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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE

Appellant,

-Against-

No. 52

KHARYE JARVIS

Respondent.

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20 Eagle Street  
Albany, New York 12207  
February 19, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 52, People v.  
2 Jarvis.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. KAEUPER: Can I have two minutes,  
6 please?

7 CHIEF JUDGE LIPPMAN: Yeah, sure. Go  
8 ahead.

9 MR. KAEUPER: Thank you, Your Honor. May  
10 it please the Court. Geoffrey Kaeuper on behalf of  
11 the People.

12 The defendant here received excellent  
13 representation. The two errors that were identified  
14 by the majority of the Appellate Division were not  
15 errors. With respect to the threat made to C.B., the  
16 defense attorney used that strategically. That was a  
17 strong point in - - - in the defense summation. And  
18 with respect to the - - -

19 CHIEF JUDGE LIPPMAN: Did it conflict with  
20 the Molineux ruling?

21 MR. KAEUPER: It did - - - yes, the judge -  
22 - - the judge ruled that that testimony was  
23 inadmissible unless the defense - - -

24 CHIEF JUDGE LIPPMAN: And it was over and  
25 over again hit on by the prosecution?

1 MR. KAEUPER: I - - - I - - - I wouldn't  
2 say over and over again. It - - - it took her lots  
3 and lots of questions to get a clear answer out of  
4 her. I mean, that's - - - and the defense made hay  
5 with that.

6 JUDGE PIGOTT: Can you answer, just  
7 fundamentally, if the judge says don't do something,  
8 and you do it, why do you do it?

9 MR. KAEUPER: You mean why does the  
10 prosecutor do it?

11 JUDGE PIGOTT: Yeah, why did she do this?  
12 I - - - I - - -

13 MR. KAEUPER: I mean, I have to assume this  
14 is just a - - - a careless error. I mean, I don't -  
15 - - you know, I don't think this was some intentional  
16 misconduct, but obviously misconduct's not the issue  
17 here.

18 JUDGE PIGOTT: No.

19 MR. KAEUPER: But - - - but I think it has  
20 to have been a simple oversight. I - - - I can't - -  
21 -

22 CHIEF JUDGE LIPPMAN: No, but that's a  
23 pretty serious oversight, isn't it?

24 JUDGE RIVERA: It's quite significant to  
25 the - - -

1 MR. KAEUPER: It is - - - it is - - -

2 JUDGE RIVERA: - - - whole case in the  
3 defense.

4 MR. KAEUPER: It is a significant  
5 oversight, and - - - and you know, if - - - if that  
6 were part of a - - - of a pattern of misconduct in  
7 this case, maybe there would be a - - - an issue with  
8 - - - with misconduct.

9 JUDGE ABDUS-SALAAM: So counsel, your  
10 suggestion is that from this record, we can  
11 determine, without a 440 motion, that defendant had a  
12 strategic - - - or defense counsel had a strategic  
13 reason for not objecting to the winning point that he  
14 had already received in the Molineux ruling that he -  
15 - - he just let it go so he could use it  
16 strategically at summation?

17 MR. KAEUPER: I would put it - - - I would  
18 put it a little differently. I would say that on  
19 this record, the defendant has failed to establish  
20 that there was an - - - an absence of a strategic  
21 reason.

22 JUDGE PIGOTT: Well, the problem I have  
23 with that, and I see your point, where you - - - you  
24 may be trying to make lemonade out of lemons, but he  
25 didn't bring up this conversation. I mean, he's

1 sitting there and, you know, the direct's going on,  
2 and - - - and he knows he's safe in that there's - -  
3 - that this isn't going to come out, and then it  
4 comes out.

5 MR. KAEUPER: Right, and - - - and so I  
6 mean, even - - - even if he didn't have a strategic  
7 reason for thinking, before the witness testified, if  
8 she - - - if - - - if she's improperly asks this  
9 question, I'll let it go. And I think actually it  
10 may be that - - - that, as the dissent points out at  
11 the Appellate Division, it may be that he intended to  
12 - - - to ask, on cross, and open the door, because  
13 that was the judge's ruling, if you open the door on  
14 cross, it can come in in rebuttal. So he may not  
15 have cared as much at that point, if he had been  
16 planning that. But even if he was thinking, great, I  
17 got this out, the - - - the question comes, and the  
18 question suggests there's a threat. And then the  
19 answer is, he said he would shoot us. And - - - and  
20 I mean, so at that point, he's - - - he's got the - -  
21 - he's got to make a strategic decision: do I - - -  
22 do I object and - - - and ask the - - - the testimony  
23 that's - - - that's already come out to be stricken,  
24 which is certainly a reasonable strategy, but it's  
25 also a reasonable strategy to say I'm not going to

1 re-ring that bell. And then, as it goes on, her - -  
2 - her - - - I mean, she's falling apart on this - - -  
3 on this questioning. And he gets to stand up there  
4 and say, in front of the jury, the prosecutor - - -  
5 essentially, the prosecutor's feeding her testimony.  
6 This is the prosecutor testifying for this witness.  
7 This - - - this ends up getting a lot better than the  
8 - - - than the - - - than it would be if he - - -

9 JUDGE RIVERA: I don't know. Isn't there  
10 case law that says that this is one of those damaging  
11 pieces of evidence that - - - that it appears that -  
12 - - well, that - - - that you have the witness  
13 testifying that the defendant threatened them? And  
14 it's the threat - - - I'm trying to find the - - -  
15 "He said if we told, he would shoot us." "If we  
16 told", obviously suggesting that there's something to  
17 be told that would put the defendant - - -

18 MR. KAEUPER: Yeah.

19 JUDGE RIVERA: - - - up for criminal  
20 charges.

21 MR. KAEUPER: Not suggesting, though - - -  
22 though; she's already testified to that. She's  
23 already testified - - -

24 JUDGE RIVERA: That's what I'm reading.  
25 I'm reading it - - - the first time - - - this is her

1 first answer.

2 MR. KAEUPER: No, no, I mean - - - I mean  
3 what she's testified right before that exchange  
4 starts. She's testified that he said, the day before  
5 the murder, I'm going to shoot that guy.

6 JUDGE RIVERA: No, no, but I'm talking  
7 about this statement, which is a statement that he  
8 was going to shoot the witness.

9 MR. KAEUPER: Right. Right. So - - -

10 JUDGE RIVERA: Haven't - - - what I'm  
11 saying is haven't we already said - - - isn't there  
12 case law that already says that this is perhaps one  
13 of the most damaging kind of evidence to come in?

14 MR. KAEUPER: It can be, but I mean, I  
15 think any - - -

16 JUDGE RIVERA: No, not it can be; it is.

17 MR. KAEUPER: Evidence always has - - -

18 JUDGE RIVERA: So what defense attorney  
19 would allow this?

20 MR. KAEUPER: A defense attorney who - - -  
21 first of all, I mean, as I said, I think we can - - -  
22 his - - - his ability to object before the question  
23 gets asked can't be the basis of ineffective  
24 assistance.

25 CHIEF JUDGE LIPPMAN: No, but - - -

1 JUDGE RIVERA: I understand that once the  
2 bell is rung - - -

3 JUDGE STEIN: He could have asked for a  
4 mistrial.

5 MR. KAEUPER: He - - - he could have asked  
6 - - - he could have asked for a - - - a mistrial.  
7 But - - - but what he gets out of this whole exchange  
8 actually ends up being better, because this is a  
9 witness who has already said - - -

10 CHIEF JUDGE LIPPMAN: Do you think this is  
11 - - -

12 MR. KAEUPER: - - - that he - - -

13 CHIEF JUDGE LIPPMAN: - - - this isn't an  
14 incompetent or ineffective counsel, that he's got  
15 some grand strategy to, on the most basic, most  
16 damning violation, that he's thinking, ah-hah, it's  
17 out now; I can make hay with this? Is that - - -

18 MR. KAEUPER: No.

19 CHIEF JUDGE LIPPMAN: - - - really a  
20 logical way to look at this?

21 MR. KAEUPER: No, I'm - - - I'm not  
22 suggesting this is a grand strategy. What I'm  
23 suggesting is, he's caught in a position where - - -  
24 once this question gets asked, he's caught in the  
25 position, and he makes a strategic decision not to

1 re-ring that bell.

2 JUDGE PIGOTT: Yeah, but wait a minute.

3 Wait a minute.

4 MR. KAEUPER: You can say - - -

5 JUDGE RIVERA: But the People have re-rung  
6 the bell many, many times here. They're asking over  
7 and over, and when she can't remember - - - what I  
8 think you're suggesting is what all of us thought he  
9 might benefit from, they get to refresh her  
10 recollection. I mean - - -

11 MR. KAEUPER: And he uses all - - -

12 JUDGE RIVERA: - - - how much worse can  
13 this get? He's - - - she's said this I don't know  
14 how many times now.

15 MR. KAEUPER: And he uses all of that in  
16 his - - - in his closing to argue that she's not  
17 credible at all. And - - -

18 JUDGE PIGOTT: Mr. Kaeuper, here's what I  
19 don't under - - - this is like fair comment that - -  
20 - you know, that people always argue on - - - on  
21 summations as well. They made errors in their  
22 summation, and all, and when we went over the top it  
23 was only fair comment for what they did. It seems to  
24 me that the People should be objecting to whatever  
25 the defendant is saying and what - - - and not

1           saying, well, now I can violate the rules with  
2           respect to my summation, because he did. This is  
3           kind of the reverse of that. You're saying, sure, we  
4           ignored the judge, we - - - we knew we weren't  
5           supposed to ask these questions, we asked them  
6           anyway. But you know what? It turned out okay for  
7           the - - - for the defense, and therefore it's not  
8           ineffective. It's like the train came off the tracks  
9           but it didn't hit any cars, so what's the big deal.

10                   MR. KAEUPER: Well, again, I don't - - - I  
11           don't think there's a misconduct claim being made in  
12           this case.

13                   JUDGE PIGOTT: No - - -

14                   MR. KAEUPER: I'd like - - - I'd like to  
15           put that aside.

16                   JUDGE PIGOTT: I'm just drawing a parallel.

17                   MR. KAEUPER: But - - - no, I - - - I  
18           understand the question. But I think the point is,  
19           okay, let's - - - let's say that this is - - - that  
20           this is an error by the defense attorney. It's not  
21           one of those rare cases where a single error is so  
22           prejudicial - - -

23                   JUDGE ABDUS-SALAAM: Counsel?

24                   MR. KAEUPER: - - - to the - - -

25                   JUDGE ABDUS-SALAAM: Counsel, could I just

1 ask - - -

2 MR. KAEUPER: Oh, beg your pardon.

3 JUDGE ABDUS-SALAAM: - - - did Ms. Rivera  
4 testify to the same threat against her and this  
5 witness?

6 MR. KAEUPER: She - - - she testified - - -  
7 she testified to the statement that he - - - you  
8 know, he was going to shoot Prather.

9 JUDGE ABDUS-SALAAM: But did she testify to  
10 the threat - - -

11 MR. KAEUPER: I - - - I

12 JUDGE ABDUS-SALAAM: - - - made against her  
13 and - - -

14 MR. KAEUPER: I don't believe she did.

15 JUDGE ABDUS-SALAAM: - - - and the witness?

16 MR. KAEUPER: I - - - I could be wrong  
17 about that.

18 JUDGE ABDUS-SALAAM: If she did - - -  
19 assuming she did, then wouldn't this other witness'  
20 corroboration of that suggest that Mr. - - - that the  
21 defendant was really a terrible guy? He not only  
22 threatened the victim, who later turns up dead, but  
23 he threatened these two potential witnesses against  
24 him.

25 MR. KAEUPER: I mean, I think the crime

1 here is - - - is an ambush or execution double  
2 murder. I think - - - I think the - - - if we can  
3 prove that, he's a pretty bad guy. So I don't think  
4 - - - I don't think the threat really contributes a  
5 whole lot to that. But - - - but - - - but I - - -

6 JUDGE ABDUS-SALAAM: But doesn't it - - - I  
7 thought the reason for the Molineux ruling was to  
8 keep out his propensity to threaten people, like the  
9 victim he ultimately killed and witnesses who might  
10 know about it.

11 MR. KAEUPER: Right. Right, I mean - - -

12 JUDGE ABDUS-SALAAM: So if - - - if the  
13 witness - - - if one witness is allowed to testify,  
14 well, he threatened me and he also threatened  
15 somebody else. And then that other witness, who has  
16 been precluded from testifying that he threatened me  
17 as well as somebody else, wouldn't that corroborate  
18 the threats and say, you know, this guy has got a  
19 propensity for threatening people?

20 MR. KAEUPER: I guess it would corroborate.  
21 Again, I don't - - - I could be wrong, but I don't  
22 believe that Rivera testified to that.

23 JUDGE RIVERA: Your red light is on, and I  
24 think you were going to start arguing that it's only  
25 one error and that it's not the kind of egregious

1 error we may have seen in Turner, but what about the  
2 alibi testimony?

3 MR. KAEUPER: Yeah, the alibi - - - the  
4 alibi is not the product of the defense attorney.  
5 All the cases on - - - on these kind of blown alibis  
6 are cases where the defense attorney is the one who  
7 interjects the error. Here she gratuitously says,  
8 oh, yeah, that was a Friday. She - - -

9 JUDGE RIVERA: Well, more than one witness  
10 made this error, right?

11 MR. KAEUPER: Right, yeah, more than one  
12 witness made the error. But - - -

13 CHIEF JUDGE LIPPMAN: But what's the  
14 defense counsel's obligation when they - - - when  
15 they keep screwing up the alibi?

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

17 CHIEF JUDGE LIPPMAN: He just sits there  
18 and says, ha-ha, wrong date, this doesn't quite work  
19 - - -

20 MR. KAEUPER: Well - - -

21 CHIEF JUDGE LIPPMAN: - - - I guess I'll  
22 just leave it alone? Or do you - - - do you question  
23 the witness to - - - to get them to give, apparently,  
24 what - - - what they wanted to give, something that  
25 would be a real alibi?

1 MR. KAEUPER: Well, I think he gets out - -  
2 - I mean, he's got - - -

3 CHIEF JUDGE LIPPMAN: He's got no  
4 obligation? He just sits there and says this is all  
5 screwed up, so there is no alibi; okay, no alibi, I  
6 give it up. And he did give it up.

7 MR. KAEUPER: Well, no, he puts on - - - I  
8 mean, in fact the defense complains about the fact  
9 that he puts on - - - on the daughter as a - - - as  
10 another alibi witness. And then he also has the  
11 defendant's sister. And - - - and when you tie all  
12 those together, I mean, I think it's pretty clear  
13 everybody's talking about the same date, whether  
14 they're adding gratuitous details, and that - - -  
15 that tells you a lot about their credibility, but - -  
16 -

17 CHIEF JUDGE LIPPMAN: Okay, counselor,  
18 let's - - - you'll save whatever you have left for  
19 rebuttal. Let's hear from your adversary.

20 MR. PIXLEY: Your Honor, first - - -

21 CHIEF JUDGE LIPPMAN: Why don't you start  
22 with the alibi? Let's start with that, and then  
23 you'll - - - you'll work back to the - - -

24 MR. PIXLEY: The alibi is the weak link in  
25 this. It's not as egregious, if you look at it on

1 its face, as the statements, the threats that came  
2 in. Obviously, that goes right to the heart of the  
3 identification defense - - -

4 CHIEF JUDGE LIPPMAN: So you agree with him  
5 that the - - -

6 MR. PIXLEY: No, I don't.

7 CHIEF JUDGE LIPPMAN: - - - the alibi,  
8 well, if you put it together, it's clear what day and  
9 date they were talking about?

10 MR. PIXLEY: No, no, not at all, Your  
11 Honor, because, in fact, the witnesses - - -

12 JUDGE READ: They all gave the same date,  
13 but it was the wrong day of the week, is that right?

14 MR. PIXLEY: They were directed to the same  
15 date, but they gave the testimony - - -

16 JUDGE READ: About the day of the week that  
17 date fell.

18 MR. PIXLEY: They gave testimony indicating  
19 that their memory of that event was tied to a  
20 birthday party on a Saturday, which the prosecution  
21 then was able to prove was - - - the Saturday was  
22 not, in fact - - - the day of the crime was on a  
23 Tuesday.

24 JUDGE STEIN: But - - -

25 JUDGE RIVERA: And some TV show on the

1 Friday or something - - -

2 JUDGE STEIN: - - - defense counsel  
3 re-emphasized that. I mean, he actually said, so  
4 that was a Friday night going into Saturday.

5 MR. PIXLEY: Yes, Your Honor.

6 JUDGE STEIN: So he compounded the - - -

7 MR. PIXLEY: He compounded the problem by  
8 reiterating it. He compounded the problem by not  
9 properly preparing his witnesses; obviously, the two  
10 of them said the same thing.

11 JUDGE ABDUS-SALAAM: Well, do we know what  
12 he did in preparation? I think you started out by  
13 saying the alibi is the weak link in this, and I  
14 think I agree with that. So I'm not sure that you  
15 could put all of this on defense counsel. We don't  
16 know whether, you know, this was an ad lib by the  
17 mother about the - - - the TV shows. Maybe they did  
18 - - - they gave the right dates; they just didn't  
19 make it the right day.

20 MR. PIXLEY: Well, the days were off quite  
21 a bit. And - - - and the fact of the matter was, the  
22 defense attorney didn't contact them for nine months  
23 after the crime. So the first question out of the  
24 defense attorney would be: why do you remember this  
25 particular date? And they said - - -

1 JUDGE PIGOTT: I don't know.

2 MR. PIXLEY: - - - it was because of the  
3 birthday.

4 JUDGE PIGOTT: You run into a situation  
5 where this stuff pops up, and you think, oh - - - I  
6 mean, short of suborning perjury, you've got to kind  
7 of accept what they think happened, right? I mean,  
8 you could point out, you know, Gunsmoke wasn't on on  
9 Tuesdays, but - - -

10 MR. PIXLEY: Well, I don't know if - - -  
11 Your Honor, the mistake had nothing really to do  
12 about the television show. That was kind of a hook.  
13 The real - - - the real problem, the base of the  
14 problem was this tying it into a birthday on a  
15 Saturday that everyone attended.

16 JUDGE PIGOTT: Um-hum.

17 MR. PIXLEY: That was the problem. And  
18 both of them remembered their - - - the test - - -  
19 their testimony based on that particular party.

20 JUDGE PIGOTT: And what's to say they  
21 weren't telling the truth, they just had the dates  
22 wrong?

23 MR. PIXLEY: That - - -

24 JUDGE PIGOTT: It's not the lawyer's fault,  
25 you know - - -

1                   MR. PIXLEY: No, but it reflected so poorly  
2 on their particular credibility.

3                   JUDGE ABDUS-SALAAM: Could you comment on  
4 the other - - -

5                   MR. PIXLEY: Well, Your Honor, first of  
6 all, as far as the threat is concerned, it wasn't  
7 just a threat that we'll shoot you or I'll shoot you;  
8 it was a threat I'll shoot you, too, which is in fact  
9 an admission to the crime. The other thing was the -  
10 - - the threat actually detracts from the credibility  
11 of the witnesses - - - of the witness, Ms. Barnheart.  
12 It doesn't enhance her credibility. There's no trial  
13 strategy you could throw around, you know, use the  
14 threat to - - - to your advantage, but it detracts  
15 from her credibility. And not - - - and not only  
16 that, it helps bolster what otherwise is a very weak  
17 case on a question of identification.

18                   JUDGE PIGOTT: He said "I'll shoot you  
19 too," isn't that an admission that ought to be  
20 admitted?

21                   MR. PIXLEY: It should have, probably  
22 should have. But the DA chose her path.

23                   JUDGE PIGOTT: I see.

24                   MR. PIXLEY: She came to the court and said  
25 I want to prove- - - I want to introduce this

1 testimony to show, in the, the instance - - - in the  
2 event that it's shown that the defense attorney  
3 attacks the witness on - - - on her failure to come  
4 forward sooner.

5 CHIEF JUDGE LIPPMAN: What should the  
6 defense attorney have done when this started to  
7 happen - - -

8 MR. PIXLEY: That - - -

9 CHIEF JUDGE LIPPMAN: - - - yell bloody  
10 murder?

11 MR. PIXLEY: Yes. Yes, Your Honor. The -  
12 - - and it's not like he didn't know - - - you know,  
13 Mr. Kaeuper seems to intimate - - - intimate that  
14 perhaps he wasn't aware; this kind of just sprung on  
15 him. If you look at the phrasing of that first  
16 question that the district attorney asked, it's  
17 almost verbatim the phrasing that she used when they  
18 argued about this in Molineux - - - at the Molineux  
19 hearing.

20 CHIEF JUDGE LIPPMAN: So once - - -  
21 basically your view that once she does that and  
22 directly violates the Molineux ruling, you know,  
23 there can be no - - - no - - - no saving of this? I  
24 mean, it's a direct unequivocal violation of the  
25 judge's order?

1 MR. PIXLEY: Well, as far - - -

2 CHIEF JUDGE LIPPMAN: It doesn't matter  
3 what the defense counsel does after that?

4 MR. PIXLEY: Your Honor, in this particular  
5 instance, this has - - - this goes to the heart of  
6 the defense. It goes to the identification. It  
7 enhances their particular witnesses.

8 CHIEF JUDGE LIPPMAN: So the answer is yes,  
9 it's a - - - it's an - - -

10 MR. PIXLEY: It - - -

11 CHIEF JUDGE LIPPMAN: - - - unforgivable  
12 error.

13 MR. PIXLEY: Yes, and then to have it  
14 repeated, the bell rung two, three, four times down  
15 the line, with him sitting there, saying nothing to  
16 stop it.

17 JUDGE ABDUS-SALAAM: Well, counsel, I'll  
18 ask you what I asked your adversary. Did Ms. - - -  
19 did the other witness, the girlfriend, testify to the  
20 threat at all?

21 MR. PIXLEY: No, Your Honor.

22 JUDGE ABDUS-SALAAM: No?

23 MR. PIXLEY: Ida Rivera testified that  
24 there had been an argument the day bef - - - that she  
25 was with the defendant the day before, the defendant

1 was upset because he'd been in an argument with  
2 Prather, one of the victims. She also testified that  
3 the day - - - that night, right after the homicide,  
4 Mr. Jarvis came to - - - to the house, Melissa  
5 Jarvis' house and said, I had killed Prather. Those  
6 were the two things that she testified about. It was  
7 nothing about her directly being threatened by Mr.  
8 Jarvis.

9 JUDGE ABDUS-SALAAM: Or that, or that the  
10 defendant had, before he did it, indicated to her and  
11 to Barnwell that he was going to kill Prather. Is  
12 that - - - that was her - - -

13 MR. PIXLEY: Rivera said that there had  
14 been a problem - - - that there had been a beef; they  
15 talked about having a beef. When Barnwell testified,  
16 she said it - - - that in fact what the defendant had  
17 said was I'm going to kill Prather. She overhear - -  
18 - she says she overhears a conversation that Ida  
19 Rivera says never happened. Ida Rivera says it was  
20 only an argument, and when pressed whether or not  
21 there was in fact a threat, she says, no, it was just  
22 there had been an argument.

23 JUDGE STEIN: Counsel, I have a question  
24 that actually it's bothering me, but it hasn't really  
25 been addressed. This defendant was convicted in

1 1992, correct?

2 MR. PIXLEY: Correct, Your Honor.

3 JUDGE STEIN: And had a direct appeal?

4 MR. PIXLEY: Correct, Your Honor.

5 JUDGE STEIN: And a 440 motion - - -

6 MR. PIXLEY: Yes, Your Honor.

7 JUDGE STEIN: - - - that was denied. And  
8 an error coram nobis prior application that was  
9 denied. And - - - and now the Appellate Division has  
10 granted this - - - this second writ. So I guess my  
11 question is, is - - - is it - - - is the standard  
12 that we should be looking at whether - - - whether -  
13 - - well, whether appellate counsel was ineffective  
14 and - - - and whether trial counsel was clearly  
15 ineffective, as opposed to the standard that the  
16 Appellate Division actually used here, which was  
17 almost more like in Anders - - - you know, possibly  
18 could have been effective?

19 MR. PIXLEY: Well, as far as - - -

20 JUDGE STEIN: Ineffective, I should say.

21 MR. PIXLEY: - - - the coram nobis goes to  
22 the appellate counsel failing to raise this issue.

23 JUDGE STEIN: And nobody's talking about  
24 that here.

25 MR. PIXLEY: Because in fact - - -

1                   JUDGE STEIN: That's why I say it's not  
2                   been raised. It - - - it's just concerning to me  
3                   that - - - that I'm not sure that we're looking at  
4                   the same standard that we normally would be on a  
5                   coram nobis.

6                   MR. PIXLEY: Well, leave was denied on the  
7                   coram nobis grant too, so - - -

8                   JUDGE STEIN: And the fact that if this  
9                   case goes back, it's - - - it's - - - you know, what  
10                  kind of evidence is there going to be, this many  
11                  years later, after all of these appeals and denials  
12                  and everything else?

13                  MR. PIXLEY: Your Honor, the Appellate  
14                  Division decided that there had been denial of a fair  
15                  trial. Twenty years later, five years later,  
16                  whatever, there'd been a denial of a fair trial. I  
17                  don't know that the length of time interfer - - - you  
18                  know, changes that equation at all.

19                  JUDGE STEIN: Thank you.

20                  CHIEF JUDGE LIPPMAN: Okay. Thank you,  
21                  counsel.

22                  Counselor, rebuttal?

23                  MR. KAEUPER: If I could get back to the  
24                  single error point here because - - -

25                  CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. KAEUPER: - - - because I think even  
2 before any question comes out about this threat, what  
3 the witness has testified to is extremely damning.  
4 Basically, if you believe this witness, the defendant  
5 is sunk. She's testified that he said, the day  
6 before, I'm going to kill this guy. So at that  
7 point, the - - - the - - - the critical thing for the  
8 defense is to undermine her credibility. Whether it  
9 was error or not, in the way he dealt with it, the  
10 bottom line is that that - - - that threat adds very  
11 little to the People's case, especially as weakly as  
12 it comes out. And - - -

13 JUDGE PIGOTT: Do you know what happened  
14 here? Because I don't believe a DA would  
15 intentionally go against an order of a court on a  
16 Molineux issue. So I don't know what happened there.  
17 But you - - - you are arguing we actually were trying  
18 to help the defense. We knew that the defense wanted  
19 - - - I know I'm exaggerating, but - - - but it seems  
20 to be that you're saying, lucky defense, we violated  
21 the order. Now, I can't believe this lawyer violated  
22 this order intentionally.

23 MR. KAEUPER: Okay. And if I - - - I can  
24 address the - - - the misconduct in - - - in a  
25 second, but if I can just - - - if I can address that

1 point, because - - - because my - - - my point is not  
2 that we were helping the defense or anything of that  
3 sort. My point is that the defense counsel here was  
4 not ineffective - - - ultimately, that is, in a  
5 Constitutional sense. That ultimately - - -

6 CHIEF JUDGE LIPPMAN: Yeah, how could he  
7 have been more ineffective than he was here? This is  
8 such a basic - - - as Judge Pigott just said, such a  
9 basic thing, the attor - - - I don't know why - - -  
10 why that happened. But what could be more than  
11 sitting there after that happened?

12 MR. KAEUPER: Even if it was a dumb,  
13 idiotic thing to do to not object, the - - - you  
14 still have to have a prejudice prong there on - - -

15 CHIEF JUDGE LIPPMAN: But the first thing  
16 was damning, what you're talking about, and this is  
17 doubly damning.

18 MR. KAEUPER: Not - - - but not the way it  
19 comes out, not when he gets to say, on, on summation,  
20 hey, you know, when, when she was testifying to that,  
21 she couldn't even remember what she had put in her  
22 police report.

23 JUDGE PIGOTT: You're saying he's - - -

24 MR. KAEUPER: He's arguing she's lying. And  
25 this - - - and he - - - he - - - he - - - if it was

1 error, if it created prejudice, he - - - he mitigates  
2 that - - -

3 JUDGE RIVERA: Well, no, she says, he said  
4 he would shoot us, and then she says other things, he  
5 would shoot us, he'll kill us, he'll beat us up. And  
6 then she says, no, I really can't remember. And then  
7 they refresh her recollection, and it matches exactly  
8 what she said, that he would shoot us. So I don't -  
9 - - I don't see how that shows that she's not  
10 credible.

11 MR. KAEUPER: Well - - -

12 JUDGE RIVERA: It shows that many years  
13 later, in a moment of fright, you might not - - - I  
14 can't remember the exact words, but what I said in my  
15 first answer happens to match what I said a long time  
16 ago.

17 MR. KAEUPER: Well, but - - - I mean, she's  
18 saying all kinds of strange things along the way.  
19 She's clearly having a lot of trouble. And - - - and  
20 the defense attorney's making this point that look at  
21 her demeanor. Look at the demeanor of her when she's  
22 testifying; she's not credible. And he - - - and he  
23 focuses particularly on that testimony where she's -  
24 - - she's evasive, well, I don't - - - and as far as  
25 the fear thing, because that, I think, was - - - was

1           - - - was what the prosecutor tried to say, is this  
2           shows her fear.  If if, I'm - - - if my bad  
3           testimony, my demeanor in testifying, my reluctance  
4           to testify, and so forth, is the result of fear of a  
5           threat, I'm going to remember the threat.  I'm not  
6           going to sit there and say, well, he said he'd kill  
7           us or beat us up or something.  I mean - - -

8                         CHIEF JUDGE LIPPMAN:  Okay, counselor.

9                         MR. KAEUPER:  Thank you.

10                        CHIEF JUDGE LIPPMAN:  Thank you both.  
11           Appreciate it.

12                        (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of People v. Kharye Jarvis, No. 52, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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