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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 45

JOEL NELSON,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 18, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
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  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Next on the  
2 calendar is number 45, People V. Joel Nelson.

3 MR. ASCHER: Good afternoon - - - good  
4 afternoon, Your Honors. My name is Alexis Ascher,  
5 I'm from the Appellate Advocates, and I'm here on  
6 behalf of Joel Nelson. I'd like to request three  
7 minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 MS. ASCHER: Thank you.

10 The trial court, in this case, failed to ensure  
11 that Mr. Nelson had a fair trial. He failed to do  
12 anything about four days of a five-day trial of spectators  
13 walking into his courtroom, wearing very noticeable white  
14 t-shirts, with full-length photograph of the deceased - -  
15 -

16 JUDGE STEIN: Well, how do we - - -

17 JUDGE ABDUS-SALAAM: Counsel - - -

18 JUDGE STEIN: - - - how do we know they're  
19 so noticeable? Does anybody say they're that  
20 noticeable? I mean, some people did notice them, but  
21 there is conflicting - - - I mean, the only thing we  
22 really have in the evidence - - - in the record is  
23 what the judge said, and he seemed to conflict with  
24 himself at times, but how do we know it was so  
25 noticeable?

1 MS. ASCHER: Actually, we have what defense  
2 counsel said; after defense counsel was done  
3 delivering his summation, he requested a sidebar and  
4 he said - - - this is page 297 of the record - - -  
5 oh, excuse me, I have it - - - yes, it's page 297 of  
6 the record. He describes the shirts, and he says,  
7 Judge, there's three members of the family sitting as  
8 close to the jury as you can get in clear view,  
9 that's what defense counsel said. He described the  
10 shirt, he said it was a full-length photograph of the  
11 deceased, and he was able to read the caption.

12 The court, in response, was able to read  
13 the caption of the shirt from his vantage point. The  
14 prosecutor never said, Judge, I don't think the  
15 jurors can see the shirt. The court never said, I  
16 don't think they can see the shirt. The court said,  
17 I've seen these shirts for three days.

18 JUDGE STEIN: What if - - - what if they  
19 could? Is it - - - is it inherently prejudicial to  
20 have a shirt with a photo of somebody, it doesn't  
21 say, you know, get the murderer or, you know,  
22 anything inflaming the jury, but showing - - -  
23 "remembering", that's what it said, right,  
24 "remembering" - - -

25 MS. ASCHER: Yes.

1 JUDGE STEIN: - - - and then it had his  
2 name on it; is that inherently prejudicial?

3 MS. ASCHER: Absolutely, hands down, inherently  
4 prejudicial. Under - - -

5 JUDGE STEIN: Okay, but what if there was  
6 only one person in the room for five minutes with  
7 that?

8 MS. ASCHER: That's a - - - that's a  
9 different case, it depends - - - it depends on the  
10 circumstances of the case - - -

11 JUDGE PIGOTT: Not too long ago - - - not  
12 too long ago, there was a case in which a correction  
13 officer was killed. And routinely, every day, during  
14 the trial, his fellow correction officers came in  
15 uniform to watch - - - to watch the trial. Is that  
16 inappropriate?

17 MS. ASCHER: It can be; different courts go  
18 different ways; lots of judges let that pass, some  
19 judges take preventive action as soon as they see it.

20 JUDGE PIGOTT: Well, I'm asking you because  
21 you say that these t-shirts are clearly prejudicial.  
22 I'm just asking if, you know, there's this show of  
23 force, so to speak, in support of the decedent; if  
24 that is inherently prejudicial.

25 MS. ASCHER: I will say it can be, yes.

1 The reason being, because just like these t-shirts,  
2 and these t-shirts are a step above that; this is a  
3 photograph, again, of the victim. This court said in  
4 People v. Stevens, you can't put a photograph of a  
5 murdered victim in as evidence, Mr. Prosecutor.

6 CHIEF JUDGE DIFIORE: Counsel, is there a  
7 difference if there is a family member of the victim  
8 of a homicide who is crying in the courtroom during  
9 the course of the homicide trial; do we draw a line  
10 there?

11 MS. ASCHER: That's a different story.

12 CHIEF JUDGE DIFIORE: How so?

13 MS. ASCHER: When you have a murder case  
14 and you have, you know, obviously somebody who is no  
15 longer with us and family members come, and they're  
16 grieving, and they're showing it, that's part of a  
17 trial; that's part of what happens. If it gets to be  
18 out of hand where, you know, that family member can't  
19 control themselves, so he gets up and starts yelling  
20 - - -

21 CHIEF JUDGE DIFIORE: Is displaying a  
22 photograph of a victim's family - - - a victim; is  
23 that a form of grieving?

24 MS. ASCHER: It's taking it a step above.  
25 Again, we have the photograph and we have the text.

1 This was a plea to the jurors to please find him  
2 guilty. We believe he's guilty, find that he's  
3 guilty. Even if it was just of grief, even if they  
4 just went in there and they didn't realize what they  
5 were doing, as they sat with each other as a group in  
6 front of the jurors on this critical day of  
7 summations and charge, even if they were just  
8 grieving and they thought they had the right to do it  
9 because nobody here stopped them, that's not okay,  
10 that's expression that does not belong in a  
11 courtroom.

12 JUDGE ABDUS-SALAAM: Ms. Ascher, let me  
13 just ask you, you mentioned that the judge noticed  
14 that - - - before counsel brought to judge - - - the  
15 judge's attention, so are you saying that the judge  
16 had to do something about it before it was brought to  
17 the judge's attention by counsel?

18 MS. ASCHER: Absolutely. This is his  
19 courtroom. The rule we're looking for is that as  
20 soon as the judge sees some sort of spectator display  
21 in his courtroom, it has to do something about it.  
22 You have to assume that those jurors, who the judge  
23 should be protecting from any outside influence - - -

24 JUDGE GARCIA: I'm sorry, counsel. Counsel  
25 has to do something about it, but wouldn't that

1 depend on what it is; I mean, what's the test that  
2 we're applying here?

3 MS. ASCHER: The inherently prejudicial  
4 test.

5 JUDGE GARCIA: So it was inherently  
6 prejudicial, that's a reversal, they saw it. No  
7 test, the judge applies. I saw someone with a t-  
8 shirt, I think the jury saw it; mistrial.

9 MS. ASCHER: It depends on the facts of the  
10 case.

11 JUDGE GARCIA: Right.

12 MS. ASCHER: If - - - if the display  
13 presents an unacceptable risk that those jurors are  
14 going to consider it - - -

15 JUDGE GARCIA: That's the second part,  
16 right?

17 MS. ASCHER: Right. Then that's - - -  
18 that's what we're dealing with, this case - - -

19 JUDGE STEIN: (Indiscernible) the judge  
20 didn't think that it did present an unacceptable  
21 risk; the judge really laid it out and said, you  
22 know, they're not acting out, they're being very  
23 quiet, they're sitting quietly, you know, there's  
24 only a couple of them, maybe it was covered with  
25 jackets, maybe it wasn't, I don't know, but - - - so

1 the question is, is do - - - what is - - - do we look  
2 at that and ask whether that was an abuse of the  
3 judge's discretion; is that what we're looking at?

4 MS. ASCHER: The judge here made a  
5 conclusion that these shirts weren't inflammatory.  
6 These shirts are exactly the kinds of things that  
7 factor into the jury's consideration of a case. They  
8 have family members sitting in front of them, the law  
9 review articles that we cited have the science that  
10 says, these are exactly the type of things that  
11 influence the jurors' verdict. So the judge couldn't  
12 sit there and say, well, I don't think these shirts  
13 aren't inflammatory.

14 JUDGE GARCIA: So we would have to say, as  
15 a matter of law, and these were inflammatory, and  
16 then what's the next step? Don't we have to analyze  
17 what effect that may have had on the jury?

18 MS. ASCHER: Whether this was an  
19 unacceptable risk that they would have considered it.

20 JUDGE GARCIA: And then we would have to  
21 find as a matter of law that he abused his discretion  
22 in not sending them out of the courtroom?

23 MS. ASCHER: He had a duty to make sure  
24 that the jurors did not see these shirts for four  
25 days out of a five-day trial, and he did nothing. I

1 remind this court in People v. Stevens, as I said  
2 before, this court already said, "A live photograph  
3 of the victim is impermissible at trial because it  
4 arouses the jury's sympathies and resentment." Well  
5 imagine how they felt here.

6 JUDGE GARCIA: But isn't that different  
7 when the prosecutor puts a photo into evidence; isn't  
8 that different analysis?

9 MS. ASCHER: Sure, it's a different  
10 analysis, but it's the same point. You don't want  
11 that in evidence, and this court has recognized it  
12 because the jurors might be influenced by it. Now,  
13 in my case you have family members wearing this photo  
14 with text, "Remembering Leo Walton"; do something,  
15 find him guilty.

16 JUDGE ABDUS-SALAAM: Do you have to - - -

17 MS. ASCHER: This - - -

18 JUDGE ABDUS-SALAAM: Do you have to - - -  
19 does the court have to ask the jurors if this is  
20 affecting them or - - - what does the court do to do  
21 something about it; you just assume it affects them  
22 and then asks them to cover it up or take off the  
23 garment?

24 MS. ASCHER: Absolutely nothing the jurors  
25 could have said. Even if the jurors would have

1           gotten up and said, well, I don't think it would have  
2           influenced me, at that point we were in this case,  
3           the fourth day of a five-day trial, there's nothing  
4           that they could have said that should have - - - that  
5           would have taken away what happened in this case.  
6           The - - - the - - -

7                         JUDGE ABDUS-SALAAM:   So there's no need to  
8           question the jurors; the judge just assumes that it's  
9           prejudicial and does what?

10                        MS. ASCHER:   Tells them to take the shirts  
11           off, and that should've happened the first day the  
12           family member - - - the first family member - - -

13                        JUDGE FAHEY:   Do they have to be preserved?  
14           For the first four days, let's say it's partially  
15           preserved, at least what - - - there's a motion - - -  
16           there's an argument - - - there's a discussion on the  
17           record, the judge makes a ruling, counsel doesn't  
18           clearly object, but he seems to object, so let's just  
19           assume it's partially preserved from the end of his  
20           summation on, that's clear - - - clearly seems to be  
21           preserved.   What about before that; does that need to  
22           be preserved?

23                        MS. ASCHER:   Our argument is that it is  
24           preserved - - -

25                        JUDGE FAHEY:   How so?

1 MS. ASCHER: Because when defense counsel  
2 protested, he protested to what he knew. He only  
3 knew of the jurors on that particular day, and then  
4 when the court - - -

5 JUDGE FAHEY: Okay.

6 CHIEF JUDGE DIFIORE: So following loosely,  
7 back on Judge Fahey's point, is this court's review  
8 of the question of law that's raised here limited to  
9 the facts that are in the trial record, and not the  
10 post-verdict motion?

11 MS. ASCHER: Well, there's enough - - -  
12 everything is in the trial record; the post-verdict  
13 motion sort of just elaborates on where these jurors  
14 were sitting but - - -

15 CHIEF JUDGE DIFIORE: So we answer my  
16 question; is our review limited to what's developed  
17 on the trial record?

18 MS. ASCHER: No, it's the entire record on  
19 appeal which would include the post-verdict motion  
20 and the comments that were made at sentencing.

21 JUDGE STEIN: Is it subject to a harmless  
22 error analysis?

23 MS. ASCHER: Absolutely not because this is  
24 a fundamental due process violation. In a courtroom  
25 you have a judge who is supposed to control what goes

1 on and an impartial jury, and when you already have  
2 spectators coming into the courtroom to influence the  
3 jury with silent speech, specialized clothing, these  
4 weren't just grieving family members, they decided  
5 what to wear that day, they decided where to sit; and  
6 the record is also interesting, because it appears  
7 that there were other family members on that day who  
8 were there to support Leo Walton's family, but those  
9 who were wearing the t-shirt went and sat closest to  
10 the jury.

11 This is a fundamental thing; when we say,  
12 you have a fair trial, it's supposed to mean  
13 something. The judge is supposed - - -

14 JUDGE RIVERA: Well, what if the defendant  
15 is shackled, is that subject to harmless error?

16 MS. ASCHER: Yes, but shackling is a  
17 completely different - - -

18 JUDGE RIVERA: How is that completely  
19 different? Doesn't that clearly plague that the  
20 state is suggesting there's something violent and  
21 terrible about this defendant versus just having a t-  
22 shirt that says, remember my family member who is no  
23 longer here?

24 MS. ASCHER: Shackling sends a different  
25 message. First of all, sometimes you can

1 constitutionally shackle a person in front of a jury.

2 JUDGE RIVERA: Understood.

3 MS. ASCHER: Right, you can do that, that's  
4 permissible. You can never have spectators come, you  
5 can never say, Your Honor, I'm going to have the  
6 spectators come, okay, that's never consta - - - it  
7 should never be constitutionally permissible.  
8 Shackles can send a message to the jury that - - -  
9 the charges are dangerous, that's why he's shackled;  
10 it makes sense. But when you see these shirts,  
11 that's a message, that's pulling on the heart  
12 strings.

13 JUDGE STEIN: What if it - - - what if  
14 there's one person with a button, you know, maybe two  
15 inches in circumference, and the same thing, and it  
16 has a picture, and it has some words, remembering,  
17 you know, Leo Walton, is - - - is that - - - and  
18 there's one person sitting in the courtroom in the  
19 front row or the second row, for counsel summation;  
20 is that inherently prejudicial and - - - and not  
21 subject to harmless error analysis?

22 MS. ASCHER: Again, that's a different  
23 story, however - - -

24 JUDGE STEIN: I know that. We're trying to  
25 figure out where the line is.

1 MS. ASCHER: Yeah, no, of course. If it's  
2 clear to the judge that that's a photograph of Mr.  
3 Walton, and if it has text on it like it did here,  
4 and if they are sitting next to the jury, yeah, it's  
5 error. If defense counsel didn't know and if they  
6 had been wearing it for three days on top of it, and  
7 the judge never even tipped them off, that's an even  
8 bigger error. And in this case, it's reversible  
9 error because it permeated the trial, and you - - -  
10 we can't say that those jurors weren't affected.  
11 This was the appeal to convict.

12 JUDGE GARCIA: Anyone wearing the button in  
13 there, and it gets in the courtroom, and it's there  
14 for let's say fifteen minutes, it's a mistrial.

15 MS. ASCHER: It's error. Whether it's  
16 reversible error, again, you have to look and see,  
17 well, is this the kind of unreasonable risk that this  
18 infiltrated the jury's deliberations.

19 JUDGE GARCIA: Isn't the judge in the best  
20 position to do that?

21 MS. ASCHER: Not necessarily, as Mr.  
22 Nelson's case shows. This judge should have tipped  
23 off defense counsel that these shirts were being worn  
24 day one, and he didn't.

25 JUDGE GARCIA: But as a general matter,

1           isn't the judge in the best position to see what's  
2           going on in the courtroom and make a determination on  
3           the second part of this analysis, which is, what's -  
4           - - what should I do here, if anything.

5                       MS. ASCHER: He has to do something, yes,  
6           the judge has to do something, I think, maybe we  
7           agree on that, the judge has to do something about  
8           it. Even if he determines that, you know, I can't  
9           see it, let me call up the parties, let me tell the  
10          attorneys, look, I think I see a t-shirt back there,  
11          or a little button, or a ribbon, I don't know what it  
12          means, I don't know if I could see it, make your  
13          record.

14                      JUDGE GARCIA: So it's the fact that he  
15          didn't do anything here, that - - -

16                      MS. ASCHER: He didn't do anything and,  
17          again, the message, the content, these shirts, this  
18          was a huge display of emotion, this was a photograph  
19          and text and a group sitting as close to the jury as  
20          they possibly could get.

21                      JUDGE RIVERA: Did - - - did the judge need  
22          to advise counsel at the very first occasion upon  
23          which the judge observed someone with a t-shirt?

24                      MS. ASCHER: Absolutely, this has no room  
25          in the courtroom. He should of - - -

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MS. ASCHER: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MR. DENNEHY: Good afternoon, Your Honors.

5 May it please the Court. My name is Morgan Dennehy,  
6 I represent the respondent.

7 The judge did do something here. He gave the  
8 jury an instruction. He told them to decide the case on  
9 the evidence and not on emotion. That instruction goes a  
10 long way. This court and other courts have routinely held  
11 that - - -

12 JUDGE RIVERA: So regardless of the  
13 display, as long as the judge says, ignore that,  
14 that's good enough?

15 MR. DENNEHY: It's - - - it's - - -

16 JUDGE RIVERA: It will always cure - - -  
17 the instruction always cures?

18 MR. DENNEHY: Well, it depends what the  
19 display is. I mean, this is - - - these - - - as the  
20 Appellate Division correctly, the majority correctly  
21 observed, and actually the dissent agreed with the  
22 majority, that these - - - these spectators display  
23 cases are to be taken on a case-by-case basis because  
24 there's so many different permutations that these  
25 cases can take. It's very fact based.

1 JUDGE RIVERA: The difference is that it's  
2 a spectator? In other words, would you agree that if  
3 the prosecutor wore this t-shirt, that would not be  
4 acceptable?

5 MR. DENNEHY: Well, that's - - - that's a  
6 state actor, and I think state actors - - -

7 JUDGE RIVERA: That's what I'm asking you,  
8 it's the difference that it's a spectator; is that  
9 what makes the difference? But it's the family  
10 members in this particular case?

11 MR. DENNEHY: Yes, absolutely. And they  
12 can come in with various forms of showing their  
13 grief. The crying - - - the crying mother and it's -  
14 - - it's - - - as Justice Garcia mentioned, the trial  
15 court's in the best position to determine how  
16 inflammatory and how prejudicial these displays are -  
17 - -

18 JUDGE STEIN: So you would agree that if  
19 the t-shirt had the picture, and it said his name on  
20 it, and it said, you know, convict the killer.

21 MR. DENNEHY: That would be a much worse -  
22 - - that would be a worse - - - a worse t-shirt; I  
23 would not concede that that would give rise as a de  
24 facto due process violation; it depends on various  
25 factors. And that's why the test that's been

1 articulated by the United States Supreme Court is so  
2 nebulous, it's an unacceptable risk of impermissible  
3 factors coming into play.

4 I looked that it that a couple of times and  
5 didn't quite know what it meant, but it leaves room  
6 for a - - - a case-by-case analysis considering  
7 different factors. And if I could suggest that this  
8 is what the Court should decide in this case, is that  
9 these factors should be considered, and the Appellate  
10 Division touched upon this, and the factors should  
11 start with the nature of the display. You know, how  
12 big is it, how is it being displayed, what is it. In  
13 this case, it was a photo of the deceased with the  
14 words "Remembering Leo Walton".

15 JUDGE ABDUS-SALAAM: What if it had said,  
16 "Justice for Leo"?

17 MR. DENNEHY: That would be worse, so that  
18 would - - - that would be a factor that would - - -  
19 that would suggest prejudice. But in this case, we  
20 don't have that here. Other factors, how many people  
21 are wearing the display, where are they seated, for  
22 how long are they wearing the display; all of these  
23 factors are taken into account in determining whether  
24 not that there's been an undue amount of prejudice in  
25 this case.

1                   JUDGE STEIN: Who's obligation is it to  
2 make a record of all this, because, you know, it's a  
3 fairly skimpy record, I think, in terms of - - -

4                   MR. DENNEHY: And the rec - - - and that's  
5 - - - I don't want a gloss over that point, Your  
6 Honor, the record in this case is completely  
7 inadequate to determine what if anything the jurors  
8 saw. There - - - there - - - defendant is alleging a  
9 due process violation, but we can't tell from the  
10 record - - -

11                   JUDGE RIVERA: Can - - - can we take the  
12 judge at his word?

13                   MR. DENNEHY: Absolutely. I think the  
14 judge - - -

15                   JUDGE RIVERA: And what does he say?

16                   MR. DENNEHY: Well, the judge made - - -  
17 there were two opportunities to discuss this issue,  
18 once when the objection was registered, right after  
19 the defense counsel completed the summation, right  
20 before the prosecutor began his, and the judge, I  
21 think, was a little taken aback by the timing of the  
22 application made by defense counsel; he thought it  
23 was a little suspicious that these shirts have been  
24 being worn previously, but counsel - - -

25                   JUDGE RIVERA: Isn't that what he says,

1 someone's been wearing them for several days, plain -  
2 - - I saw it, I know it said "Remembering" - - -  
3 "Remember Leo Walton" - - -

4 MR. DENNEHY: That's right.

5 JUDGE RIVERA: - - - and his picture, I  
6 mean, the judge puts on the record exactly what the  
7 display is, how often - - -

8 MR. DENNEHY: But - - - but the fact - - -  
9 but the fact that he can see it from the elevated  
10 position on the bench in the middle of the courtroom  
11 does not be that the jurors could see it from the  
12 side of the courtroom. And opposing counsel keeps  
13 saying that these - - - that these spectators were  
14 sitting right next to jury. The only record - - -  
15 the only evidence in the record of where they were  
16 sitting is the second row.

17 JUDGE RIVERA: But the judge was  
18 particularly upset because he expected that the  
19 defense counsel, floor level to the jury, right - - -

20 MR. DENNEHY: Well, that's - - -

21 JUDGE RIVERA: - - - didn't see it or - - -

22 MR. DENNEHY: - - - that's a presumption -  
23 - -

24 JUDGE RIVERA: - - - claimed not to see it,  
25 right?

1 MR. DENNEHY: - - - I still - - - I still  
2 think - - - because we're guessing about all this, I  
3 think it makes my point that really the record - - -  
4 there's lots of holes in the record with respect to  
5 the nature of the display, the length of the display.

6 And speaking of the length of the display,  
7 I'd just like to make this point very quickly, my  
8 opponent argues that the pre-objection display of  
9 these shirts goes toward the claim - - - the due  
10 process violation claim, but that aspect of the claim  
11 is not preserved. Counsel, when he made the  
12 objection - - - he asked for specific relief, he  
13 asked for the removal of the shirts going forward.  
14 And that's what's at issue on this appeal; not - - -  
15 not the prior wearing of the shirts; he didn't object  
16 to that at all. And he was informed - - - even after  
17 he was informed that there was prior wearing - - -

18 JUDGE STEIN: How would he object to it if  
19 - - -

20 MR. DENNEHY: - - - he said nothing.

21 JUDGE STEIN: How would he object to it if  
22 he didn't know it; he'd move for a mistrial?

23 MR. DENNEHY: Absolutely. He would say,  
24 Your Honor, you mean to tell me that someone was  
25 wearing these shirts on other days; well that's

1 extremely prejudicial; I'm moving for mistrial. And  
2 that - - -

3 JUDGE STEIN: Even though - - - even though  
4 the court had made it very clear that he wasn't  
5 buying it.

6 MR. DENNEHY: Well, it didn't - - - it  
7 didn't obviate the requirement that - - - that  
8 counsel actually make the application. So taking all  
9 - - -

10 JUDGE GARCIA: Counsel, I'm sorry - - -

11 MR. DENNEHY: Yes, sir.

12 JUDGE GARCIA: - - - just so I'm clear on  
13 that prior point, when you said he instructed the  
14 jury, that was the standard instruction, right?

15 MR. DENNEHY: It was standard, but it was  
16 effective, and jurors are presumed to follow  
17 instructions. And it was very specific - - - again,  
18 also, defense counsel never asked for a more specific  
19 instruction to specifically mention the shirts, so  
20 the court's failure to actually make a more specific  
21 instruction is not error, and the court - - - really  
22 the court sua sponte shouldn't have done that,  
23 because that's really a judgment call on the part of  
24 defense counsel.

25 JUDGE STEIN: Well, that would - - - that

1 might even bring more attention to the shirt.

2 MR. DENNEHY: Correct, that's why the court  
3 shouldn't have done it on the court's own.

4 I'd like to touch upon harmless error; if  
5 this court concludes that the wearing of these shirts  
6 - - -

7 JUDGE RIVERA: Before we move on - - -

8 MR. DENNEHY: Yes.

9 JUDGE RIVERA: - - - should - - - should  
10 the judge - - - upon the first observation, the judge  
11 have informed counsel, or asked counsel - - -

12 MR. DENNEHY: The court - - -

13 JUDGE RIVERA: - - - whether or not there  
14 was any problem with this?

15 MR. DENNEHY: The court never - - -

16 JUDGE RIVERA: Or not at all.

17 MR. DENNEHY: - - - the court never brought  
18 it up.

19 JUDGE RIVERA: No, I know that, that's not  
20 my question. My question is should the judge have  
21 done that; does the judge have any duty or obligation  
22 other than to make a determination as to whether not  
23 this is prejudicial?

24 If the court saw the shirts and concluded that  
25 the shirts were fairly innocuous, were not inflammatory,

1 were not being displayed in a flagrant manner to the jury  
2 and therefore - - -

3 JUDGE RIVERA: Uh-huh.

4 MR. DENNEHY: - - - that no prejudice was  
5 resulting, or maybe there was some prejudice but it  
6 would be ameliorated by the instruction - - -

7 JUDGE RIVERA: Uh-huh.

8 MR. DENNEHY: - - - then the court is under  
9 no obligation to bring that up.

10 JUDGE RIVERA: If that a ruling that the  
11 court is making, should the judge have put that on  
12 the record?

13 MR. DENNEHY: Only if defense counsel - - -

14 JUDGE RIVERA: But none of us was  
15 speculating about that.

16 MR. DENNEHY: - - - only if defense counsel  
17 objects to it because - - -

18 JUDGE RIVERA: Well, he wouldn't have known  
19 until the very end, right, so that - - - so to get  
20 back to your other point, at that point he should of  
21 objected and then the judge should have said, well, I  
22 made a ruling on this - - -

23 MR. DENNEHY: Well, the court - - -

24 JUDGE RIVERA: - - - is that what you are  
25 saying?

1 MR. DENNEHY: The court could have made a  
2 better record. Again, I think the court was taken by  
3 the timing of the objection, and I think the court  
4 did make a better record when it was - - - you know,  
5 after couple of days at the sentencing proceeding  
6 when the 330.30 motion was made - - -

7 JUDGE RIVERA: Uh-huh.

8 MR. DENNEHY: - - - the court made a more  
9 detailed findings and - - -

10 JUDGE STEIN: Can you think of any reason  
11 why the judge - - - I mean, I know the judge thought  
12 that there was a tactical thing, but can you think of  
13 any reason why the judge wouldn't ask them to cover  
14 it up?

15 MR. DENNEHY: I think the better course, if  
16 not for any other reason than it would take away this  
17 issue for - - - for an appeal, we wouldn't be  
18 litigating right now, would be to have the - - -

19 JUDGE STEIN: Sure, but can - - -

20 MR. DENNEHY: - - - the family members  
21 covered up.

22 JUDGE STEIN: - - - you think of any reason  
23 not to - - - especially when asked to - - -

24 MR. DENNEHY: I think the court was  
25 respecting the deceased victim's family's right to

1 grieve. And I think the court - - -

2 JUDGE RIVERA: Is that the judge's duty and  
3 obligation?

4 MR. DENNEHY: I'm sorry.

5 JUDGE RIVERA: Is that what the judge's role is  
6 in that courtroom, to concern himself with the family's  
7 needs - - -

8 MR. DENNEHY: No, but the court has to - -  
9 -

10 JUDGE RIVERA: - - - or the defendant's  
11 rights in a fair trial?

12 MR. DENNEHY: Obviously, the primary  
13 obligation is to ensure the right to a fair trial,  
14 but the court obviously thought, and correctly so,  
15 that the shirts didn't infringe upon that right to  
16 have - - - to a fair trial; and so the court wasn't  
17 going to - - - to ask family members - - - I mean,  
18 this was a crucial juncture in the trial. The court  
19 would have had to excuse the jury, inform the family  
20 members that they had to leave the courtroom, go into  
21 to a bathroom, remove - - - take of clothing, I mean,  
22 it was awkward.

23 CHIEF JUDGE DIFIORE: So are you suggesting  
24 the court doesn't have an affirmative duty to take  
25 steps to control the decorum of the courtroom?

1 MR. DENNEHY: I'm not suggesting that at  
2 all; the court absolutely has that duty, and I think  
3 the court exercised that duty here correctly. Again,  
4 it's all dependent upon these factors and the nature  
5 of this - - - but I won't go into them again, but - -  
6 - in this case, concerning all the factors, the  
7 display of these shirts for that limited period of  
8 time, we're only talking about two hours or so - - -  
9 two-and-a-half hours, during the prosecutor's  
10 summation and the court's charge; the continued  
11 wearing of the shirts did not resolve to a due  
12 process violation. Very quickly - - -

13 JUDGE ABDUS-SALAAM: Even - - - even if it  
14 were awkward, counsel, but defense counsel was asking  
15 for that, that would have - - - that would have made  
16 it awkward for the defendant, but defense counsel was  
17 asking that the court actually send these spectators  
18 out and have them change their clothes.

19 MR. DENNEHY: That's right, that was the  
20 application.

21 JUDGE ABDUS-SALAAM: Right, so why was that  
22 awkward? That's what I don't understand.

23 MR. DENNEHY: Well, that particular  
24 juncture for the court to say, okay, we're stopping  
25 the proceedings, you know, jury please wait outside -

1 - - I know, it was - - - it was a slight  
2 inconvenience, but it was - - - it's relevant to  
3 consider the context in which the application was  
4 made. And the bottom line, is the court didn't think  
5 it necessary because the court - - -

6 JUDGE FAHEY: Well, I suppose though, it  
7 seemed to me that reading into the record, like the  
8 court was treating it as if the court had been  
9 sandbagged; this had been going on for a number of  
10 days, you didn't object, and now you're objecting  
11 right before the People are going to do their  
12 summation. So that's what came across in the  
13 transcript to me; that's probably it.

14 MR. DENNEHY: That's part of it, for sure.

15 JUDGE FAHEY: I may be reading a little bit  
16 more into it, but it seems to be that was part of it.

17 MR. DENNEHY: I - - - I also - - - yeah.

18 JUDGE FAHEY: And of course, that'd be  
19 error, that'd be error, the court shouldn't make a  
20 decision that way. So the question is, is at this  
21 point, where it hasn't been objected to before, is it  
22 harmless error if we go forward from there?

23 MR. DENNEHY: It absolutely is harmless  
24 error, there's no question about the applicability of  
25 harmless error.

1 JUDGE FAHEY: Uh-huh.

2 MR. DENNEHY: Deck v. Missouri, United  
3 States Supreme Court case said that harmless error is  
4 applicable to shackling cases. And this court, has  
5 obviously adopted that - - - that ruling in three  
6 recent cases which I cite in my brief; Clyde, Best,  
7 and Cruise (ph.).

8 So there's no question that it applies to  
9 shackling, and if it applies to shackling, it has to apply  
10 to this kind of error because shackling is much worse,  
11 it's much more prejudicial, there's state actors at play  
12 here, shackling a defendant, and I think shackling - - -  
13 the message that shackling sends is way more prejudicial  
14 to a defendant than a grieving family honoring their  
15 deceased loved one.

16 So I think, if it applies to shackling, it has  
17 that apply to spectator conduct. And the evidence here,  
18 this is a textbook harmless error case, this was not a  
19 close case, the evidence was overwhelming, this defendant  
20 made extensive post-arrest statements, claiming self-  
21 defense that could not ever have been true, it was flatly  
22 refuted by the ballistics and the other evidence at the  
23 scene which - - - which corroborated the account of the  
24 surviving victim.

25 Just, not to belabor the facts, but I'd like to

1 just point out these - - - these couple of quick facts.  
2 The defendant claimed that - - - that the deceased victim  
3 was shot by the surviving victim and when he came in the  
4 room, he fired wildly. Well, the deceased victim had  
5 three bullet wounds prec - - - precisely placed in the  
6 back of his head. He was killed execution style so he  
7 couldn't have been killed in the manner in which the - - -  
8 the defendant described in his post-arrest statement.

9 Also, he claimed that he was simply defending  
10 himself against the surviving victim, yet the surviving  
11 victim testified the defendant kicked his door in and  
12 began shooting at him, and he hid behind his closet door,  
13 and that saved his live. It actually - - - the surviving  
14 victim got shot numerous times. And the evidence showed,  
15 that - - - the - - - the door frame on the bedroom door of  
16 the surviving victim was splintered, someone had kicked it  
17 in, and there are numerous bullet holes in the closet  
18 door, exactly where the surviving victim said he was  
19 hiding.

20 So, this - - - this wasn't - - - the jury  
21 returned a very quick verdict in this case and it wasn't  
22 because of the - - - that they potentially saw this t-  
23 shirts, it was because the evidence was overwhelming. So  
24 for all of these reasons, this court should affirm the  
25 decision of the Appellate Division.

1 CHIEF JUDGE DIFIORE: Thank you, sir.

2 MR. DENNEHY: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 In People v. Crimmins, this court carved out a  
5 category of cases in which due process violation occurs  
6 and harmless error does not apply. That is because, and  
7 I'm quoting, "The right to a fair trial is self-standing  
8 and proof of guilt, however overwhelming, can never be  
9 permitted to negate this right."

10 So what we see when we have cases in which there  
11 is spectator conduct and, now I'm speaking of the Supreme  
12 Court cases that I've cited in our brief, where you have  
13 the media coming in, you don't look at the strength of the  
14 evidence, you don't look to see whether the evidence was  
15 overwhelming, notwithstanding the spectator display. What  
16 you do is reverse a conviction because it's that bad. Due  
17 process means that Mr. Nelson should've gotten a fair  
18 trial that included not having these spectators in the  
19 courtroom.

20 It also means that the public should be assured  
21 that when those courtroom doors are closed, what goes on  
22 inside is fair; the judge is looking out for his jurors,  
23 the judge is looking out for his defendant, and we don't  
24 have that here. Anybody who walked into that courtroom,  
25 especially on the fifth day, when the prosecutor was

1 delivering a very powerful summation, standing in what I  
2 presume wasn't in front of the witness box but more in  
3 line in front of the spectators, and saw the prosecutor  
4 with the backdrop of Mr. Walton's family wearing their t-  
5 shirts that were very clear, the court described them from  
6 his vantage point, would not have left that courtroom  
7 thinking that was justice. Justice means justice, and it  
8 did not happen in this case.

9 JUDGE RIVERA: Let's say we disagree on - -  
10 - and determine that the harmless error analysis does  
11 apply, why isn't the evidence, as already described,  
12 sufficiently overwhelming; what doesn't it meet that  
13 test?

14 MS. ASCHER: The evidence was strong,  
15 however, you cannot parse through the verdict and  
16 decide, well, maybe the jury reached that verdict for  
17 these reasons. This jury was inundated with the  
18 image of this victim's family sitting there begging  
19 for a conviction.

20 And just, my last thing, I see my light is  
21 on, is that everyone - - - well, I'm sorry, the  
22 prosecutor keeps saying that, you know, the record  
23 was specious and it's not adequate and we don't know;  
24 we do know, we know how many times the spectators  
25 walked in the courtroom, we know what the shirt

1           looked like, we know what the caption said, we know  
2           who was wearing them, we know where they sat, we know  
3           what the judge thought of them; this record is  
4           perfect, you don't see better records than this in a  
5           spectator misconduct case.

6                         If the court has no further questions,  
7           thank you.

8                         CHIEF JUDGE DIFIORE: Thank you.

9                         (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Joel Nelson, No. 45 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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