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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 5

CHARLES HOWARD,

Appellant.

20 Eagle Street
Albany, New York
January 7, 2025

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:

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1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is number 5, People v. Charles Howard.

3 MR. COMET: Good afternoon. I'm Howard Comet,
4 appearing for the defendant, Charles Howard. May I please
5 reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MR. COMET: Thank you. Defendant has raised two
8 issues on this appeal. Although the issues are separate,
9 they both concern whether the evidence at trial was
10 sufficient to prove beyond a reasonable doubt that he was
11 guilty of robbery in the first degree as opposed to a far
12 less serious charge of larceny. The issues also both
13 involve some unique circumstances. The first issue is
14 based on what we've referred to as the sole witness rule.
15 That's the rule that when all of the evidence that the
16 defendant is guilty - - -

17 JUDGE RIVERA: So - - - so Counsel, does it make
18 a difference for purpose of the analysis that the victim
19 didn't get on the stand and admit that they had made that
20 prior statement, but rather said I just - - - I don't know.
21 I don't remember. Does that matter for purposes of our
22 analysis?

23 MR. COMET: I don't believe so, Your Honor. It
24 certainly - - -

25 JUDGE RIVERA: Why - - - why not?

1 MR. COMET: Well, it certainly would have
2 mattered if he said I didn't make that statement.

3 JUDGE RIVERA: No. Correct. Correct. Because
4 then it's clear you've got two different - - -

5 MR. COMET: Well - - -

6 JUDGE RIVERA: - - - statements. One appears
7 potentially inculpatory; one appears potentially
8 exculpatory. I get your argument there. But when - - -
9 isn't it for the jury to resolve whether or not they
10 believe his statement that I - - - as I have described it
11 at trial, that is what occurred?

12 MR. COMET: Well, except that the prosecution
13 also put on a witness. Their witness said he made a
14 contrary statement right after the crime.

15 JUDGE GARCIA: But Counsel, that raises a bigger
16 issue for me because I don't see this as a sole witness
17 case. There's two witnesses here. There's the
18 prosecution's witness who says this victim said this and
19 the victim who says, no, I - - - I didn't say this. But
20 that statement that comes in from the prosecutor's witness,
21 the - - - the detective, isn't admitted for the truth,
22 which makes this such a different case than Fratello to me.

23 MR. COMET: Well, the - - - the victim here did
24 not say that he didn't say it.

25 JUDGE GARCIA: No, no, no.

1 MR. COMET: Okay.

2 JUDGE GARCIA: But there's no contradictory
3 statement in evidence for the truth. If a victim gets on
4 the stand, the classic case, and says one thing and then
5 later says a contradictory thing, you have a single witness
6 problem. In Fratello, you had an excited utterance case,
7 victim recants later. They bring in the excited utterance
8 for the truth of those statements. In fact, I think the
9 conviction rests on the - - -

10 MR. COMET: Yeah.

11 JUDGE GARCIA: - - - statements. In this case,
12 the statements only come in to impeach. So there's no
13 dueling statements in evidence from one witness. One
14 witness says one story, and one witness is attack - - -
15 used to attack the credibility of that other witness,
16 right?

17 MR. COMET: Yes, Your Honor. Let - - - let me
18 try to answer that in two ways. One is, is there authority
19 already that the sole witness rule applies in this
20 situation.

21 JUDGE GARCIA: I disagree with that, but go
22 ahead. That - - - I - - - I - - - Judge Graffeo opinion,
23 right, later, but - - -

24 MR. COMET: The - - -

25 JUDGE GARCIA: - - - that seems to say the sole

1 witness doesn't really apply here. That's Delamota?

2 MR. COMET: Yeah, Delamota. Your Honor, that - -
3 - that says - - - I think it's at page 115, I believe, of
4 the opinion. It says, "With the exception of a limited
5 scenario envisioned by Ledwon and his offspring, we are not
6 empowered to upset a conviction because the differences
7 between the pre-trial and trial statements of a witness."
8 And of course, the - - - the pre-trial statement of the
9 witness in - - - in Delamota was admitted only for
10 impeachment. If you turn that sentence around and say the
11 same thing but in an affirmative way, what it says is, in
12 the scenario envisioned by Ledwon, we are empowered to
13 upset a conviction because of differences between the pre-
14 trial and trial statements of a witness. So to - - -

15 JUDGE GARCIA: So it just - - -

16 JUDGE RIVERA: But again, this is my problem.
17 Let's - - - let's go with this argument about the - - - or
18 questioning about the impeachment. If the witness said - -
19 - the witness is not admitting - - -

20 MR. COMET: Right.

21 JUDGE RIVERA: - - - or - - - or - - - or saying
22 that I didn't say it.

23 MR. COMET: Right.

24 JUDGE RIVERA: So they're not being impeached in
25 that - - - the truest sense of you said that then and

1 you've said this now. What are we to believe? He's
2 saying, well, I don't - - - I don't know. I don't
3 remember.

4 MR. COMET: Well, but then you have an undisputed
5 testimony from the prosecution witness that he did say
6 that. You have no reason to doubt their testimony. It's
7 never a - - -

8 JUDGE RIVERA: But I am saying - - - yes. I'm
9 sorry.

10 JUDGE SINGAS: Isn't that a jury - - -

11 JUDGE RIVERA: That was my point.

12 JUDGE SINGAS: - - - determination?

13 MR. COMET: Well - - -

14 JUDGE RIVERA: Isn't that for the jury to
15 determine whether or not the - - - there was a prior
16 statement, what that prior statement was, and whether or
17 not it's inconsistent, and then what to do with that?

18 MR. COMET: Well, there was - - - let me answer
19 that. There was no issue for the jury here, really, as to
20 whether there was a prior statement because you have
21 undisputed testimony. You also had four people that the -
22 - -

23 JUDGE RIVERA: That doesn't mean they have to
24 believe it.

25 JUDGE CANNATARO: But Counsel, it's the use of



1 the statement. I think what you're hearing from various
2 people is that prior inconsistent statements get admitted
3 all the time, and they go to the credibility of the
4 testimony that was given in court.

5 MR. COMET: Yes, Your Honor. But the whole - - -
6 the whole point of the sole witness rule is credibility.
7 The whole point of the rule is that when the - - - all the
8 evidence of guilt comes from a single witness who has given
9 conflicting, exculpatory, and inculpatory statements, then
10 the jury can't properly assess his credibility, so - - -
11 but - - -

12 JUDGE CANNATARO: Yes, but so but - - -

13 JUDGE RIVERA: Yes. But that's my point.
14 Whether or not there was a - - - a prior statement, that is
15 as the officer describes it.

16 MR. COMET: But - - -

17 JUDGE RIVERA: The witness is not admitting and
18 there's not someone else who says, yes, that's exactly what
19 they said.

20 MR. COMET: On what basis would the jury not find
21 that he said it when - - - when nobody disputed in the
22 trial?

23 JUDGE RIVERA: Because the witness is saying this
24 is how it happened, at trial.

25 MR. COMET: Yes. But then that just creates the



1 conflict that - - -

2 JUDGE SINGAS: It creates a conflict of
3 credibility. They might say, you know what? I don't
4 believe that police officer. I don't believe that police
5 officer when he says that the victim said X. And then the
6 jury has to decide, do we believe the police officer when
7 he said that, or do we believe the victim? And based on
8 what they see about the victim and their assessment of that
9 victim at trial, they say, I find the victim credible. I
10 don't find the police officer credible.

11 JUDGE RIVERA: Or they believe the - - - the
12 officer, but they think there may be a mistake in
13 translation.

14 JUDGE SINGAS: Correct.

15 MR. COMET: Well - - -

16 JUDGE RIVERA: It's not about thinking one of
17 them has perjured themselves.

18 MR. COMET: No. But - - - but that - - - there
19 was no issue raised at trial about whether there was a
20 mistake in translation. That - - -

21 JUDGE HALLIGAN: But I think - - - I think the
22 point about - - - about what you're hearing is you would
23 have a stronger case perhaps if there was a videotape, for
24 example, of his statement at the time, and it was - - - it
25 was inconsistent with what he said at trial, or if he

1 acknowledged that he had said something different at trial

2 - - -

3 MR. COMET: Well - - -

4 JUDGE HALLIGAN: But - - - but here, it's

5 filtered through the police officer's recollection.

6 MR. COMET: Well, not just his recollection. The

7 - - - it's the - - - the prosecution has argued several

8 times in this case he had - - -

9 JUDGE HALLIGAN: His - - - his testimony - - -

10 MR. COMET: - - - he's referring to his notes - - -

11 -

12 JUDGE HALLIGAN: Okay.

13 MR. COMET: - - - of the conversation.

14 JUDGE HALLIGAN: Understood. But it's - - - it's

15 - - - it's filtered through the police officer's - - -

16 JUDGE CANNATARO: It's still - - -

17 JUDGE HALLIGAN: - - - recitation of what

18 happened at the time - - -

19 MR. COMET: What's - - -

20 JUDGE HALLIGAN: - - - not him directly.

21 MR. COMET: What's your - - - if - - - if the

22 prosecution wanted to dispute - - -

23 JUDGE TROUTMAN: Yes.

24 MR. COMET: - - - he would say - - -

25 JUDGE TROUTMAN: But also plus, there was a

1 police officer who served as an interpreter. English was
2 not the first language. This person got off of work in the
3 early morning hours, fell asleep on his train, was
4 disoriented. Isn't it for the jury to decide the
5 circumstances under which the notes were taken as to
6 whether their accuracy or whether they accept as true that
7 which was given under oath at trial before them?

8 MR. COMET: Your Honor, I think there are a
9 number of points in what you said where the record doesn't
10 support that. The record doesn't support that he was
11 disoriented. The trial prosecutor argued that right after
12 the crime he was alert and awake, not confused.

13 JUDGE TROUTMAN: He was awakened. Well, he - - -
14 he - - - at some point he awakened.

15 MR. COMET: Yes.

16 JUDGE TROUTMAN: He - - - he fell asleep on a
17 train. What I'm simply saying to you, the circumstances
18 under which - - - it's up to the jury to consider the
19 circumstances under which the officer transcribed what was
20 given, what he believes he received, and then later under
21 oath, a witness testifies. The other concern I have here
22 is what - - - what happens when officers take down cursory
23 notes? Are - - - are - - - is a witness of - - - alleged
24 victim of a crime been bound by that statement when it
25 wasn't even a complete and accurate recitation of the

1 facts?

2 MR. COMET: Not at all, Your Honor. The witness
3 can offer an explanation. That's what happened in the
4 Delamota case. The witness offered an explanation. He
5 said the police officer's recollection of what I said was
6 wrong.

7 JUDGE TROUTMAN: But here the witness doesn't say

8 - - -

9 MR. COMET: He doesn't say - - -

10 JUDGE TROUTMAN: - - - he doesn't - - - doesn't
11 say there was a contradiction.

12 MR. COMET: No. He's just - - -

13 JUDGE TROUTMAN: He doesn't say that was my
14 statement.

15 CHIEF JUDGE WILSON: Well, let's suppose - - -

16 MR. COMET: Well, he's confronted with it as a
17 contradiction, and he does - - - he says, I don't remember.

18 CHIEF JUDGE WILSON: So let's - - -

19 MR. COMET: So he doesn't - - - he doesn't say -
20 - -

21 CHIEF JUDGE WILSON: Let's - - - let's - - -

22 MR. COMET: - - - I was too tired or I was - - -

23 CHIEF JUDGE WILSON: Let's suppose that the
24 Jackson rule applies just for the sake of argument. Why
25 aren't the points that - - - that Judge Troutman referenced

1 a reason for the jury to prefer one over the other?

2 MR. COMET: Because the record doesn't support
3 any of them, Your Honor, frankly. There is no evidence
4 that he was upset - - -

5 CHIEF JUDGE WILSON: No, no, no.

6 MR. COMET: - - - or tired at the time he - - -

7 CHIEF JUDGE WILSON: Just - - - just - - - just
8 the fact that this is actually taken down by a police
9 officer who clearly didn't record the statement verbatim,
10 is - - - wouldn't it be - - - is that - - - be a sufficient
11 basis for a jury to conclude I have a basis to pick one
12 over the other - - -

13 MR. COMET: Well - - -

14 CHIEF JUDGE WILSON: - - - because one is what
15 the witness has actually said and the other is what
16 somebody says the witness said?

17 MR. COMET: Well, one point, I think, that's very
18 critical to that, Your Honor, is that there's a very big
19 difference between what the police officer says that
20 Herrera said at the time of the crime and what Herrera
21 testifies to at trial.

22 CHIEF JUDGE WILSON: Well, this is - - - of
23 course, if it weren't contradictory on a material issue, we
24 wouldn't have a Jackson issue at all, so - - -

25 MR. COMET: It's not a difference of details.



1 There's no way that he could have just misheard a word or
2 two. Herrera - - -

3 CHIEF JUDGE WILSON: That - - - that sounds like
4 a jury argument. I'm asking you something a little
5 different, I think, which is, why isn't the fact that this
6 is the officer's recitation of what the officer heard a
7 reason to prefer the in-court testimony?

8 MR. COMET: Well, if - - - if there were - - -
9 if that were the categorical rule, Your Honor, then
10 perhaps. But Delamota, I think, has language contrary to
11 that. Plus the court has always, whenever the issue has
12 come up, I believe, proceeded on the basis that the - - -
13 the sole witness rule does apply here. Another case is the
14 Calabria case, where the - - - the court ultimately decides
15 it's a minor discrepancy in identification. That's not
16 sufficient for irreconcilable inconsistency. But it says
17 the sole - - - it treats as if the sole witness rule would
18 otherwise apply. In Delamota, if the sole witness rule
19 didn't apply -- the court was very sharply divided, four to
20 three. The court - - - the majority would have simply said
21 - - -

22 CHIEF JUDGE WILSON: No. I'm - - -

23 MR. COMET: - - - said no.

24 CHIEF JUDGE WILSON: All of my - - - all of my
25 questions start from the premise that the sole witness rule

1 does apply, but there is a basis that the jury had to
2 distinguish between who to pick one over the other.

3 MR. COMET: No. The point - - - the point of the
4 sole witness rule, Your Honor, is that you don't send the
5 case to the jury. If the sole witness rule applies, the
6 case should not be submitted to the jury, yes.

7 JUDGE SINGAS: So let's suppose we have a
8 domestic violence case, and there's an incident of domestic
9 violence. And when the police show up, the woman says, he
10 didn't hit me, nothing happened, nothing to see here. But
11 then months later, testifies at trial that there was an
12 assault.

13 MR. COMET: Then she - - -

14 JUDGE SINGAS: Are you saying that - - -

15 MR. COMET: - - - she explains - - -

16 JUDGE SINGAS: - - - as a matter of law, that
17 case can't go forward?

18 MR. COMET: If she said - - - if she were to say,
19 I have no recollection of what I told the police, but said
20 something like, I can't - - - I can't possibly have told
21 them that or since I told them that, but - - -

22 JUDGE GARCIA: What if they say, I don't remember
23 saying that? What if they say, I don't remember saying
24 that? Is that enough?

25 MR. COMET: I don't think that's enough. Because

1 I think what a witness would say in that - - - in the
2 situation of that hypothetical is, I don't remember saying
3 that, but that's not true. Here's my explanation.

4 JUDGE GARCIA: Isn't that what they basically
5 said in this case? I don't remember. You know, they say,
6 did you say this? He's like, I don't remember saying that.
7 And then they testified to what - - -

8 MR. COMET: No. No.

9 JUDGE GARCIA: - - - they say happened.

10 MR. COMET: But - - - but they don't - - - they
11 don't say something like I think someone would say in this
12 situation, which is, I don't remember saying that, but I
13 couldn't have said that because it simply is not what
14 happened. It's not true.

15 JUDGE RIVERA: Yeah. But he - - - he's under
16 oath. He's under oath. He's saying, having taken that
17 oath, this is my recollection of the events.

18 MR. COMET: Yes.

19 JUDGE RIVERA: Does he really need to say, well,
20 I can't remember that, but if I said that, that would be
21 incorrect. This is what occurred. Isn't that what he's
22 saying by saying - - -

23 MR. COMET: The - - - then the - - -

24 JUDGE RIVERA: - - - under oath?

25 MR. COMET: - - - jury is left with no

1 explanation. If - - - if were a videotaped deposition
2 introduced it is still - - -

3 JUDGE GARCIA: But you're left with the
4 explanation of, I don't remember saying that because I
5 didn't say it. And then, as the Chief Judge was saying,
6 it's up to the jury to - - - whether to believe the officer
7 or the witness.

8 MR. COMET: Well, he didn't say, I don't remember
9 saying it because I didn't say it. He just said, I don't
10 remember whether or not - - -

11 JUDGE RIVERA: Doesn't - - -

12 MR. COMET: - - - I said it.

13 JUDGE RIVERA: Doesn't remember that, that's
14 true, but I think you're forgetting that indeed - - - it's
15 not - - - actually, the officer who testifies who heard him
16 say a blessed thing. It's someone else who heard, who's
17 the prosecutor is arguing speaks English and Spanish, heard
18 - - - heard the gentleman - - - the victim explain what
19 happened and then translated that into English for the
20 officer who actually testifies.

21 MR. COMET: Yes, Your Honor. But - - -

22 JUDGE RIVERA: There are lots of incorrect
23 interpretations and translations. So it would not be a
24 shock that a jury might wonder whether or not they got it
25 right at - - - at - - - at the site where - - -

1 MR. COMET: There's no - - - nothing - - -

2 JUDGE RIVERA: - - - the crime occurred.

3 MR. COMET: - - - in this record that would
4 suggest the jury even considered that. No one at trial
5 said there was any problem with translation.

6 CHIEF JUDGE WILSON: So would it be enough for
7 you if the prosecutor in closing had said, I know there are
8 these inconsistent statements from the police officer, but
9 that was through a translation and it's recorded by the
10 officer, not the actual person's statement. That's the
11 basis for you to choose?

12 MR. COMET: No. I - - - I don't think that would
13 be sufficient because there are, in fact, cases directly on
14 point about that, where prosecutors argue to the jury that
15 some discrepancy occurred because of a translation problem,
16 but there was no evidence of translation problems.

17 JUDGE RIVERA: Well, the - - - the - - -

18 MR. COMET: It never came up during the evidence
19 - - -

20 JUDGE RIVERA: So - - -

21 MR. COMET: - - - and that's held to be
22 reversible then.

23 JUDGE RIVERA: Does anyone - - - the prosecutor,
24 the witness, does anyone actually need to say you should
25 think about it this way, this might explain this, as

1 opposed to, here's the record, and the jury can make
2 appropriate, reasonable inferences - - -

3 MR. COMET: It's not only a matter - - -

4 JUDGE RIVERA: - - - on that record?

5 MR. COMET: - - - of thinking about. It's a
6 matter that there's no evidence of any mistake.

7 JUDGE RIVERA: But you agree - - -

8 MR. COMET: No.

9 JUDGE RIVERA: - - - no one has to point to it?
10 That if the record had a way to - - - to make this
11 determination, that the jury could do so. Do you agree
12 with that?

13 MR. COMET: But then something would have pointed
14 to - - -

15 JUDGE RIVERA: Is that a yes or no. I just want
16 to - - - you know - - -

17 MR. COMET: Yes. But the - - - but the - - - but
18 the answer - - - the reason for that yes is because then
19 something would have pointed to it.

20 JUDGE CANNATARO: So you're saying the jury could
21 not just take into account all the circumstances? The - -
22 - they're instructed, I think, something along the lines of
23 they weigh the - - - the testimony in light of all the
24 circumstances that they find exist. And you're saying
25 unless somebody adverted their attention to whatever the

1 problem might be, that they're prohibited from considering
2 certain circumstances?

3 MR. COMET: No. What I'm saying, though, is in
4 the context of the sole witness rule, that's not the
5 solution because even in a case where the - - -

6 JUDGE GARCIA: Well, the solution in the sole
7 witness rule is a drastic remedy. It takes from the jury
8 an issue, right? So in the original sole witness line of
9 cases, you had a witness who got up on the stand and gave
10 two diametrically opposed versions of what happened,
11 conflicting, later gets applied to an excited utterance
12 versus a - - - you know, a later statement in court. But
13 what you're asking here is, as a matter of law, we remove a
14 credibility issue from the jury based on a detective
15 statement about what this witness said before that the
16 witness says, I don't remember making?

17 MR. COMET: He - - - he says, I don't remember
18 whether or not I made that, yes. Yet, I think that has to
19 follow, Your Honor, from the absence of any explanation. I
20 mean, even - - - even in the situation where there's
21 internally inconsistent trial testimony, the jury could
22 say, well, it's a credibility issue. I believe what - - -
23 the inculcating testimony and not the exculcating - - -

24 JUDGE GARCIA: Yeah. And we've said in that very
25 unique circumstance, the judge can take that issue from the

1 jury because here is a witness that the jurors heard right
2 on the stand under oath give two conflicting versions of a
3 story. And that's not what happened here.

4 MR. COMET: But Delamota says that in the
5 situation that happened here, the Ledwon rule applies.

6 JUDGE GARCIA: Well, we can disagree on exactly
7 what Delamota says. And I think there's room to disagree
8 on exactly what Delamota says.

9 MR. COMET: The - - - the dissenters in Delamota
10 certainly relied on the Ledwon rule for - - -

11 JUDGE GARCIA: Right. But - - -

12 MR. COMET: - - - 436. And the - - -

13 JUDGE GARCIA: - - - the majority says, with
14 these principles in mind, we conclude that Ledwon rule does
15 not direct the outcome of this case - - -

16 MR. COMET: At all.

17 JUDGE GARCIA: - - - which to me seems somewhat
18 ambiguous whether because of these other factors in the
19 testimony, or whether because, given what Ledwon is getting
20 at, it just simply doesn't apply. But I think the way to
21 read Delamota to me is it has to impeach the witness to
22 such an extent that we remove the issue from the jury.

23 MR. COMET: Well, yes, but - - - well, two - - -
24 two things, Your Honor. First, if - - - if - - - if the
25 rule didn't apply in Delamota, the majority would - - -

1 could have simply said to the dissenters, this rule just
2 doesn't apply here. They didn't say that. They went
3 through a whole analysis, and they said, in the situation
4 covered by Ledwon, we can reverse based on a conflict
5 between pre-trial and trial statements.

6 JUDGE GARCIA: Well, certainly, that's what
7 happened in Fratello, but the pre-trial statement came in
8 for the truth.

9 MR. COMET: Yes. I - - - I know, Your Honor.
10 But I don't think anything in Fratello indicates that that
11 fact played any part in the - - -

12 JUDGE GARCIA: But it - - - it - - -

13 MR. COMET: - - - sole witness decision.

14 JUDGE GARCIA: - - - it does seem this arc here
15 is going from direct testimony in court to Fratello
16 statement admitted for the truth to a collateral attack on
17 credibility, which raises different issues in terms of the
18 province of the jury?

19 MR. COMET: Well, it's the - - - again, the - - -
20 the - - - the issue here is, I think - - - we've all been
21 discussing is credibility. And if a statement is admitted
22 to impeach credibility, then why isn't it directly part of
23 the problem here. The problem isn't something other than
24 the credibility of the witness. That's - - -

25 JUDGE GARCIA: So you're then using the - - -

1 you're using the exception to drive a rule. To me, it
2 seems like the sole witness is an exception to that exact
3 decision being a jury issue. And now we're saying, well,
4 since you have the sole issue rule, now we're going to walk
5 it backwards to a collateral attack on credibility because
6 it's a credibility issue. But the - - - the fact that we
7 take that from the jury in a sole witness case is the very,
8 very rare exception.

9 MR. COMET: I - - - I agree sole witness cases
10 are rare, but this - - - the circumstances in this case are
11 quite rare too. In every other case I've seen where you
12 have a conflict like this, the prosecution, as always,
13 witnesses have expressly testified to a reason why this
14 occurred either - - -

15 JUDGE RIVERA: So you work from the presumption
16 that there is a conflict. And that's the point that I - -
17 - I - - - I was asking you about at the beginning, who
18 resolves whether or not there actually was a prior
19 inconsistent statement? There's obviously a statement. I
20 don't think that's debatable. Question is whether or not
21 it's inconsistent with the trial testimony.

22 MR. COMET: Well, I think - - -

23 JUDGE RIVERA: Is that for the jury to decide, or
24 is that taken away from the jury?

25 MR. COMET: I think the - - - there's two issues



1 at play here. And one is the impeachment - - -

2 JUDGE RIVERA: Yes.

3 MR. COMET: - - - question, which I think - - -

4 JUDGE RIVERA: Yes.

5 MR. COMET: - - - is separate from what - - -
6 what you're asking about - - -

7 JUDGE RIVERA: Yes.

8 MR. COMET: - - - Your Honor. And the other is,
9 how do you decide that question? I would say that in the
10 circumstance where the - - - the prosecution does not ask
11 any witness about the conflict, does not have any witness
12 say here's why those statements were given, doesn't ask any
13 witness to explain that or dispute it, just ignores it
14 altogether and never even mentions it in summation to the
15 jury, which is what happened here. There's absolutely no
16 explanation in this record. That situation where the - - -

17 JUDGE RIVERA: I'm not sure it's easy for me to
18 distinguish between a witness who gets up and says, I never
19 said that and one who says, you know, I just don't
20 remember.

21 MR. COMET: Well, if he says, I don't remember
22 that he - - -

23 JUDGE RIVERA: Because both of those allow a jury
24 to decide whether or not there really is a conflict.

25 MR. COMET: I think if he says, I don't remember,

1 then there is a - - - there is a conflict, Your Honor. He
2 just - - - he's not offered any dispute that it occurred.
3 And the prosecution has put on another witness who says,
4 this is what occurred. There's two other police officers
5 in this interview. Neither of them dispute what occurred.
6 There's no evidence of any translation mistake. Again, I
7 would also point back to the magnitude of the difference
8 here. Herrera's testimony at trial is, I woke up. A man
9 was standing by me with - - - holding a box cutter
10 demanding my property, and I handed my wallet to him. What
11 the police officer, Burnett, testifies to is that Herrera
12 said right after the crime was, I woke up on the subway, a
13 man had my wallet, dropped it, and ran away. I don't think
14 a magnitude of that kind of difference can be explained by
15 a translation mistake, especially when there's no
16 indication - - -

17 JUDGE RIVERA: I've read a lot of them that are
18 even more inaccurate than that, FYI.

19 MR. COMET: I don't see how any - - - any Spanish
20 speaking police officer, bilingual officers we had here
21 could have interpreted I - - - I saw a man standing there,
22 drop my wallet, and ran and make it into - - - or rather
23 the reverse, who could have heard the witness say I saw a
24 man standing by me with a box cutter who demanded my
25 property, and I gave him my wallet, could turn that into a

1 statement - - - no mention of a box cutter, no mention of
2 the demand, no mention of handing over his wallet.

3 JUDGE RIVERA: It's a very good closing argument
4 to the jury.

5 MR. COMET: But then there's no - - - again,
6 there's - - - it would mean that there's a categorical rule
7 that if there's - - - it's a pre-trial statement in a trial
8 testimony as long as the witness doesn't say, I did say
9 that. If - - - if all the - - - all the witness says is, I
10 don't remember whether or not I said that and so there's no
11 dispute, and the prosecution has put on witnesses to
12 testify who - - - or do testify that he did say that, and
13 no question is raised about it at trial, did he say that or
14 not, other than the witness saying, I don't remember it.
15 And - - - and you have the arresting police officer whose
16 job it is to do this, who has notes on this. You don't
17 call the other two police officers, and you don't make any
18 argument to the jury. In those circumstances, I think you
19 don't have a - - - you don't have a genuine issue of fact,
20 let's put it that way, about whether he made the statement
21 or not. If this were a summary judgment motion in a civil
22 context and the police officer came in and said, this is
23 what he told me, and the witness who supposedly told that
24 says that I don't remember if I told him that, would there
25 be a genuine issue of fact in a civil context about whether

1 that statement was made? I don't think so.

2 CHIEF JUDGE WILSON: Thank you, Counsel.

3 MR. CERRUTI: Good afternoon, Your Honors.

4 Jordan Cerruti, for Respondent, the People. May it please
5 the court. Defendant's claim is not preserved that
6 complainant, Mr. Herrera's testimony wasn't credible as a
7 matter of law because of this alleged prior statement in
8 the motion for a trial order of dismissal. Counsel never
9 argued that the trial testimony wasn't credible as a matter
10 of law, never compared the trial testimony - - - never
11 mentioned the trial testimony, never compared the statement
12 to the trial testimony. Simply adopted the statement as
13 that's what happened. This did not fairly alert the court
14 to the claim. In any event, there was objective rational
15 basis for the jury to credit Mr. Herrera's trial testimony
16 over Officer Burnett's testimony of this alleged prior
17 statement. The jacket itself, the jury could see - - -

18 JUDGE SINGAS: Do you think Mr. Herrera made an
19 inconsistent statement?

20 MR. CERRUTI: Do - - - do I think?

21 JUDGE SINGAS: Uh-huh.

22 MR. CERRUTI: Well, I mean, that was for the jury
23 to determine. I think they have - - - they have a - - -
24 there's a basis in the record for the jury to determine
25 this statement was not made as Officer Burnett remembered



1 it. The circumstances that Mr. Herrera communicated with
2 Officer Burnett through this unofficial interpreter, this
3 was late at night after - - -

4 JUDGE HALLIGAN: When you say unofficial, that -
5 - - that suggests to me that you think there's something,
6 you know, maybe second rate about it. But - - - but I
7 thought that - - - that that was an approach that was
8 pretty widely used.

9 MR. CERRUTI: I think it is presumably an
10 approach that's pretty widely used for the purpose of
11 getting an initial cursory statement from - - -

12 JUDGE CANNATARO: It's an investigatory tool.

13 MR. CERRUTI: - - - you know, an investigatory -
14 - -

15 JUDGE HALLIGAN: But should we - - -

16 MR. CERRUTI: - - - initial statement - - -

17 JUDGE HALLIGAN: - - - should we look askance at
18 it, as a general matter?

19 MR. CERRUTI: Well, I mean, I - - - I think the
20 question here is, did the jury have a basis to credit the
21 trial testimony over Officer Burnett's recollection? And
22 they do. I mean, in comparison, Mr. Herrera gives
23 testimony under oath. This was for the truth of the
24 matter. This was the product of questioning and cross-
25 examination. It was - - -

1 JUDGE HALLIGAN: Right. I'm just focusing
2 specifically on the translation point. I would guess,
3 although you'll tell me, that there are a lot of cases in
4 which there is a translation - - - I'll give it a second -
5 - - a translation that's obtained under similar
6 circumstances, and the people would rely on it and - - -
7 and treat it as a good translation. That - - - that's a
8 different point than whether the jury could have concluded
9 otherwise.

10 MR. CERRUTI: That's right, Your Honor. And - -
11 - and the issue here is, could the jury have treated that
12 as a basis for finding that that statement did not happen
13 as Officer Burnett remembered? And they could have. They
14 - - - something was lost in translation, either Herrera
15 telling it to the other officer, whomever that was who
16 translate - - - who's an interpreter. We don't know how
17 good their Spanish was. We don't know if they've ever done
18 live translation before. We don't know if they spoke the
19 same dialect of Spanish. We don't know if they were a
20 native speaker. And then - - - they then communicate to
21 Officer Burnett. Does Officer Burnett remember it
22 correctly a year and a half later? Did he take precise
23 notes? Was Herrera the most articulate after he'd been up
24 all night and been robbed and just wanted to go home? All
25 of that gave the jury bases to credit - - -

1 JUDGE HALLIGAN: I thought - - - I thought the
2 prosecution argued at trial that he was alert and awake.
3 Is that - - - is that not right?

4 MR. CERRUTI: The - - - the prosecutor did argue
5 that. I mean, their - - - their summation is in evidence.

6 JUDGE HALLIGAN: Yes.

7 MR. CERRUTI: And the - - - the jury had a basis
8 in the record. Herrera fell asleep on the train because he
9 was so tired, and then was woken up by defendant cutting
10 his jacket. So he had been up all night except for this
11 nap on the train. He testified that he was so scared that
12 he couldn't even get off the train at first. Officer
13 Burnett testified that he appeared upset. All of this was
14 in the record for the jury.

15 CHIEF JUDGE WILSON: Is it fair to say, though,
16 that the - - - the prosecutor never gave the - - - never
17 told the jury, here's a reason you could prefer the trial
18 testimony over the statement recorded by the officer?

19 MR. CERRUTI: No, Your Honor. In - - - I mean,
20 in summation, the prosecutor offered the jacket itself as
21 independent physical evidence that could be a basis for the
22 jury to credit Herrera's trial testimony. The - - - the
23 jury could see the jacket itself. I mean, the jacket was
24 put into evidence while Mr. Herrera testified, and - - -
25 and he indicated the cut. And then the trial prosecutor

1 handled it two times for the jury during summation and
2 specifically argued - - -

3 CHIEF JUDGE WILSON: I'm sorry. Why would - - -
4 why would the cut distinguish between truth and falsity of
5 the two statements?

6 MR. CERRUTI: So the - - - the - - - the jury
7 could see the cut that defendant made to the jacket only
8 went through the lining of the jacket and didn't actually
9 go all the way through to the pocket itself where - - -

10 JUDGE HALLIGAN: Did the - - - the - - -

11 MR. CERRUTI: - - - where - - -

12 JUDGE HALLIGAN: - - - the prosecutor try to
13 connect that point up to explaining the discrepancy in the
14 statement specifically?

15 MR. CERRUTI: Yes.

16 JUDGE HALLIGAN: Okay. Maybe you could point us
17 to - - -

18 MR. CERRUTI: Yeah. The - - -

19 JUDGE HALLIGAN: - - - where in the record that
20 is.

21 MR. CERRUTI: - - - on pages A-569 and A-583 to
22 84. The prosecutor argued that this cut in the jacket
23 quote, "Speaks volumes because the cut did not successfully
24 go through the pocket and actually would not release the
25 property inside. And therefore, Mr. Herrera had to be

1 awake for this robbery and had to be awake when the person
2 was taking his stuff because defendant was unsuccessful in
3 getting his wallet by cutting the pocket." So the
4 prosecutor is presenting Mr. - - -

5 JUDGE HALLIGAN: The alternative view, right?
6 But - - - but is the prosecutor anywhere explicitly
7 connecting that to the different statement from - - - from
8 the police officer via translation?

9 MR. CERRUTI: I mean, I - - - I think that's
10 implied. I think the jury - - -

11 JUDGE HALLIGAN: So - - - but not explicitly?

12 MR. CERRUTI: Not explicitly. But the - - - the
13 prosecutor is saying that this is the version of events
14 that you should credit. It's Herrera's testimony. And the
15 prosecutor specifically says, you know, he had to be awake
16 for the robbery. Well, the only version of the events that
17 he wasn't awake for the taking of the wallet is this
18 alleged prior statement. So the - - - in - - - so the - -
19 - the cut to the jacket was, you know, independent physical
20 evidence that gave the jury a basis to find that Herrera's
21 testimony that he was woken up by defendant, interrupted
22 defendant in the middle of cutting the jacket so that
23 defendant couldn't get the wallet. And then defendant
24 moved on to a second strategy, changed tactics, and instead
25 repeatedly demanded the wallet - - - excuse me, demanded

1 all of Mr. Herrera's property while displaying a box
2 cutter. The jury could rationally find that Mr. Herrera's
3 testimony was accurate and truthful because defendant
4 couldn't have gotten the wallet out of the jacket because
5 the cut did not go through to the pocket. The - - - Mr.
6 Herrera's testimony was for its truth, not - - - as opposed
7 to the prior statement, which was merely to impeach. So
8 the - - - the jury had before it the choice between
9 consistent, unwavering, detailed testimony and oh, well,
10 did Mr. Herrera misremember all of these details. He has
11 no motive to lie. Did he misremember all of these
12 consistent details versus - - - or did Officer Burnett or
13 the translating officer simply make some mistake somewhere
14 along the line in exactly what Mr. Herrera said. If there
15 are no other questions, the people ask that you affirm the
16 judgment. Thank you.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. COMET: Just a few points in response here.
19 The claim was clearly preserved. Defense attorney argued
20 that notwithstanding all the evidence in the case because
21 the witness told the police right after the crime that he -
22 - - that conduct was - - - occurred that only amounted to
23 larceny, that was the reason for dismissal. But as long as
24 we're talking about preservation, I would note that none of
25 the arguments the people have made here about what

1 explanations the jury might have come up with were made at
2 trial. For example, the translation argument, it wasn't
3 raised at trial. If it had been raised, the officer could
4 have been - - - the bilingual officer who translated could
5 have been called in, could have been asked about his
6 qualifications. The police department has a program to
7 certify bilingual officers as experts in translation, and
8 they had it at the time of this crime. So - - - but the
9 defense had no opportunity to explore any of that because
10 the prosecution never raised the issue at trial. They
11 never raised the issue at trial about whether Herrera gave
12 an incorrect statement because he was too tired or upset.

13 JUDGE RIVERA: Well, what about the pocket? What
14 about this - - -

15 MR. COMET: Okay.

16 JUDGE RIVERA: - - - other evidence?

17 MR. COMET: The pocket - - -

18 JUDGE RIVERA: The cut in the pocket.

19 MR. COMET: Yes. There's - - - there's - - -
20 there's at least three things wrong with that argument.
21 First is, Herrera didn't say anything in his statement to
22 the police right after the crime about how the wallet was
23 removed from him. There's absolutely no evidence to
24 indicate that the defendant could not have just, when he
25 had trouble cutting, stopped cutting, reached into his

1 pocket, and taken out his wallet. There's just - - - so
2 there's no - - - nothing to support the inference that
3 defendant could not have removed the wallet.

4 JUDGE CANNATARO: Isn't that the - - - isn't that
5 the evidence that your adversary just adverted to, that you
6 couldn't - - - he could not have completed it that way
7 because he never got through the pocket?

8 MR. COMET: No. No. I'm saying he could have
9 completed it in a different way. He could have completed
10 just by reaching into the pocket and taking the wallet out.

11 JUDGE CANNATARO: Without using a knife, just
12 putting - - -

13 MR. COMET: Yeah.

14 JUDGE CANNATARO: - - - the hand in the pocket?

15 MR. COMET: Well, once he found it hard to cut,
16 he could have reached the pocket and taken the wallet.

17 JUDGE RIVERA: Well, that's one particular
18 inference. Why - - - why isn't the inference that he
19 suggested enough - - -

20 MR. COMET: No.

21 JUDGE RIVERA: - - - for purposes of - - -

22 MR. COMET: The - - - the - - - the inference - -
23 -

24 JUDGE RIVERA: - - - avoiding the - - -

25 MR. COMET: The inference - - -

1 JUDGE RIVERA: - - - you know, what - - -

2 MR. COMET: - - - he's suggesting is that it was
3 impossible to remove the wallet in any way other than by
4 cutting through and that's - - - and - - - or him being
5 awake. And if that's the inference, to be sure, that it
6 was impossible, it's clearly wrong, unsupported. Second,
7 the prosecution did not relate the - - - the jacket point
8 in any way to the prior statement. What the prosecutor was
9 doing was saying, how do we know that this man, the
10 defendant, who's been identified here, was the person who
11 actually committed the crime? Well, we know it because - -
12 - well, we will know it if he - - - if the witness got a
13 good look at him on the train. She was talking solely in
14 the context of identification. She never mentioned the
15 prior statement. And what she was effectively saying was,
16 well, looking at his trial testimony, the cut didn't go
17 through, so he was awake as a result, and so he got a good
18 look at him, and therefore, you should trust his
19 identification. In no way was that related to the - - -
20 the - - - the prior statement, which, again, doesn't
21 exclude the possibility of the prior statement that he just
22 reached into the pocket and removed the wallet. And third,
23 in - - - in the sole witness - - -

24 JUDGE RIVERA: Without waking him.

25 MR. COMET: Excuse me?

1 JUDGE RIVERA: Without - - -

2 MR. COMET: Right.

3 JUDGE RIVERA: - - - waking him. Ruffling - - -
4 going in that pocket without waking him.

5 MR. COMET: Well, he did wake up shortly
6 thereafter. He saw the man standing there, he said,
7 holding his wallet and dropped - - - he dropped it. I
8 mean, the reason, as I understand it - - -

9 JUDGE RIVERA: Yes. No. But I - - - as I
10 understand what you're suggesting is that they cut enough
11 to be able to reach in and step back, but that wouldn't
12 have woken up, right?

13 MR. COMET: Yeah. The - - -

14 JUDGE RIVERA: Am I understanding you?

15 MR. COMET: Yeah. The - - - the way this jacket
16 is - - - it's a little complicated - - - the outside layer
17 of the jacket doesn't form part of the pocket. Pocket
18 hangs inside the jacket. So the cut went through the
19 outside layer but didn't go into the pocket. But what - -
20 - what I'm saying is when he - - - when he was cutting - -
21 - there's absolutely nothing to exclude the possibility
22 that when he was cutting and realized he wasn't getting
23 through quickly enough, he just took his hand, reached in
24 the pocket, and removed the wallet. The - - - what the
25 prosecution is saying now is that was impossible. The only

1 way it could have been removed was if he was awake and that
2 - - - that's absolutely - - - that inference - - -

3 JUDGE CANNATARO: I'm sorry. Is this - - - are
4 we talking about a jury argument or argument made to the
5 court on the motion for a dismissal? These - - - these
6 allegations that you're referring to? Because one, to me,
7 sounds like a credibility argument, another one sounds more
8 like a legal argument.

9 MR. COMET: No. The - - - the argument about
10 whether it was impossible to remove the wallet from the
11 pocket - - -

12 JUDGE CANNATARO: Right.

13 MR. COMET: - - - never came up during the course
14 of the evidence. No witness was questioned about that. It
15 came up for the first time in the prosecutor's summation
16 after the defense had already summed up. The argument was
17 solely about identification, that he had to be woken up in
18 order to get the wallet and that may - - - meant he could
19 give identification. But the prosecution, now, for the
20 first time in this court, is trying to draw a different
21 inference from that, trying to say, well, the prosecutor's
22 argument about - - - at trial about how he had to be awake
23 means that it was impossible for him to have removed the
24 wallet while Herrera was sleeping, and therefore, Herrera's
25 trial testimony must be correct. But it was - - - there's

1 absolutely nothing about that that establishes that it was
2 impossible for him to remove the wallet while Herrera was
3 sleeping. When Herrera - - - or under Herrera's own
4 testimony, when he's asked for his wallet, he just - - - he
5 reaches in, hands it out. Herrera says, I gave it to him
6 immediately. There's nothing to say that the defendant
7 couldn't have reached into his pocket and removed it.
8 Nothing - - -

9 CHIEF JUDGE WILSON: Thank you, counsel.

10 MR. COMET: - - - in Herrera's statement.

11 CHIEF JUDGE WILSON: Thank you.

12 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Charles Howard, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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