COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

               Respondent,

     -against-

                           NO. 38

JOHN STONE,

               Appellant.

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                        20 Eagle Street
                       Albany, New York
                     March 22, 2017

Before:

           CHIEF JUDGE JANET DIFIORE
        ASSOCIATE JUDGE ROWAN D. WILSON
         ASSOCIATE JUDGE JENNY RIVERA
        ASSOCIATE JUDGE LESLIE E. STEIN
        ASSOCIATE JUDGE EUGENE M. FAHEY
       ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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                           Meir Sabbah
                Official Court Transcriber

1   CHIEF JUDGE DIFIORE: The next matter on this

2   afternoon's calendar is appeal number 38, the People of the

3   State of New York v. John Stone.

4   Counsel.

5   MS. PACKARD: Good afternoon, Your Honors. Lisa

6   Packard on behalf of Mr. John Stone. I'd like to reserve

7   two minutes for rebuttal, Your Honor.

8   CHIEF JUDGE DIFIORE: You may.

9   MS. PACKARD: Your Honors, reversal is required.

10   Of course, there is a reasonable possibility that the jury

11   considered the detective's testimony that the defendant's

12   ex-wife, an eyewitness, accused him of the offense. There

13   is some evidence that is just too - - -

14   JUDGE RIVERA: Let's assume for a moment it's

15   error. Why - - - why isn't that cured by the instructions

16   from the judge? Both striking, telling the jurors that - -

17   - when the - - - when the testimony comes in, to disregard

18   it, and then instructing them again on the full charge?

19   MS. PACKARD: Because this particular evidence

20   completely transformed the case. Some evidence is so

21   powerfully incriminating that we cannot rely on - - -

22   JUDGE RIVERA: Well - - - well - - -

23   MS. PACKARD: - - - a cured - - -

24   JUDGE RIVERA: - - - how is that? I mean - - - I

25   mean, the - - - the victim himself says that she's present.

1   So you've already got sort of an ether that - - - that

2   she's present.

3   MS. PACKARD: But this transforms the case from a

4   one-witness - - -

5   JUDGE RIVERA: Um-hum.

6   MS. PACKARD: - - - inherently biased witness,

7   single-witness case, into a two-witness case. And the

8   reason why the Bruton line of cases are so helpful - - -

9   JUDGE RIVERA: Well, it's not direct testimony,

10   right, you're - - - you're arguing that there's an

11   inference to be drawn.

12   MS. PACKARD: Implicit accusations still violate

13   the confrontation clause. It's - - - it's - - -

14   JUDGE RIVERA: But - - - but the question is how

15   nebulous and vague really are these implications.

16   MS. PACKARD: Any implied accusation was

17   approaching a direct accusation - - -

18   JUDGE RIVERA: Well, he said he's spoke - - - he

19   spoke with her and then he proceeded to check on - - -

20   MS. PACKARD: The person who had - - -

21   JUDGE RIVERA: - - - Mr. Stone.

22   MS. PACKARD: The person who had been indicated

23   as a suspect, John Stone, it's - - - it's almost a passive

24   voice.

25   JUDGE WILSON: There was testimony though - - -

1   CHIEF JUDGE DIFIORE: You take that in a vacuum,

2   or do you consider the other testimony that had been

3   elicited regarding the investigation how it unfolded?

4   MS. PACKARD: Well, first of all, in - - - going

5   to the merits of it, that doesn't change whether or not

6   it's a confrontation clause violation. That's addressed in

7   Ryan v. Miller, which is decided by this court in DeJesus.

8   So it might change the prejudice, but the thing

9   is, is that we have the detective actually testifying that

10   he spoke with the night watch detectives, and after that,

11   he decided to talk to Rhonda Stone. He's not saying, at

12   that point, that the night watch detectives told him that

13   the complainant accused this particular individual. He

14   says that he then went to Rhonda Stone, and after speaking

15   with her, he ran computer checks on the person who had been

16   indicated as a suspect. And everybody - - - the prosecutor

17   below didn't even - - -

18   JUDGE RIVERA: So why is it you could draw the

19   inference - - -

20   MS. PACKARD: - - - make this argument.

21   JUDGE RIVERA: - - - you're talking about?

22   MS. PACKARD: Pardon me?

23   JUDGE RIVERA: Why is it you can draw the

24   inference you're talking about related to the officer

25   speaking to her and then doing a computer check on - - - on

1   the defendant; and you can't draw the inference of,

2   apparently, the judge's drawing, which is, that officer has

3   already spoken to the night watch team and already

4   understands that Mr. Stone is on the radar because the

5   complainant has identified him.

6   Why can't you draw that inference equally as well

7   as you draw the other one? So then aren't we in equal

8   poise? You can't - - -

9   MS. PACKARD: Okay.

10   JUDGE RIVERA: - - - really say it's such a

11   dramatic error.

12   MS. PACKARD: Because the source and the content

13   is clear. And so long as the source and the content is

14   clear from the implicit accusation, even if there's

15   potential other sources, it's still a confrontation clause

16   violation; it's no less a violation. It might go to

17   prejudice.

18   JUDGE STEIN: Can I back you up for a second?

19   Because we're talking about the confrontation clause. And

20   can you point to me where in the record that argument was

21   preserved as to this issue?

22   MS. PACKARD: Yes. It was a fully litigated. At

23   the moment that this testimony is elicited, everybody knows

24   what happens, counsel objects immediately, he moves the - -

25   - the jury is directed out of the courtroom, he moves for a

1   mistrial explicitly referencing the prior litigation in

2   which he had cited his client's right to confrontation

3   saying it would imply that there's a second witness, a

4   phantom witness that I cannot cross-examine. That's at 179

5   of the appendix.

6   JUDGE STEIN: But wasn't that whole thing in the

7   context of - - - of the People wanting to not allow him

8   to - - - to question about where she is and talking about

9   Trowbridge and - - - I - - - I just - - - I don't see how

10   it's really connected to this particular issue.

11   MS. PACKARD: He's - - - he's saying no

12   reference - - - no reference - - - no reference whatsoever

13   to Rhonda Stone should come in that would imply that she

14   would corroborate the testimony. And mind you, this is on

15   the heels of the judge already ruling, A28 of our appendix,

16   that no background testimony of this nature come in - - -

17   can come in where there's a question and answer series.

18   He says, this is - - - the judge says, this is so

19   worn out, I don't want any background testimony coming in

20   where you're asking the - - - the detective what he did

21   before and after speaking to certain witnesses. The

22   prosecutor pushes the envelope once again and says, I want

23   to bring in testimony showing the police officer's efforts.

24   And they extensively litigate it with defense counsel

25   saying, this cannot come in. It's a second phantom

1   witnesses that I can - - - cannot cross-examine, and it

2   violates my client's right to confrontation.

3   And then he goes - - - he references back to that

4   exact confront - - - that conversation at the time of the

5   mistrial. He says, we've gone to great lengths going back

6   to that conversation, the judge understands exactly what

7   he's talking about. Directing the jury out of the

8   courtroom at that time - - -

9   JUDGE FAHEY: You know, the - - - the

10   distinction - - -

11   MS. PACKARD: - - - to litigate it.

12   JUDGE FAHEY: - - - that I saw drawn in the

13   objection and in - - - on preservation, not - - - not to

14   spend too much time on this, but it seemed like you had

15   properly objected, and mentioned Brady and Roy to

16   confrontation in the efforts to locate Rhonda, I believe

17   her name was.

18   But that the same objection wasn't brought up

19   when we're talking about McCrosson's testimony and what had

20   happened when he originally spoke with her. That's a

21   distinction I see drawn here.

22   MS. PACKARD: The application had already been

23   made. The court had already ruled this couldn't come in.

24   And so when that happen - - -

25   JUDGE FAHEY: So you're saying it was properly

1   preserved in that context.

2   MS. PACKARD: Absolutely. And then he references

3   back to that conversation, he says, we went to great

4   lengths to make sure that nothing like this would happen.

5   The judge sort of disagreed with him about that,

6   but he already made the application, and then it was

7   completely transgressed. And the prosecutor was not

8   disputing that at all. The pro - - -

9   JUDGE GARCIA: Counsel, can we move off of this

10   is just for one second. Go back to something Judge Rivera,

11   I think, raised initially.

12   There's an objection, the judge sustains it, and

13   strikes the testimony, and gives - - - I think two, at

14   least, instructions to the jury. So it seems to me you're

15   claim of error is the mistrial motion. So we would have to

16   find it was an abuse of discretion not to grant the

17   mistrial. That's the error here you're claiming, right?

18   MS. PACKARD: No, because he requested a

19   mistrial; that preserves the confrontation question.

20   JUDGE GARCIA: No, no. Forget the preservation.

21   But your error here is no mistrial.

22   MS. PACKARD: Preserving the Constitutional

23   question entitles us to the Constitutional standard for

24   harmless error analysis. And that's - - -

25   JUDGE GARCIA: I don't understand the harmless

 1   error analysis in this case, because the error is he didn't

 2   declare a mistrial. What could be harmless if that's the

 3   error? If he abused his discretion and didn't declare a

 4   mistrial when the judge had to declare a mistrial, what's

 5   the harmless error analysis?

 6   MS. PACKARD: So now the analysis is, is it

 7   possible that the jury still considered this evidence even

 8   with the curative. It's the exact same as it is with - - -

 9   JUDGE GARCIA: Right - - -

10   MS. PACKARD: - - - Bruton context.

11   JUDGE GARCIA: - - - but that's a different

12   issue. The - - - to me, the - - - the harmless error

13   analysis is somewhat misplaced here. Because to do a

14   harmless error analysis on an error of not declaring a

15   mistrial, you'd have to say, you know, and then in the next

16   trial he got, he would have been convicted anyway. That's

17   the harmless error analysis.

18   It's - - - to me it's, was this such an error a

19   grave error that a jury is going to disregard the judge's

20   instruction to strike and his instructions about what you -

21   - - how you can't consider this, so that it was an abuse of

22   discretion for this judge not to declare a mistrial.

23   Because everything short of a mistrial, he gave to your

24   client.

25   MS. PACKARD: That's why - - -

1   JUDGE GARCIA: He didn't say - - -

2   MS. PACKARD: - - - we're here.

3   JUDGE GARCIA: - - - this was okay.

4   MS. PACKARD: That's why we're here.

5   JUDGE GARCIA: It would be harmless error if the

6   judge overruled the objection.

7   MS. PACKARD: But it's subsumed - - - it's

8   subsumed within the Constitutional harmless error standard.

9   Once that confornt - - -

10   JUDGE GARCIA: But what's your analysis of

11   harmless? If - - -

12   MS. PACKARD: The People - - -

13   JUDGE GARCIA: - - - you're saying it was an

14   abuse of discretion not to declare a mistrial, which is the

15   only error here that you can claim, what's harmless error

16   got to do with it?

17   MS. PACKARD: No, the error that we can claim

18   here is that there was a confrontation clause violation

19   that deprived him of his right to cross-examine that

20   witness - - -

21   JUDGE GARCIA: Such that a mistrial - - -

22   MS. PACKARD: - - - to test the reliability.

23   JUDGE GARCIA: - - - was necessary.

24   MS. PACKARD: Yes. Such that - - - and - - - and

25   the reason - - -

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 1              JUDGE RIVERA:  Right.  So getting - - - I think

 2   we're getting back to my first question.  Is why - - - why

 3   isn't, as Judge Garcia is pointing out, and I - - - I asked

 4   you before, sustaining the objection, striking the

 5   testimony, telling the jurors it's struck, telling them to

 6   disregard it at the time that it comes in, and then again

 7   instructing them at the time of the charge.  Why isn't that

 8   enough, and it strikes me you keep going back to, well,

 9   it's such a severe error that they cannot overcome the

10   instruction, and that's where we boil down to whether or

11   not that - - -

12              MS. PACKARD:  That's right.  And that's - - - and

13   that's what's going on in Bruton.  They're told to

14   disregard - - -

15              JUDGE RIVERA:  Yes.  And when I asked you about

16   the context, you said, well, there, that's when it goes to

17   the weight.  So why doesn't that inform the analysis of

18   whether or not the things that the judge did do, as Judge

19   Garcia said, short of granting the mistrial, enough?

20              MS. PACKARD:  Because just telling the - - -

21              JUDGE RIVERA:  To insure that - - - that the

22   defendant was not denied - - -

23              MS. PACKARD:  Because - - -

24              JUDGE RIVERA:  - - - if they already tried.

25              MS. PACKARD:  - - - just telling the - - - the
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1 jury to disregard it is not enough when the source of a

2 statement and the substance of the statement is so

3 powerfully incriminating.

4 JUDGE RIVERA: Yeah, but again, we're going back.

5 It's in the context. Right. We had this conversation, you

6 answered several questions from the chief, and it was in

7 the context. And if you've already got to that prior

8 testimony, and you come to the particular point in the

9 trial, it may very well be that it's not the kind of

10 egregious error that has the impact that you argued. And

11 in that kind of a case, the curative instructions may be

12 enough.

13 MS. PACKARD: But, I mean, this goes back to

14 Carborano from 1950 that if we could always cure error like

15 this by striking the testimony, then the prosecutors would

16 have no incentive - - -

17 JUDGE STEIN: But - - - but your - - -

18 MS. PACKARD: - - - whatsoever.

19 JUDGE STEIN: How - - - how can you compare this

20 situation, where you say, okay, we had - - - we had a

21 one-witness case, and in this case, it was a - - - yes, of

22 course it interested - - - innocent victims always are

23 interested, but had a pretty good opportunity to see his

24 attacker, and so on, and so forth. But compared to - - -

25 to a Bruton situation which is so powerful, how is this - -

1   - I mean, this is, to me, seems like any other case where,

2   okay, yeah, maybe there's some prejudice here.

3   But, you know, why - - - why does this rise to

4   the level of a Bruton? That's - - - that's - - -

5   MS. PACKARD: This is an extremely unique case.

6   The person at the scene was the defendant's ex-wife.

7   JUDGE STEIN: This happens all the time.

8   MS. PACKARD: But it's - - - but not in the

9   context of this pert - - - it's the source, the witness

10   who - - - the eyewitness that actually saw - - - was there,

11   potentially present, knows the defendant better than anyone

12   else. And it's not just that she's saying that he has

13   motive - - - sometimes confrontation clause error happens

14   in the context of describing motive. She is specifically

15   identifying him. It changes the entire case. This is the

16   exact situation where we say that there are some contexts

17   in which the risk - - -

18   JUDGE STEIN: What if it was - - - so if it's his

19   wife, his - - - his former wife, or is mother, or is

20   brother, or his sister, so any time there's somebody that

21   would - - - that would know the defendant well, that's

22   enough to - - - to make it a Bruton-type exception to the

23   general rule?

24   MS. PACKARD: Not Bruton, it's just that Bruton

25   says that there are some contexts, and then it recognizes

1   codefendant type cases as a class where we have to do that

2   analysis. But - - -

3   JUDGE RIVERA: But wouldn't your argument be

4   stronger if indeed she - - - the testimony is that she had

5   expressly identified him, which she didn't. You're asking

6   for the inference; that's your argument.

7   MS. PACKARD: Well, the confrontation - - -

8   JUDGE RIVERA: But isn't the stronger argument is

9   if she - - - if indeed the cop said, oh, then she

10   identified him, so then I called him. And that's not what

11   you have here.

12   MS. PACKARD: I think it comes about as close as

13   it could - - - as it could possibly be to that accusation.

14   He says, I began to ran computer checks on the person who

15   had been indicated as a suspect, John Stone. It's just

16   stated in the passive voice.

17   JUDGE GARCIA: But then your - - - your point

18   there is as soon as that statement comes out, it's a

19   mistrial. There's no recourse other than a mistrial. And

20   the case I saw, and I remember at least one where that

21   happened, I think the judge lets in codefendant confession

22   that goes on and on, and then says oh, you know what, that

23   was a mistake. Strike it. And the court is saying, you

24   just heard, you know, an hour-long confession from a

25   codefendant which should never have gotten in under Bruton,

1   that's - - - you can't instruct your way out of that.

2   This is - - - okay, we even grant you the

3   inference here, and the response from the court has to - -

4   - as we have to find, as a matter of law, was insufficient

5   and required mistrial as soon as the jury heard that,

6   nothing short of a mistrial, as a matter of law.

7   MS. PACKARD: All we have to find is whether or

8   not there's a reasonable - - - there are things that could

9   have happened after the court - - - after the court did not

10   grant that mistrial motion that might have ameliorated the

11   prejudice under the Constitutional harmless error test.

12   Perhaps counsel would have been allowed to bring in the

13   fact that she had redacted her statement, or that her

14   initial - - -

15   JUDGE RIVERA: Did he request that? Did he

16   request an opportunity to do that?

17   MS. PACKARD: He didn't want to - - - probably

18   didn't want to draw any more attention to her - - - to her

19   absence. But moreover, this is what makes it so unfair.

20   The prosecutor had already secured his promises that he

21   wouldn't make any references whatsoever to her absence. So

22   they get the best of both worlds at this point, because

23   this statement that ends up coming in might be far better

24   than any statement that she actually would've testified to.

25   She'd come to the prosecutor's office just the

1   week earlier to say, I didn't see him, I couldn't see

2   anything. There were people standing in between me and the

3   assailant, and moreover, you know, there was no statement

4   that I recall from that incident.

5   Defense counsel also points out that there were

6   no scratch notes taken at the time of the initial

7   interview. So this particular officer's testimony is also

8   potentially unreliable, and then compounding that error is

9   that defense counsel has no right to cross-examine him.

10   And so it's a nightmare scenario for defense

11   counsel, it's best case scenario for the prosecutor,

12   considering the harm of this statement, there would be

13   virtually no incentive for prosecutors going forward to not

14   transgress these rules, resting assured that so long as

15   some curative instruction is given that the verdict is safe

16   on appeal, and completely eviscerating that protection.

17   I see that - - -

18   CHIEF JUDGE DIFIORE: Thank you, Ms. Packard.

19   Mr. Spolzino.

20   MR. SPOLZINO: Good afternoon, Your Honors. May

21   it please the court, my name is Robert Spolzino, and I

22   represent the People on this appeal.

23   There was no abuse of discretion here in denying

24   a mistrial. The reason for that is that there was a

25   curative instruction given, and that the testimony itself

1   was not inherently in violation of the confrontation

2   clause. There was no clear inference in this testimony

3   that the person to whom did the detective had spoken - - -

4   JUDGE GARCIA: I think it's a fair inference

5   though, right? It's a fair inference.

6   MR. SPOLZINO: The legal standard is a clear

7   inference, Your Honor.

8   JUDGE GARCIA: Yeah. But it's - - - it's pretty

9   clear in the testimony.

10   MR. SPOLZINO: Well, I - - - I, respectfully - -

11   -

12   JUDGE GARCIA: Assuming that's the case, let's

13   assume - - -

14   MR. SPOLZINO: Okay. But respectfully, I

15   disagree with it. But assuming that's the case - - -

16   JUDGE GARCIA: Understood. But why isn't what

17   the judge did enough in that case then? I mean, isn't it -

18   - - you get an instruction, you get the testimony stricken;

19   this is about a mistrial, or not?

20   MR. SPOLZINO: That's correct. And the judge did

21   enough here.

22   JUDGE GARCIA: Because even the judge thought the

23   inference was there.

24   MR. SPOLZINO: Right.

25   JUDGE GARCIA: Right?

1   MR. SPOLZINO: And that's particularly true in

2   the context here of this entire trial. This was - - - the

3   defendant's argument rests on five lines of testimony. Or

4   five lines of the transcript in this - - - in this trial.

5   There's a whole rest of a trial here where the victim had -

6   - -

7   JUDGE RIVERA: Right. But if those few lines

8   allowed the jury to infer that his own estranged wife ID'ed

9   him as the perpetrator, that's pretty damning.

10   MR. SPOLZINO: Respectfully, I - - -

11   JUDGE RIVERA: And he doesn't get to cross.

12   MR. SPOLZINO: Respectfully, I'd say no, Your

13   Honor. And here is - - - here is why.

14   JUDGE RIVERA: Okay.

15   MR. SPOLZINO: First of all, the jury had already

16   heard from the victim that - - - who had identified the

17   defendant. And this was not - - - I know it's - - - it's a

18   technically a one-eyewitness ID case, but not your classic

19   one-eyewitness ID case where the eyewitness had never seen

20   the defendant before the incident. This is someone who

21   knew the defendant for years. Not well, he was the

22   ex-husband - - -

23   JUDGE RIVERA: Well, he never met him - - -

24   MR. SPOLZINO: - - - but - - -

25   JUDGE RIVERA: - - - he saw him in profile, there

1   was a hoodie that he said he removed.

2   MR. SPOLZINO: He saw - - - he had seen him on a

3   regular basis. And they at least had one - - - one face-

4   to-face confrontation. This was not just someone who saw

5   him at the time of the incident. So this is what the jury

6   heard, right.

7   So now, the detective gets up to testify, and you

8   look at this in the first - - - this all occurs in the

9   first page of the detective's testimony, where he is simply

10 reciting what happened here. And what happened was, I

11 spoke to the detectives on the night shift. Now, we also

12 know from the - - - from the victim's testimony that he had

13 told the - - - the night shift detectives he had identified

14 the defendant when he was at the - - - at the hospital.

15 The night - - -

16   JUDGE RIVERA: No, the record is not - - - not so

17 obviously clear on that. But let's assume you're right.

18   MR. SPOLZINO: The night shift detectives told

19 the Detective McCrosson that there was a victim at the

20 hospital, and told him which hospital it was at, right?

21 So - - - so the first thing he says is, I talked to the

22 detectives, the night shift detectives. What did you do

23 next? I talked to Ms. McClanahan. After that, what did

24 you do? I - - - I - - - I ran a check on the defendant

25 would been indicated, on to the - - - on the person who had

1   been indicated as the defendant, John Stone.

2   JUDGE RIVERA: The suspect.

3   MR. SPOLZINO: As a suspect, John Stone. Okay.

4   JUDGE RIVERA: But he's a suspect based on what

5   he was told before he spoke with her, he could have started

6   the computer check at that point, right?

7   MR. SPOLZINO: But he - - - he could have.

8   JUDGE RIVERA: Isn't that what the jury is

9   thinking?

10   MR. SPOLZINO: But he was testifying to a

11   sequence, and that's all the jury heard at this point.

12   JUDGE RIVERA: But that's my point.

13   MR. SPOLZINO: The jury didn't know.

14   JUDGE RIVERA: But isn't - - - that's my point.

15   Doesn't the sequence suggest that it's because she also

16   ID'ed him.

17   MR. SPOLZINO: Respectf - - -

18   JUDGE RIVERA: Because otherwise he would've done

19   the computer check before speaking to her. I mean - - -

20   MR. SPOLZINO: I - - -

21   JUDGE RIVERA: - - - no one spoken to her yet.

22   The man - - - the man was stabbed - - -

23   MR. SPOLZINO: I don't - - -

24   JUDGE RIVERA: - - - many hours, many hours

25   before this.

1   MR. SPOLZINO: I don't know that's a fair

2 inference, Judge. He's just saying what he did. He

3 didn't - - - he's not implying that he did - - - this

4 wasn't a question; as a result of speaking with Ms.

5 McClanahan, what did you do? This was after I spoke with

6 him - - - this - - - what did you do next.

7   That's - - - that's legitimate quest - - -

8 legitimate - - - legitimate questioning about what the

9 police officer did. And it's - - - doesn't shed light one

10 way or another on why he did it. It certainly doesn't

11 rise - - -

12   JUDGE STEIN: So - - -

13   MR. SPOLZINO: - - - doesn't rise the clear

14 inference that that's why.

15   JUDGE STEIN: Are you arguing that it's not

16 error, or that it's - - - I - - - I'm a little confused

17 here. That it wasn't error - - -

18   MR. SPOLZINO: I'm trying - - -

19   JUDGE STEIN: - - - to allow - - - to - - -

20   MR. SPOLZINO: I'm trying to argue on several

21 levels, Judge Stein. The first being it's not an abuse of

22 discretion not to declare a mistrial.

23   JUDGE STEIN: Because it's not error?

24   MR. SPOLZINO: Because it's - - - well, that's -

25 - - that's part of it.

1   JUDGE STEIN: Okay.

2   MR. SPOLZINO: But the other part is it was

3   cured. Even if it was error, it was cured. But I'm

4   submitting It's not error at all because I think that the

5   inf - - - given to the testimony here, the inference wasn't

6   there.

7   JUDGE RIVERA: If - - - if - - - as I had asked

8   your - - - your - - - counsel for the defendant, if instead

9   the officer had said, based on what she said, I then did a

10 computer check, can you cure that or does that require a

11 mistrial?

12   MR. SPOLZINO: I think you can still cure that

13 by - - -

14   JUDGE RIVERA: Doing what the judge did here, or

15 do you have to do something else - - -

16   MR. SPOLZINO: By doing what - - -

17   JUDGE RIVERA: - - - apropos of what she

18 suggested?

19   MR. SPOLZINO: By doing what the judge did here.

20 Not by - - - you don't need to declare a mistrial over that

21 one statement; you can cure it by saying disregard this.

22   JUDGE RIVERA: So then - - - so then at what

23 point is an error of the kind that's not curable if - - -

24 if having the estranged wife ID the defendant as the

25 perpetrator of - - - of the crime who doesn't - - - who is

1 then a witness - - - the defendant doesn't get to cross.

2 Not the kind of error that lets you do that.

3   That sounds very much like the codefendant

4 identifying him, no?

5   MR. SPOLZINO: Well, I - - - I would submit it

6 depends on the extent to which it's - - - it's a focus in

7 the record.

8   JUDGE RIVERA: Um-hum.

9   MR. SPOLZINO: Judge Garcia mentioned the case

10 where there is an excessive colloquy about the confession,

11 right.

12   JUDGE RIVERA: Um-hum.

13   MR. SPOLZINO: I think if it's something that

14 passes through the record quickly without any clear

15 implication, without - - - maybe there's an inference to be

16 drawn, I dispute that. But without a - - -

17   JUDGE RIVERA: Um-hum.

18   MR. SPOLZINO: - - - certainly without a clear

19 implication, I think you can cure it with a - - - with a

20 curative instruction.

21   JUDGE FAHEY: Can we - - -

22   MR. SPOLZINO: And that's the situation here.

23   JUDGE FAHEY: Can we turn, Mr. Spolzino, just

24 for - - - for a second to the 330.30 motion?

25   MR. SPOLZINO: Yes.

1   JUDGE FAHEY: Right. The second issue.

2   And counsel, maybe you can address it in response

3   when you come back up.

4   On that issue, the way I understand it is is the

5   victim's girlfriend sees - - - not - - - sorry, not the

6   victim. The defendant's girlfriend sees the victim saying

7   something to the jurors post trial. And the question is

8   whether or not the court was able to deny the motion

9   without a hearing. That - - - that's the way I see it.

10   So the way I understand it was - - - I'm not

11   going to quote the words exactly like, but he said

12   something like - - - to one of the jurors that you're my

13   man, or that's my man, in - - - and thanked other jurors.

14   And so we got either an expression or - - - of

15   thanks, the words either mean that, or - - - or let's say

16   an acknowledgment of friendship. So that seems to - - - if

17   that - - - if a statement can be taken two ways, isn't the

18   court under an obligation to hold some kind of a hearing to

19   make that determination? That's the first part my

20   question.

21   The second part is the thing I want you to

22   address, if you could too, is - - - is the affidavit came

23   from a - - - the lady who had seen her; her name was

24   Anderson, I believe. And if - - - if you assume that what

25   she said is true, wouldn't that also get them a hearing

1   without any other corroborative evidence? I mean, you

2   don't necessarily have to have a juror, right, and you

3   certainly don't have to have a court officer, say, to get

4   this kind of a hearing. So would you address those for me?

5   MR. SPOLZINO: Yes.

6   JUDGE FAHEY: You got a first try - - -

7   MR. SPOLZINO: I'll try to, Judge, you meant

8   the - - -

9   JUDGE FAHEY: - - - first the sent - - - the - -

10   - the words themselves, assuming them to be true,

11   assuming - - - well, you can do it in one, and if Anderson

12   said it's true, how does that ambiguity in the statement

13   not create a hearing issue for a factual determination to

14   be made?

15   MR. SPOLZINO: Because I think there has to be

16   something more clear than an ambiguity. That a statement

17   that could mean some - - - some prior relationship but

18   doesn't necessarily mean some prior relationship.

19   JUDGE FAHEY: Well, we're talking about getting a

20   hearing just - - - just to make it a factual determination.

21   What do you need to get a hearing done?

22   MR. SPOLZINO: I think you need something more

23   direct than some offhand comment that doesn't necessarily

24   apply, that there was - - - there was a - - - prior

25   relationship. If the comment had been, yeah, I saw you

1   last week - - -

2   JUDGE FAHEY: Um-hum.

3   MR. SPOLZINO: - - - good to see you again, that

4   would be a different story.

5   JUDGE RIVERA: Well, what - - - what doesn't

6   imply that the complainant and the juror knew each other if

7   the complainant is specifically saying - - - not just a

8   greeting, but saying when I - - - when I came in and I saw

9   you there, I thought, oh, there's my man?

10   MR. SPOLZINO: But that's not what he said here.

11   JUDGE FAHEY: Okay. What did he say?

12   MR. SPOLZINO: He said - - -

13   JUDGE RIVERA: Without using the expletive - - -

14   MR. SPOLZINO: There is - - -

15   JUDGE RIVERA: - - - you don't need to use it.

16   MR. SPOLZINO: There's my man or something like

17   that. It's not - - - it wasn't something referred to any

18   past relationship at all. It said you're my man. That - -

19   -

20   JUDGE FAHEY: I remember it like Judge Rivera

21   does, Mr. Spolzino.

22   MR. SPOLZINO: Sorry.

23   JUDGE FAHEY: I remember it a little bit

24   differently. But - - -

25   MR. SPOLZINO: I'll find it if you need it.

1   JUDGE FAHEY: No, you don't need to look at it.

2   You don't need to waste your time.

3   JUDGE RIVERA: I - - - I've got it right here, so

4   we don't need to belabor this.

5   The - - - the - - - the fiancée who signs the

6   affidavit says, the complainant saw - - - went up to the

7   group of jurors, went up to a particular juror. She

8   identifies him, grabbed his hand and stated, "Yo, when I

9   saw you sitting there, I was like, oh", expletive, "that's

10   my" - - - I'll - - - I'll replace the word, man.

11   MR. SPOLZINO: Right.

12   JUDGE RIVERA: When I saw you sitting there.

13   They're in the street standing up, so he's not referring to

14   the - - - the moment they meet on the street. This is

15   clearly a reference to when he came in and saw him in the

16   jury box.

17   MR. SPOLZINO: I - - -

18   JUDGE RIVERA: I mean, doesn't that, at a

19   minimum, get you the hearing?

20   MR. SPOLZINO: I - - - I - - -

21   JUDGE RIVERA: Because in - - - in the

22   complainant's affidavit, he doesn't say, I didn't say that.

23   MR. SPOLZINO: He says he said something

24   completely different.

25   JUDGE RIVERA: He says he said something else,

1   but he doesn't say - - -

2   MR. SPOLZINO: Right.

3   JUDGE RIVERA: - - - I didn't say that also.

4   MR. SPOLZINO: Yeah.

5   JUDGE RIVERA: He's not denying he said these

6   words. He is, absolutely, saying, I do not - - - I did not

7   know the juror before then. I - - - I understand that.

8   MR. SPOLZINO: I - - - I don't think even when it

9   says, I saw you sitting there - - -

10   JUDGE RIVERA: Um-hum.

11   MR. SPOLZINO: - - - I saw you sitting in the

12   jury box, you're my man - - -

13   JUDGE RIVERA: Um-hum.

14   MR. SPOLZINO: - - - to me implies that I was

15   confident you were the guy that was - - - was going to find

16   the conviction. Not that I had prior - - -

17   JUDGE RIVERA: Based on what, if I don't know

18   anything about you.

19   MR. SPOLZINO: Based on looking at him. Based on

20   judgments.

21   JUDGE RIVERA: And that would be based on what?

22   MR. SPOLZINO: But - - - but - - - but it

23   doesn't - - -

24   JUDGE GARCIA: Isn't there also a racial

25   component to this case? Right. I mean, there's - - -

1   there's a - - - something said during the time of the

2   attack, right, and I took that as it could have been also,

3   if you're looking at ambiguity, that I think they were of

4   the same race, these two there, that's my man, you're going

5   to - - - you're going to help me. You could take it as - -

6   - as that, you know, the victim and this juror.

7   MR. SPOLZINO: It - - - it may well be. It may

8   be that or just from the way he - - -

9   JUDGE RIVERA: Even more reason - - -

10   MR. SPOLZINO: - - - he looked at him.

11   JUDGE RIVERA: - - - to explore this in a

12   hearing.

13   MR. SPOLZINO: Well, but - - - but the - - - the

14   basis for the request - - -

15   JUDGE RIVERA: He is suggesting that this

16   complainant, upon viewing the juror based on race, which is

17   actually not - - - not what the - - - the fiancée says,

18   because she says he's Latino, I don't - - - I don't think

19   the complainant is Latino, right?

20   MR. SPOLZINO: But - - -

21   JUDGE RIVERA: Isn't that more reason to explore

22   this?

23   MR. SPOLZINO: But the basis for the 330 motion

24   was that this comment suggested a prior relationship that

25   had not been disclosed between the victim and the juror.

1   JUDGE FAHEY: I agree with you. I think it's

2   kind of weak. I only - - - I'm only wondering why there

3   wasn't a hearing. Not how I would have ruled if there had

4   been a hearing and we had some kind of a record. You just

5   ask those questions, what do you mean by that, did you ever

6   meet him before, asked the jury, do you know this guy,

7   those are - - -

8   You see, you know, you approach - - - sometimes

9   you approach the language that you read. I'm a sixty-five-

10   year-old white guy from Western New York, and - - - and my

11   grasp sometimes on - - - on language, the - - - the more

12   colloquial language in various other parts of the - - - of

13   the community, I don't know it. I'm not sure what it means

14   sometimes.

15   And so if I'm a judge, and I'm sitting there, and

16   I'm saying, oh, okay, I'll ask the question, what do you

17   mean?

18   MR. SPOLZINO: Right.

19   JUDGE FAHEY: And it seems to me a pretty

20   reasonable question to ask.

21   MR. SPOLZINO: I would - - - I would just - - -

22   just submit, Judge Fahey, that if - - - if the standard

23   were low enough that this could - - - would trigger a

24   hearing in a situation like this, anyone - - - any - - -

25   JUDGE FAHEY: Well, that - - - that may be true -

1   - -

2   MR. SPOLZINO: - - - defendant can get a hearing.

3   JUDGE FAHEY: - - - but it's the thin edge of the

4   wedge argument, Mr. Spolzino, and we - - - we're confronted

5   with that all the time here. It doesn't necessarily,

6   though, change the facts.

7   JUDGE RIVERA: Um-hum.

8   MR. SPOLZINO: I - - -

9   JUDGE FAHEY: Do you see what I'm saying here?

10   JUDGE RIVERA: Well, the - - -

11   MR. SPOLZINO: I understand you.

12   JUDGE RIVERA: - - - the People could have had an

13   affidavit from the juror.

14   MR. SPOLZINO: Perhaps, but they didn't. And

15   this - - - this is the record we're stuck with.

16   JUDGE RIVERA: Thank you.

17   MR. SPOLZINO: Thank you, Your Honor.

18   CHIEF JUDGE DIFIORE: Thank you, counsel.

19   Ms. Packard.

20   MS. PACKARD: So I just want to go back to the

21   question about mistrial versus the standard that - - -

22   JUDGE STEIN: Before you do that, I just want to

23   follow up on the last question about whether - - - about

24   the fact that People could have gotten an affidavit from

25   the juror. Whose burden is it on this motion?

1   MS. PACKARD: The burden - - -

2   JUDGE STEIN: It's the defendant's burden, right?

3   MS. PACKARD: The defendant's burden is to allege

4   facts, suppor - - - sworn allegations of fact - - -

5   JUDGE STEIN: Right. So it - - -

6   MS. PACKARD: - - - and a legal basis.

7   JUDGE STEIN: So if - - - if what - - - if what

8   was necessary to get this to a hearing was something more

9   than just the report of this somewhat ambiguous statement,

10 it's the defendant's burden to provide that something more,

11 correct?

12   MS. PACKARD: They met that burden by providing -

13 - -

14   JUDGE STEIN: Well, I know, that's the question,

15 whether they did or not. But the burden is on the

16 defendant.

17   MS. PACKARD: That's right.

18   JUDGE STEIN: Okay.

19   MS. PACKARD: And then - - -

20   JUDGE RIVERA: Isn't what's troubling here that

21 the - - - the version of this interaction from the - - -

22 and you'll correct me if I'm wrong - - - from the fiancée

23 is that she was with other people when she saw this. Is

24 that not what she says?

25   MS. PACKARD: That's right.

1   JUDGE RIVERA: And there is - - - and - - - and

2   they're family members of the defendant; are they not?

3   MS. PACKARD: I believe so.

4   JUDGE RIVERA: Okay. And the defendant didn't

5   get their affidavits to support her and corroborate her.

6   Doesn't that perhaps put her - - -

7   MS. PACKARD: There's an issue - - -

8   JUDGE RIVERA: - - - statements in a different

9   kind of light?

10   MS. PACKARD: There's an issue of fact. We don't

11   know why the prosecutor didn't bring - - -

12   JUDGE RIVERA: Well, then you might have an

13   argument that the juror perhaps is - - - is unavailable,

14   unwilling, I guess, the lawyer could have said so in his -

15   - - in his statements to the judge.

16   MS. PACKARD: The observable conduct that they're

17   both putting in their affidavits, their sworn allegations,

18   is enough to create multiple interpretations.

19   JUDGE RIVERA: You're saying - - -

20   MS. PACKARD: That's - - -

21   JUDGE RIVERA: - - - it's a credibility

22   question - - -

23   MS. PACKARD: Yes.

24   JUDGE RIVERA: - - - that goes to the hearing.

25   MS. PACKARD: Exactly. And so - - -

1   JUDGE RIVERA: Does it matter that the judge

2   observed the complainant and the juror the entire time - -

3   -

4   MS. PACKARD: No.

5   JUDGE RIVERA: - - - throughout, no?

6   MS. PACKARD: No, because we don't know what this

7   means. It's - - - and the legal basis is outside

8   influence. They - - - they don't have to prove anything,

9   they just have to support it that there's some fact out

10   there that actually supports that legal claim.

11   JUDGE RIVERA: Well, then if - - -

12   MS. PACKARD: And unless the People can - - -

13   JUDGE RIVERA: - - - if we agree with you, does

14   that mean that any defendant can just find someone who will

15   say, this is what I heard, and we're going to end up with a

16   bunch of hearings?

17   MS. PACKARD: It's - - -

18   JUDGE RIVERA: You're always going to end up with

19   a hearing? It's a pretty low threshold you're setting.

20   MS. PACKARD: I mean, submit them to a potential

21   perjury pro - - - I mean, it's a sworn affidavit that's

22   provided by her that she's saying she saw these

23   observations.

24   JUDGE RIVERA: Well, obviously, that's the

25   judge - - - that's the judge's conclusion here, since he

1   says, what comports with reality is the complainant's

2   affidavit, not hers.

3   MS. PACKARD: Well, perhaps he just wanted to

4   credit it, and not grant a hearing in this particular case,

5   and belabor it, but it has implications beyond 330.30. And

6   we have other - - -

7   JUDGE RIVERA: Um-hum.

8   MS. PACKARD: - - - contexts in which a hearing

9   has to be granted.

10   I do just want to note the - - - the preservation

11   question, which is that this court in People v. Smith,

12   which is cited by my adversary, addresses that we're still

13   entitled to that Constitutional harmless error standard

14   once it's preserved. And so the abuse of discretion is

15   subsumed within that.

16   So the question for this court is, even with the

17   curative instruction, and Bruton says that when you have a

18   powerfully incriminating statement, based off the source

19   and the substance that completely transforms the case, and

20   it's too much to ask the jury to put it out of their minds,

21   that, of course, there's a reasonable possibility that it

22   contributed to the verdict.

23   And, you know, that's not all that we have going

24   on as a biased witness. We also had the jury asking

25   questions about the particular circumstances of the

1   identification by the complainant. It was at nighttime, it

2   was a side profile view from eleven feet away, he was

3   wearing a hooded sweatshirt, he was attacked from behind,

4   he was a mere acquaintance - - -

5   JUDGE RIVERA: But if they're asking that,

6   doesn't that suggest that they're really basing this on

7   whether or not they believe him; that they don't see that

8   there's some other inference to be drawn from the police

9   officer's slip?

10   MS. PACKARD: The inference to be drawn is that

11   Rhonda Stone was there, and she identified him.

12   JUDGE RIVERA: Yeah, but I'm saying, then why are

13   you going to worry yourself about the complainant's ID?

14   It's very clear what the complainant has said. If you - -

15   - if she, the estranged wife, who you said knows him better

16   than anybody - - -

17   MS. PACKARD: It shows that - - -

18   JUDGE RIVERA: Right?

19   MS. PACKARD: - - - there's not overwhelming

20   proof of guilt without that error, and that's why it's so

21   problem - - - problematic, and, you know, even under the

22   nonconstitutional standard, we have Garcia contemplating

23   that an eyewitness who is even less compelling in that

24   case, does not - - -

25   JUDGE RIVERA: Do you have curative instructions

1   in that case?

2   MS. PACKARD: It was admitted. The jury heard

3   it, and it was - - - there were no limiting instructions.

4   But the point is that the jury heard it. And so does that

5   one instruction to disregard the testimony answer the

6   inquiry? No, not when the statement is so powerfully

7   incriminating. That's why procedurally, the Bruton cases

8   are helpful.

9   CHIEF JUDGE DIFIORE: Thank you, Ms. Packard.

10   MS. PACKARD: Thank you.

11   (Court is adjourned)

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

2

3   I, Meir Sabbah, certify that the foregoing

4   transcript of proceedings in the Court of Appeals of People

5   v. John Stone, No. 38 was prepared using the required

6   transcription equipment and is a true and accurate record

7   of the proceedings.

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