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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 46

DESHAWN DEVEROW,

Appellant.

20 Eagle Street
Albany, New York
April 21, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 46, The People of the
3 State of New York v. Dashawn Deverow.

4 Good afternoon, Counsel.

5 MS. CULLINA: Good afternoon, Your Honor. Alice
6 Cullina on behalf of Dashawn Deverow. I would like to
7 request to reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: Two minutes; you may.

9 MS. CULLINA: Thank you. Mr. Deverow stands
10 convicted of murder after a trial that was decidedly skewed
11 in the People's advantage, given the court's preclusion of
12 the near entirety of the defense evidence and its
13 unfavorable and unfair Sandoval ruling.

14 To start, I would turn first to Ms. Johnson's
15 testimony that was entirely precluded. Mr. Moton was the
16 only eyewitness to the shooting and he was the only person
17 to say that the shooting was unprovoked, which was the key
18 to the People's case against the justification defense that
19 my client raise. And Ms. Johnson's testimony would have
20 been direct evidence that he was either lying or mistaken
21 about what he was doing immediately prior to the shooting,
22 seconds before he encountered who he said were the
23 shooters. And that would have made it circumstantial
24 evidence that he was either lying or mistaken about what he
25 saw in those seconds right after he was supposedly --



1 JUDGE TROUTMAN: So your argument is that her
2 testimony goes to the heart of the issue at hand, not
3 simply something that which was collateral?

4 MS. CULLINA: Yes, absolutely. I could envision
5 a case where an eyewitness was on a bus and saw a domestic
6 dispute and said he was on the bus because he was going to
7 work. And if the defense proffered evidence that he was
8 actually on the bus because he was going to get a nose job,
9 that would be collateral, but that wasn't the case here.
10 This was why he was on scene in a case that had a lot of
11 unanswered questions, generally and specifically about his
12 testimony.

13 He claimed that he saw a party and socializing.
14 But in the two minutes before the shooting, what the video
15 showed was eleven men walk determinedly, march out of the
16 building all together, and walk right in front of where the
17 camera could not longer see them, and that was right before
18 the shooting. It certainly was not socializing.

19 JUDGE CANNATARO: Just to explore that a little
20 bit. Could - - - is it possible that he could have just
21 been mistaken about the night that he was out with Ms.
22 Johnson?

23 MS. CULLINA: I think even if that was the case,
24 that would be really - - - that would put a lot of concern
25 about his testimony because, I mean, he testified very



1 specifically that he heard two shots and then eleven shots;
2 that he saw the - - - my client and his codefendant raise
3 their guns, turned around, didn't see them shoot, but
4 somehow he knew that they fired first. And if he didn't
5 remember who he was with right before that - - -

6 And also, I would say that what the defense
7 proffered that her testimony would have been, she didn't
8 have a chance to put this before the court because the
9 court wouldn't even do an evidentiary hearing, but the
10 defense proffered that she would have said she didn't even
11 live there. And he said the reason they were there was he
12 was walking her home. So even if it was a different night,
13 that - - - that wouldn't explain that discrepancy.

14 JUDGE TROUTMAN: And her it matters because he's
15 the only one that identified your client as the one
16 shooting first?

17 MS. CULLINA: Exactly. Both the --

18 CHIEF JUDGE DIFIORE: Did the defendant - - - did
19 the defendant argue that he had been - - - at trial that he
20 had been misidentified by the sole witness or was his
21 defense limited to a justification defense?

22 MS. CULLINA: The primary defense was a
23 justification defense, but they did also argue that the
24 People didn't carry their burden to prove that he was - - -
25 that he had the intent to shoot. There wasn't a true



1 misidentification defense because Mr. Moton said that he
2 knew the - - - that he knew --

3 CHIEF JUDGE DIFIORE: So is that relevant to our
4 analysis as to whether or not he was deprived of his right
5 to a fair trial by the preclusion of that witness?

6 MS. CULLINA: Absolutely not, given that there
7 was a justification defense raised. The People have to
8 disprove that beyond a reasonable doubt and this evidence
9 would have been crucial to the - - - they wouldn't have
10 been able to or it would have been much harder for them to
11 if this evidence was there. The jury would have had much
12 more before it to doubt that they had disproved his
13 justification defense.

14 And it also goes in connection with all of the
15 other evidentiary rulings. So I would turn to the 911
16 calls and most crucially Ms. Molina's 911 call. The - - -
17 this court in - - - instituted the corroboration rule for
18 present sense impressions in Brown because it was concerned
19 about defendants having evidence come in against them that
20 was not tested by cross-examination. Those concerns are
21 clearly not at issue here. Ms. Molina did testify and both
22 parties could have brought out why there were
23 inconsistencies, as they did to some extent, between her
24 phone call and her testimony at trial. But to say that she
25 - - - the phone call couldn't come in at all because she

1 said one thing that was inconsistent between the call and
2 her testimony does not render it an unco - - -
3 uncorroborated present sense impression.

4 And this court has made very clear that 911 calls
5 are particularly powerful and probative. And I do want to
6 make clear that although the Appellate Division first found
7 that this call would not have been relevant, that - - -
8 that's clearly incorrect and the People don't defend that
9 now.

10 JUDGE RIVERA: Counsel, I'm on the screen. But
11 this question about the 911 calls are powerful and - - -
12 and usually admitted, isn't that when - - - when you don't
13 have the caller?

14 MS. CULLINA: It's --

15 JUDGE RIVERA: Now, isn't that possibly enough of
16 a difference here that we can't say the court erred in
17 making this determination?

18 MS. CULLINA: That's not the crucial difference.
19 There have been - - - there were several cases, and I'm - -
20 - I'm blanking on which case it was at this moment, but
21 that found even though the - - - the complainant testified,
22 their call was still powerfully probative and contrasted
23 recollective testimony against the tes --

24 JUDGE RIVERA: Even when the witness admits that
25 there is a discrepancy?



1 MS. CULLINA: Not in that case, but I don't - - -
2 I don't think that takes away from the power. And in this
3 specific case it doesn't because what was ended up being
4 elicited was that she had said she thought the shooters
5 were in the car and that she had said there were people in
6 the car. But what she actually said was - - - unprompted,
7 the 911 operator didn't ask her about this - - - she
8 unprompted said the shooters were in the car. Again, after
9 the 911 operator said help is on the way, she unprompted
10 said and tell them the shooters were in the car.

11 JUDGE RIVERA: Well, what - - - what more would
12 the jury get from hearing this?

13 MS. CULLINA: She - - - I mean, she sounds really
14 very certain. And at - - - when - - - I think most
15 important, at the end of the call, when asked for further
16 details about the description, she says the shooters were
17 probably black, I'm guessing. She knew how to say when she
18 was assuming during the call and she did say when she was
19 assuming. So if the jury heard that, heard her say certain
20 - - - with certainty the shooters were in the call and then
21 say they're probably black, I'm guessing, they would have
22 had reason to doubt her testimony at trial that she had
23 been assuming.

24 And I - - - you know, it was three years later.
25 She lived in the building where some people involved in the



1 shooting and the events surrounding the shooting lived.
2 She had time to be subject to interviews that could have
3 been suggestive, to regret getting involved in this case at
4 all. I think these are all arguments that defense counsel
5 should have been able to make to the jury that would have
6 undermined her testimony that she did not see the shooters.

7 And then I see my time's running out, so I would
8 like to briefly touch on this Sandoval. First of all, we -
9 - - this was certainly preserved. This is a very basic
10 rule of evidence. I mean, it's a basic rule that's existed
11 for 50 years, the weighing is the same in every case.
12 Defense counsel said anything beyond the conviction would
13 not be sufficiently probative. He might not have said the
14 second half of the sentence, which is to outweigh the
15 prejudicial effect, but because that is the analysis in
16 every single case, that was obvious and the court had that
17 in front of it, so it certainly preserved.

18 And in this case, it as just extremely
19 prejudicial to bring in those underlying facts. They added
20 very little to his credibility, but took away much from his
21 ability to testify, as he didn't.

22 I see my time is up. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 Counsel?

25 MS. TALCOTT: Good afternoon. My name is Nancy



1 Fitzpatrick Talcott from the Office of Melinda Katz, the
2 district attorney of Queens County.

3 The court properly precluded defendant from
4 calling a witness to testify to collateral matters.

5 JUDGE GARCIA: Counsel, let - - - let's start
6 there. I have some trouble following this collateral
7 witness argument with respect to the - - - let's say the
8 girlfriend because didn't your witness put that evidence -
9 - - make that evidence critical of why I'm here,
10 opportunity to observe, time and place, and it went
11 directly to contradicting that evidence.

12 MS. TALCOTT: Well, the issue is the time and
13 place of him meeting the defendant and the shooting --

14 JUDGE GARCIA: But he made that relevant to me.
15 He made the girlfriend's testimony relevant by saying I
16 know I was here because X. I took her home. I kissed her
17 goodnight. I turned around. And why isn't it relevant
18 that she didn't live there, she wasn't with him that night?
19 I mean, it's directly relevant to his testimony.

20 MS. TALCOTT: It's relevant to his testimony,
21 again, on a collateral matter. How he got there --

22 JUDGE GARCIA: To me, collateral matter would be,
23 you know, I really wasn't dating him; that's collateral
24 matter. But was I there, was he there with me in the time
25 and place that he's claiming he had the opportunity to



1 observe or immediately before, which he places, really, in
2 the forefront of his testimony, I don't understand how - -
3 - the argument that that's collateral.

4 MS. TALCOTT: Well, had she said I was with him
5 until 2 a.m. We didn't run into the defendant. That goes
6 directly to his ability. What - - - what the material
7 evidence is, is what he saw, running into the defendant and
8 codefendant, who he knew, and his observations from then on
9 regarding the shooting. What he did minutes before, hours
10 before, the day before --

11 JUDGE SINGAS: Seconds before, Counselor?
12 Seconds before?

13 MS. TALCOTT: Even seconds, if that was, in fact,
14 the case. As - - - as the defense raised, you know, there
15 was some dispute. He had put it at 11:30, whereas Molina
16 had it at 12:30. That --

17 JUDGE TROUTMAN: And he's the sole witness that's
18 giving this damning testimony as to the defendant?

19 MS. TALCOTT: He --

20 JUDGE TROUTMAN: It's collateral?

21 MS. TALCOTT: It's collateral what he did before.
22 If she had testimony --

23 JUDGE TROUTMAN: But the reason why he was there
24 - - - his credibility certainly was that which the jury
25 would have to assess as to accept. If he couldn't recall



1 seconds before the incident that he was with his girlfriend
2 that's relevant on the direct issue of him being a witness.
3 Not simply general credibility, the general credibility
4 questions that you ask of witnesses, but directly on the
5 circumstances underlying the event.

6 MS. TALCOTT: But the event would be him running
7 into the defendant and codefendant and the shooter. So say
8 he was mistaken about the time. And he was tested on the
9 time. He was tested about the lighting. If she had
10 something to say, we went down Beach 15th Street and it was
11 --

12 JUDGE TROUTMAN: But what about him being tested
13 on the fact that he wasn't there for the reason that he
14 said?

15 MS. TALCOTT: Well, the --

16 JUDGE TROUTMAN: Maybe he was associated with
17 someone else and would prefer to cast - - - cast a light as
18 to the defendant being the - - - the initiator as opposed
19 to someone he was friendly with.

20 MS. TALCOTT: Well, there's no indication she
21 would have proffered that. It was just she said I'm not
22 here before. It's --

23 JUDGE TROUTMAN: No. That's the point.

24 MS. TALCOTT: Right.

25 JUDGE TROUTMAN: She would have proffered that



1 that - - - the reason he said he was there was not the
2 reason, so it would go into factoring whether or not he was
3 a credible witness, as to what he specifically saw there.

4 MS. TALCOTT: Well, if she - - - if the proffer
5 had been that she could provide some evidence for a motive
6 for him to lie, that's different. Motive to lie and bias
7 are never collateral. That - - - that's not what the
8 proffer here was. And the material facts at issue were
9 what he saw when he ran into them and the thing. So now
10 it's up to the trial court.

11 JUDGE GARCIA: But let's say we have a
12 hypothetical, Counsel. So a witness comes in and says
13 every day at noon I walk across the street and I buy
14 cigarettes at the same store. That takes me directly
15 across the street, in front of the stoop. And as I'm
16 walking there, and it's 12:00, the guy pulls out a gun and
17 shoots at these people. And they want to bring in this
18 store owner who says I've never seen that guy in my life.
19 I work there every day. He never buys cigarettes from me.
20 Yes or no comes in?

21 MS. TALCOTT: I think that's a better case
22 because --

23 JUDGE GARCIA: Why?

24 MS. TALCOTT: It - - - it - - - because it's at
25 the time.



1 JUDGE GARCIA: So it has to be respect to the
2 time? It can't just be the opportunity that he was walking
3 across the street and crosses in front of the stoop?

4 MS. TALCOTT: Well, there's no bright line test.
5 It's really up to the court to decide. So the court here
6 could see, you know what, this is going to lead down a
7 rabbit hole that - - - they could present evidence, we
8 could - - - again, as we set forth in our brief, get his
9 metro card. He said he met her on the A train.

10 JUDGE SINGAS: But Ms. Talcott, you keep saying
11 time. And for me, the issue that I keep grappling with is
12 he said seconds. So we aren't talking about the same time.
13 So I think your argument on time fails.

14 MS. TALCOTT: Well, he also said it was 11:30,
15 and it's clear it was a little bit later. and he was
16 questioned about that and they argued that in the
17 summation. So if she had testimony - - - again, regarding
18 the lighting. Did - - - did she turn and say, you know, I
19 saw him walking down the block. He didn't run into anyone.
20 I know the defendant and codefendant. I was there with him
21 the whole night. We didn't run into anyone.

22 JUDGE SINGAS: Can we move to the 911 calls.

23 MS. TALCOTT: Sure.

24 JUDGE SINGAS: So I'm having, again, an issue
25 with the People arguing that the present sense impression



1 hearsay exception doesn't apply in this case where - - - at
2 least we know on Molina's call, she's saying I just saw
3 someone shot. In fact, I still hear the shooting. The 911
4 operator is listening to the gunshots. And the People are
5 arguing that that's not a present sense impression?

6 MS. TALCOTT: Well, because it's not corrob - - -
7 well, Molina's call is different than anonymous calls. She
8 acknowledges the inconsistencies.

9 JUDGE SINGAS: But that's for cross-examination,
10 right; that's for impeachment.

11 MS. TALCOTT: Right. And that - - - that was all
12 --

13 JUDGE SINGAS: We're talking about the exception
14 to hearsay for the truth of the matter. And she's saying
15 I'm looking out my window. I just saw someone shot. We
16 can hear the shots on the 911 call. It's corroborated.
17 Police roll up. There's someone with a gunshot wound to
18 his head. What more corroboration is there?

19 MS. TALCOTT: It's not corroborated that the
20 shooters were in the jeep. Once - - - once she says
21 actually, I'm not so sure; that's not corroborating.

22 JUDGE SINGAS: But Ms. Talcott, are you really
23 arguing that it's not corroborated to the People's version
24 of events, as opposed to it's not generally corroborated?

25 MS. TALCOTT: There's no corroboration that - - -



1 that there were four people shooting out of the jeep.

2 JUDGE SINGAS: So every aspect of every call
3 needs to be corroborated before it comes in as a present
4 sense impression?

5 MS. TALCOTT: Not every aspect. But the critical
6 inquiry is whether the corroboration offered to support the
7 admission of the statement truly serves to support its
8 substance and content. So the point of precluding it is we
9 need some reliability. So you need reliability as to the
10 substance and content for which it's being admitted.

11 So for the one call and Molina's call, it's that
12 there were four shooters in the jeep. For the third call,
13 it was a description of the person with the rifle. There
14 actually is no corroboration to the substance and content
15 of the calls.

16 We're not saying that every aspect of the call
17 has to be corroborated. But the point that we're
18 questioning the reliability about, that's why it's
19 precluded. You need corroboration for that. The - - - the
20 substance and the content for which it's being admitted.

21 And in any event, the court's discretionary
22 rulings were harmless. There was overwhelming evidence and
23 the precluded evidence --

24 JUDGE GARCIA: Counsel, did you - - - did you
25 argue at all that the justification defense was of - - -



1 not available under these circumstances?

2 MS. TALCOTT: I don't believe they did. And I
3 know the court charged it. I don't believe we opposed the
4 charge.

5 JUDGE GARCIA: So then, it's difficult to see how
6 it would be harmless.

7 MS. TALCOTT: The - - - the jury was well aware
8 that there was an SUV; that Molina had said there were four
9 shooters out of the jeep. They were fully aware of that
10 evidence. They were charged on the justification defense.

11 Also, Moton's testimony is strong and it's
12 largely corroborated by other witnesses and the ballistics.
13 He's the one who has them shooting first and pulling out
14 the weapon and shooting first, but much of his testimony is
15 corroborated by the other evidence. And Johnson's
16 testimony, again, would not have spoken to what he actually
17 saw with respect to the crime; running into the defendant,
18 how he knew the defendant, and everything that happened
19 after. And he was fully able - - - the defense was fully
20 able to question his credibility on those direct matters.

21 They questioned him about the lighting. How he
22 knew the defendant and the codefendant. His description of
23 the guns and whether - - - his familiarity with the guns.
24 His credibility about Facebook and having friends at the
25 party. His credibility about the fall and the injury and



1 what he had reported to the police and the medical
2 personnel. They even suggested at - - - during their
3 summation he was the shooter. Maybe he was the anonymous
4 caller who called in when they found the murder weapon.
5 They were fully able to put forth their justification
6 defense, and the court properly exercised its discretion in
7 precluding irrelevant or inadmissible evidence.

8 CHIEF JUDGE DIFIORE: Thank you, Counsel.

9 Counsel, your rebuttal?

10 MS. CULLINA: Thank you.

11 Just respecting - - - the People said that motive
12 to lie and bias are never collateral, but it doesn't have
13 to be direct evidence of motive to lie or bias. It can be
14 circumstantial evidence of motive to lie or bias and I
15 believe in Knight that was true. In - - - in that case,
16 defense counsel proffered two alibi witnesses and they said
17 that they had given the same alibi to the police. The
18 police officer was allowed to come in and testify that they
19 had not told him that alibi defense before. That's not
20 direct evidence that the alibi was a lie. It's
21 circumstantial evidence that the alibi was a lie. And that
22 was properly admitted.

23 And then I would just like to address the issue
24 with seconds. It was, of course, Moton's own testimony
25 that he parted from her seconds before. If she wasn't with



1 him at all, how soon before they parted is not important.
2 What is important is he said seconds before the shooting he
3 was with her.

4 And then of course we would argue this is not
5 harmless. There was not overwhelming evidence to disprove
6 Mr. Deverow's justification defense. This was a case with
7 a lot of holes. There was no forensic evidence connecting
8 him. I think crucially, this court should consider that
9 the Second Department found it was error to admit a
10 revolver that he purportedly possessed. And although that
11 court found it was harmless, if - - - with these other
12 errors, it certainly cannot be considered harmless. And
13 all together, Mr. Deverow did not have a right to present
14 his defense and was deprived of a fair trial. Thank you.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 (Court is adjourned)

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

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of Dashawn Deverow v. People of the State of New York, No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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