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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 165

CARLOS HERRING,

Appellant.

20 Eagle Street
Albany, New York 12207
September 7, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki
Official Court Transcriber

1 MS. SELKER: I'm Diane Selker, attorney for
2 the appellant, Carlos Herring.

3 CHIEF JUDGE LIPPMAN: Would you like some
4 rebuttal time, counselor?

5 MS. SELKER: No thank you, sir.

6 CHIEF JUDGE LIPPMAN: No? Okay, go ahead.

7 MS. SELKER: If it please the court, I
8 would like to focus on the sleeping juror issue - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MS. SELKER: - - - which I think is the
11 most important issue for my client, and may be the
12 most important legal issue raised on this appeal.
13 The People contend that the defense did not - - -

14 CHIEF JUDGE LIPPMAN: What about the two
15 incidents? How do they play together in terms of
16 this case?

17 MS. SELKER: They do - - -

18 CHIEF JUDGE LIPPMAN: The original instance
19 and then when the other juror reported?

20 MS. SELKER: Right, exactly. They do play
21 together. The prosecution's preservation argument is
22 based upon the first incident. And I think it can be
23 fairly said that at that time, the defense attorney
24 did not preserve any issue with respect to the juror.
25 The juror was called out, and the judge said that not

1 only had she noticed that the juror was sleeping on
2 numerous occasions, but she had had complaints from,
3 I believe she said jury members and members of the
4 public in the courtroom.

5 JUDGE SMITH: Is it possible that what went
6 on here was that the trial lawyer was perfectly happy
7 with the juror - - - that juror as opposed to an
8 alternate, but when - - - after deliberations started
9 and it was a mistrial, he made a different strategic
10 decision?

11 MS. SELKER: That's always possible. But I
12 think, Your Honor, that it's more likely that the
13 explanation that the juror gave, that she was on
14 medication that made her drowsy; she'd stopped taking
15 the medication; actually satisfied the defense
16 attorney. I don't want to - - -

17 JUDGE SMITH: But even if it's strategic, I
18 suppose your point is he's entitled to do that?

19 MS. SELKER: Entitled to do what?

20 JUDGE SMITH: He's entitled to say I'm
21 perfectly happy to have - - - the sleeping during the
22 trial, I'm not going to complain about because I
23 prefer her to the alternate, but I don't prefer her
24 to a mistrial. So after deliberations, I can take a
25 different approach.

1 MS. SELKER: That's possible. That's
2 possible, Your Honor. But I think that the major
3 significance of the first incident is that it lends
4 credence, believability, and sort of evidence as to
5 what was going on during the second incident - - -

6 JUDGE READ: So what do you say - - -

7 MS. SELKER: - - - during deliberations.

8 JUDGE READ: - - - the judge should have
9 done? What do you say the judge should have done?

10 MS. SELKER: I think the judge should have
11 - - - I think that where she really made her mistake
12 was not in necessarily not excusing the juror, but in
13 not making her inquiry deep enough. The 277 - - -

14 JUDGE GRAFFEO: Are you referring to the
15 first or the second - - -

16 MS. SELKER: The second.

17 JUDGE GRAFFEO: - - - questioning of the
18 juror?

19 MS. SELKER: Exactly; the second. Because
20 the first time - - -

21 JUDGE GRAFFEO: Though after - - -

22 MS. SELKER: - - - he seemed to get at the
23 problem.

24 JUDGE GRAFFEO: - - - after the juror said
25 "I'm capable to do this, I don't know why I'm here,"

1 the Court did say, "I'm going to ask you again."

2 MS. SELKER: Yes.

3 JUDGE GRAFFEO: "Listen carefully, are you
4 capable of fulfilling your duties as a juror?" and
5 the juror responded, "Yes." So what is it - - -

6 MS. SELKER: Well - - -

7 JUDGE GRAFFEO: - - - that the judge should
8 have done after that point in time?

9 MS. SELKER: I think we have to read that
10 in conjunction with some of the discussion that took
11 place prior to her calling the juror. Initially, she
12 wasn't planning on doing anything. Juror number 7
13 came out and said one of the jurors is sleeping, she
14 basically is not participating in the deliberations
15 at all. And the judge - - -

16 JUDGE CIPARICK: Should the judge have voir
17 dired the entire jury?

18 MS. SELKER: I'm sorry. Are you asking
19 should she have?

20 JUDGE CIPARICK: Yes.

21 MS. SELKER: I don't know whether she
22 needed to go that far.

23 CHIEF JUDGE LIPPMAN: What did she need to
24 do, if not that?

25 MS. SELKER: I think she needed to go

1 deeper into talking to Juror number 11.

2 JUDGE JONES: But aren't you under some
3 constraint to be careful, once a jury begins its
4 deliberations, to be very careful not to take a
5 position which will - - -

6 MS. SELKER: Yes, I think - - -

7 JUDGE JONES: - - - invade their
8 deliberative process?

9 MS. SELKER: Right. I think that that was
10 the Court's biggest fear at that point. She was
11 afraid she was going to get improperly into the area
12 of jury deliberations.

13 JUDGE JONES: Well, that's a major concern
14 here, is it not?

15 MS. SELKER: It is a major concern. But it
16 doesn't really - - - that's not really concern about
17 whether or not the juror is sleeping. You know, the
18 prosecutor suggested at one point that possibly she'd
19 made up her mind and she was just sitting back or
20 sleeping and that that was okay. But - - - or
21 possibly - - -

22 JUDGE CIPARICK: Or had her eyes closed but
23 was listening.

24 MS. SELKER: - - - had her eyes closed. Or
25 what was the third thing? She might be praying. The

1 judge suggested she might be praying.

2 There is, however, a big difference between
3 somebody who's praying and just sitting there with
4 her eyes closed - - -

5 CHIEF JUDGE LIPPMAN: But your argument is
6 that we - - -

7 MS. SELKER: - - - and unconscious.

8 CHIEF JUDGE LIPPMAN: - - - don't know,
9 right?

10 MS. SELKER: That's my - - - exactly my
11 argument; that she didn't go deep enough.

12 CHIEF JUDGE LIPPMAN: And your argument is
13 the judge just was perfunctory in terms of what the
14 questions were. But okay, so what's answer? Judge
15 must discharge the juror?

16 MS. SELKER: The answer is - - -

17 CHIEF JUDGE LIPPMAN: Without going
18 further, you have to discharge?

19 MS. SELKER: No, I think that she should
20 have gone further. I - - -

21 JUDGE PIGOTT: Well, the dilemma at that
22 point is not whether to discharge. I mean, because
23 you would need the written consent of the defendant
24 then, right?

25 MS. SELKER: Exactly.

1 JUDGE PIGOTT: And that was clear, that
2 wasn't going to happen. So - - -

3 MS. SELKER: I don't think that was so
4 clear, Your Honor.

5 JUDGE PIGOTT: I got the impression that it
6 was either going to be a mistrial or the juror was
7 going to - - -

8 MS. SELKER: Well, he said - - -

9 JUDGE PIGOTT: - - - keep going.

10 MS. SELKER: - - - remove the juror and a
11 mistrial. But the judge never got so far as to say
12 well, if I'm thinking about removing the juror, would
13 the defendant be willing to stipulate to an alternate
14 juror.

15 JUDGE READ: Does it make any difference -
16 - -

17 JUDGE CIPARICK: Were there alternates
18 left?

19 MS. SELKER: I'm sorry.

20 JUDGE READ: Does it make no difference in
21 your view that the juror denied she was sleeping?

22 MS. SELKER: It makes no view. She came
23 out defensive. The judge only asked three questions.
24 The judge asked: "Are you suffering from an
25 illness?" Very reasonable question given what she'd

1 said before. And her answer was not "yes/no", it
2 was, "I didn't do anything."

3 JUDGE READ: Well, she said, "I wasn't,"
4 she said, when asked if sleeping.

5 MS. SELKER: No, "Are you suffering from an
6 illness?" She said, "I didn't do anything." That
7 was the first question.

8 JUDGE READ: "It was reported to this Court
9 that perhaps you were sleeping during deliberations."

10 Juror number 11, "I wasn't."

11 MS. SELKER: Right. I'm sorry. That's the
12 third question. I just wanted to go through - - -

13 JUDGE READ: But that's not relevant at
14 all? I mean, she denied it, so - - -

15 MS. SELKER: I think it's - - - I think
16 it's relevant in the context that she is being very
17 defensive.

18 JUDGE CIPARICK: Had the alternates - - -

19 CHIEF JUDGE LIPPMAN: If there wasn't the
20 first incident, would that have been sufficient in
21 what the judge did?

22 MS. SELKER: It might have been.

23 CHIEF JUDGE LIPPMAN: So it's really in the
24 context of first instance - - -

25 MS. SELKER: Absolutely.

1 CHIEF JUDGE LIPPMAN: - - - is your view?
2 Yeah.

3 MS. SELKER: And that's what I think that
4 the significance of the - - -

5 JUDGE GRAFFEO: Can you just give us - - -

6 MS. SELKER: - - - first instance.

7 JUDGE GRAFFEO: - - - a more particular
8 idea; when you keep saying the juror - - - that the
9 judge didn't dig deep enough, what exactly are you
10 suggesting should have been posed here to Juror 11?
11 Because he - - -

12 MS. SELKER: Well, I think - - - I think -
13 - -

14 JUDGE GRAFFEO: - - - the judge can't say I
15 don't think you're credible; I don't think you're
16 telling the truth.

17 MS. SELKER: No, but she could delve a
18 little farther with her own theories, for example.
19 By any chance, were your eyes closed? We do have
20 somebody who reported you sleeping. He didn't say
21 anything about snoring, which might have made the
22 whole thing easier.

23 JUDGE SMITH: But doesn't that - - - the
24 trouble with almost any question is, as you've just
25 demonstrated, the answers aren't always responsive.

1 Obviously, by any chance were your eyes closed, is a
2 nice yes/no question; you won't get in any trouble.
3 But a natural way to respond to that is yeah, I
4 closed my eyes because he was saying this stupid
5 thing, and here's what he said, and here's what I
6 said.

7 MS. SELKER: Yes, but if - - - you mean
8 that possibly they'd get into the deliberations.

9 JUDGE SMITH: It is very easy to get into
10 deliberations - - -

11 MS. SELKER: I see.

12 JUDGE SMITH: - - - without trying to. And
13 isn't that a greater risk than maybe - - -

14 MS. SELKER: Well - - -

15 JUDGE SMITH: - - - missing one sleeping
16 juror?

17 MS. SELKER: - - - I guess there should
18 have been - - - necessarily, there would have to be
19 some sort of a caution. But I think it's very
20 significant that the judge asked the same question
21 three times and got three different answers. And as
22 soon as she got the answer she was looking for, she
23 sent the juror back.

24 JUDGE SMITH: Assume the juror was
25 sleeping. Does that require a mistrial?

1 MS. SELKER: Absolutely. But the thing is

2 - - -

3 JUDGE CIPARICK: Were there alternates
4 available?

5 CHIEF JUDGE LIPPMAN: Sleeping at any time
6 during the trial requires - - -

7 MS. SELKER: No - - -

8 CHIEF JUDGE LIPPMAN: - - - or
9 deliberations requires a mistrial?

10 MS. SELKER: I think sleeping at any time
11 during the trial. However, I have to say that
12 defense counsel definitely waived it during the trial
13 itself.

14 CHIEF JUDGE LIPPMAN: Right. But
15 deliberations, if you're involved and you're tired
16 and whatever - - - or you're taking medicine - - -

17 MS. SELKER: That's right.

18 CHIEF JUDGE LIPPMAN: - - - and you fall
19 asleep for a - - -

20 MS. SELKER: That's a violation.

21 CHIEF JUDGE LIPPMAN: - - - brief period or
22 for a long period or it's always a mistrial? I mean
23 people - - -

24 MS. SELKER: I guess - - -

25 CHIEF JUDGE LIPPMAN: - - - aren't going -

1 - - people are in different human conditions at the
2 time of their - - -

3 MS. SELKER: That's true.

4 CHIEF JUDGE LIPPMAN: - - - jury. You
5 know, there has to be some discretion. Isn't that
6 the whole idea that - - -

7 MS. SELKER: That's true.

8 CHIEF JUDGE LIPPMAN: - - - the judge - - -
9 it's conceivable that you could nod off like people
10 in this courtroom may be nodding off.

11 MS. SELKER: Like my colleague.

12 CHIEF JUDGE LIPPMAN: I can't imagine why,
13 but it's possible, you know?

14 MS. SELKER: Yes.

15 CHIEF JUDGE LIPPMAN: No, but you know what
16 I'm saying.

17 MS. SELKER: I do know what you're saying.

18 CHIEF JUDGE LIPPMAN: It's not a per se
19 thing. But you're saying if they're really sleeping
20 during - - -

21 MS. SELKER: Right.

22 CHIEF JUDGE LIPPMAN: - - - any significant
23 period of - - -

24 MS. SELKER: Well, and Juror number 7 said
25 that she was mostly sleeping and not participating at

1 all. So I think it went to more than - - -

2 JUDGE SMITH: Suppose a juror says, I'm
3 sick of listening to you people; puts her hands over
4 her ears; walks across the room; says I'm not
5 listening anymore. Mistrial?

6 MS. SELKER: Well, no, I don't think so.
7 Because number one, she's participating - - - he or
8 she. Walking across the room and saying I've had it
9 with this, still alert to what other people are
10 saying; still capable of coming back.

11 CHIEF JUDGE LIPPMAN: Isn't that stronger,
12 Judge Smith's hypothetical?

13 MS. SELKER: No, I don't think so.

14 CHIEF JUDGE LIPPMAN: If you put your hand
15 over your ears and say, you could say whatever you
16 want, and I'm just not going to participate, isn't
17 that - - - is that worse or better than sleeping?

18 MS. SELKER: I think - - - I think it's
19 better than sleeping, because it's a conscious
20 person.

21 JUDGE SMITH: Suppose she takes out a novel
22 and starts reading it?

23 MS. SELKER: You can still hear. You're
24 still awake. A sleeping person - - -

25 JUDGE JONES: You know, it's not unusual

1 for judges to instruct jurors that it's their
2 obligation to continue to participate in the
3 deliberations. But I think you would agree that you
4 get out into very dangerous water if you begin to
5 question them as to what is going on or not going on
6 in the jury room.

7 MS. SELKER: I think you're right. But
8 this was a very specific complaint. And I think
9 specific questions directed toward that was required
10 under the reasonably thorough inquiry that the
11 statute required the Court to make.

12 JUDGE CIPARICK: Before you sit down, can I
13 ask you about the consecutive sentencing on the
14 criminal possession of weapons - - -

15 MS. SELKER: Yes.

16 JUDGE CIPARICK: - - - in the third degree?

17 MS. SELKER: Yes.

18 JUDGE CIPARICK: Doesn't our recent
19 decision in Wright - - - Ledarrius Wright - - -
20 impact that in any way?

21 MS. SELKER: I haven't read it. I'm sorry.
22 Is that the end of that question?

23 JUDGE CIPARICK: That's the question.

24 MS. SELKER: Thank you.

25 JUDGE READ: It's an honest answer.

1 CHIEF JUDGE LIPPMAN: Okay, thanks.

2 MS. SELKER: Thank you.

3 CHIEF JUDGE LIPPMAN: Counsel, go ahead.

4 MR. YEGER: May it please the court, good
5 morning, Your Honors. Itamar Yeger for the People.
6 The preservation issue is important in this case.

7 CHIEF JUDGE LIPPMAN: Yes, but
8 preservation, it really doesn't go to the second
9 incident, right?

10 MR. YEGER: No, I - - - well, there is an
11 argument with regard to preservation for the second
12 incident, and I'll rely on my brief on that point.

13 CHIEF JUDGE LIPPMAN: Your counsel is - - -
14 your opposition is conceding that probably they were
15 satisfied - - - that counsel was satisfied by what
16 the judge did in the first instance.

17 MR. YEGER: Yes. Not only in the first
18 instance, but also in the second instance.

19 CHIEF JUDGE LIPPMAN: Oh, in the second
20 instance. I'm sorry.

21 MR. YEGER: If I may, Your Honor, there are
22 actually three instances with this juror. I'll use
23 the second instance for the deliberations, but
24 there's actually 1(a) instance where the juror did
25 not show up for three hours one morning.

1 CHIEF JUDGE LIPPMAN: Okay.

2 MR. YEGER: And defense counsel again,
3 specifically says - - - it starts on page 2619 of the
4 record - - - specifically agrees to allow this juror
5 to stay on.

6 JUDGE SMITH: Well, suppose that what I
7 suggested a few minutes ago is going on; that he
8 liked her better than the alternate, but he didn't
9 like her better than a mistrial. Is that - - - he's
10 entitled to do that, isn't he?

11 MR. YEGER: He certainly is, Your Honor.

12 JUDGE CIPARICK: Were there still
13 alternates left at that point, or had they been
14 discharged?

15 MR. YEGER: The two alternates had not been
16 discharged. And in fact - - -

17 JUDGE CIPARICK: So they were still there.
18 Okay.

19 MR. YEGER: - - - when the judge asked
20 whether the alternates should be discharged, the
21 prosecutor said not to discharge them. And coun - -
22 -

23 JUDGE SMITH: But during deliberations, he
24 would have needed the defense lawyer's consent to
25 substitute an alternate, right?

1 MR. YEGER: That's correct, Your Honor.
2 The judge would've - - - the trial judge would have
3 needed consent. That's part of our preservation
4 point. But more importantly, what was the judge to
5 do? The judge calls out the juror in question, Juror
6 11, and says, are you sleeping. The juror says no.
7 What's the next question: how long have you been
8 sleeping? It just doesn't make any sense.

9 JUDGE SMITH: Well - - -

10 MR. YEGER: There's nothing else for the
11 judge to ask.

12 JUDGE SMITH: - - - shouldn't - - - should
13 the judge have concluded, look, of course she's
14 sleeping. You've got a reliable colleague who said
15 she's sleeping; I've seen her sleeping during the
16 courtroom. When I bring her in she acts like a
17 criminal who's just been caught. Of course she's
18 sleeping.

19 MR. YEGER: Well, the question is, we
20 weren't there. The trial judge obviously was in the
21 best position to view the juror's demeanor at the
22 time.

23 JUDGE SMITH: Suppose he's convinced she is
24 sleeping. What's he supposed to do?

25 MR. YEGER: That's an interesting question,

1 because obviously - - -

2 JUDGE SMITH: Okay. Do you have an
3 interesting answer?

4 MR. YEGER: - - - obviously sleeping - - -

5 CHIEF JUDGE LIPPMAN: Go ahead.

6 MR. YEGER: - - - obviously - - - my
7 apologies, Your Honor. Obviously sleeping during a
8 trial is not automatic reason to discharge, because
9 the courts have repeatedly found that where - - -

10 CHIEF JUDGE LIPPMAN: No. But don't you
11 want to know, if you've been sleeping - - - let's say
12 that at the very least you have one person saying the
13 juror's sleeping, and the juror says I'm not. So it
14 would require, let's assume, some further inquiry.
15 Wouldn't you want to know if the juror has been
16 sleeping kind of throughout the morning or the
17 afternoon's deliberation, or whether they nodded off?
18 And how would you know that unless the judge asks
19 something more - - - again, given the fact that you
20 have one juror who comes in and says that the juror's
21 sleeping, and there had been a prior incident you
22 know of that during the trial, isn't that enough to
23 require the judge to go further? And given that the
24 judge didn't go further, what's the consequence of
25 that here?

1 MR. YEGER: Well, the question is
2 ultimately what would a reasonable judge have done.

3 CHIEF JUDGE LIPPMAN: Exactly. So tell us.

4 MR. YEGER: And, yes, a reasonable judge
5 could have done what this judge did. The fact that
6 it - - -

7 CHIEF JUDGE LIPPMAN: That just say one - -
8 - the judge sees the juror sleeping during the trial,
9 talks to the juror about it; another juror comes and
10 says the juror's sleeping, and the juror says no I
11 didn't; and a reasonable judge would say okay, fine,
12 let's go further?

13 MR. YEGER: Well, the judge - - -

14 CHIEF JUDGE LIPPMAN: Is that a rational
15 way to approach this?

16 MR. YEGER: Yes. The judge obviously was
17 concerned about delving too far into deliberations.
18 It's a problem - - -

19 CHIEF JUDGE LIPPMAN: I understand. But
20 don't you want to know is it an instant of sleeping
21 or two hours of sleeping?

22 It's a rhetorical question. Judge Pigott
23 go ahead.

24 JUDGE PIGOTT: It's possible that the judge
25 was faced with a dilemma, because if the defendant's

1 not going to allow another juror in there, he's got a
2 mistrial and this case is all over. So it seems to
3 me that it's a reasonable inquiry to make sure the
4 judge isn't doing what's - - - and I'm not suggesting
5 that here - - - is doing what's simply convenient,
6 saying I'm not going to waste another two or three
7 days on this trial, because the defendant won't sign
8 off on a replacement; so I'm going to leave this
9 juror there.

10 So you want to make sure that didn't
11 happen. And the question is whether this was a
12 reasonably inquiry; Ms. Welker (sic) says three
13 questions is not enough. I could see where you can
14 call the whole jury back and say just, for all of
15 you, a) you have to participate; you can't as, I'm
16 sorry, your colleague suggested, if you've made up
17 your mind you can go to sleep. That just isn't true.
18 You've got to participate in the deliberations. And
19 if you need a break; if you're feeling that you're
20 tired or something, we can break. But we're going
21 forward with this - - - there's a number of things, I
22 guess is my point, that can be done.

23 MR. YEGGER: Well, I agree with Your Honor.
24 And the judge actually did that in this case. The
25 judge did reinstruct on deliberations in between this

1 whole inquiry. So in that sense, the judge did
2 operate effectively in that.

3 JUDGE SMITH: I mean, he may - - - could he
4 also have concluded that by virtue of asking the
5 questions, he might have discouraged the juror from
6 dozing off in the future?

7 MR. YEGER: It's certainly - - - it's
8 certainly possible, because there's no more
9 complaints until the verdict. And I will say that
10 obviously this juror did participate in the
11 deliberations, because the verdict was twelve-nothing
12 to convict. This juror had to vote to convict.
13 Therefore, at the very least, she had to vote.

14 JUDGE PIGOTT: Well, that's not exactly a
15 QED.

16 MR. YEGER: But again, the question - - -

17 JUDGE SMITH: Suppose the misconduct here
18 were worse. Suppose you have exactly this case,
19 except that what's reported is Juror number 7 says
20 that Juror number 11 admitted she'd taken a bribe for
21 her vote. Can the - - - would the kind of inquiry we
22 had here be adequate?

23 MR. YEGER: No. In that case it would not.
24 But we're talking about - - -

25 JUDGE SMITH: So it really does depend on

1 the degree of misconduct?

2 MR. YEGER: Well, of course. I mean, it
3 has to depend on the degree - - -

4 JUDGE SMITH: Aren't you really saying that
5 sleep is not a gross disqualification?

6 MR. YEGER: Absolutely. But - - -

7 JUDGE SMITH: It's a bad thing, but it
8 doesn't make you grossly disqua - - - sleeping during
9 deliberations doesn't make you grossly disqualified?

10 MR. YEGER: Well, that would be my fallback
11 position. My initial position still remains that the
12 judge exercised her discretion appropriately.

13 CHIEF JUDGE LIPPMAN: And if we go to your
14 fallback, and I understand the point Judge Smith is
15 making about the degree of misconduct, I guess the
16 point I was trying to make before is sleeping could
17 be the kind of misconduct that would require some
18 really significant action by the judge, if we knew
19 whether the person was nodding off or whether the
20 person had been sleeping during the entire
21 deliberation and misses the whole point, so at the
22 end, even if they woke up and said guilty, innocent,
23 or whatever the issue is, they didn't participate.
24 Doesn't it matter? I guess that's my point.

25 I understand it - - - I understand what

1 you're saying. But how do we know what the degree of
2 misconduct, at least as it relates to this sleeping
3 is, because I think you would concede that there
4 could be circumstances where sleeping would be
5 sufficient in its conduct for a discharge of a juror,
6 a mistrial, or whatever the consequence was. Or
7 would you? I didn't mean to put words in your mouth.

8 MR. YEGER: Well, the issue really relates
9 to the difference between hearing all of the evidence
10 versus participating fully in every second of
11 deliberations. The - - -

12 CHIEF JUDGE LIPPMAN: Well, I give you the
13 two extremes: nodding off for a second and then you
14 catch yourself; or sleeping through a morning's
15 deliberations, and let's say, for the sake of
16 argument, and the deliberations took a day, and you
17 slept through the entire morning. Is that a cause
18 for discharge or misconduct? And that's not a
19 rhetorical question. What's the answer?

20 MR. YEGER: As I was saying, the answer is
21 perhaps, it really does depend.

22 CHIEF JUDGE LIPPMAN: And how do you know -
23 - - I guess that's my point.

24 MR. YEGER: So - - -

25 CHIEF JUDGE LIPPMAN: Don't you have to

1 know what happened here? Didn't the judge have an
2 obligation to go further in the context of - - - I
3 would totally - - - not totally, but feel reasonably
4 comfortable, if this was the first time this came up,
5 one juror says something, they asked the juror, the
6 juror says, oh, you know, I'm not - - - that's not -
7 - - and the judge says okay. But there is some
8 evidence that this is going on. Don't we want to
9 know the degree of it, I guess, is my point?

10 MR. YEGER: In the context of this case - -
11 -

12 CHIEF JUDGE LIPPMAN: Yes.

13 MR. YEGER: - - - what this judge did was
14 sufficient. Could the judge have asked more
15 questions? I guess the answer is yes.

16 CHIEF JUDGE LIPPMAN: Why was it
17 sufficient? That's what - - - I don't under - - -

18 MR. YEGER: Because the juror, in response
19 to a direct question, were you sleeping, says no.

20 CHIEF JUDGE LIPPMAN: Yes, but we know they
21 were - - - that the juror was sleeping before. It's
22 not in a vacuum.

23 MR. YEGER: Yes. That's true. But the
24 judge, in the first instance - - - I see my time is
25 up. May I - - -

1 JUDGE CIPARICK: No, answer the question.
2 I have a question, too.

3 MR. YEGER: The judge, in the first
4 instance - - - if I may recollect my thoughts. In
5 the first instance, the judge says - - - tells the
6 lawyers that the judge herself sees the Juror 11
7 sleeping.

8 CHIEF JUDGE LIPPMAN: Right.

9 MR. YEGER: There's a reason for that.
10 Juror 11 was taking some medication that she realized
11 was putting her to sleep.

12 In the second instance, the judge - - - the
13 first question the judge asked her is, are you on
14 anything? The juror says no. So the two incidents
15 are - - - aside from the first - - -

16 CHIEF JUDGE LIPPMAN: So wait. So then
17 what you're saying is that once the juror says no,
18 I'm not on medication and then says no, I'm not
19 sleeping, that then he totally disregards what the
20 other juror says, even though he had his own
21 experience with it?

22 MR. YEGER: Well, once you have the juror
23 in question emphatically denying that she was
24 sleeping, then the judge theoretically could have
25 asked other jurors - - -

1 CHIEF JUDGE LIPPMAN: No, no. I think the
2 judge could have theoretically, as Judge Smith, I
3 think, said before - - - maybe it was Judge Pigott -
4 - - that gee, if I ask the juror, that's enough to
5 wake them up, then maybe that's what was going
6 through in the judge's mind. But it seemed to me,
7 that in light of what happened in this case, you'd
8 want to know more; and a straight denial that I'm not
9 on medicine and I'm not sleeping may not be enough.

10 But anyway, Judge Ciparick?

11 JUDGE CIPARICK: I guess I was going to ask
12 about the consecutive sentencing on the criminal
13 possession of a weapon in the third degree. Same
14 question I asked - - -

15 MR. YEGER: I should have started - - - I
16 really apologize, I did not read the case either.

17 JUDGE CIPARICK: Okay.

18 MR. YEGER: I would rely on my brief - - -

19 CHIEF JUDGE LIPPMAN: So you're even.

20 MR. YEGER: Well, yes, apparently.

21 CHIEF JUDGE LIPPMAN: You're both okay.

22 JUDGE CIPARICK: All right.

23 MR. YEGER: Except to say that there was -
24 - - I'm sorry, Your Honor.

25 JUDGE CIPARICK: All right. The indictment

1 pled it as not at home or place of business. It
2 didn't have that intentional element - - -

3 MR. YEGER: Right.

4 JUDGE CIPARICK: - - - you know.

5 MR. YEGER: Well, it's clear that he - - -

6 JUDGE CIPARICK: If unlawfully.

7 MR. YEGER: - - - it's clear that he
8 possessed the weapon from well before the time that
9 he murdered the victim until well after he murdered
10 the victim, because he actually pointed the weapon at
11 the witness who cut the - - -

12 JUDGE SMITH: Am I right that he was
13 convicted of the lower level of possession; he wasn't
14 convicted of intent to use against another?

15 MR. YEGER: My recollection is that he was
16 convicted of both - - -

17 JUDGE CIPARICK: Both. Both.

18 MR. YEGER: - - - CPW 2 and 3, Your Honor.
19 And the judge consecutively sentenced based on the
20 simple possession - - -

21 JUDGE SMITH: Okay. I - - -

22 MR. YEGER: - - - recognizing that the use
23 would have been - - -

24 JUDGE SMITH: - - - convicted of - - -
25 consecutive sentencing was only - - -

1 MR. YEGER: Right.

2 JUDGE SMITH: - - - on the one that did not
3 require - - -

4 MR. YEGER: Correct.

5 JUDGE SMITH: - - - yes, so I - - -

6 MR. YEGER: So in other words, the use was
7 not subsumed - - - was subsumed into the murder
8 conviction, and therefore the judge didn't sentence
9 that way.

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. YEGER: Thank you, Your Honors.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 MS. SELKER: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor, thank you.
15 Thank you both.

16 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Carlos Herring, No. 165 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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