

1 THE COURT: Yes.

2 (A short break was taken.)

3 MR. CANTY: Detective Charles DeCaro.

4 (The Court Officer left the courtroom and
5 returned shortly thereafter with the witness.)

6 COURT OFFICER: Stand in the box, face the
7 clerk, and raise your right hand.

8 THE CLERK: Do you swear or affirm the
9 testimony you are about to give will be the truth, the
10 whole truth, and nothing but the truth?

11 THE WITNESS: Yes, I do.

12 THE CLERK: Thank you. Have a seat, please.
13 Would you give the Reporter your name, spelling your
14 last name, your shield number, and command.

15 THE WITNESS: Detective Charles DeCaro,
16 D-E-capital-C-A-R-O, Third Squad, Detective, Nassau
17 County Police Department, Shield Number 1047.

18 D E T E C T I V E C H A R L E S
19 D E C A R O, having been first duly sworn by the Clerk
20 of the Court, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. CANTY:

23 MR. CANTY: Officer, I'm going to ask you to
24 keep your voice up when you answer the questions.

25 THE WITNESS: Yes, sir.

1 MR. CANTY: Good afternoon.

2 Q By whom are you employed?

3 A The Nassau County Police Department.

4 Q And, how long have you worked for the Nassau County
5 Police Department?

6 A Since August 15, 1997.

7 Q In what capacity?

8 A Currently as detective.

9 Q Prior to being a detective?

10 A Police officer.

11 Q And, what precinct did you work in?

12 A Third Precinct.

13 Q What areas of Nassau County does it cover?

14 A Third Precinct covers Bellerose, Floral Park, New
15 Hyde Park, Mineola, Williston Park, East Williston, Westbury,
16 Carle Place, New Cassel, Uniondale, East Meadow.

17 Q Among others?

18 A Yes.

19 Q Can you please describe your duties as they were
20 when you were a police officer?

21 A Patrol. I was assigned to patrol.

22 Q Can you describe the training you received in order
23 to become a police officer?

24 A I received training at the Nassau County Police
25 Academy, six months. Study Penal Law, criminal law, Vehicle

1 and Traffic Law. We did drug recognition and other training.

2 Q Specifically, where were you assigned on January 20,
3 2004?

4 A Third Precinct.

5 Q To what command?

6 A Third Precinct, plain clothes.

7 Q And, approximately, how many arrests have you made
8 during your career as a police officer?

9 A (Sigh). I would say a few hundred. In the
10 hundreds.

11 Q I would like to direct your attention to January 20,
12 2004 at approximately 8:45 p.m. Were you working on that day?

13 A Yes, sir.

14 Q And, you were working for the Nassau County Police
15 Department?

16 A Yes, sir.

17 Q And, who, if anyone, were you working with?

18 A My partner, Officer Philip Kouril.

19 Q Could you describe for the Court the uniform?

20 A We were in plain clothes, soft clothes.

21 Q Were you in a marked or unmarked patrol car?

22 A Unmarked, sir.

23 Q Did there come a time where you took an assignment
24 at Mineola High School?

25 A Yes.

1 Q Could you describe the circumstance of that
2 assignment?

3 A Communications gave out a call for a male creating a
4 disturbance and refusing to leave at the Mineola High School.

5 Q And, what, if anything, did you do in response to
6 that?

7 A My partner and I were a few blocks away in the
8 vicinity of Jericho and Herricks Road, and we decided to pick
9 up that call.

10 Q Did there come a time where you actually went to
11 Mineola High School?

12 A Yes.

13 Q How do you travel there?

14 A I believe we were heading west on Jericho Turnpike.
15 My partner was driving. I believe he made a U-turn on Jericho
16 and we made the right turn on Armstrong and went right down the
17 block to the high school.

18 Q What, if anything, did you observe when you traveled
19 on Armstrong?

20 A We saw four males walking away from the high school
21 toward Jericho, west.

22 Q How long did it take to get to Mineola High School?

23 A About a minute.

24 Q What, if anything, occurred when you arrived at
25 Mineola High School?

1 A When we got to the front lobby, front vestibule, we
2 were met by the athletic director or a coach, and he stated
3 there was a male who was in the school creating a disturbance.
4 They asked him to leave and he wouldn't and he was accompanied
5 by three other males.

6 Q How did you identify yourself to the individual at
7 the Mineola High School?

8 A Had our shield displayed and told him we were from
9 the Nassau County Police Department?

10 Q How was that shield displayed?

11 A Hanging around my neck outside the outer garment.

12 Q Did you recall whether you left Mineola High School?

13 A Yes.

14 Q Where were you going?

15 A The male we were talking to in the lobby said the
16 four males left the high school and he last saw them walking
17 northbound on Armstrong toward Jericho.

18 Q What, if anything, did you conclude after hearing
19 that information?

20 MR. MASSIMO: Objection.

21 THE COURT: Overruled.

22 A Okay. We believe that the males that we saw walking
23 up Armstrong, as we were approaching the high school, were
24 quite possibly that were the males that were in the high
25 school.

1 Q And, what, if anything, did you do at this point?

2 A We backtracked. Made a U-turn on Armstrong and went
3 toward Jericho Turnpike.

4 Q Where is Dunkin' Donuts located?

5 A Dunkin' Donuts is on the southwest corner of Jericho
6 Turnpike and Herricks Road in Garden City Park.

7 Q How far is that from Mineola High School?

8 A A block and a half, two blocks away.

9 Q In Nassau County?

10 A Yes.

11 Q State of New York?

12 A Yes, sir.

13 Q What, if anything, did you observe when you passed
14 the Dunkin' Donuts?

15 A There was some people sitting down eating, drinking,
16 and we saw a few males that matched the description of the
17 males we saw walking now standing inside Dunkin' Donuts.

18 Q What did you do next?

19 A My partner pulled into the lot. We parked the
20 vehicle and we entered the Dunkin' Donuts.

21 Q Can you describe how your shield was displayed when
22 you went into Dunkin' Donuts?

23 A My shield was still on the outside garment. I don't
24 know if I had a chain or rope. It was hanging outside.

25 Q When you finally entered the Dunkin' Donuts, what,

1 if anything, did you do?

2 A Observed two males standing to the left -- I guess
3 the left side of the counter. We asked them to step over to
4 the side so we could talk to them.

5 Q Did you have an opportunity to -- for what purpose
6 were you going to ask them questions?

7 A We wanted to see if they were the males that were
8 involved in the disturbance at the high school.

9 Q Were you able to inquire as whether they were the
10 individuals?

11 A We started to ask about what happened. As we
12 started, the male -- the man at the counter behind us yelled
13 out.

14 Q What, if anything, did he yell?

15 A I believe he yelled, fuck that. This is my hood.
16 We ain't talking to any of you niggers. At that point we
17 stopped talking to the two males we had sitting there and we
18 turned our attention at the male at the counter.

19 Q Do you recognize the male at the counter in the
20 courtroom today?

21 A Yes.

22 Q Could you point him out and identify an article of
23 clothing?

24 A Male seated at the table with the beige shirt with
25 his hand crossed.

1 MR. CANTY: I would like the record to reflect
2 the witness has identified the defendant.

3 THE COURT: The record reflects the witness
4 has identified the defendant.

5 MR. CANTY: Thank you.

6 Q Could you please describe what happened to your
7 investigation as a result of the comment?

8 MR. MASSIMO: Objection.

9 THE COURT: I'm going to overrule that
10 objection.

11 A We stopped talking to the two males that were
12 talking to us and now we were directed at that male that was
13 yelling at us at the counter.

14 Q Was he the subject of the investigation when you
15 first walk in?

16 A No. First the two males at the left side of the
17 counter.

18 Q What, if anything, did you ask the defendant?

19 A As we were talking to him, we wanted to know who he
20 was. We asked for identification and he continued to yell at
21 us.

22 Q What did he yell?

23 A I believe after that he said, you might as well wait
24 for me to finish eating 'cause I ain't talking to either one of
25 you niggers. This is my hood and you can't tell me what to do

1 in my hood. And, then he walked past and continued to sit down
2 at the table and chair in the store.

3 Q What, if anything, was your response?

4 A We wanted identification. We wanted to know who was
5 talking to us.

6 Q What, if anything, did the defendant do?

7 A He took the table and pushed it toward my partner
8 and I believe it struck him in the leg.

9 Q What did you do at this point?

10 A We informed him he was under arrest and, you know,
11 he would have to come with us.

12 Q What was the defendant's response after you informed
13 him he was being placed under arrest?

14 A As we went to grab him to get away, he pulled his
15 arm away. He was flailing, pushed against us. He was fighting
16 with us. We then had to take him down to the ground to place
17 him in the handcuffs.

18 Q Could you describe the manner in which he spoke to
19 you?

20 A He was yelling at us.

21 Q I'm sorry?

22 A He was yelling enough for the patrons I noticed
23 picked up their food and exited the store.

24 Q Approximately, how many people did you see leave the
25 store?

1 A Approximately, eight people that were seated and
2 people still coming in and out. I don't know what happened
3 with them.

4 Q Did there come a time where you eventually were able
5 to handcuff the defendant?

6 A Yes.

7 Q Approximately, how long after you originally told
8 him he was being placed under arrest?

9 A It wasn't immediately. I would say probably almost
10 a few minutes, maybe. Two minutes, if that.

11 Q What happened with respect to your investigation as
12 who was trespassing at Mineola High School?

13 A That ceased. We were now with him and I don't know
14 if anyone was left. I don't remember talking to anyone else in
15 the store. I was now with the defendant.

16 Q Approximately, how many times did you tell the
17 defendant verbally he was being placed under arrest?

18 A Numerous times.

19 Q What specific statement?

20 A You are under arrest. Don't resist. Give us your
21 hand.

22 Q What was his response?

23 A You are not arresting me.

24 Q What was his physical response?

25 A Pulling away.

1 MR. MASSIMO: Judge, objection to the response
2 that was not noticed to the defense.

3 MR. CANTY: We would ask that be stricken.
4 Verbal.

5 Q What was the physical?

6 A Pushing away, pulling his arm away, flailing his
7 arms.

8 MR. CANTY: Officer, I would now like to play
9 for you the surveillance video.

10 MR. MASSIMO: Judge, shall we have myself and
11 the defendant go to the jury box?

12 THE COURT: Yes.

13 (The defendant and his attorney left the
14 defense table and entered the jury box.)

15 (Viewing videotape.)

16 Q Officer, do you recognize where these shots are
17 being taken?

18 A The Dunkin' Donuts in question.

19 Q Officer, do recognize the three individuals at the
20 counter?

21 A I wasn't looking at that screen, sorry. If you
22 could just go back.

23 (Viewing videotape.)

24 Q (Indicating).

25 A Yes. Okay.

1 (Viewing videotape.)

2 Q Do you recognize the individuals that just came into
3 the screen down?

4 A Yeah.

5 Q Who were they?

6 A Those were the males we saw walking up Armstrong
7 Avenue that were standing to the left of the counter.

8 (Viewing videotape.)

9 Q Do you recognize that individual, the legs of that
10 individual right there?

11 A Yes, I believe it is either myself or my partner.

12 Q And, could you please describe what you are doing at
13 this point?

14 A The gentlemen were at the counter. I believe there
15 was an empty table and asked him to come sit and talk to them
16 about what happened in high school.

17 Q Do you see the defendant?

18 A In the bottom left corner. Male at the counter.

19 Q Approximately, the distance from where you took the
20 two individuals to conduct your investigation?

21 A I would say maybe 12, 15 feet.

22 Q And, what, if anything, did the defendant say at
23 this point?

24 A That's when he was yelling at us as we were talking
25 to the males on the side.

1 Q Do you have any trouble hearing him from where you
2 were standing?

3 A No, he was yelling quite clear. It was loud enough
4 for us to hear.

5 Q What, if anything, did the reaction of the other
6 patrons in the store have?

7 MR. MASSIMO: Objection.

8 THE COURT: Sustained.

9 (Viewing videotape.)

10 Q Officer, you recognize these tables?

11 A Yes, sir.

12 Q Can you please point out which table the defendant
13 sat in that evening?

14 A It is a little statically now. You just passed it.

15 MR. CANTY: I will rewind it.

16 (Rewinding videotape.)

17 THE WITNESS: Stop right there. I believe the
18 table that's between that table right there. The six
19 o'clock position.

20 (Viewing videotape.)

21 Q Do you recognize what time it says at the top of the
22 screen there?

23 A That I can't see.

24 MR. CANTY: I would ask the witness be given
25 permission --

1 MR. MASSIMO: Judge, I will stipulate. 8:50
2 and 13 seconds.

3 MR. CANTY: Thank you.

4 THE WITNESS: I can't see it.

5 MR. CANTY: I'm going to ask you to watch the
6 upper left-hand screen.

7 THE WITNESS: Okay.

8 (Viewing videotape.)

9 THE WITNESS: Counsel, it is 8:50 and 52
10 seconds.

11 MR. MASSIMO: Sure.

12 Q What, if anything, did you observe about the table
13 the defendant was sitting at?

14 A The table was pushed away. It is away from where it
15 was.

16 Q Where was the table pushed?

17 A At my partner.

18 Q What are you doing about the talking to the
19 defendant?

20 MR. MASSIMO: Can we have the record reflect
21 the videotape is stopped -- I'm sorry -- I wanted to get
22 the time.

23 THE COURT: Can you rewind it?

24 MR. CANTY: I have it. It is all set up,
25 Judge. 8:52:02.

1 MR. MASSIMO: Thank you.

2 Q Detective, I'm going to ask you to pay a careful
3 attention to this individual. Do you recognize that
4 individual?

5 A I believe that is myself.

6 Q What are you doing at this point?

7 A At this point we told him he is under arrest and
8 tried to grab his arm.

9 Q Do you see the time?

10 A Eight fifty-two.

11 Q And 10 seconds?

12 A Ten seconds.

13 Q And, do you recognize these individuals?

14 A My partner, and myself, and the defendant on the
15 floor now.

16 Q Based on this video, is the defendant in custody at
17 this point yet? Do you have cuffs?

18 A I didn't see. It wasn't so far.

19 MR. CANTY: I will rewind it.

20 (Rewinding videotape.)

21 A At that point he wasn't in custody.

22 Q What time is it now?

23 A Eight fifty-two and 54.

24 Q Almost a minute has gone by at that point?

25 A Approximately.

1 Q Now, again?

2 A Now, I believe he is in cuffs and we are putting him
3 down making sure he has nothing on him.

4 MR. CANTY: Thank you, officer.

5 (Defendant and his attorney left the jury box
6 and returned to the defense table.)

7 Q Officer, when, if ever, did you strike the defendant
8 on that day?

9 A I never struck him.

10 Q What, if anything, did you use an object to hit the
11 defendant?

12 A Did not use an object.

13 Q When, if ever, did you use physical force to effect
14 the arrest on the defendant?

15 A I never used physical force.

16 MR. CANTY: Thank you. No further questions.

17 MR. MASSIMO: May I, your Honor?

18 THE COURT: Yes, please.

19 CROSS-EXAMINATION

20 BY MR. MASSIMO:

21 MR. MASSIMO: Good afternoon, Officer

22 DeCaro -- I am sorry -- it is detective?

23 THE WITNESS: Yes. Good afternoon, sir. How
24 are you.

25 Q You said you responded to Dunkin' Donuts on that

1 evening in response to this complaint of a trespass at Mineola
2 High School?

3 A Believe the call said a man creating a disturbance.
4 Refusing to leave.

5 Q Do you recall filing out -- All right -- withdrawn.
6 Now, both yourself and Officer Kouril, you were both in plain
7 clothes on that night, correct?

8 A Yes, sir.

9 Q When you enter the store in Dunkin' Donuts, the
10 counter is directly across from you, correct?

11 A No. When you come in, it's a little to your left.
12 It's in front of you, but it's a little where they would serve
13 you.

14 Q It would be straight from the opposite side of the
15 room?

16 A Correct.

17 Q To the left of the entrance there are tables,
18 correct?

19 A Yes.

20 Q And, there are other tables to the right?

21 A I believe to the vestibule leading to the pizzeria.

22 Q Now, when you walk in the store, you saw Mr. Wharton
23 and two other individuals that were in the store as well,
24 correct?

25 A Yes.

1 Q And, when you started speaking to the other two
2 individuals, I believe you stated that Mr. Wharton said
3 something to the effect of, fuck that. This is my hood. We
4 ain't talking to any of you niggers, correct?

5 A Yes. Um-hum.

6 Q Now, yourself, you're not an African-American,
7 correct?

8 A No, sir.

9 Q And, your partner -- is it detective or officer?

10 A Detective now.

11 Q -- Detective Kouril, is he of African-American
12 descent?

13 MR. CANTY: Objection, Judge.

14 THE COURT: Overruled.

15 A No, he is not.

16 Q Now, the defendant indicated to you that he did not
17 have a desire to speak to you, correct?

18 A At what point?

19 Q When you first encountered him, correct? He said,
20 we're not talking to you?

21 A Initially, I wasn't talking to him. I was talking
22 to the other two males. I didn't know he was part of that
23 group.

24 Q So you didn't know that he was part of the group
25 that he was speaking with you?

1 A I had my back to him and I was talking to the other
2 males at the left side of the counter.

3 Q When he said to you, fuck that. This is my hood.
4 We ain't talking to any of you niggers, that was a sign from
5 him that he wasn't interested in speaking with you, correct?

6 A Could be taken like that.

7 Q Now, you believed at that time that that constituted
8 an obstruction of your investigation?

9 A As he continued yelling at us, yes.

10 Q You then went over to speak with Mr. Wharton,
11 correct? At some point?

12 A At some point.

13 Q And, at the point when you went over to speak to
14 Mr. Wharton, he had moved over to the table and seated himself?

15 A Yes. He left the counter and went to the table.

16 Q So when yourself and Officer Kouril or Detective
17 Kouril now went over to Mr. Wharton, he was seated, correct?

18 A He walked past us and then he sat down at the table.

19 Q Have you been trained in the First Amendment, by the
20 way?

21 MR. CANTY: Objection, Judge.

22 THE COURT: Counsel, I'm going to sustain that
23 objection.

24 MR. MASSIMO: I'm sorry, your Honor?

25 THE COURT: I'm going to sustain that

1 objection.

2 Q Now, did you believe at that time you had a right to
3 arrest Mr. Wharton?

4 A At that point?

5 Q Yes.

6 A Um, did we have a right to? We didn't place him
7 under arrest at that time.

8 Q Okay. Now, his mere cursing wasn't a crime,
9 correct?

10 MR. CANTY: Objection.

11 THE COURT: I'm going to sustain that
12 objection.

13 Q Do you believe that you can arrest someone for
14 cursing?

15 MR. CANTY: Objection.

16 THE COURT: I'm going to allow him to answer
17 that question.

18 A Can you?

19 Q Yes.

20 A Everyone is entitled to their free speech, sir.

21 Q So you have been taught that mere cursing is not
22 enough to arrest a person, correct?

23 A Correct.

24 Q Now, you and your partner, did you ask him for
25 identification prior to him allegedly pushing the table or

1 after?

2 A I believe it was we asked him once for
3 identification, and then he shoved the table, and then we asked
4 him again for identification.

5 Q Now, when you first asked him for identification,
6 did he say, no, he wasn't giving it to you?

7 A I believe his response, you might as well wait for
8 me to finish eating because I ain't talking to either one of
9 you niggers.

10 Q That was his response to that question?

11 A I believe so.

12 Q You then say he pushed the table toward you?

13 A He struck my partner.

14 Q Now, you wrote the original 85A on this case?

15 A I would have to see. I don't recall. It's been
16 almost two years.

17 MR. MASSIMO: Your Honor, this is a situation
18 where I only have one copy.

19 THE COURT: Tell me where it is. I will find
20 it. Is it the beginning or middle?

21 MR. MASSIMO: It's about the middle of the
22 packet.

23 If I could see it, Judge? Can I approach?

24 THE COURT: Yes. (Handing).

25 COURT OFFICER: Right here.

1 MR. MASSIMO: (Examining.) Yes. Okay.

2 Before I ask that question, officer, isn't it
3 true that you never stated in your crime report, which
4 you prepared on the night of the incident, that
5 Mr. Wharton pushed the table at either one of the
6 officers?

7 THE WITNESS: I would have to see it. I don't
8 have an 85A in front of me. Like I said, it is almost
9 two years.

10 MR. MASSIMO: I understand.

11 If we can have that marked as Defendant's C
12 for identification, your Honor.

13 COURT OFFICER: (Marking).

14 (The above-mentioned document, Crime Report -
15 85A, was marked for identification as Defendant's
16 Exhibit C.)

17 COURT OFFICER: (Handing).

18 THE WITNESS: May I read it?

19 THE COURT: You can read it.

20 THE WITNESS: Okay. (Examining).

21 COURT OFFICER: Okay.

22 THE COURT: Mr. Massimo. Ready?

23 THE WITNESS: Yes.

24 Q Did you write in your report that he had pushed the
25 table at either yourself or the other officer?

1 A I believe my partner prepared this report.

2 Q Well, I refer you to page -- the first page towards
3 the bottom. Am I incorrect it says it is written by Officer
4 DeCaro, D-E C-A-R-O?

5 A That would be my serial number and my abbreviation,
6 but I believe it was my partner who prepared it. Once you log
7 on a computer, who is logged on the computer, you would
8 generate whatever paperwork.

9 Q I want to get it. Your partner prepared that
10 narrative?

11 A It says prepared by Philip Kouril and it is signed
12 off by the desk officer.

13 Q So the best recollection is that your partner
14 prepared that, right? But you read it over?

15 A Yes.

16 Q It doesn't mention anything about the defendant
17 pushing the table?

18 MR. CANTY: At this point if he hasn't
19 prepared the defendant, then it's improper. It is not
20 an inconsistent statement by this witness.

21 THE COURT: I will sustain the objection.

22 MR. MASSIMO: All right.

23 Q You did prepare some document in this case, right,
24 Officer DeCaro?

25 A Yes, I believe --

3 A Again, I would have to see the Court Information.

6 MR. CANTY: If I may have a copy?

9 COURT OFFICER: (Marking).

13 COURT OFFICER: Here you go. (Handing).

15 Q You prepared that document?

18 Q The original charge of resisting arrest, isn't it
19 true you didn't say anything about the defendant pushing a
20 table at yourself or the other officer?

22 Q Did you recall preparing the Court Information on
23 the disorderly conduct charge?

25 MR. MASSIMO: Can we have this marked as

1 Defendant's E for identification.

2 COURT OFFICER: (Marking).

3 (The above-mentioned document, Court
4 Information, was marked Defendant's Exhibit E for
5 identification.)

6 COURT OFFICER: (Handing.)

7 THE WITNESS: (Handing).

8 COURT OFFICER: Thank you.

9 THE WITNESS: (Examining).

10 Q Does that refresh your recollection as to whether or
11 not you prepared that document?

12 A Yes.

13 Q In fact, Officer DeCaro, in the disorderly conduct
14 charge you didn't mention anything about the defendant pushing
15 the table at yourself or your partner?

16 A For the disorderly conduct, no.

17 MR. MASSIMO: Thank you. (Handing).

18 Q Now, have you had an opportunity to watch the
19 videotape in this case?

20 A Yes.

21 Q Do you recall seeing on the videotape the portion or
22 the point where the defendant pushed the table towards either
23 yourself or Officer Kouril?

24 A I believe you see him going for the table. Again, I
25 don't know if it's to bring it back, but we stop him from doing

1 that.

2 Q You said at some point Mr. Wharton pushed the table
3 toward Officer Kouril, correct? Can you show me on the
4 videotape where that occurs and I will put it on, if you wish,
5 but you have reviewed it?

6 A Yes, I reviewed it.

7 Q When you reviewed it, do you recall seeing the point
8 where Mr. Wharton pushed the table toward Officer Kouril?

9 A The tape -- it skips and it doesn't show certain
10 things.

11 Q So it's not on the tape?

12 A Not captured on the tape.

13 Q So we can agree that portion is not on the tape?

14 A Correct.

15 Q Did you try to place him under arrest immediately
16 after he allegedly pushed the table toward Officer Kouril?

17 A Within a few moments.

18 Q At that point he was under arrest he was pushing a
19 table toward the officer?

20 A Not immediately. We went to grab him to say he was
21 under arrest.

22 Q It was a very short time after that, that's the
23 point where you made a decision to place him under arrest?

24 A Yes.

25 Q Isn't it true that you didn't put in your -- well,

1 withdraw this. You prepared what papers on the night of the
2 incident? What paperwork?

3 A Looks as of right now I see two Court Informations
4 with my name on it.

5 Q Do you recall other documents you prepared on that
6 night?

7 A I would have to see the arrest packet.

8 Q Do you have your file with you?

9 A The arrest packet?

10 Q Yes.

11 A No.

12 Q You don't?

13 A No.

14 Q You don't recall what documents you prepared that
15 night?

16 A I know I worked on paperwork. As I said, we go into
17 a computer screen. Each one would fill out a certain screen.

18 Q What documents would normally be prepared?

19 A 81, 85A, the Court Informations. If he is going
20 over to the headquarters to be lodged for the night, property
21 receipt, that's about it. There was no evidence. That should
22 be about it.

23 Q Can you tell me one document, one document that you
24 prepared on the night of the arrest where you wrote down that
25 Mr. Wharton pushed a table toward either yourself or Detective

1 Kouril?

2 MR. CANTY: Objection, Judge. He doesn't know
3 what document he's prepared. If he wants him to go
4 through all the documents --

5 MR. MASSIMO: I have no problem.

6 THE COURT: You have no problem with?

7 MR. MASSIMO: Looking through the documents.

8 THE COURT: Do you have them?

9 MR. MASSIMO: Please. If you have them. I
10 don't have them.

11 MR. CANTY: Judge, a lot of charges were
12 superseded, so I wouldn't have them with me.

13 THE COURT: You don't have the arrest packet.
14 He doesn't have the arrest packet.

15 Detective, do you have any recollection of
16 preparing a document that said that?

17 THE WITNESS: I have copies of the case
18 report, the arrest report.

19 MR. MASSIMO: But that's not with you in the
20 Court?

21 THE WITNESS: It's actually outside in my
22 folder.

23 MR. MASSIMO: I have no objection to him
24 getting his folder.

25 THE COURT: If we can do it really quickly

1 because we have five minutes.

2 THE WITNESS: One second, your Honor.

3 THE COURT: Okay.

4 (The witness left the witness stand and the
5 courtroom.)

6 THE COURT: Off the record.

7 (Discussion held off the record.)

8 (The witness returned shortly thereafter.)

9 THE WITNESS: Excuse me, your Honor.

10 (Examining). May I view it?

11 THE COURT: Go ahead.

12 THE WITNESS: Okay. (Examining). Okay.

13 Q Did you find any document that you created on the
14 night of the arrest, January 20, 2004, or even January 21st
15 before the arraignment, that you wrote that Mr. Wharton pushed
16 the table either toward yourself or Officer Kouril?

17 A No, I don't.

18 Q And, the fact of the matter, Officer DeCaro, the
19 reason why it's not in the reports because he never pushed the
20 table into you, isn't that true?

21 MR. CANTY: Objection.

22 THE COURT: Overruled.

23 Q Isn't that true?

24 A No, sir.

25 Q You never charged him with any crime with regard to

1 pushing a table toward you? Isn't that correct?

2 MR. CANTY: Objection.

3 MR. MASSIMO: I will withdraw that. That's a
4 bit confusing.

5 Q When you drew up the original charge against
6 Mr. Wharton on that evening, there was no charge against
7 Mr. Wharton for allegedly pushing a table toward yourself or
8 Officer Kouril?

9 MR. CANTY: Objection. There is no charge in
10 the Penal Law that says you can't push a table into
11 somebody. There needs to be a specific charge.

12 THE COURT: Are you going to need to
13 continue -- I sustain the objection -- are you going to
14 continue to need this witness for cross-examination?

15 MR. MASSIMO: Yes.

16 THE COURT: All right. Detective, we're going
17 to need you back here tomorrow morning.

18 THE WITNESS: Absolutely.

19 THE COURT: You can step down.

20 THE WITNESS: Thank you.

21 (The witness left the witness stand and the
22 courtroom.)

23 THE COURT: Okay. Counsel, approach.

24 (Discussion held off the record.)

25 (Mr. Canty left the courtroom and returned

1 shortly thereafter with the witness, Detective DeCaro.)

2 THE COURT: Detective, you are in the middle
3 of your examination which means you can't discuss your
4 testimony with either the district attorney or with your
5 partner. You understand that?

6 THE WITNESS: Yes, ma'am.

7 THE COURT: Okay.

8 MR. CANTY: Your Honor, with the one caveat
9 being a scheduling matter.

10 THE COURT: What schedule?

11 MR. CANTY: I need to get a teletype of the
12 subpoena.

13 THE COURT: You can't have any substantive
14 discussion of the testimony. We have to arrange to make
15 sure you can both be here tomorrow.

16 THE WITNESS: No problem.

17 THE COURT: Mr. Massimo, anything else?

18 MR. MASSIMO: I have nothing else, your Honor.

19 THE COURT: Okay.

20 MR. MASSIMO: Nine-thirty you want us here?

21 THE COURT: Yes.

22 (The witness left the witness stand and the
23 courtroom.)

24 (Case concluded at 4:45 p.m. and continued to
25 the following day, Tuesday, December 13, 2006.)

1
2
3 NASSAU COUNTY FIRST DISTRICT COURT
4 FIRST DISTRICT : CRIMINAL PART 7

5 -----X
6 THE People OF THE STATE OF NEW YORK,

7 -against-

Index No.

2004NA002058

8 JOSHUA WHARTON,

Defendant.

9 -----X
10
11 Tuesday, December 13, 2006
12 Hempstead, New York

13
14
15 B E F O R E : HONORABLE SONDR K. PARDES
16 District Court Judge

17
18
19 A P P E A R A N C E S:

20 DENIS DILLON, ESQ.
21 District Attorney of Nassau County
22 99 Main Street
23 Hempstead, New York 11550
24 BY: MICHAEL CANTY, ESQ.
25 Assistant District Attorney

18
19 MASSIMO & PANETTA, ESQS.
20 99 Quentin Roosevelt Boulevard
21 Garden City, New York 11530
22 BY: NICHOLAS MASSIMO, ESQ.
23 Attorney for the Defendant

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M I N U T E S O F B E N C H T R I A L C O N T I N U I N G

Reported by:
Jean H. Beskin
Official Court Reporter

1 (Trial continuing the following day, Tuesday,
2 December 13, 2005.)

3 THE CLERK: Case on trial, People versus
4 Joshua Wharton.

5 People ready?

6 MR. CANTY: People ready.

7 THE CLERK: Defendant ready?

8 MR. MASSIMO: Yes, your Honor.

9 THE COURT: Anything you need to address?

10 (There was no response.)

11 THE COURT: I want to continue with the last
12 witness' examination. So let's call the detective in.
13 DeCaro.

14 (The Court Officer left the courtroom and
15 returned shortly thereafter with the witness.)

16 CROSS-EXAMINATION CONTINUING

17 BY MR. MASSIMO:

18 MR. MASSIMO: Good morning, sir.

19 THE WITNESS: Good morning.

20 Q Detective, what is your height?

21 A Approximately, 6 feet.

22 Q How much do you weigh?

23 A About 210, 215 pounds.

24 Q Mr. Wharton, I believe you put in the paperwork, is
25 approximately 6 foot, correct?

1 A I would have to refresh. I don't remember.

2 Q Would it refresh your recollection if you saw the
3 paperwork?

4 A Yes, sir.

5 MR. MASSIMO: Do you want it marked?

6 THE COURT: Not if it is just going to be used
7 to refresh his recollection.

8 MR. MASSIMO: Okay. I have a courtesy copy
9 for the Court. (Handing).

10 THE WITNESS: (Examining).

11 Q Does that refresh your recollection?

12 A Yes, sir.

13 Q And -- withdrawn. Was he approximately 6 feet?

14 A Six feet, 140 pounds.

15 Q Now, you testified at some point Mr. Wharton, and
16 yourself, and Detective Kouril ended up on the floor, correct?

17 A Yes.

18 Q And, when the three of you ended up on the floor,
19 Mr. Wharton's body was flat out on the floor, correct?

20 A He was on the floor. I don't know if he was flat
21 out. I know we were attempting to place him in handcuffs.

22 Q Now, both yourself and Detective Kouril got on top
23 of Mr. Wharton, correct?

24 A To effect the arrest, yes.

25 Q And, were you towards his head or towards his feet?

1 A I believe I had his arms. I would say towards the
2 upper portion.

3 Q Upper portion of the body?

4 A Yes, sir.

5 Q And, I believe you testified he was flailing his
6 arms and pushing and grabbing at both of you?

7 A Yes.

8 Q Now, you said also that people exited the store?

9 A Yes.

10 Q Do you take any statement from anyone who exited the
11 store?

12 A No. Didn't have a chance.

13 Q Now, would you agree with me that the language that
14 Mr. Wharton used was directed solely at yourself and Detective
15 DeCaro -- I'm sorry -- Detective Kouril?

16 A Yes.

17 Q And, Mr. Wharton did not encourage anyone to fight
18 either you or Detective Kouril, correct?

19 A No.

20 Q And, he did not incite anyone to attack either
21 yourself or Detective Kouril?

22 MR. CANTY: Objection.

23 THE COURT: Overruled.

24 A No, he did not.

25 Q And, he didn't incite any one of the patrons at

1 Dunkin' Donuts, correct?

2 A Correct.

3 Q And, he didn't incite any of the inside -- any of
4 the employees to attack?

5 A Right.

6 Q Mr. Wharton did not incite anyone to use any
7 physical violence, correct?

8 A Correct. (Coughing). Excuse me.

9 Q Mr. Wharton did not physically prevent you from
10 speaking to any persons, correct?

11 A At some point.

12 Q Well, you said that Mr. Wharton said something to
13 you, right?

14 A Yes.

15 Q And, that then focused your attention on
16 Mr. Wharton, correct?

17 A Correct.

18 Q Mr. Wharton did not physically get between you and
19 the other individuals to prevent you from speaking to them,
20 correct?

21 A Correct.

22 Q Now, when --

23 THE COURT: Are you okay?

24 THE WITNESS: No. I had to sneeze. Excuse
25 me.

1 Q -- when you approached Mr. Wharton by the table, he
2 was in a seated position, correct?

3 A He was walking towards the table as we got there.

4 Q He was sitting there?

5 A He sat down.

6 MR. MASSIMO: If I could, your Honor, could I
7 have People's 1? Just have it a brief moment to set it
8 up for some questioning.

9 COURT OFFICER: (Hanging).

10 (Viewing videotape.)

11 Q Now, I believe you testified to this. If the record
12 could show the frame is freezed (sic) at 8:50:50. Would you
13 agree that's Mr. Wharton that's at the counter?

14 THE COURT: You would have to go back a
15 little. I wasn't focusing on that screen.

16 (Rewinding videotape.)

17 THE COURT: Right there.

18 (Viewing videotape.)

19 Q All right. We will stop it here, 8:51:14. Would
20 you agree that's Mr. Wharton on the lower left hand?

21 A I believe so, yes.

22 MR. MASSIMO: Okay. Now, just want to go back
23 one moment -- whoops -- sorry.

24 (Rewinding videotape.)

25 MR. MASSIMO: Okay. Now, I freezed (sic) at

1 8:50:50 once again, if the record could reflect.

2 Q Would you agree at this point in the tape there are
3 two patrons sitting on the bottom of the top left-hand screen?

4 A You said the bottom. I believe there's one there
5 and --

6 Q One here?

7 A Yeah.

8 Q Two patrons sitting over here.

9 A Okay. Looked like there would have been more.

10 Q There were some people walking on the top. Now we
11 are at 8:51:30. Again, there are some people walking on top.
12 Correct? Is that Mr. Wharton's friends actually?

13 A It went so fast.

14 Q Do you need a better look?

15 A If you could go back.

16 THE COURT: Do you want to get closer to the
17 screen?

18 THE WITNESS: Can I? Tell me what screen you
19 want me to focus on.

20 (Witness left witness stand.)

21 Q 8:51:30. Are you able to tell in there?

22 A No, I'm not able to tell.

23 Q We agree the table that had patrons seated at
24 8:51:30 the patrons are now not seated?

25 A The ones you just showed me. Right there.

1 Q I am talking about this table where we saw -- those
2 people are still seated, correct?

3 A Correct.

4 Q And, there are people seated that are no longer
5 there?

6 A Correct.

7 MR. MASSIMO: Okay. Okay. Now, I want to
8 stop this screen, if I could just move back. Sorry.
9 This is hard to get.

10 (Rewinding videotape.)

11 MR. MASSIMO: It's difficult. Okay. Now --
12 oh, what did I do. Judge, I apologize. This thing is
13 difficult to work.

14 THE COURT: I'm not trying to do it.

15 (Rewinding videotape.)

16 Q All right. Now, when Mr. Wharton pushed the table,
17 how did he push the table?

18 THE COURT: If you are going to ask him
19 questions --

20 MR. MASSIMO: I will ask him to go back.

21 (Witness returned to witness stand.)

22 Q Detective, when Mr. Wharton pushed the table
23 towards -- was it yourself or your partner?

24 A Toward my partner.

25 Q -- when he pushed it toward your partner was it

1 forward or pushed it to the side, one side to the left or to
2 the right?

3 A I believe it was -- it was out. I know I was on the
4 right side and my partner on my left. It wasn't toward me. I
5 believe it was toward him. I would have to say toward the
6 left.

7 Q Towards the left? Toward Mr. Wharton's left or your
8 partner's left?

9 A If Mr. Wharton is sitting facing me, it would be
10 toward his right. My left. My partner's.

11 Q You pushed the table to the right?

12 A To the right, which would have been my left side, if
13 I was facing him.

14 MR. MASSIMO: Judge, if we can have the
15 officer back?

16 THE COURT: Sure.

17 (Witness left the witness stand.)

18 Q I have freezed (sic) at 8:52:02. Would you agree at
19 this point -- well, withdrawn. Is this you over here in the
20 picture with the darker shirt or you with the blazer?

21 A Me with the hat on.

22 Q Lighter with the hat on?

23 A Yes.

24 Q At this point you are standing directly in front of
25 Mr. Wharton; is that correct?

1 A Yes.

2 THE COURT: I want everybody to stop for a
3 second. I can't see so I'm moving.

4 (The Judge left the bench and entered the jury
5 box.)

6 MR. MASSIMO: Could we agree again for the
7 record this screen is at 8:52:02?

8 MR. CANTY: Yes.

9 Q Can we agree at this point you're standing directly
10 in front of Mr. Wharton on the image; is that correct?

11 A On his left side.

12 Q You are toward his left?

13 THE COURT: Somebody point out Mr. Wharton.

14 Q This is Mr. Wharton?

15 A Correct.

16 Q And, you are standing in front of him?

17 A In front of him and my partner to my left on his
18 right.

19 Q The table is over here behind where your partner is
20 at?

21 A Yes.

22 Q Okay. A little bit.

23 (Viewing videotape.)

24 MR. MASSIMO: Okay. Now, freeze it at

25 8:52:06.

1 Q Now, detective, at this point you're taking your
2 gloves off, is that correct?

3 A Yeah, I believe. Looks like I took them off.

4 Q The purpose for taking your gloves off, to now get
5 in a position to arrest Mr. Wharton?

6 A One for my safety if I don't feel comfortable. I
7 don't know what type of gloves. I know I had gloves on. If
8 something was to happen I wanted my hand. I feel more
9 comfortable without my gloves on.

10 Q Can we agree you took your gloves off?

11 A Yes.

12 MR. MASSIMO: Now, I want you to watch this
13 next frame. I don't know if I can slow it. I want you
14 to watch as I go through this.

15 (Viewing videotape.)

16 MR. MASSIMO: Now, let the record reflect we
17 are now at 8:52:10.

18 Q Now, detective, at this point you have your right
19 arm grabbing Mr. Wharton's left arm; is that correct?

20 A Correct.

21 Q And, at this point are you now in a position to take
22 Mr. Wharton out of this seat?

23 A Somewhat.

24 Q So this is when you began to effectuate the arrest?

25 A I would say at that point I am pretty close to it.

1 (Viewing videotape.)

2 Q Now, did you see in that frame Mr. Wharton's hand go
3 toward the table?

4 A Yes.

5 Q Was that the point where Mr. Wharton pushed the
6 table?

7 A No.

8 MR. MASSIMO: I would like the record to
9 reflect, your Honor, we are now at 8:52:46 on the
10 screen.

11 Q At this point in time would you agree that the
12 gentleman here on the ground toward the bottom of the top left
13 portion of the screen is Mr. Wharton?

14 A On the floor, yes.

15 Q And, would you agree that this is you that's on the
16 right-hand side of the picture?

17 A Yes, that is me.

18 Q And, that's Detective Kouril on the left-hand side?

19 A That's correct.

20 Q Mr. Wharton's head is up by where you are, correct?

21 A Underneath this chair. On the floor.

22 Q His feet are toward Detective Kouril?

23 A Correct.

24 Q You testified he was flailing his arms and pushing
25 and grabbing both you and Detective Kouril?

1 A Correct.

2 MR. MASSIMO: I want you to watch the screen
3 and tell me if you can see Mr. Wharton pushing and
4 grabbing at you or flailing his arms, okay.

5 (Viewing videotape.)

6 MR. MASSIMO: I will try to go back again
7 trying to do it as slow as I can. I don't know how I
8 just did it, Judge, but I am not tempted to fast forward
9 it again.

10 Q By the way, at this point in time the arrest is
11 going on, correct?

12 A Correct.

13 Q Would you agree that this gentleman is doing a sale?

14 A Yes.

15 Q Okay. Do you need to see that again?

16 A No.

17 Q Did you see in that screen him pushing and flailing
18 and grabbing his arm?

19 A Not at that screen.

20 Q Customer is still over here, correct?

21 A Yes.

22 Q The employees still behind the counter and still
23 doing their transaction?

24 A Yeah.

25 Q Okay. Now, I'm going to ask you to watch this

1 screen and once again tell me if you can see Mr. Wharton
2 pushing and grabbing or flailing his arms toward yourself or
3 Detective Kouril.

4 (Viewing videotape.)

5 Q Are you searching his pocket?

6 A I believe he should be cuffed. He shouldn't be
7 flailing now.

8 Q 8:52:22. Did you see him pushing and flailing?

9 A He is cuffed at that point.

10 MR. MASSIMO: All right. You can have a seat.

11 THE WITNESS: Thank you.

12 THE COURT: Are you done with the video?

13 MR. MASSIMO: I think I am.

14 THE COURT: Then I will go back to my seat,
15 too.

16 THE WITNESS: May I?

17 THE COURT: Please.

18 (The Judge left the jury box and returned to
19 the bench, and the witness returned to the witness
20 stand.)

21 Q Now, isn't it true that Mr. Wharton never actually
22 flailed his arms?

23 A That's untrue.

24 Q Isn't it true that actually while you have him on
25 the ground you are actually looking through his pockets to find

1 his identification?

2 A No.

3 Q Isn't it true when he was on the ground Mr. Wharton
4 wasn't moving at all?

5 A We had him handcuffed. We had him on the ground.

6 Q Isn't it true you had control over him?

7 A Eventually we gained controlled.

8 MR. CANTY: I'm going to object. Can we have
9 a context of what time period we are talking about?
10 He's obviously under control when he's cuffed and on the
11 ground.

12 THE WITNESS: That's what I thought the
13 question was.

14 MR. MASSIMO: I am talking about the entire
15 period on the ground.

16 Q Isn't it true the entire period on the ground that
17 yourself and Detective Kouril had total control over
18 Mr. Wharton?

19 A No.

20 Q Isn't it true the entire period he was on the ground
21 Mr. Wharton didn't have an opportunity to move his arms or
22 legs?

23 A Absolutely not.

24 Q Now, there was a gentleman who came over by you
25 guys?

1 A Yes.

2 Q Do you know who that gentleman is?

3 A Yes.

4 Q Who is that?

5 A Tom Masur.

6 Q And, Mr. Masur is employed by whom?

7 A The district attorney's office or the Nassau County
8 Police Department. I don't know if he is a detective or
9 investigator for the DA office in Mineola I found out.

10 Q And, isn't it true that's the only individual that
11 came to the area where Mr. Wharton was at?

12 A During?

13 Q During the entire incident at the table.

14 A Yes.

15 Q And, when he came over there, he stood over there,
16 right?

17 A He asked us if we were okay and needed a hand.

18 Q He didn't run out?

19 A No.

20 Q Now, isn't it true that this dispute is really
21 clearly between you, Detective Kouril, and Mr. Wharton?

22 MR. CANTY: Objection, I don't understand the
23 question.

24 THE COURT: Rephrase the question, please.

25 Q Isn't it true that incident is really between the

1 three of you and there are no other individuals involved?

2 MR. CANTY: Objection again.

3 THE COURT: I'm not sure I understand the
4 question.

5 Q When you were involved with Mr. Wharton were there
6 any other individuals actually involved in that situation?

7 MR. CANTY: Objection. What situation are we
8 referring to?

9 MR. MASSIMO: Talking about -- All right,
10 withdrawn.

11 Q When Mr. Wharton said something to you were there
12 any other individuals along with him doing that?

13 A He was by the counter at the chair. He was by
14 himself.

15 Q Right. And, when you went over to Mr. Wharton,
16 there was no other individual that was assisting him or
17 involved in any way?

18 A No.

19 Q Is there anywhere on the tape that you can show me
20 where Mr. Wharton is resisting his arrest?

21 A If you go back, I could show you a sign where I
22 could try to explain it to you.

23 Q I am asking you: Can you actually show me physical
24 resisting on the tape?

25 THE COURT: Go to the videotape.

1 MR. MASSIMO: Can we, Judge?

2 THE COURT: Sure.

3 (Viewing videotape.)

4 THE COURT: I'm going to ask if you can back
5 this up to the point where the officers are approaching
6 the defendant.

7 MR. MASSIMO: Yes.

8 THE COURT: And, then slow it down. I want to
9 look again and watch it.

10 THE WITNESS: Your Honor, may I move forward?

11 THE COURT: Yes. You are going to have to.

12 THE WITNESS: Thank you.

13 (The Judge left the bench and entered the jury
14 box and the witness left the witness stand.)

15 (Viewing videotape.)

16 THE COURT: That's the point at which you are
17 approaching the defendant?

18 THE WITNESS: Yes, ma'am.

19 THE COURT: Where is the table in question?
20 Which table?

21 THE WITNESS: The table is over here.

22 (Indicating).

23 (Viewing videotape.)

24 THE WITNESS: Back up.

25 MR. MASSIMO: Okay.

1 THE WITNESS: I believe it was 34 and 36
2 seconds on the top.

3 (Viewing videotape.)

4 THE WITNESS: Stop. Okay.

5 Q You saw resisting?

6 A My partner is in control of his legs sitting on top
7 of his legs. I am on top trying to control his arm, and if you
8 would go a little, he is still trying to get his arm, still
9 trying to get him handcuffed. Still up here trying to get him
10 handcuffed. My partner is still going.

11 Q Your testimony is between --

12 MR. CANTY: I'm going to object. He asked for
13 the tape to be backed up. Counsel asked him to point
14 out.

15 THE COURT: And, he pointed it out.

16 MR. CANTY: He still wants to point out.

17 A Right before.

18 MR. MASSIMO: Okay.

19 (Viewing videotape.)

20 THE WITNESS: If you could go back. You
21 passed it again.

22 MR. MASSIMO: Right towards the end.

23 (Viewing videotape.)

24 MR. MASSIMO: I'm sorry.

25 (Viewing videotape.)

1 Q Towards the end of it?

2 A Yeah. Right before it goes into the next kitchen
3 scene or baking area scene. Right here, if I may. Okay. I'm
4 still trying to gain control of his arm. My partner has
5 control of the feet by sitting on top of him and still trying
6 to get his other arm, and I am trying to get control of one arm
7 and he is trying to get control of the other arm. If you see
8 him, again, he still comes up again still right there.

9 Q All right. That's what your testimony of him
10 pushing, grabbing, and flailing his arm, right?

11 THE COURT: Before we go on to the next
12 question, the scene preceding this you are standing to
13 the defendant's left. Your partner is standing to the
14 defendant's right?

15 THE WITNESS: Yes, ma'am.

16 THE COURT: And, you are taking your gloves
17 off?

18 THE WITNESS: Yes, as I am coming around to
19 the side.

20 THE COURT: A few seconds after that it
21 appears the defendant is putting his arm toward a table
22 which is actually in back of your partner.

23 THE WITNESS: On the side of my partner.

24 THE COURT: And, your partner moves that table
25 out of the way?

1 THE WITNESS: Yes.

2 THE COURT: Is that the table you are talking
3 about?

4 THE WITNESS: That was the table that was
5 pushed.

6 THE COURT: You are saying this took place
7 after the table was pushed?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Okay.

10 (The Judge left the jury box and returned to
11 the bench, and the witness returned to the witness
12 stand.)

13 Q After you got the handcuffs on Mr. Wharton he did
14 not fight, correct?

15 A After the handcuffs were placed did not fight, no.

16 Q He was compliant. He was taken off the floor?

17 A Yes.

18 Q And, he was compliant as he was led out of the
19 store?

20 A Yes.

21 Q Now, isn't it true that you really arrested
22 Mr. Wharton because he was a wise guy?

23 A Absolutely not.

24 Q The original charge that you did in this case for
25 disorderly conduct, that was for obscene and abusive language,

1 correct?

2 A I don't remember the original -- again, I would have
3 to see the original paperwork.

4 Q Would it refresh your recollection if you saw the
5 original disorderly conduct charge?

6 A The original disorderly, yes.

7 MR. MASSIMO: Judge, if we can have
8 Defendant's E for identification shown to the witness?

9 THE COURT: Yes. If you could take a look at
10 it, officer, and read it, and after you are finished let
11 me know.

12 COURT OFFICER: (Hanging).

13 THE WITNESS: (Examining). Okay.

14 Q Okay. The original charge for disorderly conduct
15 was for obscene and abusive language, correct?

16 A Yes.

17 Q You did not charge Mr. Wharton with disorderly
18 conduct under the guise of fighting and tumultuous behavior?

19 MR. CANTY: Judge, objection. Charge being
20 dis --

21 THE COURT: He is asking the question. I am
22 going to overrule.

23 Q Is that correct?

24 A Please repeat the question.

25 Q You did not charge Mr. Wharton under the guise for

1 fighting and tumultuous behavior, correct?

2 A We charged him with sub 3.

3 Q Now, it was only after the incident occurred that
4 you found out that there was a tape, correct, a videotape?

5 A Yes.

6 Q And, there came a time later when you found out when
7 Mr. -- withdrawn. At a later time you found out that
8 Mr. Wharton's father is actually a Nassau County Correction
9 Officer?

10 MR. CANTY: Objection.

11 THE COURT: What's the relevance, counsel?

12 MR. MASSIMO: I think you will understand by
13 the next question.

14 THE COURT: Okay. I will let you continue.

15 THE WITNESS: Please repeat the question.

16 Q Later sometime that evening you found out
17 Mr. Wharton is a Nassau County correctional officer?

18 A Later that evening, yes.

19 Q Isn't it true that you went back to Dunkin' Donuts
20 and told them not to release the tape to Mr. Wharton's father?

21 MR. CANTY: Objection, Judge. I don't
22 understand the relevance of that question.

23 THE COURT: I don't understand the relevance
24 of it either.

25 MR. MASSIMO: Can we approach outside the

1 witness?

2 THE WITNESS: Sure.

3 COURT OFFICER: Right out here.

4 (Witness left the witness stand and the
5 courtroom.)

6 (Discussion held off the record.)

7 THE COURT: Okay. The witness may come back.

8 (Witness entered courtroom.)

9 Q Isn't it true that you really placed Mr. Wharton
10 under arrest because he said something that you felt interfered
11 with getting people to speak to you about the trespass?

12 A His action impeded our investigation.

13 Q You felt that it interfered with your ability to get
14 the other two individuals you were speaking to to talk to you?

15 A We were conducting an investigation.

16 Q Is it your understanding that somebody can interfere
17 with an investigation by using words?

18 A It's possible.

19 Q Is it your understanding that you can charge
20 somebody with governmental obstruction of administration if
21 they only use words?

22 MR. CANTY: Objection, Judge.

23 THE COURT: I will allow the question.

24 THE WITNESS: Would you repeat the question?

25 Q Is it your understanding you can charge somebody

1 with obstruction of governmental administration when they are
2 only using words and physical action?

3 A If they are yelling and screaming in a public place
4 and it's causing annoyance and alarm.

5 Q That's disorderly conduct. I am asking about
6 obstruction.

7 A I am telling you my partner and I are conducting an
8 investigation and somebody is yelling and screaming at us and
9 we are trying to talk to someone. We can't concentrate on who
10 we are talking to and we have to focus on the individual who is
11 causing the disturbance.

12 Q Isn't it true you arrested Mr. Wharton because you
13 guys wanted to show him who is boss?

14 MR. CANTY: Objection.

15 THE COURT: Overruled.

16 A Absolutely not.

17 Q Isn't it true that he paid for that by also having a
18 resisting arrest?

19 A Please repeat?

20 Q Isn't it true you made him pay by sticking him with
21 resisting arrest?

22 MR. CANTY: Objection.

23 THE COURT: Sustained.

24 Q Isn't it true, officer, that you add a charge of
25 resisting arrest because you knew this arrest was bad?

1 MR. CANTY: Objection, Judge.

2 THE COURT: Sustained.

3 MR. MASSIMO: Nothing further.

4 THE WITNESS: Thank you.

5 THE COURT: Wait.

6 MR. CANTY: Redirect, please.

7 REDIRECT EXAMINATION

8 BY MR. CANTY:

9 Q You were asked questions about comments the
10 defendant made. Who engaged whom in the confrontation?

11 MR. CANTY: Objection to the characterization.

12 THE COURT: Sustain the objection. Rephrase.

13 Q Who engaged whom with respect to you and the
14 defendant in Dunkin' Donuts on the date in question?

15 A He engaged us, meaning my partner and myself.

16 Q And, where were you when he engaged you in
17 conversation?

18 A I was in front of him with my back turned towards
19 him.

20 Q You were also asked whether or not he physically
21 prevented you from continuing your investigation. With respect
22 to him just being at the situation, how did that prevent you
23 from continuing your investigation?

24 A Just repeat that?

25 Q Just being there, how were you positioned with

1 respect to the defendant when you heard the comment?

2 A I was in between him and the individuals we were
3 talking to.

4 Q How was your body positioned?

5 A At some point?

6 Q With respect to the defendant.

7 A My back was to the defendant.

8 Q And, after hearing the comments what, if anything,
9 did you have to do?

10 A I had to take my attention from the individuals and
11 turn around and face the defendant.

12 Q Why did you have to turn around?

13 A For my safety and my partner's safety.

14 Q You were asked specific questions about whether or
15 not you saw things on the tape. Are you aware how this tape is
16 configured?

17 A Yes, somewhat.

18 Q Can you please describe to the Court how that tape
19 records?

20 A It seems to be in, like, fast motion for lack of a
21 better term. It's catching maybe every two seconds per screen
22 from what the way we have been stopping it and going from
23 screen to screen maybe 18 to 20 seconds of a particular scene
24 that's in question.

25 MR. CANTY: I would like to go back to the

1 tape at this point.

2 (Viewing videotape.)

3 Q You stated on direct -- on cross -- excuse me --
4 that there are individuals sitting at this table, correct? On
5 cross-examination you were asked if people were sitting at
6 these tables?

7 A Yes, Um-hum.

8 (Viewing videotape.)

9 Q These people are still here drinking their coffee?

10 A If you could move your finger.

11 MR. CANTY: (Responding).

12 A Yes, it looks like everyone is still there.

13 Q And, at this point, officer, where are you?

14 A I believe we are off to the side talking to the
15 individuals.

16 Q In relation to when you are talking to the
17 individuals, when does the defendant start to yell and scream?

18 A As we start talking to them.

19 Q And, it's your testimony that at that point people
20 started to exit the store?

21 A Yes.

22 Q Officer, where are the people that were sitting at
23 this table?

24 A They are gone.

25 Q And, at this point the defendant has yelled and

1 screamed?

2 A Yes.

3 MR. CANTY: Do you see it says approximately
4 8:52:06? I would like the record to reflect.

5 MR. MASSIMO: Sure.

6 Q Officer, what, if anything, does the defendant do
7 after you take off your gloves?

8 MR. CANTY: I'm going to play the tape for
9 you.

10 (Viewing videotape.)

11 A He reaches for the table that he just pushed away.

12 Q And, at this point you and your fellow officer have
13 decided to do what?

14 A Stay away from the table.

15 Q And, at this point are you going to effect the
16 arrest?

17 A Yes.

18 MR. CANTY: Let me just rewind it.

19 (Rewinding videotape.)

20 THE COURT: I want you to rewind it back to
21 where you just were.

22 MR. CANTY: If you need to go back further.

23 THE COURT: There are people sitting at the
24 second table.

25 MR. CANTY: Yes.

1 THE COURT: On the view of the screen what
2 time is that?

3 THE WITNESS: 8:55.

4 THE COURT: And, there are still people
5 sitting?

6 MR. CANTY: There are still people at this
7 table here.

8 THE COURT: The table that's the upper part of
9 that screen, not the bottom?

10 MR. CANTY: Not the bottom.

11 THE COURT: Now, move it forward to the next.
12 (Viewing videotape.)

13 THE COURT: Now stop. What's the time now?

14 MR. CANTY: 8:51:30.

15 THE COURT: Where is the defendant?

16 MR. CANTY: The defendant is now walking
17 towards.

18 MR. MASSIMO: No, he is at the counter.

19 THE COURT: Isn't he at the counter?

20 MR. CANTY: He's turned.

21 THE COURT: The defendant is at the counter.
22 What was he doing?

23 THE WITNESS: He was yelling at us as we were
24 talking to the other individuals on the side.

25 THE COURT: You say you were talking to the

1 other individuals on the side? On the side of the
2 counter?

3 THE WITNESS: On the bottom-right screen on
4 say the eleven o'clock position.

5 THE COURT: That's near the witness facing
6 Herricks Road?

7 THE WITNESS: Yes, ma'am. That's where the
8 tables and chairs are.

9 THE COURT: That's not you standing at the
10 counter?

11 THE WITNESS: No.

12 THE COURT: Somebody else in a light jacket?

13 THE WITNESS: Mr. Masur.

14 THE COURT: You are having a conversation with
15 the other individual away from the counter area?

16 THE WITNESS: Yes.

17 THE COURT: And, the defendant is at the
18 counter?

19 THE WITNESS: Yes, ma'am.

20 THE COURT: So your testimony is that standing
21 at the counter he started shouting at you several feet
22 away in another portion of the store?

23 THE WITNESS: Yes.

24 MR. CANTY: May I continue, your Honor?

25 THE COURT: Yes.

1 MR. CANTY: I will get done with the video
2 first.

3 (Viewing videotape.)

4 REDIRECT EXAMINATION CONTINUING

5 BY MR. CANTY

6 Q Officer, at this point are your intentions after he
7 reaches for the table to place him under arrest?

8 A Yes.

9 (Viewing videotape.)

10 MR. CANTY: I would like the record to reflect
11 the time is 8:52:06 -- actually, 8:52:10 -- when he
12 determines that the defendant is going to be placed
13 under arrest.

14 MR. MASSIMO: I don't know if that's correct.

15 MR. CANTY: Counsel --

16 THE COURT: Let him look at the scene.

17 MR. CANTY: If he doesn't want to stip --

18 MR. MASSIMO: No, it's the next screen.

19 THE COURT: Go back.

20 MR. MASSIMO: I don't think that's what he
21 testified to.

22 (Viewing videotape.)

23 MR. CANTY: 8:52:10 when you grabbed his arm.

24 THE WITNESS: When I grabbed his arm.

25 MR. MASSIMO: Yes.

1 (Viewing videotape.)

2 Q Officer, what, if anything, do you observe on this
3 screen with respect to the defendant's body?

4 A He's on the ground and we're still trying to gain
5 control and place him in handcuffs.

6 (Viewing videotape.)

7 Q That is at what time, approximately?

8 A 8:52:42.

9 Q So, approximately 30 seconds you struggle with the
10 defendant on the ground to place --

11 A Not on the ground. We were standing up and
12 eventually we had to take him down to the ground.

13 Q How long did it take you from when you first
14 determined you were going to place the defendant under arrest
15 until you successfully were able to place cuffs on the
16 defendant?

17 A Say at least a minute.

18 MR. CANTY: Okay. I am finished with the
19 tape.

20 Q I want to clarify the table we saw on the video. It
21 was prior to the video showing the defendant trying to grab for
22 it. When was the table pushed at your fellow officer in
23 relation to that occurrence?

24 A When we first got to the table and we started
25 talking to him.

1 Q Could you describe the manner in which he pushed the
2 table?

3 A The defendant sat down and with his hand and pushed
4 the table. (Indicating).

5 Q What exactly did the defendant say when you were
6 investigating the trespass at Mineola from across the room?

7 A Initially he said -- I believe his words were --
8 fuck that. We don't have to talk to any of you niggers.

9 Q Now, with respect to that statement, who was he
10 referring to when he said "we"?

11 MR. MASSIMO: Objection.

12 THE COURT: There is a conclusion. I'm going
13 to sustain the objection.

14 Q He wasn't speaking in the singular?

15 A No.

16 Q Were his comments directed in any particular
17 direction?

18 MR. MASSIMO: Objection.

19 MR. CANTY: Judge, if I may, on
20 cross-examination he asked whether or not he tried to
21 influence anybody else in the store. He said the
22 comments were directed at him. I think the context the
23 comments were made --

24 THE COURT: I am a little confused. Okay, the
25 defendant is at the counter. You've got your back to

1 him and you are in a corner with the other people?

2 THE WITNESS: On the side.

3 THE COURT: And, you hear the defendant making
4 a statement?

5 THE WITNESS: Screaming and yelling, yes.

6 THE COURT: Okay. You can rephrase the
7 question.

8 Q Who were you talking to at the point where he said,
9 we don't have to talk to you?

10 A Talking to the two individuals that were at the
11 counter and we asked to come to the side.

12 Q Did they stop talking to you at that point or did
13 your conversation cease at that point?

14 A Yes.

15 Q With respect to the height and weight of the
16 defendant, what do you base -- when you fill out your report,
17 what do you base those numbers on?

18 MR. MASSIMO: Objection.

19 THE COURT: Overruled.

20 A We ask them.

21 Q You asked the defendant how tall are you? How much
22 you weigh? That information you gained with respect to the
23 height and weight from the defendant? You didn't determine
24 that on your own?

25 A Correct.

1 Q And, with respect to the patting down of the
2 defendant, for what purposes did you pat down the defendant
3 after he was placed in handcuffs?

4 A To make sure he has nothing on him that would hurt
5 us in the car. He is going to be in our car. To make sure he
6 has nothing else on him.

7 Q As a result of the comment -- how far were you from
8 the defendant when he started to yell and made the comments?

9 A About 12 feet; 12, 14, 15 feet away.

10 Q Approximately, how many people left the store
11 because of those comments?

12 A I remember --

13 THE COURT: One second. I'm going to stop for
14 a moment.

15 MR. MASSIMO: It's the defendant's father.

16 THE COURT: Sorry.

17 A I believe a couple of people sitting down. I would
18 say at least four or five people.

19 Q When the defendant took --

20 MR. MASSIMO: Sorry. I didn't hear that last
21 answer.

22 THE WITNESS: Four to five people.

23 THE COURT: I didn't hear the question. You
24 have to step out.

25 MR. MASSIMO: Can I have the question and

1 answer read?

2 THE COURT: Excuse me. Okay. I'm going to
3 ask the Court Reporter to read back the last question.
4 I think I'm certainly distracted.

5 (The Court Reporter read back the requested
6 portion of the testimony.)

7 MR. MASSIMO: I'm going to object.

8 THE COURT: I'm overruling the objection.

9 Q How did the fact the defendant pushed the table into
10 your partner affect your ability to conduct your investigation
11 with respect to the trespass at Mineola High School?

12 A Now we had to concentrate on him. Right now that
13 was second. We had to worry about him now in the store.

14 Q For what purposes did you push the table out of the
15 way when we saw that in the video?

16 A Pushed it once. We didn't want him to push it
17 again.

18 MR. CANTY: No further questions.

19 MR. MASSIMO: I have a few.

20 RECROSS EXAMINATION

21 BY MR. MASSIMO:

22 Q Detective, you were asked a question about when
23 Mr. Wharton made his comments I believe you said that you had
24 to turn around for safety.

25 A Yes.

1 Q Something to that effect. Nothing that Mr. Wharton
2 said was a threat, right?

3 A Towards me?

4 Q Yes.

5 A No.

6 Q When Mr. Wharton is sitting in the chair right
7 before we see in the video where his arm goes toward the table,
8 he has a sandwich that he bought in his lap and his hand?

9 A He has the sandwich. I don't know if it's his lap
10 or his hand. He had a sandwich or something.

11 Q When Mr. Wharton is on the ground and both yourself
12 and Detective Kouril are on top of him, his arms are underneath
13 him, aren't they?

14 A When we are on the ground -- yeah, at one point his
15 arms were underneath him and we had to get his arm out and try
16 to place him in handcuffs.

17 Q You also testified -- I don't know if you really
18 testified -- you were asked a question -- I don't know if you
19 said or the district attorney said in the question that he
20 stood up before -- he was standing or you were all standing up
21 before he was taken to the ground. Isn't it true he never
22 stood up? He was in the seat?

23 A We grabbed him. We had to stand him up and place
24 him in the handcuffs, and that's when the pushing and shoving
25 and grabbing of the arm took place.

1 Q When you grabbed him, he was still seated?

2 A Yes.

3 Q As far as height and weight go -- well, withdrawn.
4 That information is necessary for future cases, isn't it?

5 A Correct.

6 Q That's took for somebody to know their description,
7 so you want that to be as accurate as possible?

8 A Yes.

9 Q Now, you also asked questions about -- as he was
10 being handcuffed, you were patting him down, I believe you
11 said?

12 A Yes.

13 Q You also looked through his pockets, didn't you?

14 A Yes.

15 Q You actually, physically, I think, you took one
16 inside out?

17 A Took stuff out. It was cold out that night and he
18 had a lot of clothes on and make sure there was nothing in
19 there.

20 Q You said as he was yelling people left the store?

21 A Yes.

22 Q You didn't speak to those people, right?

23 A Didn't have a chance to.

24 Q You don't know why they left the store, right?

25 A No, I don't.

1 MR. MASSIMO: Thank you.

2 THE COURT: Don't go.

3 Your testimony was he was sitting. You
4 decided to place him under arrest and took hold of his
5 arm and you made him stand up?

6 THE WITNESS: Had to stand him up and place
7 him in the handcuffs.

8 THE COURT: Okay. Okay. All right.

9 Are there any other questions for this
10 witness?

11 MR. CANTY: Nothing further, your Honor.

12 MR. MASSIMO: No.

13 THE COURT: Thank you.

14 THE WITNESS: Have a great day.

15 THE COURT: We are going to take a brief
16 break. I'm going to let my clerk take care of some
17 business with some other case.

18 (A break was taken from 11:15 a.m. to 11:45
19 a.m.)

20 THE CLERK: Case on trial, People versus
21 Joshua Wharton.

22 People ready?

23 MR. CANTY: People ready, your Honor.

24 THE CLERK: Defendant ready?

25 MR. MASSIMO: Defendant is ready, your Honor.