To be argued by: [redacted]
Time Requested: 10 minutes

Appeal No: [redacted]

New York State Supreme Court
Appellate Division, Fourth Department

People of the State of New York,

Respondent

-against-

[redacted],

Appellant

BRIEF FOR APPELLANT

[redacted]

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PRELIMINARY STATEMENT

This appeal is from a judgment of conviction entered on [redacted] in the Supreme Court, Erie County, [redacted] After a non-jury trial, [redacted] was found guilty of petit larceny, as a lesser included offense of robbery in the second degree under Count 1 of the indictment, and guilty of assault in the second degree as an accessory (PL 20.00; 120.05 [12]) under Count 3 of the indictment. Annabel was found not guilty on Counts 2, 4, and 5.

A timely notice of appeal was filed. Appellant is represented on appeal by [redacted] The People are represented by The Erie County District Attorney, [redacted].

QUESTIONS PRESENTED

1. Was the evidence at trial legally sufficient to support the conviction of assault in the second degree as an accessory (PL 20.00; 120.05 [12]) where the there was no evidence that [redacted] intended to cause physical injury to her father, nor was causation established that any of [redacted] actions actually caused her father the physical injury he sustained.

2. Was the evidence at trial legally sufficient to support the conviction of petit larceny (PL 155.25) where there was no evidence that [redacted] was seen with stolen money, ever used stolen money, nor that that the stolen money was ever recovered or otherwise accounted for.

3. Was the verdict supported by the weight of the evidence, where there was conflicting testimony presented at trial?

STATEMENT OF FACTS

On [redacted], a Saturday, an incident occurred inside the family home of [redacted] and County of Erie. Also residing at the home at the time of the incident were [redacted] daughters of [redacted]. On the date of the incident, [redacted] and [redacted] the youngest daughter, was [redacted] (T 295, 298; numerals in parentheses preceded by "T" refer to pages in the non-jury trial transcript).

[redacted] testified that on [redacted] 2017, he was siting on the couch when "everybody" (his wife and three daughters who lived at the house) came into the room (T 301). He testified that "they" (he forgot specifically who it was) informed him that he would no longer have to go shopping with "them" (T at 302). He testified that he usually went shopping with Christine on Saturday (T 302).

When asked on direct examination who specifically informed him, Mr. [redacted] responded, "I *think* [redacted] said it, and [redacted] said it, and they said, just give me the money to go shopping" (T 302) (emphasis). Mr. [redacted] then testified that he got up and got money out of his left pants pocket and gave them the money (T 303). He then testified that the next thing he knew, [redacted] reached into his right pants pocket "as I was giving them the money" (T 303).

Mr. [redacted] went on to clarify that he allegedly had eleven hundred dollars in his right pocket and, also, that he owed a roofer twelve hundred dollars for a recent roof repair at another property (T 303). There was no testimony whatsoever as to how much money was allegedly in Mr. [redacted] left pocket, which he was attempting to give to his wife or any of his daughters during this incident.

In any event, Mr. [redacted] went on to testify that, "I had it in my left hand, and I'm turning this way, and I was trying to give it to [redacted]. And the next thing I know, [redacted] reaching in my right hand pocket taking the other money out" (T 303).

When asked what he did next, Mr. [redacted] testified that he put his hand on his pocket, and then all of a sudden, everything "broke loose," and he remembered [redacted] "putting her arm around my throat" (T 303). When asked where the money (presumably the eleven hundred dollars) was at this time, Mr. [redacted] responded, "[i]t was coming out of my right hand pocket" (T 303-04).

Mr. [redacted] went on to testify that he started to go to his left and then he started stumbling, "and the next thing I know, I'm on the floor" (T 305). "I stumbled, fell on the floor right in front of where that oak icebox was, and I'm laying on the floor right there." Once he was on the floor, Mr. [redacted] testified that, "they starting kicking me" (T 306). At first he stated he was kneeling, "and then kind of fell to the ground because I heard something snap, and I was

in a lot of pain" (T 306). He claimed that he was kicked multiple times and that it "could have been ten" (T 306). Then he testified that after a while they stopped and left the room (T 306).

When asked if he could tell who was kicking him, Mr. [redacted] responded that he could not (T 307). He then testified that he left the house and drove to the emergency room on Route 20 (T 307). He was later diagnosed with a fractured rib and a bussed spleen (T 308). He did not have any scratches, cuts, or bruising on his face or neck area.

The defense's only witness was co-defendant [redacted]. She testified to a different version of events that took place on [redacted] [redacted] testified that she was upstairs in her bedroom that Saturday when she heard her father's voice raised downstairs (T 409). She went downstairs to see what was happening (T 410). As she came into the kitchen, she also saw that her sister [redacted] had come downstairs (T 410). [redacted] saw her father standing in front of the couch and her mother diagonal to him by the dining room table, several feet away (T 410). [redacted] in the alcove area on the other side of the coffee table (T 410).

[redacted] testified that she quickly realized that "my father was telling my mother that he didn't want to go grocery shopping that day." [redacted] testified that after her father was saying he didn't feel like going that [redacted] spoke up and said she would go and to please give her money (T 411).

[redacted] also testified that as [redacted] spoke up she also gestured for her father to give her the money by putting her hand out (T 411-12). [redacted] stated, "[w]e're Italian." "We speak with our hands sometimes" (T 411). [redacted] testified that after [redacted] put her hand out, her father slapped her hand (T 412).

[redacted] then testified that, at this point, her father decided to leave, and as he was leaving, he passed [redacted] and "he knocked her and shoved her" (T 411). [redacted] saw [redacted] and her father fall to the floor (T 412-13). Her father then pinned [redacted] to the ground and grabbed her hair (T 413).

It was [redacted] testimony that [redacted] then rushed over and tried to pull her father off of [redacted] After much effort, [redacted] was eventually able to pull her father off [redacted] (T 413-14). [redacted] testified that from the time she saw [redacted] shoved down to the time [redacted] pulled him off her happened "very quickly." When asked if it was seconds, [redacted] responded, "[s]econds, twenty seconds." Additionally, on cross-examination, when asked if she just stood there and did nothing, [redacted] responded, "No, this happened very quickly. I wasn't the first to act, [redacted] sprung into action (T 431). [redacted] testified that after her father was pulled off of [redacted] he got up and left (T 414).

At no point after this incident of [redacted], did any member of the [redacted] family contact the police. When asked on cross-examination why she didn't personally contact

the police, [redacted] answered, "[a]s the victim, I felt that was a call for my [redacted]] to make if she wanted to" (T 432).

The five individuals — [redacted] were the only people in the house and were the only witnesses to the incident that occurred on [redacted] [redacted] (T 307-08).

By way of background, there was much foundational testimony at trial about [redacted] [redacted] receiving words or messages from God, starting around the year [redacted], and the family having a communion on Sunday at the house where Elissa would receive those words. Two siblings who had previously moved out of the house, and whom were not present or living there on [redacted] testified for the prosecution about this and other family background information, [redacted] (T at 112-13; 188).

POINT ONE

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT [redacted] CONVICTION OF ASSAULT IN THE SECOND DEGREE.

The People failed to present legally sufficient evidence to support [redacted] conviction for assault in the second degree. Even viewing the evidence in the light most favorable to the prosecution, the proof at trial did not establish every element of assault in the second degree beyond a reasonable doubt. Accordingly, [redacted] conviction must be reversed. This issue is preserved based on counsel's detailed motion for a trial order of dismissal made at the close of the People's case and again at the close of all proof (T 384-94, 440; *see People v Gray*, 86 NY2d 10, 19 [1995]).

A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which the trier of fact could have found the elements of the crime proved beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]).

In order to prove assault in the second degree as an accessory, the People must establish that [redacted] while acting with the mental culpability required for the commission thereof, she solicits, commands, importunes, or intentionally aids such person to engage in such conduct. Here, such conduct is the intent to cause physical injury to a person [redacted] or

older, and causing such injury to such person when the actor was more than than ten years younger than such person (*see* Penal Law § 120.05 [12]).

Here, the evidence at trial failed to establish that [redacted] had any intent to cause physical injury to her father and it also failed to establish any causation whatsoever from [redacted]s specific actions to the physical injury that was sustained by [redacted] The totality of the evidence against [redacted] was that she reached for her father's pocket and also put her arm around his throat. There was no testimony whatsoever that [redacted] intentionally pushed her father to the floor, or that she ever kicked [redacted].

By [redacted] own testimony, the sum total of evidence against [redacted] was that she grabbed at his left pants pocket and put her arm around his neck. These facts neither establish intent to cause injury, nor do they establish causation of the type of injury that was sustained by [redacted] — a fractured rib (*see People v Pietrocarlo*, 2021 NY Slip Op 06940 [Ct App Dec. 14, 2021] (Wilson, J. dissenting, where no evidence in the record supported the proposition that [redacted] could be found liable for second degree assault as an accessory where the People offered no evidence specific as to [redacted] actions during the incident and did not establish that [redacted] even took part in an assault on her father).

By his own testimony, we have two somewhat differing accounts of why [redacted] fell to the floor. In one version, he testified that he stumbled and fell to the floor after [redacted] had allegedly put her arm around his throat (T 305). A second version was that he was first on

his knees, but then fell to the ground "because I heard something snap, and I was in a lot of pain" (T 306).

And, of course, there is the testimony of [redacted], who testified to a substantially different account of the incident, wherein [redacted] fell to the floor as he passed by [redacted] shoved her (T 411). According to [redacted] it was only *after* [redacted] and her father were on the floor that [redacted] then "sprung into action" and attempted to get her father off of Elissa.

Accordingly, even crediting [redacted] version as true (as the trial court did), there is no evidence in the record that supports the proposition that [redacted] specific action(s) of putting her arm around his throat or reaching into his pants pocket would amount to her intent to cause him physical injury, and specifically a fractured rib. There was no testimony that [redacted] intentionally pushed her father down to the floor or ever kicked him.

Conversely, if this Court were to credit [redacted] version as true, or closer to the truth, then [redacted] actions of aiding and defending of her eldest and disabled sister and attempting to pull her father off of [redacted] would clearly not amount to an intent by [redacted] to cause any injury to her father, as she was acting in defense of another.

POINT TWO

THE GUILTY VERDICTS OF PETIT LARCENY AND ASSAULT IN THE SECOND DEGREE WERE NOT SUPPORTED BY THE WEIGHT OF THE CREDIBLE EVIDENCE.

The People failed to present credible evidence proving the allegation of petit larceny and assault in the second degree beyond a reasonable doubt. For the reasons set forth below, the verdict was against the weight of the credible evidence (*see* CPL 470.15[5]; *see also People v Bleakley*, 69 NY2d 490, 493-495 [1987]).

A weight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]). If so, the appellate court must "affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Carter*, 158 AD3d 1105, 1112 [4th Dept 2018], *quoting People v Delamota*, 18 NY3d 107, 116-117 [2011]).

In conducting a weight of the evidence review, the court must consider the elements of the crime—even if the prosecutor's witnesses were credible, their testimony must prove the elements of the crime beyond a reasonable doubt (*see Danielson*, 9 NY3d at 348). Importantly,

even is verdict is legally sufficient, it can still be against the weight of the evidence and require reversal (*see id*. at 349).

Here, an acquittal on the charge of assault in the second degree would not have been unreasonable. As argued in Point One, *supra*, the elements of intent and causation were not established beyond a reasonable doubt. The People failed to present evidence that [redacted] intended to cause her father physical injury and further failed to present evidence that [redacted]s actions of putting her arm around his throat would have, in any way, caused the injury that he sustained.

Even if the verdict were deemed legally sufficient, there was conflicting testimony during the trial on the ultimate issue of what occurred on September 9, 2017, in the [redacted] home. Upon reviewing the conflicting testimony, the testimony of [redacted] should be credited.

The testimony of Mr. [redacted], who had previously been arrested on three prior occasions for incidences with his wife or family, was simply not credible. It was also internally not logical and contradictory.

[redacted] claims that he was confronted by his wife and daughters on a Saturday afternoon and was advised he no longer needed to go shopping with [redacted]. He then claims he reached into his pocket to give his wife some grocery money, but [redacted] then suddenly reached

into his other pocket for *different* money and also put her arm "*around* [his] throat" (T 303) (emphasis).

[redacted] would only have been able to put her arm "around" her father's throat if she was behind him when this happened. However, Mr. [redacted] unequivocal testimony was that his wife and daughters were in front of him (T 301).

> THE COURT: Right in front of you?
>
> THE WITNESS: Oh, directly in front of me.
>
> THE COURT: Standing?
>
> THE WITNESS: Yes. (T 301-02).

Accordingly, [redacted] recollection of [redacted] arm (rather than just one hand) being "around his throat" is much more consistent with [redacted] testimony that [redacted] was attempting to pull her father off of [redacted] from behind:

> Q. All right. What's the next thing you saw happen?
>
> A. [redacted] rushed over.
>
> Q. What did [redacted] do?
>
> A. She tried to pull him off.
>
> Q. What did you see her do?
>
> A. I saw her *from behind* try to pull his shoulders, at first, without success. (T 413) (emphasis).

Indeed, on direct-examination, the prosecutor asked, "[a]fter [redacted] choked you *from behind*, at some point did you go down to the ground?" (T 305) (emphasis). Accordingly, this critical point of [redacted] own testimony is actually more consistent with [redacted] testimony (that [redacted] attempted to pull her father off of [redacted] from behind) rather than the balance of his own testimony that [redacted] suddenly and simultaneously reached into his pocket with one hand and also put her entire arm around his throat with her other at a point in time when [redacted] was in directly in front of him. The logistics of [redacted] performing both of these actions simultaneously and while she is in front of her father are impossible and do not make logical sense.

And then there is the issue of the money. Mr. [redacted] claims he had some money in is left-side pants pocket that he handed to his wife for the groceries. There was never any testimony elicited about how much money this was. Nor was there any testimony elicited about whether it was, in fact, ever used for groceries or anything else.

He then claimed that [redacted] reached into his right-side pants pocket. By his own testimony, he claimed to have eleven hundred dollars in his right pants pocket on [redacted] Although there was testimony that he owed a roofer twelve hundred dollars, there was no testimony about when he planned to pay that money to the roofer and/or, whether that roofer was ever eventually paid or not.

After the incident, [redacted] testified that, "all of the money was gone out of my — both my pocket and my hand" (T 305). There was never any testimony elicited that [redacted] was seen with the money or used that money to purchase anything. At the very best, and only if crediting all of Mr. [redacted] testimony as true, the evidence in the record would only support a conviction of an attempted petit larceny by [redacted]

However, [redacted] also testified that [redacted] had jobs, that [redacted] received Worker's Compensation, and that [redacted] "is the housewife, stays home and takes care of the house" (T 315). Accordingly, if the dispute on [redacted] indeed began over grocery money, then it most certainly began between [redacted]

By his own testimony, [redacted] returned to the house later that evening (T 312). He didn't confront anyone about the stolen money, nor did he call the police.

Accordingly, [redacted] presented a more credible account of what precipitated the incident and is more reasonably believed than [redacted] story of a sudden and unprovoked attempted robbery by [redacted]l. [redacted] is the youngest daughter. Youngest siblings can have fierce loyalty to elder ones, and [redacted] was much more likely coming to the defense of her mother and/or [redacted] due to an argument that began between [redacted] which then seems to have escalated to [redacted]shoving and knocking down [redacted]as he stormed away.

It is also very important to note that, if some type of family rift and/or disfunction began in the year 2001 when [redacted] began receiving words from God, that [redacted] *was only 3 years old at this time*. Accordingly, the family disfunction and/or religious views from 2001 going forward was all that [redacted] really ever knew and grew up with her entire life.

Lastly, it is notable that the trial court acquitted [redacted] on Counts 2 (robbery in the second degree, acting in concert), 4 (criminal obstruction of breathing) and 5 (menacing). If [redacted] was not credible enough for convictions on the counts, it follows that his version of the alleged assault and larceny are, likewise, not credible.

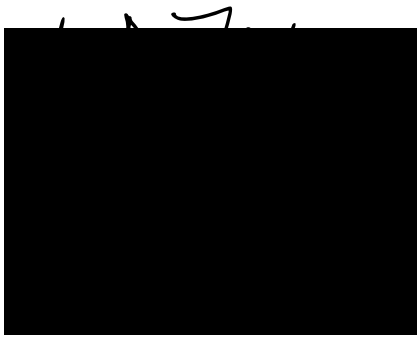
Accordingly, because the verdict was against the weight of the evidence, this Court should reverse [redacted] conviction on the charges of assault in the second degree and petit larceny, as a lesser included offense of robbery in the second degree.

CONCLUSION

[redacted] CONVICTION ON ALL COUNTS SHOULD BE REVERSED AND ALL CHARGES AGAINST HER SHOULD BE DISMISSED.

Dated: [redacted]
Buffalo, New York

Respectfully Submitted,



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