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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 117

ANNER RIVERA,

Respondent.

20 Eagle Street
Albany, New York 12207
May 08, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 117?

2 Counselor?

3 MR. KOELSCH: May I reserve two minutes for
4 rebuttal time, Your Honor?

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
6 go ahead.

7 MR. KOELSCH: Thank you very much. May it
8 please the court, Adam Koelsch on behalf of the
9 appellant in this People's appeal.

10 Any error in the trial court's robing room
11 discussion with Juror number 11, did not constitute a
12 mode of proceedings error.

13 Specifically, any violation of the
14 defendant's right to be present here was de minimis,
15 and therefore did not constitute reversible error,
16 because the court was essentially repeating an
17 instruction that it had already given in court, in
18 the defendant's presence - - -

19 JUDGE SMITH: Was it even doing that? I -
20 - - I thought you might argue that all the - - - all
21 the judge said in substance was I can't tell you
22 anything?

23 MR. KOELSCH: And - - - and that would be
24 the next thing that I would say here is, not only is
25 it a repetition but it was a noninstruction. The

1 court said this is a - - - an issue which you, as
2 jurors, are going to have to resolve for yourselves.
3 I can't give you any more guidance.

4 JUDGE READ: How did this happen. I mean -
5 - - I guess the attorneys, everybody agreed that he
6 could - - - did they think that the juror had a
7 personal problem or something that he was going to
8 talk to the judge about?

9 MR. KOELSCH: It's not exactly clear from
10 the record. But the record is - - - is consistent
11 with this maybe being a scheduling problem. You
12 know, the juror isn't going to be able to come in at
13 10 o'clock tomorrow morning, because of child care or
14 - - -

15 JUDGE READ: Because the attorneys - - -
16 the attorneys knew about this and they were copacetic
17 with it, right?

18 MR. KOELSCH: Yes. This was done on
19 consent of - - - of both of the attorneys.

20 CHIEF JUDGE LIPPMAN: It wasn't such a
21 great idea, though, for the judge to talk to him in
22 this way, was it?

23 MR. KOELSCH: Well, again, it would depend
24 on what - - - what he thought the question was going
25 to be. I mean, there - - - there's - - - it's

1 consistent with the record here that the judge was
2 essentially blindsided by this request for a legal
3 instruction. And then the judge is left - - -

4 CHIEF JUDGE LIPPMAN: So, in answer to
5 Judge Read's question, they anticipated maybe it
6 would be more ministerial or something?

7 MR. KOELSCH: I - - - I think that that's
8 consistent with the record. And so the court here
9 was left with a split-second decision that it needed
10 to make about how to respond to this question. And
11 the court's instincts were in the right direction,
12 because - - -

13 JUDGE RIVERA: Okay. Okay, so yes, let's -
14 - - let me stay what that - - - because I want to get
15 back to something else you said.

16 MR. KOELSCH: Sure.

17 JUDGE RIVERA: Okay. So I - - - I'm
18 willing to, for a moment, assume that you're right,
19 that it's a split-second decision in the first
20 response. But there seems to be more than only one
21 response. I mean, this is a back-and-forth. Don't
22 you agree?

23 MR. KOELSCH: Well, I - - - it's - - - I
24 don't think it's really a back-and-forth. And - - -

25 JUDGE RIVERA: You don't?

1 MR. KOELSCH: No. I think what the court
2 says - - -

3 JUDGE RIVERA: Well, I'm sorry. Well, then
4 why - - - why is it after Juror number 11 asks the
5 question, says, "This is the big issue with some of
6 us," and the court goes on, "That's understandable,
7 but I can't, there's no legal definition other than
8 what I've given you," goes on and on and on. The
9 juror then says, "Well, it's like the facts say both
10 - - - say both more or less one or the other," on and
11 on. And the court comes back and responds.

12 I don't - - - that doesn't sound to me like
13 one split-second decision. This sounds to me like an
14 engaged conversation back and forth. Should not the
15 judge have stopped?

16 Perhaps, we'll grant you the one response.
17 But when the juror comes back, why continue to
18 respond?

19 MR. KOELSCH: Well, again, I think this is
20 - - - if you look at what the judge is saying here -
21 - -

22 JUDGE RIVERA: Um-hum.

23 MR. KOELSCH: - - - this is just a splicing
24 of the instruction that it had given before. And it
25 was saying essentially the same thing.

1 If you look, as it continues, he's saying,
2 listen, there's no more I can say to you. He starts
3 off by saying, that, you know - - -

4 JUDGE RIVERA: But he keeps talking a lot
5 for someone who says I can't say much more to you.

6 MR. KOELSCH: Oh, I think this - - - this
7 occupies the space of less than two pages, and also
8 there is a ministerial part at the end where it says,
9 "Is tomorrow the last day we're going to have to make
10 a decision?" And the court says, "I can't tell you
11 that."

12 JUDGE PIGOTT: Mr. Koelsch?

13 MR. KOELSCH: Yes.

14 JUDGE PIGOTT: I see your point, but should
15 - - - should there be a rule that jurors should not
16 be meeting with the judge without anyone else in the
17 room in - - - in the robing room? I mean, just a
18 blanket this should not occur, whether it's with
19 consent or not?

20 MR. KOELSCH: Well, I think it is in the
21 mode of proceedings errors context, which is what we
22 have here, the court has rejected that sort of
23 categorical blanket approach to mode of proceedings -
24 - -

25 JUDGE PIGOTT: So you should - - - so you

1 would say that it's okay for a - - - for a juror to
2 meet alone with a judge in chambers, if the - - - if
3 counsel consent?

4 MR. KOELSCH: Well, no, I - - - I certainly
5 wouldn't be saying that. I mean, there are mis - - -

6 JUDGE PIGOTT: So you'd say it's wrong.

7 MR. KOELSCH: - - - there are ministerial -
8 - -

9 JUDGE PIGOTT: Would you then say it's
10 wrong to - - -

11 MR. KOELSCH: No, I'd say it depends on the
12 circumstances.

13 JUDGE PIGOTT: Does it depend on the judge?
14 Because there are some judges that do things that
15 other judges would never dream of doing. And, you
16 know, if we're trying to get a - - - you know, kind
17 of get a base here - - -

18 MR. KOELSCH: Well, I think - - -

19 CHIEF JUDGE LIPPMAN: It's a bad practice,
20 isn't it, counsel?

21 MR. KOELSCH: It is. And - - -

22 CHIEF JUDGE LIPPMAN: This isn't the most
23 brilliant idea in the world?

24 MR. KOELSCH: We're certainly not saying
25 that it wouldn't have been better if they'd just

1 followed the O'Rama protocol.

2 CHIEF JUDGE LIPPMAN: And for everyone to
3 agree to it, and for the judge to do it?

4 MR. KOELSCH: I - - - you're right, Your
5 Honor. Of course we're not saying that it wouldn't
6 be the better practice if we - - - they - - -

7 JUDGE GRAFFEO: How did this juror come to
8 the judge's attention?

9 MR. KOELSCH: Well, according to the
10 record, it was the attorneys who actually said - - -

11 JUDGE GRAFFEO: What were the attorneys
12 doing talking to the juror? Does the record tell us
13 that?

14 MR. KOELSCH: I - - - we don't. But there
15 is - - - it could be that there was a juror that was
16 signaling something.

17 JUDGE GRAFFEO: I mean, this wasn't a juror
18 note that came out - - -

19 MR. KOELSCH: No, this was - - -

20 JUDGE GRAFFEO: - - - I'd like to talk to
21 you?

22 MR. KOELSCH: - - - this wasn't a juror
23 note. No.

24 JUDGE GRAFFEO: So, I mean, it's kind of
25 questionable how this whole thing evolved, I think.

1 MR. KOELSCH: Well, I - - - again, Your
2 Honor, I can't say how, but - - - and we're not even
3 sure which attorney brought this to the court's
4 attention, or both attorneys. We don't know. But
5 again, this - - - it may be the better practice that
6 all of this take place in the courtroom, that this
7 comply with 310.30. And some judges make large
8 substantive violations on the basis of calculated
9 decisions that are wrong.

10 And sometimes judges slip up. And that's
11 what happened here.

12 CHIEF JUDGE LIPPMAN: Yeah, but this is a
13 pretty - - - pretty serious slip-up. I mean, this -
14 - -

15 MR. KOELSCH: No, I think we - - - no, I
16 think - - -

17 CHIEF JUDGE LIPPMAN: No? This is - - -
18 this is - - -

19 MR. KOELSCH: No, again, because it's
20 consistent with the judge being blindsided. It's
21 essentially a noninstruction. And then you have the
22 cure to - - -

23 CHIEF JUDGE LIPPMAN: If the lawyer hadn't
24 know about it or agreed to it, then what would it be?

25 MR. KOELSCH: Well, I think we're - - -

1 we're still - - - our position is, is that it's still
2 a de minimis error and it's - - -

3 CHIEF JUDGE LIPPMAN: Even if the judge - -
4 -

5 MR. KOELSCH: - - - nonreversible - - -

6 CHIEF JUDGE LIPPMAN: - - - just did it and
7 the lawyer didn't - - - and what if the lawyer didn't
8 know about it, if the lawyer objected and said what?
9 You can't do that?

10 MR. KOELSCH: Well, then - - -

11 CHIEF JUDGE LIPPMAN: I need - - - I need -
12 - - you know, the defendant has to be present.

13 MR. KOELSCH: Well, if - - - if it was - -
14 - if it was an objection, Your Honor, certainly we
15 wouldn't be here on mode of proceedings grounds. But
16 - - -

17 CHIEF JUDGE LIPPMAN: And - - - and what if
18 the lawyer just didn't know and - - - and this
19 happened. Not mode of proceedings?

20 MR. KOELSCH: I still think - - -

21 CHIEF JUDGE LIPPMAN: You think it's just
22 de minimis on an issue like this?

23 MR. KOELSCH: Because it's de minimis.
24 Yes, Your Honor.

25 CHIEF JUDGE LIPPMAN: Even more so if you

1 don't know what he's going to ask?

2 JUDGE SMITH: Well - - -

3 JUDGE RIVERA: Did - - - did he repeat any
4 of what he said to Juror 11 to the other jurors?

5 MR. KOELSCH: You mean after - - - after -
6 - -

7 JUDGE RIVERA: Correct, correct. I'm
8 sorry. Yes, correct.

9 MR. KOELSCH: No, Your Honor. No, Your
10 Honor. There's nothing in the record about that.

11 JUDGE PIGOTT: But he did transcribe it.
12 He had a stenographer there.

13 JUDGE READ: He had a stenographer, yeah.

14 MR. KOELSCH: I'm sorry, to the other - - -
15 to the other jurors, I think she was asking me.

16 JUDGE PIGOTT: He had a stenographer in the
17 robing room when he was talking to the juror?

18 MR. KOELSCH: Correct. Correct. He did.

19 JUDGE SMITH: And he told - - - and he told
20 both the defendant and counsel that the transcript
21 was available?

22 MR. KOELSCH: Yes. Not only was there a -
23 - - a summary which was a substantive summarization
24 of what had occurred, but he twice offered to defense
25 counsel a verbatim read-back of what had happened.

1 JUDGE RIVERA: But although he - - - in the
2 - - - in the discussion in his robing room with Juror
3 11, is saying that all of you have to work it out,
4 he's clearly referring to the jurors as a corps. He
5 does not - - - I just want to be clear - - - he does
6 not subsequently inform the other jurors of this
7 instruction, this supplemental - - - supplemental
8 instruction that he's given to Juror 11 - - - he
9 doesn't inform all the rest of them of this
10 instruction?

11 MR. KOELSCH: No, but - - - well, in the
12 sense that the entire jury panel had already been
13 given this instruction prior - - -

14 JUDGE RIVERA: Well, so had - - - well,
15 including Juror 11?

16 MR. KOELSCH: Correct.

17 JUDGE RIVERA: He's told Juror 11?

18 MR. KOELSCH: Correct. Correct.

19 JUDGE SMITH: Would it - - - would it have
20 been more prudent, or would it have cured the error,
21 if there was an error, if he had called all the
22 jurors back, in the presence of the defendant,
23 present of - - - presence of counsel, and said,
24 ladies and gentlemen, just so you're all hearing the
25 same thing, I'm going to read you a conversation I

1 just had with Juror 11? Would that - - - would that
2 have cured any problem?

3 MR. KOELSCH: If the entire jury panel had
4 been - - -

5 JUDGE SMITH: Yes.

6 MR. KOELSCH: - - - brought back? I - - -
7 I think that would be just as good a cure, yes. Yes.

8 JUDGE READ: But you - - - your position is
9 it was cured here by what actions?

10 MR. KOELSCH: Well, it was cured here, and
11 there has to be a distinction here between the
12 violation of the defendant's right to be present and
13 the 310.30 notice violation. With the right to be
14 present, we're not talking just about the cure, we're
15 talking about the error itself. But the cure is the
16 court came back out; it told the defendant and the
17 defense attorney exactly what happened in the robing
18 room, and then it said twice to defense counsel, you
19 want to hear a verbatim read-back? You're welcome to
20 it. And at that point, the jury deliberation - - -

21 CHIEF JUDGE LIPPMAN: So if there was any
22 problem, he - - - he took care of it?

23 MR. KOELSCH: I'm sorry?

24 CHIEF JUDGE LIPPMAN: If there was any
25 problem, he took care of it when he said that, right?

1 MR. KOELSCH: Yes. Because - - -

2 JUDGE SMITH: You're saying any O'Rama
3 problem was cured. As to Mehmedi, you're really
4 saying there was no - - - it was de minimis.

5 JUDGE READ: Right.

6 MR. KOELSCH: Correct. Correct.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. KOELSCH: And - - -

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. KOELSCH: Thank you, Your Honors.

11 CHIEF JUDGE LIPPMAN: You'll have rebuttal.

12 Let's hear from your adversary first.

13 MS. WHOOLEY: May it please the court, my
14 name is Kathleen Whooley, and I represent the
15 defendant-respondent, Anner Rivera.

16 Your Honor - - -

17 CHIEF JUDGE LIPPMAN: Counselor, what's
18 more than - - - your adversary talks about this being
19 de minimis. Why is it not de minimis? What's - - -
20 what's of vital importance to the fairness of the
21 proceeding to the defendant?

22 MS. WHOOLEY: Absolutely. This court has
23 recognized two types of conversations: ministerial
24 conversations and substantive conversations. The
25 People concede this was a substantive conversation.

1 The fact that it was similar to - - -

2 JUDGE SMITH: Are you saying that no
3 substantive conversation can ever be de minimis?

4 MS. WHOOLEY: Absolutely. The - - - you
5 have to go back to 1882 to Bragle, to find an example
6 of this court - - -

7 JUDGE SMITH: Well, but seem to approve of
8 Bragle in - - - in what's it called - - - Morales.

9 MS. WHOOLEY: Morales? In Morales, you
10 mention the concept hypothetically in a footnote,
11 without any reference to what specifically such an
12 error would look like. But in Bragle, the only case
13 in which this court has actually found a violation of
14 the right to be present at a core proceeding de
15 minimis, you specifically distinguished the error in
16 that case from this very error. You specifically
17 said in Bragle that the defendant's absence from
18 additional instructions to the deliberating juror
19 would not be de minimis. This - - -

20 JUDGE READ: Does it make any difference
21 that - - - as somebody said, that the judge may have
22 been blindsided, he may not have expected to have
23 been asked - - -

24 MS. WHOOLEY: No, it makes - - -

25 JUDGE READ: - - - substantive - - -

1 MS. WHOOLEY: - - - no difference. The
2 only noninstruction that the court should have given
3 is, I'm sorry, we cannot discuss this in private.
4 The court - - -

5 JUDGE SMITH: Isn't - - - isn't that pretty
6 close to what he said?

7 MS. WHOOLEY: No, he did not. He said that
8 this is a question - - -

9 JUDGE SMITH: He said I can't tell you
10 anything.

11 MS. WHOOLEY: He said - - - but then he
12 went on. He said this is a question of fact. You
13 have to continue deliberating. This court found in
14 People v. Torres, that instructions to a jury at an
15 impasse to continue deliberating is non-ministerial -
16 - -

17 CHIEF JUDGE LIPPMAN: What about - - -

18 MS. WHOOLEY: - - - and - - -

19 CHIEF JUDGE LIPPMAN: - - - the fact that
20 he had a reporter? Was that of any significance?

21 MS. WHOOLEY: No. Because the defendant -
22 - -

23 CHIEF JUDGE LIPPMAN: Did that help in
24 terms of curing this thing?

25 MS. WHOOLEY: No, not at all. Because the

1 defendant had a right to witness the proceedings
2 himself.

3 JUDGE ABDUS-SALAAM: Would it have been
4 cured, counsel, if the next day - - - because
5 apparently the other jurors had already left by now.
6 It seemed like the end of the day.

7 MS. WHOOLEY: It appears so, yes. It was
8 at the end of the day.

9 JUDGE ABDUS-SALAAM: So if the next
10 morning, before the jury began deliberating, the
11 court had put everybody in the box with the defendant
12 and counsel there and said this is what happened with
13 Juror number 11 last night, and I'm telling you
14 again, what I told her before, would that have been a
15 cure, in your - - - in your - - -

16 MS. WHOOLEY: No. It certainly would have
17 been better with respect to the fact that courts
18 should not be speaking to jurors alone. That's an
19 additional error. But it would not have cured the
20 defendant's absence. And it would not have cured the
21 lack of notice.

22 JUDGE PIGOTT: So - - -

23 JUDGE SMITH: So you're - - - is the
24 defendant's absence absolutely incurable? Once - - -
25 something has hap - - - once something material has

1 happened in the defendant's absence, you might as
2 well just declare a mistrial and take the rest of the
3 day off?

4 MS. WHOOLEY: Well, absolutely, the
5 defendant should be offered a mistrial. If the
6 defendant doesn't want a mistrial, the defendant is
7 free to waive his Constitutional right. But that
8 right - - - that waiver has - - -

9 JUDGE SMITH: But he can't - - - he can't -
10 - -

11 MS. WHOOLEY: - - - to meet - - -

12 JUDGE SMITH: - - - so he can't consent - -
13 - he can't say go ahead and do it, and then the judge
14 comes back and said, now you just told me to do that,
15 but I know that you can play gotcha, so I'm now
16 asking you if you want to take that back and move for
17 a mistrial, and he says no, I don't want a mistrial.
18 Then it's okay?

19 MS. WHOOLEY: No, no, no. I'm not saying
20 the defendant couldn't waive that right in advance of
21 the conversation. But that didn't happen here. All
22 we know is that defense counsel - - -

23 JUDGE SMITH: Well, when he says go ahead
24 and do it, you don't think implicit in that is that
25 I'm not going to move for a mistrial on that ground?

1 MS. WHOOLEY: That's defense counsel. This
2 right is personal to the defendant.

3 JUDGE SMITH: I see. So - - - I see.

4 MS. WHOOLEY: And it's also - - -

5 JUDGE SMITH: So if the defend - - - the
6 defendant could have consented?

7 MS. WHOOLEY: Absolutely. But in that
8 case, it would have to be a Constitutional waiver.
9 It would have to be knowing, intelligent, and
10 voluntary. And it's the Court's obligation to ensure
11 that it appears on the face of the record. A silent
12 record cannot overcome the presumption against
13 waiver.

14 JUDGE PIGOTT: So - - -

15 JUDGE READ: And the - - - and the attorney
16 had no obligation to object or to say I want to look
17 at the transcript or to say, gee, Judge, this was - -
18 - this was not what you should have done and I - - -
19 I object to this?

20 MS. WHOOLEY: No, absolutely not. Because
21 the right to be present is personal to the defendant,
22 and whether defense counsel consents, whether defense
23 counsel fails to object - - -

24 JUDGE READ: So it's not curable, you're
25 saying?

1 MS. WHOOLEY: It's only curable by a
2 Constitutionally sound waiver that appears on the
3 record.

4 JUDGE SMITH: So if you had - - - if you
5 had been the defense counsel in this case, and a
6 judge has said can I do this, and the defendant isn't
7 there, you'd be saying to yourself, this is a dream
8 come true. I'm - - - I've got an automatic reversal.
9 And you say, go ahead, Judge, be my guest.

10 MS. WHOOLEY: Well, that's exactly what
11 happened in Cain. In Cain, there - - - you had a
12 robing room colloquy with a single juror. But in
13 that case, defense counsel was present. Defense
14 counsel participated in the conversation. That's
15 better than what happened here, where defense counsel
16 only got an after-the-fact read-back.

17 JUDGE SMITH: Well, but the point I'm
18 making really is, I guess, it's the problem with all
19 mode of proceedings error, I admit, but the more you
20 recognize the mode of proceedings error, the more you
21 invite it. You - - - you're letting - - - you're
22 giving sophisticated defense counsel, really, a
23 chance to entrap the judge.

24 You can say, Judge, I got a great idea, go
25 have a private conference with a juror.

1 MS. WHOOLEY: Well, the judge should know.
2 And Your Honors' decision in this case should be a
3 very clear warning to the courts, never, never do
4 this. This is bad practice.

5 JUDGE SMITH: Because you never - - - never
6 trust the defense lawyer, because he might know
7 something you don't know.

8 MS. WHOOLEY: Well, no. Never speak to a
9 juror in the absence of the defendant, or for that
10 matter, in the absence of the rest of the jury.

11 JUDGE ABDUS-SALAAM: Would you say,
12 counsel, for example, what if - - - what if, as
13 someone said here, the notion was, maybe this was a
14 scheduling issue and they just wanted to do it - - -

15 MS. WHOOLEY: Sure.

16 JUDGE ABDUS-SALAAM: - - - ministerially.
17 But as soon as the judge finds out it's not a
18 scheduling issue, is it too late, because he's
19 already started the conversation - - -

20 MS. WHOOLEY: No, no, no.

21 JUDGE ABDUS-SALAAM: - - - with the juror?

22 MS. WHOOLEY: The question being asked,
23 that doesn't create the error. If they were talking
24 about scheduling, and then all of a sudden the juror
25 says, you know, Your Honor, when can the defendant be

1 deemed responsible, which is what the juror said here
2 - - - when can the defendant be deemed responsible.
3 The court must say something to the effect of, I'm
4 sorry, we can't discuss this in private. That's it.
5 And then the juror has - - -

6 JUDGE PIGOTT: I think that's still error.
7 Don't you?

8 MS. WHOOLEY: No, I don't think that the
9 court has control of the words that come out of the
10 juror's mouth. But the court certainly has control -
11 - -

12 JUDGE PIGOTT: But - - - but that - - -

13 MS. WHOOLEY: - - - over his response.

14 JUDGE ABDUS-SALAAM: Wouldn't you say that
15 the judge has to just stop talking and not give any
16 explanation, because anything he says might be a mode
17 of proceedings error, and that - - - then the judge
18 would just leave the room with the reporter, go out,
19 talk to the defense counsel, and say there's a
20 substantive question, and I'm going to bring the
21 juror out. Where's the defendant? And then carry it
22 on in open court?

23 MS. WHOOLEY: Sure. In an abundance of
24 caution, if the court said absolutely nothing, I
25 think that's appropriate. I also think it's - - -

1 would be appropriate for the judge to say, I'm sorry,
2 we can't discuss this, and then go and speak - - -

3 JUDGE PIGOTT: Isn't that error?

4 MS. WHOOLEY: - - - to counsel. I'm sorry?

5 JUDGE PIGOTT: Why isn't that error? I
6 mean, he's - - -

7 MS. WHOOLEY: To say, I'm sorry, we can't
8 discuss this?

9 JUDGE PIGOTT: I'm sorry. Go ahead.

10 MS. WHOOLEY: Because I don't believe
11 that's an instruction on the law. That's - - -
12 that's simply saying that we - - -

13 JUDGE PIGOTT: But why are we going to be
14 in that, you know, in that sword point over that? I
15 mean, you say it's not instruction, I say it is.

16 MS. WHOOLEY: Well, then - - - then in that
17 case, then the court should simply stand up and - - -

18 JUDGE SMITH: So it is an instruction.

19 MS. WHOOLEY: - - - and - - -

20 JUDGE SMITH: We can't discuss this. Why
21 can't you discuss it? Because the law says he can't.
22 That's the only reason, right?

23 MS. WHOOLEY: Well, then - - - then the
24 court should simply, without speaking, get up and
25 leave the room. The point is that - - -

1 JUDGE PIGOTT: But it's his room.

2 MS. WHOOLEY: Certainly. Then - - -

3 JUDGE SMITH: He can say guard, remove this
4 man?

5 MS. WHOOLEY: That could happen, too.
6 However it comes about, there should be no
7 substantive discussion in the defendant's absence.
8 This is a critical point in the trial, and the
9 defendant's rights should be carefully safeguarded.

10 Your Honors have repeatedly recognized that
11 this is the point of the trial most likely to
12 determine the outcome of the case, whether a verdict
13 is reached at all, and if so, what that verdict is.
14 The court should be extremely cautious.

15 And as you discussed with my adversary,
16 this is a bad practice. It sets a bad precedent.
17 And a bright line rule here is not only necessary,
18 it's possible.

19 JUDGE PIGOTT: What is it? What is it?

20 MS. WHOOLEY: A court should never speak to
21 a deliberating juror about substantive factual or
22 legal issues - - -

23 JUDGE PIGOTT: I think you've got to be
24 tougher than that, because as Judge Abdus-Salaam - -
25 - or - - - I mean, if a juror says, I've got a

1 serious problem, and I'm not broadcasting it to the
2 court, I'm not broadcasting it to my colleagues on
3 the jury. I want to talk to the judge. And it may
4 be something serious, and personal that can't - - -
5 that can't be.

6 It would seem to me, if she does that, it's
7 a mistrial, because now she's alone in chambers with
8 the judge.

9 MS. WHOOLEY: Absolutely. I believe that
10 the judge - - -

11 JUDGE PIGOTT: You agree with me on that?

12 MS. WHOOLEY: Yeah - - - well, I believe
13 that - - -

14 JUDGE PIGOTT: But it happens to that
15 juror.

16 MS. WHOOLEY: I believe that the court, in
17 an abundance of caution, should make it explicit
18 before going into that room, get a note, hear from
19 the court officer, what are we speaking about. Is
20 this scheduling or - - -

21 JUDGE PIGOTT: No, she's saying, I've got a
22 serious personal problem that I need to talk to
23 someone about. And I - - - and I'm not talking in
24 open court and I'm not talking among my fellow
25 jurors.

1 JUDGE SMITH: And I won't tell anyone
2 except the judge what the problem is.

3 MS. WHOOLEY: I think that it would be
4 appropriate to go into the room, and if the - - - if
5 the juror said I'm having a medical or personal
6 medical issue - - -

7 JUDGE PIGOTT: Why isn't that - - - why
8 isn't that a mistrial? I mean, we don't know.

9 MS. WHOOLEY: Because this court has held
10 that those sorts of conversations are ministerial.
11 The juror's health, that's ministerial. That's not
12 substantive.

13 JUDGE PIGOTT: You're saying - - - you're
14 saying there's some judgment on the part of the
15 court. And if - - - and if the - - - and if she
16 blurts something out or he blurts something out or
17 says something, then the mistrial happens?

18 MS. WHOOLEY: Well, then the conversation
19 has to end.

20 JUDGE PIGOTT: Well, no, it's already a
21 mistrial, because it - - - because he or she has
22 said, by the way, this guy's guilty as sin, so I
23 don't think I'm going to be here too much longer
24 starting tomorrow morning, and I think I can go to a
25 doctor if you let me out by 11.

1 MS. WHOOLEY: If the court doesn't respond,
2 if the court then goes and tells the attorneys and
3 the defendant what was said - - -

4 JUDGE PIGOTT: But he goes out and he tells
5 the attorneys and the defendant and said by the way,
6 the guy just told me that they're - - - they're close
7 to a guilty verdict and - - - and we'll be over here
8 by 11. I just want to let everybody know, do you
9 think somebody might want to - - -

10 MS. WHOOLEY: My position - - -

11 JUDGE PIGOTT: - - - take some action on
12 that?

13 MS. WHOOLEY: Well, my position is, the
14 juror blurting that out, if the court says nothing,
15 that's like receiving a note that this - - - that
16 this juror has sent. As long as there's no response
17 from the court - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 MS. WHOOLEY: Thank you.

20 CHIEF JUDGE LIPPMAN: We understand your
21 position. Thank you.

22 Counselor, any rebuttal?

23 MR. KOELSCH: I - - - yes, Your Honor.
24 Very quickly, because I know the court is going to be
25 looking to fashion a rule here. And so I want to

1 point - - -

2 CHIEF JUDGE LIPPMAN: So what's the rule?

3 MR. KOELSCH: So I think whatever that rule
4 is - - -

5 CHIEF JUDGE LIPPMAN: Your adversary says
6 never do this - - -

7 MR. KOELSCH: And - - -

8 CHIEF JUDGE LIPPMAN: - - - never say
9 anything to the juror. Why isn't that the rule?

10 MR. KOELSCH: And I'll say that that
11 shouldn't be the rule for - - - for two good reasons.

12 CHIEF JUDGE LIPPMAN: Why?

13 MR. KOELSCH: And these are the two
14 guidelines that this court should look at and it's
15 ones that they've talked about before.

16 It's generally mistrials are a drastic
17 remedy. And if there's a slip-up, it's going to be
18 curtains for you. That's what you'd be telling the
19 court if you made something as minimal as this a
20 mistrial after, say, a three-month-long trial. And
21 you want to encourage courts to cure violations to
22 the extent that they possibly can.

23 And secondly, it's - - - it's - - - and I
24 think you touched on this before. We have to look at
25 this through the lens of - - - of Autry. And it's -

1 - - the rule there is if the defense attorney has an
2 opportunity to object, and there's a reasonable
3 tactical decision that a reasonable attorney would be
4 able to make to just step back and not object to
5 that, as opposed to just inadvertence or not knowing
6 that an error had occurred, that's not a mode of
7 proceedings error.

8 JUDGE SMITH: Well, that - - -

9 MR. KOELSCH: Why?

10 JUDGE SMITH: - - - that - - - yeah, I - -
11 - that appeals to me. But aren't we going to have
12 overrule ten or twelve cases to go that far?

13 MR. KOELSCH: Well, no. I mean, certainly
14 this is a guiding principle that this court has used
15 to identify certain mode of proceedings errors. I'm
16 not saying mode of proceedings error - - -

17 JUDGE SMITH: And - - -

18 MR. KOELSCH: - - - case law is very clear.

19 JUDGE SMITH: - - - in Mehmedi, in O'Rama,
20 in Ahmed, in all those cases, a reasonable lawyer
21 probably could have done exactly what the lawyers
22 there did.

23 MR. KOELSCH: Right.

24 JUDGE SMITH: But we found mode of
25 proceedings error.

1 MR. KOELSCH: In a lot of those cases,
2 there's - - - there's - - - there may be reason to
3 believe that it's inadvertent, or they didn't know
4 that an error had occurred in the first place. But
5 when it's plain as day and he - - - he knows an error
6 has occurred, and there's a reason for him to just
7 sit on his hands, we don't want to create an
8 opportunity for gamesmanship here on behalf of the
9 defense.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. KOELSCH: Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you both.

13 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anner Rivera, No. 117 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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