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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 223

ANDREW SPENCER,

Appellant.

20 Eagle Street
Albany, New York 12207
November 14, 2012

Before:

Chief Judge Jonathan Lippman
Associate Judge Carmen Beauchamp Ciparick
Associate Judge Victoria A. Graffeo
Associate Judge Susan Phillips Read
Associate Judge Robert S. Smith
Associate Judge Eugene F. Pigott, Jr.

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Spencer.
2 Counselor, do you want any rebuttal time?

3 MR. UNGER: Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two minutes, sure.

5 MR. UNGER: Thank you.

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MR. UNGER: And may it please the court.

8 I'm Randall Unger and I represent the appellant, Mr.
9 Spencer.

10 I submit that Mr. Spencer was denied his
11 Constitutional right to present a defense.

12 CHIEF JUDGE LIPPMAN: How so, counselor?
13 Why weren't you able to present the defense?

14 MR. UNGER: Because at almost every stage -
15 - -

16 CHIEF JUDGE LIPPMAN: Didn't you - - - let
17 me add one thing. Didn't you really communicate,
18 were able to get across your message that, in effect,
19 this was a bad cop? This was really what you were
20 trying to convey. How were you - - -

21 MR. UNGER: I think - - -

22 CHIEF JUDGE LIPPMAN: - - - stopped from
23 doing that - - -

24 MR. UNGER: Well - - -

25 CHIEF JUDGE LIPPMAN: - - - in its very

1 basic nature of presenting a defense?

2 MR. UNGER: Defense counsel at trial was
3 able, in bits and pieces, to present this so-called
4 bad cop argument. But at almost every stage - - -
5 during opening statements, during the cross-
6 examination of the People's witnesses, during the
7 defense case, and particularly during the closing
8 statement - - - the trial judge stepped in and
9 sustained so frequently when the argument was made -
10 - -

11 CHIEF JUDGE LIPPMAN: So it's a matter of
12 degree that some of the rulings would have been all
13 right if they went against you, but on the whole,
14 there were so many rulings adverse to you that - - -

15 MR. UNGER: I - - -

16 CHIEF JUDGE LIPPMAN: - - - that the
17 totality of it was that you weren't able to present
18 the defense?

19 MR. UNGER: Well, I think it's a cumulative
20 situation, and of course, under the Constitution, a
21 defendant is entitled to present a full and complete
22 defense.

23 JUDGE CIPARICK: So your defense was that
24 it was a frame-up; that was your defense?

25 MR. UNGER: Essentially.

1 JUDGE CIPARICK: Essentially.

2 MR. UNGER: Yes.

3 JUDGE CIPARICK: And obviously you wanted
4 to communicate to the jury that this police officer
5 was lying because he was friendly with the victim.

6 MR. UNGER: That's exactly it.

7 JUDGE CIPARICK: That's - - -

8 JUDGE READ: Why wasn't - - - let's assume
9 we agree with you; why isn't it harmless here?

10 MR. UNGER: It's not harmless because the
11 evidence, for one thing, wasn't particularly strong.
12 We have no forensic or physical evidence establishing
13 that Mr. Spencer even possessed the gun at any time.

14 JUDGE READ: We had four eyewitnesses,
15 didn't we?

16 MR. UNGER: You have the friend of the drug
17 dealer, Mr. Palmer - - - Officer Palmer. We have his
18 wife, who one would expect would take his side and be
19 favorable to his version. We have her brother - - -
20 the brother-in-law of the police officer. And we
21 have, I think, a neighbor or a friend.

22 CHIEF JUDGE LIPPMAN: Yeah, but that's
23 weighed against the defendant's testimony which
24 sometimes was inconsistent and sometimes implausible.
25 When you weigh these two together, why wasn't it

1 harmless?

2 MR. UNGER: It's not harmless, again,
3 because as I said, the case was essentially based
4 upon the testimony of the officer, his family and
5 friends.

6 JUDGE SMITH: You skipped - - - there's
7 actually five, wasn't there? Because there was also
8 the guy - - - the other guy who was fixing the car,
9 the friend - - - the brother - - - the friend - - -

10 MR. UNGER: Again - - -

11 JUDGE SMITH: - - - of the brother.

12 MR. UNGER: - - - that's a friend of the
13 brother-in-law.

14 JUDGE SMITH: It's a - - - so you've got -
15 - - the defense is - - -

16 JUDGE CIPARICK: What about the 911 calls?
17 There were 911 calls also, right?

18 MR. UNGER: Yes, made by the wife of the
19 officer, and I believe her brother, as well.

20 JUDGE SMITH: But when you add - - -

21 MR. UNGER: Again, we're not - - -

22 JUDGE SMITH: - - - when you add it all up,
23 you've got five people, two of whom are not so
24 intimately connected with the victim - - - I mean,
25 you have the brother-in-law's friend and the

1 neighbor. And you have two 91 - - - you have to have
2 them all in a frame-up and the frame-up has to be in
3 operation by the time they're calling 911. Isn't
4 this getting a little far-fetched?

5 MR. UNGER: I don't believe so. And
6 they're not so far removed. Maybe they're far
7 removed, in a sense, from Mr. Kendel, the drug
8 dealer, but they're all fairly well connected with
9 Mr. Palmer.

10 JUDGE SMITH: Yeah, but you have to be
11 pretty well connected to someone or he - - - he says
12 to you, look, I want to frame so-and-so for an
13 assault he didn't commit. I mean, if my neighbor
14 asked me that, I would be reluctant to go along. I
15 mean, isn't this getting a little hard to believe?

16 MR. UNGER: No, I don't think so at all.
17 And when you look at Mr. Spencer's version of the
18 events, it's not implausible at all. I know that the
19 respondent has made that argument, but I don't - - -

20 JUDGE SMITH: Well, what about the part
21 where he just happened to shout out, "Call my parole
22 officer"? Doesn't that sound a little implausible
23 for someone in that situation to be shouting?

24 MR. UNGER: Well, no more implausible than
25 what the prosecution's theory was, that Mr. Spencer

1 was asking where this other fellow Kendu was, and
2 when Officer Palmer says he's not here, you can leave
3 now, he decides to punch him in the face and then
4 pull a gun on him. I mean, that doesn't sound - - -

5 CHIEF JUDGE LIPPMAN: Why wasn't the judge
6 just doing his job during this trial, trying to
7 control the courtroom, make appropriate rulings and
8 do what he's supposed to be doing?

9 MR. UNGER: No, I - - -

10 CHIEF JUDGE LIPPMAN: Why not?

11 MR. UNGER: - - - do not agree with that at
12 all.

13 CHIEF JUDGE LIPPMAN: Why not?

14 MR. UNGER: Because the judge's job was to
15 be impartial, not express in any way or signal to the
16 jury that he had an opinion. Look, this court may
17 not think that the defense was particularly strong.

18 JUDGE SMITH: Did he - - -

19 MR. UNGER: The Appellate - - - I'm sorry.

20 JUDGE SMITH: I'm sorry. I grant you he
21 probably signaled the opinion that he didn't think
22 much of the claim that Palmer was partners with Kendu
23 in drug dealing and was drag racing with him. Is
24 that the same as signaling an opinion on guilt or
25 innocence?

1 MR. UNGER: Yes. It's telling the jury the
2 defense is worthless. By telling the defense
3 attorney repeatedly, do something relevant, Kendu's
4 not on trial here.

5 JUDGE SMITH: Well, I guess maybe you're
6 right, but I think I asked the question ineptly.

7 MR. UNGER: What about - - -

8 JUDGE SMITH: I mean, he excluded the
9 evidence.

10 MR. UNGER: Yes.

11 JUDGE SMITH: Maybe it was error to exclude
12 the evidence; maybe it wasn't. Obviously, in
13 excluding the evidence, he signaled to the jury that
14 he didn't think this evidence was absolutely key.
15 But is there any error - - - any real error,
16 independent of an error, in excluding the evidence?

17 MR. UNGER: Well, there's the antagonism
18 that the trial judge expressed very clearly towards
19 the defense attorneys.

20 JUDGE SMITH: What's the most antagonistic
21 thing he said in the jury's presence?

22 MR. UNGER: We'll speak after trial.

23 JUDGE SMITH: Is that - - -

24 MR. UNGER: And I think that's - - - well,
25 maybe as an attorney I would take that as a much more

1 threatening statement than jurors might, but I think
2 it was pretty clear the judge was very upset with the
3 defense attorney because she persisted, in good
4 faith, in trying to present her defense which the
5 judge had cut her off from doing. And by telling her
6 there'll be consequences, we'll speak after trial, I
7 think a reasonably intelligent jury could figure out,
8 oh, this attorney is doing something wrong, and if
9 she's doing something wrong, maybe because it's her
10 client - - - that her client's guilty.

11 JUDGE SMITH: She was a little persistent,
12 I mean, even if the judge's rulings were wrong, she
13 was a little persistent in trying to get the stuff in
14 - - -

15 MR. UNGER: No doubt - - -

16 JUDGE SMITH: - - - that he had kicked out.

17 MR. UNGER: - - - she was an aggressive
18 counsel and aggressive - - -

19 CHIEF JUDGE LIPPMAN: So why doesn't the
20 judge have the right to control the courtroom in an
21 appropriate way?

22 MR. UNGER: I think what it comes down to
23 here is the judge was wrong. His decision that the
24 defense was irrelevant and was - - -

25 CHIEF JUDGE LIPPMAN: In every instance the

1 judge was wrong?

2 MR. UNGER: In many of his rulings he was.

3 CHIEF JUDGE LIPPMAN: In many of his
4 rulings is different - - -

5 MR. UNGER: And - - -

6 CHIEF JUDGE LIPPMAN: - - - than in all his
7 rulings.

8 MR. UNGER: No, not all.

9 CHIEF JUDGE LIPPMAN: There were some
10 rulings that went against your client.

11 MR. UNGER: Yes.

12 CHIEF JUDGE LIPPMAN: Does that - - -

13 MR. UNGER: And like - - -

14 CHIEF JUDGE LIPPMAN: - - - in and of
15 itself, mean that the judge was wrong on every
16 ruling?

17 MR. UNGER: Of course not. But here - - -

18 JUDGE GRAFFEO: None of this was collateral
19 to the main altercation between the two actors here?

20 MR. UNGER: Not at all, because the
21 essential theory of the defense was that this was a
22 frame-up - - - that the off-duty police officer was
23 accusing Mr. Spencer falsely in order to protect his
24 friend, the drug dealer named Kendu.

25 CHIEF JUDGE LIPPMAN: But didn't you get

1 that - - -

2 MR. UNGER: So there was motive.

3 CHIEF JUDGE LIPPMAN: Didn't you get that
4 message across?

5 MR. UNGER: But not entirely. It didn't -
6 - - it didn't flow effectively, as it should have
7 been allowed to - - -

8 CHIEF JUDGE LIPPMAN: So - - -

9 JUDGE SMITH: The jury heard some of the
10 inadmissible evidence and then the judge struck it.
11 I guess your point is that the jury has to be - - -
12 you have to assume the jury followed the instructions
13 to unlisten to that evidence?

14 MR. UNGER: There's the presumption that
15 they would have had to follow that, so even if it got
16 out there but then was stricken from the record, that
17 presumption keeps them from considering those - - -

18 JUDGE SMITH: So - - -

19 MR. UNGER: - - - facts.

20 JUDGE SMITH: So if he wrongly excluded it,
21 we can't affirm just on the ground oh, they heard it
22 anyway?

23 MR. UNGER: I don't see how.

24 CHIEF JUDGE LIPPMAN: Okay, counselor.

25 MR. UNGER: Thank you.

1 CHIEF JUDGE LIPPMAN: Thank you. You'll
2 have some rebuttal time.

3 Counselor?

4 MS. BRODT: Good a - - -

5 JUDGE CIPARICK: Isn't extrinsic proof that
6 tends to establish a reason to fabricate never
7 collateral?

8 MS. BRODT: Yes, Your Honor. It's never
9 collateral except for one situation where - - - and
10 again, because it's an evidentiary ruling it's
11 subject to abuse of discretion here. It's collateral
12 if the thing it wants to prove, the bias or motive to
13 lie, would not explain the defense, which is the case
14 here. In other words, normally, extrinsic evidence
15 of motive to lie is not collateral, but if that
16 motive to lie would not explain the story that the
17 defendant is telling - - -

18 JUDGE SMITH: Well, his story seemed - - -
19 I mean, you might be skeptical of it, but it's
20 logically consistent. The story is that he's - - -
21 that the victim is best buddies with this guy Kendu,
22 and therefore when Kendu committed a crime, he
23 decided to cover up for Kendu - - - that - - -

24 MS. BRODT: Except - - -

25 JUDGE SMITH: - - - by framing Spencer.

1 MS. BRODT: Except that the easier and
2 better way for a cop to have done that would be to
3 just say, as defendant testified, get out of here, I
4 have this - - -

5 JUDGE PIGOTT: That's a good summation.

6 MS. BRODT: - - - and - - -

7 JUDGE PIGOTT: - - - but the defense - - -

8 JUDGE SMITH: Why isn't that for the jury?

9 JUDGE PIGOTT: The defense opened saying
10 we're going to show that all of this Kendu stuff - -
11 - and no one seemed to be upset with that at the - -
12 - well, until later. But now they put the defendant
13 on the stand who wants to testify to this, and the
14 objection is irrelevant. And I just don't see how
15 you can say it's irrelevant when they open saying,
16 we're going to prove that the reason we're standing
17 here is because this cop was protecting Kendu, and
18 that's what he wanted to testify to.

19 MS. BRODT: Because the statement
20 "irrelevant" may have been overstating what the
21 situation was in this particular case.

22 CHIEF JUDGE LIPPMAN: But time and time
23 again, didn't the judge rule that way?

24 MS. BRODT: The judge gave one ruling,
25 which said up to the point - - - everything else - -

1 - first of all, the judge allowed them to ask of
2 every prosecution witness whether or not it was true
3 and unobjected to except whether or not it was true -
4 - -

5 CHIEF JUDGE LIPPMAN: But - - -

6 MS. BRODT: - - - that Kendu drag raced - -
7 -

8 CHIEF JUDGE LIPPMAN: But what your
9 adversary is arguing is that the totality of those
10 rulings did not allow him to present his defense.

11 MS. BRODT: No, Your Honor, that's not
12 true.

13 CHIEF JUDGE LIPPMAN: And on top of it,
14 that the judge's actions created almost a
15 antagonistic relationship with counsel that the jury
16 couldn't miss, that the judge had certain feelings;
17 why is that not the case? How do you - - -

18 MS. BRODT: If I may answer them
19 separately.

20 CHIEF JUDGE LIPPMAN: Yes, please do.

21 MS. BRODT: I'll answer the latter one
22 first.

23 CHIEF JUDGE LIPPMAN: Okay.

24 MS. BRODT: The latter one is that's
25 actually a distortion of the record. The court was

1 very careful - - - first of all, the court took a
2 long time of counsel flaunting rulings, and more
3 important, asking compound questions that assumed an
4 answer that had not been given - - -

5 CHIEF JUDGE LIPPMAN: Where do you - - -

6 MS. BRODT: - - - on the part of - - -

7 CHIEF JUDGE LIPPMAN: Where do you draw the
8 line between the judge controlling the courtroom and
9 creating a situation that's prejudicial to the
10 defendant?

11 MS. BRODT: It can be a close line, but in
12 this case the court didn't cross it for the following
13 reason. The court - - -

14 CHIEF JUDGE LIPPMAN: Was it a close line
15 here or is it - - -

16 MS. BRODT: It only came close when the
17 court said "for what it's worth".

18 JUDGE PIGOTT: Well, what about - - -

19 MS. BRODT: And in context - - -

20 JUDGE PIGOTT: I apologize for interrupting
21 you again, but when they say that their whole defense
22 is that this was contrived, all right, to protect
23 Kendu, and at the end, when the defendant is on the
24 stand, and he wanted to say that Kendu and he used to
25 be good friends until Kendu got into the Bloods. All

1 right? At that point there was this objection, and
2 the court not only sustained it, he said I don't see
3 any relevancy to this Kendu thing; go on to something
4 else, which I would think the defense lawyer then
5 says well, there goes my whole defense; that's what I
6 was going to have him testify to.

7 MS. BRODT: No, Your Honor, because again,
8 the court may have erroneously said - - - let's
9 assume for a moment that the court is erroneously
10 ruling that it's not at all relevant as opposed to
11 that it's of limited relevance.

12 JUDGE PIGOTT: "I still don't see the
13 relevancy of this Kendu thing" - - -

14 MS. BRODT: Right, I'm saying - - -

15 JUDGE PIGOTT: - - - of this Kendu thing.

16 MS. BRODT: - - - if the court said that,
17 it might have been overstating the irrelevance.

18 JUDGE PIGOTT: But isn't that - - -

19 MS. BRODT: But since - - -

20 JUDGE PIGOTT: - - - what the jury hears,
21 that the Kendu thing doesn't count anymore, that he,
22 the judge, does not believe that there was any
23 fabrication here; this whole Kendu thing is a
24 fabrication.

25 MS. BRODT: No, Your Honor.

1 JUDGE PIGOTT: Move on to something - - -

2 MS. BRODT: No, Your Honor, because - - -

3 JUDGE PIGOTT: "Move onto something
4 relevant," he said.

5 MS. BRODT: Because the court says Kendu is
6 not the one on trial. And while the defense may be
7 saying this is the larger thing that happened here,
8 the court is not signaling to the jury that it
9 doesn't believe defendant's version of events.
10 Defendant himself takes care of that with how
11 implausible that version of events is and how large
12 the conspiracy has to be, roping in, as this court
13 pointed out, neutral witnesses, especially the
14 neighbor who sees it, her fath - - - calls her
15 father, who phones it in and then ducks down, but she
16 sees - - -

17 JUDGE PIGOTT: Yes, that was a good one.
18 But defense counsel asked Palmer if he knew Kendu and
19 the court sustained the People's objection, saying it
20 has got to be legally permissible evidence. What's
21 wrong with asking somebody if they know somebody?

22 MS. BRODT: Again, Your Honor, I believe
23 that was to the way the question was asked because
24 defendant was allowed to ask, at other times, of each
25 witness, including Palmer, whether they knew - - -

1 whether they knew Kendu.

2 JUDGE SMITH: She probably asked it a lot
3 of times - - -

4 MS. BRODT: That was not - - -

5 JUDGE SMITH: - - - a lot of times you
6 might think it was unwise of her to ask it. Of
7 course, every time she was digging a bigger hole for
8 her client - - -

9 JUDGE PIGOTT: That's true.

10 JUDGE SMITH: - - - yeah, yeah, everybody
11 let her go ahead.

12 MS. BRODT: Well - - -

13 JUDGE SMITH: It was only - - -

14 MS. BRODT: Well, but - - -

15 JUDGE SMITH: It was only when she was
16 getting good answers that there were objections that
17 were sustained.

18 MS. BRODT: No, Your Honor, that's not
19 true. She wasn't - - - she was not getting good
20 answers from any prosecution witness.

21 JUDGE SMITH: No, I - - -

22 MS. BRODT: Every prosecution - - -

23 JUDGE SMITH: But wasn't she entitled - - -
24 I guess what I'm really saying is wasn't her client
25 entitled to tell his story? You may say it's a

1 fantastic story, you can tear it apart on summation,
2 but he's entitled to tell it.

3 MS. BRODT: Of course he's entitled to tell
4 it, Your Honor.

5 JUDGE SMITH: Including the part - - -

6 MS. BRODT: And he was entitled to tell it.

7 JUDGE SMITH: Including the part about how
8 Palmer was best buddies with Kendu, he used to drag
9 race with him, Kendu used to sell drugs in his
10 presence.

11 MS. BRODT: Again, Your Honor, if I could
12 get to a two-part answer to that. One of them is,
13 would it have been better if the court allowed that
14 question to be answered? Of course. It would have
15 been much easier; we wouldn't be here. But - - -

16 CHIEF JUDGE LIPPMAN: Would it have been
17 better for the court to allow all this testimony to
18 come in?

19 MS. BRODT: But again - - -

20 CHIEF JUDGE LIPPMAN: Would it? Would it?

21 MS. BRODT: Probably some of it, anyway,
22 maybe not every bit of it, but certainly the court
23 could allow - - -

24 CHIEF JUDGE LIPPMAN: Then the judge made a
25 lot of poor rulings in that case - - -

1 MS. BRODT: I think it - - -

2 CHIEF JUDGE LIPPMAN: - - - because he
3 knocked this out left and right.

4 MS. BRODT: I think it was one ruling, and
5 I think the ultimate - - - when defendant finally got
6 up to testify, and the one ruling had been made
7 already, and defendant - - - and counsel kept trying
8 to ask these questions, counsel points to them as a
9 series of rulings; it's one ruling.

10 JUDGE PIGOTT: I'll give you another one.
11 He wanted to testify that Palmer and Kendu knew each
12 other and were working on cars together. The
13 objection was sustained and the judge says I don't
14 know what case you're trying here.

15 MS. BRODT: Again, Your Honor, I believe it
16 was, in the court's mind, part of the same ruling.
17 It was not the relationship between Palmer and Kendu.

18 JUDGE PIGOTT: It was a continuing ruling
19 like a continuing - - -

20 MS. BRODT: In its - - -

21 JUDGE PIGOTT: - - - objection?

22 MS. BRODT: In its mind, that was relevant.
23 It's a continuing - - - it's like a continuing
24 objection; it's a continuing ruling. It was - - -

25 JUDGE PIGOTT: Would the jury, in

1 witnessing this, get an impression as to whether the
2 judge had an opinion as to how this case was going?

3 MS. BRODT: I think the court was careful,
4 largely, not to signal that. A lot of admonishment
5 was at sidebar, and in fact, consisted of warnings
6 not to pursue it so that he wouldn't have to - - -
7 the court would not have to - - -

8 CHIEF JUDGE LIPPMAN: It was obvious,
9 though, that there wasn't a good relationship between
10 the judge and counsel for the defendant, wasn't it, I
11 mean, by any objective standard?

12 MS. BRODT: I think it was - - -

13 CHIEF JUDGE LIPPMAN: The jury couldn't
14 miss that there was some problem here, whether the
15 judge was totally right and just controlling the
16 courtroom or whether not, that clearly there was - -
17 - that relationship was obvious.

18 MS. BRODT: I think it was clear that the
19 relationship was deteriorating. I think, again, the
20 court has to look at the transcript as it progresses.
21 The court was extraordinarily patient in the
22 beginning, extraordinarily respectful, let counsel
23 have her way - - -

24 CHIEF JUDGE LIPPMAN: So your view is it's
25 just the counselor was a little bit out of control

1 and the judge was doing - - -

2 MS. BRODT: Counsel - - - the counsel was
3 getting more and more out of control and the court
4 was becoming, perhaps, less patient. But the jury's
5 impression would not necessarily have translated to
6 it being about the defense as much as about counsel's
7 persistence. And to incorporate further, just if I
8 may sum up - - -

9 CHIEF JUDGE LIPPMAN: Sure, go ahead.

10 MS. BRODT: - - - the court pointed out
11 that the jury was hearing the theory of the defense.
12 Now, we're not relying on the fact that that defense
13 was ever presented fully, in the sense that she ever
14 got the answer she wanted from any of the other
15 witnesses, but defendants are constantly saying that
16 despite curative instructions you can't unring the
17 bell, you can't unring the bell. If ever there was a
18 case where the jury knew what counsel intended her
19 client to testify to, this was it.

20 JUDGE SMITH: Yeah, but he's right, isn't
21 he, in saying we can't affirm - - - if evidence is
22 erroneously stricken from the record, we can't affirm
23 on the ground - - -

24 MS. BRODT: No - - -

25 JUDGE SMITH: - - - the jury heard it

1 anyway.

2 MS. BRODT: - - - of course not, Your
3 Honor, of course not. But the point I'm making is,
4 it goes somewhat to the harmlessness. Again, this
5 evidence is only relevant if it supports this larger
6 conspiracy theory. Motive to lie, alone, is not what
7 you have to look at; you have to look at motive to
8 tell this lie. And for the officer, his wife,
9 neutral witnesses to have roped in this large
10 conspiracy, all for the purpose of protecting this
11 Kendu, made no sense.

12 CHIEF JUDGE LIPPMAN: Okay, counselor.
13 Thanks, counsel.

14 Counselor, rebuttal?

15 MR. UNGER: Thank you, Your Honor. You
16 know, when - - -

17 CHIEF JUDGE LIPPMAN: Counselor, do you
18 agree this is one ruling?

19 MR. UNGER: No, not at all. This is
20 rulings throughout the trial, from the very beginning
21 to the - - -

22 CHIEF JUDGE LIPPMAN: But it's the same
23 ruling, is what your adversary is saying.

24 MR. UNGER: Well, it's the same defense.
25 It's - - -

1 JUDGE PIGOTT: Well, she got tripped coming
2 out of the starting blocks when that witness - - -
3 the first witness came up and testified about the 911
4 call; don't you agree?

5 MR. UNGER: Well, again, it's up to the
6 jury to determine how much weight to give any of the
7 testimony.

8 JUDGE PIGOTT: What do you - - -

9 MR. UNGER: They may have - - -

10 JUDGE PIGOTT: I'm sorry. I was going to -
11 - - the Appellate Division, of course, ruled on all
12 of this and thought that there ought to be a caution,
13 the judge ought to be a little more careful. But
14 other than that they seemed to be satisfied that - -
15 -

16 MR. UNGER: Well - - -

17 JUDGE PIGOTT: - - - that this conviction
18 should be sustained.

19 MR. UNGER: - - - I certainly don't think
20 that went far enough.

21 JUDGE CIPARICK: Well, the Appellate
22 Division said there was error; they just said that it
23 was harmless error because of the overwhelming
24 evidence.

25 MR. UNGER: Well, the Appellate Division

1 ruled differently with respect to the right to
2 present a defense claim than they did with the judge
3 antagonism claim.

4 JUDGE CIPARICK: Right.

5 MR. UNGER: What I was just going to say,
6 Your Honors - - - look, we know that jurors look up
7 to the trial judge; they have respect for the
8 position and for the judge, him or herself. And when
9 that judge, who is supposed to sit as impartial and
10 with no opinions about the case, repeatedly yells at
11 the defense attorney, yells the word sustained, not
12 just once but four times in succession, tells the
13 attorney what she's asking is irrelevant, you must be
14 in a different courtroom than I am - - - that has an
15 effect on the jury and they start to believe, and I
16 think with some good reason, that the attorney is
17 trying to pull something on them, trying to put
18 something over.

19 JUDGE SMITH: But what is a judge supposed
20 to do when the lawyer is being impossible in front of
21 the jury? Don't you have to yell at him or her a
22 little bit sometimes?

23 MR. UNGER: I wouldn't want to switch
24 places.

25 JUDGE CIPARICK: Not yell.

1 MR. UNGER: With all due respect, I think I
2 don't expect a judge to be a robot and put up with
3 insults and - - -

4 CHIEF JUDGE LIPPMAN: You think that - - -
5 your bottom line is, you think the judge crossed a
6 line here?

7 MR. UNGER: I do.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. UNGER: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you both.
11 Appreciate it.

12 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Andrew Spencer, No. 223 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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