, it might have  
11 shown that the event didn't unfold exactly as the  
12 witnesses had said. This - - - this might have shown  
13 something as obscure as whether or not Mr. Handy was  
14 wearing clothing at the time, because Deputy Saeva  
15 said, yes, he was wearing clothing, and Mr. Handy  
16 said, no, he was butt naked.

17 So, you know, something as obscure as that,  
18 whether or not it showed that he was wearing clothing  
19 at this time, would put into doubt the testimony of  
20 the prosecution witnesses.

21 JUDGE GRAFFEO: At what point did the  
22 defense ask for the tapes?

23 MS. SOMES: The defense asked for the tapes  
24 first in his discovery - - - in his discovery demand,  
25 which is on page 17 of the record. He asked for any

1           electronic surveillance or recordings. In his Brady  
2           demand, on page 19 through 21 of the record, he  
3           demanded anything - - - any material that could be  
4           used to show the witnesses were not credible.

5                       He also, apparently, had had some  
6           conversation with the prosecutor beforehand, so that  
7           he was - - - they were at - - - he knew that defense  
8           counsel wanted the tapes. So can I pinpoint exactly  
9           when before the discovery demand the tapes were  
10          demanded? I cannot, but it seems to be that there  
11          was conversation about it. They were requested.

12                      JUDGE SMITH: And the - - - as to the - - -  
13          as to the counts we're talking about here, the tapes  
14          we're talking about here, no demand was made within  
15          the thirty days, because the indictment didn't happen  
16          within thirty days, right?

17                      MS. SOMES: That's prob - - - that's - - -  
18          I'm not sure that - - - that there was a demand  
19          within the thirty days or not. There could have  
20          been. Not a formal demand, but there could have  
21          been. If he was arraigned in city court, there could  
22          have been a request then.

23                      But that thirty days is kind of an  
24          artificial time line. There's no reason why - - -  
25          why there has to be that thirty days. I think that

1           it became an issue because when counsel was - - -  
2           defense counsel was trying to differentiate his  
3           request for the adverse inference instruction - - -

4                    JUDGE SMITH: Well, isn't it - - - I  
5           thought thirty days was the amount of time as a  
6           matter of practice before these things get taped  
7           over.

8                    MS. SOMES: That is - - - that is right.  
9           However, that doesn't mean that the People aren't - -  
10          - don't have to preserve exculpatory evidence or  
11          evidence that may be helpful for the defense, just  
12          because it wasn't asked within thir - - - the thirty  
13          days. That's an artificial time line.

14                   JUDGE READ: What are you asking for? Are  
15          you asking - - - at some point, are you asking for us  
16          to interpret something in the gap filling or  
17          something in the law?

18                   MS. SOMES: I - - - what I'm asking for is  
19          - - - is a rule that would say that when there is a  
20          recording that is in possession of law enforcement or  
21          that they have created that has the potential to have  
22          captured events relating to a criminal charge to be  
23          helpful to the defense, that it has to be preserved.

24                    I think that when you strictly look at the  
25          two - - - you know, the discovery statute in 240,





1 turned over to them, then they have the duty to  
2 preserve them, and to take care of them. If they  
3 generate them, then they have the duty to preserve  
4 them and take care of them.

5 JUDGE SMITH: Are you saying the failure to  
6 turn them over - - - the failure to preserve them  
7 requires dismissal of the indictment or just an  
8 adverse inference charge?

9 MS. SOMES: Well, unfor - - - I'd like to  
10 say dismissal of the indictment, but based on the  
11 record here, I don't think defense counsel - - -  
12 trial counsel - - - shot high enough. He asked for  
13 an adverse inference charge.

14 JUDGE SMITH: So, I see. So you - - - so  
15 you - - - on this - - - because of preservation  
16 issues, you're not asking for dismissal of the  
17 indictment, but you are saying you'd be entitled to  
18 it, if he preserved it?

19 MS. SOMES: I think - - - I think that  
20 would be one of the remedies - - -

21 JUDGE SMITH: No, I guess - - - I mean, I  
22 would be, you know, whatever the consequences in this  
23 case, shouldn't we be concerned about a holding  
24 that's going to require every indictment to be  
25 dismissed every time somebody mistakenly tapes over a

1 video?

2 MS. SOMES: Well, I think that this court  
3 has done that before where, you know, you look at - -  
4 - you look at the circumstances and say that it's  
5 within the discretion of the trial court to say what  
6 the - - - what the sanction's going to be for the  
7 lost evidence, and that seems to have worked fairly  
8 well, but there needs to be a sanction. And in this  
9 case, we asked for a sanction, and we did not get any  
10 further sanction.

11 JUDGE SMITH: You don't - - - you aren't -  
12 - - you don't have to ask for anything more than an  
13 adverse inference charge here?

14 MS. SOMES: Do I? Do I have to ask for  
15 anything more than - - -

16 JUDGE SMITH: No - - -

17 MS. SOMES: Like I said, I'd like to.

18 JUDGE SMITH: - - - answer whichever two  
19 questions you're thinking.

20 MS. SOMES: I'd like to ask for more than  
21 an adverse inference, but I don't think it's - - -  
22 it's fair on this record.

23 I'd like to go to preservation just for a  
24 moment, because Mr. Kaeuper argues that this - - - my  
25 argument is not preserved. And it's preserved under

1 two different way - - - two different bases. First  
2 under CPL 470.05(2), Mr. Handy is a party who,  
3 without success, has not gotten the charge that he  
4 wanted. He specifically wanted this char - - - an  
5 adverse inference charge as to Count II, and he did  
6 not get it, so he does not have to have any further  
7 protest. But he did further protest. The court gave  
8 him - - - and my light is on.

9 CHIEF JUDGE LIPPMAN: No, go ahead; finish  
10 your argument.

11 MS. SOMES: The court gave him a proposed  
12 charge. That proposed charge was to Count III, the  
13 January incident only, and once the court gave him  
14 the charge, then defense counsel went through what  
15 was wrong with that charge. He went through the time  
16 line of what had happened, that he was deprived of  
17 it, and he said, at the - - - he said, regardless of  
18 the language to be used, whether it's presumption or  
19 inference in the case, there should be an adverse  
20 inference as to Counts II, III, and IV - - - or  
21 Counts I, II and III. So this is preserved two  
22 different ways.

23 CHIEF JUDGE LIPPMAN: Okay, counsel,  
24 thanks.

25 Counsel, what's wrong with the rule that

1 your adversary laid out?

2 MR. KAEUPER: Well - - - Geoffrey Kaeuper  
3 for the People. The rule - - -

4 CHIEF JUDGE LIPPMAN: We know; you've been  
5 here before, today. We know who you are; go ahead.

6 MR. KAEUPER: We got the talk beforehand,  
7 so I got to follow the rules.

8 CHIEF JUDGE LIPPMAN: All right, go ahead.

9 MR. KAEUPER: But as far as - - -

10 CHIEF JUDGE LIPPMAN: Don't listen to the  
11 Clerk of the Court; we tell you what to do. Go  
12 ahead; I'm kidding you.

13 MR. KAEUPER: As far as the rule, I mean,  
14 if the rule here is to be that if there's a video of  
15 the crime that the People had - - - that the People  
16 are in possession of, that they have an obligation to  
17 preserve that. And we never contested that in the  
18 trial, for we agreed with that all along. So - - -  
19 and I wouldn't try to argue anything - - -

20 CHIEF JUDGE LIPPMAN: So where do you dis -  
21 - - where do you - - -

22 MR. KAEUPER: - - - if it's actually of the  
23 crime.

24 CHIEF JUDGE LIPPMAN: So where do you  
25 disagree with your adversary?

1                   MR. KAEUPER: Well, for one thing, I don't  
2 agree that this is a - - - the video - - - the video  
3 that we're actually talking about here is the video  
4 in Cell Block C.

5                   CHIEF JUDGE LIPPMAN: Yeah, but she's  
6 saying it's kind of interrelated, and it's all  
7 related to the circumstances - - -

8                   MR. KAEUPER: Where - - - where - - -

9                   CHIEF JUDGE LIPPMAN: - - - surrounding,  
10 you know, what this is all about.

11                  MR. KAEUPER: Right. But she's assuming  
12 that it shows some part of the incident that's  
13 charged in Count I.

14                  JUDGE READ: But we don't really know or  
15 not know, right?

16                  MR. KAEUPER: Well - - -

17                  JUDGE READ: Because the - - - the officer  
18 who looked at it remembered looking at it, but  
19 couldn't really remember what he saw.

20                  MR. KAEUPER: Well, he - - - he - - - he  
21 does describe the location of the camera, says it  
22 points sort of in the direction of defendant's cell,  
23 but off to the side.

24                  JUDGE SMITH: He said it captured what he  
25 called a small part of the incident.

1                   MR. KAEUPER: Which is - - - and then he  
2 describes it as him go - - - him approaching another  
3 inmate's cell. And then the defendant talks about  
4 the - - -

5                   JUDGE SMITH: Do we have to take his word  
6 for what he said? I mean, he - - - doesn't it look  
7 kind of bad that he looked at it, can't say how many  
8 times he looked at it, can't say who he looked at it  
9 with. He remembers that it didn't show anything bad,  
10 and after he looked at it, it was deleted. Isn't - -  
11 - doesn't - - - shouldn't that make us a little  
12 uncomfortable?

13                  MR. KAEUPER: I think it probably should  
14 make you uncomfortable. The defendant, though,  
15 testified about the position of the camera also.

16                  JUDGE PIGOTT: So let's go back; let's go  
17 back.

18                  MR. KAEUPER: And - - -

19                  JUDGE PIGOTT: I mean, just fundamentally,  
20 because we're always talking about statewide import  
21 of some of these decisions. The complainants here  
22 are the sheriffs. The videographers are the  
23 sheriffs. They arrest the guy. So they're  
24 arresting, they're the witnesses, they're the  
25 victims, and they have the film, and it's gone. What

1 do you do about that?

2 I mean, it's not as - - - I don't think you  
3 meant this, but if the People have it. It's not  
4 whether or not the DA has it. It seems to me that  
5 you've got a situation here where the only people  
6 that had it were the people who were complaining  
7 here. And wouldn't the presumption be that if it  
8 said - - - showed something that they wanted - - -  
9 that you would have had it in your file and it would  
10 have been subject to 240?

11 MR. KAEUPER: Well, I mean, I guess - - - I  
12 guess that goes to a question of bad faith, and I  
13 don't think there was ever - - -

14 JUDGE PIGOTT: No, it just goes to a  
15 question of - - - as Ms. Some is suggesting, that,  
16 you know, isn't it an adverse inference, at least?  
17 Whether it's bad faith or not, I mean, my goodness.

18 MR. KAEUPER: Well, if there's some reason  
19 to believe it shows some - - - again, the inference  
20 has to be an inference about evidence. So you have  
21 to instruct the jury: you heard testimony about this  
22 videotape; you can infer that it may not have shown  
23 what the officer said it showed. But what would - -  
24 - what would the jury infer here? The defendant says  
25 that the camera shows Officer McCarthy's back. He

1 says, well, Officer McCarthy, before he comes into  
2 it, he's in front of the camera. It's showing his  
3 back.

4 JUDGE SMITH: Well, well - - -

5 MR. KAEUPER: The defendant is - - - is - -  
6 -

7 JUDGE SMITH: Well, the jury - - - the jury  
8 - - - what would - - - I could imagine a juror who  
9 didn't believe a word the defendant said but thought  
10 maybe the officers were stretching it a bit, too.

11 MR. KAEUPER: Okay, but, I mean, but there  
12 has to be - - -

13 JUDGE SMITH: And - - - and - - - and  
14 wouldn't it - - - would, yeah - - - couldn't - - -  
15 couldn't such a juror reasonably infer that if the  
16 officer was telling the complete truth, the video  
17 wouldn't have disappeared?

18 MR. KAEUPER: I mean, I guess you could in  
19 - - - you could infer that. But - - - but again, I  
20 mean, the - - - the defendant here testifies with  
21 respect to Count III about the camera. The camera is  
22 right on the shower stall. It captured everything.  
23 He testifies about that. Was the camera in Cell  
24 Block C, he testifies - - -

25 JUDGE PIGOTT: What would you - - - what



1 would you have done if he, you know, having suffered  
2 some injuries had - - - had pictures taken of him,  
3 and then said but I lost the pictures. But, boy,  
4 they were something; they showed all kinds of bruises  
5 and everything. I mean, wouldn't you say to the  
6 court, Judge, we never got to see the pictures; we'd  
7 like an adverse inference with respect to that?

8 MR. KAEUPER: Well, no, no, I - - - I don't  
9 - - - I mean, I don't he gets in testimony about  
10 pictures that don't exist or something. I mean, I  
11 don't think he can - - - I mean, there'd be a best  
12 evidence problem, I think, with that.

13 JUDGE PIGOTT: No, I mean, I - - -

14 MR. KAEUPER: If he's going to testify,  
15 then the contents of - - -

16 JUDGE PIGOTT: All analogies limp. But I'm  
17 - - - all I'm suggesting to you is that you would be  
18 complaining an awful lot if the defendant said, I've  
19 got the smoking gun; I just lost it.

20 MR. KAEUPER: Well, okay, but - - - but if  
21 - - - if - - - if somebody is taking pictures and  
22 we're both here and you say, those pictures, if they  
23 hadn't been lost, would have shown - - - that I  
24 possessed - - - would have shown, you know, my  
25 horrible injuries, you know, and I don't disp - - -

1 or I - - - I'm messing up - - -

2 JUDGE PIGOTT: I know; we're both lost.

3 MR. KAEUPER: But - - - but my point is the  
4 defendant is not saying that this camera captured  
5 this incident. The defendant is saying something  
6 completely inconsistent with that.

7 JUDGE PIGOTT: Does he know?

8 MR. KAEUPER: He - - - yeah. I mean, he's  
9 there. You look - - - you see the camera. You can  
10 see where it's pointing. He testifies about - - -

11 JUDGE READ: But the other - - - but the  
12 other witness said it got a small part of it or  
13 something like that.

14 MR. KAEUPER: A small - - - I mean, I guess  
15 that depends on what - - - what do we think he means  
16 by the incident.

17 JUDGE SMITH: The only person who testified  
18 who actually saw the video was Saeva.

19 MR. KAEUPER: Right.

20 JUDGE SMITH: So, you know - - -

21 MR. KAEUPER: But defendant had no problem  
22 with testifying about where the camera was pointing  
23 in - - -

24 JUDGE SMITH: Yes.

25 MR. KAEUPER: - - - with respect to Count

1 III, and what it captured.

2 JUDGE SMITH: Yeah, but - - - but - - - but  
3 don't we have to - - - if the one man who saw it,  
4 says it captured part of the incident, it's pretty  
5 clear that it captured part of the incident, isn't  
6 it?

7 MR. KAEUPER: Well, I - - - again, I mean,  
8 I guess that depends on what he means by the  
9 incident. He says it captured me going up to the  
10 cell of another inmate. Now, if - - - I mean, if the  
11 incident - - - if I'm - - - you know, if I'm a  
12 corrections officer, I'm probably thinking the  
13 incident is that whole - - - you know, is that whole  
14 transaction, not the specific crime. And what he  
15 does the moment before doesn't end up being relevant  
16 to - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but the bottom  
18 line is we just don't really know because, you know,  
19 it's gone, and we don't know what, you know, he said  
20 or he saw or didn't see. And we know what he said.

21 MR. KAEUPER: Well, if - - - and if the  
22 defendant's testimony wasn't totally contrary to - -  
23 -

24 CHIEF JUDGE LIPPMAN: You're saying what  
25 the defendant says - - -

1 MR. KAEUPER: He talks about where the  
2 camera - - -

3 CHIEF JUDGE LIPPMAN: - - - demonstrates  
4 that this is not important, so the - - -

5 MR. KAEUPER: It - - - he doesn't even  
6 claim in his testimony that it captured - - -

7 JUDGE GRAFFEO: But wouldn't your  
8 adversary's rule, though, create a better practice so  
9 that these things are preserved?

10 MR. KAEUPER: Well, which - - - which - - -

11 JUDGE GRAFFEO: - - - when we're in a law-  
12 enforcement situation like this?

13 MR. KAEUPER: If the rule is dismissal? I  
14 mean, I don't - - - I don't think dismissal is the  
15 appropriate - - -

16 CHIEF JUDGE LIPPMAN: She's not advocating  
17 for dismissal.

18 MR. KAEUPER: Oh, okay. I - - - I, you  
19 know - - - I guess I'm - - -

20 JUDGE PIGOTT: The case we have is  
21 inference. Next week it'll be dismissal.

22 JUDGE READ: She would be advocating for  
23 dismissal if it had preserved. We know that.

24 MR. KAEUPER: Right, but I mean, that's - -  
25 - that's not even the rule with Rosario, which is

1           what - - - the analogy that was drawn in the brief,  
2           but - - -

3                         JUDGE PIGOTT:   But the thing is, take a  
4           bank.  I mean, if there's - - - if the bank's been  
5           robbed, somebody at the bank says get the tapes.  You  
6           had the same thing happen here.  Why wouldn't - - - I  
7           mean, isn't there a pol - - - I mean, shouldn't there  
8           be a policy, that when there's an incident involving  
9           that the tape comes out of the machine and you put a  
10          new one in?

11                        MR. KAEUPER:   I think there absolutely  
12          should be a policy, and I think one thing that's  
13          happening here, clearly, is you've got a different -  
14          - - the prosecutor who's handling the case changes at  
15          one point, and I don't know if that's - - - if that's  
16          part of where sometimes things fall through the  
17          cracks when - - - when those transitions happen.  I  
18          don't know if that explains it, but the prosecutor  
19          who ends up trying the case is, admittedly, not all  
20          that clear on what happened in - - -

21                        JUDGE PIGOTT:   Yeah, but it's not them,  
22          it's the sheriff.  I mean, why wouldn't they have  
23          done that?  I mean, they're in law enforcement.

24                        MR. KAEUPER:   I - - - I don't know why they  
25          wouldn't have done that.

1                   JUDGE SMITH: Are you - - - going back to  
2 what you were saying a minute ago. You talked a lot  
3 about the defendant's testimony. Suppose if the  
4 defendant - - - this case is exactly the same, except  
5 the defendant had not testified. He chose not to  
6 present a case. Would you concede then that he would  
7 be entitled to an adverse inference charge?

8                   MR. KAEUPER: No, because I think he still  
9 could put forth evidence that would show - - - that  
10 would give the jury a basis for - - - to - - - that  
11 is, again, I mean, the jury has to have some  
12 evidentiary basis to apply this presumption to. You  
13 know - - -

14                   JUDGE PIGOTT: But they do. They have  
15 testimony that there was a tape, and it's gone.

16                   MR. KAEUPER: Right, but you heard  
17 testimony that the tape contained this. You may even  
18 infer, but don't have to, that that's not true.  
19 Well, what are they going to - - -

20                   JUDGE PIGOTT: But then - - - then you're  
21 saying - - - then your policy at the sheriff's  
22 department is destroy all tapes, because then we  
23 don't have to - - - we can explain them, and we don't  
24 have to produce them.

25                   MR. KAEUPER: Well, I mean, if there's - -

1 - if it's in bad faith, if it's actually being just -  
2 - -

3 JUDGE PIGOTT: No, I'm not suggesting bad  
4 faith. I'm just - - -

5 MR. KAEUPER: Well, but that would - - -  
6 but that would certainly be bad faith.

7 JUDGE PIGOTT: No, it's - - -

8 JUDGE SMITH: It's hard to prove bad faith,  
9 isn't it?

10 MR. KAEUPER: I mean, I suppose it is hard  
11 to prove - - -

12 JUDGE SMITH: And it's also prove - - -  
13 it's hard to prove what's on a tape after it's been  
14 erased.

15 MR. KAEUPER: I don't know of any way to do  
16 it.

17 JUDGE SMITH: Do you agree with your  
18 adversary that if that - - - assuming hypothetically,  
19 that there's significant video footage of the Cell  
20 Block C incident, that that's relevant on Count II?

21 MR. KAEUPER: I don't - - - well, I guess,  
22 it depends on what you mean by significant. I mean -  
23 - -

24 JUDGE SMITH: I mean, it shows - - -

25 MR. KAEUPER: If it's - - -

1                   JUDGE SMITH: It either contradicts or  
2 confirms either or both of the witnesses' versions.

3                   MR. KAEUPER: No, I really don't think so,  
4 because the people involved are different, so that  
5 the credibility of those witnesses is really not very  
6 relevant.

7                   JUDGE SMITH: But doesn't she have a point  
8 that if the man was acting either like a choirboy or  
9 a wild animal two minutes before the Count II  
10 incident, that's relevant on Count II?

11                  MR. KAEUPER: I think, yeah - - - and I  
12 think - - - I think, yeah, if it were to show the  
13 ending part of that incident charged in Count I, that  
14 would probably be relevant to point (sic) II. What  
15 the deputy does immediately prior to, whether he was  
16 going to another inmate's cell, I think, is clearly  
17 not relevant to - - -

18                  JUDGE SMITH: The - - - even though - - -  
19 even though your light's on, I wanted to ask you:  
20 are you - - - are you saying that she didn't preserve  
21 - - - that the trial counsel didn't preserve the  
22 argument for an adverse inference charge?

23                  MR. KAEUPER: Well, I - - - I - - -

24                  JUDGE SMITH: It looked to me like he asked  
25 for it.



1                   MR. KAEUPER:  There - - - there are a whole  
2 series of different things that were requested in the  
3 original brief, many of which, I think, are now  
4 conceded were not preserved.  I had argued that the  
5 permissive adverse inference, the narrow question of  
6 the permissive adverse inference as to that Cell  
7 Block C video, was not preserved.  I have been  
8 convinced by the respondent's reply brief; I think  
9 that narrow issue is preserved.  I think the other  
10 issues raised are not preserved.

11                   CHIEF JUDGE LIPPMAN:  Okay, counsel.  
12 Thanks, counsel.

13                   Counsel, rebuttal?

14                   MS. SOMES:  Unless there are any questions?

15                   CHIEF JUDGE LIPPMAN:  Nope, I think you're  
16 okay.

17                   MS. SOMES:  Thank you.

18                   CHIEF JUDGE LIPPMAN:  Thanks both of you.

19                   (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dayshawn P. Handy, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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