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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 17

CHRISTOPHER A. NICHOLSON,

Appellant.

(Papers sealed)

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20 Eagle Street  
Albany, New York 12207  
January 13, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

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1 JUDGE PIGOTT: Case number 17, People v.  
2 Christopher Nicholson.

3 Ms. Davison, good morning.

4 MS. DAVISON: Good morning. May it please  
5 the court. Mary Davison for the appellant. May I  
6 have two minutes, please, Judge Pigott?

7 JUDGE PIGOTT: Two? Sure.

8 MS. DAVISON: Your Honors, this case  
9 presents the court with two issues of pure law. The  
10 first is whether Supreme Court erred in its role as  
11 gatekeeper for admitting rebuttal testimony by  
12 allowing testimony of the People's rebuttal witness  
13 with respect to a very narrow scope that is  
14 specifically whether the defense witness was  
15 untruthful when she testified that she maintained a  
16 relationship with Mr. Nicholson, a friendship-based  
17 relationship with Mr. Nicholson, between 2003 and  
18 2008.

19 The second pure question of law is whether  
20 the majority at the Appellate Division committed a  
21 Concepcion/LaFontaine error when it drew what it  
22 referred to as a permissive inference that it could -  
23 - - it would allow that testimony because it went to  
24 the issue of bias or motive to fabricate which, as  
25 the court is aware, is never collateral.

1           JUDGE STEIN: Well, on that score, would  
2 you agree that the trial court made a finding by - -  
3 - by not sustaining the objection to this testimony,  
4 the rebuttal testimony, that in fact it was relevant  
5 and not collateral?

6           MS. DAVISON: Which one, I guess is the - -  
7 - the question in response. There were two  
8 objections lodged. One was that it was not relevant  
9 - - - pardon me. One was that it was not relevant;  
10 it was not relevant. One was that it was collateral;  
11 it was collateral. And so - - -

12           JUDGE STEIN: Well, but the trial court  
13 found otherwise. The trial court found that it was  
14 relevant and it was not collateral. Otherwise it  
15 wouldn't have admitted this - - - this testimony,  
16 correct?

17           MS. DAVISON: We're - - - I think we're  
18 limited by the record, Judge Stein. The trial court  
19 found, regarding that limited testimony, it's proper  
20 rebuttal.

21           JUDGE STEIN: Right, so in finding that it  
22 was proper rebuttal, it must - - - it necessarily  
23 found that it was relevant and not collateral. That  
24 - - - that's what I'm asking. It didn't - - - it  
25 didn't articulate that, but - - - but then again,

1 trial courts don't always articulate their - - -  
2 their reasoning for - - - for making a ruling. So  
3 why then would the - - - would the Appellate  
4 Division, explaining why that was a proper ruling, be  
5 committing a LaFontaine/Concepcion - - -

6 MS. DAVISON: I think you have to start  
7 with the - - -

8 JUDGE STEIN: - - - error?

9 MS. DAVISON: - - - premise that Supreme  
10 Court erred in finding that it was not collateral.  
11 It was collateral. It - - - by the very language of  
12 its - - - of its ruling, at the trial court level, it  
13 limited the scope of that rebuttal testimony to - - -

14 JUDGE STEIN: But that's your first - - -

15 MS. DAVISON: - - - iss - - -

16 JUDGE STEIN: I'm sorry; that's your first  
17 issue.

18 MS. DAVISON: Yes.

19 JUDGE STEIN: I'm talking about the  
20 LaFontaine/Concepcion question, and - - - and - - -  
21 and whether it's in fact a different basis or whether  
22 it's the same basis. The Appellate Division agreed  
23 with the trial court that it was relevant and not  
24 collateral, and - - - and didn't make some other  
25 finding.

1 MS. DAVISON: Respectfully, Judge Stein, I  
2 think the question infers the Supreme Court was  
3 correct in its ruling, and it was not. I - - - I  
4 think the Appellate Division committed the LaFontaine  
5 error because it tried to salvage an incorrect  
6 evidentiary ruling by substituting in the - - - what  
7 would have been a permissible basis, which was mo - -  
8 - bias or motive to fabricate.

9 JUDGE ABDUS-SALAAM: Isn't - - - isn't  
10 Judge Stein correct that if there is no articulation  
11 by the court, then - - - express articulation, you  
12 can look at the record, as you indicated, counsel,  
13 and see that the - - - the trial court inferred, from  
14 the arguments made on whether this rebuttal testimony  
15 should be allowed, that it was relevant and not  
16 collateral. Particularly when the prosecutor said, I  
17 - - - I'm going to cross-examine on, you know, this  
18 relationship, or whatever she said regarding that.

19 MS. DAVISON: Well, what she said was very  
20 - - - was a very specific - - -

21 JUDGE ABDUS-SALAAM: She could have been a  
22 lot more articulate; I agree. She could have just  
23 said I want to find out more about this relationship;  
24 I think that the motive here is not that they're  
25 friends, but that they have a romantic relationship.

1           Granted, the prosecutor did not come forth - - -  
2           forth with that express statement of why she wanted  
3           to call this rebuttal witness, but she did reference  
4           her cross-examination of this Ms. Marincic - - - I'm  
5           not sure if I'm pronouncing her name - - -

6                       MS. DAVISON: I think that's correct.

7                       JUDGE ABDUS-SALAAM: - - - correctly - - -  
8           Ms. Marincic, where she tried to bring out that the  
9           relationship was more than a friendship between Ms.  
10          Marincic and the defendant.

11                      MS. DAVISON: If the prosecutor had offered  
12          it for bias or motive to fabricate, I don't think  
13          we'd be here today. She did not; she offered it for  
14          purposes of truth. She used the word "untrue", and  
15          the court - - -

16                      JUDGE FAHEY: The question is, though, and  
17          this is what's difficult, I guess - - -

18                      MS. DAVISON: It is difficult.

19                      JUDGE FAHEY: - - - but interesting about -  
20          - - about this question. It seems that the rebuttal  
21          witness was - - - was - - - it's almost like you're  
22          both correct. The rebuttal witness was offered to  
23          show that they had - - - that - - - that her  
24          testimony was tainted by a romantic relationship and  
25          therefore that he - - - though it wasn't articulated

1 as clearly as could have been, you're right about  
2 that, but that from the People's point of view it was  
3 biased, she was a - - - a biased paramour in a  
4 romantic relationship with this person over a period  
5 of time.

6 On the other side, the defense says it's an  
7 impeachment. You're trying to say that she lied.  
8 But was she lying about her romantic relationship,  
9 and therefore biased, or was - - - or was she lying  
10 about something else? So when they're both there - -  
11 - in other words, both bias, which benefits the  
12 People, and impeachment, which is clearly in your  
13 favor, and both those principles are there, it seems  
14 to me very difficult for this court to reach down and  
15 say, not having watched them and not having been part  
16 of it, oh, no, that that rebuttal witness shouldn't  
17 have been there.

18 MS. DAVISON: I think the answer is found  
19 in People v. Williams where this court found, in  
20 1959, that when the proponent of an offer of proof is  
21 not - - - is unequivocal - - - maybe that's not the  
22 right word - - - is unclear, is probably a better  
23 word - - - it's their problem. It's not the problem  
24 of the person who is in response to the testimony  
25 that's being offered.

1                   JUDGE FAHEY: Kind of unusually, though, we  
2 have the benefit of having read it, and it seems,  
3 having read the testimony, it seems you're both  
4 vindicated to me also. So it's a - - - I don't see  
5 it as quite that much of a slam-dunk, but okay.

6                   JUDGE RIVERA: Can we perhaps think about  
7 this a different way? Friendship is bias.

8                   MS. DAVISON: Yes, it - - -

9                   JUDGE RIVERA: Witness is biased. There's  
10 no - - - there's no ifs ands or buts around that.

11                   MS. DAVISON: And she admitted that - - -

12                   JUDGE RIVERA: So - - -

13                   MS. DAVISON: - - - bias.

14                   JUDGE RIVERA: She admitted the bias. So  
15 when - - - when the prosecutor says I want to put in  
16 a rebuttal witness, the friendship is - - - is not  
17 true, the rebuttal is still about this bias. I mean,  
18 how is it not about bias? The cross, as Judge  
19 Abdus-Salaam has already pointed out, was very much  
20 geared to show it's more than a friendship, which is  
21 to say the prosecutor's goal here is to show that  
22 there's not just a friendship bias, which may not,  
23 perhaps, motivate someone to perjure themselves on  
24 the stand, but a romantic bias may very well drive  
25 someone to perjure - - - this particular witness to



1           perjure herself on the stand. And that becomes very  
2           obvious when you look at the cross, that this is what  
3           the prosecutor means. We're going to say that's not  
4           true. That's not the level of her bias.

5                       MS. DAVISON: Well - - -

6                       JUDGE RIVERA: Why is that not an  
7           appropriate way to look at what went on during this  
8           trial and on this trial judge's call about - - -

9                       MS. DAVISON: Several re - - -

10                      JUDGE RIVERA: - - - about this proffer?

11                      MS. DAVISON: Several responses to that.

12                      JUDGE RIVERA: Yeah.

13                      MS. DAVISON: First of all, when she admits  
14           the bias, it's over; it's done. There's - - -  
15           there's no - - - no place left to go with respect to  
16           the friendship.

17                      JUDGE RIVERA: Well, other than, as I say,  
18           the prosecutor may be very much interested in making  
19           very clear that she is not being really candid on the  
20           stand about the scope of the bias.

21                      MS. DAVISON: But their problem is she  
22           didn't articulate that and under - - -

23                      JUDGE RIVERA: She being the prosecutor?

24                      MS. DAVISON: She being the prosecutor,  
25           yes. And under Williams and under Ennis as well, she

1 has to.

2 JUDGE ABDUS-SALAAM: Well, those cases,  
3 though, were talking about whether she preserved - -  
4 - in other words, if - - - if the court had not  
5 allowed the - - - the evidence in and - - - and then  
6 her failure to - - - the prosecutor's failure to  
7 articulate the reason would leave her argument  
8 unpreserved on appeal. We're not talking here about  
9 preservation; we're talking here about not how the  
10 proponent did or didn't articulate it, but how the  
11 trial court did or didn't articulate it.

12 MS. DAVISON: Or secondarily, how the  
13 Appellate Division was allowed to review it. And I'd  
14 - - - I'd direct the court to 470.15 subdivision 3,  
15 which is, it's my understanding, the Appellate  
16 Division's fact-finding authority. And the - - -  
17 that section of the statute very clearly says in  
18 reversing or modifying a conviction, they have the  
19 authority to make facts. They did neither in this  
20 case; they affirmed. And so I would submit that they  
21 didn't have the authority to draw those inferences in  
22 this particular case.

23 I'd like to speak one moment, if I may,  
24 about the sex abuse accommodation syndrome witness.  
25 This presents an interesting question for the court,

1           which has been touched upon in prior Appellate cases,  
2           which is at what point does this issue become so much  
3           a part of the common fabric of our society that we no  
4           longer need that type of expert, if you will call him  
5           that. I - - - I wouldn't, but in this particular  
6           case, every single member of the empaneled jury who  
7           responded to the questions, and inferentially all  
8           those - - -

9                         JUDGE RIVERA: But there's the rub. Some  
10           of them never made a statement - - -

11                        MS. DAVISON: But the - - -

12                        JUDGE RIVERA: - - - correct?

13                        MS. DAVISON: But the panels were - - -  
14           that is correct, but the panel, as a whole, was  
15           asked, would you be sho - - - would anybody be  
16           shocked, and nobody responded affirmatively.

17                        JUDGE RIVERA: But they had different  
18           reasons, didn't they?

19                        MS. DAVISON: The - - - the panel members?

20                        JUDGE RIVERA: The ones who responded.

21                        MS. DAVISON: They gave - - - they answered  
22           the questions.

23                        JUDGE RIVERA: But they gave a variety of  
24           reasons - - -

25                        MS. DAVISON: Yes.

1 JUDGE RIVERA: - - - why they would not be  
2 - - -

3 MS. DAVISON: Yes.

4 JUDGE RIVERA: - - - shocked.

5 MS. DAVISON: Yes. But nobody - - -

6 JUDGE RIVERA: So why does that not mean  
7 that then they are entitled to this kind of a witness  
8 to be able to run through the various reasons?

9 MS. DAVISON: Well, two answers. One is -  
10 - -

11 JUDGE RIVERA: I've got one reason, that  
12 I've articulated, why I wouldn't be shocked. But you  
13 know what? I'm not persuaded in this case, because  
14 I've not been given the opportunity to hear from this  
15 witness that explained, sort of, the - - - the range  
16 of experience that might result in a failure to  
17 immediately disclose the abuse.

18 MS. DAVISON: The most obvious answer is  
19 that there's no indication it's beyond the ken of the  
20 jurors who were empaneled, but - - -

21 JUDGE STEIN: What about the testimony that  
22 a victim might act out violently or aggressively?  
23 How - - - how - - - was that ever addressed with the  
24 jurors?

25 MS. DAVISON: Well, there certainly were

1 questions with respect to what would you expect to  
2 see, what reactions would you expect to see. And the  
3 jurors calmed all the fears of the prosecutor by  
4 saying, you know, we don't have any expectations; it  
5 could be anything; it could be anyone.

6 JUDGE ABDUS-SALAAM: Well, but every - - -  
7 in a pop question like that, at a voir dire, unless  
8 you're delving into each juror's experience - - - you  
9 know, nowadays jurors watch all of these TV shows,  
10 CSI, all these other things, and I think they have  
11 some kind of familiarity with what goes on in the  
12 criminal justice system. But is - - - is the  
13 prosecutor bound by those answers?

14 Even if they - - - if the jurors do suggest  
15 that they may be familiar with a syndrome, does that  
16 mean the prosecutor can't educate them on the - - -  
17 what the - - - what the experts are saying about the  
18 syndrome as opposed to what they - - - the jurors  
19 think they know about it?

20 MS. DAVISON: I guess the question is  
21 what's the limit of that education? Where do you go  
22 across the line and become bolstering, because  
23 extensive amount of time was spent on voir dire in  
24 educating the jurors. As attorneys, we know that's  
25 one of the functions of voir dire is to educate the

1 jurors.

2 JUDGE FAHEY: You know what? The thing is  
3 I'd draw an analogy to a civil case. Everyone knows  
4 of a particular disease, cancer, something we've all  
5 had experience with in life, and most jurors have had  
6 experiences with it, but nonetheless, there'd still  
7 be a requirement for expert proof to go forward to go  
8 into the details and the process, even though people  
9 are generally familiar, say, with the parameters of a  
10 particular disease. And I'm trying to see how that  
11 wouldn't apply here.

12 MS. DAVISON: Even assuming that it did  
13 apply - - -

14 JUDGE FAHEY: Um-hum.

15 MS. DAVISON: - - - the second layer here  
16 is that the admission of that testimony is always a  
17 matter of discretion of the trial court, and here,  
18 Supreme Court, in its - - - in its commentary,  
19 indicated that it had no discretion. I don't think  
20 Spicola, and that line of cases, had been decided  
21 quite at that point. But the Fourth Department  
22 certainly had decided Donk and other cases, and the  
23 Supreme Court said I have to follow these cases, and  
24 the inference is it had no discretion - - -

25 JUDGE STEIN: It may - - - or it may have

1 concluded that if it didn't allow it in this case, it  
2 would have been an abuse of its discretion.

3 MS. DAVISON: Again, that's not what  
4 Supreme Court articulated, and I think that we're  
5 left with what's on the record before us.

6 JUDGE PIGOTT: Thank you, Ms. Davison.

7 MS. DAVISON: Thank you.

8 JUDGE PIGOTT: Mr. Kaeuper, good morning.

9 MR. KAEUPER: Good morning, Your Honors.  
10 May it please the court. Geoffrey Kaeuper for the  
11 People.

12 If I can start with the - - - with the  
13 rebuttal witness, this is a mixed question of fact  
14 and law, and I think there's clearly record support  
15 for this being addressed to bias or motive to  
16 fabricate.

17 JUDGE PIGOTT: One of the things that had  
18 struck me was that if the ex-wife had a boyfriend who  
19 thought that she was useless, could the defense call  
20 him to say, you know, she's doing this because she  
21 wants to get back at her ex-husband, just like she  
22 tried to get back at me, so she's lying about the  
23 fact that this - - - this girlfriend was lying. Or  
24 are we getting collateral?

25 MR. KAEUPER: Well, I mean, if - - - I

1 mean, if - - - if they can call a witness to show  
2 that one of our witnesses has a - - - a motive to  
3 fabricate testimony - - -

4 JUDGE PIGOTT: I understand fabricate.

5 MR. KAEUPER: Yeah.

6 JUDGE PIGOTT: I understand fabricate. But  
7 the - - - she says - - -

8 MR. KAEUPER: Or a bias, sure.

9 JUDGE PIGOTT: She said that - - - she said  
10 this witness testified specifically that she has been  
11 friends with the defendant the entire time, including  
12 the time after she broke up with him and he was with  
13 his wife, up to the present date. I'm - - - I'm  
14 calling this witness to rebut that statement, that  
15 they were friends this entire time.

16 So that sounds collateral to me, you know,  
17 and - - - and if - - - if this witness then - - - if  
18 you're saying they can do that, I'm wondering if you  
19 can call the ex-boyfriend of the ex-wife to say the  
20 ex-wife is a - - - is a liar, she's been lying  
21 forever; the reason why she's doing this is to get  
22 back at her ex-husband, just like she's trying to get  
23 back at me because we broke up last week.

24 MR. KAEUPER: Yeah, I mean, I - - - I think  
25 the problem with that would be that it's not based on



1 anything. I mean - - - but I mean, if - - - if he  
2 can - - - if - - - you know, if they can call a  
3 witness who will say, you know - - - I mean, I don't  
4 know; I can't think of something, but where - - -  
5 where there's something definable, some actual  
6 extrinsic evidence that will - - -

7 JUDGE PIGOTT: No, what I'm suggesting to  
8 you is at some point you've got to stop this.

9 MR. KAEUPER: Um-hum.

10 JUDGE PIGOTT: I mean, you - - - you've got  
11 a witness that comes in and - - - and says I was with  
12 - - - with him the entire - - - you know, whatever.  
13 But she admits bias; there's a cross-examination. At  
14 some point you've got to stop. And - - - and I just  
15 - - - I saw no - - - I saw no - - - no use for this.  
16 I mean, I didn't know what it added to the - - - to  
17 the case.

18 MR. KAEUPER: Yeah, I'm - - -

19 JUDGE PIGOTT: It seemed collateral to me.  
20 And then the argument is if - - - if that's the rea -  
21 - - if that's the - - - if she was let in for one  
22 reason and the Appellate Division made a different  
23 decision, where do we go from there?

24 MR. KAEUPER: Yeah, well, I mean, I don't  
25 think that's what happened here. I think - - - I

1 think - - - I certainly agree with Judge Abdus-Salaam  
2 that - - - that the prosecutor here didn't articulate  
3 her part - - - her position particularly well. But  
4 when she's ask - - - but when the collateral  
5 objection is made, this is collateral, her response  
6 is I was asking about her present relationship. And  
7 then she says, you know, this line about being  
8 friends about all the time, this is a lie.

9 Now, that's - - - that is somewhat  
10 ambiguous; it's not particularly well spelled out.  
11 But you see in her summation what she does with it,  
12 what - - - what her point is. She doesn't argue she  
13 lied about whether she was friends with her at one  
14 point so she must have lied about other stuff; she  
15 didn't make that argument. She makes the argument,  
16 you know, she's either - - - she's either secretly  
17 carrying on this relationship while - - - while the  
18 defendant's married, or she's - - - she's lying about  
19 - - - about whether or not there was a friendship  
20 ongoing - - -

21 JUDGE ABDUS-SALAAM: Are you suggest - - -

22 MR. KAEUPER: - - - and either - - - I'm  
23 sorry.

24 JUDGE ABDUS-SALAAM: Counsel, Mr. Kaeuper,  
25 are you suggesting that the ADA couldn't figure out

1 what she really wanted this witness - - - rebuttal  
2 witness for until she got to the summation?

3 MR. KAEUPER: No. No.

4 JUDGE ABDUS-SALAAM: Because she should  
5 have told that to the - - - the trial judge.

6 MR. KAEUPER: She should have said it  
7 better - - -

8 JUDGE ABDUS-SALAAM: Yeah.

9 MR. KAEUPER: - - - absolutely. But I  
10 think - - - I think - - - I think you can see from  
11 what she's saying what she's thinking in the  
12 colloquy. And I think then - - - then in - - - in  
13 summation it becomes even clearer.

14 And not - - - and you know, because defense  
15 counsel says in the reply brief, well, you know,  
16 things change in trial, and maybe she changed her - -  
17 - her idea. Nothing changed on this point. The  
18 rebuttal came in exactly as she wanted it to. If she  
19 had called it just to point out a lie, she would have  
20 made that argument in summation. She didn't; she  
21 made the bias argument.

22 And if I can address the - - - the Williams  
23 issue too, because this - - - this stuff about you  
24 can't consider the - - - what happens later.  
25 Williams involved an - - - an offer of proof. Offer

1 of proof is a term of art. There was no offer of  
2 proof here. An offer of proof is when evidence is  
3 getting excluded and you have to - - - of course the  
4 colloquy's what's - - - what's got to be - - - got to  
5 lay everything out because the evidence isn't going  
6 to come in; you're not going to know what happens to  
7 the evidence.

8 Here the evidence comes in, it gets used,  
9 we can look at what was the purpose of bringing this  
10 in. We can tell what the purpose is; she uses it to  
11 show motive or - - - motive to fabricate bias by  
12 trying to argue that this shows - - - the fact that  
13 she's lying about the - - - the nature of the  
14 friendship shows that she actually has a romantic  
15 relationship with him. So I think - - - I mean, I  
16 don't think the Appellate Division was - - - was  
17 finding new facts or - - - or changing the - - - the  
18 ruling here at all.

19 JUDGE RIVERA: But the witness has already  
20 admitted bias, in the sense of, yes, I have a  
21 friendship, I am his friend, and talks about how  
22 often they communicate with one another, and that  
23 it's been a longstanding friendship. That's already  
24 about bias. So doesn't the prosecutor have to do  
25 more than simply way I want to show that's untrue, to

1 really clarify I'm still staying with this issue  
2 about bias?

3 MR. KAEUPER: I mean, again, I think - - -  
4 I think she could have articulated it better,  
5 absolutely. But I don't think there's a rule that it  
6 has to be fully articulated in responding to an  
7 objection. You know - - -

8 JUDGE PIGOTT: But don't forget it's a  
9 two-edged sword, and I - - - I can see the defense  
10 wanting to bring in witnesses similar to this to show  
11 that police officers lied, that - - - that police  
12 officers did not tell the truth with respect to some  
13 aspect of a - - - of a - - - a confession or  
14 something like that, and - - - and citing this case  
15 and saying, you know, this is the case the People  
16 argued saying that we can bring in people to  
17 collaterally attack witnesses.

18 MR. KAEUPER: If - - - if the extrinsic  
19 evidence goes to motive to fabricate, if the  
20 inference from the evidence as to motive to fabricate  
21 and bias is - - - is a reasonable one. Yeah, I mean,  
22 so - - - I mean, and so that requires some - - - some  
23 dis - - - some discretion by the trial judge in - - -  
24 in sorting this out.

25 JUDGE PIGOTT: When have you seen that

1           happen?

2                   MR. KAEUPER: I mean, I think the judge  
3           does it in this case. I mean, he - - - it - - - you  
4           know, it takes him some - - - wait, wait, what are -  
5           - - what's the timing? He's thinking about this.  
6           He's thinking is this going - - - is this going to be  
7           collateral? Is this going to - - - to advance the -  
8           - - the issue of bias at all? I mean, he - - - the  
9           objections by the defense counsel are - - - are the  
10          proper objections to make, and the judge decides  
11          those issues; he considers them.

12                   JUDGE PIGOTT: So your - - - you would say  
13          yes to the - - - to bringing in the - - - the  
14          ex-boyfriend of the ex-wife who wants to say that - -  
15          - that she has a bias and a motive to lie about the  
16          girlfriend and the - - - and the ex-husband - - -

17                   MR. KAEUPER: Yeah, I think - - - I think  
18          that - - -

19                   JUDGE PIGOTT: - - - right?

20                   MR. KAEUPER: - - - would be proper - - -

21                   JUDGE PIGOTT: But can we - - -

22                   MR. KAEUPER: - - - proper testimony.

23                   JUDGE PIGOTT: - - - bring in the - - - the  
24          guy at the bar who knows that the ex-boyfriend, you  
25          know, is a drunk and he already told him that, you

1 know, he really still does love his ex-girlfriend,  
2 and the reason he's doing this is to lie about her to  
3 get back at her because she's trying to help the - -  
4 - the ex-husband with whom she had a relationship and  
5 is now mad at the - - - at the - - - at the  
6 girlfriend?

7 MR. KAEUPER: I mean, there might be a  
8 hearsay problem with it, but - - - but conceptually,  
9 I don't think there's a problem with it.

10 JUDGE PIGOTT: Let's do that. And why  
11 don't be bring in the bartender that says that the  
12 guy at the bar who's saying that this guy is a drunk  
13 is lying about the fact that this guy is a drunk  
14 because he - - - he wouldn't pay his drink? You see  
15 my point.

16 MR. KAEUPER: Right. No, I - - - I - - -  
17 right. I mean, the - - - it has to be - - - right.  
18 At some - - - at some point, I mean, I suppose - - -  
19 I suppose it would be somewhat abusive to - - - to  
20 take it a different way, not have that - - - that  
21 chain, but, you know, to bring in a - - - a rebuttal  
22 wit - - - or a - - - yeah, bring in a - - -

23 JUDGE PIGOTT: Well, you've got to roll  
24 your eyes when you're bringing in an ex-wife to  
25 testify about how a girlfriend is lying. I mean, I

1 thought what - - - what - - - is anyone surprised at  
2 this? I mean, what - - - what are we doing here?  
3 And - - -

4 MR. KAEUPER: But - - - but this - - -

5 JUDGE PIGOTT: And all - - - and it seemed  
6 to me all you're doing is bolstering and - - -

7 MR. KAEUPER: Well, but I - - - I mean, I  
8 think this is a critical - - -

9 JUDGE PIGOTT: Yes.

10 MR. KAEUPER: - - - defense witness.

11 JUDGE PIGOTT: It sure is.

12 MR. KAEUPER: And whether or not she's  
13 romantically involved with this defendant is very  
14 important to judging how to - - - how to evaluate her  
15 testimony.

16 JUDGE RIVERA: Well, let's say we believe  
17 it's error; is it harmless?

18 MR. KAEUPER: I - - - I think - - - I  
19 wouldn't - - - I wouldn't try to argue here that the  
20 proof was overwhelming, so I think harmless doesn't  
21 work, in that sense, under Crimmins. But I would say  
22 that - - - that there's some - - - I mean, even the  
23 dissent at the Appellate Division says this didn't  
24 matter.

25 JUDGE PIGOTT: Right. But they were very



1 worried about this collateral aspect of it and - - -  
2 and, you know, went to some length describing it.

3 MR. KAEUPER: But I mean, I think - - - I  
4 think if - - - if this were to be - - - to be  
5 determined to be error, I mean, I think - - - I think  
6 this - - - this might be that - - - that kind of de  
7 minimis error that doesn't even require the - - - the  
8 - - - the harmless test. But I - - - but I certainly  
9 would agree that I cannot pass the overwhelming  
10 evidence here. This was a - - - a credibility case -  
11 - -

12 JUDGE PIGOTT: Okay.

13 MR. KAEUPER: - - - absolutely.

14 If - - - if I can address then, just  
15 briefly, the CSAAS testimony here. What happened in  
16 voir dire, I mean, I think - - - I think it probably  
17 is true that a large section of the population now  
18 has some vague idea that, yeah, kids who are sexually  
19 abused don't necessarily always report on that.  
20 That's a - - - if that was what the expert here  
21 testified to, if that was the limit of it, then yeah,  
22 his - - - his testimony would have been unnecessary.

23 He gives very specific testimony that's  
24 very relevant to the particular facts of this case  
25 too, you know, about how - - - how family relations

1           affect the delay, about how violence in the  
2           relationship affects the delay. And - - - and his  
3           testimony is - - - is really very different from some  
4           sort of generalized, sort of, yeah, I've sort of  
5           gotten the idea that maybe kids don't always right  
6           away report abuse. So I think - - - I think this - -  
7           - this was properly admitted here.

8                         And I don't - - - don't agree that the  
9           judge was saying that he was required to and had no  
10          discretion; he says he's required to file - - -  
11          follow the cases. He is required to follow the  
12          cases, and the cases tell him to use his discretion.  
13          I think he did that here. Thank you.

14                        JUDGE PIGOTT: Thank you, Mr. Kaeuper.

15                        Ms. Davison, is it a mixed question?

16                        MS. DAVISON: No, the question is was - - -  
17          was the evidence admissible. The question is, if the  
18          evidence was - - - did the Appellate Division have  
19          the authority to draw that permissive inference to  
20          find that this is what the judge ruled on.

21                        JUDGE STEIN: Or is it whether it was an  
22          abuse of discretion to admit that evidence?

23                        MS. DAVISON: I'm sorry; repeat that.

24                        JUDGE STEIN: Or is the question whether it  
25          was an abuse of discretion to admit that evidence?

1 MS. DAVISON: By Supreme Court?

2 JUDGE STEIN: Yeah, that's a little  
3 different from saying is it admissible. I mean, if  
4 it's a discretionary determination, then - - - then  
5 we look to abuse, don't we?

6 MS. DAVISON: If it was an abuse of  
7 discretion, as a matter of law, then I would submit,  
8 because - - - because of the purposes for which  
9 Supreme Court admitted that - - - that particular  
10 evidence, I think it's very clear on the record,  
11 there - - - there is no record support for the  
12 Appellate Division's determination that this was for  
13 purposes of bias or motive to fabricate.

14 The - - - the judge articulated it two or  
15 three times: I'm allowing it for purposes of showing  
16 that this individual did not remain friends with Mr.  
17 Nicholson from 2003 to 2008. That was the limit of  
18 the proffer. That was the limit of the ruling.

19 JUDGE RIVERA: You're saying that's only  
20 relevant in the context of that witness, because it  
21 shows she's a liar and therefore it's collateral, as  
22 opposed to showing that based on the cross that her -  
23 - - it's not just a friendship; it is a romantic  
24 interest.

25 MS. DAVISON: She admitted her interest.

1 She admitted the friendship. She - - - and - - - and  
2 in fact, the testimony that was properly adduced  
3 during the - - - the rebuttal witness' testimony - -  
4 -

5 JUDGE RIVERA: I guess what I'm saying, if  
6 she's already admitted this - - - my - - - perhaps I  
7 didn't get to this question before. If she's  
8 already, as you say, admitted the bias - - -

9 MS. DAVISON: Right.

10 JUDGE RIVERA: - - - of the friendship,  
11 what would be the value in putting up a rebuttal  
12 witness that says, no, no, no, they're not friends -  
13 - -

14 MS. DAVISON: It - - -

15 JUDGE RIVERA: - - - other than to show  
16 there's another bias.

17 MS. DAVISON: None.

18 JUDGE RIVERA: The whole point of that is  
19 to show there is a bias, is it not? Why - - - why -  
20 - - why would a prosecutor want to undermine the bias  
21 that the witness itself - - - herself has admitted  
22 to?

23 MS. DAVISON: Here you've got a witness who  
24 says I lived in this household during the period in  
25 question in - - - in the indictment. This wasn't

1 going on. There weren't these horrific incidents  
2 late at night or early in the morning where - - -  
3 where the sexual abusive - - -

4 JUDGE RIVERA: Um-hum.

5 MS. DAVISON: - - - assaultive conduct was  
6 going on.

7 JUDGE ABDUS-SALAAM: All the more reason to  
8 want to show that she had a - - - a motive to lie,  
9 and it might be that she has a romantic relationship  
10 with the defendant and doesn't want to see him go to  
11 jail, not that they were just friends.

12 MS. DAVISON: But think about what was  
13 adduced in the testimony. The testimony, if you read  
14 through it very carefully and cull out all the  
15 foundational objections and that kind of thing, is  
16 they had no contact in 2003, 4, 5, 6, 7, 8. That's  
17 the limit of the rebuttal testimony. And all that  
18 does is go to show that the defense witness was being  
19 untruthful when she said I maintained contact with  
20 him during this period of time.

21 And so it is collateral. It has - - - it  
22 has nothing to do with bias or motive to fabricate.  
23 She admitted her bias. That was the limit of proper  
24 cross-examination. It was reached; it should have  
25 been done. And Supreme Court erred by allowing this

1           rebuttal testimony in.

2                       I think it's a red herring to say look at  
3           the summation. As an attorney goes through cross-  
4           examination or through direct examination, things  
5           develop based on the answers that the witnesses give  
6           you. And as things develop, you take advantage of  
7           them. You feel that the - - - the testimony is being  
8           drawn in one direction or the other, and you go there  
9           because when you've got a witness who's saying to you  
10          this happened or that happened and - - - and you get  
11          the sense that they're hedging, you follow that  
12          witness. You can't say, in retrospect, oh, this was  
13          a - - - a planned course of action.

14                     I would submit to you that this prosecutor  
15          didn't know what the defense witness was going to say  
16          until it was said, and she followed that course. Did  
17          she take advantage of it in summation? She did, but  
18          that doesn't mean that that's what her intent was and  
19          that doesn't mean that was what her initial course  
20          was.

21                     So again, I'd - - - I'd submit this is not  
22          harmless error. The - - - the correct remedy here is  
23          reversal and remittal for a new trial.

24                     JUDGE PIGOTT: Thank you, Ms. Davison - - -

25                     MS. DAVISON: Thank you.

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JUDGE PIGOTT: - - - Mr. Kaeuper.

(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. Christopher Nicholson, No. 17, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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