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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

DONNY P. BEATY,

No. 148
(Papers Sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
September 4, 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.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 148, People v. Beaty.
2 Counsel, you want any rebuttal time?

3 MS. SOMES: I would like two minutes,
4 please.

5 CHIEF JUDGE LIPPMAN: Sure.

6 MS. SOMES: Janet Somes from the Monroe
7 County Public Defenders' Office on behalf of Donny
8 Beaty.

9 CHIEF JUDGE LIPPMAN: Cou - - - counsel,
10 how is - - - how is this different than Sirico?

11 MS. SOMES: This is very different from
12 Sirico.

13 CHIEF JUDGE LIPPMAN: Tell us what's
14 different than - - - it seems that on the surface,
15 Sirico has even more discussion of what the defendant
16 drank or did or, you know, how much there was - - -
17 you know, there was some articulation of what that
18 was, and here we really don't know anything about - -
19 - obviously, I'm talking about the intoxication
20 charge - - - why isn't this a weaker case than
21 Sirico? And Sirico's found that a bare assertion is
22 - - - is not enough.

23 MS. SOMES: Because what we have in this
24 case is - - - is very different. What we have - - -
25 in Sirico you had the quant - - - quantitative

1 information about - - -

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MS. SOMES: - - - what he had to drink, but
4 Sirico never said, I was intoxicated. He never said,
5 I was drunk. He never made that representation, so
6 there was nothing to show how he - - - that alcohol
7 that he drank - - -

8 CHIEF JUDGE LIPPMAN: But isn't a lot - - -

9 MS. SOMES: - - - impacted his behavior.

10 CHIEF JUDGE LIPPMAN: But isn't a lot of
11 the discussion here that the defendant gives - - -
12 talks about what happens to him when he's drunk,
13 rather than what happened in this particular
14 situation?

15 MS. SOMES: I think he did talk about what
16 happens when he gets drunk. Then he said he got
17 drunk, and then this is what happened. He - - -

18 JUDGE SMITH: He said, in substance, that
19 he blacked out, didn't he?

20 MS. SOMES: Yes, he did.

21 JUDGE SMITH: Or at least that he - - -
22 that he remembered almost nothing of what happened?

23 MS. SOMES: That's correct. He remembered
24 drinking all over the place, and then he got drunk.
25 You know, most people, when they get really drunk,

1 probably aren't going to be able to tell you exactly
2 what you had - - - they had to drink, how many, when.
3 That's just a matter of what happens.

4 CHIEF JUDGE LIPPMAN: But he knew he went
5 across the street. He, you know - - -

6 MS. SOMES: He did. That was the last - -
7 -

8 CHIEF JUDGE LIPPMAN: - - - he knew what
9 happened there - - -

10 MS. SOMES: That was the last thing that he
11 remembered. He told the police what he remembered.
12 He remembered drinking all over the place. And then
13 his - - - his, you know, recollection of what
14 happened is very consistent with somebody who's in an
15 alcoholic blackout.

16 CHIEF JUDGE LIPPMAN: But there is some - -
17 - some evidence of a very purposeful going about his
18 business, the cutting of the screen - - -

19 MS. SOMES: There is, and that - - -

20 CHIEF JUDGE LIPPMAN: - - - and all of
21 that.

22 MS. SOMES: And that would bring us back to
23 the Farnsworth case, where the Appellate Division in
24 Farnsworth affirmed the conviction, saying that there
25 was very purposeful acts. The defendant in that case

1 had to remove broken glass from a window. He had to
2 actually lift himself - - - get himself up to go
3 through a window. He was going through drawers,
4 taking out valuables. The police came - - -

5 JUDGE SMITH: Yeah, but the in - - - but in
6 Farnsworth, see, it was a burglary case, and the
7 question was what he intended to do when he went into
8 the house. Here, the charge, I guess, is rape. He -
9 - - he - - - the evidence is that he cuts glass, goes
10 in, chokes the - - - yeah, tells the woman to shut
11 up, chokes her, rapes her, throws a comforter over
12 her head, and steals her cell phone. How - - - how
13 can you argue to a jury that he could not form the
14 intent to do those things? How do you do those
15 things without intent?

16 MS. SOMES: I think it's the intent to
17 forcefully compel in that if this - - - if - - - when
18 you look at his statement, he says when he gets
19 drunk, he - - - a spirit takes over his body. He has
20 no control of it. I think a jury could find that
21 this defendant went in there and he really was
22 disconnected. He was not conscious of what he was
23 doing; he was in an autonomic state, sort of.

24 JUDGE GRAFFEO: But without any specifics
25 as to his behavior before this incident and where he

1 was drinking or quantity - - - I mean, we've said
2 repeatedly that you need some specifics. Couldn't
3 any defendant - - - every defendant could come in and
4 say, you know, when I get drunk, I can't remember
5 what I do?

6 MS. SOMES: Every - - - and they could;
7 they could.

8 JUDGE GRAFFEO: So how - - - so how do you
9 avoid that kind of situation? Isn't that why we're
10 looking for some additional information?

11 MS. SOMES: I think you're looking for
12 additional information. In those cases, where we
13 just got a defendant saying this is what I've had to
14 drink, or I had a couple of drinks, like in Gaines, I
15 had a couple of drinks. Here we have, I had a lot of
16 drinks; I was drinking all over the place. And then
17 we have the: this is how alcohol - - -

18 JUDGE GRAFFEO: But couldn't he have
19 mentioned at least two or three of the places he was
20 drinking? At least where he initially went to drink?

21 MS. SOMES: He did say he went to - - - he
22 started out at Lux Bar on South Ave. in Rochester,
23 but - - -

24 CHIEF JUDGE LIPPMAN: Yeah, but
25 qualitatively, are you saying that - - - that his

1 saying, I just got smashed, or whatever he said, is
2 more imposing then the guy saying, as in Sirico, I
3 had two beers, four - - - a bottle of vodka, or
4 whatever it was. Is it more impressive to say, gee,
5 I just got drunk, in terms of the qualitative nature
6 of what happened?

7 MS. SOMES: I think it is, because what we
8 have here is we have the evidence as to the effect
9 that that alcohol consumption had on the defendant.
10 We didn't have that in Sirico; we didn't have it in
11 Gaines.

12 JUDGE RIVERA: What - - - what's that
13 evidence other than his statements?

14 MS. SOMES: The evidence is that a spirit
15 takes over his body - - -

16 JUDGE RIVERA: Those are his statements.

17 MS. SOMES: Those are his statements.

18 JUDGE RIVERA: Other than his assertions,
19 what - - - what do you have?

20 MS. SOMES: You have the complainant saying
21 that his breath smelled of alcohol. But when you're
22 talking about these are his statements - - -

23 JUDGE RIVERA: But in Gaines there was more
24 - - - there was also this other type of evidence, and
25 it wasn't enough.

1 MS. SOMES: In Gaines there was - - - in
2 Gaines there was nothing where he said, I was drunk;
3 I was intoxicated. It was, I had a couple of drinks
4 in Gaines.

5 JUDGE READ: So - - -

6 JUDGE ABDUS-SALAAM: Well, what about the
7 case where someone says - - - the person was high,
8 and the police say his eyes are glassy, but that
9 wasn't sufficient.

10 JUDGE RIVERA: But that was the Rodriguez
11 case.

12 MS. SOMES: And I think that that may be
13 indication that someone has smoked some pot or done
14 something. So there may be - - - that may be proof
15 of consumption to some level. But what we've got in
16 this case is proof of - - - of the impact of the
17 consumption. We may not know exactly how much other
18 than, I was drinking all over the place; I was drunk.
19 But we have proof as to the impact of that alcohol
20 consumption on his behavior.

21 CHIEF JUDGE LIPPMAN: But he - - - but he
22 really talks about that in general. He - - - he
23 doesn't say what happened here. He says, I don't
24 know; when I'm drinking, a spirit takes over me, and
25 then, as I think Judge Smith said, he said, so I

1 don't know; I don't know anything.

2 MS. SOMES: He doesn't know what - - -

3 CHIEF JUDGE LIPPMAN: I mean, that's - - -
4 that's enough that - - - for the jury to reasonably
5 say that - - - to question the intent?

6 MS. SOMES: Well, he has - - -

7 JUDGE ABDUS-SALAAM: Didn't he - - - before
8 you answer - - - just to add. But didn't he also
9 say, he remembers - - - finally remembered going into
10 the rape victim's home and laying down with her and
11 then, you know, she wakes up and screams, and then he
12 leaves. So he remembered that.

13 MS. SOMES: He remembered part of it, which
14 may be in - - - which may be consistent with, you
15 know, some recovered memory of it. But, I think,
16 getting back to your question, Judge Lippman, is that
17 the fact that it goes to the jury at that point. If
18 we have purposeful acts, then we have others - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but you have to
20 get over the threshold, right?

21 MS. SOMES: The threshold is very low.
22 This court has repeatedly said, it's very, very low.
23 And here - - -

24 CHIEF JUDGE LIPPMAN: And - - - and this is
25 a stronger case than Sirico?

1 MS. SOMES: I think it is, because we have
2 - - - we have evidence that tells what happens when
3 he gets drunk, and he said he got drunk. And we
4 can't say, gees, it's from the defendant's own mouth;
5 it's self-serving. If you se - - - if you look at it
6 that way, then you're no longer looking at the
7 evidence in the light most favorable to the
8 defendant, which is the way you need to look at the
9 evidence in this case.

10 But the purposeful acts in Sirico, you did
11 mention there was one line that those were purposeful
12 acts. But that was only after this court found there
13 was insufficient evidence of intoxication, that the
14 court said in - - - and indeed the acts were
15 purposeful. But when you go back to Farnsworth, you
16 have the purposeful acts, which when you have
17 purposeful acts and you have evidence of
18 intoxication, when you have the two things, if
19 becomes a jury question for whether or not this
20 threshold has been met.

21 CHIEF JUDGE LIPPMAN: Okay, counsel. Okay,
22 you'll have your rebuttal. Let's - - - let's hear
23 from your adversary.

24 MR. KAEUPER: Good afternoon, Your Honors.
25 I - - - I think here we have considerably less than

1 in Sirico.

2 JUDGE PIGOTT: Except the fact that you've
3 got some strange situations here. I mean, the - - -
4 he was arrested about a week and a half after this
5 incident, right? I mean, it wasn't like - - -

6 MR. KAEUPER: After the second incident.

7 JUDGE PIGOTT: Right, right. Well, after
8 the rape.

9 MR. KAEUPER: Right, right, and - - -
10 right, a couple of months after the - - -

11 JUDGE PIGOTT: He's arrested for a robbery
12 or burglary, and then they - - - then they connect
13 him to this. And so they're asking him about
14 something that went - - - happened a week and a half,
15 two weeks earlier, and he testifies to it. Isn't it
16 strange that someone who is raped says, I woke up and
17 there he was beside me, and he smelled of alcohol,
18 and I screamed and he left. I mean, it sounded like
19 they were both toasted. And I think she said - - -

20 MR. KAEUPER: But - - -

21 JUDGE PIGOTT: - - - she had - - - she was
22 drunk, right?

23 MR. KAEUPER: Well, she - - - she had - - -

24 JUDGE PIGOTT: The victim?

25 MR. KAEUPER: Yeah, she had been drinking,

1 but - - -

2 JUDGE PIGOTT: And we accepted that.

3 MR. KAEUPER: But she doesn't say that she
4 woke up and screamed and he left. I mean, she gives
5 a detailed account of a vicious rape, where he's
6 strangling her within an inch of her life.

7 JUDGE PIGOTT: No, but - - - but - - - but
8 my point is, that he - - - he was there on her couch
9 with her sleeping, right? And then, all of this
10 happens?

11 MR. KAEUPER: He lies - - - he lies down
12 with her first, right, which is consistent with the
13 attempted rape, too, when he - - -

14 JUDGE PIGOTT: It doesn't sound like a
15 sober person, though, does it?

16 MR. KAEUPER: I don't know whether it's a
17 sober person or not, but it sounds like somebody
18 who's intending what he's doing.

19 JUDGE PIGOTT: Well, then - - - eventually.
20 But I mean, do people usually wander into somebody's
21 house and lie down on the couch next to somebody?

22 MR. KAEUPER: If they're serial rapists, I
23 mean, that - - - this is clear - - -

24 JUDGE PIGOTT: Why would they - - -

25 MR. KAEUPER: - - - this is his way of - -

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JUDGE PIGOTT: I would - - - I would think at that point they would then commit the act. I mean, this - - - this seem to dovetail with his statement that he drinks a lot, that he drank a lot.

MR. KAEUPER: I - - - I don't - - -

JUDGE PIGOTT: I'm almost done.

MR. KAEUPER: Yeah, I'm sorry.

JUDGE PIGOTT: And that then he blacked out.

MR. KAEUPER: Yeah - - - no, I don't think it's consistent with his statement, because I don't think her testimony is that he's sleeping with her. He lies down with her first. But it's - - - yeah, when she says something to him, that's when he tells her shut up, and starts hitting her and so forth. But I don't think he - - - I don't think her version is that he's lying there asleep with her. I think that's a significant difference there.

But - - - but I think - - - I think they're sort of - - - they're - - -

CHIEF JUDGE LIPPMAN: How about - - - how about your adversary's argument that it says more to us by he just - - - him just saying, I was stark raving drunk, and we know what he does when he's

1 drunk, or he says what he does when he's drunk. How
2 do you react to that being stronger in some ways in
3 Sirico, because - - - because we're not getting into
4 measuring the quantity exactly.

5 MR. KAEUPER: No, they're not - - -

6 CHIEF JUDGE LIPPMAN: He's drunk; he's
7 telling you he's drunk.

8 MR. KAEUPER: Yeah.

9 CHIEF JUDGE LIPPMAN: Is that weaker or
10 stronger than Sirico?

11 MR. KAEUPER: I think it's weaker. And I
12 think it's - - - it's directly controlled by Gaines.
13 Gaines tells us that kind of conclusory "I was drunk"
14 is not enough.

15 JUDGE SMITH: Is this - - - is there really
16 just a conclusory "I was drunk"? He says the - - -
17 he says, "When I get drunk, demons take over my mind.
18 I did get drunk that night; I don't remember. I
19 remember almost nothing of what happened." Isn't
20 that sort of what you'd expect somebody who is very,
21 very drunk to remember?

22 MR. KAEUPER: Well, I mean - - -

23 JUDGE SMITH: I mean, in Sirico, he just
24 said I had a couple of drinks.

25 MR. KAEUPER: Well, I don't - - - I mean,

1 blacking out is certainly one thing that happens when
2 somebody's drinking. But his story of drinking is
3 I'm drinking at bars. This - - - this is a rape that
4 happened in about 6 in the morning. So we've got
5 four hours minimum, and he doesn't tell us anything
6 about when he's drinking the previous day. Four
7 hours minimum where he's blacking out, and then
8 suddenly he remembers knocking on the door, waiting
9 for - - - I mean, knocking on the window - - -

10 JUDGE SMITH: So you're - - - you're - - -
11 aren't you evaluating the credibility of his story
12 when you - - - when you make this argument?

13 MR. KAEUPER: I'm - - - I'm evaluating
14 whether it's - - - it's providing a reasonable
15 explanation for it.

16 JUDGE SMITH: Suppose - - - suppose you had
17 a case where - - - where intent really was a close
18 question. I can't think of one offhand, but there
19 are - - - there are - - - yeah, there are cases where
20 we know what he did, and the question of whether he
21 intended to do it, wouldn't you - - - are you saying
22 that even in such a case this statement wouldn't - -
23 - wouldn't suffice to get an intoxication charge?

24 MR. KAEUPER: Yeah, I think this - - - I
25 think this statement is too conclusory, just "I" - -

1 - "I got drunk" at some unspecified time - - -

2 JUDGE SMITH: Even - - - even - - -

3 MR. KAEUPER: - - - quite a bit before the

4 - - -

5 JUDGE SMITH: Let's say - - - say it was a
6 trespass case. Say the only thing he did was wander
7 on to the grounds, and he gives this statement or a
8 statement very similar to this. You're saying he
9 doesn't get an intoxication charge as to whether he
10 had an intent to trespass?

11 MR. KAEUPER: Yeah, I think he - - - I
12 think he has to give us something more specific than
13 I got drunk the day before.

14 JUDGE SMITH: Yeah, but you - - - but on
15 the other hand, you do - - - the - - - the evidence
16 of purposeful conduct is important to your case,
17 isn't it?

18 MR. KAEUPER: Absolutely. I mean, that's
19 why I think there's sort of two - - - two questions,
20 in a way. There's - - - one is how - - - has he
21 shown enough evidence of intoxication? I don't think
22 he has. But even leaving that aside, there - - - it
23 still has to be intoxication that would provide a - -
24 - that would negate an element here. And this
25 conduct is intentional.

1 I mean, the comment was made there that it
2 - - - he might have - - - it might negate forceful
3 compulsion. I mean, that would be the Newton case,
4 where - - - where you have a situation where, because
5 I was so drunk, I thought she was consenting. This
6 guy is strangling this woman so that there is, you
7 know, her blood vessels are bursting in her eyes.
8 Intoxication doesn't make that a reasonable - - - he
9 was so drunk that I thought while I was choking her
10 that she was consenting. I mean, it makes no sense.

11 JUDGE PIGOTT: What in your view would he
12 have needed to prove - - - to get an intoxication
13 charge in this case?

14 MR. KAEUPER: I think he would have had to
15 tell us - - - I mean, as far as just getting - - -
16 getting the degree of intoxication, because I think
17 the nature of this crime doesn't work with it, but -
18 - -

19 CHIEF JUDGE LIPPMAN: But does - - - your
20 theory is regardless of the degree of intoxica - - -
21 I gather from what you're just saying. Regardless of
22 the degree of intoxication, he was choking her, he
23 was whatever, that - - - that you couldn't have a
24 reasonable question of intent.

25 MR. KAEUPER: Right. He's - - -

1 CHIEF JUDGE LIPPMAN: So is your argument
2 that it doesn't matter what they - - - what - - - how
3 much evidence you have of how much you drank or - - -
4 nonconclusory - - -

5 MR. KAEUPER: Right.

6 CHIEF JUDGE LIPPMAN: - - - more definitive
7 statements still wouldn't have been enough? Is that
8 your - - -

9 MR. KAEUPER: I - - - I think - - - I think
10 under these circumstances, yes, but - - -

11 JUDGE SMITH: So if he came in - - - if he
12 came in with an in - - - yeah, he remembered bar by
13 bar and drink by drink, exactly what he'd had. And
14 he - - - he described twenty-three drinks, and it
15 wasn't 6 in the morning, it was five minutes after
16 the bar has closed. Does he get an intoxication
17 charge in this case?

18 MR. KAEUPER: Not - - - no, not on the
19 rape.

20 JUDGE SMITH: Because - - - because - - -
21 just because it's too - - - for the contact itself.
22 Is there any way to get an intoxication charge on
23 facts like these?

24 MR. KAEUPER: No, I think not on the rape,
25 because I think intoxication doesn't - - - isn't

1 going to negate intent. I mean, or - - - I mean,
2 maybe if he said - - - I mean, I can't think of what
3 bizarre thing he could say that would - - - that
4 where - - - where you could say, oh, yes, because he
5 was drunk, he misperceived that circumstance and - -
6 -

7 JUDGE PIGOTT: Well, you're giving full
8 credibility to the victim, who was drinking as well.
9 And if - - - and if someone were to cross-examine the
10 victim and - - - and challenge her - - - her story
11 which was that this was forced, et cetera, et cetera,
12 then, if you took Judge Smith's proposal, then would
13 you think there'd be an intoxication charge in that
14 event?

15 MR. KAEUPER: Well, no, because I think - -
16 - I don't think I'm relying on the victim's
17 credibility, and this, I think, goes to the question
18 about - - - about viewing the evidence in the light
19 most favorable to the defendant; you still have to
20 view all of the evidence. And so, I mean, you know,
21 you can't just discount anything that doesn't work
22 for the defendant in the defendant's favor, I mean -
23 - -

24 JUDGE SMITH: Is there - - - I mean, is
25 there any evidence of any alternative - - - say, that

1 anything that happened other than what the victim
2 said happened?

3 MR. KAEUPER: No, and there's - - - and
4 there's evidence that is incontrovertible that
5 supports her. I mean, the fact that she has the - -
6 - petechiae, I think, is the term for it. I mean,
7 this is - - - you know, the window was opened when -
8 - -

9 JUDGE SMITH: The window was cut, actually.

10 MR. KAEUPER: I beg your pardon, yes. The
11 screen was - - -

12 JUDGE GRAFFEO: The screen was cut, right?

13 MR. KAEUPER: The screen is cut; the window
14 is initially opened. I think maybe she closes the
15 window, but yes, the screen is cut, and - - - and
16 sort of dust or debris has been wiped away from the
17 sill where that's - - -

18 JUDGE SMITH: He - - - he steals her cell
19 phone.

20 MR. KAEUPER: Correct.

21 JUDGE PIGOTT: Well, the judge, if I'm - -
22 - I've got this right, said specifically "There's no
23 evidence whatsoever indicating the alleged
24 intoxication of the defendant. And there's no
25 evidence to support the instruction as regard to the

1 number of drinks or the amount of alcohol consumed,
2 the time period involved, whether any drinks at all
3 contained alcohol, as well as any physical effects
4 that the alcohol may have had on the defendant's
5 behavior or mental state."

6 And therefore, he denied it. So he - - -
7 he considered the merits of it, and just said that
8 there wasn't enough evidence of it, right?

9 MR. KAEUPER: Right. And he - - - yeah, he
10 cites, I believe, Shaw, which is a Fourth Department
11 case, which I think comes out of - - -

12 JUDGE PIGOTT: Right, but he didn't say - -
13 - he didn't say I'm not going to give it, because
14 under no circumstances in this case is intoxication a
15 valid defense. He just said there was insufficient
16 evidence of it.

17 MR. KAEUPER: Right. That's - - -

18 JUDGE PIGOTT: So to go back to Judge
19 Smith's question, which I was kind of curious about,
20 if he - - - if he did testify that I was in four bars
21 and I had fifteen drinks, and - - - and by the way,
22 I'm five-six and 120 pounds, and a doctor comes in
23 and says, a person who drank that much, you know, et
24 cetera, what does it take to get an intoxication
25 charge?

1 MR. KAEUPER: Yeah, no, I think - - - I
2 think under Gaines that probably does enough.

3 JUDGE PIGOTT: I was sure it would. But is
4 there something less? I mean, do you need an expert?
5 Do you need - - - you know, do you just need a number
6 of bars, times, a number of drinks?

7 MR. KAEUPER: I think - - - I mean, I
8 think, the underlying concern here, the jury has to
9 be given something with which to evaluate the
10 instruction. They have to have evidence that they
11 can use to consider this question. If you like - - -

12 JUDGE SMITH: In - - - in your answer to
13 Judge Pigott a minute ago, did you mean to concede
14 that that would be enough, even on the facts of this
15 case?

16 MR. KAEUPER: No, I thought he was taking
17 that part out of it. I thought you were saying just
18 on the - - - I thought you were - - - you were
19 indicating, in effect, that the judge had not decided
20 that second - - -

21 JUDGE PIGOTT: He said based - - - he said
22 based upon the lack of information here, I'm not
23 going to charge it. He didn't say under - - - he
24 didn't say based upon the other evidence that you
25 alluded to that - - -

1 MR. KAEUPER: Right, and so - - - so I
2 mean, it's - - - if you're getting at sort of a
3 LaFontaine/Concepcion issue, that the judge didn't
4 decide that question - - -

5 JUDGE PIGOTT: Theme of the day.

6 MR. KAEUPER: - - - I don't - - - what - -
7 -

8 JUDGE PIGOTT: I'm sorry; it was - - -

9 MR. KAEUPER: Theme of the - - - yeah.

10 JUDGE PIGOTT: An editorial comment, I'm
11 sorry.

12 MR. KAEUPER: Yeah, I mean, I don't know if
13 that's true. Part of the problem here is that the -
14 - - the bulk of the discussion happens off-the-
15 record, and then it gets sort of put on the record.
16 But I would agree that the judge does not explicitly
17 on the record make that holding, but I - - -

18 CHIEF JUDGE LIPPMAN: But counsel, but the
19 question was, in the hypothetical that Judge Smith -
20 - - Judge Pigott is giving you, in this case, your
21 position is, you can't get the intoxication charge -
22 - -

23 MR. KAEUPER: It doesn't - - - it can't
24 negate an element.

25 CHIEF JUDGE LIPPMAN: - - - because - - -

1 okay.

2 MR. KAEUPER: Yeah.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 MR. KAEUPER: Thank you.

5 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

6 MS. SOMES: A couple of quick points. In
7 the Koerber case, which is one of the foundational
8 cases from - - - back from 1924, the - - - this court
9 has said, you know, we may doubt whether or not an
10 intelligent jury would actually have this evidence of
11 intoxication affect its verdict, but it's a question
12 for the jury. And they - - - and to withhold it from
13 the jury is improper.

14 And two, you know, the question of if - - -
15 if he ended up being able to recall everything that
16 he had to drink, then probably he wasn't that
17 intoxicated. So, you know, you're - - - you're kind
18 of putting a rule in place where people are going to
19 have to stop drinking at the point where they'll
20 start forgetting what they've had, and there's a very
21 narrow window there, in order to get that
22 intoxication charge.

23 And finally, in terms of the purposeful
24 conduct and whether or not you can ever get an
25 intoxication charge on a rape case such as this, you

1 know, if the - - -

2 CHIEF JUDGE LIPPMAN: Well, on this case -

3 - -

4 MS. SOMES: That - - -

5 CHIEF JUDGE LIPPMAN: - - - not on a rape
6 case such as this. Can you get an intoxication
7 charge in light of what your adversary is describing
8 is very purposeful conduct?

9 MS. SOMES: In light of the fact that, you
10 know, he could be so - - - the jury could find that
11 he was so intoxicated that he was absolutely
12 oblivious to his own actions, and his own conduct,
13 and the impact - - -

14 CHIEF JUDGE LIPPMAN: Even if he's choking
15 her or whatever he's doing?

16 MS. SOMES: And the impact, may not
17 understand what he's doing - - -

18 JUDGE SMITH: How do you obliviously steal
19 a cell phone?

20 MS. SOMES: How do you obliviously - - -

21 JUDGE SMITH: Yeah, how can you be
22 oblivious to the fact you're taking someone's cell
23 phone?

24 MS. SOMES: I think you could probably take
25 it, and as he said, he didn't seem to have a

1 conscious objective to things; it was more like an
2 unconscious objective, and I think that that is
3 consistent with the entire intoxication issue here.

4 CHIEF JUDGE LIPPMAN: Okay, thanks,
5 counsel.

6 MS. SOMES: Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you both;
8 appreciate it.

9 (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. Donny P. Beaty, No. 148 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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