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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,  
  
-against-  
  
DAVID R. LANG,  
  
Appellant.  
-----

NO. 27

20 Eagle Street  
Albany, New York  
June 2, 2020

Before:

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

Appearances:

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Today our colleague Judge  
2 Feinman is participating in oral argument remotely by  
3 telephone.

4 Counsel, your appearance?

5 MR. HELLMAN: Good morning. My name is Matthew  
6 Hellman, I'm here with my co-counsel, Sheila Tendee (ph.),  
7 and I'm appearing for David Lang. I'd like to reserve two  
8 minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. HELLMAN: Thank you, and may it please the  
11 court, I want to focus on three critical legal errors in  
12 the trial below. I'll begin with the court's failure to  
13 give a curative instruction on the blood alcohol issue,  
14 then I'll turn to the court's improper replacement of a  
15 juror mid-trial, and finally the prosecution's improper  
16 opinion testimony during summation.

17 CHIEF JUDGE DIFIORE: Counsel, before you - - -

18 MR. HELLMAN: Starting - - -

19 CHIEF JUDGE DIFIORE: - - - begin - - - before we  
20 address the adverse inference charge, if we find that the  
21 trial court violated CPL - - - I think it's 270.35 - - - do  
22 we get to the instruction to - - - to the jury?

23 MR. HELLMAN: That would be sufficient by itself  
24 to require a vacatur and - - - and remand. That's correct,  
25 Your Honor. So no, you would not reach the adverse



1 inference instruction.

2 So I'm happy to start with that if - - - if that  
3 would be useful to Your Honor.

4 CHIEF JUDGE DIFIORE: No, no. That's fine.

5 MR. HELLMAN: Because I - - - I think that - - -  
6 you know, turning to 270.35, this case will become the  
7 court's leading case on what a reasonably thorough inquiry  
8 is, which is what that provision requires. And there was  
9 no inquiry.

10 If this inquiry was reasonably thorough, then no  
11 inquiry is not reasonably thorough, because what happened  
12 here was in the middle of trial the judge summarily  
13 replaced a juror without making any inquiry as to whether  
14 or not it would be possible to have the juror change the  
15 date of the appointment that she supposedly was going to,  
16 whether it would be possible to have someone else take her  
17 child to that appointment.

18 And what made this inquiry particularly  
19 unreasonable, was that the judge seemed to believe that the  
20 juror, during voir dire, had already stated that she would  
21 need to leave trial for some - - - for an appointment of  
22 this kind, when in fact, the juror said exactly the  
23 opposite.

24 So I submit to the court that if "reasonably  
25 thorough" is going to have any meaning, the court needs to



1 make at least some effort to determine whether or not the  
2 juror could have postponed the appointment or had someone  
3 else - - - someone else go.

4 And if you look at this court's cases and the  
5 cases in the lower courts of the State of New York, they  
6 all gravitate around that concept.

7 This court, in the Jeanty case, you know, looked  
8 at three different cases when it was construing this  
9 provision, and at each one, the court made some effort - -  
10 - some effort to reach the juror by phone, some effort to  
11 ascertain whether or not there was a way to avoid  
12 substituting the juror in the middle of the trial.

13 JUDGE WILSON: Would the - - -

14 MR. HELLMAN: And in our papers - - -

15 JUDGE WILSON: Would the - - -

16 MR. HELLMAN: - - - we talk about the People v.  
17 Battle case, which is really on all fours, coming from the  
18 First Department, exactly the same fact pattern.

19 The judge says that a court official told him  
20 that a juror could not attend and the court then  
21 substituted a replacement juror in - - - in that juror's  
22 stead.

23 JUDGE WILSON: Counsel, would - - - would - - -

24 MR. HELLMAN: What the First Department said was  
25 - - -



1 JUDGE WILSON: Counsel?

2 MR. HELLMAN: - - - that is not a reasonably  
3 thorough inquiry, that is not an inquiry at all. New York  
4 law requires more for - - - to safeguard the Constitutional  
5 right of a defendant to a jury of his or her choosing.

6 JUDGE WILSON: Mr. Hellman, would the lack of  
7 notice to counsel by itself be sufficient?

8 MR. HELLMAN: Well, the - - - as - - - if you  
9 look at the provision 270.35, what you'll see, it - - -  
10 it's really a double-barreled provision. It both requires  
11 a reasonably thorough inquiry by the court - - - that's one  
12 nec - - - necessity that the provision imposes. And the  
13 second is an opportunity for counsel to comment and  
14 contribute - - - a notice and opportunity to be heard on  
15 the issue, which is a second and independent requirement.

16 Here we had a failure of both. And your  
17 hypothetical goes, I suppose to - - - if the court  
18 conducted a reasonably thorough inquiry but didn't give the  
19 - - - the counsel an opportunity to participate, that too,  
20 would violate the rule. And that's also what we have here.

21 So I think either ground is a sufficient basis to  
22 overturn the Third Department's 270.35 ruling in the case.

23 And again, I'd stress that - - - you know, I  
24 understand my opponent to be suggesting - - - or the Third  
25 Department certainly did - - - that what the court did was



1 reasonable under the circumstances. That simply isn't  
2 correct, both as a matter of common sense and as a matter  
3 of what New York courts do every day in this kind of  
4 situation.

5 Courts - - - and frankly it - - - we - - - we  
6 canvassed quite a few cases in our - - - in our papers - -  
7 - courts routinely - - - this is the age of the cell phone.  
8 They make a call to determine if the juror really can't be  
9 reached. They - - - and they at least - - - you know, and  
10 - - - and frankly, in cases that involve far - - - far more  
11 obvious disabilities than this one. Somebody has to go to  
12 - - - some - - - the juror herself is - - - you know, falls  
13 ill and goes to the hospital.

14 Even in those situations, the court makes some  
15 effort - - - some effort to ascertain what - - - whether or  
16 not the juror truly needs to be absent. And here, no  
17 record was created whatsoever, because the court came in  
18 and simply said this juror's not here, or so I'm told, this  
19 juror can't be here, end of story.

20 JUDGE FAHEY: Can we move on to the - - - to the  
21 first point and the Handy analysis?

22 MR. HELLMAN: Yes - - - yes, Your Honor. What we  
23 - - - so going to the curative-instruction issue, what we  
24 have here was a situation in which intent and intoxication  
25 were the central substantive issues at this trial.



1 JUDGE STEIN: How - - - if we - - - maybe we came  
2 to know that at the trial or at some point prior to the  
3 trial, but how - - - given the circumstances and how they  
4 developed at the scene, how - - - how would the police know  
5 that at the time that - - - that - - - when the request was  
6 made for the - - - for the BAC test?

7 MR. HELLMAN: So there's a couple things going on  
8 here, but what they amount to is really a perfect storm, in  
9 terms of the circumstances. It's not just that the police  
10 could smell alcohol on Mr. Lang's breath when they picked  
11 him up, although that's certainly part of it. It's - - -  
12 it's not just that the police took him into custody and  
13 were the only ones capable of giving a blood alcohol test,  
14 which of course, is a dissipating substance, and time  
15 matters - - - time is of the essence; but also that the  
16 defense counsel asked the - - - the - - - the police to  
17 take that test.

18 They didn't for nearly five hours more. And then  
19 at trial, the prosecution made it a centerpiece of their  
20 presentation and cross-examination - - -

21 JUDGE FAHEY: Can I interrupt you - - -

22 MR. HELLMAN: - - - that there was really - - -

23 JUDGE FAHEY: - - - can I - - -

24 MR. HELLMAN: - - - that - - - that our  
25 intoxication - - -



1 JUDGE FAHEY: Stop for a second.

2 MR. HELLMAN: - - - evidence, couldn't - - -

3 JUDGE FAHEY: Counselor?

4 MR. HELLMAN: - - - isn't - - - yes, please?

5 JUDGE FAHEY: Counselor, yes. Slow down.

6 Sometimes it's clumsy, the communication. I apologize for  
7 that.

8 The key distinction for me here is between  
9 obtaining evidence and destroying evidence. And I think  
10 that's where you really need to focus your argument,  
11 because, the way I understand Handy - - - I was on the case  
12 in the Fourth Department - - - is that case involved  
13 destruction of evidence. Here we have a request to obtain  
14 evidence that wasn't acted upon.

15 MR. HELLMAN: I - - - I - - - thank you, Your  
16 Honor. And I think this is important.

17 So under this court's possession case law, I  
18 think these are the key factors. They had Mr. Lang; they  
19 had him in their exclusive control; and there was a request  
20 to take the blood alcohol test, which the police did not do  
21 in a way that was timely enough, such that then, at trial,  
22 as - - - as I've said, the prosecution made a big deal of  
23 there not being an earlier test.

24 JUDGE STEIN: So what was the - - -

25 MR. HELLMAN: The police had Mr. Lang, in every





1 sense of the word.

2 JUDGE STEIN: - - - what was actually the  
3 evidence - - - Counselor - - -

4 MR. HELLMAN: He was under their exclusive  
5 control and there was a request made by counsel to capture  
6 something that would otherwise dissipate absent further  
7 action.

8 JUDGE STEIN: Counselor, what was the evidence?  
9 It sounds like you're saying that the defendant was - - -  
10 was essentially the evidence from which they could extract  
11 this - - - this additional evidence. And I - - - I'm just  
12 having trouble understanding what evidence was in existence  
13 at the time that - - - that this test was requested that  
14 they destroyed by not - - - by not giving the test.

15 MR. HELLMAN: So as you say, Your Honor, the  
16 police had Mr. Lang. They obviously also had his blood  
17 which contained the record or the - - - the - - - the blood  
18 alcohol level that was material to the case.

19 But if - - - if I may, if - - - there - - -  
20 there's another line of this court's authority, I think,  
21 that is useful to understand here, because even when - - -  
22 as we said in our papers, we're not asking the court to  
23 overturn its - - - its standard rule which says that the  
24 police don't need to go out and affirmatively gather  
25 evidence in the general case.



1           However, this court has also been very careful to  
2 say that even when the police don't possess in - - - in  
3 some sense, the evidence, it - - - a due process problem,  
4 nevertheless, would arise or at least it is relevant for  
5 due process and Brady considerations - - -

6           CHIEF JUDGE DIFIORE: Well, Counsel, that's - - -

7           MR. HELLMAN: - - - if the defense - - -

8           CHIEF JUDGE DIFIORE: - - - interesting - - -  
9 that's interesting that you raise that, because wouldn't  
10 this conduct then have been better addressed in a motion to  
11 dismiss the indictment rather than a curative instruction  
12 at the back end, if you're alleging that, you know, the  
13 police had him in custody; they made a request for the  
14 police to have his - - - blood drawn; they dragged that  
15 out; and now at trial the prosecutor wants to exploit that  
16 situation?

17           To - - - to my mind, I'm thinking, well, this is  
18 a motion to dismiss alleging due process violations, and  
19 there could have been a hearing to determine that, not a  
20 curative instruction at the back end.

21           MR. HELLMAN: Well, I'd have to check the record  
22 to see precisely whether or not - - - there was a lot of  
23 pre-trial motion practice in his case.

24           But you know, from - - - I think the key point  
25 for this argument is that a court has many tools to deal



1 with a violation, and a curative instruction is one of  
2 them. If that is a lesser remedy, it's still an  
3 appropriate remedy.

4 And I - - - I'd point the court to this - - - to  
5 its decision in the Jardin case, which my friend does not  
6 mention in her briefing, but we talk about quite a bit.  
7 That's a case in which the prosecution did not gather DNA  
8 evidence in a - - - in a - - - in a case involving charges  
9 of rape.

10 The court held that there was no violation  
11 because - - - because - - - and it emphasized this - - -  
12 the defendant had a reasonable opportunity to get the DNA  
13 himself and - - - and - - - and on those facts, there was  
14 no reason to think the DNA was actually going to be  
15 material.

16 The court car - - - I submit to you, the court  
17 carved out those factors for a reason. It matters for the  
18 analysis whether or not Mr. Lang and his defense counsel  
19 had a reasonable opportunity to get the evidence that they  
20 asked the police to preserve and measure.

21 They did not, in this case. And it was the same  
22 in the Alvarez case which actually involves Breathalyzers  
23 and DUI, and there the court again emphasized - - - it  
24 didn't have to - - - but it said it was important that  
25 under the law that pertained to that particular kind of



1 violation, the defense had a right to obtain its own breath  
2 - - - Breathalyzer analysis of the blood alcohol level.

3 Here - - -

4 JUDGE RIVERA: So Counsel - - - Counsel - - - oh,  
5 thank you. I'm glad you could hear me.

6 So I just want to clarify your argument. So the  
7 police did eventually administer the test or there was - -  
8 -

9 MR. HELLMAN: That's correct.

10 JUDGE RIVERA: - - - eventually a blood alcohol  
11 test taken, correct?

12 MR. HELLMAN: Yes.

13 JUDGE RIVERA: So the real argument is the  
14 timing, that they waited a particular period of time, and  
15 as a consequence the evidence is just not as - - -

16 JUDGE FEINMAN: If I - - - if I may - - -

17 JUDGE RIVERA: - - - valuable - - -

18 MR. HELLMAN: It's that under the law that  
19 pertains to that particular - - -

20 JUDGE RIVERA: What happened there?

21 Correct? I'm sorry, I heard some back - - - what  
22 am I hearing.

23 MR. HELLMAN: Yes, I'm hearing a little bit of  
24 (indiscernible) myself, I think. But - - -

25 CHIEF JUDGE DIFIORE: Counsel?



1 MR. HELLMAN: But yes, the timing is important,  
2 Judge Rivera. Yes.

3 JUDGE RIVERA: Okay. I'm sorry. We have to fix  
4 - - - there's some feedback here. Hold on a second.

5 Okay, we're good? Thank you. All right.

6 So the question is the timing. So now let's say  
7 we agree with some - - - somewhat with your analysis. What  
8 would be the rule? So at what point is it that the judge  
9 has to give that curative instruction? So how - - - how  
10 much time has to have passed where the evidence is no  
11 longer as helpful - - - let me put it that way - - - to the  
12 defense?

13 MR. HELLMAN: The rule we're asking for is - - -

14 JUDGE RIVERA: Um-hum.

15 MR. HELLMAN: - - - in that situation, where  
16 there's a delay, after exclusive custody and - - - and - -  
17 - and a request by the defense, at a minimum - - - the  
18 minimal rule that we are asking for is if the prosecution  
19 then exploits the delay in the testing as a way to  
20 establish its own intent case and say just what the  
21 prosecutor did here, that the test was unreliable, that we  
22 will never know, you know, all those kinds of things,  
23 that's when a curative instruction is warranted.

24 JUDGE RIVERA: Um-hum.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



1 Counsel?

2 MR. HELLMAN: If I - - - if I may, I know I'm - -  
3 -

4 CHIEF JUDGE DIFIORE: Thank you, Counsel. You'll  
5 have your - - -

6 MR. HELLMAN: - - - I'm over my time - - -

7 CHIEF JUDGE DIFIORE: - - - rebuttal time.

8 MR. HELLMAN: - - - but I will just say very  
9 quickly on the summation point, because I think it tie - -  
10 - it ties in quite well with the curative instruction  
11 point.

12 As I started, I think, on this point,  
13 intoxication was the key to this case, whether the seventy-  
14 year-old David Lang was too intoxicated to form the  
15 requisite intent or whether he - - - he was not. In the  
16 prosecution's closing, in the People's closing, they hit  
17 this point, not just by pointing to the evidence in the  
18 case, which as I said, was diminished in an improper way,  
19 due to the failure to have it cast without a curative  
20 instruction, but the prosecutor himself said I don't  
21 believe he was intoxicated.

22 Those were not accidental words. They went to  
23 the key factual issue in the case, and they had the  
24 prosecutor cloaking himself, or cloaked in the majesty of  
25 the law, telling the jury what the - - - you know, what the



1           supposed truth was.

2                       This court's cases are quite clear. I pointed  
3           the Court to People v. Bailey as my primary authority that  
4           the prosecution can't - - - can't be an unsworn witness to  
5           an issue. That's exactly what we had here, and it was  
6           highly material, given the nature of this case.

7                       CHIEF JUDGE DIFIORE: Thank you, Counsel.

8                       MR. HELLMAN: And with that, I'll reserve my time  
9           for rebuttal.

10                      CHIEF JUDGE DIFIORE: Thank you, Counsel.

11                      Ms. Bowen?

12                      MS. BOWEN: Yes. May it please the court,  
13           Michele Bowen for Respondent.

14                      As far as the request for a curative instruction  
15           goes, we believe that it was properly denied by the trial  
16           court. There's much talk about this request for BAC that  
17           came later. The court must remember that in a murder case,  
18           evidence of intoxication is not necessary to the  
19           prosecution, and the police are not required to obtain that  
20           evidence.

21                      And when - - - just to skip a little to  
22           Appellant's point, this was not drawn out and delayed for  
23           destruction-of-evidence purposes. You have to understand,  
24           this was a murder investigation.

25                      And so by the time evidence was tested, there was



1 much talk about - - -

2 JUDGE FEINMAN: Ms. Bowen, I don't know if you  
3 can hear me. It's - - -

4 MS. BOWEN: - - - it came later - - -

5 JUDGE FEINMAN: Ms. Bowen, I don't know if you  
6 can hear me. It's Judge Feinman.

7 MS. BOWEN: I can.

8 JUDGE FEINMAN: My question is, would you agree  
9 that if we were to reverse on the trial issue - - - on the  
10 juror substitution issue, that everything about Handy  
11 becomes an advisory opinion.

12 MS. BOWEN: I would agree that if the court so  
13 chooses to take that action, then we would probably not  
14 reach the other issues.

15 And so if we want to get to that now, with the  
16 substitution of the juror - - -

17 JUDGE WILSON: Well, before - - - Counsel, before  
18 - - -

19 MS. BOWEN: The court - - -

20 JUDGE WILSON: - - - you move on to that, if I  
21 can- - -

22 MS. BOWEN: - - - did not make a thorough inquiry  
23 because a phone call came in that - - - can you hear me?

24 JUDGE WILSON: Yes. But Counsel, before you move  
25 on to that issue, I just wanted - - - I had one question on





1 the blood alcohol issue.

2 MS. BOWEN: Yes.

3 JUDGE WILSON: To me it seems that - - - I can't  
4 tell from the record whether the delay was reasonable or  
5 unreasonable, if you want to call it a delay, because I - -  
6 - you know, the request was to take blood.

7 The inference that I would make from the record  
8 is that the police in this little town didn't have the  
9 ability themselves to take blood, because they ended up  
10 taking him to a hospital. I don't know how far that  
11 hospital is, I - - - and you know, the moment the request  
12 is made, there's maybe four-and-a-half hours that lapse  
13 between the time the request is made and the time his blood  
14 - - - the blood is taken.

15 But I don't know whether that's reasonable or not  
16 reasonable. I don't know what circumstances the police are  
17 operating under and where the hospital is.

18 MS. BOWEN: So the hospital is a - - - is a  
19 little bit of a distance from the barracks where he was  
20 taken to be processed. But in the interim, as I - - - I  
21 just need to reiterate for - - - this is a small community;  
22 this is a murder case.

23 Evidence had to be processed. They weren't going  
24 - - - they absolutely had no ability to draw his blood at  
25 that substation.

1           And so before they took him to the hospital, he  
2 had evidence on his body, as far as the clothing he was  
3 wearing. They're not going to take him to a hospital and  
4 contaminate all of that evidence.

5           And while the request came in, he had to be  
6 interviewed, the evidence processed. They went and they  
7 got a search warrant for items of evidence, including his  
8 blood. And once all of that was handled, they took him to  
9 get a blood draw.

10           I would also like to note, I believe it's  
11 mischaracterized that the People used any of this  
12 information in our case-in-chief. We did not.

13           The - - - the majority of this information about  
14 the blood came in in response to cross-examination by  
15 defense counsel. And when they put forth a - - - a witness  
16 - - - an expert witness to talk about the level of  
17 intoxication, my colleague certainly raised issues and  
18 tried to derail that, yes, this was all speculative now;  
19 not because the police delayed getting the blood, but  
20 because there wasn't enough information about what he ate  
21 and all of the details that would make a better  
22 extrapolation.

23           Any information that came out at trial about the  
24 level of intoxication was merely my colleagues trying to  
25 refute the defense that was put forth. And as a matter of



1 fact, the 911 call, which we put in, clearly indicated that  
2 he was not intoxicated to the point where he could not be  
3 responsible for his actions.

4 He talked about how he shot his brother. He said  
5 his brother's name. It's almost comical that he says "his  
6 name was Russell", that he knew that his brother could be  
7 dead. He told them where the weapons were located. He  
8 gave them so much information. He said yes, "I drink every  
9 goddamn day, why are you asking."

10 And further to show his intent, they were  
11 concerned about where the weapon was, and he said don't  
12 worry, I'm not going to shoot anybody else.

13 CHIEF JUDGE DIFIORE: Ms. Bowen, let's - - -

14 MS. BOWEN: And so - - -

15 CHIEF JUDGE DIFIORE: - - - Ms. Bowen - - -

16 MS. BOWEN: Yes.

17 CHIEF JUDGE DIFIORE: - - - let's move to the  
18 juror discharge issue.

19 MS. BOWEN: Okay.

20 CHIEF JUDGE DIFIORE: And my question to you is:  
21 how much effort would it have taken to determine the reason  
22 that the juror wasn't present?

23 MS. BOWEN: Well, so there's a couple of issues  
24 there. The - - - apparently there was some night-before  
25 information that this juror had to take - - - I believe it



1 was - - - a child to a - - - an emergency appointment in  
2 Rochester.

3 Now, I know it's very difficult for folks to  
4 imagine it in Albany, but we have dead zones here in the  
5 North Country. So once that juror said I'm on my way to  
6 Rochester, there's a significant amount of time - - - it's  
7 something that's trying to be fixed up here - - - where  
8 it's a dead zone, and you have no cell service.

9 JUDGE STEIN: But - - - but - - - but there's no  
10 indication that there was an attempt to call. There's  
11 nothing on the record about that. So that - - - that's - -  
12 - that's just pure, it seems to me, speculation about what  
13 may have happened.

14 Isn't - - - isn't it - - - isn't it necessary for  
15 the court to make a record of what attempts were made to  
16 contact this juror and - - - and - - - and determine her  
17 availability?

18 MS. BOWEN: I believe when the court came out and  
19 said that the juror called and said she would not be here  
20 today, that he had to replace her, and then he asked if  
21 there was any objection, in the record you can see where  
22 it's dot-dot-dot, to indicate he held it a moment to see if  
23 there was any - - - was any objection. And he said, in any  
24 case, let's go on and call our next witnesses.

25 There was no objection. I would just like to set



1 the scene for the court here. This was a defense table  
2 that constituted four attorneys and assistants, two law  
3 firms, that had been a contentious trial with many  
4 objections. And at this key juncture they don't raise an  
5 objection?

6 And so I would just say that the judge put on the  
7 record the information that he had, which is she called in  
8 today; she said she wasn't going to be here, is - - - you  
9 know, if there's any objection, dot-dot-dot, waited, there  
10 was no objection. And this really all occurs later when  
11 the judge - - -

12 JUDGE RIVERA: But Counsel - - - Counsel - - -

13 MS. BOWEN: Yes.

14 JUDGE RIVERA: Counsel? I thought the court  
15 indicated that objections would be heard later, and in  
16 fact, when the objections are discussed, the court said to  
17 defense counsel, you seemed to disagree with my approach,  
18 is there something you wish to say.

19 So obviously the court was aware that there was a  
20 problem from - - -

21 MS. BOWEN: Well - - -

22 JUDGE RIVERA: - - - defense counsel's view.

23 MS. BOWEN: Well, I - - - I believe that he said  
24 we - - - we - - -

25 JUDGE FEINMAN: Counselor, this is Judge Feinman,



1           again.

2                   Counselor, I don't know if you can hear me. I  
3           hope so.

4                   MS. BOWEN: I can.

5                   JUDGE FEINMAN: And I don't understand what the  
6           defense was supposed to object to, because it was already a  
7           fait accompli, wasn't it?

8                   MS. BOWEN: I - - - I think the defense could  
9           have raised the issues that we're discussing here today  
10          which is what efforts were made, can you - - - can the  
11          court just articulate to us so that we know what - - - what  
12          happened.

13                   The judge did, at the conference, when he said I  
14          noticed your body language, that there was an issue and  
15          then defense counsel articulated all the things he could  
16          have put on the record at the time when he was asked for an  
17          objection.

18                   I would also like to say that the judge had said,  
19          well, we can discuss this later, because it was a medical  
20          appointment issue. But then, after he said that, he said  
21          are there any objections. So he said one thing first, and  
22          then the other thing after, and then waited a bit to see if  
23          there would be any objection, and none was raised, so he  
24          moved on.

25                   JUDGE FAHEY: You - - - you know - - - it's Judge



1 Fahey. My understanding of the record is a little bit  
2 different than you had articulated. I understood that the  
3 juror told the court attendant two days earlier that she  
4 had had a medical appointment and that she went forward  
5 with that, but no attempt was made to contact the juror or  
6 to clarify if that was true, by the court.

7 Honestly, I don't know if the court had been  
8 notified by the court attendant or not. But that's - - -  
9 that was my understanding of the record.

10 MS. BOWEN: I believe that there were two  
11 conversations. It sounds like at one point they thought  
12 that there was this issue where they thought it was raised  
13 during voir dire. That turned out not to have been  
14 correct. And then there was some discussion that she had  
15 let somebody know a period of time before.

16 I believe the final in the record is that she  
17 called the night before to say that she wasn't going to be  
18 here today, and then she, in fact, did not show up.

19 JUDGE FAHEY: Thank you.

20 MS. BOWEN: And - - - and so let's - - - I just  
21 want to move on to the issue of the - - - my colleague's  
22 summations. I just wanted to say that they were a fair  
23 response to defense counsel's summation.

24 In that summation, defense counsel called law  
25 enforcement slipshod and incompetent, they're not



1 trustworthy, they - - - they wouldn't look you in the eye,  
2 he told the jurors. And that is indicative of people who  
3 lie.

4 He told them at the end, "you cannot believe  
5 Trooper Bogart or Peters, but the fact that the Trooper  
6 Bogart and Peters are unreliable and untrustworthy proves  
7 the evidence is - - - evidence is insufficient."

8 Now, he didn't say "I think" or "I believe", he  
9 just straight up usurped their role as a fact-finder and  
10 said these are unreliable liars. And so my colleague,  
11 perhaps should not have used words like "I", but I think it  
12 was a fair response to defense counsel's completely trying  
13 to obliterate the work that law enforcement had done.

14 And so I believe it absolutely was a fair  
15 response to that summation which was just littered and  
16 peppered with calling law enforcement - - -

17 JUDGE RIVERA: So - - -

18 MS. BOWEN: - - - liars.

19 JUDGE RIVERA: - - - Counsel, if - - - if I can  
20 just clarify. So your position is, if defense counsel gets  
21 up and says something to the effect "those witnesses are  
22 liars", that the prosecutor can get up and say I don't  
23 believe the witnesses are liars?

24 MS. BOWEN: I don't believe he got up and said  
25 that the witnesses were liars.





1 JUDGE RIVERA: No, no, just my question.

2 MS. BOWEN: It wasn't - - -

3 JUDGE RIVERA: No, no. I'm asking you - - -

4 MS. BOWEN: I'm sorry.

5 JUDGE RIVERA: - - - I'm asking you my question.

6 Can a prosecutor then get up and say I don't believe the  
7 witnesses are liars? In my opinion those witnesses are not  
8 liars?

9 MS. BOWEN: I believe he can in a - - - in a  
10 sense dress that up. I mean, I don't think he should say  
11 those kinds of things, but I think that because the - - -

12 JUDGE RIVERA: Doesn't our case law - - -

13 MS. BOWEN: - - - summation was so direct - - -

14 JUDGE RIVERA: - - - say you can't get up and - - -  
15 -

16 MS. BOWEN: - - - in that aspect.

17 JUDGE RIVERA: - - - doesn't our case law say  
18 that you cannot get up - - - as a prosecutor, get up and  
19 give your opinion, your assessment?

20 MS. BOWEN: I believe it depends on what the  
21 summation was of defense counsel. Perhaps there should  
22 have been objections at the points where defense counsel  
23 was having such an improper summation.

24 CHIEF JUDGE DIFIORE: Thank you, Ms. Bowen.

25 Mr. Hellman, your two minutes.



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MR. HELLMAN: Yes, thank you, Your Honor. Three quick points.

Starting with the - - - the juror issue. The court is absolutely correct that all we can do is speculate as to whether or not Juror Number 9 could have changed that appointment, could have had somebody else go to it, because the court made no effort whatsoever - - - Judge Fahey's account of the chronology is - - - is correct, by the way - - - during the apparently two days in which they had notice of this.

Instead, it was already a fait accompli, as you - - - as you said, Your Honor. The juror was substituted. And if Rule 270.35 was going to mean anything, that cannot be a reasonably thorough inquiry.

The second point, on the adverse instruction, you know, just to respond to what my friend on the other side is saying, I just want to be clear. The - - - the testimony at pages 853 forward shows that the police were perfectly capable of taking a Breathalyzer from the moment that they had apprehended Mr. Lang. They did not do that.

So there - - - there were ample ways to - - - to measure Mr. Lang's blood alcohol content. It is not correct to say that they had to wait until 9 o'clock to do it, and certainly not more than - - - or - - - or approximately five hours after our request for doing so.

1           And then third, I just want to end, I guess,  
2           where I ended my - - - my opening remarks. This was all  
3           about intent, it was all about intoxication.

4           This was a close case involving a seventy-year-  
5           old man who called 911 and admitted that he had been  
6           drinking, that he had shot his brother. This comes down to  
7           whether or not - - - to blood alcohol levels and - - -

8           JUDGE RIVERA: So - - - so, Counsel - - -

9           MR. HELLMAN: - - - and intoxication.

10          JUDGE RIVERA: - - - Counsel.

11          MR. HELLMAN: It was not - - - yes?

12          JUDGE RIVERA: Counsel, I'm sorry to interrupt  
13          your last point there, but I just want to circle back, now  
14          that you've said that, to something that was mentioned  
15          earlier.

16          So if the court were to agree with you on the 270  
17          issue, on the juror discharge issue, I think you said no,  
18          we would not have to reach the question of the adverse  
19          instruction. But isn't this issue just going to come up  
20          again - - - the issue about the police not responding and  
21          preserving - - - what you've called preserving the  
22          evidence? Isn't that going to come up in a retrial?

23          MR. HELLMAN: Yeah, I - - - I appreciate you  
24          raising that question, Judge Rivera, because I had the same  
25          thought as I was sitting here listening to the - - - to the



1 counsel's argument.

2 Yeah, the - - - well, I have a two part-  
3 submission. The juror issue is sufficient, by itself, to  
4 require vacatur.

5 JUDGE RIVERA: Um-hum.

6 MR. HELLMAN: But the issue of curative  
7 instruction, I think, would be best reached by this court  
8 as well, both as guidance for the courts of New York and  
9 for this case, in terms of what the proper way to proceed  
10 is, given the failure to take the test, on the facts that  
11 we have here.

12 So - - -

13 JUDGE GARCIA: Chief?

14 MR. HELLMAN: - - - the - - - the juror issue is  
15 sufficient, all by itself to - - - to vacate the - - - the  
16 - - -

17 JUDGE GARCIA: Chief?

18 MR. HELLMAN: - - - verdict here, but it would be  
19 prudent and I think appropriate for the court to reach the  
20 curative instruction issue as well.

21 JUDGE GARCIA: Counsel?

22 MR. HELLMAN: Given its importance to the case.

23 JUDGE GARCIA: Counsel? Just a quick follow-up  
24 on that. It seems to me, if we were to reverse on the  
25 substitution, isn't - - - and I think this follows up on



1           what I believe Judge Wilson was getting at earlier - - -  
2           isn't the entitlement to a charge at least - - -

3                   JUDGE FEINMAN: But why doesn't that become - - -  
4           Counsel, this is Judge Feinman. I hope you can hear me.

5                   I don't understand why that doesn't become an  
6           advisory opinion. Because the record could be different.  
7           You don't know what that trial judge on retrial - - - it  
8           may not even be the same judge - - - is going to do with  
9           these issues.

10                   MR. HELLMAN: I appreciate it. I know there's  
11           two questions coming at once.

12                   To Judge Feinman, what I would say is, I - - - I  
13           appreciate the advisory aspect. I think if the People  
14           agreed that they would not, you know, make an issue of the  
15           - - - of the delay and the testing at - - - at any retrial,  
16           then - - - you know, but I don't - - - I don't know if the  
17           People would be willing to make that concession here.

18                   JUDGE GARCIA: But Counsel - - - Counsel - - -

19                   MR. HELLMAN: So I think in that sense, it's not  
20           an advisory if it comes up again. We're going to have the  
21           same problem with a delayed test.

22                   JUDGE GARCIA: Counsel - - -

23                   MR. HELLMAN: But - - -

24                   JUDGE GARCIA: Counsel?

25                   MR. HELLMAN: - - - and then - - - I'm sorry,



1           there was another question.

2                       JUDGE GARCIA:  Yeah, it actually is the same  
3 question.  But the point not being what are they going to  
4 concede or not, the point being I think that at the next  
5 trial, the circumstances may be different.  The record  
6 developed may be very different.

7                       As I was starting to say, I think Judge Wilson  
8 was asking about the development of the record:  what time  
9 did this get in, we have.  But who did it go to?  Where did  
10 it go?  What were the opportunities?  Is the delay  
11 reasonable?  All - - - under these circumstances, all of  
12 that may well be different and more fully developed in an -  
13 - - in the next trial.  What type of guidance would we be  
14 giving, then, in a - - - in doing that under these  
15 circumstances, where, again, assuming we would reverse on  
16 the first issue?

17                      MR. HELLMAN:  So I - - - I'm just thinking it  
18 through, Your Honor.  I think, to the extent that this  
19 decision vacates the Third Department's opinion which says  
20 that it was appropriate not to give a curative instruction,  
21 then - - - then that would obviate the need, nec - - - the  
22 need, necessarily, to - - - to deal with the adverse  
23 instruction issue.

24                      To the extent that decision remains good law in  
25 the Third Department, I do think there is some benefit to -



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- - to the court reaching the issue because that would then  
become the operative precedent in - - - in any retrial of -  
- - of Mr. Lang. But - - -

CHIEF JUDGE DIFIORE: Thank you, Mr. Hellman.

MR. HELLMAN: Thank you, Your Honor.

CHIEF JUDGE DIFIORE: Thank you both.

(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 The People of the State of New York v. David R. Lang, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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