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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 23

FAROD MOSLEY,

Appellant.

20 Eagle Street
Albany, New York
February 14, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE BETSY BARROS

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Mosley. And we are delighted to be joined by our
3 colleague from the Second Department, the Honorable Betsy
4 Barros.

5 MR. LEITH: Good afternoon, Your Honors. May it
6 please the court. Thomas Leith for Mr. Farod Mosley.

7 Det. Kilburn should not have been permitted to
8 offer his opinion to the jury that it was Mr. Mosley - - -
9 Mosley depicted in the low quality, blurry video that was
10 shown to the jury in this case and was the crucial piece of
11 - - -

12 JUDGE SINGAS: And what is the reason why? Is it
13 because he did not know him at the time of the commission
14 of the crime?

15 MR. LEITH: There - - - there are various
16 reasons, Your Honor. First, the trial court applied the
17 wrong legal standard regarding lay opinion testimony. In
18 our view, the court only required a bare familiarity with -
19 - - with the defendant in this case.

20 JUDGE CANNATARO: How much do you need? How much
21 familiarity is enough familiarity?

22 MR. LEITH: Well, according to this court's case
23 law, it should be something connected close to, in time, to
24 - - - first of all, close in time to the events depicted in
25 the photo or the video. There should be certainly more

1 than what we saw here. There should be some - - - there
2 should be testimony regarding the quality of the
3 interactions, how numerous they were. Here we have an
4 officer who could only recall one specific time that he
5 spoke to Mr. Mosley. And this was after - - -

6 JUDGE HALLIGAN: Can I ask you on that,
7 specifically? The Appellate Division dissent, and it
8 sounds like you agree, said that they only met once. Can
9 you tell me where in the record that's apparent because I -
10 - - I couldn't make it out.

11 MR. LEITH: In the - - - in the - - - I believe
12 it's in the voir dire. He could - - - he is only able to
13 specifically recall one time that he actually met. Now,
14 there may have been other times. There was only one time
15 that he could recall meeting with Mr. Mosley.

16 And let's keep in mind the context of this, Your
17 Honor, that shouldn't be surprising. Mr. Mosley had been
18 arrested. He had been incarcerated. And that was the
19 first time that Det. Kilburn met him. And so presumably,
20 he brought - - - and he was never released on bond - - - so
21 presumably he brought him from jail to the station or
22 somewhere where he could interview him.

23 JUDGE HALLIGAN: What do you do about the
24 constraints on cross that I think existed because of
25 concerns about revealing too much that might tell the jury

1 about the circumstances in which they had interacted?

2 MR. LEITH: Well, the - - - the cross-examination
3 problem is a big one, Your Honor, and especially when it
4 concerns law enforcement. And you saw that play out in
5 this case.

6 JUDGE HALLIGAN: But what's the solution to it?
7 Is the solution that a law enforcement officer is - - - is
8 somehow disqualified from testifying? I'm just trying to
9 understand how you would - - - how you would deal with it.

10 MR. LEITH: First of all, it's a reason to be
11 very skeptical of allowing this kind of testimony because
12 there is this difficult problem to get around, surely. And
13 the court, perhaps a little ham-fistedly, tried to do that
14 in this case, and we saw the problems. The defense counsel
15 was unable to interrogate on cross, anything about the
16 nature of the - - -

17 JUDGE SINGAS: No, that seemed to be a decision
18 that he made, because he didn't even ask a question to
19 clarify how many times - - - what's the total time that you
20 spent together? From what angles did you view him? A
21 number of questions could have been asked, I think, that
22 would not have run afoul of, you know, having the danger of
23 introducing the jury to the fact that he knew him from
24 prior arrests.

25 Like, you know, the record here is pretty bare,

1 but the defense attorney could have asked a lot more
2 questions and didn't. Do you disagree with that?

3 MR. LEITH: I don't disagree with that. Surely
4 there were more questions that the defense attorney could
5 have asked. But some things he could not have asked were,
6 for example, where did you meet with this defendant?

7 JUDGE SINGAS: Right.

8 MR. LEITH: Did you meet him on the street?
9 Because he's going to open the door to a lot of extremely
10 prejudicial information. And even just - - - and if the
11 answer is no, I didn't meet him on the street, there's a
12 very clear implication that it was a part of this
13 detective's investigation.

14 So I think that the problems with - - - with
15 cross, Your Honor, it doesn't - - - it doesn't
16 automatically disqualify law enforcement from testifying in
17 these situations, but it is something that the trial court
18 needs to consider very carefully, especially when it
19 considers the amount of prejudice that might result from
20 allowing this type of opinion testimony, which the trial
21 court did not do in this case.

22 JUDGE CANNATARO: So are you proposing some sort
23 of bright line or categorical rule that says arresting
24 officers can't testify in this type of situation? Or are
25 you - - - are you - - - are you advocating for anything

1 other than just making sure that there's a foundation for
2 the admission of the evidence? Is there a categorical rule
3 that you think should be applied?

4 MR. LEITH: I don't necessarily think there needs
5 to be a categorical rule. I do think, however, that
6 allowing post-arrest - - - post-arrest familiarity by a law
7 enforcement officer to testify as to their opinion whether
8 or not something like a video is the defendant should be
9 viewed extremely skeptically, in part because of the cross-
10 examination limitations that would occur.

11 JUDGE HALLIGAN: But you - - -

12 JUDGE CANNATARO: And again - - -

13 JUDGE HALLIGAN: Please.

14 JUDGE CANNATARO: Because I'm going to refer to
15 your question that you asked just a moment ago. It seems
16 like in this case, everyone is sort of really taking great
17 pains to avoid exposing the arrest. And I think you've
18 heard questions from across the panel about the things that
19 could have been asked that weren't asked. And if you asked
20 - - - if you were to ask me about that, it seems the
21 motivation behind that was not to - - - not to let the
22 horse out of the barn.

23 Who - - - who bears the responsibility - - -
24 assuming that there's - - - that's correct - - - who bears
25 the responsibility for failing to develop the record

1 adequately with respect to the officer's familiarity with
2 the defendant?

3 MR. LEITH: I think that perhaps multiple parties
4 bear some responsibility here. I think that the defense
5 counsel was put in a very difficult situation about how to
6 develop at least - - -

7 JUDGE CANNATARO: I think everyone was, don't
8 you? It seems as if everyone took the judge very seriously
9 and did not want to, like, let this out. And they - - -
10 they were very limited in their questioning on this very
11 issue.

12 MR. LEITH: And I think it's a reason to be
13 particularly skeptical of this type of testimony, Your
14 Honor, especially when you consider how little value it was
15 really providing to the jury, which are some of the other -
16 - -

17 JUDGE HALLIGAN: And why is that? Wasn't this
18 really the only evidence if - - - if, in fact, the - - -
19 the officer had some experience with the defendant and the
20 video was poor quality, wouldn't the officer at least
21 provide some better basis?

22 MR. LEITH: Potentially, Your Honor, but here's
23 the problem, this officer - - - first of all, his
24 familiarity was overstated, I believe, by the - - - by the
25 Fourth Department in its decision, as outlined by the

1 dissent, I think, very well. But the problem here is that,
2 given this officer's familiarity, whatever it is, he needed
3 to be able to connect that familiarity to some observable
4 thing that he could articulate, that he can point to, and
5 say a video that the jury can then use in its independent
6 determination of who it is in that video. And that never
7 happened here.

8 JUDGE HALLIGAN: Can I ask you to go back to
9 Judge Cannataro's question about, you know, who has
10 responsibility to develop the record? Is the answer to
11 that the same in the context of cross as opposed to voir
12 dire? Or do the People have more of a burden in voir dire
13 to establish the officer's familiarity with the defendant
14 and lay a foundation for introducing his testimony?

15 MR. LEITH: Well, I think that clearly the
16 defense counsel is not as constrained in the voir dire
17 about their cross-examination about developing the
18 officer's familiarity because it's not in front of the
19 jury.

20 JUDGE HALLIGAN: Sure.

21 MR. LEITH: And the opposite is true, of course,
22 once he is. And I think that it's - - - it's the People's
23 burden, first of all, to establish this familiarity in the
24 first instance. And that would occur - - - we're - - - we
25 argue that this should occur during the voir dire, first of

1 all, which is - - - we think is another problem with the
2 way that this happened here is that the - - - the - - -
3 that's the moment when the foundation needs to be laid.

4 Now, the Fourth Department talked a little bit -
5 - - the majority talked about some reasons to think that a
6 foundation was laid, but this was already after he was
7 testifying in front of the jury. And in fact, the judge
8 had already allowed this identification to occur. He only
9 afterwards says, here was the basis of my recognition.
10 Here's why I can tell you that I think it's the guy. But
11 this happened already after the identification would be
12 made. There was no testifying - - - no testimony like this
13 whatsoever during the actual foundational part during the
14 voir dire, where - - - and this is something that we think
15 was an error made by the lower court that it should occur
16 in that earlier period. And the other - - -

17 JUDGE BARROS: What do you propose as a test - -
18 - a way to approach these kinds of cases? They're very
19 commonplace now. They weren't before, and we don't have a
20 lot of jurisprudence on this issue in as much as it
21 involves a nonpercipient witness. What do you propose as a
22 way to approach these kinds of cases?

23 This is not the best example of how it should be
24 approached. I think everybody would agree on that. What
25 do you think should be done? Should there be a request for

1 like a sort of like a Rodriguez hearing, something where
2 you establish the familiarity and have a full-fledged
3 hearing to determine whether or not this evidence should be
4 admissible?

5 MR. LEITH: Something like that, Your Honor. So
6 I think, first of all, there should be some sort of jury
7 out voir dire type hearing. And in that hearing, the first
8 thing that should be established is the familiarity aspect.

9 JUDGE SINGAS: Didn't that happen here?

10 MR. LEITH: That's the only thing that happened.
11 But yes, it did happen. There was - - - there was a - - -
12 there was a jury out hearing and there was testimony at the
13 jury out hearing about familiarity. Now we say it was
14 inadequate, but that's just the first step.

15 And to get to what we would consider a test, the
16 next part is there has to be some nexus between that
17 familiarity. Like, how does he recognize this person in
18 that video? And there has to be some observable thing in
19 the video itself that he can point to that will actually be
20 useful for the jury to see, because it doesn't matter if -
21 - - if the video looks like TV static, Mr. Mosley's own
22 mother wouldn't be able to identify him. So there has to
23 be something in that video that - - - that the witness can
24 point to, that the jury can then use constructively to make
25 an identification one way or the other. So that's the

1 second step.

2 The third step is whatever that identifiable
3 characteristic is, it has to be something that the jury
4 could not have seen on its own otherwise.

5 So for example, in this case, although this
6 didn't happen in the voir dire, this happened afterwards
7 during the jury testimony, the witness says, well, I'm
8 basing this on the shape of his nose and his build. Well,
9 the shape of his nose and his build are something that the
10 jury can very well see. They're looking at this defendant
11 for three days during trial, and I would submit that they
12 have every bit as good a recognition of what this guy's
13 nose looks like and his build looks like as that officer
14 who met him maybe once or a few times.

15 JUDGE CANNATARO: Can you see the shape of his
16 nose on this video?

17 MR. LEITH: You cannot whatsoever. If - - - if
18 you didn't know humans had noses, you still wouldn't know
19 after watching this video.

20 JUDGE CANNATARO: I have to tell you, so I don't
21 know what this means, but I think if you pause the video
22 when his face is in the frame, it's very pixelated. I
23 can't see the shape of anything, but what I can see is a
24 lighter colored pixel where his nose might be. Does that -
25 - - I mean, does that mean anything? Is - - - is there a

1 discoloration issue with this defendant's nose? Is his
2 nose lighter than the rest of him?

3 MR. LEITH: Not that - - - not that was in the
4 record, Judge. And - - - and certainly at no point did the
5 witness say, you know - - - look at a video and say, here,
6 look, you see the nose here, this is why I knew it was him.
7 There's nothing of that nature at all. And even - - - even
8 seeing his - - - a person's nose or face at all is almost a
9 generous interpretation of how that video looks - - -

10 JUDGE RIVERA: What about his statements that he
11 framed in and out on that video, suggesting that he did
12 spend more time connecting whatever was his recollection of
13 the appearance, right, based on his interactions with the
14 defendant and the figure in the video.

15 MR. LEITH: If he zoomed in and out - - -

16 JUDGE RIVERA: Uh-huh.

17 MR. LEITH: - - - in the video in some way, and -
18 - - I have zoomed in and out of that video. He never
19 explained to anyone, to the judge and the foundational
20 hearing how that zooming in and out could have possibly
21 elicited an identification.

22 JUDGE SINGAS: So you're saying it could have
23 been enough, but in this case, because there wasn't the
24 actual connection, it wasn't enough. Am I hearing that
25 right?

1 MR. LEITH: Well, the - - - perhaps in another
2 case it could have been enough. I don't think it's
3 irrelevant if he could zoom in and then, oh, yes, there's
4 something in the video that I recognize. That didn't
5 happen here, and there was never any explanation as to how
6 that zooming aided his identification in any way.

7 JUDGE BARROS: Well, the jury wanted to zoom in
8 and out with the magnifying glass, right. And they were
9 not permitted to obviously have a magnifying glass for - -
10 - for the proceeding. It sounds like they were also trying
11 to do what the officer may have testified about.

12 MR. LEITH: They were, Your Honor. I do believe
13 that the jury had the opportunity to zoom. Now, whether or
14 not they zoomed in the same way as - - - as the witness is
15 impossible to tell. I don't know that there's multiple - -
16 - it seems there's only one way to zoom on this video.

17 So - - - so clearly the jury - - - I mean, and
18 there's no doubt that this was extremely important
19 evidence. In fact, it was really the only evidence. And
20 there's no doubt that Det. Kilburn's testimony - - -
21 opinion testimony about whether or not the video depicted
22 the defendant was - - - was very important. They asked,
23 can we base our verdict on one witness's testimony? They
24 meant - - - they meant Det. Kilburn. And - - - and that
25 they asked about the magnifying glass, and they wanted to

1 read back Det. Kilburn's testimony. They wanted to watch
2 the video again. All of which is - - - just goes to show
3 the importance of this video and how there's no doubt that
4 the improper nature of this testimony was prejudicial to -
5 - - to Mr. Mosley.

6 JUDGE BARROS: How does this tie in to the
7 judge's limiting instruction and final instruction? Was
8 there an instruction regarding the opinion - - - evidence
9 that was offered here?

10 MR. LEITH: There was no - - -

11 JUDGE BARROS: - - - and that, similar to the ID
12 - - - is that sufficient? Is the identification charge
13 sufficient to cover this scenario?

14 MR. LEITH: In this - - - in this instance, Your
15 Honor - - - and you asked what we thought would - - - would
16 be the procedure for - - - for a judge. We think that they
17 should, of course, give a limiting instruction informing
18 the jury that this is merely - - - this is an opinion that
19 can be rejected or accepted.

20 JUDGE HALLIGAN: And was that requested?

21 MR. LEITH: That was not requested.

22 JUDGE HALLIGAN: And so - - - so why would we
23 take issue with the failure to give it at this juncture?

24 MR. LEITH: I think - - - well, maybe not as an
25 independent based - - - basis to reverse Your Honor, but I

1 certainly - - - I don't think that - - - there was no
2 limiting instruction that might bolster the People's case
3 because it just didn't exist, whether or not - - - and I
4 think it's just another brick in the wall, I suppose you
5 might say, as to why we believe that this was an
6 impermissible conviction.

7 JUDGE RIVERA: Well, just to clarify, are you
8 asking - - - what - - - keeping in mind what Judge Halligan
9 has just said, that nevertheless, moving forward, that this
10 is a best practice or that courts should do this regardless
11 of whether or not there's a request.

12 MR. LEITH: Yes. Yes. And at the time - - - and
13 I think there is cases that say it might be best practices
14 at the time when the testimony is given for the judge to
15 make a simultaneous admonishment to take this testimony for
16 what it is, which is opinion testimony.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. OASTLER: Good afternoon, Your Honors. Brad
19 Oastler for the People.

20 My reading of this case - - - case, and I think
21 our brief lays this out, is that there's two distinct
22 questions. There's a question of law and a mixed question.
23 The question of law is perhaps going to be - - - engender
24 less debate here, but I think the - - - the - - - the - - -
25 our position is that a post-crime familiarity by a

1 nonpercipient witness is a valid basis on which for that
2 witness to base a lay opinion that somebody depicted is the
3 defendant.

4 This - - - and we lay this out in our brief - - -
5 I think - - - the same risks that are associated with
6 somebody who maybe grew up with a defendant and then
7 identifies them in the video - - - and identifies them in
8 the video - - -

9 JUDGE HALLIGAN: Would you agree it has to be
10 roughly contemporary - - - over here - - - roughly
11 contemporaneous? In other words, if - - - if the crime is
12 ten years ago and I see the - - - I have a familiarity, you
13 know, from last month.

14 MR. OASTLER: That would be a better scenario or
15 an ideal one, I suppose. I don't think it would be
16 appropriate for there to be a bright-line rule setting out
17 a time limit, and I - - - I say that because - - - and this
18 is an example that I think would create a real issue with
19 that - - - with a strict rule - - - but a parent, somebody
20 who maybe spent more time with - - - with - - - you know, a
21 child than anybody else - - -

22 JUDGE HALLIGAN: Do you believe that rough
23 contemporaneousness is - - - is something that would bear
24 on whether it's appropriate?

25 MR. OASTLER: Yes, I think it has to be. But I

1 think it's also something for the trial court as sort of
2 the gatekeeper for evidence that's not going to be unduly
3 prejudicial. It's the trial court's ability - - - they're
4 in the unique position to make that determination. But
5 certainly a temporal aspect is going to be part of the
6 overall consideration.

7 JUDGE SINGAS: What - - -

8 JUDGE RIVERA: Why is that actually necessary if
9 there's not any physical change? Perhaps - - - I think you
10 said ten years, if I'm not mistaken, Judge Halligan. So if
11 it's a decade, perhaps there is some physical change.

12 MR. OASTLER: And that's one of the other factors
13 - - -

14 JUDGE RIVERA: If there's none - - - if there is
15 actually no physical change, why does it matter temporally?

16 MR. OASTLER: Well, and that's why I don't think
17 it's the only factor to be considered. It is certainly
18 going to be one, along with, you know, anything else we
19 could think of that might play into whether an
20 identification is going to be, you know, credible or more
21 of just a guess that's not going to be supported by some
22 level of actual familiarity, or for that witness to be in a
23 position to have some basis to assist the jury - - -

24 JUDGE SINGAS: But what about your adversary's
25 point that the foundation was stated, but then it wasn't

1 connected to the actual video. So when he says he's got
2 some kind of distinct feature about his nose and then he
3 doesn't show the jury what he's talking about, the nose, is
4 the jury supposed to do that analysis on its own?

5 MR. OASTLER: So this is where, Your Honor, I
6 would say we've moved into the mixed question in terms of
7 what happened in this case.

8 Now, I will, I think, readily admit that I also
9 cannot see anything in the video that suggests a shape of a
10 nose. And I've also seen that - - - that - - - that pixel
11 that seems a little lighter than the surrounding ones. But
12 I - - - there's no way for us to tell a shape of a nose. I
13 think I would very much agree on that point.

14 However, the officer didn't say only the shape of
15 the nose. He really seemed to focus more both on voir dire
16 and then his ultimate testimony in front of the jury with
17 body type or build and his gait. And I think the video
18 does show a body type or build, and it does show a gait.
19 There is - - -

20 JUDGE CANNATARO: Did he elaborate on that at
21 all? I mean, build is - - - yeah, everyone's got a build.
22 But like tell us what it is about this build that's
23 distinctive.

24 MR. OASTLER: He did not elaborate. I think
25 there might have been a mention of - - - of like a slender

1 build, something along those lines. And I'm not really - -
2 -

3 JUDGE CANNATARO: Are you sure about that,
4 because I had a hard time finding any elaboration.

5 MR. OASTLER: That may have been in cross, and
6 I'm not going to promise that it's in there. I thought
7 there was a brief mention, but he - - - by and large, he
8 does not elaborate for the jury. I don't know if that's
9 necessary for him to - - -

10 JUDGE GARCIA: Can I ask something here on that?
11 It seems to me, and this struck me when I read your brief,
12 that the justification for allowing this officer to come in
13 and do this was that the video was blurry. And it's really
14 the only proof in this case. So I'm struggling with how do
15 we factor in that you have the sole evidence really linking
16 this defendant to this crime, which is too blurry. And you
17 bring in a police officer to say, yes, that's the guy. And
18 that's really the only evidence you have. How do you
19 factor that into what foundation you have to lay to allow
20 that testimony?

21 MR. OASTLER: The - - - I think the way that the
22 trial court looked at it is essentially the way I would
23 suggest is the appropriate way, which is going to be a
24 combination of, does the officer have some familiarity, and
25 to what degree did that familiarity develop, what kind of

1 detail? And that is something that is mentioned in the
2 jury instructions, in terms of what the jury should
3 consider about the officer's familiarity and ability to
4 identify the defendant. And then coupling that with - - -
5 I think in this case, we have what I would describe as a
6 video that's of somewhat moderate quality. It's pixelated
7 enough that we're not going to see somebody's face
8 necessarily and say, yep, that's definitely - - -

9 JUDGE GARCIA: So you - - - the ID is helpful in
10 that case, but - - -

11 MR. LEITH: Oh, absolutely.

12 JUDGE GARCIA: - - - it just seems - - - I don't
13 know, this is way before your time, but you know, the Guys
14 and Dolls movie where Big Jule rolls the blank dice, but he
15 remembers where the spots were, and he wins all the time.

16 MR. OASTLER: Well, so - - -

17 CHIEF JUDGE WILSON: He loses when he bets \$1
18 just to - - - just to show that the game's fair.

19 MR. OASTLER: So what I would say in response to
20 that, Your Honor, is that it is a - - - it is the province
21 of the jury to determine whether or not they actually find
22 the testimony to be credible.

23 Now, I think the court here in a somewhat
24 prescient manner, did I think what would be an appropriate
25 process. Also, sort of in line with Perdue from a month or

1 so ago, where we have a pause in the trial to determine if
2 this testimony should be permitted.

3 So we have the voir dire testimony the court
4 decides it's appropriate, and then it's up for the People
5 questioning the detective in this case to provide enough of
6 a basis for the jury to - - - to - - - to believe him, to
7 actually find that's the case. And the jury - - - any lay
8 juror is going to look at the video and look at the
9 detective's testimony and say, do I - - - do I actually
10 believe that he has an ability to identify the defendant in
11 the - - - in the video, despite the quality and, you know,
12 zooming issues, and the pixelated nature of it at times.

13 JUDGE SINGAS: But don't you think a police
14 witness, a law enforcement witness, would carry more weight
15 with the jury than a lay witness looking at the same
16 evidence?

17 MR. OASTLER: I suppose I would have to recognize
18 that there - - - that that is a reality, despite the jury
19 charge that instructs the jury not to give them either the
20 benefit of the doubt or to otherwise hold it against them.

21 JUDGE HALLIGAN: Isn't that made more challenging
22 by the constraints on cross as well? What do we make of
23 that?

24 MR. OASTLER: I - - - I disagree that the
25 constraints on cross are so problematic here, such that

1 they're - - -

2 JUDGE HALLIGAN: Why are they not? In another
3 circumstance, if there was an interaction, there would be
4 an opportunity for a fairly more extensive exchange, even
5 if you could have asked another question or two in this
6 case. So how does that weigh in our analysis?

7 MR. OASTLER: I think what - - - the types of
8 questions that could have been asked here by presumably
9 defense counsel on cross - - -

10 JUDGE HALLIGAN: Like where did you see him?

11 MR. OASTLER: Well, I think it would be more
12 getting - - - it would be more hitting at the potential
13 bias of the police officer. Sort of the argument of
14 everything is a nail if you're a hammer.

15 JUDGE HALLIGAN: Yes.

16 MR. OASTLER: If the - - - if the - - - if the
17 main criticism, I suppose, of the officer's identification
18 here is that he's - - - he's doing it because he wants to
19 help solve a crime, and he's not really concerned about who
20 he identifies. He just wants to help his - - - his fellow
21 officers out and solve this case. That type of questioning
22 is going to be enough to at least plant the seed in the
23 minds of the juror - - - of jurors, let's be skeptical here
24 about an identification that's not made by someone the
25 defendant - - -

1 JUDGE HALLIGAN: I'm just trying to - - - to
2 understand, is it your view that this can weigh in the
3 analysis, those constraints, or that it's not relevant, or
4 it has some weight but not dispositive?

5 MR. OASTLER: It may have - - - it - - - there -
6 - - there could be scenarios, certainly, where the
7 inability to question maybe the exact circumstances where
8 the familiarity developed is going to be problematic. I
9 don't think there's anything in this case where - - - that
10 would have prohibited defense counsel from saying, let's
11 talk about when you met him. Were you in a room? Was it
12 well lit? How close were you? How long were you in the
13 room with him? None of that necessarily speaks to, oh, you
14 were questioning because he was - - - he was arrested for
15 something. It's just going into the same type of - - - the
16 same way we might cross-examine a witness who's - - - who's
17 developed a familiarity in any other scenario.

18 JUDGE HALLIGAN: Do you agree that the record
19 only reveals one interaction between the two of them?

20 MR. OASTLER: I don't agree with that.

21 JUDGE HALLIGAN: So you think - - - where would
22 we look? Because the Appellate Division dissent thought it
23 was one, right?

24 MR. OASTLER: So I - - - I - - - I disagree with
25 the dissent, respectfully. But in both his voir dire and -

1 - - well, let's start with the voir dire. He mentions that
2 he's involved in three investigations and that - - - I
3 believe his language is numerous times - - - he had sat
4 with the defendant in the same room, walked with him,
5 viewed photos. Moving on to his testimony in front of the
6 jury, he says that he, I believe, met with the defendant on
7 a couple of occasions.

8 JUDGE HALLIGAN: But that could have been in one
9 day, presumably. We don't know.

10 MR. OASTLER: That is true. It could have been
11 perhaps a couple meetings in the course of one day.

12 JUDGE BARROS: So is the foundation the - - - is
13 the foundation your responsibility to establish the
14 familiarity, i.e. it was over a course of one and a half
15 years, and I had many occasions to speak with him, to walk
16 with him. Where's the burden here?

17 MR. OASTLER: Oh, I think it's with us, Your
18 Honor. And it's - - - and it ends up being in - - - in two
19 steps, I think, as we had here. We have to first make sure
20 that the trial court understands that there's an adequate
21 basis, just sort of from the broader - - -

22 JUDGE BARROS: So what is the basis? You didn't
23 say he worked on this homicide - - - in the voir dire - - -
24 he worked on this homicide. He was involved in the lineup.
25 So he walked him to the room. He was involved in getting a

1 confession from him, or he canvased and saw him numerous
2 times on the street. None of that. It's just, you know,
3 very general, right?

4 MR. OASTLER: It could have been more specific,
5 certainly, but I - - - the notes that I have from the voir
6 dire are investigations taking - - - three investigations
7 taking place over the course of eighteen months, numerous
8 times sitting with him, walking with him, and viewing
9 photos. And the first meeting, of which was in January of
10 2016, which is about seven months after the shooting in
11 question here.

12 CHIEF JUDGE WILSON: So where - - - where - - -
13 familiarity is based on something that happens after the
14 arrest. Forget about whether it's an officer or not.
15 Would there be a problem with a rule requiring the witness
16 to identify specific features of the defendant that are
17 distinctive and point to the places on the video where you
18 can see those?

19 MR. OASTLER: No, I don't - - - I don't know that
20 - - - that that's a rule that would not make sense. What I
21 would say though, for - - - for this particular case is
22 that if the officer is going to - - - if the officer is
23 going to rely on identifying body type or gait - - -

24 CHIEF JUDGE WILSON: Uh-huh.

25 MR. OASTLER: - - - those are things that are

1 going to be relatively apparent from watching the video,
2 and certainly the jury can observe - - -

3 CHIEF JUDGE WILSON: My point is, wouldn't the
4 officer have to say that the thing that is distinctive
5 about this person's gait is that he lists to the left when
6 he walks, or his left foot - - - something that you can see
7 on the tape and could be pointed out to the jury so they
8 could observe whether the characteristic the officer says
9 this person has, based on the observations that happened
10 after the crime, are something that - - - that can be seen
11 on the tape.

12 MR. OASTLER: It - - - it probably would be
13 helpful to do that. However, it's somewhat hollow because
14 I'm not sure the jury is going to be in a position to
15 really observe gait of the defendant live to compare. I
16 mean it - - - my point being that a witness could simply
17 describe whatever they see on the video and say, yep, I've
18 met my - - - I've now provided the basis and there's not
19 really a way to test that. And that I - - - you know,
20 which is conceivably problematic, but I'm not sure that
21 that is a - - - I'm not sure it should be a strict - - -

22 CHIEF JUDGE WILSON: But it would take - - - it
23 would take care of the nose question here, for example.

24 MR. OASTLER: I mean, I - - - it would. I mean,
25 I think the record speaks on its own that that's not going

1 to be a valid basis. I'm assuming no juror would have
2 looked at that and said, oh yeah, definitely, because they
3 watched the video themselves. But that's where I - - - I -
4 - - I would be troubled by a rule saying you must set out
5 certain bases or a certain number of - - - of observations,
6 because if it's gait, that should be relatively self-
7 evident from the video in this case.

8 JUDGE BARROS: Well, he was running in the video,
9 right, for the most part. So - - -

10 MR. OASTLER: There - - - there - - -

11 JUDGE BARROS: - - - he wasn't running in the
12 officer's presence, arguably.

13 MR. OASTLER: Sure.

14 JUDGE BARROS: And there were just maybe a couple
15 of seconds, maybe, when he walked before - - -

16 MR. OASTLER: There was a brief number of seconds
17 when he walks at the top of the frame, and then - - - and
18 then he does run back through the parking lot - - -

19 JUDGE BARROS: So how does that distinguish his
20 gait. Is it a distinguishable gait here?

21 MR. OASTLER: I - - - there are factors that I
22 can see that I would - - - that I would argue are
23 noticeably different than the three or four other people
24 that were sort of right behind him when he's walking out of
25 the frame. Now, we don't really see anybody running to

1 compare, but he - - - he had a - - - he did have a certain
2 style to his run with the - - - the holding the - - - the
3 weapon out with his one hand and his arm kind of flailed
4 about - - -

5 JUDGE BARROS: But he did run in the presence of
6 the officer and the detectives, right. So - - -

7 MR. OASTLER: Not that we know from the record.

8 JUDGE BARROS: - - - how you compare, like, how
9 he ran? He never saw him run.

10 MR. OASTLER: No. No. But the walk - - - I
11 mean, the walk - - - the officer did say that he had walked
12 with him. And the walk is, I think, visible on the video.

13 JUDGE HALLIGAN: But is the point of specificity
14 to be able to compare the characteristic with the
15 defendant, him or herself, or is it to provide some basis
16 for evaluating how reliable the, you know, officer's
17 identification is?

18 In other words, you could say, you know, I've
19 walked with him X times and he limps on his left leg.
20 Right. And the video shows the same. I - - -

21 MR. OASTLER: I don't - - - it probably serves a
22 different purpose depending on whether we're in the voir
23 dire sort of hearing portion of the proceedings versus - -
24 - versus the - - - the live jury testimony. The initial
25 being the sort of minimum level that the trial court's

1 going to need to see to permit the testimony. And then the
2 - - - the - - - the portion in front of the jury is going
3 to be expressly to allow the jury itself to evaluate and
4 make that decision.

5 And I - - - my position here is that there is a
6 record basis that the court not only conducted sort of that
7 two-step inquiry, but that the trial court properly
8 permitted that testimony and there was enough there, based
9 on the video, for the jury to - - - to find the - - - the
10 detective's identification testimony credible.

11 JUDGE BARROS: What about the judge's
12 instruction, or lack thereof? Because, again, this is - -
13 - it's a close case, right. It's an identification case.
14 And you only have the opinion of someone who did not
15 witness the event.

16 MR. OASTLER: Yes.

17 JUDGE BARROS: Right.

18 MR. OASTLER: So - - -

19 JUDGE BARROS: So you don't have any kind of
20 limiting instruction. You have something about Molineux,
21 don't infer anything by the fact that they knew each other
22 or that the detective knew him, but there's nothing there,
23 I understand, that wasn't requested. But also, there's
24 nothing in the final charge. So how is the jury to have
25 some guidance in evaluating, in this case, how to consider

1 this particular opinion.

2 MR. OASTLER: Absolutely. I would point the
3 Court to the seven pages of jury instructions that I see as
4 relevant, and obviously acknowledging that there was no lay
5 opinion with a lay - - - identification opinion charge
6 requested or given.

7 But the court explained - - - and this is
8 obviously just part of the normal instructions - - - what
9 the court explained that the jury can evaluate the
10 officer's testimony or this evidence on whether the officer
11 saw the events, whether his - - - whether his testimony was
12 plausible. And I think that maybe speaks to the nose
13 example. I'm not sure a juror would agree that that was a
14 really plausible way to identify the defendant, but then
15 also bias, motive to lie. Does the officer have an
16 interest in the outcome? In terms of whether an ID was
17 mistaken, did the officer have the capacity to observe and
18 remember features? Did he have a reason to do that?
19 Lighting, distance involved in the identification. Was he
20 there live or not? There was a sort of breadth of
21 instructions provided, just as part of the normal charge,
22 that I - - - we can assume the jury heard those and took
23 those into account in terms of evaluating the detective's
24 testimony.

25 Given that trial courts are granted the



1 discretion to charge the jury in a way that is - - - is
2 appropriate, while I would agree that I would have liked to
3 have seen a more tailored charge with respect to the - - -
4 the detective's testimony here, the record is not devoid of
5 instructions that apply here or that would have safeguarded
6 against the jury just kind of being taken along for the
7 ride, so to speak.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. OASTLER: Thank you.

10 MR. LEITH: One thing I have to mention, Your
11 Honors, there's been a lot of talk about the gait of Mr.
12 Mosley. And please don't take my word for this, but there
13 is no - - - there is no mention of his gait anywhere in the
14 record.

15 Det. Kilburn says - - - in the voir dire, he says
16 the only thing that can relate to his walking at all is
17 that he walks side by side with him. Okay. That's the
18 only thing he says in the voir dire.

19 In the actual trial testimony in front of the
20 jury, he says that he walked with him before. He says he
21 was familiar with his body type and familiar with his
22 build. But - - - and he never says - - - the only thing he
23 says that he based his identification in the video on is he
24 - - - he's asked the question, and he says, based on my
25 interactions with him and viewing the video, based on his

1 build and the shape of his nose. So those are the only two
2 things that he says, his build and his nose. The only two
3 things in the record that he says he identified him on.

4 So I think in a different case, the gait could be
5 an interesting question. I don't think it's a question
6 that's relevant in this case. And even if he did talk
7 about his gait, if you look at the - - - the frame rate on
8 this video, if you look at the choppiness of it, you can't
9 glean a lot about this defendant's movements from that.
10 But I did want to make that clear and obviously check my
11 work.

12 The only other thing I wanted to mention briefly
13 is a policy point about post crime, post arrest familiarity
14 by law enforcement. And I think that's something that this
15 Court should think about very carefully. And the reason
16 they should is because you don't want to get into a
17 situation where on any blurry video case, you can have law
18 enforcement do an interview, post arrest, with this
19 defendant, possibly cynically, possibly not, but for the
20 sole purpose of having him be an identification witness on
21 that case.

22 JUDGE HALLIGAN: But you don't have any
23 categorical objection, do you - - - correct me, if you do -
24 - - to having a nonpercipient witness provide some
25 testimony on a video if a foundation is laid?

1 MR. LEITH: If the foundation is laid and it's
2 something that the jury - - - that will truly assist the
3 jury that they can't observe on their own, and there's a
4 nexus to the video in the way we talked about.

5 JUDGE HALLIGAN: Right. And that could - - - in
6 some circumstances, I take it you acknowledge, be a law
7 enforcement officer, but you're identifying particular
8 concerns that might be attendant to that. Is that - - -

9 MR. LEITH: Yes, I am. And I'm also - - - if I
10 can just raise the bigger point that - - - that this should
11 be - - - the lay - - - the lay identification testimony
12 opinion testimony should be an exception. And we're having
13 a situation where the exception is - - - is swallowing the
14 rule here or - - - and it certainly threatens to increase.
15 So - - - and the law enforcement aspect is another reason
16 for us to be very wary of it.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. LEITH: Thank you, Your Honor.

19 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Farod Mosley, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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