COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 22

JASON BOHN,

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 SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MARK W. VORKINK, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street, 9th Floor
New York, NY 10038

CHRISTOPHER JOHN BLIRA-KOESSLER, ESQ.
QUEENS DISTRICT ATTORNEY
Attorney for Respondent
12501 Queens Boulevard
Kew Gardens, NY 11415-1520

Chrishanda Sassman-Reynolds
Official Court Transcriber

CHIEF JUDGE WILSON: Next case is People v. Bohn. Counsel?

MR. VORKINK: Good afternoon, Your Honors. Mark W. Vorkink of Appellate Advocates for appellant, Mr. Jason Bohn. If I could reserve three minutes for rebuttal, please?

CHIEF JUDGE WILSON: Yes.

MR. VORKINK: Your Honors, the People failed to prove the torture mens rea to sustain the first-degree murder charge in this case. As Your Honors discussed in the prior case, the torture mens rea is specifically defined by statute. It requires proof that a defendant intended to commit torture, which is evinced by evidence that they relished the infliction of extreme physical pain, suggesting debasement or perversion or evidenced pleasure in the infliction of that pain and what - - -

JUDGE TROUTMAN: What about the defendant's words overheard on the recording?

MR. VORKINK: Your Honor, both experts - - - both the People's experts and the defense experts agreed the defendant sounded angry in the voicemail recording that Your Honor is referencing.

JUDGE HALLIGAN: But can't you be angry and relish something at the same time? Is there only one emotion that you can have?

MR. VORKINK: I think it's possible, in a hypothetical scenario, to hold two emotions at once. But I think it's dispositive that the expert said that he sounded angry.

JUDGE HALLIGAN: So why is that a question for the experts to resolve as opposed to the jury? My recollection - - - correct me if I'm wrong. Did the jury hear the tape?

MR. VORKINK: The jury did hear the tape.

JUDGE HALLIGAN: I thought they did. Right. So why can't the jury draw whatever conclusion they want about what the experiences that the defendant is having at the time?

MR. VORKINK: I think a jury can draw that conclusion, Your Honor. I - - - I - - - it would not be our position that every first-degree murder by torture case requires expert testimony about - - - to interpret what - - - what a defendant's maybe emotional state was at the time. But I think it's relevant and dispositive that both experts agreed that the only emotion that they could glean from the voicemail was anger.

JUDGE HALLIGAN: But you're not taking the position, I take it - - - correct me if I'm - - - I'm wrong, that the jury could not take a different view? Is your position that the expert's take on it is - - - is the

only - - - the only view that - - -

MR. VORKINK: I think the expert's take is one factor that supports our position that the People fail to prove the torture mens rea in this case. Because I think that they heard the tape, it was their conclusion. But I would submit that the jury needed to draw and could only draw that conclusion based on the evidence in the record. I think that the defendant's statements on the voicemail show that he was concerned with extracting information, that he was furious, that he was - - - you know, had lost control and he was focused - - -

CHIEF JUDGE WILSON: How does - - - how does extracting information bear on this at all?

MR. VORKINK: It - - - it bears on this, Your Honor, because - - -

CHIEF JUDGE WILSON: Isn't it sort of the classic torture from movies, that you're torturing somebody to get information out of?

MR. VORKINK: Well, Your Honor, I think - - - I think that's a point that the People make in their brief, which is that torture has this commonsense understanding, but that's not how the legislature defined it.

CHIEF JUDGE WILSON: No, I understand that, but I'm - - - but that's right, it's not how the legislature defined it. So why does it matter?

MR. VORKINK: Well, it - - - it - - -

CHIEF JUDGE WILSON: And you're now trying to make something affirmative out of the fact that there was information being gathered. I don't see how that cuts either way.

MR. VORKINK: I think our position, Your Honor, would be that - - - that to the extent that an emotional state could be gleaned from the voicemail that was presented to the jury, it's that if there was a goal, the goal was to extract information about the 508 number and not to evince pleasure - - - to extract pleasure or enjoyment or debasement or perversion from the injuries.

JUDGE RIVERA: Then why ask her how does it feel?

MR. VORKINK: I think that there's a number of potential meanings. I think one is that he was attempting to draw attention to the injuries themselves in order to force her to respond to his question concerning the 508 number. I think that's the most reasonable inference that can be drawn from that statement.

JUDGE RIVERA: The jury couldn't draw a different inference?

MR. VORKINK: I don't think that the - - - that the record supports any other rational inference, such as that he was attempting to - - - that he was evincing pleasure from asking that question.

JUDGE SINGAS: There wasn't only the tape, right? There were emails. And I believe in one of the emails sent in the weeks before her murder, he said she needed to be taught a lesson and he would enjoy being her instructor.

MR. VORKINK: I think the context of that E-mail is important, Your Honor. I mean, I would not dispute that that is in the record. I think that E-mail was talking about certain allegations of misconduct that he had - - - he had claimed that she had committed. I think the broader scope of what the incidents arose from was his own feelings of betrayal, his fear of abandonment; this is what the defense expert talked about.

JUDGE TROUTMAN: But you - - - when you say context, if you consider what's said in those messages and what's heard on the tape and his actions of starting and stopping of infliction of harm upon her, could not a jury reasonably conclude that he was enjoying - - - that he found pleasure in what he was doing?

MR. VORKINK: I - - - I don't believe so, Your Honor, and I would draw this court's attention, as I know the facts have been discussed already, but I think the Williams decision, the Valdez-Cruz decision, and the Lauderdale decision are dispositive. I think in all of those - - - Valdez-Cruz in particular, I think speaks to the question concerning the E-mails. There you had

statements prior to the - - - the death-causing incident itself, in which the defendant threatened to commit torture and specifically described the types of conduct that he planned to engage in. Conduct, much of which actually he did in fact engage in at the time of the fatal incident. You do not have that in this case.

JUDGE TROUTMAN: What about the time frame that's going on? The People calling the police? Her own phone call? And do you disagree there was a course of conduct here?

MR. VORKINK: We would not contest that's a course of conduct. We would also not contest that there was extreme physical pain caused, the medical examiner testified to that. It's not our contention to dispute - - -

JUDGE CANNATARO: So going back to the enjoyment issue. In response to a question that Judge Troutman asked you, it seems you contradicted - - - I - - - you may - - - you may have contradicted a statement that you made to Judge Halligan, which is that you conceded that a person could hold two mental states simultaneously. You can be angry and something else. And you also seem to concede that that falls within the can of a lay person. You don't need an expert to tell you either that a person can hold two mental states, or that they can somehow perceive two

mental states. So why is it that you seem to also be arguing that there needs to be some kind of specific admission - - - words regarding enjoyment, or something like that, in order to be the proper basis for a jury's conclusion that there was some level of depraved pleasure?

MR. VORKINK: Well, I think two responses, Your Honor. I think that there is a hypothetical scenario in which a defendant could perhaps hold two different distinct men - - - mens reas was at one time, so I - - - I'm not going to try to dispute that. I would say that, however, in a case in which that that was dispositive, the People would have to prove both distinct mens reas. And here they only proved - - - they did not prove the dispositive mens rea was - - - which was the torture mens rea.

JUDGE CANNATARO: I guess, my question is, why can't the opportunity to listen to exactly what it was the defendant was saying in the moment, be enough proof for a jury that we presume, is very adept at - - - at inferring what's going on emotionally from what they're hearing?

MR. VORKINK: I - - - because I think that at the end of the day, the question is, did the People prove it beyond a reasonable doubt? And juries reach conclusions all the time that are not necessarily supported by the evidence. And that's the job of the appellate courts to - - - to ultimately determine whether or not the People

carried their burden. And they did not here. And I think the voicemail doesn't bear that out. The injuries do not bear that out. And I think - - - you know, and this arose in the Estrella case as well, but these are rare cases. And it - - - it's relevant that only five of them have arisen in the last twenty-five years since the statute was enacted. The legislature drew the lines for what constitutes murder by torture very narrowly and for good reason. And they chose to do it that way. And they chose to create this very specific mens rea that there has to be proof of relishment, of enjoyment, of debasement, of perversion. And I think the cases that historically have affirmed convictions along those lines: Valdez-Cruz, Williams, and Lauderdale are paradigmatic examples of where that can be borne out.

JUDGE GARCIA: Counsel, it seems, on that unusual series of - - - of cases, it is unusual to have - - - granted, we have a course of conduct and we have the injuries, to have a tape recording of the actual murder taking place that the jury can listen to and judge for itself how it interprets the defendant's conduct. I mean, isn't this the outlier case?

MR. VORKINK: It is not common, Your Honor, to have that evidence in a murder prosecution. I - - - we would not disagree with that, but that doesn't change the

outcome. And I think that you have to look at the nature of the injuries as well, which is not something we've discussed in - - - in depth. And I think here, unlike in those other prosecutions, you don't have the same sort of needlessly brutal injuries, the sadistic injuries. There also was no sexual component to the murder prosecution, which, as was true in Lauderdale and Valdez-Cruz, and in Williams, there's no evidence of that here.

JUDGE HALLIGAN: You're not suggesting that's required under the statute?

MR. VORKINK: No, I'm not, Your Honor. But I'm saying that it's a factor among many factors that I think the jury and an appellate court should consider in determining whether or not the People have carried their burden to prove this mens rea. And I think it's relevant that those - - - that that was a factor present in the other three cases and was not present here. And I think - - -

JUDGE HALLIGAN: Where in the statute do you see the proposition that that particular factor is relevant or something that we should notice if it's missing?

MR. VORKINK: I - - - I think it goes to the debases or perversion issue, Your Honor. I think it also goes to common sense understanding of how pleasure could operate. But I think that issue aside, the fact that it's

present in those three other cases and not present here, coupled with the - - -

JUDGE GARCIA: You do have threats of that here, right? You do have E-mails threatening and phone calls threatening that type of activity, right?

MR. VORKINK: You do. But it's not carried out, Your Honor, as it was in the other cases.

JUDGE CANNATARO: Well, do you think in general that a person can - - - any person can derive pleasure from revenge?

MR. VORKINK: Potentially. In a hypothetical scenario, potentially, Your Honor.

JUDGE CANNATARO: So you know, if a person has a lesson to learn and I'm going to be the one to teach it, it's possible that you might enjoy teaching the lesson.

MR. VORKINK: You might, Your Honor, but I think it - - - it's again, we have to go back to the statutory definition. I think the legislature defined it a very specific way. Relishment in the infliction of extreme physical pain, debasement, perversion, these are very specific terms. And I think a revenge or - - - you know, torture in a commonsense understanding is not what the legislature intended. And they didn't make out the mens rea here. I would like to not forget mentioning the two other points in our brief, if I may?

CHIEF JUDGE WILSON: Of course.

MR. VORKINK: Can I turn to the for-cause challenge point?

CHIEF JUDGE WILSON: Please.

MR. VORKINK: Your Honors, two prospective jurors in this case deliberately violated the court's instructions concerning Internet research about the case. Those instructions were clear. The jurors were told on multiple occasions not to Google the case, and they admitted doing so. They admitted that they understood the prohibition and that one of them, PT, never promised not to do it again. When counsel raised the for-cause challenge, however - - -

JUDGE TROUTMAN: Does it matter that they promised they could be fair and impartial?

MR. VORKINK: It does not, Your Honor.

JUDGE TROUTMAN: And with respect to the court exploring what it was or the extent of their looking and considering what they saw, does it matter that they said, just the headlines?

MR. VORKINK: I - - - for two different reasons, Your Honor, I don't think it does. One, having admitted that they violated an express - - - express court prohibition on Internet research, I think it stands to reason they would not necessarily be as forthcoming about what perhaps they may have encountered when they read

online. But I think - - -

JUDGE TROUTMAN: Who's in a better position to make that assessment as to whether or not they're being forthright?

MR. VORKINK: And I'm sorry, do you mean the prospective juror or the court, Your Honor?

JUDGE TROUTMAN: The - - - at the time that they're giving that response to the court? It - - - the court is in the better position than we looking at a cold record.

MR. VORKINK: It is, Your Honor. Although, I would note that when counsel raised a for-cause challenge, he asked the court to conduct a further inquiry, as a court is required. All trial courts have a sua sponte duty to conduct a follow-up inquiry to attempt and extract an unequivocal assurance of impartiality, and the trial court here had refused to. So who knows what the prospective juror may have said if the court had fulfilled its obligation?

JUDGE TROUTMAN: So the court didn't go far enough?

MR. VORKINK: It did not. But I think separate and apart from what they read, the point of the matter is, is that they engaged in deliberate misconduct. And I want to respond to an argument that the People made when they

seem to suggest that these jurors stumbled through happenstance upon this information. Googling is an affirmative act. And I think particularly nowadays, where information on the Internet is such - - - at easy disposal by jurors - - -

JUDGE RIVERA: Did both of them do that?

MR. VORKINK: Yes, Your Honor.

JUDGE RIVERA: I thought one said it was on their feed? So not - - -

MR. VORKINK: I believe that both admitted that they searched the Internet. Because I think they typed in murder in Queens.

JUDGE RIVERA: I thought one did that?

MR. VORKINK: I - - - I think both PT and TT, as my recollection of the record, affirmatively researched the case online.

JUDGE RIVERA: So then your position is when - - - when a prospective juror violates a directive of the court, they cannot be rehabilitated?

MR. VORKINK: I think perhaps - - - perhaps in another case, they could be, Your Honor. I think here PT gave no assurance. He was not asked and never said he would not violate this prohibition in the - - - in the future. And I think in those circumstances, there is no way that he could be rehabilitated, and he should have been

struck for cause. And I think, as this court has said, in Arnold and in other cases, if there's any doubt about a juror's fitness to serve, they should be removed. And of course, the trial court here seemed to acknowledge that there was doubt as to TT. The court said, I'm going to give him the benefit of the doubt, suggesting that the court understood there was a question as to whether or not he was fit to serve and nevertheless denied counsel's for-cause challenge as to TT.

Briefly addressing, I think - - - you know, KN in the record. I think there, again, you have a juror who says that she does not like gruesome photos. She never rejected that proposition. I know there's a back and forth with the People about what the record said subsequent to that concerning incidents of domestic violence. That would only show that whatever her statement was, it was at best equivocal and she should have been struck for cause. Particularly where, again, the court misapprehended the record in denying counsel's for-cause challenge as to her; saying that she never raised any problems about the photographs, when in fact she did.

Can I briefly address point 3, Your Honor?

CHIEF JUDGE WILSON: Very quickly.

MR. VORKINK: Very quickly. I'll follow up more in rebuttal. But I just want to make clear that trial

courts absolutely have discretion to admit expert testimony. There's no question about that. We would not dispute that. But there have to be guideposts when that evidence comes in; evidence which is so powerful in the jury's understanding of a case. And this court, in Kenny and elsewhere, have said that an expert must be familiar with the subject matter about which they are asked to render an opinion. And here the expert Dr. Rosner had never conducted an evaluation of EED, hadn't ever opined about an independent state of mind at the time of a crime, which was the subject matter about which she was asked to render an opinion.

JUDGE RIVERA: Does that - - - does that go to the weight - - - as to what weight the jury should accord her testimony?

MR. VORKINK: It does not, Your Honor. It goes to her qualification to render an opinion. And the testimony that she actually gave, as we discussed in greater depth in our brief, confirms why she was not qualified. Because she made a number of different statements that are contradicted by clear case law about what an expert can testify to, particularly in the EED context, as this court's seminal case decision in Cronin makes clear. So - - -

CHIEF JUDGE WILSON: Thank you.

MR. VORKINK: Thank you very much.

MR. BLIRA-KOESSLER: Good afternoon, Your Honors. Chris Blira-Koessler for the office of Melinda Katz, the Queens County DA, for respondent. I think it's important to note what the statute here says, because we've been talking a lot about it. The statute doesn't have any prohibition against feeling two separate things at the same time, or feeling something at one point in a transaction, then feeling something else. All it says is that you have to derive a sense of pleasure. A sense of pleasure from the extreme pain you're inflicting. You can be angry at the same time. You could be trying to gather information at the same time. You may enjoy gathering the information and thereby derive the pleasure. So there's nothing in the statute, nothing in the legislative history that says if somebody is doing one thing, then that's it.

CHIEF JUDGE WILSON: Is it fair to say that this - - - sorry. Over here.

MR. BLIRA-KOESSLER: Oh, sorry.

CHIEF JUDGE WILSON: That's okay. It's hard to tell where the audio is coming from.

MR. BLIRA-KOESSLER: Yeah.

CHIEF JUDGE WILSON: Is it fair to say that this is a statute that is reserved for extreme cases based on the legislative history?

MR. BLIRA-KOESSLER: I - - - sorry, judge. Oh, I thought you wanted to say something. Yeah. I mean, just by the wording of the statute, it describes extreme conduct.

CHIEF JUDGE WILSON: And in - - - and in fact, is the attempt to restore the death penalty in the State of New York, right?

MR. BLIRA-KOESSLER: At the time the statute was changed, I believe in 1995, we still had the death penalty then.

CHIEF JUDGE WILSON: And this is to - - - - yes. And this was - - - these were death eligible crimes?

MR. BLIRA-KOESSLER: Yes.

CHIEF JUDGE WILSON: So we should sort of keep that in mind when you think about how extreme the conduct needs to be here to meet this definition?

MR. BLIRA-KOESSLER: Yeah, but the - - - the statutory language is a pretty good guide, I think. I mean, it's a very wordy statute. You know, it's a very wordy statute. It kind of is a little bit redundant in terms of talking about sense of pleasure and relishing, it's almost - - -

CHIEF JUDGE WILSON: Is there a - - -

MR. BLIRA-KOESSLER: - - - the same thing.

CHIEF JUDGE WILSON: - - - is there a difference,

you think, between those two?

MR. BLIRA-KOESSLER: I - - - I really - - - I honestly do not know. I mean, I think if you evince a sense of pleasure, that means you had shown some sign that you're taking pleasure from somebody's pain. When you - - - you know, relish the infliction of extreme physical pain, showing the basement of perversion, it sounds like they're saying, well, you have to do it in a way that lowers your character. Or perversion, that you do something the opposite of what most reasonable people would do. I'm using the Black's Law Dictionary - - -

CHIEF JUDGE WILSON: Well, most reasonable people - - -

MR. BLIRA-KOESSLER: - - - definition of those terms.

CHIEF JUDGE WILSON: - - - don't kill - - - don't kill people.

MR. BLIRA-KOESSLER: Right. But that's - - - that's why we have the first-degree murder statute taking it, elevating it if - - - if, before the killing, you have this infliction of extreme pain now as - - -

JUDGE HALLIGAN: Do you - - - do you see this case as distinct from other domestic violence cases that might involve some significant physical injury and result in death?

MR. BLIRA-KOESSLER: Yeah. I mean, I think it's - - - I mean, I think it's rare, as the court recognized, that we have this recording.

JUDGE HALLIGAN: And is that why? Is it because of the recording and - - - and that that's what might allow a jury, you would argue, I assume, to find relishing and extreme physical pain?

MR. BLIRA-KOESSLER: Yeah. That's - - - that's a very - - - obviously a very big piece of evidence in this case. You know, it - - - it's - - - a lot of it comes from the recording because he's taunting her. He's asking, how does it feel? I mean, I don't know - - -

JUDGE HALLIGAN: And so if you didn't have the recording, in your view - - - and you did have the evidence of the injuries, would that be enough?

MR. BLIRA-KOESSLER: I don't really know. I mean, if we didn't have the recording, we had his statements prior to all this happening.

JUDGE HALLIGAN: Well, you have those E-mails, I think, right?

MR. BLIRA-KOESSLER: The E-mail - - -

JUDGE HALLIGAN: But - - - but would that be - - - I'm trying to understand in - - - in light of the Chief Judge's point, that this appears from the legislative history to be a statute that is reserved for very

extraordinary cases.

MR. BLIRA-KOESSLER: Right?

JUDGE HALLIGAN: So without the recording, would it be sufficient, do you think?

MR. BLIRA-KOESSLER: We might not have enough without the recording. I don't know how we would try to do develop the case without it. If we saw these E-mails, for instance, that he's saying he wants to do all these things to her. If the medical examiner could, for instance, say, well, this wound was caused at this time, and then what age the wound's at - - -

JUDGE HALLIGAN: Could - - - could you infer - - -

MR. BLIRA-KOESSLER: - - - that he was - - - sorry. That - - - that he was just drawing it out in order to increase the pain. But I have to acknowledge that without the recording, far different case.

JUDGE HALLIGAN: Could you - - -

MR. BLIRA-KOESSLER: Far different case.

JUDGE HALLIGAN: And so I take it that it would be much harder, maybe not possible, for a jury to infer relishing if they could infer here, absent the recording; is that a fair?

MR. BLIRA-KOESSLER: Yeah. I mean, in a lot of the cases where we've seen this statute come into play - -

- none of which are binding on this court, of course - - - but in a lot of those cases you have statements made before or after. In the Estrella case, it's a statement made after here. We have statements both before and during the crime. So there has to be some evidence to show that you're enjoying this. Now, could that come from the wounds themselves? I don't know. Possibly. So far I don't think we've had a case with torture-murder where it's just the wounds and it was a legally sufficient case. There was always some other indicia that the defendant enjoyed it.

CHIEF JUDGE WILSON: But just picking up on something that Judge Halligan's question suggests. Is it - - - it sort of just a fortuity here that there is the recording, right? To put it differently - - - and I hate to say this - - - there are probably a lot of domestic violence cases that end up with someone dead, where the conduct is the same, or perhaps even worse than this. It's just that we don't have a recording.

MR. BLIRA-KOESSLER: Right. I I'm sure that - - - go ahead. Sorry.

CHIEF JUDGE WILSON: No, no, that is - - - I mean, would you - - - I mean, you have more experience with this than I do. Was that fair?

MR. BLIRA-KOESSLER: In those cases, it's probably going to be murder 2.

CHIEF JUDGE WILSON: Yeah.

MR. BLIRA-KOESSLER: With something like this murder 1.

JUDGE CANNATARO: Probably some cases where there's no evidence and they don't get charged, right?

MR. BLIRA-KOESSLER: Exactly. Or you don't find the perpetrator at all.

JUDGE GARCIA: To go back to the death penalty in - - - I don't know how the New York statute worked. I don't know if you do, but was it possible to charge first-degree murder at the time and not seek? Because, of course, the death penalty involved an entirely separate procedure after a guilty verdict, right?

MR. BLIRA-KOESSLER: Yeah. Again, I know there was a lot of litigation years ago when - - - you know, the Bronx DA's office didn't - - - didn't want to seek that - - - seek the death penalty, but just went after life without parole. Which is still - - - which is still a very - - -

JUDGE GARCIA: Of course.

MR. BLIRA-KOESSLER: - - - extreme punishment, you know. But I think what we have here - - - just to talk about anger and this information-gathering motive, you know, one thing that their own expert said on recross examination by - - - by the prosecutor, what he actually said before he said that this was about anger. He - - - he

was asked - - - this is on page A-1671 of the record. "So although Jason kept asking, what's this 508 number? What is it here for? Why is it here? Despite him asking it several times, it's your contention he wasn't really asking that question to get any answer. He was just angry". And Dr. Bardey says yes. So there goes the information-gathering motive from the mouth of their own expert. And just as a matter of common sense, if you listen to this recording, this victim is completely out of it. I mean, I - - - I would be surprised if she even knew her own name towards the end of this. The idea that you can keep asking somebody over and over the same question and expect an actual answer that means anything is absolutely ridiculous. It is - - - even without this expert testimony, it is absolutely ridiculous to think that you could choke and beat somebody for an hour and that they're going to have any knowledge - - -

JUDGE RIVERA: But how do you get - - -

MR. BLIRA-KOESSLER: - - - to impart to you.

JUDGE RIVERA: - - - how do you get an inference of pleasure?

MR. BLIRA-KOESSLER: Well, I think - - -

JUDGE RIVERA: Because that would only matter if - - - I thought you had said before - - - if the attempt to get information gives you pleasure, right? Using a - - -

making the individual feel extreme pain as an effort to draw out information gives you pleasure. I thought you had said that would fall under the torture statute. So - - - so here, when you're just saying, look, you just keep asking it. You - - - you're not doing that to get information genuinely, you can't. So how does that, though, show that instead the mens rea is to get pleasure? That that's what you're doing?

MR. BLIRA-KOESSLER: Well, you could be seeking information, definitely, but still experience that pleasure from the pain. It's just two entirely - - - it's almost like apples and oranges. It's two separate things.

JUDGE RIVERA: Yeah. Well, I'm just asking how does what you were just quoting, how does that evince or - - - or allow a jury to draw the inference that, oh, when he was saying that, that that helps the juror understand or come to the conclusion, yes, what you were trying to - - - what you were doing is getting pleasure - - - pain from this?

MR. BLIRA-KOESSLER: I - - - I think that comes from his - - - more from his other statements; how does it feel, the mocking, the taunting. I think that him asking this question repeatedly was just - - - I don't know what to call it. Maybe - - - maybe a convenient way to keep this up because he was enjoying it so much. And this was a

six foot tall, 200 pound defendant beating and choking a 117 pound young female for at least fifty minutes - - - that's conceded, that it took at least fifty minutes to an hour. There's also nothing in the statute that says this is - - - there are other claim that that's not torture. I - - - I don't think any reasonable human being could listen to that recording and read what happened to this young woman and say, oh, that beating and choking, that's - - - that's just some common way of killing somebody.

JUDGE RIVERA: Well, I might see your point quite easily there, except for the way the statute is written. Right? Because what - - - yes. What occurred here could very well satisfy other definitions and understandings of torture. The question is, does it satisfy the New York statutes' definition of torture? And that's why the - - - to me, the real issue here, especially given the concessions by your adversary, is whether or not there's - - - there's pleasure that he drew from this?

MR. BLIRA-KOESSLER: Yeah. And I think - - - I mean, just looking at because I haven't addressed the statements that he made about seventeen days prior. And my adversary's position is that that shows anger. You know, it could show anger. But those statements, one is I will unleash a fury that Satan will envy. You know, that's - - - that's a very colorful, descriptive way to describe what

you're going to do. You know, a reasonable juror could look at that and say, you know, he's going to do more than just beat her up or wanted to do more than beat her up; he wanted to make her suffer. Because that's - - - that's - - - that's a very, very descriptive, unique way to - - -

JUDGE RIVERA: So let me just - - -

MR. BLIRA-KOESSLER: - - - describe your anger.

JUDGE RIVERA: - - - let me just understand you there. If - - - if the goal is to make someone suffer, that means that the - - - that they are also getting pleasure from making someone suffer?

MR. BLIRA-KOESSLER: I don't know if the goal has to be to make them suffer. You could start out with one intent. You could start out angry or even seeking information, but - - - and they had a whole history of relationship problems that had culminated in this. But as you're doing this to somebody, you could start to experience pleasure. You know, it's just like - - - you know, you get pleasure out of revenge. You could start to get a sense of pleasure as long as there's evidence to prove that you experienced a sense of pleasure, that's all. It doesn't have to be a goal, an intent that you formulate before you start all this. It can pop up out of nowhere.

JUDGE CANNATARO: Could this kind of continuous assault be a debasement? Could - - - would that qualify as

a debasement under the statute? I'm not sure what it means. So tell me what it means.

MR. BLIRA-KOESSLER: I honestly don't know either. I thought the basement and the perversion applied more to the defendant performing the acts, because the way the statute reads, "he relished the infliction of extreme physical pain upon the victim, evidencing debasement or perversion. So whose debasement or perversion?

JUDGE CANNATARO: Oh, you don't know who that modifies evidencing? Whether it modifies the defendant or the victim?

MR. BLIRA-KOESSLER: Yeah. I mean, I was reading it as it showed that he's acting in a debased, perverse - - - perverse manner. I could be one hundred percent wrong about that. You could also be debasing the victim. I mean, it - - - it could also be that, too, you know. But I thought that more spoke to the defendant's character in terms of enjoying or relishing the pain that he's - - - he or she is inflicting.

CHIEF JUDGE WILSON: So in looking at that, that relishing, perversion, debasing prong of the statute, I noticed that the trial counsel for the defendant described the conduct as perverted and extremely cruel.

MR. BLIRA-KOESSLER: Correct.

CHIEF JUDGE WILSON: So there's almost a - - - I

mean, it - - - it's a little hard then to argue that the jury couldn't draw the required inference under that prong of the statute.

MR. BLIRA-KOESSLER: Under the cruel - - -

CHIEF JUDGE WILSON: And - - - yes.

MR. BLIRA-KOESSLER: - - - and wanton, is what it says.

CHIEF JUDGE WILSON: Under the - - - under the perverted and debasing prong.

MR. BLIRA-KOESSLER: Yeah. No, they - - - they could have certainly drawn that that conclusion. And just by the way, on the cruel and wanton part he did - - - they - - - that is pretty much waived, you know. Their - - - their argument now that that's not - - - their argument now that that is not torture seems to be that it does not satisfy that part of the statute - - - the cruel and wanton part of the statute. So that's the part that - - - that's the argument that I think is affirmatively waived, because as you just said, as you just acknowledged, he said, oh, it's arguably perverted or cruel, right? So his actions satisfy that part of the statute that requires a course of cruel and wanton conduct. But yeah, it's - - -

JUDGE RIVERA: Now, what - - - what's the point of the word "especially"?

MR. BLIRA-KOESSLER: Well, "especially" meaning

more so than usual.

JUDGE RIVERA: Really, really, really, really cruel. Huh? I mean, the - - - I'm not trying, of course, to trivialize - - -

MR. BLIRA-KOESSLER: No, no.

JUDGE RIVERA: - - - certainly, what happened here or - - -

MR. BLIRA-KOESSLER: Right.

JUDGE RIVERA: - - - the intent behind the legislature. But it does make you wonder is that, as has already been discussed, perhaps yet another legislative signal that this applies to - - - to very, very few cases. That there - - - people acting cruel and horrible ways and they can be criminal ways and they can result in fatalities - - -

MR. BLIRA-KOESSLER: Right.

JUDGE RIVERA: - - - but they don't necessarily fit this statute.

MR. BLIRA-KOESSLER: Right. And I - - - I think it's played out as the legislature has intended, because this is what now? You know, the fifth case? First case that come before this court - - - the first two cases to come before this court dealing with the statute in thirty years, almost.

JUDGE RIVERA: So I guess I'm - - - where would -

- - I think - - - I think you were asked this question before by Judge Halligan. Where then - - - let's say we agree here that the jury could reach this verdict. What would be the line in the sand for your office moving forward when deciding in these interpersonal violence cases, result in a fatality, which one falls on this line and which one falls on the other line, that they're horrible, horrible cases, but they don't rise to the level of torture? Because you must concede that this is different from the cases that counsel has referred to, Williams, Valdez-Cruz, right? Those are - - - they are extreme. I'm not suggesting that that is what you need, but there is some quantitative difference, if I can put it that way - - -

MR. BLIRA-KOESSLER: I mean - - -

JUDGE RIVERA: - - - between this and those cases.

MR. BLIRA-KOESSLER: - - - I mean, we - - - we don't - - - sure, this is the only case I know of in my office where we charged torture-murder. I don't know of any other case ever in the history of - - - maybe - - - maybe there has been one. I haven't heard of it. And I - - - again, I think this case is very much driven by the fact that we had this recording, which you're not going to have in a lot of cases. You know, you're just not going to

have that. It's - - - you just need some evidence. And - - - and I don't want to say it's like a certain type of evidence, like just a statement or a recording. But something along those lines to make out this section of the statute that talks about a sense of pleasure. How are you going to prove that the defendant felt pleasure? Usually, that's going to come from statements the defendant made. That's the way it's been in every other case, Lauderdale, Valdez-Cruz, Williams. You can also look at the course of conduct as - - - as well, but you've always had statements to show that the defendant is enjoying it, and that's what you have here. You know, you could also listen to the recording and say, oh, at certain points he's angry, he's frustrated. But when you listen to it, you see he's pretty calm in other sections. He's coherent.

JUDGE RIVERA: But - but I assume that if there weren't quote-unquote, "statements", if during the recording he's laughing hysterically, that you might very well say, this looks to us like a case that falls on the other line?

MR. BLIRA-KOESSLER: Right. Right. If - - - If you have something like hysterical laughter. But again, as - - - as one judge of this court noted - - - I forgot who made the point. You're not always going to have a statement like, yeah, I really enjoyed doing that to you.

You're going to have other statements like, how does it feel? You know, now that's not the same as saying - - - it - - - it's basically, in an implied way, the same as saying, I enjoy torturing you. Because what does it focus on? The physical sensation of pain. He knows how she felt. She was right there in front of him. He was the one doing all this to her. He could see her pain. He didn't need her to confirm it. He didn't need a description of it. He knew what he was doing, but he was gloating. So when you have something like this and when you have these repeated actions: choking and releasing, choking, and releasing, taunting the victim over a prolonged period of time, I think this is one of the most open and shut cases of torture. Maybe there will be other cases that are more borderline, but this one isn't it. This one just isn't it.

I - - - I see my time is up. Can I briefly - - -

CHIEF JUDGE WILSON: Yes. The - - -

MR. BLIRA-KOESSLER: - - - the jury points?

CHIEF JUDGE WILSON: Sure.

MR. BLIRA-KOESSLER: The first two jurors, PT and TT, there - - - there's no affirmative evidence in the record they actually disobeyed the court's instruction. The court said, stay away from media attention about this case. The first juror was asked during voir dire, well, did you Google any of the parties and did you read anything

about the case? The juror never said - - - Google is the word that counsel used. The juror never said he affirmatively did that. That's why we made the argument that you can look at his answers and say, all right, he might have run into something about the case while he was online. And he read the headline. Then he stopped. And then he was forthright with the court and said, this is what happened. Didn't violate the court's order. Counsel made some argument about that they're not credible, that maybe they did. There's absolutely no evidence in the record of that. The second juror was - - - you know, very candid as well, very forthright. And technically, he didn't violate the court's order either. He said he Googled - - - they asked him, well, what did you put on the Internet? What did you Google? He said murder in Queens, I think. He didn't type in anything about the case. Now, maybe that was a clever, roundabout way of - - - you know, getting to the case, but technically it didn't violate the court's order. But worst-case scenario, even if they expressed some sort of curiosity or did things that showed their curiosity, it's not a wanton disregard of a court order. In Shulman, this court used the word forthright. These jurors were forthright. They came - - - you know, the court would have never known - - - never known what they did. This came from their mouths. It's not like the

court found this out on its own. It's not like they lied to the court about it, they came forward. And by their answers they showed that they actually abided by what the court said, which is don't read anything. They stopped at the headlines. They said they could be fair. They could be impartial. You know, there's - - - there's an expression that no defendant is entitled to - - - or - - - or that - - - that there are no perfect trials. But I think that applies to jurors, too. There are no perfect jurors. These jurors assured the court that they followed their instructions. And that includes the first juror, because he was asked by counsel, you know - - - or told by counsel, you know you can't do that. The court's going to tell you, you can't do that. And he said, yes. So obviously he intended not to violate that order again to the extent he violated it in the first place. So again, there are no perfect jurors. These two were honest, came forward, assured the court that they could abide by the court's instructions and be fair and fairly evaluate the case.

As far as Dr. Rosner goes, she - - - she was qualified as an expert in forensic psychology. That's - - - she - - - she was skilled in the profession to which the subject matter of her testimony related. She gave a very detailed accounting of her experience with EED 2. Look at

Dr. Bardey's testimony, though, because according to them, he's the perfect expert. He never said what his experience with it is. He said he testified six to ten times about EED. He said he lectured about it. But he never set forth a whole litany of things that he had done or studied in relation to EED. Dr. Rosner said that she studied it in grad school, studied twenty-eight cases of it, took classes on it; she was very, very familiar with this subject. And therefore the court qualify - - - qualifying her as an expert was not an - - - was - - - was not an abuse of discretion.

CHIEF JUDGE WILSON: Thank you.

MR. BLIRA-KOESSLER: Thank you.

MR. VORKINK: Just to address a few points, Your Honor. I think the first thing is, I - - - I want to focus on something that Chief Judge Wilson, you raised about the commonness of this offense. And - - - and I think that while it's true, as Judge Garcia you pointed out, I think what's unusual is that we do have a recording. This type of offense, which is a domestic offense, and the types of injuries involved are not uncommon in the world of homicides. And as a public defender, I can speak to that issue to a certain degree. But I - - - I think that that matters in this case because the statute that we're all discussing here - - - a statute which I think the People

rightfully say is wordy. It's wordy for a reason. It's wordy for a reason because - - -

JUDGE RIVERA: But Williams and Valdez-Cruz are also domestic violence cases.

MR. VORKINK: They are, Your Honor. Absolutely.

JUDGE RIVERA: It's - - - it's really about whether or not you satisfy the other requirements of the statute.

MR. VORKINK: Absolutely, Your Honor. But I think, as Your Honor rightly pointed out, I think the facts in Valdez-Cruz and Williams are distinguishable from those here. You know, this was a murder. The murder was caused by blunt force trauma and strangulation. Those are tragically all too common methods that murder is committed, particularly in a domestic violence scenario.

JUDGE SINGAS: But aren't you really making his point that they're so rare? How many have you defended other than this one, in your career?

MR. VORKINK: Well, excuse me if I misspoke, Your Honor. My point is, is that - - - that the facts in this case are not that rare. Not that rare. And so were this court to uphold Mr. Bohn's conviction of first-degree murder, I think there's a real concern that we would see more and more of these types of prosecutions.

JUDGE HALLIGAN: So what about the - - -

JUDGE SINGAS: You say there'll be an expansive use of this murder in the first degree in a way that we've never seen before, if we rule that this was torture?

MR. VORKINK: I think that there's a risk of that. There's a risk of that, that would go beyond what the legislature contemplated when it narrowly drew the definition of it.

JUDGE TROUTMAN: Or is it that if the court ruled that way, it would be clear clarity as to what constitutes the crime as the legislature intended? And that maybe prosecutors will look at cases that should have been prosecuted in the same way. It - - - it's not just because there are more. It - - - it was stated that there are a number of domestic violence cases wherein they're not solved, and they're simply charged as murder 2. Doesn't mean that torture and other egregious things did not occur.

MR. VORKINK: No, of course not, Your Honor. Of course. And that's not our position. I - - - I think our position is - - - is - - - and this is responsive to a point that the People make in their brief. I think they trot out crime statistics. But if you look at those statistics, arguably the conduct in this case would be represented in ten percent of homicides in New York State. So I think our point is that the legislature drew these lines very narrowly, and they did so for a reason. And

there's a concern that if they're broadened, if the definition of torture becomes this more of a commonsense understanding - - - you'll know it when you see it - - - a subjective view, there's a concern it would apply more broadly than the legislature ever envisioned.

JUDGE CANNATARO: But doesn't that discount the tape? To - - - to Judge Garcia's point, the reason why we can set this one apart, even though it looks on the surface the same as that broader run of cases, is that we have an insider's view of what happened.

MR. VORKINK: We do have a tape. But I think for the reasons that we discussed earlier, it's our position that that doesn't make out the requisite mens rea, particularly in combination with the other factors in this case that you don't see in the cases in which first-degree murder has been affirmed on appeal. So true, it - - - it makes this case different. But I don't think that that's dispositive in terms of making out the requisite mens rea. Just to briefly address two final - - -

JUDGE GARCIA: But - - - before you go to that. Your point on making this too broad, wouldn't it - - - if we'd say this, wouldn't it be that our ruling would be even with this tape that records this domestic murder and gruesome details of it and the defendant's voice, that's not enough. Is that setting the bar too high?

MR. VORKINK: No, I don't believe so, Your Honor. I don't believe so because the tape - - -

JUDGE GARCIA: Even if you have a tape, you never would bring this case anymore?

MR. VORKINK: No. Because I think the tape - - - the tape doesn't bear out the mens rea. And because the tape doesn't bear out the mens rea and the absence of the other types of factors that you see in cases where first-degree murder by torture have been affirmed, show that - - -

JUDGE TROUTMAN: So it's only for serial killers?

MR. VORKINK: No. No, Your Honor, it's not only for serial killers. I mean, it - - - there's no apparent evidence in the record that Mr. Valdez-Cruz was a serial killer or that Mr. Williams was either. But I think that you need those other factors. You need that other type of evidence that evinces pleasure or evinces relishment or debasement or perversion. And that was not borne out here.

Just to address very quickly the voir dire point. This - - - this court's decision in Shulman, I think, is very instructive there. This court talks about honest misunderstanding. If a court - - - if a juror conducts research based on an honest misunderstanding, it can be - - - it can be excused. This was clearly not an honest misunderstanding. I think the trial court characterized PT

as having googled the case. I think, perhaps, maybe, he read it online. But PT - - - TT was definitely an affirmative research of the case online. And I think, again, given the prevalency of Internet research where jurors - - - prospective jurors are engaging in this sort of conduct, it has to be strictly policed. And where they deliberately violate the court's instructions, they should be excused for cause, unless there's that follow-up inquiry which did not occur here.

So for all those reasons we ask you to reverse the conviction. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jason Bohn, No. 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature:  _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 22, 2024