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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

M. ROBERT NEULANDER,

Respondent.

No. 71

20 Eagle Street
Albany, New York
September 5, 2019

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is People of the State of New York v.
3 Robert Neulander.

4 MR. MAXWELL: May it please the court.

5 CHIEF JUDGE DIFIORE: Good afternoon.

6 MR. MAXWELL: I'm James Maxwell, appearing for
7 the People. I'd ask for two minutes of rebuttal time,
8 please.

9 CHIEF JUDGE DIFIORE: Certainly.

10 MR. MAXWELL: Thank you.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. MAXWELL: The Appellate Division Fourth
13 Department majority in this case erred, as a matter of law,
14 when it reversed the trial court's 330.30 decision and
15 granted the defendant a new trial. This is a case where
16 the juror in question, juror number 12, was not shown to be
17 impartial. And the Fourth Department majority didn't stop
18 short of requiring the defendant to meet that burden. And
19 that was error.

20 JUDGE FAHEY: Mr. Maxwell, it's a difficult case,
21 and one of the things I struggle with, when you go through
22 the text messages in the case, they don't seem to be
23 dispositive one way or the other. The issue, though, and
24 the way I read the Fourth Department decision was that it
25 was the concealment of -- of the communication that had



1 taken place, and then lying under oath. Those are the
2 things that I think were ultimately dispositive in - - - in
3 their decision.

4 MR. MAXWELL: And I have problems with that in
5 terms of the fact that under 330.32, by definition, the
6 juror misconduct must be misconduct during the trial. And
7 they, instead, elevate to a substantial right those two
8 things you just mentioned that were after the trial. I
9 think the correct approach was the trial court's approach
10 which was to look at everything and decide whether those
11 post-trial indiscretions were of such a nature as to cause
12 the court to have to find for the - - - for the defendant.
13 And they weren't.

14 CHIEF JUDGE DIFIORE: So counsel, how does the
15 court assess the impact of all of these things on the
16 juror's impartiality when the juror is not particularly
17 honest and forthcoming with the court?

18 MR. MAXWELL: Well, again, that's the nature of a
19 330.30 that the information is not known during the trial.
20 So there's - - - that's built into the equation. Her
21 failure to be - - - to come forward during the trial is - -
22 - is not itself a substantial right.

23 And then to compound the error from the Fourth
24 Department, is they went out - - - they went to the wrong
25 statute. They started talking about 270.35 with the - - -



1 with the idea that the defendant lost a chance to challenge
2 the juror during the trial. Well, that's similar to an
3 argument that this court rejected in People v. Rodriguez
4 where the - - - where the defendant tried to get a look
5 back to jury selection when a - - - a juror in that case
6 failed to disclose that he knew an assistant DA in the
7 office that was prosecuting the case.

8 JUDGE STEIN: Aren't you saying that this is
9 ultimately a credibility determination on the part of the
10 trial judge, or in this case was on the part of the trial
11 judge?

12 MR. MAXWELL: Well, he had a valid basis for a
13 credibility determination, but what I'm saying is when - -
14 - when the - - - and that should have been given - - -

15 JUDGE STEIN: Well - - -

16 MR. MAXWELL: - - - due deference.

17 JUDGE STEIN: Okay.

18 MR. MAXWELL: But that beyond that the Fourth
19 Department committed multiple errors in reviewing that
20 decision that they - - - they elevated things to a
21 substantial right and - - - and didn't hold the defendant
22 to his burden. For example, there are cases where this
23 court has found something so inherently wrong that the
24 defendant doesn't have to show actual prejudice: crime
25 scene visits, experiments, Brown, Crimmins. That is not



1 this case.

2 JUDGE STEIN: So is there a distinction between
3 lying or covering up in order - - - with the purpose of
4 affecting the jury verdict?

5 MR. MAXWELL: Oh, it would be completely
6 different, yes.

7 JUDGE STEIN: Okay.

8 MR. MAXWELL: Yeah. Yeah.

9 JUDGE STEIN: And what's the difference?

10 MR. MAXWELL: Well, here, I mean, her covering
11 up, I think she's showing some after the fact, oh, am I - -
12 - have I done something wrong? And it really shouldn't be
13 up to her to decide whether she did something wrong; it
14 should be up to the courts. And as opposed to during the
15 trial - - -

16 JUDGE STEIN: Well, she knew that lying was doing
17 something wrong.

18 MR. MAXWELL: Well - - -

19 JUDGE STEIN: Or presumably, so I mean - - -

20 JUDGE RIVERA: I mean, not following the
21 directive of the court is doing something wrong.

22 JUDGE STEIN: Are there innocent explanations for
23 lying?

24 MR. MAXWELL: Well, again, I think that's putting
25 it too strongly. I think when she was asked during the



1 trial by the court directly: have you discussed the
2 particulars of the case, and she said no, that wasn't a
3 lie, because she believed that she had not discussed the
4 particulars of the case.

5 JUDGE WILSON: How do we know that? Because - -
6 - how do we know that because then, after the trial, she
7 goes and deletes things that she describes as problematic
8 and deletes the entirety of her browsing history.

9 MR. MAXWELL: Well, again, the browser history,
10 the court below found, and the Appellate Division didn't
11 dispute that, that there was no finding that she did
12 anything improper when she was browsing. The - - - I'm
13 sorry, the beginning of your question was - - - I lost it;
14 I'm sorry.

15 JUDGE WILSON: Sure. It essentially goes back to
16 where you started which is you were drawing a dichotomy
17 between what happened at trial and what happened after the
18 trial. And it seems to me the question here really is when
19 there is substantial information about conduct of the juror
20 that happens after the trial, directly related to what she
21 did at the trial, doesn't that really then impugn things
22 like the statement she made that no, I haven't done
23 anything wrong.

24 MR. MAXWELL: Well, I think that - - -

25 JUDGE WILSON: How do we then believe her?



1 MR. MAXWELL: I think that puts it in the trial
2 courts - - - that's what trial courts do. They can believe
3 some of what a witness says and some - - - and not believe
4 some of what a witness says. And that's what the judge
5 here discerned it. And when we look at what she deleted -
6 - -

7 JUDGE WILSON: And the Appellate Division has the
8 power to refine that?

9 MR. MAXWELL: But when they - - - well, what they
10 did is they committed multiple errors in reviewing the
11 judge's decision. And the things that she deleted really
12 shows - - - many of them show that she was doing her job
13 correctly. The - - - the final - - - I think it's exchange
14 number 36, during deliberations, the night before they
15 reach a verdict, she deleted this entire thing. It shows
16 that she was undecided. It shows she was agonizing over
17 it. It shows that she was doing what jurors are supposed
18 to do. And she's not revealing - - - and none of the
19 records shows that any of these things that were said to
20 her during the trial had anything to do with the issues at
21 trial.

22 JUDGE STEIN: Does it matter whether the
23 Appellate Division here found, as a matter of law, that
24 there was an abuse of the trial court's discretion versus
25 whether the Appellate Division was exercising its own



1 discretion in making its own credibility determination - -
2 -

3 MR. MAXWELL: Yes, and I - - -

4 JUDGE STEIN: Is there - - -

5 MR. MAXWELL: The former is the case here; they
6 say that right at the beginning of their decision. And I
7 think that's where we have an error of law that this court
8 should correct, similar to People v. Testa which was a
9 Third Department decision where they - - -

10 JUDGE FAHEY: So you're saying they weren't
11 making a credibility determination?

12 MR. MAXWELL: No, I'm saying they made a series
13 of errors of law. And - - - and to the extent that you say
14 that they were making a credibility determination, I - - -
15 I just don't - - - I see the errors as the problem.

16 JUDGE FAHEY: The reason I ask is because if
17 there - - - if the trial court made a credibility
18 determination and then the Appellate Division made a
19 different credibility determination, then I'm not sure we'd
20 have the power of review over that. That's why I'm asking
21 the question.

22 MR. MAXWELL: But Your Honor, what they did was
23 they never reached whether the defendant had to show actual
24 prejudice, and that was error.

25 JUDGE FAHEY: Well, that's the nub of this. The



1 language of the statute says "may have affected a
2 substantial right of defendant".

3 MR. MAXWELL: Um-hum.

4 JUDGE FAHEY: And that word "may" doesn't mean
5 actual prejudice; that means is there a scenario under
6 which this could have been prejudicial. And that's why we
7 go back to concealment.

8 MR. MAXWELL: Can I give two answers to that, if
9 I may? One is that word "may" has been in there right
10 along when this case - - - when this court said in
11 Rodriguez and Irizarry that "absent a showing of prejudice
12 to a substantial right, the defendant is not entitled to a
13 new trial". And italicizing the word "may" doesn't give
14 the Fourth Department license to - - -

15 JUDGE FAHEY: No, but it is there.

16 MR. MAXWELL: No, no, it is there.

17 JUDGE FAHEY: And "may" is different than actual
18 prejudice or "must have" affected. It's a much different
19 analysis that we would go through. It seems like is there
20 any reasonable possibility. I guess that's the way I - - -

21 JUDGE FEINMAN: The - - -

22 MR. MAXWELL: Sorry.

23 JUDGE FAHEY: No, go ahead.

24 JUDGE FEINMAN: Following up on that - - -

25 MR. MAXWELL: Yes.



1 JUDGE FEINMAN: - - - because it's about the - -
2 - you know, whether you want to enforce this conviction or
3 uphold this conviction, where there's a specter that is
4 overshadowing this, that you had a juror who's clearly not
5 following instruction. And that's clearly demonstrated in
6 this record; she's not following instructions. And that, I
7 think, is what the concern is of the Fourth Department.
8 And, you know, it goes to the whole integrity of - - - of
9 the process.

10 MR. MAXWELL: About the specter, though, during
11 the trial the messages show that she was following the
12 instructions not to talk about the case. "We can't talk
13 about this case; I'll talk to you when it's all over."

14 JUDGE GARCIA: The problem with that, I think,
15 going back to, I think, what Judge Wilson pointed out
16 earlier is - - - I mean, along the lines of Judge Feinman,
17 you have the right to a juror who's going to decide this
18 case on the law as the judge gives it to them and the facts
19 as they're developed at trial, and the witnesses. And she
20 erased her browser history.

21 So one, I think that shows some consciousness
22 that there was something in there you don't want people to
23 see. And two, how will we ever know now that they weren't
24 - - - they were - - - they got that, that the defendant
25 here was given a juror who didn't go out and browse and



1 look at the crime scene and look at other photos and look
2 at other information? And there's a very clear inference
3 here that, you know, that was deleted for a reason,
4 combined with the fact that you're deleting internal text
5 within a conversation. I mean, that's a pretty tough set
6 of facts to overcome.

7 MR. MAXWELL: Again, Your Honor, she also deleted
8 information that, once looked at, demonstrated that she was
9 following the judge's instructions about not discussing the
10 case. And this information that she was presented from
11 these three sources had nothing to do with the issues at
12 trial.

13 JUDGE WILSON: May I just fact check something to
14 make sure I've got it right? After the alternate juror
15 submitted her affidavit and that was brought to the
16 People's attention, the People met with juror number 12 and
17 she presented printouts of the texts to you during a
18 meeting and those were the expurgated versions of the
19 texts, and she didn't disclose to you that things had been
20 removed; is that right?

21 MR. MAXWELL: What we were doing at that point is
22 trying to answer the - - - the accusation - - -

23 JUDGE WILSON: Yeah, I just want to know the - -
24 -

25 MR. MAXWELL: - - - about whether she got media



1 alerts.

2 JUDGE WILSON: Right.

3 MR. MAXWELL: And so she presented the
4 information that showed she got a screen shot as opposed to
5 a media alert. And - - -

6 JUDGE WILSON: I'm not asking - - -

7 MR. MAXWELL: But I'm not - - -

8 JUDGE WILSON: Right.

9 MR. MAXWELL: - - - disputing the facts - - -

10 JUDGE WILSON: No, no, I'm just trying ask if - -
11 - if there was a point in time before you - - - I think you
12 tendered her affidavit, juror number 12's affidavit to the
13 court?

14 MR. MAXWELL: Um-hum.

15 JUDGE WILSON: There was a point in time, before
16 that affidavit was finalized, that you met with her and
17 that she produced to you some version of these text
18 messages that was not the complete version of the text
19 messages, and she did not disclose to you that she had
20 removed the text from those messages - - -

21 MR. MAXWELL: Yes.

22 JUDGE WILSON: - - - is that right?

23 MR. MAXWELL: Yes, but what I'm saying is the
24 issue - - - what she presented to us was, to answer that
25 particular issue, that's really not an issue now which is



1 was she getting media alerts. No, she wasn't; somebody
2 sent her a screen shot.

3 JUDGE WILSON: All I'm really asking is when you
4 tendered the affidavit to the court, you did not know that
5 the attached text messages had deletions that were not
6 evidenced on the face of it.

7 MR. MAXWELL: Correct. Correct.

8 And again, if you look at the information she was
9 presented - - -

10 JUDGE RIVERA: Counsel, much of what Judge
11 Feinman and Judge Garcia have been pointing out to you, I'm
12 having difficulty understanding how your position and your
13 - - - the rule that you're promoting, the standard that
14 you're promoting promotes public confidence, not just in
15 this verdict, but in the jury system. When you have a
16 juror who even the lower court said - - - and I'm not
17 talking about the Appellate Division, the trial court says
18 her actions show a consciousness of misconduct. She's - -
19 - even if you don't want to use the word "lying", she has,
20 at a minimum, shaded her version of what has occurred and
21 attempted to cover her tracks. It makes it very difficult
22 for anyone on the street to say, yeah, you get a fair shake
23 when you go in front of a jury when you have a juror that's
24 conducting themselves in this way.

25 MR. MAXWELL: Well, again, I think - - -



1 JUDGE RIVERA: And then the courts say nothing
2 about it or say, no, that's okay.

3 MR. MAXWELL: I beg to differ in that the trial
4 judge made his determination and he didn't find totally one
5 way or the other. He did what hearing courts do. He
6 discerned what the facts were and he discerned the legal
7 effect of those facts. And the fact that after - - - after
8 the fact she engaged in some conduct that didn't make her
9 look very good does not retroactively mean that she
10 committed substantial misconduct during the trial. It's
11 just the opposite - - -

12 JUDGE RIVERA: Right, but that - - -

13 MR. MAXWELL: - - - as shown from the messages.

14 JUDGE RIVERA: Again, that's a judge deciding
15 it's not substantial misconduct because I don't think it
16 affected what she did during deliberations. And again,
17 we're left with how can anyone really trust that without
18 knowing fully what the record is, given her conduct.

19 MR. MAXWELL: Well, we had a full record. We had
20 a very exhaustive hearing. And there is no evidence that
21 she was anything but an impartial juror during the trial.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Counsel?

24 MS. SHAPIRO: May it please the court. My name
25 is Alexandra Shapiro, and I represent respondent, Robert



1 Neulander.

2 I think some of Your Honor's questions have got
3 at the real fundamental issue in this case which is that
4 because of the fraud and lies and deceit perpetrated by
5 juror number 12, there is simply no way to know both the
6 extent of outside influence and whether she followed the
7 instructions.

8 And indeed, with respect to the latter, I think
9 her repeated violations of not only the instructions not to
10 interact with third parties and access the media, but also
11 the court repeatedly told the jurors that if they were
12 contacted by a third party they had to report that to the
13 court, and she not only did not do so, but during the
14 inquiry hid that.

15 JUDGE GARCIA: Counsel, what about the suggestion
16 here that, at bottom, this is a credibility determination.
17 The trial court looked at all of this, factored in these
18 lies/misrepresentations, deleted browser history, and then
19 made these credibility determinations based on everything
20 the trial judge had heard that this type of influence
21 didn't occur.

22 MS. SHAPIRO: Well, Your Honor, with respect, I
23 think that the only thing that really supported that was
24 the juror's own self-serving testimony. And this court and
25 other Appellate courts in New York have repeatedly said



1 that that is not at all dispositive.

2 JUDGE STEIN: Well, are you talking about the
3 access to the web, because if you're talking about her
4 texts, it's not just her own word, it's supported by those
5 texts. I mean, I - - - I have a hard time finding anything
6 in the texts that indicate bias. So it's - - - you know,
7 we're sort of saying what we don't know.

8 MS. SHAPIRO: Well - - -

9 JUDGE STEIN: And my - - - my concern about all
10 of this is that are - - - are we really saying that - - -
11 that every time a - - - a juror is not completely honest
12 about his or her conduct that that's a presumption of bias,
13 and we're going to - - - we're going to over - - - overturn
14 convictions?

15 MS. SHAPIRO: No, not at all, Your Honor. And
16 indeed, this court has repeatedly held that there is no
17 ironclad rule for these types of determinations and that
18 it's a case-by-case inquiry.

19 JUDGE STEIN: So if that's true, why do we not
20 defer to the trial judge's determination unless it's an
21 abuse of discretion as a matter of law. And I don't see
22 how this is an abuse of discretion as a matter of law other
23 than the question of her lying - - -

24 MS. SHAPIRO: Well, it - - -

25 JUDGE STEIN: - - - if that's what you're saying



1 it is.

2 MS. SHAPIRO: I am saying that, and it's because
3 of the extent of the lying and the particular
4 circumstances.

5 And if I can just get back to what we don't know.
6 It goes - - -

7 JUDGE FEINMAN: Well, but could you, in response
8 to that, also - - - although they say that they have
9 reversed this on the - - - the law, when you actually look
10 at the decision, read it, because we do sometimes look
11 behind those characterizations and say that this is really
12 a reversal on the law and the facts and then - - -

13 MS. SHAPIRO: Well, I think you - - -

14 JUDGE FEINMAN: - - - that sort of changes - - -

15 MS. SHAPIRO: - - - you could certainly say that
16 - - -

17 JUDGE FEINMAN: - - - our review power.

18 MS. SHAPIRO: - - - because it is certainly clear
19 that the Appellate Division had a different - - - different
20 interpretation of the significance of the evidence before
21 the trial court and the - - - the significance of the - - -
22 the juror's testimony and whatever was in those texts. So
23 you could say that.

24 But I think it's really important to emphasize
25 that what we don't know is not only - - - with respect to



1 the texts, we don't know what other texts the woman was
2 engaging in. She did, as came out in the discussion with
3 Judge Wilson, give selective versions of her texts to the
4 prosecutors when she was specifically asked about all of
5 this.

6 JUDGE STEIN: But I may be wrong; weren't they
7 able - - - in their forensic analysis, weren't they able to
8 - - - to get the texts, at least, that she hadn't
9 disclosed?

10 MS. SHAPIRO: Texts were recovered, but we don't
11 know what wasn't recovered. Forensic analysis is not a
12 perfect thing.

13 And with respect to the internet sites, I want to
14 emphasize two things. Number one, the - - - they were able
15 to recover these cookies even though she had deleted the
16 browser history. It's unclear whether those are incomplete
17 or not, but they show that she was, on two different days,
18 accessing two different news websites that had coverage of
19 the case, and with respect to one of those, the
20 Syracuse.com, she said she might - - - she believed she
21 recalled that she was looking at a cheerleader article - -
22 -

23 JUDGE FAHEY: It was about a cheerleader, yeah.

24 MS. SHAPIRO: - - - and the evidence showed there
25 was no cheerleader article - - - excuse me - - -



1 JUDGE FAHEY: Let me ask this.

2 MS. SHAPIRO: - - - published that day.

3 JUDGE FAHEY: I remember that in the record. Is
4 there anything in the record, in the texts that are in the
5 record that you would point to as signs of bias or
6 prejudice?

7 MS. SHAPIRO: Well, certainly, and indeed even
8 the dissent in - - -

9 JUDGE FAHEY: Specifically what's in there? What
10 do you point to?

11 MS. SHAPIRO: Well, the father - - - excuse me;
12 I'm sorry.

13 JUDGE FAHEY: The father's statements, right, but
14 - - - but she didn't agree with them.

15 MS. SHAPIRO: We don't know whether she did or
16 not; she didn't respond.

17 JUDGE FAHEY: I see.

18 MS. SHAPIRO: She didn't respond. The - - - the
19 one friend - - -

20 JUDGE FAHEY: So are we establishing - - - would
21 we be establishing, from a practical point of view, an
22 impossible standard: my wife's on the jury, she comes
23 home, I said how did it go today, she said I can't talk to
24 you about it.

25 MS. SHAPIRO: Well - - -



1 JUDGE FAHEY: Or instead - - - but if she says
2 fine then she's violating the juror code?

3 MS. SHAPIRO: No, Your Honor.

4 JUDGE FAHEY: Okay. So - - -

5 MS. SHAPIRO: With respect. So - - -

6 JUDGE FAHEY: Slow down. So - - -

7 MS. SHAPIRO: I can go through each of the texts,
8 but I think - - -

9 JUDGE FAHEY: No, I don't want you to do that.
10 I just want you to point to the ones that you thought are
11 valid. But we've got to understand the rule that - - -
12 that we may be creating here, and I want to be clear about
13 it. Are we creating a rule, because it seems that text
14 messaging in any form by a juror discussing a trial in any
15 way is automatically a juror misconduct.

16 MS. SHAPIRO: No, Your Honor.

17 JUDGE FAHEY: Okay.

18 MS. SHAPIRO: And for several reasons. First of
19 all, I think this court has repeatedly held that you have
20 to look at the totality of the circumstances, and so you
21 can't just consider one - - - in a case like this you
22 wouldn't just look at each thing in isolation, and we would
23 not and nor do we need to argue that one particular
24 exchange is the problem. I think here - - -

25 JUDGE STEIN: But isn't that what the court did



1 here?

2 MS. SHAPIRO: I'm sorry?

3 JUDGE STEIN: Isn't that exactly what the trial
4 court did here - - -

5 MS. SHAPIRO: The trial court - - -

6 JUDGE STEIN: - - - looked at the totality of the
7 circumstances, acknowledged, recognized that we didn't have
8 everything, looked at the burden and everything - - - but
9 looked at the text messages, looked at what proof there
10 was, looked at her testimony, and - - - and weighed all of
11 that and decided that it wasn't - - - it wasn't - - -

12 MS. SHAPIRO: No, Your Honor; my point is a
13 different one, and I think the trial court did exactly the
14 opposite, and one of its legal errors was that it didn't,
15 that instead what it did was it looked at each piece of
16 evidence in isolation instead of looking at the entire
17 picture and instead of taking account of the lies in - - -
18 in their full.

19 And I do want to point out that although my
20 adversary - - -

21 JUDGE STEIN: Well, it seems to me it could be
22 argued that what you're saying is is put all of that other
23 stuff aside and only look at the fact that she was not
24 truthful and - - - and - - -

25 MS. SHAPIRO: Well - - -



1 JUDGE STEIN: So that could be viewed - - -

2 MS. SHAPIRO: No, I don't think so - - -

3 JUDGE STEIN: - - - as not looking at the total -
4 - -

5 MS. SHAPIRO: - - - Your Honor, because we have
6 not only the fact that she wasn't truthful; we have the
7 fact that she repeatedly violated the trial court's
8 instructions. And how can this court have confidence and -
9 - - and issue a holding that says it's okay - - -

10 JUDGE FAHEY: Well, you know it really comes down
11 to the charge that you give every jury, you know, false in
12 one thing, false in everything. The falsus in uno charge
13 in - - - and isn't that your argument if that's what - - -

14 MS. SHAPIRO: Well, that's part of the argument,
15 certainly, that we just simply can't have confidence that
16 she followed instructions when she clearly - - -

17 JUDGE FAHEY: What about the distinction that - -
18 - that Mr. Maxwell makes about during the trial
19 interactions and her post-trial behavior?

20 MS. SHAPIRO: Well, I was actually getting to
21 that; I don't think it's accurate, for several reasons.
22 Number one, there was an in-chambers conference with the
23 court during deliberations in which the juror was asked
24 whether she had had conversations with an alternate juror
25 about the case. And there's a credibility dispute there



1 that was not - - - never resolved.

2 But she was also asked: did you have discussions
3 with anyone else? And she said no. And so that occurred
4 during the trial. That was at a time where a further
5 inquiry could have - - - could have been conducted, and
6 more information could have come out, and perhaps the
7 situation could have been cured or the defendant could have
8 exercised his right to try to argue that on - - - that the
9 juror should be removed. But none of that was able to
10 happen because during the deliberations she failed to
11 disclose it.

12 Moreover, although we don't know exactly when she
13 deleted all these texts and destroyed all this evidence, it
14 clearly must have happened during the trial. And so we
15 know that during the trial she was repeatedly violating the
16 instructions and deleting evidence.

17 The other thing about the texts, in particular,
18 that I want - - - I want to emphasize two other things.
19 One is that we don't just have a situation, as occurs in
20 some of the other cases that are cited, where there isn't
21 dishonesty, where you know, someone's on Facebook and
22 somebody posts something and a juror doesn't respond. Here
23 we have a juror who's actively engaging with these friends.
24 Even though she didn't respond to the father's text, she
25 actively engages and responds to the other texts, including



1 the text from Flanagan about the key defense witness, Jenna
2 Neulander. She's sending these - - -

3 JUDGE STEIN: But her responses did - - -

4 MS. SHAPIRO: - - - hear no evil, see no evil
5 emoticons.

6 JUDGE STEIN: But her responses didn't show any
7 bias, did they?

8 MS. SHAPIRO: I - - -

9 JUDGE STEIN: The responses that we have?

10 MS. SHAPIRO: I think that - - - that the point
11 here is that maybe, if all you had is the text, maybe this
12 verdict should have stood, but - - -

13 JUDGE WILSON: That's what I was going to ask
14 you.

15 MS. SHAPIRO: - - - that's not - - - that's not
16 this case.

17 JUDGE WILSON: That's what I was going to ask
18 you, though.

19 MS. SHAPIRO: This case has much more and - - -

20 JUDGE WILSON: If you put aside the browsing
21 history and she conducted all the text messaging which she
22 did and then was entirely forthcoming about it, so when
23 interviewed in camera she said, yes, I have text messages,
24 handed her phone over to the judge and looked at
25 everything, do we really, in that circumstance, think that



1 that's - - -

2 MS. SHAPIRO: I think that would be a very
3 different case, Your Honor.

4 JUDGE WILSON: It would be a very different case.

5 MS. SHAPIRO: Very different case.

6 JUDGE WILSON: Would it be on the other side of
7 the line, do you think?

8 MS. SHAPIRO: And I think that may well - - - the
9 verdict could stand, if those had been the facts, if the
10 juror had been forthcoming.

11 JUDGE FEINMAN: So I want to be clear, though,
12 you know, and I think Judge Fahey was asking about this
13 earlier which is how do we articulate a rule for trial
14 judges to enforce? How do you articulate how they decide
15 when is over the line or not over the line?

16 MS. SHAPIRO: Well, I - - -

17 JUDGE FEINMAN: Or they just know it when they
18 see it?

19 MS. SHAPIRO: I actually think that the Appellate
20 Division's core holding is - - - is pretty on point, and
21 it's a very narrow one. They said every defendant has a
22 right to be tried by jurors who follow the court's
23 instructions, do not lie on sworn affidavits about their
24 misconduct during the trial, and do not make substantial
25 efforts to conceal and erase their misconduct when the



1 court conducts an inquiry with respect thereto. These
2 rights are substantial and fundamental to the fair and
3 impartial administration of a criminal trial. And I think
4 that's the fundamental point here.

5 JUDGE RIVERA: But if those violations have
6 nothing to do - - - they're just embarrassing. Let's say
7 you're having an affair and your texts are with your lover,
8 and you - - - and you lie about all of that, do you still
9 think that person - - -

10 MS. SHAPIRO: Well, I think - - -

11 JUDGE RIVERA: - - - that's juror misconduct,
12 they shouldn't serve on the jury?

13 MS. SHAPIRO: - - - that if that's - - - that's
14 not related to the trial, that's not what we're talking
15 about here.

16 JUDGE RIVERA: Exactly.

17 MS. SHAPIRO: And I think here - - -

18 JUDGE RIVERA: So all I'm saying is the point
19 about the covering up the lie, it's still even narrower;
20 it's as related to the trial, not about something personal
21 that you may be engaged in that's irrespective of the
22 trial.

23 MS. SHAPIRO: If it's about something personal,
24 unrelated to the trial, then of course not. But - - - but
25 that's not the case here.



1 JUDGE RIVERA: Unless you think it's reflecting
2 an inability to be truthful and honest, and maybe you have
3 other concerns about that juror.

4 MS. SHAPIRO: Well, it might be - - - so you
5 might have an extreme case where it turned out the juror
6 had concealed, for example, a personal relationship with a
7 key witness or a party or something like that.

8 JUDGE RIVERA: Those cases are kind of obvious,
9 yes.

10 MS. SHAPIRO: But putting that aside, if it's
11 completely irrelevant to the trial - - - I mean, keep in
12 mind that one of the many lies here was in the sworn
13 affidavit she said at all times I followed the judge's
14 instructions, which is the critical question here, in - - -
15 in many ways.

16 JUDGE STEIN: Well, what if - - - just getting
17 back to the texts for a minute. What if every single text
18 that came from a third party her response was I can't talk
19 about it until the trial is over, I have no opinion, and so
20 on. Is that - - - is that misconduct?

21 MS. SHAPIRO: If that's all there was and she
22 didn't, you know, lie to the court about those
23 communications when inquired into it, perhaps not.

24 JUDGE STEIN: No, I'm not talking about the lies.
25 I'm talking about the texts themselves.



1 MS. SHAPIRO: But I guess my point is that - - -

2 JUDGE STEIN: Because she might very well think
3 that that was not disobeying the court's instructions.

4 MS. SHAPIRO: But how would you know? There's no
5 way to know, and there's no way to know whether she was
6 reading articles about the case. She may well have been
7 reading articles. This case - - -

8 JUDGE STEIN: No, I'm not asking about this case.
9 I'm - - - I'm focusing - - -

10 MS. SHAPIRO: Just in general.

11 JUDGE STEIN: - - - in on the rule in general,
12 yes. If - - -

13 MS. SHAPIRO: Well, I just - - -

14 JUDGE STEIN: Because what concerns me,
15 partially, is that everybody has a cellphone now, and you
16 know, are we going to - - - are we going to be interfering
17 with a lot of trials and a lot of verdicts if we - - - if
18 we basically say and - - - if somebody contacts you about
19 the trial then you're - - - that's it, that's misconduct.

20 JUDGE GARCIA: Or when you answer that, what I'm
21 concerned about too, on the same answer, is the
22 intrusiveness of this proceeding because you have a jury,
23 you have a jury verdict, people come and they serve and
24 they - - - you know, and now we're going to forensically
25 examine your phone. So what - - - and you're going to



1 testify, and now you're lying, and - - - and what is the
2 standard, if we rule the way the Appellate Division - - -
3 if we affirm that, for the next lawyer to come in and say I
4 want the phone, I want a forensic examination of the phone,
5 because somebody contacted them, they may lie about it, you
6 know, let's go for the phones.

7 MS. SHAPIRO: Well, I - - -

8 JUDGE GARCIA: And now we're going to have this
9 proceeding where - - -

10 MS. SHAPIRO: I think there would have to be a
11 showing, and - - - and there was here, because an alternate
12 juror came in and said that she had - - - that the - - -
13 this juror in question had been looking at media alerts on
14 her phones and had - - - there - - - there was some
15 evidence from which to - - -

16 JUDGE GARCIA: Media alert, and it turns out it
17 pops up on your phone, and now we're going to take your
18 phone and do a forensic exam?

19 MS. SHAPIRO: No, no, but what happened here was
20 there was more than that in terms of the conversation that
21 was alleged by the alternate juror. So I - - - I think - -
22 -

23 JUDGE STEIN: I thought the media alert had to do
24 with the jurors being selected or something.

25 MS. SHAPIRO: Well, there were - - - I don't



1 think this is really before the court but - - - but the - -
2 - in the sense that there - - - the alternate juror made a
3 number of allegations about the juror having discussed the
4 case with her during deliberations. The juror disputed
5 some of that. The trial court did not resolve most of
6 those disputes, although he did rule that actually the
7 juror was not accurate in terms of her - - - the media
8 alert thing. What happened was the juror claimed that it
9 was an innocuous text from another individual who's not
10 mentioned in these appellate papers, and the trial court
11 determined that was not true, and in fact it - - - it was
12 an exchange with one of the individuals here, Flanagan.

13 So - - - but - - - but we are certainly not
14 advocating, nor does this court need to adopt some kind of
15 broad rule that would open the floodgates to inquiries into
16 what's on a juror's phone. I think the bar is - - - you
17 know, has got to be set a lot higher in terms of what
18 constitutes misconduct. And I think what - - - there - - -
19 what happened here just is way beyond the pale.

20 I'm not aware of any case remotely like this,
21 except for a couple of federal cases. I haven't seen any
22 case in - - - in this state where there was this level, or
23 anything even remotely approaching it, in terms of
24 dishonesty when questioned.

25 And you know, the Supreme Court - - -



1 JUDGE RIVERA: Let me ask you this. I mean,
2 we're focused on the social media for all the obvious
3 reasons; there is real concern.

4 MS. SHAPIRO: Sure.

5 JUDGE RIVERA: These are real issues about what
6 to do with the fact that people are so very comfortable
7 with social media or these kinds of interactions, but if
8 this didn't involve her cellphone, if she was doing this
9 face to face, I assume you'd take the same position. If
10 she - - - if she was talking to people or they were talking
11 to her before the trial, on her lunch break or when she
12 went home - - -

13 MS. SHAPIRO: You mean - - -

14 JUDGE RIVERA: - - - you would take the same
15 position, would you not?

16 MS. SHAPIRO: Sure.

17 JUDGE RIVERA: Because she'd come back and have
18 lied to the judge, no, I didn't talk to anyone - - -

19 MS. SHAPIRO: Of course.

20 JUDGE RIVERA: - - - when she had.

21 MS. SHAPIRO: Yes.

22 JUDGE RIVERA: So it - - - it is a mode of
23 communication, but the point is the communication.

24 MS. SHAPIRO: The point is the communication
25 coupled with - - -



1 JUDGE RIVERA: And the cover-up.

2 MS. SHAPIRO: - - - the dishonesty and the fraud
3 on the court really.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MS. SHAPIRO: Thank you.

6 CHIEF JUDGE DIFIORE: Counsel?

7 MR. MAXWELL: Just to follow up on some of these
8 things. What I think is beyond the pale is to grant
9 someone a new trial when there's been no showing of
10 prejudice, and to make a rule where we're going to be
11 giving new trials when a trial court is found there's no
12 showing of prejudice - - -

13 JUDGE FEINMAN: But doesn't the statute actually
14 require that?

15 MR. MAXWELL: I'm sorry; I didn't hear the
16 beginning.

17 JUDGE FEINMAN: We go back then to the language
18 of the statute; does it require that - - -

19 MR. MAXWELL: I believe - - -

20 JUDGE FEINMAN: - - - actual prejudice?

21 MR. MAXWELL: I believe the way it's worded and
22 the way it's been interpreted by this court, unless you
23 have one of these inherently prejudicial situations, such
24 as a crime scene visit or an experiment, you - - - that
25 unless you have that, you're in a situation where the



1 defendant, by a preponderance of the evidence, has to show
2 prejudice. And - - -

3 JUDGE STEIN: Prejudice in what way? Are you now
4 talking about harmless error analysis?

5 MR. MAXWELL: I'm talking about not harmless
6 error but whether the error was harmful, whether the
7 defendant was - - -

8 JUDGE STEIN: Well, isn't that - - -

9 MR. MAXWELL: - - - was - - -

10 JUDGE STEIN: Isn't that the flip side of
11 harmless error?

12 MR. MAXWELL: Well, I'm saying that - - -

13 JUDGE STEIN: And haven't we said that this sort
14 of thing is not subject to that kind of analysis?

15 MR. MAXWELL: Actually, some of your cases
16 indicate that, in a given case, you're not going to go to
17 harmless error, but it doesn't rule it out. But what I'm
18 saying is, and I don't mean to be drawing too fine a
19 distinction, but rather than straight harmless error
20 analysis, I'm saying that the harm or prejudice is not here
21 because the proof - - - the issues in the case are
22 completely different than the information that was in the
23 text that there's no overlap. No one - - -

24 JUDGE STEIN: What about the argument that what's
25 really critical is following the court's instructions, and



1 if someone doesn't follow the court's instructions and then
2 lies about it, how can we be confident that they were
3 impartial jurors?

4 MR. MAXWELL: We can be confident because the
5 trial court had a thorough hearing. Not following the
6 instructions is simply what creates the issue, presents the
7 issue. Looking at the texts themselves and the testimony
8 and the hearing resolves the issue. The - - -

9 JUDGE FEINMAN: So let me ask you a different
10 question, and maybe it's not a fair question for your side,
11 but let's say we don't agree with you and we do think that
12 there should be an affirmance, how would you formulate the
13 rule so that we're not opening up the floodgates?

14 MR. MAXWELL: Well, I suppose any case could be
15 limited to facts, but again, the - - - the situation here
16 invites defense attorneys to get a verdict and then launch
17 onto a new string of litigation. This is kind of a fluke
18 that there even was a hearing because they're all generated
19 by the alternate juror.

20 JUDGE WILSON: Isn't there some point where - - -

21 MR. MAXWELL: Right.

22 JUDGE FEINMAN: I mean - - -

23 MR. MAXWELL: It's unusual.

24 JUDGE FEINMAN: - - - it's not going to be every
25 case.



1 MR. MAXWELL: But maybe now it will be if the
2 rule is such that - - - that any showing that a juror faced
3 with her privacy being invaded - - - we have exchange
4 number 8 which shows - - -

5 JUDGE FEINMAN: That's why I'm trying to give you
6 an opportunity, if you were to end up on the losing side of
7 this case, to have input into the formulation of the rule -
8 - -

9 MR. MAXWELL: Well, I think - - -

10 JUDGE FEINMAN: - - - so that it doesn't - - -

11 MR. MAXWELL: Well, I think any rule has to go
12 back to the defendant still has a burden to demonstrate
13 that he - - - that the juror was not impartial.

14 JUDGE WILSON: Isn't there some point where
15 injury to the system itself is great enough that - - -
16 where we shouldn't require a defendant to show injury to
17 the defendant? And let me give you an example. I - - -
18 I've been summoned - - - well, I'm going to be summoned for
19 jury duty in - - - in November or so. And let's suppose I
20 show up and I say my name is Gene Fahey, I live in Buffalo.
21 I - - - I give a completely false description of who I am,
22 and I'm impaneled on a jury and that doesn't surface until
23 later.

24 MR. MAXWELL: Um-hum.

25 JUDGE WILSON: The juror may not have been - - -



1 well, might have been, but may not have been prejudiced by
2 that. But it seems like the system shouldn't tolerate that
3 sort of thing, no?

4 MR. MAXWELL: And Your Honor, I think that that's
5 illustrated by Crimmins, by Brown, where there's something
6 that's so fundamental that it's inherently prejudicial.
7 That is not this case. That is - - - this is not
8 inherently prejudicial. It's not even prejudicial at all
9 when you look at the information she receives. She
10 receives information about whether the defendant's daughter
11 should be a suspect. Well, again, any information that
12 anyone other than the defendant is a suspect is, arguably,
13 exculpatory. But in the context of this case it just shows
14 that this Lindsay Flanagan just didn't know what she was
15 talking about.

16 The other friend saying: is he scary? Well,
17 again, that has nothing to do with the issues at the trial.
18 It's not like they came up and said what about those red
19 neurons, this is how it works, or here's how rigor mortis
20 works or here's how vertigo works. This is not - - - this
21 is not those - - - those cases.

22 JUDGE RIVERA: You know, bias works itself in
23 such strange and varied ways. The constant onslaught of
24 the disbelief in the veracity of the defendant's version of
25 the stories. The constant reaction to what is going on in



1 - - - in the courthouse, the father saying make sure you
2 find him guilty.

3 MR. MAXWELL: Well, again - - -

4 JUDGE RIVERA: And then you lie about it, you
5 cover it up, you delete it.

6 MR. MAXWELL: Well - - -

7 JUDGE RIVERA: Again, back to my other question,
8 how does that promote confidence? Very much what Judge
9 Wilson's asking: how does that promote confidence, not
10 just in this verdict but in our system, in our jury system?

11 MR. MAXWELL: How does it promote confidence?

12 JUDGE RIVERA: I mean, I - - - I think you would
13 agree that if when she was in the venire and she was asked
14 can you follow my directions, and she said no, it sounds
15 like a good cause to strike there; do you not agree?

16 MR. MAXWELL: But Your Honor, she didn't come to
17 this trying to lie her way out of the jury. She didn't
18 want - - - particularly want to be on this jury.

19 JUDGE RIVERA: But one could certainly look at
20 her conduct as an attempt to stay on the jury by covering
21 it up by never telling the judge I had these contacts
22 today.

23 MR. MAXWELL: Well, again, what happened during
24 the trial, she was specifically asked: did you discuss the
25 particulars of the case? She said no. That was accurate.



1 We know that was accurate not because of her testimony - -
2 - not just because of her testimony after the fact. We
3 know it from looking at the text messages. They don't
4 involve the particulars of the case. They don't involve
5 the issues of the case.

6 Fourth Department said otherwise.

7 JUDGE RIVERA: Are you busy deleting things?

8 MR. MAXWELL: That's her phone. She was not
9 under any order to not delete anything. And who knows why
10 people delete. And much of what she deleted, once it was
11 uncovered and looked at, shows that she was conscientiously
12 doing her job as a juror.

13 JUDGE RIVERA: All the more reason not to delete.

14 MR. MAXWELL: Again, it's her phone. She - - -
15 are we going to make a rule that puts jurors through what
16 she was put through and - - -

17 JUDGE RIVERA: Well, it certainly would be a
18 deterrent, would it not - - -

19 MR. MAXWELL: It would be a deterrent to people
20 wanting to be on a jury.

21 JUDGE RIVERA: - - - to violating the judge's
22 rules.

23 MR. MAXWELL: I know Judge - - -

24 JUDGE RIVERA: It might be a very good rule.

25 MR. MAXWELL: Judge Wilson may want to keep that



1 in mind in a couple of weeks. Lucky you, as the dad would
2 say. But she didn't even remember the exchange with the
3 dad. She didn't see - - - there'd be no reason for her to
4 see anything against the defendant in any of the
5 information. It's not like she was given information about
6 the case or information that - - - that was inculpatory
7 towards the defendant, you know, excluded evidence. That's
8 not this case. And to give a new trial to a defendant who
9 has not shown that the juror was anything but impartial, is
10 wrong.

11 CHIEF JUDGE DIFIORE: Thank you, Mr.

12 Maxwell.

13 (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 The People of the State of New York v. M. Robert Neulander, No. 71, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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